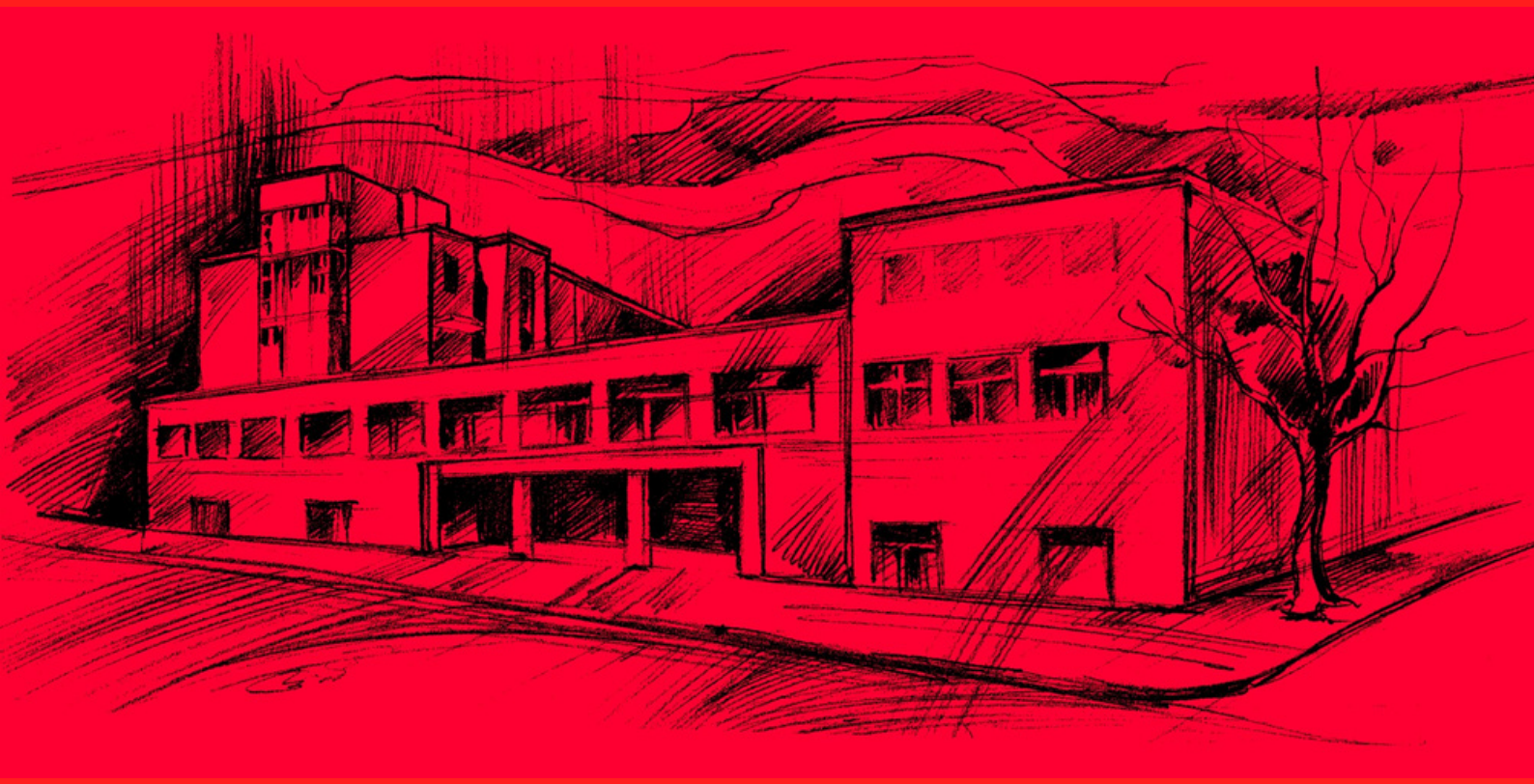
ŠTEFAN SISKOVIČ
INGRID LANCZOVÁ
MONIKA MARTIŠKOVÁ
(eds.)

Legal Historical Trends and Perspectives III



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Legal Historical Trends and Perspectives III

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Právnohistorické trendy a výhľady III.

Scientific contributions from international scientific conference held on 9th November 2017 in Trnava under the title "The Key-Stone of Discrimination and the Impact of Its Manifestations on the Selected Groups of Population"

Štefan Siskovič, Ingrid Lanczová, Monika Martišková (eds.)

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Content

Foreword

The "Legal Historical Trends and Perspectives vol. III" conference proceeding is the third volume of the conference proceedings, periodically published by the Department of Legal History, the Faculty of Law, Trnava University in Trnava, which focuses on the history of state and law.

The author of the concept of publications entitled Legal Historical Trends and Perspectives was the head of the Department of Legal History, Prof. JUDr. Dr. h. c. Peter Mosný, CSc., in year 2015. His idea was to create a publication providing space for national but also foreign academics – professors, assistant professors, as well as PhD. candidates, who intend to present their actual research results and acknowledge wider international scientific community. Unlike the previous two volumes of the Legal Historical Trends and Perspectives conference proceedings, the third volume is devoted to a very complex, highly actual, multidisciplinary and thematically specialized issue "*The Key-Stone of Discrimination and the Impact of Its Manifestations on the Selected Groups of Population*". The reason why the third volume of the Legal Historical Trends and Perspectives conference proceedings is focused on the above mentioned issue, is the few years long ongoing research of the Department of Legal History of the Faculty of Law, Trnava University in Trnava, aimed on the legal status of the Jewish population in the Central Europe. The third volume of the conference proceedings was therefore created under the grant project No. 1/0549/15 VEGA entitled: "The Legal Status of Jews in Slovak Republic between 1939–1942 with regard to some Selected Areas of Legislation in the Central European Context".

Nowadays, the world's most applied and dominant scientific language is English and that is why it became also the language of the third volume of the Legal Historical Trends and Perspectives conference proceedings. The language choice follows the idea of interconnecting not only the Slovak scientific community but also to introduce the Slovak research results to the worldwide scientific community and at the same time to offer a suitable space for the presentation of research results of the foreign colleagues. In this volume of the periodically published conference proceedings, alongside the Slovak academics, the foreign scientific community is presented by the colleagues from Austria, France, Greece, Poland and Sweden who kindly contributed with their research results.

Trnava, May 2018

Editors

Peter Mosný[1]
Trnava University in Trnava, Law Faculty, Department of Legal History

Conceptual Foundations of the Anti-Jewish Legislation in the Central European Area in the First Half of the 20th Century[2]

Abstract: The study in its shorter part deals with the attitude of the majority inhabitants of the Kingdom of Hungary towards the Jewish inhabitants in the medieval times. The longer part focuses on the specific period of time in the history of countries occupied by the Nazi Germany, i.e. Poland and Protectorate of Bohemia and Moravia as well as in the history of allied countries, i.e. the first Slovak Republic and Hungary. Predominantly the study devotes itself to precautions adopted by these states, without detailed analysis of their legal rules. It points out the much shared identity of opinion sources and attitudes of the society as well as of the state power.

Key words: Jew; Kingdom of Hungary; Medieval Times; Nazi Germany; Poland; Protectorate of Bohemia and Moravia; Slovak Republic; Hungary.

From the time point of view, the anti-Jewish attitudes did not concern only the twentieth century and absolutely not just the Central European space. Pogroms, with all the accompanying related sequences, occurred since the Middle Ages, particularly across the European continent, from its West to the outermost East. It was not only the looting and burning of the Jewish property, as it included various kinds of rough physical violence, including murdering of this population.

The justness of such practices was essentially derived by the medieval beliefs of existing state groups essentially from the understanding of the state basis as a community of Christian believers in an opposite position against unbelieving Jews, moreover, clearly considered as guilty of the torture and death of Jesus Christ.[3] This logically meant that the Jewish population in individual state groupings was excluded from legal life as an equal part of the Christian full-fledged population. Thus they still had the legal status of the second-class population with all resulting features of a lower category. It means rather an object than a subject of legal relations in the state.

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[1] Prof. JUDr. Dr. h c. Peter Mosný, CSc.

[2] The study is the result of working on VEGA project No. 1/0549/15 entitled: Legal status of Jews in the Slovak Republic between 1939–1942 with regard to some selected areas of legislation in the Central European context.

[3] In this period, anti-Jewish attitudes were exclusively religious with associated political, cultural and philosophical frameworks.

Nevertheless, the medieval state-legal theory partially neutralized that status in the form of special privileges, which prevented their position from being totally unfair in the medieval community. Thus, the Jews obtained concrete forms of legal protection.[4] This was very much due to the recognition of the fact that they were skilled in the commercial and economic fields, so that they participated significantly in the economic power of individual medieval state formations.

The position of the Jewish population in medieval state formations experienced developments and changes. To illustrate the statement, we will use a view to the territory of Slovakia from the earliest times, belonging predominantly to the Hungarian state in the Middle Ages.

The first mention of Jews and their presence in Pannonia were found in sources from the 9th century [Nomocanon (Greek), The Legend of the life of St. Clement, Raffelstetten Customs Regulations and administrations of Arab travelers – like Ibrahim Ibn James]. The law-making to govern the special and separated status of the Jewish population was fully developed in Hungary by the rulers of the Arpad dynasty (Stephen, Ladislaus, Coloman, Béla IV). The laws of King Ladislaus set out prohibitions of marriages between Christians and Jews, prohibitions of employing or owning Christian servants or slaves in Jewish households, prohibitions of work during Christian holidays and Sundays addressed to Jews.[5] The successor of King Ladislaus – Coloman – regulated details of the status of Jews confirming the provisions of the previous law-making. Then he subsequently developed their segregated position into compulsory settlements in Episcopal settlements and forbidding sale of food to the Christian population. Because of their growing economic importance and the free trade privilege gradually created in the country, he regulated details of the terms of loan agreements[6] and purchase agreements between Christians and Jews, characterized by strict formalism meaning a disadvantage for Jews compared to Christians.[7] In the Golden Bull of Andrew II of 1222 and its confirmation of 1231

[4] Privileges to the Jewish population granted by rulers as heads of states concerned their rights to life, property, human dignity, exercise of religious rites in synagogues, the right to trade in connection with tax obligations, and, last but not least, an adjustment of the relation of Jews to the exercise of state authority. In summary, the Jewish religious community achieved its autonomous status both in relation to its members as well as externally, and, in addition, it was governed directly by its ruler.

[5] For more details see also ŠIMEKOVÁ, S.: Židia v právnych pamiatkach Uhorska za Arpádovcov, In: *Historický časopis*, 48, 2000, p. 401–416, also LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: *Pramene práva na území Slovenska I. (od najstarších čias do roku 1790)*, Trnava: Typi Universitatis Tyrnaviensis, 2007, p. 71–81.

[6] The Jewish legal status was especially influenced by the Medieval worldview on the provision of interest-bearing loans. The rule "nummus nummum non parit" known already by Aristotle and taken over by the Catholic Church, did not apply to Jews, what meant building a financial monopoly for merchants – Jews.

[7] For more details see also: ŠIMEKOVÁ, S.: Židia v právnych pamiatkach Uhorska za Arpádovcov, In: *Historický časopis*, 48, 2000, p. 401–416, also: LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: *Pramene práva na území Slovenska I. (od najstarších čias do roku 1790)*, Trnava: Typi Universitatis Tyrnaviensis, 2007, p. 71–81.

we can find a formulated prohibition for Jews to acquire high offices in the state economic apparatus.[8]

However, the real situation in the state showed violations of many of the statutory provisions, which also affected the political and economic stability of the country. At that time, Jews were considered as a personal and exclusive property of the sovereign, thus they gradually were becoming a specific population group (servi camerae regiae)[9] standing more-less on the edge of society.[10] The Jews were economically and personally dependent on the sovereign, any stay depended on his/her permission, as well as moving and economic activities [with a remarkably different policy of individual sovereigns, from helpful (e.g. Béla IV)] up to a discriminative one (Louis I. of Anjou) who even ordered displacement of Jews from Hungary in 1360[11] when only their own movable property could be retained. Jews paid charges for this "protection" – a special tax – representing one of the sovereign's main income.

From the economic point of view, the limitation of Jews in acquiring real estates was extremely important; it was abolished as late as in the middle of 19th century.[12] The Jewish privilege of Béla IV. of 1251 became the special and fundamental regulation of Jewish legal relations with Christians; it contained procedural and substantive standards in the area of the contemporary contract law and the right in rem (loan agreement, secured obligations) and criminal law.[13]

The position of Jews in the Middle Ages was characterized by a certain segregation externally presented with using clear distinctive signs. For example, in the light of conclusions of the Synod of Buda of 1279, Jews were obliged to sew a circle of red color on their outer wear, on the left side of the chest; without this circle it was forbidden for them to go to the public and Christians could not market with them.[14] The second order of the Synod of Buda forbade Jews to hold public offices.[15]

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[8] Čl. 24 "Kammer counts, coiners, salters and tollmen should be the nobles of the kingdom; Ishmaelite and Jews can not become them". In: LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: *Pramene práva na území Slovenska I. (od najstarších čias do roku 1790)*, Trnava: Typi Universitatis Tyrnaviensis, 2007, p. 88.

[9] Frederick II., Duke of Austria, used such term for the first time in 1236, in the context of his response to the doctrine of Pope Gregory IX. about perpetual slavery of Jews.

[10] "The oppression of Jewry culminated in the times of the cross-wars when, in terms of both secular and ecclesiastical laws, it became just a tolerated element, to which all natural disasters and diseases affected Europe were charged". HOLÁK, J.: Niekoľko kapitol o právnom postavení Židov v stredoveku so zvláštnym zreteľom na pomery v Bratislave, In: *Odtlačok zo Sborníka Matice Slovenskej*, annual volume 13, No. 4 – Historical part.

[11] LUBY, Š.: *Dejiny súkromného práva na Slovensku.* Bratislava, Iura Edition, 2002, p. 172.

[12] Ibid, p. 173–174.

[13] In this aspect, very interesting is the fact of a similar regulation in the surrounding countries – Austria, the Kingdom of Bohemia.

[14] Regulations on distinctive signs on clothing for the Jewish population were typical for the whole Europe (red coats, pointed hats, ribbons, red or yellow rings sewn on their outer wear, etc.).

[15] FRISS, A. (ed.): *Monumenta Hungariae Judaica.* Budapest, 1903, p. 52–53.

In the times of the medieval Hungarian state, an isolation of the Jewish population started with defining territories, Jewish ghettos, where they had to and could live. In general, the Jews formed a group in the Kingdom of Hungary not only with a lower social status, but also with a lower legal status, and they could not defend themselves against that fact.[16]

In the twentieth century, the decisive part of the activation of anti-Jewish attitudes in the Central European area represented the Hitler-style German Nazi racial ideology in it's latent form expressed in the infamous Mein Kampf, also by the following words: "...if Jewish financiers success... again in putting the nations into a world war, the result will be... the extermination of the Jewish race in Europe."[17] Subsequently, it was recast in 1935 into the legal area with Nuremberg Laws.[18] The phenomenon of the racist formation of the German national community into the position of the so-called Aryan type of man with defined external appearance features, such as blue eyes, light to blond hair, body composition, etc.[19] These elements were to result in the desired widespread complexity that "Aryans are not the greatest due to their mental qualities, but because of the great willingness and readiness to offer all their capabilities in the service of society."[20] In general, the basic stimulant of the signs created fellow citizens with unmixed German blood as a preferred national of the German Empire. Ipso facto Jews can not be Aryans.[21] The Aryan origin was therefore the decisive factor in racial determination of who is and who is not a Jew. It was not a matter of

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[16] LUBY, Š.: *Dejiny súkromného práva na Slovensku.* Bratislava, Iura Edition, 2002, p. 173.

[17] HITLER, A.: *Mein Kampf.* Prague, 2016, p. 323.

[18] The Reich (Imperial) Citizenship Law (Reichsgesetzblatt I., 1935, p. 1146), and the Law for the Protection of German Blood and German Honour (Reichsgesetzblatt I., 1935, p. 1146–1147).

[19] In their complex, plotted form, they included exemplary morality, body composition associated with health, religiousness, ability to create values in the field of philosophy, science, and religion. The concept of the idealized superior Aryan race was developed from a comparative linguistics. It happened in the 18th century when a British scientist, Sir William Jones, operating in India discovered similarities between Sanskrit, Greek and Latin. People who used these languages were called Aryans. In Sanskrit, this term means "noble". Subsequently, other scientists divided them into families comprising more than forty languages, including English and German, which featured common features. This simple discovery was in the 19th century distorted placing the question of how it is possible that Indians and Europeans speak similar languages. The German Hitler's expansive nationalist ideology of the 20th century, in the person of its main ideologist, Alfred Rosenberg, stated that the Aryans decided to move eastward from their German country, to India. However, it missed the decisive fact that it was the language, not the race, that the Aryans had as a common element.

[20] HITLER, A.: *Mein Kampf.* Prague, 2016, p. 230. In contrary, A. Hitler declares with the German Aryan predominance disrespect that "Jews are in agreement only if they are forced to be by a common danger, or if they see a common loot. However, if both reasons disappear, cruel egotism features enter into their law, and the eternal nation is swept away, it becomes a bloody fighting horde of rats. If the Jews were alone in this world, they would drown in dirt and dreck". In: Ibid, p. 231.

[21] Particularly augmented by, among other things, with the claim: "Because just a racially pure German nation (note of P. M.) that is conscious of its blood purity, can never be conquered by Jews. In this world, Jews can only reign over half-bloods". – In: HITLER, A.: *Mein Kampf.* Prague, 2016, p. 249.

religious or national affiliations that were distinctive to the Jewish community. At the same time, in the sense of the German racist theory of the so-called Aryan man, in addition to the fact that Jews formed a separate race[22] of a lower category, this lower category was considered to be the most dangerous of all these lower-category races. The Nazi ideology and propaganda in the sense of the racial theory considered Jews a prior as potential criminals with racial and genetic preconditions. This was also used to justify their exclusion from the German society in terms of Aryan Volksgemeinschaft protection.

The other important aspect, following the ideological and theoretical points of view, was their focus on the Jewish property, its huge scope as declared by the German's propaganda. Members of the Jewish race were considered as cruel, ruthless exploiters. The typological stereotype was a rich Jew, symbolizing capitalism, whose property was based on speculations, usury, and other unfair forms of money earning that were considered to be economic crimes. And the task of so-called the Third Reich was thus naturally based on the protection of the German society. In addition, the Jewish community was accused by the Nazis of launching the First World War with cruel consequences for the German post-war economy.[23]

The presented Nazi opinion property basis in the end resulted in es-cheating Jewish property using several forms; this way the second pillar of anti-Jewish discriminatory measures was developed. As the Jewish property passed to Aryan hands, in the historical writings, the name "arization" was used.[24] Symptomatic phenomena occurred in all the countries occupied by the German Reich, as well as in the Allied countries.

Illustrated Nazi discriminatory anti-Jewish basis for opinions affected practically all legal branches of the German legal order-criminal law, civil law and economic jurisdiction. The Jews were not allowed to practice many professions, to attend social and cultural facilities.

With the Munich agreement, the Central European area became controlled by the power guardianship of Nazi Germany, with the consent of its signatories. State regimes in these territories applied anti-Jewish attitudes in the policy line as well as in law-making, either directly by the occupation – the Polish territory, the territory of Bohemia and Moravia – or in the allied states – the Slovak Republic, Hungary – mainly with direct interventions of Nazi Germany. These attitudes depended also on residual historical opinions; the facts are highlighted in singularities in the following commentary.

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[22] In his reflections, A. Hitler stated his conviction that "the Jewry was always a nation with certain racial features, and never with a religion ... Jewish religious theory leads particularly to the purity of Jewish blood ... This basic lie, namely that the Jewry it is not a race but only a religion, is then necessarily a basis for further lies..." In: Ibid, p. 234–235.

[23] For more details see the relevant parts of Mein Kampf.

[24] In contemporary materials, the term occurred rarely. More frequent is to meet such terms as Germanization, transfer of Jewish property to German hands, expropriation, etc. In the principle, however, it was a theft, plundering, pillage, and so on, propped up by the legislative framework.

On the territory of Poland, political anti-Jewish approaches and attitudes were showed abundantly and determined even before the General Government had been established in September 1939. The years 1905 and 1914 were milestones for this as a reaction to the strong rise of Jews in the Polish territory. Basically, all major political streams externally declared a limitation, or even exclusion, of so-called nationally non-Polish communities from the Polish national community. Openly, this meant focusing on fight against the Jewish community. In Catholic Poland, the Jewish minority represented not only a threat to Catholicism, but also, in accord, the main danger to Polish national identity. The Polish nationalism, misunderstood as patriotism, was in the form of an uncompromising rejection of any Jewish influence on the preferred, one-nation community of the contemporary society. The only acceptable position related to the Jewish minority was complete and unconditional loyalty. Jews were considered an undesirable element and the main factor of destabilization and subversive activities through a foreign capital in connection with ongoing international post-World War I. processes. It means with the communist revolutions in Russia, Germany and Hungary.[25]

The presented anti-Jewish situation of opinions existed since the very beginning of the independent Polish state, despite the fact that the constituted parliamentary democracy of the Second Republic of Poland guaranteed civil and political rights and liberties to its Jewish population.[26] Their implementation was obstructed with the internal Polish feeling and the fact that in the new national Polish state, ethnic Poles represented just two-thirds of the population. The rest of the population were national minorities, where Jews accounted for 10 percent of the total population. This fact was then influenced by an increasing Polish nationalism in the form of the need to fight against the threat of Jewish influence in the society. It was in the form of right-wing efforts in the Polish society to restrict political and civic rights of the Jewish minority, or attempts to discriminate Jews adopting "numerus clausus" laws as well as at secondary schools and universities.

The status of Jews was worsened because of the conditions related to the economic crisis in the 1930s. The concerns about the worsened social status, rising unemployment, higher competition on the labor market increased anti-Jewish attitudes in the Polish society. However, you can not argue that Polish politics and the society had any preconditions for implementing anti-Jewish Nazi views and even pursuing them. In general, Anti-German attitudes, historically determined, permanently rooted in the conservative-mental memory of the Polish nation, remained in the center. In spite of the facts above, so to say, before the World War II, all relevant political parties in Poland took the line of the mass expulsion of the Jewish population

[25] For the Polish society, the irrefutable evidence in this respect was the leadership of representatives of revolutionary movements in these countries, such as Trotsky, Zinoviev, Luxemburg and Béla Kun, whose origin was demonstrably Jewish.

[26] The status of minorities, including the Jewish one, was regulated in the inter-war Poland by the so-called the Little Treaty of Versailles and the constitution deed of March 1921 in its article No. 96 as follows: "... all citizens are equal before the law".

as the only way to solve the Jewish question. Its solution after September 1939, however, was completely controlled by Nazi Germany.

Different situation compared to the Polish territory was in the 20th century in the territory of Bohemia and Moravia that until the creation of the Protectorate regime in March 1939 belonged to the framework of the unitary Czechoslovak Republic. Despite the democratic regime of the pre-Munich Czechoslovak state, anti-Jewish attitudes could be noticed already during the period of the general economic crisis as a reaction to the wave of Jewish refugees coming to the Czech territory following Hitlerism arising in Germany. The anti-Jewish attitudes were based on concerns of Jewish competition in the economic sphere, threatening their own national success.[27] In addition, along with religious intolerance, there were also historical remnants from the duelist Austro-Hungarian monarchic period. The Jewish element was not entirely unguilty during the violent Germanization of the Czech population in conjunction with the German element. Thus the anti-Jewish standpoint of the Czech society was understood by it as a serious threat to further undisturbed development of the Czech national life.

The fundamental rise of anti-Jewish moods in the Czech part of the Czechoslovak state occurred in the post-Munich period. The open anti-Jewish behavior of a part of the Czech political spectrum publicly or in print was not avoided; in addition, this trend was gradually showed also in some governmental parties. Therefore, it was not accidental that in the end of 1938, the government circles started to focus on solving of so called the Jewish question particularly in relation to settled Jewish refugees from Germany.

The change from the democratic state regime to the opposite trend meant the adoption of the so called Act/Constitutional Law No. 330/1938 Coll. on Authority to Change the Constitutional Charter as amended. As a part of its provisions, the government could change legal regulations by government regulations, what was used in issuing the Government Regulation No. 339/1938 Coll. as amended. "on Adjustment of Certain Staffing Conditions in the Public Sector".[28] Its provisions were based, in relation to our topic, on the possibility to transfer any official operating in a state or regional self-government institution into any other public service department or into services of a defined group of employers.[29] The symptomaticity of the embodied anti-Jewish measure must be seen in connection with the government resolution of January 1939, which specifically addressed the status of Jews in the civil service deciding to exclude them entirely from the state-duty relationship.[30] The declared connection with the government regulation in question creates preconditions for recog-

[27] For more details see also GOLDSTUCKER, E.: K dějinám českého antisemitizmu, In: POJAR, M.: *Hilsnerova aféra a česká společnost 1899–1999.* Praha, 1999, p. 146–147.

[28] It happened on 21st December 1938.

[29] It applied to employees actively employed on 1st October 1938.

[30] The methodology of defining the term Jew was based on the religious or national Jewish origin of both his/her parents, and was not determined by the length of the period during which the parents met one of these criteria. It applied also to the mother of a child outside a marriage.

nizing that the Government Regulation No. 379/1938 Coll. as amended is the first anti-Jewish legal norm adopted in the territory of the Czechoslovak state in nationwide legislation.

By declaring the Protectorate of Bohemia and Moravia in March 1939, fundamental changes in anti-Jewish measures in this area were implemented in the sense of direct German interventions into the Protectorate norm-making. Open signs could already be seen in the A. Hitler's Proclamation, by which he established the Protectorate state formation. Article II. The Proclamation governed the issue of the status of German nationality citizens living in the Protectorate territory under the German citizenship regulations as well as provisions relating to the protection of German blood and German honor.[31] The special consideration of the Proclamation must be seen in the fact that its provisions introduced racial elements into the legal system valid on the territory of Bohemia and Moravia from the so-called anti-Jewish Nuremberg Laws.

The first anti-Jewish measures of the Protectorate government were implemented in a record-breaking time, i.e. the next day after the Direction was issued. On their basis, exercising such professions as doctors and lawyers were prohibited for Jews.[32] In connection with this measure, Jewish doctors and lawyers were removed from lists of their professional organizations.

Despite the fact that all measures of the Protectorate authorities were subject to the prior preliminary approval of the Reich protector, it can not be said that their anti-Jewish activity was not sufficiently active. Early in 1940, the Protectorate authorities issued a regulation, according to which identification cards of the Jewish population had to be indicated with the red letter "J". In the summer months of 1940, a measure began to apply, where Jewish staying in hotels, visits of theaters and cinemas were forbidden, and this group of the Protectorate population had to travel in the latest wagons of trains. So obviously these were measures of segregation nature.

The persecution of the Jewish population by the Protectorate authorities went forward also in the following year of 1941. The plenty of measures included, for instance, the requirement to return driving licenses, documents of vehicles, not to enter libraries, to stay in the place of permanent residence, etc., up to the order of wearing Jewish stars for all individuals from the age of 6 years.[33]

In connection with the discussed and all other undoubtedly numerous, often bizarre, measures of the Protectorate authorities, it can be said that their basis in the Protectorate state formation was not the religious principle but the racial one. It was

[31] From this point of view, it is possible to consider the Direction of the Leader (Führer) and the Reich Chancellor on Establishment of the Protectorate of Bohemia and Moravia as the first anti-Jewish act issued on the Protectorate territory.

[32] For more details see also: KÁMY, M.: *„Konečné řešení". Genocida českých Židů v německé protektorátní politice*. Praha, 1991, p. 22.

[33] The definition of "Jew" was based on the Nuremberg Laws. In the following year of 1942, the Protectorate authorities addressed such issues as the definition of the term "Jewish mixed-blood", their employment in the public service, then marriages of Jewish persons of mixed-blood and Jews, etc.

applied in the level of persecution measures, the level of personal status of Jews in all social spheres, as well as in the following level of economic and property limitations. They were based on law-making issued in both the unity and interconnections of the occupation administration and Protectorate authorities. This fact can be demonstrated by very active and powerful "Czech efforts" to appropriate exclusively Jewish properties subject to arization.[34]

In the post-Trianon Hungarian public, the question of responsibility for the consequences of the loss in the global military conflict was repeatedly put to the attention. The most responsible and their pre-war policy avoided their liability: the old liberal layers of magnates, the high clergy and the big entrepreneurs representing a chauvinist approach towards non-Hungarian nations and nationalities in the national politics. However, the guilty persons were found, even though the form of the sacrificial virgin that was adequately specified. Without any doubts, Jews became such persons; especially since the duelist state organization, it was not a minor community. Assimilated Jews actively and significantly participated in the state policy of the uncompromising violent Hungarianization of the non-Hungarian nations.

In the duelist state, Hungarian nationalism became stronger among Jews as an accompanying sign of seamless and incomparably rapid assimilation comparing to other assimilated national or ethnic groupings.

In the immediate period after World War I., the creation of a substantially single-nation state grouping, Hungarian policy no longer required any Jewish support in suppressing rights of non-Hungarian nations. The most numerous non-Hungarian community in the state became Jews as the only competitor of the Hungarian nation, in addition with a strong middle-class economic representation. The Hungarian public judgment took the standpoint that the loss in the war conflict was not due to external, foreign circumstances. But internal actors, the Jewish community, of course, which always pauperized the Hungarian people with its usury and unreasonable rising of prices of all goods, contributed decisively. It also benefited from military orders. Nobody tried to investigate whether all this is more or less true, which lies were created and supported by the state propaganda machinery.

The acute anti-Jewish Hungarian attitudes had also domestic, own, racist backgrounds in the form of so-called Turanism. It was based on the proclamation of the necessity of creating a unity of ancient so-called Turanic nations with Eastern Europe as a precondition for forming the so-called Turanic world.[35] Hungarians should have a special status among them in the position of the more western branch of the so-called Turanic world, which had to stand against Western European positions in asserting its own interests. The particularity of the so-called Turanic world was to

[34] These views and ideas, even resulting in acrid disputes with the occupational German administration, were ultimately rejected. In spite of a displeasure of the Protectorate representatives, the German occupation administration was the only one who participated in arization.

[35] Among other nations, it should consist of Finish, Lapp, Uzbeks, Turks, Tatars, Bulgarians, for details see FISCHER, R.: *Entwicklungen des Antisemitismus in Ungarn 1867–1939*. München, 1988, p. 146 et seq.

express itself in the Turanic predominance, based on the Turanic, basically Nordic, and morality.

The declaration and in total the 133-day existence of the proletarian communist dictatorship in Hungary since March 1919, in the form of the Hungarian Soviet Republic, finally declared the acute negative attitude of the Hungarian society to Jewry. This attitude got wider international dimensions because of an imported element of B. Kuna in the so-called "Jewish Bolshevism". It was undoubtedly a foreign element that replaced the Hungarian national consciousness built for centuries, with prioritizing not only principles of proletarian internationalism unmeaning for ordinary people, aimed to solve all the problems of the majority of the Hungarian society through a world revolution dictated by hated Russia. Against the centuries-old foundations of Hungarianness in the national, state, Christian, i.e. sacred and therefore inviolable levels.

The decisive fact for the acute anti-Jewish attitudes became the origin of the leaders of this Hungarian communist experiment. According to reliable estimates, the overwhelming majority of communist commissioners, up to 75%, were Jewish in either direct line or as Jewish converts.[36] In addition, it came from Russia, the country that stood behind the defeat of Hungarian national – state efforts in 1848–1849.

The anti-Jewish attitudes in Hungary were accelerated not only under the influence of the left-wing communist dictatorship. The left-wing, so-called the red terror, was then replaced by the right-wing, so called the white terror. Its intensity grew after Miklos Horthy was elected to the post of governor in March 1920. The accompanying sign of the focused and so-called white terror, in the form of reprisals of various kinds up to murders, were particularly again Jews. It was a symptomatic expression of the fact that at the beginning of M. Horthy's state-political activity, the regent relied on the extreme right wing part of the young army officers trying to establish a military dictatorship of the fascist type in the country.

For the Hungarian anti-Jewish attitudes, a basically broad-spectrum, own, domestic sociopolitical basis, lasting for the next two and a half decades, in the form of adopted and applied anti-Jewish legislation, was created.

Thus, in a sense, it was not accidental that only a few months after the election of M. Horthy as a provincial governor, the coercive consequence was that the Hungarian Parliament adopted in the 20th century first Hungarian and all-European anti-Jewish Act/Constitutional Law No. XXV/1920/ under the title "The Regulation of admission into the Universities of Science, the Polytechnic, the Budapest Faculty of Economic Studies, and the Academies".

The substance of the law expressed by the well-known name "numerous clausus", undoubtedly contained elements of pruderism in the political and social spheres. On the other hand, it presented an initial and fundamental step towards the anti-Trianon anti-Jewish moods in the Hungarian politics and society, which could no lon-

[36] Similarly, it was also in post-revolutionary Soviet Russia, where a large number of leaders of the October Revolution of November 1917, and in the subsequent post-revolutionary period, also had Jewish origins with an atheistic orientation without inclination to Zionist ideas.

ger be stopped. And, over time, also under the influence of international events, they intensified.

However, the question of the reason why a degree of moderation of the given statutory provisions was used, thus without any definition of the term "Jew" in the anti-Jewish meaning, remains doubtful. The answer is the dualistic stage of the development of social relations in the Hungarian state.[37]

In the conglomerate, it was not easy for the Hungarian post-World War I. official policy to achieve a rapid anti-Jewish reversal of the public opinion. On the one hand, the indisputable fact supported by the politics of increasing the anti-Jewish focus within the society with its accompanying, first at all, verbal communications. On the other hand, for the entire Hungarian society (also for those who did not stand in anti-Jewish positions) legally binding, legal and legitimate measures against a special religious group of full-fledged Hungarian citizens.

The general clarification of the filling of the state related to the adoption and the content of the provisions cannot be comprehensive without noticing the unpredictable perversion of the official state policy based on the fact that the adoption of the Art. No. XXV/1920 was not influenced by any foreign ideology. The German Nazi antisemitism in racial bondage was expressed in its original form already some years later. This also includes another unmissable fact that the content of the legal regulation in the form of the Art No. XXV/1920 was designed and adopted by the legislators based on their internal, own initiative, without any external coercion, even without the German one.

The infamous whole-European primacy of the anti-Jewish Act No. XXV/1920, in its consequences, did not, until 1938, have any catastrophic life-threatening impacts on the Hungarian Jewish community. This did not change the fact of the gradual application of the so-called Segedin ideology based on preserving the Christian ideological essence as a form and means of protecting the Hungarian race along with the agrarian status of the state. The breakthrough and duration of the World War II conflict in relation to the Hungarian Jewish community shared identical features with the German Nazi ideology both in the level of their personal status and in relation to property attributes.

The declaration of the independent Slovak state in March 1939 meant that long-term aspirations and ideas of decisive national leaders in a wide historical diapason as well as of a wide spectrum of the Slovak nation came true. It was unquestionably a legal and legitimate act based in the state administration on the autonomous arrangement of the Czechoslovak state in the autumn of 1938. It is mentioned

[37] The reason for assimilating the Jewish population was not an opportunism. They declared their Hungarian nationality as they were convinced and needed to find their own country. The Jews were not so in the position of a national group, but they wanted and did form a fully-fledged, anti-separatist, integral part of the Hungarian political nation. Their Jewry had two basic features. In the first place, their efforts in the unchangeable end inseparable alliance with the existence of the fully-fledged status of a Hungarian state citizens. Subsequently, however, as a sympathizer practicing Jewish own faith. Basically ethnic Hungarians speaking their native Hungarian language, but of the Moses' religious confession.

also in the text of the Declaration of the Government of the Slovak Republic of 21st February 1939 emphasizing that "... since 6th October 1938, this Slovak state is a successor to the old Czechoslovak state, it grows as if from it, however, it is a new state... within the framework of a new state constitution..."[38]

The new and first statehood of the Slovak nation was not influenced by historical residuals of a burden and, above all, responsibilities in the broadest sense of the word, thus also in the attitudes to the Jewish question existed in the surrounding Central European states. This is due to the premiere entry into the previously unknown state-forming, higher version of implementation of the national-political efforts of the Slovak nation.

The decisive, strongest, but not the only political force in Slovakia as soon as since the Czechoslovak parliamentary elections in 1920 was the Hlinka Slovak People's Party. Its importance undoubtedly increased in the period since the declaration of autonomic self-government in Slovakia in autumn 1938. It unquestionably increased because in the spectrum of Slovak political parties, it was the only one constantly and openly seeking for a self-governmental state status, whether in the form of autonomy and later as an independent state formation.[39]

The declaration of the independent Slovak state in 1939 admittedly meant strengthening of self-confidence for the Slovaks after the millennium-long oppression of the Hungarians, very-needed for revival and national rebirth. It turned up that the problem, however, was the fact of the actually unexpected and unprepared grasp of the state independence revealing the lack of experience of the politicians in the real management of their own statehood. The result was a degree of complaisance towards the Central European Power – Hitler's Germany – although the Western Powers were involved in this status with their signing of the Munich Agreement. The Slovak politics in its own country did not and even could not have any other goal than enhance the nation and provide it with welfare ensuring opportunities for work. Of course, in the Central European political lines of force, it could not been done without allied bands with Nazi Germany. Many of the above-mentioned tasks were fulfilled, although unfortunately, with evolving discriminatory attitudes towards their own citizens of Jewish origin.

Relationships between Slovaks and Jews were decisively influenced by the fact that more than four fifths of the undisputedly religious Slovak nation declared their adherence to the Roman Catholic religion with all of the resulting symbolical consequences. They stood on the positions of the Church teaching of the collective gilt of Jews for torture, death, and non-recognition of the divine nature of the founder of Christianity, Jesus Christ. And Slovak Catholics strictly respected the Church, its representatives, who acted significantly in a dual position – as preachers of the Catholic clergy and as state officials. Thus, if something was claimed by the priest in the first position, it had to be the respected truth of the priest acting from the se-

[38] *Dokumenty slovenskej národnej identity a štátnosti*, II., Bratislava: Národné literárne centrum, Dom slovenskej literatúry, 1998, p. 197.

[39] For a comparison see results of the elections in December 1938.

cond position. The exact words in church sermons as the words at public political assemblies.

Slovaks did not condemn Jews as people, even though they did not have good experience with some groups of them ever during their existence within the Hungarian state. In that period, Jews were primarily blamed because of their usury – pub keeper behavior and approach, basically ruthlessly liquidating, leading to further pauperizing of the Slovak village people, tied with the subsequent accumulation of the wealth of Jewish pub keepers and usurers.[40] In addition, similar as in the Czech lands in relation to Germanisation, there were reservations about the considerably active participation of Jewish communities during the violent Hungarianisation of the Slovak population.

In addition to this experience, in the inter-war period, in the growing influence of the social-democratic and communist movements, their followers were to a large extent Jews.[41] The atheistic Communist ideology, of course, contravened the ideology of Christianity, which sharply and aggressively rejected atheism. On the territory of Slovakia during the inter-war period, the Catholic Church used a simple, purposeful but effective collocation – Jews are behind the Communist movement. It was supported by the already mentioned state leadership in Soviet Russia.

It is needed also to mention that during the inter-war period there was a significant increase in the Zionist movement as the expression and content of the strong Jewish nationalism. In addition, in the period of the first Czechoslovak state, Jews did not show a sympathy to the Slovaks, they rarely declared Slovak nationality, ignored the Slovak language, separated themselves from the Slovak society. The Jews in Slovakia declared more rarely the Jewish nationality, they preferred especially and mostly to be Hungarians, expecting possible state changes meaning that Czechoslovak statehood would not survive and the old times come back.

With the outlined facts, the Slovak national life entered into a short period of self-government autonomy and an independent state formation.[42] The feelings in the Slovak society in those times towards the Jews, i.e. for a longer time, were not very kindly nor particularly friendly. It was also due to their social status and property wealth, no envy nor political strict positions were behind. In the programming theses of the decisive political party, HSLS, whether in the form of the Hlinka People's Party striving for autonomy or the Tiso People's Party, as opposed to Germany, we do not find racist elements trying to elevate the Slovak nation to the level of a special superior race in the form of the so-called Aryan or other type. The increased po-

[40] Pubs in the Slovak countryside had in a decisive extent Jewish owners.

[41] The export of "unholy" communist ideas from the territory of Hungary establishing the Slovak Soviet Republic was an indubitable proof. Also the fact later that the Communist Party of Czechoslovakia had many Jews in its leading positions.

[42] Anti-Jewish feelings at the time of the autonomy of the territory of Slovakia were also influenced negatively by the ill judged demonstration of the Jewish population in Bratislava just before the arbitration decision requesting connection of the city to the Hungarian state. Therefore the escalated aversion against the Jewish community in relation with the negative arbitration decision for Slovakia is quite obvious.

litical Slovak nationalism took primarily a form of decisive elements of very needed self-conscious patriotism in relation to the enforced and implemented Czechoslovakian policy of the centralist Prague type lasting twenty years. The Slovak nationalism at least had not enough time to occur, space-time enough for it, nor any necessary economic background.

Signing the so-called Protection Treaty with Germany, the first Slovak Republic had to succumb to the anti-Jewish policy of Nazi Germany as well as the surrounding states. Its foundation did not lead from the highest law of the state – from the Constitution adopted in July 1939 / Const. Act No. 185/1939 Coll. The foothold of these statements can be found in the context of several of its provisions. In the introduction, the position of the Slovak state is declared in the level of a factor associating "all the moral and economic forces of the nation in the Christian and national commonalty..."[43] It is possible to decode this as a priority relation of the state to the members of the Slovak nation and thus also a suppression of the civic principle to the rest of the population. The president as the head of the state in the President's adjuration accepts the commitment to "... always have in eye the moral and material elevation of the people..."[44] what is an unequivocally wider concept than the Slovak nation. A term incorporating the Jewish population. The viewpoint is supported also with provisions of Art. 81, par. 1 declaring that "...all citizens, regardless of their origin, nationality, religion and occupation, use the protection of their life, freedom and property",[45] and these rights could be limited only by the law. The Constitution, in none of its provisions, indicated a possibility to discriminate a particular Jewish or any other category of the population.

Official approaches and speeches of leading state officials, particularly of the hard core of the Tiso People's Party, were different. Despite the fact that President J. Tiso did not belong to this Tuka-Mach grouping, his stoniest speech against the Jews was presented at the well-known assembly in Holíč on 15 August 1942 in connection with taking property with the following words: "... And we did it based on the God's command: Slovak, sweep, get rid your offender! In this sense, we are and will be doing also other orders. We will sure observe human rules and laws, we will keep the level of justice, but what belongs to the nation of Slovaks, we will not abandon anything to anyone!"[46]

The mistrust against the Jewish population in the Slovak state by the majority nation also resulted from the situation when the government estimated that the Jews owned between 40% and 50% of the Slovak national economy. Also for these reasons, by law regulations, it was decided to start so-called slovakization of the economy in the first Slovak Republic, for which the concept of arization was generally accepted. This process, even by its name, did not take the form of German one in the

[43] For more details see the constit. Act No. 185/1939 Coll.

[44] Par. 34 of the constit. Act No. 185/1939 Coll.

[45] Of the constit. Act No. 185/1939 Coll.

[46] Cited by: ĎURICA, M.: *Jozef Tiso. 1887–1947, Životopisný profil*, Bratislava, 1995, p. 208.

Jewish property arization as such, because in Nazi Germany the Jewish property was under the state racial theory allocated to the superior Aryan-Ariana pure German population.

Another difference was the fact that in the first phase, since the summer of 1940, so-called Slovak arizators agreed a contract with the Jewish owners where a Jewish-Slovak co-ownership was created with a 51% share on the part of the new co-owner. Thus, it was the obligation to sell a part of the Jewish property to Slovakian hands for an agreed fee. So, no transfer to state ownership or taking property without any compensation. As late as in the next stage, after the so-called Salzburg negotiations, since September 1940, taking of the Jewish property applied to the property in its entirety and without any compensation. So, in the true sense of the word it was a theft, expropriation later applied also to personal Jewish property.

Deportations represented a special fact, however, not praiseworthy. Since the adoption of the so-called "Jewish Code" (Govern. Reg. No. 198/1941 Coll.) they were determined by origin, not as before by religion under the Govern. Reg. No. 63/1939 Coll.[47] The system of deportations was based on the eviction of Jews outside Slovakia for work to Germany.[48] In addition to the loss of personal freedom, the symptomatic phenomenon was a confiscation and forfeiture of property to the state. The system of deportations thus confirmed the intention of the official state policy to weaken the social and property status and influence of the Jewish population in terms of the coercion and ideas of Nazi Germany.

The first Slovak Republic was undoubtedly an independent state formation, until German troops were called to suppress the Uprising, with its own authoritarian state regime implementing also an open anti-Jewish policy. Thus, the anti-Jewish measures in law-making and practice cannot therefore be given only to the position of a German coercion, which undoubtedly existed and was their co-creator. Despite the innumerable amount of anti-Jewish legislation adopted, the Jewish Code as the most extensive legal norm can be used as an example to adopt an opinion of PhDr. Ivan Kamenec, CSc., undoubtedly an expert in the issue: "That time, a part of the Slovak press claimed that the Slovak Code was even stricter than the Nuremberg Laws, but I think that it was not true, rather a propaganda. The Jewish Code, though bringing extraordinarily many tragedies, was never so consistently applied as the Nuremberg Laws."[49]

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[47] In relation to identification of the Jews, they are considered either as a nation, or the criterion is their religious affiliation. They are not considered to be a special race.

[48] The first transport was in March 1942 and the deportations made by the Slovak state machine were finished in October 1942. Together with them, work camps were established in the territory of Slovakia. The reason for finishing the deportations was the information about the work camps, in fact extermination concentration camps, in Germany. They started again, but under the guardianship of Germany, after the Slovak National Uprising had been suppressed.

[49] KAMENEC, I.: *Vina sa dá oľutovať i odpustiť. Zodpovednosť je konštantná.* Pravda – Insert, 14 September 2016, p. 4

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Róbert Jáger[1]
Matej Bel University in Banská Bystrica, Faculty of Law, Department of Theory of State and Law

Legal and Social Status of Jews in Great Moravia: the Origin of Anti-Semitism in Slovakia?

Abstract: The paper describes the documents of the Great Moravian and Post-Great Moravian period containing references to Jews in the territory of Great Moravia. This is the *Legend of St. Kliment's life*, so-called *Raffelstheten Customs Order*, *Ibrahim Ibn Jakub's Slavic Report*. These documents, however, provide very brief information on the basis of which it can only be deduced that the Jews existed in Great Moravia. On the basis of these documents, it is not possible to establish conclusively whether these Jews were settled on the territory of Great Moravia or only visited the country as the "foreign traders". In order to find further information on the legal or social status of Jews in Great Moravia, Methodius's *Nomocanon* is analyzed, from which the parts were abstracted that are devoted directly or indirectly to Jews. However, as *Nomocanon* is more or less only a translation of a Byzantine original, we try to put the provisions in question within the Great Moravian context and find out the motivation for their adoption. Consequently, it is pointed out that the legislation concerning Jews was probably not implemented in practice consistently. At the end of the article, the opinion is presented that the population of Great Moravia was not anti-Semitic, and the so-called "anti-Jewish regulations" came to the country only because of the ecclesiastical influence.

Key words: Legal Status of Jews; Social Status of Jews; Great Moravia

The first written references to the existence of Jews in Pannonia are found in written sources as late as from the 9th century. This is not surprising. It is justifiable by the lack of domestic written sources before 863 and the content austerities of foreign written documents of that period dealing with the events of Great Moravia. Despite a small amount of the original written documents dealing with the history of Great Moravia (devoted to Jews), they also contain sections where we can at least learn about the brief indications of the social or legal status of the Jews. The references to the Jews include the following documents of the Great Moravian and Post-Great Moravian period: the *Legend of St. Kliment's life*, so-called *Raffelstheten Customs Order*, *Ibrahim Ibn Jakub's Slavic Report*. The most extensive document by its scope, which, as the only one, repeatedly deals with the issue of Jews, was Methodius's *Nomocanon*.

[1] JUDr. PhDr. Róbert Jáger, PhD., contact: robert.jager@centrum.sk.

The Legend of St. Kliment's life states that after Methodius's death and the expulsion of his students, two hundred of them were sold by the Frankish priests to Jews.[2] (Kučera states that these were sold to slavery).[3] It results from the text that the Jews acted as merchants in the area of Panonia in the period of Methodius death (885). However, it is possible to assume that the Jews acted in the role of traders in the Great Moravia already in a much earlier period, although we do not have a written record of it. Nor is it possible to find out from the text in question whether the Jewish population was permanently settled in the territory of Great Moravia or whether it was traveling merchants who came to the country for trade only and then left the country.

Another written mention of the Jews in the territory of the surrounding countries comes from the years 903–906, is found in the so-called *Raffelstheten Customs Order*. It states: *"Merchants, i.e. Jews and other merchants, from anywhere they would come from this country or from other countries, let them pay from the slaves as well as from other goods a proper duty, as was always paid during the previous time of the kings."*[4] Also in this text, the Jews appear as traders who were trafficking in slavery. Interesting is the phrase *"Merchants, i.e. Jews and other merchants"*. This formulation allows us to know that the Jews were considered to be the merchants, that is, the word "Jew" and "merchant" were used mostly in a synonymous meaning in the language of that time (this is called "polysemy": one word has more meanings. It is a specific phenomenon of old languages).[5]

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[2] *"They tortured them inhumanly, some of them burgled their houses, combining profitability with impiety, other were dragged along thorny shrubs, even old people, even those who crossed the age of David. And the younger one of the priests and deacons were sold to the Jews. And there were not just few of them, counting up to 200 servants of the altar."* STANISLAV, J.: *The Lives of the Slavic Apostles Cyril and Methodius* (*Životy slovanských apoštolov Cyrila a Metoda)*. Martin, 1950, pp. 121–122. STANISLAV, J.: *The Fates of Cyril and Methodius and Their Disciples in the Life of Kliment* (*Osudy Cyrila a Metoda a ich učeníkov v živote Klimentovom)*. Bratislava: Tatran, 1963, pp. 91–92.

[3] KUČERA, M.: *Slovakia After the Fall of Great Moravia (Slovensko po páde Veľkej Moravy)*. Bratislava: Veda, 1974, p. 272.

[4] The document originated probably between 903 and 906. This date is based on the fact, that the document mentions the bishops Burkard (who is mentioned as the bishop for the first time as of 12th August 903) and Teotmar (who died during the Battle of Bratislava in 907). See closer: *Raffelstetten Customs Order* In: BARTOŇKOVÁ, D. – HAVLÍK, L. – MASAŘÍK, Z. – VEČERKA, R.: *Magnae Moraviae Fontes Historici. I – IV. Sources for the history of Great Moravia* (*Magnae Moraviae Fontes Historici. I – IV. Prameny k dějinám Velké Moravy)*. Prague, Brno: Masaryk University, 1966–1971 (next time citated as MMFH) 1968, pp. 198–201. NOVOTNÝ, B. et al.: *Encyclopedia of Archeology (Encyklopédia archeológie)*. Bratislava: Obzor, 1986, pp. 740–741. STEINHÜBEL, J.: Great Moravia – on a halfway from the tribe to the state (Veľká Morava na polceste od kmeňa ku štátu). *Forum Historiae*, 2014, 8, No. 2. pp. 71–97.

[5] In many terms of the Slavic language and the Old Slavic language, their polysemy is evident. It was like this also on the contrary: the characteristic feature of the language is that one concept was also in a language expressed in many terms. This fact, however, was a characteristic feature of the language of law practically until the latest period. Similarly, in the development of the language there were significant shifts. It is also problematic that the Old Slavonic language has not been preserved in written form, so we can not determine to what extent Methodius consistently retained their original meaning in adopting the words of a domestic origin.

The fact that the word Jew in the European languages was not exclusively of religious or ethnic meaning is also signified by the sentence of the letter by Mikuláš I. to Bulgarians, where it was mentioned: *"You say that there were many baptised in your homeland from a Jew, and you do not know whether he was a Christian or a pagan, and ask what to do"*.[6] From the above statement it follows that in the Bulgarian language, the term "Jew" could also have referred to someone who could be a Christian or a pagan (non-Christian). It is interesting that in the following text neither the Pope tries to refute or explain the Bulgarian perception of the notion of Jew and "works" with this Bulgarian perception. In order to explain this Bulgarian perception of the word "Jew", appropriate is the above explanation that the Bulgarians were baptised by a merchant ("Jew"), and it was not known whether he was a Christian or a pagan.

The Raffelstheten Customs Order also suggests that the slave trade (which was mostly done by the Jewish) in the Bavarian-Moravian border area had to be relatively widespread, if the rules of the Kingdom of the East Franks also responded to this fact.

It should be noted that the church law of that period did not support slave trade, and it was totally forbidden to enslave Christians. Although the church laws of this character from the territory of Great Moravia have not been preserved, their application can be expected in practice also in Great Moravia, because the missionaries spreading Christianity in Moravia came from countries where such rules had been used for a long time, and they were (at least partially) applied in practice. But these bans were also circumvented by the fact that the slave trade was left to Jewish merchants who bought slaves in Central European regions, and used the Amber Road to take them to Venice and from there they drove them to the Muslim regions of North Africa, where Christian slaves were highly sought after.[7]

The mention of Jews from the Post-Great Moravian period comes from the Arab merchant of a Jewish origin Ibrahim Ibn Jakub, who also arrived in Prague around 965. In his work *The Slavic Report* he says: *"... from the countries of Turks (the Kingdom of Hungary), Muslims, Jews and Turks come to it and bring goods and gold."*[8] It is clear from the text that the Jews came to Prague from "Hungary" and bought slaves in Prague with whom they returned. The participation of Jewish merchant on the Prague market is also mentioned by the biographers of St. Vojtech. St. Bruno complains about the people who *"sell Christian slaves to the unbelieving Jews."*[9]

These texts allow us more or less to know that Jews were present in Great Moravia. The earliest of these texts about the Jews dates from 885, but it is not possible to assume that the Jews had not been present in Great Moravia in the period before that

[6] In: MMFH IV, p. 87.

[7] See closer: VAVŘÍNEK, V.: *Cyril and Methodius – between Constantinople and Rome* (*Cyril a Metoděj – mezi Konstantinopolí a Římem)*. Prague: Vyšehrad, 2013. p. 313.

[8] *Ibrahim Ibn Jakub's Report on Slavs.* See closer for example In: MMFH III, 2013, p. 369.

[9] *Life of St. Brunon*. See closer for example In: MMFH II, 2010, p. 161.

year. Evidence of the existence of Jews in the previous period may also be the knowledge of linguistic etymology: as in 885 the word "Jew"[10] was recorded in written documents, this word had to exist in the native language earlier (it is suggested also by so-called "linguistic stability theory"). Also, if there was a word for a Jew in the language of that period, the people who used that language had to know the Jews (there are word signs in the language only for what the users of the language really know).

This is also evidenced by the established form of the word used to describe Jews, which is almost identical in all documents (the established form of this word also indicates the long-term use of that word). A longer period of use of the word "Jew" also shows a longer period of existence of the relations of the domestic population of Great Moravia with the Jews. Thus, the Jews in Great Moravia were not "a new, so-far then unrecognized element". Although we have the first mention of the Jews in Great Moravia at the very end of its existence, it is not unlikely that Jews existed in the territory of Great Moravia (whether as permanent settlers or as travelling merchants) already in the Pre-Great Moravian period, as it was in the case of other surrounding countries of Europe of that time.

Based on the above text, we assume that during the existence of Great Moravia there was a Jewish population in Great Moravia. It is not possible to reliably determine if the Jews were permanently resident in the country or visited the country only as itinerant merchants. Even if some Jews were permanently settled in the country, it is not even possible to answer the question of how many they were. Their number can be expressed only approximately: using the analogy with the number of Jews in the Kingdom of Hungary in the Early Feudal Period or the number of Jews living in the surrounding countries. It is estimated that in these countries the Jewish population was around 1 percent.[11] Even if there was a settled Jewish community in Great Moravia, its population probably did not exceed this average in other countries.

From the reports mentioned above in the text, we can only know that the Jews probably operated in Great Moravia. They do not inform about their legal or social status (in addition to dealing with trading, in particular the slave trade). Certain information about the legal and social status of the Jews includes only Methodius's translation of *Nomocanon*.

Methodius's translation of Nomocan is older than the above documents (at the same time Nomocanon is the youngest of the legal texts[12] of the Great Moravian period). The period when Nomocanon could have originated in Great Moravia can be defined by the years 873–880. His author, at the time of translation, had been in Great Moravia for a longer time and had the opportunity to get to know the condi-

[10] The word Jew is Pan-Slavic word, and has been taken from the Latin *iudaeus* through Italian *giudio*. REJZEK, J.: *Czech etymological dictionary (Český etymologický slovník).* Prague: Leda, 2015, p. 818.

[11] ELIÁŠ, M.: Jews in the Arpads Legislation (Židia v právnych nariadeniach Arpádovcov). *Medea*, 2006, No. 10, pp. 77–99.

[12] For the purposes of this work, we will use the phrase "normative texts" (or "legal texts") for the common denomination of the *Court Law for the People*, the *Provisions of the Holy Fathers*, the *Acknowledgment for the governors*, but also the *Nomocanon*.

tions of life in the society (on the contrary, he had a shorter time in the time of creating of older legal texts).

This is evidenced by the recurring statements of linguists that Nomocanon is firmly connected with the Great Moravian language environment. The richness of the vocabulary contained in Nomocanon also highlights its wide scope: Nomocanon accounts for about 90 per cent of all Great Moravian legal texts. The amount of legal terms contained therein is the largest compared to other legal texts. And it is precisely its scope and a "firm connection" with the Great Moravian language environment that designates it to be the most suitable subject of the study and to be the source of knowledge of the legal and social status of the inhabitants of Great Moravia (Jews as well).

Nomocanon contains the following text parts containing references to the Jews:

XXXVII titьl(ъ) lz. O s(vę)štajemychъ be-štinu. I o ereticěch(ъ) i o prilěplęjuštichъ sę ichъ. I jako / ne podobajetь nikomuže postiti sę sъ nimi, ni m(o)l(i)tvъ tvoriti ni prazdьnika sъ jeretiky ni sъ židy, ni že ot nichъ bl(a)g(o)s(lo)v(e)nija priimati, ni vъ sъnьmišta ichъ vъchoditi li prinositi vъ nę oleja li prinošenii kakovъ. About bishops who are wrongly ordained. About the heretics and about their followers. And about that, that no is supposed to fast or pray with them, nor to celebrate the feasts with heretics and Jews, nor to receive blessings from them or enter their synagogues, nor to bring oil or some sacrifice there.

XXVI titьl(ъ) kdz. (O) pěvьcichъ i o a(na)gnostěchъ i oprok(istěchъ). Chalkidonьskag(o) sbora kan(onъ) di. Poneže vъ eterachъ oblastьchъ oslableno bys(tь) pěvьcemъ i čьtьcemъ ustavi s(vę)tyi sborъ, da ne budetь dostoino nikomuže ichъ, zlověrьny poimati ženy. Prižívъšaja že uže děti ot takovychъ ženitvъ, ašte ubo dostigli budutь roženyja ot nichъ kr(ь)stiti ot eretikъ, privoditi ja kъ obьšteniju kafolikija c(ь)rk(ъ)-ve. Ašte ne, k tomu da ne kr(ь)štajutь s(ę) sь jeretiky ni směšati sę braky sъ jeretiky ni sъ židy ni sъ eliny, razvě tokmo ašte oběštajutь sę priložiti sę na pravoslavьnuju věru sъvъkuplęjemoje lice sъ pravověrnymi. Ašte li kъto ustavъ prestupitь sbornyi, to kanonьstěi jepitemii povinenъ budi. Since, in some eparchies, a cantor and a lecturer were allowed (to marry), the holy senate ordered that none of them should marry a woman of an evil faith. If those who had children of these marriages and gave already their children to the heretics for baptism, they must bring them into the community of the Catholic Church, and children without the baptism should not be baptized by heretics. They should not establish marriages with either the Jews or the (Paganic) Greeks, only if, the person who marries with the Orthodox promises to pass on to the Orthodox religion. If anyone breaks this provision, he or she will undergo a canonical punishment.

XXXVII tit(ь)l(ъ) .lz. O s(vę)štajemychъ be-štinu i o ereticěchъ

...Togože kan(onъ) lz. Jako ne podobajetь u židovъ oprěsnъkъ vьzimati/ li pričaštati sę nečьstьchъ ichъ. That unleavened bread from the Jews should not be accepted nor attend their worship.

...Togože kann(onъ) mz. Ašte kotoryi pričьtnik(ъ) li ljudinъ vьnidetь vъ sborište židovьsko li eretičьsko m(o)l(i)tvy dějatь, da izveržetь s(ę) i otlučitь s(ę). If any cleric

or layman goes into the Jewish synagogue or to the heretical ("synagogue") to pray there, let him be deprived of his rank and excommunicated.

Togože kann(onъ) ov. Ašte kotoryi klirikъ li kr(ъ)stьjanъ eläi nesetь vъ trebište poganьsko li vъ sborište židovьsko li svěštju prosvětitъ, da otlučitь s(ę). If any cleric or a Christian brings to the pagan ceremony or to the Jewish synagogue (on their holiday) oil or lights a candle, let them be excommunicated.

Togože kann(onъ) oa. Ašte kotoryi ep(i)s(ko)pъ li pop(ъ) li dijakonъ li vsękъ pričьtьnikъ s(vę)št(e)nija postitь s(ę) sъ židъmi li prijemletь oprěsnoky pra/zdьnika ichъ li ino takovo, da izveržetь s(ę). Ašte li ljudinъ, da otlučitь s(ę). If any bishop, priest or deacon, or any member of the clergy fasts with Jews, or if he accepts their bread from their feast, or something like this, let them be deprived of rank. If he is a layman, let him be excommunicated.

XXXIX titьl(ъ) lth. O obraštajuštichъ sę ot požьršich(ъ). S(vę)tych(ъ) ap(o)s(to) lъ kan(onъ) nth. Ašte kotoryi pričьtьnikъ stra/cha radi čl(o)v(ě)čьska židovьsku li poganьsku li eretičьsku volju stvoritь i otvьržetь s(ę) imene Ch(ri)s(to)va, da otinudь iždenutь s(ę) ot c(ь)rk(ъ)ve. Ašte li imatь imę kr(ь)stьjanьsko, da otlučitь s(ę). Ašte li (ne) imatь imene s(vę)štenьna, da izveržetь s(ę). Pokajavъ že sę, aky ljudinъ prostъ prijatъ budetь. If any cleric because the human fear would comply to the Jew or to the pagan or to the heretic, and if he denies the name of Christ, let him be totally expelled from the Church. If he has a Christian name, let him be excommunicated. If he has the name of a cleric, let him be deprived of rank. If he does repent, let him be accepted into the Church as a layman.

L tit(ь)l(ъ) n. O pravilě m(o)litvьněmь i o pěnii i čtenii… Nikeiskag(o) sbor(a) kan(onъ) a. Vsę smějušta razaręti kako ustava s(vę)t(a)go i velikago sobora, v Nikei sъbravъšago sę pri bl(a)goč(ьs)tivěmь Kostęntině o s(vę)t(ě)mь praznič s(ъ)p(a)snyja pasky, bespričastьnomъ i otlučenomъ byti ot c(ь)rk(ъ)ve, ašte preby/vajutь protivu gl(agolju)šte vъpreky predanymъ. Se že g(lago)lemъ o ljudechъ prostychъ. Ašte kto ot jep(i)s(ko)pъ li ot popovъ li ot dьjakonъ po ustavě semь dьrznetь na razvraštenije ljudemъ i smuštenije c(ь)rk(ъ)v(ь)nikъ osobstvovati i sъ židъmi stvoriti pasku, sego s(vę)tyi sborъ ottolě kromě c(ь)rk(ъ)ve byti sudilъ jestь, jako ne tъkmo sebe grěchъ sbirajetь, nъ mnogъmъrastelěnija i razvraštenija vinu byvajemu. Ne bo takovyichъ lišati služenija, nъ i pričaštajuštichъ po otverženii. A izvьrženyja lišiti i vъněšьněja česti, juže s(vę)tyi kanonъ i B(ož)ije sv(ę)št(e)nьstvo pričastiša. All those who dare to violate the order of the holy and great congregation gathered in Nicea in the times of the godfearing Emperor Constantinus about the holy feast of the saving *Pascha* (Easter), they should not be part of the Church and should be excluded, if they remain in opposition and speak against what is traditionally established. We talk about laymen. If any of the bishops or priests or deacons after this regulation undertake to the offense of the people and to the concern of the clerics to separate and celebrate *Pascha* (Easter) with the Jews, this holy congregation shall condemn him to be out of the Church, as not only he falls into sin, but also he is the cause of destruction and offense to many others. Not only do they must be deprived of the service but also those who keep with them in communion.

S(vę)tych(ъ) ap(o)s(to)l(ъ). Ašte kotoryi jep(i)s(ko)pъ li popъ li dьjakonъ s(vę)tyi d(ь)nь paschy stvoritь preže vesnьnychъ rabnii sъ židъmi, da izveržetь sę. If a bishop or priest or deacon celebrates *Pascha* (Easter) before the equinox with the Jews, let them be deprived of rank.

From the contents of these provisions of Nomocanon containing references to the Jews we can abstract the following rules: 1. It is forbidden to celebrate holidays with Jews, heretics and pagans, or perform a common religious cult with Jews, heretics or pagans; it is forbidden to enter their synagogues (or pagan places of sacrifice). 2. It is forbidden to marry with the Jews, heretics and pagans (except that the Jewish spouse would convert to Orthodox faith). While the first abstracted rule has a religious-theological dimension (rigorous separation of Christian and Jewish or heretic or pagan cults) the second rule has a social dimension: banning the creation of mixed marriages, between Christians and Jews (or with heretics and pagans).

However, it is important to note that these Nomocanon norms do not prohibit the common celebration of the cult and making mixed marriages only between Christians and Jews, but also between Christians and "pagan Greeks or heretics". In the area of Great Moravia, the existence of "pagan Greeks" was probably not an acute problem, and this phrase came into the text of Nomocanon probably only as a translation of the Byzantine Greek original. For the territory of Great Moravia it could be applied in the sense of prohibiting of the cult and social contact between Christians and non-Christians ("pagans"). On the basis of the above, we would like to state that these Nomocanon norms were not exclusively anti-Jewish, but they were directed against all non-Christians, and the Jews were "only" one of these "non-Christian" groups.

From the content of the first abstracted rule (It is forbidden to celebrate holidays with Jews, heretics and pagans, or perform a common religious cult with Jews, heretics and pagans. It is forbidden to enter their synagogues/or pagan places of sacrifice) our attention was drawn to the last part, which provides for a "ban to enter their synagogues". Author of the book Jews in the Arpads Legislation (*Židia v právnych nariadeniach Arpádovcov*) based on this phrase considers that, *"at that time, the Jews lived in the Pannonia region and had their own synagogues built here."* He also states: "*This could indicate the existence of a permanent settlement of the Jewish people, or at least the existence of buildings owned and used by Jewish merchants*".[13] We wish to be more careful when formulating the claim that this Nomocanon provision proves the existence of the synagogues in Great Moravia. We repeatedly emphasize that Nomocanon is "only" the translation of the Byzantine original. Thus, the used word formulation containing the word synagogue does not prove the existence of Jewish synagogues in Great Moravia but proves their existence in the Byzantine Empire.

The author of the cited work justifies his statement about the existence of the Jewish synagogues by saying that Methodius in translation of the Byzantine Nomo-

[13] ELIÁŠ, M.: Jews in the Arpads Legislation (Židia v právnych nariadeniach Arpádovcov). *Medea*, 2006, No. 10, pp. 77–99.

canon left out about a third of original text and he only took over the canons that had to be applied in Great Moravia: since Methodius had chosen this canon, synagogues had to exist in Great Moravia. If we applied this idea to the other canons of Nomocanon, we might as well make an absurd conclusion: There were many baths[14] in Great Moravia (as Nomocanon repeatedly forbade entering the baths for men and women), and the Great-Moravian men castrated themselves as this was repeatedly forbidden in Nomocanon. Similarly, there would have been money in Great Moravia, because the Nomocanon also contains provisions on money or interest.

The author of the cited work does not pay attention to the whole text of the canon in question. The first part of the canon says *"About bishops who are wrongly ordained. About the heretics and about their followers. And about that, that no is supposed to fast or pray with them*". This norm was chosen by Methodius, because of – at that time still ongoing – dispute with bishop Wiching (to whom it would be possible to apply the sentence *About bishops who are wrongly ordained*). In Byzantine tradition, it was inconceivable to change the canon, or to omit some part of it, thus Methodius took it in its entirety, with the section on the "*ban to enter their synagogue*". We therefore allow ourselves to conclude that this norm was not transposed into Nomocanon because there were synagogues in Great Moravia, but because Methodius needed to legitimize his struggle against Wiching.[15]

Also, it should be noted that although the translation of this canon contains the phrase "*Jewish synagogues*", there is no word "synagogue" in the Old Slavonic text, and in the original text is used a descriptive phrase "place of meeting of Jews" or "Jewish assembly" (*sborište židovъsko*). This phrase suggests that the Old Slavonic language has no proper word for designating the synagogues. If there was a word synagogue in the Old Slavonic language, Methodius would certainly use it, and he would not have to use a phrase whose content is much wider than the original term contained in the original Greek version (the specific and unambiguous term "synagogue" and the very generic term "Jewish assembly"). Applying the rule that there are only words in the language that people in their society really know, it can be assumed that if there was no word "synagogue" in the language of Great Moravia, there were no synagogues in Great Moravia. If such a word existed in the Old Slavonic language, Methodius would certainly have used it: Methodius used descriptive phrases only in cases where the Old Slavonic language did not have the relevant terms. The assumption of the existence of synagogues in Great Moravia is neither supported by

[14] We do not exclude the existence of bathing pits in Great Moravia: springs of healing mineral waters have always been used for their healing effect. Nomocanon, however, forbids entry into "Greek and Roman" spa homes, which were mainly visited for physical enjoyment, and were often the center of the sexual activities of the population, not excluding prostitution.

[15] For more on the issue of the selection of canons from the Byzantine original to Moravian Nomokanon, also the motivation of this selection, see in the work JÁGER, R.: *Nomocanon – Law-Historical Analysis and Transcript* (*Nomokánon – právnoshistorická analýza a transkript)*. Banská Bystrica: Belianum, 2017.

the findings of archeology: all buildings of a sacred character dating to the time of Great Moravia have an exclusively Christian character.[16]

Interesting is also the question of finding motivation of the legislation concerning the legal status of the Jews contained in Nomocanon, and who was the initiator. Since Nomocanon was a translation of the Byzantine Church model and was primarily intended to arrange the organizational structure of the Church hierarchy in Great Moravia (secondly, to assert Methodius's rights to manage the Moravian Church in the struggle against Witching), it can be assumed that the initiator of it was Methodius himself. This statement is important because the eventual anti-Jewish mode contained therein can not be attributed to the ruler of Great Moravia (or even anti-Jewish nature of the inhabitants of Great Moravia). Nomocanon was not even a "codification" of the customary law that was applied in Great Moravia before the arrival of the Byzantine mission (and subsequent creation of normative legal texts). Therefore, it is not appropriate to assume that Nomocanon would only capture previously existing norms of an anti-Jewish nature in writing.

However, very important is the question of the extent to which Nomocanon's provisions governing the relations of Christians with non-Christians were applied in practice. Given that the older normative texts of the Great Moravian period did not regulate the legal status of the Jews (either in the form of preferential treatment or the form of disadvantage), it can be stated that the first partial regulation of the status of the Jews was the above Nomocanon provisions. If we share the view that Nomocanon was created between 873 and 880, it can be assumed that the first written legal regulation on the status of the Jewish population did not exist before year 873. However, the primary task of the Nomocanon was the organization of the administration of the Church affairs. We assume, therefore, that the question of the legal status of the Jews did not necessarily have to be implemented (in practice) immediately after the creation of Nomocanon. At the same time, it should be noted that Nomocanon was a predominantly church-law norm to regulate church affairs. Secular affairs were governed by other Great Moravian normative texts. Based on the above, we can assume that the practical implementation of the above provisions in practice may not have been carried out consistently and across the whole country. This can also be highlighted by a number of internal problems in which not only Great Moravia but also the church administration were at that time and whose solution was definitely more acute in that period.

The fact that these Nomocanon provisions did not have to be implemented in practice also suggests the above-mentioned statement, that the selection of the can-

[16] Although we do not expect the existence of synagogues in Great Moravia, it is possible to assume that the Jewish merchant could own in the big merchant centers houses, of groups of houses where they stayed during their business trips. There could also be places for cult performance (a kind of tabernacle). This is particularly evident in the practice of merchants of other nations who used such houses in merchant centers. For example, in Venice, in the Eastern Mediterranean and the Black Sea, merchants had houses where they stayed during their business trips. OHLER, N.: *Traveling in the Middle Ages (Cestování ve středověku)*. Prague: H&H, 2003, pp. 96–97.

ons was carried out by the Methodius for the struggle with Witching, and the provisions of the Jews were included in Nomocanon "only" as part of these canons.

As a proof of a very lax approach to the norms of the church law in their practical realization, we can also mention Witching's behavior after the death of Methodius when 200 of his students were sold to slavery. If the Archbishop of Moravia sold Christian students to slavery (which was explicitly forbidden by the church law mainly used in Western Europe), a similar ambiguous approach may be envisaged in the application of other church-law norms that regulated the legal situation of Jews (who, we suppose, were only a tiny fraction of society).

However, the presumption of not strictly applying norms governing the status of Jews in Great Moravia is only a hypothesis of the author. If this hypothesis will not be accepted, it is necessary to work with the hypothesis that, in the period after 873, these norms were applied in practice, and that the actual exclusion of contacts between the Christians and the Jews existed. If it really was like this, then it can be assumed that it would not be possible until the end of the existence of Great Moravia, but only within a shorter period. Since the author of Nomocanon was Methodius, and Nomocanon represents the application of the Byzantine church law in practice, Witching took over the management of the Moravian Church after Methodius's death. It is not right to assume that Witching continued to apply in practice the collection of Byzantine Church law (which Methodius had advocated in the fight against Witching).[17] On the basis of this, we can assume that if the Nomocanon norms regulating the status of Jews in Great Moravia were applied, it was probably only between 873–885.

If the norms of Nomocanon governing the legal status of the Jews were actually applied after 873, we do not expect immediate changes in the lives of the Jews. Changes in the lives of the peoples of the Medieval countries were very slow. It is not right to assume that immediately after Nomocanon was created, the inhabitants became "anti-Jewish". Ordinary inhabitants probably did not even understand why they should not have contact with the Jews (as they did not understand why they could not have two wives, premarital or extramarital sexual intercourse, and they did not observe these provisions, as evidenced by the repeated sermons of Methodius criticizing the population of Great Moravia for non-observance of norms regulating sexual behavior).[18] If we proceed from the hypothesis that Nomocanon's norms regulating the legal status of the Jews were applied only between 873 and 885, we can say that it was a very short period of time to create or even root in anti-Judaism in society.

At the end of this article, the question arises whether the then Church tried to assimilate the Jews located in the territory of Great Moravia. We do not have a direct

[17] JÁGER, R.: *Nomocanon – Law-Historical Analysis and Transcript* (*Nomokánon – právnoshistorická analýza a transkript)*. Banská Bystrica: Belianum, 2017.

[18] GÁBRIŠ, T. – JÁGER, R.: Sexual offenses in Slavic law in Great Moravia (Sexuálne trestné činy v slovanskom práve na Veľkej Morave). Schelle, K. et al. *Sexual offenses yesterday and today (Sexuální trestné činy včera a dnes).* Ostrava: Key Publishing, 2014.

written original proof from Great Moravia, which could give us the answer. However, the letter of 866 has been preserved, in which the Pope Nicholas I answered the questions of the Bulgarians, i.e. from the near-time of the creation of the most important normative texts of the Great Moravian period. The Bulgarian society was at a similar level of development as the Great Moravian society,[19] and in the questions addressed to the Pope tackled similar problems, as were also present in Great Moravia. Even Bulgarians had already adopted Christianity, and they had many questions to which they looked for the answers.[20] In the above-mentioned letter, the Pope readily and sensitively, sometimes with a high philosophical and theological attachment, patiently responded to their questions.

Between the questions of the Bulgarians and the answers of the Pope, the above question is not directly answered, but the following can be abstracted from the "spirit" of the whole text: "*The pagan should not be forced to become a Christian*".[21] This text does not speak directly about the Jews, but about the pagans: in that time the pagans were referred to as non-Christians (that is, the Jews also fell into this category). Although we do not have a similar "implementing regulation" for normative texts at the time of Great Moravia, the role of the "interpreter" of these texts could be carried out by Methodius. And Methodius, as a person who was familiar with the church law as well as with Christian philosophy, Christian teaching or world view, would probably had similar view as presented in the Pope's letter to Bulgarians. Also, on the basis of this official statement of the Pope, which Methodius probably knew, we can say that parts of the Byzantine Nomocanon were not adopted into the Nomocanon of Great Moravia with the purpose of carrying out the *privilegia odiosa* or discriminating against the Jewish population.

If we assume that the official teaching of the Catholic Church did not require the assimilation of Jews (or other non-Christians), it is necessary to answer the question why (at least in the official teaching of the Catholic Church) it was forbidden to jointly practice cult and marry with the Jews. This question is also answered (though only indirectly) by the letter of Nicholas I to Bulgarians. In this letter the Pope wishes in a broad way that once baptized people would not return to non-Christian religions (heresy, paganism). It is precisely that, the Pope considers a very serious problem the "renunciation" of Christians from the "true faith" and their inclination to old religions. If, in another place, the Pope says that non-Christians should not be forced to become Christians, we can assume that the purpose of restricting Christian contacts with non-Christians (and also Jews) should be to "protect" Christians from re-

[19] Developments in Great Moravia were in some aspects at a slightly higher level of development, a few decades ahead of developments in Bulgaria. Nonetheless, the periodic interpretation and perception of the norms of society's law contained in the Pope's letter is applicable not only to Great Moravia but also to other countries with evolving Christianity.

[20] The Pope's letter to Bulgarians consists of 106 (more or less) large-scale responses, and each answer begins with some "introduction to the issue" from which it is relatively easy to abstract the original question of the Bulgarians.

[21] *Non esse inferendam pagano violentiam, ut Christianus fiat, supra docuimus*. In: MMFH IV, p. 87.

nunciating Christian faith, and not direct segregation of Jews, or other non-Christian groups. Although there actually was a segregation of Jews in many European countries (also in the Middle Ages Hungarian Kingdom), we do not expect that this phenomenon occurred during Great Moravia. Likewise, we do not expect even developed anti-Judaism in Great Moravia.

The development of anti-Judaism was in the history associated with medieval Europe, predominantly with the role of the Jews in monetary system and the provision of interest-rate loans. But there was no developed monetary system in Great Moravia. Due to the predominantly natural-exchange character of the Great Moravian country, the money was not used (even if coins from precious metals were found singly, these were exclusively of a foreign origin). Since there was neither a developed monetary system, we do not expect a massive spread of lending to interest, which, especially during the centuries of younger age, caused the negative emotions of the majority population against the Jews. On this basis, we would like to state that the Great Moravian society (with a high degree of probability) was not anti-Judaistic, and it did not change much in the practical life of ordinary Jewish residents or Jewish merchants, even after the adoption of Nomocanon. The segregation and exclusion of Jews in the society were carried out only in the period of the high and late Middle Ages in the Kingdom of Hungary. However, this issue will not be dealt with in this article, as it is a relatively well-researched and processed issue in other publications.

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Adriana Švecová[1]
Trnava University in Trnava, Faculty of Law, Department of Legal History

The Legal Basis of Forming, Maturing and Escalating of Anti-Jewish Legislation in the Kingdom of Hungary in 1938–1941 (Phase I)

Abstract: The study focuses on the enactment of the first discriminatory anti-Jewish legal norms adopted by the Horthy regime between 1938 and 1941, as it reflects both the material legal basis and the political and historical anabasis of their passage and application. This legal status of primary anti-Jewish legislation can be identified as the first phase of the solution of the Jewish question in the Kingdom of Hungary, which from the mid-term perspective only partially saturated Hungarian anti-Jewish political circles and anti-Jewish-tempered society until the German occupation of the country in March 1944, when the fate of the Hungarian Jews had been concluded during the second phase and within the hastily approved storm of numerous legislative norms, culminating in an accelerated deportation to the concentration camps in Poland or Germany and plundering their property.

Key words: anti-Jewish Legislation; Hungarian Kingdom; Horthy Regime; Fate and Legal Status of Hungarian Jews; Legal Regulation; Legal Concept of a Jew.

Introduction

In post-Trianon Hungary, due to a number of factors, the first anti-Jewish discriminative act (unique even on the European scale)[2] – **Act XXV/1920** was adopted in the unstable political and social situation. The act, in terms of content, affected mainly intellectuals, respectively the right to higher education of persons of Jewish origin, whose numbers were significantly reduced and restricted by the stated act, respectively the act obstructed the right to university studies. For that time, it was significant that despite vague formulations and direct absence of the use of the term Jew, the act was already understood at the time of its adoption as the first anti-Jewish

[1] doc. JUDr. PhDr. Adriana Švecová, PhD., contact: adriana.svecova@truni.sk.

[2] The study is the result of working on VEGA project No. 1/0549/15 entitled: Legal status of Jews in the Slovak Republic between 1939–1942 with regard to some selected areas of legislation in the Central European context. MOSNÝ, P.: Poprvopovojnový vzrast maďarského antisemitizmu ako predpoklad prijatia prvého protižidovského zákona v Maďarsku i v Európe v 20. storočí. *Societas et iurisprudentia*, Trnava, 2017, Vol. V, No. 2, pp. 23–37. Available online at: http://sei.iuridica.truni.sk.

act (its direct amendment was Act XIV/1928).[3] The act set a *numerus clausus of 6%* for Jewish university students to limit their influence on social and spiritual level of the population and, possibly, according to the wording of official policy, to "punish" Jews for the national tragedy caused by the Treaty of Trianon. On the other hand, its apparent circumvention in the interwar practice did not mean a significant social discrimination for the Jewish population, rather a complication, and thus Hungarian Jewry continued to develop in all its aspects, building on its economic and social as well as national and cultural boom from the time of the Hungarian statehood (mainly in the 19th and early 20th century). The interwar period up to year 1938 was therefore mainly lenient and tolerant towards Jews, as the social and national (pro-Hungarian oriented) assimilation of Jews and their strong economic positions were willy-nilly accepted by the Hungarian public and *de facto* provided many public and social gains and benefits on both sides (Hungarian and Jewish).[4]

Hungarian Discriminatory Legislation on Basis of Three Anti-Jewish Acts[5]

Chronologically, **the Act XV/1938 on Securing a More Effective Balance in Social and Economic Life** approved by Parliament on 29th May 1938, standing on a confessional principle, is considered to be the first anti-Jewish act.[6] After the First Vienna Arbitration, i.e. immediately after 2nd November 1938, the act also bound (of course the subsequently adopted anti-Jewish legal norms did as well) Slovak Jews living in arbitrary territories. In addition, at the time of the adoption of the act in 1938, the above-mentioned anti-Jewish norm was the first such norm among the other countries of Europe (with the exception of Germany).[7] The explanatory report to the act reveals a background of political reasons for the adoption of the act and tradition-

[3] For more details on the act and its application and on Hungarian or interwar antisemitism see: LANG, T.: *Zbavení práva – majetku – života. Židovský osud na južnom Slovensku 1938–1947*. Nové Zámky: Finecom, 2016, pp. 19–22. In evaluating stated act and the level of Hungarian antisemitism, which manifests itself at different levels of social life, Lang works on SZÉGVÁRI, K.: *Numerus clausus rendelekzések az ellenforradalmi Magyarországon*. Budapest: Akadémia Kiadó, 1988.

[4] ŠVOLIKOVÁ, M.: Maďarské protižidovské zákonodarstvo a jeho dosahy. Príklad židovskej komunity v Leviciach. FIAMOVÁ, M. (ed.). *Protižidovské zákonodarstvo na Slovensku a v Európe*. Bratislava: Ústav pamäti národa, 2014, pp. 323–324.

[5] For more detailed characteristics of the adoption and content of the below stated three anti-Jewish Acts from 1938 to 1941, see GYURGYÁK, J.: *A zsidókérdés Magyarországon*. Budapest: Osiris Kiadó, 2001, pp. 135–158. For the wording of the legal norms see https://1000ev.hu on-line.

[6] Hungarian legislation and the public referred to them as Jewish acts, legal acts, however, they are all anti-Jewish, respectively anti-Semitic in terms of content. Their legal basis was published as a selection from paragraphed text translated by LANG, T. – ŠTRBA, S.*: Holokaust na Južnom Slovensku*. Bratislava: Kalligram, 2006.

[7] When adopting the act, it was also the tactics of the Hungarians to appeal to the German Reich in the pursuit of revisionist attempts to change the Treaty of Trianon and the Hungarian state borders.

ally formulated criticisms of Hungarian Jewry: *"When we speak about Jewry and its roles, we cannot forget to mention the circumstances that immigrant classes* [understand the Jewish people – Auth.] *or people who migrated multiple times have failed to adapt to other classes of domestic population in feelings, thinking and whole spiritual state*", by which the lawmaker unprecedentedly attacks or reproaches the inadequate assimilation of Hungarian Jewry as well as *"general expansiveness* [understand of Jews – Auth.] *in all professions of mental work"*. Reasons for blaming Jews could continue, so the lawmaker of the first anti-Jewish act used the adoption of the act as a form of a legal solution to all of the mentioned problems: *"Under such conditions, it is the duty of the government, by adopting the act and its follow-up government measures, to launch and ensure such a process, which will restore the balance between Jewish and non-Jewish classes of population in relation to their percentage representation in economic life and freelance occupation."*[8] In addition to the left, Christian intellectuals and politicians, who advocated the civic equality of Jews, also stood against the act arguing that *"this bill does not as humiliate Jewry as it offends the Christian middle class when it assumes that by depriving civic equality and rights, impoverishment and compulsion* [understand of Jews – Auth.], [understand the Christian middle class – Auth.] *will contribute to securing its own existence."*[9] The act directly defined the term Jew (and its offspring) on the confessional principle in § 4 for the first time, when it designated Jew as a person who counted among the Israeli religion or anyone who converted to Christianity after 1st August 1919.[10] Thus, the act affected a large group of Jews converting after that date, i.e. *de iure* of Christians, and the mentioned formulation had to be firstly negotiated with representatives of Christian churches, who initially disagreed with an openly discriminating definition. War veterans, firefighters and widows of heroically dead (special reference to participants in the revolution in 1919) were also excluded from the definition. Act XV materially discriminated Jews defined in the act in such segments of social life as the press, economy, finance and the exercise of some freelance occupations to a determined *numerus clausus* of 20%.[11] However, the application of the act, as in the case of both the previous and the later legislation, collided with an interest of preserving a functional economy held by the economically powerful Jewish circles, but these were to be subordinated and governed by the Christian Hungarian majority. However, the already suspicious implementation of the previous anti-Jewish norms gave a clue that the implementation of this act would be equally cumbersome, respectively it would be Potemkin-retouched again. Moreover, the Hungarian government rudely and perfidiously assumed that Jews would think in the terms of the policy of lesser evil, and would again cooperate in putting the act into effect. As T. Lang points out, *"in the sense of*

[8] On its contents and application see LANG, T.: *Zbavení práva – majetku – života. Židovský osud na južnom Slovensku 1938–1947,* pp. 26–31.

[9] LANG, ibidem, p. 31.

[10] However, anti-Jewish legislation avoided the term Jew and Jewry until the adoption of the Act IV/1939 and the Act XV/1938 itself used this term only in § 4.

[11] In short on the act see ŠVOLIKOVÁ, ibidem, p. 324.

this policy, [government – Auth.] *cynically demanded and expected the cooperation of Jewry itself to promote social acceptance of anti-Jewish acts, as the Prime Minister B. Imrédy later declared: …if the measures are met with consent or at least with patience of a part of Jewry, there is no need to fear a greater leak of capital or any greater international reprisals that would further exacerbate our current, already difficult economic situation, into unbearableness."* However, the fact remains that the Jewish community took a stand to the mentioned act as to a gesture of good will and hoped that the discriminative policy of the Horthy regime and Imrédy's government would be ended with the stated act. It did not happen.

Just seven months after the Act XV came into effect, it was followed by the second anti-Jewish Act, **Act VI/1939 on the Limitation of the Public and Economic Life of Jews**, approved on 5th May 1939, which was submitted to Parliament by the Government of B. Imrédy at the time of a culminating interwar crisis and an advanced fascization of political and legal conditions at the end of the 1930's, induced certainly, but not only, by an open coercive policy of gradual, non-diplomatic steps of the German Reich against the Central European states. Similarly, the parliamentary debate itself prior to the passing of Act VI/1939 was much fiercer than at the time of passing of the Act XV/1938. While in 1938, anti-Jewish norms were issued only in Hungary and Germany, in 1939, other states began to adopt anti-Semitically motivated legal norms saturating concealed or open forms of differently politically and socially tinted anti-Semitism in a relatively rapid succession, and therefore, the act in question must be put into this foreign policy context of European legislative anti-Semitic populism.

We consider the second anti-Jewish act as the originary legal basis of the following discriminatory, anti-Jewish lawmaking,[12] to which most of the executive legal norms most frequently referred, amended it, respectively the substantive basis of the below mentioned Act IV was amended by them countless times in subsequent years.[13] We understand the second anti-Jewish act as a material basis (along with the first and the third anti-Jewish acts) of the first phase of anti-Jewish lawmaking[14] adopted during the war, i.e. before and after the occupation of the country on 19th March 1944 by the German Reich, when the final, second phase of solving the problem of Hungarian Jews began.

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[12] From the explanatory report, we opt for the following: "*the provision of the act (i.e. Act XV/1938), which determined a proportional number of Jews at the quadruple level to their total share in the state's population, proved inadequate, it means that the number was estimated at 20 percent, and, via allowed exceptions, the act allowed them to significantly exceed this share. ... We consider it necessary to submit a new, significantly more vigorous bill.*" Quoted from LANG, ibidem, p. 32

[13] Most often in sub-legal form of government regulations and regulations of relevant ministries.

[14] Until then, all anti-Jewish-oriented legal norms did not directly use the terms Jewish or Jew, even though personal effect of mentioned legal norms was clear from the wording, but the mentioned second anti-Jewish act used the term Jew in its title for the first time and defined itself openly anti-Jewish and without scruples not only by its title, but also by direct references to Jews as subjects of legal regulation.

The basic classic definition of the term Jew in the Act IV was set in the opening § 1 sec. 1, and was based, as it was typical for this type of anti-Jewish lawmaking, on the definition criteria of the confessional principle in combination with the criterion of legitimate affinity, respectively origin.[15] Among Jews, in addition to the full blood Jews, the act also included the so-called first-degree Jewish mixed persons (Mischling, the so-called half-Jews) who were subject to anti-Jewish legislation within full scope of its provisions.[16] In the following paragraphs, the act mitigated the definition of the term Jew, and excluded several categories of Jews from the full scope of the act. Preferentially, the act affected Jewish converts (and their offsprings) to state-recognized Christian churches who converted before 1st August 1919, as well as Christians (and their offsprings) who married a Jew before 1st January 1939. Enumeratively defined exceptions from the scope of the act could be further used by some of the law-defined groups of Jews *ad personam* (i.e. the act did not explicitly apply to offsprings of liberated persons). The exceptions were provided to persons who, for example, actively participated in the First World War, respectively in national struggles after the end of the war, 50% war invalids or Olympic winners, university professors, senior civil servants in the rank of royal (privy) counsellors, as well as those who became priests of one of the Christian churches, including the widows and orphans of soldiers who died in combat. At the same time, other Jews could request further exceptions from the executive bodies. It follows from these provisions that there was a clear tendency to exclude from the negative effects of the act, unless the act provided otherwise, those Jews who became not only economically beneficial but who contributed to national separateness and independence or to the reputation of Hungary during and after the First World War.

As regards *expressis verbis* discriminatory measures, Act IV completely excluded Jews from acting in political life and defined, according to the *numerus clausus* principle, their subsequent activities in the law-specified areas, including socially significant offices and professions or economically significant industry and trade sectors, as well as ownership of the immovable land and forest fund. The act, and this is typical for the first phase of anti-Jewish legislation, only materialized the factual public activity of the Jewish population in the country and towards the non-Jewish Hungarian majority by setting restrictions on basis of *numerus clausus*. The government

[15] The act states literally the following in § 1 sec. 1: "*As regards the application of this act, such a person is considered to be a Jew who is a member of the Jewish faith or at least one of whose parents or at least two of whose grandparents are members of the Jewish faith at the time of the entry of this act into force or before the entry of this act into force was/were member/members of the Jewish faith. This also applies to offsprings of the above-mentioned persons born after the effective date of this act.*"

[16] In short, Nuremberg's lawmaking, according to the First Implementing Regulation to the Act on Imperial Citizenship of 14th November 1935, considered a Jewish mixed person on the racial principle to be such a person, who came from at least one or two Jewish grandparents in line, whilst distinguishing between two subcategories: first grade mixed person, so-called half-Jew who had two Jewish grandparents and who was assessed as a full-fledged Jew and a second grade mixed person who had only one Jewish grandparent. Based on SCHMITZ-BERNING, C.: *Vokabular des Nationalsozializmus*. 2. Auflage. Berlin – New-York: Walter de Gruyter, 2015, pp. 339–340.

provided for its exercise under condition that it was allowed to temporarily regulate relevant legal conditions by different rules in the re-annexed (occupied) territories. In particular, the act focused, in addition to the above stated definition of the term Jew (§ 1 and 2), on

1) the regulation of the restriction or exclusion of Jews from defined social, economic spheres and public services (§§ 3–24);
2) criminal prosecution for breach of the act, respectively failure to comply with statutory obligations (§§ 25–28) and;
3) final provision (§ 29).[17]

The legal restrictions were focused on the following legal areas, respecting the given *numerus clausus* of 6%, respectively 12%:

i) complete exclusion from the exercise of political rights and freedoms and restrictions on the acquisition of citizenship or other public office; in the field of suffrage;
ii) employment-law restrictions on the exercise of certain professions (i.e. employing Jews in an industrial (trade), mining, metallurgical, banking or exchange business, in a private insurance company, in a transport company and in an agricultural (horticultural and grape) plant, further in any other gainful employment in the position of a functionary or in commercial or intellectual position), respectively leading positions (director of cultural facilities, editor, publicist, publisher);
iii) restriction of access to public higher education institutions and universities;
iv) restrictions on the property status, on the disposal and acquisition of real estate-land and acquisition of a trade licence.

Second anti-Jewish Act IV/1939 caused a considerable shock among Hungarian Jewry and an intrusion into their personal status and, in real practice, deprived hundreds of thousands of Jews of suffrage or forced them to acquire evidence of the Jewish origin of their grandparents. In addition, after the parliamentary elections in 1939, the far right Szálasi party became with 20% the strongest opposition party, intensifying the political pressure to adopt other anti-Jewish regulations.

The third anti-Jewish act became **Act XV/1941 On The Amendment and Modification of Act XXXI/1894 on Marriage Law and its Protection, as well as on some Necessary Measures for the Protection of Race**,[18] which was already adopted by the government of László Bárdossy and approved by Parliament on 8th August 1941, but this act only normalized the Hungarian anti-Jewish policy within the scope of European Nazi anti-Jewish legislation. The fundamental negative reservations were made by rightists who appealed to unlawfulness of the act in terms of elementary human rights, as the act *"contradicts the laws of the Catholic Church and the essence of Christianity ... racial biology is nonsense from a scientific point of view, the bill is*

[17] From the content of the act we in addition opt for one of the final provisions of § 22, which authorized the government to decide on measures focused on supporting the eviction of Jews.

[18] For the act, see KURT, A.: Judenfrage und neue Ehegesetzgebung in Ungarn. Katzburg, N. (ed.). *Zsidópolitika Magyarországon 1919–1943*. Budapest: Bábel Kiadó, 2002, p. 164.

contrary to national and Christian interests and contradicts the laws of nature."[19] Even the leaders of the Hungarian Churches (Cardinal Serédi, Bishop of the Reformed Church Ravasz and the Bishop of the Evangelical Church Kapi) were fundamentally opposed, however, their internal motivation was not based on empathy with Jewry but it was an act of protecting Jewish converts from their inclusion among Jews on racial principle.

However, the reasons given for the adoption of the act were already of racial origin: *"to protect the racial purity of the Hungarian nation from the strong influence of mixing with different races, whose natural consequences* [understand the submitted act – Auth.] *will protect the next generations from mixing. In Hungary, Jewry is the only race that acts as a distinct race."* The public debate before and after the adoption of the act thus stirred the wildest passions and gave room for the pseudoarguments of the deepest dye that were used especially by the ultra rightists of the Szálasi's Party.[20]

In the first three parts, the act using camouflage regulated the health grounds which excluded entry into marriage in general, and only in the Part IV, the act regulated a strict ban on the entry into marriage between a non-Jew (Christian) and a Jew, but both of them had to be Hungarian citizens (the act called them "residents"). Explicitly, the act did not apply to Jews or non-Jews who were foreign nationals. § 9 formulated this prohibition as follows: *"It is forbidden to enter into marriage between non-Jewish female (non-Jewish male) and Jewish male (Jewish female)."* The following sections of § 9 provided, who was considered as a Jew/non-Jew. In short, one would be considered a Jew who had at least two Jewish grandparents or who accepted the Jewish faith. However, one would not be considered a Jew, who had two Jewish grandparents, but he or she was born and remained a Christian and his or her parents were both Christians. Stated Christians were forbidden to enter into marriage with Jews and non-Jews, whose one or two grandparents were Jews. The origin of an illegitimate child was considered similarly, if one of its grandparents was a Jew, except that the child was born to a Christian mother and became a Christian. Thus, the definitional base inaccurately and imperfectly segregated the majority Hungarian population from the Jewish minority and, for the third time, normatively defined the term Jew on a racial principle in combination with the determining criterion of belonging to the Jewish faith, respectively of formal membership to the Jewish faith. However, the act did not bring any significant changes into the lives of Hungarian Jews, as the Jewish faith forbade marriage or extramarital intercourse with non-Jews as well. Liberatingly, § 9 established for the Minister of Justice, for reasons of particular regard, the possibility to grant an exception to enter into an illegal mixed marriage of a Jew with a non-Jew, *"if only two parents of such a Jewish male (Jewish female) were born as members of the Israelite faith and he himself (she herself) was born as a member of the Christian faith or, before reaching the age of seven, be-*

[19] LANG, ibidem, p. 38.

[20] LANG, ibidem, p. 39.

came a member of the Christian faith and in both cases he or she remained the Christian. This provision shall also be accordingly applied to a child born out of wedlock." The act in the Part V stipulated criminal penalty for non-observance of provisions of the Part IV. Persons entering into forbidden marriage, as well as public officials assisting with the entry, committed a criminal offence, thereby condemning themselves to a five-year term of imprisonment. Extramarital sexual intercourse also became prosecutable with a term of imprisonment of up to three years and, in case of a privileged facts of the case committed by threats, violence, or against the person who was in custody of the offender, or against a woman – a Hungarian non-Jew who has not reached the age of 21, the criminal rate increased to five years along with sentence of loss of the public office and political rights.

Stated three anti-Jewish acts from 1938 to 1941 affected the personal status of individual Jewish fellow citizens, respectively families. The Jewish Church itself, however, until the adoption of the **Act VIII/1942 on The Regulation of Israelite faith**, was not legally affected, but that changed again with the stated act and the Jewish Church was degraded to the level of a recognized church, but no longer state supported. This removed the equal, public collective status of the Hungarian Jewish religious communities with other Catholic or state-privileged churches. As a result, it meant that the Jewish communities lost the right to nominate their representatives to the Upper House of Parliament or a local government and also the right to request state benefits for their activity.

Conclusion

Stated Act XV/1941 somehow naturally closed the first chapter of anti-Jewish legislation, which can be characterized as clearly discriminatory and segregating. The aforementioned norms also originally defined the legal term Jew (even non-Jew), thus separating Hungarian Jewry initially according to the confessional principle and then according to the racial principle defined in Act IV/1939 and intensified in Act XV/1941. However, stated norms, for their lax implementation in legal and administrative practice, did not affect Jews as noticeably and liquidately as we can see in Slovakia in the immediately commenced radical trend of solving the Jewish question in the first years of the war (years 1938 to 1942). Although the property status itself became more difficult due to the subsequently adopted legal regulations in the years 1941–1942 (we are literally speaking about social and private bullying, aggravating, intimidation, humiliation, etc.), it was not eliminated yet (for example, let's mention Act XIII/1941 on The Regulation of Certain Issues Concerning Lawyers, Legal Candidates and Legal Self-Government, Act XIX/1942 on The Rights of Legislative Commissions and Membership in Self-Governing Representations, Act XV/1942 on The Agricultural and Forest Real Properties of Jews). The fact that the Horthy regime had a certain autonomy and the state administration remained faithful to the regime, and especially the tactical policy of promises of Prime Minister Miklós Kállay (head of the government from 9th March 1942 to 22nd March 1944), who claimed

to the dissatisfied Germans that the Jewish question could not be solved (and, in particular, not radically) in the short term, caused, despite the gradual moral and material decline, that Hungarian Jews could feel as state-protected persons even during the last years of the war. Hungary was even considered to be "an island of peace and security for Jews in Europe" by domestic government propaganda.[21] Until the German occupation of Hungary in March 1944, Hungarian Jews could reasonably believe that they would at least save their lives and would not be deported, but after the occupation of the country by the German army and the change of the political regime, and especially after the emergence of ultra right Nyilasists, it was out of the question. A totally different situation arose, characterized as the second and final phase of the solution of the Jewish question in Hungary, according to the same scenario as in other German satellites in Europe, supported by a new, numerous anti-Jewish legislation.

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[21] ŠVOLÍKOVÁ, ibidem, p. 329.

Ján Sombati[1]
Comenius University in Bratislava, Faculty of Law, Department of Legal History and Comparative Law

"The Land Belongs to Those Who Work on It." – Question of Restitution of Jewish Land Ownership in the Middle of Political Struggle of Slovak Democrats and Communists After 1945

Abstract: Considering the peculiarities of wartime political and socio-economic development in Slovakia, as well as different interests of Slovak Democrats and Communists in the post-war period, the enactment of restitution of Jewish land ownership proved to be one of the most delicate topics of contemporary political and social discourse. In fact, Slovak politicians, as well as Slovak peasantry, did not display any significant determination to restore the unjustly deprived real property to its Jewish owners. The aim of this article is therefore to point at how the Slovak political elites directly or indirectly contributed to discrimination of Slovak Jews in a process of restitution of their land ownership with the use of relevant contemporary archive documents.

Key words: Jewish Land Ownership; Aryanization; Restitution; Democratic Party; Communist Party of Slovakia.

Aryanization of Jewish Land Ownership During the Era of Wartime Slovak State

If we want to understand the complex issues of post-war restitutions of Jewish land ownership, we must begin our narration before 1945, when authoritarian National Socialistic regime dramatically interfered with the ownership rights of Slovak Jews. The era of wartime Slovak State between 1939 and 1945 is tainted with substantial anti-Jewish measures orchestrated and carried out by political elites of the ruling Hlinka's Slovak People's Party (hereinafter as "HSPP") under the direction of advisors from Nazi Germany. Gradual exclusion of Jews from social, economic and political life followed the main goal of a complete liquidation of the Jewish minority in Slovakia and acquisition of its wealth. Slovak government displayed considerable interest in economic aspects of the solution of Jewish question. The process of Aryanization of Jewish property, which began soon after the establishment of Slovak State, aimed at the transfer of Jewish movable and immovable property into the

[1] Mgr. Ján Sombati, PhD., contact: jan.sombati@flaw.uniba.sk

hands of "Aryan" Slovak citizens. Even though the Constitution of the Slovak Republic from 1939[2] guaranteed inviolability of private property and right for equal protection of life, personal freedom and property of all inhabitants of Slovakia, irrespective of their origin, nationality, religion and profession, Slovak government fully exploited possibility of their restriction by statutes, allowed by the same Constitution. Since Slovak president and leader of HSPP Jozef Tiso insisted, that *"neither legal order shall be an obstacle for solution of Jewish question of our internal policy,"*[3] partial statutes and government regulations, together with the infamous "Jewish Code" from 9th September 1941[4] paved the way to systematic and unscrupulous Aryanization, which fulfilled socio-economic, as well as political goals of the ruling authoritarian regime. According to the leading ideologist of HSPP, Štefan Polakovič, the goal of Aryanization was *"creation of a strong Slovak social class, which have capital…in order to let many people with economic enthusiasm to get rich"*, what represented national priority as *"Who hinders this economic enrichment, either from jealousy or other reasons, indeed damages the nation."*[5] This far-reaching Aryanization was to affect a group of approximately 90 000 Jews, which according to latest estimates remained within the reduced territory of Slovakia after the Vienna Arbitration from 2nd November 1938.[6] From among them we can also find a group of landowners, whose land ownership was subjected to land reform, which represented a specific form of Aryanization in the branch of agriculture.

In spite of general political statements claiming that land reform was primarily designed as a measure for improvement of bad social and economic standing of Slovak peasantry,[7] its outcome clearly shows that Aryanization of Jewish land owner-

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[2] Constitutional Act No. 185/1939 of the Slovak Code of Laws (hereinafter as "SCoL"), enacted on 21st July 1939. For the full text of Constitution see: GRONSKÝ, J.: *Komentované dokumenty k ústavním dějinám Československa I. 1914–1945.* Praha: Karolinum, 2005, pp. 491–515.

[3] HUBENÁK, L.: *Rasové zákonodarstvo na Slovensku (1939–1945).* Bratislava: Vydavateľské oddelenie Právnickej fakulty UK, 2003, p. 34.

[4] Government Regulation on Legal Status of Jews No. 198/1941 SCoL.

[5] HUBENÁK, L.: *Rasové zákonodarstvo*, p. 39.

[6] KUKLÍK, J. a kol.: *Jak odškodnit holocaust?* Praha: Karolinum, 2015, p. 252. This group was but of a remnant of more numerous Jewish minority, which existed in Slovakia in the conditions of interwar Czechoslovakia. From official statistics about population of Slovakia, gathered during the population census to 1st December 1930, 136 737 inhabitants reported to Judaism. From this group 44 009 reported to Czechoslovak nationality, 178 to Ukrainian, 9 945 to German, 9 728 to Hungarian, 72 644 to Jewish and 233 to other nationality. *Riešenie židovskej otázky na Slovensku (1938–1945). Dokumenty, 4. časť.* Bratislava: Slovenské národné múzeum, Múzeum židovskej kultúry, 1999, p. 10.

[7] Member of the Assembly of Slovak Republic, Teodor Turček, during the discussion about the Act on Land Reform No. 46/1940 SCoL said, that *"Implementation of this act will practically mean strengthening of smaller and middle peasant homesteads besides creation of new peasant agricultural units ... as to redress the injustices committed by the first land reform, as to get land into the hands of those, who really work on it."* Record of the 26th session of the Assembly of Slovak Republic from 22nd February 1940. [online] [cit. 15.1.2018] Available at: http://www.nrsr.sk/dl/Browser/DsDocumentVariant?documentVariantId=28658&fileName=zazn.pdf&ext=pdf

ship was the main concern of its authors. A proof of it could be found in words of Štefan Polakovič, who elaborated the foundations of state agrarian policy. Its essence constituted the idea of socially just division of land ownership which was, however, strongly deformed by the influence of antisemitism and Slovak version of National Socialism. The process of "Slovakization of land", which anticipated the transfer of all Jewish land ownership within Slovakia into the hands of Slovak owners,[8] was built upon deeply rooted prejudices of Slovak society against the Jews. National Socialistic propaganda intentionally amplified them with carefully chosen statements, that *"Slovak land belongs into the hands of Slovak peasant, its thousand-year-old ploughman"* and that Jews had stolen Slovak land from their legitimate owners, because *"Nobody will delude us, that Jew, who came into the village with a bundle, honestly became a millionaire after a short time."*[9] Therefore it is not a surprise that intensive ideological influence won favour and support of people in the countryside for an idea of land reform with anti-Semitic orientation.

Slovak government made its first step by issuance of Government Regulation No. 147/1939 SCoL, which subjected the Jewish owners to mandatory registration of their land ownership and all dispositions with it, as well as to restriction of their freedom to dispose with it through alienation, encumbrance or lease. According to contemporary statistics, which differ from one another, State Land Office (hereinafter as "SLO") reported that up to 1941 Jewish owners registered approximately 90 771 ha of land, from which agricultural land constituted 42 229 ha, forest land 37 640 ha and other types of land 8 902 ha.[10] This land was subsequently subjected to procedure of mandatory purchase, which was organized and conducted by SLO under the terms of Act on Land Reform No. 46/1940 SCoL (hereinafter as "Act on Land Reform"). Concept of mandatory purchase dwelled in right of SLO to purchase all Jewish land registered under the terms of Government Regulation No. 147/1939 SCoL for the purchase price determined by the official appraisal. The only exemption from this rule were cases of the so called "summary allotment", when SLO approved the sale of Jewish land by its owner to a Slovak citizen. What is more, Act on Land Reform pro-

[8] POLAKOVIČ, Š.: *Slovenský národný socializmus. Ideové poznámky.* Bratislava: Generálny sekretariát HSĽS, 1941, p. 105.

[9] POLAKOVIČ, Š.: *K základom slovenského štátu. Filozofické eseje.* Martin: Matica Slovenská, 1939, pp. 151–152.

[10] FIAMOVÁ, M.: Štátny pozemkový úrad a jeho miesto v procese arizácie židovského pozemkového majetku. *Pamäť národa,* Bratislava, 2, 2012, p. 4. Historian Samuel Cambel quotes the same statistics, but also other, slightly different statistics from 1939, according to which 4 693 Jewish owners registered 101 423 ha of land, from which agricultural land constituted 44 372 ha. CAMBEL, S.: *Slovenská dedina (1938–1944).* Bratislava: Slovak Academia Press, 1996, p. 47. Lower numbers of registered Jewish land could be found in official report about the implementation of land reform during the era of wartime Slovak State, which was made by the Commissariat of Agriculture and Land Reform in 1947. According to this report, Jewish owners registered only 85 271 ha of land, from which forest land constituted the bigger half, what was in variance with aforementioned statistics, where agricultural land took the bigger proportion. Slovak National Archive (hereinafter as SNA), fund (hereinafter as f.) Povereníctvo pôdohospodárstva (Commissariat of Agriculture, hereinafter as "CoA"), box (hereinafter as b.), number 147.

hibited any acquisitions of agricultural land by Jews, with the exception of cases of inheritance. Relatively accurate statistical documents from the archives of post-war Commissariat of Agriculture and Land Reform, which are based upon the documentation from wartime SLO, provides information about the practice of SLO and Aryanization of Jewish land.

As the fastest way of transfer of Jewish land ownership into the hands of new Slovak owners proved the practice of summary allotment. By this manner, SLO approved 632 cases of transfer of approximately 5 294 ha of agricultural and forest land, where average allotment did not exceed 10 ha of land.[11] Since the procedure of administrative purchase with the need of appraisal was slow and complicated and after 1941 Germans increased the pressure on the final solution of Jewish question, Slovak government made several legislative amendments in order to hasten the Aryanization of Jewish land ownership. Government Regulation No. 93/1941 SCoL together with Jewish Code substituted the procedure of administrative purchase with the procedure of officially ordered transfer of ownership from Jewish landowners on the state. Transfer itself could have been conducted by a notice on transfer of ownership, published by SLO in Official Newspaper (hereinafter as "ON") and effective on the date stated in the notice. To avoid the necessity of publishing a notice in each individual case, SLO published its general notice on transfer of all remaining Jewish land ownership within the borders of Slovakia under the No. 231/1942 ON from 13th May 1942.[12]

On the one hand, state was free to dispose with the Jewish land ownership through its allotment, sale by auction or lease to the individuals. Thus, up to 1943 SLO allotted approximately 3 000 ha of agricultural land in a form of 2 600 simple allotments, 614 ha of agricultural land in a form of peasant hereditary estates,[13] 4 000 ha of agricultural land in a form of residual estates[14] and 16 741 ha of forest and agricultural land predominantly to state or other public corporations, catholic church and small number of individuals.[15] On the other hand, the main goal of accelerating

[11] Ibid.

[12] Transfer of ownership became effective on 16th May 1942.

[13] Peasant hereditary estate was a specific form of ownership of agricultural land, which was for the first time established during the interwar land reform in a form of so called indivisible homestead. Its typical feature was limitation of owners right to dispose with the land *inter vivos* or *mortis causa*. For more details see Part II (sections 30 to 55) of the Act on Allotment No. 81/1920 Coll. and section 31 subsection 2 of the Act on Land Reform from 1940.

[14] Residual estates were also a residue of interwar land reform, which were created according to section 11 of the Act Providing for Expropriation No. 215/1919 Coll. by exemption of land ownership from expropriation up to the extent of 500 ha. They were object of big corruption scandals during the interwar Czechoslovak Republic. For more details see: PAVOL, S. – SKALOŠ, M.: Trestné činy korupcie v historicko-právnom kontexte na území Čiech a Slovenska. In: VOJÁČEK, L. – TAUCHEN, J.: *III. česko-slovenské právněhistorické setkání doktorandů a postdoktorandů.* Brno: Masarykova Univerzita, Právnická fakulta, 2015, pp. 227–231.

[15] Official report about the implementation of land reform during the era of wartime Slovak State. SNA, f. CoA, b., number 147.

the subsequent transfer of ownership of land on Slovak peasant applicants was not achieved. Administrative staff at SLO and other governmental agencies was suddenly overburdened by duties of managing the newly acquired land ownership. Therefore an Act No. 108/1942 SCoL established a Fund for Management of Agricultural Property (hereinafter as "FMAP"), whose main task was to manage all Jewish land ownership together with its inventory, which was not allotted or otherwise transferred on individuals or institutions. It must be pointed out, that FMAP managed predominantly lucrative estates, whereas petty Jewish farms were further sold by auction to individuals. During 1943 and 1944 were by these means sold approximately 8 500 ha of land to 9 000 applicants.[16]

It is beyond any doubts that Aryanization of Jewish land ownership in wartime Slovak State brought substantial consequences. Although the statistics once more vary, the lowest estimate indicates that approximately 37 829 ha of land was allotted to 13 684 individuals, predominantly petty peasants who were dependent on income from cultivation of agricultural land, and remaining 48 442 ha was managed by FMAP.[17] Regardless of differences in statistics, changes in ownership were so significant that already during the war they raised many even more serious legal, political, social and economic questions. Is it appropriate to carry out the restitution of Jewish land ownership in favour of former owners or their heirs? Is the restitution legally realizable? What shall be the fate of Slovak peasants who acquired the Jewish land ownership during the war? These are but of a few practical problems, which caused intensive debates between the representatives of domestic communist and non-communist civil resistance.

Different Approaches of Domestic Resistance to the Issue of Property Restitutions

Experiences with the Great Depression from 1930s, atrocities and destruction of the ongoing war, as well as consequences of persecutory measures undertook by the German occupants and domestic collaborationist regime, led many resistance politicians to reassessment of their opinion on continuity of political and socio-economic establishment of interwar Czechoslovak Republic. It is therefore not surprising that ideas of nationalization and socialization became very frequent in the political discourse. They had even significant influence on the discussions about the solution

[16] Ibid.

[17] Ibid. It should be stressed that Commissariat for Agriculture and Land Reform in its report from 1947 mentioned incomplete state of statistics obtained from the archives of wartime SLO. That may be one of the reasons why statistics presented by modern historians contain higher numbers. For instance Ján Kuklík speaks of 23 515 ha of land transferred into ownership of individuals and approximately 27 000 ha in management of FMAP until the end of 1943, while Samuel Cambel, quoting the statistics of Vlastislav Bauch (BAUCH, V.: *Poľnohospodárstvo za Slovenského štátu.* Bratislava: Práca, 1958.) mentions 44 329 ha of land in ownership or possession of 22 351 individuals until the end of war in 1945. KUKLÍK, J. a kol.: *Jak odškodnit holocaust?*, p. 259; CAMBEL, S.: *Slovenská dedina (1938–1944)*, pp. 56–57.

of such a complex issue as property restitutions. After the unification of Slovak domestic communist and civil resistance on the basis of the Christmas Agreement from December 1943, these discussions were led on the soil of supreme political and representative body of domestic resistance, Slovak National Council (hereinafter as "SNC"). Efforts to find appropriate form of property restitutions, reflecting the peculiarities of Aryanization of Jewish land ownership in the Slovak countryside, proved to be extremely complicated. It was caused by the simple fact, that the leading political parties, Communist Party of Slovakia (hereinafter as "CPS") and Democratic Party (hereinafter as "DP"), were advocating different political interests, originating in different ideologies.

Consent between CPS and DP on essential political issues was only a rare phenomenon in the beginning of their cooperation. In the aforementioned Christmas Agreement both parties declared their determination to ensure a dignified life for each citizen by socially oriented changes in society and economy, at that moment outlined only very generally as extension of democracy on the economic and social field through fair distribution of national income.[18] These general thoughts were a bit more elaborated shortly after the outbreak of Slovak National Uprising in the Declaration of SNC from 1st September 1944. CPS and DP intended substantial improvement of social and economic standing of poverty stricken groups of Slovak workers and peasants. Besides the general motto of fair distribution of national income, in agricultural sector politicians announced a plan for implementation of a new land reform in order to secure fair distribution of land in favour of petty peasants.[19] This statement points at two very important trends in the policy of Slovak Communists and Democrats, which had an impact on the enactment of restitutions of Jewish land ownership.

Firstly, issue of land reform and fair distribution of land became one of the top political priorities of both parties. Adjustment of scope of land reform, however, became the most delicate problem. Not only was it a problem due to ideological differences, but also due to initially unclear attitudes toward the Aryanized Jewish land ownership and its subjection to land reform. Different opinions on this issue, which gradually crystalized, eventually led CPS and DP into open confrontation during the period between 1945 and 1948. Secondly, as it will be later pointed out, petty peasants became the target group of communist and democratic propaganda. In predominantly agrarian country such as Slovakia, where majority of population worked in agricultural sector, both parties were dependent on the support of this social group as it was essential for acquiring decisive position on Slovak political scene. It was thus symptomatic, that CPS and DP promoted property interests of Slovak

[18] *"The idea of democracy shall be transferred and extended also on the economic and social field so as the distribution of national income between the whole population would be as evenly as possible and that the life of each citizen would be humanly dignified."* GRONSKÝ, J.: *Komentované dokumenty I.*, p. 547.

[19] *"In order to raise the standard of living of the nation we are for a fair distribution of national income, for a new arrangement of ownership and possession of land in favour of petty peasants."* Ibid, p. 549.

peasants, but each one used reasoning reflecting different ideological aspects. There is no doubt, that under such circumstances expectations of the former Jewish owners of fast and uncomplicated restitution of their property were in vain.

Concerning the ideological aspects of land reform and related issue of property restitutions, political program of DP from the time of Slovak National Uprising was of a moderate nature. In the matters of economic and social policy it was formulated as a middle way between extremes of economic liberalism and unrealizable goals of Marxism. Support of land reform and petty peasants was limited by the demands of inviolability of private property and preservation of individual freedom and initiative in economic matters, which could have been restricted only in interest of the whole nation.[20] These axioms represented the fundament of democratic policy in agrarian matters until 1948. However, when it came to the fate of Jewish land ownership, these principles proved to be very flexible. Although DP did not mention this issue in its formative political documents from 1944, we can make an idea about the attitudes of Slovak Democrats in this matter indirectly.

When they returned back to homeland after the end of war, many Slovak non-communist politicians, who worked in Czechoslovak exile government in London, found their way into the ranks of DP. That was also the case of Ján Lichner, former member of interwar Agrarian Party, who in London together with Czech agrarian politician, Ladislav Feierabend, took part in preparation of post-war land reform. It is in particular worth of noting, that during the plenary session of the exile government in early October 1944, where a draft of presidential decree on extraordinary measures for securing the economic life on liberated territory of Czechoslovakia was discussed, Lichner and Feierabend strongly opposed the initial concept of extensive property restitutions. Concerning the situation in Slovakia, Lichner pointed out that Jewish land ownership was Aryanized or otherwise taken over by Slovak peasants, whose social and economic interests he advocated. After sharp discussion with Czech National Socialists, a compromise was achieved. Restitutions of all property sequestrated as a result of racial, national or political persecution after 28th September 1938 were declared only as a general principle, whose detailed conditions of realization were to be stipulated after the end of war by particular presidential de-

[20] *"Our goal is cultural, physically healthy, mentally and morally advanced, politically free, materially independent human being, as a fundament of human society and its organizational units: family, village, nation and state. Individuality of human being limits respect for interests of commonality. …We strongly advocate principle of private property…Liberalism is an obsolete construct. Socialism in its original form, particularly if it pursues revolutionary changes in economic and social field, is in some aspects practically unrealizable. But those demands of this system, which in our conditions could be realized without undermining the interests of national collective, we adopt and want to bring them into life in such an extent, which our conditions allows. …Land and forest reform must be rigidly implemented. Small farmer, who mostly economically suffered, must above all obtain support in business in such an extent and form as to help to create conditions for improvement of standard of his living, for his economic progress and welfare."* ŠUTAJ, Š.: *Slovenské občianske politické strany v dokumentoch (1944–1948).* Košice: Slovenská akadémia vied, Spoločenskovedný ústav SAV, 2002, pp. 91, 94–95.

cree or statute of National Assembly.[21] It is true, that Lichner's opinion pertains to the efforts of exile government in London and to period of 1944. Nevertheless, it is still indicative as to the way of thinking of nearly all Slovak rightist politicians after 1945. As it will be later pointed out, support for limitation of scope of property restitutions due to the transfer of Jewish land ownership into the hands of Slovak owners during the war was a common argument of DP and its representatives between 1945 and 1948.

On the other hand, though it was rhetorically adapted to actual conditions of political scene, program of CPS in principle always offered simple and straightforward definitions of problems and their specific solutions. Let us for instance mention resolution of unifying congress of CPS and Slovak Social Democratic Workers Party from 17th September 1944. Leftist politicians emphasized the fact that one of the reasons of bad social standing of peasantry was unfair distribution of land ownership, whose majority was in ownership of big landowners. Therefore the logical solution of this problem was seen in practical implementation of socialistic ideals, what in the Slovak countryside meant redistribution of land ownership in favour of petty peasants.[22] Socially oriented idea of fair distribution of land was thus an integral part of communist political program since Slovak National Uprising and during the autumn of 1944 it further crystalized into a concept of general land reform. Attribute of "general" meant, that not only estates in ownership of Germans and Hungarians, but also those in ownership of Slovak landowners and Church were to be confiscated and divided into lots between petty peasants and landless people in countryside.[23] Although SNC did not proceed to enactment of general land reform due to the defeat of Slovak National Uprising by Germans, the idea itself proved to be very dangerous for the further fate of Jewish land ownership for two reasons.

First of all, the danger came from the Marxist-Leninist philosophy itself due to its notion of social stratification of countryside and tasks of peasantry during the transformative period of people's democracy, marked with establishment of dictatorship of proletariat and transition from capitalism to socialism. From the perspective of Marxism-Leninism, a substantial socio-economic transformation of such an extent was possible only through socialist revolution. It began with the establishment of political rule of working class and revolutionary state organization in a form of dictatorship of proletariat. New socialist state subsequently pursued the main goals of socialist revolution to supersede the private ownership of the means of production with collective ownership and final removal of exploitation of man by man. In order to fulfil them, rule of working class had to be strengthened by the political union of workers and peasants, who were together predestined to continue the class-struggle against bourgeoisie either by use of violence or by non-violent way. On the eco-

[21] KUKLÍK, J.: *Znárodněné Československo. Od znárodnění k privatizaci – státní zásahy do vlastnických a dalších majetkových práv v Československu a jinde v Evropě.* Praha: Auditorium, 2010, pp. 127–129; KUKLÍK, J. a kol.: *Jak odškodnit holocaust?*, pp. 149–150.

[22] GRONSKÝ, J.: *Komentované dokumenty I.*, p. 560.

[23] CAMBEL, S.: *Slovenská agrárna otázka 1944–48.* Bratislava: Pravda, 1972, pp. 34–37.

nomic field, the socialist transformation was supposed to take the form of socialist nationalization, whose main goal was to transform the private ownership of exploitative bourgeoisie on collective ownership of the whole nation. Nationalization was also aimed at countryside, where it had to take shape of nationalization of land.[24] It is important to note, that Vladimir Ilyich Lenin thoroughly described the role of each particular stratum of peasantry in the process of nationalization of land during the transformative period of people's democracy.

Agrarian proletariat, working as hired manpower on capitalist estates, small parcel cultivators, together with petty peasants, represented the main ally of workers in the countryside due to their dependence on land, which they lacked entirely or in satisfactory amount. On the other hand, middle peasant class and owners of big estates represented political and economic enemies, who had to be either neutralized in order to stay aside of political struggle between proletariat and bourgeoisie in the case of former, or gradually liquidated through confiscation of their land ownership in the case of latter.[25] Unfortunately, many Jewish landowners in Slovakia belonged to the classes of middle peasants and big estate owners. Communist ideological attitudes therefore represented a direct threat for them, as it opened a way either for confiscation of their property, or substantial limitation or even abandoning of the idea of property restitutions. There existed no exemption from this rules, since Lenin himself said, that *"Revolutionary proletariat shall immediately and unconditionally confiscate all land ownership of estate owners, big landowners, … to some extent often also middle peasants…"* and *"In no way can be permitted … propagation or promotion of reimbursement of big landowners for confiscated land, because … it would mean a betrayal of socialism and imposition of a new burden on working and exploited masses…"*[26] Such a principled attitude gained its particular importance in political conditions of post-war Slovakia. Although political program of DP relied in many cases on too general and abstract formulations, betting on attachment of Slovak peasantry to their land ownership and strong proprietary sentiment of Slovak peasantry was a strong weapon in struggle for their political support with CPS. That is one of the reasons why Communists took an uncompromising stance in the matter of restitution of Jewish land ownership.

The second reason why the concept of general land reform was dangerous for Jewish landowners dwelled in the question of their nationality. Jewish community in Slovakia was formed during the 18th and 19th century in the environment of Hungary. Since the Jews predominantly preferred occupations in crafts, commerce, banking and culture, they had intensive connections with members of higher strata of Hungarian and German nations. Many Jews therefore identified themselves with

[24] OSTROVIŤANOV, K. V. et al.: *Politická ekonómia. Učebnica.* Bratislava: Slovenské vydavateľstvo politickej literatúry, 1955, pp. 360–366.

[25] For more details see Lenin's work "Preliminary Sketch of Theses on Agrarian Question" from June 1920, made for the 2nd Congress of Communist International and quoted in: BAUMGARTNER, J. – SLIVKA, K. (eds.): *Čítanka vedeckého komunizmu.* Bratislava: Pravda, 1978, pp. 190–199.

[26] Ibid, p. 195.

these two dominant nations, what was reflected in fact that in 1930 approximately 20 000 Slovak Jews reported to German or Hungarian nationality.[27] Though many of these Jews died during the holocaust, the rest of them were in intricate situation due to the beginning of land reform. Menace became more tangible on 4th February 1945, when SNC in Košice published its Manifesto, stipulating the main tasks of people's power in liberated Czechoslovak Republic. Concerning the fate of Germans and Hungarians living on the territory of Slovakia, SNC declared its determination to uproot the German and Hungarian influence in economy by the means of confiscation of their land and its subsequent distribution to Slovak peasants upon the principle that land will be allotted to those, who work on it.[28]

Slovak communists further specified this general statement in connection with their attitudes toward Slovak Jews during the Conference of CPS, which took place in Košice on 28th of February 1945. Member of Central Committee of CPS, Gustáv Husák, in his main report stated, that although CPS refused antisemitism in full extent, the party wanted to assess the nationality of Slovak Jews according to their choice of nationality during the last population census. CPS did not want to discriminate those Jews who reported themselves as Germans or Hungarians in the matters of land reform. However, immediate restitutions of Aryanized Jewish property were acceptable only in cases of socially weak Jews, whereas property of well-situated Jewish owners were subjected to management of local National Committees until the final resolution in the subject matter.[29] Partially ambivalent, but partially also legible attitude of CPS proved to be very problematic in the practice of recently initiated land reform, which was enacted by the Presidency of SNC only a day earlier on 27th February 1945.[30]

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[27] According to aforementioned statistics from the population census in 1930 German nationality had 9 945 Jews and Hungarian nationality 9 728 Jews. *Riešenie židovskej otázky na Slovensku (1938–1945). Dokumenty, 4. časť*, p. 10; KUKLÍK, J. a kol.: *Jak odškodnit holocaust?*, p. 252.

[28] *"We will uproot whole influence of the Germans, Hungarians, their Slovak helpers, as well as all anti-Slovak elements in our economy. We will carry out great social reforms. In new Slovakia, only rightful rule will become a deed so as the land shall have only the one who work on it."* KLIMEŠ, M. et al. (eds.): *Cesta ke květnu. Vznik lidové demokracie v Československu. 2. svazek.* Praha: Nakladatelství Československé akademie věd, 1965, p. 487.

[29] *"That Jewish member, who reports as Hungarian or German, will be considered as such with the difference, that it will be looked upon him as upon democratic Hungarian and German. However, we will not allow the conjunctural and opportunistic elements to change their nationality eight times during six months. …all Aryanized property must be given under the management of National Committees, which will immediately return the property to Jewish members from socially weak strata… Other big Jewish properties will stay under the management of National Committees until the lawful decision. We have no interest so as to give back property to those rich men, who never had understanding for the cause of Slovak nation…"* VARTÍKOVÁ, M. (ed.): *Komunistická strana Slovenska. Dokumenty z konferencií a plén 1944–1948.* Bratislava: Pravda, 1971, pp. 97–98.

[30] Presidency of SNC legally regulated the issue of land reform in its Regulation on Confiscation and Expedited Distribution of Agricultural Property of Germans, Hungarians as well as Traitors and Enemies of Slovak Nation No. 4/1945 of the Collection of Regulations of SNC (hereinafter as "Coll. SNC" and whole statute as "Regulation No. 4/1945 Coll. SNC").

Restitution of Jewish Land Ownership in the Shadow of Land Reform

Implementation of land reform began immediately after the liberation of territory of Slovakia by Soviet Red Army, when inhabitants of towns and villages created administrative bodies in a form of local and district National Committees, as well as local and district Peasant Commissions. Although Commissariat of Agriculture and Land Reform (hereinafter as "CALR") was gradually restoring its activities, it were National Committees and Peasant Commissions who were during the first months of 1945 responsible for preparation and execution of confiscation procedure and allotment of land right in the field.[31] Despite relatively clear and comprehensible instructions included in legislation of SNC and CALR, local authorities often arbitrarily confiscated Jewish land ownership, which was either in hands of individuals or in management of former FMAP, or eventually abandoned by their current holder after the retreat of German army. Motivation of local authorities could be seen in poverty of many petty peasants, who wanted to take the advantage of their membership in National Committee or Peasant Commission and satisfy their need of means of subsistence. Therefore many small Jewish farms, which were allotted to individuals during the war, as well as big Jewish estates in management of former FMAP, were suggested for confiscation and allotment.[32]

Presidency of SNC, together with CALR had the knowledge of this situation, since both of them instructed local authorities about how they should handle with the Jewish land ownership. In order to prevent groundless confiscations, on 19th March 1945 Presidency of SNC issued a direction about the assessment of nationality of former Jewish owners or their heirs. By then, National Committees strictly applied those provisions of Regulation No. 4/1945 Coll. SNC and Ordinance of CALR No. 24/1945 OG, according to which nationality of Jewish owner was assessed on the basis of their nationality reported during the last population census, language used between the family members or membership in German or Hungarian political party after

[31] Until the passing of Regulation of SNC No. 104/1945 Coll. SNC from 23rd August 1945, the confiscation procedure and subsequent allotment of confiscated land to Slovak peasants were regulated by the provisions of Regulation No. 4/1945 Coll. SNC and Ordinance of CALR No. 24/1945 of the Official Gazette. Local National Committee compiled a list of persons, whose property was eligible for confiscation, which it submitted for examination to CALR. Upon the proposal of CALR, Presidency of SNC decided whether the person from the list is or is not a German, Hungarian, collaborator or traitor of the Slovak nation. If the person qualified for confiscation, Presidency of SNC confiscated its property and handed it over into management of Slovak Land Fund. Subsequently, local and district Peasant Commissions prepared plan for allotment of land and after its approval by CALR they introduced the new owner into the ownership or possession of allotted land. For the authentic text of abovementioned regulation and ordinance, see: GABZDILOVÁ-OLEJNÍKOVÁ, S. – OLEJNÍK, M. – ŠUTAJ, Š. (eds.): *Nemci a Maďari na Slovensku v rokoch 1945–1953 v dokumentoch I.* Prešov: Universum, 2005, pp. 149–158.

[32] CAMBEL, S.: *Slovenská agrárna otázka 1944–48*, pp. 90–91.

6th October 1938.[33] Since assessment of nationality became problematic either due to discrepancies in official statistics from population census or due to unreliable local testimonies, Presidency of SNC determined that land ownership of those Jews, who claimed to be of Jewish nationality during the population census in 1930, was exempted from confiscation.[34] Nonetheless, confiscations and allotment continued, what compelled CALR to intervention in order to prevent the deepening of chaos in ownership relations.

On 19th May 1945 CALR issued a circular, by which it instructed all local and district National Committees to preserve the *status quo* of property relations, established by the decisions of former SLO during the war. In practice it meant that all Jewish land ownership allotted to individuals and entrusted into the management of former FMAP had to be left in the possession of current holder until the final resolution in the subject matter by authorized bodies. What is more, National Committees were forbidden to review and in any way alter the decisions of former SLO and former Jewish owners or their heirs were forbidden to take the possession and use of their property, together with any kind of disposition with it.[35] Local authorities ignored even these instructions, because on 30th June 1945 CALR issued another circular for its subordinate bodies, through which it informed them about the instructions of Commissariat of Internal Affairs in the matter of unlawful confiscations of land ownership. Upon the findings of CALR, that local and district National Committees parcelled out land ownership, which either did not qualify for confiscation or which was eventually not yet confiscated, Commissariat of Internal Affairs instructed all local authorities to strictly adhere to legal regulation of confiscation proceedings to prevent obstructions in implementation of land reform.[36] Regardless of all these efforts, call of Slovak peasants for confiscation and distribution of Jewish land ownership, together with already executed confiscations and allotments created a *fait accompli*, which Slovak Communists and Democrats could not ignore. Under such circumstances, politicians began to discuss the question of property restitutions.

We must keep on mind, that although SNC exerted relatively broad powers within the territory of Slovakia,[37] its political decisions were not isolated from the influence of Czech political scene. It was particularly true in the matters of land reform and property restitutions, whose fate was dependent also on the content of political Program of the New Government of National Front of Czechs and Slovaks from 5th April 1945, known as Košice Government Program (hereinafter as "KGP"). Basic

[33] Section 1, subsection 5 of Regulation No. 4/1945 Coll. SNC and paragraph 1 of Ordinance of CALR No. 24/1945 OG.

[34] CAMBEL, S.: *Slovenská agrárna otázka 1944–48*, pp. 91, 93.

[35] SNA, f. Povereníctvo pôdohospodárstva a pozemkovej reform (Commissariat of Agriculture and Land Reform, hereinafter as "CALR"), b., number 1.

[36] Ibid.

[37] For more details about SNC and its powers see: BEŇA, J.: *Vývoj slovenského právneho poriadku.* Banská Bystrica: IRIS, 2001, p. 100 et seq.

principles of property restitutions could be found in parts X and XI of KGP. Since unlawfully sequestrated or otherwise taken over property ended mainly in the hands of Germans, Hungarians and domestic traitors and collaborators, newly established Czechoslovak government agreed upon the conception that this property had to be entrusted into the management of National Committees, which were authorized to decide about its possible restitution to its rightful owner.[38]

Implementation of this conception in Slovakia was eventually never achieved due to existing discrepancies between SNC and Czechoslovak government about the issue of nationwide legal force of Presidential Decree No. 5/1945 Coll., which contained the relevant legal regulation.[39] However, more momentous was political success of still more influential Communists, who succeeded with including the principle of interconnection of property restitutions with the main goals of social and economic policy of state into the text of KGP. Thus, property restitutions were subordinated to the interests of post-war economic reconstruction, proper functioning of national economy and implementation of land reform. In practice this led to limitation of the scope of property restitutions only on cases of small property, which could have been restored only to former owners from socially weak strata.[40] Practical consequences of this approach have been manifested in the first attempts of SNC to enact its own legislation regulating restitution of Jewish land ownership.

Sometime before 23rd August 1945, CALR prepared a draft of regulation on restitution of Jewish land ownership (hereinafter as "draft"), which however remained only on the paper.[41] Nevertheless, its text offers us very interesting insight into the way of thinking of democratic and communist leaders, who in that time had to par-

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[38] For relevant passages of KGP see: GRONSKÝ, J.: *Komentované dokumenty k ústavním dějinám Československa II. 1945–1960.* Praha: Karolinum, 2006, pp. 29–30.

[39] An account about legal and political aspects of the mentioned problem could be found in the following sources: VOJÁČEK, L.: Příčiny sporu o dekret prezidenta republiky č. 5/1945 Sb. In: ŠUTAJ, Š. (ed.): *Dekréty Edvarda Beneša v povojnovom období.* Prešov: Universum, 2004, pp. 84–85, 88–89; BEŇA, J.: *Vývoj slovenského právneho poriadku*, pp. 178–183.

[40] See Part X of the KGP. GRONSKÝ, J.: *Komentované dokumenty II.*, p. 29. Efforts for limitation of property restitutions were always relevant for both Slovak and Czech Communists. For instance, during the political negotiations between the representatives of Communist Party of Czechoslovakia and Czechoslovak President Beneš in Moscow in December 1943, the communist leader Klement Gottwald presented a requirement, that under restitutions should come only property not exceeding the value of 500 000 Czechoslovak crowns. Otherwise the property was meant to be subjected to the so called "national management", limiting the owner's freedom to dispose with his property until the final resolution of new parliament, elected after the end of war. KUKLÍK, J.: *Znárodněné Československo*, p. 119.

[41] It is impossible to determine the exact date of origin of this draft. On the other hand, assessment could be made upon the reference to the Regulation No. 4/1945 Coll. SNC in section 3, subsection 3 of the draft. Since the quoted regulation was passed on 27th February 1945 and nowhere in the draft is mentioned its amendment, the Regulation of SNC No. 104/1945 Coll. SNC which was passed on 23rd August 1945, the probable date of origin of this draft could be placed somewhere in the period between 27th February 1945 and 23rd August 1945. For the authentic text of the draft see: SNA, f. CALR, b., number 1.

ticipate on its preparation.[42] Proclaimed purpose of the draft was the redress of injustice committed on Jews, as well as retribution toward the servants of authoritarian regime and traitors of Slovak nation. Yet, already in the beginning the legislator explicitly limited claims of Jews with German and Hungarian nationality for restitution. Claim for restitution was reserved only for citizens of Czechoslovakia,[43] what represented a potential threat, taking into account the existing possibility of loss of citizenship due to claimant's nationality.[44]

Further narrowing of the scope of restitutions is perceptible in the list of landed properties, which were eligible for restitution. In the list absented those landed properties, whose voluntary sale to Slovak peasants was approved by former SLO under the terms of section 26 of Act on Land Reform from 1940.[45] This provision favoured particularly petty Slovak peasants, who acquired predominantly small Jewish farms or their agricultural inventory. Additional problems may have occurred during the restitution procedure itself. In case of a claim for restitution of land ownership *in natura*, besides the national and political reliability of claimant, CALR also assessed the facts whether he personally cultivated the land, whether he was dependent on income from cultivation of land and whether he was able to ensure its proper cultivation.[46] This automatically disqualified the big Jewish landowners, who on their estates in the past used hired manpower or who owned the land only as a long-term investment. Finally, CALR was authorized to dismiss claims for restitution if claimant qualified for confiscation, if complete or partial restitution of land ownership *in natura* was not purposeful for economic and social revival of the country and if CALR made an agreement with claimant on takeover of land ownership for the purposes of land reform. CALR was also authorized to condition the restitution of land ownership by specific terms, which had to be fulfilled if it was in favour of public interest.[47] Discretion of such an extent not only opened space for arbitrary decisions,

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[42] According to our assessment of the date of creation of the draft in question, CALR was in that time controlled by the members of DP. Post of Commissar of Agriculture and Land Reform was held by Ján Ursíny (21st February–11th April 1945) and Martin Kvetko (11th April 1945–18th November 1947). At least during Ursíny's term of office, member of CPS and Ursíny's predecessor Michal Falťan was employed as his deputy and thus could have influenced preparation of the draft. Many provisions of the draft bear deep imprints of communist ideology and contemporary policy.

[43] Section 1 subsection 1 paragraph a) of the draft. SNA, f. CALR, b., number 1.

[44] After the passing of Constitutional Decree of President on Conversion of Citizenship of Persons with German and Hungarian Nationality No. 33/1945 Coll. from 2nd August 1945, it was unfortunately very common that many Jews with German and Hungarian nationality lost the Czechoslovak citizenship or at least had problems with issuance of its confirmation due to unlawful and many times intentional actions of local authorities. KUKLÍK, J. a kol.: *Jak odškodnit holocaust?*, pp. 164–167.

[45] Section 1 subsection 2 of the draft. SNA, f. CALR, b., number 1.

[46] Section 3 subsection 1 of the draft. Here we can see the signs of contemporary communist attitudes. Ibid.

[47] Section 3 subsections 3 and 4 of the draft. Also here is the communist influence very perceptible. Ibid.

reflecting the current political interests of the party controlling the CALR, but even more limited the access of Jewish owners to their land ownership. To sum it up, the most remarkable aspect of this draft is attitude of both CPS and DP toward the issue of restitution of Jewish land ownership. The draft formally offered opportunity to apply for restitution, but its provisions were formulated in accordance with political line of both political parties, which favoured the new Slovak owners and possessors instead of former Jewish owners and their heirs. This trend eventually continued further.

CALR was not the only governmental body engaged into the enactment of property restitutions. Commissariat for Industry and Commerce (hereinafter as "CIC") prepared a draft of regulation as well, which encompassed the issue of property restitutions as a whole, implying also the restitution of land ownership. The idea of general restitution legislation was strongly opposed by CALR, which elaborated its own new draft of regulation on restitution of Jewish land ownership. Commissar of Agriculture and Land Reform Martin Kvetko during the session of Presidency of SNC on 7th August 1945 demanded that plenary session of SNC should firstly discuss the draft prepared by CALR.[48] The reasons for Kvetko's demand could be concluded from the remarks of CALR on the draft made by CIC, dated from 8th August 1945. It must be said, that the main reason was conceptual discrepancy between the notions of property restitution as to the Jewish land ownership.

Since Kvetko was a DP nominee, the discrepancy was mainly consequence of promotion of the political interests of DP, whose essence was protection of Slovak peasants owning the Jewish land ownership. It is clear from the statement, that CALR disagreed with potential nullification of voluntary property transfers made according to section 26 of Act on Land Reform from 1940, obligation of state and other public corporations to unconditionally restore all the Jewish land ownership, assumption of bad intention of acquirers of Jewish land ownership, obligation of these acquirers to pay compensation to former Jewish owner if a financial remuneration was awarded to him instead of restitution of land ownership *in natura*, as well as with the obligation of state to recompense these acquirers in such situation.[49] All these remarks CALR reflected in its new draft of regulation on restitution of Jewish land ownership. Voluntary property transfers made according to section 26 of Act on Land Reform from 1940 were exempted from the restitution, together with that Jewish land ownership, which was acquired by the state or by individuals in a form of small allotments and peasant hereditary estates, which was subjected to confiscation, which its former owner had not personally cultivated and was not his only mean of subsistence and whose restitution was not purposeful for the sake of economic and

[48] Minutes of the meeting of the Presidency of SNC from 7th August 1945. SNA, f. Úrad Predsedníctva SNR (Office of the Presidency of SNC, hereinafter as "OP SNC"), b., number 1a.

[49] Remarks of CALR on the draft of general regulation on property restitutions made by CIC. SNA, f. OP SNC, b., number 264.

social revival of country.[50] Jewish land ownership had to be restored only at the end of economic year and only to those claimants, who had Czechoslovak citizenship and who were nationally and politically reliable performing peasants dependent on cultivation of land as their only one mean of subsistence.[51] Finally, in the case of land ownership exempted from restitution, former Jewish owner had claim only on financial compensation.[52] However, political consensus on the soil of Presidency of SNC was not achieved, as in September 1945 the discussions were diverted from SNC to the Slovak National Front, where all Slovak political parties were organized.[53]

What purpose did all these legislative initiatives serve? Anyone who wanted to enact the restitutions of Jewish land ownership stood in front of a complex question: How to resolve the clash of two competing interests? Will I stand on the side of Slovak peasants, who in many cases were not anti-Semites, but in the end took the opportunity and profited from discriminative policy of wartime Slovak State, or will I support the claims of former Jewish owners and their heirs, who were targets of unprecedented and morally inexcusable persecution? Political programs of DP and CPS, together with their particular expressions in practice indicate that both political parties chose to endorse the interest of Slovak peasants from mainly political reason of wining their support. Initially ambivalent attitudes evolved into clear efforts to exempt the issue of Jewish land ownership from the general regulation of property restitutions and to enact such a form of property restitutions which were able to minimise the chance of Jewish owners for successful restoration of their property. Paradoxically, political discussions between DP and CPS during the autumn of 1945 did not produce any results. On 5th January 1946 Presidency of SNC therefore sent a letter to Czechoslovak government asking it for enactment of statute on property restitutions with nationwide legal force.[54]

Legacy of Slovak Democrats and Communists

Provisional National Assembly during its last session on 16th May 1946 passed Act on Nullity of Some Property Transactions from the Period of Oppression and on Claims Arising from This Nullity and from Other Infringements into Property No. 128/1946 Coll. (hereinafter as "Act on Restitution"), which represented first uni-

[50] Sections 1 and 2 of the draft of regulation on restitution of Jewish land ownership from august 1945, made by CALR. Ibid.

[51] Through used terminology, such as "political reliability" or "performing peasant", could be perceived the influence of Communists, section 3 of aforementioned draft. Ibid.

[52] To avoid unnecessary accumulation of budgetary burden, CALR decided to cover expenses connected with potential financial compensation from the Fund for Land Reform, established according to section 50 of Act on Land Reform from 1940 and subsidized from charges collected from transfers of Jewish land ownership, section 8 of aforementioned draft. Ibid.

[53] Minutes of the meeting of the Presidency of SNC from 4th, 11th and 18th September 1945. SNA, f. OP SNC, b., number 1a.

[54] CAMBEL, S.: *Slovenská agrárna otázka 1944–48*, pp. 259–261.

form legal regulation of property restitutions on the territory of whole Czechoslovakia from the end of war. Nonetheless, it also represented an imperfect solution of existing problems with Jewish land ownership in Slovakia, which further radicalized the situation in countryside.

First major complication dwelled in the introduced forms of property restitutions. Section 6 subsection 1 of Act on Restitution allowed either restitution of property *in natura* or in precisely specified cases financial compensation. Financial compensation was awarded if restitution *in natura* was impossible to carry out, if the claimant was not interested in restitution *in natura* and did not ask for it, or under the terms of subsection 2 in cases worthy of special consideration, when holder of the property in question needed it for the subsistence of his family or his own and claimant did not necessarily need it. Restitution *in natura* was impossible to carry out also in cases, where such a form of restitution threatened important public interest.[55] These few simple provisions puzzled the population of Slovak countryside as it threatened their rights of ownership, which were until then undisputed and advocated by DP and CPS. Regular acquirer of Jewish land ownership stood in front of two potential, equally unfavourable options. If the court restored the land ownership *in natura* to its former Jewish owner or his heir, Slovak peasant lost the land, as well as money which he had paid for it to wartime Slovak State. On the other hand, if the court awarded financial compensation, Slovak peasant paid for the Jewish land for the second time. Under such circumstances both DP and CPS were ready to intervene for the sake of Slovak peasantry.

After some time the representatives of Commissariat of Justice informed their Czech counterparts at the Ministry of Justice about the problems with wording and implementation of Act on Restitution during their mutual consultation in Prague on 1st March 1947. Besides other outlined problems, Slovak reservations were related mainly to the fact that under the conditions of section 6 of the Act on Restitution all Slovak acquirers of Jewish land ownership were *a priori* considered as having bad intentions even though they mostly fulfilled the criteria of national and political reliability under the terms of post-war legislation. Though representatives of Ministry of Justice displayed certain degree of understanding for Slovak matters, their support for novelization of Act on Restitution was very limited and strictly conditional.[56] DP therefore took the initiative and Commissar of Agriculture and land reform Martin Kvetko, together with other democratic members of Constitutional National Assembly began with the preparation of an amendment of Act on Restitution.

From correspondence between Commissar Kvetko and Minister of Justice, Prokop Drtina, emerges argumentation which confirms the continuity of basic principles of described policy of Slovak Democrats. Since both restitution *in natura* and financial compensation were unacceptable due to their negative consequences for Slovak

[55] For detailed interpretation and commentary on Act on Restitution see: KNAPP, V. – BERMAN, T.: *Vrácení majetku pozbytého za okupace (Restituční zákon).* Praha: V. Linhart, 1946.

[56] See report from the Prague consultations on 1st March 1945 and statement of Ministry of Justice. SNA, f. CoA, b., number 500.

acquirers of Jewish land ownership, Kvetko deemed as the only thinkable compromise two proposed solutions. Firstly, restitution proceeding had to be turned over from courts on administrative bodies.[57] That was supposed to bring the restitution agenda into the hands of Slovak authorities under the control of Slovak politicians. Secondly, Kvetko intended to separate the restitution of Jewish land ownership from the general restitution agenda.[58] That was supposed to mean that Slovak administrative bodies would become free in promoting the interests of Slovak peasantry. Nevertheless, this conception was unacceptable for the Ministry of Justice in Prague, as well as for nearly the whole political spectrum on the soil of Constitutional National Assembly.[59]

Kvetko with other members of DP therefore prepared a compromise draft of amendment, which aimed only at the most problematic issues of Act on Restitution, e.g. on limiting the amount of restored land ownership to the extent of 20 ha if its current holder was petty Slovak peasant or establishment of 3 years foreclosure period for submission of restitution claims. Draft was eventually submitted into the Constitutional National Assembly in early July 1947. Besides the traditional argument of bad social and economic standing of Slovak peasants, authors included also assertion about seeming legality of Aryanization, which induced Slovak peasants to take over the Jewish land ownership.[60] Yet, this was only first indication of toughening political rhetoric, because draft included also several unseemly and generalising allusions on negative traits of former Jewish owners. The most astounding was statement that many Slovak peasants during the war acquired back only their own land which later Jewish owner took from them by auction even before the beginning of war.[61] Such arguments became very popular among the democratic politicians, what proves also the article in newspaper "Democratic Weekly" from 3rd August 1947, published by democratic member of Constitutional National Assembly, Rudolf Fraštacký. Apart from repeating Kvetko's arguments he added, that *"former owners nearly did not work on the agricultural possessions and it surely would contradict the principle, propagated by our peoples-democratic regime, that land shall be given into the hands of those, who work on it, if these petty acquirers would be deprived*

[57] Kvetko's letter for minister Drtina from 22nd March 1947. SNA, f. CoA, b., number 147.

[58] Ibid.

[59] Letter from the chairman of the Club of Members of DP in Constitutional National Assembly, Ľudovít Linczényi, to commissar Kvetko from 27th March 1947. Ibid.

[60] *"It would be possible to object, that these petty acquirers are in fact Aryanizators, but it shall be stated, that they did not acquire the agricultural possessions directly from the racially persecuted perhaps by the use of force but they acquired it from the so called Slovak State, that the agricultural possessions were allotted into the ownership for consideration and not for free and whole this proceeding had official label, what confused these acquirers."* Parliamentary press No. 753 from 7th July 1947. [online] [cit. 15.1.2018] Available at: http://www.nrsr.sk/dl/Browser/Document?documentId=50815

[61] *"Many of these petty acquirers only acquired back those agricultural possessions, which they earlier lost due to their sale by auction pursued just by the racially persecuted…"* Ibid.

of this land and thus existentially destroyed."[62] Let us add that even Communists did not stay behind and communist member of Constitutional National Assembly, Michal Falťan, together with his colleagues in October 1947 prepared their own draft of amendment of Act on Restitution. It was similar to Kvetko's draft, but in some aspects a bit more rigorous. It proposed to award financial compensation to former Jewish owners instead of restitution *in natura* in cases of land ownership in hands of petty Slovak peasants, but in cases of big estates owners it presumed racial or fascist motive of enrichment.[63]

In the end, neither Kvetko's, nor Falťan's draft was taken into consideration and it was the draft prepared by the central government in Prague, which was passed after the communist takeover on 25th February 1948. Published as Act No. 79/1948 Coll. from 7th April 1948, this amendment finally succeeded in minimizing the chances of former Jewish owners and their heirs for successful restitution of their land ownership *in natura*, and eventually also their chances for awarding of financial compensation. Claim for restitution *in natura* was reserved only for performing peasants, i.e. those who personally or together with the members of their family cultivated their land or those who at least participated on its cultivation,[64] what automatically disqualified those Jewish owners and their heirs who were not employed in agriculture. To this group of claimants state awarded financial compensation in a form of state bonds, what in the end satisfied mainly Slovak peasants, who were threatened neither by the loss of land, nor by obligation to pay the compensation.[65] Similar solution was chosen in the matter of confiscated Jewish land ownership, since state was interested in preservation of new ownership relations established by the land reform. In order to prevent revision of confiscation proceedings, Act No. 79/1948 Coll. introduced a principle of mandatory financial compensation, paid by the state predominantly in a form of state bonds, in cases when former Jewish owner or his heir asked for restoration of confiscated land ownership. Moreover, amount of compensation was calculated according to regulations of land reform, what was justified by an argument that even if there was no wartime persecution, Jewish land ownership

[62] SNA, f. Demokratická strana (Democratic Party, hereinafter as "DP"), b., number 7. Dissemination of these attitudes went even further, when democratic politicians used them to address Slovak peasantry during Peasantry days of DP on the turn of August and September 1947. See Record from the Peasantry days of DP in: SNA, f. DP, b., number 5.

[63] *"But this applies only to petty peasants, because in case of acquisition of bigger property it surely could not be justly supposed, that acquirer did not act with intent of taking an advantage of injustice committed by fascist regime.*" Parliamentary press No. 856 from 27th October 1947. [online] [cit. 15.1.2018] Available at: http://www.nrsr.sk/dl/Browser/Document?documentId=50918

[64] Definition of performing peasant was included in section 1 subsection 1 of the Act on New Land Reform (Permanent Regulation of Ownership of Agricultural and Forest Land) No. 46/1948 Coll. SOUKUP, T. – PETRŮV, F.: *Zákon o nové pozemkové reformě. Trvalá úprava vlastnictví k zemědělské a lesní půdě.* Praha: Orbis, 1948, p. 47.

[65] In cases when restitution *in natura* was approved, state completely or partially compensated Slovak peasant for payment of the acquiring cost for the Jewish land ownership to the wartime Slovak State. For more details on this issue see: KNAPP, V.: *Nové předpisy o restituci (Systematický výklad zák. č. 79/1948 Sb., t. zv. restituční novely).* Praha: V. Linhart, 1948, pp. 53–57.

would nevertheless have been subjected to land reform.[66] With the use of institution of retroaction, effect of Act No. 79/1948 Coll. was extended on all restitution procedures, which began and were not ended before 28th April 1948, i.e. before the date of its effectivity.[67] Thus, the possibility of former Jewish owners or their heirs to claim restitution of their land ownership *in natura* was significantly reduced in exchange for promise of unsure financial compensation.

If we want to summarize our narration, we have to search for the legacy of the deeds done by Slovak Democrats and Communists. It is beyond any doubts that from the beginning both political parties approached to solution of restitution issue with inclination to prefer interests of Slovak peasantry, which acquired the Jewish land ownership during the war. Their political programs, as well as legislative initiatives pursued the objective of creating such discriminative conditions, under which the former Jewish owners formally would have had the opportunity to seek restitution of their land ownership *in natura*, but which left to the state bodies enough space to minimize the risk of its realization. For the purpose of achieving this goal Democrats and Communists were eventually eager to use ideologically tinged arguments, which from the point of view of logic and ethics either appears ridiculous or conspicuously resembles the attitudes of wartime authoritarian regime. Such a precisely targeted rhetoric in times of political struggle for the support of Slovak countryside, where on Jewish land ownership dependent peasantry was still affected by the wartime anti-Semitic attitudes, found its recipients. Modern historians agree, that post-war wave of antisemitism in Slovakia was predominantly connected with the issue of restitution of Jewish property, since their acquirers were uneasy about the fate of their new possessions gained during the war.[68] It is therefore a lamentable fact that Democrats and Communists used this atmosphere for their political aspirations and therefore contributed not only to survival of antisemitism, but also to pursuance of morally disputable policy toward the members of Jewish minority. When we then retrospectively look upon the discussed events, we come across a question, if such an outcome was inevitable. Alas, we must note, that Slovak Democrats and Communists did not even try to find other solution.

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[66] Ibid, pp. 44–45.

[67] Ibid, p. 63.

[68] ŠIŠJAKOVÁ, J.: K príčinám povojnového antisemitizmu na Slovensku v rokoch 1945–1948. In: HOLOMKOVÁ, E. et al. (eds.): *Mladá veda 2009. Historické vedy, filozofia a etika.* Banská Bystrica: Fakulta Humanitných vied UMB, 2009, pp. 98–110; KUKLÍK, J. a kol.: *Jak odškodnit holocaust?*, pp. 143–144, 268–272.

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Jana Turanská[1]
Paideia – European Institute for Jewish Studies in Stockholm

The Impact of the Jewish Migration from Moravia on 19th Century Upper Hungarian Jewish Communities

Abstract: The article discusses the impact of the migration of Moravian Jews on the area of today's Western Slovakia (in the 19th century region of Upper Hungary). Migration to the east increased mainly after the restrictive laws of Charles VI. were adopted. Newcomers established in Hungary formed new communities or joined already existing ones. This article is concerned about the relationships that were kept in religious spheres between Moravian and Hungarian Jewish communities and the possible impact of these relations on Upper Hungarian Jewish communities. The author is examining the question of religious identity of the communities settled by Moravian migrants, whether they preferred more orthodox or progressive form of Judaism and whether their origin played some role in their preferences.

Key words: Jews; Migration; Moravia; Upper Hungary; 19th Century; Rabbis; Orthodoxy; Reform Movement; Jewish Schools.

Reasons for the Migration

During the Thirty Years' War Jewish communities in Moravia suffered not only in a consequence of the war but also later during the anti-Habsburg fights of Kuruc armies. Rebels attacked Jews and massacres took place for example in Kroměříž, Lipník, Holešov, Tovačov, Mikulov or Uherský Brod.[2] Destruction and massacres caused by the armies of Imrich Thököly led to the migration of the Jews also to the areas of Upper Hungary.[3] Many migrants settled mainly in towns of Nové Mesto nad Váhom, Trenčín, Nové Zámky or Galanta. A. J. Jelínek claims that many Moravian Jews especially from Holešov were the most important Jewish settlers in today's area of the northern and eastern Slovakia.[4]

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[1] Mgr. Jana Turanská, contact: j.turanska@gmail.com.

[2] The massacre of Uherský Brod is documented in yiddish source: Khurben godel shehaya bekehile hadoshe Ungarish Brod [The great destruction that struck the holy community of Uhorský Brod]. Available in Czech translation: SOUKUPOVÁ, M.: *Masakr v Uherském Brodě, 1683* (Master thesis). Olomouc: Palacky University, 2004, pp. 3–23.

[3] HABÁŇOVÁ, T.: *Každodennosť židovských spoločenstiev na Morave 18. storočia vo svetle archívnych prameňov. Historicko-antropologická analýza*. Prague: Charles University, 2010, p. 17.

[4] JELÍNEK, Y. A.: *Dávidova hviezda pod Tatrami*. Bratislava: Vydavateľstvo Jána Mlynárika, 2009, p. 27.

From the communities in today's western Slovakia that are researched in this article, mainly Sobotište, Šaštín, Senica together with Brezová and Myjava with the surrounding areas, experienced massive influx of the migrants.

Despite the migration, the Thirty Years' War was followed by the rapid demographic growth. Number of Jews in Moravia, but also in Upper Hungary, grew after the expulsion of Jews from Vienna in 1670.[5] Proportion of the Jews in towns also increased after the expulsion of Protestants after the Thirty Years' War. In Prostějov the number of Jewish residents for the short time period outgrew the number of Christians. Jews bought out abandoned Christian houses and settled in the parts of the towns where they had not lived before. Such a disproportion together with the anti-Jewish sentiment from the Catholic Church during the re-Catholicization process provoked in the society anti-Jewish moods.[6]

As a result of the demographic growth after the Thirty Years' War legal measurements were adopted by Charles VI. in 1726. They were created to regulate the growth of Jewish population in the Czech Lands.

The so called *Translocation Rescript* from 1726 legally established the segregation of the Jews in the separate town quarters, preventing the Jews to live in a close proximity with the Christian town dwellers. Jewish quarters were not allowed to be established near the churches, cemeteries, or places where religious processions took places. This restrictions limited physical space of the Jewish population and led to the overpopulation of the Jewish quarters, because despite the restrictions the Jewish population kept growing.[7]

As a result of restrictive measurements also Jewish business activities were limited. From the center of the town their businesses were pushed out on the periphery. As it could be seen from the statistics, Jews were forced into the crafts that were not demanding on the space (tailors, butchers, shoe makers).[8] Many poor Jews were also peddlers.[9] Those who were richer could afford to rent out arenda.[10] The aim of the

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[5] MILLER, M. L.: *Moravští Židé v době emancipace*. Prague: Nakladatelství lidové noviny, 2015 p. 36.

[6] ISRAEL, J. I.: *European Jewry in the Age of Mercantilism 1550–1750*. London: The Littman Library of Jewish Civilization in association with Liverpool University Press, 1997, pp. 136–137.

[7] PĚKNÝ, T.: *Historie Židů v Čechách a na Moravě*. Prague: Sefer, 2001, p. 9.

[8] Gold is providing statistics about the number of craftsman from the town of Úsov, Miroslavov and Dolné Kounice. From the statistics it is clear that the majority of Jews worked in above mentioned crafts. GOLD, H.: *Die Juden und Judengemeinden Mährens in Vergangenheit und Gegenwart*. Brno: Jüdischer Buch- und Kunstverlag Brünn, 1929, p. 275, p. 338, pp. 389–390.

[9] Silvester Nováček claims that peddlers (usually called Hausierer, Dorfgeher or Pinkeljuden) were mainly the younger sons who decided to stay in Moravia but did not have a right to gain Familiant Number. NOVÁČEK, S.: *Z dějin moravských Židů*. Říčany u Prahy: Oregon, 1998, p. 67.

[10] KLENOVSKÝ, J.: *Plány separace židovského osídlení na Moravě z let 1727–1728*. In: *Židé a Morava: sborník příspěvků přednesených na konferenci konané 8. listopadu 1995 v Kroměříži*. Kroměříž: Muzeum Kroměřížska, 1996, p. 54–56. KLENOVSKÝ, J.: *Židovské město v Prostějově*. Prostějov: Muzeum Prostějovska v Prostějově, 1997, p. 12–20. MILLER, M. L: *Moravští Židé v době emancipace*, pp. 43–44.

law was not only to suppress social contact but also economical competition between the Jews and the Christians.

So called *Familiant Laws*[11] were laws which aimed to restrict the growth of the Jewish population. Modelled after Prussian restrictive laws from 1714, they were accepted in 1727 for Moravia and Silesia. Based on previous population census, the number of the families, which were allowed to live in Moravia was 5106.[12] Individuals – the so called Familiants (germ. Familianten, male heads of the family) were subscribed "familiant numbers" (germ. Familiantennummer or Familiantenstellen).[13] After the death of a father, the number was inherited by the oldest living son, who therefore gained a right to establish the family. In Moravia, unlike in Bohemia, the familiant numbers were bound to the particular towns and great corruption always surrounded the selling of the familiant number.[14] In Jewish communities, the system of familiant numbers created even stronger hierarchy than the one existing before and based on ownership of the houses. Owners of the familiant numbers were at the top of the social hierarchy. Second were so called supernumeraries (germ. Überzähligen), who gained the permission to marry but their children did not inherit such a privilege. Even lower were younger sons (germ. Nachgeboren) and at the bottom of the social hierarchy were illegitimate sons, who were often born in a marriage recognised by the Jewish law but not seen as a legitimate by state. Their number was raising within each generation.

Younger sons and illegitimate descendants had several options how to establish the family and lead their life. They might have lived in celibacy, convert to Catholicism, undertake the danger of illegal wedding or migrate. The places for migration were the countries like Hungary or Poland, where the Familiant Laws were not in force. Often used option was also to get married just behind the Moravian borders and then to return. For this practise there was a risk of being punished by expulsion from the country.[15]

The aim of the Familiant Laws was not to reduce the Jewish population in the country, but to maintain its even numbers. Despite this effort in 1798 the number of familiants was increased to 5400. It is paradoxical then that despite the effort to keep the numbers of the Jews same, as Stoklásková demonstrates, emigration was punished.[16] Documents in the founds of the Moravian Land Archives demonstrate, that escapes were common. List of serfs who escaped across the border that were created

[11] In Hebrew the laws were called *gezerat ha-shniot* and referred to Talmudic prohibition of certain types of marriages. Due to their character and because of their focus on first born sons they were also called "pharaonic laws".

[12] In Bohemia this number was 8451 and in Silesia it was 1245 familiant numbers.

[13] MILLER, M. L: *Moravští Židé v době emancipace*, pp. 37–42.

[14] Ibid, p. 46. PĚKNÝ, T.: *Historie Židů v Čechách a na Moravě*, p. 95.

[15] MILLER, M. L: *Moravští Židé v době emancipace*, p. 50. HECHT, L.: *Moderní dějiny českých Židů 1648–1848*. Olomouc: Palacky University, 2003, p. 17.

[16] STOKLÁSKOVÁ, Z.: *Cizincem na Moravě: Zákonodárství a praxe pro cizince na Moravě 1750–1867*. Brno: Matice moravská, 2007, p. 95.

for nobility were preserved. In the list there were noted also the names of the towns in Hungary where these people lived in that time which allows us to follow the Jewish migration towards Upper Hungary.[17]

Patent of Toleration issued for Moravia[18] on the 13th of January 1782 did not mean any change. The emperor stated clearly that it was not his interest to raise the number of the Jews or attract foreign Jews to come, but to keep the number of the Jews as it had already been set. Toleration did not mean equality although new laws were accepted that improved the legal status of the Jews.

Situation changed only after the 1848. The restrictive laws were abolished and freedom of movement was allowed for the Jews of Moravia. Jews in Moravia but also in Hungary started to move from the small towns on the periphery towards the bigger cities like Budapest and Vienna. Also the Familiant Laws were abolished together with the laws restricting Jews to resign outside of Jewish quarter. Abolishment of the Familiant Laws was followed by the wave of marriages. Couples already married according to the Jewish law wanted to legitimise their marriage and status of children also for the state.[19]

Jews in Hungary actively participated in the revolution 1848–1849 on the Hungarian side. Revolutionary parliament in Debrecen during its last session on the 28th of July 1849 therefore accepted the law giving the Jews the full citizen rights. This equality was after the defeat of the revolution abolished and only gained again in 1867.[20] Despite this fact the rest of the discriminative laws abolished by revolutionary parliament were not accepted again. The full emancipation and the civic equality was achieved in both parts of the monarchy in 1867.[21]

Migration towards the Upper Hungary

As a consequence of these restrictive laws many Jews, especially younger sons and couples married just according to the Jewish religious law, decided to migrate to the nearest places where the restrictive laws were not in force. They established new communities or joined those which already had existed. This article is focused on such communities located nowadays in the area of western Slovakia, formerly Nyitra County in the region of Upper Hungary. Researched communities, Brezová pod Bradlom, Holíč, Myjava, Senica, Skalica, Sobotište and Šaštín, were located near the border with Moravia. This location attracted the migrants from Moravia who had

[17] Moravský zemský archív v Brne (MZA), f. Rodinný archiv Vrbů Holešov, box. 11, inv. No. 84.

[18] For Bohemia it was issued on the 19th October 1781, for Silesia on the 15th April 1781 and in 1783 for the Hungarian part of the monarchy.

[19] IGGERS, W.: *The Jews of Bohemia and Moravia: A Historical Reader*. Detroit: Wayne State University Press, 1993, pp. 59–60.

[20] In 1895 the emancipation process was completed with the recognition of Jewish church as a church recognised by state.

[21] MILLER, M. L.: *Moravští Židé v době emancipace*, pp. 288–290.

settled there mainly during the first wave of migration.[22] In the following part the relationship between the communities on both sides of the border will be examined together with its possible influence on the religious life of the communities in Hungarian part of the monarchy.

There were various types of relationships between the Moravian "mother" community and Hungarian "daughter" community which was established or densely populated by Moravian migrants. Communities were connected for example in the area of taxation. It was the case of the relationship between the community in Myjava and Strážnice in Moravia. Jews from Strážnice are documented to be settled in Myjava already in 1728.[23] The community in Myjava originally belonged under Strážnice community. Myjava became independent from Strážnice during the 18th century, although the exact year is not known. However, it is still documented that in 1786 Myjava's Jews were paying the religious tax to Strážnice and the communities also shared a rabbi.[24]

The best example, from our sample of the communities, to observe the relationship between Moravian and Hungarian communities connected with common rabbi is the case of communities of Hodonín in Moravia and Holíč.

Holíč is Upper Hungarian town located closely to the Moravian border. Just across the river Morava from Holíč is Hodonín. Therefore many Jews from Hodonín were settling in this community already from the 15th–16th century and in higher numbers since the 18th century. Close proximity allowed Moravian Jews to maintain the relationships with their families. The location of Holíč on the trade-road which followed between Šaštín, Sobotište, Myjava and Nové Mesto nad Váhom also made Holíč extremely attractive for Moravian newcomers. In 1786 the community had already 400 members.[25] Thanks to its location the community was successful in trade and also in crafts and therefore in the 18th century became one of the richest in Nyitra County. The wealth of the community is documented by the amount of paid *Tolerance tax* which in 1771 was 1965 florins. For comparison, higher taxes were paid in Nyitra County only by the Jews of Nové Mesto nad Váhom and Senica.[26]

Holíč rabbinate consisted of twenty-six neighbouring communities. Hugo Gold documents that in 1770, after the independent Holíč community was established, rabbi Franz Türckl who served in Holíč also served as the rabbi for the community of Hodonín.[27] This is the first documented case of what later became a common

[22] The second wave of migration was the migration towards the big cities (mainly Budapest or Vienna) in the mid-19th century.

[23] BÜCHLER, R. J.: *Encyklopédia židovských obcí na Slovensku*. Part 2. Bratislava: Slovenské národné múzeum – Múzeum židovskej kultúry, 2010, p. 80.

[24] Židovské muzeum Praha (ŽMP), f. Barkány Slovensko, inv. No. 120, *Myjava*.

[25] KORBINSKY, J. M.: *Geographisch-historisches und Produkten Lexikon von Ungarn*. Pressburg: Weber & Korabinsk, 1786, p. 411.

[26] BÜCHLER, R. J.: *Encyklopédia židovských obcí na Slovensku*, Part 2, p. 147.

[27] GOLD, H.: *Die Juden und Judengemeinden Mährens in Vergangenheit und Gegenwart*. Brno: Jüdischer Buch und Kunstverlag, 1932, p. 220.

practise between these two communities.[28] The case of Holíč is rather exceptional one. It was not an exception to find a rabbi who was serving in several communities. But these rabbis were usually seated in "mother" community rather than "daughter" community.

In the case of Holíč the situation was reversed. "Daughter" community which belonged under the Hodonín community until the end of the 18th century was suddenly lending the rabbi to the "mother" community. This unique relationship was possible also thanks to the geographical proximity of both communities. The last rabbi with documented position in both communities was Jozua Wohlmout in 1845–1852.[29]

The influence of Moravian migrants was evident also on the architecture of the synagogues from the researched communities. In Myjava the synagogue built in 1846, is quite simply shaped, with rectangle shape and had very similar features to pre-emancipation synagogues in Moravia. Similar architecture is also documented on the synagogue from Brezová pod Bradlom.[30]

Other bonds between "mother" and "daughter" community were in the sphere of trade or in the custom to bury the dead from "daughter" community in Moravia. This was the custom between Hodonín and Holíč community and most probably also between Myjava and Strážice.[31]

The connection between the communities of Upper Hungary to Moravia was often demonstrated by the choice of rabbi. It was of a significant difference whether the chosen rabbi was a student of Moravian yeshiva[32] (e.g. Prostějov or Mikulov) or Hungarian yeshiva (in case of researched communities from Pressburg). In order to understand why it is significant, we have to examine the ideas influencing Moravian and Upper Hungarian religious studies.

Moravian environment was conservative but it was also deeply embedded in the rabbinical authority, tradition and the respect for the Hebrew language. Therefore, as Miller demonstrates, it was possible for Moravian yeshivas to integrate also some of the ideas of the haskalah without feeling threatened. This enabled students of Moravian yeshivot to study also secular subjects.[33] Such a situation was impossible in Pressburg. Strict orthodoxy of Chatam Sofer prohibited everything new and abolished secular studies and the reading of any kind of secular literature.[34]

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[28] ŽMP, f. Barkány Slovensko, inv. No. 66, *Holíč*.

[29] GOLD, H.: *Die Juden und Judengemeinden Mährens in Vergangenheit und Gegenwart*, p. 222.

[30] Sketches of the synagogues are available in ŽMP, f. Barkány Slovensko, inv. No. 120, *Myjava* and ŽMP, f. Barkány Slovensko, inv. No. 103, 153/85, *Brezová*.

[31] ŽMP, f.: Barkány Slovensko, inv. No. 66, *Holíč*. ŽMP, f. Barkány Slovensko, inv. No. 120, *Myjava*.

[32] Yeshiva is a higher Jewish religious school focused mainly on the Talmud studies and Jewish religious law – halakha. A graduate from yeshiva could have been appointed as a rabbi. In case of Moravia he first had to pass the exams given by the Moravian Chief Rabbi.

[33] MILLER, M. L: *Moravští Židé v době emancipace*, p. 72.

[34] See comparison between two memorials documenting studies in Moravia and also in Pressburg in referred time period: WEISS, I. H.: *Meine Lehrjahre: aus den hebräischen Erinnerungen des Verfassers*. Berlin, 1936, p. 76. KLEMPERER, G.: Reminiszenzen aus meiner frühen Jugendzeit. *Zeitschrift*

Because of these differences, appointing the rabbi from Moravian yeshiva or yeshiva in Pressburg, or sending one's son to study to one or another, meant an important statement regarding orthodoxy by an individual or a community.

While examining the choice of rabbis done by communities it is also relevant to examine the religious preferences of the communities and explore them in relationship to the tightness of the bounds with Moravia. Since time framework for this research was set on the 19th century it is also the question whether it still would be possible to detect the heritage of the migration from Moravia in this late period.

The communities in Brezová pod Bradlom, Myjava and Sobotište were orthodox communities.[35] While choosing the rabbi, these communities had the tendency to choose the students of yeshiva in Pressburg who were more conservative then Moravian rabbis. The religious preference is especially interesting in the case of Sobotište, which was populated by many Moravian Jews and in case of Myjava, which until the end of the 18th century belonged, as it was already mentioned, under the community in Moravia. Myjava, despite its close ties to Moravia has been choosing rabbis tied to Hungarian type of orthodoxy.[36]

On the other hand, liberal communities or communities status quo ante (Šaštín, Holíč, Skalica and also Senica), were choosing the rabbis studying in Moravian yeshivot or even at universities and this way they demonstrated their openness not only towards the secular sciences and modernisation but also towards modernisation in the sphere of religion.

As it was already mentioned, Holíč had close tights to Moravian communities, mainly Strážnice. In the 19th century the rabbis of the town had also connection with Moravia and most of them were also born there. Around the middle of the century the community has been choosing orthodox rabbis of Moravian origin such as Moses Isaak Pereles from Uherský Brod or Abraham Beck from Pohořelice.[37] Interestingly enough, the orthodox rabbis did not have much of the influence in community. Holíč has chosen to join the neolog communities after the congress of 1868–1869.[38]

Community of Šaštín also appointed personalities who were closely tied with tradition. The most important personality in the mid-19th century was Mordechai Broda. Broda was born in Uherský Brod and was active in Strážnice. Here he met and

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für die Geschichte der Juden in Tschechoslowakei, Brno: Jüdischer Buch- und Kunstverlag, 6, 1936, pp. 25–37.

[35] Communities kept their orthodox status also in the 20th century. Slovenský národný archív (SNA), f. Ústredná kancelária židovských ortodoxných obcí (ÚKŽOO): founds are not arranged.

[36] GRÜNWALD, S.: *Piešťany Memorial Book. Sefer zikaron li-ḳehilot Pishṭani, Verbovah (Ṿerbo), Miyavah u-Brezovah u-sevivatan: she-nehergu ʿal ḳidush ha-shem ba-Shoʾah ba-shanim 702 ʿad 705*. Jerusalem: Yiddish Book Centre, 1969, p. 52.

[37] UJVÁRY, P.: *Magyar Zsidó Lexikon*. Budapest, 1929, p. 696. GOLD, H.: *Die Juden und Judengemeinden Mährens in Vergangenheit und Gegenwart,* p. 282.

[38] ŽMP: f. Barkány Slovensko, inv. No. 66, *Holíč.*

became a close friend with Chatam Sofer. He was active as dayan of the community in Šaštín and died in 1815.[39]

Connection between Jews of Skalica and Moravia could be found already in the 15th century. Skalica had the closest relationship with the community of Strážnice, since the majority of new migrants settled in Skalica came from there. During this time period, Skalica's Jews belonged under the rabbinate in Mikulov.[40]

In 1868 the community became status quo ante community. In the Encyclopedia of the Jewish Communities it is mentioned that it was under the influence of the rabbi Adolf Friedman when the community became neolog.[41] If this information is correct then another shift occurred since the community was classified as orthodox after the establishment of Czechoslovakia.[42]

Community in Skalica appointed rabbis who had secular education from universities which suggested liberal tendencies in religious practices of the community. At least this was the case in the mid-19th century. Therefore it is likely that the community really became neolog. The shift towards the orthodoxy is unclear since the lack of the documents.

Strong impact on the communities was also sometimes caused by individual rabbinical personalities influencing the religious preferences of the community. One example is the conservative community in Senica. During the 1833–1854 Jehuda Aszód, important rabbinical scholar and strong adherent of orthodoxy, was appointed as a rabbi in Senica.[43]

Surprisingly right after him the liberal rabbi, Jakob Heinrich Hirschfeld, was appointed. As Wilke assumes, he was most probably the first rabbi in Hungary to hold a doctoral diploma. He studied not only at the traditional yeshivot but also at the university in Vienna, Prague and Pest. This type of secular education was still unacceptable for Hungarian orthodox rabbis. He became a rabbi in Senica in 1855 and later he moved in 1858 to Pécs.[44]

Interestingly, after the congress in 1868–1869 Senica chose to join the status quo ante communities and not orthodoxy. Later it became orthodox and it stayed orthodox until its destruction. Because of the lack of the documents we can not follow the tensions within, at that time, officially orthodox community.[45]

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[39] ŽMP, f. Barkány Slovensko, inv. No.56.

[40] BÜCHLER, R. Y.: *Encyklopédia židovských obcí na Slovensku*. Part 3. Bratislava: Slovenské národné múzeum – Múzeum židovskej kultúry, 2013, p. 56.

[41] BÜCHLER, R. Y. a kol.: *Encyklopédia židovských obcí na Slovensku*. Part 3, p. 57.

[42] SNA, f. (ÚKŽOO): founds are not arranged.

[43] More about the important personality of Hungarian orthodoxy see: BÜCHLER, S.: *Die Lebensgeschichte des Rabbi Judah Aszód, 5556-5626*. Dunajská Streda: Armin Weisz, 1901, 82 pp.

[44] WILKE, C.: *Den Talmud und den Kant*. Hildesheim: Georg Olms Verlag – Weidmannsche Verlagsbuchhandlung, 2003, p. 500, 513.

[45] BARKÁNY, E. – DOJČ, Ľ.: *Židovské náboženské obce na Slovensku*. Bratislava: Vesna, 1991, p. 92.

The conflict between more conservative and liberal members of the community occurred also in other places. The example of such a disagreement is documented from Holíč. Conservative rabbi of the community Juda Dressnitz sharply protested against the employment of liberal Arona Friestadl as rabbi. Part of the community actually accepted Friestadl, but as a consequence of Dressnitz disagreement and pressure he had to leave the community. Friestadl left for Moravia where he served as a rabbi in Prostějov.[46]

Conclusion

Based on the presented article it is possible to conclude with several following observations. The migration from Moravia, mainly as a consequence of the restrictive laws adopted by Charles VI., affected all of the researched communities. "Daughter" communities kept various types of connections with the "mother" communities in Moravia. Documents allow us to observe mainly the relationships in the religious sphere. Communities in Upper Hungary and Moravia for example shared the rabbis. The communities in Hungary employed the rabbis from Moravia. Tendency to prefer the rabbis from Moravia, rather than rabbis trained in Hungarian yeshivas, is visible in the more liberal communities which chose to belong into the neolog camp. The conservative communities, which, after the congress in 1868–1869, preferred after the congress orthodox camp, were appointing in the 19th century rabbis trained mainly in Pressburg yeshiva.

Based on the researched sample the migration from Moravia by itself did not play any role in religious preference of the communities in 19th century. Also it was not discovered that the close ties between the Moravian and Hungarian Jewish communities that had been kept in previous centuries would have any effect on the religious preferences in the 19th century.

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[46] ŽMP, f. Barkány Slovensko, inv. No. 66, *Holíč*.

GRÜNWALD, S.: *Piešťany Memorial Book. Sefer zikaron li-ḳehilot Pishṭani, Verbovah (Ṿerbo), Miyavah u-Brezovah u-sevivatan: she-nehergu ʿal ḳidush ha-shem ba-Shoʾah ba-shanim 702 ʿad 705*. Jerusalem: Yiddish Book Centre, 1969.

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Dimitrios A. Kourtis[1]
Aristotle University of Thessaloniki, School of Law, PhD. Cand. in International Law at the Department of International Studies; Attorney at Law; f. Expert to the Parliamentary Committee on WWII Reparations

Anti-Jewish Legislation in Occupied Greece During WWII: The Juridical Path to Genocide and the Jewish Community of Thessaloniki

Abstract: The paper in hand will examine the legal means employed by the Nazi authorities in occupied Greece, especially in the territory controlled by the Salonika–Aegean Military Command, so as to pave the way for the implementation of the *final solution's* genocidal plan vis-à-vis the flourishing Sephardic community of Thessaloniki. From the 'Black Sabbath' order of 11th July 1942 to the yellow star decree of 6th February 1943, the confiscation of Jewish property, the ransom tragedy, the looting of the monetary gold, and the uprooting of the Jewish cemetery, obliquely expropriated by municipal authorities, the present essay will attempt to systematically document and analyze the methods and means utilized in order to execute a policy of targeting, symbolization, dehumanization and discrimination against the local Jewish population, thus paving the way to the commencement of the mass extermination project, forming part of the *actus reus* pertaining to the 'crimes of crimes', i.e. genocide.

Key words: Greece; Holocaust; Anti-Jewish Legislation; Discrimination; Genocide; Thessaloniki.

Introduction: Law As an Instrument of Genocide

A study on the origins and the normativization of anti-Semitism in occupied WWII Greece is bound to pay its fair tribute to the peculiar case of the Thessalonicean Jewish Community brought to annihilation by the concerted genocidal policies implemented under the auspices of the German administration and solidified by the actions, omissions, and patterns of tolerance adopted by local collaborators and bystanders.[2] A study concerning the more or less unknown pages of the Holocaust's

[1] Dimitrios A. Kourtis, LLM, PhD. Cand., contact: kadimitr@law.auth.gr.

[2] See PLOUT, J. E.: Greek Jewry in the Twentieth Century, 1913–1983: Patterns of Jewish Survival in the Greek Provinces before and after the Holocaust. Madison NJ: Fairleigh Dickinson University Press, 1996; KOUNIO-AMARILIO, E.: *From Thessaloniki to Auschwitz and Back, 1926–1996: Memories of a Survivor from Thessaloniki*. Trans. SUNDT, TH. London/Portland OR: Vallentine Mitchell, 2000; MAZOWER, M.: *Salonica, City of Ghosts: Christians, Muslims and Jews, 1430–1950*. New York: Alfred A. Knopf, 2005; BOWMAN, ST. B.: *The Agony of Greek Jews: 1940–1945*. Stanford CA: Stanford University Press, 2009.

history, such being the case of the Thessalonicean Jews, bears paramount importance, given the current rise of both anti-Semitism and the culture of Holocaust denial or oblivia. As a prominent genocide scholar once opined:

> More than fifty years have passed since the final defeat of Nazism, and yet its presence in our minds seems to be stronger than ever. This demands explanation. After all, public interest in events of the past normally diminishes as they recede in time […]. But the case of Nazism, and especially of the Holocaust, is different. There are episodes in history whose centrality can only be recognized from a chronological distance. The mass of inexplicable, often horrifying details is endowed with sense and meaning only retrospectively, after it has passed. Gradually such events come to cast a shadow over all that had previously seemed of greater significance, reaching backward and forward, until they finally touch our normal lives, reminding us with ever growing urgency that we are the survivors of cataclysms and catastrophes that we never experienced. The Holocaust is such an event.[3]

In this all-inclusive process of radical extermination, a landmark for the law and praxis on the prevention and punishment of mass atrocities and a measuring stick for all post-Holocaust genocides,[4] law and the juridical notions were either absent or silent, according to the standard narrative of major Holocaust scholars.[5] Nevertheless, such statements should be accepted with the proverbial *grain of salt*. It is a truism that Hitlerites resented both the intricacies of legal order and the legal profession.[6] This notwithstanding, the Nazi leaders accomplished the almost complete annihilation of the Jewish population of Europe following a pattern similar to the tactics implement during the interwar period, while the Nazi party's rise to power within the socio-political context of the Weimar Republic;[7] namely, the erosion of the legal system's core-concepts and principles through legal formalism, extreme positivism, and the bending of norms based on ideologically oriented interpretation or the re-conceptualization of standard-content general rules or clauses.[8] Even

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[3] Cf. BARTOV, O.: *Germany's War and the Holocaust: Disputed Histories*. Ithaka NY/London: Cornell University Press, 2003, p. 192.

[4] BAZYLER, M.: *Holocaust, Genocide, and the Law: A Quest for Justice in a Post-Holocaust World*. Oxford: Oxford University Press, 2016, p. 61.

[5] See – for instance – RUBENSTEIN, R. L.: *The Cunning of History: The Holocaust and the American Future*. New York: Harpter & Row, 1975, p. 87.

[6] According to Ingo Muller [MULLER, I.: *Hitler's Justice: The Courts of the Third Reich*. Trans. SCHNIEDER D. L. Cambridge MA: Harvard University Press, 1991, p. 295], the Führer:
[…] detested lawyers as pen-pushers who filled whole volumes with tangled commands and prohibitions and always had their noses buried in ridiculous tomes. He once confided to a gathering of confidants that going to law school must turn every rational person into 'a complete idiot', and that for his part he would 'do everything he could […] to make people despise a legal education'.

[7] BAZYLER, M.: *Holocaust* …, p. 5–7.

[8] Cf. VAGTS, D. F.: International Law in the Third Reich. *American Journal of International Law*, 84, 1990, pp. 661–704.

so, the primacy attached to legal formalism and the positivistic approach towards both the creation and the implementation of legal norms, themselves considered as means to the Nazi cause, resulted in a drastic and holistic re-definition of law's purpose within the racially pure universal society envisaged as the ultimate *desideratum* of all Nazi policies. Thus, the Nazi laws were re-shaped to serve the goals of the new regime; they were transformed into an instrument of international crimes' perpetration;[9] in the Third Reich, legal rules were degenerated, perverted, and diminished from guarantees of societal cohesion, order, and conflicts' avoidance, to corner-stones of the juridical path to genocide.[10] This radical transformation of the legal order into an *instrumentum sceleris*, a juridical weapon *at large* for the commission of genocide, war crimes, and crimes against humanity is highly relevant to the systematic, organized, and massive character of the Final Solution's implementation policies. Furthermore, the interpretation and application of legal norms both *in foro interno* (i.e. Third Reich Germany) and in the occupied territories contributed to the emancipation of standard legal guarantees, such as the double jeopardy rule or the due process clause, from their inherent modalities and their reclassification as means to the *Raison d'État*, the national interest as authoritatively stated by the Hitlerite masterminds.[11] To employ the pertinent wording of Professors Stoltzfus and Friedlander:

> The judicial system played a decisive role in the Nazi regime's efforts to provide the majority with a sense of *Rechtssicherheit*, of stability and legal predictability. Adhering to the formal appearance of the rule of law, the regime anchored the disenfranchisement and dispossession of the German Jews in German law and thereby turned the law into a [legal] means of persecution. The German judicial system was one reason the Holocaust resembled machine-like mass murder rather than a Czarist pogrom.[12]

Consequently, it comes as no surprise that the history of the Thessalonicean Jews complete annihilation unfolds itself on equal footing with the understanding of the legal rules implemented so as to effectuate the targeting and discrimination of the local Jewish community, the study of their socio-political context, and the assessment

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[9] US NUREMBERG MILITARY TRIBUNAL III, *United States of America v. Altsötter et alt.* (*The Justice Case*), Case No 3, III *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10* (Opinion & Judgment of 4 December 1947) p. 954, at p. 984:
The very essence of the prosecution case is that the laws, the Hitlerian decrees and the Draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime.

[10] BAZYLER, M.: The Thousand Year Reich's over One Thousand anti-Jewish Laws. In FRIEDMAN, J. C. (ed.): *The Routledge History of the Holocaust*. London/New York: Routledge, 2011, pp. 82–89.

[11] See – indicatively – LIPPMAN, M.: They Shoot Lawyers Don't They?: Law in the Third Reich and the Global Threat to the Independence of the Judiciary. *California Western International Law Journal*, 23(2), 1993, pp. 257–318.

[12] STOLTZFUS, N. – FRIEDLANDER, H. (eds.): *Nazi Crimes and the Law*. Cambridge: Cambridge University Press, 2008, p. 8.

of their contribution to the formation of collective ideal-types on identity, citizenship, and otherness.[13] In the following pages, the essay in hand will attempt to touch upon these three fundamental issues, which can shed light on the great riddle of disintegration and intra-communal segregation that allowed the occupation authorities to bring about the almost total extinction of one of the primary pillars of the city's history and culture, whose uncontested and continuous presence dates back to the 15th century AD.

Setting the Scenery on the Three Periods of Thessalonicean Jews

The presence of Sephardic Jews, refugees from Spain, as a direct effect of the Alhambra Decrees of March 31, 1492 marks the beginning of the long and turbulent history of the Jewish community of Thessaloniki.[14] Spanish Jews would settle in all coastal urban centres of the Ottoman Empire, upon invitation of Sultan Bayezid II in 1492.[15] The Jewish settlement accomplished a proper revitalization of civil life and commerce in a highly degraded metropolis, which – subsequent to the fall of the Eastern Roman Empire – was gradually abandoned.[16] October 26, 1912 acts as a landmark in the historic course of Jewish Thessaloniki. The outcome of the Balkan Wars finds the Modern Greek State victorious against the Ottoman Turks incorporating Thessaloniki in its sovereign territories.[17]

Greece embarked on a project of Hellenization of the newly acquired territory and, especially of Thessaloniki with its large non-Christian Greek population.[18] Under a royal proclamation of November 1912 the Thessalonicean Jews were granted full citizenship in the Hellenic State, while guaranteeing equality of civil status and civil rights.[19] The whole process gradually accelerated due to the Hellenic Genocide perpetrated by the Young Turks Regime, Greece's defeat in the Anatolia's frontier and the subsequent population exchange on a religious basis between Greece and Turkey.[20] Assurances to the city's community were also offered by local and central administrative authorities in an attempt to prevent civil unrest and ensure Jewish sup-

[13] See – in general – ZIMMERMANN, A.: Legislating Evil: The Philosophical Foundations of the Nazi Legal System. *International Trade & Business Law Review*, 13, 2010, pp. 221–241.

[14] BOWMAN, ST. B.: *The Agony* …, p. 16.

[15] MAZOWER, M.: *Salonica* …, pp. 46 *et seq*.

[16] HAGOUEL P. I.: The History of the Jews of Salonika and the Holocaust: An Exposé. *Sephardic Horizons*, 3(3), 2013, p. 1, 2.

[17] MOLHO, R.: The Jewish Community of Salonika and its Incorporation into the Greek State 1912–19. *Middle Eastern Studies*, 24(4), 1998, pp. 391–403.

[18] See WASSERSTEIN, B.: *On the Eve: The Jews of Europe Before the Second World War*. New York: Simon & Schuster, 2012, p. 119 *et seq*.

[19] PIERRON, B.: *Juifs et chrétiens de la Grèce moderne: Histoire des relations intercommunautaires de 1821 à 1945*. Paris: Harmattan, 1996, pp. 83 *et seq*.

[20] MOLHO, R.: The Jewish Presence in Thessaloniki. *The Observer* (= *Ο Παρατηρητής*), 25–26, 1994, p. 13, at p. 32 (*in Greek*).

port in the international arena, an element essential for the recognition of Hellenic sovereignty in the newly annexed territories.[21]

In the interwar period, Thessalonican Jews were thriving, progressing in communitarian coherence, population numbers and economic affairs. Thus they stood apart from the rest of the population in two obvious ways, first by their linguistic and cultural difference (bearing the legacy of the Sephardic language and civilization) and, second, by their sheer number. They had managed to create strong communal urban enclaves, like the 151 quarter and the Hirsh neighbourhood, thus distinguishing themselves from non-Jewish residents, while occupying a central place in both the economy and the urban development of the city. This set of distinctive defining characteristics was unique to this community, rendering it the only prominent example of peaceful and unimpeded existence of a non-Christian societal formation, within a highly integrated – both on terms of religion and ethnicity – State, like the Modern Greek Polity.[22]

At the dawn of the WWII the flourishing community included 56,000 members. When Germany unconditionally capitulated to the United Nations on May 8, 1945, only 1,900 Thessalonican Jews barely escaped Polish death camps to be scattered across the globe, from Mandatory Palestine, to France and the Americas.[23] Only but a few chose to return to the motherland, Thessaloniki, in what has been aptly described – in *Ladino*, the Judeo-Spanish language of Thessalonican Jews – as *Retorno del Inferno*, i.e. *Return to Hell*.[24]

Italy declared war on Greece on October 28, 1940 and fighting erupted on the Albanian front. Initially, Greece was victorious, while thousands of Jewish Greek conscripts and officers fought valiantly alongside their non-Jewish (Christian) fellow Greeks. The 50th Brigade of Macedonia, a unit of Greek tactical military forces, was nicknamed the *Cohen Battalion*,[25] reflecting the preponderance of Greek Jews in its composition. The termination of hostilities coalesced with the unconditional surrender of the Greek forces to the Axis Powers; *cessante bello*, many Jewish soldiers returned home as war heroes, distinguished by their achievements in battlefield.[26] On April 6, 1941 Germany invaded Greece from the North. Hostilities did not last long, and finally the Northern territories were placed under direct German control, with the establishment of the Salonika-Aegean Field Military Command.[27] The uncondi-

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[21] MOHLO, R.: Popular Antisemitism and State Policy in Salonica during the City's Annexation to Greece. *Jewish Social Studies*, 50(3)-(4), 1988/1993, p. 253, pp. 256–257.

[22] See MAZOWER, M.: *Salonica …*, Chap. 21, pp. 321 *et seq*.

[23] KEREM, Y.: La destruction des communautes séfarades des Balkans par les Nazis. In TRIGANO, S. (ed.): *Le Monde Sépharade: Histoire*, Vol. I, Paris: Seuil, 2006, pp. 907–954.

[24] RIVLIN, B.: Retorno del Inferno. *Aki Yerushalayim*, 49–50, 1995, <http://www.orbilat.com/Languages/Spanish-Ladino/History/Retorno_del_Inferno.html> (last accessed: December 2017).

[25] KEREM, Y.: *La destruction …*, *loc. cit.*

[26] Cf. BOWMAN, ST. B.: *The Agony …*, pp. 39–40.

[27] MAZOWER, M.: *Inside Hitler's Greece: The Experience of Occupation, 1941–44*. New Haven CT/ London: Yale University Press, 1993, pp. 15 *et seq*.

tional surrender of Thessaloniki stands as the prelude to the ultimate extermination of its flourishing Sephardic Community. As aptly described:

> These events effectively conclude the fascinating narrative of the two millennia Jewish Thessaloniki, bode a taste of the upcoming tumultuous upheaval of the Community, and mark the end of the second period in the History of Jewish Thessaloniki. The declared aim of the Occupier, if only thinly veiled, was the eventual annihilation of the Jews, an event in World History that will come to be known as the Holocaust, the Genocide of the European Jews. In less than three years time Jewish Thessaloniki will cease to exist as such.[28]

Intent to Destroy: Stagnation, Complication, and the Arrival of Max Merten

Genocide is a crime distinguished by a surplus *mens rea*,[29] i.e. it contains a general intent as to the underlying acts, and an ulterior intent with regard to the ultimate aim of the destruction of the group.[30] In the case of genocide, the general intent relates to the acts listed in the offence's umbrella *actus reus* and the knowledge that such actions are directed against one of the protected groups (national, ethnic, racial or religious). Genocidal intent may be induced, especially during the early phases preparatory to the perpetration of the crime in question, through the application and proliferation of legislative and regulatory measures[31] aiming at the antagonistic segregation of the targeted community, the distinction of the community vis-à-vis the general population, the marginalization and objectification of its members, their exclusion from public sphere and public authority, their symbolization (as incarnation of a societal threat of or a communitarian pariahs, a scapegoat *tout court*), and finally their dehumanization.[32]

Let us now turn to the German Occupiers' actions within the framework of administering the territories posed under the authority of the Salonika-Aegean Military Command and the vibrant Sephardic Jewish Community of Thessaloniki. Central Macedonia, including Thessaloniki, was occupied by the Germans, who entered the city on April 9, 1941. Interwar diplomatic correspondence between Nazi officials and the German consulate in Thessaloniki highlights the anxiety of the Third Re-

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[28] HAGOUEL, P. I.: *The History …*, p. 6.

[29] INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA [TRIAL CHAMBER II], Case No IT-97-24-T, *Prosecutor v. Stakic*, Judgment of 31st July 2003, para 520.

[30] Cf. AMBOS, K.: What Does 'Intent to Destroy' in Genocide Mean?. *International Review of Red Cross*, 91, 2009, pp. 833–858.

[31] LEMKIN, R.: *Axis Rule in the Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*. Washington DC: Carnegie Endowment for International Peace/Division of International Law, 1944, pp. 79 *et seq*.

[32] INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG), *United States of America et alt. v. Goering & alt.*, 22 *Trial of the Major War Criminals before the International Military Tribunal* 418–419 (Judgement of 1st October 1946).

ich concerning the appropriate policy approach towards the case of Thessalonicean Jews, forming an integral part of the local society;[33] Sephardic Jews represented an unknown parameter for the Germans;[34] for instance, the German plenipotentiary in Athens, Viktor Prinz zu Erbach-Schönberg, advocated for the establishment of antagonistic segregation as the part and parcel of the Reich's policy against Sephardic Jews of Thessaloniki.[35]

At the same time, other officials of the Nazi leadership were quite puzzled by the Sephardic riddle, given that the Sephardim were a unique case, both ethnically and culturally, distinguishing themselves from Eastern European Jews. Furthermore, certain Nazi scholars during the first year of the military occupation of Thessaloniki, supported the idea that Sephardic Jews were culturally and racially different form the '*Ostjuden*' (East European Jews of Ashkenazim origin) thus posing at least a lesser threat to the 'purification of the Aryan blood' agenda of Hitlerites. However, Greek anti-Semitic advocates – fostered by the interwar military junta of Ioannis Metaxas – were constantly promoting the idea that the Thessalonicean Jews represented an imminent peril for the administration of Hitler's justice in the occupied Northern territories.[36]

For instance, Laskaris Papanaoum, an alt-right sectarian leader and Nazi collaborator, sent a letter of protest to the German consulate (during the summer of 1941), stating that *'in every European country, and in the Balkans, measures have long since been implemented to render the Jews harmless. Only the Jews of Greece – and Salonika in particular – remain free and untouched to this day* […]'.[37] The stagnation caused by the non-application of the racial and highly discriminatory Nuremberg Laws of 1935[38] in the territory of Thessaloniki, the protestations effectuated by Greek Nazi collaborators, alongside with a report of the German consul confirming the existence of reasonable grounds for the equal and analogous to the 'Ostjuden' treatment of Sephardims, created great irritation to the Berlin authorities, who deemed that the non persecution of Thessalonicean Jews was pernicious to the Nazi cause and prejudicial to the ultimate agenda of the 'Final Solution' (*Endlösung*).[39]

Adolf Eichmann and other high-ranking officials of the Reich government selected Dr. Max Merten,[40] attorney general of the Reich and civil officer possessing the

[33] DUBLON-KNEBEL, I.: The Holocaust of Greek Jewry as Reflected in Documents from the German Foreign Office, <http://greece.haifa.ac.il/images/events/holocaust_greece/knebel_english.pdf> (last accessed: December 2017), pp. 1–18.

[34] *Ibid*., p. 7.

[35] *Ibid.*, p. 4.

[36] Cf. PLOUT, J. E.: *Greek Jewry …*, p. 59.

[37] DUBLON-KNEBEL, I.: *The Holocaust …*, pp. 7–8.

[38] See HEIDEMAN, R. D.: Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials. *Loyola LA International & Comparative Law Review*, 39, 2017, p. 5.

[39] DUBLON-KNEBEL, I.: *The Holocaust …*, *loc. cit.*

[40] See V *Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem*, Testimonies Taken Abroad, Defence, Witness Max Merten (7th May 1961, Affidavit).

rank of *Hauptmann* (Captain) within the Army Group E (*Heeresgruppe E*), a German battalion operating in the Eastern Mediterranean and the Balkan Peninsula, to carry out the annihilation of Thessalonicean Jews.[41] Merten entered the Nazi party and the Nazi bar association in 1937.[42] He was appointed *Kriegsverwaltungsrat* (Civil Administrator) to replace the person he was meant to assist, namely the former Administrator Dr. Marbech, who was incumbent during the implementation of the *Black Sabbath Order*.[43] The peculiarities of non persecution during the first year of the occupation were brought to an end as soon as Max Merten was appointed Civil Administrator of Thessaloniki and head to the bureau for the management of the Jewish Affairs in the city, per force of an Order – dated August 6, 1942 – of the Field Military Command (*Feldkommandantur*) No 808 of Thessaloniki.[44] Merten's orders were clear: he should find a way to accelerate the *Endlösung*, without disturbing the local society of the occupied northern metropolis.[45] The Reich's chosen one was in desperate need of a mechanism sympathetic enough to the whole *cause* so as to effectuate a proper cosmogony,[46] namely the declassification of half of the city's population from the human race and the initiation of persecution via discriminatory attacks.[47]

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[41] US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b1f, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0001.

[42] US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b2c, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0029.

[43] US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b51, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0012.

[44] MOLHO, M. – NEHAMA, J.: *In Memoriam: Dedication to the Memory of the Jewish Victims of Nazism in Greece*. Thessaloniki: Jewish Community of Thessaloniki, 1974, pp. 327–332 (*in Greek*).

[45] US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b40, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0007.

[46] US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b52, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0010. Later on, Merten had no trouble providing incriminatory statements against his former colleagues (see cited document).

[47] These sympathizers proved quite handy when Merten was indicted by the Hellenic Republic's prosecutorial authorities, giving him the necessary leverage so as to be '[…] calm because his astonishing memory for details called to his recollection one fact which invalidates the most damaging charge by the Greeks against him, namely enrichment from Jewish properties'; on this see US CENTRAL INTELLIGENCE AGENCY (FOIA), Special Collection, Nazi War Crimes Disclosure Act, Doc No 519b7f95993294098d512b64, Doc ID /specialCollection/nwcda6/154/MERTEN, MAX/MERTEN, MAX_0005.

The Endlösung on the Move: Bystanders, Collaborators and the Preparation of Genocide

Almost a month before Merten's appointment becomes effective, on the Sabbath of July 11, his predecessor signed the so-called *Black Sabbath Order*,[48] a General Direction or Decree towards all male Jews of Thessaloniki, aged 18 to 45 years old; persons falling within the ambit of the Order, were obliged – under the pain of immediate arrest and indefinite detention – to appear and assemble for registration at *Plateia Eleftherias*,[49] the Liberty Square, which was then the urban epicentre of Thessalonicean city culture. The goal was to identify, measure, and confirm the pool of available men to be enlisted for forced-labour. At noontide, nine thousand (9,000) adults gathered in the square.[50] They were forced to stand for hours under the scorching sun, while German soldiers coerced many of them into performing callisthenics, *in lieu of* fake military drills.[51] This was the first time, Merten utilized collaborators, Nazi and anti-Semitic local sympathizers, to infuse a culture of 'bystandism', crucial to the annihilation policies which were due for execution on the following months.[52]

Thessaloniki was the home land of fierce anti-Semitic, ultra-nationalist political and paramilitary organizations from the beginning of the 20th century.[53] Fractions like the Triple E (EEE, standing for Elliniki Ethniki Enosi, National Hellenic Union) were particularly active in supporting anti-Semitism and advocating for the ethnic-cleansing of the region during the early 1920s, targeting prominent members of the Jewish Community and spreading all kind of malicious propaganda against local Jews, for instance connecting them with Bulgarian irredentism towards the Thessalonicean territory or communist conspiracies promoting the secession of the region from Greek sovereignty and the creation of a socialist puppet State.[54] Successful incitement and the turbulent political atmosphere of 1930s effectuated a proper pogrom against certain Jewish families of high social and political status within the city and the destruction of several Jewish buildings and institutions in 1931.[55] Key-players to the 1931 incidents were subsequently acquitted by a criminal tribunal seated in the northern city of Veroia in April 1932. Associations and unions linked to the Veroia trial were subsequently dissolved by the authorities of

[48] See TZAFLERIS, N.: "Black Sabbath" and the Holocaust of Greek Jewry: The Holocaust in the Jewish Metropolis of Salonika. *Yad Vashem Quarterly*, 66, 2012, pp. 8–9.

[49] MAZOWER, M.: *Salonica …*, p. 395.

[50] BOWMAN, ST. B.: *The Agony …*, pp. 50–51.

[51] YACOEL, Y.: *Memoirs 1941–1943*. Thessaloniki: Partiritis, 1993, pp. 58–59 (*in Greek*).

[52] MAZOWER, M.: *Salonica …*, *loc. cit.*; BOWMAN, ST. B.: *The Agony …*, *loc. cit.*

[53] MOHLO, R.: *Popular Antisemitism …*; BOWMAN, ST. B.: *The Agony …*, pp. 30 *et seq*.

[54] KALLIS, A.: The Jewish Community of Salonica under Siege: The Antisemitic Violence of the Summer of 1931. *Holocaust and Genocide Studies*, 20(1), 2006, pp. 34–56.

[55] *Ibid*. 47–48.

the Metaxa's dictatorship. However, eliminationist and anti-Semitic fractions were still quite present in the area, when the civil administration decided to call upon them for the perpetration of the very first phase of genocide; distinction and marginalization.[56]

The Black Sabbath Order (July 11, 1942)

During the Black Sabbath incident, local anti-Semites gathered in the Liberty Square publicly praising the acts of the German military authorities, while fomenting other locals to denounce any Jew who – to their knowledge – violated the Black Sabbath Order, thus escaping German forced-labour enlistment. To the aftermath of the Black Sabbath Order, local non-Jewish population rapidly acquired a spirit of bystandism, a self-imposed moral blindness and rational indifference; non-Jewish Thessaloniceans, terrified to raise their voices against the persecution of their fellow citizens, remained in petrified silence while atrocities against the Sephardic Jews were gradually unfolding, bringing to the threshold of extinction the flourishing community, whose long presence and contribution to the progress of the city had earned Thessaloniki the sobriquet *Madre d'Israel* ('Mother of Israel').

Through public humiliation, incited and eulogized by collaborators, Merten drew a definite line[57] between non-Jews and Jewish citizens of Thessaloniki, manhandling and downgrading the Sephardic Jews, forcing them to perform false drills at gunpoint while showing them off as an instrument of amusement to local bystanders. The message was crystal clear: all Jews and sympathizers are inferior creatures, destined to submit before German authority and Greek spirit; all Greeks not praising or tolerating in silence the torments of their fellow countrymen were to be treated as seditionists, traitors and members of a group despised more than Jews themselves, Judeophiles, i.e. Jewish sympathizers. Antagonistic segregation and an 'us versus them' culture[58] of guilty tolerance towards atrocities were thus imprinted in the very centre of civil life in occupied Thessaloniki.

The Forced Labour Directive and the Ransom Incident (July – November 1942)

Collaborationism and bystandism created a new dynamic for the development of Merten's plan to de-judify (*Judenrein*) Thessaloniki.[59] Soon after the completion

[56] See the enlightening testimony of Itzchak Nechama in II *Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem*, Session 47th (22 May 1961).

[57] See APOSTOLOU, A.: The Exception of Salonika: Bystanders and Collaborators in Northern Greece. *Holocaust and Genocide Studies*, 14(2), 2000, pp. 165–196.

[58] See – in general – MOSHMAN, D.: Us and Them: Identity and Genocide. *Identity: An International Journal of Theory & Research*, 7(2), 2007, pp. 115–135.

[59] Cf. DUBLON-KNEBEL, I.: *The Holocaust* …, p. 12.

of Liberty Square's assemblage and registration, 9,000 male members of the Jewish community were conscripted for forced labour in various parts of the Military Command's territory, forcefully employed to construct a lane connecting Thessaloniki to the city of Katerini and the cradle of Central Greece, Larissa, regions long suffering from malaria and pestilence. Forced labour for the construction of this road artery was by no means a fortuitous choice. The Thessalonicean Jews were unknowingly preparing their own funeral lane, paving the road of their forcible transfer to the Polish death camps.[60]

Hard labour, unhygienic conditions and malnutrition taken in conjunction with the fact that most were already either bodily or else traumatized by the recent war, while they were unaccustomed to hard labour and manual activities, increased radically the death and sickness rates amongst the conscripts.[61] In less than ten weeks, 12% of the conscripts died of exhaustion and disease.[62] This situation forced the community to negotiate with the German authorities. The negotiations led to an understanding according to which the Jewish Community agreed to pay as ransom a lump sum of 2,500,000,000 (two billion five hundred million) drachmas in order to exempt its members from further compulsory enlistment. However, later on Merten demanded the overall sum for the liberation and safe return of the enlisted men to be raised to 3,500,000,000 (three billion five hundred) drachmas, an exorbitant amount of money, impossible to be gathered even in the pre-war years of economic growth and prosperity. Between October and November 1942, under 7 (seven) cheques signed by the head of the Jewish community and countersigned by Max Merten to the regional office of the National Bank of Greece, the ransom was paid, providing to the bearer of the instruments a lump sum of 1.9 billion drachmas.

Yet, until now nobody actually knows what became of the funds, who was the ultimate payee/beneficiary of the instruments in question and where the funds were subsequently distributed or placed. In 2013 the Second Civil Chamber of the Hellenic Court of Cassation (*Areios Pagos*) in its Judgment No 2013 of November 8, 2013 rejected claims brought by the Jewish Community of Thessaloniki against the Federal Republic of Germany for the ransom incident of 1942, opining that the jurisdictional immunity of the foreign State whose sovereign acts formed the basis of

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[60] MAZOWER, M.: *Salonica …*, pp. 395 *et seq*.; BOWMAN, ST. B.: *The Agony …*, p. 51.

[61] Cf. Merten's testimony in V *Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem*, Testimonies Taken Abroad, Defence, Witness Max Merten (7th May 1961, Affidavit): By order of the Commander dated 7th July 1942, Jews from Salonika's intelligentsia were included in forced labour programmes. The action started on 11th July 1942, a Saturday. After a few days it covered eight to nine thousand Jews. They were employed on road building and railway works. They were housed in the most wretched conditions in forced labour camps. Owing to their previous occupations, these Jews were unaccustomed to hard physical labour. The work involved, however, was of the hardest nature. The result was a high mortality rate, and I consider that the figure of twelve per cent in two and a half months, given by Molcho in his book In Memoriam, is still too low.

[62] See HEKIMOGLOU, E.: The "lost" cheques of Merten. *Thessalonikeon Polis*, 18, 2005, pp. 40–59 (*in Greek*).

the claim under litigation, barred the *forum's* judicial authorities from addressing the merits of the case.[63]

Following exhaustion of local remedies, the community seized the European Court of Human Right.[64] The Strasbourg Court did not address the merits of the case, either, since it declared the application inadmissible as manifestly ill-founded in 2014. So this particular aspect of Jewish objectification remains not only neglected but also unredressed. The objectification of male Thessalonicean Jews and their equalization to tradable particles, initiated by the Merten administration furthered the marginalization of the community and paved the way for the dehumanization of its members. Genocide, being itself a crime against the very existence of the targeted group, is rooted in practices and policies of distinction aiming at leaving the victim-community bereft of any protection or moral status affordable to a collective association of human beings.[65]

Bystanders could be assured that tradable persons, used as leverage or slaves, were not to be considered of equal standing vis-à-vis the rest of the citizens; they were not their neighbours, friends, co-workers etc.; they should be treated as objects of inferior nature and no status. Given the ultimate end of the Merten administration, the initiation of the 'Final Solution', the ransom incident was actually a multiplying factor; the community was further dissociated from the rest of the population, it was terrorized by the prospect of losing most of its male members, it faced extreme marginalization since it was left totally alone to address the intricacy of finding such an exorbitant amount of money within a limited time-frame; finally, the post-ransom Jewish Thessaloniceans were faced with silence, indifference and even discomfort by the majority of their fellow citizens, being a constant reminder of their own inadequacy to prevent the Merten's atrocities.[66]

Wisliceny & Brunner Arrive Alongside With the Nuremberg Laws

On Saturday, February 6, 1943 a Special Assignment Detachment of the Reich Security Service in charge of the Jewish bureau was dispatched to Thessaloniki with clear

[63] CIVIL CASSATION COURT (HELLENIC REPUBLIC), CHAMBER A2 (CIV.), Judgment No 2013/2013 (8 November 2013), para III (reported in the Legal Database NOMOS).

[64] CENTRAL BOARD OF JEWISH COMMUNITIES IN GREECE, Statement regarding the 'Application of the Jewish Community of Thessaloniki before the ECtHR for the vindication of Occupation's Ransom' (4th March 2004), <https://kis.gr/index.php?option=com_content&view=article&id=991:2014-03-05-08-46-25&catid=54:2009-05-27-11-10-17&Itemid=30> (last accessed: December 2017). See also JEWISH COMMUNITY OF THESSALONIKI, Announcement 'Submission of Application against the Federal Republic of Germany', <http://www.jct.gr/view.php?id=547> (last accessed: December 2017).

[65] See FOURNET, C.: *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory*. Aldershot: Ashgate, 2007.

[66] See APOSTOLOU, A.: *The Exception …*, *loc. cit.*

orders to get rid off the Jews, as soon as possible. This unit was headed by Dieter Wisliceny, SS Captain (*Hauptsturmführer*), and his subordinate, Alois Brunner, also an SS official (Hauptsturmführer). Merten had established a mechanism gradually dissociating the community form its own vital space in history, urban development, and the public sphere. However, he deemed it quite profitable to retain the Jewish community terrorized, yet alive, so as to drain out all the wealth that its members could provide in order to protect themselves and their families from further persecution.[67]

The Berlin's *attachés*, themselves Eichmann's mentors and collaborators, came to accelerate the process and reprimand Merten for his delay. This delay, of course, gave the Administrator a gold opportunity to loot almost all the monetary gold available to the community of Thessaloniki in its private reserves.

The Yellow Star Order of February 6 (8), 1943

The chain of events starts with the order to Rabbi Koretz, spiritual head of the Community and appointed president, to confer with the SD Detachment. This takes place on Monday, February 8, 1943 and, immediately, he is handed down the first order signed by Max Merten introducing the German Nurnberg Racial Laws effective almost immediately. The mockery of it rests in the details of the order; the said juridical act was antedated to February 6. The order decreed that Jews should be distinguished as such, i.e. marked with a distinctive sign, and that they should concentrate at and live in specific areas (*Ghettos*). Wisliceny is empowered to enforce these directives and issues implementation orders. These orders command that all Jewish shops should be marked as such, and, the distinctive mark for all Jewish Greeks aged more than 5 years should be the Yellow Star of David (the six pointed star). It should be made out of cloth and sewn on garments and overcoats. Wisliceny's order stipulated that, along with the garment distinctive mark, all Jewish Greeks should be issued a Community Identity Card (Ausweis) numbered sequentially and identifying the holder as Jewish. The same number appearing on the ID should also be stamped on the cloth stars.[68]

Segregation & Distinction Orders of March 1943

The final stage of deprivation from public space and negation of public life was initiated on early March 1943. Pursuant to an order of the Civil Administration a ban was instituted for Jews, curtailing further their freedom of movement; Jews were prohibited from walking on the promenade of the Thessalonicean beach, and the

[67] MAZOWER, M.: *Salonica …*, pp. 399 *et seq*.

[68] See Security Police and Security Service (S.D.) Branch in Salonika, To: The Jewish Community in Salonika, Attn: The Chief Rabbi, Dr. Koretz, Re: Implementation order of the military commander of Salonika-Aegean (February 12, 1943), <http://www.jewishvirtuallibrary.org/jewish-community-of-salonika-instructed-on-wearing-the-yellow-star> (last accessed: December 2017).

main streets, they were impeded from trading in the most central and commercial area of the city, the Egnatia avenue, and they were denied the right to leave the ghettos on Saturday. The use of public transport, public utilities and public phones was also banned. The *Segregation Decree* of late March 1943 established a separate Jewish military police (*Juden Ordnunspolizei*), a rare form of collaborationist structure within the targeted community, while obliging all Jewish citizens to fill out detailed questionnaires about their assets. Purportedly, such juridical acts were paving the way for the creation of an autonomous self-contained entity, a Jewish polity within the city of Thessaloniki; consequently, many members of the community submitted voluntarily to the recording of assets process, believing that their future was guaranteed.[69]

The Tutelary Administration of Jewish Properties (Immediate Effect Order of March 7, 1943 & Law No 205 of May 29, 1943)

Soon after, the last act of *Shoah's* preparation was initiated. Under Law No 205/1943[70] in the region under the jurisdiction of the General Directorate of Macedonia. The law sanctioned *ex post* the *Immediate Effect Order* of March 7, 1943, issued by Max Merten, concerning the tutelary administration of the Jewish properties and businesses.[71]

According to the aforementioned Decree, Greek collaborators were named *Treuhänder*, i.e. custodians or trustees of Jewish properties and businesses, while the armed forces supervising the execution of the orders on many occasions coerced Jewish businessmen to sign off their entire property to the designated trustee, usually Greek public servants, black marketeers, collaborationist informants, and other Nazi collaborators. The same fate awaited the Jewish land plots and houses, abandoned by their tenants first to abide with the ghetto urban restrictions, leaving the greater part of wealthy Jewish neighbourhoods off the ghetto limits, and afterwards to follow the path towards annihilation in the death camps of Auschwitz-Birkenau and Dachau.

Pursuant to the *Immediate Effect Order* a special administration was established within the General Directorate of Macedonia; the 'Service for the Administration of Israelite Properties' (*Ypiresia Diacheiriseos Israelitikon Periousion*). The end to be pursued by the said authority was crystal clear. As per the first provisions of its constitutive *Order*: *You are hereby ordered to place all Jewish shops and businesses in Thes-*

[69] BOWMAN, ST. B.: *The Agony …*, pp. 65 *et seq*.

[70] Law No 205 of May 29, 1943 '*On the Administration by the Occupation Authorities of the Sequestered and Abandoned Jewish Properties*', [1945] Official Gazette, Issue A', No 160 (*in Greek*).

[71] See MAGLIVERAS, K.: *The Question of War Reparation for Looting during the Nazi Occupation of Greece: The Case of Jewish Monetary Gold*. Athens: Central Board of Jewish Communities in Greece, 2009, pp. 20 *et seq*. (*in Greek*).

saloniki under the power of Greek custodians – trustees [Treuhänder], *posing each and every business under the control of a sole custodian – trustee. To the end of supervising the actions of the custodians – trustees, you are mandated to establish a separate 'Service for the Administration of Israelite Properties', under whose authority all custodians – trustees are to be submitted. Further directions regarding the process of transferring ownership of the formerly Jewish properties to their custodians – trustees will be granted soon.* […]. *Constantly, and in any case on a weekly basis, you must submit written reports concerning the progress of the case in question.*[72]

Law No 205 not only sanctioned but also furthered the looting of Jewish wealth. Although, trustees were named mere administrators of the requisitioned business or property, custodians of small shops and average commercial enterprises were allowed to liquidate the assets and usurp the outcome of the process, while acquiring full ownership of both the building and the enterprise assets. Per force of Article 14, all houses and domiciles formerly occupied by Thessalonicean Jews were considered *ex lege* requisitioned and their administration was attributed to the General Directorate of Macedonia. Such buildings were to be used for the housing of non-Jewish locals, public and municipal officers, refugees and homeless persons according to the Directorates best judgment. The application of the legal norms in question was further complicated by the practice of *epistles extraordinary to the bearer*, i.e. orders in the form of official letters addressed to the authorities of the Salonika-Aegean Military Command and signed by civil administrators, such as Merten or Wisliceny, allowing the bearer to demand the assistance of the military authorities so as to be granted full access to the sequestered property, thus being placed under his/her administration. Despite the thin veil of legality, administrators were acting as owners, disposing the property under custody at will. In a likewise manner, requisitioned Jewish domiciles were looted and subsequently occupied by German collaborators or, even common citizens who took advantage of their fellow-countrymen predicament so as to upgrade their social status and increase their patrimony, by usurpation and unlawful appropriation of the abandoned Jewish establishments and immovable assets.

Epilogue: The Juridical Path to Genocide

As the first convoys of the deported Thessalonecean Jews began their deadly journey from the train station of Thessaloniki to the hub station of Larissa and from there to Krakow, with their ultimate destination the Auschwitz death camp, on March 15, 1943 the juridical path to genocide has been firmly established. Legal measures promoting antagonistic segregation and implementing demarcation policies aiming at the distinction and dissociation of the community from the general population proved deadly successful. The Black Sabbath order distinguished and margin-

[72] 'Befelshaber Saloniki-Aegaeis Abteilung Militaerverwaltung, Nr. MV pol 5 283 / Dr. Me' in MAGLIVERAS, K.: *The Question* …, p. 20 (Greek translation) & 144 (German copy).

alized the community, dishonouring its members and silencing by the iron feasts of German militarism the voices of opposition; the Forced Labour Directive and the Ransom Incident promoted the segregation between Jews and non-Jews in the city, infusing mistrust and enmity between them; the objectification of the Jewish Thessaloneceans solidified by the ransom incident deepened and deteriorated the 'us versus them' ambiance, fostered by the occupation authorities; at this point the community had been fairly distinguished and targeted, while the objectification of its members acted as the prelude to the dehumanization, the ultimate *telos* of the Final Solution's preparatory stage. The Yellow Star and the Segregation & Distinction Orders implemented a multi-level policy of racial discrimination, constructing an ideal-type of Jewish impurity to be purged by the fires of Auschwitz.

The ghettoization of the Baron Hirsh neighbourhood, the overall tolerance towards the spoliation of the abandoned houses and businesses, and the identification Directive erected an impenetrable barrier in the idea of citizenship and civility; Jews were not included in the civil order, thy were 'exotic', confined within the Hirsh ghetto, they were denied any kind of *jus standi* in the public sphere and in the public life. The message of this absence was crystal clear: with the Jews gone, the Greeks, collaborators and/or bystanders could actually find benefit in the epicentre of the atrocity. The Tutelary Administration Regime rendered the genocidal scheme against Thessalonecean Jews an ironclad operation. The extreme poverty imposed on the occupied population, the general relaxation of moral standards promoted by the war necessities, the core-deep schism between the Jewish and non-Jewish population of the city combined with the overall indifference towards the value of human life, consolidated by famine and pestilence as direct effects of German administration in the occupied territories, bestialized the Greek population of the Thessaloniki. Consequently, the final act to the prelude of the *Endlösung*, the monetarization of the imminent atrocity as a mechanism of dissemblance and collective guilt, left the targeted community totally abandoned to the malicious conspiracies orchestrated by the civil and military leadership of the Third Reich. Thus, Jews of Thessaloniki were finally dehumanized, considered mere instruments impeding the distribution of wealth amongst other societal sections.

The extermination of the community and the welfare of the remaining non-Jews, a match made in hell, may explain the low numbers of persons that were able to escape deportation through concealment. Although many brave Thessaloneceans tried to protect their fellow citizens by granting them asylum in their own houses or providing them with fake identification documents, the majority of the population stood by as the most thriving Jewish community of the Balkan peninsula was brought to its knees by the Occupiers and their collaborators. Bystandism, as a culture of self-imposed blindness, was afterwards coupled with spoliation and usurpation of the abandoned wealth. This sort of collective guilt may explain contemporary reluctance of local authorities to reanimate the Jewish heritage of the city. Sephardic toponyms and quarters are long gone, while the very first Holocaust Memorial Monument was erected in 1997 to be transferred to its rightful place, the Liberty Square, in 2006.

The Aristotle University of Thessaloniki only in 2017 did acknowledge the forcible contribution of the Jewish community to its own progress and development by instituting a monument to the memory of the Jewish heroes and martyrs of the city; another monument is due for unveiling in the Villa Kapantzi, the former 5th male middle school of Thessaloniki, where 40 Jewish students were not allowed to achieve graduation, since they were forcibly deported to Auschwitz, never to return. The culture of negation is gradually collapsing, after 72 (seventy four) years of self-preserved oblivia. In the course of this presentation juridical acts and administrative practices of the Occupation authorities towards the Thessalonicean Jews have been addressed under the explicit purpose of identifying patterns or policies solidifying the perpetration of genocide against the Jewish population of the city. Genocide as a crime of destruction negates the very right of existence of the targeted community. Such an extreme abnegation of humanity cannot be effectuated in the nick of time. It needs calculated policies coupled with an ambiance of at least negative support, or tolerance, towards the unfolding atrocity. The legal norms and administrative actions were but mere instrument to the creation of this environment.

Gradually, they transformed Thessaloniki in what has been aptly described as a 'City of Ghosts';[73] the Thessalonicean aspect of the *Shoah* stands as a paradigmatic case on the banality of evil; distinction, targeting, marginalization, objectification, dissociation, discrimination, and dehumanization, all preparatory stages of genocide, could not have been effectuated without internal or intra-societal assistance, in the forms of collaborationism and bystandism. The genocidal intent, corresponding to the solidification of each and every of the aforementioned stages, must be obvious by now. What remains unaddressed, is the iron shadow of denial concerning the Jewish past of Thessaloniki and the actors involved in the genocidal uprooting of the community. To this end, memory and collective symbolic reparations offer the most suitable remedy; to this end, I submit the present essay to your best of judgment.

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[73] MAZOWER, M.: *Salonica …*, pp. 429 *et seq*.

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Peter Vyšný[1]
Trnava University in Trnava, Faculty of Law, Department of Legal History

The Legal Status of Indians in Colonial Spanish America as a Legal Expression of Their Positive Discrimination

Abstract: The present contribution briefly examines the specific legal status of Indians, the native inhabitants of the American colonies of Spain (Indies), which was a legal expression of their positive discrimination. Since Indians were considered free subjects of the Spanish Crown and their situation in the colonial society was unfavourable (due to various reasons), the Crown protected them systematically and favoured them in various ways, as well as it allowed them to live separately from colonists of Spanish origin and have some degree of self-government, and so on. Indians gradually became so-called *personae miserabiles*; they had their personal freedom and a whole series of special privileges, but at the same time they were considered to be some kind of 'less perfect' people who would not do without a tutor or a curator, i.e. the Crown. The Crown as a public tutor or curator of the Indians imposed on them a completely new way of life – the European/'civilized' and Christian/Catholic one, coupled with many restrictions, prohibitions and orders. This Crown's policy towards Indians was due to the fact that one of the most important sources of legitimacy of the Crown's rule over the Indies was its mission to 'civilize' and Christianize the Indians, which was entrusted to it by the pope.

Key words: Indies; Indians; Spanish Crown; Positive Discrimination; Legal Status; *Personae Miserabiles.*

Introduction

The Spanish Crown, as it is well known, systematically introduced the Indians, who were the original inhabitants of its American colonies (Indies; spanish: *Indias*), to a way of life completely new for the Indians, which from the Crown's point of view was the only correct and perfect one since it was 'civilized' and based on Catholicism. At the same time the Crown was implementing paternalistic and protectionist policies towards the Indians and in many ways was discriminating them positively. The legal expression of this attitude of the Crown to the Indians became the specific legal status of the so-called *personae miserabiles* (miserable persons), which the Crown granted to the Indians during the 16th century – therefore the Indians were sometimes referred to as "indios miserables" (miserable Indians).

[1] doc. JUDr. Peter Vyšný, PhD., contact: petervysny@hotmail.com.

The aim of this contribution is to: 1. characterize the legal status of the *personae miserabiles*, 2. briefly summarize the reasons which instigated the Crown to provide the Indians with the legal status of *personae miserabiles*, and 3. show that Indians' legal status of *personae miserabiles* positively discriminated them in many ways. The contribution is, due to its limited extent and considering that further investigation into the topic is planned by the author, only an outline.

The legal status as well as the real situation of the Indians in colonial society represents a complex issue that has been explored in varying degrees and from different angles over the past decades. In addition to syntheses[2] and many articles examining this issue from the point of view of Spanish colonizers and of contemporary European and Christian civilization, there are also works that analyze it from the point of view of the Indians.[3] Not only from the point of view of legal history, it is particularly important that recent studies do not examine the legal status of the Indians solely on the basis of contemporary legislation but also in the light of different aspects of the everyday social reality of the Indies and concrete legal cases, as well as taking into account local or regional specifics, which produces a more complete, accurate and realistic picture of both Indians' legal status and real situation in the colonial society.[4]

General Characteristics of Personae Miserabiles

The term *personae miserabiles* can be translated as 'miserable people'. In pre-modern times it referred to people who had long been in a particular unfavourable life situation and needed constant help, support and protection from the community, state or Church. A means to help, support and protect *personae miserabiles* was to provide them with personal privileges or (as one would say today) to discriminate them positively. On the other hand, *personae miserabiles* were considered to be people who could not, for objective reasons, satisfy sufficiently their needs nor enforce and defend their interests by themselves only. The legal expression of it was the relative legal incapacity of the *personae miserabiles*, that is, these persons, even if free, had to have a representative (a tutor or a curator) who acted (in various public and private social

[2] See e.g.: HANKE, L.: *The Spanish Struggle for Justice in the Conquest of America*. Boston: Little, Brown and Company, 1949. HANKE, L.: *El prejuicio racial en el Nuevo Mundo. Aristóteles y los indios de Hispanoamérica*. México: SEP/SETENTAS, 1974. HANKE, L.: *Uno es todo el genero humano*. México: Gobierno Institucional del Estado Chiapas, 1974. PAGDEN, A.: *La caída del hombre natural. El indio americano y los orígenes de la etnología comparativa*. Madrid: Alianza Editorial, 1988. PÉREZ LUÑO, L.: *La polémica sobre el Nuevo Mundo. Los clásicos españoles de la Filosofía del Derecho*. Madrid: Trotta, 1995.

[3] See e.g.: KELLOGG, S.: *Law and the transformation of Aztec culture, 1500–1700*. Norman: University of Oklahoma Press, 1995. LOCKHART, J.: *The Nahuas After the Conquest. A Social and Cultural History of the Indians of Central Mexico, Sixteenth Through Eighteenth Centuries*. Stanford: Stanford University Press, 1992. WACHTEL, N.: *Los vencidos. Los indios del Perú frente a la conquista española (1530–1570)*. Madrid: Alianza Editorial, 1976.

[4] See e.g.: CEBALLOS GÓMEZ, D. L.: Gobernar las Indias. Por una historia social de normalización. *Ius Commune. Zeitschrift für Europäische Rechtsgeschichte*, XXV, 1998, pp. 181–218.

spheres) instead of the *personae miserabiles* and on their behalf and benefit, having at the same time certain power over them.

The term *personae miserabiles* refers to a specific institution of pre-modern law, which no longer exists in modern law, on the grounds that the granting of special privileges (*iura singularia*) only to a certain group of people (and not to the entire population), as well as a special treatment of this group by the state or the Church is contrary to the principle of legal equality of all individuals and their right to equal treatment by public authorities. However, the pre-modern law did not recognize such a principle and moreover it was characterized by particularism, that is, it included legal regulations which were applied only to particular social groups or only in some parts of the state territory. Thus, there is no surprise that the institution of the *personae miserabiles* existed within the pre-modern legal system.[5]

No universal definition of *personae miserabiles* occurred in the past and the list of categories of people considered *personae miserabiles* never became *numerus clausus*. The term *personae miserabiles* remained rather vague throughout the whole period of its application as confirmed by, for example, the *Ethymologiae* of Saint Isidor of Seville, in which the word 'miser' refers very generally to those who have lost all their happiness and the word 'miserabilis' is understood very broadly as anyone who is worthy of compassion.[6]

The expression *personae miserabiles* as a juristic *terminus technicus* first appeared in the late antiquity in Emperor Constantine I's *constitutio* C 3.14 *Quando imperator inter pupilos vel viduas vel miserables personas cognoscat et ne exhibeantur* [When the emperor judges minors, widows and (other) miserable persons, (the persons concerned) should not be forced to come (before the court); 334 AD]. The *personae miserabiles* mentioned in this *constitutio*, notably the minors, widows and those who were seriously sick for a long time, were granted certain procedural privileges due to their vulnerable situation: if these persons were sued, the imperial judge could not force them to appear at the imperial court; if they were plaintiffs, the defendants (who did not belong to the *personae miserabiles*) had to appear at the imperial court (or could be officially forced to do so). Later, the term *personae miserabiles* was adopted by *ius commune*, canon law, and the Law of Indies (*derecho indiano*),[7] but the categories of individuals belonging to the *personae miserabiles* were never defi-

[5] For more details see DUVE, Th.: *Sonderrecht in der Frühen Neuzeit: Studien zum ius singulare und den privilegia miserabilium personarum, senum und indorum in Alter und Neuer Welt*. Frankfurt a. M.: Vittorio Klostermann, 2008.

[6] Cfr. [173] Miser proprie [dicitur] eo quod omnem felicitatem amiserit. Secundum autem Ciceronem proprie mortuus, qui in Tusculanis (1,5) miseros mortuos vocat, propter quod iam amiserunt vitam. Miserabilis, quod sit miseriae habilis. ISIDORI HISPALENSIS EPISCOPI ETYMOLOGIARUM SIVE ORIGINUM LIBER X [online], http://www.thelatinlibrary.com/isidore/10.shtml (25/10/2017).

[7] *Derecho indiano* (Law of Indies) was a complex legal system of Spain's American colonies. On *derecho indiano* in general see e. g.: DOUGNAC RODRÍGUEZ, A.: *Manual de Historia del derecho indiano*. Segunda edición. México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas & McGraw-Hill, 1998.

nitely established. Therefore various categories of disadvantaged people were considered to be *personae miserabiles*, in particular the minors, seniors, widows, orphans, very poor, physically or mentally disabled, persons with serious long-term illness and, last but not least, the neophytes. The absence of a complete enumeration of concrete *personae miserabiles* has led to certain flexibility of the judicial practice since judges could *ad hoc* grant the legal status of *personae miserabiles*, i.e. some privileges, benefits and protection, to people who needed it due to their specific handicaps even if these people were not *personae miserabiles* according to the contemporary legislation or jurisprudence.[8]

Reasons for Granting the Legal Status of Personae Miserabiles to the Indians

The granting of the legal status of *personae miserabiles* to the Indians was a reaction to unfavourable situation of most of them in the early colonial society of the Spanish Indies (16th century). Many Indians, although *de iure* they were free people and free subjects of the Spanish Crown, respectively, *de facto* they became almost slaves since they were obliged to work life-long in favour of so-called *encomenderos*, Spanish colonists whom groups of Indians were entrusted on condition they 'civilize' them and introduce them to Catholicism. In practice, however, the *encomenderos* largely ignored their task to 'civilize' and Christianize the Indians and the only thing they were interested in was the Indians' labour force which they often abused. They also seized Indians' possessions and resources existing in Indians' territories to some extent.[9]

The unfavourable situation of the Indians instigated since the very beginning of the Spanish expansion in Indies (since 1492) a systematic, even if only partially successful effort of the Crown to improve it, which was based on extensive legislation aimed at helping and protecting the Indians,[10] as well as on colonial administrative and judicial apparatus which was complex but functioned problematically.

The first serious attempt to solve the inconvenient situation of the Indians in a special way – by granting the status of *personae miserabiles* to the Indians – did not occur until 1545. On October 19, 1545, Bartolomé de Las Casas, Bishop of Chiapas, Antonio de Valdivieso, Bishop of Nicaragua and Francisco Marroquín, Bishop of Guatemala, presented a petition to the *Audiencia de los Confines*,[11] which stated

[8] For more details see CASTAÑEDA DELGADO, P.: La condición miserable del indio y sus privilegios. *Anuario de Estudios Americanos*, XXVIII, 1971, pp. 245–335.

[9] For more details see e. g.: ZAVALA, S.: *La encomienda indiana*. México: Porrúa, 1992.

[10] The most important parts of this "Indians-friendly" legislation were the so-called *Laws of Burgos and Valladolid* (*Ordenanzas para el Tratamiento de los Indios*) of 1512/1513 and the so-called *New Laws* (*Leyes y ordenanzas nuevamente hechas por S. M. para la gobernación de las Indias y buen tratamiento y conservación de los Indios*) of November 20, 1542.

[11] *Audienca de los Confines* was the supreme colonial court whose jurisdiction spread over vast territory of today Chiapas (one of Mexican federal states), Guatemala, Belize, El Salvador, Honduras, Nicaragua and Costa Rica.

that the overall situation of the Indians was so bad that it undoubtedly made it possible to qualify them all as *personae miserabiles*. The petition tenaciously, even under the threat of excommunication of its addressees, i.e. the functionaries of the *Audiencia de los Confines*, imposed upon them in the case they would reject the petition, demanded that the Indians, as evident *personae miserabiles*, would be totally subordinate to the Church's jurisdiction, that is the Church would not only supervise the religious life of the Indians, but it also would resolve problems of their practical life and would provide them with both factual and legal assistance and protection in order to generally improve their situation in the colonial society. The core of the argument of the authors of the petition, strongly supporting the granting of the legal status of *personae miserabiles* to the Indians, can be resumed as follows: Indians were hard and unfairly suffering 'wretches' whom Spanish colonists arbitrarily and violently oppressed and brutally exploited and whose material existence, as well as religious life and posthumous salvation were fundamentally endangered, whereby this unfavourable situation ultimately threatened the mission of the Spanish Crown to Christianize the Indians, on which the legitimacy of the Spanish rule over Indies was based. Since royal colonial authorities were not able to enforce and defend the legitimate interests and rights of the Indians (especially in the countryside) and the Indians were largely unable to enforce and defend their own interests and rights before the court by themselves, the petition claimed that the only option was to completely subordinate the Indians to the Church's jurisdiction and its well-developed institutions.[12]

However, the Crown did not agree with the petition, because complete subordination of the Indians to the Church's jurisdiction would lead to the loss of its control of its Indian subjects, and moreover the care of the *personae miserabiles* was perceived as a task not only for the Church but also for the king. The Crown's disapproval was also due to the fact that it had constantly been struggling with the Church, as well as with the colonists/ *encomenderos,* for the control of Indians.[13]

The granting of the legal status of *personae miserabiles* to the Indians was also the result of the contemporary Spanish views of the Indians, which were heavily marked by many prejudices and stereotypical ideas, as well as by insufficient knowledge and inadequate interpretations of Indian societies and cultures. Although these views were not uniform, their overwhelming majority was based on the belief that the Indians were culturally, physically and intellectually underdeveloped – in the latter case, they might lack full rationality – and therefore must submit to the Spanish rule, along with they should serve Spaniards to some extent (even if not as Spaniards' slaves), since otherwise the Spaniards could not effectively help them become 'civilized' people and Christians and thus normal members of the 'only perfect' Western

[12] SEMPAT ASSADOURIAN, C.: Fray Bartolomé de Las Casas obispo: la naturaleza miserable de las naciones indianas y el derecho de la iglesia. Un escrito de 1545. *Historia Mexicana*, XL, 3, 1991, pp. 387–451.

[13] For more details see e. g.: CUNILL, C.: El indio miserable: nacimiento de la teoría legal en la América colonial del siglo XVI. *Cuadernos Intercambio*, 9, 2011, pp. 229–248.

and Christian civilization. The subjugation of the Indians to the Spanish rule necessarily implied some limitations on their personal freedom, but these, in Spanish perspective, were fully compensated by great positives that such a subjugation could bring the Indians – the acquisition of both a Christian identity guaranteeing posthumous salvation and a 'civilized' way of life.

The Crown considered the Indians to be its personally free subjects having certain rights that should be enforced in the colonial society and at the same time having certain obligations (towards the Spanish state represented by colonial authorities, the Church and Spanish settlers/ *encomenderos*) that they must meet. In 1493 Pope Alexander VI as *'dominus totius mundi'* ('lord of the entire world') 'donated' the Indies to royal spouses Isabel of Castile and Ferdinand of Aragon and their successors to Spanish throne on condition the Spanish Crown introduce systematically all Indians to Christianity and 'civilization', i.e. the Western way of life.[14] Therefore the Crown considered its essential duty to Christianize and 'civilize' the Indians and thereby make them people who in terms of their lifestyle, culture, religion, legal status and like would resemble Crown's other subjects (those who lived in Spain). On the other hand, the Crown was considerably influenced by the aforementioned view of Indians (Indians as physically, intellectually and culturally underdeveloped people) and soon became convinced that Indians were, as compared with Europeans, 'backward', 'simple', 'naïve', 'cumbersome', 'incompetent', 'passive' as well as 'physically and mentally much less resistant people', etc., who were incapable of taking care of themselves and therefore they needed to be systematically guided and protected. Moreover, the Crown's guidance and protection of the Indians was interpreted as the only means to 'improve' the thinking, behaviour and living conditions of these people along with to stimulate progressive development of their societies. This conviction of the Crown was reflected in the sphere of law by the qualification of the Indians as *personae miserabiles*, relying on the assistance and protection of a guardian (tutor, curator) who gradually (during the 16th century) became the Crown. However, it needs to be clarified, that the legal status of *personae miserabiles* did not belong to Indian elites who had full legal capacity.

Positive Discrimination of Indians as Personae Miserabiles

During the 16th century, a socio-political organization emerged in the Indies, which can be characterized as the coexistence of two major, significantly different categories of population – Spaniards, born in Spain or in the Indies, and the Indians. These categories, especially in the second half of the 16th century and in the 17th century, were referred to as the 'republics' in the sense of a part of the colonial society with certain autonomy. Both 'republics', i.e. the so-called *Republic of Indians* (*república de indios*) and the so-called *Republic of Spaniards* (*república de españoles*), lived sepa-

[14] For more details see e.g.: CASTAÑEDA DELGADO, P.: *La teocracia pontificial en las controversias sobre el Nuevo Mundo*. México: Universidad Nacional Autónoma de México, Instituto de Investigaciones Jurídicas, 1996.

rately, communicated together only to a limited extent and managed their internal affairs (at the lowest/ local level) by themselves, both being, however, at the same time subordinated to the same higher institutions of the colonial administration (viceroys, the courts called *audiencias* etc.), as well as the king of Spain. In both 'republics' the Law of Indies was widely used, even if in both of them also specific laws were applied to some extent (the law of Castile in the *Republic of Spaniards* and customary laws, which partially had emerged in pre-colonial times, in the *Republic of Indians*). The two 'republics' had their self-governments made up of municipal councils and various dignitaries. In the *Republic of Indians*, the Indian elite (*caciques*) had an important position within the institutional organization of the self-government.[15]

The creation of two 'republics' was linked to the Crown's policy towards the Indians. The Crown, as we already know, introduced a system of protection or positive discrimination of the Indians and attempted to Christianize and 'civilize' them. To achieve this it looked very useful to segregate, at least to some extent, the Spaniards and the Indians, i.e. to create the two aforementioned autonomous 'republics'. In other words, the Crown expected that its control of Indians, along with the assistance and protection the Crown was giving them, would be much more effective if they lived separately from the Spanish settlers. However, it remains questionable and by historiography unresolved whether the establishment of the *Republic of Indians* was the intention of the Crown, which, through its creation, intended to control the Indians more directly and effectively, and thus easier, or rather it proves certain failure of the Crown's colonial policy, namely its inability to assert its power and to achieve its actual goals in the Indies.

To implement its protective and 'civilizational' program aimed at the Indians the Crown undertook four complex measures.

Firstly, Indians were concentrated in separate villages. In the *Viceroyalty of Peru* (*Virreinato del Perú*)[16] these villages were called *reducciones* and had been in existence there since the 1570s. In the *Viceroyalty of New Spain* (*Virreinato de Nueva España*)[17] these villages were called *congregaciones* and had existed there since the 1550s. The concentration of Indians in special villages was supposed to accelerate the Christianization of Indians and their adaptation to the Western civilization, as well as enable the Crown to control effectively the Indians' behaviour, work and ful-

[15] DÍAZ REMENTERÍA, C.: La constitución de la sociedad política. In: Sánchez Bella, I. – de la Hera, A. – Díaz Rementería, C.: *Historia del Derecho Indiano.* Madrid: MAPFRE, 1992. LEVAGGI, A.: República de los indios y república de los españoles en los reinos de Indias. *Revista de estudios histórico-jurídicos*, 23, 2001, pp. 419–428.

[16] Spanish colonial administrative district, created in 1542, that originally contained most of Spanish-ruled South America, governed from the capital of Lima.

[17] Spanish colonial administrative district, created in 1535, that contained the territory of the Spanish Empire north of the Isthmus of Panama.

filment of their obligations (though having certain degree of autonomy, the villages were supervised by Spanish colonial authorities).[18]

Secondly, colonial (royal) administrative and judicial authorities as well as the Church had been suppressing systematically those elements of the original way of life of Indians that were incompatible with the Spanish (European) and Christian lifestyle.

Among them, were e. g. human sacrifices, rituals of Indian 'pagan' religions, promiscuity, polygyny or ritual cannibalism. However, the elements that were compatible could continue to be used as Indian legal customs (*costumbres*) in the *Republic of Indians*.[19]

Thirdly, virtually all institutions of the colonial administrative and judicial apparatus were obliged to help and protect the Indians, to respect their interests, rights and privileges and to treat them well.[20] Furthermore, a special office to protect and defend the Indians (*protector y defensor de los naturales*) was created. Originally (from ca. 1529 to ca. 1554) this office was held by the bishops, later (since the 1550s) by various laymen who worked for royal colonial administration,[21] which was related to the above-mentioned effort of the Crown to gain effective control over the Indians and maximally limit the power that the Church and the Spanish settlers had over them.

Fourthly, Indians were granted many personal privileges of different nature.[22]

Privileges granted to the Indians by the Crown, can be divided into procedural and substantive. Let us look at the procedural ones at first.

To the procedural privileges of Indians belong, *inter alia*, the following:[23]

a) *restitutio in integrum*. *Restitutio in integrum* was a mechanism which allowed to restore the legal situation of Indians previous to their current unfavourable situation, caused by the colonial authorities (the authorities, for example, did not inform the Indians about their rights, failed to help the Indians to enforce their rights or unlawfully intervened in Indians' affairs), or resulting from disadvantageous contracts that the Indians had executed;
b) the obligation of courts to promptly handle and terminate Indian cases;
c) criminal as well as civil cases of Indians were considered *casus curiae* (*casos de Corte*) and thus the highest royal judicial authorities in the Indies (i.e. the *audiencias* and the viceroys) were obliged to deal with them what at least theo-

[18] DÍAZ REMENTERÍA, C.: La formación y el concepto del derecho indiano. In: Sánchez Bella, I. – de la Hera, A. – Díaz Rementería, C.: *Historia del Derecho Indiano*, p. 53 ff.

[19] Ibid.

[20] Ibid.

[21] DOUGNAC RODRÍGUEZ, *Manual...,* pp. 229–231.

[22] DÍAZ REMENTERÍA, C.: La formación y el concepto del derecho indiano. In: Sánchez Bella, I. – de la Hera, A. – Díaz Rementería, C.: *Historia del Derecho Indiano*, p. 53 ff.

[23] VYŠNÝ, P.: *Historicko-právne súvislosti dobytia Nového sveta Španielmi*. Trnava: Typi Universitatis Tyrnaviensis, 2015, pp. 179–181.

retically should ensure that these cases would be resolved both professionally and justly. The Indians did not have to attend the hearings personally if they were too busy to travel to court or if they had no time to travel for their work;

d) it was assumed that Indians had not committed their criminal and civil offences as wilful acts unless the contrary was proven sufficiently before the court;

e) penalties imposed upon Indians by the courts were less severe than those imposed upon Spaniards. Moreover, the offences of Spaniards causing some harm to Indians were considered *crimina publica* and the persons (Spaniards) who were suspected of committing them were prosecuted by the courts *ex officio*, i.e. no formal accusations by the victims of offences (Indians) to start the trials were expected;

f) it was not possible to condemn the Indians to pay a fine and to forced labour;

g) Indians were not subject to the Inquisition, because they were considered to be neophytes, i.e. recently baptized, and thus (so far) 'incomplete' Catholics who would become 'normal' Catholics over time. This specific religious status of the Indians was the counterpart of their legal status of specially protected *personae miserabiles*;

h) the courts should resolve the cases concerning the Indians preferentially according to the principles of natural justice and taking into consideration the specific interests of concrete Indians. Therefore the judges dealing with these cases were supposed to use the positive law only as a secondary basis of their decisions.

As mentioned above, besides the procedural privileges Indians enjoyed the substantive ones. Among these were, for example, the following:[24]

a) since 1553 it was presumed that Indians were free persons. In other words, it was prohibited to enslave Indians. On the other hand, Indians could sell themselves to slavery in order to obtain some money;

b) Indians did not pay judicial and administrative fees and did not pay to their village priests for the celebration of sacraments and the funeral service;

c) Indians could not be forced to pay the churchshot to the Church and were exempted from paying the *alcabala* (sales tax) to the Crown. On the other hand, Indians had to pay *per capita* a special tax (*tributo*) to the Crown, whereby on the proper payment of this tax depended Indians' rights, especially the right to obtain and possess land, which they enjoyed in their villages;

d) in their villages, Indians could use their own legal customs unless they were not contrary to the Catholic faith or the Law of Indies. However, in practice there emerged many *consuetudines contra legem*;

e) Indian elites (*caciques*) were supposed to have (at the local level) their traditional sources of income and property, including real estate, which their ancestors had owned before the Spanish conquest of the Americas. Besides, they were supposed to have administrative and judicial powers over the local population comparable to those their ancestors had had before the conquest, but their per-

[24] Ibid., p. 181.

formance was limited in several ways – ordinary Indians, for example, could appeal the decisions of their *caciques* before the officials of royal colonial administration.

Conclusion

The Spanish view of the Indians as *personae miserabiles* should not be confused with scorn, even if Spaniards considered their civilization to be supreme and 'perfect' as compared to Indian cultures. The granting of the legal status of *personae miserabiles* to the Indians was undoubtedly an important expression of the Spanish serious effort to help the Indians and protect them, based on legal instrument (the concept of *personae miserabiles*) that was at the time available and seemed to be suitable to carry out this effort. However, it would be naïve to think that the application of this instrument to the Indians motivated only the effort to help and protect the Indians unselfishly. This application supported the promotion of political and economic interests of the Crown on the territory of the Indies. In the early colonial period, the Crown struggled with Spanish colonists and the Church for control of the Indian population, its labour force and the results of its work. The 'Indians-friendly' politics of the Crown, which the Crown had implemented initially through the Church and later by its own institutions (colonial administration), was based on many measures that not only improved the lives of the Indians but also intensified the administrative and economic control of the mass of the Indian population by the Crown and thus in various ways weakened the power of the rivals of the Crown – the colonists and the Church.

The purpose of the Indians' legal status of *personae miserabiles* and their positive discrimination, respectively, was also to accelerate and streamline the transformation of their thinking, behaviour and way of life, so that the Indians became sooner subjects to the Crown comparable to its Spanish subjects. However, this purpose largely failed in practice.

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Józef Ciągwa[1]
University of Silesia in Katowice, Department of Legal History

Acts of Discrimination in Interpellations and in the Legislation Implemented by the Head of State and in the Acts of the Legislative Sejm and the Silesian Sejm

Abstract: The reading of the interpellations submitted to the Voivode of Silesia by a group of Silesian Sejm deputies reveals a series of events bearing traits of acts of both factual and legal discrimination. Among the interpellations under study, those submitted by the deputies of the German Club (and, later, also by the representatives of the Socialist Deputies Club), discriminated against the German system of education: the interpellation of 16th March 1923 submitted by the German Club, a document which failed to take into account the will of parents enrolling their children with German schools, resulted in *forcing thousands of pupils to attend Polish schools*; similarly, the GC interpellation of 14th June 1923 concerning the State School of Industry in Bielsko, was an act of discrimination against education in German, as its tangible effect was the closure of the German-speaking section of the school. Another instance of discrimination against the ethnic Germans was groundless dismissal of two German locksmiths from the Nitrogen Compounds Factory in Siemianowice (the GC interpellation of 4th March 1925, concerning the termination if employment of Mr. Taszke and Mr. Wróbel by the Nitrogen Compounds Factory in Siemianowice). Similarly, the interpellation concerning the placement of war widows of German nationality at a disadvantage in granting war victims extraordinary support from the Silesian budget credits submitted by the Socialist Deputies Club on 13th February 1931 qualifies as a discriminatory act – as, beyond doubt, does the rejection of candidates of German origin for the management of one of the branches of the Workers' Food Association on the basis of a decisive statement of the head of the Department of Treasury of the Silesian Voivodship Office who declared that 'only a Pole may be approved as a deputy concession holder'.

Another object of discrimination – members of the Polish Socialist Party – becomes manifest in the text of the interpellation of 16th June 1930 concerning the events at the Katowice cemetery of 16th June 1930.

Apart from the interpellations, however, elements of discriminatory nature also loom large in selected legal acts: the act of the Silesian Sejm on the celibacy of female teachers (Act of 29th March 1926) and in several decrees issued by the Head of State and the Legislative Sejm, which significantly raise the voting age for the population of the Silesian Voivodship (both in the case of Silesian Sejm elections and in the case of elections to the councils of the municipal and rural communes).

Key words: Discrimination; Interpellations; Parliamentary Acts; Celibacy of Female Teachers

[1] Prof. Dr. hab. Jozef Ciagwa, Contact: jozef.ciagwa@us.edu.pl.

Introduction

The Second Polish Republic (1918–1939) consisted of 13 voivodships (provinces) and one municipal voivodship (the capital city of Warsaw) excluded from the Warsaw Voivodship. Of the 13 existing voivodships, only the Silesian Voivodship comprising the territory which until 1920, or relatively 1922, was part of Austria and Germany enjoyed an autonomous status. The Act of the Legislative Sejm (1919–1922) of 26th September 1922 *on the Principles of the Voivodship General Self-Government, in Particular of the Lviv, Ternopil, and Stanislavov Voivodships* (Journal of Laws of the Republic of Poland no. 90, item 829) governed the autonomy of three voivodships of south eastern Poland. In fact, the autonomy of these three voivodships was not implemented.

The Treaty of Versailles concluded on 28th June 1919 between Germany and the Allied and Associated Powers[2] provided in art. 88[3] for conducting a plebiscite to settle the issue of the division of Upper Silesia between Germany and Poland. As a form of direct democracy, plebiscites were held in Warmia and Masuria (11th July 1920);[4] and Upper Silesia (20th March 1921). Nevertheless, the plebiscite in Teschen Silesia, Spiš and Orava scheduled on 24th July 1920 did not take place.[5]

Truly, both Poland and Germany used the whole set of weapons of pre-plebiscite propaganda in order to promote their cause and secure the most favourable results. Important measures designed to encourage the participants in the plebiscite to vote in favour of Upper Silesia being part of Poland or the Weimar Republic included promises of autonomy. An Act of the Prussian Landtag of 14th October 1919 on establishing an Upper Silesian province contained declarations of autonomy for the German part of Upper Silesia.[6] In reality, the German declaration of autonomy was never implemented. In response to the German autonomy, during its 164th sitting, the Polish Legislative Sejm enacted a Constitutional Act of 15th July 1920 which contained an organic statute of the Silesian voivodship (Journal of Laws of the Repub-

[2] English and French were the official languages of the Treaty. For the use of the Polish authorities and offices a translation of the text of the Treaty into Polish was published in the Journal of Laws of the Republic of Poland of 1920, no. 35, item 200.

[3] Art. 88: In the portion of Upper Silesia included within the boundaries described below, the inhabitants will be called upon to indicate by a vote whether they wish to be attached to Germany or to Poland.

[4] Articles 94 and 96 of the Treaty of Versailles formed the legal basis for the plebiscites in Warmia and Masuria.

[5] These plebiscites, among others, are discussed by Professor Andrzej Ajnenkiel in his publication tilted *Plebiscyty w Polsce i w Europie po I wojnie światowej*. In: *Z perspektywy sześćdziesięciu lat*. Warsaw 1982, pp. 283–301.

[6] Preussisches Gesetz, betr. die Errichtung einer Provinz Oberschlesien, vom 14. Oktober 1919 (GS 169). Polish publications containing a text of the Act include *Materiały do ustawy konstytucyjnej z 15 lipca 1920 r. zawierającej statut organiczny Województwa Śląskiego* (Mikołów 1932, pp. 129–131); and a publication of HAWRANEK, F.: *Polityka Centrum w kwestii górnośląskiej po I wojnie światowej.* Opole 1973, pp. 45–46, footnote 86).

lic of Poland no. 73, item 497). Being the first constitutional act of reborn Poland, the aforementioned law granted autonomous status to the Silesian voivodship, with the Silesian Sejm, government administrative bodies, self-government Voivodship Council, and the Silesian Treasury.

Interpellations appearing in the title of this contribution were indeed control measures which the Silesian Sejm imposed on the executive power (the voivode and the Voivodship Council) through its deputies. Article 14 of the July Constitutional Act and the rarely amended parliamentary rules of procedure formed the legal basis for making interpellations.

The Acts of the Silesian Sejm, being the final stage of the legislative process governed by the Constitutional Act of 15th July 1920, were published in the Journal of Silesian Laws. Three entities were empowered to undertake legislative initiative, namely: the voivode acting under the authority of the government; deputies pursuant to the rules of procedure; and the Voivodship Council. The Silesian acts required merely the signature of the Marshal of the Silesian Sejm for their validity.

The final article of the organic statute, i.e. art. 45, stipulated that the provisions on the Silesian autonomy were to enter into force upon Poland taking over Silesia. Therefore, in practice it meant that the provisions on autonomy became effective in August 1920 (in Teschen Silesia); in June 1922 (in former Prussian Silesia); in November 1938 (in Zaolzie region).

Moreover, different meanings of interpellation and laws in respect of discrimination must be recalled. This is that, essentially, the provisions of the invoked laws constituted discrimination against certain entities and their groups; whereas the interpellations only depicted legal and factual occurrences of discrimination.

Acts of Discrimination in Interpellations

Discrimination against German Schools

Rallies were held in Mysłowice, Laura Steelworks, Józefowiec, Dąb, Szarlej, Pszów and Wodzisław to protest against the establishment of German schools. At these rallies, dire threats against the German minority were made, but the authorities did not react in whatever way against this incitement to class hatred. Contrary to the provisions of the Geneva Convention, officials and teachers attempt to exert influence on the persons having parental custody as to their decision on what school their children attend.

The German Club alleged that the Silesian Voivode had breached the provisions of *the Polish – German Convention relating to Upper Silesia* (of 15th May 1922) which guaranteed Polish citizens of German nationality residing in Silesia the right to German schools. In particular, point 4 of the interpellation captures the essence of discrimination against minority schools: *Due to violation of art. 114, item 2 and art. 131 of the Geneva Convention, as well as an Ordinance of the Voivode of 29th December*

1922, thousands of children were forced to attend Polish schools against the will of persons having parental custody of them.[7]

The Voivodship Council adopted a resolution on the closure of a German-speaking section of State School of Industry in Bielsko in a sitting on 8th June this year. (…) Pursuant to art. 2 and 4 of the organic statute, only the Sejm is empowered to modify the existing educational relations.

Moreover, the closure of the German-speaking section of the State School of Industry is a means of inflicting great harm on industry and the workforce.[8]

The submitters of the interpellation alleged that the Voivodship Council had closed the German-speaking section of the State School of Industry in Bielsko in violation of law. In their opinion, the illegal closure of the German-speaking section of the School *is a means of inflicting great harm on industry and the workforce*.

Discrimination against Workers of German Nationality in the Nitrogen Compounds Factory in Siemianowice

Upon request of the Commune Management in Siemianowice approved by the Katowice County authorities, the Nitrogen Compounds Factory in Siemianowice terminated the employment of two German locksmiths, Mr. Taszke and M. Wróbel. In the opinion of the submitters, *it is sufficient for the Commune Management in Siemianowice, as well as the County authorities in Katowice, that a citizen belongs to a minority to deem him hostile towards the State and deny him means of subsistence at the time of most acute economic deprivation.*

In view of the above, the deputies of the German Club asked the Voivode: *What does Mr. Voivode intend to do to ensure full enjoyment of rights to retain nationality by the persons belonging to the German minority?*[9]

Discrimination against Members of the Polish Socialist Party

An interpellation submitted to the Marshal of the Sejm by a socialist deputy, Roman Motyka, on 16th June 1930 concerning the incidents which occurred at the cemetery in Katowice on 16th June 1930 presents detailed facts on discrimination against the members of the Polish Workers' Party.

On Monday 16th June 1930, at 4 in the morning, a ceremony of laying a wreath by socialists at the grave of Franciszek Morawski, a well-known leader of the Polish work-

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[7] Interpellation of the German Club of 16th March 1923 concerning breach of the provisions of the Geneva Convention on minority schools. In: CIAGWA, J.: *Interpelacje niemieckie w I Sejmie Śląskim (1922–1929).* In: *Z dziejów prawa. Część 7*. Katowice 2005, p. 111; Ibid.: *Interpelacje poselskie w Sejmie Śląskim 1922–1939. Regulacja prawna i praktyka*. Katowice 2016, pp. 83–84.

[8] Interpellation of the German Club of 14th June 1923 concerning the State School of Industry in Bielsko. In: CIAGWA, J.: *Interpelacje niemieckie* …, pp. 114–115; ibid.: *Interpelacje poselskie* …, p. 103.

[9] Interpellation of the German Club of 4th March 1925 concerning the termination of employment of Mr. Taszke and Mr. Wróbel by the Nitrogen Compounds Factory in Siemianowice. In: CIAGWA, J.: *Interpelacje niemieckie* …, p. 118; ibid.: *Interpelacje poselskie* …, p. 195.

ers' movement in Silesia deceased 24 years ago, was to be conducted at the cemetery in Katowice located at Sienkiewicz Street.

When a group of approximately 30 men and women carrying a wreath tried to enter the cemetery, police officers barred their way, surrounded them and a great crowd gathered rapidly. The curious and hastily-gathered onlookers made unpleasant and insulting comments to the police and the Polish State.

The police commissioner demanded that the wreath sash be removed, otherwise he would block the ceremony of laying the wreath. The sash bore the following inscription: 'In commemoration of deceased Franciszek Morawski – Polish Socialist Party'. Apart from the aforementioned words, the red sash carried no other inscription.

Having presented the facts, the submitters asked the Voivode: *what steps do you intend to take in future to ensure that dead citizens who held socialist beliefs are buried in peace and may be properly commemorated and remembered by workers?*[10]

Discrimination against War Widows of German Nationality

An interpellation submitted by the Socialist Deputies Club on 13th February 1931 concerning placing war widows of German nationality at a disadvantage in granting war victims extraordinary support from the Silesian budget sheds light on discrimination against war widows of German nationality.

The interpellation was submitted by a German socialist (DSAP) advocate Zygmunt Glücksmann. The interpellation formally submitted by the Socialist Deputies Club was signed by three socialists: two German (Zygmunt Glücksmann, DSAP; Johann Kowoll, DSAP) and one Polish (Józef Machej, Polish Socialist Party). The interpellation was supported with signatures of seven German deputies, two from Deutsche Partei and five from Deutsche Katholische Volkspartei. Given the electoral defeat of the socialists during the Third Silesian Sejm elections (they obtained only three mandates), the Socialist Deputies Club was forced to enlist the cooperation of the German Club, as without the German support the socialists would not be able to submit any interpellations or motions.[11] Nonetheless, the interpellation concerning the placement of war widows of German nationality at a disadvantage was deemed an interpellation of the Socialist Deputies Club for the reason that it was executed by a German socialist, advocate Zygmunt Glücksmann, who was the first deputy to affix his signature on it.

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[10] Interpellation of deputy Roman Motyka and company of 23rd June 1930 concerning the incidents at the cemetery in Katowice, on 16th June 1930. In: CIAGWA, J.: *Interpelacje poselskie w Sejmie Śląskim II kadencji (11 maja 1930 r. – 26 września 1930 r.). Z dziejów prawa. Część 8*. Katowice 2006, pp. 40–141; ibid.: *Interpelacje poselskie* …, pp. 379–380.

[11] The rules of procedure of the Second Silesian Sejm enacted on 17th June 1930 were effective also for the Third Silesian Sejm, that is from 9th December 1930 to 26th March 1935.
Art. 24 of the rules of procedure of 17th June 1930 provided in item one that 'Interpellations submitted to the Government, Voivode or Voivodship Council should bear the signature of at least 5 deputies.' (CIAGWA, J.: *Interpelacje poselskie*, …, p. 413).

The essence of discrimination against war widows of German nationality was conveyed by its author as follows: *The Department of Labour and Social Security of the Silesian Voivodship Office pays war widows an annual extraordinary support.*

Sadly, these benefits can be claimed only by widows being members of the Association of War Invalids of the Republic of Poland, and the mentioned Department makes a payment of benefits on the basis of the lists compiled by that Association.

Under these circumstances, the benefits are claimed by widows favoured by the aforementioned Association, regardless of their financial standing. Meanwhile, financially disadvantaged widows outside the mentioned Association or widows belonging to the German Association of War Invalids are completely overlooked.[12]

Discrimination against Polish Citizens of German Nationality, or Relatively, Polish Citizens of Polish Nationality Who Joined Opposition Parties

The essence of discrimination is captured by an interpellation of the Socialist Deputies Club and the German Club of 14th January 1932 concerning a) the right to existence, b) right to work and wages.

The essence of the matter lays in the following situation: on the territory of the Bielsko county, the Workers' Food Association, with a dozen or so branches selling spirits in closed vessels under a granted license, had been operating for several years. However, in 1928, the Department of Treasury of the Silesian Voivodship Office refused to approve the managers of the branch as deputy concession holders, whist the Head of the Department of Treasury declared that *only a Pole may be approved as a deputy concession holder*.

The undersigned express great doubts as to whether under current practice every Pole is granted approval for deputy concession holder. The undersigned may cite repeated cases where even Poles are rejected as deputy concession holders, thus it can be deduced that only a specific category of Poles selected on the basis of political reasons may rely on having their requests approved.[13]

Acts of Discrimination in the Legislature of the Silesian Sejm. Discrimination against Married Female Teachers

This type of discrimination occurred as a result of the provisions of the Act of the Silesian Sejm of 29th March 1926 on the termination of a contract of teaching service upon contracting a marriage by a female teacher (Journal of Silesian Laws no. 8, item 12), in short referred to as the act on the celibacy of female teachers.

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[12] Interpellation of the Socialist Deputies Club of 13th February 1931 concerning the placement of war widows of German nationality at a disadvantage in granting extraordinary support from the Silesian budget loans. In: CIAGWA, J.: *Interpelacje poselskie* …, p. 424.

[13] Interpellation of the Socialist Deputies Club and the German Club of 14th January 1932 concerning a) the right to existence, b) the right to work and wages. CIAGWA, J.: *Interpelacje poselskie* …, pp. 466–467.

Article 4 point 6 of the Constitutional Act of 15th July 1920 which contained an organic statute of the Silesian voivodship stipulating that the Silesian Sejm reserves the right to adopt 'legislation on comprehensive and vocational schools of all types and degrees'[14] (Journal of Laws of the Republic of Poland no. 73, item 497) formed the legal basis for adopting the Act by the Silesian Sejm on 29th March 1926.

Art. 1 of the mentioned act provides as follows:

'Contracting a marriage by an assistant, temporary or permanent teacher employed in a school in the Silesian Voivodship funded by the Silesian Treasury or by communal associations results in termination of her contract of teaching service. The termination of the service relationship with the teacher shall be stated by the female teacher's superior in writing by way a notice.

Dismissal of a teacher from service shall take effect no later than as from the end of July, provided that the marriage is concluded in the first half of the calendar year, or as from January of the consecutive year at the latest where the conclusion of marriage takes place in the second half of the calendar year.'

The provision quoted above is complemented by art. 2 of the act which governs the interim status of the vacant post. Pursuant to art. 2, 'Married persons may not be appointed female teachers in state schools in the Silesian Voivodship'.

Moreover, the penultimate article of this short act, i.e. art. 7, laid down that 'the provisions of this Act shall not be applicable to contract female teachers of feminine craft and design'.

Discrimination against a particular professional group stems from a breach of the ancient Greek principle of *isonomy*, i.e. equality before the law, thus a situation in which unmarried female teachers enjoy greater rights than married female teachers.

The act under investigation contains another type of discrimination, i.e. discrimination against female teachers in relation to male teachers, as the celibacy act was not applicable to men. Thus, in state schools of the Silesian voivodship, both married and unmarried men could freely practise the teaching profession. In fact, the idea of the inability to combine the working and family responsibilities by female teachers was truly a shrewd measure aimed at reducing unemployment. In essence, a female teacher who got married would rely on her husband to provide means of livelihood for the family (the husband would find it easier to get a job), whilst the vacant post would be filled by an unmarried female teacher.

Subsequently, the act on the celibacy of female teachers underwent minor amendments by way the revised Act of 1st October 1926 amending some provisions of the Act of 29th March 1926 on termination of the teaching service relationship upon contracting a marriage by a female teacher (Journal of Silesian Laws no. 8, item 12), (Journal of Silesian Laws no. 23, item 39). It should be noted that the revised act did not alter by any means the discriminatory nature of the provisions of the Act of 29th March 1926.

[14] Comment on this provision penned by a renowned expert on the autonomy and self-government of Silesia is included in a publication by KOKOT, J.: *Zakres działania województwa śląskiego jako jednostki samorządu terytorialnego*. Katowice 1939, pp. 83–84.

The act on the celibacy of female teachers remained in force in the Silesian voivodship for 13 years, that is from March 1926 until the outbreak of World War II, unifying two models of the legal status of female teachers: the Austrian model (in Teschen Silesia) and the Prussian model (in Prussian Upper Silesia).

Interestingly, the provisions of the Act on the celibacy of female teachers did not exist in Polish national legislation. The Silesian Act of 29th March 1926 remaining in force, as amended, until the end of the autonomy was a distinctive feature of the educational system in Silesia.

Discrimination against Silesians in Acts on Election Law

In the comments set out below, the analysis of election law of the interwar period is restricted to only the criterion of age (for eligibility to vote and eligibility to stand for election) in the Legislative Sejm and Silesian Sejm, as well as in self-government bodies.

In summary, the essence of discrimination against Silesians in the provisions of the electoral code is presented in the following table:

Table no. 1
Criterion of age for non-Silesians and Silesians in the acts on election law

Elections to the Legislative Sejm	Elections to the Silesian Sejm
Eligibility to vote – 21	Eligibility to vote – 21[15]
Eligibility to stand for election – 21	Eligibility to stand for election – 30
Elections to Communal Councils	
Eligibility to vote – 21[16]	Eligibility to vote – 25[17]
Eligibility to stand for election – 25[18]	Eligibility to stand for election – 30[19]

[15] A Decree of the Head of State of 28th November 1918 on the electoral code to the Legislative Sejm (Journal of Laws of the Polish State no. 18, item. 46) formed the basis for the electoral code for the Silesian Sejm. By way of an Ordinance of the Council of Ministers of 25th July 1922 on the electoral law for the Silesian Sejm (Journal of Laws of the Republic of Poland no. 59, item 527) and an Ordinance of the Minister of the Interior of 29th July 1922 on the text of the decree on the electoral law for the Legislative Sejm in the wording in force for elections to the Silesian Sejm (Journal of Laws of the Republic of Poland no. 59, item 528) many of its provisions, among others provisions on the criterion of age, lost validity.

[16] Art. 2 and 4 of the Decree of 13th December 1918 on elections to Communal Councils on the territory of Congress Poland (Journal of Laws of the Polish State no. 20, item 58).

[17] Art. 1 and 5 of the Act of 5th May 1926 concerning the electoral code for municipal and rural councils in Upper Silesian part of the Silesian Voivodship (Journal of Silesian Laws no. 13, item 22).

[18] On the territory of former Congress Poland.

[19] On the territory of the Silesian Voivodship.

The essence of discrimination against the inhabitants of the Silesian voivodship lay in considerable differences in the criterion of age in the Silesian voivodship and outside, both in elections to the Silesian Sejm and in elections to municipal and rural council bodies in the Upper Silesian part of the Voivodship. The provisions of the electoral code for the Silesian Sejm and for the communal bodies significantly inhibited the social and political activity of the younger generation, despite the fact that the level of socialization and political culture of Silesians was indeed very high.[20]

Conclusion

Of six interpellations in total containing a description of events of clearly discriminatory nature, five identify occurrences of discrimination against persons of German nationality, or against German institutions; and one of discrimination against representatives of the Polish Workers' Party.

Within the scope of Silesian legislature, discriminatory acts include the Act of 29th March 1926 on the celibacy of female teachers, discriminating against married female teachers; as well as several decrees of the Head of State, acts of the Legislative Sejm and the Silesian Sejm relating to the election code, establishing a strict eligibility criterion for elections to the Silesian Sejm and the self-government bodies, thus reducing the social and political activity of the younger inhabitants of the Silesian voivodship, depriving them of the rights which voters on the territory of former Congress Poland enjoyed with a less stringent criterion of age.

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[20] Mentioned by KOKOT, J.: *Zakres działania* …, pp. 96–97.

Konrad Graczyk[1]
University of Silesia in Katowice, Department of Legal History

Discrimination of Poles and Jews before the Special Court in Katowice (Sondergericht Kattowitz) 1939–1945

Abstract: The article discusses the problems of discrimination of Poles and Jews in the criminal law of the Third Reich, with an emphasis on the Regulation of 4th December 1941 on criminal law for Poles and Jews in the eastern incorporated territories. An analysis is carried out of the contents of the Regulation with the use of the formal-dogmatic method, which is then referred to the practice of application of that Regulation by the Special Court in Katowice (*Sondergericht Kattowitz*). Attention is also drawn to other activities of that judicial body, which were a manifestation of discrimination against Poles and Jews in the so called incorporated territories.

Key words: Criminal Law; Special Court; Poles; Jews; Polenstrafrechtsverordnung; Discrimination; Katowice

We hold […] that all men were created equal.[2]

From Nuremberg Laws of 1935 to the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 1941.

The most famous – although not isolated – example of discriminatory legislation of the Third Reich period are so called Nuremberg Laws. This term refers to the Acts unanimously adopted by the Reichstag during the NSDAP rally in Nuremberg on 15th September 1935: on the citizenship of the Reich, on the protection of German blood and German honour, on the colours and flag of the Reich. These Acts (more precisely, the two former – on the citizenship of the Reich, on the protection of German blood and German honour), most shameful in the entire legal system of the Third Reich, were targeted against Jews and excluded them from the German national community. They prohibited Jews from entering into marriage with German

[1] Konrad Graczyk, contact: ko.graczyk@interia.pl

[2] *Deklaracja Niepodległości Stanów Zjednoczonych z dnia 4 lipca 1776 r.* [in:] M. Sczaniecki, *Wybór źródeł do historii państwa i prawa w dobie nowożytnej*, Warszawa 2001, p. 233.

citizens of German or related blood, having sexual intercourse with people of German or related blood and flying national flags and Jewish colours.[3]

The racial and discriminatory motives, which underlay the Nuremberg Laws were concretized in the form of many legislative acts adopted in Germany in a later period. Although the Nuremberg Laws themselves contained criminal provisions addressed to Jews, their total discrimination in criminal law ensued towards the end of 1941. At that time, it was linked to the discrimination of Poles.

In April 1941, the Minister of Justice Franz Schlegelberger expressed the opinion that Poles and Jews require special provisions. The Minister's view was a concretization of the postulates voiced since 1940 at the grassroots at conferences by presidents of higher regional courts and attorneys general, who considered the then applicable criminal and judicial legal regime – based on the special courts created in the Polish territories incorporated in the Reich and the introduced procedural restrictions which precluded challenging judgments of regional courts in criminal matters before the Court of the Reich – insufficient. Pressure to that end was exerted also by the chief of the security police.[4]

The assumption which underlay the legislative works on the respective draft consisted in "preparation of such principles of criminal law for the incorporated territories that would fulfil the postulate of essentially different treatment of Poles and Jews, as opposed to Germans, before judicial bodies."[5] The declared conception of new law strived after full discrimination of Poles and Jews, both in the area of criminal substantive and procedural law.

The purpose for adopting the new piece of legislation, however, was not only to expand the catalogue of tools for the implementation of criminal policies in respect of Poles and Jews. The Regulation was to play an important role in the "national fight" waged in the incorporated territories. As Freisler wrote – inasmuch as in the National Socialist criminal law addressed to racially fully-fledged Germans the aim was to keep the hygiene of the nation, this purpose could not refer to Poles, who were not members of the German national community. In the light of the above, where the person held criminally liable was a Polish national, the question of "the need to purify the national community" (*Reinigungsbedürfnis der Volksgemeinschaft*) was not considered at all. The political purpose of the Regulation was to weaken the Polish element in the incorporated territories. With its help, the Polish nationality was to be subdued (*Niederhaltung*) in that area[6]

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[3] F. Neumann, *Behemot. Narodowy socjalizm – ustrój i funkcjonowanie 1933–1944*, Warszawa 2016, p. 134–136; F. Połomski, *Ustawodawstwo rasistowskie III Rzeszy i jego stosowanie na Górnym Śląsku*, Katowice 1970, p. 105–131.

[4] F. Ryszka, *Państwo stanu wyjątkowego. Rzecz o systemie państwa i prawa Trzeciej Rzeszy*, Wrocław-Warszawa-Kraków-Gdańsk-Łódź 1985, p. 411–412.

[5] A. Konieczny, *Pod rządami wojennego prawa karnego Trzeciej Rzeszy. Górny Śląsk 1939–1945*, Warszawa-Wrocław 1972, p. 124.

[6] G. Werle, *Justiz-Strafrecht und polizeiliche Verbrechensbekämpfung im Dritten Reich*, Berlin-New York 1989, p. 373.

As a result, the Council of the Reich's Defence Ministers passed the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 4th December 1941. (*Verordnung über die Strafrechtspflege gegen Polen und Juden in den eingegliederten Ostgebieten vom 4. Dezember 1941*).[7] That piece of legislation accumulated all German criminal regulations adopted against Poles and Jews in the incorporated territories and in the so called Old Reich (*Altreich)* in a compact form, which is why it was referred to as a separate criminal code for Poles and Jews. The Regulation covered exhaustively substantive and procedural penal law relating to Poles and Jews.[8] The intention of German lawyers – as expressly stated by Roland Freisler, at that time a secretary of state in the Ministry of Justice – was to make the new special law a separate compact statutory work, whose psychological impact would be similar to that of a poster or announcement which may be hung on the door of each town hall.[9] Such form of exposure of the legislative act was in fact possible because of its small size. As Freisler wrote – the Regulation was a ramification of the situation of the territories incorporated in the Reich from the point of view of the German element in that area and the resulting position of the Polish national group.[10] It was divided into five parts in the fields of: substantive criminal law, criminal procedure, special criminal law for Poles and Jews, extension of applicability and final provisions. Editors of the Regulation adopted the taxonomy of Roman numerals and items, instead of paragraphs and subparagraphs.

The provision of numeral I item 1 of the Regulation was in fact a classical example of *lex imperfecta*, as it did not provide for any sanction. However, it clearly expressed the burden of the entire piece of legislation by articulating the conception which underlay its adoption. In this connection, it can be regarded as preamble. This provision laid down that Poles and Jews in the eastern incorporated territories should comply with the German legislation and orders issued by the German administration. They were to abandon everything that was detrimental to the dignity of the German Reich and the German nation. In consequence, this provision provided for an express and wide-ranging duty of obedience for Poles and Jews. This obligation was made a legal foundation (basis) of the entire piece of legislation and was supposed to permeate all states of affairs governed by the Regulation. In case of doubts, it was also to serve as an interpretive guideline.[11]

The following items of numeral I introduced the death penalty for acts committed by Poles and Jews, consisting in an assault on a German committed on grounds of his national origin; hateful or agitating activity showing a hostile attitude to Germans – especially hostile comments related to Germans, tearing off or destroying announcements of the German authorities or other behaviours degrading the digni-

[7] Reichsgesetzblatt (RGBl.) 1941, S. 759.

[8] G. Werle, *op. cit.*, p. 371.

[9] Ibid., p. 372.

[10] R. Freisler, *Das deutsche Polenstrafrecht*, "Deutsche Justiz", Nr. 31/32 vom 19. Dezember 1941.

[11] G. Werle, *op. cit.*, p. 372–373.

ty of the Reich or detrimental to the Reich or the German nation; assault on a Wehrmacht soldier, members of organizations subordinate to the Wehrmacht, officers of the Police and its auxiliary forces, the Reich Labour Force, German office, duty station or NSDAP; intentional damage to equipment belonging to a German office or objects used for the activities of German offices or objects of public utility; calling for or inciting disobedience towards regulations or orders issued by German offices; making arrangements with the intention to commit punishable acts, conducting important negotiations on that matter, expressing readiness to commit such acts or acceptance of such proposals, or omission to notify at the right time when the danger may be averted, an office or the person threatened of such act or the intention to commit it despite having received credible information; being caught on illegal possession of firearms, hand grenade, blunt or bladed weapon, explosives or other military equipment, or omission to immediately report to the authorities that a Pole or Jew is in illegal possession of such an object despite having received credible information about that fact. In the event of one of the final five factual situations set out in numeral one of the Regulation, the alternative was to impose a sentence of imprisonment if the matter was of lesser importance. The possibility of death penalty and the normative constructions of the above factual situations are the reasons why those provisions are justly referred to as Draconian.[12]

Numeral two of the Regulation allowed for the possibility to apply legal analogy in proceedings against Poles and Jews in the event of violation by a member of either national group of German criminal legislation or commission of an act which justified punishment "in accordance with the burden of one of German criminal statutes and the state's needs in the eastern incorporated territories."[13] There is no doubt that the provision did not meet the criteria of definiteness and, in the first place, violated the prohibition of analogy inherent to substantive criminal law. The principle *nullum crimen sine lege stricte* meant that the culprit was only liable for the commission of an act matching precisely the definitional elements of an offence as defined in the criminal statute, and not for committing any similar act.[14] In contrast, the provision of the Regulation referred to "the burden of a criminal statute" or "state needs," which concepts were vague, non-definable and did not offer their addressees sufficient insight into what did and what did not amount to a crime.

Numeral three of the Regulation provided for the possibility to impose on Poles and Jews the penalty of imprisonment, fine and forfeiture of assets. The penalty of imprisonment was executed by incarceration in a penal camp (for a period from 3 months to 10 years) or in a strict regime penal camp (for a period from 2 to 15 years). Numeral three of the Regulation provided as well for imposition of the death penalty, even without any specific legal basis if the crime was a manifestation of particularly low motives or was particularly severe for other reasons. On that ba-

[12] F. Ryszka, *op. cit.*, p. 412.

[13] A. Konieczny, *op. cit.*, p. 129–130.

[14] M. Mozgawa (ed.), *Prawo karne materialne. Część ogólna*, Warszawa 2011, p. 39.

sis, also adolescents were punishable by death.[15] In addition, there was a prohibition on reducing the maximum penalty set out in the German criminal statute unless the crime was exclusively against persons of the same nationality as the culprit (i.e. Poles or Jews). The last provision of numeral three provided for substitution of a fine by the penalty of incarceration in a penal camp from 1 week to 1 year in the case of the former's unenforceability.

The second part of the Regulation (numerals IV-XII) was devoted to criminal procedural law. Numeral four of the discussed piece of legislation introduced the opportunity principle: the prosecutor prosecuted only such offences of Poles and Jews whose prosecution was considered by himself purposeful for reasons of public interest. Numeral five specified the personal jurisdiction in respect of Poles and Jews. They were to be tried by a special court (*Sondergericht*) or a district court (*Amtsgericht*), wherein the prosecutor could bring charges before a special court in all matters, and before a district court if he did not expect a penalty higher than 5 years of imprisonment in a penal camp or 3 years in a strict regime penal camp. The provision on court jurisdiction did not violate the exclusive competence of the People's Court (numeral V item 3 of the Regulation). Numeral six of the Regulation provided for immediate enforceability of each sentence. This norm envisaged the possibility to appeal the judgment but reserved it to a prosecutor. Numeral seven of the Regulation discriminated against Poles and Jews, precluding them from filing an application challenging a judge. The next provision modified the prerequisites of ordering temporary arrest and detention. With regard to Poles and Jews, temporary arrest was "always admissible" if there was an intention to commit crime, and its application in preliminary (preparatory) proceedings could be ordered not only by the court but also the prosecutor. The prosecutor could also order the application of other coercive measures. Numeral nine of the Regulation precluded swearing in Poles and Jews in a judicial proceeding – which impaired the reliability of their testimony, whereas German witnesses still gave testimony under oath. In addition, numeral nine provided for the possibility to lodge an application for reopening of proceedings only by a prosecutor and to bring an action for annulment only by the attorney general. The court competent in respect of an application for reopening proceedings concluded with a judgment of a special court was the same special court, and the judicial body to decide in matters of annulment was the higher regional court. Numeral eleven of the Regulation discriminated against Poles and Jews depriving them of the right to bring private prosecution and act as subsidiary prosecutors. The highly meaningful and flexible provision of numeral twelve of the Regulation obliged the court and the prosecutor to apply the procedure according to the provisions of the German criminal process but at the same time permitted discretion. Provisions of procedural and judicial law could be abandoned if it was purposeful for the timely and definite conduct of the proceedings.

Provisions of part three of the Regulation (numeral XIII) provided for the possibility of establishment by over-presidents in the eastern incorporated areas of sum-

[15] A. Konieczny, *op. cit.*, p. 130.

mary courts for Poles and Jews who committed gross transgressions against Germans or other offences posing a serious threat to the German reconstruction work. The summary courts imposed only death penalty on culprits or decided to hand them over to the Gestapo.

In part four of the Regulation (numeral XIV), its applicability was extended to all Poles and Jews who, as on 1st September 1939, lived in the territory of the former Polish state and committed acts defined in numerals I-IV in the territory of the Reich other than the incorporated areas. These cases could also to be handled by the court of the contemporary place of residence or stay – and then such court was bound by the provisions of numerals V-XII. Provisions of numeral XIV did not refer to acts tried by courts of the General Government.

Part five of the Regulation (numerals XV-XVIII) included final provisions. They referred to the legal definition of Poles, understood in that legislative act as persons under protection (*Schutzangehörige*) and stateless persons of Polish nationality; derogation of the groundless provision of art. II of the Regulation introducing German criminal law in the incorporated territories of 6th June 1940 in relation to Poles and Jews;[16] authorization of the Minister of Justice to issue, in consultation with the Minister of the Interior, legislative and administrative acts related to the implementation and supplementation of the Regulation, and to resolve doubts through the administrative channel; as well as matters concerning entry into force of the discussed piece of legislation. Numeral eighteen provided for a fourteen-day *vacatio legis* as of the announcement of the Regulation, whereby it entered into force as of 30th December 1941.[17]

The Regulation actually deprived Poles of the legal protection which was afforded to German defendants. Even the slightest transgressions were subject to draconic penalties, and the scope of factual situations falling under provisions of criminal legislation was extremely extended by use of imprecise determinants. Criminal proceedings against Poles and Jews were made very similar to summary proceedings.[18]

The impact force of the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 4th December 1941 – important because of the very substance of the piece of legislation – was additionally reinforced at the beginning of 1942. The Minister of Justice, relying on the provision of the December Regulation authorizing him to issue legislation "necessary for its entry into force and supplementation," adopted a concise (including just two articles) Regulation on the supplementation of the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 31st January 1942 r. (*Verordnung zur Ergänzung der Verordnung*

[16] Verordnung über die Einführung des deutschen Strafrechts in den eingegliederten Ostgebieten vom 6. Juni 1940, RGBl. 1940, S. 844. Art. II of the Regulation referred to introduction in the incorporated territories of the Code of Criminal Procedure, however, with exceptions concerning complaint compelling proceedings (*Klageerzwingungsverfahren*), private and subsidiary prosecution and restitution of term.

[17] A. Konieczny, *op. cit.*, p. 132.

[18] M. Broszat, *Zweihundert Jahre deutsche Polenpolitik*, Frankfurt am Main 1972, p. 290.

über die Strafrechtspflege gegen Polen und Juden in den eingegliederten Ostgebieten vom 31. Januar 1942).[19] The first provision of the Regulation opened the possibility to apply numerals from one to three of the Regulation of 4 December 1941 upon the consent of the prosecutor's office to acts committed prior to entry into force of that piece of legislation. In the same way, the norm perfidiously violated the principle *lex retro non agit*, by permitting retroactive application of the draconian law, and decisions in this regard were actually left to the prosecutor, who, because of his role in the Nazi criminal process, was vitally interested in conviction under the most severe provision. The second article of the Regulation of 31st January 1942 accounted for the possibility of Poles and Jews being heard by a designated judge outside the main trial without prejudice to the provisions of the Code of Criminal Proceedings.[20]

The political and national motivation of the enactment of the Regulation on criminal law for Poles and Jews in the eastern incorporated territories is also evidenced by the circumstance that it related to the newly-adopted Regulation of 4th March 1941 on the German National List (*Deutsche Volksliste – DVL*)[21] and German citizenship in the incorporated territories (*Verordnung über die Deutsche Volksliste und die deutsche Staatsangehörigkeit in den eingegliederten Ostgebieten vom 4. März 1941*).[22] The differentiation of the constitutional status of Poles and Jews appeared in the provisions on the National List, and the Regulation of 4th December 1941 applied to individuals who did not have the right of entry on the National List – so called charges of the Reich and stateless persons of Polish nationality (numeral XV of the Regulation of 4th December 1941).[23] In this fashion, the discrimination provided for in the Regulation on criminal law for Poles and Jews in the eastern incorporated areas of 4th December 1941 had an additional hidden purpose towards the population of the incorporated areas: it encouraged endeavours for an entry on the National List.

Specific Situation of the Upper Silesia

One of the most important regions of application of both the Regulation on the German National List of 4th March 1941 and the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 4th December 1941 was Upper

[19] RGBl. 1942, S. 52.

[20] A. Konieczny, *op. cit.*, p. 132.

[21] Literature on the National List is quite ample, see for instance: Z. Izdebski, *Niemiecka Lista Narodowa na Górnym Śląsku*, Katowice-Wrocław 1946; E. Serwański, *Hitlerowska polityka narodowościowa na Górnym Śląsku*, Warszawa 1963; Z. Boda-Krężel, *Sprawa volkslisty na Górnym Śląsku*, Opole 1978; R. Rak, *Die deutsche Volksliste (1941) und ihre sittliche Beurteilung*, "Oberschlesisches Jahrbuch", vol. 7 (1991); R. Koehl, *The deutsche volksliste in Poland 1939–1945*, "Journal of Central European Affairs", vol. XV, no. 4 (1956); J. Grabiec, *Sprawa volkslisty na Górnym Śląsku po II wojnie światowej*, "Prace Historyczno-Archiwalne", vol. IX; M. Węcki, *Kwestia folkslisty na Górnym Śląsku*, "Biuletyn IPN", nr 9(142)/2017.

[22] RGBl. 1941, S. 118.

[23] A. Konieczny, *op. cit.*, p. 126.

Silesia. The national situation in that area had been long complicated, which was determined by its history, especially the conflict for its national status between Germany and Poland and an artificial demarcation of the disputed territory between both countries after the announcement of results of the 1921 plebiscite and outbreak of the III Silesian Uprising. The historical reminiscences were the reason why the German propaganda claimed, after the conquest of Upper Silesia at the beginning of September 1939, that Upper Silesia (or, more precisely, its Polish, i.e. eastern part) was "liberated from the Polish yoke." It was asserted that the region had always been German and that its population had also been German.[24] These views were reflected in the orders given by the so called military administration to the troops on the conquered areas – in one of the documents, concerning implementation of a so called cleansing action (*Säuberungsaktionen*) which consisted in the pursuit of soldiers and weapons, it was clearly and firmly noted that in the captured Upper Silesian territory such activities were to be carried out in a completely different (less severe) way than in the part of the former Congress Poland (*Kongresspolen*) located further east. At the same time, it was commanded that native-born Upper Silesians be treated differently than Poles who came from the Congress Poland.[25]

The military administration in the occupied territory of Poland lasted until 26th October 1939,[26] when the Decree by Adolf Hitler of 8th October 1939 on the division and administration of the eastern territories (*Erlass des Führers und Reichskanzlers über die Gliederung und Verwaltung der Ostgebiete vom 8. 10. 1939)*[27] came into force. The regions incorporated in the Reich were Greater Poland, Pomerania, Silesia (including a part of eastern Lesser Poland) and northern Mazovia.[28]

The incorporation of the Polish part of Upper Silesia in the Reich was to enable "a full-scale modification of national relations" in that region. Its most important manifestation was the introduction of the National List, which, however, was to be preceded by a police census carried out at the turn of 1939 and 1940.[29]

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[24] M. Węcki, *op. cit.*, p. 33.

[25] Geheimes Staatsarchiv Preussischer Kulturbesitz Berlin-Dahlem (hereinafter: GStAPK), XVII. HA Schlesien, Rep. 201e Regierung zu Kattowitz (z.T. Dep.) 1927–1945, Nr. Ost 4 Kattowitz 3 Einrichtung einer deutschen Verwaltung nach Besetzung Oberschlesiens durch deutsche Truppen, Bd. 1: 26th August – 20th September 1939, k. 176, *Befehl des Grenzschutz-Abschnitts-Kommando 3 vom 19. September 1939* [Order of the Command of the 3 Section of the Border Guard of 19th September 1939]. The term "Poles coming from the Congress Poland" was probably a mental leap – in practice, it probably also referred to Poles who came to the area of Upper Silesia from Galicia.

[26] M. Wrzosek, *Administracja niemiecka na okupowanych terenach Górnego Śląska w okresie od 3 września do 25 października 1939 r. Struktura organizacyjna i kompetencje*, "Studia Śląskie", vol. XXII (1972), p. 273.

[27] RGBl. 1939, S. 2042. Originally, the Decree was to enter into force as of 1st November 1939.

[28] C. Madajczyk, *Die Okkupationspolitik Nazideutschlands in Polen 1939–1945*, Berlin 1987, p. 24.

[29] M. Węcki, *op. cit.*, p. 35.

Entries on the National List in Upper Silesia had a mass character[30] and took part in coercive conditions.[31] The statistical data of 1st April 1944 concerning the Katowice administrative district: altogether there were 1 369 337 persons entered on the National List – out of which 70% qualified as group III, and applications by 68 766 familied were dismissed.[32] In general, in Upper Silesia the number of individuals entered on the National List reached 90%.[33] The entry on the National List implied protection from the provisions of the Regulation on criminal law for Poles and Jews in the eastern incorporated areas of 4th December 1941. Persons whose application for entry on the National List was dismissed or who, contrary to the obligation, omitted to lodge such application had to face the eventuality of being held criminally liable under that piece of legislation, which blatantly violated fundamental principles of law. Under its provisions, in principle, Poles and Jews were to be tried by a special court. The court competent for the Katowice administrative region and, in consequence, for the predominant part of Upper Silesia (during the war, there were also special courts in Bielsko and in Opole) was the Special Court in Katowice (*Sondergericht Kattowitz*).

Discrimination before the Special Court in Katowice

The Special Court in Katowice was established already during the September Campaign. The organisation and competences of that body as well as the procedure were set out, in the first place, in the Regulation of the government of the German Reich on the creation of special courts of 1933.[34] It was a criminal court destined for single-instance adjudication in matters relating to specific prohibited acts, predominantly grave criminal, economic and political offences. Since the beginning of 1939, the jurisdiction *ratione materiae* of special courts was extended to all offences – as regards felonies and misdemeanours the prosecutor's office could press charges before a special court if "an act posed a particularly severe threat to the public order and safety."[35] The adjudicating activity of the Katowice Special Court was inaugu-

[30] R. Kaczmarek, *Polacy w Wehrmachcie*, Kraków 2010, p. 62.

[31] A. Szefer, *Główne problemy Górnego Śląska w granicach III Rzeszy w latach 1939–1945* [in:] A. Szefer (ed.), *Niemcy wobec konfliktu narodowościowego na Górnym Śląsku po I wojnie światowej*, Poznań 1989, p. 188.

[32] M. Węcki, *op. cit.*, p. 42.

[33] R. Kaczmarek, *op. cit.*, p. 64.

[34] Verordnung der Reichsregierung über die Bildung von Sondergerichten vom 21. März 1933 [Regulation of he government of the Reich on the creation of special courts of 21st March 1933]. RGBl. S. 136.

[35] § 19 of the Regulation on measures concerning court organisation and the system of justice of 1st September 1939 (*Verordnung über Maßnahmen auf dem Gebiete der Gerichtsverfassung und der Rechtspflege vom 1. September 1939*), RGBl. 1939, S. 1658.

rated on 20th September 1939, when the court delivered its first judgment in a matter concerning extorsion and appropriation of office.[36]

The judicial practice of the Special Court in Katowice provides examples of discriminatory treatment of defendants of Polish and Jewish nationality. Such situation had two sources. The first and the basic one was the attitude of judges (but also advocates!) belonging to the NSDAP towards Poles and Jews, and the second one was the legislation enacted in Germany. Since the law itself ordained to treat differently the two national groups, then, by its very nature, putting that law into practice had to involve exercise of discrimination.

The anti-Polish and anti-Jewish attitude followed, in the first place, from the ideological assumptions of the Nazi system: efforts to eliminate Jews from the life of the German nation[37] and hatred of Slavs.[38] Second, it was a consequence of personal experiences. It was presumed that judges employed for service in the eastern incorporated territories should predominantly come from the eastern, borderline regions of Germany. It was to be obvious to them – as persons "who grew up amid the national fight in the east" that a Pole ought to be treated differently than a German.[39] The experiences of German lawyers, mostly negative, related to the Greater Poland Uprising or the Silesian Uprisings, were sporadically reflected in their personal dossiers. By way of example, the first president of the Special Court in Katowice, Justice Paul Hugo Seehafer, when defending himself from disciplinary claims concerning his behaviour towards defendants of Polish nationality, invoked the experiences of himself and his family in the former "Poznań province,"[40] and Justice Alfred Herrmann received an award for his participation in the struggle for the incorporation of Upper Silesia into Germany.[41] In addition, the archives provide an example of refusal to defend by an advocate who, having viewed the case files, realized that his client had been a Silesian insurgent. He justified his request for resignation as public defender by the suffering experienced from insurgents.[42]

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[36] GStAPK, XVII. HA Schlesien, Rep. 201 e Regierung zu Kattowitz (z.T. Dep.) 1927–1945, Nr. Ost 4 Kattowitz 4, bp, *Urteil gegen den Schlosser Alfons Barczyk vom 20. September 1939* [Judgment against a locksmith, Alfons Barczyk of 20 September 1939].

[37] W. Jochmann, *Kryzys społeczny, antysemityzm, narodowy socjalizm*, Poznań 2007, p. 464–467; F. Połomski, *op. cit.*, p. 34–39.

[38] E. Grodziński, *Filozofia Adolfa Hitlera w Mein Kampf*, Warszawa-Olsztyn 1992, p. 93–95; J. Borejsza, *Antyslawizm Adolfa Hitlera,* Warszawa 1988, passim.

[39] G. Weckbecker, *Zwischen Freispruch und Todesstrafe. Die Rechtsprechung der nationalsozialistischen Sondergerichte Frankfurt/Main und Bromberg*, Baden-Baden 1998, p. 711.

[40] GStAPK, XVII. HA, Rep. 222a, P. 192 Nr. 3587 Paul Seehafer, *Zeugnisheft*, k. 48-49r, *Dienststrafverfügung gegen Landgerichtsdirektor Dr. Seehafer vom 2. Januar 1941* [Disciplinary order against the director of a regional court, Dr. Seehafer of 2nd January 1941].

[41] GStAPK, XVII. HA, Rep. 222a, P. 89 Nr. 1317 Alfred Herrmann, *Zeugnisheft*, k. 56a, *Fragebogen* [Questionnaire].

[42] State Archive in Katowice [hereinafter: APK], Sondergericht Kattowitz, file reference 1193, chart 78, *Schreiben des Rechtsanwalts Dr. Kurt Englisch an Sondergericht Kattowitz vom 23. Juni 1942* [Letter of advocate Dr. Kurt Englisch to the Special Court in Katowice of 23rd June 1942].

The attitude of German lawyers to defendants of Polish and Jewish nationality was revealed in the report prepared in November 1939 by a prosecutor at the Katowice special court, who described the practice, contrary to the legal provisions prescribing mandatory defence, consisting in the appointment of attorney only in cases where the expected punishment was death penalty. As argued by the prosecutor, it was considered impossible to appoint an attorney for every defendant since it was difficult to require that German advocates would defend Jews or insurgents (*Insurgenten*), that "rabble" (*Gesindel*).[43]

In the same document, the prosecutor gave an account of scandalous proceedings relating to the execution of the first death penalty imposed by the special court. The sentence, passed against a Pole, was executed in violation of legal provisions: without a decision in respect of clemency and by shooting[44] rather than guillotine.

Manifestations of anti-Polish attitude, marked by prejudice and discrimination, are also proven by quotations from selected judgments of the Sondergericht Kattowitz: "because he is a Pole and adheres to his Polish nationality, he had […] to be punished by death,"[45] "as a Pole, he had to take into consideration the possibility of death Penalty,"[46] "the defendant, by his conduct, made himself a tool of Polishness, which by all measures endeavours to destroy the German nationality,"[47] "possession of firearms by a Pole implies a great threat to public security and peace."[48]

Application of the provisions of the Regulation of 4th December 1941 by courts in conjunction with the Regulation on the German National List gave rise to procedural difficulties. It is obvious that the December Regulation could be applied only to persons of Polish and Jewish nationality – individuals not entered on the National List. The administrative character of an entry on the National List led to a situation in which this essential aspect translating in the legal qualification made the prosecutor's office and courts dependent on decisions by administrative authorities, namely county, circuit and regional committees of the German National List, as well as the

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[43] Bundesarchiv Berlin (hereinafter: BA), R 3001, Reichsjustizministerium (Ministry of Justice of the Reich)/9803/7/2, *Tätigkeitsberichte der Staatsanwaltschaften bei den Sondergerichten in Polen* [Reports on the activities of prosecutor's offices at special courts in Poland], k. 28-33, *Schreiben von der Staatsanwaltschaft beim Sondergericht in Kattowitz vom 15. November 1939 an den Reichsminister der Justiz betr. Tätigkeitsbericht* [Letter of the prosecutor's office at the special court in Katowice of 15th November 1939 to the Minister of Justice of the Reich concerning report on the activities].

[44] Ibid, k. 32, *Schreiben von der Staatsanwaltschaft beim Sondergericht in Kattowitz vom 15. November 1939…*

[45] APK, Sondergericht Kattowitz, file reference 991, sheet 74, *Urteil gegen Stanislaus Taborski vom 20. Februar 1941* [Judgment against Stanisław Taborski of 20th February 1941].

[46] APK, Sondergericht Kattowitz, file reference 568, sheet 163, *Urteil gegen Roman Gawronski vom 22. April 1943* [Judgment against Roman Gawronski of 22nd April 1943].

[47] APK, Sondergericht Kattowitz, file reference 28, sheet 61, *Urteil gegen Emil Kowoll vom 30. Januar 1940* [Judgment against Emil Kowoll of 30th January 1940].

[48] APK, Sondergericht Kattowitz, file reference 34, sheet 19, *Urteil gegen Martin Kciuk vom 15. Februar 1940* [Judgment against Martin Kciuk of 15th February 1940].

Supreme Tribunal for National Matters.[49] Oftentimes, this resulted in protraction of criminal proceedings because of an unclear legal status of the defendant. Repeatedly, it was the initiation of the criminal process that worked as a stimulus for the suspect or defendant to file an application for entry on the National List, as an attempt to improve his or her legal position. It must be remembered that conclusion of administrative proceedings for an entry on the National List was not finally decisive as to the national classification of a given person – decisions in respect of entry on the National List could be annulled.[50] Strangely enough, a reason sufficient to annul a decision concerning entry on the National List could be a fact tantamount to the grounds for the commencement of criminal proceedings. The judgment of the Special Court in Katowice of 17th August 1944 in the case under the file number 13 K Ls 62/44 reads that:

> *"[…] the defendants were already accepted in the III group of the German National List. In light of the above, they had German citizenship pending further notice. By the order of 24th June 1944, the over-president of the Upper Silesia province, on behalf of the Reichsführer SS, cancelled the citizenship on account of the events which gave rise to these proceedings. From now on, they are considered charges of the German Reich […]"*[51]

The events referred to by the special court in the above fragment of the judgment's justification boiled down to provision of assistance to a pack which committed robbery crimes, support and handling. The mechanism put in place in the cited example could serve as a basis for the annulment of a decision concerning entry on the National List in respect of every person who committed a crime.

An analysis of the entirety of the preserved body of rulings by the Special Court in Katowice as to their discriminatory elements would reach beyond the framework of this article. As regards cases adjudicated by that forum in which the death penalty was imposed, a number of circumstances relating to the application of the Regulation on criminal law for Poles and Jews in the eastern incorporated territories of 4th December 1941 can be placed in front of the brackets which evidently amount to discrimination. This involves assessment of participation of that legislative act in the imposition of the death penalty, answer to the question about the scale of retroactive application of the Regulation within such category of cases and the nationality whose members were held liable more frequently. It seems legitimate to examine, in the group of cases concluded with a death sentence, the practice of appointing attorneys for defendants of Polish and Jewish nationality.

As far as advocacy is concerned, it should be noted that from the time of creation of special courts in the Third Reich, one of the elements of legal proceedings before these bodies was mandatory defence. This implied a need to appoint a public defend-

[49] M. Węcki, *op. cit.*, p. 39.

[50] A. Konieczny, *op. cit.*, p. 136.

[51] APK, Sondergericht Kattowitz, file refeence 1507, bp, *Urteil vom 17. August 1944 gegen Albert Mutz und Andere* [Judgment of 17th August 1944 against Albert Mutz at al.], p. 2.

er if the defendant had no defender of choice. A restriction in this regard was first introduced upon the outbreak of the war. Under § 20 of the Regulation on measures concerning court organisation and the system of justice of 1st September 1939 (*Verordnung der Reichsregierung über Maßnahmen auf dem Gebiet der Gerichtsverfassung und der Rechtspflege vom 1. September 1939),*[52] defence was mandatory in three situations: if the special court adjudicated instead of a jury court, if a decision in respect of castration, placement in a care facility or protective custody was expected, or if the defendant was def or dumb. In 1940 – under § 32 and 33 of the Regulation of the government of the Reich on the jurisdiction of criminal courts, special courts and other criminal procedural provisions (*Verordnung der Reichsregierung über die Zuständigkeit der Strafgerichte, die Sondergerichte und sonstige strafverfahrensrechtliche Vorschriften vom 21. Februar 1940*)[53] – mandatory defence was reframed. From now on, it was prescribed for the main trial before the Court of the Reich, People's Court or higher regional court; an act threatened by death penalty or severe life imprisonment; an act threatened by severe imprisonment with a prosecutor's request to appoint an attorney; if the matter involved murder or perjury; if a decision concerning castration was expected, the defendant could be placed in a care facility or protective custody, or if the defendant was def or dumb. In addition, the presiding judge appointed an advocate for the duration of the entire proceedings or their part, if, bearing in mind the seriousness of the act or complexity of the factual or legal situation, the presiding judge found his participation desired, or if the defendant was unable to defend himself on his own. As the end of the Third Reich was approaching, in 1944, the scope of mandatory defence was restricted again. From that time on, participation of a public defender was required on account of the factual or legal seriousness of a case or where the defendant was unable to defend himself.[54]

The first full year of implementation of the December Regulation was 1942. Then, the following years 1943, 1944 and 1945 should be taken into consideration, wherein the last one is of merely symbolic character since Katowice was liberated by the Red Army at the end of 1945.

In 1942, in the Katowice special court, the capital punishment concluded altogether fifty-five cases, in which death sentence was imposed on ninety persons. In twenty-eight cases (i.e. 51%) from among that total, the judgment was based on the December Regulation. In these matters, the highest penalty was imposed on forty-seven defendants: thirty-nine Poles and eight Jews. In twenty-seven (i.e. 96%) cases, the December Resolution was applied retroactively – to acts committed before its entry into force. In 1942, the formal side of the right of defence looked tolerably: in twenty-four cases defendants had an attorney and only in four (in the last quarter) were deprived of such assistance.

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[52] RGBl. 1939, S. 1658.

[53] RGBl. 1940, S. 405.

[54] H. Schmidt, *"Beabsichtige ich die Todesstrafe zu beantragen". Die nationalsozialistische Sondergerichtsbarkeit im Oberlandesgerichtsbezirk Düsseldorf 1933–1945*, Essen 1998, p. 34.

In 1943, death penalty concluded altogether forty-three cases with regard to sixty-one defendants. Only in seventeen cases (i.e. 39%) the legal basis of the decision was the December Regulation. In that year, death penalty was imposed on thirty-one Poles and only two Jews. In fourteen cases (i.e. 82%) the December Regulation was applied retroactively. In the equal number of cases, no attorney for the defence appeared. An advocate was present only in one court proceeding (the data is missing for two cases).

1944 saw a further decrease in the application of the discriminatory Regulation. In the entire special court, seventeen proceedings ended with imposition of the death penalty, out of which only six (i.e. 35%) sentences were based on the December Regulation. Six Poles were sentenced. The Regulation was applied retroactively only in two cases. In four cases there was no attorney, and in respect of two cases gaps in the files preclude a clear conclusion in this respect.

For the several days of 1945, the Special Court in Katowice pronounced probably only one death sentence – against a Pole coming from the General Government who was found guilty of looting during an air raid in April 1944. No advocate took part in these proceedings, and the judgment was delivered on 4th January 1945.[55]

The above statistics, relating to the application of the December Regulation solely in cases with an imposed death penalty permits to make a couple of conclusions. First, in practice, the Regulation was – apart from a few exceptions from 1942 and 1943 – applied predominantly to Poles. Jews were rarely – contrary to an express provision of the Regulation – brought before the special court. In respect of them, police measures were used predominantly (handing over to the Gestapo, concentration camp). It must be also remembered that shortly after the entry into force of the December Regulation, implementation of the Final Solution of the Jewish question was initiated, which strongly affected the chances of a person of Jewish nationality to be brought before a special court. Second, the first year from the entry into force of the December Regulation was generally a period of its totally retroactive application. The situation was paradoxical, it violated an elementary sense of justice and the rule of law, all the more that the violations took place in the area of criminal law and resulted in death sentences. In one of the above cases, a Jewish defendant ineffectively raised in his defence that at the time of his legally valid sentence being passed by the Regional Court in Bytom-Katowice (*Landgericht Beuthen-Kattowitz*) the December Regulation was not yet issued. The case was brought before the Special Court in Katowice following an action for annulment (*Nichtigkeitsbeschwerde*) and the court simply exercised the discretion left by the legislator and took advantage of the consent given by the prosecutor's office to retroactive application of the December Regulation.[56] The paradox of the situation was that where a given act was tried by a special court in the years 1940 or 1941, it was qualified under other provi-

[55] APK, Sondergericht Kattowitz, file reference 1653, *Abschrift des Urteils vom 4. Januar 1945 gegen Wladislaus Zapala* [Copy of the judgment of 4th January 1945 against Władysław Zapala].

[56] APK, Sondergericht Kattowitz, file reference 978, sheet 610–612, *Urteil vom 11. Januar 1943 in der Strafsache gegen Leon Weitzenbaum* [Judgment of 11th January 1943 against Leon Weitzenbaum].

sions, which were generally milder. If, however, a criminal proceeding was initiated later, or was protracted and did not end until the end of December 1941, the special court – upon the consent of the prosecutor's office – could impose death penalty. This was the case although such circumstances were beyond control of the perpetrator of the tried act. Third, the analysed cases prove that until the end of 1942 the court generally stopped appointing attorneys for defendants of Polish and Jewish nationality. Even though the then applicable provisions no longer envisaged mandatory defence, they still provided for the appointment of an advocate in the threat of a death sentence. In contrast, in all the indicated cases, despite the capital punishment being imposed, no attorney took part in the proceedings. In this fashion, Poles and Jews were discriminated at every stage of law application, wherein the discriminatory letter of the law was supplemented by discriminatory practice of application of other provisions which, in theory, were non-discriminatory.

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Miriam Laclavíková[1]
Trnava University in Trnava, Faculty of Law, Department of Legal History

Labour Service in Czechoslovakia and Its Discriminatory Context (1945–1960)

Abstract: The study is a normative outline of establishing the work duty based on the provisions of the Decree issued by President Eduard Beneš No. 88/1945 Coll. on Universal Work Duty and subsequent constitutional amendments in the form of Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic and Constitutional Act No. 100/1960 Coll., Constitution of the Czechoslovak Socialist Republic. The labour service correlated to "the national labour mobilisation," i.e. the programme providing the labour force for recovery of the war-devastated economy and for rebuilding it accordingly to back then upcoming socialism. The planning of the labour force distribution and promoting the full-employment politics became priorities of the People's Democratic state and consequently of the Socialist state and remained priorities until the regime fall in Czechoslovakia in 1989.

Key words: Czechoslovak Republic; Socialism; The People's Democracy; Labour Law; Right to Work; Labour Service.

Introduction

After the World War II, Czechoslovakia was in an extremely tough political, economic and social situation. War operations affected almost the entire territory what resulted in its destroyed transport network, a broad destabilization of the economy[2] and problems with population supplies. There were social and political tensions growing, and one of the key issues in the political struggle was a social issue which afflicted not only the more righteous system of social benefits and allowances, but also a newly-built and regulated labour market. As soon as in the program of the first post-war government of the Czechs and Slovaks (known as the Košice government program)[3] issued on April 5, 1945, in Košice, the requirement *"to provide work and*

[1] doc. JUDr. Miriam Laclavíková, PhD., contact: miriam.laclavikova@truni.sk.

[2] PRŮCHA, V. et al.: *Hospodářské a sociální dějiny Československa 1918–1992.* I. díl: Období 1918–1945. Brno: Nakladatelství Doplněk, 2004, p. 576.

[3] Considering the implementation of the Košice Government Program and the development in the period from 1945 to 1948 we can say that *"The Košice Government Program was a program creating a revolutionary system of regulated democracy, euphemistically called 'people's democracy', gradually leaving the ideological foundations and constitutional principles of the parliamentary democracy and the free market economy, on which the pre-Munich republic was founded, and following the interna-*

earnings for all people able to work" was proclaimed, in addition to the government's promise contained in Art. XIV *"to lay foundations of a generous social policy and social care for all layers of working people of the cities and the countryside"*. In the regime of people's democracy, socialism and its approach to the compulsory use of labour force in the state's economy were built.

National Work Mobilization and Work Duty (1945–1960)

The Klement Gottwald Government Program (proclaimed on 8th July 1946) known as the Construction Program emphasized that social rights (right to work, to rest after the work, to receive remuneration for the work done, etc.) correlated with the obligation *"of all citizens of the Republic to contribute with their work to the welfare of the whole."* The focus to work, as an activity aiming to provide welfare for the society and the state, became a new phenomenon. Work according to the new ideology was not supposed to be for individuals only a source of livelihood, but became a public affair with the requirement of its public convenience. The Construction Government Program was based on the belief that *"work is especially the source of permanent prosperity of the nation and the republic"* and on obligations of the government: *"we will do everything so that productive work, especially physical work, gains the honorable position that rightfully belongs to it."* In relation to the young generation, a message was addressed that *"young people will be educated in love for work, especially for productive work"*.[4] To reach the objective of post-war recovery and construction of the republic, the government used the Act No. 192/1946 Coll. on the Two-Year Economic Plan for years 1947–1948 setting a new understanding of the new political and economic structure of the state, prioritizing the construction of heavy industry, electrification and mechanization of agriculture, with an impact on necessary labour force transfers to productive sectors even using new labour resources (strengthening employment of women, young people, people with reduced work capacity, etc.).[5]

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tional relations created after the war, directed towards the establishment of the authoritarian system of a government of a single party – the Communist Party of Czechoslovakia – and the general expropriation. Therefore, the revolution would be more appropriate to be designated as a national, anti-fascist and social revolution, as the basis for the anti-capitalist coup, the beginning of the socialist revolution in Czechoslovakia". GRONSKÝ, J.: Komentované dokumenty k ústavním dějinám Československa. II 1945–1960. Prague: Univerzita Karlova v Praze, Nakladatelství Karolinum, 2006, p. 22. See also MOSNÝ, P. – HUBENÁK, L.: *Dejiny štátu a práva na Slovensku.* Košice: Aprilla, s. r. o., 2008, p. 352.

[4] Construction (Government) Program. (Cit. 9th Sept. 2017). Available at: https://www.vlada.cz/assets/clenove-vlady/historie-minulych-vlad/prehled-vlad-cr/1945-1960-csr/klement-gottwald-1/ppv-1946-1948-gottwald1.pdf

[5] The two-year economic plan was followed by the Act No. 241/1948 Coll. on Five-Year Economic Development Plan of the Czechoslovak Republic and the following similar adjustments typical for the planned economy of the years (1948–1989).

Overcoming labour shortages[6] (post-war losses, evacuation of German national minority members) had to be arranged in the frame of *"national labour mobilization"* and therefore *"the participation of every individual in the economic construction of the state must become a matter of national honour and patriotism"*.[7] However, the idea of "labour mobilization" and the work duty implementation was very lively in that time in our territory, as evidenced by the minutes of the 12th meeting of the Slovak National Council held on 14th September 1945 in Bratislava, which states that *"national labour mobilization … is justified even for the reason that the workload is evenly distributed to all our citizens"*.[8]

The universal work duty was implemented on the basis of the Decree of the President of the Republic No. 88/1945 Coll. on Universal Work Duty pronounced on 1st October 1945. The work duty related to men able to work in age from 16 to 55 years and women in age from 18 to 45 (with set exceptions), where their place of work was chosen *"to carry out the works, needed urgently because of important public interests"*. When assigning to work,[9] personal, economic and social circumstances of the persons to be assigned were supposed to be considered, as well as their expertise and their current occupation. Single and unpaid persons were supposed to be prioritized for assigning; in the case of employed persons the assignment was possible in case of lack of other labour forces and after hearing the employer's opinion. According to the Decree, the assignment period was limited to 1 year, however, for reasons of urgency, the assignment could be extended by maximum 6 months. That provision was amended by Act No. 175/1948 Coll., amending the Decree of the President of the Republic on Universal Work Duty to maximum 3 years (*"The work assignment may be for maximum one year; this period may be extended only for reasons of urgency, not more than twice, each time for a period not longer than one year."*).

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[6] To achieve this goal, according to the provisions of the Act on the Two Years' Economic Plan, the following should be arranged: redeployment of employees from other workplaces to places where they are urgently needed; return of a qualified staff to their original professions; inclusion of persons capable of working but not yet working into the work process; planning of young people inclusion into work processes; increasing of women employment; inclusion of people with reduced working capacities into work processes, etc.

[7] Construction (Government) Program. (Cit. 9th Sept. 2017). Available at: https://www.vlada.cz/assets/clenove-vlady/historie-minulych-vlad/prehled-vlad-cr/1945-1960-csr/klement-gottwald-1/ppv-1946-1948-gottwald1.pdf

[8] The Plenum of the Slovak National Council. Stenographic minutes of the 12th meeting of the Slovak National Council, held on 14th September 1945, in Bratislava from 3pm till 7pm. (cit. 9th August 2017). Available at: http://www.psp.cz/eknih/1945snr/stenprot/012schuz/s012003.htm

[9] Pursuant to Art. 2 of the Decree No. 88/1945 Coll., the following persons were not subject to work duty (excluded): *"(1) military staff in active duty; (2) persons whose stay in the current activity or place of work is necessary because of the public interest; (3) students of universities who continue their studies or are preparing for exams and pupils of public secondary and vocational schools or such schools with the right of the public; (4) persons who are in a regular education relationship; (5) women from the beginning of their third month of pregnancy until the end of the third month following the time of childbearing; women who take care of at least one child under the age of 15, and women who alone take care for at least one household member; (6) members of foreign embassies and members of their families."*

From the point of view of labour law, the assignment to work was a specific case of creating an employment relationship based on an administrative act. Notices of the assignment were issued by the relevant department responsible for workpower of the National Committee[10] (if the assigned person already had a contract of employment concluded, their employment relationship did not finish under the Art. 9 of the Decree, and the period of work assignment was reported as a holiday).[11] In practice, the number of work assignments was not very high, the literature shows statistics of 1,500–2,000 people assigned to work per calendar month, especially in the first post-war years.[12] **However, applying provisions of the Decree, its discriminatory context can also be observed. The work duty was applied broader to members of German, Hungarian nationality,[13] Roma and convicted people than to the majority population that the Decree wanted to affect and where a higher degree of volunteerism was manifested.** This volunteerism was considered also in the Act on the Two-Year Economic Recovery Plan of 1946 also defining that only in the case when the required number of workers in the economy was not reached *"measures will be taken on the basis of statutory provisions on work duty"*. The act set out an obligation to employers to handle economically and efficiently the workforce, however, this requirement became symptomatic for its failure to comply with the consequences of the overemployment typical for socialism. Effective workforce deployment[14] was more precisely addressed in the Act No. 87/1947 Coll. on Some Measures to Perform National Workforce Mobilization.[15]

The Universal Work Duty Institute found its reason for existence also in the requirement of "reeducation to work", which was implemented by Act No. 247/1948 Coll. on Forced Labour Camps. Under Art. 1 of the Act: *"**To allow persons defined in Art. 2*** (especially those avoiding work; persons threatening the construction of our people-democratic regime, public supplies, and persons allowing them to do

[10] Art. 6 of the Decree No. 88/1945 Coll.: *"To assign work, the relevant District Labour Office (branch office) is the one, in whose district the persons to be assigned to work, have their residence or stay. Assigning a person who works outside their residence or place of stay, the relevant District Labour Office (branch office) is the one in whose district the workplace is located. ... The notice on work assignment shall be delivered to the assigned person and, if no state of emergency occurs, it should be at least 3 days before the date set out for the assignment; if that person is already in an employment relationship, a copy of the assessment notice shall be delivered to their employer."*

[11] SKŘEJPKOVÁ, P.: *Zásahy státu v oblasti pracovního práva a jeho deformace v poválečném období.* In: Vývoj práva v Československu v letech 1945–1989. Sborník příspěvků. Malý, K. – Soukup, L. (eds.). Prague: Univerzita Karlova v Praze, Nakladatelství Karolinum, 2004, p. 526; VOJÁČEK, L. – KOLÁRIK, J. – GÁBRIŠ, T.: *Československé právne dejiny (1918–1992).* 2nd revised edition. Bratislava: Eurokódex, s. r. o., 2013, p. 171.

[12] RÁKOSNÍK, J.: *Sovětizace sociálního státu. Lidově demokratický režim a sociální práva občanů v Československu 1945–1960.* Prague: Charles University in Prague, Faculty of Philosophy, 2010, pp. 206–207.

[13] GABZDILOVÁ-OLEJNÍKOVÁ, S. – OLEJNÍK, M. – ŠUTAJ, Š.: Nemci a Maďari na Slovensku v rokoch 1945–1953 v dokumentoch. I. Prešov: Universum, 2005, p. 35.

[14] BARANCOVÁ, H. – SCHRONK, R.: Pracovné právo. Bratislava: Sprint dva, 2009, p. 61.

[15] FILO, J. et al.: Československé pracovné právo. Bratislava: Obzor, 1981, pp. 36–37.

so; persons lawfully convicted for any of the actions under the act on the protection of the people's democratic republic, the act on black trade and similar machination prosecution, on the criminal protection of the implementation of the two-year economic plan and under the act on criminal protection of national enterprises, nationalized enterprises and enterprises under national administration; or persons convicted for administrative offenses to work in forced work facilities) ***to be educated to view work as a civic duty and to allow using their work skills to allow the whole society to benefit*** *(Art. 32 of the Constitution), forced labour camps are being established*".[16] Persons could be sent to the camps for a period lasting from three months to two years. As the best known camps in Slovakia we can mention Nováky, Ústí nad Oravou and Ilava.[17]

The fulfillment of the tasks set out in the two-year economic plan and the broader criminal law protection of economic interests of the state were guaranteed under the third title of the Act No. 231/1948 Coll. on the Protection of the People's Democratic Republic governing criminal acts against the state's internal security (criminal acts of sabotage and threatening the unilateral economic plan by negligence). Criminal law provisions were included also in the Act No. 87/1947 Coll. on Certain Measures to Implement National Workforce Mobilization, which may specifically demonstrate the merits of the offense of avoiding work.[18] The standards above also

[16] From the historical point of view, the establishment of forced labour camps, approved schools or institutes was also known in Austrian, Hungarian and Czechoslovak first-republic law. The establishment of forced labour units was also included in the Decree of the President of the Republic (referred to as the Large Retribution Decree) No. 16/1945 Coll., the Decree of the President of the Republic No. 126/1945 Coll. on the Special Forced Work Units and the Decree of the President of the Republic No. 71/1945 Coll. on the Work Duty of Persons that Had Lost Czechoslovak Citizenship; as in Slovakia valid regulation of the Slovak National Council No. 33/1945 Coll. reg. of SNC on the Punishment of Fascist Criminals, Occupiers, Traitors and Collaborators, and on the Establishment of the People's Judiciary, and the Regulation of the Slovak National Council No. 105/1945 Coll. Reg. of SNC on Establishment of Work Camps, the regulation of the Slovak National Council No. 37/1945 Coll. reg. of SNC on the Employment of Hungarians and Germans who, according to the Constitutional Decree of the President of the Republic No. 33/1945 Coll., lost Czechoslovak nationality. Later regulations of SNC No. 7/1948 Coll. Reg. of SNC and its Implementing Regulation No. 18/1948 Coll. Reg. of SNC were issued – after the Act on Forced Labour Camps was adapted, camps set up under these standards were transformed into forced labour camps. BLÁHOVÁ, I. – BLAŽEK, L. – KUKLÍK, J. – ŠOUŠA, J. et al.: *Právnická dvouletka. Rekodifikace právního řádu. Justice a správy v 50. letech 20. století.* Prague: Auditorium, 2014, p. 315.

[17] For more details see also VARINSKÝ, V.: Tábory nútenej práce na Slovensku v rokoch 1941–1953. Banská Bystrica: Matej Bel University in Banská Bystrica, Faculty of Humanities, 2004, p. 37. SOUKUP, L.: *Zákon o táborech nucené práce v ČSR z r. 1948.* In: Vývoj práva v Československu v letech 1945–1989. Sborník příspěvků. Malý, K. – Soukup, L. (eds.). Prague: Univerzita Karlova v Praze, Nakladatelství Karolinum, 2004, p. 418.

[18] Art. 37. Judicial punishments: *"(1) Any person who permanently and unjustifiably avoids working as employed or in permitted self-employed activities, or who repeatedly induces himself/herself by the excessive consumption of alcoholic beverages into a state which provokes a justified nuisance in the working environment, shall be punished for the offence by a court for imprisonment lasting up to 3 months. (2) If the court convicts the offender for a crime act under paragraph (1), at the same time it shall pronounce as a subsidiary punishment that he/she may be held in a forced work facility (it shall send the offender to a forced work facility)."*

demonstrate **the typical feature of '50s, which was the sanctioning nature of labour law standards[19] and the overall infiltration (penetration) of repressive and sanction measures into this area.**

The constitution of 9th May 1948 (Constitutional Act No. 150/1948 Constitution of the Czechoslovak Republic) in the contemporary catalogue of social rights (*social rights* Art. 26 – Art. 29 of the Constitution) enshrined rights, such as

- the right of every worker to a fair remuneration for the work performed;
- the right of every worker to rest after his/her work;
- the right of every worker to have his/her health and life at work protected;
- the right of working women to receive equal pay for the same work as men receive;
- the right of working women to specially adapted working conditions with regard to her pregnancy, maternity and childcare;
- and the right of young people to legally defined special working conditions.

The anchoring of the right of every citizen to work in Art. 26 of the Constitution of 9th May 1948 was particularly important (*"All citizens have the right to work. This right is guaranteed in particular by the organization of work controlled by the state according to the planned economy"*), which in the practical level fulfilled the duty of every citizen to work anchored in Art. 32 (*"Every citizen is obliged to work according to his/her capabilities and use his/her work to contribute to the welfare of the whole society"*).

Administrative filing and registration of employment was technically performed by the existence of work cards issued under Act No. 29/1946 Coll., introducing work cards. The work cards were public deeds certifying the education, special knowledge, skills and other personal qualities of the person important for his/her job performance; then the type of his/her profession and the way and duration of employment. The obligation to have a work card applied to all employees with an employment contract (including apprentices), home workers and self-employed persons. In´50s, work cards were replaced by keeping records of employment relationship in identification cards (employers recorded the day of starting and the date of termination of employment).

To add, it should be noted that **for work duty adjustments, work camps as well as adjustments of the planned workforce allocation (showing features of forced**

[19] The sanctioning nature of the labour law standards is evident already in Art. 23 of the Decree No. 88/1945 Coll. on Universal Work Duty: *"Acting and omissions that are breaching provisions of this Decree or the regulations issued for its execution shall be punished by District Labour Protection Offices with a fine of up to 10,000 K, or by District National Committees upon proposals of these offices by administrative penalties with a fine of up to 100,000 K or by imprisonment up to one year, or using both punishments. If an administrative penalty is imposed in cash, for the case of its uncollectability, at the same time, a substitute prison sentence shall be imposed according to the degree of conviction within the limits of the penalty rate for unprisoning."*

labour[20]), in '50s, Czechoslovakia was often criticized by the International Labour Organization (ILO). The contemporary ideological argumentation of the legitimacy of this procedure is interesting, as it was applied in the argumentation of the Czechoslovak party stating that *"forced labour could not exist in any social and state system building socialism, in which labour is free of exploitation; people work for the society and therefore for themselves."*

Taking into account the wide international criticism and the domestic situation in the domestic labour market in the context of massive industrialization, **the first part of the Decree of the President of the Republic No. 88/1945 Coll. stipulating the general work duty was abolished by the Act No. 70/1958 Coll. on the Tasks of Businesses and National Committees in the Field of Workforce Care**.[21] Previously, however, specifically **in 1953, the work duty was supplemented by the civil work instrument** (Government Ordinance No. 40/1953 on Civil Work Assistance). National committees encouraged citizens to civilian work assistance needed *"to manage surged or extra works that can not be postponed because of general interest and their performance can not be ensured by other means, particularly by voluntary workers"*. Persons who were in an employment relationship were not supposed to be called to civilian work assistance (if it was to be provided at the time of their employment or it otherwise could affect the proper performance of their employment). Civilian work assistance was abolished as late as in 1975.[22]

The Košice Government Program, the Building Program and the subsequent two-year or five-year plans for the development and renewal of the national economy indicated the basic tendencies of changes in state, economic and social regimes. **In 1960, a socialist constitution was adopted – the Constitution of the Czechoslovak Socialist Republic (Constitutional Law No. 100/1960 Coll.) and declared solemnly in its preamble that *"socialism has won in our country"* and *"the exploitation of man by man is forever eliminated. Neither economic crises nor unemployment exist."*** From a point of view of a place and importance to human labour, the following preamble statements became key ones: *"Relieved human labour has become a fundamental factor in our entire society. **It is now not only a duty, but also a matter of honour for every citizen.** The principle of socialism is now being implemented: "Everyone according to his/her abilities, everyone paid according to his/her work!"* The Constitution of 1960 enshrined (like the previous constitution) an entire catalogue

[20] In this context, see the interesting ideological justification for the absence of forced labour in Czechoslovakia contained in the work: CHÝSKÝ, J.: *Nucená práce a její problematika se zřetelem k podstatě pracovněprávního poměru.* Prague: ČSAV, 1962.

[21] KUKLÍK, J. et al.: *Dějiny československého práva 1945–1989.* Prague: Auditorium, s.r.o., 2011, p. 160.

[22] HAVELKOVÁ, B.: Pracovní právo. In: *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Bobek, M. – Molek, P. – Šimíček, V (eds.). Brno: Masarykova univerzita, Mezinárodní politologický ústav, 2009, p. 495.

of social rights.[23] The enshrined right to work in the Constitution was linked to the right to receive remuneration for the work performed.[24] **The work duty was defined in the preamble of the Constitution ("work is not only a duty but also a matter of honour for every citizen") and in Art. 19 ("work in favour of the whole society is a primary duty and the right to work is the primary right of every citizen").**[25] The relevant provision of Art. 19 can be considered as an important interpretative basis of application and hierarchization within the catalogue of social rights and obligations of citizens. The spirit of collectivism, suppression of interests and possibilities of individual realization of individuals with the right as well as the duty to work (de facto working without motivation), should be considered looking at the period of building socialism in the Czechoslovak Republic.

Conclusion

Enforcing a full employment policy became a priority of the built people-democratic and then socialist states, as evidenced by a considerable number of legal and subordinate standards governing this issue in the period of 1945–1965. The planned allocation of the population able to work after the end of the war and its implementation with the work duty was not exceptional in terms of the European conditions and needs of recovery of the economy of the Czechoslovak state destroyed in the war. The major part of the society accepted this as a necessity for the justifiable critical situation in the economy.[26] Its discriminatory context was exceptional and unambiguously abhorrent to human rights. In summary, we can state that after 1948, the catalogue of social rights and the individual status of an individual in the area of labour law was based on a subordination of the interests of individuals to the interests of the society or the whole; accepting a direct management and planning the economy; efforts to unify social interests and education, or re-education of individuals

[23] The right of every worker to rest after his/her work (Art. 22 of the Constitution), the right of every worker to have his/her health and health care protected, as well as the right to be financially secured in old age and when they are unable to work (Art. 23 of the Constitution), the right of working women to specially adapted working conditions with regard to her pregnancy, maternity and childcare (Art. 27 of the Constitution).

[24] Art. 21 of the Constitutional Act No. 100/1960 Constitution of the Czechoslovak Socialist Republic: *"(1) All citizens have the right to work and receive remuneration for the work performed according to its quantity, quality and social significance. (2) The right to work and the remuneration for it is ensured by the entire socialist economic system, which knows neither economic crises nor unemployment, and guarantees a continuous increase in real labour remuneration. (3) The state focused its policy so that production development and labour productivity increase can be used to shorten working hours gradually, without lowering wages."*

[25] Compare Art. 32 of the Constitutional Act No. 150/1948 Coll., Constitution of the Czechoslovak Republic: *"Every citizen is obliged to work according to his/her capabilities and use his/her work to contribute to the welfare of the whole society."*

[26] RÁKOSNÍK, J.: *Sovětizace sociálního státu. Lidově demokratický režim a sociální práva občanů v Československu 1945–1960.* Prague: Charles University in Prague, Faculty of Philosophy, 2010, p. 200–201.

to become conscious citizens, building first a people-democratic and then socialist state; directing state pay policy;[27] a change in the nature of work performance, and considering work as a human activity at all.

The work duty introduced in 1945 was principally neither exceptional nor surprising adjustment, in relation to national as well as European realities. Its subsequent constitutional enshrining (following the basic labour law regulation incorporated in the Decree of the President of the Republic Eduard Beneš No. 88/1945 Coll.) in the Constitution of the Czechoslovak Republic of 1948 and the Constitution of the Czechoslovak Socialist Republic in 1960, was based on a new ideologically conditioned understanding of work not only as a source of subsistence, but also as an activity convenient for the society as a whole. Therefore, the work was supposed to be perceived as with two meanings, i.e. as a social realization and as an expression of the relation or respect of the individual to the society. Although the abolition of the general work duty occurred as soon as in ´50s, the constitutional enshrining of the right to work and the duty to work (ensured by offense and criminal law) remained a part of the Czechoslovak labour law until 1989 (work as a duty and a matter of honour of every citizen).

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[27] KUKLÍK, J. et al.: *Vývoj česko-slovenského práva 1945–1989.* Prague: Linde Praha, a. s., 2009, p. 610.

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Christian Neschwara[1]
University of Vienna, Law Faculty, Institute for Legal History and History of the Constitution

Marriage Impediments Induced by Confession in Austrian Civil Code (ABGB): The Interdiction of Marriages Between Christians and Non-Christians

Abstract: Among the institutes of Austrian Civil Law none other was more often exposed to attempts of amendments than marriage law.[2] One of the main targets of these attempts in the course of the 19th century was the existence of marriage impediments induced by confession, namely:

(1.) If a dissolution of a Catholic marriage in lifetime of spouses should be allowed or not;
(2.) If the interdiction of marriage between spouses of Christian and non-Christian confession should be abrogated or not.[3]

The first aspect has actually often been dealt in literature;[4] therefore the following contribution will be focussed on the second aspect.

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[1] ao. Univ. Prof. Dr. Christian Neschwara, contact: christian.neschwara@univie.ac.at.

[2] WAHRMUND, L. (ed.): *Dokumente zur Geschichte der Eherechtsreform in Österreich* [Documents About the History of Marriage Law Reforms in Austria]. Innsbruck: Wagner, 1908, pp. 892–894, 1063–1064, 1077–1079, 1115–1116 and 1169–1174.

[3] RITTNER, E.: *Österreichisches Eherecht* [Austrian Marriage Law]. *Systematisch und mit Berücksichtigung anderer Gesetzgebungen dargestellt*. Leipzig: Ducker & Humblot, 1876, pp. 137–139. LENHOFF, A.: *§§ 44–111*, 115–136. In: KLANG. H. (ed.): *Kommentar zum Allgemeinen bürgerlichen Gesetzbuch* [Commatary on General Civil Code], 1/1. Wien: Österreichische Staatsdruckerei, 1933, pp. 466–468 (§ 64); WALKER, G.: *Internationales Privatrecht* [Private International Law; IPR], 5. Auflage [issue]. Wien: Österreichische Staatsdruckerei, 1934, pp. 599–599.

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Key words: Circumvention of Law; Civil Code; Diversity of Confession; Divorce; Indissolubility of Marriage; (Jewish) Marriage Law; Marriage Impediments; Separation from Bed and Board; Simulated Migration.

1. Basics of the Marriage Law of the ABGB to the State of 1811[5]

A) In General: Confessional Character

The marriage law of ABGB was regulated in §§ 44–136, it was strictly confessional orientated, containing specific rules for marriages of Christians, Catholics and non-Catholic (protestant and orthodox Christians), as well as specific rules for marriages of Jews. Mixed marriages were only permissible between members of Christian confessions. Mixed marriages between Christians and non-Christians were supposed to be interdicted; they were forbidden by law and sanctioned with invalidity. It was the so-called "Interkonfessionellen-Gesetz"[6] that made it already possible to convert from the Christian belief to the Judaism in 1868 (RGBl Nr 49).

The confessional orientation of the ABGB marriage law was also extended to the acts of wedding, which belonged to the pastors of the respective confessions, being parsons, pastors or otherwise, for example rabbis, to whom the state delegated these acts (§ 75).[7] Members of other confessions, who did not enjoy recognition by the state, were deprived of any regular access to marriage law in ABGB. The character of non-denominate persons, who were not affiliated to a state-recognized confession, got such a recognition in 1868, but their admission to marriage followed just in 1870, when persons, who did not belong to a confession, which was not state-recognized, or which declared themselves non-denominate, were allowed to marriage with assistance of administrative authorities, of district administration ("Bezirkshauptmannschaft") or Magistrate ("Statutarstadt").

B) Mixed Marriages

1. Catholics and non-Catholics

In accordance with the ABGB the marriage impediments provided for Catholics were also relevant for marriages between Catholics and non-Catholics. Therefore, the indissolubility of marriage was also determined for marriages, in which only one spouse was a Catholic. In contrast to this, a marriage of non-Catholics remained dis-

[5] SCHIMA, S.: Das Eherecht [Marriage Law] des ABGB 1811, and KALB, H.: Das Eherecht in der Republik Österreich [Marriage Law in Austria] 1918–1978, *BRGÖ* 2/1, 2012, pp. 13–17 and 28–30.

[6] Gesetz, wodurch die interconfessionellen Verhältnisse der Staatsbürgern in den darin angegebenen Beziehungen geregelt werden [The law about the regulation of relations of nationals in religious matters], vom 25.5.1868. In *Reichsgesetzblatt* [Journal of Imperial Laws; RGBl], Nr 49.

[7] LENHOFF, A.: *§§ 44–111*, 1933, pp. 501–503 (§ 75).

solvable, even if one of the spouses converted to the Catholic confession subsequent to marrying (§ 111, 2).[8]

2. Christians and non-Christians

All Christians were interdicted to marry a person, who did not profess a Christian religion (§ 64);[9] such marriages could not validly be concluded. The administrative authorities never gave indulgence (dispensation) from this marriage impediment.[10] At the time, when ABGB was introduced, no other non-Christian confession than the Jewish confession was recognized by the state, therefore the marriage impediment induced by diversity of religion was directed only against Jews.[11] This may be considered as discrimination, but the rejection of Jewish-Christian mixed marriages had its roots also in Jewish religious law. This marriage impediment was practiced as a custom in Jewish religious law until the 19th century.[12]

A subsequent conversion from Judaism to Christendom did not have any legal meaning. Such a conversion, after declaration of invalidity of this marriage, might be remedied by another wedding, which might lead to a valid marriage, and which even remained valid after a withdrawal to Judaism (§ 136 explicitly) and reverting from the Christian to Jewish confession.[13] In the case, when a Jewish marriage turned to a mixed marriage, because of conversion to Christianity of one spouse, ABGB allowed dissolution of the marriage, in accordance with the provisions for Jewish marriages (§ 136); The marriage could be dissolved, by means of a letter of divorce by the husband to his wife (§§ 133–135).[14]

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[8] LENHOFF, A.: *§§ 44–111*, 1933, pp. 735–737 (§ 111, 2).

[9] LENHOFF, A.:*§§ 44–111*, 1933, pp. 466–468. KÖSTLER, R.: *Das österreichische Eherecht unter Mitberücksichtigung des Burgenlandes im gemeinverständlicher Darstellung.* München: Rikola, 1923, pp. 29–31. NEUMANN-ETTENREICH, R.: *Das österreichische Eherecht gemeinverständlich dargestellt*. Wien: Manz, 1913, pp. 31–33. SCHUSTER-BONNOT. M., SCHREIBER. K. (eds.): STUBENRAUCH, M.: *Commentar zum österreichischen allgemeinen bürgerlichen Gesetzbuche*, 8. Auflage Wien: Manz, 1902, p. 132. RITTNER, E.: *Eherecht*, pp. 137–139; ANDERS, J.: *Das Familienrecht systematisch dargestellt* (= Compendien des österreichischen Rechtes). Berlin: Heymann, 1887, p. 22.

[10] LENHOFF, A.: *§§ 44–111*, 1933, pp. 471–472. KÖSTLER, R.: *Eherecht*, 1923, pp. 69–70. WALKER, G.: *IPR*, 1934, 602.

[11] RITTNER, R.: *Eherecht*, 1923, pp. 139–140.

[12] SCHIMA, S.: Eherecht. *BRGÖ* 2/1, 2012, p. 21. WILD, T.: *Die Entwicklung des Ehescheidungsfolgenrechts – Eine rechtshistorische Analyse von Joseph II. bis zur Gegenwart* (Dissertation) Wien: Universität Wien, 2014, pp. 72–73. GRAßL, I.: *Das österreichische Eherecht der Juden* [Austrian Jewish Marriage Law]. In: DOLLINER, T., GRAßL, I. (eds.): *Handbuch des österreichischen Eherechts* [Manual of Austrian Marriage Law]. Ausführliche Erläuterung des zweiten Hauptstückes des bürgerl. Gesetzbuches von §. 123–136, Band V, Neue Ausgabe. Wien: Braumüller, 1848. ZEILLER, F.: *Commentar über das allgemeine bürgerliche Gesetzbuch* …, Band I. Wien-Triest: Geistinger, 1811, p. 212.

[13] GRAßL, I.: *Eherecht*, 1848, pp. 146–148.

[14] LENHOFF, *A.: §§ 44–111*, 1933, pp. 833–834.

2. Marriage Impediment Induced by Confession and Fundamental Rights

Since the unsuccessful attempt of Austrian Imperial Diet at Kremsier in Moravia (Kroměříž/Czech Republic) in 1848/49 to implement cogent civil marriage and to abolish the marriage impediment induced by religious diversity, marriage law of ABGB remained unchanged; in regard of marriage impediments induced by confession all was regulated in the same way as before in Pre-March. Marriages, which were Catholic ones from the very beginning and then, as a result of the conversion of one spouse, became Christian-mixed or rather were mixed from the very beginning and became Catholic due to the subsequent conversion of one spouse, remained indissoluble (the marriage-tie could not be dissolved).

The constitutional warranty of freedom of religion constituted in Article 14 of "Staatsgrundgesetz" (Basic State Law) in December 1867 could not change these issues;[15] whereas the adoption of the law about the regulation of relations of nationals in religious matters ("Interkonfessionellen-Gesetz")[16] based on Art. 14, gave all citizens the freedom of religion and determined, that – due to changing the confession all cooperative rights to the abandoned religious community got lost to resigning members (§§ 4 and 5 Law about inter-confessional relations). In addition to this § 16 of this law ordered, that all provisions in other laws, which were conflicting especially §§ 4 and 5 of "Interkonfessionellen-Gesetz", were not longer supposed to be applied. The provisions of ABGB about marriage law were not affected by fundamental rights. Only the regulation, which declared it as a reason of disinheritance (§ 768a ABGB), when a person turned to apostate, was abrogated, as well as the regulation of Austrian Criminal Code of 1803, which declared incitement to apostasy as a crime (§ 122c).[17]

Some other initiatives concerning the elimination of confessional differentiation in marriage law of ABGB were undertaken in Austrian parliament (Imperial Council). These efforts were following the laws about the regulation of confessional relations, which were enacted in 1868. Building on the "proclamatory" declarations of draft constitution of Kremsier in 1848/49, the implementation of cogent civil marriage was not demanded. Such a claim would have been unenforceable, because the decision of the Imperial Council needed the consent ("Sanktion") of the conservative and Catholic monarch; however, the abrogation of marriage impediments induced by confession seemed to be within reach. In accordance with this, the law, which was passed in 1876 in the House of Representatives ("Abgeordnetenhaus"), was rejected

[15] Article 14 Staatsgrundgesetz über die allgemeinen Rechte der Staatsbürger [Basic State Law About Fundamental Rights of Nnationals], RGBl, Nr 142.

[16] RGBl, 1868, Nr 49.

[17] In connection with Interkonfessionellengesetz (RGBl, Nr 49), Article 7 (1).

in the House of Lords ("Herrenhaus"). Therefore marriage law remained unchanged until the end of Austrian monarchy.[18]

3. Ways to Circumvent Confessional Marriage Impediments

Since the period of the 1870s citizens, who were affected by marriage impediments induced by confession, began to seek ways to circumvent the marriage law of ABGB.

The Law about inter-confessional relations of 1868 could not provide any suitable opportunities for Catholics affected by the interdiction of remarriage. It was impossible for Catholics, if they were separated only from bed and board, to convert to a religion, which allowed a divorce, because it was not possible to convert an indissoluble marriage (§ 111) into a dissolvable one by this way. It was much easier to switch off the marriage impediment by changing to another religion in case of diversity of religion (§ 64).

A) Interdiction of Remarriage for Catholics Separated from Bed and Board

1. Legal bases

The dissolution of a marriage, which was mixed or purely Catholic from the very beginning and also, when it changed to mixed one as a result of the conversion of one spouse to a purely Catholic one or in the same way from a mixed marriage to a non-Catholic one, was prevented because of § 112 (2) ABGB. This provision declared the marriage-tie indissoluble, even when only one of the spouses confessed Catholic religion at the time, when marriage was concluded. Therefore, attempts of Catholics, who were separated from bed and board, in order to realize a following remarriage by declaration of being not a member of a (state-recognized) religious confession or undenominational state ("Konfessionslosigkeit"), were doomed to failure. Persons, to whom it was interdicted to marry, were compelled to celibacy or had to live in concubinage. A change of confession could not pave the way to another marriage.

2. Practice

The only way for Catholics to escape this situation was the circumvention of Austrian marriage law by submitting themselves to a foreign legal system, which allowed the separation of a Catholic marriage-tie. Apart from changing the confession, for a Catholic, who was separated only from bed and board, this had to be made by changing the citizenship in order to effect the application of such a marriage law. Such a migration was only exploited for the purpose of the dissolution of a Catholic marriage followed by a remarriage abroad.[19] The first cases of such simulated migration ("Scheinmigration") rose immediately after the failure of initiatives for a re-

[18] HARMAT, U.: *Ehe*, 1999, pp. 24–26, particularly 29–31.

[19] FUCHS, W.: *Das Ehehindernis des bestehenden Ehebandes nach österreichischem Recht und seine Umgehung* [The Impediment of Current Marriage-Tie in Austrian Law and Its Circumvention]. Wien: Hölder, 1879, pp. 3–4; PELIKAN, CH.: *Aspekte*, 1989, pp. 85–87.

form of ABGB marriage law in the 1870s. Apart from the introduction of a civil marriage caused by emergency ("Notzivilehe") for undenominational persons in 1870, no more attempts to a reform of marriage law could be expected. Obviously the same applied to other marriage impediments induced by confession, such as § 64 (diversity of religion), which also remained in force after 1868, notwithstanding the constitutional guarantee of freedom of religion.[20]

3. Relevance in legal life

The judicature of the Austrian civil courts showed different paths, which Catholics took, in particular to acquire the citizenship of a state, in which the dissolution of a Catholic marriage, following the capacity to remarry, was allowed[21] like in Hungary, especially Transylvania, or in Germany, especially Coburg. Discussions concerning a reform of the marriage law, especially due to marriages which were induced by simulated migration ("Scheinmigration"), became evident in the middle of the 1870s in Austrian parliament (Imperial Council), in 1875 in the House of Representatives and in 1877 in the House of Lords.

In 1880 it was estimated, that already (several) hundreds of such marriages did exist at this time. Since the mid of the 1870s the information about this phenomenon was constantly appearing in legal literature and law reports. Collections of judicial

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[20] In this sense: Decisions of Supreme Court (Oberster Gerichtshof [OGH]) in permanent judicature since 1871: *Allgemeine österreichische Gerichts-Zeitung* [General Gazette on Austrian Jurisdiction; *AÖG-Z*]), 1871, pp. 198–199. GLASER, J., UNGER, J., WALTHER, J. (eds.): *Sammlung von zivilrechtlichen Entscheidungen des k.k. obersten Gerichtshofes* [Collection on Civil Law Decisions of the Supreme Court: GlU]. Wien IX, 1871, pp. 17–19/Nr 4018 (1876).

[21] See in general: FUCHS, W.: *Die sogenannten siebenbürgischen Ehen und andere Arten der Wiederverehelichung geschiedener österreichischer Katholiken* [So-called Transylvanian Marriages and Other Kinds of Remarriage for Austrian Catholics]. Wien: Manz, 1889, pp. 19–21. Further literature is quite extensive: FUCHS, W.: Siebenbürgische Ehen. *Juristische Blätter* [Juridical Papers, *JBl*], 1879, pp. 589–590. ROSZNER, E.: *Die Klausenburger Ehen* [Cluj Marriages]. *JBl* 1879, p. 631; FUCHS, W.: *Die unitarische Ehetrennung und das österreichische Eherecht* [Unitarian Dissolution and Austrian Marriage Law]. *Österreichische Advocaten-Zeitung,* 1879, no 6. RITTNER, E.: Auch einiges über die „Siebenbürger Ehen" [Also Something About "Transylvanian marriages"]. *AöG-Z,* 1880, pp. 231–234, 243–246. FUCHS, E.: Siebenbürgische Ehen. *JBl,* 1883, pp. 133–134, 145–146. FUCHS, E.: Correspomdenzen. Österreich-Ungarn. *JBl,* 1887, 166 pp. FUCHS, W.: Eine siebenbürgische Ehe vor den französischen Gerichten [Transylvanian Marriages Before French Courts]. *JBl,* 1890, pp. 152–153. FUCHS, W.: Ein katholisches Analogon zu den siebenbürgischen Ehen [A Catholic Analogy to Transylvanian Marriages]. *JBl,* 1890, pp. 279–281. FUCHS, W.: Über siebenbürgische Ehen und verwandte Erscheinungen [About Transylvanian Marriages and Similar Phenomena]. *JBl* 1893, 77. CALL, F.: Gegen die Siebenbürger Ehen [Against Transylvanian Marriages]. *AöG-Z,* 1893, pp. 57–59, 65–68. OFNER, J.: Zur Lehre von den siebenbürgischen Ehen [About the Doctrine of Transylvanian Marriages]. *Gerichtshalle* [Court Lobby; GH], 1893, pp. 109–111, 119–120. GELLER, L.: Über die Grenzen der Anwendbarkeit der kanonischen Ehehindernisse nach österreichischem Recht [About the Limits in Applying Marriage Impediments of Canon Law in Austria], *Zentralblatt für die Juristische Praxis* [Central Journal for Legal Practice; *ZBlJP*], 1896, 14, pp. 1084–1085. PFAFF, L.: Zur Frage der Klausenburger Ehen [About the Question of Cluj Marriages]. *JBl,* 1899, pp. 305–306. BETTELHEIM, E.: Zur Frage der Gültigkeit der sogenannten ungarischen Ehen in Österreich [About the Validity of So-called Hungarian Marriages in Austria]. *JBl,* 1926, pp. 226–228.

decisions reported only about invalidity of such marriages – reports relating to lower courts were not available.[22] It is not possible to report exactly about the frequency of German, Hungarian and Coburg marriages. The jurisdiction of the lower courts was fluctuating, but the Austrian OGH took the same line about the validity of such marriages and until 1907 declared them invalid.[23]

B) Marriage Impediment Induced by Diversity of Religion

1. Legal bases

Until 1868 marriages between Christians and non-Christians were only permitted in cases, in which the Jewish spouse converted to Christendom; since 1868 it was also allowed for Christians to circumvent the marriage impediment induced by diversity of religion by other means. Following the introduction of civil marriage for persons, who did not belong to any denomination or to a confession, which was recognized by the state, this possibility came into action just in 1870. From that time on it was not necessary to change to another confession, but to declare being not a member of a religious denomination ("Konfessionslosigkeit"); this made possible to marry at administration authorities ("Notzivilehe"). The opportunity of such a civil marriage caused by emergency was first opened for Catholics in cases, when the competent Catholic parish refused to wed a couple due to a reason, which did only comply with canon marriage law, but did not comply with marriage law of ABGB. This was set in force in 1868 instead of the canon marriage law, which had been set in force in 1856 because of the Concordat of 1855. Therefore, civil marriage caused by such an emergency was initially limited to Catholics, but in 1870 the application of it was extended to marriages of persons without a (state-recognized) confession.[24]

2. Practice

The laws of 1868/1870 led, as recent researches are showing,[25] to a remarkable mobility concerning the inter-confessional relations of nationals. The resignation

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[22] FUCHS, W.: *Ehen,* 1889, Vorwort pp. IV–V.

[23] Confer NESCHWARA, CH.: Eherecht. *BRGÖ* 2/1, 2012, pp. 101–117; NESCHWARA, CH.: *Wege*, 2014, pp. 145–159. NESCHWARA, CH.: *„Besondere Verhältnisse machen es mir wünschenswerth … das deutsche Reichsbürgerrecht zu erwerben"* ["Because of Certain Reasons I Would Like to ... Acquire the Citizenship of German Empire"]: *Die Coburger Eheangelegenheit* [The Coburg Marriage] *des Johann Strauß (Sohn)*. In: POTZ, R., SCHINKELE, B., WAKOLBINGER, D. (EDS.), FESTSCHRIFT FÜR HERBERT KALB ZUM 60. GEBURTSTAG. WIEN: Österreichisches Archiv für Recht & Religion, 65/1, 2018, pp. 1–18.

[24] Gesetz über die Ehen von Personen, welche keiner gesetzlich anerkannten Kirche oder Religionsgesellschaft angehören, und über die Führung der Geburts-, Ehe- und Sterberegister für dieselben [Law about the marriage of persons, who are not members of state-recognized churches or religious communities] (RGBl, Nr 51), vom 9.4.1870.

[25] STAUDACHER, A.: *Proselyten und Rückkehr. Der Übertritt zum Judentum in Wien* [Proselytes and Reversion. The Conversion to Judaism in Vienna], 1868–1914. Frankfurt/Main: Lang, 2016. STAUDACHER, A.: *Die Trauungsbücher der Zivilmatriken in Wien* [The Marriage Registers on Civil Marriages in Vienna]. Das erste Trauungsbuch 1870–1882. Zweiter Teil. *Zeitschrift „Adler"*,

from a confession had to be notified to the administrative authorities at the place of the habitual residence, but it did not have to be notified to the administrative authority at the residence. Therefore to a large extent Vienna became the centre for a lot of believers, who wanted to leave their confession, especially for foreigners, in most cases from Hungary, because the notification of resignation could even be issued by passing from abroad through Austria. The notification of resignation did not require a certain form; the affected religious community had to be informed by the administrative authority, which also had to issue a written acknowledgement ("Ratschlag") about the resignation to the resigning person. Moreover this confirmation enabled to transfer to another confession. Neither the withdrawal of a confession with the effect of being of no confession (non-denominate) nor the transfer to another confession, what could take place simultaneously, could cause a permanent (legal) binding for the affected person.[26]

The register books ("Matriken"), which the Viennese municipal administration ("Magistrat") held about civil marriages caused by emergency contain about 5200 of such marriages, recorded from 1870 to 1914; in Graz and Salzburg only about 100 civil marriages were registered in the same time.[27] These recordings show, that more than 90% of these civil marriages had been concluded to cover Jewish-Christian marriages, in about 80% of these cases one of both spouses before wedding was Jewish (or had declared to be undenominational).[28] If one spouse of such a mixed marriage wanted to remain Jewish, he/she needed the confirmation of the rabbi about denial of marriage, to get the admission to a civil marriage at the administrative authority. However, in Vienna such confirmations were issued by the Jewish religious community by the thousands.[29]

3. Legal assessment

Just more than a quarter of the 18.000 withdrawals of the Judaism, which was raised in Vienna, was motivated to circumvent this impediment.[30] Nevertheless it cannot be estimated approximately, to what extent mixed marriages between Christians and Jews were contracted, and which of them – as a consequence of this – were

Wien 24 (XXXVIII alter Zählung [old version count]) / 1, 2, 2007, pp. 41–43. STAUDACHER, A.: Die Notziviltrauungen [Civil Marriages Caused by Emergency] *in Graz und Salzburg*. Zweiter Teil. *Zeitschrift „Adler"*, Wien 26, 8, 2012, pp. 321–322.

[26] STAUDACHER A.: *Proselyten,* 2016, pp. 37–38 (about "Notzivilehe"), 108–109, 110–111, 151–152 (about "Interkonfessionellengesetz"). STAUDACHER, A.: Trauungsbücher. *Zeitschrift „Adler"* 24/1, 2, 2007, pp. 41–43.

[27] STAUDACHER, A.: *Proselyten,* 2016, p. 142. STAUDACHER, A.: Notiziviltrauungen. *Zeitschrift „Adler"*, 26, 8, 2012, pp. 321–322.

[28] STAUDACHER, A.: Trauungsbücher. *Zeitschrift „Adler"* 24/1, 2, 2007, pp. 43–45.

[29] STAUDACHER, A.: *Proselyten,* 2016, pp. 140–141,

[30] STAUDACHER, A.: *Proselyten,* 2016, p. 142.

declared invalid, because they were concluded without circumvention of marriage impediment of diversity of religion.[31]

a) In general

The contemporary legal sources did not contain any indications about such marriages. The contemporary collections about the decisions of the Austrian OGH show a few declarations about their invalidity but *pars pro toto* they allow to make conclusions about the relevance, which the marriage impediment induced by diversity of religion had in the legal culture of Austrian monarchy as an instrument to prevent such mixed marriages. Like in regard to the decisions about marriages, which had been made in purpose to circumvent the interdiction of remarriage of Catholics (in accordance to § 111 ABGB), who were only separated from bed and board, in the way of simulated migration; also only marriages abroad were playing a decisive role in the judicature of Austrian courts in cases relating to the marriage impediment of § 64 ABGB; either for the reason, that at least one spouse had become a foreign citizen, or corresponding to fact, that this marriage was made abroad in contrary to the interdiction of § 64 ABGB by Austrian nationals with purpose to derive legal consequences from this marriage concluded abroad on the national territory of Austria.

b) Specific cases about marriages abroad

At almost the same time, when the Austrian OGH was changing its opinion about the invalidity of marriages, which were concluded abroad in order to circumvent § 111 ABGB, it changed its opinion about marriages abroad, which were contracted to circumvent the marriage impediment induced by diversity of religion (§ 64).

Such Jewish-Christian mixed marriages were still absolutely interdicted in Austria. Therefore the following analysis is concerning only the marriages concluded abroad at foreign locations.

aa) Judicial review of the validity:

The judicial review of marriages, being opposed to the marriage impediment induced by diversity of religion, was ex officio reserved to the competence of civil courts (§ 94 ABGB). Following matters got evident in decisions of Austrian courts; The normal case was formed by applications to the courts, only in a few cases made by the husband, and more often by his wife,[32] for instance in cases of criminal investigation[33] or conviction to a perennial detention,[34] of course because of bigamy,[35] and infrequently in the way of consensual

[31] STAUDACHER, A.: *Proselyten,* 2016, p. 5 (footnote 4).

[32] PFAFF, L., SCHEY, J., KRUPSKY, V. (eds.): *Sammlung von Zivilrechtlichen Entscheidungen des k.k. obersten Gerichtshofes*, Neue Folge [GlUNF]. Wien: Österreichische Staatsdruckerei, 1### Nr 1832 (1902); GlUNF Nr 4653(1909) = JUNKER R., FUCHS G. (eds.): *Rechtsprechung des k.k. Obersten Gerichtshofes in Eheungültigkeitssachen*. Wien: Manz, 1916, Nr 76/1909.

[33] GlUNF 4818 = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 83/1909 (= Spruchrepertorium [Repertory on Legal Rules; SprR] Nr 205).

[34] GlUNF Nr 6867 (1878).

[35] GlUNF Nr 3108 (1905) = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 40/1905.

application of both spouses, often in conjunction with the declaration "not to strive a recovery of the invalid marriage"[36] (for instance after changing the confession by one or both spouses concluding a new marriage).[37] In some cases applications of spouses to administrative authorities, like applying the registration of a child's legitimation[38] or rather the legitimate birth of a child[39] or the registration of the establishing of a residence,[40] became evident and were followed by activities of courts in order to examine the validity of the respective marriage.

bb) Differentiation of legal assessment in order to the citizenship of the spouses: In accordance with the participation of nationals as well as foreigners, such marriages in the judicature of the Austrian OGH were judged following the rules of private international law.

α) Marriages of nationals: Marriages of Austrian citizens, contracted abroad in contrary to the interdiction of § 64 ABGB, were declared to be invalid[41] – in accordance with § 4, indicating, that nationals in acts and business, which they undertake in foreign countries, remain bound by Austrian law, as far as their personal capacity to undertake them, is limited by Austrian law – and as far as these acts and business should produce jurisdictional consequences in Austria. In such cases it did not acquire any knowledge about the existence of such a restriction, the actual non-compliance was enough.[42] Therefore, concerning marriages abroad, Austrian nationals remained bound by the interdiction of § 64 ABGB, but only insofar as they wanted to derive any rights from this marriage abroad in Austria.[43] A return of the spouses back to Austria could not lead the Austrian OGH to decide, that this intention had already existed at the time of the marriage. The Austrian OGH followed this line of jurisdiction just since 1905; it favoured the validity of Jewish-Christian mixed marriages. Following the entry of this legal opinion in the Repertory on Legal Rules ("Spruchre-

[36] GlUNF Nr 2738 (1904) = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 27/1904; *Entscheidungen des österreichischen Obersten Gerichtshofes* [Decisions of Austrian Supreme Court] in Zivil- (und Justizverwaltungs-)sachen, veröffentlicht von seinen Mitgliedern [SZ], Wien, 1919–1938, Nr 3250.

[37] GlU Nr 11241 (1886); GlUNF Nr 3092 = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 38/1905.

[38] GlUNF Nr 3485 (1906) = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 47/1906; JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 67/1908.

[39] GlUNF Nr 3649 (1907) = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 49/1907.

[40] GlUNF Nr 3787 (1907) = JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 54/1907 (= SprR Nr 198).

[41] GlUNF Nr 3092 (1905); GlUNF Nr 3649 (1907).

[42] GlUNF Nr 3787 (1907).

[43] GlUNF Nr 3485 (1906), Nr 3649 (1907); similar JUNKER R., FUCHS G.: *Rechtsprechung*, 1916, Nr 67/1908.

pertorium"), the OGH could deviate from its own jurisdiction only under specific conditions; this might be regarded as a precedent for lower courts.[44] A marriage, which was concluded abroad between Austrian nationals obviously with the intent to circumvent the marriage impediment induced by diversity of religion was retroactively declared invalid, therefore also in that period of time, in which the marriage abroad had to be considered valid, too. This fact was perceived as an "anomaly";[45] and this anomaly had to appear really stark, if the invalidity of such a marriage should only capture the territorial scope of ABGB. This might be the case, for example, in Jewish-Christian mixed marriages concluded between an Austrian national and foreigner abroad.

β) Marriages between nationals and foreigners: Marriages, which were concluded between Austrian nationals and foreigners abroad, were considered to be invalid, because Austrian nationals had to be judged in accordance to Austrian law, as far as their personal capacity for undertaking this juridical act (to marry) was limited by Austrian law (§ 4 ABGB); Austrian citizens remained in accordance with § 4 bound to Austrian law.[46] The existence of the marriage impediment of § 64 ABGB had unavoidably led to invalidity of such a marriage. In first decisions the Austrian OGH regarded an absolute invalidity, because it also must affect the personal status of the foreign spouse. Similar to its decisions about the invalidity of Catholic marriages caused by simulated migration, the Austrian OGH argued with the existence of a public reservation, so that such marriages had to be fundamentally indecent and therefore had to be absolutely prohibited for foreigners too. However, since 1902 the decisions of the Austrian OGH stated the invalidity of such marriages with relevance only within the space of ABGB.[47] From 1905 on the invalidity of such marriages was only stated, if the intention of the spouses to circumvent Austrian law could be considered as approved at the time, when the marriage was concluded. If this was not the case, such a marriage – in accordance with § 34 ABGB – should be judged in accordance to the law of the place, where this business (wedding) was concluded abroad. If this foreign law did not contain an appropriate interdiction like the marriage impediment induced by diversity of religion (§ 64), the validity of such marriages had to be recognized in Austria.[48] Diversity of religion was no longer considered as

[44] GlUNF Nr 3787 (1907).

[45] WINIWARTER, J.: *Das Personenrecht* [The Law of Persons] *nach dem allgemeinen bürgerl. Gesetzbuche, systematisch dargestellt und erläutert* (= Das österreichische bürgerliche Recht … Erster Theil), 2. Auflage (2nd issue). Wien: Mösle und Braumüller, 1838, pp. 57–58.

[46] GlU Nr 11241 (1886)= GlUNF Nr 2454 (1903) = GlUNF Nr 2738 (1904).

[47] GlU Nr 1832 (1902); GlUNF Nr 3250 (1906).

[48] GlUNF Nr 3108 (1905) = Nr 4653 (1906).

an absolute marriage impediment, because since 1868 the withdrawal and transfer as well as the resignation from one confession to another was permitted, so that Christian-Jewish mixed marriages could be covered either by conversion of one or both spouses to another confession or by declaration of one or both spouses being non-denominate; and, after the marriage was contracted one or both spouses could revert to the former confession. The validity of such mixed marriages was not called into question, because ABGB considered Jewish-Christian mixed marriages being valid, due to the conversion of the Jewish spouse to Christendom (§ 36). The spouse, who remained Jewish, was authorized to apply for divorce: Therefore the existence of such mixed marriages in Austria was not absolutely prohibited, and could not be regarded as indecent,[49] but without a conversion of confession, such marriages could validly not be constituted in Austria.[50]

γ) *Marriages between foreigners*: the Austrian OGH was allowed to judge about the validity of marriages, which were concluded between foreigners abroad, if an appropriate competence was given. This was the case, if both spouses had taken up residence in Austria. Following the right of domicile (§ 37) of both spouses, if an equivalent marriage impediment similar to § 64 ABGB did not exist, the Austrian OGH considered such marriages valid.[51] Moreover since 1907 the acquisition of a foreign citizenship by Austrian nationals in order to circumvent marriage impediments of Austrian law, did not lead the Austrian OGH to declare the invalidity of such a marriage in Austria. This was pursuant to the opinion of the Austrian OGH to judge of such marriages in accordance with the law of domicile of both spouses – and this could not prevent, that spouses, now as foreigners, would return to Austria in order to retain their residence.[52] Following the acquisition of the foreign citizenship legal bindings to Austrian legal system did expire; a procedure in order to proof the validity of a marriage concluded by foreigners abroad, without a residence in Austria, at an Austrian court, was considered to be inadmissible. Such procedures would compromise Austrian courts, they would lead to a fraudulent acquisition of legal jurisdiction of an Austrian court, in order to claim the existence of a marriage impediment based on Austrian law, which did not exist according to the right of domicile abroad.[53]

[49] GlUNF Nr 3485 (1906).

[50] GlUNF Nr 2817 (1904).

[51] GlUNF Nr 3108 (1905) = Nr 6757 (1914).

[52] GlUNF Nr 5603 (1911).

[53] GlUNF Nr 6757 (1914).

4. Outlook

A reform of the marriage law did not take place in Austria – neither until the end of Austrian Monarchy nor in the first Republic of Austria after 1918. In regard of the ways to circumvent the marriage impediment induced by diversity of religion this problem was solved by treating this marriage impediment as a dispensable one.[54] The administrative authorities gave allowance ("Dispens") and this did not meet with any difficulties in the judicature of Austrian courts.[55] Reports on procedures judging about the invalidity of mixed marriages between Christians and Jews were no longer being present in decisions of Austrian courts, the invalidity between Christian and other non-Christian persons could be noticed only in a few cases.[56]

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Gesetz, wodurch die interconfessionellen Verhältnisse der Staatsbürgern in den darin angegebenen Beziehungen geregelt werden [The law about the regulation of relations of nationals in religious matters], vom 25.5.1868 (*RGBl* Nr 49).

[54] SZ Nr 73 (1920), Nr 3 (1926); similar SZ Nr 208 (1933).

[55] SZ Nr 130 (1920), Nr 73 (1926), Nr 3 (1926).

[56] SZ Nr 307 and 398 (1924).

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Ivana Šošková[1]
Matej Bel University in Banská Bystrica, Faculty of Law, Department of History of State and Law

Act No. 138/1942 Coll. on Restrictions on Jews in Adoption

Abstract: The contribution focuses mainly on the reasons and circumstances of adopting this legal act which highly discriminated the Jewish population, which through adoption sought a way how to avoid the effects of the anti-Jewish legislation adopted so far. This act deprived the Jews of both passive and active adoption rights. Although there has not been a serious attention paid to this legal act, it is necessary to emphasize that it was an important part of the official anti-Jewish legislation of the Slovak State.

Key words: Slovak State; Jews; Anti-Jewish Legislation; Adoption.

Introduction

Anti-Semitism became the official ideology of the government and regime since the declaration of the independent Slovak State (1939–1945).[2] The Constitution of the Slovak Republic itself allowed the legal personality of Jews' reduction and negation,[3] which was finally consummated within the anti-Jewish legislation.[4] Of a special importance were the following acts: the "Arization Act" (Act No. 113/1940 Coll. on Jewish Enterprises and Jews Employed in Enterprises of 25th April 1940), the Government Order No. 198/1941 Coll. on the Legal Status of the Jews, known as the "Jewish Code" and the Constitutional Act No. 68/1942 Coll. about the eviction of the Jews – as the culmination of the anti-Jewish racial law in our country. In the Jewish Code there was expressis verbis a "limitation", but in fact, it was a manifest of systematic lawlessness and gradual total negation and abolition of the legal capacity of the Jews.

[1] doc. JUDr. Ivana Šošková, PhD., contact: ivana.soskova@umb.sk.

[2] BEŇA, J. *Vývoj slovenského právneho poriadku*. Banská Bystrica: Právnická fakulta UMB, 2001, p. 68.

[3] For the terminological concept of the Jews as a special category of population with a special legal status, see e.g.: MOSNÝ, P. Východiská právneho postavenia židovského obyvateľstva v období prvej Slovenskej republiky. In *Pocta Stanislavu Balíkovi k 80. narozeninám. Acta historico-iuridica Pilsnensia 2008*. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2008, pp. 250–257.

[4] JÁGER, R. Salzburské rokovania a zmeny v majetkovo-právnom postavení Židov. In *Aktuálne otázky práva v Slovenskej republike a Poľskej republike*. Rzeszow, 2004, pp. 171–178. JÁGER, R. Zásahy nemeckého diktátorského režimu do slovenskej vládnej moci a jeho následné zmeny v protižidovskom zákonodarstve. In *Diktatúry v európskych dejinách – Slovensko – ukrajinské vedecké kolokvium*. Užhorod: UŽNU, 2006, pp. 65–75.

Jews were supposed to be excluded from the economic, social and public life, they were unable to enter into business, acquire rights in rem, trade licenses and after the legalization of the deportations, their removal from Slovakia was supposed to take place.[5] It was therefore natural, that the Jews, whose source of livelihood – trade license had to be withdrawn, sought to find ways to keep the business active, with the possibility to retain some degree of impact on it. Similarly acute was the effort of the Jewish population to avoid transporting. For both suggested problems, there was one appropriate and even legal solution – it was the adoption.

Adoption – the Basic Legislative Framework and the Characteristics of the Institute

The basic norm regulating the adoption during the existence of the Slovak State was the Act no. 56/1928 Coll. on Adoption (hereinafter referred to as "AA"). It was the law adopted in the era of the so-called first Czechoslovak Republic,[6] which practically unified and codified the legal standards of adoption and its legal effects. In the field of family law, it was basically the most comprehensive standard with a unifying character,[7] adopted in the era of the inter-war Czechoslovakia.[8] In the sense of the diction of the reception provision (Art. 3 of the Act no. 1/1939 Coll.), the Act on Adoption (AA) became part of the legal order of the newly established Slovak State. Its acceptance and validity was subsequently confirmed by the construction contained in the Constitution of the Slovak Republic (Constitutional Act No. 185/1939 Coll., Art. 102), as was of all the existing legal regulations that were not in conflict with the Constitution or the existence of an independent Slovak Republic.[9] During the existence of the Slovak State, the adoption legislation as it was enshrined in the AA of 1928 was essentially left without any fundamental changes. Assembly of the Slovak Republic did not consider amendment or supplementation of the existing legislative framework for adoption. An exception to this was the government's draft

[5] HUBENÁK, L. Rasové (protižidovské) zákonodarstvo – vývoj a charakteristika. In *Quid leges sine moribus? (Metamorfózy vývoja štátu a práva v dejinách): medzinárodná online vedecká konferencia venovaná životnému jubileu prof. JUDr. Dr. h. c. Petra Mosného, CSc. konaná dňa 10. apríla 2014*. Krakow: Spolok Slovákov v Poľsku, 2014, p. 67.

[6] BEŇA, J. *Vývoj slovenského právneho poriadku*. Banská Bystrica: Právnická fakulta UMB, 2001, p. 30.

[7] Ibidem, p. 34.

[8] For a partially unifying success in the field of family law see also: FERANCOVÁ, M. Unifikačné a kodifikačné snahy v oblasti súkromného (občianskeho) práva v ČSR (1918–1938). In *Acta Universitatis Tyrnaviensis Iuridica*, akademický rok 2002/2003. Trnava: Právnická fakulta Trnavskej univerzity v Trnave, 2003, pp. 162–181. Also: LACLAVÍKOVÁ, M. Proces kodifikácie a unifikácie v ČSR v kontexte vývoja medzivojnovej strednej Európy s prihliadnutím na oblasť súkromného práva. In *Súkromné a verejné právo súčasnosti. Zborník z vedeckej konferencie doktorandov PF TU*. Trnava, 2005, pp. 210–228.

[9] BEŇA, J. *Vývoj slovenského právneho poriadku*. Banská Bystrica: Právnická fakulta UMB, 2001, p. 52.

law on Some Restrictions on Jews in Adoption submitted in 1942, which will be the subject of our interest in this paper. For a better understanding of the meaning and purpose of this draft, let us first introduce the institution of adoption and the relevant legislation (in basic aspects),[10] valid in the Slovak State, before the adoption of Act no. 138/1942 Coll. on the Restrictions on Jews in Adoption, which entered into force on July 21, 1942.

The adoption was, in accordance with the Act no. 56/1928 Coll., a contractual relationship, the meaning of which was to imitate the natural relationship between parents and children and of course to secure the right of inheritance for persons without a legal heir. It was a contract in which the adopter (the adoptive parent) legally took another's child and incurred the rights and responsibilities of a parent.[11] The Act was built on the principle *adoptio naturam imitatur*, which means that adoption is supposed to replace the natural relationship between parents and children.[12] An essential condition for adoption was that the adoptive parent could only be a person who did not have their own legitimate children and children of the same position (i.e., legitimized, adopted, in relation to the mother out of wedlock). The adopter had to reach the age over 40 years and the age difference between the adopter and the adoptee was supposed to be no less than 18 years. The age of the adopted child was proved by the child's baptismal or birth certificate. The age of the adopter was proved by a baptismal or birth certificate when applying for confirmation of the adoption agreement. The fact that the adopter did not have own legitimate or equated children was evidenced by confirmation of the register of the relevant municipal office. The conditions were logically defined so that the sense of adoption could be fulfilled – to obtain a descendant, respectively an heir in the position of the own child.

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[10] More on adoption institute under Act No. 56/1928 Coll. on Adoption, see: ŠOŠKOVÁ, I.: Zákon o osvojení z roku 1928 – jednotná právna úprava inštitútu osvojenia v medzivojnovom Československu. In *Pocta Karlu Schellemu k 60. narozeninám: sborník k životnímu jubileu.* Brno: Nakladatelství KEY Publishing, 2012, pp. 595–603.

[11] To adoption kinship and relatives, see also: JÁGER, R. – JANIGOVÁ, E. *Vývoj právnej úpravy poskytovania sociálnej pomoci na území Slovenska (od najstarších čias do roku 1939).* Banská Bystrica: Univerzita Mateja Bela, Právnická fakulta. 2013, p. 53. JÁGER, R. Social Support in Slovakia During the Interwar Period. In *Socioekonomické a humanitní studie (vedecký časopis)* 1/2013, volume 3, Praha: Bankovní institut vysoká škola, a. s. 2013, pp. 5–18.

[12] For example, prior to the enactment of AA, particularly on the Slovak territory there were common cases when someone wanted to adopt his brother-in-law or sister, or his grandchildren (for example, legitimate children of a son or illegitimate child of a daughter. There were also cases when a man married a widow with children, and although he himself as a widower had his own children, he adopted all the children of his wife's previous marriage. Practice originating from the Hungarian Ministry of Justice even allowed grandparents to adopt their own grandchildren. It was possible also to adopt a father and his underage children at the same time (except of the children born after the adoption). See: ROUČEK, F. – SEDLÁČEK, J. *Komentář k čsl. obecnímu zákoníku občanskému. I. díl.* Praha: Právnické knihkupectví a nakladatelství V. Linhart, 1935, p. 910; in particular see: Explanatory Report to the Government Bill on Adoption (Senate Press 1494/1922). Digitální knihovna. Národní shromáždění republiky Československé 1920–1925. Senát – tisky. Tisk č. 1494. Available on: http://www.psp.cz/eknih/1920ns/se/tisky/t1494_00.htm [cit. 2017-12-16].

Although the primary purpose of the AA (1928) was the greatest possible approximation of the relationship between parents and children, the AA also allowed the **adoption of an adult, a rightful, *sui iuris* person** (arrogation). This is a supportive argument for the assertion, that the adoption was, in principle, an institution for preservation of the family property in families without any child, and that its aim was to ensure the transition of family capital to a de facto family-bound person.[13]

Once adopted person could not be adopted by anyone else, except the spouse of the adopter (see Art. 1, Sec. 5 of the AA). Only spouses could adopt someone as a common child. Adoption of own spouse, sibling or relative in a lineal consanguinity was impossible. More people could be adopted at a time, but there had to be a relationship between them that could be likened to the natural relationship of the siblings (e.g., it was impossible to adopt a father with a son, etc.). To resume, institutionally it was about accepting someone for their own, whether it was a minor (non sui iuris) or an adult (sui iuris) person. Adoption under this legislation was a legal instrument of gaining a descendant, a successor in a family relationship, practically primarily in a lineal consanguinity (ascendants and descendants).[14]

One of the basic effects of the adoption was that the adopted person acquired the surname of the adopter; in the case of the adopter-woman the adopted person got her native (girl's) surname (AA, Art. 3). If the adopter-woman was married, her surname obtained by her marriage could be acquired by the adopted person only with the consent of the adopter's spouse. If the married woman was adopted, she had to append the adopter's surname to the surname after her husband.[15]

Another – and perhaps the most important legal consequence of the adoption was establishing a relationship imitating the natural relationship between the parent and the legitimate child. Pursuant to the Art. 4 of the AA, the same legal relationship existed between the adopter and the adoptee and the adopter and the adopted child's descendants, as between the birth parents and the legitimate children.[16] It was the basic premise of adoption. However, the important implication was, that the adoptive parent passed the parental and paternal authority (patria potestas) over the adoptee, so the adopter was obliged to take care of the upbringing and maintenance of the adoptive child. Of course, exceptions were due to the very nature of the case, e.g., an adult married man did not belong under the patria potestas.[17] Descendants

[13] KLABOUCH, J. *Manželství a rodina v minulosti.* Praha: Orbis, 1962, p. 233.

[14] RADVANOVÁ, S. – ZUKLÍNOVÁ, M. *Kurs občanského práva – Instituty rodinného práva*. 1. vyd. Praha: C. H. Beck, 1999, p. 127.

[15] Rules relating to the surname acquired by the adoptive were cogent, i.e. it was not possible to modify the effect of adoption in a different way (see Art. 5 of the AA).

[16] LUBY, Š. *Základy všeobecného súkromného práva*. II. vydanie. Bratislava: Ústav všeobecného súkromného práva Právnickej fakulty Slovenskej univerzity, 1947, pp. 227–228.

[17] Regarding the exercise of parental and paternal power (*potestas*), three possible cases have to be distinguished. 1) If both spouses together were adoptive parents, the parental power belonged to both of them. The paternal power belonged naturally to the husband. 2) In the case that the only adopter was a man (it was irrelevant whether he was single or married), he had the same position as

of the adoptee, who were living at the time of conclusion of the adoption contract entered into a legal relationship with the adopter only if they gave their consent or permission to do so, or if such consent was given by their legal representative with the approval of the court.

The third important legal consequence of the adoption was that the adoptee and their later offsprings were also acquiring all property rights towards the adopter in the same way as legitimate children towards their parents. What was very interesting, there was an unambiguous unilateral application of property claims, since these belonged only to the adopted person towards their adopter and not vice versa (the adopter did not acquire any property rights towards the adopted person and his/her offspring, he acquired exclusively personal claims – at which there was the reciprocity); in addition, the property rights of the adoptee belonged only specifically to the person of the adopter, not to adopter's relatives.

One particular feature of the adoption under the AA was the fact that the adoptee and his/her offspring did not lose the rights in their own family to their birth parents and their relatives. They did not enjoy their personal or property rights unless there was a duplication of rights as a result of the adoption (e.g. blood father lost his patria potestas after the adoptive parent got it). The bonding of an adoptee to his/her own family did not substantially disappear. Through adoption he received the relationship only to the adopter. In relation to the adoptive family members the adoptee had no family relationship, nor the adoptee/ adoptee's descendants did have any property rights and claims. The maintenance obligation was primarily encumbered by the adopter. However, the claimant's entitlement to maintenance to his or her birth parents and blood relatives was also preserved – the law granted it supportively – it means – only if the adopter himself was unable to provide a good maintenance (Art. 4, Sec. 4 of the AA).[18]

Adoption according to the presented legislation was a typical contractual relationship, where one person stepped into the position of birth parent under the contract. The contract had to comply with statutory requirements (Art. 8 of the AA). The contract had to be made in the form of a public document or a private document, with the signatures of the parties being authenticated or notarized. If the court's approval was necessary, the contract could also be prepared by means of a registration with that competent court /court record/. The same applied to the declaration of accep-

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widowed birth father. Parental as well as paternal power belonged to him fully. 3) If the adopter was only a woman (again regardless of her status – single/married), she had a preferential entitlement to the upbringing of the child, but the paternal power continued to belong to the birth father of the adopted child. He still represented the child, he was managing his possessions, he determined his/her profession, and particularly he was obliged to bear the cost of his/her upbringing See: ROUČEK, F. – SEDLÁČEK, J. *Komentář k československému obecnímu zákoníku občanskému. I. díl*. Praha: Právnické knihkupectví a nakladatelství V. Linhart, 1935, p. 899.

[18] *Úr. sb. 1835.* Cited by FAJNOR, V. – ZÁTURECKÝ, A. *Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi*. III. vydanie pôvodného diela. Šamorín: Heuréka, 1998, p. 453. See also: *Rozh. ze dne 21. dubna 1933, Rv II 725/31, čís 12.538.* Cited by GERLICH, K. *Rozvod, rozluka, alimenty*. Praha: Právnické knihkupectví a nakladatelství V. Linhart, 1934, p. 80.

tance by adoption participants. To adopt a non sui iuris person, the consent of parents or legal representative, as well as of the court was necessary. Even the adoption of sui iuris persons required parental consent and the court approval. If the parents were of a different opinion, the word of the father was influential. However, if both parents (or only one of them) denied to give consent without a valid reason, the consent could have been made by the competent court instead. The fact that the consent of the parents (guardian, court) had always been the condition of adoption has to be considered as a germ of later adjustments to the issue of the need for parental consent to adoption. If the contract contained all requirements and the legal condition of parental consent was fulfilled, the contract became valid. In addition to parental consent, the law emphasized **the approval of the adoption agreement by the court.** This was supposed to ensure that all the adoption conditions required by law were met. Through the valid court approval, the adoption treaty became effective. Parental approval and court approval thus co-ordinated the normative process of the adoption treaty.[19]

The contractual nature of the acquisition was also supported by the AA's provisions on the possibility for the parties to modify their rights and obligations by way of derogation from the law. An exception to this was the legal effect of acquiring the adopter's surname, since the provisions governing this legal matter were of a mandatory nature (*ius cogens*). Otherwise, the contractual autonomy of the parties was respected. **The AA also allowed the parties to end the adoption relationship freely.** Just as the agreement of all participants was necessary for the creation of the relationship, so it was also for its revocation.[20]

These arguments therefore support the view that adoption was governed by civil law as a typical private-law relationship with minimal state intervention. Despite the effort to modernize the adoption institute, the Act No. 56/1928 Coll. on Adoption, by its adjustment mainly reflected the protection of legitimate children (born in matrimony) and accentuated the transition of property rights.[21] The primary purpose of adoption was not to take care of the child and to introduce the child into family background suitable for development of the child's individual qualities, but to obtain the descendant, the holder of the property rights, the potential heir.

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[19] ROUČEK, F. – SEDLÁČEK, J. *Komentář k československému obecnímu zákoníku občanskému. I. díl.* Praha: Právnické knihkupectví a nakladatelství V. Linhart, 1935, p. 896.

[20] The provisions of the law did not determine, whether the court's approval was necessary in such a case. There was also unequal opinion of legal science on this issue. (See ROUČEK, F. – SEDLÁČEK, J. *Komentář k československému obecnímu zákoníku občanskému. I. díl.* Praha: Právnické knihkupectví a nakladatelství V. Linhart, 1935, p. 903). Our opinion is that if approval of the court was necessary in establishing an adoption relationship (and on the basis of which the appropriate records were made in the population register), then the abolition of the adoption by the treaty, needed necessarily such approval of the court as well. This changed the personal status of the adopted person. In addition, this approval had the nature of a proper background for registration.

[21] RADVANOVÁ, S. – ZUKLÍNOVÁ, M. *Kurs občanského práva – Instituty rodinného práva*. 1. vyd. Praha: C. H. Beck, 1999, p. 127.

Government Draft Law on Some Restrictions on Jews in Adoption (Proposed in 1942)

In the context we have indicated in the introduction, as a result of the escalating anti-Jewish policy and the adoption of number of legislative measures to limit or negate the legal subjectivity and legal capacity of the Jews, adoptions in the first years of existence of the Slovak State became a possible means of dealing with the unfavourable situation of the Jewish population. Adoption was a contractual relationship, essentially without serious interference by the state into its creation and revocation. The law allowed the adoption of an adult and sui iuris person and it was (same as arrogation) based on both personal and property rights and claims. In reality situations occurred, in which the Jewish people, through adoption, sought a way how to avoid the effects of anti-Jewish measures. There was a possibility to transfer property rights, including trade licenses, to the adopted non-Jew. There were many cases when the Jewish people had been adopted by influential non-Jews in order to avoid transports and deportation. The government recorded such cases and because of "abusing the adoption to circumvent the anti-Jewish measures" and decided to prevent them legislatively.[22] The reason for preparation of the government bill limiting the active and passive rights of the Jews to adopt is as follows;

The draft of the law – constitutionally the negation of fundamental rights and freedoms (on the basis of and in accordance with the constitution) was accepted by ordinary law. It consisted of the title, the introductory formula and the three short articles. The Art. 1 was divided into two sections, both of which contained "references" to existing legal regulations, namely the Jewish Code and the constitutional law on the eviction of the Jews. According to the Art. 1, Sec. 1: *"The Jew (Art. 1, Government Order No. 198/1941 Coll.* /on the Legal Status of the Jews, known as the "Jewish Code" – author's note/) *can not adopt a non-Jew nor can the Jew be adopted by the non-Jew."* Pursuant to the Art. 1, Sec. 2: *"Persons referred to in Art. 2 of the Constitutional Act no. 68/1942 Coll.* /about the eviction of Jews – author's note/ *can not adopt a Jew, nor can they be adopted by the Jew."* Therefore, the person who fell into the legal definition of a Jew in accordance with the Jewish Code was not allowed to enter into a personal relationship, neither via adoption nor via a newly created relationship in the direct lineage with a non-Jew. This prevented the evasion of anti-Jewish legislation, especially in relation to business under a trade license. The second section of Art. 1 was a response to the avoidance of the transportation of Jews. According to the explanatory report, the government was primarily interested in precluding those adoptions where the Jew would adopt a non-Jew or be adopted by the non-Jew, or where a Jew excluded from the forced eviction would adopt or be adopted by the Jew, who could be evicted. This was the objective pursued by the Art. 1 of the bill in ac-

[22] The Government bill on Some Restrictions on Jews in Adoption (press 571/1942). Explanatory Report. Digitální knihovna. Snem Slovenskej republiky 1939–1945. Tisky. Tisk č. 571. Available on: http://www.psp.cz/eknih/1939ssr/tisky/t0571_00.htm [cit. 2017-12-16].

cordance with the intentions of the Jewish Code.[23] Anyway, the whole Art. 1 of the proposed draft forbade, and thus explicitly abrogated the possibility for the Jews to apply their passive and active rights to adopt. After that, the Art. 2 of the bill gave the court the possibility to reject a petition for approval of adoption in cases under Art. 1, if the petition had been filed before the date of entry into force of this law and was not yet legally arranged. Art. 3 contained the usual effect (commencement) and the implementing clause. At the end, the government declared that the implementation of this law would not generate any new state treasury expenditure and also expressed the wish to refer the draft to the Constitutional Committee in Parliament.[24] The draft was signed by Dr. Vojtech Tuka, the Prime Minister and Minister of Foreign Affairs, and Dr. Gejza Fritz, the Minister of Justice.

The parliamentary Constitutional Committee dealt with the relevant bill on the 23rd June 1942. In its report (press no. 581), it accepted the government's stated reasons for the legislative amendment, confirmed that the adoption institution had been abused to circumvent anti-Jewish normative measures, and explicitly stated that *"the provisions of the bill are indeed necessary to avoid this undesirable phenomenon."*[25] It more precisely formulated the Art. 2, according to which the adoption contracts contrary to the provisions of the Art. 1, if not approved or confirmed by that act, could not be approved or confirmed. In its report, the Committee formulated some direct instructions for the courts, when it stated: *"Petitions for approval or confirmation of such contracts must therefore be rejected."* Of course, it considered that this provision would apply only to contracts concluded prior to the effect of the proposed law. The adoption contracts concluded after the effectiveness of the proposed law would already be directly and ex lege under Art. 1 invalid.[26] The parliamentary Constitutional Committee recommended the proposed bill to be adopted.

In the same way, according to the above-mentioned reasons, rapporteur Matej Huťka submitted a report of the Constitutional Committee on the Government's draft proposal to the Slovak Republic Assembly on the 2nd July 1942 at its 92nd meeting. The fact that the issue was perceived very routinely and as a clear obviosity in respect to the anti-Jewish measures, was evident because the speech of the named rapporteur was word for word identical to the text in press no. 581, and neither none of the members of the Assembly started a discussion after his presentation, nor no amendments were suggested. The Assembly adopted the draft law without any qualification, without any reservation, according to the committee's report.[27] The Act on

[23] Ibidem.

[24] Ibidem.

[25] The report of the Constitutional Committee on the Government Bill on Some Restrictions on Jews in Adoption. Digitální knihovna. Snem Slovenskej republiky 1939–1945. Tisky. Tisk č. 581. Available on: http://www.psp.cz/eknih/1939ssr/tisky/t0581_00.htm [cit. 2017-12-16].

[26] Ibidem.

[27] The report on the 92nd meeting of the Slovak Assembly, held on the 2nd July 1942. Digitální knihovna. Snem Slovenskej republiky 1939–1945. Stenoprotokoly. 92. schůze. Čtvrtek 2. července 1942. Available on: http://www.psp.cz/eknih/1939ssr/stenprot/092schuz/s092005.htm [cit. 2017-12-16].

Restriction on Jews in Adoption was published under No. 138/1942 Coll. (partial sum 32) and came into effect on July 21, 1942.

This law was enacted in the period of oppression,[28] during the resistance against the existence of the Protectorate of Bohemia and Moravia and against the Slovak State, and during the fight for the reconstruction of the Czechoslovak Republic. As a rule abhorrent to the republican-democratic spirit of the law,[29] it was neither considered to be part of the Czechoslovak legal order nor to be the Slovak law recognized and authorized by the Slovak National Council as the representative of the state power in Slovakia.[30] The legal regulation of adoption with relevance for the territory of Slovakia was based on the Act no. 56/1928 Coll. on Adoption, which continued to apply after the restoration of Czechoslovakia, naturally in its original wording. It was later abrogated by the Act No. 265/1949 Coll. on Family Law, which comprehensively codified Czechoslovak family law and in comparison to the past, it gave the institute of adoption a qualitatively completely different dimension, function and purpose, under the influence of socialist science on family law.

Conclusion

The basis of the legal regulation of adoption in the period of existence of the Slovak State was the Act No. 56/1928 Coll. on Adoption, a standard of Czechoslovak origin, which was incorporated into the legal order of the Slovak State in March 1939. In the framework of anti-Jewish policy and the whole range of anti-Jewish measures, laws and regulations, there was a new law enacted by the Assembly of the Slovak Republic in 1942, which concerned the adoption and determined its conditions, specifically and exclusively in relation to the Jewish population. The Act No. 138/1942 Coll. on Restriction on Jews in Adoption responded to the multiplier cases, when the Jewish population via the adoption institute followed the circumvention of anti-Jewish normative measures, in particular with regard to their impossibility or restrictions on business activity, and also with regard to forced deportations and loss of citizenship. From our point of view, there is only minimal attention paid to the Act on Restriction on Jews in Adoption in our historical and legal-historical literature. In the area of anti-Jewish discrimination legislation, this law is perceived more marginally. With a few exceptions (as part of the legal-historical literature[31]), it is usually not included in the list of laws and regulations adopted in the era of the Slovak State, which

[28] In accordance with the constitutional decree of the President of the Czechoslovak Republic dated August 3, 1944, on the Restoration of the Rule of Law – no. 11/1944 Czechoslovak Official Journal.

[29] See the reception standards under the Art. 2 of the Slovak National Council Regulation of September 1, 1944 no. 1/1944 Coll.

[30] VOJÁČEK, L. – KOLÁRIK, J. – GÁBRIŠ, T. *Československé právne dejiny*. Bratislava: Eurokódex, 2013, p. 27.

[31] See e.g.: HUBENÁK, L. *Rasové zákonodarstvo na Slovensku (1939–1945)*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, Vydavateľské oddelenie, 2003, p. 201.

created a special legal regime for the Jews in Slovakia and allowed their deportation and arization of property.[32] The analyzed legal norm was clearly discriminatory, significantly affecting the personal and family rights of the Jewish population, negating their active and passive adoption rights. Although it was a law of no great significance, we can not deny, that this act formed a small chunk of a large mosaic of condemnable anti-Jewish legislation. We are convinced that, as a memento, this act certainly deserves its place and attention in the memory of our nation.

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[32] See e.g. the list of so-called "Jewish Laws" – available on the website of the Nation's Memory Institute: http://www.upn.gov.sk/data/pdf/zoznam-z.pdf [cit. 2017-12-16].

dejinách – Slovensko-ukrajinské vedecké kolokvium (Košice 26.–28.4.2006). Užhorod: UŽNU, 2006, pp. 65–75.

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Ingrid Lanczová[1]
Trnava University in Trnava, Law Faculty, Department of Legal History

Slovak and Hungarian Marriages in the Shadow of the Third Reich: An Insight into Anti-Jewish Marriage Law during the World War II[2]

Abstract: The study offers insight into the legal regulation of the German, Slovak and Hungarian marriages, influenced by Anti-Judaism, i.e. the racial politics after Adolf Hitler came to power. Selected aspects such as the definition of the Jew, criminal offences related to interpersonal relationships, sanctions for these criminal offences and subjects of these offences help us to demonstrate mirroring the German legal regulations, however with certain declinations. Pursuant to it, there is an evaluation of the contemporary declaration of the Slovak press about Slovak legal regulation being stricter than German and a comparison of the Hungarian legal regulation with the other two named regulations as well.

Key words: World War II; Anti-Jewish Regulations; Anti-Judaism; Racial Policy; Jew; Non-Jew; Mixed-blood; Marriage; Confessionally Mixed Marriage; Confessionally Mixed Partnership; Human Rights Violation; Violation of the Right to Privacy and Family Life.

Introduction

The Nazi ideas about marriage had an immediate effect on the legal regulation after Hitler's rise to power in 1933. The marriage, which became perceived as a population policy institute and as an institute for keeping the blood pure, was instantly regulated by the new Law passed on 14th July 1933 – the Law for the Prevention of Hereditarily Diseased Offspring, according to which people with hereditary, physical, and mental illnesses had to be compulsorily sterilised and marriages of sterilised and non-sterilised spouse had to be divorced.[3] Among other adopted measures was the well known ***Blutschutzgesetz***,[4] passed on 15th July 1935, which prohibited marriages and partnerships of Jews and non-Jews and such marriages made void, regard-

[1] JUDr. Ingrid Lanczová, internal PhD. student, contact: inge.lanczova@gmail.com.

[2] The study is the result of working on VEGA project No. 1/0549/15 entitled: Legal status of Jews in the Slovak Republic between 1939–1942 with regard to some selected areas of legislation in the Central European context.

[3] ESSNER, C. – CONTE, E.: „Fernehe," „Leichentrauung" und „Totenscheidung". Metamorphosen des Eherechts im Dritten Reich. *Vierteljahrshefte für Zeitgeschichte,* vol. 44, book 2, 1996, p. 201.

[4] "Law for the Protection of German Blood and German Honour."

less of where they had been contracted.[5] Breach of this prohibition constituted an offence called *Rassenschande,* i.e. "blood defilement", for the same reasons which led to adoption of anti-Jewish regulations in Hungary, the country with the first anti-Jewish regulations after the World War I,[6] already in 1920 (and much sooner due to the very reasons in the Kingdom of Hungary during the reign of the Arpad dynasty[7]).

The reason, recognised in Germany as the *stab-in-the-back myth* (***Dolchstoßlegende***), was *losing the World War I* due to the *wealth of Jews.* According to this *myth,* the German Army was not defeated in the World War I on the battlefield but was instead betrayed on the home front by the civilians – the so called "November Criminals", who were the unpatriotic people led by wealthy Jews.[8] *The myth* was born at the end of the World War I and was also referred to by Adolf Hitler,[9] what put the myth in important position within the National Socialism. From the Slovak periodicals, it was the *Gardista [The Guardsman],* the newspaper of the Hlinka Guard,[10] which made reference to the *myth.* In the article *Židovstvo chystalo terajšiu vojnu ["The Jewry Planned This War"]* was stated that: *"When the Munich Agreement was signed against the will of Jewish war instigators and war instigators paid by the Jews, and when the tension was reduced in international relations, the international and mainly the French Jewry continued with seditious and gypsy propaganda against Germany. In this effort, to unleash international war against Germany, all the Central European*

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[5] *Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre (15.09.1935),* art. 1 and 2. In documentArchiv.de [online]. [cit. 2017. Aug. 25]. Available at: http://www.documentarchiv.de/ns/nbgesetze01.html

[6] Even though the National Socialist Program from 24th February 1920 was anti-Jewish as well. According to the point four: *"Only members of the nation may be citizens of the State. Only those of German blood, whatever be their creed, may be members of the nation. Accordingly, no Jew may be a member of the nation."* Naturally, the anti-Jewish ideas gained their full power afterwards, in the fundamental publication – Mein Kampf, e.g.: *"Hence it is that at the present time the Jew is the great agitator for the complete destruction of Germany. Whenever we read of attacks against Germany taking place in any part of the world the Jew is always the instigator."* In HITLER, A.: *Mein Kampf,* vol. 2, p. 195 [online]. [cit. 2017. Oct. 09]. Available at: https://archive.org/stream/AdolfHitlersmeinKampfpart2/MeinKampf002#page/n195/mode/2up/search/Jew
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[7] E.g. Ladislaus I/9; Ladislaus I/10; Coloman I/48; Coloman I/74. In LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: *Praktikum k dejinám štátu a práva na Slovensku. I. zväzok. (Od najstarších čias do roku 1848). [History of State and Law on the Territory of Slovakia from Ancient Times Till 1848. A Practice Book.]* Trnava: Typi universitatis tyrnaviensis, 2015, p. 40, 47.

[8] More In VASCIK, G. S. – SADLER, M. R.: *The Stab-in-the-Back Myth and the Fall of the Weimar Republic: A History in Documents and Visual Sources.* London: Bloomsbury Publishing, 2016.

[9] HITLER, A.: *Zum Parteitag 1923.* Aufsatz im Völkischen Beobachter vom 27. Januar 1923. In: EBERHARD, J. – KUHN, A.: *Adolf Hitler: Sämtliche Aufzeichnungen. 1905–1924.* (= *Quellen und Darstellungen zur Zeitgeschichte*, Band 21). Stuttgart: Deutsche Verlags-Anstalt, 1980, p. 801.

[10] It was the militia maintained by the Slovak People's Party in the period from 1938 to 1945.

Jews collaborated."[11] The Geraman *myth* was furthermore backed up by *scientific publications* such as *Essai sur l'inégalité des races humaines* (by French diplomat J. A. de Gobineau), *The Passing of the Great Race* (by American lawyer Madison Grant), *Rassenkunde des deutschen Volkes* (by German eugenicist Hans F. K. Günther) etc. about the biological distinctions of the "races," which were not to be mixed and among whose the Aryan race was the *Herrenvolk* that had to be preserved and enhanced.

Following the example of the Nazi Germany, the anti-Jewish regulations were adopted also by the German allies, what led to modification of their marriage (family) laws, more or less following two trends; firstly the anti-Jewish and secondly the pro-eugenical.

It was the Law no. XXXI of 1894 (i.e. "the Marriage Act" as amended) which was in force in both Slovak Republic and Hungarian Kingdom even during the World War II, as the countries shared almost thousand year long joint history. On the following pages we will take a closer look on provisions altering the Marriage Act in the Slovak Republic and Kingdom of Hungary, adopted due to the racial policy and we will scrutinize them also in the light of contemporary legal commentaries and other publications.

The anti-Jewish Marriage Law in the Slovak Republic

The Law no. XXXI of 1894 was in the Slovak Republic amended by **The Government Order no. 198 of 1941, Coll. on the Legal Status of the Jews, passed on 9th September 1941**, known as the **"Jewish Code".** One of the authors, dr. Jozef Martinka, expressed himself as follows: *"A statesman who thinks that way* (i.e. who accepts the right of equality and freedom in constitutions), *would have to admit, that same rules should apply for civilised people and cannibals living together in one state. However, here is the stumbling block. As this is impossible, impossible is also to have the same rules applying for Jews and for non-Jewish inhabitants.*"[12]

The Jewish Code contained the ***Restrictions on Marriage and Sexual Relations*** in chapter III, art. 9–11, dedicated to two criminal offences. In the first case it was a misdemeanour punishable with up to three years imprisonment, with discharge from public service and suspension of the exercise of political rights for breaching the art. 9 (1) according to which **it was prohibited to contract a marriage between a Jewish man (woman) and non-Jewish woman (man), as well as between a Jew (Jewish woman) and a Jewish Mixed-blood woman (man).**

In the second case it was a misdemeanour punishable with up to five years imprisonment for breaching the art. 10, dedicated to the **intentional sexual relations between a Jew (Jewish woman) and a non-Jewish woman (man).**

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[11] Židovstvo chystalo terajšiu vojnu. ["The Jewry Planned This War"]. *Gardista [The Guardsman],* vol. 2, no. 35, 1940, p. 6.

[12] MARTINKA, J.: Codex Iuris Iudaici. Dôvod a cieľ jeho vydania. [Codex Iuris Iudaici. The Reason and Aim of its Publication]. *Gardista [The Guardsman],* vol. 3, no. 210, 1941, p. 3.

Following the comparison with the Nuremberg Laws, certain similarities and certain differences can be seen;

First of all, **the term Jew and Jewish Mixed-blood**[13] were defined accordingly in the Slovak Jewish Code, named the Slovak Nuremberg Law,[14] and in the First Regulation to the Reich Citizenship Law *(Erste Verordnung zum Reichsbürgergesetz Vom 14. November 1935)*.[15] Following strictly the Nazi example was not only a political necessity but also a question of honour. According to the newspaper article, *as the greatest man of the modern history, Adolf Hitler, has been asking himself: "Is the Jew also a human? Is the Jew also a German?,"* also the Slovaks were recommended to frequently ask themselves *"whether the Jew is also a human and whether the Jew is also a Slovak."* On top of that, following the Nazi example was question of a "blind faith in taking the load off Slovaks' chest," where the load symbolised long-lasting hegemony of different nations over the Slovaks. It was the Reich Minister of Propaganda Göbbels who promised that the Slovak Republic would gain *a special and respectable place in the history after the end of the World War II because it had become an ally sooner than the others, once when making such a decision had involved risk.*[16]

According to both Slovak and German legal regulations, persons with at least three Jewish grandparents were classed as Jewish. Also persons with two Jewish grandparents, who met the legal requirements, were classed as Jewish. Among the legal requirements were: practiced faith towards a certain date,[17] ancestry from marriage with a Jew towards a certain date and ancestry from the sexual relation with a Jew towards a certain date. Those who did not meet the legal requirements or who had only one Jewish grandparent were, according to both legal regulations, deemed for Jewish Mixed-bloods.

Secondly, *Blutschutzgesetz* as well as the Jewish Code recognised the same criminal offences related to marriage or to sexual relation between a Jew and a non-Jew. **The Slovak Jewish Code forbade Jews to marry a Jewish Mixed-blood and the First Regulation to the Law for the Protection of German Blood and German**

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[13] In the Slovak Republic, like in Germany, were the Mixed-blood Jews specified either as first degree or as second degree. In MARTINKA, J.: Niekoľko poznámok k Židovskému kódexu. [A Few Remarks on the Jewish Code]. *Verejné právo [Public Law],* vol. 2, 1941, p. 276.

[14] Židovský kódex už pripravený. [The Jewish Code Ready]. *Gardista [The Guardsman],* vol. 3, no. 205, 1941, p. 1.

[15] The first "milder definition in the Government Order no. 63/1939 Coll. was inspired by the Hungarian legal regulation. According to it, a Jew was a person of Jewish faith (even converted after a certain date), a person without faith with a Jewish parent, children of these persons (except of converted Christians before a certain date), their spouses/partners/their children since certain date. In LIPSCHER, L.: *Židia v slovenskom štáte 1939–1945. [Jews in the Slovak State in Years 1939–1945].* Banská Bystrica: Print-servis, 1992, p. 39.

[16] Pravá tvár Židovstva. [The True Face of the Jewry]. *Gardista [The Guardsman],* vol. 2, no. 36, 1940, p. 5.

[17] Here, the German legal regulation was stricter, as it applied on matrimonies contracted before stated date.

Honour forbade Jews to marry a Jewish Mixed-blood with one Jewish grandparent.[18]

According to the legal regulation, marriage of a German and a Jewish Mixed-blood with one Jewish grandparent was allowed, in accordance with the belief that *over time the Jewish blood would get washed out.*[19] Marriage of a German and a Jewish Mixed-blood with two Jewish grandparents was allowed on issue of a special permission, which in reality, however, was not granted.[20] **We have not found such differentiation between Jewish Mixed-blood with one or two Jewish grandparents in the Slovak legal regulation or secondary Slovak sources.**

A difference can be seen in sanctions for two named criminal offences. In the Slovak Jewish Code, there was an up to three years imprisonment together with discharge from public service and suspension of the exercise of political rights for the first offence and up to five years imprisonment for the second offence. The German *Blutschutzgesetz* punished the first offence with compulsory labour and the second with either compulsory labour or imprisonment. **However, the practice of the German courts was usually to charge the Jewish *Rassenschande* offender with more than one offence, in order to impose death penalty.**[21] The Jewish women were consequently deported to concentration camps.[22]

The interesting thing, though, is highlighting and distinguishing both sexes in the articles of the Slovak Jewish Code, despite the first-article-definition of the Jew regardless of sex (Jewish man and Jewish woman, non-Jewish man and non-Jewish woman, Jewish Mixed-blood man and Jewish Mixed-blood woman). **This was a difference from the German attitude** noticeable in Art. 5, sec. 2 of the *Blutschutzgesetz* ("*a man* who violates...") and noticeable also in the Stuckart-Globke commentary according to which *a woman could not be a Rassenschande offender because her testimony was crucial for the man's effective persecution.* This was in accordance with Hitler's belief that *man is the one who is more active, more aggressive, more morally responsible and more self-controlled than a passive woman.*[23] **Nonetheless,**

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[18] *Erste Verordnung zur Ausführung des Gesetzes zum Schutze des deutschen Blutes und der deutschen Ehre, (14.11.1935)*, §§ 2–4. [online]. [cit. 2017. Aug. 28]. Available at: http://www.verfassungen.de/de/de33–45/blutschutz35-v1.htm

[19] Nürnberger Gesetze. In *JuraForum.* [online]. [cit. 2017. Sept. 06]. Available at: http://www.juraforum.de/lexikon/nuernberger-gesetze

[20] FRIEDLÄNDER, S.: *Das Dritte Reich und die Juden.* München: C. H. Beck, 2007, p. 167.

[21] For example, offender was sentenced to death penalty because of recidivism, multiple offence sentencing (body injury, theft, etc.) or e.g. because of committing the offence during blackout.

[22] MAJER, D.: *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939–1945.* Baltimore: Johns Hopkins University Press, 2003, p. 331.

[23] FRIETSCH, E. – HERKOMMER, CH.: *Nationalsozialismus und Geschlecht: Zur Politisierung und Ästhetisierung von Körper, »Rasse« und Sexualität im »Dritten Reich« und nach 1945.* Bielefeld: transcript Verlag, 2015, p. 115.

the court practice was ambiguous and due to ideology, this question finally became irrelevant.[24]

Another difference between Slovak and German regulation was, that confessionally mixed Slovak marriages contracted before effect of the Jewish Code **could not be declared void.**

The anti-Jewish Marriage Law in the Kingdom of Hungary

The Law no. XXXI of 1894 was in the Kingdom of Hungary amended in the same year as in the Slovak Republic, **by the Law no. XV of 1941 (the third anti-Jewish Law) on "The amendment and modification of the Marriage Law Act no. XXXI of 1894, and the related necessary racial provisions."** It contained not only anti-Jewish provisions,[25] but also a whole new concept of marriage of *people belonging to old grand Hungarian nation* which, similarly as the German nation and unlikely the Slovak nation with very short national history, had to be preserved and enhanced through **eugenics.**[26] This becomes evident after taking a closer look on the first three chapters of the Law no. XV of 1941;

The first chapter contained generally applicable provisions on *compulsory medical examination before marriage* in less than thirty days prior to marriage contraction. The aim was to disallow marriages of people suffering from tuberculosis or infectious venereal diseases.[27] The second chapter regulated *marriage loans.* Applying for them again required *medical fitness.* The third chapter regulated *action for nullity of marriage* which could be filed if the plaintiff had been deceived about the medical fitness of the defendant.

The marriage was declared void also when fiancée contracted marriage despite untreatable mental illness and the other fiancée lacked such information and was unable to get it. Breakout of mental illness in the course of divorce proceeding was not a restraint from its continuance. The strong position of eugenics, which was based on image of strong Hungarian nation capable of territorial expansion, was evident in the contemporary legal commentary as well; *"We believe in God and in power of our weapons. However, we know that there are just a few of us and every dead Hungarian hero, even though a moral example of self-sacrifice that strengthens our nation,*

[24] MAJER, D.: *"Non-Germans" Under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe with Special Regard to Occupied Poland, 1939–1945.* Baltimore: Johns Hopkins University Press, 2003, p. 333.

[25] The "general" marriage legal regulation in the Slovak Republic was the Law no. XXXI of 1894 and in Germany it was the *Ehegesetz* of 1938.

[26] The Law for the Protection of the Hereditary Health of the German Nation (Marriage Health Law), i.e. *Gesetz zum Schutze der Erbgesundheit des deutschen Volkes (Ehegesundheitsgesetz)* was passed on 18th October 1935.

[27] It was criticised that mental illness was not covered up and was not recognised as a divorce ground, despite the previous long-lasting debates. In Die Neuste Ungarische Literatur über Familienrecht. *Litteraria Hungarica,* vol. 1, book 1–2, 1943, p. 161–162.

in light of numbers, is a loss. We live and die for Greater Hungary and even if we can not doubt its restoration, we must accept that only with numerous self-assured, healthy and strong Hungarians, only with loads of them, we will achieve that. No matter how great our king, St. Stephan, was, we can not respect his belief that a unilingual nation is weak."[28]

The Hungarian Anti-Semitism can be seen in following commentaries as well: *"The British nation became a world ruler due to astonishing isolation of the British race;"* or *"If splendid nations such as the British and German stand fast on their belief not to mix with unwanted elements, what about us, the little Hungarian nation? We must be all the more alert, to avoid the destiny of ancient Rome;"* or *"Jews have Eastern--Asian origin and different comprehension of the morals. Such low morals can not be accepted by the Hungarian nation."* Naturally, the Hungarian Anti-Semitism is visible in the fourth chapter of the third anti-Jewish law as well;

The fourth chapter regulated *prohibition of marriage contraction between Jews and non-Jews.*

In the fourth chapter there was a definition of Jew for the purposes of this law.[29] **Persons who had at least two grandparents who were born as members of the Israelite denomination and, regardless of their ancestry, those who were themselves members of the Israelite denomination, were considered Jewish.** As Jew was classed also an out-of-wedlock child who had unknown father, if at least one of the child's grandparents was Jewish (not if one of the child's grandparents was Jewish and the child was born as Christian, remained Christian and the child's mother was Christian in the moment of delivery). As Jews were classed also children born in Jewish marriage contracted after a certain date, regardless of the grandparents' ancestry. A person, who contracted a marriage with Jew, was classed as Jewish even if born and remained Christian, having Christian parents in the time of marriage contraction and two Jewish grandparents. Jewish was a child from such marriage. Jewish was a convert to Jewish denomination once the law was in effect, if contracted a marriage against prohibition, even if re-converted to Christianity. A non-Jew was a person with two Jewish grandparents, who was born and remained Christian and had both parents Christian in the time of the marriage contraction. Such a non-Jew was prohibited from marriage with *a non-Jew whose one or two grandparents were Jewish.*

Even though the inspiration by the Nuremberg Laws was evident, it copied them less than the Slovak law.[30] Yet this did not make the Hungarian laws less strict;

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[28] HORVÁTH, Gy.: *Házasság intézményének jogi méltatása az 1894. évi XXXI. és az 1941. évi XV. törvénycikkek alapján.* [Legal Regulation of Marriage According to the Law no. XXXI of 1894 and Law no. XV of 1941]. Debrecen: Debreceni Magyar Királyi Tisza István Tudományegyetem, 1942, p. 44–45.

[29] The primal Hungarian definition of Jew was in the Law no. IV of 1939 *on the limitation of Jewish expansion in public and economic spheres*. The Law no. XV of 1938 on *creating more effective guarantees for social and economic equality* defined a non-Jew, but did not define a Jew.

[30] According to the Slovak contemporary sources: *"The Slovak nation, as the very first nation in Europe, just after the Germans, by adoption of the Jewish Code made a step which again proves, that*

In contrast to Slovak legal regulation, it was sufficient under Hungarian law to have at least two (i.e. not three) **Jewish grandparents in order to be classed Jewish.** Furthermore, Hungarian legal regulation more severely affected the people **converted** from Jewish to Christian faith.[31]

Hungarian historian Krisztian Ungváry[32] confirms that: *"Nazis did not put pressure on Hungarians to adopt anti-Jewish legislation before 1942 and they were not even able to do so as Hungary in this field surpassed Germany."* The historian Béla Tomka supports his opinion, however not in full range because he considers the German influence over other European states crucial.[33]

Interesting is that there was a definition of Jew in the Law no. XV from 1941 for the purposes of that law and for other purposes, there was a definition in the Law no. IV from 1939, which did not define as Jewish heroes of the World War I., University teachers, Olympic Games winners, etc.[34]

The Hungarian legal regulation of criminal offences involving marriage and sexual relations of Jews and non-Jews in the fifth chapter was similar, however more extensive and detailed when compared to three brief sentences of the Slovak Jewish Code. According to art. 14 and 15:

A non-Jewish Hungarian citizen who marries a Jew; a Jew who marries a non-Jewish Hungarian citizen; and a Hungarian citizen who is a Jewish man marrying a foreign non-Jewish woman commits a crime in violation of the prohibition set out in Art. 9 (not a Hungarian Jewish woman with a non-Jewish foreigner) *and shall be*

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the Slovaks as nation and European country, understand the goals of the new Europe and are able to fully achieve them ... There are no more doubts today, that the Reich and its Führer, Adolf Hitler, will reward the brave loyalty and resolution of the Slovak nation to build the Europe on new principles. The Slovak nation will be entitled to this reward sooner than any other European nation." In Rozhodnosť slovenského národa dostane svoju odmenu. Slovensko vzorom ostatným európskym štátom-Európsky ohlas zavedenia norimberských zákonov na Slovensku. [Resolution of the Slovak Nation will be Rewarded. The Slovak Republic – Example for the Other European Nations – European Response to the Nuremberg Laws Adoption in the Slovak Republic.] *Gardista [The Guardsman],* vol. 3, no. 208, 1941, p. 3.

[31] VÁGI, Z. – CSŐSZ, L. – KÁDÁR, G.: The Holocaust in Hungary: Evolution of a Genocide. Plymouth: AltaMira Press, 2013, p. 12.

[32] VÁRNAI, P.: „Ha pozitív személyiséget keresünk... Bethlen Istvánt kellene választani" [If We Search for a Positive Character... We Would Choose Bethlen István]. In *Szombat [Saturday]* [online]. Budapest: Szombat, 2013. [cit. 2017. Sept. 04]. Available at: http://www.szombat.org/politika/ha-pozitiv-szemelyiseget-keresunk-bethlen-istvant-kellene-valasztani

[33] TOMKA, B.: *Opponensi vélemény Ungváry Krisztián „A Horthy – rendszer mérlege. Diszkrimináció, szociálpolitika és antiszemitizmus Magyarországon, 1919–1944" c. akadémiai doktori értekezésként benyújtott művéről. [Expert Opinion on the dissertation "The Balance Sheet of the Horthy Regime: Discrimination, Social Policy and Anti-Semitism in Hungary."]* [online]. Szeged: Szegedi Tudományegyetem, 2014, p. 3. [cit. 2017. Sept. 04]. Available at: http://real-d.mtak.hu/687/9/Vony%C3%B3%20J%C3%B3zsef.pdf

[34] Art. 2. In LEHOTAY, V.: Az 1941. évi XV törvénycikk és a bírói gyakorlat. [The Law no. XV of 1941 and the Court Practice]. *Profectus in Litteris II. Előadások a 7. Debreceni állam- és jogtudományi doktorandusz-konferencián. [Profectus in Litteris II. Contributions from the 7th Debrecen State and Law Doctoral Conference]*. Debrecen: Debreceni Egyetem, 2010, pp. 220–221.

punished by up to five years imprisonment, discharge from public service and suspension of the exercise of political rights. So will be punished also the marriage officer who allowed the marriage contraction in violation of the prohibition set out in Art. 9. It will be a misdemeanour if committed negligently and shall be punished by up to three months imprisonment.

Jews commit misdemeanour punishable by up to three years imprisonment, discharge from public service and suspension of the exercise of political rights if they have extramarital intercourse with a decent non-Jewish Hungarian woman, or if they secure or attempt to secure a decent non-Jewish Hungarian woman for themselves or for another Jew for the purpose of such intercourse.

The action is a felony punishable by up to five years imprisonment, discharge from public service and suspension of the exercise of political rights if the offender committed the act:

a) through deceit, violence, or threat,
b) against a relative or someone entrusted or subordinated for education or supervision,
c) when the woman had not yet turned 21 years of age,
d) despite previous punishment for such an offence and ten year period has not elapsed since completing the sentence for that offence.[35]

The Hungarian **criminal sanctions** regulation in the relevant law was the most precise. Both criminal offences were punisheable by primary and secondary (supplementary) sanctions. Compared to the Slovak Jewish Code, violation of the marriage prohibition was punishable with more severe imprisonment and violation of extramarital intercourse was punishable more severely (supplementary sanctions) if committed in a more serious way [Art. 15, letters a) to d)].

The role of the **sex** in the Hungarian legal regulation of *Rassenschande* differed from the German and Slovak legal regulations. Offender could only be a male Jew having an intercourse with a **decent** Hungarian woman (*tisztességes nemzsidó nő*), not Hungarian non-Jewish man who had an intercourse with a Jewish woman. Same as in German law, also in Hungarian law, *Rassenschande* offender could only be a man. Similar was, that in the German law, there was the concept of *honour* and in Hungarian law the concept of *decency,* which was a non-legal attribute for women, just partially clarified in the court practice.[36] Not surprisingly, there were cases when the women rather falsely stated that they were not decent so that their Jewish partners would be exculpated.

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[35] Art. 16 and the Decree no. 71000/1941 were in effect for the Transylvania citizens.

[36] The Hungarian Supreme Court specified that *decent* meant not to be registered as a prostitute. As not decent were considered also those women who agreed to sexual intercourse with no hesitation. In SZEGEDI, G. Tisztaság, tisztesség, Fajgyalázás. Szexuális és faji normalizáció a Horthy-korban. [Purity, Decency, Shaming the Race. Sexual and Racial Normalisation in the Horthy Age]. *Socio. hu* [online]. Budapest: MTA TK Szociológiai Intézet, 2015, no. 1, pp. 68–69. [cit. 2017. Sept. 16]. Available at: http://socio.hu/uploads/files/2015_1/szegedi.pdf

Similarly to the Slovak law, it was not possible to declare the already contracted confesionally mixed marriages **void**.

Conclusion

It becomes evident from the comparison of German, Slovak and Hungarian legal regulations of confessionally (*racially*) mixed marriages, that the Slovak Republic and the Hungarian Kingdom in 1941 followed the German example, inspiring themselves namely by the *Blutschutzgesetz, Ehegesundheitsgesetz* and *Ehegesetz.* However, the adopted anti-Jewish legal regulations in named countries were not identical.

The first difference can be seen in the **degree of nationalism.** Higher degree of nationalism was visible in the German and Hungarian laws, while the Slovak legal regulation was rather a copy of the German one, without a clear defence of superiority of the Slovak nation over "*inferior*" group of Jews.[37] The Germans and Hungarians were motivated by anger, dissatisfaction and injustice which they felt due to after-war Treaties that stripped them of substantial territories and imposed significant reparation payments. It is evident from the anti-Semitic and eugenic legal regulation adopted in Germany in order to enhance the *Aryan race* and in Hungary in order to *expand the Hungarian army* and, using the words of Horváth, to *restore the Greater Hungary.* There were no eugenic provisions in the Slovak marriage law as the Slovak national emancipation took place first only in 1918 within Czechoslovakia and in 1938 within the first independent state, providing little time for rooting of nationalism.

Secondly, the Jew definition made the Hungarian law the strictest among the compared legal regulations as it was enough for a person to have two (i.e. not three) grandparents who were born as members of the Israelite denomination to be classed as Jewish.

Thirdly, the possibility to declare confessionally mixed marriages **void** was only in the German law.

Fourthly, the laws in question had a different attitude to **sex** in *Rassenschande* offence. The least strict was the Hungarian law as it did not restrict Hungarian male non-Jews on their sexual freedom. They could legally have intercourse with Jewish women. For a Jewish man to be sentenced for *Rassenschande,* an intercourse with a *decent* Hungarian woman had to be proved. Hungarian women at all could not be *Rassenschande* offenders. Taking into account the laws in question, as the strictest one seemed the Slovak law as the *Rassenschande* offenders could be both men and women.

Fifthly, Germany had the strictest **sanctions** for criminal offences. Some judges punished the named crimes with one day imprisonment, however some with fifteen

[37] *Following the experience of other nations and taking into account the peculiar economic and national situation of the new state, the Slovak Republic decided to solve the Jewish problem.* In VAŠEK, A.: *Protižidovské zákonodarstvo na Slovensku. [anti-Jewish Legislation in the Slovak Republic].* Bratislava: Kníhtlačiarsky úč. spolok v Turčianskom sv. Martine, 1942, p. 11.

years of compulsory labour. Furthermore, since 1937 the Gestapo called for more severe punishments of these crimes.[38] So it was normal to hear a judge say: *"Butter bread-a year of imprisonment, kiss-two years of imprisonment, an intercourse-make shorter by a head."*[39]

All this led us to following conclusions;

The Slovak and Hungarian legal regulations mirrored the German laws in major degree. This is upheld by both Hungarian contemporary jurisprudence[40] and Slovak contemporary press,[41] and mainly is apparent once the comparison of the named legal regulations is done. Naturally, the mirroring was not absolute. However, referring to such differences and possible concessions does not diminish the guilt of any of these states. It was the ideology and the will of ideologist, not the laws, which were decisive. It would be difficult to believe that the court practice was more moderate in the country which was the international ideology-setter. As the Slovak historian Kamenec said: *"In Germany the laws were followed in a typical German way – adopted laws were strictly kept. However, it was different in Slovakia."*[42] Even though the Slovak elections in December 1938 played certain role,[43] it was the German influence which was pivotal for the birth of the Slovak State,[44] and for the Slovak legislation as well.

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[38] GRUCHMANN, L.: "Blutschutzgesetz" und Justiz. Entstehung und Anwendung des Nürnberger Gesetzes vom 15. September 1935. *Via Regia- Blätter für internationale kulturelle Kommunikation,* 1995, book 32/33. [online]. [cit. 2017. Sept. 18]. Available at: http://www.via-regia.org/bibliothek/pdf/heft3233/gruchmann_blutschutzgesetz.pdf

[39] KRAMER, H.: *Richter vor Gericht: Die juristische Aufarbeitung der Sondergerichtsbarkeit,* p. 128. [online]. [cit. 2017. Sept. 18]. Available at: https://www.justiz.nrw.de/JM/haus_und_historie/zeitgeschichte/3publikationen/jur_zeitgeschichte/bandXV/leseprobe.pdf

[40] The Law no. XV of 1941 was based on three German laws. In LEHOTAY, V.: Az 1941. évi XV törvénycikk és a bírói gyakorlat. [The Law no. XV of 1941 and the Court Practice]. *Profectus in Litteris II. Előadások a 7. Debreceni állam- és jogtudományi doktorandusz-konferencián. [Profectus in Litteris II. Contributions from the 7th Debrecen State and Law Doctoral Conference].* Debrecen: Debreceni Egyetem, 2010, p. 220.

[41] "The majority of existing ministerial orders on Jewish question will be harmonized with the Jewish Code, which was made in compliance with the Nuremberg laws." In Židovský kódex prijatý. [Jewish Code Adopted]. *Gardista [The Guardsman],* vol. 3, no. 206, 1941, p. 1.

[42] PILC, Ľ.: Historik Kamenec: Vina sa dá oľutovať i odpustiť. Zodpovednosť je konštantná. [The Historian Kamenec: The Guilt Can Be Regretted and Forgiven. The Responsibility is Perpetual]. *Pravda [The Fact],* 2016. [online]. [cit. 2017. Sept. 18]. Available at: https://zurnal.pravda.sk/rozhovory/clanok/404958-historik-kamenec-vina-sa-da-olutovat-i-odpustit/

[43] In the (referendum alike) elections to the Slovak Assembly held in 1938, people were asked the following question: *"Do you want new, free Slovakia?"* 97,5 % of all electors answered "Yes." 91 % of all the inhabitants of Slovakia participated in the elections. In MOSNÝ, P. – LACLAVÍKOVÁ, M.: *Dejiny štátu a práva na území Slovenska II. (1848–1948). [History of State and Law on the Territory of Slovakia II. (1848–1948)].* Krakow: Spolok Slovákov v Poľsku-Towarzystwo Słowaków w Polsce, 2014, p. 62.

[44] KAMENEC, I.: *Slovenský štát z rokov 1939–1945. [The Slovak State in Years 1939–1945].* Bratislava: Metodické centrum v Bratislave, 1993, p. 3 and ff.

In Hungary, the Anti-Judaism was rooted already in the Laws of Saint Stephen[45] and was strengthened due to the defeat in the Great War. However, the Hungarian Anti-Judaism turned into ideology only after Germany becoming a European leader. On the second hand, the Hungarian eugenic works about the superiority and inferiority of population groups were written in the same time as they were written in Germany, Great Britain, France, Italy, or Scandinavian countries. Germany had the leading influence, however the guilt was collective. Its source were unsolved problematic international relations, Great War stigmas, infatuation and incorrigibility of the mankind which, despite Icarus and his nameless followers, did not understand that no one can fly closer to Sun than the others. Evil deeds evoke only more evil deeds and so the anti-Jewish legislation spread across Europe. Whether the legal regulations contained less strict provisions compared to German laws or not, ideologically based legislation and ideologically based interpretation will never be just. Let's look on the made comparison as on an example of deformation of legal rules which must be forever reminded to discourage any Icarus from building new wings and rather to encourage them to use the feathers as quills, for sharing one message; *"Defeating racism, tribalism, intolerance and all forms of discrimination will liberate us all, victim and perpetrator alike." (Ban-Ki-moon).*

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[45] MOSNÝ, P. – LACLAVÍKOVÁ, M.: Prvotná profilácia protižidovských opatrení v Maďarsku v 20. storočí. [Primary Profiling of Anti-Semitic Measures in Hungary in the 20th Century]. In *Právnohistorické trendy a výhľady I. [Historical Perspectives and Current Legal Trends I].* Trnava: Trnavská univerzita v Trnave, 2016, p. 143.

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Andrej Démuth – Slávka Démuthová[1]
Trnava University, Faculty of Philosophy and Arts, Department of Philosophy – University of St. Cyril and Methodius at Trnava, Faculty of Arts, Department of Psychology

The Problem of Lookism and Appearance-based Discrimination[2]

Abstract: Many scientific studies show that good-looking people have an advantage in the job market and they generally receive better evaluations. The presented study focuses on the problem of lookism and on the attempt how to eliminate appearance-based discrimination. The contribution analyses philosophical and psychological aspects of discrimination and the problems with the implicit and explicit criterion of the evaluation. The main aim of the study is to show the roots of discrimination in ordinary live and unacceptability of the discrimination in the "public" use of reasons.

Key words: Discrimination; Lookism; Game Theory; Beauty.

In recent times it has been possible to observe a growing interest of cognitive scientists in research into the reasons for and causes of the existence of a phenomenon which is not new in any way, but which has acquired a new form of appearance. Discrimination of people based on various criteria (especially race, religion, ethnicity or sex) represents an age-old ethical and legal problem. It seems that after the adoption of various legal documents, declarations and manifestos, most countries have managed to find a mechanism to eliminate discrimination on the basis of these features. However, numerous studies show that the phenomenon of differing attitudes to individuals on the basis of certain unwritten criteria has not wholly disappeared but may be found in a new form.

In this contribution I shall attempt to draw attention to three aspects of the understanding of discrimination:

a) the philosophical explanation of the concept of discrimination as such
b) the issue of lookism and appearance-based discrimination
c) the legal aspects of discrimination as fraud.

In philosophical dictionaries and in the dictionaries of the Slovak Language, the term "discrimination" itself denotes several phenomena, at first sight unrelated to each other. The first is discernment in the sense of the ability to find clear and obvi-

[1] Prof. Mgr. Mgr. Andrej Démuth, PhD., contact: demuthovci@yahoo.com.
Doc. PhDr. Slávka Démuthová, PhD., contact: demuthovci@yahoo.com.

[2] This work was supported by the Slovak Research and Development Agency under the contract No. APVV-15-0294.

ous criteria for the differentiation of two and more elements. In this sense we speak about discrimination during perception; in equipment that registers deviations from a particular set value (energy, quantity, etc.).

Another meaning of this term is used in the mathematical field, where we speak about discrimination when looking for key parameters which influence the whole solution of a mathematical operation. Such as for instance, the discriminant – a mathematical expression decisive in the roots of an equation (a part of the formula for the solution of quadratic equations) or another distinguishing element, a criterion. Its mathematical value is decisive in the value and the character of the roots. If the discriminant is greater than 0 (a positive number), the equation will have two positive roots. If the discriminant equals zero, the equation will have two identical real roots and if the discriminant is negative, the given polynomial will have no solution among real numbers; its roots will have to be sought in the realm of complex numbers.

However, the most frequent use of the term "discrimination" in ordinary language is connected with the different treatment, the disadvantaging, or downright limitation of rights causing damage to individuals or groups. As is obvious, this understanding directly follows from the previous two meanings, that is first of all, the ability to distinguish and identify some difference between several elements (people) and consequently from this difference to also derive different types of behaviours or different results from operational procedures. In other words: under the term discrimination we most usually have in mind "such behaviour that when in the same situation one person (group of people, organisation, country, group of countries) is treated in a different way to another person (group of people, organisation, country, group of countries) on the basis of a difference between them e.g. racial or ethnic origin, religion, age, gender, sex or sexual orientation; deciding whether discrimination has or has not occurred takes place on the basis of whether there exists a causative connection between the disadvantage and the use of the criterion for the differentiation".[3] The Slovak Anti-Discrimination Act No. 365/2004 Coll. differentiates between direct discrimination, indirect discrimination, harassment, sexual harassment; and victimisation. Direct discrimination is considers to be "any action or omission where one person is treated less favourably than another person is, has been or would be treated in a comparable situation".[4] It then understands indirect discrimination as "an apparently neutral provision, decision, instruction or practice which puts a person at a disadvantage compared with another person".[5] At the same time it defines the areas in which it presupposes the observation of the principles of identical treatment and the eradication of discrimination on the grounds of "sex, religion or belief, race, nationality or ethnic origin, disability, age, sexual orientation, marital or family status, colour, language, political affiliation or other conviction, na-

[3] https://sk.wikipedia.org/wiki/Diskriminácia_(znevýhodňovanie) [1.11.2017]

[4] The Slovak Anti-Discrimination Act No. 365/2004 Coll. [Section 2a(2)].

[5] Ibid [Section 2a(3)].

tional or social origin, property, lineage or any other status or on the grounds of reporting of crime or any other wrongdoing",[6] with EU law defining six main areas in which stricter legal protection is ensured, those being: 1) gender and sex, 2) race and ethnic origin, 3) age, 4) disability or poor health, 5) sexual orientation, and 6) religion, faith or the fact that the person is without a religion. Pursuant to Section 13 (2) of the Labour Code, "[i]n labour-law relations, discrimination shall be prohibited on the grounds of sex, marital and family status, sexual orientation, race, colour of skin, language, age, unfavourable state of health or disability, genetic traits, belief or religion, political or other conviction, trade union activity, national or social origin, national or ethnic group affiliation, property, lineage or other status."[7]

In the second part of my contribution I shall focus on an area which is not the subject of specific legal protection, but undoubtedly often interferes with an individual's everyday life and influences their rights or position in several areas of life. It is lookism and appearance-based discrimination.

From numerous scientific studies, as well as a number of personal experiences we know that the selection of potential employees for various positions (especially those involving contact with the public) as well as the evaluation of artistic, sport or even intellectual performances (such as the examination of students at school) and many other things are often influenced not only by the truly achieved results and possible fulfillment and/or failure to fulfill the criteria, but also by the overall impression and many other (not explicitly stipulated) criteria of evaluation – especially a positive or negative aesthetic appearance and attractiveness. Several psychological studies prove that the attractiveness of one's face helps towards the acquisition of better work positions[8] but also a better evaluation of the results achieved.[9] Beautiful people are more successful in gaining employment, in work evaluations[10] as well as in dealing with the authorities; attractive female/male students receive better assessments, due to the way that teachers evaluate their work and their expectations. The attractiveness of an accused decreases their potential punishment and the likelihood of punishment as such, and vice versa, a lack of attractiveness and physical handicaps (scars, malformations, etc.) undermine a person's trustworthiness and seemingly indicate bad intentions. People with a tattoo or piercing record feelings of discrimination when

[6] European Anti-Discrimination Directive 2000/78/EC [Section 2(1)].

[7] Act No. 311/2001 Coll.

[8] HOSODA, M., STONE-ROMERO, E. F., & COATS, G.: The effects of physical attractiveness on job-related outcomes: A meta-analysis of experimental studies. *Personnel Psychology,* 56, (2003), 431–462.

[9] MALOUFF, J. M., THORSTEINSSON, E., B.: Bias in grading: A meta-analysis of experimental research findings. Orbital and ventromedial prefrontal cortices are implicated in emotionally-driven moral decisions. *Australian Journal of Education.* Vol. 60, Issue 3, (2016) pp. 245–256.

[10] As Professor of Economics at University of Texas Daniel Hamermesh states, the difference in the evaluation of an attractive and unattractive employee in the same position in the USA represents during the life of the employee over $ 230,000. See: HAMERMESH, D.: Beauty Pays. Why Attractive People Are More Successful? Princeton University Press, (2011), p. 47.

applying for various socially important positions; obesity may be an obstacle for employment in hospitality, services or aboard a plane. The problem of lookism and appearance-based discrimination has become so significant that studies have started to appear which consider it a new form of racism or fascism, or to put it in a less vehement way, they study whether the preference for attractive people is acceptable and lawful,[11] or whether it may be necessary to adopt legal measures which would limit[12] or even ban it altogether.[13] May the employer take into account appearance and give preference to or disadvantage attractive or less attractive people, or require they meet criteria for their appearance (e.g. height, weight, make up, a certain type of professional clothing, etc.)? All this is, increasingly, becoming not only a theoretical but ever more a legal and practical problem, which is also evidenced by the increasing number of legal trials.

Before I try to respond to these questions, I would like to dedicate attention to a short analysis of the causes of why lookism and appearance-based discrimination exists at all.

Cognitive-scientific research has repeatedly proven that a number of our cognitive operations run in parallel and that the brain works in a holistic way. This concerns the processes of perception as such, in which the processing of the resulting impression, besides the sensory data itself, involves also previous experience and/or implicit knowledge (top-down processes), as well as deliberation or the so-called analytical processes, which are influenced, besides other things – such as memory, productive and reproductive imagination, the sum of the information available – also by previous experience, temperament and emotions. According to various studies,[14] beautiful people are often also considered good,[15] but frequently we can also find a significant correlation between the perceived attractiveness and intelligence, perception of attractiveness and helpfulness, that being despite the fact that the listed characteristics do not logically or statistically relate to each other. The reason why this is so lies in neurophysiology, individually gained associative experience (Pavlovian conditioning) but also in what we call the halo effect, that is the kind of social perception when an individual is influenced by the first impression which somebody makes on them – in a positive or negative way. That affects the overall setting of the evaluation and we tend to apply positive or negative evaluations on the whole complex of the assessed features and behaviour.

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[11] TIETJE, L., CRESAP, S.: Is Lookism Unjust? The History and Ethics of Aesthetics and Public Policy Implications. *Journal of Libertarian Studies*, Vol. 19 No. 2, Spring (2005), pp. 31–50.

[12] FAIGMAN, D., L. et al.: A Matter of Fit: The Law of Discrimination and the Science of Implicit Bias, 59 *Hastings L.J*. 1389, (2008), 1404.

[13] TOLEDANO, E.: May the Best (Looking) Man Win: the Unconscious Role of Attractiveness in Employment Decisions. *Cornell HR Review*. February (2013).

[14] SHAHANI-DENNING, C.: Physical attractiveness bias in hiring: What is beautiful is good, *Hofstra Horizons*, pp. 15–18, Spring (2003).

[15] DION, K. K., BERSCHEID, E., & WALSTER, E.: What is beautiful is what is good. *Journal of Personality and Social Psychology,* 24, 1(972), 285–290.

Neurophysiological reasons for such a connection between beauty (attractiveness) and other domains are caused by the fact that the process of the evaluation of aesthetic qualities is performed by a very old evolutionarily mechanism of rapid thought,[16] whose important part is the reward system. This uses structures such as the orbitofrontal cortex, nucleus accumbens and limbic system, which are activated by various mechanisms when feeling pleasure, that being pleasure from ingesting food, especially sugar, fats and protein, as well as sexual pleasure, or the origination of various addictions, etc. As has been shown by Takashi Tsukiura and Roberto Cabeza, "activity in the medial orbitofrontal cortex increased as a function of both attractiveness and goodness ratings, whereas activity in the insular cortex decreased with both attractiveness and goodness ratings."[17] A characteristic sign of this mechanism is not only experiencing pleasant feelings from a current event, but especially that the nucleus accumbens releases dopamine into the reward system even for an expectation, or anticipation of possible pleasure in the foreseeable future. This means that the reward system is active not only retroactively, but on the contrary, it also produces desires and expectations, which are connected with possible pleasures in the foreseeable future. Among cognitive scientists there is an on-going discussion over whether various types of pleasure originate from the same activity of the reward system and thus, whether a vision of goodness produces a similar pleasure as a vision of the satisfaction of basic needs, or the perception of an attractive face. Although significant differences exist in the final impression we have from any particular anticipation, it is clear that the same reward system is activated by aesthetic as well as moral and intellectual rewards and uses the same mechanism, structures and neurotransmitters. That brings us to the view that the associations produced by a person's attractiveness unwittingly provokes anticipation also in other areas and that is why we often connect beauty with other positive expectations.

This phenomenon can also be explained by means of game theory: If an individual is to decide between two applicants who at first sight fulfil the previously set criteria to the same extent, and from additional information they discover other (unimportant) information (such as attractiveness, age, sex, etc.), then this differentiation between the similar people is already perceived positively by them – it is a reward in itself. Their reward system thus cannot quite pass over this data and performs a deliberation not unlike an aesthetic version of the prisoner's dilemma. That is approximately the following:

If we are to decide between two applicants and only evaluate two basic (and equal, as far as values are concerned) qualities – e.g. attractiveness and goodness, from which one is apparently present (attractiveness) and the other is rather questionable (goodness can only be assumed on the basis of existing knowledge), for each rational player the dominant strategy is to make a decision on the basis of the evidence of the positive value of the first quality (beauty) and not on the basis of a risk

[16] KAHNEMANN, D.: *Thinking, Fast and Slow*, Farrar, Straus and Giroux, (2011).

[17] TSUKIURA, T., CABEZA, R: Shared brain activity for aesthetic and moral judgments: implications for the Beauty-is-Good stereotype. *Soc Cogn Affect Neurosci.* 2011 Jan; 6(1): p. 138.

with regard to the other quality. Hence, later if it is seen that the attractive candidate is not only attractive but also scores highly in the other area – they are at the same time very good – the user of this strategy will achieve maximum gain: their selection will combine not only the most good candidate but also a beautiful one (maximax strategy).[18]

If on the basis of logic related to the causal isolation of beauty and goodness we do not presuppose a link between beauty and goodness or if we even expect a higher occurrence of the coexistence of beauty with moral depravity (e.g. for the sake of equalising the distribution of positives or due to the presupposition that beauty seduces its bearer to more frequent misuse and other people to benevolence towards the depravities of beautiful people, etc.), the maximin strategy will attempt to eliminate disappointment; if the beautiful applicant is not the most good, we still have the benefit of them being beautiful. The result of this strategy is that we either gain a beautiful-only applicant, or that the beautiful applicant may eventually also be the most good (same score as in the maximax).

In the opposite case, in the case of the positive discrimination for a non-attractive applicant the overall score of both the used strategies (preference for an unattractive one in the hope that they will be the most good, or a preference for the unattractive one with the risk that they will be bad) brings a lower sum of overall benefits, or, in a single case (the less attractive candidate is at the same time the most good and the attractive one is the least good), it may reach the sum of benefits of the discrimination strategy in favour of attractiveness. Due to this preference for the attractive applicant is mildly dominant, that is more advantageous or, at the most, equally advantageous as a non-preference. In everyday life, of course, the weights of the individual qualities – goodness and beauty – do not represent a total balance, that not only due to differences in the evaluators and their intentions, but especially given that the criteria for selection or evaluation of the applicants are established as dominant. In the case of equality of fulfilment of criteria, however, it is more rational to match higher value with additional criteria which we perceive with certainty rather than the fulfilment of criteria whose definitive proof eventually presupposes verification in practice.

We consider this "logic" of decisions natural in our everyday life and often do not see any problems with its application in our private lives. After all, we select our partners on the basis of a similar beauty-and-good contest. In everyday life we decide in a holistic manner, we take into account all the available information and often we even change the weight of the individual criteria, according to various circumstances and findings. Why is it then a problem in public decision-making?

One of the reasons this holistic evaluation represents a problem is that it leaves room for a lack of clarity, lies and fraud. Most of the evaluations are, or should be, evaluations of performance or suitability for the fulfilment of some role or some-

[18] DÉMUTH, A.: *Game Theory and the Problem of Decision-Making*. Towarzystwo Słowaków w Polsce, Krakow, 2013, p. 36.

thing similar. In this evaluation it is important to absolutely clearly define the criteria observed as well as their weights, and follow them thoroughly. The problem of taking attractiveness and non-attractiveness into account in the process of selection is that it is often not defined in the established requirements, or rather that its potential weight in the decision process is not quite clear. It is apparent that for some positions (fashion model, presenter, flight attendant, etc. – especially a beauty contestant) it is natural to expect an attractive appearance because it represents an advantage for the achievement of the desired goal. The saleability of products offered by attractive individuals is markedly higher, because the circumstances that influence people working in the HR area also affect potential clients in the same way (if not even more). As experience tells us, we allow ourselves to be persuaded to purchase a product or services by a beautiful woman more often and more willingly than when we are being persuaded by somebody unattractive. Simply, attractiveness pays.[19] But unless it is defined in the conditions of decision-making, taking it into account is using a discriminatory criterion, which as such creates grounds for considering it as fraud, as the decision-making is taking other criteria into account.

Another serious problem of appearance-based discrimination is the subjectivity of experiencing attractiveness. What seems attractive to one person may not be experienced in the same way by another. And this even though the majority of philosophers from times immemorial have been searching for a concept of beauty which may claim a universal and certain validity. Experience, however, tells us that attractiveness is a very relative issue and it is most likely that no explicitly definable criteria of beauty or attractiveness exists with which we could objectively evaluate attractiveness. And it is here that we arrive at the core of the problem.

Unless we have at our disposal unequivocal and "objectivise-able" criteria of beauty or attractiveness, their inclusion into the decision-making processes brings with it the danger of uncontrolled and rationally unjustifiable decision-making. And it is namely a feeling of rationally unjustifiable decision-making that is frequently the reason for viewing a decision as discriminatory. And that even in the case of positive discrimination.

If the reason for giving preference or favour to somebody in an evaluation is purely due to their belonging to the above-mentioned and clearly unjustifiable criteria (such as sex, colour of skin, etc.), the subjects assessed may perceive this decision-making as discriminatory. The effort to preserve diversity, preferring disadvantaged individuals and thus protection for members of minority groups or the balancing of these handicaps may be acceptable only in a wider context, but in the particular anti-discrimination criteria it creates serious problems (besides demotivation with regard to changing one's own position), especially through the disadvantaging of the members of majorities, or confirmation and legitimisation of the state against which the anti-discrimination law is directed. An example of such a process may be, for example, the practice of selection of lecturers at an unnamed conference on beauty

[19] HAMERMESH, D.: Beauty Pays. Why Attractive People Are More Successful? Princeton University Press, 2011.

which was held in Great Britain. In the creation of its programme the organisational committee took into account the participation of all relevant minorities, and thus the programme also included contributions which in a blind review process may not have passed due to their quality and vice versa, some others could not be presented as that would have meant their taking the place of those positively discriminated for. From the viewpoint of science it thus appears to be necessary to meet anti-discrimination criteria, which most often occurs through a double-blind review process. On the other hand, in the creation of a scientific team, or a group of collaborators, it is of course desirable to evaluate not only the qualities of the particular authors but also their compatibility and the possible "chemistry" with regard to the observed intentions. To thus establish (positive discrimination) criteria regardless of the proclaimed goals is very problematic, which was also documented by the Finding of the Constitutional Court of the Slovak Republic of 18th October 2005 on the unconstitutionality of Section 8 (8) of the Anti-Discrimination Act of the Slovak Republic.

Conclusion

In this contribution we attempted to clarify that the discovery of distinguishing criterion is, from the cognitive viewpoint, always perceived by the subject as positive knowledge (reward), and hence they take it into account to a greater extent than its real value deserves. At the same time, however, we attempted to demonstrate that from a cognitive viewpoint the decision-making process is of a holistic nature and the elimination of some of its aspects deforms the overall decision-making. That explains, together with the evolutionarily acquired associations of beauty, goodness and truth, why we have a tendency to connect these signals although logically they are not linked to each other at all. On the other hand, if the individual criteria of choice are not clearly defined in advance, or their real weights are not known, or possibly – as is the case in the form of discrimination based on appearance – if the evaluation of the particular criterion is relative, then the particular decision-making creates grounds for a justified feeling of inequitable treatment and rationally unjustifiable decision, which leads to a suspicion of discrimination. The way to avoid this problem to the greatest extent possible is through the objectivisation of criteria and their weights and in some cases also objectivisation by delegating the decision-making to a committee, although that in itself still does not have to mean the total elimination of reasons for the existence of discriminatory behaviour. By its use, however, we can distribute the subjective effect on decision-making to several decision-makers, thus increasing the chance of them balancing each another out. But even that may not be enough sometimes, as a great part of our prejudices tend to be socially indicated. The history of discrimination against a minority by the majority purely on the basis of appearance is a clear proof of that.

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The Slovak Anti-Discrimination Act No. 365/2004 Coll.

European Anti-Discrimination Directive 2000/78/EC

The Slovak Act No. 311/2001 Coll.

Marek Káčer[1]
Trnava University in Trnava, Faculty of Law, Department of Theory of Law and Constitutional Law

Is Affirmative Action Consistent with the Principle of Equality?

Abstract:
The principle of equality says, roughly, that each man or woman deserves equal respect. Affirmative action, on the other side, is a public policy grounded on an assumption that a certain category of people should be treated more advantageously in comparison with others. Assuming that the requirement of consistency of moral judgements implies equality of treatment, we ask whether an affirmative action meets this requirement. And we answer that it does.

Key words: Affirmative Action; Consistency; Discrimination; Exceptions to Rules; Equality; Inclusiveness; Racism; Reversible Reasons; Universalization.

Introduction

In what follows we will try to prove that the idea of affirmative action as such is universally acceptable in a sense that it would be unreasonable to disagree with it. In defending this claim we will proceed in three steps.

In the first section, assuming that being reasonable means being consistent, we demonstrate Hare's idea according to which consistent use of moral judgements is possible only if the judgements are universalizable, i.e. if they pass a universalization test such as the Golden Rule. The process of universalization and the realization of the principle of formal equality reach their points of perfection when a judgement is presented as a conclusion stemming from a rule with a universal personal scope. However, it would be wrong to think that by using the term "all" to set up a rule's personal scope we neglect all differences between particular categories of the rule's eventual subjects. It is because the question of personal scope in itself presupposes the most fundamental difference between subjects and objects and this difference can be drawn in various ways according to a particular moral or political consideration. After all, all attempts to universalize moral judgements end up only as more or less inclusive generalizations.

In the second section, we demonstrate that moral argumentation needs to reflect the fact that there are plenty of differences between people which seem to be morally relevant in a sense that they constitute justification for fragmentation of personal

[1] Doc. Mgr. Marek Káčer, PhD., contact: humnox@gmail.com.

scope of rules and, consequently, they create legitimate exceptions to formal equality. So, the process of universalization is not just about presenting judgements as conclusions resulting from some generalizations, it is equally important to reflect morally relevant differences between the situations people live in or between abilities or resources they live with, even the diversity of their moral viewpoints. The choice of particular generalization used to delimit the personal scope of the rule is guided by the rule's justification, the proscription of the evil to be avoided or the prescription of the good to be achieved (Schauer). Thus, for example, the *subject-matter* difference between *good* and *evil*, or between *help* and *harm*, can be mirrored in the *personal-scope* difference between *some* and *all*. At a lower level of abstraction, it may be quite difficult to find a universally acceptable concept of what is evil or what is good, but there is still a universally acceptable guideline that determines what generalizations we should not use when formulating rules. It is the guideline according to which we should not use generalizations whose under- or overinclusiveness is too high, i.e. which would cause the set of the rule's applications to be significantly different from the set of direct applications of the rule's justification. It seems that a typical discriminatory legislation, if it is designed to inflict burdens on certain categories of people, does not meet this requirement.

In the last section, we are answering the question whether we will come to the same result if we test the universality of reversed discrimination legislation. We are working on two assumptions. According to the first one, the difference between discrimination and reversed discrimination equals to the difference between harming and helping. According to the second one, it is much more difficult to find a *category* of people which is the evil's perpetrator than to find a *category* of people which is the evil's victim. So, if the justification of a rule imposing burdens on only certain categories of people is based on the belief that these people have committed evil, while the justification of a rule favouring the same categories of people is based on the belief that these people have been suffered evil, then it is reasonable to assume that the inclusiveness of these categories will have significantly different error rate. In the case of discrimination, the rate will be too high, while in the case of reversed discrimination it will be relatively low. Thus, everyone who accepts that "Helping needy people is good," is also committed to accepting that "Affirmative action in favour of discriminated people is good".

All of Us

Let us assume that acceptation of moral judgements is not contingent only upon moral emotions, such as compassion or vengefulness, but also on their reasonableness, on the logical links between thoughts from which they are composed. After all, judgements, whether moral or not, are judgements because they are conclusions stemming from some premises, and not because they are desired effects of some manipulation. Keeping judgements in our main focus of interest, the proper subject matter of this paper is not acceptation of moral judgements (a question whether

an individual agrees with a judgement), but their acceptability (a question whether a judgment is objectively right or wrong or whether it is reasonable to agree with it or unreasonable to disagree).

It is a notorious fact that people do not agree in answering all moral questions, and in some cases, this disagreement cannot be resolved even in a dialogue that meets all the conditions of rational discourse.[2] This failure, however, does not have to lead us to a sceptical conclusion that accepting a certain moral judgement is always just a question of individual taste and that rational agents are left with no other choice but to agree to differ. Such resignation may not be a solution "*for to agree to differ is only possible when we can be sure that we shall not be forced to make choices which will radically affect the choices of other people. This is especially true where choices have to be made co-operatively…*"[3] On the other hand, the practical necessity of cooperation between agents with different moral viewpoints should not force us to accept a theoretical conclusion that every moral question must have the only right answer.

So, what are the roles of reason and the overall cognitive faculties of man in the making of moral judgements? If our expectations were too high, we could end up being a moral realist who believes that our moral terminology copies a predetermined objective reality. For example, Michael S. Moore is convinced that moral terms such as duty, justice or guilt represent entities that are part of the objective mind-independent world. The phenomena around us have not only natural but also moral properties, both of which we recognize by our ordinary sensory facilities, our five senses.[4] For instance, when we see two boys as they pour gasoline on a cat and then sets her on fire, our senses perceive not only that the burning being is suffering, but also that the cruel youngsters are doing something wrong.[5] According to Moore, this kind of moral realism is the best scientific explanation of how we make moral judgements; in particular the explanation of why we go into it with the belief that we can justify them as objectively true.[6]

To prove that moral judgements are not just a matter of taste or emotions, one does need to claim far less than a moral realist. He namely intends to prove not only that certain moral judgments can be logically inferred from certain moral premises but also that the truth of these moral premises is possible to be scientifically verified or falsified. We will focus only on the inference. Thus, the competence of human

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[2] For the review of various suggestions of these conditions see: HABERMAS, J.: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. Cambridge – Massachusetts: The MIT Press, 1996, p. 302ff. For the issue of reasonable disagreement in the domain of political morality see: McMAHON, Ch.: *Reasonable Disagreement: A Theory of Political Morality*. Cambridge: Cambridge University Press, 2009, pp. 18–25.

[3] HARE, R. M.: *The Language of Morals*. Oxford: Clarendon Press, 1952, p. 142.

[4] MOORE, M. S.: Moral Reality Revisited. *Michigan Law Review*, Vol. 90, No. 8, 1992, pp. 2517–2519.

[5] Ibid, pp. 2515–2516.

[6] Ibid, p. 2492.

cognitive faculties employed in making moral judgements we limit to the area of formal relationships between particular moral ideas. What is the minimum requirement that every moral judgement must meet if it is to be labelled as "reasonable" or if it ever deserves to be called "judgement"? The requirement is consistency; the principle according to which in a set of propositions there must not be found sentences that contradict each other. The relationship between in/consistency and rationality is as follows:

> "*Consistency and inconsistency are important because, among other things, they can be used to evaluate the overall rationality of a person's stated position on something. If the statements expressing such a position are consistent, then there is at least a possibility that the position makes sense. ... On the other hand, if the statements are inconsistent, then there is no possibility that the position makes sense.*"[7]

If one and the same participant in a dialogue asserts propositions that are mutually contradictory, the dialogue ceases to be rational because it entails anything.[8] If this contradiction cannot be removed, for example, by refining some premises or by clearing some conclusions, it makes no sense to continue in it. What originally looked like a judgement finely turned into a free association of thoughts that might be of interest at most from a psychological or aesthetic point of view.[9]

But how shall we apply the requirement of consistency in the process of making moral judgements? Let us start with a simple sentence "X is good". R. M. Hare claims that if the meaning of this sentence is to commend X, then this commendation necessarily goes over the particular X to all other similar X′, X′′… because it has to be grounded on some *general* reasons:

> "*When we commend an object, our judgement is not solely about that particular object, but is inescapably about objects like it. Thus, if I say that a certain motor-car is a good one, I am not merely saying something about that particular motor-car. To say something about that particular car, merely, would not be to commend. ... Whenever we commend, we have in mind something about the object commended which is the reason for our commendation. It therefore always makes sense, after someone has said 'That is a good motor-car', to ask 'What is good about it?' or 'Why do you call it good?' or 'What features of it are you commending?' It may not always be easy to answer this question precisely, but it is*

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[7] HURLEY, P. J.: *A Concise Introduction to Logic*. 7th ed. Belmont: Wadsworth Publishing, 2000, p. 331.

[8] This is called the law of explosion. Cf. CARNIELLI, W. – CONIGLIO, M. E. – MARCOS, J.: Logics of Formal Inconsistency. In. GABBAY, D. M. – GUENTHNER, F. (eds.): *Handbook of Philosophical Logic*. 2nd ed. Vol. 14, Dordrecht: Springer, 2007, p. 1.

[9] Hermann Lotze distinguishes between *coherent* set of ideas and *coincident* set of ideas. Although both of them appear in our consciousness with strict necessity, only the former is a mode of connection which is *"universally valid for all souls"* and as such creates ground for making distinction between truth and untruth. LOTZE, H.: *Logic in Three Books: Of Thought, of Investigation, and of Knowledge*. Oxford: The Clarendon Press, 1884, pp. 1–2.

always a legitimate question. If we did not understand why it was always a legitimate question, we should not understand the way in which the word 'good' functions."[10]

If the reason why we say "That is a good motor-car" lays in the car's high speed combined with its stability on the road, then it would be inconsistent to say "That is not a good motor-car" referring to any possible car with exactly the same functional properties.[11] Thus, if we want to use this kind of sentences consistently, we need to universalize them. Now, in the domain of morality, the proper subjects of commendation are human acts or institutions. Consistent use of moral judgements ("Giving food to that person is good" or "The form of government of this state is bad"…) implies that they are supported by reasons in the form of general principles or rules.[12] All moral judgements are essentially universalizable, so if a sentence does not pass some test of universalization, it cannot be meant as a moral judgement. For the purpose of such testing we can use for instance the Golden Rule according to which "*One should treat others as one would like others to treat oneself*" or Kant's categorical imperative in the formulation *"Act only in accordance with that maxim through which you can at the same time will that it become a universal law*".[13] A successful universalization makes explicit what was originally merely implicit: it presents a moral judgement as an individual conclusion stemming from a general premise; and even if the act of moral judging were actually a decision, then after universalization it would have to be a rule-based one. Thus, a consistent use of moral judgements implies a certain degree of fairness of treatment. Frederick Schauer says that consistency has both a spatial and temporal dimension; the former one expressed in terms of equality (subjects falling into the same category should be treated equally), the latter one expressed in terms of precedent (in the similar cases we should make the same decision).[14]

The principle of equality and the principle of precedent are sometimes thought to be cardinal tenets of justice.[15] However, we should keep in mind that they are purely formal. Stressing the vagueness of terms in which the principle of equality is usually formulated, Hans Kelsen concludes that it belongs rather to the domain of logic than ethics:

"The idea of equality, for instance, which adherents of natural law most frequently affirm to be the essence of justice, the principle that equal things must be treated

[10] HARE, R. M.: *The Language of Morals*, pp. 129–130.

[11] Ibid, p. 131.

[12] Ibid, p. 176.

[13] KANT, I.: *Groundwork for the Metaphysics of Morals*. New Haven – London: Yale University Press, 2002, p. 37.

[14] SCHAUER, F.: *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*. Oxford: Clarendon Press, 2002, p. 136, footnote no. 1.

[15] Cf. RADBRUCH, G.: Statutory Lawlessness and Supra-Statutory Law. *Oxford Journal of Legal Science*, Vol. 26, No. 1, 2006, p. 7.

equally or, in other words, that equals deserve equally, suum cuique*, does not actually proclaim anything more than the logical principle of identity or the principle of contradiction. … The principle of equality as a principle of justice implies only that if A is to be treated in a certain way and B equals A, it follows that B must be treated in the same way. Otherwise there would be a logical contradiction; the principle of identity would be violated and the idea of the unity of system destroyed. To reduce the idea of justice to the idea of equality or unity of order means no more and no less than the replacement of the ethical by the logical ideal.*"[16]

At the first glance, it seemed that the universalization test was to provide an important regulatory function because it would discourage to propose those rules which a proponent did not want to apply to herself.[17] However, the permeability of the universalization filter is too high: it lets pass through indiscriminately not only liberal, conservative or socialist morality, not only morality of rights, of duties or virtues, but also "morality" of racists or religious fundamentalists. In order to push through the universalization test a rule according to which it is permissible to inflict a suffering upon innocent human beings, one does not need to become a masochist. To universalize this kind of rule one just needs to make up a generic difference between certain classes of people, e.g. a difference between "superior" and "inferior" human races, and then to claim that the rule is to be applied only to those classes of people to which he – as a rule proposer – does not belong. This is the reason why Kelsen admits that "*even the least contradictory legal order and the most perfect realization of the formal idea of equality may constitute a condition of supreme injustice*".[18] But may they?

It is pretty hard to imagine in what way a rule which permits to inflict suffering upon innocent members of an "inferior" human race can be viewed as the perfect realization of the formal idea of equality. Perfectly universalized rules – at least with respect to formal equality – are meant to be applied to "all". The universal personal scope of rules is presumed to be fair because it reflects formal equality at the highest possible rate and formal equality as such provides moral justification with the highest degree of consistency. So, when a rule makes differences between its subjects and sets up their differential treatment we can always ask its proponent how these differences are justified. Notice that from individual moral judgements we proceeded to general rules and from these rules we slid into their justification. Demonstration that some sentence stands as a moral judgement can have many steps, depending on whether we agree or want to agree on its first premise. Usually, people do not demand any further justification when we tell them that "We gave that man a loaf of bread" because "he was starving," since they agree with us on a general rule ac-

[16] KELSEN, H.: *General Theory of Law and State*. New Brunswick – London: Transaction Publishers, 2006, pp. 439–440.

[17] Cf. HARE, R. M.: *The Language of Morals*, p. 141.

[18] KELSEN, H.: *General Theory of Law and State*, p. 441.

cording to which "It is good to feed starving people". On the other side, many of us would not consider a justification to be finished, if somebody says that "He hurt that man" because "he was of a certain race", since we do not share a conviction that "It is good to hurt members of a certain race". In that case – if we want to carry on with the dialogue at all – we demand to know what is so special about the race that it justifies the infliction of suffering upon its members. A proponent of a racist legislation has to resort to reasons showing why being a member of a certain race means to be a part of "*the evil sought to be eradicated*".[19] The problem with the racist's justification is not only that it is extremely difficult to find any causal link between being of a certain race as such and an occurrence of some evil, but also in the fact that the concept of race in itself is distinctively obscure. Thus, sooner or later, it will have to become apparent that all the reputed qualities proclaimed to cause inferiority of a certain race, are shared also by members of all other races, especially when we take into account that races mix with each other.

For the sake of illustration let us consider the following suggestions of the criteria differentiating between particular races: The physical appearance of people, namely colour of their skin, could be only of a little help because it is dependent on subjective perceptions. When citizens of the state of Virginia were depicting runaway slaves to the police in the first half of the 19th century "*they knew at least sixty-one different ways to describe the skin tones of those they held in bondage*".[20] The criterion of ancestry seemed to be more promising but there was difficulty in fixing exact ratio between white and black ancestors which was decisive for the proper ascription of race. In Virginia, the criterion for defining Afro-American race was ranging from the requirement to have at least one black great-grandparent in the beginning of the 18th century to the requirement of a single drop of African blood, the so-called "one-drop rule", which became standard two centuries later.[21] One of the reasons for the adoption of the one-drop rule was that neither the previous Virginian regulations nor the practice of their application did explicitly state that the one who did not fall within the definition of Negro or mulatto was actually a white man. Thus, the racial order was pretty messy, allowing some whites "*to treat people of mixed race as if they were white in certain circumstances, whereas others might treat them as if they were black in others*".[22] Nevertheless, the obsession with the perfect purity of blood could become institutionalised in the one-drop rule only because a complete history of one's own lineage was virtually untraceable. The ancestry criterion of racial differentiation produced difficulties also in the Third Reich. One of the authors of the Nuremberg race laws Bernhard Loesener tried to alleviate the harsh impact of

[19] SCHAUER, F.: *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, p. 26.

[20] ROTHMAN, J. D.: *Notorious in the Neighborhood: Sex and Families Across the Color Line in Virginia, 1787–1861*. Chapel Hill – London: The University of North Carolina Press, 2003, p. 202.

[21] Ibid, p. 206.

[22] Ibid, p. 229.

a racist legislation by excluding from its personal scope the German-Jewish *Mischlinge* (persons of mixed race). Before the adoption of Nuremberg laws, Loesener dealt with the Aryan Paragraph in the Law for the Restoration of the Professional Civil Service from 1933 which excluded members of the mixed race from civil service. Loesener tried to persuade his superiors that this law should not be applied to one-quarter Jews. He deliberately adjusted his arguments in order to be appealing to Nazis who did not indulge in humanistic morality. According to Loesener the children and *"particularly the grandchildren of mixed marriages … feel defamed and forcibly deprived of their German national identity, even though they feel they belong exclusively to the German nation*".[23] So the Aryan Paragraph, Loesener continues, affects also *"those who otherwise stand firmly on the side of the government, and whose upbringing and intelligence make them valuable to the German nation*".[24] This argument suggests that when designing a personal scope of rules inflicting burdens, instead of a biological criterion of blood we should rather take into consideration a political criterion of loyalty to the government and economic criterion of worth for nation. This point, although concealed in Loesener's conciliatory tone, launches a frontal attack on the rationality of the racist legislation which will be discussed in more details in the following section. For now, we want to emphasize that Loesener's substituting criteria make obvious the thought presented above, namely the idea that all the specific properties which are supposed to make different one race from another, are actually shared by members of all races. And as a consequence, it is not consistent to insist that rules imposing burdens should be restricted to one race but not the other one.

A racist might defend himself by an offense: He could point out that if we wanted to take formal equality seriously, we would need to include into "all" not only human beings but also juristic persons, great apes or robots with highly advanced AI. This invitation should be accepted with warmth because it moves the subject of discussion from the problem exclusion into the problem of inclusion. At the same time, it should be taken as a challenge because it provokes us to give up the most fundamental discrimination between *persons* on the one side and *things* on the other. If we are truly seeking the perfect realization of formal equality, then it is appropriate to consider whether the term "all" is to include not only everybody but also everything. The obvious response to this challenge is to claim that the term "all" cannot include "everything" because it is used for delimitation of subjects falling within the personal scope of rules and thus it presupposes a certain conception of agency or a qualified susceptibility to suffer. So finally, we have to admit that to decide *who* belongs among subjects and *what* belongs among objects is not a matter of logic but a proper matter of ethics.

[23] SCHLEUNES, K. A. (ed.): Legislating the Holocaust: The Bernhard Loesener Memoirs and Supporting Documents. Colorado – Oxford: Westview Press, 2001, p. 40.

[24] Ibid, p. 42.

Some of Us: Harmed

So far we have learnt that the requirement of consistency is interconnected with the principle of formal equality. During justification, when trying to formulate the first premise of our moral judgement, the most reasonable is to start with the presumption that the personal scope of the premise, a new rule, should be universal; that the rule should apply to everybody. But even if rules oblige "all", they are not the perfect reflection of formal equality because this term does refer only to subjects, not objects, and the exact line of distinction between persons and things is always a matter of decision reached upon the balance of various moral reasons. So, if the term "all", used as a delimitation of personal scope of rules, implies non-formal moral considerations, these considerations will be all the more relevant when proposing rules meant to be applied only to "some". It seems that *universalization* of moral judgements has never been a purely logical operation because, in fact, it has always been rather a *generalization*.

Let us also remind that the process which we have hitherto called and will continue calling "universalization" might develop into many levels: we usually proceed from individual moral judgements to general rules and from rules to their background justification all the way up to the first premise on which we can agree. So, rules are the middle chain of the link between particular moral evaluations of individual events and a very vague moral principle telling us what aims are worth to be achieved. But how do we get to their particular wording?

Frederick Schauer says that "*rule-making in response to a particular event, and indeed most rule-making of any kind, involves the use of generalizations chosen from among equally logical candidates*".[25] The presence of choice is necessary because any individual event can be generalized in a countless number of ways depending on the direction and level of a generalization and each generalization, in focusing on a limited number of the event's properties, suppresses its other properties which could have been accentuated in some other generalizations.[26] Thus, the process of universalization has to include a decision which of the relevant generalizations will be used as a part of a rule's antecedent and this decision is guided by the rule's justification, the prescription of some goal sought to be achieved or proscription of some evil sought to be avoided.[27] Above we illustrated how this process worked in the case of racist moral judgements. The problem in universalizing racism is that the decision to use a particular race as a generalization embedded in the antecedents of rules inflicting some burden was misguided by a false belief in the causal link between being a member of the race and an occurrence of some evil. Going to the next level of justification, where we inquire why it is just this race and not the other one what causes evil in the world, a racist has to refer to more substantial reasons, such

[25] SCHAUER, F.: *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, p. 25.

[26] Ibid, pp. 21–22.

[27] Ibid, p. 27.

as those phrased by Bernhard Loesener trying to exclude one-quarter Jews from the scope of the Aryan Paragraph which prohibited Jews from entering civil service. If the justification behind this prohibition is that employment in civil service should not be available to people disloyal to government or to people who cannot create any wealth for the nation, then to use Jewish race as a generalization framing the prohibition's personal scope is not ingenious at all. It is because a great many of Jews can be loyal to the government of a country which they inhabit and even more of them can produce national wealth and at the same time a great many of non-Jews could be disloyal to the government and produce no wealth. For a description of this phenomenon, Schauer uses the pair of terms "*overinclusiveness*" and "*underinclusiveness*". A rule is overinclusive when it "*includes or encompasses instances that the background justification behind the rule would not cover*"; meanwhile a rule is underinclusive when it "*fails to reach instances that the direct application of the background justification would encompass*".[28] But neither of these qualities as such can serve as an independent argument against a rule's adoption because "*at least some degree of both over- and underinclusiveness is an inevitable part of governing human behaviour by general rules*".[29] If Schauer is right, then why was the Aryan Paragraph unreasonable? Even if we accept that *some* degree of improper inclusiveness cannot be avoided when guiding human behaviour by rules, it does not mean that it is equally reasonable to use whatever generalizations we imagine as the rules' antecedents. As was mentioned above, the choice of a proper generalization is contingent upon the rule's justification in the sense that it is not reasonable to choose those generalizations that are not causally relevant for the occurrence of good to be achieved or wrong to be avoided. Using a particular race as a sign of disloyalty to government or economical futility is like using a particular colour of car as a sign of its safety – the degree of improper inclusiveness of these generalizations with respect to the indicated causal directions is simply too high.

Nevertheless, even the generalization which has the best fit to the rule's justification has a certain degree of improper inclusiveness. After all, every rule will occasionally mandate to "*neglect potentially relevant differences*" between cases to which it applies.[30] Schauer considers this to be an essential feature of "rule-ness" and rule-based decisions and he does not hesitate to admit that "*frequently the goals of justice are served not by the rule-followers, but by those whose abilities at particularized decision-making transcends the inherent limitation of rules*".[31] The irony is that the only justifiable way how to transcend the inherent limitation of rules is to set up universalizable exceptions to them and that is, in fact, a creation of new rules. There is no reason to wonder why Schauer stresses out the direction of fit from general rules to individual decisions, while we see that rules and cases should fit also in the reversed

[28] Ibid.

[29] Ibid, p. 28.

[30] Ibid, p. 136.

[31] Ibid, p. 137.

direction. It is because his main focus of interest was the problem of rule-based decision-making, meanwhile, our main business is to analyse universalization of moral judgements which is essentially a case-based rule-making.

If rules are responsive to peculiarities of individual cases we sometimes say that they are "incompletely rigorous" or "loose". R. M. Hare distinguishes two ways in which a rule can be loose claiming that only one of them demonstrates the rule's responsiveness to particularities of individual cases. According to him, the first way is when a rule lays down a standard but it is sufficient to follow it only *"in the great majority of instances"*, meaning that *"exceptions are allowed if they are not too numerous in proportion to the total number of cases"*.[32] As an example of this kind of rule we could use "One should not indulge in eating of fat dishes". If the rule's justification is to keep one's overall health in good condition, then its occasional transgressions are harmless and they do not set up a pressure to modify it. Facing its exemptions, granting that they are not too numerous, the rule remains intact.[33] On the other side, a rule can be loose in the second form when its *"exceptions are not limited by a numerical restriction, but by the peculiarities of particular classes of instances"*.[34] Here too the agent decides whether to make an exception or not, but her decision is not restricted by the consideration whether she makes these exceptions too often, but by the consideration, whether they are justified by a speciality of the *class* of instances in which they are to be made. Hare concludes that by adding an exception to this kind of rules we are actually modifying them and in the final effect there remains no reason to describe them as "loose":

> *"The fact that exceptions are made to them is a sign, not of any essential looseness, but of our desire to make them as rigorous as we can. For what we are doing in allowing classes of exceptions is to make the principle, not looser, but more rigorous."*[35]

What lesson can we take from these observations turning back to the problem of universalization? First of all, it would be naïve to propose that for universalization to be completed it is necessary to arrive at a principle with a universal personal scope. It is just the opposite, the principle with universal personal scope usually serves as a starting, not a finishing, point. As we explained above, it is because such design makes moral judgement consistent. However, in moral argumentation we usually need to proceed much further, reflecting the fact that there are plenty of differences between people which seem to be morally relevant in a sense that they constitute justification for fragmentation of personal scope of rules and thus they create legitimate exceptions to formal equality.

Notice that when designing rules a delimitation of their personal scope is only one of many concerns and it is usually not addressed as the first in the line. If we

[32] HARE, R. M.: *The Language of Morals*, p. 50.

[33] Ibid, p. 51.

[34] Ibid.

[35] Ibid, p. 52.

use rules as devices for solving problems, then before we start making them we have an idea of what the problems are like. These might be for example a frequent occurrence of an undesirable behaviour or a state of affairs in general. The idea might be, and very often is, focused on the subject matter of the problem and its personal dimension pops up only later, in the further analysis done in the search for its possible solutions. Let us assume that the problem is a low birth rate in some country. If we found out, after investigation, that one of its causes is that women there refuse to face difficulties associated with pregnancy and birth, then it would be nothing surprising if our analysis ends up in a proposition of rules with personal scope restricted only to them. Now, let us look at how the *subject-matter* difference between *helping* and *harming* can be reflected in the *personal-scope* difference between *some* and *all*. In the state of limited resources, it seems to be justified to distribute help according to a rule which prefers one group of people before the other one, whether the criterion of prioritization is need or desert or something else. If, on the other side, help was distributed in equal portions to everybody, in the final effect it could be futile because the portion would be too small. Needless to say that help which does not help is not a help. In contrast to this, considering the subject matter of harm it seems to be hard to justify the departure from the principle of formal equality as reflected in the universal personal scope of the prohibition "Nobody shall be harmed". Perhaps we could come to the conclusion that infliction of harm can be justified only as the imposition of punishment. But in that case, the reason why we should harm only some, and not all, does not stem from the fact that there are differences between certain categories of people, but from the fact that there are differences between certain categories of human acts, namely those which meet conditions necessary for ascertainment of guilt leading to punishment and those which do not. So, in the perspective of subject-matter difference between helping and harming it is not difficult to comprehend why the provision of the retirement pension is restricted only to some, meanwhile the prohibition of torture protects all, even some animals.

Now, we see clearly that the universalization of moral judgements is much more complex than we depicted in the previous section of this paper. John Mackie distinguishes three stages of this process. In the first stage saying that something or somebody is right or wrong, good or bad, implies the commitment to take the same view about any other relevantly similar subject-matter or person. This is meant *"in the first place to rule out as irrelevant mere numerical as opposed to generic differences"*.[36] So, it excludes judgments containing *"a proper name or indexical term used not as a variable but as a constant,"*[37] but it has problem to control use of generic differences as a disguise for numerical differences: *"If an Italian patriot propounds the maxim that the interests of all boot-shaped countries should be specially favoured, we shall not accept this as universalized if it is a mere dodge for not using the proper name 'Italy'."*[38]

[36] MACKIE, J.: *Ethics: Inventing Right and Wrong*. London: Penguin Books, 1977, p. 83.

[37] Ibid, p. 84.

[38] Ibid, p. 85.

Anyway, unfairness resulting from grouping morally different particulars under one universal category lead us to the second state of universalization where our task is to place ourselves in the position of others taking into consideration their "*physical qualities and resources and social status*".[39] In this context we may say that moral reasons are essentially "reversible" – they should be acceptable both to us and to others even if our situation and theirs were reversed.[40] Despite the fact that we are inclined to feel deeply about the reversion more or less in proportion to the degree of probability that it will actually happen,[41] the fairness requires us to allow also for those *"differences of condition and inversions of role that could not possibly occur, and which it may take a considerable effort even to imagine"*.[42] Possible reversions are all the more difficult to imagine and accept in the last stage of universalization where we should take on also the other person's *"desires, tastes, preferences, ideals and values"*.[43]

Is it ever possible to meet such a demanding requirement? In the domain of theoretical reflection, it is, for example by setting up a fictional procedure for searching basic principles of justice as one made by John Rawls. If it is fair that viewpoints of all are to be included, then it should be equally fair to include none of them. In order to "*nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage*" Rawls uses his famous idea of the veil of ignorance under which these men become parties contracting basic principles of justice in the original position where:

> "*No one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this … the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of*

[39] Ibid, s. 90.

[40] INOUE, T.: Reinstating the Universal in the Discourse of Human Rights and Justice. In SAJÓ, A. (ed.): *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer-Science – Business Media, 2004, p. 133. Cf. HABERMAS, J.: *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, p. 228.

[41] "*We feel less deeply, it must be admitted, about the question, whether it was a bad act of Agamemnon to sacrifice Iphigenia, than about the question, whether it was a bad act of Mrs. Smith to travel on the railway without paying her fare; for we are not likely to be in Agamemnon's position, but most of us travel on railways. Acceptance of a moral judgement about Mrs. Smith's act is likely to have a closer bearing upon our future conduct than acceptance of one about Agamemnon's.*" HARE, R. M.: *The Language of Morals*, p. 141.

[42] MACKIE, J.: *Ethics: Inventing Right and Wrong*, 1977, p. 90.

[43] Ibid, p. 92.

civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong."[44]

In the domain of real political practice, however, it is impossible either to include or to exclude all of these considerations with respect to all of the humankind. Consequently, the requirements of universalization can always be met only in approximation. It means that not viewpoints of all, but only viewpoints of some are possible to be dealt with in the universalization process. After all, in everyday reality, it is a pretty successful achievement when a proposed wording of rules is acceptable to all who initially raised objections. Tetsuo Inoue suggests the requirements of universalization are meant to be taken as the requirement of public justification:

"Justice also requires us to give others public justification for our claims on them, justification by reasons that would be acceptable not just from our idiosyncratic viewpoint but also from that of others. Reasons that would be acceptable even from the viewpoints of others are not simply the reasons that they are likely to accept, but the ones that they would not be able to reject as unfair if they accept the requirement of public justification. … The public justification requirement … is a test to be used in critically examining whether actual consensus is the rationalization of dominance, of those parties with greater powers and transaction resources over those with lesser ones."[45]

Inoue, who is dealing with the subject of human rights universalism and cultural relativism, uses the perspectives of "ours" and "theirs". According to him, public justification is responsive only to those viewpoints that have been made heard of:

"Justification is not a logical or mathematical demonstration to be conducted indiscriminately on every assumption or belief. Justification is instead an act of responding to another who expresses an objection and as such is a form of dialogue. Justification as a dialogue does not involve demonstrating the soundness of our belief system as a whole, in such a way that every logically possible objection from every rational agent is a priori resolved, but to respond to a particular person who raises a concrete objection to a specific part of our belief system by providing reasons for our holding this particular belief that she can understand and accept."[46]

Even upholding of this minimalistic dialogical stance will not be sufficient to back up the belief that the requirement of public justification can resolve all moral or political disputes. It is because in some contexts appealing to reversible reasons in a dialogue can lead to opposite conclusions, as it is well illustrated in the fundamental conflict between consequentialist (utilitarian) and deontological (Kantian)

[44] RAWLS, J.: *A Theory of Justice*. Orig. ed. Cambridge – Massachusetts – London: The Belknap Press of Harvard University Press, 1971, p. 137.

[45] INOUE, T.: Reinstating the Universal in the Discourse of Human Rights and Justice, pp. 133–134.

[46] Ibid, p. 137.

ethics.[47] Nay in some other contexts, one and the same reversible reason – if it is excessively vague – can split into its mutually conflicting opposites, for example when its wording contains the term "freedom" which can be understood either as a negative or a positive liberty.[48] Nevertheless, these remarks should not mislead us to think that the requirement of public justification by reversible reasons is utterly useless. It is not, and it is due to its ability to rule out at least some of the "reasons" which are regularly used for rationalization of unjust dominance over the weak. Who could reasonably accept a legislation prohibiting Jews from entering civil services, if "reasonably" means that the legislation is to be justified only by reasons acceptable also to Jews?

Some of Us: Helped

When universalizing moral judgements we try to construct them as conclusions of general rules. When formulating these rules we use generalizations in which we reflect morally relevant differences between people. Each relevant difference justifies an exception to the principle of formal equality. The proper strategy is to formulate such a wording of a rule which would be acceptable to anybody who would find herself in the situation falling within the rule's ambit. Universalization pushes us to reflect not only other people's situations but also their viewpoints; however, this requirement can be fulfilled only approximatively by making the rule's justification public and by responding to all objections actually raised to it. Above we denounced the Aryan Paragraph not only out of our compassion to its victims but also due to its lack of ingenuity caused by its failure to pass the universalization test. Shall we expect the same result when testing an affirmative action in favour of a certain race?

Granting rights only to some and not to all is not in itself a controversial idea. Above we demonstrated how the subject-matter difference between helping and harming is regularly mirrored in the personal-scope difference between some and all: an obligation to help is usually restricted only to those who need it or who deserve it, while an obligation not to harm is usually expanded to all, granted that we exclude from it the imposition of legitimate punishments. The fact that it is not contentious to restrict the personal scope of rules conferring rights only to some is confirmed also by the practice of international community. Let us recall that from all the human rights treaties the one with the most parties is confined to children: 196 states agreed to the Convention on the Rights of the Child as opposed to 169 states signed under the International Covenant on Civil and Political Rights.[49] Perhaps, the parties did not have a problem to uphold the child's rights because everyone on the Earth has

[47] Cf. BLACKBURN, S.: *Ethics: A Very Short Introduction*. Oxford: Oxford University Press, 2001, p. 77.

[48] Cf. BERLIN, I.: Two Concepts of Liberty. In HARDY, H. (ed.): *Liberty (Incorporating Four Essays on Liberty)*. Oxford: Oxford University Press. 2002, pp. 166–217.

[49] See official data available at: https://treaties.un.org/.

a personal experience with vulnerability inherent in being in the state of childhood. Such a smooth progress in looking for reversible reasons is, however, not the regular case. The condition of universal acceptability is usually quite tricky to achieve.

As we mentioned in the concluding remarks of the previous section, what is acceptable from one viewpoint does not have to be acceptable from the other, unless the viewpoints are framed in so vague terms that they actually (and only initially) overlap. Yet, there is a viewpoint which has to be acceptable to everyone regardless of one's own personal preferences, if the rule-making process is not to generate unreasonable outcomes. It is the formal requirement according to which the degree of over- and underinclusiveness of rules must not be too high. When we were criticizing the Aryan Paragraph, we pointed out that it was founded on a false belief in the causal link between being a Jew and an occurrence of some evil. When we inquired what that evil could rest in, we found out only such properties (disloyalty to the government, economic futility) which were evenly shared by members of all races and therefore we concluded that the restriction of the paragraph only to one of them was not consistent, i.e. it was unreasonable. This conclusion stands even if we subscribe to Schauer's observation that some flaw in a fit between applications of a rule and direct applications of its justification is an inevitable part of ruling by the rules.

Now, it is much more difficult to find a race which is the evil's perpetrator than to find a race which is the evil's victim. It would not be too exaggerating to say that in every society there are historically disadvantaged groups with more limited access to opportunities in comparison with other groups, usually majoritarian. This is the reason why we should not be surprised that reversed discrimination, or affirmative action, can easily pass the universalization test. Let us first have a look at the criteria which guide our choice of generalizations used for restriction of the personal scope of affirmative action rules. What do the groups protected by anti-discrimination legislation share in common?

Wojciech Sadurski rejects arguments which are usually provided for justification of the claim that the groups are selected by some immutable characteristics. Immutability is not constitutive of identity, Sadurski proposes, pointing at immutable characteristics which do not define one's own identity (freckles on one's back) and at alterable characteristics which do define it (membership of political party).[50] Besides, the usual argument is that immutable characteristics used as generalizations restricting the personal scope of rules imposing burdens might leave a person no opportunity to escape a burdened group. Yet, this as such is not a sufficient reason for

[50] SADURSKI, W.: Universalism and Localism and Paternalism in Human Rights Discourse. In SAJÓ, A. (ed.): *Human Rights with Modesty: The Problem of Universalism*. Dordrecht: Springer-Science – Business Media, 2004, p. 150. However, Sadurski's argument is not too strong. Identity criteria have to be to a certain degree permanent, for otherwise they could not serve their purpose. This is so because, roughly said, what constitutes identity between me today and me tomorrow has to last longer than one day. Of course, we should also bear in mind that there are various conceptions of identity and eventual contexts of their applications. Consider the importance of birthmarks in identifying the twins or the importance of a set of teeth in identifying a person deceased in a horrible fire.

taking immutability as relevant in defining the affected group because otherwise, as Sadurski says, "*hate speech addressed against a racial minority would be considered less harmful if members of that minority could easily change their skin colour*".[51] Instead of immutable characteristics, Sadurski suggests we should rather look whether a piece of legislation is an expression of the legislator's contempt for a certain group. Among the reliable indicators of this contempt he includes these:

> "*The first indicium found in all indubitably objectionable discriminations is the fact that they impose legal burdens upon those who (before the law under scrutiny) had already been in a legally and socially disadvantageous situation – the law in question did not reverse, but added to, the pre-existing … the pattern of disadvantage. … The second indicium is that truly objectionable discriminations can be characterized as the imposition of burdens by those who enjoy better access to law-making (either through numerical strength or for other reasons) upon those at a disadvantage in this classification. … Third, all truly odious discriminations have a stigmatizing function. Apart from all other burdens, they also place on its victims the stamp of inferiority, whether moral, intellectual, or both. The burden placed by a classification upon the losers also carries the symbolic message that a particular group is unworthy or incapable of performing certain social tasks, or enjoying certain social benefits, to an equal degree as other groups.*"[52]

When looking for common criteria defining groups regularly affected by discriminatory legislation, Sadurski puts great emphasis on the actual effects of ongoing discrimination practices. This approach is workable when looking for groups to be included under anti-discrimination protection: it is not decisive whether you have a specific genealogy of blood circulating in your veins or a specific shade of skin stretched out on your body but whether you are a likely victim of discrimination. However, from looking just at the effects of ongoing discrimination practices we cannot learn whether the practices are fair or not. Consequently, we would have no ground for making difference between the legislator's contempt for, let us say, Jewish race and his contempt for criminals who rape and kill small children.

After all, we might rather say that discrimination results from an *unfair* contempt for a certain group of people. The unfairness of discrimination rests in the fact that an individual is treated unfavourably not because of his weaknesses or failures, but because he shares certain characteristics with some other people; characteristics which are in themselves harmless and which the affected group cannot or legitimately does not want to give up. One way or another, Sadurski's idea to take discrimination legislation as an expression of the legislator's contempt is reminding us one obvious truth: discriminated people usually suffer more than the others. Therefore, if we propose a rule which confers rights or provides help only to members of

[51] Ibid, p. 151. Again, it is not utterly unreasonable to uphold the claim Sadurski is opposing to. A discrimination practice would be not so harmful if it were based on such alterable characteristics as the colour of T-shirts people wear.

[52] Ibid, p. 153.

discriminated groups and if we justify it by saying that we should take care of people in need, then the rule's over- and underinclusiveness would not be too high. Everyone who accepts that "Helping needy people is good," is also committed to accepting that "Affirmative action in favour of discriminated people is good".

So, accepting affirmative action is not only about empathy but also about overall consistency of moral reasoning that is sensitive to the facts of everyday life, especially to the fact that people do live in different situations, with different abilities, resources and opinions.

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Štefan Siskovič[1]
Trnava University in Trnava, Faculty of Law, Department of Legal History

Obedience to Authority and its Relation to Formation of Totalitarianism[2]

Abstract: This paper reveals the reasons behind the existence of totalitarian regimes and suggests one of the possible reasons why there still exists a risk of their return. There is very important role given to the natural inclination of adults to fulfil commands which they regard as legitimate. By using a method of analysis, in this contribution author tries to reveal and outline a possible explanation why systems such as Nazism can quite effectively function in spite of their evident interference with an individual's freedom and identity.

Key words: Authority; the Milgram Experiment; Moral Theory; Totalitarianism.

Presenting the Problem

Every form of social cooperation which has been thought of to date, be it ideological or theoretical, has been based upon some idea of what is "good".[3] However, this has always led to such theories having their own moral limitations and restrictions. Nineteenth-century liberalism (classical liberalism) did not escape this; it considered as a good thing if society maximized the degree of economic freedom of individuals and minimized the ability of the state to interfere in the "work of the invisible hand of market". However, there was also the socialism of the twentieth century with its theory that good thing is to maximize the social equality of individuals and minimize the influence of "the invisible hand of market" on the lives of individuals. Many similar notions, such as the reformed liberalism of the twentieth century, communitarianism, and conservatism emerged with their own concepts of justice, which were built upon correctly setting a balance between the freedom and equality of individuals. It is also important to point out that all the presented political theories and notions of just social cooperation are based upon a certain form of goodness, morality, and correct behaviour. Even Nazism actively worked with a Nietzschean morality,[4]

[1] JUDr. Mgr. Štefan Siskovič, PhD., contact: ssiskovic@gmail.com.

[2] The study is the result of working on VEGA project No. 1/0549/15 entitled: Legal status of Jews in the Slovak Republic between 1939–1942 with regard to some selected areas of legislation in the Central European context.

[3] "Good" in the sense presented here means the setting of balance between freedom and equality, resulting in the satisfaction of the specific needs of the individual and the just redistribution of property.

[4] It is necessary to state that Nazism changed Nietzschean morality to a great extent and emptied words such as *Übermensch* of their original meaning. Nietzsche's *Übermensch* was an ideal person

upon which it constructed a whole political system. From the very beginning, the Nazi regime set itself the goal of *"re-educating the German nation for a new society based upon what was presented as a revolutionary values system."*[5] The individualism of Art Nouveau and the decadent Weimar Republic was to be replaced by love and self-sacrifice for the benefit of the whole (nation).

Moral Theory as the Basis of Political System

A common moral conviction is that humans have an obligation to behave towards one another in a different way than they would towards animals. The basis of this conviction is our basic understanding that for evolutionary, metaphysical, or indeed any other reasons, a human is more than just an animal. Therefore, it is not deemed to be immoral if humans kill animals for their own survival. Assuming that the previous statement is correct, this same behaviour in relation to humans, with the exception of self-defence, would be seen as murder and therefore an extremely immoral action.[6] However, humans are extremely flexible when it comes to morals. The Nazis knew this and exploited a weakness whereby if people could be convinced of the existence of "more valuable nations or races" and "less valuable nations or races", a path could open to the rationalization of slaughtering those who are considered "less valuable" for one's own survival. This idea can be explained in various ways. Currently, the most influential explanation can be found in the game theory[7] and is based on the idea that when lacking an adequate amount of awareness, an individual will want to secure for himself the best possible position in relation to others on both a local and global level. He therefore chooses strategies which, according to his own experiences, will enable him to achieve the best result, which can be substituted by any value, be it one concerning the individual, family, nation, race, or humankind, or indeed any idea which he holds.[8]

Despite such explanations, the Nazi regime remains one of the darkest chapters in the European history. Using emotional manipulation, Nazi leaders were able to cleverly join "moral sentiments (feelings of pride, guilt, shame, thankfulness, and indig-

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who was free and strong, and who did not need society. It was not any type of person in particular. Nazi ideology only used this term in the sense that the *Übermensch* was not something an individual became but rather a member of an evolutionarily chosen nation, or of the Aryan race. See NIETZSCHE, F.: *Also sprach Zarathrusta, Zarathustraś Vorrede* (third part). Available online: (http://www.nietzschesource.org/#eKGWB/Za-I-Vorrede-3), Accessed on: 16th February 2017.

[5] WELSH, D.: *The Third Reich and Propaganda.* Routledge 2002, p. 22.

[6] Nozick took a sceptical stance to the theory of universal moral obligations. According to him, their content was formed by agreement. For more detail on this, see NOZICK, R.: *Anarchy, State and Utopia.* Basic Books, New York 1974, pp. 8–9, 18, and 90–93.

[7] ŽÁK, M.: *Velká ekonomická encyklopedie,* Praha: Linde, 1999, pp. 702–703.

[8] For the theory of rational decision-making and choice of most suitable strategies, see DÉMUTH, A.: *Teória hier a problém rozhodovania.* Trnava: Filozofická fakulta Trnavskej univerzity v Trnave, 2013, pp. 22–24 and 78–82.

nation) with National Socialist virtues such as loyalty, courage, resolution, modesty, discipline, industriousness, iron will, and primarily the willingness of individuals to sacrifice themselves for the wellbeing and greatness of the nation," thereby submitting the feelings of Germans to the political goals of national socialism.[9] The following does not seek to be an examination of whether Nazi morality was a form of morality and what sort of stance present-day society should assume on it. Rather, the intention herein is to focus on outlining the phenomenon of obedience to authority, which in the state environment is one of the defining elements which have an influence on the form of state regime and presumably also on the content of the legal code. We all intuitively feel that the state appears different when power is afraid of people and different when people are afraid of power. My aim is therefore to approach the issue of the genesis of a totalitarian state. I am convinced that in the foundations of a totalitarian state, there has to be a consistent moral theory which is used as a support for its coercive and manipulative strategies so that it can imprison people in its own reality. Only in this way is it possible to create a prison so effective that the prison guards are the prisoners themselves.[10]

At the centre of totalitarian state's attention is Foucault's public sphere, where people do not oppose power and where they exploit their own obedience to it because they are convinced of its correctness. It is therefore not by chance that moralizing arguments paradoxically play a more important role in totalitarian systems in comparison to liberal ones.[11] After all, liberalism is built upon a neutrality of values. The hierarchy and structure of values in liberal societies often change or adapt; they are not and cannot be universal and stable.[12] By contrast, totalitarian regimes bring about a revival of "traditional values" and their structures, and it is upon the basis of this that their laws and legal systems are built. This could be seen in Nazi Germany, where the shift away from liberalism and its vagueness and decadence and the return to tradition was supposed to be ensured by a values-based jurisprudence. Frank, who was its foremost proponent, explained that *"in the National Socialist understanding of law there is a fundamentally new and ground-breaking reality that National Socialist policy consciously turns its attention to the basic values of the nation and leads its fight for the revival of law in the spirit of defending these basic values. [...] These basic values are: (1) the state, (2) race, (3) land, (4) work, (5) honour, (6) cultural and spiritual values, and (7) the armed forces."*[13] Nazi law was supposed to be a union of law,

[9] SOBEK, T.: *Právní rozum a morální cit*, Praha: Ústav státu a práva AV ČR, 2016, pp. 112–113.

[10] Also see FOUCAULT, M.: *Discipline and Punish, The Birth of the Prison.* New York: Vintage Books, 1995, pp. 300–308.

[11] LÜBBE, H.: *Politischer Moralizmus. Der Triumph der Gesinnung über die Urteilskraft*. Berlin: 1987, p. 7.

[12] See KÁČER, M.: *Hodnotová hierarchia a hodnotový pluralizmus,* In: Hodnotový systém práva a jeho reflexia v právnej teórii a praxi, Trnava: Trnavská univerzita v Trnave Právnická fakulta, 2013, p. 214.

[13] FRANK, H.: *Nationalsozialistisches Handbuch für Recht und Gesetzgebung.* München: Eher, 1935, p. 3.

policy, and morality. This formed a system where Nazi values such as honour, loyalty, and racial purity became a part of law alongside legal norms. When deciding a particular case, a judge was not only required to examine the relevant legal texts and the obligations arising from them; he was also obliged to ascertain whether an individual had broken any given Nazi value. This ultimately led Judge Freisler to the conclusion that everything which required punishment from a moral perspective has to be punished.[14] Freisler's moral retributionism essentially meant that the core foundation of criminal law, *nulla poena sine lege*, became obsolete, because *"the subject of evaluation and punishment was not the act itself but rather the reprehensible thinking of the offender"*.[15] Through legal as well as moral obligation, the state could demand absolute obedience from every member of the society.

There is no doubt that the Nazi regime struck a deep blow into the public and private spheres of German society. It is often used as a clear example of totalitarianism. However, if we want to know the essence of every totalitarian regime, not only the Nazi one, it is necessary to focus on and analyse the quality of authority as well as the phenomenon of obedience to it. If we understand these fundamental elements of totalitarianism, we can easily uncover and better understand the processes that lead to its creation.

The Process of Creating the Authority of the Totalitarian State

At the foreground of any totalitarian state there is authority. We recognize the numbers of types of authorities, such as authority by coercion, authority based on reward, personal authority, and value-based authority.[16] Despite of this it is not clear what type of authority is present in a particular totalitarian state. Can we say that totalitarian state is exclusively the authority based on coercion? In forming the answer we can point out that it is perceivable when a certain group of citizens respects the authority of a totalitarian state due to their fear of being sanctioned in the situation when they break a generally binding rule. However, this does not negate the existence of those who respect the totalitarian state because of a personal authority, such as leader, or because of the values which state attempts to represent and protect. It could be said that totalitarian state built on multiple forms of authority yet still tries to reach a state where it would have "absolute authority" and would exercise "absolute power".[17] However, this is not something which is immediately attainable. We will therefore work with the hypothesis that a totalitarian state emerges

[14] Freisler replaced the concept of the formal criminal act of a material criminal act. BRUINING, S.: *Roland Freisler: Rechtsideologien im III. Reich.* Verlag Dr. Kovač. 2002, p. 49.

[15] SOBEK, T.: *Právní rozum a morální cit*, Praha: Ústav státu a práva AV ČR, 2016, p. 126.

[16] For an explanation of different types of authority, see HARVÁNEK, J. et al.: *Právní teorie,* Brno 1995, Iuridica Brunesia, pp. 50–51.

[17] A totalitarian state is a political system where the state does not have any limits to its own power and where it uses its power to regulate every aspect of public and private life. *CONQUEST, R.: Reflections on a Ravaged Century, New York:* W. W. Norton & Company; Reprint edition, 1999, p. 74.

gradually, through the building of its own authority which eventually accumulates such power that there ends up being no counterpart in society which could offer any real resistance. In order to understand this process, it is necessary to ask how it is possible that people would rather efficiently cooperate even in an Orwellian state. Why are they willing to surrender their personal, political, and economic freedoms, and even support the totalitarian state by the means of personally contributing to it even when this is not unavoidable? It appears that the answer to these questions can be found in an analysis of the phenomenon of obedience. In the 1960-s, social psychologist Stanley Milgram performed several well-known experiments with aim of finding out in what way people yielded to authority and what extremes they would undergo when following orders. The impulse for his experiments was the Eichmann trial, where even after many years the accused stated that he had just been "following the orders".

The most well-known of Milgram's experiments took place in 1961 at Yale University[18] and was based on a simple situation. Three people entered the testing area.[19] The first of these was the experimenter, who at the beginning announced the aim of the experiment – to establish the degree of the influence of punishment on the effectiveness of learning. Then both participants (one of whom was a paid actor) were given papers by the experimenter who defined their roles (as a "teacher" and "learner") within the experiment. The learner was always the paid actor, and the teacher was the person being tested. After the division of tasks, the teacher and learner went into separate rooms where they were able to communicate with each other but were unable to see each other. After the teacher and learner had assumed their positions, the experimenter explained to the teacher that he would teach a given list of word pairs to the learner. This list was to be read to the learner by the teacher. Following this, the teacher was supposed to test the learner by reading the first word of the pair aloud; the learner was supposed to provide the second word from a choice of four options. It was explained to the teacher that if the learner made a mistake during this process, it would be necessary to punish him by administering an electric shock. As an example, the teacher was given a 45-volt electric shock before the tuition began. The learner would indicate his answer by pressing a button and would receive a 15-volt electric shock at the first incorrect answer. With every following incorrect answer, the level of the electric shock punishment would be increased by fifteen volts. If the learner answered correctly, the teacher would then read out the next word with four possible answers.

The learner never actually received any electric shocks. The learner's role was played by a paid actor who, after being separated from the teacher and following the

[18] A description of the experiment can be found here: (https://www.psychologytoday.com/articles/200203/the-man-who-shocked-the-world). Accessed 16th February 2017.

[19] Those who participated in the experiment either responded to an advertisement in the newspaper or had been sent a letter. They were men aged from 20 to 50 years with various levels of education. Every participant received four dollars and fifty cents for the hour the experiment was supposed to last.

commencement of testing, would turn on a tape recorder connected to an electric shock generator which would play sounds for every level of shock. After several increases in the voltage dose, the actor would add to the recorded sounds some vocal expressions by banging against the wall which was separating him from the teacher; in some versions of the experiment, he would remind the teacher that he had a heart condition. When receiving electric shocks at a high level, the learner would stop giving answers and would even stop complaining.

It was quite a paradox that the tested subject in this experiment on degrees of obedience was not actually the learner but the teacher. The aim of the experiment was to ascertain what level of voltage the teacher was capable of administering to the learner as a punishment for having given the wrong answer. After hearing the first complaints from the learner, several teachers expressed their discontent. If – at some stage while administering the electric shocks – the teacher would indicate that he wants to stop the experiment, the experimenter was supposed to verbally address him with prepared statements in the following order:

1. Please continue.
2. The experiment requires you to continue. Please continue.
3. It is absolutely essential for you to continue.
4. You have no other choice; you must go on.

At a level of 135 volts, a lot of people refused to administer further electric shocks, and they requested the learner to be checked on; others asked what the purpose of experiment was. However, after having been assured that they would not be held legally responsible for their actions, some teachers continued; some even laughed quite vocally when administering the first electric shock. The experiment was eventually stopped if the teacher insisted on halting it despite having been read the statements given above. Otherwise, the experiment would continue until the teacher had given the learner a maximum electric shock of 450 volts.

Milgram's experiment and the like were repeated by scientists multiple times in the United States as well as elsewhere (e.g. Austria and Australia).

In the 1990-s, Blass compared years of researches using the Milgram method and summarized the conclusions. He discovered that submitting to authority does not change over time and that there was no difference between men and women when it came to obedience. Probably the most important conclusion was that the percentage of those who were "fully obedient", i.e. those who continued with the experiment despite the pleas of the learner until the experiment was concluded with the final electric shock, was 61 percent on average in the United States and 66 percent in other countries.

Unsurprisingly, as soon as Milgram published the results of his experiments, it caused quite a stir. His experiment showed that "the legal and philosophical aspects of obedience are of great importance, but they say very little about how most people behave in specific situations. Milgram created a simple experiment in order to discover how much pain an ordinary citizen could inflict on another person simply because they were asked to do so by the scientist undertaking the experiment. Strict

authority was pitched against the strongest moral obligations of the subject (participant) and against the suffering of others; even with the shouts of the victims ringing in one's ears, authority prevailed more often than not. The extreme willingness of adults to go to almost all extremes when ordered to do so by an authority is the main finding of the study and a fact that needs to be explained with the utmost urgency."[20] Milgram's experiment was a breakthrough in understanding the conflict between one's conscience and complying with an order. It also appears that submission to authority plays an exceptionally important role in the behaviour of adults, and its influence can cause a breaking down of individuals' moral inhibitions. This disproves the deeply held idea that the ability to be a guard at a Nazi camp was something only a small number of sadists would possess.

Nevertheless, it was not enough for the Nazi regime to achieve a state where the reason for respecting orders was a fear of sanction and of authority. The regime's leaders actively tried to minimize the number of those who would still follow orders while being in conflict with their conscience. Such moral dilemmas simply complicated the carrying out of orders. Goebbels realized that if he wanted to control masses and individuals to the extent that someone would be convinced that when carrying out an order he was doing the right thing, it was more effective to achieve this through propaganda than through terror. Nazism was an attempt at social engineering whereby the authorities of the time wanted to control "the hearts and minds" of the German people through propaganda.[21] This demarcated aim was to be achieved by means of creating and internalizing a new concept of morality which would exclusively concern relationships between members of the Aryan community, whereas harming those who belonged to other races was supposed to be viewed as a morally neutral action.[22] This was supposed to cause the German people to become aware of their own political unity and their historical calling.

Ultimately, the Nazi regime was able to reach a state where the homogeneity of the nation and its collective purpose was secured by the allegiance of individuals to the same race as well as by them having the same orientation in the terms of worldview. The obligation to be entirely available to one's nation and race became the highest moral virtue.[23] A perfect example of this brainwashing was the well-known reaction of the Austrian people to their annexation by Nazi Germany in 1938. Crowds of Austrians welcomed Hitler as a liberator, rescuer, and saviour during his march

[20] On the CBS's "60 Minutes" programme, Milgram said that his observations led him to conclusion that enough people could be found in any average-sized American city to run a concentration camp like the ones that had existed under Nazism. Cited according to BLASS, T.: The Milgram Paradigm After 35 Years: Some Things We Now Know About Obedience to Authority, In: *Journal of Applied Social Psychology*, 1999, Vol. 25, pp. 955–978. Also see MILGRAM, S.: "The Perils of Obedience", In: *Harper's Magazine,* 1974; MILGRAM, S.: Behavioral Study of Obedience. In: *Journal of Abnormal and Social Psychology*, 1963, Vol. 67, pp. 371–378.

[21] GOEBBELS, J.: *Erkenntnis und Propaganda. In Signale der neuen Zeit*, München: 1940, p. 45.

[22] SOBEK, T.: *Právní rozum a morální cit*. Praha: Ústav státu a práva AV ČR, 2016, p. 113.

[23] FORSTHOFF, E.: *Der Totale Staat*. Hamburg. 1933, p. 42.

through Austria, which was crowned by an enormous gathering at Heldenplatz (Hero's Square) in Vienna on 2nd April 1938.[24] We can say that this reveals more than just the length to which people were prepared to join together and sacrifice themselves for the German nation or the effectivity of targeted propaganda. Such events primarily show the moral flexibility of human beings. The centuries-old history of Austrian statehood and its independent political identity was replaced by a loyalty to Germany as a result of what seemed to be a better strategy. Under the pressure of a "better future" and pressure of authority, people's ability to change their own convictions about what is right and what is not, and indeed their own self-identity (in other words, their human nature), was present in the background, and this allowed the establishment of Nazi totalitarianism.

Some may find it absurd that someone would have tried to morally excuse the existence of the concentration camps or the persecution of the Jews. However, it is important to distinguish between excusing something and explaining it. It is certainly understandable to take a stance and assert that Nazi morality was not moral. This is simply an expression of one's own moral conviction. However, it does not in any way lead to a better understanding of the Nazi regime and the Nazi state of the regime and its laws. Therefore, if we want to know about the Nazi regime, and through it the very essence of a totalitarian state, it is important to discuss the reasons for the Nazis' actions, understand the psychology of their decision-making, and then try to explain it. This allows us to find answers to the questions of why totalitarian regimes find collective unity and identity so important, why they are organized in the form of some kind of political religion, and why they hunt down every ideological deviation and every "heretic".[25] Only in this way we can understand the process of the creation of totalitarian authority and perhaps find a way to prevent it from occurring again.

Cogitation As the Ending

In the preceding text, several types of authority were mentioned. Totalitarianism is generally regarded as a forced unity brought about through violence, which implies that it is built upon the authority of the fear of sanction. At least, this is how it is usually viewed. However, as was mentioned above, totalitarianism is also nourished by those who are convinced of its correctness. Therefore, open questions remain as to whether totalitarianism can also appear in a milder way and where its boundaries lie. Totalitarianism can also be considered in cases where the technique of power is not so brutal. Does totalitarianism exist when part of a private space remains untouched by the exercise of power? Does it constitute totalitarianism if a majority who share a certain conviction exclude from political discourse those who have a different opinion, i.e. those who do not "fit in"? Ultimately is there any real difference be-

[24] LIULEVICUS, V.: *The German Myth of the East: 1800 to the Present.* New York: Oxford University Press. 2009, p. 184.

[25] SOBEK, T.: *Právní rozum a morální cit*, Praha: Ústav státu a práva AV ČR, 2016, p. 118.

tween an authoritarian state and a totalitarian one? The reason for asking such questions is the fact that most of the academic community has no problem in judging and evaluating extreme regimes, such as those which were present in Nazi Germany and the Stalinist Soviet Union, as being totalitarian. However, there is no such a level of agreement when discussing Salazar's Portugal, Mussolini's Italy, or even the wartime Slovak State. Even though Mussolini himself spoke of Italy as of a "total state",[26] his regime is more likely considered as an authoritarian one, similarly to Salazar's regime in Portugal and the wartime Slovak regime.

In the terms of how it relates to concepts, totalitarianism is an extreme example of an authoritarian regime. The concept of being authoritative or authoritarian is used to categorize "milder" regimes, namely those that do not reach a total degree of state interference in society and that leave a certain part of private life untouched.[27] In contrast to totalitarian regimes, a characteristic feature of authoritarian regimes is the fact that there are no visible utopian elements and no state ideology.

It is generally known that both the Marxist-Leninist and Nazi ideologies were created during a period of significant domination by the natural sciences and the application of (natural) scientific principles to the social sciences.[28] In constructing their own theories, social scientists began to massively use findings from the natural sciences, including the influence of Darwinism, because such ideologies saw the world as a battlefield where classes and races contested for power and living space. In this hostile environment, "visionaries" such as Lenin and Hitler developed concepts that were supposed to resolve Darwin's apparently endless struggle for survival. Their respective concepts of a "classless society" and a "Thousand-Year Reich" were essentially the equivalent of Renaissance utopias as perfect yet ultimately final and flawlessly functioning political systems.

Despite certain differences, the common feature of totalitarian and authoritarian regimes is the way in which they legitimize their own technique of power used to eliminate the problems in society. Both authoritarian and totalitarian regimes work with the idea of an enemy which threatens the common interest as defined by a leader or a political elite. Here enemies are seen to threaten the collective identity and the unity of interest, which are both key elements to any totalitarian or authoritarian regime. On the one hand, their existence provides members of society with a sense of belonging and security, often increasing the degree of order in the state. However, it also puts greater pressure on conforming behaviour, thereby strengthening the position of those who define and determine this common interest. By comparing the rhetoric of Nazi elites with Mussolini's or Tiso's speeches, it can be seen that the enemy can take various forms. Hitler saw the enemy in Jews, Mussolini saw the enemy

[26] BALL, T., BELLAMY, R.: *The Cambridge History of Twentieth-Century Political Thought*. Cambridge: Cambridge University Press, 2006, p. 133.

[27] See CINPOES, R.: *Nationalism and Identity in Romania: A History of Extreme Politics from the Birth of the State to EU Accession*. I. B. Tauris, 2010, pp. 70–72.

[28] For more on this, see SISKOVIČ, Š.: Quo vadis spoločenskovedný výskum? In: *Societas et iurisprudentia* – ISSN 1339-5467. Online; Vol. 3, No. 4 (2015), pp. 116–127.

in liberals, and Tiso saw enemies in both Jews and Bolsheviks.[29] Despite these differences, all three leaders acted as charismatic and moral leaders[30] who were renewing the traditional values of society, building a better future for all, and primarily acting as fighters against these enemies.

There is no doubt that an authoritarian state differs from a totalitarian one primarily in the intensity with which it asserts its power. Nevertheless, Milgram's analysis of the phenomenon of obedience reveals that both are essentially based on the same "weakness" in people. If we want to create criteria which would allow to create a judgement of individual regimes as authoritarian or totalitarian, it is necessary to observe the psychology that affects its citizens as well as observe a regime's external features. At the centre of these regimes' attention there are order, conformity, and obedience to state authority, which in the environment of a totalitarian regime is enforced by extreme means, including those that often interfere with an individual's innermost spheres. Nonetheless, totalitarian and authoritarian states are similar to each other in principle. It is therefore more useful to define both of them against democratic states, which appear to have fundamentally different foundations.

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[29] See, for example, Tiso's speech regarding Jews from 10th August 1940: "*They reproach us for taking the Jews' radios. But there are more important things in life than radios. Or some say, 'Don't let them go to schools, don't give Jews a chance for an education.' We must prevent Jews who are armed with school knowledge from throwing themselves at the Slovak. I do not want our village man to go to a Jewish pub owner who writes on the board; then he is talked into signing a promissory bill, which he takes to a Jewish banker; the banker goes to a lawyer, and the lawyer goes to court. And so, without any violence, theft, or blood, they have seized the property of a Slovak. As I want to defend the Slovaks, I must break this Jewish chain.*" In HRADSKÁ, K., FABRICIUS, M: *Jozef Tiso – Prejavy a články (1938–1944)*. Bratislava: AEPress, 2007. On the question of the Bolsheviks, he said: "You joined the victorious German front alongside all the Christian nations of Europe to turn away the danger of Bolshevik hell from your nation and from Europe. You are rightly called crusader knights in the anti-Bolshevik campaign for God and nation, for Christianity and social justice, and for the honour and the law of your nation. You have not gone to steal, because no Slovak craves what is not his. You are simply defending your homeland." In HRADSKÁ, K., FABRICIUS, M.: *Jozef Tiso – Prejavy a články (1938–1944)*. Bratislava: AEPress, 2007, pp. 370–371.

[30] Historians have pointed out that Hitler was also considered to be a moral person in his private life. Those who were around him saw him as someone who took morality very seriously, even when the Nazi regime was disintegrating. See BOONE, J. C.: *Hitler at Obersalzberg.* Xlibris. 2008, pp. 170–171.

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Peggy Gustavsson[1]
Lund University, Faculty of Law, Sweden

Should Cultural Practices, such as Polygamy and Female Genital Mutilation, Be a Matter of Cultural Relativism or a Matter of Universal Human Rights?

Abstract: This article analyses the universality of human rights compared to the cultural relativism. Since the United Nations Human Rights Treaty Bodies have adopted a consistent approach on matters of culture with the guarantees in human rights treaties, this article will try to find out if cultural practices, such as polygamy and female genital mutilation should be protected by universal human rights or if they should be a matter of cultural relativism.

Keywords: United Nations Human Rights Treaty Bodies; Human Rights; Universality; Cultural Diversity; Harmful Practices; Polygamy; Female Genital Mutilation.

Introduction

The United Nations Human Rights Treaty Bodies are supervising states regarding their obligations under the relevant treaties regarding human rights. Furthermore, the treaty bodies consider some specific cultural practices to be harmful to human rights. The treaty bodies have to face the diversity of cultural practices and the universal respect for the human rights.[2] This contribution analyses the universality of human rights compared to the cultural relativism. Since the treaty bodies have adopted a consistent approach on matters of culture with the guarantees in human rights treaties, this contribution will try to find out if cultural practices, such as polygamy and female genital mutilation should be protected by universal human rights or if they should be a matter of cultural relativism.[3] First the universality of human rights will be explained compared to the cultural relativism. Second the cultural practices, polygamy and female genital mutilation, will be analysed. Finally there will be a conclusion about this topic.

[1] Peggy Gustavsson, contact: PeggyGustavsson@hotmail.com.

[2] MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, pp. 616–619.

[3] MICHAEL K. ADDO: *Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights,* pp. 616–619.

Human Rights with Regard to Cultural Values

Human rights are by definition the rights of all human beings all over the world. However, there is a tension between the claim of universality and the enormous diversity in the world. The universality claim of international human rights is often criticised by the so-called cultural relativism. Originally, cultural relativism was the name of a school of anthropology.

One of their main conclusions was the tolerance of diversity and rejection of absolutes. Cultural relativists claimed that the principles for judging behaviour are valid only within a particular culture; therefore they rejected the idea of universal human rights. Furthermore they believed that since moral values are relative it is not possible to use the same criteria to judge human behaviour across a diversity of contexts. Nowadays this topic is complicated because the Declaration of Human Rights must be of worldwide applicability. It must embrace and recognize the validity of many different ways of life, since some people are living in diverged ways of life. Having said, they have different moral standards within their culture than the people living in the Western civilization. Despite that, a lot of people have tried to show that international human rights have a basis in all of the cultures in the world. However, even if people in all societies respect the value of for example human dignity, they may have diverse ways of interpreting and expressing it.[4] In my opinion, I believe that there should be minimum standards for a dignified life, a life worthy of a human being. Although the international community may seek to tolerate practices in diverse societies, it should not tolerate practices that undermine the right's fundamental values.

Since the human rights are the product of a specific Western historical and cultural tradition there is a challenge to legitimate the human rights policy. The Declaration of Human Rights originates from the original United Nation members where only three members were from Africa, eight from Asia and the rest of the forty from the colonial administration. The contribution of Western civilization to the human rights with western liberal ideology is therefore criticised.[4] Culture has been seen as an abstract and static unit based on the reality of culture as a practice. The human right scholar, Ann-Belinda Preis More, has a more dynamic approach regarding culture. Furthermore she considers human rights as cultural practices that are shaped and developed by the people affected by it and influenced by interactions.[5] However, the idea that the international community should accommodate these diverse traditions within its human rights framework is not a current idea. Article 29 of the Universal Declaration of Human Rights manifests this idea by for-example saying that in the exercise of ones rights and freedoms, everyone shall be subject only to such limi-

[4] EVA BREMS: Reconciling Universality and Diversity in International Human Rights Law, pp. 213–215. MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, pp. 605–607.

[5] MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, pp. 608–610.

tations that are determined by law solely for the purpose of securing recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.[6]

Scholars have often used culture to explain differences in legal practices. For example, Emile Durkheim considered formal law as an established body of pre-existing shared moral agreements. Friedman took this sociological explanation even further, claiming that legal culture exists only through references to customs, values, and behaviour of the society. Having said that culture is often understood as assumptions about how the world operates.[7] Furthermore, the word culture can be both a descriptive and an evaluative term, meaning what has been and what is about to happen. Nevertheless culture also means what is around us and inside us, as a matter of self-realization. The word culture also supposes to form a kind of society.[8] However, in a lot of countries the state refuses to implement and also violates the most internationally recognized human rights because of their culture.[9] Islamic states, for example, believe that the equal treatment of women conflict with the principles of Shari'ah, the historically based Islamic religious law, and are therefore inappropriate in their societies.[10] In my opinion, no culture is given by nature or fixed, although cultural relativity is a fact, cultures are different across time and space. Having said that even if their culture practiced something in their past, it does not mean that anything prevent them from endorsing human rights now.

Polygamy

Polygamy is an umbrella term that refers to having more than one spouse at the same time. It includes both polygyny and polyandry. Polygyny is when the male have multiple wives and polyandry is the opposite, when a female have multiple husbands. Over the course of human history, polygyny has been the only form of polygamy that has been practiced on a significant basis.[11] According to the United Nations Human Rights Treaty Bodies, polygamy is seen as a harmful cultural practice.[12] Polygamy violates the dignity of women and is also incompatible with the principle of equality.[12]

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[6] DOUGLAS LEE DONOHO: Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards, pp. 347–348.

[7] ABIGAIL C. SAGUY, FORREST STUART: Culture and Law: Beyond a Paradigm of Cause and Effect, p. 151.

[8] TERRY EAGLETON: The Idea of Culture, pp. 5–7.

[9] JACK DONNELLY: The Relative Universality of Human Rights, p. 283.

[10] DOUGLAS LEE DONOHO: Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards, pp. 353–354.

[11] JULIA CHAMBERLIN, AMOS N. GUIORA: Polygamy: Not "Big love" but significant harm, pp. 144–145. MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, pp. 646–647.

[12] MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, p. 643.

Regarding women's rights there is a conflict between cultural elements and international human rights. Furthermore, in many states, family law is based on Islamic law. According to Qur'ān, chapter Surat An-Nisā' 4:5 it is allowed for the man to marry more than one wife, as long as he treats them equally. Marrying more than one wife often implies significant discrimination against women. According to human rights activists, these laws seriously violate the fundamental principle of equal rights for men and women.[13] Article 1 of the Universal Declaration of Human rights states that all human beings are born free and equal in dignity and rights. Furthermore, article 23 of the International Covenant on Civil and Political Rights states that the equality of rights and responsibilities of spouses, as to marriage, during marriage and at its dissolution, should be ensured. The equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. According to the Committee on the Elimination of Discrimination against Women, polygamy violates the dignity of women and is a prohibited discrimination against women.

Consequently, the Committee on the Elimination of Discrimination against Women considers that it should be definitely abolished wherever it continues to exist.[14] In my consideration polygamy is discriminating because of the fact that the man can choose to have more than one wife if he desires.

The history of polygamy is long; polygamy has been the norm for the major period of human history. Despite that, polygamy remains illegal in all fifty states of the United States of America. Historically, the main practitioners of polygamy in America were the population of Mormons. The Court held, in Reynolds v. United States, that polygamy was not protected under the Free Exercise Clause of the Constitution although Mormons contended that the Act constrained their free practice of religion.[15] Despite the fact that it is forbidden in the United States, countries like Tanzania have recognised polygamous marriages as legal marriages. According to Prof. C.R.M. Dlamin it would not be impossible to love wives equally simply because there is more than one involved.[16] Dlamin also consider that a man does not marry more than one woman because he hates them. Some men may marry more than one wife because rather than divorcing her and marrying somebody else, the man would still keep her to take care for her. According to Dlamin some of those women who are unmarried and who feel they have no chance of marrying a single man, favour it.[17] In my opinion I do not believe that a lot of women would like to share their husband with other women. Furthermore, in some polygamous communities, young girls have been married to older men and children have been abused psycho-

[13] EVA BREMS: Reconciling Universality and Diversity in International Human Rights Law, pp. 228–230.

[14] GENERAL COMMENT NO. 28: Equality of rights between men and women. CCPR/C/21/Rev.1/Add.10,29/03/2000.

[15] ASHLEY E. MORI: Use it or lose it: The enforcement of polygamy laws in America, pp. 501–503.

[16] CRM DLAMIN: Should we legalise or abolish polygamy?, pp. 331–334.

[17] CRM DLAMIN: Should we legalise or abolish polygamy?, pp. 335–339.

logically. Having said there can be secondary effects like child abuse connected to polygamy.[18]

Nowadays there is a growing acceptance of sexual freedom and privacy. Furthermore democratic self-determination is a common expression of the idea of equality.[20] Having said that the society is more liberal and it maybe could accept the people to marry more than one person if the persons involved agree and request to do it.

Female Genital Mutilation

There are different kinds of female genital mutilations while the "worst" one is infibulation, also known as "pharaonic circumcision". Infibulation consists of the removal of the clitoris, the inner lips and cutting of the outer lips. This means almost complete stitching up the vagina, leaving only a small hole left. Other procedures of female genital mutilation are when only the clitoris or the inner-/ outer lips are removed. While male circumcision can be seen as a measure of hygiene, female genital mutilation shows an attempt to give an inferior status to women by marking them as a constant reminder to them that they are only women, they do not even have any rights over their own bodies.[19]

The Committee on the Elimination of Discrimination Against Women has concluded that the practice of female genital mutilation is harmful and has encouraged states to take steps to eliminate it. In the preamble to the Convention on the Elimination of Discrimination Against Women, discrimination against women violates the principle of equality of rights and the respect for human dignity. When the Committee challenged Senegal because of this practice, the government representative responded that traditions die hard but with education and time the practice will be stopped. The representative of Senegal agreed with the opinion that the practice was barbaric and not justified. Despite that they confirmed that the practice existed among its population, especially among the Mandingo tribe.[20] Furthermore, this harmful traditional practice is most common in regions of Africa, in some countries in Asia and the Middle East; and among migrant and refugee communities from Europe, Australia, New Zealand, Canada and the United States. The practice is recognized internationally as a violation of the human rights of women and girls. Furthermore it also violates a person's right to health, security and physical integrity.[21] According to UNICEF, more than 130 million girls and women have experi-

[18] ASHLEY E. MORIN: Use it or lose it: The enforcement of polygamy laws in America, p. 511. JACK DONNELLY: The Relative Universality of Human Rights, p. 297.

[19] ISABEL COELLO: Female genital mutilation: Marked by tradition, p. 215.

[20] MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, pp. 628–631.

[21] UNHCR: Female genital mutilation and asylum in the European union, A Statistical Update (March 2014), accessed 2015-01-02.

enced some form of female genital mutilation.[22] This harmful practice has survived because of the strong roots in various cultures and because of multiple false beliefs. Some people believe that clitoris is dangerous and that if it touches a man's penis or a baby, death will follow. It is also practiced to take control over the woman's sexuality since it eliminates a woman's sexual desire. Furthermore, the effects of this surgery remain for life. Nevertheless, during the operation, the patient who is usually a child, can bleed to death. In addition, the use of the same unsterilized material increases the probability of HIV infection.[23] According to Dr. Nahid Toubi, female genital mutilation has been practiced for 2,500 years, although its origins are unknown. In Gambia and in Senegal, the practice is seen as a necessary aspect of proper hygiene. Moreover if the female does not follow the procedure, her family will be dishonoured.[24] In my consideration, this practice, including pain and suffering, can be seen as cruel, inhuman and degrading treatment. Since this practice is known to have no health benefits and it can result in death I consider that it should be a matter of universal human rights to abolish it.

Some countries have instead tried to restrict its performance to qualified medical professionals in hospitals as a solution for its health-related complications.[25] In my consideration this is not a solution of the problem, the practice is still a degrading treatment for women and it does not contain any hygienic benefits. However, according to the 1951 United Nations Refugee Convention, women from a country or ethnic group that are in danger of suffering female genital mutilation should have the right to receive the condition of a refugee and to have the asylum granted. This is possible since the woman is escaping from an inhuman treatment due to her refusal of strict social codes of conduct.[26] In my opinion, political asylum can help these women but it should not be the solution. Women should be able to live in their own countries without having to suffer a life of pain and illness. Furthermore, they should not need to escape from their families and they should have the right to have a complete body.

Despite that, this practice has occurred in countries where one would not expect this practice to occur, for example in Switzerland and Denmark.[27] The Committee on the Elimination of Discrimination against Women was concerned because Danish residents who arranged for female genital mutilation abroad were not liable to prosecution in Denmark unless female genital mutilation was a crime in the coun-

[22] UN NEWS CENTRE: In Kenya, UN chief kicks off global media campaign to end female genital mutilation. 2015-01-02.

[23] ISABEL COELLO: Female genital mutilation: Marked by tradition, pp. 215–216.

[24] BERNADETTE PASSADE CISSE: International Law Sources Applicable to Female Genital Mutilation: A Guide to Adjudicators of Refugee Claims Based on a Fear of Female Genital Mutilation, pp. 431–434.

[25] ISABEL COELLO: Female genital mutilation: Marked by tradition, p. 218.

[26] ISABEL COELLO: Female genital mutilation: Marked by tradition, p. 223.

[27] MICHAEL K. ADDO: Practice of United Nations Human Rights Treaty Bodies in the Reconciliation of Cultural Diversity with Universal Respect for Human Rights, p. 632.

try where it was performed. The Committee urged that the State party should penalize all Danish residents who arranged for female genital mutilation regardless of where it was performed.[28] The Committee was also deeply concerned by the significant number of cases of female genital mutilation among migrant women of African descent in Switzerland. The Committee recommended Switzerland to urgently take all appropriate measures, including legislation, to eliminate the harmful traditional practice of female genital mutilation.[29]

Conclusion

Both international human rights and the different cultures are based on values. The problem to face is whether there should be a universal human right value regarding all human beings or if some practises should be matters of cultural relativism. Nevertheless, even if people in all societies respect the value of for example human dignity, they might have diverse ways of interpreting it. In my opinion, I believe that there should be minimum standards for a dignified life, a life worthy of a human being. It is important to tolerate cultural diversity as long as the cultural practice does not lead to harm of the human being. According to article 18 and 19 of the Universal Declaration of Human Rights, which states that everyone has the right to freedom of thought, conscience and religion which include freedom to manifest ones religion or belief in practice, worship and performance, the United Nation takes into account the tolerance of different religions and cultures while deciding if the practice is harmful or not. Their effort, to make states abolish harmful practices, is a step forward in the right direction. In my opinion, no culture is given by nature or fixed, even if their culture practiced something in their past, it does not mean that anything prevent them from endorsing human rights now.

Regarding the different practices that were analysed in this contribution, I would claim that there is no doubt that female genital mutilation should be abolished everywhere in the world. This practice, including pain and suffering, can be seen as cruel, inhuman and degrading treatment. Furthermore this practice is known to have no health benefits and it can result in death. Nevertheless, the pain caused by female genital mutilation does not stop with the initial procedure, it often continues as on-going pain throughout a woman's life. Despite that, some states have tried to solve female genital mutilation by performing it by qualified medical professionals in hospitals. In my opinion, this is not a solution for the problem since the practice is still a degrading treatment for women and it does not contain any hygienic benefits. Having said, the solution should instead be to abolish the practice.

The question whether practicing polygamy should be seen as a harmful practice or not is not as easy to determine as with female genital mutilation. Nowadays there

[28] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN. Twenty seventh session, June 2002, No. 38.

[29] COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN. Twenty-eighth session, January 2003, No. 38.

is a growing acceptance of sexual freedom and privacy. Furthermore democratic self-determination is a common expression of the principles of equality. Some people claim that it is possible to love several wives equally and that some women have nothing against marrying a man with multiple spouses. According to the United Nations, polygamy violates the dignity of women and is also incompatible with the principle of equality and should therefore be abolished. In my opinion I also believe that the practice is discriminating and I can not see a reason why a woman would like to share her husband with someone else. Furthermore, the harmful effects of polygamy could be connected with some secondary effects, like child abuse since it has happened that young girls have been married to older men in some polygamous communities. Having said that even this practice could therefore be seen as harmful to human beings.

Finally, the different cultures must realize that the practice is harmful to be able to abolish it.

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Monika Martišková – Pavlína Holická[1]
Trnava University in Trnava, Faculty of Law, Internal PhD. student at the Department of Legal History – International Department of the Centre for the International Legal Protection of Children and Youth, Bratislava, Slovak Republic

Violations of Human Rights According to the Committee Against Torture[2]

Abstract: The subject matter is focused on the contractual system of human rights protection within the United Nations. We will focus especially on the selected Views of the Committee against Torture, which the Committee decided on individual complaints against Switzerland, Sweden and Canada. The objective of this contribution is to determine what role the Committee against Torture plays in international law, how it realizes its competences and how it considers the individual complaints submitted by individuals, while dealing with discrimination.

Key words: United Nations; UN Treaty-Based Bodies; Human Rights; Human Rights Protection; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Committee against Torture; Individual Complaint; Asylum; Asylum Application; Refugee.

Introduction

United Nations, as the most important and influential international organization, concluded treaties with states to ensure the protection of human rights. By the ratification of these treaties states made a commitment to respect and protect human rights at the national level. In accordance with the provisions of these treaties there were formed bodies protecting human rights, also called treaty-based bodies. The task of these treaty-based bodies is to monitor the compliance and implementation of the relevant treaty in the State Party. One of such a treaty-based bodies is the Committee Against Torture.

The Crime of Torture and the Protection of Refugees

Views of the Committee against Torture are related to the cases where a person uses a possibility granted by the Convention against Torture and Other Cruel, Inhuman

[1] Mgr. Monika Martišková, contact: nika.martiskova@gmail.com.
Mgr. Pavlína Holická, contact: pavlinaholicka@gmail.com.

[2] The study is the result of working on VEGA project No. 1/0549/15 entitled: Legal status of Jews in the Slovak Republic between 1939–1942 with regard to some selected areas of legislation in the Central European context.

or Degrading Treatment or Punishment (later in the text abbreviated also as "Convention") to bring an individual complaint against the State Party to the Convention, who alleges breach of any provision of the Convention. In this contribution, we focus on the views of the Committee, which dealt with violation of Article 3 of the Convention by States Parties, which occurs in a case of an individual's deportation from the territory of a State Party to a particular country of origin. Article 3 consists of two paragraphs. The first paragraph states that "no State Party to this Convention, will terminate, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being tortured."[3] Paragraph 2 provides that the competent authorities shall take into account all relevant factors in determining whether there are such serious reasons, especially if in the country there is a consistent pattern of gross, obvious or mass violations of human rights.

The most frequent victims of a violation of Article 3 are refugees. Therefore, the issue of the rights of refugees is often used by the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Refugees are leaving their home country, especially because there is often a threat of torture, inhuman or degrading treatment or persecution. A refugee who is outside of their country of origin has the right to seek asylum in another country. Therefore, they become asylum seekers and they must prove their legitimate fear of persecution, torture or inhuman treatment in the home country. Countries where refugees are seeking for asylum are mostly democratic countries of the world such as Switzerland, Sweden, Canada and others.

The criteria for granting asylum are various. In some countries, the criteria are considered to be very strict and asylum is granted only if it is really necessary. If the refugee's application for asylum is rejected in the State where they asked for asylum, the refugee can be deported to their home country. In this case, the refugee is entitled to file an individual complaint to the Committee against Torture in accordance with Article 22 for breach of any provision of the Convention. Individual petition may be filed only when all available domestic remedies have been exhausted.

If this person claims that he or she is the victim of a violation of Article 3 of the Convention, the Committee against Torture's task is to assess whether the deportation to the country of the State Party would certainly mean a real risk of torture or other inhuman treatment or persecution. The Committee refers to its general comment concerning the implementation of Article 3 of the Convention, which states that the risk of torture has to be highly probable, foreseeable and also it has to be personal and real. The applicant bears the burden of proof and must demonstrate that the risk of torture is not only his or her theory or suspicion.[4]

Rules of international refugee law are collected in the UN Convention and Protocol relating to the Status of Refugees. The Convention defines a refugee very exten-

[3] Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. [online]. [Accessed.2016.11.18]. Available on Internet: <http://www.zvjs.sk/dokumenty/legislativa/dohovor88.pdf>.

[4] SHAW, M. N.: *International law. Sixth edition.* Cambridge University Press, 2008, p. 329.

sively in Article 1: "A refugee is a person who is outside the country of his origin and has founded fear of being persecuted for reasons of race, religion and ethnic reasons or membership in a particular social group or for holding different political views. This person is also located outside their country of nationality and is unable – or as a concequence of his fears – refuses to accept the protection of his country."[5]

Each state has the right to grant asylum to persons within its territory. The most commonly used is the territorial asylum. Territorial asylum is defined as the right of the state to provide shelter or asylum in its territory to persons who request it and also the state provides them active protection by its authorities.[6] A person who is persecuted and is seeking for asylum should not be refused at the borders. If the person has crossed the borders of the country where this person filed an application for asylum, the application should not be automatically refunded or terminated. State can not refuse the status of refugee at the border, nor return him, if it could endanger his life. This limit is called *the principle of non-refoulement*.

The Selected Cases of the Committee against Torture

In the following sections we discuss the selected cases of the Committee against Torture in which individuals filed individual complaints against Switzerland, Sweden and Canada, where they raised objection to a violation of Article 3 of the Convention and invoked the principle of non-refoulement.

Switzerland

Switzerland is one of the most developed countries in the world and is generally considered as a country with a high standard of living of the citizens. Therefore, this country is very attractive for immigrants from Europe and from the third countries. Switzerland receives the most of the asylum applications from all of the European countries. Switzerland does not try to hide its strict and uncompromising immigration policy and antipathetical attitude to the immigrants. In early February 2014, the citizens of Switzerland agreed in a referendum to introduce limits for immigrants, including the citizens of the European Union. Voters in this referendum supported the initiative that the number of immigrants would be limited by quota. This event outraged particularly the European Union, which claims that Switzerland's adoption of such a law violates the treaties that guarantee the free movement of citizens within the Schengen area. Switzerland opposed by saying that increased immigration leads to abuse of the social system, lower wages and to other social problems, and also problems in the society, including the cultural aspect. In the following case of the Committe against Torture, we can see an example that Switzerland, clearly, is

[5] Art. 1 part A (2) Convention relating to the Status of Refugees.

[6] JANKUV, J.: *Medzinárodné a európske mechanizmy ochrany ľudských práv. [International and European Mechanisms for the Protection of Human Rights].* Bratislava: Iura Edition, 2006, p. 253.

very comprehensively and uncompromisingly examining persons seeking asylum in accordance with strict Swiss rules for the granting of asylum.

Case R.D. v. Switzerland – CAT/C/51/D/426/2010

In this case, the individual complaint against Switzerland was filed by the citizen of Ethiopia. She pleaded the breach of Article 3 of the Convention since the Swiss authorities refused to grant her asylum on Swiss territory and ordered the deportation of the complainant to her home country. The complainant comes from the Oromo ethnic group, and her father, who was a member of political organization called the Movement for the Liberation of Oromo,[7] has been missing since 2005. For her father's belonging to this movement her family was often summoned for interrogation and Ethiopian authorities, in her words, more than once ransacked their house.

The complainant over time fled to Switzerland, where she became an active member of the European group of the Movement for the Liberation of Oroma and often participated in public events organized by the people involved in this group. The photographs of the complainant carrying the flag of Oromo marking the anniversary of Oromo martyrs were published on the Internet. According to the complainant, this movement is in Ethiopia regarded by the public authorities as a terrorist organization and its supporters are regularly interrogated by Ethiopian security forces. Along with the application for asylum she submitted a medical report confirming the assignment of psychiatric treatment in Switzerland. The reason for this treatment was severe depression, which, according to her words, was the result of traumatic experiences which originated from the time when she lived in Ethiopia.

Federal Office for Migration rejected the complainant's application for asylum, since it had failed by not containing a valid ID. She then appealed against this decision to the Federal Administrative Tribunal, which dismissed her appeal.

The complainant filed a second application for asylum, accompanied by a letter from a former member of the Ethiopian Parliament, who in this letter was trying to prove her father's involvement in a movement and the dangers that threatened the complainant in Ethiopia. Switzerland considered this letter as unreliable, especially because it was not signed and the information contained therein were significantly different from the complainant's claims. Federal Office for Migration rejected the second request without assessing its admissibility on the ground that the applicant did not meet the criteria for granting the status of refugee. The Authority took into account all the documents submitted by the complainant and found that her political commitment to the movement was only superficial, with a reason to obtain asylum in Switzerland more simply.

The Committee against Torture decided that the applicant's deportation to the country of origin was not a violation of Article 3 of the Convention. In this case the committee inclined to allegations of Swiss Authorities. It declared that the applicant's activities in the movement were not political in nature and therefore, the Ethiopian

[7] Oromo Liberation Front (OLF).

authorities were not interested in it. Documents provided did not show her oppositional political activity nor anti-government militant activity. Moreover, she did not provide any evidence that the Ethiopian authorities were looking for her because of her political activities.

The complainant had never been prosecuted, detained or arrested in Ethiopia. *Although the Committee is aware of the fact that in Ethiopia there are systematically violated human rights, the Committee refers to the fact that a person must clearly demonstrate that the risk of torture in their country of origin is highly probable, predictable, personal and real, and this was in no way proved by the complainant.*[8]

Sweden

It can be said about Sweden that, in comparison with Switzerland, it is more opened to refugees. Already during the nineties it was the country which accepted in the hugest amount refugees from the former Yugoslavia and later Iraq. Their migration criteria after years again mitigated. After the outbreak of war in Syria, Sweden was the first country to offer asylum to Syrian refugees. All Syrian refugees in Sweden, who applied for asylum, had it immediately approved. The most important authority on migration policy is the Swedish Migration Board, which is granting asylum and residence permits. However, the case that we have chosen and that we will write about in the following text shows that we can not definitely, without any exceptions, say about Sweden that it is too benevolent in the question of granting asylum.

Case I.A.F.B. v. Sweden – CAT/C/49/D/437/2010

The subject mater of this view is individual complaint lodged by the citizen of Algeria. The complainant alleged that he would become the victim of a violation of Article 3 of the Convention if the Swedish authorities deported him back to Algeria. The applicant supported his argument with the fact that he had been sentenced to imprisonment in Algeria and because of the situation of violating the human rights in Algeria he was convinced about the cruel treatment in prison. The complainant explained the reason for his concern. In 2005, the complainant was contacted by the members of a terrorist group who demanded from him to disclose the route, which his employer was going to carry money through. The complainant was aware that the terrorist group planned to rob the employer and therefore he passed this information to the police. The police refused to help him and told him that if during the transport of money something happened, the complainant would be accused of collaboration with the terrorists.

[8] R.D. v. Switzerland, Communication No. 426/2010. View of the Committee against Torture from 8th November 2013 – CAT/C/51/D/426/2010, para. 9.7. [online]. [Accessed.2016.11.22]. Available on Internet: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f51%2fD%2f426%2f2010&Lang=en>.

Approximately one month later the vehicle carrying money was attacked and robbed. Terrorists accused the complainant that he had sold them the plan and police began the hunt after him. The complainant began to be searched not only by the terrorists but also by the public authorities. In January 2008, the complainant was sentenced in his absence to imprisonment for a period of ten years with forced labor for membership in a terrorist group and participation in armed robbery. In December 2005 the complainant fled to Sweden where he applied for asylum. Two years later, the Migration Office rejected his request for asylum on the grounds that terrorism in Algeria was in decline and that the complainant's statement was meaningless and not based on true facts. In June 2010, the Swedish authorities issued a deportation order on the complainant. However, he refused to leave Sweden and the Swedish authorities failed in the forced deportation. Complainant's concerns about his deportation to Algeria were so strong that he went voluntarily to Egypt. The Committee on the basis of these facts ruled that the complaint was not admissible anymore because the complainant's deportation to Algeria was not about to happen.[9]

From the previous case, it can be concluded that although Sweden is milder in their asylum criteria comparing to Switzerland, it is still very much focused on a thorough assessment of arguments and supporting documents submitted by the asylum applicants. Swedish authorities carefully evaluate all the circumstances of each case and then decide whether they will grant asylum and residence in its territory to the applicant.

Canada

The Canadian Government's own website states that Canada is being a friendly country for immigrants and refugees, which receives them with open arms. "Of all the countries in the world, Canada is recognized for its leadership in providing a safe haven for people who need refugee protection. Canada provides protection for those who apply for the refugee protection and helps them to settle down."[10] Canada is actually a country whose population are immigrants. From this we can also derive a positive attitude of Canada towards immigrants.

Case Kalonzo v. Canada – CAT/C/48/D/343/2008

In this View, the Committee decided on the complaint in which a national of the Democratic Republic of Congo (later in the text abbreviated as "Congo") alleged a violation of Article 3 of the Convention by the Canadian authorities. The reasoning

[9] I.A.F.B. v. Sweden, Communication No. 425/2010. View of the Committee against Torture from 13th November 2012 – CAT/C/49/D/437/2010, para. 7.3. [online]. [Accessed.2016.11.28]. Available on Internet: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f49%2fD%2f437%2f2010&Lang=en>.

[10] Government of Canada. In *Refugees* [online]. [Accessed.2016.11.28]. Available on Internet: <http://www.cic.gc.ca/english/refugees/help.asp>.

was the authorities wanted the complainant to be deported to his home country. The complainant was eight years old when his family fled to the United States because of the persecution by public authorities. The cause of the persecution was oppositional activity of the complainant's father, who was an influential and well-known member of the opposition political party called the Union for Democracy and Social Progress (later in the text abbreviated as "the Union").

US authorities in 2002 deported the complainant back to the Congo because he had been repeatedly convicted of a crime. In Congo he was detained at the airport by the Congolese authorities, which subsequently accused him of criminal activities and membership of the Union. Then they took him to jail, where he claimed to be beaten, tortured and sexually abused. He was imprisoned for four months. Later he escaped from prison and fled to Canada where he applied for asylum. He tried to return to the United States illegally by using false documents. During his stay in the United States, there was a hearing held in Canada regarding his application for asylum in Canada, but since he did not attend the hearing, the asylum procedure was suspended by the Immigration and Refugee Board of Canada. In the US he was arrested and sentenced to thirty days of inprisonment and was subsequently issued a warrant for his return to Congo. After these events, the complainant filed an individual complaint to the Committee. Along with the complaint he submitted a medical report on his mental problems that were supposedly leading to this occasion by suffering torture and rape in prison in Congo.

In February 2005 USA provided the complainant a refugee protection. The judge acknowledged that the complainant would be subjected to torture in the event of his return to Congo. However, the complainant was deported to Canada under the Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries. In Canada he applied for asylum, but the Office of Citizenship and Immigration in Canada declared the complainant's request inadmissible because of the applicant's criminal past.[11]

In March 2007 he requested for consideration of the pre-removal risk assessment,[12] which was rejected on the grounds that the applicant had not submitted any proof of membership in the Union, it had not proved that his father remained a member of the Union, and that his statements about what happened to him in Kongo were untrustworthy. The complainant received a notice of eviction, which was scheduled for 6th June 2008. Therefore, he immediately requested for a delay of eviction to the Federal Court of Canada, but it was rejected on the grounds that he had lied to Canadian and American national authorities and had provided conflicting evidence.

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[11] Kalonzo v. Canada, Communication No. 343/2008. View of the Committee against Torture from 18th May 2012 – CAT/C/48/D/343/2008, para: 2.6. [online]. [Accessed.2016.11.28]. Available on Internet: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f48%2fD%2f343%2f2008&Lang=en>.

[12] If a person is forced to leave Canada he or she may apply for a risk assessment prior to his or her deportation from Canada.

"The applicant refered to the decision of the Committee v. Communication No. 297/2006, Sogi v. Canada, where the Committee recalls that Article 3 provides absolute protection to any person who is in the territory of a Member State, regardless of the danger which that person may pose to society. Therefore, the State can not refer to the applicant's criminal record to diverge from the moratorium on the deportation of Congolese nationals adopted by Canadian authorities."[13]

Canadian authorities stated the reasons for the unacceptability of the complaint, and that the complainant was lying about almost everything, for example he applied for asylum under a false name, he claimed that he lived all his life in the Congo, while he spent most of his life in the USA, that he was arrested together with his father for their opposition political activities and that his father died in 2002 as a result of continuous torture, while his father was still alive. They added that in no way he proved that he was a member of the opposition party. It was found that his parents came back to Congo for several times without any problems, and that they stayed there for some time without his father being imprisoned or tortured. Canadian authorities claimed that the complainant provided contradictory information about his arrest in Congo, particularly regarding the length of his detention.

The Committee despite the claims of Canadian authorities decided that the complaint was admissible and that the forced return of the complainant to Congo would violate Article 3 of the Convention. The Commitee decided this way because of the difficult position of human rights in Congo and also because of the validity of the moratorium on the deportation of Congolese citizens. It declared that the moratorium also applied to the Congolese people with a criminal record. Furthermore, it noted the complainant's imprisonment and torture in Congo and the psychological effects of trauma, which were confirmed by the medical report and the opinion of the American judge who granted him protection.

Conclusion

From the analysis of selected Views we found out that complaints are always brought by third-country nationals, mostly from African countries and from countries in the Middle East. These people fled from their home country to Switzerland, Sweden and Canada, where they applied for asylum or the status of refugee. Subsequently, the country commenced the asylum process with the examination of the application by the competent national authorities with a view to determine whether the person met the criteria for the grant of asylum. The authorities are carefully considering each argument and review of the evidence submitted by the applicant to determine whether a person qualifies for the granting of asylum and whether they do not pose a danger to the country's citizens. In these cases, the competent national authorities for

[13] Kalonzo v. Canada, Communication No. 343/2008. Rozhodnutie Výboru proti mučeniu z 18. mája 2012 – CAT/C/48/D/343/2008, para: 3.1. [online]. [Accessed.2016.11.26]. Available on Internet: <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2f48%2fD%2f343%2f2008&Lang=en>.

certain reasons decided that for these persons asylum or refugee status was not supposed to be granted and the authorities issued a decision for these persons to leave the territory of the host country. They, however, refused and after using all available remedies they submitted to the Committee against Torture the individual complaint for the violation of Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. According to each complaint if the complainant was forced to leave the host country and had to return to their home country where they would allegedly be in danger of torture or other cruel treatment, it was a violation of the principle of non-refoulment to the country dangerous with regard to his or her life.

We can point out that the Committee plays an important role in the system of international law, particularly in protecting of rights of refugees and asylum seekers who are often unjustly expelled from their host countries to their countries of their origin, where they can be exposed to harsh treatment. In its view, the Committee against Torture can give a recommendation to the state to refrain from deportation of the refugee, thereby it is a protection of their rights. We consider the Committee against Torture as being very important in the question of protection of human rights.

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Clothilde de la Porte des Vaux[1]
University of Poitiers, Faculty of Law and Social Sciences, France

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

Abstract: The Palestinian territory became independent in 1948. The same year the Organisation of the United Nations proclaimed the split of this territory: one part for the Jewish Community, one for the Arabic Community and Jerusalem which had a special international statue. Despite this decision, these two communities have not stopped fighting since the 1950's. In 2002 Israel decided to build a wall between its territory and the Palestinian territory. On the July 9, 2004 the International Court of Justice considered this construction as illegal according to International law.

Key words: Israel; Palestinian Territory; International Human Rights; International Law.

Introduction – Some Historical Landmarks

From the first half of the 19th century, Jews began to immigrate to Palestine. In 1917, British Foreign Secretary Lord Balfour issued a letter in which he declared his support for the establishment of a "Jewish National House" in Palestine. After the First World War, the Ottoman Empire was dismantled and Palestine became a British protectorate, under a 1922 mandate from the League of Nations. In the mid-1940s, about two-thirds of Palestine's inhabitants were Arabs, one-third were Jewish. Arab residents strongly opposed increasing Jewish immigration to Palestine.

In the face of escalating violence, the United Kingdom decided in February 1947 to refer the question of Palestine to the United Nations. Calling attention to "the desirability of a speedy settlement in Palestine", the British Government has requested that a special session of the General Assembly be convened immediately to establish a special commission and entrust it with the task of preparing a preliminary study on the question of Palestine so that the Assembly may consider it at its next regular session. At the first special session of the General Assembly – which opened on April 28, 1947 – a special commission on Palestine was created.

At its second ordinary session on November 29, 1947, the General Assembly adopted resolution 181 (II), in which it approved the Plan of Partition with Economic Union proposed by the majority of the Special Commission. The Plan of Partition called for the end of the mandate, the gradual withdrawal of the British armed forces and the demarcation of the borders between the two states and Jerusalem. The

[1] Clothilde de la Porte des Vaux, contact: clothilde.delaporte@gmail.com.

Jewish Agency accepted this Plan. But the Plan was not accepted by the Palestinian Arabs and the Arab states. From their perspective, the Plan violates the United Nations Charter which recognises the right of every person to decide on its own fate.

On May 14, 1948, the United Kingdom ended its mandate on Palestine and cleared its forces. On the same day, the Jewish Agency proclaimed the creation of the State of Israel on the territory allocated to it under the Plan of Partition. The next day, regular troops from neighbouring Arab states entered the territory to support Palestinian Arabs. Between February and July 1949, armistice agreements were signed under the auspices of the United Nations between Israel on the one hand, and Egypt, Jordan, Lebanon and Syria on the other. As the question of Palestine remained unresolved, a precarious peace punctuated by acts of violence and coups were maintained in the region from 1950 to 1967, when Israel came to occupy the surface of all the former territory of Palestine under the British mandate.

On April 14, 2002, former Israeli Prime Minister Ariel Sharon announced that a separation barrier would be built in the West Bank during the second Intifada. This intifada began with mass demonstrations that were violently put to an end by the Israeli army and had continued with a series of deadly suicide attacks against citizens inside the territory of Israel. After the attack on an Easter meal at a hotel in Netanya, Israel launched the "Defensive Shield" operation during which some 500 Palestinians were killed and a massive destruction of homes and infrastructure ensued in the West Bank. It was during this operation that Sharon announced the construction of the barrier, while there was still no proposed route or budget for its construction. However, the project born was likely to become one of the most important in Israeli history. On June 23, 2002, the Israeli ministry council approved a project of the construction of a wall between Israel and Palestine. As for the Israeli government, this project was only considered as a "security measure".

Taken along its length, the barrier measures between 680 and 709 km which is more than double the length of the 320 km long Green Line that marks the "recognized" border between Israel and the West Bank. Ten percent of the barrier consists of an 8 m high concrete wall, whereas the remaining ninety percent constitutes a 2 m high electronic barrier. It is unclear when the end of the construction is planned. Most of the construction operations were abandoned. The parts of the barrier that are within the Palestinian territory constitute eighty-five percent.

The Competences of the United Nations General Assembly and the International Court of Justice

On November 3, 1950 – at the initiative of the Secretary of State Dean Acheson – the United Nations General Assembly adopted the Resolution 377 (V) ("Uniting for peace" resolution also known as the "Acheson resolution"). This Resolution extends the powers of the UN General Assembly in the field of peacekeeping. The Resolution disposes that "*if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of internation-*

al peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed force when necessary, to maintain or restore international peace and security."

Before dealing with the issue of the legal consequences of the construction, the International Court of Justice (ICJ) must declare its competence. According to article 65 of the Court's Statute from June 26, 1945: "***1.*** *The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.* ***2.*** *Questions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question.*" Moreover, article 96 of the United Nations Charter from June 26, 1945 states that "***a****. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.* ***b.*** *Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.*"

The Advisory Opinion of the International Court of Justice

During its tenth emergency special session, on December 8, 2003, the General Assembly of the United Nations, in its Resolution ES-10114, asked the ICJ to pronounce in emergency an advisory opinion on the following issue: "*What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?*"[2]

On July 9, 2004, the International Court of Justice finally rendered its Advisory Opinion on the legal consequences of the construction of a wall in the Occupied Palestinian territory by Israel.

In this decision, the Court explains why the construction executed by Israel was to be considered as illegal in the light of International law. The Court also orders other states not to give any aid and assistance to the maintenance of this situation created by the wall's construction. Finally, it forbids states to recognize this illegal situation and calls on them to make Israel respect International humanitarian law, and more specifically the Fourth Geneva Convention of 1949.

In addition to that, the ICJ orders Israel to pay damages to the Palestinian people for the harm created by the construction of the wall.

[2] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, p. 9.

The Arguments of Israel

Concerning the issue of the exercise of the competence of the ICJ, Israel expressed several arguments against the fact that the ICJ has declared itself competent to deal with the conflict.

Firstly, for the Israeli government, as the conflict were only to concern Israel and Palestine, Israel argued that it had not accepted the jurisdiction of the ICJ on this specific conflict.

Indeed, when the ICJ deals with a conflict between two states, both must recognize the jurisdiction of the ICJ [article 36 (2) of the ICJ statute[3]]. However, this rule applies when the ICJ pronounce a judgment. However, in the case at stake the ICJ did not pronounce a judgment but delivered an advisory opinion. Consequently, the Court highlights the principle that in a case of an advisory opinion the consent of the concerning states is not required. No member state of the United Nations can refuse the jurisdiction of the Court concerning an advisory opinion as it is solely an opinion without binding nature.

Secondly, Israel claimed that the issue at stake was not a case of interest, either for the ICJ, nor for the United Nations, as the situation corresponds to a political issue. According to Israel, a political issue should not be solved by the ICJ.

In response to Israel's argument, the ICJ considered however that the issue of this case was linked to the United Nations as it deals with the maintenance of the international peace and security which corresponds to one of the missions of the United Nations.[4] It is precisely because of these peacekeeping characteristics, that this case does not only represent a political aspect. Moreover, this link is even more established, as the construction of the wall by Israel were in contradiction with the "Roadmap" decided by the Security Council in its resolution 1515 (2003). This "Roadmap" provides for several steps and actions which should conduct to peace between Israel and the Palestine.

Thirdly, Israel puts also forward the argument that the points of view of the two parties were strikingly opposing to such an extent, that the ICJ could not treat this question given that the Court were not to dispose of enough information about the real situation at stake. Once again, the ICJ rejects this argument as a difference of points of view between parties to a case were not a reason of its incompetence. Con-

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[3] Article 36 (2) of the ICJ statute: "*The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:*
a. the interpretation of a treaty;
b. any question of international law;
c. the existence of any fact which, if established, would constitute a breach of an international obligation;
d. the nature or extent of the reparation to be made for the breach of an international obligation."

[4] According to the Chapter 6 and 7 of the Charter of the United Nations and according to the current jurisprudence of the International Court of Justice.

cerning the argued lack of information, the Court considered to have all necessary information needed in order to deliver an opinion on this conflict.

Fourthly, Israel considered the usefulness of an ICJ advisory opinion since the UN General Assembly had already pronounced itself on the illegality of the construction of the wall. However, according to the ICJ, its opinion would serve as a basis to provide the legal information the organs of the United Nations needed to take their actions in accordance with the Law. It was not the Court which decides whether its opinions were useful or not.

Last but not least, ICJ found that the General Assembly has indeed not dealt with all the legal consequences of the construction of the wall.

Fifthly, in order to justify the construction of the wall – in Israel referred to as a project of a "security barrier" – the latter claimed an increase of violence against its territory from the Palestinian Occupied territory for several years. The Israeli government then bases its reasoning on article 51[5] of the Charter of the United Nations and the Security Council Resolution 1368 (2001) and 1373 (2001) regarding the right of self-defence. According to scholars, the right of self-defence may consist in an armed reaction by the alleged victim state towards the aggressor state, and may take the form of an individual or collective reaction.[6] There is a general consensus that the notion of self-defence constitutes a general principle of Law applicable in the field of International Relations[7] and may be a mean to justify actions which were normally to be considered as illegal with regard to the international legal order.[8]

However, according to the ICJ, the principle of self-defence may not be applied in this specific case between Israel and Palestine. Indeed, according to article 51 of the UN Charter, in order to make use of the right of self-defence, an armed attacked must come from another State. In fact, Israel exercises power and control on the Palestinian occupied territory. Therefore, the threat does not come from outside, i.e. from another State, but from the inside. In consequence, the Israeli government cannot use the right of "self-defence" to justify the construction of the wall. According to

[5] Article 51 of the Charter of the United Nations: "*Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.*"

[6] NGUYEN QUOC DINH: *La légitime défense d'après la Charte des Nations Unies;* ouvrage de droit international public, p. 225.

[7] NGUYEN QUOC DINH: *La légitime défense d'après la Charte des Nations Unies;* ouvrage de droit international public, p. 225.

[8] Article 21 called "Self-defence" of the Project of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts.
"The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations".

the ICJ, article 51 has no reason to be applied in this case. Lastly, the construction of the wall would not constitute the only mean for Israel to protect its population.

Sixthly, the Israeli government also contested the application of the Fourth Geneva Convention of 1949. Its article 2 paragraph 2 states that the Convention is applicable *"to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance"*. Thus, according to Israel this article was inapplicable as it concerns only *states* and would therefore exclude Palestine. Indeed, in 2004 Palestine was not considered and recognized as a State by most states of the international community and in particular by the United Nations (NB: the situation has barely changed in 2018).

However, the Court rejected this argument. For the Court, the occupation of a territory was the only criterion to take into consideration. Thus, the ICJ did not include a State criterion in its reasoning. In order to apply the Fourth Geneva Convention, it was only necessary that a State occupies a *territory*.

By applying article 2 paragraph 2 of the Fourth Geneva Convention to the Palestinian occupied territory, even if this territory was not formally recognized as a state, the ICJ proceeded to an extension of the Convention's application to all the territories in the world and not only to states.

Finally, Israel also argued that the provisions of the Fourth Hague Convention of 1907 were applicable to Israel, as it was not party to the convention. However, the Court considered that even if Israel was not a contracting party of the Fourth Hague Convention, the rules of this Convention would nowadays constitute rules of International Customary Law, as they oblige Israel therefore to follow these rules. Indeed, according to article 38 (1)(b) of the ICJ Statute,[9] international customary law is a source of International law and must be followed by all the States as it is considered as a general accepted practice. Israel had never clearly expressed its refusal to apply such rules in the Palestinian Occupied Territory, so the Court rejected this argument of Israel.

The Reasons of the Illegality of the Wall

First of all, the Court highlights the fact that Israel violates the principle according to which the acquisition of one territory by using force is prohibited by the International law and more precisely by article 2 paragraph 4 of the Charter of the United Nations which provides that *"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political indepen-*

[9] Article 38 paragraph 1 of the Statute of the ICJ: *"The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 5 judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

dence of any State, or in any other manner inconsistent with the Purposes of the United Nations." The Court also bases its argument on the Resolution 2625 (XXV)[10] of the General Assembly of the United Nations in which the Assembly expresses the principle that "*No territorial acquisition resulting from the threat or use of force shall be recognized as legal.*"

One of the main reasons that the construction of the wall was considered as illegal is that one part of the wall is constructed within the Palestinian occupied territory. This is an important point, since if the entire wall was on the Israeli territory, the construction, as what the position of the wall concerns, would not have been illegal regarding to International law. Indeed, the Israeli government may execute any construction it wants on its own territory, if this construction respects the rights and freedoms of the population around. Thus, the band behind the wall would become a closed area. People were allowed to access this area only with a specific permission and only during the opening time of the gates. This area would also only be controlled by the Israeli forces and would entirely depend on what the Israeli government – notably with regard to the free circulation of goods and people – will decide. It is in these circumstances that the Israeli government violated the right of free movement, the right to work, to health, to education and to an adequate standard of living of the Palestinian people. Therefore, for the Court, Israel violated the International Convention on Economic, Social and Cultural Rights and the United Nations Convention on the Rights of the Child which are aiming to protect these rights.

Moreover, Israel violated the right of the Palestinian people to choose their residence. Indeed, the position of the wall required some transfer of population without any compensation or any consent of the population. By doing so, Israel violated article 12 of the International Convention on Civil and Political Rights.[11]

Furthermore, for the Court, by the construction of the wall Israel committed a *de facto* annexation of the Palestinian occupied territory. Indeed, more than the construction of the wall, Israel installed some of its colonies within the occupied territory and administrated this territory as a complete part of its State. Hence, Israel violated the Fourth Geneva Convention which prohibits a state the transfer of one part of its civil population to the state or territory that it occupies.

As a *de facto* annexation has been found, the Court rejects the argument of Israel stating that the wall is only a temporary measure and may therefore not be illegal.

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[10] Called *"Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States"*.

[11] Article 12 of the International Convention on Civil and Political Rights:
"*1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country."

However, for the Court the wall is also a mean for Israel to annex more easily one part of the Palestinian occupied territory. This *de facto* annexation has led to a violation of the right of self-determination of the Palestinian people by Israel. This right is protected by the article 1 paragraph 2 of the Charter of the United Nations[12] and by the Resolution 2625 (XXV) of the General Assembly. The latter defined the right of self-determination as following: "*all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.*"

Concerning the issue of this right of self-determination, the fact that the territory is occupied is crucial. Indeed, this right was abolished concerning the populations of a well-bordered state, during the process of decolonisation.[13] However, concerning the population of an occupied territory, its population can still claim this right. If the Palestinian territory lawfully belongs to Israel, the principle of self-determination of a population should not be applied otherwise it might lead to the creation of a civil war amongst the two main ethnic groups of the Israeli state. Thus, the ICJ could not make use of the argument of the violation of this right by Israel in order to declare that the construction of the wall constitutes a violation of the International law.

Conclusion

Despite the rendering of the advisory opinion by the ICJ, several questions remain unsolved, in particular what concerns the effects of, on the one hand ICJ rulings and notably its advisory opinions, and on the other hand the decisions of the General Assembly of the United Nations.

First of all, the Court's ruling is only an advisory opinion, as it has no binding force and no enforceability. The effects of this decision will not have any proper judicial consequences.

Even before the Court rendered its opinion, the Israeli government had announced not to follow the Court's ruling and to reject the advisory opinion, just like the United States, as such.

If the United Nations desire to add some sort of effects to the ruling of the Court, it must implement actions on its own in order to confirm the advisory opinion. In fact, the Israeli and Palestinian issue is subject to a division among the international community. If the United Nations were to adopt measures, for instance by military means, to halt the construction of the wall and to oblige Israel to make compensations to the Palestinian people, it would in any case, require the agreement of the permanent five member states of the UN Security Council. Knowing that the United

[12] Article 1 paragraph 2 of the Charter of the United Nations. "*The Purposes of the United Nations are: To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.*"

[13] This right was abolished during the process of decolonisation in order to avoid, after the creation of the different states, some war of independence on the ground of the ethnic or religious origins.

States do not recognize the advisory opinion of the ICJ, it seems difficult and unlikely for the United Nations to adopt a decision with unanimous agreement.

However, on July 20, 2004, the General Assembly of the United Nations has adopted the Resolution ES-10/15 asking Israel to stop the construction of the wall and to demolish the parts which were already built. As some UN General Assembly resolutions may not have legal binding effects,[14] the country concerned may decide not to follow and implement the resolution. That is what Israel actually did as it never demolished the wall.

However, the advisory opinion of the ICJ and the above-mentioned resolutions do not have binding legal effects but both have, indeed, a high moral authority. Regarding to the ICJ, the Court is recognized by all member states of the United Nations as the highest judicial authority of the international order. Therefore, its ICJ decisions may influence the other organs and states in their decision-making process. Moreover, the decisions taken by the UN General Assembly may presumably have the same impact on the outcome of the UN Member States' votes, forming this General Assembly.

Nearly fifteen years after the rendering of the ICJ Advisory Opinion, the situation between the two parties is not yet solved. With regard to the precedent, Israel seems to continue violating International law and the rights of the Palestinian population. As stated above, concerning the wall, Israel has chosen to do not follow the advisory opinion of the ICJ and the resolutions of the General Assembly of the United Nations.

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[14] In general, only resolutions adopted by the Security Council acting under Chapter VII of the UN Charter, are considered binding, in accordance with article 25 of the Charter.

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