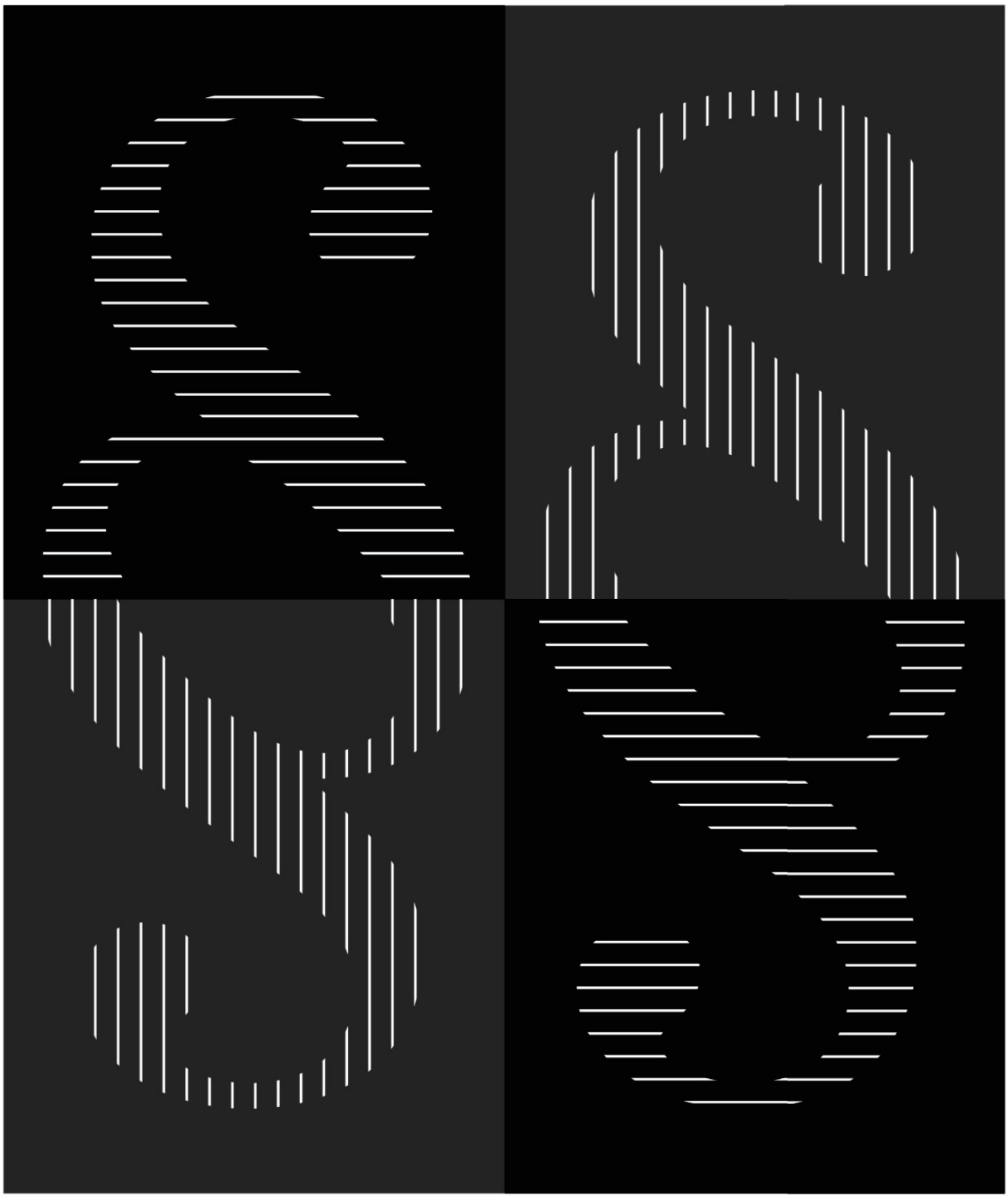
Internetowy Przegląd Prawniczy TBSP UJ

nr 7 / 2016 (29)

ISSN 1689-9601 | www.ipp.tbsp.pl



Internetowy Przegląd Prawniczy TBSP UJ 2016/7

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Wydawca

Towarzystwo Biblioteki Słuchaczów Prawa Uniwersytetu Jagiellońskiego

ISSN 1689-9601

Spis treści

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

Iwo Jarosz*

The emergence of the parol evidence rule in english law.

Streszczenie

Artykuł niniejszy omawia historyczny rozwój *parol evidence rule* (czyli reguły prawa materialnego zakazującej sądom dopuszczania na okoliczność treści bądź wykładni dokumentu *extrinsic evidence*, czyli dowodów innych niż sam dokument) w angielskim *common law* od czasów prawa anglo-normańskiego aż do uchwalenia w 1677 r. *Statute of Frauds*. Wczesne prawo angielskie charakteryzowała ogólna dopuszczalność takich dowodów. Dokumenty pisemne nie cieszyły się zaufaniem niepiśmiennej społeczności, uważano także, że sama czynność prawna dochodzi do skutku poza dokumentem. Dokument mógł więc mieć w najlepszym razie znaczenie jedynie dowodowe. Potrzeby praktyki handlowej i malejący analfabetyzm umożliwiły pojawienie się przekonania, że istota czynności prawnej zawartej w formie pisemnej jest związana ściśle i zależna od samego dokumentu. Przekonanie owo, wraz z brakiem zaufania i niechęcią sędziów do przysięgłych, jako skorych do wydawania rozstrzygnięć sprzecznych z treścią dokumentów, doprowadziły sędziów do wysnucia *parol evidence rule*. Zasada ta swój najszerszy zakres przyjęła z chwilą uchwalenia *Statute of Frauds*. Wprowadzony wówczas wymóg dokonywania szerokich kategorii czynności prawnych w formie pisemnej pod rygorem nieważności był przez angielskich prawników postrzegany jako potwierdzenie *parol evidence rule* na gruncie ustawowym.

Słowa kluczowe: *Common law,* historia *common law*, procedura cywilna, dowody, historia prawa.

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1. *INTRODUCTION*

In English common law the parol evidence rule is, following the academic definition, a rule that states that any evidence that is extrinsic to a written document (known as parol evidence, where *parol* means not only *oral* but actually pertains to any evidence extrinsic to the contents of a writing) cannot be used to add to, vary or contradict what is encompassed in that writing (in a document)[1].

Even though the parol evidence rule is steadily mentioned and elaborated in numerous modern textbooks[2], it has, since it emerged and reached its peak significance and extent, been subsequently subject to numerous exceptions. Consequently, the rule has been liberalised[3] to such an extent that some have said it does not exist anymore[4].

The purpose of this article, however, is to retrace the changes in the realm of admissibility of extrinsic evidence in written documents since the early Anglo-Norman law and throughout the next centuries in the context of the subsequent emergence of the parol evidence rule and its development up to the early eighteenth century, when it reached its mature form and its peak significance in judicial practice. As early as in the nineteenth century, common law judges began forming exceptions to the rule which subsequently led it to its current status, where some argue that it is highly doubtful that the rule would today, e.g., prevent a party from bringing in extrinsic evidence of terms that the parties intended to form a part of the agreement with[5].

Notwithstanding the above, the strict form of the parol evidence rule meant that it was perceived as a substantive legal rule which stated that if a contract had been done in writing it could not be challenged by past or contemporary extrinsic[6] evidence contradicting it or

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[1] G.H. Treitel, The Law of Contract, Eleventh Edition, London 2003, p. 346.

[2] See e.g.: Treitel, *above*; R. Stone, *The Modern Law of Contract*, 8th edition, London 2009; S. Williston, *The Law of Contracts,* Volume I, New York 1920, i.a. p. 247-248, ; J. Beatson, A. Burrows, J. Cartwright, *Anson's Law of Contract,* 29th edition, Oxford 2010, p. 138.

[3] *Anson's Law of Contract,* p. 138; Law Commission of England and Wales Report no. 154 (1986), paras 2.3.-2.4.

[4] Law Com Report no. 154, *supra*; K. Lewinson, *The interpretation of contracts*, 1989, pp. 34-37.

[5] A.L. Zuppi, *The parol evidence rule: A comparative study of the common law, the civil law and lex mercatoria,* Georgia Journal of International and Comparative Law, vol. 35, no. 2, 2007, p. 242.

[6] I.e. external to the written instrument (document).

modifying its content. The rule's evolution until it reached its historical peak in terms of its importance and extent in the eighteenth century is the subject of this article.

1.2 PRELIMINARY OBSERVATIONS AS TO THE RULE ITSELF

It is important to notice that in the common law the parol evidence rule is not a rule of evidence[7], a procedural rule[8] or a defence[9]. It is a substantive legal rule dealing with the nature of legal acts[10]. There are actually three specific rules that together form what is called the parol evidence rule[11]: first, preventing the contents of a document being proved by any means other than the production of the document itself[12]; second, pertaining to the inadmissibility of extrinsic evidence for the purpose of adding to, varying, contradicting or subtracting from the terms of the document[13]; and third, providing for the inadmissibility of extrinsic evidence to help in the interpretation of documents. Thus, if these rules were to be rigorously followed, no facts, representations and undertakings of the parties to the contract, apart from what was provided for in the writing itself, could be efficiently enforced as binding, as no evidence to it would be allowed to be accepted by a court.

Nowadays, as was presented above, oftentimes the parol evidence rule appears to be deemed increasingly less rigid, with some scholars suggesting that it is no more than a doctrine according to which the written terms of the contract shall enjoy a "position of interpretive priority"[14]. Such a standpoint is, as we shall see later, consistent with the demise of the parol evidence rule in modern common law, for which, it may well be argued, there were justified reasons. This article, however, shall relate to the "strict version" of the parol evidence rule as described at the beginning of this paragraph.

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[7] J. Thayer, *Preliminary Treatise on Evidence,* Boston 1898, c. 10.

[8] S. Greenleaf, *A Treatise on the Law of Evidence,* Boston 1883.

[9] As seen in the case of Casa Herrera, Inc. v. Beydoun, 32 Cal. 4th 336, 9 Cal. Rptr. 3d 97, 83 P.3d 497 (2004).

[10] J. Thayer, *Preliminary Treatise on Evidence,* Boston 1898, c. 10.

[11] Law Commission of England and Wales, *Law of Contract: The Parol Evidence Rule* (1976), paras 4 and 5.

[12] Also known as the "best evidence rule".

[13] Thus making the writing conclusive.

[14] James J. White, Robert Summers, Robert Hillman, *Uniform Commercial Code,* § 2-9, at 95.

It shall also be submitted that the aspects of legal acts that the parol evidence rule involves are as follows: the creation of a legal act, its integration, solemnisation and interpretation[15]. This article is concerned with the second aspect above, understood as relating to the conclusiveness of the written instrument, exclusively encompassing the terms of a legal act (here: a contract).

1.3 PERIODISATION

It is proposed that the history of the parol evidence rule's development law can be divided into four periods[16]:

I. From the beginning of Anglo-Saxon rule in England that is roughly parallel to the barbarian invasions in Europe[17] and to the emergence of the seal in the 13th century – a period characterised by a general disputability regarding written instruments and a general prevalence of extrinsic, especially oral, evidence over the contents of documents,

II. from the emergence of the seal to the enactment of the Statute of Frauds and Perjuries in 1677 and the subsequent years – a period when the parol evidence rule finally emerged, began to take hold and reached its historical peak,

III. from then on until the 19th century – a period of slow decomposition and the emergence of exceptions,

IV. from then on until the modern times – a period of stabilisation of the rule with numerous exceptions to its validity.

This article, which aims to retrace the emergence and development of the rule up to the point of its peak significance and its strictest meaning, shall concentrate on the first two periods.

[15] J. Wigmore, *A Brief History of the Parol Evidence Rule*, Columbia Law Review, Vol. 4, No. 5 (May, 1904), p. 338.

[16] Agreeing substantially with Wigmore, *op. cit.*, p. 339, with his division into three periods, one must note that upon the passing of roughly a century from the publishing of his notorious article and having regard for further development (or, as stated above, demise) of the parol evidence rule, another period needs to be listed.

[17] J.L. Myers (*The English Settlements*, London 1986, Chapter 4: *The Romano-British Background and the Saxon Shore*) states that he encountered and identified evidence of the Germanic presence in Britain during Roman rule.

2. ADMISSIBILITY OF EXTRINSIC EVIDENCE AND THE PAROL EVIDENCE RULE IN COMMON LAW UNTIL THE ENACTMENT OF THE STATUTE OF FRAUDS

2.1. EXTRINSIC EVIDENCE IN ROMAN LAW

Early Roman law was characterised by strict formalism with respect to the formation of contracts. For an obligation to come into being, one required to employ *stipulatio* – the traditional oral form of concluding legally binding agreements that was based on a strict question-and-answer formula[18]. At that time, all matters of evidence regarding the formation and content of an obligation were left to the judges' discretion[19]. Later, however, the formalism regarding a *stipulatio* was gradually relaxed. With the diminishing rigidness of *stipulatio* the role of a written instrument – the document – rose. At the beginning the document had a purely evidential meaning, treated by judges as evidence confirming the prior making of a *stipulatio*. The fact that a document contained a promise to carry out a *stipulatio* was thought to prove, by means of presumption, that a *stipulatio* had in fact been done, though contrary evidence was possible and admissible. Nevertheless, it was always clear to the Romans that a contract was concluded "elsewhere", i.e. beyond the document, within the formulas of the *stipulation*. Documents were utilised for purposes of gathering evidence as protection against fading memories and in case of a trial. The importance of what the Roman law contended may seem irrelevant to the later English common law, but the fact that the Roman law had never developed the concept of a juridical act (a contract) coming into existence solely within a writing corresponded with the views of the Germanic peoples that directly formed the roots of the early common law.

2.2. BARBARIAN LAW AND EARLY COMMON LAW – GENERAL DISPUTABILITY OF THE CONTENT OF A DOCUMENT

Contrary, however, to the general formalism attributable to early European mediaeval law, after the fall of the Roman Empire within the legal systems of the Germanic nations there "*was certainly no notion of the indisputability of the terms of a document*"[20]. The formalism of that time extended to modes of carrying out legal acts (e.g. transferring property) but did not result in the indisputability of documents. It is argued that such a situation re-

[18] R. Zimmermann, *The Law of Obligations. Roman Foundations of Civilian Tradition*, Oxford 1996, p. 68.

[19] *Ibidem*, p. 71.

[20] Wigmore, *op. cit.*, p. 339.

sulted from the very character of the Germanic tribes. These tribes were characterised by a general illiteracy, ranging from the lower classes to the elites. Having advanced into Europe, the barbarians brought with them, together with their general illiteracy, a legal system that was based on oral forms of transactions. Though, upon absorbing the lands of a predominantly Roman legal culture they encountered a system based on a preference for written juridical acts and an advanced habit of transactions made via notarial documents, the barbaric traditions seemed to have prevailed. In Merovingian and Carolingian monarchies the old Romanesque trait of using written documents initially subsisted, but by the tenth century it was eliminated, and the post-barbaric populace *en masse* returned to their old means of handling transactions only orally[21].

England, inhabited by Germanic tribes, followed suit. In the early mediaeval period most transactions were oral. "*In pre-conquest England, virtually all business transactions were communicated orally and trusted to memory*"[22]. Even the wills of Anglo-Saxon England, which were unique in that they were often written down by witnesses, did not require any writing: to the contrary, as they were subject to Germanic law, the preparation and signing of a document was not at all required[23]. One of the peculiarities of the early English law was that a document (*carta*) was perceived as one of the symbols convenient in handling formalistic transactions, on a par with a wand, a glove or a knife[24], thus gaining an independent meaning that was separate from its verbal content.

2.3. WHENCE THE RELUCTANCE?

It is hardly arguable that the general illiteracy of the era (ranging from the "*lowest churl to the great Emperor Charles*"[25] was the reason for written documents being perceived as precarious to some extent. Nowadays, used to the fact that we ourselves prepare in detail (or are capable of preparing) and undersign documents, we take it for granted that they are precisely what they are. Then "*the grantor of land, the borrower of money, could neither read*

[21] Ficker, *Beiträge zur Urkundenlehre,* 1887, p. 83-90.

[22] J.R. Wigglesworth, *Science and Technology in Medieval European Life*, London 2006, p. 18.

[23] M.M. Sheehan, J.K. Farge, *Marriage, Family and Law in Medieval Europe. Collected Studies,* Toronto 1997, p. 5.

[24] Wigmore, *op. cit.*, p. 340.

[25] Andreas Heusler, *Institutionen des Deutschen Privatrechts*, Erster Band, Leipzig 1885 [*translation quoted after Wigmore, op. cit*.].

nor write the document […] *he could but mark his cross at the bottom and hope it was alright*"[26]. It is not surprising, then, that a document gained the meaning of a token of transaction. The seller of land could transfer the title by the old form of *sale* and *vestitura* or he could simply transfer it via the document (through "*venditio per cartam*"). The *tradition carta* itself in land transfers was a formalised act, done by the document signor grasping a blank parchment, lifting it from the ground, asking the witnesses to grasp it with him, handing it to the scribe to do the writing and, finally, handing it over, i.e. delivering it, to the purchaser. The convenience of *venditio per cartam* lay in the ability to transfer land symbolically, i.e. without the requirement of being present at the land being sold. Ficker, though, accurately noticed that it also allowed the names of the witnesses to be preserved in writing[27]. What is, however, essential here is that, from a substantive point of view, the *carta* was not capable of establishing anything[28], i.e. neither legally nor in any other way bindingly. Any terms encompassed in the *carta* were subject to dispute, and if they were indeed disputed – "*the terms of the transaction may and must be proved by calling the witnesses to it, regardless of any contradiction of the writing*"[29]. Wigmore provides us with an exemplary case that was symptomatic for the then reigning premonitions as to the contestability of documents by other evidence. It shall be underlined that the case concerns a dispute that took place over two centuries after the Norman conquest, namely in 1292. This case[30] concerned a plaintiff filing an assize of mort d'ancestor[31] and seeking to recover his seisin[32] of tenements in a place recorded as "C.". The defendant replied that he was in good (legal) possession of the lands in question as he had been properly enfeoffed by the plaintiff's father. As a means of evidence the defendant produced a charter (a written document), which was a deed of the plaintiff's father. The plaintiff then admitted to the deed being his father's but stated that the tenements had been given to the defendant for one month only, upon the

[26] Wigmore, *op. cit.*

[27] Ficker, *op.cit.,* p. 85.

[28] Wigmore, o*p. cit.*, p. 341.

[29] *Ibidem.*

[30] Year Book 20 Edw I, 258 (*Edition Horwood*).

[31] An action filed by a plaintiff who wanted to recover the possession of an inheritable estate of his predecessor, usually his father (see: Black's Law Dictionary, 9th Edition, p. 1101, *mort d'ancestor*).

[32] I.e., *Possession.*

passing of which the defendant was supposed to have married the plaintiff's sister or return the tenements to the plaintiff's father. None of these conditions were in fact included in the charter. The plaintiff's father had died before the passing of the month and the defendant had not wed his opponent's sister. The defendant replied again that the deed was simple and that there were no conditions to be found within its content as the ones alleged by the plaintiff. The plaintiff, however, replied that whatever the words of the charter may have been, the arrangements of the covenant between his father and the defendant and their friends had been just as he claimed. The jury stated that the contract was as the plaintiff had motioned and the judge entered judgement for the plaintiff upon establishing that the defendant's seisin was conditional, that the condition had not been performed by the defendant's default and therefore his seisin was null, the plaintiff's father had died seised of his estate and therefore the plaintiff was awarded the assize. Here we can see very well how a written document, unambiguous, unequivocal and clear, was legally perceived as containing only some of the parties' stipulations, and how oral evidence had helped the plaintiff win the case.

Another proper demonstration of the then reigning rule of admissibility of extrinsic evidence against written contracts was the so-called wager of law[33] – a defence allowing the defendant to prove his lack of liability by proclaiming it under oath and gathering a required number of witnesses (called the compurgators – usually eleven[34] or twelve of them, sometimes more[35]), to swear that they believed the defendant's oath[36]. A successful wager of law was sufficient to outweigh a written document[37] (as Blackstone puts it: "*he shall go free and for ever acquitted of the debt, or other cause of action*"[38]).

Obviously, the very fact that we say that a wager of law was sufficient to outweigh a written document it may be inferred that there were certain instances when a written document would suffice to prove the plaintiff's case, or when a piece of writing would, in the ambiguity of other evidence, serve as decisive, but nevertheless this means that a document

[33] Known in Latin as v*adiatio legis.*

[34] John Bouvier's Law Dictionary, Revised 6th Edition, Philadelphia 1856.

[35] Þorleifur Guðmundsson Repp, *A Historical Treatise on Trial by Jury, Wager of Law and other Co-Ordinate Forensic Institutions.*

[36] J.H. Baker, *An Introduction to English Legal History*, 4th edition, London 2002, p. 6.

[37] Wigmore, *op. cit.*, p. 340.

[38] Sir William Blackstone, *Commentaries on the Laws of England. Volume 2,* New York 1828.

was contestable by other evidence. There was simply no recognised law that would prevent writing from being prone to being contested by other forms of evidence. As O.W. Holmes put it: "*It was evidence either way, and is called so in many of the early cases*"[39].

It shall thus be summed up that in the early mediaeval period, i.e. from the beginning of Anglo-Saxon rule in England until well after the Norman conquest of 1066, there was no such notion in the common law as the parol evidence rule nor were there any earlier forms of it. It was a period of the dominance of oral forms of juridical acts and especially of oral evidence. No substantive legal rules existed that would pertain to written instruments being irrebuttable by extrinsic evidence.

2.4. RISE OF THE SEAL[40] – A PREREQUISITE FOR THE PAROL EVIDENCE RULE

The tell-tale element of what was characteristic of the second of the periods mentioned above began with the so-called *rise of the seal*. The seal was a piece of wax affixed to a paper or other material on which a promise, release or conveyance was written that served as a means of proving its authenticity[41]. It originally consisted of wax bearing the imprint of an individualised signet ring, and though this requirement was relaxed in the 19th and 20th centuries, throughout the periods described in this article it did not change. As late as in the 17th century, Lord Coke stated that wax without an impression was not a seal[42]. Use of the seal in England began in the 11th century[43], after the Norman conquest, but it was not until it became common among ordinary people that its importance as a contractual instrument began, and only since then can we perceive it as a factor in the emergence of the parol evidence rule. At first it was used exclusively by the king, thence its legal value sparked from the principle that the king is not capable of attesting lies and receiving lies from his subjects, and that his word is indisputable[44]. The king's seal affixed to a document made the truth of

[39] O.W. Holmes, *The Common Law*, New York 2009, p. 184.

[40] See, generally: E.M. Holmes, *Stature and Status of a Promise under Seal as a Legal Formality*, "Willamette Law Review" 617 (1993), p. 625-637.

[41] *Black's Law Dictionary*, p. 1466, *seal.*

[42] *Restatement (Second) of Contracts*, 1979, § 96 cmt. A.

[43] Frederick Pollock, Frederic William Maitland, *The History of English Law before the Time of Edward I,* London 1898, vol. I, p. 78.

[44] Wigmore, *op. cit.*, p. 342.

the document immune to being undermined. The attestation of a private document by the king or his representatives was much sought after[45].

The popularity of the seal "trickled down" from the king to, first, senior members of the clergy (bishops) and counts to, later, an ever-growing part of the nobility and estate-holders. What is peculiar here is that the relevance of the king's seal was attributed to seals used by other people. Then it became, as Ficker duly notes, popular for those that had not yet obtained a seal (for various reasons) to ask those that possessed the benefit of having a seal to attach it to a document, thus guaranteeing its authenticity[46]. As Wigmore states: "*as the habitual use of seal extends downwards, its valuable attributes go with it*"[47]. The reason, as some suggest, may simply be the fact that a seal is more difficult to forge than a signature, not to mention an illiterate mark made with the stroke of a pen[48]. Ultimately, this led to ordinary freemen obtaining and using seals. The process of the seal gaining in importance to the point that it became common had, as we have seen, begun in the 11th century, and was not rapid at first – after all, as late as during the times of Henry II seals were said to belong properly only to kings and to very great men[49]. Notwithstanding, the process of seals becoming common was practically complete by the thirteenth century[50] – "*at the date of the Conquest the Norman duke had a seal* […] *before the end of the thirteenth century the free and lawful man usually had a seal"*[51]. This marked the dawn of the significance of transaction witnesses, as the qualities of a witness were attributed to the seal and the parties could expect a sealed document to be a sufficient means of proving that a transaction had taken place. They could also rely on (though only to some extent, as we shall soon see) a sealed document to prove the terms of such a transaction because the potential opponent, having certified the given document with his seal, could not renege on its terms anymore. Neverthe-

[45] *Ibidem.*

[46] Ficker, *op. cit.*, p. 94.

[47] Wigmore, o*p. cit.*, p. 342.

[48] Holmes, *op. cit.*, p. 184.

[49] *Ibidem.*

[50] Harry Bresslau, *Handbuch der Urkundenlehre*, Leipzig 1889, p. 534.

[51] Pollock and Maitland, *op. cit.*, p. 221.

less, the situation was far from allowing one to form a general rule that would have prohibited the use of extrinsic evidence against a written instrument as of then.

2.5. OBSTACLES AGAINST THE EMERGENCE OF THE PAROL EVIDENCE RULE IN THE LATE MIDDLE AGES – EVOLVING CONCEPTS

Though the basic notions of the indisputability of a document and the incontestability of its terms had developed, as can be observed, before the end of the thirteenth century, still the parol evidence rule was far from emerging and the general significance of written instruments was very distant from its final form. What were the reasons for this?

It must be underlined here that transactions which were most important at that time – which, for obvious reasons, were those pertaining to land – were still performed in the old ritual forms. The transfer of an estate was done by the so-called *livery of seisin* (roughly equivalent to the continental transfer of possession), to which the charter was only secondary. As Wigmore put it: "*whatever the virtue there is in writing is testimonial only*"[52]. This, it is fair to say, was a very peculiar state of matters and one that was very prone to lability. A written document was no more and no less than proof of a transaction, not a necessary one, but otherwise hardly contestable (if at all present). One may ask if it was thus not tempting for the parties to gain for themselves a piece of indisputable evidence, and was not the inadmissibility of extrinsic evidence the only logical conclusion of attributing incontestability to the documents? The answer is yes, but there was the obstacle as described above. The fact was that the main part of a transaction was some juridical act done apart from the writing. Most of these acts, especially those concerning immovable property, were done in oral forms[53]. A writing merely "testified", i.e. "witnessed" what was in fact done beyond the writing itself[54]. The important, substantive element of a transaction happened elsewhere. If so then why dully accept the terms of the writing? If the writing is no more than just evidence, it may always be countered with contrary evidence.

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[52] Wigmore, *op. cit.*, p. 343.

[53] Pollock and Maitland, *op. cit.* p. 202 & 217.

[54] Interestingly, this rhetoric persisted much later, at a time when undoubtedly a document was more than just the evidence of an act completed beside the document. William Sheppard, *Touchstone of Common Assurances*, 7th Edition, London 1820, p. 50: "*a deed is a writing or instrument* […] *sealed and delivered to prove and testify the agreement of the parties whose deed is to the thing contained in the deed*).

2.6. THE LAW OF COMMERCIAL TRANSACTIONS – A HARBINGER OF THINGS TO COME

One area of law where the idea of the indisputability of written documents appeared earliest and quickly gained a serious foothold was commercial law. In this area a sealed document was deemed as incontestable as early as in the 1300s[55]. Such was the mercantile custom that became, not formally, an element of the *lex mercatoria* (or the *Law Merchant*, as it is usually called in England). This was obviously caused by the specificity of merchants' activities in an era predating most developments such as banks and systems of shipping. A direct and immediate concern for the merchants of that time was the problem of "*making returns*" – meaning simply carrying back the fruits of one's trading journeys. Related to this was the problem of recovering funds, especially pecuniary proceeds from successful trade ventures from abroad. One of the ways that the mercantile practice dealt with these problems was with the emergence of the "*sedentary merchant*", i.e. an element of a new form of a trade organisation based on a complex structure. "*In the simplest form, the merchant would entrust the goods to an agent or an employee who travelled with the goods and arranged for their sale and the purchase of return cargo*"[56]. Such a sedentary merchant could, via a network of agents, representatives and consignees who were interconnected and autonomous to some extent, solve the problem of making returns and returning funds – what was of essence, though, was the ability to offer in the mercantile transactions a form of remuneration that would be commonly accepted, and such could only be a form of remuneration that was safe and sure. Merchants, especially the Staplers of London in their trade relations with the mercers of Flanders[57], would draw up the so-called exchange bills that would allow them to transfer value without physically carrying money. These later evolved into the more modern bills and notes. It is not by any means surprising that the doctrine of the incontestability of written documents appeared the earliest, then, with respect to commercial contracts. What made it easier and what probably accelerated the emergence of such a doctrine in commercial relations was the fact that commercial cases were often tried not by the

[55] Wigmore, *Op. cit.*, p. 344.

[56] J.S. Rogers, *The Early History of the Law of Bills and Notes*, London 1995, p. 33.

[57] E. Power, *Wool Trade in the Fifteenth Century* [in:] *Studies in English Trade and in the Fifteenth Century*, E. Power, M.M. Postan (eds.), London 1933, p. 39-90.

common law courts but by separate mercantile courts[58]. On the other hand, this same fact slowed down diffusion of the doctrine to common law courts.

There exist in the records some landmark cases that show very well how the doctrine of the incontestability of written instruments worked in the area of commerce. First is a case from 1222, where it was stated that "*by the law merchant a man cannot wage his law against a tally*"[59]. If such was the approach toward a tally then even more so toward a written document. The same rule is also confirmed in a legal treatise concerning precedents useful for pleading in the courts[60]. It is, however, important not to overemphasise these developments in the light of the following excerpt from Pollock and Maitland: "*by Law Merchant one cannot* [sic!] *wage his law against a tally; but if he deny the tally, the plaintiff must prove the tally*"[61]. So a mere denial was sufficient to turn the burden of proof against the claiming party. Clearly, the commercial law of the thirteenth or fourteenth century is too early a period to talk about anything as strict as the parol evidence rule in its strict form.

2.7. RELUCTANCE WITHIN THE LAW OF THE LAND TRANSACTIONS – UNCERTAINTY AND TRANSITION

In the fourteenth century, deeds regarding the transfer of estates started to become "necessary accompaniments"[62] of the livery of seisin. This was definitely a sign of things to come (as we shall see with respect to the Statute of Frauds), but the incontestability of writing, not to mention the inadmissibility of extrinsic evidence to the writing, was still a weak concept as late as in the mid-fifteenth century. A renowned legal scholar of the epoch, Thomas de Littleton, famously stated[63] that if parties make a deed of feoffment[64] stipulating the transfer of estate under no condition, but in executing this deed the livery of seisin is provided with a condition, i.e. an oral one, then that condition is good and enforceable. The

[58] Rogers, *op. cit.*, p. 58.

[59] Year Book 20 Edw. I, p. 68.

[60] *Brevia Placitata* (Publications of the Selden Society, vol. 66, London 1951); *Casus Placitorum and the Reports of the Cases in the King's Court 1272-1278*, ed. with an introduction by William Huse Dunham (Publications of the Selden Society, vol. 69, London 1952).

[61] Pollock and Maitland, *op. cit.*, p. 213.

[62] Pollock and Maitland, *op. cit.*, p. 82.

[63] Or actually noted what was the law in his times.

[64] Roughly equivalent to the transfer of property in Continental law.

deed is treated as if it had not been made because it contains no condition, and the terms of the transaction are actually as provided for at the making of the livery of seisin[65]. The same author also stated that even though theoretically there could be no condition effectively affixed to a lease of a freehold estate if the lease had not been made in a deed, the party eager to resort to the condition before a court of law could rely on "*a verdict of twelve men taken at large*" even if he "*letteth the same land to another for term of life without deed upon condition to render to the lessor a certain rent*"[66]. Littleton wrote *Tenures* after he became a judge of the common pleas in 1466[67]; the first edition was published in London in 1481 or 1482[68]. It is difficult not to notice that after all the legal and social changes described above the law regarding land transactions would not produce a judgement varying from the one referred to above that had been rendered during the rule of Edward I roughly two centuries earlier. The huge similarity lies in the ability of the jury to overthrow the clear and explicit terms of a deed or to ignore the lack of a deed where the law would ostensibly require one.

Why then shall we call this period a period of transition? Mainly because the sources offer contradictory evidence as to the then reigning approach to matters that were very similar. First, the same Littleton states that he recognises as a matter of "*common learning*" that a man cannot plead that an estate was made upon condition "*if he doth not vouch a record of this or show a writing under seal proving the same condition*"[69]. Of course, this opinion does not pertain to the inadmissibility of extrinsic evidence to the contents of a written instrument but to the inability to prove a condition without a writing. But it does show very well that the law, settled beforehand, had started shifting in the realm of land transactions.

Then again, in a Year Book from as late as 1523 we can find the following opinion contradicting what was written earlier by Littleton: "[…] *for a deed is nothing but a proof and testimonial of the agreement of the party, as a deed of feoffment is nothing but a proof of the livery, for the land passes by the livery; but when the deed and the livery are joined*

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[65] Thomas de Littleton, edited by: Eugene Wambaugh, *Littleton's Tenures in English*, Washington, D.C., 1903, p. 171.

[66] *Ibidem*, p. 174.

[67] *Gilman, D. C.; Thurston, H. T.; Colby, F. M., eds., New International Encyclopedia* ***vol. 12****, 1st ed., New York 1905, "Littleton, Thomas", p. 340.*

[68] It is worthwhile to notice that the first edition of *Tenures* was the first book ever printed concerning English law.

[69] Littleton, *op. cit.*, p. 173.

together, that is a proof of the livery"[70]. This is yet another contradicting statement as to the significance of a deed and its immunity (here its lack) to being overthrown by parol. However, the common opinion was soon about to change. In fact, even in the fifteenth century certain judgements had been rendered that disallowed extrinsic evidence against the contents of written documents, as we shall later see.

2.8. CONTRIBUTING FACTORS AND THE EMERGENCE OF THE PAROL EVIDENCE RULE

As we turn to examine these judgements in order to recreate, finally, the story of how the parol evidence rule gained foothold, we shall also focus our attention on the factors and circumstances that facilitated the rule's growth.

2.8.1. GROWING LITERACY

First, there was the unquestionable growth of literacy. In England, the approximate literacy rate rose from less than five per cent in the mid-fifteenth century to about 15% in 1550 and, astonishingly, to approx. 53% in 1650[71]. Putting aside the reasons for this – the most important probably being the invention and spread of printing – the result of the society becoming generally much more lettered was a rise in respect shown to written documents and, obviously, the dropping of earlier distrust toward charters. Because reading and writing were no longer the mysterious skill of a chosen few, there spread the notion that a man should generally be bound by what he declared in writing[72]. The idea grew that the written words of a transaction should be binding to the denying party, as they could easily prevent against the writing being deficient in some terms and representations[73]. In what may be perceived as one of the early instances of the full-fledged parol evidence rule's application in a case[74], it was famously stated: "*because words are oftentimes spoken by men unadvisedly and without deliberation, the law has provided that a contract by words shall not bind with-*

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[70] As per Brudnel, J; *Year Book* 14 H. VIII 17, 6 and 7.

[71] Max Roser, *Literacy, Published online (2016) at OurWorldInData.org,* Retrieved from: https://ourworldindata.org/literacy/, 28.04.2016.

[72] Wigmore, *op. cit., p. 345.*

[73] First noted as early as in 1430, Year Book 8 H. VI, 26, 15, per Babington, J, speaking of a party that had neglected to seeing to encompass certain provisions in a deed: "*It will be adjudged my own folly that I did not wish to have it written in*".

[74] Sharington v. Strotton, 75 ER 454.

out consideration. And the reason is, because it is by words which pass from men lightly and inconsiderately, but where the agreement is by deed there is more time for deliberation". Then the judge added that deeds were "*adjudged to bind the party without examining upon what cause or consideration they were made*" to, ultimately, find that a sealed deed is of a higher nature than other means of evidence.

It is worth noticing, however, that the spread of literacy itself was not sufficient for the rule to appear – otherwise it would have appeared to be applied whenever both parties to a contract could have been proved to be literate[75]. Thus more contributing factors were required for the parol evidence rule to emerge.

2.8.2. THE GROWING PERCEIVED TRUSTWORTHINESS OF WRITING

Another factor was that the old custom of transaction-witnesses, which were especially prevalent in liveries of seisin, was slowly becoming increasingly less popular, up to the point that transaction-witnesses were not commonly available[76]. Together with this there grew a general awareness of the lability of witnesses and the weakness of testimonial recollection. On the other hand, there appeared a growing sympathy for writing as being sure and trustworthy. Judges realised that there was something wrong with the ability to deny a matter recorded in writing by simply denying it[77]. As Lord Coke stated (in a case that we shall return to later): "*it would be full of great inconvenience that none should know by the written words of a will what construction to make or advice to give*"[78]. It is argued that the spread of written contracts was tightly related to the change from a subjective theory of contracting (one that states that an agreement exists beyond the contract understood as a written instrument) to an objective one (asserting that the document is actually the contract itself)[79].

2.8.3. MERCANTILE CUSTOMS

[75] Note that in the case cited above under 31 both parties had been literate, and still witness evidence was allowed to alter the contents of the writing.

[76] Wigmore, *op. cit., p. 346.*

[77] *Ibidem*, p. 347.

[78] 1591, Lord Cheyney's Case, *The reports of Sir Edward Coke, in English, in thirteen parts complete; with references to all the ancient and modern books of the law* [*Coke's reports*]*, Part 5*, sec. 68a.

[79] T. Cole, *The Parol Evidence Rule: A Comparative Analysis and Proposal*, University of New South Wales Law Journal, Vol. 26, 2003, p. 682.

Next, as we have already seen, the path had been paved beforehand by the mercantile customs and the Law Merchant. The merchants of England, especially of London, were using commercial forms, principally bills and notes which had developed in the previous centuries, as a means of hastening and simplifying transactions. The mercantile practice had already ascribed the value of indisputability to written documents.

2.8.4. RESTRAINING THE JURIES

The third factor was a more legal-political one that was related to the judicial desire to control the jury[80]. Judges, as professional lawyers, were always wary of juries and their ways of twisting the factual backgrounds of cases so as to bypass the law. Judges wanted to keep from the jury the oral parts of contracts to prevent them from misusing the parol (i.e. *oral*) evidence to overturn the words of a writing. "[…] *the distrust of the juries is one of the pillars of the parol evidence rule…* [which] *…is not applicable in equitable actions that traditionally were tried to the chancellor without a jury*"[81].

Interestingly, is has been pointed out that a very similar process is taking place nowadays, with the courts perceiving restrictions to the admissibility of extrinsic evidence as a method of preventing juries from "*hearing evidence that could cause them to lend more weight to their sympathies than to the facts of the case*[82]".

The cases cited earlier in this article show very well how a jury could tear a written instrument apart if it so willed. If parol evidence was generally allowed then the case had to be decided by a jury on its factual terms, "*and there was no telling what the jury might do*"[83]. As a judge stated in a later case[84], every deed was thought to consist of two parts – the matter of fact and the matter of law. The matter of fact was averred by the party and was triable by the jurors; the matter of law, however, was to be discussed by the judges of the law. If the matter of fact was as strict as it was worded in a deed then clearly the whole adjudication belonged solely to the judges. And so if the judges wanted to keep control of an adjudicated

[80] *Ibidem*.

[81] J.M. Perillo, *Comments on William Whitford's Paper on the Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, "Wisconsin Law Review" 965, 6/2001.

[82] William C. Whitford, *The Role of the Jury (and the Fact/Law Distinction) in the Interpretation of Written Contracts*, 2001 Wisconsin Law Review, p. 931.

[83] J.M. Perillo, *op. cit.*

[84] 1610, Edward Altham's Case, *Coke's Reports*, *Part 8,* sec. 155.

case in their hands, a doctrine had to be adapted which would exclude parol evidence as such.

This required that the judges switch from how the inadmissibility of extrinsic evidence was perceived earlier, i.e. as a testimonial rule, to a new approach that would finally make it a rule of substantive law. Earlier, as the parol evidence rule was gaining a hold, it was reduced to being a waiver of ordinary proof. A person who had produced a sealed document was disallowed to effectively come forward with contradictory evidence of other sorts. This ban, however, was operative by a legal fiction that the person had in fact waived his right to bring his evidence and had done so in advance[85]. He was, as it was worded in the epoch, estopped from using extrinsic proof, and by his own sealed act. Later this evolved, however, into a substantive law rule.

How considerably significant in the process of the emergence of the parol evidence rule was the judges' distrust toward juries may well be demonstrated by noting that the parol evidence rule never emerged in equitable actions[86]. This must be deemed very telling upon reflecting that actions in equity had always been tried in a chancery court, i.e. before a chancellor and without a jury.

2.8.5. THE PAROLE EVIDENCE RULE AS A MEANS OF CORRECTING THE "OBJECTIVE INTENTION" DOCTRINE

This general lack of trust toward juries was recently also underlined as one of the major factors for the emergence and prevalence of the parol evidence rule in English law together with the notion of *objective intention*[87]. Some authors have even described this aforementioned notion as the reason for the general literalism that is prevalent in common law and in common law interpretation[88]. The *objective intention* rule is understood by English courts as the need to enforce the intention "*which the party in question by his actions or words displays to the other, not some hidden intention which he may have concealed in the inner reaches of his mind*"[89]. Interpreting *objective intention* inevitably leads to one asking oneself

[85] Wigmore, *op. cit.*, p. 347.

[86] J.M. Perillo, *op. cit.*, p. 965.

[87] T. Cole, *op.cit.*, p. 680.

[88] C. Valcke, *Contractual Interpretation at Common Law and Civil Law: An Exercise in Comparative Legal Rhetoric* [in:] J.W. Neyers, R. Bronaugh, S. G.A. Pitel, *Exploring Contract Law*, Oxford 2009, p. 95.

[89] See Canadian case of Double N Earthmovers Ltd v City of Edmonton [2007] 275 DLR (4th) 577.

whether this *objective intention* is tantamount to *what the reasonable parties truly had in mind* or maybe to *what the parties should have had in mind had they been reasonable*. The second concept is visibly flexible and allows for a high level of judicial discretion. One of the factors that helps limit the influence of the notoriously vague notion of objective intention in contractual interpretation is the inadmissibility of extrinsic evidence; for where objective intention matters, evidence of intention is just as important as the intention itself[90], and thus the restrictive approach to whence the evidence may be drawn. Disallowing the courts to search for meaning somewhere beyond the scope of a written instrument helps restore the certainty that the doctrine of objective intention could not provide if supplemented with the courts' ability to utilise extrinsic evidence.[91].

2.8.6. THE DIFFERENT QUALITIES OF DIFFERENT EVIDENCE

Then there appeared the concept of varying qualities of certain means of evidence. We have already seen this in the case of Sharington v. Strotton, where the court determined that certain acts are not to be overthrown by other proof because of the former's higher nature – thus assuming that juridical acts may be of varying, i.e. higher or lower, nature. Francis Bacon, moreover, in a treatise regarding the rules of common law of the time, asserted that a patent ambiguity in a document may not be averred because "*the law will not couple and mingle matters of specialty, which is of a higher account, with matter of averment, which is of inferior account in law*"[92]. Finally, in a decision regarded as formative and decisive to the emergence of the parol evidence rule[93], parol evidence was unambiguously dismissed because "*every contract or agreement ought to be dissolved by matter of as high a nature as the*

first deed".

The new approach also saw a shift in how written documents were perceived. Earlier, a deed was but proof of a transaction that took place beside it. This notion is, interestingly, still prevalent in American law, where dominant is the subjective theory of contracting ac-

[90] Ibidem, p. 98.

[91] C. Valcke, op. cit., p. 97.

[92] F. Bacon, *A Collection of Some Principal Rules and Maximes of the Common Lawes of England*, London 1963, 91, Regula 23.

[93] Countess of Rutland's Case (1605), *Coke's Reports*, Part 6, sec. 52b.

cording to which the written document produced by the parties is merely a memorandum of the agreement that they have reached[94]. "Judges adhering to this doctrine have no qualms about admitting extrinsic evidence in order to ascertain each party's intent, even where the parties thought that they had created a final expression of their agreement"[95]. The fourteenth century was a period when this concept was struggling for approval, but by the early 1600s[96] it was already settled that the written document is the transaction itself. This concept is called the *operative notion of a writing*. Wigmore argues that the development of the operative notion of a writing was reinforced by the development of the parol evidence rule understood as a rule of inadmissibility of extrinsic evidence. If no extrinsic evidence is admissible, then a sealed instrument will "discharge" all earlier transactions or stipulations pertaining to what is embodied in the instrument. All previous arrangements are not demonstrable, so the whole contractual relation of the parties is reduced to what is written; and only that of the previous arrangements is binding what the parties merged into the written form. Thus there is no transaction beyond what the parties had encompassed in the writing and thus – the writing itself becomes the transaction[97].

If the writing is the sole act encompassing the whole transaction and is the transaction itself, then it is because of its very nature that no extrinsic evidence shall be allowed. There simply is no point in not dismissing it, because even if it stood in total contrast to the contents of the deed the deed would still prevail intact. The logical conclusion is to accept that it is owing to the nature of the writing that it should not bail extrinsic evidence. Thus it becomes clear how the parol evidence rule became a rule of substantive law, not just a procedural one.

It is worthwhile to take into scope the case usually credited as the one in which the parol evidence rule was established in its fullest form (prior to the enactment of the Statute of Frauds). Some authors, even nowadays, go as far as to state that the parol evidence rule's

[94] T. Cole, ibidem, p. 681.

[95] S. Schane, Ambiguity and Misunderstanding in the Law, 25 Thomas Jefferson Law Review 2002, p. 167.

[96] Wigmore, *op. cit.*, p. 350.

[97] *Ibidem*, p. 349.

origins may be traced to this case[98], however, in the light of the previous remarks this cannot be deemed true – it is fair to say there are further reaching traces of the rule.

The Countess Rutland's Case (1605)[99] actually concerned a trespass allegation brought forth by the Countess Isabel, the widow of Edward, the third Earl of Rutland, against Roger – the fifth Earl of Rutland. The dispute arose from a conflict between two written contracts that had both been made by Edward and concerned a property by the name of Eykering House, and both were about entrusting the property. The first of these contracts stipulated that upon Edward's death the trustees shall ensure that the property stay in Isabel's possession, and only after her subsequent death should it be conveyed to Roger. The second contract, made half a year later, concerned a vast set of lands including Eykering House, and under the term that the property shall be conveyed to Roger after Edward's death. As Coke's report tells us, the witnesses' testimonies proved that Edward had told various people that Isabel shall have the property. The court, however, held that a written deed would bar parol evidence. Moreover, such were the instructions that the judge provided to the jury. Coke commented that "*it would be inconvenient that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory*".

2.9. STATUTE OF FRAUDS OF 1677 – PEAK SIGNIFICANCE OF THE PAROL EVIDENCE RULE. OBJECTIVE THEORY OF A CONTRACT

The waiver theory as discussed above was complacent with the subjective theory of contracting according to which the existence of a binding agreement between the parties is determined by the existence of the concurrence of intention. Modern theory of contracts in common law prefers the objective approach, which relies on external acts of the parties to determine the existence and contents of a contract.

The processes as described above, influenced by the factors therein listed, led to the final taking of shape of the parol evidence rule in the late seventeenth century[100]. The emer-

[98] See e.g. Epstein G., Archer T., Davis Sh., *Extrinsic Evidence, Parol Evidence, and the Parol Evidence Rule: A Call for Courts to Use the Reasoning of the Restatements Rather than the Rhetoric of Common Law*, 44 N. M. L. Rev. 49-87 (2014), p. 57.

[99] Coke's Reports, Part 6, sec. 52b.

[100] Kevin M. Teeven, *A History of the Anglo-American Common Law of Contract*, New York 1990, par. 110 n. 89.

gence of the second approach was facilitated by the enactment of the Statute of Frauds[101] in 1677. The Statute in its first and third sections mentioned an estate in land as being "assigned, granted or surrendered" by "deed or note in writing". This brief but novel regulation brought forth two important notions: first, it confirmed that a legal act might not only be proved by a writing but that it may actually be constituted by the document – the document itself being the very act it encompassed. Furthermore, the Statute not only confirmed but actually made it a requirement for effective conveyances that the transfer of ownership be made in writing.

At the same time, the Statute introduced the novel feature that a document might be an ordinary piece of writing in its simplest form, not necessarily a deed under seal. Wigmore argues[102] that the significance of the Statute was mainly that it, first, eliminated the possibility of creating, granting and leasing estates in freehold by oral livery of seisin, thus substituting it with a mandatory documental form. Second, it permitted for the document to be just an ordinary piece of writing – without the seal. The requirement of a written form for the transfer of an estate underlined the constitutive (as opposed to testimonial only) character of a document. The acceptance of ordinary writing as a means equivalent to a deed led the courts to apply the parol evidence rule to everything that had been encompassed in writing, notwithstanding the lack of a seal[103]. The reasons for this seem quite clear. If a certain transaction must be done in writing, as otherwise it is null and void, then everything undertaken, discussed or done beyond the writing is also null and void. The lawyers of the era were convinced that if a contract requires that it be done in writing to be valid then nothing shall be established in court based on evidence extrinsic to that writing.

What is even more interesting is that the Statute of Frauds became a source of inspiration for arguments pertaining to matters not regulated in the Statute itself. And so the Statute was believed to typify a general principle. In a certain case in 1696[104], for instance, which did not regard the transfer of an estate, parol evidence with respect to the testator possessing, in fact, an intention contrary to the contents of a will was dismissed. Lieutenant

[101] An Act for prevention of Frauds and Perjuryes, 1677, 29 Car 2 c 3.

[102] Wigmore, *op. cit.*, p. 351.

[103] *Ibidem*, p. 352.

[104] Falkland v. Bertie, 2 Vern. 333.

Chief Justice Holt even stated that: "*the great uncertainty there is of proof in this case shows how necessary it was to make the statute against frauds and perjuries*". These words perfectly show how the Statute of Frauds was interpreted as a regulation that disallowed the admissibility of extrinsic evidence contrary or additional to a writing.

3. CONCLUSIONS

From the early Anglo-Norman law to the enactment of the Statute of Frauds, the issue of the admissibility of extrinsic evidence to add to, vary or contradict the contents of a writing underwent vast changes. Concepts and notions shifted, sometimes heavily, sometimes only slightly – but to produce very different results. The specificity of common law manifests itself in that because there were, until the Statute of Frauds, almost no codifications of relevant law there were some judgements rendered that, from today's perspective, we would perceive as ahead of their time – and others that may seem to have lagged behind.

This article traces the early beginnings of the notion of the inadmissibility of extrinsic evidence, starting with the general distrust toward writing in Anglo-Norman times. We have examined the advent of the sealed document, how it managed to gain increasingly higher ground and how it became the practice in day-to-day relations. We have also observed how the law changed to reflect the social changes – apart from the judges' eagerness to diminish the juries' role, all other changes of concepts described herein were brought about as a result of changes in approach in the society.

All in all, the legal changes described in the article here took place in the search for more justified and fairer judgements. The very same reasons, interestingly, led to the subsequent easing of the rule in the nineteenth century and in modern law.

The parol evidence rule reached its absolute peak significance along with the Statute of Frauds, encompassing all writings, even in the ordinary written form, and many types of legal relations. It was, then, an absolute rule that had no exceptions, yet only for a short period of time. Quickly, exceptions began to appear, and the rule's early rigidness yielded. Nowadays, after the Law Commission which states that the rule is subject to so many exceptions that it hardly exists anymore, one might say that its importance as an absolute rule is purely historical. This is undoubtedly so, but in terms of historical importance it is essential, as the history of the rule's emergence and development shows very well, on the one hand, how total admissibility of extrinsic evidence led to judgements that were simply unfair but,

on the other hand, how the absolutely stringent approach to the rule after it had emerged led to results that were equally unfair.

* * *

The emergence of the parol evidence rule in english law.

Summary: The article discusses the historical development of the parol evidence rule in the English common law from the Anglo-Norman law to the enactment of the Statute of Frauds in 1677. A feature of early English law was the general admissibility of extrinsic evidence contradicting, supplementing or varying the contents of a document. Documents were generally distrusted by a mostly illiterate populace, and there was a common belief that a legal act essentially happened beyond the writing – thus making the writing only, at best, evidential. The needs of commercial practice and the shifting beliefs of a growingly literate society led, in the fifteenth and sixteenth century, to a general conviction that writing encompassed the very essence of a transaction and that a transaction, if written in a document, essentially consisted of the document. This, together with a distrust for juries that were prone to rendering judgements as contradictory to the contents of a document, influenced English judges to form a principle of inadmissibility of extrinsic evidence – the parol evidence rule. Subsequently, the enactment of the Statute of Frauds that required certain transactions to be done in writing was commonly interpreted by English lawyers as statutory acknowledgement and confirmation of the parol evidence rule.

Key words: Common law, history of common law, civil procedure, evidences, history of law.

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

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"Utopia" by Thomas More – the political and legal system of Utopia as an answer to the "theologico-political problem".

Streszczenie

Artykuł stanowi próbę interpretacji skonstruowanego przez Tomasza Morusa systemu polityczno-prawnego fikcyjnej wyspy Utopii w kontekście wyzwania jakie dla myśli politycznej nowożytnej Europy stanowił tzw. „problem teologiczno-polityczny". Praca ma na celu wskazanie podstaw na jakich oparł się Morus przy próbie rozwiązania owego problemu (zarówno w jego wymiarze „publicznym", jak i „prywatnym"), sposób konstrukcji stworzonego ustroju państwowego, jak i jego ostateczny cel. Artykuł wskazuje także prawno-polityczne implikacje zastosowanych rozwiązań dla funkcjonowania człowieka w ustroju rządzonym przez niezmienne zasady moralności i cnoty. Kładzie także nacisk na przekształcenie życia politycznego jakie za sprawą swoich założeń dotyczących natury człowieka, jego dążeń, jak i wzajemnych relacji z państwem i społeczeństwem dokonuje w swojej koncepcji ustroju idealnego Morus.

Słowa kluczowe: Thomas Moore, Utopia, historia prawa, common law, historia myśli politycznej i prawnej.

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1. Introduction

This article presents an interpretation of the political and legal system of the fictional island of Utopia as constructed by Thomas More in the context of a challenge posed to the political thought of early-modern Europe by the "theologico-political problem". The aim of the article is to show the foundations on which More based his attempt to solve the aforementioned problem as well as the means of constructing the political and legal system of Utopia and its ultimate purpose. It must be mentioned that throughout the ages the meaning of "Utopia" was interpreted in numerous ways. Prof. Russel Ames enumerated fourteen different interpretations of More's work[1], among which there are examples so diverse as: a fantastic refuge from an unpleasant reality (e.g. Prof. Szacki classified it as an escapist place-utopia[2]), an early blueprint for English imperialism, or a socialist critique of a newly-born capitalism[3]. Naturally, an interpretation of the legal and political system as proposed by More cannot be and is not detached from my opinion concerning the axiological convictions of More himself. Thus, although the aim of the article is to show the comprehensive character of the solutions More laid down, it is necessary to acknowledge that the starting point of my argument is another interpretation of "Utopia's" meaning as such that can be added to the list of Prof. Ames. What this article attempts to prove is that "Utopia" is essentially an effort to close the gap between the demands issued by the secular government on the one hand and the moral precepts on the other. There are dimensions that are often incompatible with one another and which create uncertainty concerning the proper conduct of an individual who has to manoeuvre between the two modes of authority and the two modes of valuable existence which follow. The merger of two separated realms comes at the price of a political life and a model of active citizenship that has to be eradicated in order to assure the stability of the state's organism.

2. The "theologico-political problem" and proposals for its solution

[1] R. Ames, *Citizen Thomas More and His Utopia,* Princeton University Press, 1949, p. 4., as cited in L. Gallagher, *More's Utopia and Its Critics,* Scott, Foresman and Company, Chicago 1963, p. 136.

[2] J. Szacki, *Spotkania z utopią [Encounters with utopia],* Wydawnictwo Sic!, Warszawa 2000, p. 56.

[3] L. Gallagher, *More's Utopia…*, op. cit., p. 136.

2.1 Nature of the problem

In order to grasp the "theologico-political problem" (a term coined by Pierre Manent in *Intellectual History of Liberalism*[4]), it is necessary to return to the original structure of the Greek concept of *polis*, of which Montesquieu wrote: "*Most ancient people lived under governments that had virtue for their principle. When this existed in its full vigor they performed actions unknown in our time and which astound our petty souls. Their education had another advantage over ours: it was never contradicted. In the last year of his life Epaminondas said, heard, saw, did the same things as he had done at the age when he had begun his education. Today we receive three educations which differ or are even in conflict: that from our parents, that from our teachers, and that from the world. What the last one tells us reverses all of the ideas received during the first. In part this stems from the contrast that exists [in our society] between the obligations of religion and of the actual world. Such a contradiction was unknown to the ancients"*[5]. In an ancient *polis*, religion, morality, politics and virtue were merged with one another (which, of course, was but a projection of the commonly shared images of ancient Greece, not a historically accurate description of the *poleis* – with their own share of internal strife, instability and vagueness concerning the real degree of political participation[6]). Virtuous and moral was that what served the well-being of the commonwealth. The fall of the Greek city-states and their replacement by one, enormously large political form of the empire led to a dismantling of this unity[7]. People ceased to identify themselves with the

[4] See P. Manent, *Intelektualna historia liberalizmu [Intellectual History of Liberalism]*, pp. 14-16, Arcana, Kraków, 1994. In order to ensure the clarity of the argument and not to get involved in protracted terminological disputes in this article, the "theologico-political problem" is referred to only in the strict sense as employed by P. Manent in the above-cited book. Manent divides this notion into two parts – first is the role that the Church had to perform after the fall of the Roman Empire; the role of a cultural, social and political centre storing the ancient culture and creating a certain amalgam of secular and ecclesiastical functions. The second part, which is more important in the context of this article, is what Manent calls the "structural problem", which has been described below – see footnote no. 13.

[5] Montesque, *O duchu praw[The Spirit of the Laws],* Altaya, De Agostini, Warszawa 2002, p. 48, as cited in: P. Manent *Przemiany rzeczy publicznej. Od Aten do całej ludzkości [Metamorphoses of the City: On the Western Dynamic]*, Europejskie Centrum Solidarności, Gdańsk 2014, p. 304.

[6] See, for example, *stásis* within classical Athens : B. Bravo, M, Węcowski, E. Wipszycka, A. Wolicki, *Historia starożytnych Greków t. II [History of Ancient Greeks v. II],* Wydawnictwo Uniwersytetu Warszawskiego, Warszawa 2009, pp. 216-217. As to the degree of political participation: Ibidem, pp. 442-470.

[7] On the changes resulting from the collapse of the Greek *poleis* written recently, see L. Siedentop, *Inventing the Individual : The Origins of Western Liberalism*, Penguin Books, London 2015.

authority, whose centre was now located in the remote Rome. The *poleis,* although their formal political and administrative structure often remained untouched, were now dependent on the goodwill of the *Imperium Romanum*, which now had *patrocinium orbi Graeci* and which was the ultimate judge in case of any internal Greek strife[8]. Such a development led to a shift in philosophical enquiries. An exemplary expression of this shift was the "discovery of the individual", which encouraged people to focus on their inner life[9]. Christianity, which enhanced the meaning of the soul and the conscience, was based on a similar principle. It can be stated that the Christian experience was thoroughly apolitical in its original form[10]; apolitical in the sense prescribed by the ancient Greeks and Aristotle himself, namely that it did not concern itself with matters of authority over the commonwealth, or it did not ponder the question of self-government in the public sphere. This fracture, this dualism, was the cause of a protracted conflict that lasted for the entirety of the Middle Ages – a conflict between, on the one hand, the ecclesiastical authority, which after being set free and sanctioned by the Roman Empire began to claim that the moral dimension of people's lives ought to have primacy over ordinary existence as represented by secular authority[11], and, on the other hand, the secular authority itself which was largely based on the concept of the autocracy drawn from the very same Roman Empire. Thus there existed two different sources of authority, which led to the emergence of a political or "structural" dimension of the "theologico-political problem"[12].

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[8] B. Bravo, E. Wipszycka, *Historia starożytnych Greków t. III [History of the Ancient Greeks],* Wydawnictwo Naukowe PWN, Warszawa 1992, pp. 114-115.

[9] G. Reale, *Historia filozofii starożytnej t. III [History of the Ancient Philosophy v. III],* Redakcja Wydawnictw Katolickiego Uniwersytetu Lubelskiego, Lublin 1999, pp. 23-27. The described changes had begun after the conquest of Greece by Alexander the Great and developed throughout subsequent centuries and under a new, i.e. Roman, government. That is not to say that the political life, as such, ceased to exist within the *poleis* but rather that politics was gradually losing its importance up to the point when the institutions of the Greek city-states became but a part of the Roman "state machinery". B. Bravo, E. Wipszycka, *Historia starożytnych…,* op. cit., pp. 429-434.

[10] P. Manent, *Przemiany…*, op. cit., p. 214.

[11] C. Morris, *Monarchia papieska – Dzieje Kościoła zachodniego w latach 1050-1250 [The Papal Monarchy: The Western Church from 1050 to 1250]*, Wydawnictwo Marek Derewiecki, Kęty 2016, p. 194.

[12] As Manent puts it: "*The definition that the Church applies to itself is contradictory. On the one hand, the good that it brings – salvation – is not from this world. "This world", the world of the emperor, is not what the Church is interested in. On the other hand, the Church was created by God Himself and His Son in order to lead people to salvation, and it is the only entity capable of doing so. Thus the Church has a "right to inspect", or rather a "duty to inspect" everything that might endanger this salvation. […] The Church has the "duty to inspect", potentially, every single action of man. Among a human's actions these are the most important, and entail the most serious consequences, which are performed by the rulers. Therefore, the Church, because of the very reason of its existence, ought to watch out, with the greatest care, so that the rulers would not issue commands that would force subjects to deeds which could threaten their salvation, so that the rulers would not give them the*

But this problem also had a "personal" dimension[13] – for there was no obvious answer to the question as to what kind of human life was the most valuable (*vide* the traditional outcome of Saint Augustine's thought or the ancient ideal of an active citizen). The "theologico-political problem" lasted, as was mentioned before, for the entirety of the Middle Ages and was clearly signalled by prolonged disputes over investiture as well as legal quarrels concerning the interpretation of Roman law (mainly the *Digesta*[14]).

2.2 Possible solutions

The mere existence of the "theologico-political problem" gave birth to a wide variety of intellectual pursuits that would render its solving possible[15]. This Gordian knot was eventually cut by the political and legal thought of the Renaissance (although the patterns had already been there thanks to mediaeval philosophers and jurists). As J.C. Davis points out, at the beginning of the 16th century there appeared a thinker who created a solution to the "structural" part of the "theologico-political problem"[16]. This was Niccolò Machiavelli, who placed the reason of the state, and therefore the absolute primacy of the secular authority, over Christian morality and the ecclesiastical authority that followed. Machiavelli puts his emphasis on the constant struggle between the *virtú* of the prince and the circumstances that he has to face – the *fortuna*[17]. What is essential is that the *virtú* had no single, clearly defined substance (unlike

"freedom" of committing them. In this way the Church – logically, and not as a result of historical circumstances - had to claim the highest authority, "plenitude potestatis". The definition of "potestas" might have been changing substantially, especially depending on whether it was perceived of as "directa" or "indirecta", but the political consequences of claiming this authority remained, in fact, the same.[translation : M.W.]" P. Manent, *Intelektualna…*, op. cit., p. 16.

[13] As highlighted both in footnotes nos. 5 and 12, Manent focused his attention on the political or public side of the problem he was analysing. This problem though, also entailed personal or moral implications. That is why I have broadened the definition of Manent's "theologico-political problem" and included its "personal" dimension in the following analysis.

[14] See, for example, the opening chapters of the first volume of Quentin Skinner's *The Foundations of Modern Political Thought,* Cambridge 1978, or the chapter *"Law"* in *The Cambridge History of Political Thought 1450-1700*, Cambridge 1991, edited by J. H. Burns.

[15] P. Manent, *Intelektualna…,* op. cit., p. 14.

[16] J.C. Davis, *Utopia & the ideal society : A Study of English Utopian Writing 1516-1700,* Cambridge University Press, p. 43.

[17] The analysis concerning *virtú* and *fortuna* is based on a magisterial treatment of the problem done by J. G. Pocock in *The Machiavellian Moment – Florentine Political Thought and the Atlantic Republican Tradition,* Princeton 1975. For a clarification of the terms employed here, see the next footnote.

Christian morality) but was ever-changing according to the circumstances, i.e. according to the aforementioned *fortuna*[18]. Therefore, in Machiavelli's thought the only principle that rules the political world is the unceasing motion of human things[19], which *ipso facto* meant that the ancient ideal of an immutable, perfect polity had to be rejected. As Manent puts it: "*Instead of looking upward, to the imaginary republic, or principality whose rest makes it so pleasant to contemplate, one has to look downward, in any case to focus on the movement itself of human things by resisting the temptation of the ideal, which is the temptation to rest. What in the end is Machiavelli doing in proposing what he calls 'the Roman order' for us to imitate? He sets up motion itself – the possibility and necessity of motion – as the authority. Paradoxically – contrary to the opinion of 'all authors' - motion itself is the norm*"[20]. By relieving the prince from the bondages of morality and allowing him to do what is necessary to maintain his realm, Machiavelli gives his own answer to the "structural problem" – his subjects have no choice but to fulfil the prince's will, for he will not hesitate and will do what is necessary, and no Christian authority will stop him. The Church's preoccupation with people's salvation is irrelevant in this analysis. This is Machiavelli's answer to the first part of "the theologico-political problem", and because of the starting point of his argument, which is the prince himself, he does not give us an answer to the second part which concerns the value of an ordinary person's commitment to the public life. Machiavelli's thought is widely known and has been commented on. Strikingly enough though, More's "Utopia" gives us an answer to the very same problem that bothered the famous Florentine. More sees and explicitly gives voice (in

[18] The Machiavellian *virtú* and the virtue that More puts an emphasis on are two different things. More adopts the Greek tradition which: "*assumes that the purpose of civic life is not 'glory' (which it dismisses as irrelevant approval of non-experts) but rather 'happiness' (eudaimonia), the fulfilment of our rational nature through contemplation".* E. Nelson, *The problem of the prince*, [in:] J. Hankins [edit.], *The Cambridge Companion to Renaissance Philosophy,* Cambridge University Press, Cambridge 2007, p. 330. If this is so then More's virtue is objective in the sense that the human agent is capable of acquiring knowledge of the moral rules and standards that oblige him/her and which are immutable and constant (and therefore it is possible to create a state apparatus that can ensure the existence of virtue). It is virtuous to conduct as objective justice commands, regardless of the circumstances (*fortuna*). Machiavelli, on the other hand, endorses the view that: "*the imperative of rulers, whether they are princes or republican magistrates, is to maintain the peace of the city at home and maximize their share of glory abroad. If these are the highest civic values, then justice has no important place in political theory. It is the ruler's prerogative to decide when to 'imitate beasts', and, no matter his degree of wickedness or immorality, he is to be excused so long as the twin goals of peace and greatness are being achieved.* Ibidem, p. 333. *Virtú* then is not knowledge about impartial moral standards and behaving accordingly to them but the ability to act, the ability to face potentially dangerous circumstances (*fortuna)* which are a result of the seizing of the opportunities given by the Roman *vita actica*, i.e. by the freedom of action and will.

[19] N. Machiavelli, *Książe [The Prince]*, Vesper, Poznań 2008, p. 60.

[20] P. Manent, *Przemiany…*, op. cit., pp. 294-295.

Book I of "Utopia") to his awareness of the existence of a gap between the thoughts of a philosopher, scholar and moral person and the actions of secular authorities. Book I is essentially an entire dispute concerned with the question whether or not morality (presumably Christian) should be a guideline to the authority's policy and whether or not a philosopher can and should devote him or herself to improvement of the authority. Obviously, More's answer is affirmative[21]. More, just like Machiavelli, sees the very same problem that torments society, but from a reverted perspective. He looks at it from the perspective of Christian morality, the highest precept of Christianity which is a constant search for God, a unity with God and God's wisdom, unlike Machiavelli who perceived it in the light of the practical mechanisms of authority and constraints concerning the issuing of decisions. As opposed to Machiavelli, More will look for solutions to the problem not in the struggle between the *virtú* of the prince and the *fortuna* but in a carefully designed social and political system. Virtue will not be the means of surmounting the *fortuna* but the aim and, in fact, the "sovereign" of the whole polity. While Machiavelli's aim is to make political science operative again, to free political actions from the constraints of moral principles and from the "competition of authorities", to show that *virtú* has to change according to the circumstances, the aim of More's aim is to achieve perfect unity between the human pursuance of God and the outer political and social conditions of human life. What Machiavelli so drastically separates, More wants to combine into one, harmonious entity. By doing so he does not only make a proposition as to how to solve the first part of "the theologico-political problem" but how to do the same with its second part as well.

3. Aim of the political and legal system of Utopia

3.1. Placing "Utopia" in 16th-century humanist thought

The assumed aim of Utopia's regime was interpreted in numerous ways (and it is not the aim of the article to analyse all of them). This is naturally the aftermath of the form of the treaty as well as at times the ironic style of reasoning that was adopted by More. It is beyond a doubt though that the treaty fits into the intellectual stream that is now called "*transalpine*

[21] See Q. Skinner, *The Foundations…,* op. cit., pp. 217-218, also in the context of More's irony.

humanism"[22], which in itself bears a close resemblance to the "*original*" humanism. Thus we might encounter typical humanist assumptions such as: the conviction of the necessary presence of virtue (*virtus*) in the public life, the essential role that is to be played by constant education, and the upbringing of members of society or merging the classical concept of *vir humanus* with the Christian belief that human beings are formed in close resemblance to God (*imago dei)*[23]. Though, as Quentin Skinner highlights, "Utopia" is not merely a typical representation of a genre of humanist treaties concerned with a virtuous life[24]. Indeed, it takes on typical humanist premises but uses them in an innovative manner. More, according to Skinner, rejects the hypocrisy of the humanists who assigned true nobility to men of virtue while at the same time safeguarded themselves from the subversive implications of such a statement by suggesting that true virtue can mostly be found among the "real" nobility, i.e. those who possess wealth and pedigree[25]. More claims that to allow such a differentiation of people within the society is to distort the very sense of virtue, and to maintain the worst and most dangerous sin for the functioning of an individual and of a society as a whole - pride. Having done this analysis, More goes further and creates a political and legal system whose aim is to ensure social equality, to remove the sin of pride and to enable the virtue of ordinary people to flourish. As pointed out by Skinner, the most important task set for the humanists was to discover the root causes of injustice. According to him, though, "*what is unique about More's Utopia is simply that he follows out the implications of this discovery* [i.e. – that evils are caused by the misuse of private property] *with a rigour unmatched by any of his contemporaries*"[26]. What is lacking in this interpretation is that it ignores the price that has to be paid for such a radical equalisation of people. Likewise, the emphasis that Skinner puts on the social aspect of More's inquiries seems to overshadow the explicitly expressed aim of the whole political

[22] As it is done in *The Cambridge History of Political Thought 1450-1700*, see also Q. Skinner, *The Foundations…*, where the term being used is "*northern humanism".*

[23] See *The Cambridge History of Political Thought,* 1991, pp. 102-103.

[24]Q. Skinner, *The Foundations…,* op. cit., p. 257. What follows is based on the chapter titled *The humanist critique of humanism*, in Q. Skinner, *The Foundations…,* op. cit., pp. 255-262.

[25] It should be added though, that such a conviction was not shared exclusively by the humanists of the 16th century but had its own, long historical background based on the cultural heritage of chivalry and nobility, which referred to the Roman *virtutes* and Christian cardinal virtues. See K.F. Werner, *Narodziny szlachty – Kształtowanie się elit politycznych w Europie [The Birth of the Nobility – Shaping of the Political Elites in Europe],* Wydawnictwo Marek Derewiecki, Kęty 2015, p. 550.

[26]Ibidem, p. 262.

and legal structure of Utopia – the aim whose fulfilment answers the questions posed by "the theologico-political problem".

3.2. Specific aim of the political and legal system of Utopia and More's view on human nature

What is characteristic of the political and legal polity constructed by More is its absolute subordination to a concrete and explicitly expressed aim[27]. We thus read: "*The magistrates never engage the people in unnecessary labour, since the chief end of the constitution is to regulate labour by the necessities of the public, and to allow the people as much time as is necessary for improvement of their minds, in which they think the happiness of life consists"*[28] and "*But, of all pleasures, they esteem those to be most valuable that lie in the mind, the chief of which arise out of true virtue and the witness of a good conscience"*[29]. Thus the aim of Utopians is to get to know the objective truth, to perfect their own personalities, and to take an unbound journey towards God (and it is in this dimension where the concepts of *vir humanus* and *imago dei* are combined), and the aim of their political and legal system is to provide them with appropriate conditions to do so. This manner of formulating the ultimate goal of Utopians as well as the necessary commitment of the "state apparatus" in order to achieve it points to the fundamental axioms concerning human nature itself from which More begins his analysis. The first axiom is the presupposition that human nature is intrinsically corrupted, that it always leans toward wickedness, that it is poisoned by original sin and thus is always deviating from the "right path" (these assumptions are very similar to those made by Saint Augustine[30]). The second assumption, perhaps the more daring one, can be described by a reference to the words of an English writer, Gilbert Chesterton, who wrote: *"And the weakness of all Utopias is this, that they take the greatest difficulty of man and assume it to be overcome, and then give an elaborate account of the overcoming of the smaller ones. They*

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[27] *The Cambridge History of Renaissance Philosophy,* edited by C. B. Schmitt and Q. Skinner, Cambridge University Press, Cambridge 1991, p. 448.

[28] T. More, *Utopia*, Wydawnictwo Daimonion, Lublin 1993, p. 73. All of the translations of Utopia's fragments cited from the Polish edition are based on the English Cassell & Co. Edition from 1901 as it is available in the public domain (it can be, for example, downloaded for free from www.amazon.com).

[29] Ibidem, p. 95.

[30] *The Cambridge History of Political Thought …*, op. cit., p. 105.

first assume that no man will want more than his share, and then are very ingenious in explaining whether his share will be delivered by motor-car or balloon"[31]. Thomas More does not make such an assumption. He acknowledges the impossibility of overcoming human nature but tries to show that despite its corruption it can be, to a certain degree, controlled from the outside, that it can be – with the help of the carrot-and-stick of the state apparatus, of social engineering, of rigorous education – coerced to follow the "right path", even more, that the principles can be inculcated in people so thoroughly that they will consider them to be their own and that they will willingly protect them[32]. It is in this dimension that the novelty but also the radicalism of More's proposition can clearly be seen, for he is not putting emphasis on perfecting the virtue of the princes (as the whole "*mirror-for-princes"* genre used to do) but enhances the necessity of its betterment in all people. Basing himself on these two axiomatic pillars, More created a very consistent vision of how the state and society should be organised in order to allow humans to look for God, wisdom and virtue. By doing so he gave his own proposition of solving the "theologico-political problem" as a whole.

4. Methods of achieving the assumed aim

4.1. Motionless world of non-politics

In the first place, by following the apolitical nature of original Christianity and having in mind the threats posed by social conflicts, More utterly eradicated political dispute from Utopia. In a typically humanist fashion he considered the Aristotelian concept of a citizen (and human nature – *zoon politikon*) to be destructive to society as a whole[33]. The political dispute concerning the way in which society ought to rule itself, what path it should choose, the political dispute based on an ever-lasting conflict of values, on the working out an acceptable compromise for the good of the commonwealth – such a dispute is eliminated from More's

[31] As cited by W. H. G. Armytage in *Yesterday's Tomorrows. A historical Survey of Future Societies,* London 1968, p. 113., which is cited by J. Szacki in *Spotkania …*, pp. 175-176.

[32] For this, see, *The Cambridge History of Political Thought* …, p. 335.

[33] Ibidem, p. 449.

world. As Prof. Szacki wrote, and what can be to a certain degree applied to the system constructed by More: "[…] *utopias were usually worlds frigthfully ordered, built – as Dostoyevsky used to call it – on the basis of a multiplication table. The more details they had, the more clear it became that everyone has their distinctly defined place – often a place which cannot be changed without punishment. Since the system is perfect, every change has to be for worse, it has to be a return to pre-utopian chaos, to the 'rule of the men', with which Orwell's animals were intimidated. It is interesting that in utopia the aspiration for a change is never forecast. Its inhabitants simply do not wish for any changes, they do not wish for anything that does not belong to the fixed ritual. By achieving happiness they make themselves like ants. Free will has no use for them anymore"*[34]. The above interpretation can only partially be applied to More's Utopia, for in his system at a political and social level people truly do not wish for any changes. It does not follow though, that their free will is to be abandoned. On the contrary, they will have to use their will and their reason to achieve true virtue (and if they fall into wickedness they will be punished – as can be seen on the example of slavery in Utopia). Motion then does take place, i.e. within their minds. To return to the system though, the chief principle of Utopia's polity is a lack of motion and stability, and in that sense it is an ideal regime as conceived by the ancients. How does More achieve such a motionless state of things, how does he remove from society any sign of a political dispute? He does so by, on the one hand, eliminating every possible focal point and source of potential conflict and, on the other hand, by indicating that such a political and legal system was given to the Utopians, it was "imposed" on them from the outside. Let us look into both of these aspects.

4.2 Potential sources of the conflicts More is eradicating

4.2.1 Material inequalities

In the first place, the source of the most violent conflicts is private property. This aspect of More's concept was examined most thoroughly (as we have seen from the above-mentioned interpretation by Q. Skinner[35]). Private property is to be entirely liquidated which,

[34] J. Szacki, *Spotkania...*, op. cit., p. 179. The translation is mine [M.W.].

[35] See footnotes nos. 25 and 27.

thanks to the solidary work of each and every (apart from the tiny group of magistrates and clergymen) member of society, will not bring about public poverty. It is also because modesty and ambivalence toward material values are inculcated in Utopians from their infancy, that their society not only can sate their own material needs but also enables them to produce a surplus that can subsequently be exported abroad. Everyone is taught a distinct craft while at the same time taking part in the production of food. Therefore, everyone contributes to the production of goods by society[36]. Thanks to this the largest threat to the stability of society is ceases to exist: "*It is the fear of want that makes any of the whole race of animals either greedy or ravenous; but, besides fear, there is in man a pride that makes him fancy it a particular glory to excel others in pomp and excess; but by the laws of the Utopians, there is no room for this"*[37].

4.2.2. Struggles for power and the imposed character of the polity

Political disputes in the modern, colloquial sense, i.e. as struggles of factions and fractions for power, are reduced to a minimum. This is due to the character of the Utopians' involvement in the functioning of their state, as J.C. Davis puts it: *"In Utopia, however, there is a very important sense in which all men are subjects, none citizens. For citizens in the classical republic participate in order that, in some sense, they may rule themselves and in ruling themselves they may change the very form of the republic, hence the ever-present danger of corruption. In Utopia the form is forever unchanging"*[38]. Utopians do not elect politicians[39] or even their representatives but, as is explicitly expressed in the treaty: *"they choose their magistrate"*[40]. This is so because, as Prof. Szacki wrote, Utopians do not wish for a change and therefore the election of a representative would be futile in the sense that he would

[36] T. More, *Utopia,* op. cit., pp. 67-68.

[37] Ibidem, p. 75.

[38] J.C. Davis, *Utopia…*, op. cit., p. 60.

[39] And it is in that sense that *Utopia* reiterates Plato's ideal of *res publica* and not Aristotle's – see *The Cambridge History of Political Thought…*, op. cit., pp. 123-126.

[40] T. More, *Utopia*, op. cit., p. 66.

not have anything or anyone to represent. In this context, particularly interesting is the following passage of the chapter titled "*Of their magistrates": "These things have been so provided among them that the Prince and the Tranibors may not conspire together to change the government and enslave the people; and therefore when anything of great importance is set on foot, it is sent to the Syphogrants, who, after they have communicated it to the families that belong to their divisions, and have considered it among themselves, make report to the senate"*[41]. It seems then that the political decision is taken at the highest level of the state apparatus and then transferred to the people. A Syphogrant chosen by the people is not entitled to come up with a political initiative, he is not acting as a representative of the people's political will but is merely an intermediary between the decision taken by the "state" and the people. The political motion is not going upwards, the inhabitants are not citizens here, they do not decide about how specific issues should be solved, but it is going downwards – the decision that had previously been taken is communicated to the subjects. The *vita contemplativa* seems to overshadow the *vita activa*[42]. Utopians are not even entitled to talk about political matters, which further enhances how much polity of their state has been given them once and for all. The only thing that is left in the hands of the people is the choice of the magistrate, a member of the administration, a small cog in the great machinery of the state. It is in this place where the strict connection between the lack of a political dispute and the fact of imposing the state's polity by the conqueror of the island and, *de facto*, the founder, Utopus, of the state is being revealed. Utopus conquered the island, endowed its inhabitants with a thoroughly considered polity (he even concerned himself with the blueprints for individual cities[43]), and organised them into a consistent society, but then, in a sense, he vanished: "*Utopus, who conquered it brought the rude and uncivilised inhabitants into such a good government, and to that measure of politeness, that they now far excel all the rest of mankind"*[44]. In that regard, More's "Utopia" is a classical representative of the whole genre it renewed, for: "*If men are perverse and corrupted by the world in which they live, how can they rise above it to achieve a better society? It is a problem most clearly revealed in considering the utopian lawgiver – Utopus,*

[41] Ibidem, p. 67.

[42] *The Cambridge History of Renessaince Philosophy,* op. cit., pp. 449-450.

[43] T. More, *Utopia*, op. cit., p. 65.

[44] Ibidem, p .60.

Solamona, Olphaeus Megaletor, the 'Cromwell' to whom Winstanley appeals and the rest. These lawgiver heroes are presented with an opportunity which they exploit with perfect wisdom, disinterestedness and morality.[45]" If human nature is corrupt, then the only way to create a truly virtuous polity is to lay down immutable rules which cannot be changed from within (because that requires an individual to act, and thus it would put the whole system in danger because of that individual's wicked nature). That is why, regardless of the chief emphasis of a given utopia, we encounter this state of motionlessness[46]. Who rules in Utopia then? Who is the sovereign? Because of human nature there can be no human-dependent centre of true power and authority. No one is entitled to change the fixed order, no one even wants to do so. If one could think of the existence of a sovereign in Utopia it would have to be virtue – which is immutable, treated as the main principle of the entire state and essentially ancient in its roots. Virtue, just as nature, cannot be changed: "*They define virtue thus – that it is living according to Nature, and think that we are made by God for that end; they believe that a man then follows the dictates of Nature when he pursues or avoids things according to the direction of reason"*[47]. Obviously though, virtue itself is unable to inculcate in society the necessary rules of conduct. In order to do this a state apparatus needs to be created which will decide whether or not something is acceptable. It seems then that in that way real power is being transferred to the state, which plays the role of a "conveyor belt" to decisions "right" from the virtue's perspective. Naturally, due to the axiomatic impossibility of change in Utopia, such an apparatus is not "dangerous", it is not emancipating itself. That, though, does not change the fact that in such an intellectual construction we might see the anticipation of Hobbes' Leviathan. More, just as Hobbes, creates an entity which due to its location in a political (and philosophical) system acquires wide power over its subjects and becomes, in a way, separated from the people[48]. This is yet another context in which the novelty of More, as mentioned by

[45] J.C. Davis, *Utopia…,* op.cit., p. 376.

[46] That is why we find, for instance, this fixed "*scientific orthodoxy*" of Campanella's Sun City, where all knowledge is "*complete and frozen*", which creates "*mental uniformity paralleling the physical, environmental uniformity of his city-state*". Ibidem, p. 73. The institutional pattern of government is, at times, virtually omitted in the description of the perfect utopia, for instance, in Francis Bacon's *New Atlantis*, where: *"The government of Bensalem is not explained. We hear only two kings in the distant past, one of them a great ruler nineteen hundred years earlier named Salomon, who prohibited the admission of foreigners to avoid novelties and contamination of manners"* Zagorin, P., *Francis Bacon*, Princeton University Press, Princeton 1998, p. 172.

[47] T. More, *Utopia,* op. cit., p. 89.

[48] It is worth noting that, despite all the powers that Hobbes' Leviathan possessed, it was not entirely and unconditionally omnipotent. Such omnipotence (and at the same a necessity) was prescribed only to God (see L.

Skinner, reveals itself – the way to achieve the assumed aims does not lead exclusively through the virtuous life of an individual, through the just and righteous deeds of princes, but through the coordinated actions of the whole state apparatus[49].

4.2.3. Law of the Utopians and its roots

Another field in which the attempt to eradicate the political dispute from the life of Utopians is clearly visible in the law, which is to be as simple as possible and understood almost intuitively ("*They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws, and, therefore, they think it is much better that every man should plead his own case, and trust it to the judge"*[50]*).* This is a law whose interpretation does not require complicated endeavours – it can be stated that in Utopia the main directive of the statutory interpretation is "clara non sunt interpretanda" – and since the entirety of legislation is based on the dictates of nature/virtue, Utopians have no difficulties in grasping its meaning. This is obviously a result of the commonly recognised rule of virtue. "*Every one of them is skilled in their law; for, as it is a very short study, so the plainest meaning of which words are capable is always the sense of their laws; and they argue thus: all laws are promulgated for this end, that every man may know his duty*"[51]. The law in Utopia is therefore (which makes it so paradoxical) at the same time apolitical (in the sense that it cannot be used in political quarrels), resilient to "creative" interpretation and filled with

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Foisneau, *Omnipotence, Necessity and Sovereignty*, [in:] P. Springborg [edit.], *The Cambridge Companion to Hobbes's Leviathan*, Cambridge University Press, Cambridge 2007, pp. 271-285.), whereas the state had its limits resulting from the rules and reasons on which it had originally been created (for instance, the inalienable natural right of self-preservation of any individual). See G. S. Kavka, *Hobbesian Moral and Political Theory,* Princeton University Press, Princeton 1986, pp. 315-322.

[49] As *The Cambridge History of Renaissance Philosophy* puts it: "*If we ask how the Utopians arrived and this happy state, the answer is that the quality of virtus is alone prized and encouraged under their system of government"*, p. 448. More initiated a whole mode of reasoning which can best be summarised by the following passage: "*For, by the beginning of the sixteenth century, the distinction between good man and good citizen was being broadened into an abyss by the work of writers, of whom Machiavelli was only an extreme example, who emphasized the amoral nature of political activity, or rather that politics was an activity in which men could realise their full humanity as moral agents by civic participation, rather than by conformity to a pre-ordained moral standard. The utopians were engaged in attacking this development. For them, not only were good citizens expected to be good men, but the whole apparatus of the state was to be refined as an instrument primarily devoted to producing men of virtue defined in accordance with a pre-ordained standard of perfection."* J. Davis, *Utopia…*, op. cit., 83.

[50] T. More, *Utopia,* op. cit., p. 109.

[51] Ibidem.

axiological substance (therefore political in the classic, Aristotelian meaning) – by being a pattern of a just and reasonable society organised according to immutable virtue. What is symptomatic of More's approach to the law in Utopia is that he devotes only a brief passage to the important matter of its creation: "[…] *they think that not only all agreements between private persons should be observed, but likewise that all those laws ought to be kept which either a good prince has published in due form, or to which a people that is neither oppressed with tyranny nor circumvented by fraud has consented"*[52]. The law is then either published by a good ruler or accepted by the people. Both of these terms indicate an imitative or declarative character of the "enactment" of the law. There is also a very puzzling and interesting distinction that More introduced in one of his letters that was written during the last years of his life (in the Tower of London). The distinction is between the law enacted by a legally assembled general church council and the law resulting from something that he called the "*common Christian faith*", which can be seen as an equivalent of Utopia's immutable virtue. Such a law is not being simply enacted but rather acknowledged as something obvious, indisputable and forcing Christians to absolute obedience. It was placed above the statutory law and it had stronger legal power than the decisions undertaken by the council[53]. Likewise in Utopia, above every other regulation there stands something that might be called the "common virtue" or "common reason".

4.2.4. Religion, meaning of the world and the gravity of a proper education

Religion in Utopia is yet another matter which More deals with in order to eradicate any potential conflicts. The differences between cults and rituals are accepted as long as there exists the conviction of the existence of God[54], and therefore the conviction that the existence of the world has its purpose and that it is organised on the basis of reason and virtue – which are necessary in order to maintain the stability of society. Characteristically though, no one will be killed for his/her faith that is contrary to the above (or a lack of faith) as long as he/she does not try to publicly preach it – and in this way to undermine the social order. In the field of religion there can also be observed the emphasis that More's Utopians put on a rigorous

[52] Ibidem, pp. 90-91.

[53] T. More, *Pisma więzienne [Prison letters],* W drodze, Poznań 1985, pp. 92-93.

[54] Idem, *Utopia*, op. cit., p. 122.

education, as the children in the Utopian society are taught by clergymen who, in a sense, are raised above the rest of the society, e.g. they are not subject to the common judiciary system. More deals with the potentially subversive effects of such a situation by enhancing the outstanding moral and intellectual level of clergymen, which is additionally combined with their small number. This guarantees that they will not become a threat to society. On the contrary, they are the unifying force of this society. Their task is to inculcate in people (from the very beginning of their lives) rules concerning a virtuous life, its purpose as well as the proper manner of functioning within society: *"The education of youth belongs to the priests, yet they do not take so much care of instructing them in letters, as in forming their minds and manners aright; they use all possible methods to infuse, very early, into the tender and flexile minds of children, such opinions as are both good in themselves and will be useful to their country, for when deep impressions of these things are made at that age, they follow men through the whole course of their lives, and conduce much to preserve the peace of the government, which suffers by nothing more than by vices that rise out of ill opinions"*[55]. Thus the commonwealth is strongly concerned with the state of mind of its inhabitants – it cares for their development and proper behaviour. It is on the moral state of that society that the functioning of the commonwealth depends, and therefore this moral state of society is the commonwealth's greatest concern.

4.2.5. The question of the warrior class

More also took care of the potential problem connected with the existence of a class of soldiers/warriors. In so levelled a society such a category of people would inevitably begin to claim for itself the right to decide on the country's matters as compensation for their commitment to its defence. In Utopia, though, this problem does not exist, for their inhabitants use mercenary forces in their wars, occasionally only (and in a voluntary system) do they use their own people as soldiers. In this way they not only, as More puts it, "*protect the valuable lives of their citizens*"[56], but also nullify the threat of the emergence of a situation known, for example, from the history of ancient Greece – in which the whole social change began as a result

[55] Ibidem, pp. 128-129.

[56] T. More, *Utopia*, op. cit., pp. 112-113.

of a shift in the way of fighting and the creation of hoplites, which led to the democratisation of Greek societies[57].

5. Summary

5.1. The novelty of More's proposition

Such an imagined world surely drew much from similar projects of a perfect state that had been created, for example, by Plato, whose reader and eulogist More surely was[58]. What is innovative though is More's concept of an entanglement between the human being and the polity in which he/she lives. As is rightly emphasised by J.C. Davis, there are diametrical differences in the way Utopians behave while they are in their own land and while they leave it and encounter other nations[59]. In the final chapter of "Utopia", Hythlodeus (who is relating his visit on the island) utters the following phrase: "*In all other places it is visible that, while people talk of a commonwealth, every man only seeks his own wealth; but there, where no man has any property, all men zealously pursue the good of the public, and, indeed, it is no wonder to so see man act so differently*"[60]. What More recognises is the immense role of outer conditions on the formation of an individual and his/her behaviour. Utopians if unbound by their polity and their laws would behave just as "normal" people. In the foreign policy they would be cynical and ruthless, and they would look for gain because that is the natural predisposition of human nature, which has to be so in order to survive. More acknowledges that human nature cannot be changed, but he also believes that by changing the conditions in which it exists it is possible to give it the right direction, tame its impulses and show it the right path. More believed that by getting rid of poverty, by changing the animal-like conditions of human lives it is possible to achieve a higher intellectual and moral level of human development. It

[57] A. Ziółkowski, *Historia powszechna – Starożytność [Ancient History]*, Wydawnictwo Naukowe PWN, Warszawa 2009, p. 385.

[58] *The Cambridge History of Renaissance Philosophy,* op. cit., p. 451.

[59] J.C. Davis, *Utopia…*, op. cit., pp. 54-55.

[60] T. More, *Utopia*, op. cit., pp. 134-135.

is due to this commitment that he became an inspiration for what was to become left-wing political thought, for he highlighted that state and society through their own actions and the way they are organised can contribute to the betterment of human existence. What is important though is that for More this betterment of human material conditions is not an aim in itself but a means of achieving something more – intellectual and religious enquiries, the development of one's personality, the practice of virtue.

5.2 Solution of "the theologico-political problem"

The institutional means as enumerated above combined with permanent control and an emphasis on education as well as social adjustment allowed More to construct a consistent image of a world ruled by virtue. In this world, the "theologico-political problem" in both of the aforementioned senses ceased to exist. This is so due to the fact that in Utopia there no longer are any differences between the standards of morality/faith and the potential demands of the "temporal" authority. The "structural" part is being solved by a reinterpretation of the Greek ideal of human life. The secular dimension of people's lives is being subdued by the orders issued by nature, virtue and reason. This answer also entails the solving of the "personal" part of this problem. It is clear that what gives human life its true meaning is not involvement in political disputes (its nature is not as Aristotle assumed) but a search for a higher good, looking for ways of leaving the Platonic Cave. The price that had to be paid was abandonment of the political dimension of human life, for in More's world people can contribute to an efficient functioning of their commonwealth but they cannot change its form.

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"Utopia" by Thomas More – the political and legal system of Utopia as an answer to the "theologico-political problem".

Summary: This article presents an interpretation of the political and legal system of the fictional island of Utopia as constructed by Thomas More in the context of a challenge posed to the political thought of early-modern Europe by "the theologico-political problem". The aim of the article is to show the foundations on which More based his attempt to solve the aforementioned problem (both in its "public" and "private" dimension) as well as the means of constructing the political and legal system of Utopia

and its ultimate purpose. The article also indicates the implications of human existence in a polity ruled by immutable principles of morality and virtue. It also puts an emphasis on the transformation of the political life that, due to axioms concerning the nature of humans, their desires as well as relations to the state and society, is proposed by More in his concept of an ideal polity.

Key words: Thomas More, Utopia, history of law, common law, history of legal and political thought.

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

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From Roman Immunitas to Merovingian Emunitas - Remarks on the Evolution of Roman Fiscal Concepts in the Germanic Realms.

Streszczenie

Kodeks Teodozjański zawierał liczne prawa mające na celu zapewnienie uprzywilejowanego statusu Kościoła i kleru. Prawa owe były elementem szerszej polityki skierowanej na umocnienie chrześcijańskiego imperium rzymskiego. Zwolnienia fiskalne grały tu znaczną rolę. Po upadku Zachodniego Cesarstwa, *regna* barbaro-rzymskie zachowały rzymskie dziedzictwo prawne i koncepcje prawodawcy oraz właściwego modelu relacji władzy monarszej i duchowieństwa. Utrzymano też w dużej mierze rzymskie rozwiązania skarbowe. Rozwijały się tez nowe idee i instytucje ustrojowe. Immunitety skarbowe Merowingów są tu dobrym przykładem. Królowie z tej dynastii starali sie naśladować wzorce cesarskiej polityki wobec duchownych. Jednak zmienione okoliczności polityczne i gospodarcze sprawiały, że rzymskie instytucje przekształcały się w więzi feudalne.

Słowa kluczowe: Prawo rzymskie, historia prawa średniowiecznego, immunitet, prawo frankijskie, historia średniowiecza, imperium rzymskie.

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1). Roman legal heritage

a). Introduction

When the end of the old order had come and the new Earth was being born in pain - with those words begins a hymn in honour of Saint Benedict of Nursia[1]. The epoch of saints like Benedict was a time of destruction and decay, but it was also the time of innovation and evolution. In this paper, I would like to focus on one aspect of this process, namely on the changes and accommodations of Roman ecclesiastical privileges in fiscal matters as they occurred in the Germanic states of Latin Europe.

The new realms, established on the remains of Roman social structure, had to keep internal coherence and efficient mechanisms of power in the profoundly changed social and economic circumstances. They utilized a number of Roman political and cultural ideas and notions. Still those had to be accommodated, also in the fiscal sphere, to the conditions of the predominantly rural economy and "feudal" mentality of the ruling elite, especially in the Merovingian domains.

No matter how different from late Roman aristocracy, the new elite was Christian almost from the beginning and included prominent churchmen. In the epoch under discussion the Universal Church, which was one of the few institutions which did not cease to continue their existence. In spite of the fall of imperial rule in the West, it functioned as a union of numerous local communities under bishops' power and with the recognition of papal primacy and the communion of faith[2]. In Roman times, the city church with a bishop as its head was the basic

[1] *Liturgia Horarum, (Liturgia Godzin,* Poznań 1996) feast of Saint Benedict of Nursia, Patron of Europe (11th of July), Hymn for the *Officium Lectionis,* the first two verses.

[2] See examples of use in the texts and understanding of the word *ecclesia* collected by H. Leclercq s.v. *Eglise,Dictionnaire de`Archelologie Chretienne et de Liturgie*, Paris, 1907-1953, (hereafter DACL) IV.2, cols. 2220-2238. The catholicity of the Church found its expression in the Roman Canon of the Mass, which is of a very early origin (3rd century?; see e.g. B.Nadolski, s.v. *Kanon Rzymski*, s.v. *Te Igitur* [in:] *Leksykon Liturgii*, Poznań 2006), in the words *pro Ecclesia tua Sancta Catholica, quam adunare, pacificare et custodire digneris toto orbe terrarum* (…); also the Mozarabic liturgy has similar wording: *Ecclesia toto orbe in pace diffusa; per universum orbem in tua pace diffusa*; commemoration of the Pope of Rome is confirmed in the 5th century Milan, in 529 it was recommended by the Council of Vaison, (B. Nadolski, *loc.cit*). See also from the newer works e.g. C. Hovorun, *Evolution of church governance: from the diaspora-model to pentarchy*, IURA ORIENTALIA IX

entity in the canon law. In the Merovingian domains monasteries rose to prominence. Ecclesiastical holdings developed quickly and extensively thanks to numerous donations. For example, already in 314 Emperor Constantine the Great ordered that Bishop of Carthage, Caecilian should receive a substantial sum of 3,000 *folles* from the imperial treasury as a kind of financial support. Similar payments were promised to the churches of Africa[3]. *Patrimonia* of the Church of Rome were scattered across the Mediterranean lands[4]. The network of churches and chapels also developed quickly[5]: as early as the 4th century, Rome boasted over 40 large churches[6]. Donations and foundations continued in the new realms along with missionary work and peregrinations to the shrines of prominent local saints.

The imperial policy towards the Church was conducted, *inter alia*, through legal means, especially enactments of general character. Most of them are known to us thanks to the Theodosian Code, which was designed as a new and comprehensive basis for adjudication and administration. It was intended to prevent applying obsolete legislation, forgeries and laws known only to a limited number of people[7]. Still quite soon after its promulgation, the Western Empire fell into the hands of invaders. Even though the new rulers did not intend to revoke imperial law, the Code had to cope with the changed circumstances.

b). Immunitas ecclesiarum clericorumque

Apart from detailed legislation, law contained statements, which justify particular provisions. They can be seen as declarations of ideas and beliefs about the function of law. Those

(2013), pp. 91-99. Texts of Roman law are quoted after the website The Roman Law Library (droitromain.upmf-grenoble.fr (retrieved: 14.05.2016)) if not stated otherwise.

[3] Euseb. Historia Ecclesiastica 10. 6, also his *Vit. Const*. 4. 28.

[4] See J. Gaudemet, *L'Église dans l'Empire Romain : (IVe-Ve siècles),* Paris 1958, pp. 153- 172; H. Leclercq s.v. *Domaines Ruraux* [w:] DACL, 4.1, cols. 1289-1346; also e.g. R. Finn, *Almsgiving in the Later Roman Empire: Christian Promotion and Practice (313-450)*, Oxford 2006.

[5] See e.g. J. P. Thomas, *Private religious foundations in the Byzantine Empire*, Washington 1987,pp. 8-10.

[6] Optatus, *De schism. Donat*. 2.4 mentions *quadraginta* (...) *basilicas* (Minge *Patrologia Latina (*hereafter: PL), 11. 954).

[7] A. Honore, *Law in the Crisis of Empire,* Oxford 1998, pp. 127-128. See also *Theodosiani libri* XVI, ed. Th. Mommsen, P.M. Kruger, Berlin 1905, vol. I.1: *Prolegomena*, pp. IX-XIII and D. Liebs [in:] A. K. Bowman, et al. (red.), *Cambridge Ancient History*, vol. 12-14, Cambridge, 1970-2001, (hereafter: CAH), v. 14 p. 245.

parts of legislation can be understood as an inspiration and a source of general directives also in the Germanic kingdoms.

For example, in C.Th. 16.5.47 (409 AD) *salus communis* was declared to be synoymous with *utilitas* of the Catolic Church*: Si quis contra ea, quae multipliciter pro salute communi, hoc est pro utilitatibus catholicae sacrosanctae ecclesiae, adversus haereticos et diversi dogmatis sectatores constituta sunt, etiam cum adnotationis nostrae beneficio venire temptaverit, careat impetratis*[8]. Const. Sirm. 13. (419 AD) makes a clear statement that the empire has the *ecclesiasticae defensionis munimen*, which is part of or similar to imperial *humanitas,* which estalibshes the real equity or fairness. The *Novella Maioriani* VI in the *proemium* declares, that the emperor shall reflect on how the state (*res publica*) is conserved and flourishes owing to the laws, the army and the *religionis reverentia*[9]. Subsequently, those three must cooperate to ensure the well-being of the Roman body politic. A concept of *symphonia* is implicitly introduced here. Such ideas are also visible in the *proemium* of Nov. 17 (445 AD) of Theodosius and Valentinian.

It is noticeable that C. Th. 16.2.16 (361 AD)[10] served as a kind of a "general clause" and a directive of interpretation for the proper application of fiscal laws as it states that persons of "great virtue" shall live in "perpetual safety" (*securitas perpetua).* This wording provides a reason for various privileges of the clergy, especially freedom from the *munera*. General justifications of legal policy of Christian emperors are visible in other laws of the epoch. For example, C.Th. 16.5.1 declares, that *privilegia* were granted because of the *contemplatio religionis (scil. ortododoxae)* and they shall be cherished only by *catholicae legis observatories* - followers of the orthodox doctrine[11].

All the constitutions dicussed above provide general interpretative directives and *rationes legum* for particular laws concerning the privileges of the Church and the clergy.

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[8] Cf. the wording in Const. Sirm. 9. (408 Nov. 27): [...] *Utinam quidem ii tantum clericorum nomen induerent, quorum in deteriorem partem relabi vita non possit. Esset laetitia communis et facile pios ritus cultusque divinos veneratio humana sequeretur.* [...] and expressions like *cultus pietatis aeternae*, *sacrosanctae religionis obsequium* employed in the Const. Sirm. 11 (412 AD).

[9] Cf. also the wording of *Nov. Valentiniani* III (439 AD) *proemium*, mentioning *catholica religio servata* in the context of the confirmation and renovation of older laws aimed at the public good.

[10] See in addition C.Th. 16.2.47 (425 AD) *proemium* and sec. 1; also similar wording of Const. Sirm. 6.

[11] Cf. C.Th. 16.5.1 (326 AD), which explains that exceptions can be enjoyed only by the orthodox priests.

Those laws will be shortly characterized in order to provide an outline of the most important part of the "legal environment" of the issues under discussion.

C.Th. 16.2.1 is of rather a detailed character as it provides freedom of the clergy from *nominationes* - appointments to perform curial duties, and *susceptiones*- obligations to act as a tax collector. C.Th. 16.2.2 provides freedom of the clergy from the burdens of public service (*qui clerici appellantur, ab omnibus omnino muneribus excusentur*)[12]. The law allowed arguing in favour of a rather general immunity of the clergy from any public duties.

C.Th. 16.2.10[13]. exempts clergy from taxes and grants freedom from the *munera* and payment of immovable property tax for clerics, their wives, children and servants. It also confirms freedom of the clergy engaged in trade from paying *chrysargyron*[14].

C.Th. 16.2.8 is addressed not to an imperial official, but to the clergy. This is unique in the entire Code[15]. Clerics obtained here an exemption from new taxes, whereby they were not obliged to bear fiscal burdens introduced after the constitution became valid. Moreover, they did not have to provide accommodation for the soldiers and public officials (*hospitalitas*)[16]. In addition, freedom from the payment of *chrysargyron*[17] was confirmed. Also in C. Th. 16.2.15 **(**360 or 359 AD**)**, clerics received an exemption from the *chrysargyron* due from revenues of the petty trade carried on to provide for their families[18].

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[12] See Е. В. Сильвестрова, *Второй Титул Шестнадцатой Книги Кодекса Феодосия*, Вестник православного Свято-Тихоновского гуманитарного университета, 30 (2010), p. 36.

[13] See L. Bove, *Immunita...*, p. 891. and C.Th. 16.2.4.4.and C.Th. 16.2.14 of confirmatory character.

[14] Cf. *Syro-Roman Law Book* (*Fontes Iruis Romani Anteiustiniani*, ed. V. Aragnio-Ruiz *et al*., Firenze 1968,vol. 2. p. 749): *Constantinus ... liberavit* κληρικούς *omni tributo ut neque argentum capitis dent neque* χρυσάργυρον *neque quid eiusmodi*. See also about the proper reading of this law: *Theodosiani libri XVI... op.cit.* vol. II,p. 838, J. Godefroy, *Codex Theodosianus cum perpetuis commentariis,* vol. 6.1, Leipzig 1743, p. 40, About C.Th. 16.2.10: L. Bove L. *Immunita fondiaria di chiese e chierici nel Basso Impero*, Synteleia Vincenzo Arangio-Ruiz. 1964. Vol. 2, pp. 890-891.

[15] Е. В. Сильвестрова, *Второй титул...*,, p. 42.

[16] Cf. Е. В. Сильвестрова, *Второй титул...*,, p. 42.

[17] In 401 AD the C.Th. 16.2.36 ordered that priests who sell food supplies according to law, were free from paying *collatio lustralis*, that is *chrysargyron*, or, as the text of the law has it, *auraria pensio.* Thus the terminology was vague.

[18] Late imperial law tried to prevent the clergy from conducting secular activities (Novel 35 of Theodosius and Valentinian of 425 AD, 7; C. Th. 16.4.24. = C. I. 1.3.17). This corresponded with the Scripture, church canons and papal admonitions.

C.Th. 16.2.9 (349 AD) confirmed the immunities, but introduced an obligation of the sons of the priest to enter the clergy if they were not obliged to enter city councils. Thanks to this law the clergy obtained an exemption from curial duties and the so-called "civil duties" - *civilium functionum*. Those *functiones* seem to be synonymous with *munera, and* they are a wide category, including almost every fiscal duty[19].

C.Th. 16.2.11[20] confirms the prohibition of nominating priests and bishops without possessions to perform curial duties. Moreover, the law stressed that the offspring of the clergy should not be obliged to perform curial duties even if the children are of proper age, but have no adequate financial means. Additionally, an immunity from *munera* was granted to the sons of the clergy until they were under their fathers' power. Additionally, C. Th. 16.2.24 (377 AD) [21] established the immunity of presbyters, deacons, exorcists, lectors and other church servants and lower clergy from the *munera personalia*.

As the Church had become a prominent landholder already in the 4th and 5th century, it is rather obvious that issues of land taxes played an important role. The first testimonies about the general tax exemptions of the church real property have been known to us since the times of Constantine the Great or Constans[22], which is soon after widespread donations had begun. According to the C.Th. 11.1.1, the tax immunity of church estates from the land tax was established in 315. This law stated that the exemptions could be granted only to the property of certain persons of very high social standing, enumerated in the constitution. Officials who granted other exemptions without reason, were to compensate for the loss from their own resources.

C.Th. 16.2.15 **(**360 or 359 AD**)** mentions and confirms the regulation, according to which ecclesiastical land is free from fiscal burdens. Private estates of the clergy did not receive any special immunity[23].

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[19] Cf. L. Neesen, *Die Entwicklung der Leistungen und Ämter (munera et honores) im römischen Kaiserreich des zweiten bis vierten Jahrhunderts*., Historia: Zeitschrift für Alte Geschichte 2 (1981),. pp. 210-216 with extensive references.

[20] See on the proper reading of the text : *Theodosiani libri*... p. 838.

[21] See discussion on the correct reading of the text: J. Godefroy, *Codex Theodosianus...*, pp. 62-63.

[22] Cf. L. Bove, *Immunita*, pp. 886-887 i *passim*.

[23] About the duties mentioned in C.Th. 16.2.15.2: L. Bove, *Immunita*, s. 900-901 and C.Th. 16.2.33.

In the C.Th. 16.2.40 (412 AD) the emperors confirm and justify the duty of "*ecclesiae urbium singularium*" to pay the land tax[24]. The law in clearly declares that the *canonica illatio* is to be paid by the churches. This law can be seen as a testimony to a tendency to establish equal imposition of the land tax in the whole state with no privileged groups or individuals[25].

As for real estate tax, imperial policy seems to be quite strict. However, it is good to remember that lack of permanent and full exemption of the church real estate from the property tax was considered as justified by Ambrosius of Milan[26] and Gregory the Great[27]. The conclusion that the church paid real estate tax is supported indirectly by the contents of C. Th. 11.1.37 (436 AD) as it grants to the Bishop of Afrodisis a privilege to pay the tax in gold, which indicates that no immunity was granted. C.Th. 11.24.6 (415 AD) also allows one to argue that there was no general immunity of the ecclesiastical property[28]. Such a situation demonstrates that neither emperors nor the ecclesiastical circles regarded ecclesiastical privileges as a total exclusion of any obligation towards the state.

That attitude is corroborated by, for example, C.Th. 16.2.40 (412 AD), mentioned above. This law granted immunity to the ecclesiastical immovable property, termed as *praedia usibus caelestium secretorum dicata*[29], which belonged to the *ecclesiae urbium singularum*. They were to be free from *munera sordida* and from taxation except *canonica illatio*.

C.Th. 11.1.33 (424 AD) corroborates the full immunity of the Church in Thessalonica[30]. In the Theodosian Code, the law still seems to be binding only locally. Nonetheless, the author

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[24] This law is also conserved as Const. Sirm. 11; shortened and slightly changed version: C. 1.2.5.

[25] L. Bove, *Immunita*..., p. 894.

[26] Ambrosius, Ep. 22, *C. Auxent*, 33 (PL 16. 1017B): *Si tributum petit, non negamus*. *Agri Ecclesiae solvunt tributum: si agros desiderat imperator, potestatem habet vindicandorum; nemo nostrum intervenit*. *Ibidem,* 35: (PL 16.1018B): *solvimus quae sunt Caesaris Caesari et quae sunt Dei Deo. tributum Caeasaris est, non negatur. Ecclesia Dei est, Caesari utique non debet addici*., also remarks in *Comm. in epist. ad Rom*, 13.1-7 (PL 17.162-164B).

[27] Ep. I.66.: (...) Clericorum siquidem vel aliorum consuetudinem te oportet illibatam servare, eisque annis singulis quae sunt consueta transmittere. Nobis autem de caetero, ne quid transmittere debeas, inhibemus. PL 77.523A (cf. Joannes. Diaconus, Vita Gregorii Magni, 3.24., PL75.144).

[28] L. Bove, *Immunita,* pp. 896-900, see also C.I. 1.3.16.

[29] *Praedia dicata* may signify, if understood in a restrictive manner, only the property with churches and other consecrated buildings in which sacraments (*caelestia secreta)* were to be celebrated or bodies of saints kept (*martyria).*

[30] L. Bove, *Immunita*... p. 895.

of this paper thinks that it could be interpreted as a general law and applied as a basis of extensive and "friendly" interpretation of the privileges established in other imperial enactments[31], However, it is good to remember that such a directive did not allow anyone to act *contra* or *praeter legem* and create new privileges without legal sanction.

In spite of intensive legislative policy towards ensuring the privileged status of the clergy and safeguarding their freedom from burdensome secular duties, it was already in 423 AD that the C.Th. 15.3.6 repealed the exemption from the obligations of financing the maintenance of public roads and bridges[32]. In 441 Valentinian III decided to declare expressly that the obligation to pay taxes is of general character: Nov. 10: *Neque domum divinam neque ecclesiam aut aliquam persona a quolibet munere publico excusandam*. He justified his decision with the requirements of justice and urgent needs of the treasury[33]. However, generally speaking, the privileged status of the clergy and of the church possessions survived the hardships of the 5th century.

2). Barbarian kingdoms and the ecclesiastical immunity - continuation and change

a). Law, taxation and the royal treasury

Roman law as such played important role in the early Middle Ages[34]. After the fall of the Roman rule in the West, "Roman law" came to be understood there as the Theodosian Code and the rules were contained in the so-called *Leges Romanae Barbarorum*. The official collections partially reflected the so-called "vulgar law" or "Germanic Roman law".

[31]See *Ibidem*, p. 895. Many other confirmatory laws have been preserved: C.Th. 16.2.13 (357 AD); C.Th. 11.16.21 and 16.2.30 of 397 AD, C.Th. 16.2.34 (399 AD), C.Th.16.2.38 (407 AD).; C.Th. 16.2.46, (425 AD), see also J. Godefroy, *Codex Theodosianus*..., pp. 43-44.

[32] This was justified by a statement that such a duty does not belong to *munera sordida*, cf. C.1.2.7.

[33] L. Bove, *Immunita*... pp. 901-902. This law was promulgated for the West, cf. C.I. 1.2.11 (445 AD) and J. Gaudemet, *L'Église*... pp. 314 and 179.

[34] Cf. W. E. Brynteson, *Roman Law and Legislation in the Middle Ages*, Speculum, Vol. 41, No. 3 (Jul., 1966), p. 420.

Roman law as it was applied then is characterized as a kind of written customary law, somehow simplified, "vulgarized" and without active legislators[35]. Still, in the early 6th century, the Theodosian Code was used throughout Gaul[36]. Compilations or edicts prepared in the new *regna* did not aim at being a comprehensive and exclusive legislation. Apart from the statements about the importance of the statutory law, it was declared that it was necessary to preserve old customs[37].

One nation of Germanic barbarians (apart from the Vandals) after another tried to copy and emulate the Roman ideal and doctrine of an active state, which legislates according to the precepts of justice and ensures efficient rule of law and equity[38]. King Recceswinth's law calls the king - *artifex legum*, obliged to work towards ensuring *utilitas populi*. He has to protect and establish *utilitas communis omnium civium*[39]. Roman law including Roman fiscal law, provided the new states with examples of developed regulation and with a model of ecclesiastical policy based on mutual support, cooperation and privileged status of the ecclesiastical property and the clergy in the state[40].

Such aims were to be achieved not only thanks to legislative measures undertaken by professional lawyers, but also through strict cooperation with ecclesiastical hierarchy, represented by bishops convened in synods[41].

Was the promulgation of written law only a formality and was the law in the Germanic kingdoms, especially in the Merovingian realm, of overwhelmingly customary character? Obviously, a large amount of law had such a character and was believed to be discovered rather

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[35] See *ibidem*.

[36] T.M. Charles-Edwards [in:] CAH,vol.15, p. 282. Cf. about the value and usefulness of legal knowledge in the realities of barbarian realms: Gregory of Tours, *Historia Francorum* (hereafter: HF). 4.46.

[37] W.E. Brynteson, *Roman Law*... p. 426, Cf. P. Vinogradoff, *Roman Law in Medieval Europe*, Oxford 1909 pp. 1-13, E. Levy, *West Roman Vulgar Law: the Law of property*, Philadelphia 1951, pp. 1-18; M. Cohn, H. U. Kantorowicz, *Romisches Recht im Fruhesten Mittelalter*, ZSS RA, 47 (34) 1913, pp. 13-45.

[38] D. Liebs [in:] CAH, vol. 15, p. 238.

[39] Leges Visigothorum, I, I. 3 (MGH *Leges Nat. Germ*. vol. I/1, Hannover-Leipzig 1902): *tunc primo requirendum est, ut id, quod inducitur, possibile credatur. Novissime ostendendum, si non pro familiari conpendio, sed pro utilitate populi suadetur, ut appareat cum, qui legislator existit, nullo privatim commodo, sed omnium civium utilitati communi motum presidiumque oportune legis inducere*, Roman Law and Legislation... p. 425.

[40] Cf. W. E. Brynteson, *Roman Law*..., pp. 421-422.

[41] See M.E. Moore, *Sacred Kingdom*, Washington D.C. 2011, *passim*.

than created. Still, it is worth noticing[42] that Isidore of Seville knew well that law could be established, not only "discovered"[43]. Isidore had a certain general knowledge about Roman law and about the rules of legislation[44]. He stated, that *lex* is a source of law[45].His writings show that customs were not the unique source of law in the early Middle Ages. In certain situations they could be considered just as an auxiliary source of law[46]. Such a statement is justified by the legislation, diplomas and regal policy in the field of fiscal immunities, where the late Roman policy of ecclesiastical privileges was continued and developed further.

Isidore also noticed that law should be drafted *pro communi utilitate*[47]. This idea reflects statements conserved in the Theodosian Code and Novels about the purpose of legislation in ecclesiastical matters. Additionally, the *Interpretatio* to the *Breviarium*5.12.1 states that *consuetudo* can replace *leges* only as long as this is not against public interest[48]. Custom gains the force of law only if there is no proper legislation or when the interpretation of existing law is not clear[49]. Preservation of the *tranquilitas regni* is synonymous with the enforcement of common utility[50].

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[42] Cf. W. E. Brynteson, *Roman Law*..., p. 423.

[43] *Etymologiae*, 5.5.20: *Factae sunt autem leges ut earum metu humana coercetur audacia, tutaque sit inter inprobos innocentis, et in ipsis improbis [inpiis], formidato supplicio, referentur nocendi facultas.*

[44] W. E. Brynteson, *Roman Law*..., p. 423.

[45] *Etym*. 5.3.1-4.: *Ius generale nomen est, lex autem iuris est species. Ius autem dictum, quia iustum* [est]. *Omne autem ius legibus et moribus constat.* [2] *Lex est constitutio scripta. Mos est vetustate probata consuetudo, sive lex non scripta. Nam lex a legendo vocata, quia scripta est.* [3] *Mos autem longa consuetudo est de moribus tracta tantundem. Consuetudo autem est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex.* (...). The ideas of Isidore are similar to the words of D. 1.3.32, (see W.E. Brynteson, *Roman Law and New Law: the Development of a legal idea*, RIDA 3rd ser. XII (1965, pp. 61-81). Still, it is hard to talk about any "Isidorian theory of legislation" (W. E. Brynteson, *Roman Law* ... p. 423).

[46] W. E. Brynteson, *Roman Law*..., pp. 423- 424.

[47] Etym. 5.21.

[48] W. E. Brynteson, *Roman Law*..., p. 424.

[49] *Ibidem.*

[50] Cf. the *proemium* to the Nov. 114 of Justinian.

A statement of the law of Recceswinth about the statute as a *medicamentum*, and the idea of a monarch as a doctor bears obvious similarities to the concept of *lex salubris* of the Theodosian Code[51]. The statement in the *Leges Visigothorum* I, II. 2: *Lex est emula divinitatis, antestis religionis, fons disciplinarum, artifex iuris, boni mores inveniens adque conponens, gubernaculum civitatis, iustitie nuntia, magistra vite, anima totius corporis popularis*[52] mentions at the same time the *divinitas*, *religio* and *disciplina*, thus stressing the strict cooperation of the royal and church power in the proper government of society and the establishment of the common good.

Consequently, it is not surprising that a kind of imitation of Roman legislation is noticeable. The very titles of Salic and Burgundian *leges barbarorum* were borrowed from the Theodosian Code. Roman lawyers were active in the writing down of Germanic customary law. It is also worth noticing that Childebert II's last edict is attested by Asclepiodotus, who was previously active as a referendary to Guntram. His name suggests that he was of Gallo-Roman descent[53]. The establishment of the Italian Kingdom of the Ostrogoths did not cause changes in the administrative staff or in the legal situation of the Church[54].Certain laws promulgated by the new rulers were intended to apply both to the Romans and the Barbarians. The preface to the Edict of Theodoric, which mentions general validity of *leges* and *ius publicum,* and the Edict of Athalaric are good examples[55]. Similar legislation was prepared in the Burgundian realm[56].

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[51]W.E. Brynteson, *Roman Law*... pp. 424-425 cf. T. M. Charles-Edwards [in:] CAH vol. 15, pp. 265-285 about the Brugundian law, about the *Lex Salica* as a piece of legislation, *ibidem,* pp. 275-278; use of Roman legal terminology to talk about a king as a judge: Remigius of Reims; *Epist. Austras*., no. 1 (MGH, *Epistolae Merowingici et Karolini Aevi*, ed. Gundlach, Berlin 1892, pp. 112 -113): *Dominus meus, repelle de tuo corde tristitiam (...) regnum sagacius gubernare, erectiora sumentes studio sereni tatis consilia. Laetum cor membra conforta; (...), acrius invigilabitis ad salutem : manet vobis regnum administrandi et, Deo auspice, properandi. Populorum caput estis et regimen sustinetis* (...) .

[52] MGH *Leges Nationum Germanicarum*, Hannover, Leipzig 1902, p. 41. Compare this wording with the one of Nov. Just. 105 2.4 *in fine* about the *lex animata*: *Omnibus enim a nobis dictis imperatoris excipiatur fortuna, cui et ipsas deus leges subiecit, legem animatam eum mittens hominibus*:, and W. E. Brynteson*, Roman Law and Legislation*... pp. 425-426.

[53] T. M. Charles-Edwards [in:] CAH 15, p. 270.

[54] L. Duchesne, *Early history of the Christian Church,*. ., tr. C. Jenkins, London 1909-1924, vol. III, p. 450.

[55] T. M. Charles-Edwards, [in:] CAH 15, p. 283.

[56]*Ibidem,* p. 284; *Constitutiones Extravagantes* (MGH Leges Nat. Germ., Hannover 1892, pp. 120-121), XIX (a letter to "all counts"), XXI.11 (*ut omnes comites, tam Burgundionum quam Romanorum*).

The distinction between primary and secondary rules is useful here[57]. The Theodosian Code and the Novels, especially the parts devoted to the public law, were probably seen as a kind of a higher or learned law, especially at the beginning of the new order. Then, it seems to the author of this paper that the kings, as those of the Merovingian dynasty, began to issue their own enactments such as acts granting a new kind of immunity. They fused Roman notions, like *immunitas* and *beneficium* conserved in the Code of 438 with Germanic concepts such as *mundeburgium,* and transformed both of them. This alteration was also adjusted to the needs of contemporary politics based on the strong union of royal houses and bishops. Merovingian model of the so-called "symphony" of Church and State is a case in point here[58].

Declarations of Theodoric the Great or Sigismund of Burgundy[59] about being fair-minded imitators or servants of the Roman Empire can be seen either as a mere rhetoric or a diplomatic lip service to the imperial court. However, Theodoric found it necessary to appear as part of the empire, therefore he deliberately issued an "edict" like a Roman magistrate[60]. Still, the Visigoths were formally independent from the Empire since 466[61], which does not mean that Roman laws, fiscal legislation included, were rejected.

New rulers of the former Roman domain in the West "imitated" the emperors of the East, and in so doing they also tried to emulate their legislative activity. Such a stance is visible not only in the Edict of Theodoric, but also in the politics of immunizing the ecclesiastical land and hierarchs in the Merovingian realm. This practice is quite well known to us thanks to various diplomas and formulas.

Under the Visigoths the tax system of the Roman times remained operational. In Gaul under the rule of the Visigoths, *comites*, who were appointed by the king, were both of Roman and Germanic origin. A kind of discrimination against the Roman population was brought to an end by the *Codex revisus* of Leowigild. Provisions of the Council of 589 allowed Arian

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[57] T. M. Charles-Edwards [in:] CAH v. 15, p. 284.

[58] See M.E. Moore, *Sacred Kingdom*, op.cit., p. 52 ff.

[59] Theodoric: Cass. Var., I.1.3: *Regnum nostrum imitatio vestra est, forma boni propositi, unici exemplar imperii: qui quantum vos sequimur, tantum gentes alias anteimus*. (...).; Sigismund: Avitus de Vienne, Ep. 83, PL 59,285B: *Cumque gentem nostram videamus regere, non aliud nos quam milites vestros credimus ordinari.*

[60] T. M. Charles-Edwards [in:] CAH vol. 15 p. 285.

[61] *Ibidem*.

Church hierarchs to join the Catholic Church and abolish their particular status[62]. Decurions of the city councils played the same role as under Roman rule. The *Breviarium* includes a variety of imperial laws promulgated with a view to preventing decurions from the evasion of their fiscal duties[63]. The privileges of the members of the imperial senate were not included in the *Breviarium*, which is significant when compared with the inclusion of a law granting privileges to the clergy. However, the application of the law in practice, especially forcing the most potent landowners to pay the due tax could be complicated[64].

Under the Merovingian rule, *annona, vestis militaria, aurum coronarium, gleba senatoria* had disappeared, and also units of tax assessment– *capita* and *iuga* - ceased to be used. It seems that in Merovingian domains *curiales* ceased to be authorized and responsible for the collection of land-tax, which was probably collected by representatives of a *comes*[65]. Roman *munera*, at least some of the wide catalogue, known from the Theodosian Code, were replaced by a new duty of providing hosting and upkeep of the travelling king and his officials[66].Yearly tributes from private lands paid by *Romani possessores* to the royal treasury were called *consuetudinariae functiones*[67]. *Tributum* was paid by free royal subjects. It was collected through tax farming carried out by local officials. Such practice could lead to abuses and seeking royal protection, especially through diplomas, which granted immunity or royal *mundeburgium*.

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[62] E.g. M. Jaczynowska *Historia*…,, p. 645-46. About the specific method of tax collection on two levels (*coloni* - latifundists - royal treasury) see W. Goffart, *Barbarians and Romans A.D. 418-584: The Techniques of Accommodation*, Princeton 1980, pp. 78-79, 92, 101.

[63] H.W.G. Liebeschuetz [in:] CAH vol. 15 pp. 207-208, 231-232.

[64] *Ibidem*, p. 232.

[65] HF. 4.2, 5.34, 9.30; H.W.G. Liebeschuetz [in:] CAH,vol. 15 p. 235. HF. 10.7 mentions tax collectors –*exactores*, W. Goffart (*Old and New in Merovingian taxation,* Past & Present 96/1982, p. 3 n. 2) argues that such collectors cannot be identified with the *curiales.*

[66] HF 6.45; 8.42, W. Goffart (*Old and New…)* characterizes this obligation as a conversion of Roman fiscal duties towards the *cursus publicus*, especially when compared with the Nov. Maior. 7.13; 17 (458 AD); *Lex Burgundionum* 38; Cass. Var. 5.14.5,7; 12.15.6-7.Felix Dahn (*Zum merowingischen Finanzrecht* [in:] *Germanistische Abhandlungen zum 70. Geburstag Konrad von Maurers*, Gottingen 1893 p. 345) argued, that at the beginning of the Merovingian rule, the whole Roman tax system stayed unchanged (after W.Goffart, *Old and New*… pp. 4-5; Cf. also his, *Caput and Colonate: Towards a History of Late Roman Taxation* (Phoenix suppl. vols. XII, Toronto 1974, pp. 22-30).

[67] See A.C. Murray, *Immunity, Nobility, and the Edict of Paris*, Speculum, 69⁄1 (January, 1994), p. 20.

It is interesting that even the *Lex Baiuvariorum* in Chapter 1.13 demonstrates a kind of preservation of Roman ideas, at least in ecclesiastical circles, as it regulates peasants' or serfs' duties towards the Church in a manner similar to the Roman *delegatio*[68]. Additionally, a method used to level the amount of taxes called *pearequatio* or *ordinatio* was still in existence[69]. Certain duties could have been a continuation or transformation of Roman *munera sordida* and *angariae*[70]. However, the same law introduces a number of new concepts - *mansus*, denoting arable land area, used in the tax assessment, *riga* - a type of corvée and a special military tax - *hostilicium*.

b). Immunitas in the new realms

According to the *Lex Romana Visigothorum* ecclesiastical property was *res divina*[71]. The *Breviarium* included the constitution C.Th.16.2.2 (= *Breviarium Alarici*, 16.1.1).The *interpretatio* of this law is interesting as it declares that the clergy are to be free from any *munus.* This *munus* is then briefly defined as any *officium* and any *servitus.* This is how the *interpetatio* interpreted the words *ab omnibus omnino muneribus excusentur* of the constitution. The clergy are not to be ordered to perform duties of tax collectors (*exactores, allecti)*. Any violation of this precept was to be considered as a sacrilege[72].The provision of the Breviary is

[68] See W. Goffart, *From Roman Taxation to Mediaeval Seigneurie*: *Three Notes*, Speculum 47 (1972), pp. 390-391.

[69] W. Goffart, *Merovingian Polyptychs: Reflections on Two Recent Publications*, Francia, IX 1982.

[70] B. Guerard, *Polyptyque de l`abbe Irminion*, Paris 1844, 2 vols.; vol. I pp. 793-801; W. Goffart, *From Roman Taxation*… pp. 390-391 and note 202. In the manuscripts of the *Lex Baiuvariorum* the word *angarias* has a gloss added, which shortly defines it as "*vel fuora opera*", therefore, the term meant any type of transport with carts and horses.

[71] *Epitome Gai seu Liber Gai* I [IX]. *De Rebus*: 1. *Omnes itaque res aut nostri iuris sunt, aut diuini, aut publici.* (...) *Diuini iuris sunt ecclesiae, id est, templa Dei, uel ea patrimonia ac substantiae, quae ad ecclesiastica iura pertinent.* (...).

[72] An 8th cent. *Epitome* of the *Brev.. 13.2.2,* prepared in the Frankish state, says: (...) *Virgines, viduae, pupili non debent inter reliquam plebem censeri, sed immunes sunt, et hi, qui se sacrae religionis obsequio dedicaverunt. (Epitome suppl. lat. 215*. ed. G.Haenel, *Lex Romana Visigothorum*, Leipzig 1849, p. 240*).* Canons of the Council of Clichy of 626 or 627, no. 7 and 8 (MGH Concilia Mer. Aevi, p. 198) attempted to reinforce Roman precepts as they stated that: *7. Si iudex cuiuslibet ordinis* [also a fiscal or a private official] *clericum publicis actionibus inclinare presumpserit aut pro quibuslibet causis absque conscientia et permissum episcopi distringere aut calumniis vel iniuriis affici presumpserit, a communione privetur*, (...) 8. *Hi vero, quos puplicus census expectat,*

therefore very general and generous. However, there always existed a possibility to ask for additional favours and acts of royal largesse.

We know about an individual tax exemption granted by Theodoric the Great to certain Arian *antistes* (bishop) named Unscilla and to his church[73]. This exemption seems to reflect the adherence to the so-called principle of personality of law - a Gothic priest and his congregation would have to obtain an individual exemption from taxes, because Roman law did not apply to them[74].

However, in the context of the preface to the *Edictum Theodorici*, which stresses the necessity to respect *leges,* it is much more probable that Unscilla received an exemption of a wider scope than that prescribed by Roman law and obtained royal confirmation of the privileged status of his Church[75]. This was granted as a kind of royal protection similar to the Merovingian *mundeburgium*[76]. Such an opinion is also supported by the fact that in the realm of the Ostrogoths, the Germanic populace was subjected to Roman fiscal order[77].

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sine permissu principis vel iudicis se ad religione sociare non audeant (as this causes a prvileged status). Cf. also Councils of Toledo: 3rd, can. 18; 4th, can. 19, 32 and 47.

[73] Cass. Var. 1.26.2: *Unde quia religiosi studii reverentia commonemur, ut quae dudum ecclesiae viri venerabilis Unscilae antistitis praestitimus, valere in perpetuum censeamus,nunc quoque illustrem magnificentiam tuam duximus admonendam, quatenus superindicticiorum onera titulorum praefata ecclesia in ea summa non sentiat, qua usque a magnifici viri patricii Cassiodori, pura nobis fide et integritate comperti, temporibus est soluta.*

[74] Another act cancelling the tax due from an estate granted by Theodoric as an allotment (*sors*) to an Arian priest is known to us (Cass.Variae 2.17.) Was this privilege actually the diversion of local tax revenues to the priest, whose *sors* therefore comprises the tax revenues from the piece of land? Such an idea bears certain similarity to the Merovingian solutions. However, a much simpler interpretation that just a cancellation of the liability is meant (so M. Innes, *Land, freedom and the making of the medieval West*. Transactions of the Royal Historical Society 16/2006, p. 57) is acceptable.

[75] Cass. Var. 1.26.1 speaks of *beneficium prior* which should not be reduced or annulled. The king is obliged by the *fides.* In the realm of Theodoric the Arian Church was, just like the Catholic one and secular owners, obliged to pay the land tax. The king did not resign from a vast source of income, which was the land tax collected from numerous church estates. Such avpolicy corresponded with the provision of the *Edictum* ensuring the growth of ecclesiastical property (*Ed. Theodorici* 26, cf. C. Th. 5.3 and C.J. 1.3.20 and G. Pfeilschifter, *Der Ostgotenkönig Theoderich der Große und die katholische Kirche*, Münster 1896, pp. 229-231). See also A.H.M. Jones, *Late Roman Empire*, p. 259; Cassiodor mentioned a payment in gold currency (*tributarius solidus, asssis publicus,)*, but gold in pieces is also possible (Cass. Var. 5.39.5; 12.16.3); about the Italian *negociatores* active in the tax collection: Cass.Var. 2.26; 30; 38; 5.35; Ed.Theod. 149.

[76] See still useful work by N.D. Fustel de Coulanges, *Etude sur l'immunite merovingienne*, Paris 1883, p. 51 ff. *Emunitas* became fused with the royal protection or patronage. (Cf. *ibidem*, p. 55).

[77] The royal fiscal grant for Unscilla can be termed as a gift- *Schenkung* (G. Pfeilschifter, *Der Ostgotenkönig...,* p. 230).

The Church presided over by Unscilla received annulment or exemption from certain sums due to be paid as a tax. However, its estates were still burdened with the *superindicta*. As a result, the bishop petitioned Theodoric to grant alleviation of the *superindicta* and ordinary land taxes. The king granted freedom from the *superindictio* due from the estates already possessed by the Church before the benefice was granted. The estates acquired later received no immunity at all[78]. Also, Alaric II granted a kind of similar *immunitas* or, to be more precise, *beneficium,* from a certain number of *capita* to the Church of Arelatum[79].

Such royal enactments of individual character served as a supplementation of general immunities granted by the imperial constitutions of the 4th and 5th centuries. The rather reserved attitude towards granting full exemptions is also noticeable. It can be seen as a kind of continuation of the imperial policy of the final years of the Western empire, when attempts to increase the revenue and prevent decay of public infrastructure were reflected in the legislation.

As the situation in the former Roman Gaul will be discussed now, it should be borne in mind that there were two main components of the Merovingian model of immunity:

a). fiscal immunity - exemption from taxes and a determined fiscal burden. This type of immunity may be understood as a kind of continuation of Roman ideas[80], still with certain modifications. This is the kind of immunity referred to by the 5th Canon of the Orleans Council of 511. This Canon mentions an *immunitas concessa* for the ecclesiastical real property. The funds saved[81] were to be spent on repairs of churches, support of the clergy, the needy

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[78] W. Goffart, *Old and New*… p. 12; Cass. Var. 1.26.2-3. A similar case is mentioned in HF 3.25: (...) *Erat enim regnum cum iustitia regens, sacerdotes venerans, eclesias munerans, pauperes relevans et multa multis beneficia pia ac dulcissima accommodans voluntate. Omne tributo, quod in fisco suo ab eclesiis in Arvernum sitis reddebebatur, clementer indulsit*. Cf. also HF 9.30.and HF 10.7: *In supradicta vero urbe Childeberthus rex omnem tributum tam eclesiis quam monasteriis vel reliquis clericis, (...) larga pietate concessit. Multum enim iam exactores huius tributi expoliati erant, eo quod (...) colligi vix poterat hoc tributum; quod hic, Deo inspirante, ita praecipit emendare, ut, quod super haec fisco debitur, nec exactore damna percuterent nec eclesiae cultorem tarditas de officio aliqua revocaret*.

[79]*Testamentum beati Caesarii*: *Nam absit ut de tua, piissime pontifex, inscientia inculperis; quia, ut supra jam dixi, pietas divina concessit ut per meam humilitatem immunitas Ecclesiae [H]in tot capitibus daretur*..(PL 67.1142B); Sidonius, *Carmina*. 13.20.

[80] A. Callander Murray, *Merovignian Immunity Revisited*, History Compass 8/8 (2010), p. 915.

[81] Those sums were saved thanks to the remissions of taxes known to the Roman fiscal law (*functiones publicae capitatio humana et terrena)*. There were also new tributes: *bannus (heriban), freda, mansiones*, certain compulsory works, toll and market fees (H. Leclercq s.v. *Immunite* DACL, VII.1, 345-346); Cf. also diploma of Dagobert I *(Diplomata*, ed. K. Pertz, pp. 16-17, n. 15: *quicqud exinde fiscus forsitan de eorum hominibus aut de ingenuis aut de servientibus aut in eorum agris commanentibus vel undecumque poterat sperare, ex nostra Indulgentia* (…) *tam nobis in Dei nomine viventibus quam per tempora succedentibus legibus debeant cuncta*

and poor and for the redemption of captives. Additionally, Chlotar II decided that the Church should receive tithes from pastures and arable land[82]. The same monarch granted to the clergy and churches an exemption from *functiones*[83]. Merovingian rulers gradually immunized the clergy from the poll tax. The real estate tax (the land tax) was generally preserved, with many individual privileges, though. An exemption from *onera canonica* was understood as a special kind of *immunitas* or *beneficium*[84]. Merovingian kings granted *villae* and other estates *sicut a fisco nostro fuit possessa*. This phrase meant a donation *cum emunitate*[85].

b). "judicial" immunity, that is an explicit and strict prohibition of the entrance of royal "judges" (*introitus iudicum*)[86], especially counts and their functionaries, into the lands of the beneficiary to adjudicate, collect fines and court fees. This type of immunity first appeared in Merovingian diplomas in the 7th century[87].In a similar manner, the edict of Chlotar II of 614[88] mentions the *emunitas* of the Church and *potentes,* described as an exclusion of royal (public) jurisdiction (*judices publici atque audientia)*.

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proficere", such clauses are typical of the Merovingian diplomas. They were effective cessions of public or regnal rights to the beneficiary. They can be seen as a kind of delegation of public duties together with fiscal revenues.

[82] [*A*]*graria, pascuaria vel decimas porcorum*, Boretius, Cap. I.19., MGH Capitularia Merovingici Aevi, p. 11.

[83] *Ecclesia vel clericis nullam requirant agentes publici* [= *missi regii*] *functionem, qui avi vel genitoris* [*aut germani*] *nostri immunitatem meruerunt*.(MGH *Capitularia* vol. I,, ed. A. Boretius, Hannover 1893, p.19); Probably *immunity* granted by Chilperic and Chlotar I is meant here (Cf. G. Waitz, *Deutsche Verfassungsgeschichte*, vol. II (1882) p. 279, vol. IV (1885) p. 125; W. Goffart, *Old and New*…pp. 17-18).

[84] B.H. Rosenwein, *Negotiating space : power, restraint, and privileges of immunity in early medieval Europe,* Ithaca N.Y. 1999, p.29.

[85] H. Leclercq s.v. *Immunite*, DACL, VII.1, 335-336.

[86] E.g. Marculfi Formulae 1.14: "*decernemus (...) ut ipsa villa illa antedictus vir ille (...) in integra immunitate absque ullius introitus iudicum de quaslibes causas freta exigendum, perpetualiter habeat concessa*". Diploma of immunity granted for the monastery in Rebais by the chancery of Dagobert I states: *Ut nulli penitus judicium vel culibet hominum licentia sit de rebus praefati monasterii* (...) *aliquod defraudare aut termerario spiritu quicquam exinde sius usibus usurpare* (…) *ut nulla judiciaria potestas nec presens nec succidua ad causas audiendum aut aliquod exactandum ibidem non praesumat ingredi*. (Diplomata, ed. K. Pertz, MGH, n. 15, p. 16-17).The issue if the judicial immunity was always coupled with the fiscal one is discussed (A. Callander, Murray, *Merovignian immunity....* pp. 920-921).

[87] See A. Callander Murray, *Merovignian Immunity...,* p.. 915, who remarks that both privileges had a fiscal character. Apart from the immunity, there were also exemptions from customs.

[88] MGH *Capitularia* vol. I,, p. 22.

Grants of fiscal privileges protected the beneficiaries from abuses of royal officials and guarded an estate from their "unlawful entry". In Merovingian times, special immunity officials appear in the sources: *agens, cissus, iudex*[89].

The statement that a grant of *emunitas* did not create any personal right[90] seems to be unjustified. Violation of this royal privilege was penalized with a fine shared between the royal treasury and the victim[91].This was an innovation and departure from the Roman regulations. Such a solution is very similar to the *compostitio* of Germanic law. Thus, the distinction between "public" and "private" sphere and law became rather blurred here.

Grants of immunity were substantiated by stating that the beneficiary contributes to the general prosperity and public good in a different manner than performing his fiscal duties towards the king[92]. Such justifications are very similar to those found in the Roman legislation, which was described above: the clergy shall be free from *munera* because they have their own *munus* - religious services, which bring valuable benefits to the whole society.

In the Merovingian domains, the institution of *immunitas* (*emunitas*) preserved, at least partially, public character; it constituted a royal grant, an act of royal benevolence. It was an exemption from various duties, especially fiscal ones, towards the king (the person of the monarch was identified with the state)[93].This *immunitas* did not have a general character: it was not addressed to any class of subjects[94].

Therefore, a kind of particularism begun to develop. The scope of an immunity granted in a royal diploma slightly differed from case to case. This way of regulating matters became

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[89] *Iudex* of the immunized land - *iudex privatus* (N.D. Fustel de Coulanges, *Etude...*, p. 62).

[90] Ibidem, , pp. 25, 30, 49-50, 68.

[91] Canon 11 of the Council of Chalon, 639-654 AD, MGH Concilia, p. 210: *Pervenit ad sancta synodo, quod iudicis publici contra veternam consuetudinem per omnes parrochias vel monasteri, quas mos est episcopis circuire, ipsi inlicita praesumptione videantur discurrere, etiam et clericus vel abbatis, ut eis praeparent, invitus adque districtus ante se faciant exhibere, quod omnimodis nec relegione convenit nec canonum permittit auctoritas. Unde omnes unianimiter censuemus sentientis, ut deinceps debeant emendare* (...).

[92] A. C. Murray, *Merovignian Immunity...,* pp. 917-918 argues that the *immunitas* was granted as a kind of remuneration for certain merits of social significance. The ecclesiastical immunities were justified in a similar manner by the Council of Orleans of 511 (*ibidem*). See also his *Immunity, Nobility, and the Edict of Paris,* Speculum, 69/ 1 (January, 1994), pp. 19-20.

[93] See A. C. Murray, *Immunity... passim*. The notions of *res publica* and *res regis* were fused (N.D. Fustel de Coulanges, *Etude...*, p. 25).

[94] *Ibidem...*, p. 24.

important in the further development of the institution. According to the documents, immunities were perpetual, still, in practice, they could be revocable in an arbitrary manner[95]. This may indicate why in the case of Unscilla discussed above royal *fides* is mentioned.

It is worth mentioning here that Gregory of Tours wrote that the royal tax revenue became a kind of "luxury" of the king, a kind of occasional or unsure source of money. This is an exaggeration or a metaphor reflecting problems with the enforcement of fiscal regulations of Roman origin along with the new types of taxes. It may also reflect the spread of territorial immunity. The rulers needed land to reward their allies and followers and to be able to act as protectors and benefactors of the Church. They seem to have acted in such roles not by using monetary payments, but by donating estates and issuing immunity diplomas. What is specific and different from the Roman understanding of the fiscal *immunitas is* that the landowner granted with an immunity kept the tax which he received from the *coloni* or tenants and other people residing or economically active in the domain instead of passing it to the functionaries of the king[96]. This encouraged particularism, decentralization and a certain type of financial autonomy and self-government. In the West, church building was temporarily interrupted by the turmoil and wars of the mid 5th century, but it is significant that it was resumed in the late 5th and 6th centuries. This growth corresponds with the policy of immunization. The decentralization and the development of countryside centres of ecclesiastical territorial power based on grants of the new type of immunity is visible already in the 6th century. We know of Nicetus, Bishop of Trier, who not only possessed his city residence in the town, but also a fortress (a castle) on the Moselle[97]. This stronghold owned by a bishop indicates the arrival of a new era.

3). Conclusion - transition from an ancient empire to the feudal realms

[95] N.D. Fustel de Coulanges, *Etude...*, p. 24.

[96] J. Liebeschuetz [in:] CAH, v. 15, p. 235.

[97] *Ibidem*, p. 209, 229-236; Venantius Fortunatus, *Carmina* 3.12. (MGH *Auctores antiquissimi* 4.1, ed. F. Leo, Berlin 1881, p. 64), Cf.. About the new aims of being a town resident: Cass. Variae 8.31 and J. Liebeschuetz [in:] CAH, v. 15, p. 235, pp. 221-222, 232-233.

The Theodosian Code intended to strengthen the privileged position of the Christian Church in society[98]. Laws addressing ecclesiastical matters create an impression that the emperor drafted the core of their content by himself. However, it is more probable that the initiative and proposals came from the bishops[99]. Imperial law was often negotiated instead of being arbitrarily imposed in a political and intellectual vacuum[100].Such negotiation and preparation of an act or a piece of legislation was present also in the new kingdoms, as it is clearly demonstrated in Merovingian capitularies and diplomas and in the work of Cassiodore. This approach corresponded well with one of the basic political responsibilities of Frankish kings, that is with the settlement of disputes and keeping the *pacem atque disciplinam* in the land. Here support of the clergy was of the utmost importance[101].

The repetition of the law in the Theodosian Collection, which is visible also in the sections devoted to the fiscal privileges of the Church, seems to indicate lack of proper enforcement of the law. Still, it could as well serve as a reminder and confirmation of the previous regulation. Moreover, emperors intended to be seen as supporters of the initiatives that were beneficial to the Commonwealth, although from the juristic point of view, there was no need to issue new regulations. Emperors tended to avoid being seen as neutral and passive rulers. The Code of 438 did not try to eliminate repetitions[102].Such repetitions and corroborations seem to have added strength to and increased the implementation of the law[103]. Tendencies to stress the prominent position of the law and to establish the rule of justice, which emanates from the person of the king as the supreme judge of his realm and protector of the Church, are clearly visible in Germanic states. The new rulers and their officials were under the influence

[98] A. Honore, *Law...* p. 124, Although the law in strong words condemned "old superstition" and declared privileges of pagan priests null and void (C.Th. 16.10.14), the Code of 438 was not going to depart from the intellectual heritage of the Roman jurists, also in the sphere of tax exemptions (Cf. A. Honore, *Law...*, pp. 124-125). What was useful was to be preserved and adapted. Can this legislation be considered as a programme of reform? See B. Sirks, *Reform and Legislation in the Roman Empire* https://mefra.revues.org/1871?lang=fr#bodyftn1, (retrieved: 3.05.2016).

[99] A. Honore, *Law*..., s. 133, Sozomen, HE 9.1.5-6.

[100] J. Harries, *Law and empire in late antiquity,* Cambridge, UK ; New York 1999*,* p. 36; cf. p. 58.

[101] Cf. P. Fouracre, R. Gerberding, *Late Merovngian France*, New York 1996, p. 2 and I. Wood, *The Merovingian Kingdoms* 450-751, London-New York 1994, pp. 201-202.

[102] A. Honore, *Law...* p. 133-134, in a similar manner J. Harries, *Law...* pp. 78, 84-85.

[103]*Ibidem*,. p. 86.*Interpretationes* and extracts also show that the law was studied and applied.

of Roman ideas of church politics, albeit they did not avoid efficient adjustment to the exigencies of new reality of politics and government.

For example, the *interpretatio* of the constitution C.Th. 16.2.2=brev.16.1.1, as other *intepretationes*[104], tried to accommodate legal precepts of the emperors to current requirements. It can be seen as a kind of "law in action"[105] written down. Many of those short "explanations" at first glance, seem to be mere summaries or paraphrases. On close scrutiny, it becomes visible that they contain a new rule. This rule is similar although not identical to the one they seem to summarize. It is possible that the Theodosian Code, especially the part devoted to administrative and fiscal matters, was seen in the barbarian kingdoms as a type of sophisticated, learned "higher written law"[106], reflecting important aspects of the proper social order. This *lex generalis et superior* was to be supplemented, explained and made effective through the royal legislation, in which the king acted as *imitator imperii Romani*. A similar role was also played by the *interpretationes* and royal diplomas, which continued the politics of privilege and cooperation between the sovereign and the clergy[107]. However, the Roman legal heritage of the *ius publicum* gradually ceased to be applied as a living law, also in fiscal matters, and was replaced with the new order of the so-called "feudal society".

This is not surprising as the Theodosian Code contained laws prepared within an urbanized state. The code was to be used by trained bureaucracy. However, western medieval culture in the epoch under consideration was of increasingly rural character, where cities gradually had ceased to be the dominant centers of administration and intellectual life[108]. Political power, especially in the Merovingian domains, "begins to sit upon the land directly"[109].

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[104] See e.g. the *interpretatio* to C.Th. 1.1.1 [=Brev.1.1.1], where the word "*leges*" is used instead of "*consitutiones sive edicta*". *Interpretatio* to C.Th. 1.1.2 replaced the word "*consitutiones*" with the words "*leges*" and "*statuta*". Those seem to be synonymous, but the words of the *interpretatio* have wider meaning. Cf. also *interpretationes* to C.Th. 1.2.9 and C.Th. 1.3.1.

[105] As opposed to the so called "law in books".

[106] It is probably no coincidence that Books 2 to 5 were conserved only partially, while the public law legislation is preserved in full and in fine manuscripts. (D. Liebs [in:] CAH 15, p. 246).

[107] *Indulgentiae,* as those mentioned in HF 3.25, 10.7, seem to be a continuation of old imperial policy in the new circumstances.

[108] See e.g. P. Fouracre, R. Gerberding, *Late Merovignian France*, op. cit. p. 1 and *.passim.*

[109] *Ibidem*.

The Visigoths' and Ostrogoths' states seem to be more conservative in their approach towards the adaptation of Roman law to the new circumstances. However, Frankish *emunitas* can be interpreted as a creative and innovative development and accommodation of Roman solutions in the context of a king's duty to preserve *pacem regni*[110]. Charters granting immunization could also be a useful tool for the monarch in shaping his church policy, especially as they did not address general categories but individual beneficiaries[111].

An interesting and picturesque analogy while using Roman heritage in practice can be drawn between immunities and the use of *spolia* in church construction. For example, in the crypts of Jouarre, colourful decorative shafts of Roman marble columns were reused, still, they were combined with white capitals made by Merovingian sculptors[112]. Both in such cases and when it comes to fiscal privileges, Roman achievement was combined with new additions, thus creating pieces of their own character.

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From Roman Immunitas to Merovingian Emunitas - Remarks on the Evolution of Roman Fiscal Concepts in the Germanic Realms

Summary: The Theodosian Code contained a variety of laws aimed at the assurance of a privileged status of the Church and the orthodox clergy. Those laws were part of a general imperial policy aimed at the establishment of the Christian Roman Empire. Fiscal exemptions played an important role here . After the fall of the Western Empire, new Germanic realms respected and preserved the Roman legal heritage and ideas of legislation and relations of ecclesiastical and royal power. Roman fiscal solutions were also generally maintained. On the other hand, new ideas and institutions developed. Fiscal immunities of the Merovingian Age are exemplary here. Frankish kings tried to imitate Roman emperors' ecclesiastical policy and legislative measures. However, the profoundly changed political and economic circumstances led to a transformation of Roman fiscal institutions into new types of feudal bonds.

[110] Cf. P. Fouracre, R. Gerberding, *Late Merovignian France*, op. cit., p. 2, I. Wood, *The Merovignian Kingdoms,* op.cit. pp. 60-61.

[111] Cf. I. Wood, *The Merovingian Kingdoms* op.cit.,. 204 ff. Additionally, as charters did not have to be irrevocable, additional room for maneuver was available (see *ibidem*).

[112] Other creative adaptations were numerous, e.g. the baptistery of St. Jean in Poitiers.

Key words: Roman law, history of medieval law, legal immunity, Frankish law, history of Middle Ages, Roman Empire.

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

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The principle and limits of freedom of contract from the perspective of the Roman law tradition.

Streszczenie

Praca omawia elementy konstrukcyjne zasady swobody umów oraz jej ograniczeń na podstawie polskiego kodeksu zobowiązań z 1933 roku, oraz art. 353^1 kodeksu cywilnego z 1964 r. w oparciu o recepcję prawa rzymskiego i powstałą na tym polu badań tradycję romanistyczną. Głównym motywem jest pokazanie związków pomiędzy pojęciami i konstrukcjami wytworzonymi w praktyce stosowania prawa rzymskiego a współczesnymi regulacjami prawnymi.

Słowa kluczowe: Prawo cywilne, prawo rzymskie, Kodeks Zobowiązań, historia prawa, europejska tradycja prawna.

Introduction

The principle of freedom of contract is currently of great importance in all law. It fulfils an important function in the broadest sense of the freedom of determining mutual rights and obligations between parties involved in business transactions as the "competence" to shape the subjects of legal relations binding them(...). Sometimes freedom of contract qualifies as a

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"right" or a "subjective right". However, the general view adopted in the science of civil law combines these concepts with the existing legal relationship resulting from the legal event[1].

Already during the Second Republic of Poland, the eminent polish civil lawyer Roman Longchamps de Bérier wrote that this principle "pervades the entire obligation law"[2]. It was not without reason that this author stressed the importance of this institution. Also today, perhaps especially now it has become a key issue for all of contract law. Just as in relation to other structures of contemporary private law, it was shaped as a result of reflection on the different institutions of Roman law and its subsequent reception.

According to the archaic Roman law, individual legal action, despite its formalistic framework, posed for the parties some leeway in terms of the alignment of mutual rights and obligations. It would be unreasonable to say that during this period this rule was fully formulated, in the form that is known today. The very notion of rules that not only refer to a system of legal norms is the abstract recognition of repetitive behavior[3]. This principle is formulated in general terms because it meets the universal function, contributing positively to the specific normative order which is characterized by a certain element of discretion. In the case of that, principle of freedom of contract was a result of the application more flexibility forms, give parties more freedom in legal transactions.

The Roman jurists involved in the development of practical legal problems did not create theoretical concept of the principle of freedom of contract. C. Kunderewicz wrote on this topic that: "Roman lawyers have not developed any general theory of contracts, the most important and most frequently occurring in practice source of obligations. On the basis of their decisions, only anecdotal mediaeval glossators and modern Roman law commentators created an adequate system of general concepts"[4]. A similar view is expressed by P. J. Thomas: "It is a widely shared view that the Roman jurist was practically orientated and had no penchant for theoretical or philosophical explanations"[5].This does not mean, however, that there was no

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1 Z. Radwański, A. Olejniczak, *Zobowiązania- część ogólna*, Warszawa 2006, p. 126.

2 R. Longchamps de Bérier, *Prawo zobowiązań* , Poznań1948, p. 154.

3 More about the principle, comp. R. Dworkin, *The Model of Rules in Law, Reason and Justice*, New York-London 1969.

4 C. Kunderewicz, *Rzymskie prawo prywatne*, Lódź 1995, p. 130.

5 P. J. Thomas, *The Eternal Values of Roman Law* [in:]J. Sondel, J. Reszczyński, P. Ściślicki (red.), *Roman Law as Formative of Modern Legal System, Studies in Honour of WieslawLitewski*, Kraków 2003, p. 174.

specific legal action which would offer the possibility of laying mutual rights and obligations with more or less freedom.

On the basis of Justinian's codification of Roman law[6], which was reborn in the university centers of Italian cities, the theoretical development of the concept of freedom of contract came early. This took place in a context of strong growth in the political position of these cities and in the development of mercantile practice .

Additionally, a large influence on the modern concept of contracts was consideration formulated by the doctrine of canon law, for which the foundation was the Roman contracts elaborated by the law glossator's schools. This was reflected primarily in the rejection of the already known Decree of Gratian, the Roman division of the contract which bore a ratio of obligations and those that did not cause such effects. A consequence of this was the thought expressed in the Decretals of Gregory IX that the whole "bare agreement" in principle should be protected by law, or *pacta quantumcunque nuda servanda sunt*; thus also the principle known today as *pacta sunt servanda.* In the following period there was introduced a modification of the rule of restricting agreements which arose from a commitment only to those that were included in a serious intention (*serio animo)* and with consideration (*deliberatione).* Both of these reasons have become the starting point for the development of the theory of the so-called cause of obligation (*causa*). The achievements of mediaeval canon law were used subsequently by the modern school of natural law, which stated that a contract validly depend on *causa* of the obligation, which is connected to the nature of the obligation[7].

These changes resulted in placement, for the first time, in the Napoleonic Civil Code[8]provision which immediately established the principle of freedom of contract. Later, indirectly expressed also provisions of the German Civil Code BGB[9], which „soon was recognized as

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6 M. Sczaniecki, *Powszechna historia państwa i prawa* , Warszawa 2003, p. 43.

7 W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, p. 432.

8 K. Sójka-Zielińska, *Wielkie Kodyfikacje XIX wieku*, Warszawa 1970, p.90.

9 K. Sójka-Zielińska, *Historia Prawa*, Warszawa 2003, p. 244.

the incorporation of the theory of pandects"[10].German Pandects were also reception of Roman law, based on a concept developed by the school of glossators and commentators[11].

The principle and limits of freedom of contract in the code of obligations of 1933 and in the civil code of 1964

It's found place also in the Polish Code of Obligations of 1933 (further k.z.), whose article 55 k.z. stated: "On the other hand, as long as the content and purpose of the contract is not opposed to public policy, law or good morals". This provision marked the relatively wide range of free contracting and named, alongside the laws and good morals, the limitation of the purpose and content of the agreement with the public order clause, which R. Longchamps de Bérier stated as: "Here are, contrary to the agreement with the tax regime, the courts, the family, the principle of individual liberty, freedom of earning a living, equality of all before the law, with the duties of civil"[12]. Regulation of art. 55 k.z. was in force until the entry of the new Civil Code of 1964 (further k.c.), which was abandoned with the inclusion of a provision establishing the principle of the freedom of contract.

To Polish private law principle of freedom of contract amendment to the Civil Code of 28 July 1990[13]. This was possible due to the economic system transformation in 1989. Previously, for ideological reasons, but also with its profound justification in business practice, the principle of freedom of contract had no reason to exist. It follows that, reported for the principles of regularity, it applies only in a market economy. It can even be stated that it is one of the legal pillars of a liberal economic system.

The principle of freedom of contract is the basic structure of all of law, and in particular of contract law. Each agreement[14]is a legal action, which consists of a subjective, material and content. The obligation (*obligatio*) is therefore a legal relationship[15] which is formed between

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10 M. Kuryłowicz, *Prawo rzymskie, Historia, Tradycja, Współczesność,* Lublin 2003, p. 104.

11 M. Kuryłowicz, A. Wiliński, *Rzymskie prawo prywatne, Zarys wykładu,*Warszawa 2008, p. 53.

12 R. Longchamps de Bérier, *Prawo...*, p. 154.

13 M. Safjan, *Zasada swobody umów (Uwagi wstępne na tle wykładni art. 353[1]),* PiP nr 4 (1993), p. 12.

14 Z. Radwański, A. Olejniczak, *Zobowiązania*, p. 116.

15 L. Morawski, *Wstęp do prawoznawstwa*,Toruń 2006, p. 185.

two parties, where one party debtor (*debitor*) is obliged to provide the other side of the creditor (*creditor*). Therefore, the creditor is the authorized entity and the debtor is the entity obliged. The relationship that creates an obligation to have legal effect only between the parties to that relationship. We say, that it is the right relative, effective *inter partes* as opposed to absolute rights, effective *erga omnes*, to all legal entities.

In Roman law there was no uniform definition of the term *obligatio*. The term comes from the Latin verb *ligare*, and the meaning of this concept is the word "bind". Originally, it meant certainly bound by a physical person who had failed to fulfil his/her obligation with respect to another entity, often carried out by self-help. Only in a later period of development of business transactions was there a new understanding of the concept as legally binding. Justinian's codification of Roman law includes the following definition: *obligation est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostre civitas iura* – "obligation is a legal node which forces us to provide something in accordance with the laws of our state"[16]. However, as noted by K. Kolańczyk: "this definition does not reflect the diversity of the obligations of the Roman. Fuller definition passed the Digest of Justinian[17]: *Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum* – "the essence of the obligation is not to make us a thing or an ease but in order to force someone else to give us something, to do or to provide something"[18]. Therefore, the duty of the debtor was *dare*, *facere*, *preastare*.

Roman law distinguishes between four main types of contracts. *Et prius videmus de his, que ex contractu nascuntur. Harum autem quattuor genera sunt:aut enim re contrahitur obligatio, aut verbis, aut litteris, aut consensu* –"first take care of those obligations that arise from the contract. These are the four types: the fact incurs the obligations either through the thing, either by word or by letter, or by agreement"[19]. K. Kolańczyk stated that: "consensual

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16 I. 3,13; Translation for W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł*, Warszawa 1991, p. 277.

17 K. Kolańczyk, *Prawo rzymskie*, Warszawa 1999, p. 335.

18 D. 44,7,3 (*Paulus libro secondo institutionem*). Translation for W. Rozwadowski, *Prawo...*, Warszawa 1991, p. 277.

19 G 3,89; The work has been used in the translation published in Gaius, *Institutions*, translated from Latin by C. Kunderewicz, elaborated by J. Rezler, Warszawa 1982.

contracts are historically the youngest against the background of the previous rigor and formalism in incurring liabilities which represented a real breakthrough for the ease and freedom of movement"[20].

The Polish Civil Code of 1964 was based on the design principle of contractual freedom in article 353[1]. According to this provision, "the contracting parties may lay the legal relationship at its own discretion, as long as its content or purpose is not opposed to the properties (nature) ratio, the law or principles of social coexistence"[21].

The scope of freedom of contracts as designated by article 353[1] k.c. is similar to article 55 k.z. despite the fact that the condition in the form of public order has not been terminated in the current regulation. There is a long-established view in the doctrine[22]and in case law[23] that it applies indirectly since it is impossible to interpret other general clauses contained in the Civil Code and in particular with the principles of social coexistence. It is therefore necessary to consider the content of the principle of freedom of contract as expressed in article 353[1] k.c.

According to article 353[1] k.c., the parties are not tied to the choice of the form of legal action. They have the obligation to comply with a predetermined order for actions necessary to conclude the contract. They can also form mutual rights and obligations according to their own will, by forging a new relationship bond or changing an existing one. This regulation also does not specify the characteristics of the entities which can benefit from the opportunities of free contracting. It uses the term 'party', which only indicates a greater number of players than one. This is understandable given that it concerns agreements[24].

As can be observed, the positive definition of freedom of contract would give unlimited opportunity to shape mutual rights and obligations which could lead to abuse. That is why later in the provision the legislature introduced restrictions in the form of a compliance order

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20 K. Kolańczyk, *Prawo...*, p. 360.

21 The Act of 23 April 1964 of the Polish Civil Code (Dz. U. 1964, Nr 16 poz. 93, as amended).

22 More about this topic in: M. Olechowski, *Porządek publiczny jako ograniczenie swobody umów*, PiP nr 4 (1999), p.60.

23 Polish Supreme Court judgment of 12.5.2000, V CKN 1029/00, OSN 2001, Nr 6 pos. 83.

24 W. Czachórski, A. Brzozowski, M. Safjan, E. Skowrońska- Bocian (red), *Zobowiązania*, Warszawa 2008, p. 145.

and content of the agreement with the nature of the relation, law and principles of social co-existence. It should be emphasized that despite the difference in the order in which they are cited in article 353[1], these restrictions are just as important and are exceptions to the rule, therefore, they cannot be broadly interpreted in accordance with rule *exceptiones non sunt extendende*[25].

First, the Code lists the property that is the nature of the legal obligations. The question is how this phrase should be understood. M. Safjan states: "the notion of the nature of the legal obligation may be in the context of the relationship understood in two ways: in wider or narrower terms (...).In a broader sense, as an obligation to respect the basic characteristics of the legal relationship so those of its elements the failure of which could undermine the sense of (being) referring to legal relations (...).In a narrower sense, the term 'nature of the obligation' should be understood as an obligation to respect the part of those specific elements against the bond whose omission or modification would have to lead to a distortion of the assumed model of legal relations connected with the type of relation"[26].

Undoubtedly, another major limitation is the accuracy of the content and purpose of the contract with the legal norms of *iuris cogentis* which are contained in the legislation at the level of the act. These are therefore generally applicable legal acts[27]with unlimited material scope which are constituted in the appropriate procedure[28].It follows that the agreement should also be in accordance with acts of standing higher in the hierarchy of sources of law than the statutory regulation.

Of course, all of this refers to the Constitution, which contains a number of general clauses and international agreements that were ratified with prior consent granted by statute. It also appears that the provisions of the contract can be assessed for compliance with the legal standards set out in the implemented regulation issued under the Act. This view is expressed

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25 J. Wróblewski, *Sądowe stosowanie prawa,* Warszawa 1998, p.140.

26 M. Safjan, *Komentarz do art. 353[1]* [in:] K. Pietrzykowski (red.), *Komentarz do kodeksu cywilnego. T. 1,* Warszawa 2008, p. 837 and n.

27 *A contrario* acts of internal law as regulations, orders cannot be a basis for conformity assessment content and purpose of the contract with its provisions. They apply only those organizational units subordinate to the licensing of this type of legal norms.

28 L Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2005, p. 135.

by P. Machnikowski, who stated that the "law-commented provision means all the sources of universally binding law in Poland"[29].

The last-mentioned restriction *explicite* in article 353[1] k.c. is a general clause in the form of rules of social coexistence. It refers to rules of good manners as mentioned in the text of article 55 k.z. There is no shortage in the doctrine of criticism in relation to the term "social intercourse ":just to cite one of them: "the Civil Code still speaks in this regard, inherited from the socialist legislator terminology (...), which should be regarded as anachronistic and ill-contractual relations in trade"[30]. Apart from the considerations about the adopted terminology, a more prominent issue is the attempt to clarify the content of this principle. At this point there appears the problem of blurring[31], with expressions such as 'good manners' or 'social intercourse'. Surely, the principle of social coexistence represents a matter of law contracts recognized in the community's moral rules relating to concepts such as integrity, an honest merchant, or to generally perceived reasons of fairness. Despite these attempts to translate the principles of social coexistence the concept is still vague semantically and their use may be useful only in relation to a particular situation and individually marked entities. Hence the important in this regard of the role of judicial decisions[32].

The principle and limits of freedom of contract in Roman law

As was previously indicated, in ancient Roman law the principle of freedom of contract did not apply to the extent as it does now. The question is whether or not there were *de facto* activities which served in the practice of its functions. It seems that it would be difficult to answer this question in the affirmative given the size of the business and the need to lay the legal relationship. Already in the archaic period legal action can be observed which left the parties a certain margin of discretion in laying down their rights and obligations. This include

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29 P. Machnikowski, *Komentarz do art. 353 [1]* [w:]: E. Gniewek (red.), *Komentarz do kodeksu cywilnego*, Warszawa 2008, p. 534.

30 J. Rajski, W. Kocot, K. Zaradkiewicz, *Prawo umów w obrocie gospodarczym*, Warszawa 2002, p. 60.

31 M. Pyziak-Szafnicka, [in:] M. Pyziak-Szafnicka (red.), *Komentarz do Kodeksu Cywilnego. Część ogólna*, Warszawa 2014, p. 82.

32 See the judgments of 8.01.2003, CKN 1097/00 OSP nr 4/2004; 20. 05. 2004 II CK 354/03, Biul. SN 2004, Nr 12, pos. 7; and the Polish Supreme Court judgment of 6.03.1992 OSN 1992, pos. 90; 20.07.1993 OSN 1993 pos. 208.

institutions such as the stipulation (*stipulatio*), or act with bronze and weight (*actus per aes et libram),* „which also gave the possibility of a maneuver added to the act reservations (so-called *lex privata* and *pactum fiduciae*)[33]".

Lex privata was developed by consensus agreement, added as a clause that allowed to lay the legal relationship according to the needs of the parties and which eased the rigid form *actus per aes et libram*. The doctrine also stresses that *lex privata* could fulfil the role of the subjective right or rules of *iuris dispositivi*[34] terms of *ius civile*, which in this case would be a rule of *ius cogens*. While *pactum fiduciae*, an action which is based on *fides*[35], it gave the opportunity to add a stipulation that one party behave in a clearly defined manner after the contents of the original liability resulting from *negotium per eas et libram*.

However, of particular importance in this regard was the stipulation, e.g."*verbis obligatio fit ex interrogatione et responsione, velut: Dari Spondens?Spondeo, Dabis? Dabo, Promittis? Promitto, Fidepromittis? Fidepromittio, Fideiubes? Fideiubeo, Facies? Faciam"* –"Through the words of an obligation arise the following questions and answers, such as: Do you promise solemnly that it be given? I promise solemnly; Can you?; Do you promise? I promise; Do you promise reliably? I promise reliably; Do you provide reliably? I assure fairness; Did you do it? I will do it"[36]. According to the Gaius Institution, the liability of stipulation notice for words in a particular order, but it was only the form in which the parties could lay down the mutual rights and obligations. This did not happen because nothing determine the subject matter of what to be given to what be promised and it is from the same stakeholders. Of course, all of this was in a raised, formalized character. Only activities praetor make more flexibility of that act, by ensuring an informal promise can become a source of Roman contracts, and later approved by *ius civile*. Naturally, this could be done initially only in strictly defined cases. This situation changed quite late, during the end of the Roman state, after the year 472 A.D. The Constitution of Emperor Leo, which provided validity contained a stipulation even if it did not maintain

33 W. Wołodkiewicz, *Rzymskie korzenie współczesnego prawa cywilnego*, Warszawa 1981, p. 82.

34 W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, p. 34.

35 J. Sondel, *Słownik łacińsko-polski dla prawników i historyków*, Kraków 2006, p. 382, s.v. *I Fides -ei.*

36 G 3,93.

the formal requirements: "This form of liberalization stipulation is indicated as the most far-reaching rapprochement in the ancient Roman law principle of freedom of contract"[37].

The stipulation was one of the main forms of actions performed throughout the period of formation of *ius contractus* and, as W. Wołodkiewicz wrote: "Despite its formalism it gained more and more applications and could be used to achieve all sorts of purposes. It has become, in its various forms of a multi-functional instrument, that *grosso modo* was the modern principle of freedom of contract"[38].One of the sources *obligationes* have been recognised by the *ius civile*, and which the law confers protection in the form of the possibility of complaint (*actio in personam*)[39].
K. Kolańczyk noted in this topic that: "The same three words, further specifying the obligation of the debtor to the creditor (*dare*, *facere*,*praestare*) also occur in the definition of Gaius *actio in persona"*[40]. Gaius says: '*in personam actio est, qua agimus cum aliquo, qui nobis vel contractu vel ex delicto obligatus est, id est cum intendimus dare facere praestare oportere – Actio in personam* is when we file a lawsuit against someone who is against us and is obliged to either contract or tort, that is, when we say that he/she should give us something (*dare*), make (*facere*), or provide something (*praestare*)"[41].

With the development of trade and related, new economic activities, some not recognized by the *ius civile* contract gained legal protection granted by praetor. One procedure undoubtedly contributed to the emergence and development of the formula. As a result, in addition to the existing *obligations civiles* there developed a new category *obligations honorariae*, as indicated by Gaius who wrote that *ius praetor iumest, quod praetoresintroduxeruntadiuvandi, velsupplendi, velcorrigendiiuriscivilis gratia propter utilitatempublicam.* –"praetor law is that because for public benefit were introduced magistrates to assist, supplement or correct the civil law"[42]. Praetor activity involving the above-mentioned activities soothed the formalism

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37 W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo...*, p. 431.

38 W. Wołodkiewicz, *Rzymskie...*, p.82.

39 A. Dziadzio*, Powszechna historia prawa*, Warszawa 2008, p. 346.

40 K. Kolańczyk, *Prawo...*, p. 336.

41 G. 4,2.

42 D. 1,1,7,1 (*Papinianus libro secondo definitionum*). Translation for B. Szolc-Nartowski, *Digesta Justyniańskie. Księga pierwsza,* Warszawa 2007, p.16.

of *ius civile*, giving the parties the possibility of more flexibility and to freely determine their relationship as legal and economic. We cannot forget that *ius honorarium* protects only certain types of agreements in their specific content and form of conclusion.

Directory contracts that were actionable, whether due to the protection granted in the edict of the praetor or through recognition by their*iuscivile*, were already mentioned in the stipulation as well as in the loan agreement (*mutuum*), lending (*commodatum*), storage (*depositum*), trust (*fiducia*), order (*mandatum*), society (*societas*), sale (*emptiovenditio*) and contract *loactioconductio*. This was the "core of the Roman obligations *ex contractu*"[43], but still functioned informal agreement, which not given the complaint, hence they were known as *pacta nuda*, i.e. literally called a "bare contract". They were not the statute of the contract according to Roman law. Parties could conclude a "bare contract", but there was a reasonable risk on behalf of the creditor that the rightful provision would not be met and he/she would not have the legal possibility to pursue his/her claims because e*x nudo enimpacto inter cives Romanos actio non nascitur*–"with bare agreement between Roman citizens no obligation arises"[44]. In order to protect the creditor, in the classical period a rule was adopted that in a situation when one of the parties fulfilled its benefitto the agreement the other side also had a duty to fulfil its duties. This was quite a relaxation of the restrictive limit in pursuing claims *ex nudo pacto.*

In case only certain types of agreements have been challenged and recognized under *ius civile* as the appropriate source of obligations. For this process the jurisprudence of Roman law create new term as a "nominalism contract"[45]. The catalogue of contracts protected by the award of a complaint *actio in personam* expanded gradually, which took place mainly as a result of praetor activities. A praetor did not give protection informal agreements: *quae neque dolo malo, neque adversus leges, plebis scita, senatus consulta, decreta directa, principium, neque quo fraus cui eorum fiat facta erunt, servabo* [46]. Of particular interest seems to be the last of the conditions relating to circumvention of the law, which is defined by Paulus as

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43 W. Dajczak, T, Giaro, F. Longchamps de Bérier, *Prawo...*, p. 430.

44 PS. 2,14,1. Translation for A. Dębiński, *Rzymskie prawo prywatne*, Warszawa 2007, p. 307.

45 W. Wołodkiewicz, *Czy prawo rzymskie przestało istnieć?,* Kraków 2003, p. 72-73.

46 D 2,1,4.7 (*Ulpianuslibro quarto ad edictum*).

contra legem facit, qui id facit quod lex prohibet, in fraudem vero, qui salvis verbis legis sententiam eius circumvenit[47].

In conclusion, the freedom of contract was never absolute and there were always factors that limited it. These were present in nature and associated with the content of activities as well as with the subjective aspect, which was associated with the position of the individual in the community of Roman society and the situation which was dependent on status: *libertatis, civitatis i familiae.*

At the beginning of these considerations it would be worth considering the following sentence: *imposibilium nulla obliagtio est*[48]– "what is impossible not create obligations". This rule expresses the fundamental principle of limiting the freedom of contract, and it cannot agree on the benefits of which at least one party is unable to meet the objective reasons. Implicated also conclude agreements provided (*condicio*), which is known, that cannot be met. Any such agreement will not give rise to a liability relation because *item siquis sub eaconicionestipuletur, quae existere non potest, velutsi"sidigitocaelumtetigerit", inutliseststipulation* –"also, if someone receives a formal pledge under conditions, which is not possible- for example if it touches a finger to the sky, that is ineffective promise and doesn't create obligation "[49].

Another element which constitutes a fairly serious limitation was extended precisians, especially during the archaic and before the classic period. It manifested itself in the binding force of rigid rules that governed the order to make certain gestures or speak the right words in the right order. Undoubtedly, this was a major inconvenience, and every mistake resulted in the annulment of these activities. These limits were important, but using current terminology they were of a procedural nature. This does not mean, however, that the parties were bound only by requirements of a formal nature. Just as today, in ancient Roman law there were limitations in the form of the compatibility of the agreement with the acts of law and the constraints of an axiological nature. *Pacta quae contra leges contitutionesque vel contra bonos mores fiunt,*

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47 D. 1.3.29 (*Paulus libro V ad legem Iuliam et Papiam*) Translation for B. Szolc-Nartowski, *Digesta Justyniańskie,Księga pierwsza*Warsaw 2007, p.45.

48 This rule is still under private law. SeeZ. Radwański (red.) *System Prawa prywatnego, Prawo cywilne- część ogólna*, Warszawa 2004, p. 223.

49 G. 3,98.

nullam vim habere indubitati iuris es. –"Contracts which are contrary to the law, the imperial constitution or morality, without a doubt, they have no legal force"[50].

The first conclusion to be drawn in connection with the reading portion of the Constitution of the Emperor Caracalla is a statement that if the agreement is contrary to the acts of law or the laws and constitutions of this emperor have no legal effect which are provided for in its content, as *ius publicum privatorum pactis mutari non potest*–"public law cannot be changed by agreements among individuals"[51]. In addition, the agreement could not be concluded for a wicked purpose as p*acta, quae turpem causam continent, non sunt observanda*. But there is a problem of interpretation in relation to restrictions which are good manners or a wicked purpose. This is associated with the their "axiological load".

The premise of good manners limiting the freedom of contracting can also be found in a speech of Paulus, in that it relates to a contract of mandate which had the character of Roman contracts: *illud constant, siquis de ea re mandet, quae contra bonos mores est, non contra obligationem* –"it is certain that if someone gives order , which is against good morals, does not create obligations"[52]. Paulus' opinion can derive a general rule that other agreements recognized by the *ius civile* for contracts are subject to this restriction. Unfortunately, the jurist does not explain how one should understand the concept of good morals or the criteria of wicked purpose of the activity and what the conditions are for assessment of the contract as wicked or incompatible with morality. Unfortunately, Roman jurists do not explain these concepts.

Concluding remarks

The problem of limits of freedom of contract remains, moreover, in modern times. Just recall the general clause of rules of social coexistence and reflect on its meaning, depending on the different context. This forces the use of discretionary methods for resolving contractual provisions which are within good manners or principles of social coexistence. This may be controversial, and different interpretations depending on worldview and values appear. But

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[50] C. 2,3,6.

[51] D. 2,14,38 (*Papinianus libro secundo quaestionum*). Translation for W. Rozwadowski, *Prawo rzymskie. Zarys wykładu wraz z wyborem źródeł*, Warszawa 1991, p. 230.

[52] G. 3,157.

this is not the only contiguous point in which *ius Romanum* mingles with contemporary regulations. This kind of influence of ancient Roman law, and it past or even nowadays reflection is much more. It was impossible to present them all, even with regard to the issue of freedom of contract. This indicates the wide range of Roman law influence to current positive and judicial law. It is worth to notice what H. Kupiszewski wrote: "Studies of Roman institutions are simply an irreplaceable value in teaching. *Cupida legum iuventus* brings comprehensive and at the same time precise legal terminology. They teach the concepts of construction of modern civil law"[53].

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The principle and limits of freedom of contract from the perspective of the Roman law tradition.

Summary: The work discusses the structural elements of the principle of freedom of contract and its limitations under the Polish Code of Obligations of 1933 and the current regulation of art. 353^1 of the Civil Code of 1964 from the point of view of the Roman law tradition. The main aim is to show the relationships between concepts and structures as developed in the practice of Roman law and in contemporary legal regulations.

Key words: Civil law, Roman law, Code of Obligations, Civil Code, history of law, European legal tradition.

[53] H. Kupiszewski, *Prawo rzymskie a współczesność,* Warszawa 1988, p. 218.

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

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Adam Smith's View on the Functions of Taxation.

Streszczenie

Ojciec klasycznej ekonomii, Adam Smith, znany jest z metafory niewidzialnej ręki. Bywa to powodem utożsamiania go ze radykalnymi zwolennikami wolnego rynku i państwa nocnego stróża. Analiza jego poglądów na funkcje opodatkowania może pomóc zweryfikować stopień, w jakim był on oddany „niewidzialnej ręce rynku". Opodatkowanie ma trzy główne funkcje: fiskalną, regulacyjną i stymulującą. Radykalni liberałowie ekonomiczni i zwolennicy państwa minimalnego zgadzają się wyłącznie na funkcję fiskalną. Adam Smith wierzył, że podatki inne daniny publiczne powinny być wykorzystywane do redystrybucji dochodu. Można do dostrzec w jego analizie opłat drogowych oraz podatku od dochodów z najmu. Opowiadał się także za regulacyjną funkcją podatków. Co więcej, proponował wykorzystanie opodatkowania do promowania szczególnych form dzierżawy ziemi, uznawanych przez niego za bardziej korzystne dla społeczeństwa od innych. Proponował także ulgi podatkowe na badania i rozwój. Należy zatem uznać, że popierał także stymulacyjną funkcję opodatkowania. Podsumowując, Adam Smith jest jednym z najbardziej wpływowych ekonomistów liberalnych, ale daleko mu od bycia neoliberałem czy libertarianinem. Wierzy on, że państwo powinno czasami interweniować w gospodarce, a podatki są właściwym narzędziem do tego celu.

Słowa kluczowe: Adam Smith, opodatkowanie, niewidzialna ręka rynku.

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Introduction

The failure or non-existence of the invisible hand of the market are slogans very frequently used[1] by critics of policies called more or less accurately *neoliberal economy*. The phrase "invisible hand of the market" is often wrongly attributed to the Scottish philosopher and the father of classical economy, Adam Smith, the author of *The Wealth of Nations*. What is more, the metaphor of "invisible hand" was used by many thinkers and writers before Smith, including Shakespeare, Voltaire and Defoe, but Smith himself employed it quite sporadically and without the "market" context[2]. The invisible hand cliché mistakenly evokes associations between Adam Smith and radical economic liberals, including libertarians, neoliberals etc. The analysis of functions of taxation put forward by Adam Smith in his proposals concerning the fiscal system will probably be helpful while verifying Smith's allegedly strong beliefs in the invisible hand.

Functions of taxation and economic liberalism

The contemporary theory of taxation makes a distinction between three main functions of taxes: fiscal, regulatory and stimulating[3]. The first and oldest one is the fiscal function. It consists in the tax being used to raise revenues for the budget, thus enabling states to maintain their institutions and perform various duties[4].

The regulatory function of taxes is aimed at shaping the income and capital of taxpayers[5]. Put simply, taxes are used by state for the redistribution of income. Therefore, this function is sometimes called the redistributive function[6].

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[1] It is enough to take look only at the titles of many economic books and papers to notice this pattern. For instance: J. Schlefer, *There Is No Invisible Hand,* "Harvard Business Review", 2012, https://hbr.org/2012/04/there-is-no-invisible-hand, 3.05.2016; J. Stiglitz, *There is no invisible hand,* "The Guardian", 2002, http://www.theguardian.com/education/2002/dec/20/highereducation.uk1; R. Amir-ud-Din, A. Zaman, *Failures of the "Invisible Hand",* "Forum for Social Economics", 2015, http://dx.doi.org/10.1080/07360932.2015.1019536, 3.05.2016; G. B. Gorton, *Slapped by the Invisible hand: The Panic of 2007,* New York 2010.

[2] *vide* G. Kennedy, *Adam Smith and the Invisible Hand: From Metaphor to Myth,* "Econ Journal Watch", 2009, vol. 6(20).

[3] R. Wolański, *System podatkowy w Polsce,* Warszawa 2009, p. 27.

[4] A. Gorgol, A. Kuś, P. Smoleń, *Zarys finansów publicznych i prawa podatkowego*, p. 18.

[5] R. Wolański, *op. cit.*, p. 30.

[6] A. Gorgol, A. Kuś, P. Smoleń, *op. cit.*, p. 19.

The last function of taxation is the stimulating one. This function is aimed at influencing the taxpayer's choices. A state can encourage certain behaviours by lowering taxes which are related to them, or, by way of contrast, discourage some forms of conduct by increasing the relevant taxes[7].

The acceptance of particular functions of taxation in the fiscal system is a political matter. The fiscal function stems from the definition of taxation. The Encyclopaedia Britannica says: "taxes are levied in almost every country of the world, primarily to raise revenue for government expenditures, although they serve other purposes as well"[8]. The fiscal function is the main function of taxation and the basic role of taxes is to raise revenue. Other functions are popular nowadays but these are of secondary importance. Their approval is not common unlike the fiscal one. For instance, libertarian circles criticize especially the stimulating function and they consider it as some kind of leftist policy and undesirable social engineering[9]. Members of the Austrian School of Economics are also against the use of taxes for purposes other than revenue-raising because they believe that a tax should be neutral[10]. It is worth finding out whether the author of *The Wealth of Nations* shares their views.

The aim of this article is to analyze Adam Smith's proposals regarding taxation from the perspective of the modern classification of taxation functions as described above. As it has been shown, hard core free market liberals, libertarians, supporters of the Austrian School of Economics, etc. accept the first of the tax functions solely – the fiscal one. Therefore, Smith's possible advocacy of taxes designed to implement other functions would be quite a convincing proof that the Scottish philosopher was a predecessor of more moderate centrist social liberalism rather than the questionable patron of the supporters of neoliberalism with the unlimited free market and the night-watchman state. As the existence of the fiscal function stems from the nature of the fiscal system and it occurs in every case of taxation being generally

[7] *Ibidem,* p. 18-19.

[8] F. Neumark, *Taxation* [in:] *Encyclopaedia Britannica, http://www.britannica.com/topic/taxation,* 3.05.2016.

[9] T. Sowell, *The Busybody Left: Using Taxes for Regressive Social Engineering,* "Capitalism Magazine", 4.1.2016, http://capitalismmagazine.com/2016/01/the-busybody-left-using-taxes-for-regressive-social-engineering/, 03.05.2015.

[10] L. von Mises, *Human Action*, Auburn 1998, p. 767-768.

independent from political views[11], research will be focused on the regulatory and stimulating functions.

Adam Smith on the regulatory function of taxes

Adam Smith's opinion on the regulatory and stimulating functions of taxation can be reconstructed from his analysis of the British fiscal system and his ideas of potential reforms in that area. Smith's proposals in that matter can be found in Chapter 2 of Book 5 of his *opus magnum*, *An Inquiry into the Nature and Causes of the Wealth of Nations*[12]. Significantly, the whole chapter which deals with taxes is entitled: "Of the Sources of the General or Public Revenue of the Society". It can be concluded at first glance that the fiscal function is the most important objective of taxation for the Scottish philosopher. Public levies should serve primarily as a way of financing justified and necessary expenses of the government, which is described in the preceding chapter.

At the very beginning of his analysis of the tax system, Adam Smith notes that taxpayers should contribute to the budget of the state proportionally to their revenue[13]. This means that the most liberal tax concept accepted by the father of classical economics is the proportional tax with a flat rate. As early as at this point the paths of Adam Smith and the neoliberals diverge. For the latter, flat tax is already a compromise. Neoliberals consider a poll tax (defined as a tax of a uniform, fixed amount levied on each taxpayer[14]) as a most just solution. Margaret Thatcher's government tried to introduce it in the 1970s under the name of community charge, which led to strong protests and was one of the main causes of the fall of the Iron Lady[15]. Adam Smith openly opposes the poll tax. He believes that such a tax has its origins

[11] It should be noted that only the existence of the fiscal function of taxation is independent from political views. The intensity of implementation of this function is heavily reliant on the political ideology. For instance, taxation is significantly higher in welfare states (e. g. Sweden) than in the countries of pure neoliberal economy (e. g. Ronald Regan's USA).

[12] This book more widely known under the abbreviated title: *The Wealth of Nations.*

[13] A. Smith*, An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 2, p. 825.

[14] *Poll tax* [in:] *Encyclopaedia Britannica,* http://www.britannica.com/topic/poll-tax, 3.05.2016.

[15] D. Burns, *Poll tax rebellion,* Balmoral Place – London 1992, p. 9-20.

in the age of slavery and when levied on free people, it is arbitrary and unequal[16]. Consequently, proportional tax is the most liberal concept approved by the author of *The Wealth of Nations.*

However, even the proportional taxation wouldn't be enough for Adam Smith. On the next few pages, in the section of *The Wealth of Nations* devoted to the taxes on real estate, he suggests that the best way of taxation of buildings will be levy amounting to a certain percentage of the actual cost of renting a particular house. The amount of payable tax would be determined on the basis of a public register of rental contracts. Smith is aware that ultimately the tax on house-rents will be passed on to tenants. What is more, he perceives it as a tool for redistribution of income.

The Scottish philosopher writes in his *opus magnum*: "The proportion of the expense of house-rent to the whole expense of living is different in the different degrees of fortune. It is perhaps highest in the highest degree, and it diminishes gradually through the inferior degrees, so as in general to be lowest in the lowest degree. The necessaries of life occasion the great expense of the poor. They find it difficult to get food and the greater part of their little revenue is spent on getting it. The luxuries and vanities of life occasion the principal expense of the rich; and a magnificent house embellishes and sets off to the best advantage all the other luxuries and vanities which they possess. A tax upon house-rents, therefore, would in general fall heaviest upon the rich; and in this sort of inequality there would not, perhaps, be any thing very unreasonable. It is not very unreasonable that the rich should contribute to the public expense, not only in proportion to their revenue, but something more than in that proportion"[17]. In this excerpt Adam Smith proposes an interesting solution for income redistribution. Although such a tax on house-rents is not a classical progressive tax (tax rate does not increase while the taxable amount grows), the Scottish philosopher clearly argues for the possibility of introducing progressive taxation[18], which can be concluded from Smith's predictions of the economic impact of a house-rent tax.

[16] A. Smith, *op. cit.,* p. 857.

[17] A. Smith, *op. cit.,* p. 842.

[18] P. Baum, *Poverty, Inequality, and the Role of Government: What Would Adam Smith Say?,* "Eastern Economic Journal", 1992, Vol. 18, No. 2, p. 153.

The author of *The Wealth of Nations* believes that the rich spend significantly higher percentage of their income on housing than the poor. The latter are forced to spend most of the income on foodstuffs and other basic commodities while the rich can afford to rent luxurious apartments. As a result, the effective tax rate for the upper class would be much higher than the taxation of the poorest. Smith notices that the public levy which formally has the flat rate, in practice, will be progressive in nature. It is possible due to the imposition of the tax not on the income, but on the particular category of expenses the scale of which depends on the social class of a taxpayer. Thus the richer will bear a greater burden of maintaining the public institutions which serve all citizens of the country. Their contribution will be even more substantial than the proportion relative to their income. As a result, such a system will lead to the redistribution of income in society. What is significant, Smith does not relate to the rich with excessive appreciation. He writes about their vanity and need to be admired, contrasting it with the plight of the poor. Far more social sensitivity can be seen here than when it comes to individualistic liberalism.

Parenthetically, in the further part of the section on the real estate tax, Adam Smith criticizes the so-called window-tax, the amount of which depends on the number of windows in a particular house. He considers this solution as bad and unjust because it harms the poor. The Scottish philosopher explains that modest rural homes often have more windows than exquisite urban residences[19]. In this case, social justice is the main argument against a certain form of tax.

The most interesting idea propounded by Adam Smith regarding the regulatory function of public levies can also be found in his *opus magnum, The Wealth of Nations*, but surprisingly not in the chapters which are dedicated to taxes. In the part dealing with public expenses and the justified duties of the state, the Scottish philosopher confirms that he is not an enthusiast of an intense activity of the state. However he turns out to be a supporter of some public investments in transport facilities: navigable canals, harbours, bridges and roads. Then he goes on to analyse the possible ways of financing such infrastructure[20].

[19] *Ibidem,* p. 846.

[20] *Ibidem,* p. 724.

He indicates that the cost of transport infrastructure maintenance should be borne directly by its users. As far as the level of fees is concerned, Smith proposes the principle of proportionality. Therefore, the toll should depend on the degree to which a particular user contributes to the infrastructure wear and tear. In the case of roads, the heavier the vehicle is, the higher the charges should be. However, the Scottish philosopher provides an exception to this rule. He says: "When the toll upon carriages of luxury, upon coaches, post-chaises, etc. is made somewhat higher in proportion to their weight than upon carriages of necessary use, such as carts, wagons, etc. the indolence and vanity of the rich is made to contribute in a very easy manner to the relief of the poor, by rendering cheaper the transportation of heavy goods to all the different parts of the country[21]". Despite the fact that this passage does not strictly deal with the taxes but with other public levies, Smith proposes nothing else than a very progressive programme of redistribution. First, he believes that a higher toll for luxurious vehicles will not be noticeable for their wealthy owners (luxury vehicles are usually light so the total cost of road use would still be reasonable despite the higher rates). Their greater contribution to the costs of road infrastructure maintenance will help to reduce the fee for ordinary vehicles used in transport of various goods. As an economist, Smith believes that transport costs are ultimately borne by the final consumer. Thanks to the principle of proportionality, toll reduction will be most noticeable in the case of the goods which are cheap to produce but quite heavy. In their price, it is the transport costs that have the largest share. Such cheap but heavy goods are usually the most basic necessities (mainly simple foodstuffs e. g. wheat, vegetables, groats etc.) bought by the poor. Therefore, a higher toll for luxurious vehicles will result in lower prices of the basic victuals. Smith's proposal concerning road maintenance turns out to be indirect income transfer from the rich to ordinary people.

Attention should be paid to the blunt and emotional description of the owners of the aforementioned luxury vehicles. In the passage cited above, Smith calls them "indolent" and "vanish". Subsequently, it seems that his proposal is based not only on economic efficiency, but also on moral arguments. Apparently, Adam Smith's views on the issue seemingly unrelated to taxes turn out to be the irrefutable proof of his support of the concept of income redistribution.

[21] *Ibidem*, p. 725.

It transpires that Adam Smith was a supporter of income redistribution and he would use taxes and other public levies for that purpose. He believes that taxation proportional to income is necessary to ensure equality but sometimes that is not enough and progressive tax is also acceptable at times.

The stimulating function of taxes in Adam Smith's views

Arguments for Adam Smith's support for the next function of taxation can also be found in his proposals for the fiscal system in *The Wealth of Nations.* The first public levy analyzed by Adam Smith in Chapter 2 of Book 5 of his *opus magnum* is a tax on the rent of land[22]. Although the amount of the tax actually paid depends on the amount of the land owned, it is not a tax on real estate in the modern sense. In those days, most of the nobility didn't cultivate their land by themselves, but rented cropland to individual farmers. The income from the lease of land constituted the tax base. Therefore, according to contemporary criteria, the tax on the rent of land should be classified as an income tax. In practice, in Adam Smith's times, tax assessment was not made on the basis of real income from the rent. Landowners' revenue was based on the land valuation that had been made many years before. Those regulations are the subject of the Scottish philosopher's criticism. He believes that a tax determined in that way is unequal and not related to the actual income[23]. Smith is committed to the task of finding a better solution to the land tax.

The author of *The Wealth of Nations,* in his research into land-rent taxation, uses his favourite comparative methodology. He compares British regulations with the tax laws existing in France and Venice. On this basis he comes to the conclusion that may seem obvious these days: the tax should amount to a certain percentage of the actual rental fee. Smith believes that the introduction of such a tax will be possible after the establishment of a public register of contracts[24]. That proposal is relevant to my research into the functions of taxation in Adam Smith's thought as such a comprehensive database would enable the implementation of the taxes which perform the stimulating function. It must be noted, however, that the Scottish philosopher's support for the establishment of a public register of civil contracts in itself

[22] *Ibidem,* p. 829.

[23] *Ibidem,* p. 828.

[24] *Ibidem*, p. 830.

is an interesting argument in the debate concerning Smith's views on political economy. What is more, he goes so far as to propose criminal liability for reporting false information to that register[25]. The thinker who advocates the expansion of bureaucracy in order to increase tax justice cannot be considered as a libertarian or neoliberal any more.

Coming back to the issue of the stimulating function of taxation, the full knowledge of the provisions of each land-lease contract coming from the public register allows the state to levy different taxes on rental income from each contract, depending on the conditions provided in it. This paves the way for the state to promote certain (e.g. publically beneficial) forms of land-lease by lower levies (or discouraging from undesirable clauses in contracts by higher taxation). Adam Smith, the liberal, does not miss such an opportunity for social engineering.

In his further analysis, the Scottish philosopher describes two ways of payment for land-lease. First, there is the standard rent - periodic fees paid throughout the duration of the whole contract. The second method of payment is a one-time fee for the renewal of the lease. Smith is very critical of the latter solution: "This practice is in most cases expedient of a spendthrift, who for a sum of ready money sells a future revenue of much greater value. It is in most cases, therefore, hurtful for the landlord. It is frequently, hurtful for the tenant, and it is always hurtful for the community. It frequently takes from the tenant, and it is always hurtful to the community"[26]. Smith not only points out that the contract is disadvantageous for both parties, but also stresses the negative social impact in a wider context. The author of *The Wealth of Nations* wants the state to discourage people from entering into such harmful agreements: "By rendering the tax upon such fines a good deal heavier than upon the ordinary rent, this hurtful practice might be discouraged, to the no small advantage of all the different parties concerned, of the landlord, of the tenant, of the sovereign, and of the whole community"[27]. He wants to use taxes to influence the choice between one and the other form of agreement between two private parties. This is a perfect example of the (un)stimulating function of taxes[28].

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[25] *Ibidem,* p. 831.

[26] *Ibidem*.

[27] *Ibidem.*

[28] It seems that both stimulating and unstimulating functions of taxes can be found in this case. Tax policy proposed by Smith encourages raising the ordinary rent while discouraging from collecting renewal fee. A tax where the unstimulating function appears alone is, for instance, an excise duty on alcohol the main function of which is to discourage people from drinking spirits. At the same time, it doesn't encourage people towards alternative forms

It is noteworthy that Smith's attempt to protect landowners from themselves must be regarded as a manifestation of state paternalism rejected by many prominent classical liberals such as John Stuart Mill and Wilhelm von Humboldt[29].

Other examples of unstimulating function of taxes can be found in the Scottish philosopher's proposals of the tax on the rent of land. He considers many practices popular among landowners as socially harmful. To eliminate them from economy, he recommends levying higher taxes on contracts containing clauses regulating methods of land cultivation, the type of crop, certain succession of the crop etc.[30]. Smith believes that the farmer has better knowledge than the landowner. Therefore, limiting the use of farmland would be economically inefficient and such a contract would be harmful for the tenant. Apart from the unstimulating function of taxation, the way of thinking similar to the economic analysis of law can be encountered here.

Yet another example of the stimulating function of taxation in Adam Smith's proposals is worth discussing because it is significantly ahead of the times of the author of *The Wealth of Nations.* The Scottish philosopher notes that another way of taxation of the owners who choose self-cultivation of their land has to be found. In case of the lack of an agreement, which can be entered into the public register, what he advocates is possible income estimated on the basis of the value of land-lease contracts from the neighborhood as the proper tax base. Interestingly, Smith suggests that the amount of tax levied on the land owners who decided to cultivate their land by themselves should be slightly reduced compared to the amount resulting directly from the estimation described above. He believes that cultivation of the cropland by its noble owner would be beneficial to society: "It is of importance that landlord should be encouraged to cultivate a part of his own land. His capital is generally greater than that of the tenant, and with less skill he can raise a greater produce. The landlord can afford to try experiments and is generally disposed to do so. His unsuccessful experiments occasion only a moderate loss to himself. His successful ones contribute to the improvement and better cultivation

of behaviour. These considerations are purely theoretical. Distinction between stimulating and unstimulating functions of taxes does not seem to have much impact on the functioning of the fiscal system.

[29] J. Kleining, *Paternalism,* Manchester 1983, p. 24.

[30] A. Smith, *op. cit.*

of the whole country"[31]. As this excerpt from *The Wealth of Nations* demonstrates, the main reason which Smith gives for reducing the taxes for landlords who decide to cultivate their land by themselves is the hope for innovations in agriculture which can be introduced by landlords who have the capital to invest. There is no doubt of the outline of the stimulating function of taxation, but what is more amazing is the fact that Adam Smith came up with the idea of tax reductions for the research and development in the mid 18th century!

A brief analysis of the ensuing Adam Smith's proposals for the fiscal system proves that the stimulating function of taxes is easily identifiable in the ideas of the Scottish philosopher. He finds taxes as a good measure for encouraging people towards specific behaviour or discouraging them from it. Smith believes that the state should occasionally resort to taxes not only to secure the common good but for paternalistic reasons also.

Conclusion

There is no doubt that Adam Smith is one of most prominent liberal economists in history. He was a devoted advocate of economic rationality and free market. However, even such a brief analysis of the functions which he designed for the particular taxes shows that the Scottish philosopher believed that the night-watchman state is definitely insufficient. He was sure that the rich should contribute more to the common good than ordinary people. He was convinced that the state should intervene in the market from time to time.

He treated taxes as a good tool to improve society. He agreed that taxes can also serve other functions besides the fiscal one: they can be used for redistribution of income or for discouraging people from harmful behaviour. On the other hand, Smith thought that tax reductions might inspire people to do something not only in their own interest but also for the common good. Surely, the author of *The Wealth of Nations* is liberal and his support for the free market and private property is strong. But he does not treat those values as dogmatically as neoliberals or libertarians do. His views on the functions of taxes are an irrefutable proof of this. Probably the Scottish philosopher would not vote for Ronald Regan nor would he agree with Murray Rothbard.

[31] *Ibidem*, p. 832.

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Adam Smith's View on the Functions of Taxation.

Summary: The father of classical economics, Adam Smith is known for the metaphor of the invisible hand. It evokes associations between him and radical supporters of free market and the night-watchman state. The analysis of his views on the functions of taxation can help one verify how much he is committed to "the invisible hand of the market". Taxation has three main functions: fiscal, regulatory and stimulating. Radical economic liberals and supporters of the minimal state allow merely the fiscal function. Adam Smith believes that taxes and other public levies should be used for income redistribution. It can be seen in his analysis of taxes on house-rent and toll road charges. Therefore, he supports the regulative function of taxation. What is more, he proposes using taxes to promote particular forms of land-lease contracts, which are more beneficial to society than others. He also suggests tax reductions for research and development. Consequently, he also supports the stimulating function of taxation. In conclusion, Adam Smith is one of the most prominent liberal economists, but he is far from being neoliberal or libertarian. He believes that the state should occasionally intervene in the economy and that taxes are proper tools for such interventions.

Key words: Adam Smith, taxation, the invisible hand of the market.

Internetowy Przegląd
Prawniczy TBSP UJ 2016/7
ISSN 1689-9601

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Leibniz's *Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum* – legal logic at the service of politics: a study in the history of legal and political thought.

Introduction

The abdication[1] of King John II Casimir on 16 September 1668 meant not only an end to the rule of the House of Vasa but also a serious decrease in the importance of the Polish-Lithuanian Commonwealth on the international arena; actually, it opened the door for a further increase in foreign influence in the country, whose height would fall in the 18th century and would indirectly lead to the erasure of Poland off the map of Europe[2]. According to R. Frost, the campaign for an *election vivente rege* under John Casimir came closer than any other attempt before the late 18th century to breaking the political stalemate which was the true source of the Commonwealth's weakness"[3]. Hopes raised in view of the election of a new

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[1] The abdication of John II Casimir involves a political event that, even though trivial at first glance, was noticed in the memoirs of Jan Chryzostom Pasek: "(…) at last, when all the pleading and persuading had failed, Ożga [the chamberlain from Lwów] says, being greatly moved: Well, Gracious King, if you do not wish to be our King, be a brother to us then". J. Ch. Pasek, *Memoirs of the Polish baroque: the writings of Jan Chryzostom Pasek, a squire of the Commonwealth of Poland and Lithuania*, Berkeley 1976, p. 206. It is quite significant that after his abdication John II Casimir became one of the nobles. In fact, the spiritual body of King John II Casimir dies but the king's natural body stays intact. From this perspective, Ożga's words are the crowning proof of the king's two-body concept from one of the twentieth century's most important intellectual historians - Ernst Kantorowicz. For more information, see, among others, E. H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology*, Princeton 1998.

[2] H. Olszewski, *Sejm Rzeczypospolitej epoki oligarchii 1652 -1763*, Poznań 1966 s. 15.

[3] R. Frost, *After the Deluge. Poland-Lithuania and the Second Northern War 1655-1660*, Cambridge 1993, p. 179.

king were also connected with unfulfilled desires to restore the Nobles' Democracy, which in the second half of the 17th century appeared only as a carefully treasured myth having nothing to do with reality. According to J. Sowa, the transformation of the Commonwealth's political system into a magnate oligarchy was not only a reorganisation of the system but also an indication of a decline into an anarchist-federalist structure[4] which was held together only by an elective monarch[5].

From this perspective the 1669 election of a new ruler who faced growing internal and external threats and would live up to the raised expectations, was crucial for ensuring a stable existence of the war-weary Commonwealth. In his work, R. Frost states that the 1669 election was an appropriate death-knell for the last plan to reform the Commonwealth's political system, "which might have rescued its international position before it was too late"[6]. The favourites in the race for the Polish crown – still valuable, though tarnished by John II Casimir's poor policy – were four candidates, each of whom was keenly interested in the royalty. They were all foreigners: Louis duc de Condée, his son, Henri d'Enghien, Philip Wilhelm, Duke of Neuburg, and Alexis, the son of Tsar Alexei Mikhailovich of Russia[7]. A critical description of these candidacies is attributed to Mikolaj Jemiolowski, who depicted the profiles of the pretenders in a style that even Jan Chryzostom Pasek would not have been ashamed of[8]. Even La Fontaine, as J. Griard wrote, "composed a poem on election in Poland addressed to the Princess of Bavaria[9]:

"Interest and ambition/ 'L'interest et l'ambition
Working for the election/ Travaillent à l'élection
Of the Monarch of Poland. / Du Monarque de Pologne.
We believe here that the task/ On croit icy que la besogne

[4] S. Płaza, *Wielkie bezkrólewia*, Kraków 1988 p. 77.

[5] In Sowa's work, Sarmatism is explained as an ideology in the psychoanalytical sense and is identified as the main cause for the political disintegration of the Nobles' Republic. J. Sowa, *Fantomowe ciało króla*, Kraków 2011 ss. 243 – 246.

[6] R. Frost, *After the Deluge. Poland-Lithuania and the Second Northern War 1655-1660*, Cambridge 1993, p. 171.

[7] D. Stone, *The Polish-Lithuanian State, 1386-1795*, Volume 4, Seattle 2001, p. 233.

[8] M. Jemiołowski, *Pamiętnik Dzieje Polski Zawierający* (1648-1679), Warszawa 2000 s. 381.

[9] J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008, p. 371.

Is advanced: and the spirits/ Est avancée; et les esprits

Will soon give the prize/ Font tantost accorder le prix

To the Lorrainer, then to the Moscovite/ Au Lorrain, puis au Moscovite,

Conde, Neuburg; since merit/ Condé, Nieubourg; car le merite

On all sides creates the problem (…)"/ De tous costez fait embarras (...)'

Leibniz's Essay on Political Demonstrations for the Election of the King of Poland

The profile of the second candidate, Duke Philip William Wittelsbach of Neuburg who was married to Sigismund III Vasa's daughter, is connected with the work of Gottfried Wilhelm Leibniz[10] titled: *Specimen Demonstrationum Politicarum Pro Eligende Rege Polonorum Novo scribendi genere ad claram certitudinem exactum, Auctore Georgio Vlicovio Lithvano, Vilnae M D LXIX* (An Essay on Political Demonstrations for the Election of the King of Poland)[11].

The essay was written by Leibniz in only several months at the end of 1668 and the beginning of 1669 for Baron Johann Christian von Boyneburg[12] who supported Philip William's candidacy[13]. The author was given an extremely difficult task of making the noble electors warm up to the character of Neuburg by listing his virtues as well as of dissuading

[10] This period of Leibniz's life is described by R. Ariew: "Leibniz's first publications, other than his university theses and dissertations, concerned politics and jurisprudence. In 1669, under the assumed name of Georgius Ulicovius Lithuanius, Leibniz wrote a treatise about the Polish Royal succession. When Johann Casimir, King of Poland, abdicated his crown in 1668, the Palatine Prince, Philip Wilhelm von Neuburg, was one of the pretenders. Leibniz argued that the Polish Republic could not make a better choice than von Neuburg". R. Ariew, *G. W. Leibniz, life and* the works [in] The Cambridge Companion to Leibniz, ed. N. Jolley, Cambridge 1995, p. 21-22. For more information, see, among others, J. Suzuki, Mathematics in Historical Context, Mathematical Association of America, Washington 2009 p. 209; B. Mates, The Philosophy of Leibniz: Metaphysics and Language: Metaphysics and Language, Oxford 1986; S. Majdański, Logika i polityka, czyli w stronę G.W. Leibniza Wzorca dowodów politycznych, [in]: Leibniz. Tradycja i idee nowoczesnej filozofii, red. B. Paź, Kraków 2010, s. 289–317.

[11] See: G.W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983.

[12] "The minister of Schoenborn, John Christian von Boineburg, had just introduced the young Leibniz to the court of Mainz. Before returning as Ambassador to the Diet of Warsaw where the election would be held, Boineburg asked his protégé to write a text defending Neuburg's candidature" See: J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008, p. 371.

[13] "In Germany, a tract on Polish politics was composed by the mathematician and philosopher, Gottfried Leibniz when employed as secretary to the ambassador of the Duke of Neuberg". N. Davies, *God's Playground A History of Poland: Volume 1: The Origins to 1795*, Oxford 2005, p. 279.

them from voting for the other candidates[14]. Moreover, because of the growing aversion of the Polish nobility [*szlachta*] toward foreigners, Leibniz's book was supposed to be regarded as the work of a Lithuanian, and hence the title page of the work included the pseudonym *Georgio Vlicovio Lithvano*[15]. Interestingly, these initials form an anagram of the real author's name.

Leibniz carried out his mission and sent to his principal a finished manuscript in March of 1669[16]. Then *Specimen* was to be printed in Krolewiec (Könisgberg) and used during the election sejm by the followers of Wittelsbach as a weapon in the political struggle. Unfortunately, because of a delay in the print run as well as the inexplicable behaviour of von Boyneburg, who did not come to Warsaw until 3 May 1669 and was therefore the last of the foreign envoys to present the profiles of the candidates, Leibniz's intellectual effort was thwarted[17]. Ultimately, only the final fragments of the German philosopher's publication were distributed; however, these fragments were of no importance as they had become lost in the mass of other propaganda pamphlets.

Yet it should be remembered that apart from serving the purpose of propaganda, Leibniz's work also included general thoughts regarding historical and political matters. The author had decided to go beyond the imposed guidelines referring to a campaign for a particular candidate and created a universal scientific work[18]. According to J. Griand, "instead of writing a simple apology for Neuburg and three pamphlets against each of the other candidates, he

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[14] For more information concerning Polish affairs in Leibniz's life and works, see, among others: M. Staszewski, *G. W. Leibniz. Jego osobistość – stosunki z Polską – jego stanowisko w rozwoju dziejowym myśli ludzkiej*, Kraków 1917; W. Voisé, Posłowie, [in:] G. W. Leibniz, Wzorzec dowodów politycznych, trad. T. Bieńkowski, Warszawa 1969 pp. 154-162.

[15] W. Voisé indicates that the choice of Vilnius was not accidental. Wittelsbach was not known in the wider circles of the Polish nobility [*szlachta*]. However, in Vilnius they had heard about him before – in 1642 a collection of poems, *Bellaria Academica*, dedicated to the Duke of Neuberg was published by the Jesuits. W. Voisé, *Posłowie*, [in:] G. W. Leibniz, *Wzorzec dowodów politycznych*, translation: T. Bieńkowski, Warszawa 1969 p.154.

[16] According to B. Mates, Leibniz "worked day and night the whole winter… without receiving any recompense whatever for it and produced a remarkable 360-page treatise". B. Mates, *The Philosophy of Leibniz: Metaphysics and Language: Metaphysics and Language*, Oxford 1986 p. 20.

[17] Leibniz's work was published in mid-June after the election had already taken place. See: P. H. Smith, *The Business of Alchemy: Science and Culture in the Holy Roman Empire*, Princeton 1994, p. 132.

Leibniz, as J. Griand wrote, "starts from the facts and a given situation in order to trace, *in concreto*, the portrait of the best candidate. At the same time, he manages to abstract from the declared candidates, so that his text might not be seen as a conspiracy against any of them"[18]. J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008, p. 373.

provided an implacably reasoned text presented in an objective form"[19]. So, for the philosopher the 1669 election was only a starting point for deliberations on the legal and political aspects of the Polish state.

Seemingly, Leibniz's work is internally balanced as it meets both propaganda and scientific standards but, using Foucault's metaphor, it should be stated that this *form of balance* becomes a false precipice. Perhaps this flaw in the structure of the work caused its failure, because when it failed to be a truly powerful political weapon it could not become a paradigmatic political proposal.

Language, logic and politics

Leibniz used to be called a universal encyclopaedia, which was an allusion to his function as a librarian at the court in Hanover[20]. Contemporarily, he would rather be called a *polymath*; nevertheless, his knowledge reached far beyond one scientific discipline[21].

In his prologue preceding the main content of *Specimen*, Gottfried Wilhelm Leibniz states without coyness that *he tried out the human power on the field not yet marked by human feet*, i.e. he used the mathematical method of proving a theorem [demonstratio] in a political pamphlet[22]:

Raram novamque scribendi rationem affero, Lectores, cui utinam tam par essem ego, quam ipsa materia digna est ! Controversia, qua nunc per orbem ingenia exercentur, a cujus eventu Europae fata dependent, dedignari mihi visa est, sive inanes Oratorum argutias, sive humi repentes Scholasticorum Syllogismos[23].

In order to vest his words with appropriate meaning, Leibniz cites a number of authorities who, just like him, craved to achieve a *masculine, concise, pure and decorated only with*

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[19] *Ibidem*, p. 371.

[20] *Historical Dictionary of Leibniz's Philosophy,* ed. Stuart Brown, N. J. Fox, Oxford 2006, p. xxx.

[21] For more information, see: B. Paź (red.), *Leibniz – tradycja i idee nowoczesnej filozofii*, Kraków 2010.

[22] According to J. Griard, "in the *Specimen*, Leibniz applies to politics the method that he expounded I 1666 in his *De Arte Combinatoria"*. J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008 p. 379.

[23] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 3.

forcefulness style of writing. He simultaneously mentions names such as those of Hippocrates, Euclid, Galileo, Descartes, Hobbes and Grotius, as nothing reflects an author's erudition so well as efficient employment of the *argumentum ad autoritatem* [argument from authority]:

Venit in mentem masculum illud, breve, et tersum, et ipsa subtilitate cultum Orationis genus, quo se Hippocrates collegit, quo Euclides astrinxit, quo Aristoteles contorsit, quo admirabilis Jure consultorum veterum in Pandectis brevitas se diffudit. Sed ipsam connexionis formam a Mathematicis petendam censui, qui soli prope mortalium nihil dicunt, quod non probent. Etiam nunc nostro saeculo certitudo earum atrium bono generis humani, exundare in caeteras scientias coepit. Princeps Galilaeus reseratis motuum claustris, naturalem scientiam nova foecunditate irrigavit. Hujus exemplo Cartesius altiorem in Metaphysicae sublimia aquae ductum, impari tamen successu, molitus est. At viringeniosissimus, Thomas Hobbes Anglus (cui Hugonem Grotium materia magis quam methodo jungas) inter plana et abrupta medius Philosophiae civili sese infudit. Quae cum duabus partibus constet, justo et utili, priorem ille persecutus est, utinam tam vere quam acute![24].

At the same time, Leibniz tried to make his work as scientific in character as possible so that it would earn its valuable place in the history of political thought and would remain valid even beyond the end of the election sejm[25]. Thus the philosopher inserted the term *Specimen* in the title, trying to direct his potential readers' attention to the fact that what they had in front of them was a mathematical model of reasoning used in politics:

Nam nec Geometrae eum in demonstrando rigorem tenent, materiae evidentia sermonis hiatum supplente. At in civilibus, tam varie contortis, nemo, nisi a summa severitate ratiocinationis, certitudinem speret. Dedimus tamen auribus aliquid, et de re nihil, de vocum geminatione nonnihil remisimus[26].

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[24] *Ibidem.*

[25] According to J. Griard, Leibniz "wants to make a political prescription, to suggest who is to be elected, which candidate the nobles should elect. It is therefore not the chances of each candidate that are evaluated, but the reasons for electing them. It is for this reason that while combinatorial analysis is traditionally used in the calculation of probabilities". J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008 p. 378.

[26] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 4.

Accepting the order for a propaganda pamphlet from Baron von Boyneburg was for Leibniz an opportunity to realise the idea of Ramon Llull[27]. The experience of a long-standing religious war on the Italian Peninsula between the Christians and the Muslims had been for the mediaeval Catalan mathematician a benchmark for his philosophical search[28]. This constant presence of a conflict growing for ages had made Llull take on the mission of inventing a new way to settle worldview disputes. In general, it would allow the conflicting sides to dissociate themselves from the very content of uttered and experienced judgments and opinions, which seemed impossible as no Christian would be able to win over a Muslim only on the basis of his own philosophical and religious view.

It is evident that the hypothesis regarding the impossibility of agreement with a foreigner who would be communicating in a different discourse was clearly advanced already in the Middle Ages, and Llull himself could have been a patron of the concepts of Jean Lyotard: "as distinguished from a litigation, a differend [différend] would be a case of conflict, between (at least) two parties that cannot be equitably resolved for lack of rule od judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule)"[29].

However, Llull did not restrict himself to a theoretical assessment of the problem but tried to face it. He managed to construct a special device made up of charts fixed concentrically and rotating independently of one another on an axis. On the charts was a set of basic principles such as *goodness, greatness, wisdom* and *truth*, and the rules allowing to put them together. Thanks to the rotation of the charts, which allowed for 900 different combinations,

[27] Leibniz also wrote a thesis titled *De arte combinatoria*, which was an extended version of his first dissertation written before the author had seriously undertaken the study of mathematics. In his early work, Leibniz wanted to follow the rules of Ramon Llull. G. W. Leibniz, *O sformalizowaniu języka nauki*, translation: M. Gordon, [in:] Filozofia matematyki. Antologia tekstów klasycznych, Poznań 1986, p. 96.

[28] For more information, see, among others: A. Bonner, *The Art and Logic of Ramon Llull: A User's Guide*, Leiden 2007; L. Badia, J. Santanach, A. Soler, *Ramon Llull As a Vernacular Writer: Communicating a New Kind of Knowledge*, Woodbridge 2016.

[29] Jean-François Lyotard, *The Différend: The Differend: Phrases in Dispute*. Minneapolis 1988, p. xi.

Llull – as A. Bonner states – tried to find an objective method for settling philosophical disputes[30]. It may be stated that in his method Llull accepted the possibility that the conflicting sides may invalidate their views and accept a verdict issued by a mechanical factor that was independent of the conflicting sides. This way he certainly wanted to minimise the negative effect of mutual prejudices, which very often prevented the conflicting sides from conducting a fruitful debate. Llull realised that reaching an agreement as regards the truth required reaching an agreement as regards the rules on how to reach that truth[31].

Although Llull did not succeed in his religious-philosophical mission, and the philosopher himself died at the hands of the Muslims, his idea of settling disputes on the basis of combinatory logic was lively discussed among mathematicians[32]. Leibniz, too, knew the benefits of adopting a standardisation attitude that was manifested in the search for the "metaspecimen" of a given mathematical discipline[33]. This competence allowed him to believe in a quick realisation of Llull's programme[34].

According to Leibniz, his *demonstratio* method was meant to change human political thought once and for all: *Nunc contractis in arctum spatiis, septis itineribus, continuo etiam nexorum sibi Soritarum filo vestigia regente, quid mirum est, etiam in labyrintho, etiam a caeco non vacillari? Id vero filum mihi ipsa demonstrandi forma est, perpetua rationum*[35]

For Leibniz, the already mentioned command system *consisting of a chain of deliberations and made of intertwining links of presumptions* was the *thread*.

This particular meaning of political issues, which deserve a thorough mathematical analysis, was meant to be the justification for applying a new research method: *Me vero incuriae*

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[30] A. Bonner, *The Art and Logic of Ramon Llull: A User's Guide*, Leiden 2007, p. 290.

[31] *Doctor illuminatus: A Ramon Llull Reader*, ed. A. Bonner, Princeton 1993, p. 82.

[32] See: L. Badia, J. Santanach, A. Soler, *Ramon Llull As a Vernacular Writer: Communicating a New Kind of Knowledge*, Woodbridge 2016.

[33] Leibniz's dream finally came true in his project *characteristica universalis*. This project was combined with *calculus ratiocinator* – another of his ideas. The purpose of this project was to create a tool that would create the Encyclopedia – a compendium of all human knowledge. See: G .W . Leibniz, *O sformalizowaniu języka nauki*, tłum. M. Gordon, [in:] M. Gordon, *Leibniz*, Warszawa 1974, p. 245-246.

[34] *Doctor illuminatus: A Ramon Llull Reader*, ed. A. Bonner, Princeton, 1993, p. 42-44.

[35] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 4.

humanae admiratio perculit: qui motus corporum ad calculos revocamus, iidem motus animorum nobis intimos, nec minus certa lege constantes, obiter percurrimus; de horologio aliquo demonstrationes, de salute tot populorum declamationes habemus. Ergo impetum sumsi, eo in campo certitudinem humanam periclitandi, quem nulla pedum vestigial signant[36].

The philosophical grammar that was proposed by Leibniz had to fulfil the standards set by the structure of the language of mathematics[37]. Therefore, it could not contain any features that were typical of natural language, such as ambiguity, vagueness or semantic fickleness of the applied notions. For Leibniz, the attempt to invent a new language based on a dictionary of common philosophical notions could have provided a solution for speaking different languages:

quando orientur controversiae, non magis disputatione opus erit inter duos philosophos, quam inter duos Computistas. Sufficiet enim calamos in manus sumere sedereque ad abacos, et sibi mutuo sibi mutuo (accito si placet amico) dicere: calculemus[38].

Political work or work on politics

Leibniz was given the extremely difficult task of making the noble electors warm up to the character of Neuburg by listing his virtues as well as of dissuading them from voting for the other candidates. That is why in *Specimen Demonstrationum Politicarum* the philosopher presents 60 premises that must be fulfilled by an ideal pretender to the throne and then confronts them with the particular candidacies to determine whether they conform to their actual state or not. After conducting this complete logical operation, Leibniz comes to conclusions which are supposed to determine who deserves the Polish crown:

Conclusio I: MOSCHUS utiliter non eligetur.

Conclusio II:CONDAEUS utiliter non eligetur

Conclusio III: LOTHARINGUS utiliter non eligetur

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[36] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 4.

[37] Leibniz's idea, based on a combination of language and mathematics, was analysed in: H. Święczkowska, *Język jako projekt filozoficzno-polityczny: Gottfrieda Wilhelma Leibniza "Swobodne rozważania o naprawie i ulepszaniu języka niemieckiego"*, Kraków 2008; M. Gordon, *Leibniz*, Warszawa 1974.

[38] W. Lenzen, *Leibniz's logic* [in:] *The Rise of Modern Logic: from Leibniz to Frege*, ed. D. M. Gabbay, J. Woods, Amsterdam 2004, p. 1.

Conclusio IV:NEOBURGICUS utiliter eligetur[39].

Having applied his mathematical method, Leibniz determined that the best candidate to the throne was Philip William, which was obvious on account of the identity of the principal[40]. What is characteristic is that Leibniz does not add to *Specimen* his fifth conclusion, in which he would assert that the election of a Piast would not be beneficial. On the one hand, this could have resulted from an *a priori* rejection by Leibniz in the premise LX candidatures of Piasts as not probable enough since they were not supported by neighbouring countries. On the other hand, the length and specificity of the reasoning of premise LX suggests that an opposite claim may be equally probable: Leibniz regarded a Piast pretender so dangerous that he had to *a priori* exclude him from reasoning and the language:

PROPOS. LX.

Rex extraneus esto, seu PIASTUS ne esto.

Piastus novus est.

Omne novum periculosum, caeteris paribus,

Periculosum periculoso tempore fit Periculosius. Poloniae autem nunc status periculosus est.

Ergo Piastus nunc Periculosissimus .

Certum est novandis in Polonia rebus nullum tempus praesente incommodius esse posse.

(…)

Idem aliter:

Piastus rerum Polonicarum super extraneos peritus erit.

Ergo et defectuum Polonicorum. Ergo callebit modos nobis nocendi.

Ergo et minuendi libertatem.

Quod quis callet, id facilius potest.

Ergo Piastus facilius extraneo libertatem minuet.

Idem aliter:

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[39] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 84-90.

[40] According to B. Mates: "The argument is in the mathematico-deductive form, with propositions, proofs, corollaries, and conclusions. (…) after obtaining three conclusions excluding the other principal candidates, Leibniz finally reaches the end result: Conclusio IV: Neuburgicus utiliter eligetur". B. Mates, *The Philosophy of Leibniz : Metaphysics and Language: Metaphysics and Language*, Oxford 1986 p. 20.

Piastus Polonus est.

Polonus gratior Polonis.

Qui gratior, is minus suspectus.

Qui minus suspectus, minus impeditur.

Qui minus impeditur, facilius destinata efficit, seu potentior est.

Ergo Piastus facilius Extraneo libertatem minuet.

Idem aliter:

Piastus intestinus est,

Intestinus est vicinissimus,

Qui vicinissimus, idem potentissimus,

Quo quis potentior, eo periculosior libertati,

Ergo Piastus periculosissimus libertati[41].

Contrary to what Leibniz was determined to prove in his *Specimen Demonstrationum Politicarum*, Philip William was not disinterested in running for the Polish throne. In fact, he had many reasons to take part in the election. The permanent deadlock in domestic politics, the continuous clashes between particular oligarchic factions and John II Casimir's court and the deteriorating military-economic situation – all this together constituted a sort of invitation to neighbouring countries to unleash a baroque *danse macabre* in the Commonwealth. While the cabals related to the monarch tried to adapt the Commonwealth to the political model of *absolutus dominium* [an absolute monarchy] already existing in Western Europe, the magnate factions defended the notion of *Golden Liberty* while at the same time realising their own individual interests[42]. To sum up, it was the crisis in the Polish-Lithuanian Commonwealth caused by the reign of John II Casimir that had led to such a large number of pretenders to the throne in the election of 1669[43]. Among the candidates was also Duke Wittelsbach of Neuburg.

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[41] G. W. Leibniz, *Sämtliche Schriften und Briefe* [Complete Writings and Correspondence], *Vierte Reihe: Politische Schriften, Erster Band: 1667-1676*, Berlin 1983, p. 68-73.

[42] W. Sadowski, *Państwo i władca w oczach szlachty. Postawy polityczne obywateli województwa lubelskiego za panowania Michała Korybuta Wiśniowieckiego i Jana III Sobieskiego*, Lublin–Radzyń Podlaski 2008 s. 65-67.

[43] W. Kłaczewski, *Abdykacja Jana Kazimierza*. *Społeczeństwo szlacheckie wobec kryzysu politycznego lat 1667-1668*, Lublin 1993 s. 72-73.

Neuburg became interested in accession to the Polish throne around 1665, after he had formed a secret alliance regarding the legacy of John II Casimir with the Elector of Brandenburg[44]. The Elector undertook to support the candidacy of Neuburg even if this would require the involvement of armed troops[45]. This concept was approved not only in the Wielkopolska [Greater Poland] province, which was Neuberg's natural power base, e.g. because of its location, but also at the court of the reigning king (!). On 9 March 1668, only 2 days after the disruption of the sejm, John II Casimir signed his abdication[46], which ceased to be his need and became a necessity, and established an agreement with Philip William and Louis XIV in which he undertook to place his crown in the hands of the nation by mid-August 1668 *in order to enable the duke to be elected to the Polish throne*. The provisions of the treaty ensured the last representative of the House of Vasa a lifetime income paid out by Louis XIV from the date of abdication, regardless of whether the Duke of Neuburg would be chosen as king or not[47]. John II Casimir kept his promise and abdicated from the throne, though he missed the date by a month.

Another important factor acting in favour of the upcoming election of Neuburg was the conclusion of a treaty between Sweden and Brandenburg on 2 July 1667 in which both sides agreed to protect (!) the current political system of the Commonwealth. Neuburg's ascension to the throne was a guarantor of those provisions because in view of his certain personal qualities he would not act as a sovereign ruler but rather as a king partly dependent on the Elector of Brandenburg. Such a perspective of rule explicitly shatters the panegyric assessment of Wittelsbach's candidacy as provided by Leibniz. The historiosophical hope contained in the question: *"What if Neuburg had been elected king?"* becomes completely dispelled and disappears in the mists of 17th-century noble diplomacy, which does not comprehend the subtlety of the language of logic.

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[44] D. McKay, *Small-power diplomacy in the age of Louis XIV: the foreign policy of the Great Elector during the 1660s and 1670s*, [in:] *Royal and Republican Sovereignty in Early Modern Europe: Essays in Memory of Ragnhild Hatton,* Robert Oresko, G. C. Gibbs, H. M. Scott, Cambridge 1997 p. 197.

[45] A. Kaminska, *Brandenburg-Prussia and Poland*: 1669-1672, Marburg 1983, p.1-2.

[46] W. Czermak, *Ostatnie lata życia Jana Kazimierza*, oprac. A. Kersten; Warszawa 1972 s. 296-297.

[47] W. Kłaczewski, *Abdykacja Jana Kazimierza*. *Społeczeństwo szlacheckie wobec kryzysu politycznego lat 1667-1668*, Lublin 1993 s. 73.

Election

The course of the election, as a result of which Michael I [Michal Korybut Wisniowiecki] was quite unexpectedly elected king, was very stormy not only in the figurative sense but also in terms of the weather, which disrupted the order of the day. Other factors hampering the election included the endlessly prolonged anticipation and lack of a candidate with a clear advantage over the others. As a result, the atmosphere among the Polish nobility was growing tense. Also the common people demanded that a new king be elected, accusing the electors of betrayal: "Traitors! We'll cut you down. We'll not let you out of here; to no avail did you wreak havoc on the Commonwealth; constituemus other senators, we'll elect a king from our own midst as the Lord God inspires our hearts"[48].

At first, the date of the election was set to 18 June 1669; however, as J. W. Poczobutt-Odlaniecki reported, the aforementioned storm prevented the election of a king, which was postponed until the following day in hopes of better weather[49].

Michael I was elected king on 19 June 1669, one day before Corpus Christi. This time the weather was favourable. The election began with the hymn *Veni Sancte Spiritus* [Come Holy Spirit], intoned by Stefan Wierzbowski, a diocesan from Warsaw[50]. Then the electors went their separate ways to proceed to vote in their respective provinces. At first the candidacy of Michael I was not taken into consideration at all. Neuburg had an advantage among the electors in the Wielkopolska provinces, while Lorrainer in the Małopolska [Lesser Poland] provinces[51]. Negotiations between the factions lasted for a long time; also political propaganda was used to discredit rivals among the nobility.

According to M. Chmielewska, at that time lampoons, caricatures and rumours were distributed to portray the candidates in a negative light[52]. Neuburg was ridiculed because of the abundance of his offspring that would suck out the Commonwealth like leeches, whereas

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[48] J.Ch. Pasek*, Memoirs of the Polish baroque: the writings of Jan Chryzostom Pasek, a squire of the Commonwealth of Poland and Lithuania*; Berkeley 1976, s. 212.

[49] J. W. Poczobutt Odlanicki, *Pamiętnik*, ed. A. Rachuba, Warszawa 1987 s. 242.

[50] For more information, see: *The election of Michal Korybut Wisniowiecki in 1669* [in] *Europa Triumphans: Court and Civic Festivals in Early Modern Europe*, Volume 1, ed. J.R. Mulryne, Hampshire 2004 p. 424-430.

[51] J.Ch. Pasek, *Memoirs of the Polish baroque: the writings of Jan Chryzostom Pasek, a squire of the Commonwealth of Poland and Lithuania*; Berkeley : University of California Press 1976, s. 212.

[52] M. Chmielewska, *Sejm elekcyjny Michała Korybuta Wiśniowieckiego 1669 roku*, Warszawa 2006 s. 216.

Lorrainer was mocked because of his fear of the influence of the Jesuits and the Spanish Inquisition. According to D. Stone, "the nobles also feared Habsburg absolutism and involvement in wars against Turkey"[53]. Great differences rose among the nobility, creating an atmosphere of upcoming bloodshed.

It is not exactly known when the candidacy of Michael I was put forward because it had already been proposed to elect a Piast as king. Among the potential candidates were Boguslaw Radziwill and Aleksander Polanowski, but their negative electorate was too extensive for them to count on any success in the election[54]. Perhaps further negotiations would have come to a standstill had the castellan of Kalisz Kazimierz Radonicki not made a mistake – because of a slip of the tongue he proposed Michael I instead of Duke Aleksander Ostrogski. This mistake turned out to be fateful. The provinces hailed Michael I king as he was sitting among them and allegedly *with tears in his eyes tried to excuse himself from accepting the crown*[55].

In view of the common consent among the nobility, Primate Mikolaj Prazmowski was forced to commence the election procedures. Having asked three times the representatives of the provinces for consent to proclaim Michael I as king, and having received no dissenting voice, he hailed: *Vivat serenissimus Michael Rex Poloniae!*

From the perspective of the electors who were afraid of losing their privileges and wanted to fulfill the will of the noble masses, the candidacy of Michael I seemed to be perfect. It was a genuine response to the noble longing for the Piast dynasty, which had ended in 1370 along with the death of Casimir III the Great. The election of a Piast threw off the yoke of political maturity.

Epilogue

King Michael I was not only a Piast, which was a *sine qua non* for his election, but also a person of weak character and personality, both of which did not predispose him to assume royalty despite his gentility in the great Wisniowiecki family[56]. According to D. Stone,

[53] D. Stone, *The Polish-Lithuanian State, 1386-1795*, Volume 4, Seattle 2001, p. 233.

[54] J.Ch. Pasek, *Memoirs of the Polish baroque: the writings of Jan Chryzostom Pasek, a squire of the Commonwealth of Poland and Lithuania*; Berkeley 1976, s. 212.

[55] M. Chmielewska, *Sejm elekcyjny Michała Korybuta Wiśniowieckiego 1669 roku*, Warszawa 2006 s. 217.

[56] D. Stone, *The Polish-Lithuanian State, 1386-1795*, Volume 4, Seattle 2001, p. 233.

Wisniowiecki "learned to speak eight languages while studying at home as well in Prague, Dresden, and Vienna, but he acquired no interest in politics, philosophy, literature, or the arts"[57]. His lack of qualities, which was characteristic of West European rulers, meant that the Polish nobility saw his reign as laying the ghost of absolutism that was already common in Western Europe and as maintaining the cracked political pillars of the Nobles' Democracy.

To sum up, the election of Michael I was one of the last independent political initiatives of the Polish nobility, which was in harmony with the Polish-Lithuanian Commonwealth's reputation as – in Leibniz's words – the best of possible worlds. However, the nobility's theodicy was already doomed to failure. Almost a century later the rationalist Voltaire lampooned Leibniz's arguments by creating in his philosophical novella *Candide* the character of Pangloss – a philosopher whose life was ruled by adversities and yet who held on steadfastly to his optimism.

Nevertheless, J. Griand states that Leibniz's work was important for the history of philosophy, politics and law: "Though, historically, a complete waste of time, the *Specimen* is of interest because it offers a new approach to the rationality of political decisions. It gives an example of reason trying to estimate the best possible decision in a given situation"[58].

* * *

Leibniz's *Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum* – legal logic at the service of politics: a study in the history of legal and political thought.

Summary: In 1668 King John II Casimir abdicated the Polish-Lithuanian throne and left for France. As a result of his decision, the Commonwealth was once again left without a monarch, thus another election was necessary. The favourites in the race for the Polish crown – still valuable though tarnished by John II Casimir's poor policy – were four candidates, each of whom was keenly interested in the

[57] *Ibidem*.

[58] J. Griard, *The Specimen Demonstrationum Politicarum Pro Eligendo Rege Polonorum: From the Concatenation of Demonstrations to a Decision Appraisal Procedure* [in:] *Leibniz: What Kind of Rationalist?*, ed. M. Dascal, Tel Aviv 2008, p. 381.

royalty. The profile of the second candidate, Duke Philip William Wittelsbach of Neuburg who was married to one of Sigismund III Vasa's daughter, is connected with the work of Gottfried Wilhelm Leibniz titled *Specimen Demonstrationum Politicarum Pro Eligende Rege Polonorum* (An Essay on Political Demonstrations for the Election of the King of Poland). Yet it should be remembered that apart from serving the purpose of propaganda, Leibniz's work also included general thoughts regarding historical and political matters. The author had decided to go beyond the imposed guidelines referring to the campaign of a particular candidate and created a universal scientific work. A natural consequence of Leibniz's theory of legal argumentation is the need to create new discourses whose intellectual roots lie within the broad spectrum of mediaeval doctrines (Ramon Llul).

Key words: History of the Polish state and law, legal logic, Leibniz, history of legal and political thought.

InternetowyPrzegląd

Prawniczy TBSP UJ 2016/7

ISSN 1689-9601

Paula Złotowska*

Trends in Egyptian Constitutional Law After 1952. Maintaining Strong Presidential Power in the Reality of Middle East Affairs.

Streszczenie:

Arabska Republika Egiptu jest jednym z najbardziej wpływowych krajów świata. Pełni na Bliskim Wschodzie wyjątkową rolę zwłaszcza, gdy połączy się ją z relacjami z Izraelem, współpracą ze Stanami Zjednoczonymi czy historią kolonialną kraju. Jest to również główne centrum kulturalne i religijne świata muzułmańskiego. To, co jednak jest najbardziej fascynujące to historia konstytucyjna i prawna Egiptu. Artykuł ten skupia się na ewolucji egipskiego systemu ustrojowego po 1952 r., tj. po zamachu stanu Wolnych Oficerów, który całkowicie zmienił Egipt, przynosząc mu po okresie rządów monarchii konstytucyjnej rządy republikańskie. Te zmiany i ewolucja systemu nie mogą być jednak w pełni uświadomione bez pewnej podstawy historycznej. Rządy kolonialne i to, co ze sobą przyniosły, zwłaszcza powstanie państwa Izrael ukształtowały Egipt, jego obywateli, rząd, i politykę – zwłaszcza relacje ze Związkiem Radzieckim, a po 1971 r. ze Stanami Zjednoczonymi. Miały również wpływ na system prawny Egiptu, począwszy od najbardziej fundamentalnych ustaw – jego konstytucji, które odzwierciedlały zmiany polityczne w kraju.

Słowa kluczowe: Egipt; prawo konstytucyjne; Konstytucja; prezydent; Bliski Wschód

1. Introduction

The Arab Republic of Egypt is one of the most influential countries in the world. It plays a unique role in the Middle East, especially when we combine it with its relation to Israel, partnership with the United States and its colonial history. It is also one of the major cultural and

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religious centers in Islamic world, with the oldest Islamic university – Al Azhar, which has its headquarters in Egypt's capital city, Cairo. But what really is fascinating and susceptible to analysis for scholars is Egypt's constitutional and legal history. This article will not analyze Egyptian emergency state law which has been in force for over thirty years and allowed the government to rule the country with no explicit boundaries of its legitimate powers. Instead, it will focus on the evolution of Egypt's constitutional system after 1952, i.e. the Free Officer's Revolution that entirely changed Egypt and introduced republican (or rather – authoritarian, especially during the reign of Hosni Mubarak) government in place of constitutional monarchy. Those changes and the evolution of the system cannot be understood properly without some historical background. The colonial rule and what came after it, i.e. the emergence of the State of Israel has shaped Egypt, its people, the government, the politics, especially the foreign affairs with Soviet Russia and with the United States. It also had its impact on the Egyptian legal system, starting with basic laws – its constitutions, which reflected political changes in the country.

2. Egyptian constitutional history before 1952

In 1922 Egypt gained its independence[1]. For over three decades it had been ruled by the British colonial government. But what seemed to be a victory over colonial rule only started a new struggle towards self-determination and building national consciousness. It also started a long process in creating a legal background for a new country. European colonialism, and before it Ottoman rule, brought alien laws and legal methods to the Middle East. The traditional legal system was based on Islamic law as well as on traditional law that existed in the region[2]. Colonialism changed the situation in such a way that still creates problems. Foreign interference has started a revival of Islamic traditionalism which amongst other things led to the creation of the Muslim Brotherhood[3] – the most influential religious organization in Egypt. However, from the

[1] On the history of Egyptian campaign for independence, see: S.A. Cook, *The Struggle for Egypt. From Nasser to Tahrir Square,* Cairo 2012

[2] See: J. Danecki, *Podstawowe wiadomości o islamie,* Warszawa 2007; S.W. Witkowski, *Wprowadzenie do prawa muzułmańskiego,* Warszawa 2009

[3] The Society of Muslim Brothers, or as it is commonly known - the Muslim Brotherhood (ar. *al-Ikhwān al-Muslimūn*) is a Sunni Islamic organization, founded in 1928 in Egypt by Islamic scholar Hasan al-Banna. Its main goal was to spread Islamic education and help people in need. Later on the Brothers started a political activity. They were regularly banned from conducting their activities on the basis of links to terrorism. In the presidential election in 2012 the member of the Muslim Brotherhood, Mohamed Morsi, became the president of the Arab Republic of Egypt but was overthrown a year later, in July 2013.

legal perspective the most interesting thing was the process of building the country and its government on constitutional basis. The first modern Egyptian constitution was created in 1882, shortly before the British entered Egypt. It lasted less than a year[4]. Until 1923 Egypt was deprived of the constitution of any kind. The British rule in Egypt[5] created a puppet government of Egyptian ministers. As a result the nationalist movement emerged as the main force that was able to overthrow the British government in Egypt. It partly succeeded in 1922 when the United Kingdom declared Egypt the independent country, but the last British troops withdrew from Egypt only in 1956[6].

After Egypt gained its independence the main goal for the Egyptian government was to create a Constitution which would help unite the people and bring the sense of self-determination[7]. Established in 1922, the Constitutional Commission was designed to create an appropriate constitution for Egypt. During its work contradictory opinions emerged concerning state authorities. The initial draft limited royal prerogatives to executive only and the right to veto parliamentary bills[8]. But by the Kings decision those provisions were changed and royal prerogatives became much wider[9].

Started in 1923, the Egyptian system of government was characterized by the strong power held by the King. It has changed in 1928 when the Constitution was suspended due to the domestic unrest. Later, in 1930 the authorities introduced a state of emergency and again the Constitution was suspended[10]. King Fuad and Prime Minister Ismail Sidki seized the opportunity and signed the new Constitution which granted the King even more power than the former one; it also introduced indirect elections. As one might have predicted, this led to the strong resistance –

[4] N.J. Brown, *Constitutions in a Nonconstitutional World. Arab Basic Laws and the Prospects for Accountable Government,* New York 2002, p. 26-34
[5] Until 1914 the British rule in Egypt was known as „the veiled protectorate". After 1914 it officially became the British protectorate over Egypt due to the declaration of war with the Ottoman Empire, of which Egypt was nominally a part.
[6] J. Zdanowski, *Historia Bliskiego Wschodu w XX wieku*, Wrocław 2010, p. 184
[7] Despite formal independence Egypt was still under the British control. The Declaration of Independence set conditions which Egypt had to fulfill in order to become independent. Four issues were to be regulated by treaties: the British control over Egyptian finances and foreign policy, the safety of navigation in the Suez Canal, the form of the government in Sudan and the future of the system of surrender; source: J. Zdanowski, *op. cit*.,
p. 76
[8] B. Stępniewska-Holzer, J. Holzer, *Egipt. Stulecie przemian*, Warszawa 2008, p. 33
[9] For instance, the King had the right to issue royal decrees even when the Parliament operated normally. He also exercised executive and legislative authorities and could dissolve the Parliament.
[10] B. Stępniewska-Holzer, J. Holzer, *op. cit.*, p. 48-49; J. Zdanowski, *op. cit*., p. 103

opposition demanded the former Constitution to be restored[11]. In 1934 the 1930 Constitution was abolished[12] and Egypt remained the country with no basic law which would limit the government for almost two years; the 1923 Constitution was restored in 1936 and remained in force until the 1952 and the Free Officers' Revolution.

2. *1952 - The Free Officers' Revolution and its implications for Egyptian politics*

Restoration of the 1923 Constitution in 1936 had coincided with the signing of the Anglo-Egyptian Treaty, which had allowed the British forces to stay in Egypt (the Suez Canal area) until 1956[13]. Above all however, it had allowed the Egyptian army to rebound and get the real national character. Thanks to the government's decision to modernize the army and increase its potential, armed forces had become more Egyptian in nature. After fifteen years in 1952 the Egyptian army were finally able to reach for real independence. The Free Officers' Movement, the organization composed of young Egyptian officers mostly from the lower classes of the Egyptian society, took its chance and seized power during the bloodless Revolution which set a new path in country's history. It brought military rule that continue with a short pause from July 2012 to July 2013[14], to this day.

[11] The main opposition party - the Wafd Party - saw the 1930 Constitution as a tool with which the King could have destroy the opposition. The new law introduced several limits for the political parties, such as the property census and the education census which significantly lowered the electoral base for the Wafd Party. During the 1931 elections opposition parties speeches were prohibited and their leaders were victimized. As a result the Wafd Party boycotted the elections which ended up with the ruling party's victory.

[12] J. Zdanowski, *op. cit.,* p. 103

[13] The Treaty signed 26th August 1936 transferred the command over Egyptian army to the Egyptians. At that time the main problem which the new command must have faced was the weakness of the Egyptian army, poor equipment and operational capabilities and above all – it's social structure. Most of the officers originated from Turkish-Caucasian soldiers or from the Egyptian upper class. Egyptian command decided to change this trend and during the first year the number of Egyptian officers increased dramatically, from 398 in 1936 to 982 in 1937; data from: A.S. Hashim, *The Egyptian Military, Part One: From the Ottomans through Sadat,* „Middle East Policy", 3/2011

[14] After the January 25th Revolution (or the Arab Spring) and overthrowing of Hosni Mubarak, Mohamed Morsi, the member of the Muslim Brotherhood, became the new President of the Republic in July 2012. However, he managed to maintain his position only for one year. In the first days of July 2013 Egyptian army once again led to the fall of the incumbent President. The current President, general Abd al-Fattah al-Sisi is former commander-in-chief and Minister of Defence and Military Production. As a commander-in-chief of the armed forces he launched the coup d'état against President Mursi in July 2013.

Before 1952 the Egyptian army was weak and the command - unsuccessful. The best proof for that was a tremendous defeat in the first Arab-Israeli war (1948-1949) with newly established Israel, when the combined armies of several Arab countries, including Egypt and Jordan, were unable to protect their borders and Palestine from Jewish interference. What is more, the Egyptian government was corrupt and unstable. The Officers decided that the best way to clean the political sphere in the country was to change the government and the entire political system. Therefore they've started the Revolution, or rather a coup d'état, which according to Ozan O. Varol had, however, democratic features[15]. The question is: how is it possible to assign democratic features to actions that violate the law. Democracy consists of the rule of law that requires subordination to the law. But one must identify the rule of law not only with formal features that apply to the rules but also with the element of ethics. The regime that rules in accordance to the law, but law that is unfair and which violates a sense of social justice and human rights – cannot be identified as a regime that governs its people in accordance with the principles of the rule of law. When such a situation occurs, people or institutions that reflect the will of the Nation should have the right to stand against its rulers. This is why Ozan O. Varol permits the definition of democratic coup d'état. He argues that the "democratic coup d'état" is not an oxymoron; on the contrary, he claims that some coups d'état are more democratic than the others because the army answers the popular demand for the ruling regime to resign[16]. It this particular situation the army overthrows the regime and holds free elections but as a result of the regime change it protects its own interests by implanting its vision of the new regime in the constitution[17].

That was exactly what happened in Egypt. The army carried out the coup d'état, took power, held the free elections and maintained its rule because there were no other force which would at that time be able to govern the country. Partly due to compulsion and partly because of the Officer's interests, the army maintained the power instead of giving it to another player in the political arena; furthermore – it established the regime based on civil-military connections, where army played the role of the protector of the regime and the regime repaid military by

[15] O.O. Varol, *The Democratic Coup d'Etat,* „Harvard International Law Journal", 2/2012
[16] He provides necessary features of democratic coup d'état: the military coup d'état is conducted against the authoritarian or totalitarian regime as a answer to the popular demand to overthrow the regime; the authoritarian leader refuses to resign; the coup is held by the army that have the popular support; the army holds in a short period of time the free and fair elections; and finally the power is transmitted to the legally elected government.
[17] *Ibidem*

establishing the laws and regulation which favor the military. The system of government created by the Free Officers survived because of the popular support and the esteem armed forces has among the Egyptian people. The military rule, initiated by the coup helped Egypt become the leader in the region, especially after Arab countries were forced to face the major threat from Israel as well as start to play politics with the new leader – the United States.

The Cold War between the United States and the Soviet Union played out not only in East era Europe – probably the most significant for the world's history was the front situated in the Middle East. During the 1950s the United States began to enter the Middle East. What caused this interest? First of all – oil revenues, especially in Iraq which gained its independence in 1932. But in the context of Egypt more significant was the role the Soviet Union started to play in the region. The United States wanted to confront the Soviets in the Middle East because the strong Soviet Union was a threat for the international political order, from the American perspective. The United States wanted to create the Middle East Defense Organization (MEDO) as a supplement for NATO operations in the region which would, if necessary, support defensive actions against the Soviet Union[18]. Egypt was meant to be one of its pillars, with the alliance's military bases in the Suez zone. For Egypt the emergence of this new organization, in which the United Kingdom meant to play a significant role, was unacceptable and was perceived as a continuation of colonialism in Egypt and the Middle East. Gamal Abdel Nasser, the second president of the Republic of Egypt, decided that Egypt would not take part in MEDO operations; instead he started a political mission called "Pan-Arabism" – its aim was to unite the Arab countries against one enemy – Israel, and build a strong Arab coalition which would serve the region as a peacekeeper and ensure a stable development for newly independent countries. Pan-Arabism was based on the ideology which called all Arabs one nation; therefore they were supposed to act together, not against each other, and create the coherent politics for the good of all Arabs, not particular countries.

But policy aimed at the unification of regional countries and defense of the borders required a strong, well-equipped and modernized army. This was indeed a problem especially when we take into consideration the embargo on arms supplies that was imposed by the tripartite declaration signed in 1950 by the United States, France and Great Britain. Therefore Egypt asked the Soviets for help and signed arms deals with Czechoslovakia. The Close relationship with the Soviet Union was against the US' politics in the region[19]. However, during the Sadat era (1970-

[18] P. Calvocoressi, *Polityka międzynarodowa po 1945 roku*, Warszawa 2010, p. 367
[19] See: H. Kissinger, *Dyplomacja,* Warszawa 2009, p. 570 and next

1981) and after the Six Days War with Israel in 1967 it has changed[20]. Sadat's policy was based on *infitah* – "the opening". He wanted Egypt to become more open to the world, to foreign investments, foreign capital etc. He also transformed Egypt from the socialist country, with the socialist constitution to the capitalist one, with private ownership. He also saw the United States as the only solution to the regional crisis and the pillar of peace[21]. With the signing of the Peace Treaty with Israel in 1979 Egypt became dependent on the US development and military aid[22] and became a military partner for the United States government, taking care for stability in the region and providing help for American military operations in the Gulf[23].

3. *Egyptian Constitutions – legal form for maintaining strong, presidential power*

Some say, that Egypt became a country, where modern pharaohs rule[24]; no need for deep, thorough analysis to prove this statement. With the history of ancient Egypt the analogy seems natural. However, what is vital for understanding why such a situation occurred is providing a basic background of the country's history – which I did in previous paragraphs. Now it is the time for legal analysis of Egyptian constitutional order with the emphasis on the presidential prerogatives and how in time his position in the system of government has changed.

3.1 *From Constitutional Monarchy to the Democratic Republic – president as the king with no crown?*

The 20th century for Egypt was the era of strong government headed by the monarch or the president. The system has changed, but characteristics remained – Egypt was to be ruled by the individual, with real power, wide prerogatives and support from the parliament and the army[25]. During almost six decades, from 1952 until the Arab Spring in 2011, Egypt's presidents ruled with the support of parliament, where the majority came from the presidential political party and the military. Egyptian constitutions of 1956 and 1971[26] were both more or less democratic

[20] See: S.A. Cook, *op. cit.*
[21] *Ibidem*, p. 135
[22] S.A. Cook, op. cit., p. 219
[23] *Ibidem*, p. 161
[24] *Ibidem*, p. 167
[25] In fact this is still in force, with the current president Abd al-Fattah al-Sisi who originated, as his predecessors on this office, from the Egyptian Armed Forces.
[26] I do not count the 1964 Constitution nor the Constitution of the United Arab Republic from 1958.

in their overall characteristics. But they have created, especially the one from 1971, a legal ground for emergence of the authoritarian rule. What strikes at first glance is the frequency with which the legislator made references to ordinary legal acts, leaving the parliament and the president space for creating the legal reality as they wish to with no real and effective legal boundaries[27]. It has been reflected for example in continuously maintaining the state of emergency – this is however not the right place or time to determine whether it was really a necessary and the best possible solution for Egypt to be ruled by using the provisions of the 1958 Emergency Law[28]. It is enough to say here that the state of emergency for the whole country was not lifted until 2013[29]. Egypt has been ruled by the emergency provisions for over thirty years; years of continuous strengthening of the presidential powers at the expense of basic human rights. The regime justified it by referring to the threat of terrorism, religious fundamentalism or constant unrest in the border regions – especially the Palestinian issue which is still in force. One may ask whether the state of emergency was absolutely necessary in order to ensure peace. In the Egyptian case colonial history taught the republican government (the President) that ruling the country by using the emergency provisions may be useful[30]. The 1958 Emergency Law was issued to provide the government means for acting against the constitutional provisions, which were in general democratic in their nature, but within the boundaries of law.

The other area of law that was to be regulated by the ordinary laws was electoral law. Both constitutions, of 1956 and 1971 had left the duty of regulating it to the legislator. Both only briefly mentioned the rules of electoral law. While the 1956 Constitution stated that the National Assembly was to consist of members elected during the secret ballot, it left every other regulation to the legislator, stating only that he should decide upon the number of members, the conditions that must be met in order to be elected and the electoral law itself[31]. The following articles defined the powers of the legislative, but what was really dangerous was the presidential

[27] In 1979 however the Supreme Constitutional Court was established, with its main goal to control the constitutionality of laws and to provide the biding interpretation of law. Often the SCC decided upon violations of human rights, i.e. freedom of expression, right of associations, freedom of peaceful assembly or gender equality.
[28] Law No. 162/1958 on the Emergency State; http://www.aljazeera.net/specialfiles/pages/46609207-599c-4f9d-ad6e-618fec866c14, 05.05.2016
[29] It is however still in force in some areas, i.e. the Sinai Peninsula, due to the threat of the so called Islamic State.
[30] See S. Reza, *Endless Emergency: The Case of Egypt*, "New Criminal Law Review", 10/2007, p. 535-537; N.J. Brown, *Law and Imperialism: Egypt in Comparative Perspective,* "Law & Society Review", 29/1995, p. 111
[31] Article 67 of the 1956 Constitution.

prerogative to resolve the entire parliament (Article 111)[32]. On the contrary, the 1971 Constitution *expressis verbis* stated that the National Assembly consisted of at least 350 members of which at least fifty percent were to be workers and farmers[33]. They were to be elected in public, direct elections in secret ballot. It also gave the president the right to choose at most ten members of the Assembly. The 1971 Constitution left the electoral law to be adopted by the legislator, but in the Article 88 it stated that the elections shall be conducted under the supervision of judicial bodies. In 2007 the aforementioned Article was changed in such a way that practically jeopardized the judicial supervision. It set the principle of conducting the elections during one day only throughout the country. It was impossible for judicial bodies to control the elections and every polling station or office in the country. What was the reason for the regime to amend Article 88? In 2000 the Supreme Constitutional Court ruled that in order to implement the provision of Article 88 to supervise the elections by the judicial bodies it is necessary to put at least one member of the judiciary in every polling station[34]. During the 2000 elections, which were conducted under the judicial supervision – as a realization of the SCC ruling – a number of abnormalities were detected. The regime could not risk losing control over the elections and changed the provisions of Article 88 making the judicial supervision impossible to fulfill.

The initial question – did the President of the Republic became the King with no crown – is not as surprising as it might appear. When in December 1952 the Revolutionary Command Council (RCC)[35] abolished the 1923 Constitution and later – the King himself, the issue of future presidential prerogatives emerged. The new 1956 Constitution granted the president wide prerogatives, including ability to issue decrees with the force of law. But in comparison to the former regime, the Egyptian new Republic was much more centered around the President. This is because the parliament consisted of the politicians loyal to the president[36]. During the reign of kings Fuad (1922-1936) and Farouk (1936-1952) parliament was the counterweight to the monarch. While the royal government cooperated with the British representatives in Egypt, the parliamentary opposition endeavored to become truly independent, acting against the will of the monarch. In the new republican reality this was not be possible. The RCC dissolved all political

[32] Egyptian parliament in 1956 consisted only of one chamber – the National Assembly. Second chamber, the Shoura Council, have been added by the 1980 amendment to the 1971 Constitution.
[33] Article 87 of the 1971 Constitution.
[34] See T. Moustafa, *Law versus the State: The Judicialization of Politics in Egypt,* "Law & Social Inquiry", 28/2003, p. 919- 924
[35] The temporary government consisting of the members of the Free Officers.
[36] N.J. Brown, *Constitutions* .... , p. 79

parties after it took power in 1952; the new Constitution established one-party system[37] which granted the president huge power combined with the luxury of stable political background and parliament fully subjected to the president's will. What is more, the system of human rights protection was ineffective. Most of the constitutional guarantees and freedoms were to be regulated by the ordinary law[38] – situation that enabled the regime to act against the basic democratic rules.

Nowhere in the 1956 Constitution appears the formal separation of powers. For the regime in Cairo the lack of explicit division of competences was one of the useful manipulations that allowed the government, especially the president, to interfere with the competences of others, be it legislative or even judiciary[39]. There were however articles that related to this issue. For example article 93 banned members of the National Assembly from interfering in the matters given by the Constitution to the exclusive jurisdiction of the executive or legislative power. Lack of formal separation of powers, combined with huge presidential prerogatives resulted in the system of the government that was fully subordinate to the highest authority. Under the rule of the 1971 Constitution this trend only increased.

3.2 The end of Nasser. How the next presidents protected their position – the 1971 Constitution, constitutional amendments and Islam

When Anwar Sadat took power in 1970 his presidency was seen as a temporary by his opponents. He appeared to be a weak candidate, although he was Nasser's vice president which was enough for him to become a new president after Nasser's death in 1970. But what eventually made him a real political figure was his leadership during the October War with Israel in 1973. His daring order to attack Israel during its most important day in the year – Yom Kippur[40], or

[37] It did so by granting all the previous resolutions adopted by the RCC the binding force under the new Constitution – see article 191 of the 1956 Constitution.
[38] In fact, most of these freedoms were to be regulated by the law. For example freedom of associations, freedom of peaceful gatherings, freedom of opinion and scientific research, freedom and inviolability of correspondence, inviolability of private homes etc. See part III of the 1956 Constitution.
[39] Hosni Mubarak, acting under the emergency law, often interfere in the judiciary competencies by transferring individual cases to be decided before the military or emergency courts; H. Abu Seada, *Exceptional Courts and the Natural Judge* [in:] N. Bernard-Maugiron (red.), *Judges and Political Reform in Egypt,* Cairo 2008
[40] The 1973 war (the Yom Kippur war) was the fourth war Egypt fought with Israel - after the 1948-1949 war (the Independence War), the Suez Crisis in 1956 and the 1967 war (or the Six Days War). The most significant result of the conflict was the beginning of the peace process between Egypt and Israel, with the US assistance. It ended up with the signing of the Peace Treaty in 1979 which led

the Day of Atonement, was so surprising for Israel that Egyptian forces almost defeated their most dangerous enemy[41]. It also paved the way for the peace process that ended up with signing the Peace Treaty between Egypt and Israel in 1979, with the assistance of United State's representatives, i.e. the President of the United States Jimmy Carter[42].

Before that however the new Constitution had been established in 1971, strengthening the presidential rule in Egypt, especially after 1980 amendments where the possibility of unlimited re-election was granted. This move however leads us to the issue of Islamic influences in Egyptian constitutions, starting with the 1971 Constitution. When Sadat became the President his major concern was the legitimization of his rule. Being former vice-president was apparently not enough to maintain the stability and gain the support. As a practicing Muslim he wanted the support of the religious groups. The first concession to Islamic groups was the Article 2 of the new Constitution, which called the principles of *Shari'a*[43] "a major source of legislation"[44]. It was the first time in Egyptian modern history when Islamic law gained such a status in the state's law. In 1980 further changes to the laws concerning the President forced Sadat to amend Article 2 as well. This was also due to the religious groups objections toward the Peace Treaty with Israel. For Islamists the recognition of the Jewish State was unacceptable. Sadat had to cooperate with religious groups, especially the Muslim Brotherhood, in order to push through his amendments which enabled unlimited re-election[45]. He therefore accepted the proposal to amend Article 2 which would act since then as a basis for creation of a religious state. This connection between the civil government and religious scholars is one of the characteristics that is common for Muslim countries. But in Egypt it is a potentially dangerous combination. Egypt is not religiously unified country; the biggest religious minority in Egypt – Copts, members of the Coptic Orthodox Church and the Coptic Catholic Church – represent around 10 percent of

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eventually to the series of attacks - one of them was the assassination of president Sadat himself in 1981.

[41] The initial attack was carried out by the artillery, not by the Air Forces which are the main and most renowned forces in the Egyptian Army.

[42] About the peace process, see: S.A. Cook, *op. cit.*, p. 141-154

[43] Islamic law, based on the Quran and in addition to that *sunnah* and other sources of law, i.e. the tradition – *'urf,* the general consensus of scholars – *ijma,* or the analogy – *qijas.* On Islamic law, see: S.W. Witkowski, *op. cit.*; M.H. Kamali, *Shari'ah Law: An Introduction,* Oxford 2008

[44] See article 2 of 1971 Constitution.

[45] Sadat never benefited from this amendment, though. He was assassinated in 1980, not long after the amendment came to force.

the country's population[46]. The Islamization of politics might have led to discrimination or acts of aggression towards non-Muslims.

The new wording of Article 2: "(...) the principles of Islamic *Shari'a* are the major source of legislation" enhanced the position of Islamic law in the country, making it the basic law and positioning it even above the Constitution itself. The question is did this make Egypt the Islamic republic? If we define the Islamic republic as a state where Islamic law is, even only on paper, a major source of legislation and it determines all the laws to be coherent with itself – then the answer may be positive. But if one require the Islamic law to be really in force, not only on paper, and the state's organs to follow the dictates of the religion in the first place – then the answer must be negative. First of all the Egyptian penal code was incompatible with *Shari'a*[47]. Also the Supreme Constitutional Court only after fourteen years decided what was the meaning of " the principles of Islamic *Shari'a*"[48] and gave the executive and legislative authority to decide upon its binding interpretations[49]. As N.J. Brown wrote: "Granting such authority makes it very unlikely that Article 2 can serve as the basis for an Islamic constitutionalism in Egypt."[50] The essence of Islam is that no government has the right to interpret the Divine law. The closing of the gates of *ijtihad* in mid 9th century completed the process of legal interpretation in sunni Islam[51]. Since then no one had been able to create or interpret the law – the only activity possible was applying the provisions of existing law. Therefore it was not in government's power to decide whether the new law was consistent or not with Islam. Neither was it in the power of the Supreme Constitutional Court, which was finally established in 1979. The Law on the Supreme Constitutional Court[52] explicitly states that the SCC has the power to decide upon the constitutionality of laws, make the binding interpretations of laws and to settle jurisdiction disputes between courts. Nowhere in the law or the Constitution has the SCC gained the right to interpret Islamic law or to decide on the legality of statutory law in compliance with Islam. Neither was this right granted to Islamic scholars. Islam has therefore been used as a veil for the politicians. It served as the element that unites the society against the common enemy: Israel. But most of

[46] It is estimated number as for 2012; source: https://www.cia.gov/library/publications/the-world-factbook/geos/eg.html, 12.05.2016
[47] M.Abdelaal, *Religious Constitutionalism in Egypt: A Case Study*, "Fletcher Forum of World Affairs", 37/2013, p. 42 http://www.fletcherforum.org/wp-content/uploads/2013/01/Abdelaal_37-1.pdf, 10.05.2016
[48] *Ibidem*, p. 39
[49] Brown, N.J., *Constitutions*...., p. 182
[50] *Ibidem*, p. 182
[51] In Shiism this never happened. Shiites are able to interpret the religious law and as a result even create new regulations that has no equivalent in Quran. See: J. Danecki, *op.cit*., p. 217
[52] In Arabic: http://old.qadaya.net/node/214, 12.05.2016

all the introduction of *Shari'a* to the 1971 Constitution was the effect of political game and it constituted a political compromise which enabled Sadat to amend the Articles he wanted to be amended and that could not be successfully changed without the support from the religious groups. The loss of this support would possibly cost Sadat his presidency, especially during the unstable political situation after signing the Peace Treaty with Israel.

Sadat needed this support also for another reason. After 1979 fundamentalist Muslim militias started operating in Egypt as an opposition to the state's policy. Later, during Mubarak reign it has resulted in terrorist activities around the country, in which also foreign tourists were victims[53]. It has dominated Egyptian internal politics giving the regime the background for maintaining the state of emergency. It also helped the regime to unite people against a new, local and much more common threat than the one of Israel. The justification for extending the state of emergency, combined with the military support for the regime resulted in years of growing authoritarian rule, based on law. The Constitution which was created on the basis of the European law could not play the same role in Egypt as it has played in the West. The problem lies in different political culture, and culture in general[54]. It is not possible to copy Western rules and institutions to the different cultural background without proper modifications that would allow achieving intended objectives. The question occurs, whether Western law is resistant to the extraordinary situations, be it the threat of terrorism? The answer for this question I leave for the reader's consideration.

In the 1980's amendments Sadat established the Shoura Council (or the Consultative Assembly)[55] making the Egyptian parliament bicameral. It may seem that it was a pro-democratic move, for the Council was to be the consultative body. But what weakened those provisions was the presidential prerogative to nominate one third of the Shoura members, the right which

[53] The most severe attack happened in 1997 when Al-Gama'at al-Islamiyya killed 58 foreign tourists and 10 Egyptians in Hatshepsut Temple (Luxor).
[54] While in Europe the legal and religious systems have been separated, in the Middle East, where Islam played the vital role in politics and society, it has never happened. In the first half on the 20th century in Turkey, Mustafa Kemal Atatürk introduced, among other things, secularism to politics. But in Arabic countries, such as Egypt or Iraq the religion faced a revival. It was related to the battle for independence and the weakness of the local governments. For Islam written constitution would play a minor role in everyday life because it would always be subordinated to the Quran. Liberal constitutionalism - as it is in the Western world - treats constitution as the most important legal act, wether it is written or not. In Islam that part is played by the Quran, not the constitution. During the colonial era Arabic societies could not have develop their political and legal tradition and adapt it to the new conditions. Also the Ottoman Empire, which during the centuries of its existence was the most influential political organism in the region, has lead to the political and legal stagnation.
[55] Articles 194-205 of the 1971 Constitution.

in Egyptian reality gave the president double power in legislative process. He also had the right to dissolve the Shoura Council when the emergency situation required it. Giving that Egypt has been under the state of emergency for thirty years it was, as an addition the prerogatives relating to the National Assembly, a dramatic change which alongside other things eventually led to emergence of authoritarian rule and to maintain it on stable ground.

4. Conclusion

Egyptian constitutional and political reality has been determined by the history and tradition. History – because of the colonialism, struggle for independence and geopolitics. Tradition – because of the overwhelming nature of Islam which does not see the difference between religion and politics. It all had a huge impact on building the modern Egyptian state, which is also today clearly visible in the reality of Middle Eastern politics. The constitutional history of Egypt aimed in a specific direction – creating a strong state with a reliable leader whose powers were not strictly limited by the law. For years it was Nasser who created the political and social reality in the state. His charisma and inner strength, combined with him being the personification of the military that brought Egypt to real independence helped him achieve his goals. The 1956 Constitution might not have been ideal but it was the first constitution that was created without the foreign supervision. And even that it had lasted only for less than two years[56] it shaped the general image of Egyptian future. The 1971 Constitution was a real achievement giving that it have survived for forty years in a country, where duration of the previous constitutions was short. It also improved the means for strong presidential powers. Constitutional provisions combined with the emergency law gave president Mubarak almost unlimited power to decide even upon lives of his citizens.

Egypt's the example of how the government and the president may use the law for their particular interest. With the support from the United States who wanted to maintain stability and peace in the region after the Peace Treaty between Egypt and Israel, Egyptian leaders did not have to be afraid of foreign interference in their internal affairs as long as they were able to keep the status quo in the region. At least until 2011.

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[56] It was abolished in 1958 when Egypt and Syria established the United Arab Republic, which lasted only until 1961. In 1964 Egypt get the constitution – it was eventually replaced by the one of 1971.

Trends in Egyptian Constitutional Law After 1952.
Maintaining Strong Presidential Power in the Reality of Middle East Affairs.

Summary: *The Arab Republic of Egypt is one of the most influential countries in the world. It plays a unique role in the Middle East, especially when we combine it with its relation to Israel, partnership with the United States and its colonial history. It is also one of the major cultural and religious centers in Islamic world. However what really is fascinating is Egypt's constitutional and legal history. This article will focus on evolution of Egypt's constitutional system after 1952, i.e. the Free Officers' Revolution that entirely changed Egypt bringing the republican government instead of the constitutional monarchy. Those changes and evolution of the political system cannot be understood properly without some historical background. The colonial rule and what came after it, i.e. the emergence of the State of Israel shaped Egypt, its people, the government, the politics, especially the foreign affairs with the Soviet Russia and after 1971 with the United States. It also had its impact on the Egyptian legal system, starting with the basic laws – its constitutions, which reflected political changes in the country.*

Keywords: Egypt; Constitutional Law; Constitution; President; Middle East

InternetowyPrzegląd

Prawniczy TBSP UJ 2016/7

ISSN 1689-9601

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The Formation of Christian Personal Law in British India from 1865 to 1872.

Streszczenie:

Celem artykułu jest zaprezentowanie początków tworzenia się tzw. Christian personal law w Indiach Brytyjskich w latach 1865 – 1872. W tym czasie zostały uchwalone cztery akty prawne, które do dnia dzisiejszego stanowią podstawę dla tego zagadnienia. Zostało w nich uregulowane przede wszystkim dziedziczenie, zawieranie małżeństw oraz uzyskiwanie rozwodu przez poddanych Brytyjczyków, którzy byli indyjskimi chrześcijanami. Główną przyczyną powstania Christian personal law było to, iż muzułmanie, hindusi oraz parsowie zamieszkujący Indie Brytyjskie posiadali już swoje własne prawne regulacje dotyczące wymienionych powyżej zagadnień. W konsekwencji powstało pytanie, które przepisy powinny być stosowane do konwertytów indyjskich, którzy przeszli na chrześcijaństwo. W artykule zostaną pokrótce omówione cztery ustawy uchwalone w drugiej połowie XIX wieku oraz to jaki miały efekt.

Słowa kluczowe: Christian personal law, Indie Brytyjskie, Indie, chrześcijanie, Convert's Marriage Dissolution Act, Indian Christian Marriage Act, Indian Divorce Act

1. Introduction

British dominance on the Indian Peninsula had without a doubt an immense impact on today's legal system in India. This is why it is crucial to explore this period of Indian history, especially that many of the laws enacted by the British are still in force in India. In my article I

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am going to focus on the law which was created mainly to clarify the legal position of Indian Christians in matters such as marriage, divorce and inheritance. Four acts will be described which are collectively referred to as Christian personal law and were enacted between 1865 and 1872.

What is then personal law? It is a law which determines which laws should be applied to a the person with a particular religious identity. Indigenous inhabitants of the Indian Peninsula were not governed by one legal system during the British dominance but instead they could refer to their own traditions, customs and laws in certain matters. In nowadays India the situation is quite similar. There are five personal law systems for five different religious groups: Hindu personal law, Muslim personal law, Christian personal law, Parsis personal law and Jewish personal law. There is basically no option to be an atheist.

Under the scope of personal law there are matters such as inheritance, marriage, divorce and adoption, which in European countries are usually governed by civil law and, to be more precise, by family law and inheritance law. However, there is no one uniform civil code in India (even thought it is written in the Indian constitution that it should be enacted[1]) but instead people are governed by the personal laws of the religious group to which they belong.

The British had a great impact on the formation of the contemporary system of legal pluralism in India, but it was not British invention. In the days of Mughal Empire people living in the Indian Peninsula could follow their own customs and practices (or it would be better to say the customs of the community to which they belonged) in the matters which today are reserved for personal law[2]. Those forms of behaviour were not homogeneous among the believers of the same religion, which is why personal law was original more connected to the specific community and not to the whole religion[3]. However, with time this law was made uniform in the way it is organised today (only five personal law systems).

Without a doubt, the Hindu personal law and the Muslim personal law are the most important and attracting the most attention. It is due to the large number of the followers of Hinduism and Islam on the Indian Peninsula. For a long time only those two religious groups could follow their own religious law, according to the special protection granted by the acts of

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[1] ***Art. 44 "The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India", The Constitution of India*, 1949, [26th of November, 1949].**

[2] N. Chavan, Q. J. Kidwai, *Personal Law Reform and Gender Empowerment: A Debate on Uniform Civil Code*, New Delhi 2006, p. 199-201.

[3] P. Bilimoria, *Muslim Personal Law in India: Colonial Legacy and Current Debate* [access: 22nd of July 2014, < https://www.law.emory.edu/ifl/cases/India.htm>].

British, due to their policy of non-interference.[4]

The beginnings of that policy could be found in the Charter of Charles II for the English East India Company from 1683 which was said to "*decide according to equity and good conscience and according to the law and custom of merchants"*[5]. In the Charter of George II from 1753 the right to obtain an exemption from the Mayor's Courts and to resolve their cases by applying their religious laws were granted to Hindus and Muslims[6]. This policy was afterwards developed in British India and resulted in lack of codification of substantive civil law into one act applied to all the British subjects on the Indian subcontinent while eg. the of Civil Procedure (1859) was then in force. The Penal Code (1860) and the Code of Criminal Procedure (1861) which were applied to everyone irrespective of their religious affiliation[7].

While the Indian subcontinent has been a mosaic of cultures, religions, traditions, languages and ethnicities, Muslim personal law and Hindu personal law were not sufficient enough to cover all the people living in British India. Therefore the courts often recognized the customs and traditions of other groups such as Buddhists, Sikhs, Parsis, Jews, Christians and many more. For some of these groups their rules were gathered and codified into written acts like in the cases of Parsis and Christians.

2. Christian personal law

The situation of the Christians and their laws in British India was quite complicated in the 19th century. First of all, it was not determined what kind of legal rules should be applied to them and their children. They were mostly converts from Islam or Hinduism and the courts could no longer apply to them the laws and customs of their previous religions. What is more, they also were not British so it was impossible to apply English law in the matters of marriage, inheritance etc. Moreover there is no Christian religious law in the same sense as we understand Hindu religious law or Muslim religious law, which made the situation of converts incredibly uncertain[8]. Because of that, Indian Christians found themselves in a legal vacuum which resulted in the need of finding a solution.

The idea appeared that in matters of inheritance the Christian converts should be

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[4] G.C. Rankin, *The Personal Law in British India*, Journal of the Royal Society of Arts, vol. 89, 1941, p. 427.
[5] *Ibidem,* p. 433.
[6] A.A.A. Fyzee, *Muhammadan Lad in India*, Comparative Studies in Society and History, vol. 5, no. 4, 1963, p. 412.
[7] G.J. Larson, *Introduction: The Secular State in a Religious society*, [in]: *Religion an personal law in secular India: a call to judgment*, Ed. G.J. Larson, Bloomington 2001, p. 4.
[8] M.F.P. Herchenroder, *Study of the law applicable to native Christians in the French Dependencies and in India*, Journal of Comparative Legislation and International Law, vol. 18, no. 4, 1936, p. 186.

governed by the personal law which was applied to them before the conversion. It was due to the fact that there are no Christian legal rules concerning the issue of succession. However, it was not uncommon that the family had a negative attitude towards the converts to Christianity and refused them any right to inherit their share in the familial property.[9]

Even though, in theory the previous law of inheritance could be applied to the converts, it was completely impossible in the matters such as marriages and divorces because the old rules would often contradict the spirit of the Christian religion[10]. For example, bigamy, which was legal for both Hindus and Muslims in British India, was unacceptable for Christians.

Application of the English law also would not help, because it was not sufficient to resolve all the problems encountered by the Christian Indians. The Indian reality was simply too complex and complicated. Christians wanted to prove their otherness and to get their own personal law system, but they also wanted to show that they still were Muslims or Hindus to be entitled to inherit after the member of their family.[11]

Therefore, the British faced the need to regulate the legal situation of Indian Christians. It resulted in the enactment of several acts between 1865 and 1872, which will be presented below.

2.1. Indian Succession Act

This act adopted in 1865 was not actually created as a special law for Christians. Its aim was to provide a uniform law of inheritance for all the Indians. However, the goal of unification was not achieved. Muslims, Hindus, Buddhists and Parsis (but only partially) rejected the application of the law to them on the grounds of having their own inheritance rules and eventually they were granted an exemption from this act. In consequence, the ones who were governed by the legal rules contained in the Indian Succession Act were Christian converts.[12]

The Indian Succession Act provided legal rules for intestate and testamentary succession based on English law with some changes had been introduced[13]. The act incorporated provisions from private international law according to which moveable property was governed by *lex*

[9]N. Chatterjee*, Religious change, social conflict and legal competition: the emergence of Christian personal law in colonial India, Modern Asian Studies,* vol. 44, 2010, p. 1149 – 1150.
[10]M.F.P. Herchenroder, *op. cit.*, p. 187.
[11]N. Chatterjee*, op. cit.,* p. 1181 – 1153.
[12]*Ibidem*, p. 1179-1180.
[13]W. Stokes, *The Indian Succession Act, 1865 (Act X of 1865): With a Commentary, and the Parsee Succession Act, 1865, Acts XII and XIII of 1855, and the Acts Relating to the Administrator General, with Notes*, Calcutta 1865, preface.

domicilii of a deceased and immoveable by *lex loci rei sitae*[14]. Because of that, the act included the provisions considering the determination of someone's domicile - when and how it changes. For example, the domicile of origin of a legitimate child was the father's domicile in the time of the birth of a child while the domicile of the illegitimate child was the domicile of the mother, irrespective of where the child was born[15]. The woman's domicile was the same as her husband's with two exceptions that the wife's domicile did not follow anymore the domicile of her husband if the Court formed the judgement of their separation or if the husband was sentenced to transportation.[16]

The interesting rule was enclosed in article 4 of the act. It applied to the marriages solemnised after 1st January 1866 and said that "*[n]o person shall be marriage, acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property, which he or she could have done if unmarried*".[17] Without a doubt, this provision strengthen the position of a woman and rejected the right of a husband to all the woman's possessions.

The Indian Successions Act also regulated how to create a valid will. According to these legal rules all the wills had to be registered, which made the oral wills invalid. This was one of the reasons why Muslims rejected this act, because, according to the Quran, it is possible to make an oral will. The situation was different with regard to Parsis who actually accepted the part of the Indian Succession Act which dealt with the creation of wills, even though they were working on that time on their own personal law that time. For Hindus the government passed in 1870 the Hindu Wills Act, which extended one of the section of the Indian Succession Act to them. However, because of external pressure from the Hindu community, the government added some privileges which only Hindus could use.[18]

Because of that, in practical terms, Christians were the only group governed entirely by this law in the matters of inheritance and hence, it could be said that this act became a part of their personal law. However, the Christians were not content with the enactment which actually denied their rights to the Hindu inheritance law. They were entitled to it only for a few years because of the Caste Disabilities Removal Act, enacted in 1850.[19]

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[14]T.S. Rama Rao, *Conflict of laws in India*, *Zeitschrift für ausländisches und internationales Privatrecht*, vol. 23, 1958, p. 272-273.
[15]W. Stokes, *op. cit.*, p. 7.
[16]*Ibidem*, p. 12.
[17]*Ibidem*, p. 3.
[18]N. Chatterjee*, op. cit.,* p. 1179-1180.
[19]*Ibidem,* p. 1180-81.

The Indian Successions Act shows that the British did not oppose the idea of legal pluralism. Even thought they created a law with the intention to apply it to all the Indians, they also granted the exemptions to the groups with their own personal laws. It led to the situation in which the Indian Successions Act was applied only to a small minority of people living in British India.

At the end, it should be noted that the Indian Succession Act of 1865 was amended and consolidated by the Indian Succession Act of 1925.[20]

2.2. Convert's Marriage Dissolution Act

After determining the legal rules of inheritance applicable to Indian Christians it was time to address the issue of marriage, because Christians encountered many problems in this area. That is why, in 1866 the Native Converts Marriage Dissolution Act was enacted.

It all started at the beginning of the 19th century when Christian missionaries encountered more and more often the situation in which only one person from the married couple (mostly a man) converted to Christianity while the other did not. In such cases the spouse, who did not convert, quite often did not want to live anymore with her/his spouse or consummate (when betrothed in infancy) the marriage. What is important, under the Hindu law the baptism of the spouse did not dissolve his Hindu marriage, while the spouse who remained Hindu was granted a right to marry one more time in case of such situation. It placed converts in a difficult position. Polygamy is strictly forbidden in Christianity so they could not marry again, because officially they were still married to the Hindu spouse.[21] The converts from Islam were not in a better situation, even if it seemed at the beginning, which will be explained later.

Such situation created a difficult situation for Indian Christians. Especially it harmed male converts because they were the only category of Indian men (except Parsis after 1865) for whom polygamy was prohibited[22]. Due to the lack of other legal regulations, Indian Christians were either forced to live in sin according to their new religion or to live alone till their previous spouses who did not convert and left the one who did died,.

As a consequence. the government received an enormous amount of petitions with the

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[20]A. Mishra, "*Breaking Silence – Christian Women's Inheritance Rights Under Indian Succession Act, 1925*", Chotanagpur Law Journal, vol.9, no. 9, 2014-15, p. 2.

[21]J.D.M. Derrett, *The Native Converts' Marriage Dissolution Act, 1886: Should it be abolished?*, [in]: J.D.M. Derrett, *Essays in Classical and Modern Hindu Law: Current Problems and the Legacy of the Past,* Netherlands, 1978, p. 53-54.

[22]N. Chatterjee*, op. cit.,* p. 1188.

requests to enact the law which would make it possible for Indian converts to Christianity to dissolve their non-existing marriages solemnised under a different religion[23]. These requests had been finally answered in 1866 with the enactment of the Native Converts Marriage Dissolution Act which provision 4 says as follows:

> "*If a husband changes his religion for Christianity, and if in consequence of such change his wife, for the space of six continuous months, desert or repudiate him, he may sue her for conjugal society*"[24] (in the provision 5 was provided the reverse situation when the wife converted and the husband deserted her because of that).

If the spouse who did not convert would refuse in front of the court to cohabit with the Christian spouse because of the change of religion, the court would order the spouse to come back in 12 months. If after that time the respondent was still refused to remain in a marriage with a petitioner, the court had the right to dissolve a marriage.[25]

What is interesting is that the Indian Christians who were Muslims or Jews before the conversion were excluded from that law. Muslims were exempted on the ground that under the Muslim personal law the marriage was automatically dissolved if one of the spouses commit apostasy so there was no need to apply the act to converts from Islam. However, when I describe the case of Zabardast Khan it will be clear that this was not actually true.[26]

One more issue was the fact that the act did not give any solution to the situation when the spouse who did not convert was impossible to find (which was actually happening). Unfortunately, without the presence of both spouses in the court the dissolution of marriage could not be obtained because the whole process of questioning and convincing to reconcile could not be omitted.[27]

2.3. Indian Divorce Act

The Indian Divorce Act was passed in 1869 to supplement the Native Converts Marriage Dissolution Act which, as was noted already, did not resolve all the problems of the lack of the law for Indian Christians. It was mainly based on the Matrimonial Causes Act from 1857, which applied to the territories of England and Wales[28].

As the title suggests, the Indian Divorce Act provided legal rules for ending the marriage.

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[23] *Ibidem.*
[24] ***Convert's Marriage Dissolution Act*, 1866, Act No. 21 of 1866, [2nd of April, 1866].**
[25] ***Convert's Marriage Dissolution Act.***
[26] N. Chatterjee*, op. cit.,* p. 1190-1191.
[27] *Ibidem.*
[28] *Ibidem,* p. 1191.

Therefore, there were provisions containing grounds for dissolution of marriage, for its nullity, for judicial separation, custody of children etc.[29]

To get a divorce under the Indian Divorce Act it was sufficient for a husband to prove that his wife was guilty of adultery. In the reverse situation wife could seek for divorce if besides adultery she could establish cruelty, bigamy, desertion or incest committed by her husband[30]. In the act it was also provided that if the husband would convert from Christianity to another religion and marry another woman his Christian wife may petition for a dissolution[31]. Although there was no such possibility provided for the husband under the Indian Divorce Act, however if the Christian wife would decide to change the religion and re-marry with a different man her behaviour would be recognised by the court as adultery and hence her husband could obtain a divorce[32]. The positions of the spouses were not equal according to that act, since the husband could commit adultery without any consequences for him and without a possibility for the wife to seek divorce only on this ground.

Coming back to the converts from Islam, I would like to describe the case *Zaburdust Khan versus his wife*, because it clearly shows how difficult the legal situation of converts to Christianity was. Zaburdust Khan filed for divorce in 1870 under the Indian Divorce Act. The reasons for which he was demanding a divorce were adultery and desertion committed by his wife. It was a Muslim couple who, after getting married according to Muslim rites, converted to Christianity. Some time later, the wife decided to reconvert to Islam and in consequence marry another man who was Muslim. In this situation, Khan decided to return his wife her *mahr*, which under the Muslim law signifies the end of their relationship, and apply for a divorce under the Indian Divorce Act. The case was brought to the High Court whose judges stated that they could not apply the Indian Divorce Act to that case because it is only applicable to marriages between Christians and not to polygamous contracts like the ones concluded under Muslim personal law. Of course, under Muslim Personal Law Khan and his wife were separated because by committing apostasy he was considered to be socially dead. However, during the time of the trial he was Christian so the judges could not apply Muslim Personal Law to him. That is why Khan lost his case and till the death of his ex-wife it was impossible for him to marry again since bigamy among Christians was forbidden and recognised as a criminal offence. What is more, the Native Converts Dissolution Act did not apply to him either because of the

[29] ***Indian Divorce Act*, 1869, Act No. 4 of 1869, [26th of February,1869].**
[30] ***Indian Divorce Act.***
[31] ***Indian Divorce Act.***
[32] N. Chatterjee*, loc. cit.*

fact that he was Muslim before he converted to Christianity. The situation of Christian Indians changed a bit in 1912, when the Calcutta High Court held that if at the time of the suit the plaintiff was Christian then the court would be allowed to apply Indian Divorce Act.[33]

Under the Indian Divorce Act both husband and wife had a right to present a petition to the court for declaration that the marriage was null and void. The grounds for such petition were: impotency, the prohibited degrees of consanguinity or affinity between wife and husband, the fact that the spouse was lunatic or idiot at the time of the marriage, when at the moment of solemnising a marriage the former spouse of one party was still alive and the former marriage was still in force and when the consent of one party was obtained by force or fraud.[34]

What is interesting, under under the Indian Divorce Act the husband whose wife committed adultery had a possibility to claim damages from his wife's lover. Moreover, the court could also order the adulterer to pay all the costs of the proceedings started by the husband. However, he did not have to pay the costs if the wife was living apart from her husband at the time of the adultery and was living the life of a prostitute or when at the time of adultery the lover had no reasons to believe that the woman was married.[35]

2.4. Indian Christian Marriage Act

The last act is the Indian Christian Marriage Act from 1872. As is stated in the preamble, it was enacted to:

> "*consolidate and amend the law relating to the solemnisation in India of the marriages of persons professing the Christian religion*[36]."

The main goal of the act was to simplify the existing law by codifying all the legal rules concerning the solemnisation of the valid marriage. Before then the rules concerning this subject could be found in two British acts and in two acts of the Indian Legislature.[37]

The Indian Christian Marriage Act specified many technical details concerning the solemnisation of a valid marriage in which both parties were Christians or only one party was Christian. It is because the act also applied to interfaith marriages.[38]

First of all, there were provided two forms of marriage in the Indian Christian Marriage

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[33] *Ibidem*, p.1147-1149 and 1192.
[34] *Indian Divorce Act.*
[35] *Indian Divorce Act.*
[36] ***Indian Christian Marriage Act*, 1872, Act No. 15 of 1872, [18th of July, 1872].**
[37] ***Indian Christian Marriage Act.***
[38] ***Indian Christian Marriage Act.***

Act: civil marriage and sacramental marriage. The sacramental one was of course performed by a priest of one of the Christian denominations or a Minister of Religion, while the civil marriage was solemnised by a Marriage Register appointed under the Indian Christian Marriage Act.[39]

The law also determined such issues as the place of a marriage, obligation to register, the consent of the father, mother or guardian to contract a marriage of a minor (less than 21 years old and not a widow or a widower) or even such details as the time of a marriage (between 6 in the morning and 7 in the evening), however derogations were provided.[40]

3. Summary

The British encountered many challenges during their attempt to provide legal rules for the Christians inhabiting the Indian subcontinent and many of them were not successfully resolved by the four described acts. One of the reasons for this is the difficulty to understand the cultural and religious diversity of Indian society by the Europeans. The matter of personal law, the legitimacy of its existence, the advantages and disadvantages which the system brings are the issues vividly discussed in modern India on a daily basis. This is mostly due to the undying idea of the creation of the uniform civil code for the whole of India and for all their citizens irrespective of their religious affiliation. Without a doubt, the shape of the system and the way it works nowadays developed largely during the period of the British dominance and because of their policy of non-interference. That is why, to understand it correctly, it is important to analyse how it all began.

The case of Christian personal law is interesting because it was created solely by the British while it was different for Muslims, Hindus and Parsis. These groups could refer to their long lasting traditions, practices, customs and religious texts, while in the case of converted Christians the situation was much different.

Christianity was mainly brought by Europeans to the Indian Peninsula during the colonial period[41] together with European legal solutions. The Indian Christians, could only accept the legislation given by the British. What is more, it could be imagined that because the British were Christians ,they could not think of a different legal solution apart from their own. As a consequence, many legal provisions were incorporated from English law into Christian personal law. Sometimes it was done without any reflection whether it would match the Indian

[39] ***Indian Christian Marriage Act.***
[40] ***Indian Christian Marriage Act.***
[41] However, it should be noted that Christianity was known on this land before but on the smaller scale.

reality. That is particularly noticeable in the case of the conditions for obtaining a divorce for Indian Christians. Contrary, the legal rules applicable to Hindus and Muslim s were based mainly on their indigenous customs and holy texts.

Without a doubt, at some point Christians found themselves in a legal vacuum which had to be resolved. The British decided to allow Indian subjects to remain loyal to their traditions and did not enact one uniform civil code, which caused the lack of legal regulations for converted Christians. It could be said that the policy of non-interference actually resulted in the need for interference by the British in the matter of the personal law system of the Indian Christians.

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The Formation of Christian Personal Law in British India from 1865 to 1872.

Summary: *The goal of this article is to present the beginnings of Christian personal law in British India between 1865 and 1872. During this period of time four acts were enacted which till today constitute the basis for that issue. The matters regulated by this act are: succession, marriage and divorce which were applied only to the British subjects who were Indian Christians. This was due to the fact that Muslims, Hindus, Parsis and others already had their own legal regulations in those matters which resulted in the uncertainty which legal provisions should be applied to Christian converts. This article will present what kind of legal solutions were adopted and the effect they had.*

Keywords: Christian personal law, British India, India, Christians, Convert's Marriage Dissolution Act, Indian Christian Marriage Act, Indian Divorce Act