Mirza Hebib, Amila Svraka-Imamović (eds.)

MEETING OF LEGAL CULTURES

CONFERENCE PROCEEDINGS

XXVII Annual Forum of Young Legal Historians, Sarajevo, September 21-23, 2023

FACULTAS IURIS SARAJEVOENSIS MCMXLVI
PRAVNI FAKULTET SARAJEVO 1946

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Published by:
University of Sarajevo – Faculty of Law
Obala Kulina bana 7/1, Sarajevo

For Publisher:
Prof. Dr. Zinka Grbo, Dean

Peer reviewers:
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Prof. Dr. Tommaso Beggio (University of Trento)
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Cover page:
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Proofreading:
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Enida Dučić

DTP and Design:
Amra Mekić

This publication was co-financed
by the Center for Legal Culture in Sarajevo.

Centar za pravne kulture
Sarajevo

ISBN 978-9926-544-14-0

CIP zapis dostupan u COBISS sistemu
Nacionalne i univerzitetske biblioteke
BiH pod ID brojem 65477126

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Sarajevo, 2025

CONTENTS

INTRODUCTION

The Proceedings before you are the result of the XXVII Annual Forum of Young Legal Historians, held in Sarajevo from September 21 to 23, 2023. This prestigious event, hosted by the University of Sarajevo - Faculty of Law, is part of a long-standing tradition that brings together young researchers in the field of Legal history and Roman law, providing them with a platform to share their latest research, exchange ideas, and engage in interdisciplinary discussions. The overarching theme of the conference was "Meeting of Legal Cultures" which explored the convergence of legal traditions and cultures, with a special emphasis on the interaction between the East and West, and the complex dynamics that arise from these encounters.

The idea for this conference was born out of the participation of a Teaching and Research Assistant Amila Svraka-Imamović at the XXVI Annual Forum of Young Legal Historians held in Istanbul in October 2022. During this conference, she nominated the University of Sarajevo - Faculty of Law to host the next edition of the forum. After receiving strong support from the participants, Sarajevo was selected as the host city, and the conference took place successfully in 2023.

The organization of the conference was supported by the Ministry of Science, Higher Education, and Youth of Sarajevo Canton, within the framework of the Support Program for Scientific Research and Artistic Development Projects, funded through the Sarajevo Canton Budget for 2023.

In our call for papers, we invited contributions that explored the meeting of legal cultures, particularly the challenges and opportunities presented by cross-cultural encounters in the development of legal systems. We specifically sought research that examined how legal systems have evolved and adapted to new contexts through interactions between different legal traditions, especially those between the Orient and Occident. The topic also focused on the ways in which legal systems reconcile

conflicting norms and protect fundamental values. The convergence of legal cultures, especially between the East and West, has played a pivotal role in shaping the development of law throughout history, and this remains an ongoing and critical aspect of legal history today.

The meeting of legal cultures is an important part of the legal tradition of Bosnia and Herzegovina. Therefore, holding a conference on this topic in Sarajevo was highly symbolic. Bosnia and Herzegovina, at the turn of the 19th to the 20th century, represented a region where East and West met. With the establishment of Austro-Hungarian administration after 1878, there was a gradual introduction of law based on the Roman legal tradition, thus confirming Bosnia and Herzegovina's place in European legal culture (to which it also belonged during the medieval period). Due to broader social and political circumstances, the occupying power did not implement radical changes to the legal order, but the legal system changed through legal practice and gradual amendments to legal regulations. A continuity was maintained between the old and new law. Only Ottoman regulations that conflicted with general legal principles and civil equality were abolished. The provisions of Sharia law regulating family, inheritance, waqf (endowment), and religious matters for the Muslim population, as well as certain regulations governing property relations, remained in force. In line with this, the entire period was marked by an interesting intertwining of legal cultures, the departing Ottoman and the (for that time in Bosnia and Herzegovina) new European ones, based on Roman legal tradition. The process of Europeanization of law was primarily reflected in the establishment of a new system in which key legislative and judicial duties were undertaken by lawyers educated at European universities, the adoption of new laws, and the gradual implementation of the General Civil Code. In this process, the General Civil Code became one of the fundamental tools in the modernization and Europeanization of the Bosnian-Herzegovinian legal culture.[1]

[1] More about the meeting of legal cultures in Bosnia and Herzegovina cfr. Hebib, M. (2024). *Rimska pravna tradicija i bosanskohercegovačka pravna kultura od druge polovice 19.*

The conference was officially opened at the National Museum of Bosnia and Herzegovina, where distinguished guests were greeted by Prof. Dr. Zinka Grbo, Dean of the University of Sarajevo – Faculty of Law, Prof. Dr. Rifat Škrijelj, Rector of the University of Sarajevo and Dr. Amila Svraka-Imamović on behalf of the Organizing committee. The opening ceremony was also attended by officials from the diplomatic corps, as well as Prof. Dr. Darja Softić-Kadenić, Minister of Justice, and representatives from the Sarajevo Canton government.

The conference sessions, which took place at the Faculty of Law, featured distinguished scholars, including Prof. Dr. Ehlimana Memišević, from the University of Sarajevo, who presented on "Islamic Legal Culture in Transition" and Prof. Dr. Tomislav Karlović, from the University of Zagreb – Faculty of Law, who discussed "Roman Legal Tradition in South Eastern Europe - Evolution through the Meeting of Legal Cultures"

The conference featured several thematic panels, including those focused on legal cultures, religious law, Roman law, and modern legal systems, with 50 young researchers from countries including Austria, Belgium, Bosnia and Herzegovina, Brazil, the Czech Republic, Greece, Croatia, Italy, Japan, China, Hungary, Germany, Poland, the United States, Turkey, and Great Britain.

All members of the organizing committee and the editors have made an invaluable contribution to the successful organization of the conference and to ensuring that these proceedings meet the highest academic

stoljeća, in: Karlović, T., Ivičević-Karas, E. (eds.), Legatum pro anima: zbornik u čast Marku Petraku. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, pp. 649-675; Hebib, M. (2024). Diritto romano e tradizione romanistica in Bosnia ed Erzegovina (1878-1946), *Roma e America. Diritto romano comune*, 45, pp. 151-166; Bećić, M. (2022). *Između Orijenta i Okcidenta: Recepcija Općeg građanskog zakonika u Bosni i Hercegovini*. Sarajevo: Univerzitet u Sarajevu – Pravni fakultet; Povlakić, M. (2010). *Private Law in Bosnia and Herzegovina*, in: Jessel-Holst, C. et alt. (eds.), Private Law in Eastern Europe: Autonomous Development or Legal Transplants. Tübingen: Mohr Siebeck, pp. 205-236; Amzi-Erdoğdular, L. (2023). *The Afterlife of Ottoman Europe. Muslims in Habsburg Bosnia Herzegovina*. Stanford: University Press; Karčić, F. (2019). *Shari'a Courts in Yugoslavia 1918-1941*. Sarajevo: Centar za napredne studije.

standards. The proceedings you are about to read consist of eight scholarly articles, all of which have undergone a rigorous peer review process and editorial work. These articles reflect the rich diversity of research presented at the conference. Through these papers, readers can gain insights into the evolution of law, the interaction of different legal traditions, and the ongoing challenges that arise from the convergence of legal systems across cultures.

* * *

The paper by Athanasios Delios, Assistant Professor of Legal History at the Democritus University of Thrace explores the evolution of wills in ancient Athens from the 6th to the 4th century BC. It discusses how Solon, the Athenian legislator, introduced the concept of a will in the 6th century, allowing childless citizens to adopt a son as their heir. Over time, the content of wills evolved, with 4th-century wills increasingly focusing on other aspects such as appointing guardians for children, designating dowries for daughters, and manumitting slaves. This change reflects the evolving societal needs of Athens. The paper emphasizes the continuing importance of Solonian wills in the classical era, despite the introduction of new forms of wills.

Ivana Vlašić, LL.M, Senior Assistant at the University of Mostar, analyzes the significance of banking activity in ancient Babylon and the Roman world in her paper. The study explores the role that banking played in both societies, emphasizing the use of loans and deposits, which are foundational to modern banking systems. Through historical, comparative, and dogmatic methodologies, Vlašić compares the legal and financial systems of Babylon and Rome, demonstrating how both contributed to the development of banking. While each system had its own characteristics, they shared common elements that laid the groundwork for later banking systems. The paper highlights how banking, as an essential component of trade and economic development, existed in different forms long before the modern banking institutions we know today.

Dr. Michael Binder's paper examines the concept of *exceptio ex iure tertii* in both Roman law and Austrian civil law. This legal concept involves a defendant (debtor) using a third party's (tertius) right against a plaintiff (creditor) to counter the plaintiff's claim. Generally, such an objection is not allowed because it requires a third party's involvement, often necessitating a separate lawsuit. However, Binder argues that there are exceptional cases where this type of defense can be used, particularly to protect the defendant or third party from an unjust claim. The paper analyzes Roman law cases involving this defense, particularly focusing on situations like suretyship and the sale of goods, and compares them with Austrian civil law. Through this analysis, Binder explores the circumstances under which an *exceptio ex iure tertii* could be justified, contributing to a deeper understanding of its role in both historical and modern legal systems.

Łukasz Gołaszewski, Assistant Profesor at the University of Warsaw, examines the role of ecclesiastical courts in the 18th century Polish-Lithuanian Commonwealth, specifically focusing on the consistory in Janów (now Janów Podlaski) within the Diocese of Lutsk. The paper explores how the Polish nobility's matrimonial cases were handled by religious courts, which operated based on both universal and particular canon law. Gołaszewski analyzes court records from the southern part of Bielsk land, highlighting how ecclesiastical courts played a key role in resolving legal matters related to marriage, which were not regulated by secular law. The study also discusses the judicial structure of the Diocese of Lutsk and the broader context of ecclesiastical jurisdiction in the region.

Masahiro Kitatani's paper examines the reception of Roman military law in early modern Germany, focusing on two key translations: Justin Gobler's *Rechtenspiegel* and Leonhardt Fronsberger's *Kriegsbuch*. Gobler's translation of Roman military law into German is significant because it adapts the original text to contemporary military issues in 16th-century Germany, particularly the challenges posed by mercenaries. Unlike other legal texts of the time, Gobler's work aimed to improve societal order

and address these military concerns. In contrast, Fronsberger's *Kriegsbuch* simplifies and abridges the Roman military texts, using them more as historical references rather than solutions to current problems. The paper explores how both Gobler and Fronsberger approached the translation and adaptation of Roman military law, highlighting the differences in their methods and intentions. Through this comparison, the paper demonstrates the influence and limitations of Gobler's work in the reception of Roman law during the early modern period.

Carolina Argiroffi's paper explores the use of comparative methods in Italian legal discourse on labor during the 19th and 20th centuries. It focuses on how legal scholars, in response to emerging labor issues and the need for social reforms, incorporated comparative approaches to challenge traditional legal frameworks. The paper examines the works of the Commissione per lo studio dei contratti agrari e del contratto di lavoro (1893-1902), highlighting the intersection of legal, political, and social debates on labor laws for both factory workers and agricultural laborers. Argiroffi emphasizes the importance of adapting Roman law traditions to new labor realities and the transnational exchange of legal models. The paper provides insights into the process of creating modern labor law categories while addressing the challenges of balancing local traditions with broader, global perspectives.

Eugenio Ciliberti's article discusses the 2020 Civil Code of the People's Republic of China, which marks the culmination of a long process of legal reform aimed at modernizing and consolidating civil law. The Code, influenced by Roman law traditions, is the result of efforts that began in 2014, with the introduction of the General Provisions of Civil Law in 2017. The article traces the historical development of Chinese civil law, from the 1911 Draft Civil Code to the reforms under Deng Xiaoping. It also explores the Code's broader geopolitical significance, particularly in the context of the Belt and Road Initiative, and reflects on the role of Roman Law scholars in shaping contemporary legal systems.

The paper by Dr. Rafał Kaczmarczyk, an independent scholar, discusses the presence of elements of Islamic law within the Polish legal system, particularly since Poland regained its independence in 1918. This phenomenon results from the long-standing presence of the Muslim minority in Polish territories. During the Polish-Lithuanian Commonwealth, local and Islamic law influenced each other, as seen in issues related to Muslim wills. However, the legal norms from that period had limited impact due to the partitions of Poland. The paper also explores the influence of the legal systems from the partitioning powers (Austria, Russia, and Germany) on the legal position of Muslims in Poland.

Support in the process of preparing the Proceedings, in the form of reviewing papers was provided to the editors by: Prof. Dr. Tomislav Karlović (University of Zagreb); Prof. Dr. Mehmed Bećić (University of Sarajevo); Prof. Dr. Mariateresa Carbone (The Magna Græcia University of Catanzaro); Prof. Dr. Samir Aličić (Institute of Comparative Law Belgrade); Prof. Dr. Kacper Górski (Jagiellonian University Krakow); Prof. Dr. Antonio Angelosanto (Sapienza University of Rome); Prof. Dr. Nikol Žiha (University of Osijek); As. Prof. Dr. Marko Sukačić (University of Osijek); Dr. Chiara Iovacchini (Sapienza University of Rome). The book as a whole has been positively reviewed by Prof. Dr. Marko Kambič (University of Ljubljana), Prof. Dr. Tomasso Beggio (University of Trento) and Prof. Dr. Ehlimana Memišević (University of Sarajevo).

We would like to extend our gratitude to all the participants and partners who contributed to the success of the conference and the preparation of these proceedings. We would also like to express our special thanks to the reviewers for their invaluable feedback and expertise, which greatly enhanced the quality of the publication. We believe they will serve as a valuable resource for scholars, students, and practitioners of legal history. They provide a deeper understanding of how legal systems have evolved over time through cross-cultural interactions, and how these interactions continue to shape the development of law in a global context.

This publication stands as a testament to the importance of studying the meeting of legal cultures and its significance for the future of legal scholarship and practice.

EDITORS

As. Prof. Dr. Mirza Hebib

Dr. Amila Svraka-Imamović

Athanasios Delios*

THE EVOLUTION OF WILLS IN ANCIENT ATHENS

Summary

At the beginning of the 6th century BC, Solon, the Athenian legislator gave the opportunity to every childless Athenian to draw up a will through which he was able to adopt a son who was going to be his future heir and the new head of his family. In the 4th century BC, a new type of will appeared: the new will did not include adoption but it was related to different orders and appointments by the testator, like the testator's selection of his daughter's future husband, the manumission of a slave, the decoration of his tomb etc. This evolution of wills, which took place in ancient Athens within two centuries, reflects the different needs of Athenian society. The aim of this paper is to shed some light on this evolution and change of wills from the archaic to the classical era in Athens, uncovering the structures of the ancient Athenian testamentary law as well as focusing on the predominant role that the Solonian will had during the classical era.

Keywords: *Athens, evolution, family, heir, inheritance, Isaeus, oikos, succession, testaments, wills*

1. Introduction

According to the logographer (speechwriter) Isaeus, who is considered to be the basic source of knowledge regarding the Athenian inheritance law (Dobson, 1919), all Athenians who were about to die took some measures to be sure that after their death their house was going to avoid the extinction (MacDowell, 1989) and that there was going to be a man – the new head of the family (Cox, 1998) – who would carry out all the sacrifices as well as the traditional religious rites which all Athenians followed (Isaeus 7 *On the Estate of Appolodorus* 30). This could be achieved

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either by the presence of a natural son within the house who was born after a legal marriage of his parents (Scafuro, 2011) or by the presence of an adopted son (Demakis, 1986).

Regarding the adoption, aside from the option of the *inter vivos* adoption (Troianos & Velissaropoulou, 1997), as well as the posthumous adoption (Lindsay, 1999), Solon, the Athenian legislator of the archaic era, gave the opportunity to every childless Athenian to draw up a will through which he could adopt the person he wished (Floros, 1968). This male person would be the future heir and the successor of his family. The adoption which was included within the Solonian will was an action which strengthened the foundations of the Athenian family (the term which is used in the sources is "oikos").

During the fourth century BC aside from the Solonian wills, a new type of wills emerged. Many Athenians, in particular, began to draw up wills which did not include adoption but contained their last wishes such as the appointment of a guardian of the orphans, the dowry which would be given when the daughter of the deceased would get married, the manumission of a slave, orders regarding their tombs, items that they wanted to bury into the tomb, etc. This evolution from the Solonian will to the new type of will took place slowly from the 6th century BC to the 4th century BC and surely reflects a different approach of Athenian society towards the testamentary succession.

The aim of this paper is to show how the Athenian wills evolved from the archaic to the classical era, focusing on the different content of the testaments which obviously served different needs underlining in this way the nature of testamentary succession in ancient Athens.

2. The Solonian will

In 594 BC, Solon, the Athenian legislator, introduced the system of testamentary succession in Athens (Velissaropoulou, 1984). In particular, in his legislation, he introduced the will through which the childless

Athenians could adopt a person who usually belonged to the circle of their close relatives (these were the persons up until the sons of their first cousins) or their close friends. On one hand, this type of will was a way through which adoptions took place in Athens and, on the other hand, it was the means of finding the future head of the family as well as the successor of the family's assets (Youni & Delios, 2023).

The privilege of producing a will belonged to adult male Athenians who were citizens (this means that they had full political rights and were called "epitimoi") and they were neither personally adopted nor did they have a son (Youni, 2006). In his speech 2 *On the Estate of Menecles* 13, Isaeus claims that according to the Athenian law (which dates back to the era of Solon), a man was able to dispose of his own estate in the way he liked as long as he did not have a legitimate offspring (Biscardi, 2010). The same law is also cited by the logographer in his speech 3 *On the Phyrrus Estate* 68 (Edwards, 2007). In case an Athenian had a male child, the latter inherited his father according to the rules of intestate succession (MacDowell, 2015) and, therefore, a Solonian will could not be drew up (Harrison, 1968).

However, there was also an exception to this rule based on what Demosthenes mentioned in his speech 46 *Against Stephanus b* 24: "A father who had sons could make a will which was activated if his sons died two years before the age of twenty. Under these circumstances, this will was valid". This exception was justified and explained as follows: In case an Athenian father had a son who was seriously sick, it is apparent that the future of his house was in danger since if the son ultimately died, there would not be a successor of the family. Therefore, the Athenian law enabled a father with a legitimate son to draw up a will but the provisions of this will were not activated if the son ultimately survived. On the other hand, if the son died before the age of twenty, then this will would have been valid.

In case the Athenians had only a daughter, they were able to draw up a Solonian will being fully aware of the fact that if they did not act in this

way, then after their death, their daughter would become an heiress (the term which is used in the sources is "epikleros") obliged to get married to her uncle or her first cousin on her father's side (Cudjoe, 2006), and to give birth to a son who would become the new head of her father's oikos through a posthumous adoption. This is cited in the Athenian law regarding the son of the heiress: "Law: If the son of the heiress reaches the age of twenty, he gets the inheritance (of his grandfather on his mother's side) and he is also responsible for the nutrition of his own mother (epikleros)" (Demosthenes 46 *Against Stephanus b* 20).

Moreover, the Athenians who were interested in producing a will had to be mentally mature (Phillips, 2013) because, according to the Athenian law, which Demosthenes said in his speech 46 *Against Stephanus b* 14, all wills were invalid if drawn up under a state of mental immaturity due to old age, illness, or female influence or they were drawn up under psychological or physical violence of the testator (Arnaoutoglou, 1998).

The sources mostly show that the childless Athenians who were interested in drawing up a Solonian will were usually young men who were about to take part in a significant battle and their lives were in serious danger. For instance, in his speech 9 *On the Estate of Astyphilus* 6, Isaeus claims that Hierocles received the Solonian will drawn up by Astyphilus when the latter was going to sail to the island of Mytilene to take part in a battle there (Edwards, 2007). Moreover, the childless Athenians who faced disease and were about to die also preferred to draw up a Solonian will. They acted in this way since one of their main concerns was the fact that their family (oikos) was going to become extinct which meant that there was not going to be a person to carry out the sacrifices and all the customary rites before the tomb of the deceased (Griffith-Williams, 2012) and this was a prospect that they were interested in avoiding (Cudjoe, 2010). So, due to the immediate danger, they selected the option of adopting a male via a will, acting in the direction of protecting the interests of their house.

When the Athenians drew up a will, they usually invited as many witnesses as possible, even though this was not compulsory by the law. However, all testators were advised to invite witnesses during the production of a will. The persons who were selected to play the role of the witnesses could be divided into three categories based on what Isaeus remarked in his speech 9 *On the Estate of Astyphilus* 8: The first ones were the close relatives, the second ones were the fellow citizens and last but not least, the friends of the testator were called (Edwards, 2007).

It is truly interesting that a strange process was followed regarding witnesses. According to logographer Isaeus, in his speech 4 *On the Estate of Nicostratus* 13-14, the witnesses were not usually informed by the testator about the exact content of the will. They were just present, ready to testify to the production of a will. This means that after the death of the testator, the witnesses could not actually help the Eponymous Archon (who was the magistrate responsible for family and inheritance issues according to Isaeus in his speech 7 *On the Appolodorus Estate* 30) when he began the adjudication (Lanni, 2006) of an inheritance.

This condition made the forgers' work easier. This means that although forgers were fully aware of the fact that all wills required adjudication (Harrison, 1971), they did not hesitate to take the risk and produce a false testament. They acted in this way since they knew that the real witnesses, who were present when the will was made, did not have knowledge of the will's exact content and were not able to certify whether the presented will was actually original or it was just a falsified document (Demakis, 1994). At the same time, many other Athenians could easily testify lies if they were highly paid. The more persuasive the witnesses were, the more likely the forgers were to convince the jurors at the court about the "authenticity" of the submitted will. This is the reason why Athenian jurors were usually prejudiced against the wills (Thompson, 1981) as they were aware of the above practices.

But it seems probable that most mature Athenians were interested in securing the interests of their house, which is why they invited as many witnesses as possible when they drew up a will and they also informed them about the person they selected to adopt via this will to be absolutely sure that this will would not be challenged after their death. In that way, not only did they secure the foundations of their house but they also helped the adopted son via the will, strengthening his own status.

Citations of Solonian wills are abundant in the forensic speeches of the orators. Two very characteristic examples of a Solonian will are the following: The first one is derived from the speech of Isaeus 10 *On the Estate of Aristarchus* 9 who claims: "I am of the opinion, judges, that all of you are fully aware of the fact that adoptions take place through wills. The interested parties adopt a son and, at the same time, they offer him their assets." (Demakis, 1995). Even though it is explicit that this argument is not correct since there were three types of adoption in ancient Athens (inter vivos, via a will, posthumous), it is interesting that the logographer underlines the importance of the adoption via a will (in other words the Solonian will).

The second example is cited by Isaeus in his speech 4 *On the Estate of Nicostratus*. The orator claims that Nicostratus and Chariades were soldiers in the Athenian army and, while being far away from Athens, Nicostratus adopted Chariades through a will. After the death of Nicostratus, Chariades submitted his claim as an heir before Eponymous Archon to have Nicostratus' inheritance adjudicated to him (Hardcastle, 1980). In the forensic speech, the logographer cites Chariades as the heir "by the (Solonian) will" (Demakis, 1994). It is very interesting that logographers usually refer to the Solonian will in their speech through the citation of two infinitives or two participles which are related, on the one hand, to the adoption of a male or the entrance of a male adoptee into the house of the adopter and, on the other hand, to the production of a will.

The Solonian will was of vital importance both for the Athenians themselves and also for the city itself (the term which is used in the sources is "polis"). First of all, it ensured the continuation of the house (oikos) through the adopted son (who was going to be the new head of oikos) and also benefited the city, since the house was the fundamental unit of Athenian society. Furthermore, Solon recognized the right of the Athenians to select the male that would succeed them (Youni, 2017), which is why Plutarch in *Solon* remarks that "the legislator (Solon) was very famous for his law regarding wills. Before Solon, the Athenians did not have the right to draw up a will and their whole estate was inherited by the close members of their family. But Solon honored friendship more than kinship and made the estate their own property (Youni, 2006).

3. The new will

The 4th century BC was a turning point regarding wills. In particular, as shown through the forensic speeches of the orators, during that period most Athenians who were close to death were actually looking for a means through which they would be able to make various provisions, set orders, and express wishes for their *post mortem* era (Youni & Delios, 2023). They knew that these wishes could not be fulfilled via the original Solonian will, since it had a certain content. They were also not interested in giving oral directions to their relatives since they were fully aware of the fact that oral directions were easily violated, whereas written directions were mostly followed. These were the conditions which could be characterized as favorable ones for the introduction of the new type of will.

The Athenians who drew up the new type of will were citizens with full political rights either childless or with legitimate descendants (both male and female). Since the new will's basic characteristic was that it did not include an adoption, it did not play any role if the testators were the Athenians who had sons. This kind of will was not viewed as a way to avoid the desolation of the house by a male's introduction into the family

as an adopted son. It served different needs which were not covered by the Solonian will. Furthermore, while producing the new type of will, the testators had to have mental clarity without being influenced by their old age, a woman, and of course without being under a state of psychological or physical violence.

The content of this type of will was varied. First of all, it included legacies (Velissaropoulou, 1984). In particular, the Athenians who had a legitimate son were able to make a will of the new type during the 4th century BC through which they could appoint a certain person as a legatee of a piece of their own property. The rest of their property was obviously inherited by their natural son according to the rules of intestate succession. This practically means that the legatee had a double financial benefit. On the one hand, he acquired the legacy through the new type of will and, on the other hand, he inherited the estate of his own natural father according to the rules of the intestate succession (the law of the Athenian intestate succession is cited by Demosthenes in his speech 43 *Against Macartatus* 51). Of course, it is apparent that when the Athenians who had a legitimate son drew up a will through which a legacy was included, then this action led to the reduction of the property which would be inherited by their own natural son. But this was an acceptable condition by all Athenians. The worst scenario would be a family without a successor and not an oikos in the presence of a master with fewer assets.

The testators could also include various provisions in the new type of will such as the appointment of a guardian for their minor children as well as the order to the guardian to lease the estate of the minors (Youni & Delios, 2023). Moreover, it could also include the manumission of a slave, instructions regarding the post-mortem rites, as well as the appointment of a husband for their widow or any of their daughters and the dowry (Foxhall, 1989) which would be given to them. As far as the latter case is concerned, a very characteristic example is stated by Demosthenes in his speech 45 *Against Stephanus a* 28 who claims: "Will. That's Pasio's will of

Acharnae. (After my death) I decide my wife to be given to Phormio and I also give to her one talent as dowry due to me at the area of Peparethus, one talent which is due to me here in the city, a house which is worth one hundred mnae, the female slaves, and the jewelry and all the other things which she has got within the house. All these things are given to Archippe (by me)." It is apparent that the testator named Pasio drew up a new type of will through which he gave a huge dowry to his wife for her future marriage with Phormio.

4. Conclusions

To conclude, testamentary succession in ancient Athens is a perplexing but also very interesting field of research since its basic characteristic is the fact that there was an evolution of wills from the archaic to the classical era. However, this evolution does not mean that the older form of wills was replaced by the new form. On the contrary, they were both combined in harmony. The older form of wills covered the need to avoid the desolation of the family through adoption (Demakis, 1986), since this need never ceased to exist. Moreover, the law of wills was highly respected since this was the law of the eminent legislator, Solon. On the other hand, the new type of wills covered other needs such as the testator's wish to make provisions and set orders about the period after his death. Such content could not have been included in the original form of wills. That is why the Athenians began to draw up the new form of wills as is shown through the forensic speeches of the orators. This was a great evolution which took place within two centuries (so it was a slow process) and does not actually cause any surprise. Different eras and, therefore, new needs in the field of testamentary succession were reflected and expressed through the new type of will. So, although all Athenian laws regarding wills in the classical era referred to the Solonian will, it is clear through the forensic speeches of the orators that the Athenians were also fond of producing wills without adoption and this was an acceptable practice.

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Ivana Vlašić*

ANCIENT MIDDLE EAST AND THE ROMAN WORLD: THE QUESTION OF BANKING ACTIVITY IN BABYLON AND BANKING IN THE ROMAN WORLD

Summary

Since ancient times, banking and banking activities have represented a significant segment of economic activity in a state and one of the main pillars of trade and economic development. Just like in the Roman world, Mesopotamian society, including Babylon itself, was very wealthy and sophisticated, primarily based on agriculture but with a highly developed trade system. Using the historical, comparative, dogmatic methodology, the aim of this work is to analyze and present the significance and role that banking had in the Babylonian and Roman world, and whether these two legal and financial systems knew the essential elements of banking – loan and deposit as two prominent bases of functional deposit banking. Each of these systems had its specifics, but they have in common that they laid the foundations for the banking system itself, the development of which would follow in later periods of historical development.

Keywords: *banking, Babylon, Roman world, credit system, deposit*

1. Introduction

The economy and economic prosperity of a country form the backbone of its legal, economic, social, and cultural development (Srb & Matić, 2003, p. 3; also Cappiello, et al. 2010). Since ancient times, money and numerous monetary activities have represented a significant segment of economic and commercial relations, and their legal formation and shaping is the result of a long historical legal development that was exposed to

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various state, political, social, and economic influences. Due to different understandings of the legal and financial nature of a bank and the scope of its operations, the systematic definition of the term bank creates certain difficulties. According to the modern definition of the banking dictionary, a bank (English *bank*, German *Bank*) is a financial, so-called depository institution that receives funds on deposit, pays interest on them, and invests them mainly in loans, also dealing with financial services (Rječnik bankarstva, 1998, p. 33). However, both in ancient times and today, there are a large number of inconsistent views on the concept of a bank and its basic characteristics, which largely points to the problem of a precise definition that would encompass its core and specifics. Summarizing the basic elements of those definitions, perhaps two roles could be highlighted as the basic characteristics of banks, namely receiving capital for safekeeping – deposit and loan of that capital.

Such an uneven position on the problem of defining a bank and setting a distinguishing line between various obligatory-legal and commercial-legal loan, credit, and deposit transactions of other participants and professional bankers, which unites these procedures within itself, but still with a different professional basis, calls into question the need for thorough studies about the origin and early history of banks.

The roots of legal institutes are very often reflected and found centuries before they are fully integrated into another legal system, and today's norms that regulate the complex banking system are only a reflection of the legal and historical development of banking institutes, contracts, activities, but also numerous financial market laws related to the banking sector. In the historical context, financial transactions that we can partly connect with the original forms of banking transactions appear centuries before the very appearance of the institution of money. This is precisely why, using historically legal, comparative, and dogmatic methods, this paper intends to compare two different financial systems in matters of the importance of banking in that area, the use and existence of loans and deposits as basic

banking activities. It will analyze and compare the Babylonian legal and financial system as a system that was very often mentioned as a precursor and the first instance of the emergence of banking and Rome as a legal system in which not only the economic boom of banking took place but also the legal regulation that followed this development and which is said to have laid the foundations that we still recognize in banking operations today. In doing so, it is extremely important to follow the issue of loans, deposits, and deposit banking and, in general, the question of how important banking was in these legal systems.

2. The question of banking activities in Babylon

The first known monetary activities were already identified in the ancient civilizations of Assyria, Babylon, Egypt, ancient Greece, and Rome (Goddard & Wilson, 2016, p. 3). In the aforementioned agrarian economies, financiers were a necessary element for the sustainable survival of the economy because, according to Braudel (1983), credit was necessary for the old agricultural economies, which were exposed to the constant dangers of the seasons, seasonal disasters, and long waiting period (p. 562). Banking developed in close connection with the financial activities of the temples, which received material things of great value for safekeeping and performed various financial and transactional services. Due to their nature as a sacred space, they represented a safe place for storing valuables, and examples from ancient Egypt, Mesopotamia, Greece (Delphi and Olympus), and Jerusalem testify to the first banking activities inside temples (Dos Santos Justo, 2014, p. 1666).

The development of banking was initiated from the need for trade and the market for additional capital because the system of collecting and keeping funds in the temples was not sufficient for a sustainable market. So already in Babylon during the reign of Hammurabi, in the 18th century BC we find clay tablets that bear witness to financial transactions and the use of loan contracts, which only shows that the concept of the

development of banking business was already initiated. Later, the activities of professional bankers will be taken over by individuals who will receive deposits for storage and place money to their clients in the form of a bank loan, which is particularly evident in the examples of Greek *trapezites* and Roman *argentarii*.

The sanctuaries in Babylon, as well as in other ancient civilizations, are economically important because they represent the initial stage of the emergence of the banking business. In addition to religious issues, temples were the center of educational, judicial, and archival, but also financial and commercial affairs (Bromberg, 1942, p. 77). The Temple of Shamash, God of the sun and justice, enjoyed a considerable reputation in banking affairs, kept records of all decisions, business, and marriage contracts, and drew up loan and purchase contracts in the presence of official scribes who were also priests of the temple. Because of all of the commercial affairs, there are opinions that this temple was the first bank in the world (Jastrow, 1911, as cited in Bromberg, 1942, p. 77).

Throughout its long historical development, the market of Mesopotamia developed a complex series of financial and economic institutes. The Mesopotamian economy of the third millennium BC was mostly redistributive, while from the second millennium private economic activity occupied an important place in society (De Graef, 2008, p. 4). The economic significance of financial activities in such circumstances was immeasurable, that is, financial and trading activities were intertwined, and the basis of business was in agriculture (Bogaert 1966, as cited in Joanes, 2008, p. 18).

The loan agreement has become one of the central contracts of financial activity. Many records of credit that have been preserved since Ur III are the best evidence of the practice of granting loans and the legal nature of credit in that period. In his research and analysis of Babylonian business, money, and loans, Stainkeller presented the thesis that in ancient Babylon, as well as in other ancient civilizations, the main goal of the lender, when entering into a loan agreement, was to obtain the borrower's

work, his land, or very often both, which made the interest only a tool for that achievement, and in itself had no economic purpose and was devoid of real economic value (Steinkeller, 2001, p. 48). For instance, *TuM n.F. 1/2 32 tablet and case; Ibbi-Sin 1/vi; Nippur: Suna received from Seš-dada 7 shekels of silver (as a loan). In lieu of the interest, he placed Uba'a, his slave [woman] (with Seš-dada). He (i.e. Suna) swore by the name of the king to pay a daily wage of 5 liters (of barley), should she abstain from work. 3 witnesses. Date. Seal of S [una?], son of 'X-xl;* or *Owen NATN 307; Šu-Sin 9/vii; Nippur: [χ bushels] of barley (I1i-mišar received from X as an interest-bearing loan). In lieu of the interest, I1i-mišar placed Selibum, son of I1i-mišar, for 5 years (with X). He (i.e. I1i-mišar) swore by the name of the king not to take him away (during that period). Before 5 witnesses. Date.* (Sources cited by: Steinkeller, 2001, p. 57). This purpose of a loan is not an indicator of the legal nature of the loan, which was used later in Roman financial transactions where the main goal of financiers was to obtain capital income, often through contracted interest rates.

Babylonian loans from this period can be classified into three basic categories: ordinary loans, interest-free loans, and antichretic loans (Garfinkle, 2004, p. 3). The most represented category of loans were ordinary loans that had various things as their object, including silver, barley, and wool, and their basic characteristic was that interest was paid in addition to the principal debt, and they used standard terminology. These loans were ordinarily of short duration (for example: *MVN 8 165, 166, 167*, and *171*), and consumptive, or harvest, loans (for example: *MVN 8 153* and *154; ZA 93/2 4; MVN 13 896 + 897*), which usually required repayment after the harvest (Garfinkle, 2004, p. 3 f. 5). The second type of credit mentioned was interest-free loans (for example: TMHC NF 1/2 31; YOS 4 51, 52) which of course did not include interest payments and during Ur III these were most often loans issued for a short, often no longer than a month. The last category differed greatly from the previous two categories of loans because, within them, the borrowers pledged their work as interest on

the loan (Garfinkle, 2004, p. 4–5). Most of the documents from this period testifying to the loans are certificates of ur5-*ra* loans, i.e. interest-bearing loans (De Graef, 2008, p. 7). Terminology and expressions used in the Ur III period correspond to two terms: še-ur$_5$-*ra*, i.e. grain loans, and *maš$_2$*, i.e. due interest on the loan (Monaco, 2012, p. 165).

Interest-bearing loans during the reign of Ur III were very often given in the form of loans for consumption, which were usually given in grain, and loans for production, which were usually paid in silver. With consumer loans, the debtor took a loan to ensure his existence and the existence of his family, and these loans were almost always short-term loans. In contrast, productive loans were concluded so that the borrower would use the required capital to improve and increase the material conditions of his household, and the interest was the price of these improvements. With this type of loan, both the lender and the borrower sought economic benefit from the transaction. The interest rate commonly accepted in that period for a grain loan was 1:3 (A bulla + tablet from Nippur (AUCT 3, 502. 503) specifies the rate of interest as *maš$_2$ -bi igi 3-gal$_2$ -bi-kam* i.e. "his interest is 1/3") and generally confirmed in sources from different cities, while silver loans implied an interest rate of 1:4 or 1:5 (Monaco, 2012, pp. 165–166).

The loans were drawn up in writing, on clay tablets, which were broken upon the return of the loan because the loan was fulfilled and invalid at that moment. Thanks to the stratigraphic data belonging to the Igibuni family archive, De Graef (2008) hypothesizes that the invalid loan documents were not immediately destroyed and broken, but simply thrown away, and this is one of the reasons why such a large number of clay tablets testifying to loans survived (p. 15).

During the reign of Hammurabi, 1792-1750 (Kurtović, 2005), the importance of the *tamkarum* merchant-bankers, who were involved in a large number of business and financial activities, from trade to lending and credit, grew significantly (Miklinski, 2021, p. 130). In Old Sumerian documents, *damkar* or *tamkarum* are found only in the role of merchants, but

at the time when the private economy was on the rise (after the beginning of the third dynasty of Ur, 2112-2004 BC) the *tamkarum* was definitely a business person who would take on the role of a credit provider, and by the time of the Code of Hammurabi, in many cases, the tamkarum must be a money lender (Hudson, 2021, p. 21). Hudson (2021) interprets that the transition from a merchant to a banker is completely natural and there is no essential difference between the two professions, especially not in Babylon where, in principle, no great distinction was made between money in the modern sense and other marketable things (p. 21).

Hammurabi's code is of exceptional importance in the study of Babylonian law because it forms a set of legal regulations that reflect not only the legal system and practice of that period but also a large part of the customs that were in force until the Code was created. The Code is very familiar with loan and bequest contracts and devotes a large part of its provisions to them. Banking operations from this period relied on important mechanisms of private law. First of all, the written form of the contract on a clay tablet, also containing the specified payment terms and interest, was reinforced by the institute of witnesses to the contract (Miklinski, 2021, p. 131). Hammurabi's code protected the debtor who is unable to repay the debt with interest on borrowed money in the event of weather disasters that caused the income of his field to fail (article: 48, The Code of Hammurabi, translated by L. W. King, 2008). Also, very often the loan agreement was secured by a pledge, and if the debtor cannot repay the debt, the creditor has the right to settle from the income of the pledged property (Articles 49 and 50 of the Code). Likewise, the code sets a limit on interest rates for grain at 33% and for silver at 20% (see: articles 49 and 50). The debtor enjoyed the possibility to pay the loan and interest in kind, i.e. if he did not have money, the debtor could get rid of the debt by paying the grain or sesame dealer (articles 51 and 52). A very important provision of the code is the limitation of debt slavery to three years (article 117).

Even the contract on the deposit of Hammurabi's code suffers from formality when concluding it, so if the contract is not concluded in writing and with witnesses, it would not produce legal effects (articles 122 and 123).

Babylonian law also recognized a great similarity with the irregular deposit of Roman law, because there was an agreement on the deposit of generic things, and the depositor was not obliged to return the given thing, but only the thing of the same type and quantity (Kurtović, 2005, p. 63). Donbaz-Stolper pointed out that the deposit of money has only been functioning since the Achaemenid period (Joannes, 2008, p. 19). Although the deposit as a contract is legally regulated, the question is whether its nature and purpose were of such a form that we can talk about deposit banking and the kind of deposit we see in Roman law, as well as in modern banking operations. In the Neo-Babylonian and early Achaemenid periods, the most important and impressive archival documentation came from the Egibi family. The Egibi family was one of the families of Sumero-Babylonian origin whose business records constitute the largest and most important source of private business documents from the Neo-Babylonian and early Achaemenid periods. The Egibi family tiles were found in 1870 and 1880 among the ruins of private houses in Babylon. This archive, which originally amounted to about four thousand tiles, was unfortunately reduced to about two thousand due to various problems such as careless excavations and shipments. Most of the collection is now in the British Museum (Wunsch, 2007, p. 232). The archive bears witness to the business activities of five generations who received deposits, gave loans, settled clients' debts, and enabled the acquisition of goods for future payments by granting loans. The family was very successful in the agricultural trade, which allowed them to acquire large estates, and some of its members became leading officials in Babylon. Cornelia Wunsch, the author who analyzed the archives of this family, claims that the activities of the Egibi family is better described by the term entrepreneurship than deposit bankers because they received and

kept deposits and gave loans, but they paid depositors the same interest they charged for their loans (usually 20 percent per year) (Wunsch, 2007, p. 232). This claim calls into question the existence of banking in Babylon, if we bear in mind the fact that the deposit of money from which the loan was later given, was the basis of banking operations.

3. The question of banking activities in the Roman world

Private financial operations, which today can be compared with the term bank, were designated in Roman legal sources by the term *mensa*, which originally meant bench or table, which is the terminological equivalent of the word *trapeze* in Greek law. The term *mensam exercere* would thus mean 'to run a bank' (Rathbone & Temin, 2008, p. 391). Bankers became an important segment of the economy, especially after the Second Punic War when we can observe the increased trade and economic activity of Rome (Kaser, 1995, p. 159). It was a turning point in the new and more dynamic development of Roman law and the era of supremacy in the Mediterranean, which brought new commercial and economic challenges. The consequence of all these socio-economic changes was the response of the Roman state to new practices, entailing the creation of new legal institutes as well as new entrepreneurial occupations. The period from the 3rd century BC to the 3rd century AD marked the significant development of banking activity in Rome its their ubiquity in the financial market.

Deposit banking in Rome originated during the 3rd century BC. The presence of bankers *argentarii* in the Roman forum was first recorded by Livy around 310 BC and Varro:

Titus Livius IX, 40, 16: tantum magnificentiae visum in iis, ut aurata scuta dominis argentariarum ad forum ornandum dividerentur. inde natum initium dicitur fori ornandi ab aedilibus, cum tensae ducerentur.

Varro, De vita populi romani, lib. 2., 12.: Hoc intervallo primum forensis dignitas crevit atque ex tabernis lanienis argentariae factae (Kettner, 1839, p. 31).

The testimony of the presence of bankers, *argentarii*, is also brought by Plautus in his work Curculio (190 BC) mentioning banker Lyca who acknowledges that he owed as much or even more than he could demand from his debtors:

Plautus Curculio 3.1.: Beatus videor: subduxi ratiunculam, quantum aeris mihi sit quantumque alieni siet: dives sum, si non reddo eis quibus debeo. Si reddo illis quibus debeo, plus alieni est.

The terms *argentarii, nummularii, coactores*, and *coactores argentarii* are attested until the 1st century BC to denote a banker in Rome. Andreau and Bürge believe that these four terms were used to denote four different types of bankers. On the other hand, Rathbone and Temin believe that *argentarius* is a generic word for a banker, while the terms *nummularius* and *coactor* refer to specific roles, that an *argentarius* "might or might not carry out as part of his general banking, and which were sometimes carried out on their own as a specialized business" (Rathbone & Temin, 2008, p. 392). There has been much discussion in doctrine about the distinction between the terms *argentarii, nummulari, mensulari, coactores,* and *collectari*. Professional bankers were definitely not the only participants in the financial market. In addition to *argentarii* and *nummularii*, as well as other professional forms of bankers, members of the Roman elite who had a large property value at their disposal performed their financial activities and borrowed money from these funds. However, a special group had a significant place in the financial market, which cannot be included in any of the aforementioned groups due to its characteristics. Andreau, following Howgego, mentioned the name "entrepreneurs" whose financial activities more closely resembled the activities of the Roman elite, but they were not members of the Senate or the equestrian order. One of them was Publius Sittius from Nuceria, about whose business ventures Cicero also wrote, *For Sulla*, 20.56-9. (Andreau, 1999, p. 50). Petrucci classified the other participants of the financial market into several groups stating: persons specialized in lending money with interest called *feneratores* or

sometimes *negotiatores*; members of high social classes who perform various financial transactions through their slaves, freedmen, clients, and friends; *societates publicanorum* that had public money at their disposal; imperial slaves and freedmen, agricultural entrepreneurs; tutors who, among their obligations, were responsible for interest on the ward's money (Petrucci, 2002, p. 16).

The banking business in Rome represented a specific professional activity, recognized in legal sources, and organized and professionally managed in order to make a profit (D. 14.3.5.; D. 31.77.16.). The premises where bankers carried out their activities were called *tabernae,* which Ulpian also wrote about (D. 18.1.32).

Roman bankers were professionals for whom this profession was a source of income and who made a living from banking, using the usual business techniques inherent to that profession. In terms of social status, these were mostly freedmen who did not have significant private capital at their disposal and conducted their business through a combination of receiving deposits and granting loans (Gröschler, 1996). Women were prohibited from performing professional banking activities (D. 2.13.12). The banking profession in the public sense did not exist because Roman banks were not regulated or guaranteed by the state (Rathbone & Temin, 2008, p. 392).

According to available sources, for certain periods (from the 2nd century BC to the 1st century AD) there was no special jurisdiction for banking activity. Banking activities were carried out according to Roman private law, and the data we find in legal sources point to the fact that a special set of rules was created related to the business of bankers and their organization. In the sources, we find a large number of legal solutions for contracts related to monetary benefits and which solutions were applicable to any subjects of a legal relationship, and not expressly and only to bankers. For example, the sources regulate the *stipulation* or *depositum irregulare* without the need to specify the profession of the entities that

conclude the contract. Special rules on banking business can be found in praetorian edicts, which primarily sought to protect entities that engaged in business relations with bankers. They refer to *editio rationum argentariarum, receptum argentarii, agere cum compensatione, exceptiones argentariae, replicatio 'ne aliter emptori res traderetur quam si pretium emptor solverit* (Cerami & Petrucci, 2002, p. 74). On the other hand, certain legal relationships and contracts, such as a set-off or compensation, which arose within the framework of banking activities, were later generalized and applied to a wider range of subjects, while certain contracts disappeared from use or were modified in Justinian's law, such as the *receptum argentarii* (Cerami & Petrucci, 2002, p. 74).

When we talk about the economy of the Roman state, we should keep in mind that it is an ancient, pre-industrial society, and it is inappropriate to compare these economic trends with contemporary global trends, which generate and circulate significantly greater funds and resources than was the case in Rome. The result of industrialization was a greater number of participants in the modern global market, which is reflected in the greater prosperity of today's countries and supranational organizations, as well as the economic situation and instruments for establishing balance both by the government and the central financial institutions of an individual state or organizations.

Economic developments and prosperity determined the standard of living of the Romans, the development of the market for commodities and goods, the labor market, the operation and role of financial markets, but also the further growth of the economy. What many scholars emphasize is the character of the long-term stability of the Roman economy because, as Di Porto, Petrucci, Andreau, Carandini, and Manacorda claim, until the 2nd century BC (or perhaps earlier), Rome acquired all the economic, social, legal, and psychological structures on which it continued to depend until the Principate (Andreau, 1999, p. 146).

The question of the importance of banks in the economy of the Roman state is a question that greatly divided the views of the Romanist doctrine. Most authors who researched this phenomenon agree with the statement that *argentarii* and *nummularii* had a leading role in credit and intermediary activities of money circulation. Such an attitude is shared by, among others, Marquartd, Voigt, Deloume, Mitteis, Petrucci (Petrucci, 1991, p. 11). On the one hand, there are theses about the achieved influence of bankers on the economy of the Roman state, according to which the banking sector, along with trade, industry, and agriculture, is considered one of the fundamental branches of the Roman economic system. The close connection between the developments of these branches of law is emphasized, so banking grew precisely because of the growth of commercial traffic, industrial, and agricultural production, which in turn required the use of ever-increasing financial resources (Rostovtzeff, 1963). Although bankers did not have a monopoly over financial activities, they had a significant economic role, especially in the field of auctions and concluding deals on behalf of others. The variety of activities in which they participated, from depositing and keeping money, issuing loans, keeping accounts, participating in auctions, and exchanging currencies, influenced the stability of trade and finance. Trading, buying, selling, and exchanging coins became a necessity during the Roman Republic when the influx of foreign goods increased and the market presence of foreign traders in the Roman territory increased. Exchange activities took place in most cases through bankers and were a great source of income and benefits (Niczyporuk, 2013, p. 140). With their ubiquity and various types of financial activities, bankers imposed themselves as indispensable actors of the Roman economic system, i.e. financial life was to some extent woven into the functioning of the economy (Andreau, 1999, p. 146).

Just as in Babylon, the loan agreement represented the merit of financial activities and was directly linked to numerous trade movements. Issuing loans was one of the most common activities of Roman bankers and they were issued for both consumer and production purposes

(TP Sulp. 39 – TP Sulp. 48). The dogmatic framework of the loan agreement is still a problematic issue within the Roman legal system, especially if its development is followed from the time of foundation, regulation according to Justinian's law, existence in practice, until its development and concretization in positive legal systems. The legal nature of *mutuum* is a complex issue in Romanist circles, and the difficulties in its categorization were largely caused by the duality of contract and quasi-contractual elements that the loan combines.

Loans were given by all categories of financiers, depending on their clients. Lenders included aristocratic financiers, *publicani*, entrepreneurs, civil servants (Egypt), civil treasuries, temple funds, foundations, banks, money societies, credit associations, pawnshops, brokers, usurers, and all other individuals who could lend money from time to time (Howgego, 1992, p. 14). All these financiers did not act in the same way nor were they equally represented as financiers, but they were capable of improving productive diversity and thus influencing economic life (Andreau, 1999, p. 149).

However, in the case of bank loans, the practice was directed in a completely different direction, and the rich documentation of banking operations indicates the fact that, at the social and economic level, the loan was not granted without compensation at all.

Placing money at interest was a form of commerce that the Romans always considered logical, moral, and favorable to them. But in order to acquire the right to interest, the lender had to add another item to the loan agreement, which consisted of a return fee, which was the *stipulatio usurarum* (Perozzi, 2002, p. 254). As evidenced by numerous literary sources, especially Cicero, Roman society had no moral prejudices against those who lent money with demand and interest, especially if they were on a large scale or in connection with large business *magna mercatura* (Lovato et. al, 2014, p. 484).

As Salazar Reveuelta (1999) wrote, consumer loans in Rome were not really free and interest always existed even before money circulated,

because interest could also be calculated on the fruits of other exchangeable things (p. 22). A money loan was indeed considered a normal form of trade, which made it possible to earn a larger amount of capital to then invest in further forms of earnings (Lovato et. al, 2014, p. 484).

The so-called *gratuita* tip of the Roman loan is inherent in the contract. It must be understood in a strictly legal sense, as the inability of the loan to contain a valid agreement on the payment of interest, but in a social and economic sense, the loan/credit was never free nor, at the time when social customs imposed gratuity or when it was a custom, the social habit was always, as now, the opposite (Perozzi, 2002, p. 254).

Unlike the written form used in Babylon, Roman bank loan was most often concluded in the verbal form of contracting, through stipulation. This use of a double form of loan contracting, through an informal agreement and a stipulation, has a special connection with commercial practice and economic and credit activities (Bramante, 2008, p. 65). In particular, the problem is created by the lack of clarity as to why it was necessary to enter into a *mutuum* as an informal contract, which in itself creates a mandatory legal responsibility for the execution of the contract with a stipulation. The Romanist doctrine dealt a lot with this construction of the contract *mutuum cum stipulatio*, and the literature offers different designations and categorizations of this type of contracting. Legal and literary sources testify that giving money in the name of a loan was associated with a promise to pay the borrowed sum (D. 46.2.7, D. 45.1.126.2, D. 44.4.2.3, D. 12.1.30, Gai 4.116), until it was pointed out when this did not happen, which indicates the frequent practice of this construction and that the exception was situations in which this construction did not follow (D. 46.2.6.1, D. 46.1.56.2).

For centuries, the irregular deposit has been the basis of all banking operations, enabling the execution of basic banking operations, both in the time of Roman law and in the modern age. The growth of the economy, meeting the needs of the market, and the general development of

socio-economic relations have influenced the formation of new types of special legal transactions, including irregular deposits. Bankers played a major role in the creation of the irregular deposit, and it is likely that it originated within the framework of banking operations and the special banking practice of receiving unsealed money for deposit, which would become one of the defining characteristics of bankers in Rome (Gordon, 2007, p. 62). Searching for the origin of an irregular deposit within the framework of the banking business is quite logical. Perhaps, in support of this claim, the best evidence is numerous sources of Roman law that mention only an irregular deposit in monetary form, but also several texts that bear witness to the banking business and confirm that irregular deposit was represented in banking practice in general (D. 16.3.7.2; D. 42.5.24.2, and D. 16.3.28).

There are well-known concepts about the connection between the banking irregular deposit and Greek law, which claim that the first bankers who settled in Rome were Greeks who brought their banking technique with them, including the *παραχαταθήχη*, which could function as an irregular deposit and produce interest in favor of the depositor (Vigneron, 1984). Certain Romanists, such as Collinet (1912), claimed that Roman lawyers from Asia, such as Papinian and Scaevola who were influenced by Greek law (pp. 122–123), were familiar with the irregular deposit. Litewski (1974) also pointed out the fact that the first bankers in Rome were Greeks. Referring to Hellenistic sources, he interpreted the practice of depositing money with the right of use, which implied the transfer of ownership and the obligation to return the equivalent value, as well as that the first lawyers who were familiar with irregular deposits were Papinian and Scaevola who knew Hellenistic customs very well (p. 225).

The claim that the collection of money deposits and their further marketing for the purpose of profit would become one of the basic characteristics for distinguishing bankers from other financial participants in the market shows how important a role the irregular deposit played in the

banking business. Raymond Bogaert, who devoted his scientific work to the study of banking in Greece, carefully separated deposit bankers from other financial participants and various lenders, money changers, and credit intermediaries. In his opinion, the Greek bankers *trapezitai* were deposit bankers who became bankers from money changers when, sometime in the 5th century, they began accepting deposits from their clients and continued working with these funds. Irregular deposit is the key to banking and without it, commercial banking would not exist (Bogaert, 1968, pp. 331–332). Bogaert established that regular deposits of valuable objects and documents were found among the *trapezitai* files, but these deposits were rare. On the other hand, irregular deposits were the key to financial operations and Bogart pointed out two types that are found in practice, namely *dépôts de paiement*, i.e. capital deposit intended for consumption, and *dépôts de placement*, i.e. investment deposit, mainly savings capital that should be increased (Bogaert, 1968, pp. 331-351). Jean Andreau, who studied banking in Roman law, took the claim made by Bogaert, transferred it to the Roman world, and presented the thesis that the deposit bankers *argentarii,* later also *nummularii*, were the only category of financial experts who operated under the *condition d'activité* (Andreau, 1999, pp. 39–40). Verboven also pointed out that at the heart of the *ars argentaria* was deposit banking. Bankers received money on deposit and managed it on behalf of their customers, offering teller and payment services, and in return could use the deposited amounts for business, mainly lending money at interest (Verboven, 2008, pp. 211–229). It was not in the nature of other participants in the financial market, such as credit intermediaries and brokers, to take open cash deposits, irregular deposits, or manage client accounts by offering cashier services.

Several sources report cases based on the deposit of money in a *mensa* or *argentariia*. *Mensa* as a symbol of banking business is mentioned in Justinian's Codex,

C.4.25.3.: *Institoria tibi adversus eum actio competit, a quo servum mensae praepositum dicis, si eius negotii causa, quod per eum exercebatur, deposita pecunia nec reddita potest probari.*

in whose fragment the reason for the answer was precisely the question of depositing money in a deposit. In the same way, jurist Papinian in fragment D. 14.3.19.1 explicitly mentions:

D. 14.3.19.1 (Papinianus libro tertio responsorum): *Si dominus, qui servum institorem apud mensam pecuniis accipiendis habuit, post libertatem quoque datam idem per libertum negotium exercuit, varietate status non mutabitur periculi causa.*

The fragment in which the case of the *servus institor*, who was in charge of managing the banker's *mensa*, is considered, performed, among other things, the *mensam pecuniis accipiendis*, and the change of his status from a slave to a free person did not affect the cause of risk. Ulpian's fragment mentioned money deposited with *argnetarius*:

D. 42.1.15.11 (Ulpianus libro tertio de officio consulis): *Sed et si pecunia penes argentarios sit, aeque capi solet. Hoc amplius et si penes alium quem, destinata tamen ei, qui condemnatus est, solet pignoris iure capi et converti in causam iudicati.*

The text of the fragment enables us to conclude that the possibility of confiscation of money deposited with *argenatrii* was allowed. Moreover, when the same money that was in the hands of another person but intended for the judgment debtor, i.e. the judgment debtor was the recipient of the deposited amount, not its depositor, might be confiscated for the purpose of the collection according to the pronounced judgment.

There are numerous other fragments that indicate the existence of an irregular deposit which are problematic in nature and have a large number of different interpretations. However, due to the scope of this paper, we do not have space to deal with the problematic legal nature of irregular deposits in more detail, but we certainly want to point out the need for further research into this issue.

The practice of what in modern law is called fractional reserve banking, which involves taking money from customers and then lending that money at interest, while keeping some of the money as a reserve, is the basis of banking in Rome. The term deposit can be misleading from a technical and legal perspective because fractional reserve banking does not involve the deposit of money as strict collateral or what is called *depositum regulare* in the legal system. Here the act of deposit is actually considered a monetary loan for consumption in which the ownership rights of the money are passed to the recipient of the money (Coll. 10.7.9. *Si pecuniam deposuero eamque tibi permisero, mutua magis videtur quam depostita ac per hoc periculo tuo erit*). Formally, the fractional reserves of bankers in which banks receive a deposit or loan from their clients and continue to place the deposited money to make a profit could be achieved through a contract of *mutuum, mutuum con stipulatio*, only *stipulatio* in later law, and an irregular deposit as an important item in this activity (Collins & Walsh, 2014, p. 183).

The irregular deposit was, without any doubt, an important item of Roman *argentarii* and deposit bank operations. The *ars argentaria* was focused on deposit banking as bankers received money and managed it on behalf of their clients, offering teller and payment services, and, in return, the deposited sums of money could be used for gambling, which was mostly not lending money at interest (Verboven, 2008, p. 212).

4. Concluding remarks

Modern banking deposit systems have their roots and the outlines of legal and financial institutes since ancient legal institutes, which is particularly reflected in the definition of basic banking contracts whose legal formulation can be compared with the definitions of Roman law. It is indisputable, however, that the development of banking led to the specialization of banks and the separation of the central bank from other banks. This was not the case with the Babylonian and Roman financial systems, but it is clear that the basis of banking, both currently and at that time, consisted

of two basic contracts – a loan and a deposit. Analyzing and researching the ancient financial and banking sector, the question that always arises is one of the legal nature of the loan, especially of the deposit, whose legal nature should be at the service of the development of deposit banking. The essence of the Roman bank was that it received deposits, usually with interest, from its customers, made payments to them, and loaned their collected money with interest. The legal recognition of the contract *depositum irregulare* leads to the conclusion that the accounts on which interest was paid were a frequently used and common practice of Roman bankers also known to legal sources. Although one part of the doctrine describes financial actors similar to the bankers of Babylon, called entrepreneurs, because they received and held deposits and made loans, but paid depositors the same interest they charged for their loans, we will agree with the thesis of Theodore Pinches, who pointed out that the statement that deposit bankers did not exist in Babylon is better replaced by the expression that no documents have yet been found to indicate their existence. And yet, although the deposits and loans of Babylonian law did not correspond to the set definitions of the deposit bankers of ancient Rome, the importance of the practice of Babylonian commercial and banking institutes and affairs is reflected in the fact that a large part of these commercial techniques and economic strategies, developed already in the third millennium BC in the temples and palaces of the Middle East, found their place centuries later in ancient Greece and Rome. This primarily means shifting to the use of uniform weights, measures, and fees for keeping accounts and annual reports, charging interest, as well as profit-sharing contracts between public institutions and private traders. All remaining vagueness opens up new questions about the research on banking and banking business in the ancient world, which creates a sufficient motive for some new research and deeper, more interesting analyses.

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ZA 93/2 4;

MVN 13 896 + 897;

TMHC NF 1/2 31;

YOS 4 51, 52;

A bulla + tablet from Nippur (AUCT 3, 502. 503).

Corpus iuris civilis

Digesta

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D. 12.1.30

D. 14.3.5.

D. 14.3.19.1

D. 16.3.7.2.

D. 16.3.28.

D. 18.1.32.

D. 31.77.16.

D. 42.5.24.2.

D. 44.4.2.3

D. 45.1.126.2

D. 46.1.56.2

D. 46.2.6.1.

D. 46.2.7.

Gai Institutiones

Gai 4.116

Tabulae Pompeianae Sulpiciorum:

TP Sulp. 39 – TP Sulp. 48

Michael Binder*

THE *EXCEPTIO EX IURE TERTII* IN ROMAN LAW AND AUSTRIAN CIVIL LAW

Summary

In his objection against the claim of the plaintiff (creditor), a defendant (debtor) can (try to) refer not to his own right against the plaintiff but to the right of a third party (tertius) against the plaintiff. Such an exceptio ex iure tertii is problematic because the third party is not involved in the lawsuit. Usually, another lawsuit between the creditor and the third party is necessary. Therefore, an exceptio ex iure tertii is generally not permitted. However, a closer examination shows that certain exceptions should be considered in order to protect the defendant (and the third party) against the claim of the creditor. In this paper, the cases with an exceptio ex iure tertii in Roman law and Austrian civil law are the subject of analysis.

Keywords: *Roman law, Austrian civil law, exceptio ex iure tertii, suretyship, circuit of actions, regula iuris, delegatio, dolo facit, qui petit quod redditurus est*

1. Introduction**

In most situations, an *exceptio ex iure tertii* was not permitted. A general rule can be described as follows: *Exceptio ex iure tertii non datur*. The *exceptio ex iure tertii* has been the subject of several monographs on German civil law (Stammler, 1900; Rappaport, 1904; Makowsky, 2019). However, in Roman law and Austrian civil law, an analysis of *exceptio ex iure tertii* still remains necessary. Firstly, cases with an *exceptio ex iure tertii* (and similar cases) in Roman law should be identified and then

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** I want to thank Prof. Dr. Philipp Scheibelreiter for his revision and feedback on this article.

compared to Austrian civil law. Following this comparison, possible reasons for an *exceptio ex iure tertii* can be determined.

2. Origin of the term *exceptio ex iure tertii*

A defendant has the right and opportunity to counter a plaintiff's claim (receivable) with his own claim, and in such a case, the defendant could raise an *exceptio* (objection). However, in certain cases, the defendant may not have a claim against the plaintiff, but an *exceptio* could still be granted to him because of the right of a *tertius* (third party) against the plaintiff (first category). Therefore, in this case, the *exceptio* would result not from a right of the defendant against the plaintiff but only from a right of a *tertius* against the plaintiff. This phenomenon can be characterised by the Latin term *exceptio ex iure tertii* (Wacke, 2005, p. 383) or *exceptio de iure tertii* (Weber, 1988, p. 62).

The terms *exceptio ex iure tertii* and *exceptio ex iure tertii non datur* were not used by Roman jurists (Stammler, 1900, p. 7; Rappaport, 1904, p. 12; Makowsky, 2019, p. 33). Instead, these terms were later invented by the postglossators (Makowsky, 2019, p. 33). The Romans did not further characterise an *exceptio* with which a defendant referred to the right of a *tertius* against the plaintiff. Such an *exceptio* was, for instance, just an *exceptio doli* (Lübtow, 1952, p. 32) and only the context could indicate that with this *exceptio doli* the defendant referred to the right of a *tertius*. However, it was later discovered that the term *exceptio ex iure tertii* was a practical systematisation, which can be found in the modern Romanistic literature (Lübtow, 1952, p. 32; Wacke, 2014, p. 742 n. 37; Wacke, 2015, p. 79).

In other situations, the defendant could receive an *exceptio* against the plaintiff because of the right the defendant had against a *tertius* (second category). The difference between these cases is that the defendant had a right against a *tertius* rather than the *tertius* having a right against the plaintiff.

Both categories are extraordinary. Indeed, the defendant could counter the plaintiff's claim even though he did not have a claim or right against the plaintiff himself. In the next chapters, both categories are the subject of an analysis.

3. Case studies on Roman law

3.1. First category: A tertius with a right against the plaintiff

3.1.1. Guarantee (suretyship)

The first contract to be analysed is a guarantee (suretyship). A guarantor's obligation depended on the obligation of the principal debtor – the principle of accessoriness (Benke & Meissel, 2021, pp. 274–275). In the next two sources, possible defences of the guarantor against the creditor are discussed.

D. 44.1.19 (Marcianus *libro* 13 *institutionum*)

Omnes exceptiones, quae reo competunt, fideiussori quoque etiam invito reo competunt.

All defenses which are competent to a debtor are also competent to his surety, even against the wishes of the debtor (Translation: Beinart, 1998a, p. 136).

D. 46.1.32 (Ulpianus *libro* 76 *ad edictum*)

Ex persona rei et quidem invito reo exceptio [et cetera rei commode] fideiussori ceterisque accessionibus competere potest.

Even though the debtor does not wish it, a defense [or any other advantage] stemming from the person of the debtor can avail his surety and others acting for him (Translation: Beinart, 1998b, p. 205).

According to Marcianus, the guarantor (*fideiussor*) had the possibility to use all defences that the principal debtor (*reus*) had, and Ulpianus and others (Kaser, 1971, p. 664 n. 42) made similar references. The guarantor (defendant) could receive an *exceptio* against the creditor (plaintiff)

because of the right a *tertius* (principal debtor), not the defendant, had against the creditor. Hence, the *exceptio* of the guarantor against the creditor could be classified as an *exceptio ex iure tertii* (Rappaport, 1904, pp. 36–72).

3.1.2. Sale

An *exceptio ex iure tertii* primarily protected the defendant against the plaintiff. However, the guarantor's *exceptio ex iure tertii* against the creditor also ensured that the main debtor was protected (Rappaport, 1904, p. 46). Without this, the main debtor would have to pay because of the guarantor's right of recourse. According to the next source, the defendant received an *exceptio* that also served the function of protecting another person.

D. 5.3.25.17 (Ulpianus *libro* 15 *ad edictum*)

Item si rem distraxit bonae fidei possessor nec pretio factus sit locupletior, an singulas res, si nondum usucaptae sint, vindicare petitor ab emptore possit? Et si vindicet, an exceptione non repellatur "quod praeiudicium hereditati non fiat inter actorem et eum qui venum dedit", quia non videtur venire in petitionem hereditatis pretium earum, quamquam victi emptores reversuri sunt ad eum qui distraxit? Et puto posse res vindicari, nisi emptores regressum ad bonae fidei possessorem habent. Quid tamen si is qui vendidit paratus sit ita defendere hereditatem, ut perinde atque si possideret conveniatur? Incipit exceptio locum habere ex persona emptorum. Certe si minori pretio res venierint et pretium quodcumque illud actor sit consecutus, multo magis poterit dici exceptione eum summoveri. Nam et si id quod a debitoribus exegit possessor petitori hereditatis solvit, liberari debitores Iulianus libro quarto digestorum scribit, sive bonae fidei possessor sive praedo fuit qui debitum ab his exegerat, et ipso iure eos liberari.

Again, if the possessor in good faith has disposed of a thing and not been made richer by its price, could the claimant vindicate individual objects from the buyer if they have not been usucapted? And if he vindicates, would he escape being barred by the defense "insofar as the question of the inheritance between the plaintiff and the seller

> *be not prejudged," because the price of the things does not appear to come under the claim for the inheritance. Yet if the buyers are defeated, they are going to turn to the man who sold them the things. In fact, my opinion is that the things can be vindicated if the buyers cannot go back and sue the possessor in good faith. But what if the seller in his defense of the inheritance is prepared to be taken to court just as if it was his possession? A defense* (exceptio) *begins to be available on the side of the buyers. Certainly, if the things have been sold for too small a price and the plaintiff has got hold of that price, whatever it was, there will be much more reason for saying that he is barred by a defense. Certainly, Julian, in the fourth book of his Digest, writes that if the possessor pays to the claimant of an inheritance what he has exacted from debtors, the debtors are released from their liabilities, whether he was a possessor in good faith or a grabber, and they are released automatically* (Translation: Kinsey, 1998, pp. 191–192).

Ulpianus referred to a case (Müller-Ehlen, 1998, pp. 272–274) in which the *petitor* had the right to sue the *bonae fidei possessor* with the *hereditatis petitio*. However, the *petitor* did not immediately sue, and a *res* was sold to an *emptor*. After the sale and the lapse of the enrichment, the *petitor* could no longer successfully sue the (former) *bonae fidei possessor* due to the *Senatus Consultum Juventianum* (Rappaport, 1904, p. 261).

According to Ulpianus, the *petitor* only had the possibility to sue the *emptor* if the *emptor* would not be able to exercise a right of recourse against the *bonae fidei possessor*, who was no longer enriched from the sale (*et puto posse res vindicari, nisi emptores regressum ad bonae fidei possessorem habent*).

Therefore, it can be concluded that if the *emptor* had a right of recourse against the *bonae fidei possessor*, the *emptor* would receive an *exceptio* against the *petitor*. The *exceptio* had the function to protect the *bonae fidei possessor* and not only the *emptor*, as the *emptor* would receive an action against the *bonae fidei possessor* due to an eviction. The justification for the *exceptio* of the defendant (*emptor*) can be found in

the legal relationship between the *petitor* (plaintiff) and the *bonae fidei possessor* (*tertius*), as the *bonae fidei possessor* (*tertius*) had an objection against the *petitor* (plaintiff). Therefore, in this case, the *emptor*'s *exceptio* could be categorised as an *exceptio ex iure tertii* (Rappaport, 1904, pp. 261–262).

3.1.3. Potential equalisation from a third party

In certain cases, the creditor could only successfully sue the debtor if he (the creditor) did not receive a payment from a third party, and such a case is mentioned in the next source.

D. 19.2.19.9 (Ulpianus *libro* 32 *ad edictum*)

Cum quidam exceptor operas suas locasset, deinde is qui eas conduxerat decessisset, imperator Antoninus cum divo Severo rescripsit ad libellum exceptoris in haec verba "cum per te non stetisse proponas, quo minus locatas operas Antonio Aquilae solveres, si eodem anno mercedes ab alio non accepisti, fidem contractus impleri aequum est."

When a scribe leased out his own labor and his employer then died, the Emperor Antoninus together with the deified Servus replied by rescript to the scribe's petition in these words: "Since you allege that you are not responsible for your not providing labor you leased to Antonius Aquilia, it is fair that the promise [of wages] in the contract be fulfilled if during the year in question you received no wages from anyone else" (Translation: Frier, 1998, p. 106).

Ulpianus referred to a rescript of the emperors Antoninus (Caracalla) and Septimus Severus dealing with the *locatio conductio operarum* (Benke & Meissel, 2021, pp. 196–197; Krumnack, 2022, pp. 68–69). The *conductor* died before the *locator* could work for him, and according to this rescript, the *locator* could only claim his wage if he did not receive a wage from a third party.

If the *locator* had been paid by a third party, the *actio locati* against the *conductor*'s heir would not have been successful. However, the *locatio*

conductio operarum was a *bonae fidei iudicium*, and thus, an *exceptio* was not necessary for the heir of the *conductor* in order to defend himself against the *locator*. Nevertheless, the *praetor* could still insert an *exceptio* in the *formula* of the action (Finkenauer, 2020, pp. 77–136). If the *praetor* inserted such an *exceptio*, this *exceptio* would be granted because of the legal relationship between the *locator* (plaintiff) and a *tertius* (Oertmann, 1901, p. 98, 112; Rappaport, 1904, pp. 151–193). The heir of the *conductor* (defendant) only enjoyed protection due to the fact that the *locator* received a payment from a *tertius*. However, the heir could not bring forward an objection because of a right that a *tertius* would have against the *locator*. Therefore, the heir's *exceptio* would have similarities with an *exceptio ex iure tertii* but would not be an *exceptio ex iure tertii* in the technical sense.

3.2. Second category: A defendant with a right against a *tertius*

3.2.1. Succession

The heir of the creditor usually (Strobel, 2023, pp. 1418–1420) inherited the creditor's claim against the debtor as a result of the principle of universal succession. However, it is questionable whether the debtor who would have had an *exceptio* against the deceased could defend himself against the creditor's heir. In the following source, the effect of a *pactum* between a creditor and a debtor is illustrated.

D. 2.14.40 pr. (Papinianus *libro* 1 *responsorum*)

Tale pactum "profiteor te non teneri" non in personam dirigitur, sed cum generale sit, locum inter heredes quoque litigantes habebit.

A pact such as "I declare that you are not liable" is not framed in personam, but, since it is general, will also hold good between the heirs of the parties if they litigate (Translation: MacCormack, 1998, p. 71).

Papinianus showed that a *pactum* between the creditor and debtor remained valid between their heirs (Gröschler, 2023, pp. 2893–2894 n. 72).

If the creditor died, the debtor could defend himself with an *exceptio pacti* against the claim of the creditor's heir. However, the creditor's heir never had a contract with the debtor. It is questionable whether the *exceptio pacti* of the defendant (the debtor) against the heir of the creditor (plaintiff) was an objection from a right that the defendant (the debtor) had against a *tertius* (the deceased) because in the case of universal succession, the two legal subjects (the creditor and his heir) could be seen as identical (Rappaport, 1904, pp. 72–77; chapter "4.4.1 Universal succession").

The debtor would need an *exceptio* if the successor would only receive the right without an objection (Rappaport, 1904, pp. 72–77). However, singular succession (by contract) did not exist or must have been rare in Roman law (Kaser, 1971, pp. 222–223), although a similar phenomenon could occur if somebody made a promise to a *filius familias*.

D. 45.1.45 pr. (Ulpianus *libro* 50 *ad Sabinum*)

Quodcumque stipulatur is, qui in alterius potestate est, pro eo habetur, ac si ipse esset stipulatus.

Whatever stipulation is made by a man who is in the power of another will be reckoned on behalf of that person as if he had made the stipulation himself (Translation: Hart, 1998, p. 171).

The *pater familias* could claim from the *promissor* the sum which was promised to his son – *filius familias* (Finkenauer, 2023, p. 575). In the next source, the question is raised whether a *promissor* could bring forward an *exceptio* against the *pater familias.*

D. 15.1.38.1 (Africanus *libro* 8 *quaestionum*)

Si nuptura filio familias dotis nomine certam pecuniam promiserit et divortio facto agat de dote cum patre, utrumne tota promissione an deducto eo, quod patri filius debeat, liberari eam oporteret? Respondit tota promissione eam liberandam esse, cum certe et si ex promissione cum ea ageretur, exceptione doli mali tueri se posset.

A woman who promised a certain sum of money by way of dowry at a time when she was engaged to a son-in-power sues the father

> *on the dowry after the marriage has ended in divorce; should she be freed from her promise in its entirety or only subject to a deduction of what the son owes the father? The reply given was that she should be freed from the whole promise, since if she were sued on it she could obviously raise the defense of fraud* (Translation: Weir, 1998, p. 446).

In the case (D'Ors, 1997, pp. 352–354) mentioned by Africanus, a woman provided the *dos* (dowry) to her husband – a *filius familias* – in the form of a *stipulatio* and later demanded from the *pater familias* of her husband the discharge of her debt (*nuptura filio familias dotis nomine certam pecuniam promiserit et divortio facto agat de dote cum patre*).

Due to the divorce, the woman would have been able to claim the entire *dos* back from her husband with the *actio rei uxoriae* (Kaser, 1971, pp. 336–337). Nevertheless, since her husband was a *filius familias*, a verdict against such a person would not be considered enforceable (Kaser, 1971, p. 343). Indeed, the *pater familias* was only liable to a limited extent due to the *peculium* (Binder, 2023, p. 210).

According to Africanus, who referred to Iulianus' opinion (D'Ors, 1997, p. 352), the woman could successfully demand the discharge of her debt from the *pater familias* because she would have had an *exceptio doli* against him. This *exceptio doli* would only have been granted (in the full extent) to the defendant (the woman) against the plaintiff (*pater familias*) due to the fact that the defendant (the woman) had a claim (*actio rei uxoriae*) against a *tertius* – *filius familias* (Binder, 2023, pp. 210–211).

3.3. A *tertius* with a right against the plaintiff (first category) and a defendant with a right against a *tertius* (second category)

3.3.1. Circuit of actions

The term circuit of actions (Wacke, 1970, p. 58; Balbusso, 2013, p. 180) – or circuity of action (Williams, 1951, p. 121, 217) – describes the phenomenon of the financial situation of three (or more) parties not changing after

three (or more) successful lawsuits between them. This circuit of actions can be demonstrated with the following example:

A has a claim against B for the amount of 100. C owes B 100, and C can claim 100 from A. If all debtors fulfilled their obligations, B would have to pay 100 to A, A would have to pay 100 to C, and C would have to pay 100 back to B. After those payments, A, B, and C would neither gain nor lose money. Therefore, the payments could be considered unnecessary. Indeed, three lawsuits between A, B, and C, which could be characterised as a circuit of actions, would lead to a loss of resources (Wacke, 1970, pp. 57–58).

However, there are also more considerations in this case. A would have to take the insolvency risk (Wacke, 1970, p. 59) of B, B the insolvency risk of C, and C the insolvency risk of A. Therefore, a circuit of actions would be harmful to all parties. In this case, the question arises of how such an unnecessary (and possibly also dangerous) circuit of actions can be prevented.

A circuit of actions would not take place if A had an *exceptio* against C, B had an *exceptio* against A, and C had an *exceptio* against B. Such an *exceptio* could be based on the right of a *tertius*.

The *exceptio* of the defendant (B) against the plaintiff (A) could be based on the claim of a *tertius* (C) against the plaintiff (A). Therefore, an *exceptio* raised by B against A could be qualified as an *exceptio ex iure tertii* (Wacke, 1982, p. 478). This *exceptio* belongs to the first category (chapter "2. Origin of the term *exceptio ex iure tertii*"). Furthermore, the *exceptio* of the defendant (B) against the plaintiff (A) would also depend on the claim of B (defendant) against a *tertius* (C). Therefore, B's *exceptio* would also fall in the second category (chapter "2. Origin of the term *exceptio ex iure tertii*"). Overall, B's *exceptio* against A would seem appropriate because A would claim from B what A would have to give back to B indirectly (via C).

Similar considerations could be made for the legal relationship between A and C or C and B. A's *exceptio* against C would be based on

B's claim against C and A's claim against B. C's *exceptio* against B would depend on A's claim against B and C's claim against A. In the following source, the question of whether or not a circuit of actions should be prevented is discussed by Ulpianus.

D. 44.4.7.1 (Ulpianus *libro* 76 *ad edictum*)

Idem Iulianus ait, si ei, quem creditorem tuum putabas, iussu tuo pecuniam, quam me tibi debere existimabam, promisero, petentem doli mali exceptione summoveri debere, et amplius agendo cum stipulatore consequar, ut mihi acceptam faciat stipulationem. Et habet haec sententia Iuliani humanitatem, ut etiam adversus hunc utar exceptione et condictione, cui sum obligatus.

The same Julian stated that if on your instruction I promised to someone, whom you thought to be your creditor, money which I thought I owed to you, the person suing me ought to be barred by the defense of fraud, and, moreover, by suing the stipulator I may claim from him that he give a discharge of the stipulation. And this view of Julian contains humanity so that I may use the defense as well as a condictio against him to whom I became liable (Translation: Beinart, 1998a, p. 150).

Tu (the drawer/delegator/instructing party) instructed *ego* (the drawee/delegatee/instructed party) to make a promise to the *creditor* – the beneficiary/obligee/receiving party (Benke & Meissel, 2021, p. 297; Eschig & Pircher-Eschig, 2021, p. 501). The relationship between *tu* and *ego* can be characterised as the cover relationship, that between *tu* and the *creditor* as the underlying debt relationship, and that between *ego* and the *creditor* as the performance relationship (Benke & Meissel, 2021, p. 298).

In the case mentioned by Ulpianus, a *stipulatio* between *ego* (*promissor*) and the *creditor* (*stipulator*) took place. *Ego* only accepted the instruction because he thought that he could free himself from his obligation towards *tu* with a payment to the *creditor*. The instruction was made by *tu* for a payment to be given from *tu* to the *creditor*.

Before the date of the payment, *ego* realised that *tu* had no claim against him, and *tu* discovered that he owed nothing to the *creditor*. After a payment from *ego* to the *creditor*, *ego* would be able to sue *tu* with the *condictio indebiti*, and *tu* could bring forward the same action against the *creditor* (Sacconi, 1971, p. 94).

Ego refused to make a payment to the *creditor*, and the *creditor* sued *ego* with a *condictio* or the *actio ex stipulatu*. According to Iulianus, *ego* could defend himself with an *exceptio doli* against the *creditor*. This particular *exceptio doli* was an *exceptio ex iure tertii* (Lübtow, 1952, p. 32; Wacke, 2014, p. 742, n. 37). *Ego* (the defendant) could only successfully defend himself against the *creditor* (the plaintiff) because *tu* (the *tertius*) would have been able to sue the *creditor* with the *condictio indebiti* (first category). Concurrently, *ego*'s *exceptio* depended also on the right that *ego* would have against *tu* (second category).

Through the *exceptio doli*, a circuit of actions was prevented. If *ego* had no defence against the *creditor*'s action, the *creditor* would have been sued by *tu* with the *condicito indebiti*, and *tu* would also have been sued by *ego* with the same action. *Ego*'s *exceptio doli* against the *creditor* could be explained (Wacke, 1982, p. 478) with the juristic rule *dolo facit, qui petit quod redditurus est* (Mader, 2002, pp. 417–420; Lambrini, 2006, pp. 264–266; Binder, 2022, pp. 14–16), which is mentioned in the next source.

D. 44.4.8 pr. = D. 50.17.173.3 (Paulus *libro* 6 *ad Plautium*)

Dolo facit, qui petit quod redditurus est.

A person who claims what he will have to return acts fraudulently (Translation: Beinart, 1998a, p. 150).

The *creditor* claimed from *ego* what he would have to return to *tu*, and *tu* would have to return it to *ego*. Therefore, the *creditor*'s action could be qualified as fraudulent, because he demanded from *ego* what he (indirectly) would have to give back to *ego*.

4. Austrian civil law

4.1. Introduction

Parts of the Austrian Civil Code are commonly based on Roman foundations. In the following chapters, cases with an *exceptio ex iure tertii* in Austrian civil law are analysed and compared to cases in Roman law.

4.2. Suretyship

In relation to Austrian civil law, the obligation of the surety guarantor must be examined. The obligation of the surety guarantor is explained in the following sections of the Austrian Civil Code.

§ 1351 ABGB (Austrian Civil Code)

Verbindlichkeiten, welche nie zu Recht bestanden haben, oder schon aufgehoben sind, können weder übernommen, noch bekräftiget werden.

Obligations which have never existed lawfully or have already been cancelled can neither be assumed nor secured (Translation: Eschig & Pircher-Eschig, 2021, p. 486).

§ 1363 ABGB (Austrian Civil Code)

Die Verbindlichkeit des Bürgen hört verhältnißmäßig mit der Verbindlichkeit des Schuldners auf. Hat sich der Bürge nur auf eine gewisse Zeit verpflichtet; so haftet er nur für diesen Zeitraum. Die Entlassung eines Mitbürgen kommt diesem zwar gegen den Gläubiger; aber nicht gegen die übrigen Mitbürgen zu Statten (§. 896).

The obligation of the surety guarantor terminates proportionally with the obligation of the debtor. If the surety guarantor obliged himself only for a certain period of time, he is only liable for such period of time. The release of a co-surety guarantor is effective only with respect to the creditor but not with respect to the other co-surety guarantors – section 896 – (Translation: Eschig & Pircher-Eschig, 2021, p. 489).

In the literature, it is often mentioned that the surety guarantor (defendant), who is equally as liable as the main debtor, can bring forward an objection that the main debtor (the *tertius*) would have against the creditor – the plaintiff (Gamerith, 2002, p. 42, § 1351/6; Welser & Zöchling-Jud, 2015, p. 171). Hence, a surety guarantor's objection that results from the right of the main debtor could be classified as an *exceptio ex iure tertii* – first category (chapter "2. Origin of the term *exceptio ex iure tertii*").

Similar to the legal situation in Roman law, in Austrian civil law, the principle of accessoriness is part of the law of suretyship (section 1351 of the Austrian Civil Code and section 1363 of the Austrian Civil Code), and this principle provides the reason why the surety guarantor can raise an objection belonging to the main debtor (Faber, 2016, p. 927, § 1351/10). Without this protection, the surety guarantor would have a right of recourse against the main debtor. An objection is necessary to protect the main debtor (chapter "3.1.1 Guarantee (suretyship)").

4.3. Contracts in favour of third parties

In Roman law, true contracts in favour of third parties were not possible (Benke & Meissel, 2021, p. 186). Indeed, the third party could not claim for himself something that was promised to another person – *alteri stipulari nemo potest* (Kaser, 1971, p. 491; Zimmermann, 1996, pp. 34–38). In Austrian civil law, true contracts in favour of third parties are allowed, and the Austrian Civil Code mentions this explicitly.

§ 881 ABGB (Austrian Civil Code)

(1) Hat sich jemand eine Leistung an einen Dritten versprechen lassen, so kann er fordern, daß an den Dritten geleistet werde. (2) Ob und in welchem Zeitpunkt auch der Dritte unmittelbar das Recht erwirbt, vom Versprechenden Erfüllung zu fordern, ist aus der Vereinbarung und der Natur und dem Zwecke des Vertrages zu beurteilen. Im Zweifel erwirbt der Dritte dieses Recht, wenn die Leistung hauptsächlich ihm zum Vorteile gereichen soll. (3) Das Recht auf die bei einer Gutsabtretung vom Übernehmer zugunsten eines Dritten

versprochenen Leistungen gilt mangels anderer Vereinbarung dem Dritten als mit der Übergabe des Gutes erworben.

(1) If someone has been promised a performance to a third party, he can demand that performance is made to the third party. (2) Whether and at which time also the third party directly acquires the right to demand the performance from the promising party has to be assessed based on the agreement and the nature and purpose of the contract. If in doubt, the third party acquires this right if the performance is mainly to his benefit. (3) The right to performances which have been promised by the transferee in favour of a third party in connection with the transfer of agricultural property is deemed to be acquired with the transfer of the agricultural property unless agreed otherwise (Translation: Eschig & Pircher-Eschig, 2021, p. 318).

In the first subsection of section 881 of the Austrian Civil Code, it is stated that a promise cannot only be made to another party (the contractual partner), but also to a third party, and the second subsection focuses on the legal effects of a promise in favour of a third party. This subsection states that the parties to the contract can decide whether the third party should receive the right to directly claim something that has been promised.

If the third party obtains a direct claim against the promising party, the question arises regarding how the promising party can defend himself against the third party. An answer to this question can be found in the following section of the Austrian Civil Code.

§ 882 ABGB (Austrian Civil Code)

(1) Weist der Dritte das aus dem Vertrag erworbene Recht zurück, so gilt das Recht als nicht erworben. (2) Einwendungen aus dem Vertrage stehen dem Versprechenden auch gegen den Dritten zu.

(1) If the third party rejects the right acquired in connection with the contract, the right is deemed not to have been acquired. (2) The promising party can raise objections arising from the contract also against the third party (Translation: Eschig & Pircher-Eschig, 2021, p. 318).

According to the second subsection of section 882 of the Austrian Civil Code, the promising party can bring forward an objection (that he would have against the contractual partner) against the third party as well. Such an objection against the plaintiff (third party) results from the right that the defendant (the promising party) has against a *tertius* (the contractual partner). In terms of the described categories, the objection of the promising party would fall in the second category (chapter "2. Origin of the term *exceptio ex iure tertii*").

The second subsection of section 882 of the Austrian Civil Code is based on the principle that the legal position of the promising party should not deteriorate only because a third party (and not the contractual partner) is able to claim what was promised (Bydlinski, 2023, p. 1028, § 882/2; Kolmasch, 2024, p. 817, § 882/2).

4.4. Succession

4.4.1. Universal succession

As in Roman law, the concept of universal succession can also be found in the Austrian Civil Code. An example of this concept is listed in the next section of the Austrian Civil Code.

§ 547 ABGB (Austrian Civil Code)

Mit der Einantwortung folgt der Erbe der Rechtsposition der Verlassenschaft nach; dasselbe gilt mit Übergabebeschluss für die Aneignung durch den Bund.

The heir assumes the rights and obligations of the estate upon devolution. The same applies for the assumption of the estate by the Federation upon the order relating to the transfer of the inheritance (Translation: Eschig & Pircher-Eschig, 2021, p. 213).

Similar to the legal situation in Roman law, in Austrian civil law, the heir usually (Nemeth, 2024, p. 474, § 531/3) inherits the creditor's claim. The debtor can defend himself against the creditor's claim with the objection that he would have had against the deceased. It is unclear whether the

objection of the defendant (the debtor) against the plaintiff (the creditor's heir) could be characterised as a right based on the defendant's right against a *tertius* (the deceased).

The answer to this question is negative; indeed, in such a case of inheritance, the legal relationship between the creditor and debtor is not disrupted by a *tertius* in a way that a three-party legal relationship would occur. Instead, only a unification between the creditor and his heir takes place (chapter "3.2.1 Succession").

4.4.2. Singular succession

4.4.2.1. Assignment

In Roman law, a *cessio* (assignment) was not possible due to the concept of *vinculum iuris* (Kaser, 1971, pp. 222–223). However, a similar outcome to that of a *cessio* could be reached with the *mandatum ad agendam in rem suam*, where the mandatarius could enforce the mandator's claim (Benke & Meissel, 2021, p. 213). If the *debitor* consented to a change of creditor, this could, of course, be done with a *novatio* (Benke & Meissel, 2021, p. 212).

The Austrian Civil Code allows the transfer of a claim (without the consent of the *debitor cessus*) from the cedent (the assignor) to the cessionary (the assignee), as stated in the following section of the Austrian Civil Code.

§ 1392 ABGB (Austrian Civil Code)

> *Wenn eine Forderung von einer Person an die andere übertragen, und von dieser angenommen wird; so entsteht die Umänderung des Rechtes mit Hinzukunft eines neuen Gläubigers. Eine solche Handlung heißt Abtretung (Cession), und kann mit, oder ohne Entgeld geschlossen werden.*
>
> *If a receivable is transferred by one person to another and accepted by such, the modification of the right takes place with the accession of a new creditor. Such action is called an assignment and can be concluded for or without consideration* (Translation: Eschig & Pircher-Eschig, 2021, p. 497).

After a successful *cessio* occurs, the question arises regarding how the *debitor cessus* can defend himself against the claim of the cessionary. An answer to this question can be found in the following section of the Austrian Civil Code.

§ 1394 ABGB (Austrian Civil Code)

> *Die Rechte des Uebernehmers sind mit den Rechten des Ueberträgers in Rücksicht auf die überlassene Forderung eben dieselben.*
>
> *The rights of the assignee are the same as the rights of the assignor with respect to the assigned claim* (Translation: Eschig & Pircher-Eschig, 2021, p. 498).

According to section 1394 of the Austrian Civil Code, the cessionary receives the same legal position as the cedent once had. This means that the *debitor cessus* can bring forward an objection (that he would have had against the cedent) against the cessionary as well (Wolff, 1951, pp. 316–317; Welser & Zöchling-Jud, 2015, pp. 136–137). The defendant (the *debitor cessus*) could defend himself against the plaintiff (the cessionary) because of a right the defendant had against a *tertius* (the cedent). Section 1394 of the Austrian Civil Code ensures that the legal position of the *debitor cessus* does not deteriorate if a *cessio* occurs (Kepplinger, 2024, pp. 1772–1773, § 1394/1). The objection of the *debitor cessus* would fall in the second category (chapter "2. Origin of the term *exceptio ex iure tertii*").

Interestingly, the *debitor cessus* can raise an objection not only if a defect in the cover relationship (between the *debitor cessus* and the cedent) occurs but also if there is a defect in the underlying debt relationship – between the cedent and the cessionary (Wolff, 1951, pp. 317–318; Welser & Zöchling-Jud, 2015, p. 137). In such a case, the defendant (the *debitor cessus*) can defend himself against the plaintiff (the cessionary) because of a right a *tertius* (the cedent) has against the plaintiff (the cessionary). Therefore, the objection of the *debitor cessus* against the cessionary would be an *exceptio ex iure tertii* (Honsell, 2005, p. 370, n. 72), and this objection would belong to the first category (chapter "2. Origin of the term *exceptio ex iure tertii*").

4.4.2.2. Assumption of debt

In Roman law, an assumption of debt was not possible (Kaser, 1971, pp. 222–223). However, in Austrian civil law, an assumption of debt is allowed. As with the *cessio*, an assumption of debt causes a singular succession. In the context of the assumption of debt, this means that the creditor should receive a new debtor and the old debtor should be released. However, unlike with the *cessio*, where the consent of the *debitor cessus* is not necessary, the assumption of debt requires the consent of the creditor, as stated in the following section of the Austrian Civil Code.

§ 1405 ABGB (Austrian Civil Code)

> *Wer einem Schuldner erklärt, seine Schuld zu übernehmen (Schuldübernahme), tritt als Schuldner an dessen Stelle, wenn der Gläubiger einwilligt. Bis diese Einwilligung erfolgt oder falls sie verweigert wird, haftet er wie bei Erfüllungsübernahme (§ 1404). Die Einwilligung des Gläubigers kann entweder dem Schuldner oder dem Übernehmer erklärt werden.*
>
> *Whoever promises a debtor that he will assume his debt (assumption of debt) assumes his position as debtor if the creditor consents. Until such approval is given or if it is rejected, he is liable as in the event of an assumption of performance (section 1404). The approval of the creditor can either be declared to the debtor or the assuming party* (Translation: Eschig & Pircher-Eschig, 2021, p. 503).

If a successful assumption of debt occurs, it can be questioned how the new debtor can defend himself against the creditor. This question is addressed in the following section of the Austrian Civil Code.

§ 1407 (1) ABGB (Austrian Civil Code)

> *Die Verbindlichkeiten des Übernehmers sind mit den Verbindlichkeiten des bisherigen Schuldners in Rücksicht auf die übernommene Schuld ebendieselben. Der Übernehmer kann dem Gläubiger die aus dem Rechtsverhältnis zwischen diesem und dem bisherigen Schuldner entspringenden Einwendungen entgegensetzen.*

The obligations of the assuming party are the same as the obligations of the existing debtor with respect to the assumed debt. The assuming party can raise the objections resulting from the legal relationship between the creditor and the existing debtor (Translation: Eschig & Pircher-Eschig, 2021, p. 503).

The legal position of the new debtor is similar to that of the *debitor cessus* (Neumayr, 2023, p. 1962, § 1407/1; chapter "4.4.2.2. Assumption of debt"). Section 1407 of the Austrian Civil Code states the new debtor can bring forward an objection[1] (that the old debtor would have had against the creditor) against the creditor himself. In these cases, such an objection from the defendant (the new debtor) against the creditor (the plaintiff) would be based on the right that a *tertius* (the old debtor) would have had against the creditor (plaintiff). The new debtor's objection is an *exceptio ex iure tertii*, and such an objection belongs to the first category (chapter "2. Origin of the term *exceptio ex iure tertii*").

4.5. Circuit of actions

Similar to the legal situation in Roman law, in Austrian civil law, a circuit of actions can occur in the context of a *delegatio* (instruction). The *delegatio* is mentioned in the following section of the Austrian Civil Code.

§ 1400 ABGB (Austrian Civil Code)

Durch die Anweisung auf eine Leistung eines Dritten wird der Empfänger der Anweisung (Assignatar) zur Einhebung der Leistung bei dem Angewiesenen (Assignat) und der letztere zur Leistung an ersteren für Rechnung des Anweisenden (Assignant) ermächtigt. Einen unmittelbaren Anspruch erlangt der Anweisungsempfänger gegen den Angewiesenen erst, wenn die Erklärung des Angewiesenen über die Annahme der Anweisung ihm zugekommen ist.

[1] However, there are certain exceptions. A right to alter the legal relationship between the old debtor and the creditor by unilateral declaration, can only be exercised by the new debtor if the old debtor transfers this right to the new debtor, see Rudolf, 2024, p. 1791, § 1407/2.

> *By the instruction in connection with the performance by a third party, the recipient of the instruction (receiving party) is entitled to demand the performance from the instructed (instructed party) and the latter entitled to perform in favour of the former on account of the party giving the instruction (the instructing party). The receiving party obtains a direct claim against the instructed party only once he has received the declaration from the instructed party relating to the acceptance of the instruction* (Translation: Eschig & Pircher-Eschig, 2021, p. 501).

If the instructed party (the drawee/delegatee) accepted the order of the instructing party (the drawer/delegator), the receiving party (the beneficiary/obligee) would obtain a claim against the instructed party. The obligation of the instructed party can usually be characterised as abstract (Rudolf, 2024, p. 1785, § 1402/2), but this can be problematic if a deficiency occurs in the cover relationship (between the instructing party and the instructed party) or the underlying debt relationship (between the instructing party and the receiving party).

If the instructing party only made the order because of the underlying debt relationship, and the instructed party only accepted the instruction because of the cover relationship, it is questionable whether the instructed party can raise an objection against the receiving party that relates to the cover or underlying debt relationship. In the following section of the Austrian Civil Code, the possible objections of the instructed party against the receiving party are described.

§ 1402 ABGB (Austrian Civil Code)

> *Hat der Angewiesene die Anweisung dem Empfänger gegenüber angenommen, so kann er diesem nur solche Einwendungen entgegensetzen, welche die Gültigkeit der Annahme betreffen oder sich aus dem Inhalte der Anweisung oder aus seinen persönlichen Beziehungen zum Empfänger ergeben.*
>
> *If the instructed party accepted the instruction towards the receiving party, he can raise only such objections against the receiving party, which relate to the validity of the acceptance or in connection with*

the content of the instruction or his personal relationship with the receiving party (Translation: Eschig & Pircher-Eschig, 2021, p. 502).

According to section 1402 of the Austrian Civil Code, the instructed party (defendant) has the opportunity to dispute the validity of the acceptance. The instructed party can also defend himself against the receiving party (the plaintiff) by arguing that the receiving party is claiming something that goes beyond the scope of the instruction. Furthermore, the instructed party can bring forward an objection due to his personal relationship with the receiving party. In general, only objections arising for one of these three reasons should be possible.

Conversely, the instructed party cannot raise an objection resulting from a deficiency in the cover relationship or underlying debt relationship. However, if the cover relationship and the underlying debt relationship are both deficient, a circuit of actions would be necessary.

In such a case, the receiving party could successfully sue the instructed party in relation to the accepted order, and the instructing party could claim from the receiving party due to the deficiency in the underlying debt relationship (with a *condictio*) what the receiving party obtained, and the instructed party could claim due to the deficiency in the cover relationship (with a *condictio*) from the instructing party what the instructing party received (Welser & Zöchling-Jud, 2015, pp. 474-476; Steininger, 2021, p. 469).

A circuit of actions could be prevented if the instructed party had the possibility to counter the claim of the receiving party with an objection, and this type of objection would be an *exceptio ex iure tertii*. The objection would be based on a claim that the *tertius* (the instructing party) – not the defendant (the instructed party) – would have against the plaintiff (the receiving party). This objection would also depend on the claim of the defendant (the instructed party) against the *tertius* (the instructing party). As a result, the objection of the defendant (the instructed party) in this case would fall into both categories (chapter "2. Origin of the term *exceptio ex iure tertii*").

However, in literature, it is controversial whether the instructed party has an objection against the receiving party in this case. The wording of 1402 ABGB suggests that such an objection cannot occur because it is not listed (Wilburg, 1951, p. 451; Steininger, 2021, p. 469). On the other side, it is argued that in the case of deficiencies in the cover and underlying debt relationship, no *causa* can justify the transfer of an asset in the performance relationship between the instructed party and the receiving party (Spielbüchler, 1973, pp. 48–54; Welser & Zöchling-Jud, 2015, p. 188).

5. Conclusion

In Roman law, the defendant had the opportunity to counter the plaintiff's claim in certain situations even though the defendant had no right or claim against the plaintiff himself. These situations can be divided into two categories.

In the situations that belong to the first category, the defendant's objection was based on a right that a *tertius* had against the plaintiff. The protection of the *tertius* sometimes required such an objection of the defendant against the plaintiff (chapter "3.1.1. Guarantee (suretyship)"; chapter "3.1.2. Sale"). If the defendant had no objection against the plaintiff but a right of recourse against the *tertius*, the objection of the *tertius* against the plaintiff could be evaded.

In such a case, the plaintiff would not sue the *tertius* directly and lose the lawsuit due to the objection of the *tertius*. Instead, the plaintiff would sue the defendant, and the defendant would exercise his right of recourse against the *tertius*. With this course of action, the same result would be achieved as if the *tertius* had no objection against the plaintiff. To protect the *tertius*, it is necessary to grant the defendant an *exceptio ex iure tertii*.

Another reason for an *exceptio ex iure tertii* was the principle of accessoriness (chapter "3.1.1 Guarantee (suretyship)"). If the defendant's obligation depended on the obligation of the main debtor, then the defendant must also have the same objections as the main debtor.

The second category covers cases where the defendant had an objection against the plaintiff because of a right the defendant had against a *tertius*. For example, if a woman promised the *dos* to a *filius familias* and was sued by the *pater familias*, the divorced woman could argue that she has the right to claim the *dos* back entirely from the *filius familias* (chapter "3.2.1. Succession").

On occasion, it was necessary for an objection of the defendant against the plaintiff that a *tertius* had a right against the plaintiff (first category) and that the defendant had a right against the *tertius* (second category). This would be the case if the drawee had already made a promise to the obligee and if the cover and underlying debt relationships were deficient. The drawee could then counter the obligee's action because of a right that the *tertius* (the drawer) would have against the obligee and a right that the defendant himself would have against the *tertius* – the drawer – (chapter "3.3.1 Circuit of actions").

Similar to the legal situation in Roman law, in Austrian civil law, the surety guarantor can have an *exceptio ex iure tertii* against the creditor (chapter "4.2 Suretyship"), and (according to one doctrine) the drawee can have the same objection against the obligee (chapter "4.5 Circuit of actions"). However, unlike Roman law, in Austrian civil law, a contract in favour of a third party, an assignment, and an assumption of debt are possible.

In the context of a contract in favour of a third party, the defendant (the promising party) could bring forward an objection against the plaintiff (the third party) that the defendant has against a *tertius* (contractual partner). Such an objection belongs to the second category (chapter "4.3. Contracts in favour of third parties").

If an assignment occurs, the defendant (the *debitor cessus*) is able to raise an objection against the plaintiff (cessionary) if there is a deficiency in the underlying debt relationship. This objection would be an *exceptio ex iure tertii* because the cedent (*tertius*) would have a right against the plaintiff (chapter "4.4.2.1. Assignment").

If a party (the new debtor) assumes the debt of another person (the old debtor), an objection is not lost. The defendant (the new debtor) can defend himself against the plaintiff (the creditor) because of a right the *tertius* (the old debtor) would have against the plaintiff (the creditor). Such a defence can be characterised as an *exceptio ex iure tertii* (chapter "4.4.2.2. Assumption of debt.").

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UNCHARACTERISTIC *CAUSAE SPIRITUALES* OF POLISH NOBILITY IN THE LIGHT OF ECCLESIASTICAL COURTS RECORDS FROM THE 18TH CENTURY: SELECTED MATRIMONIAL CASES FROM THE DIOCESE OF LUTSK

Summary

This article is a study of some atypical matrimonial cases from the 18th century that were heard by the ecclesiastical court of the Polish-Lithuanian diocese of Lutsk. I have included among the atypical cases all those that were not initiated by the complaint of one of the spouses. They are divided into two groups: those triggered by the pretensions of abandoned fiancés and those initiated as a result of an accusation by the diocesan public prosecutor or a third party. The former fiancées were usually concerned with the reimbursement of expenses incurred in connection with the would-be marriage. In the case of the second group, it was usually demanded that the marriage be declared null and void as a result of a breach of the norms of canon law. Some of these cases indicate a rather puzzling ignorance or disregard of these well-known rules by the clergy.

Keywords: *Latin diocese of Lutsk, matrimonial cases in the Polish-Lithuanian Commonwealth, Pope Benedict XIV's letters to Polish bishops, Tridentine matrimonial law in Polish-Lithuanian Commonwealth*

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1. Introduction**

Polish Crown Land Law,[1] which was to a large extent a customary law, did not contain regulations on such legal institutions as marriage. The commencement, duration, and end of the marriage were determined by the religious norms of the spouses, who used to take every matrimonial legal dispute to a relevant religious court (Uruszczak, 2013, pp. 303-305). Likewise, the registration of the marital status of the inhabitants or population of the Polish-Lithuanian Commonwealth was carried out within the structures of the individual denominations. Roman Catholic parish priests were obliged to keep books of baptisms, marriages, and deaths in accordance with one of the decrees of the Council of Trent (Canones 1864, pp. 137-139;[2] Uruszczak, 2013, p. 250), while similar registers began to be kept by other Christian denominations at the same time, from the mid-17th century and even since the end of the 17th century (Kuklo, 2009, p. 97; Ptaszyński, 2015, pp. 405-406). Only Jewish communities had not kept records of this sort until after the partitioning of Poland when such a requirement was imposed on them (Kuklo, 2009, pp. 97-98). Naturally, we must bear in mind that new regulations not always were (and are) introduced everywhere at the same time. It is likely that death certificates were the last to appear in parishes, although we usually do not know whether the oldest surviving books of certificates are the oldest ones created. As a consequence, for any information on factual and legal problems relating to events such as marriages or births, we should consult the court books of churches and religious associations. It is mainly the records of the courts of the Roman Catholic Church that have survived to our times.

** My research was financed from the funds of the Polish National Science Centre on the basis of decision number DEC-20L3 I 11 IN/HS3/04734.

[1] The term "Land Law" denotes the law applicable to most of the territory of the Kingdom of Poland, to which all its inhabitants were subject unless they were subject to other laws under separate regulations (such as the burghers of towns governed by Magdeburg law) in whole or in part. Obviously, in the first instance, this law applied to the nobility, which had the decisive vote on its amendment.

[2] We refer, for example, to the council decree on the form of marriage (*Tametsi*), which includes a provision on the obligation of parish priests to register marriages.

2. The Diocese of Lutsk and its courts

One of such courts, usually referred to as consistory, operating for the western part of the diocese of Lutsk, was located in Janów (today Janów Podlaski) and adjudicated a wide variety of cases as a first-instance tribunal (Królik, 1983, pp. 161-162, 171-175; Gołaszewski, 2024, pp. 177-178). The primary judge in the diocese was, of course, the bishop, who did not, however, preside over all cases personally, and in some cases appeared only at a certain stage. In the performance of his duties, this judge was deputised by a judicial vicar, named an official (Polish: *oficjał*, Latin: *officialis generalis*; see McDougall, 2022, p. 467; Donahue Jr., 2016b, pp. 250-265; Helmholz, 2016, pp. 348-352; Erdő, 2016, pp. 435-448; comp. García y García, 2016, pp. 402-406); in Janów there was also a surrogate judge (hereafter we will call him simply a judge), deputising for and assisting the official. All of them appear in the cases examined below, although we must remember that the judgments of the bishop's deputies had the same validity as those of the bishop himself. As a result, judgments issued in Janów by the bishop, the official, or the judge were appealed to a higher instance – usually to the court of the apostolic nuncio in Warsaw, less frequently to the Primate of Poland (Królik, 1983, pp. 175-178; Gołaszewski, 2024, pp. 175-176). This court in Janów was, like other ecclesiastical courts in the Polish-Lithuanian Commonwealth, based on universal and particular canon law, and followed the procedure proper to that law. I would like to point out that the sentences handed down in Janów by the bishop, the official, and the surrogate judge were entered in the same court books. In addition, the official in the diocese of Lutsk was also a general vicar *in spiritualibus* (Erdő, 2016, pp. 437, 444-445).

In my research of Janów court books, I looked at cases originating in the southern part of Bielsk land, which was part of Podlaskie palatinate, composed of three lands (Bielsk, Drohiczyn, and Mielnik lands). This southern part of Bielsk land was at the same time the north-western corner of the diocese of Lutsk, with a rather extensive territory. This diocese

included the southern part of Podlaskie palatinate (i.e. southern part of Bielsk land and also Drohiczyn and Mielnik lands), Wołyńskie (with Lutsk), Bracławskie, and Brzesko-Litewskie (with Brest, which in the 18th century was considered by the locals to be the second capital of the diocese) palatinates. Almost all of them belonged to the Kingdom of Poland but the Brzesko-Litewskie palatinate was a part of the Grand Duchy of Lithuania. In fact, the diocese of Lutsk was one of two dioceses covering lands belonging to both parts of the PolishLithuanian Commonwealth. The other was the diocese of Vilnius, which included the northern part of the Bielsk land, but in relation to the total territory of this diocese, this was a small piece, unlike the Diocese of Lutsk, which covered significant areas of both Poland and Lithuania (Królik, 1983, pp. 96-103; Butterwick, 2012, p. xviii (map); Szady, 2021, pp. 52-55). In the 18th century, it therefore had two consistories subordinate to two judicial vicars. The court in Janów dealt with cases from the territory of the diocese covering a part of Podlaskie Palatinate and Brzesko-Litewskie Palatinate, and these were the areas of the diocese inhabited by the largest percentage of Roman Catholics (especially the first). The second court was located in Lutsk and had jurisdiction over the Wołyńskie and Bracławskie palatinates (Gołaszewski, 2024, pp. 177-178). The diocese of Lutsk was therefore divided into two districts and had two officials who were also general vicars *in spiritualibus*.

3. Ecclesiastical jurisdiction and matrimonial cases

In this paper I will focus on selected court cases from the 18th century, which concern marriage, i.e. the issue of personal interest to the nobility and, at the same time, closely linked to the Catholic religion as one of the sacraments. Obviously, these were not the only cases heard by the court in Janów – I am excluding criminal and civil cases against clergy and laymen (in the case of the latter, regarding mainly bad manners, occasionally magical practices, or superstitions), along with disputes over the staffing of benefices, tithes, rents, real estate and other ecclesiastical property, succession and testamentary matters of the clergy, and the

parochial affiliation of particular places (Królik, 1983, pp. 181-183). The catalogue of cases falling within the jurisdiction of the ecclesiastical courts was defined identically by the statutes of the provincial synod of 1542 (Constitutiones, 1761, pp. 119-120)[3] and the constitution of the sejm of 1543 (Ohryzko, 1859, pp. 283-284; comp. Erdő, 2016, pp. 437-438). Although the latter was only supposed to be in force for one year or until the next sejm, it was still referred to in the 18th century. One reason for this seems to have been the editing of this text in a popular Latinlanguage collection of laws. This is because it did not include the relevant clause accompanying the Polish-language text (Gołaszewski, 2024, p. 59, 110). The aforementioned catalogue of ecclesiastical court cases, as promulgated at the synod of 1542, divided them into three groups (*causae mere spirituales*,[4] *causae iudicio spirituali annexae*,[5] *causae mixti fori*[6]), the most extensive

[3] A collection of synodal statutes prepared by the Archbishop of Gniezno and Primate of Poland, Stanisław Karnkowski, covering material up to and including 1578, was published in print in 1579 in Kraków. A second completed edition was published in 1630 through the efforts of the next Primate, Jan Wężyk. I am using the 1761 edition of this collection, to which reprints of editions of statutes of provincial synods promulgated after 1578 were appended.

[4] *Causae itaque mere spirituales sunt hae: fidei catholicae, haeresis, schismatis, blasphemiae in Deum et sanctos ejus, apostasiae, decimarum, septem sacramentorum Ecclesiae, beneficiales, matrimoniales, simoniae, usurarum, presbytericidii, sacrilegii, cujuslibet etiam confugientis ad aedes sacras (exceptis tamen quinque casibus videlicet: nocturni depopulationis agrorum, aggressoris viatorum, publici et proclamati furis, incendiarii et immunitatis ecclesiasticae violatoris, quibus forum et immunitas ecclesiastica propter immanitatem criminum non suffragatur, qui de ecclesiis et locis sacris extrahantur et judicio suo seculari restituantur). Item causae mere spirituales sunt maleficia, incantationes, sortilegia, raptus et violentiae ecclesiasticae ac quorumcunque censuum perpetuorum, qui terreni, et conditionalium, qui widerkaffy vulgo appellantur, ac dotium sive agrorum plebanalium et aliorum sacerdotiorum, qui vulgo poświątne nominantur, praesertim in quorum possessione Ecclesiae et ecclesiasticae personae fuerunt a tempore diuturno et praescripto, nec non miserabilium et destitutarum personarum, quae labore et usu manuum suarum victum quaerere non possunt et legitimitatis seu natalium. Sortitur etiam, quis forum seu judicium ecclesiasticum ratione contractus vel obligationis in judicio ecclesiastico factae, et ratione delicti in ecclesiasticas personas et nec ecclesiasticas in loco sacro commissi* (Constitutiones, 1761, p. 119).

[5] *Causae autem judicio spirituali annexae sunt jurispatronatus et dotis post divortium restituendae et repetendae* (Constitutiones, 1761, p. 120).

[6] *Causae autem mixti fori sunt testamentorum et ultimarum voluntatum seu ordinationum. Quodque hujusmodi testamenta facilius exequutioni demandentur, liberum erit unicuique pro legatis et aliis omnibus in testamento contentis jure experiri coram judicio quo velit sive ecclesiastico, sive seculari, et ubi causam inceperit ibidem jure praeventionis eandem*

of which was the first. Importantly, in general canon law, this category was more narrowly framed, not including, for example, cases of tithes, rents, or ecclesiastical property (Santangelo Cordani, 2023, p. 23; comp. Donahue Jr., 2016b, pp. 268-276; Donahue Jr. & McDougall, 2016, pp. 319-326; Helmholz, 2016, p. 380). While the jurisdiction of these courts did not raise major doubts in matters of faith or the sacraments, the nobility strongly objected to the jurisdiction of the Church in matters of payments to the Church institutions, such as tithes or rents. This was because they considered it to be detrimental to their privileged position in the Commonwealth as the ruling state and tried to deplete it by all means, which they succeeded in doing in the second half of the 18th century, for example in the case of tithes (Gołaszewski, 2024, pp. 57-85).

As regards marriages, we must remember that in the 1740s, the process of declaring them null was reformed by Pope Benedict XIV (although there is a view in the literature that needs to be verified that this was done under the influence of overuse in the ecclesiastical courts of the Polish-Lithuanian Commonwealth (see Pomianowski, 2022, pp. 26, 43-46), whereas the records of the court of Janów contain marriage cases dating back to the entire 18th century. The Pope, moreover, has intervened several times in connection with abuses occurring in Poland. First, in the breve *Matrimonii* of 11 April 1741, Benedict XIV admonished the Polish bishops to be more careful in declaring in the courts of Polish dioceses the nullity of marriages. This is because news of abuses in this area concerns Poland in particular. There have even been reports of people marrying for the third or fourth time (Benedictus XIV, 1845, pp. 37-38).

However, this papal intervention probably did not help much, since on 18 May 1743, Benedict XIV issued another breve *Nimiam licentiam*. Although he mentions his earlier orders in it, he focuses on the agreements between the spouses, on the basis of which, in exchange for money, neither of them appeals against a judgment declaring the marriage null. He also mentions

finire teneatur, exceptis tamen legatis ad pias causas, quae inter causas mere spirituales computantur (Constitutiones, 1761, p. 120).

in more detail other abuses, concerning the frequent assisting at marriages by a clergyman other than one's own parish priest, as well as delegating a faculty of assisting by diocesan authorities without the knowledge of that parish priest. He also complains that it is common to dispense from banns without any legal or urgent reason. He stresses that all this must have led to an increase in disputes over the validity of marriages, fostering the entering of them under duress, in the wrong form or by concealing impediments. In turn, the proliferation of null marriages, on top of deliberate violation of the divine and canon laws, causes great depravity (comp. McDougall, 2022, pp. 460, 464-465). The Pope declares the abovementioned agreements to be non-existent, adding that those entering into them are subject to excommunication *ipso facto* reserved to the Pope. Benedict XIV also prescribes rules of conduct tried and tested in other dioceses: 1) the parish priest must assist at a marriage unless there is a legal and most serious obstacle, 2) he must determine before the banns whether the parties voluntarily wish to enter into the marriage and whether there are any impediments, 3) the three bans should be made, and dispensing from them and delegating a faculty of assisting to another clergyman may take place only in necessary and justifiable cases where there is no impediment to the marriage, 4) it should be ensured that priests observe the law in force. In addition, the Pope rejects any abusive custom in Polish dioceses regarding dispensations from banns. In order to set an example to the bishops of proper practice, the apostolic nuncio in Poland was forbidden to give dispensations from banns and to agree to assist in marriages by a strange priest. Finally, two unanimous judgments of the courts of both instances declaring a marriage null were to be approved by the Sacred Congregation of the Council (Benedictus XIV, 1845, pp. 301-306). I omit from this analysis the writings of Benedict XIV addressed to the Polish bishops concerning mixed marriages (*Magnae nobis* from 29. 6. 1748, *Ad tuas manus* from 8. 8. 1748, and another from 12. 9. 1750) as there are no such cases in the surveyed sources. There is no doubt that accurate information about the abuse of the ecclesiastical courts in the Polish-Lithuanian Commonwealth in matrimonial matters has

reached the Holy See. However, it is not known by what route this occurred (perhaps through the nunciature in Warsaw?) and how detailed the information was.

4. Unusual matrimonial cases: definition

The cases regarding marriages from the same area were of course more diversified. It should not come as a surprise that usually one of the spouses challenged her or his marriage, and the typical reasons presented before the court included giving consent for marriage under duress (from parents, relatives, or guardians), too close consanguinity or, not infrequently, sexual impotence of the spouse (Pomianowski, 2022, pp. 43-44; Guzowski, 2013, p. 23). I have not examined this type of case in detail, choosing to concentrate on the other categories, which are less obvious; however, I have noted that they usually involved marriages of the nobility and that the ecclesiastical court in Janów – irrespective of declaring the marriage null – imposed financial penalties on family members forcing their daughter or sister (such coercion was generally exerted on women) to marry a particular candidate (comp. Helmholz, 1974, pp. 90-94). In addition, it is worth noting that defenders of the bond appeared in these trials since their function and related tasks were defined by Pope Benedict XIV.

Here, however, I will not deal with them; instead, I want to examine less typical cases than those initiated by one of the spouses seeking a declaration of nullity of the marriage, namely: 1) cases for the nullity of marriage initiated by the public prosecutor – the consistory instigator, 2) cases initiated by an abandoned fiancé wishing to prevent the marriage of his fiancée to another man. In my opinion, such matrimonial cases seem equally interesting and undoubtedly deserve to be brought to the fore since they are less known. Moreover, in these cases too, we see the abuses or malpractices complained of by Pope Benedict XIV in the letters to the Polish bishops discussed above.

[Cases Initiated by the Diocesan Public Prosecutor or a Third Party]

Indeed, sometimes the case for nullity of the marriage was brought not by one of the spouses but by the diocesan public prosecutor, referred to as the *instigator* or *fiscalis* (i.e. the shortened term *procurator fiscalis*; see Donahue Jr., 2016b, p. 266; Helmholz, 2016, p. 352; Erdő, 2016, p. 439, 450). This was usually the scenario when the marriage had not been concluded before the competent parish priest or when, after the conclusion of the marriage, one of the diriment impediments was detected (comp. Müller, 2022, pp. 338-339). In the first type of case, the court declared the marriage null unless the parties presented the permission of the relevant ecclesiastical authority (usually the diocesan bishop of a given parish or his general vicar) to conclude it in front of a priest of their choice. It can also be presumed that most of the noble spouses (especially those from wealthier families or those more aware of the importance of the issue), when entering into a marriage before a so-called strange priest (it was fundamentally every priest other than fiancée's or fiancé's parish priest; sometimes their relative or friend), sought in advance to obtain the appropriate permissions. The *Tametsi* decree of the Council of Trent, promulgated in the Polish-Lithuanian Commonwealth relatively soon afterwards, stated that the prescribed form was required for a marriage to be valid (Canones 1864, pp. 138–139; Constitutiones, 1761, p. 375; Synodus, 1629, p. Gv).[7] A marriage contracted in the presence of an unsuitable clergyman was classified as a so-called clandestine

[7] This decree states, *inter alia*, that: *Qui aliter, quam praesente parocho, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit, prout eos praesenti decreto irritos facit et annullat*. [--] *statuitque benedictionem a proprio parocho fieri, neque a quoquam, nisi ab ipso parocho vel ab ordinario licentiam ad praedictam benedictionem faciendam alii sacerdoti concedi posse; quacunque consuetudine, etiam immemorabili, quae potius corruptela dicenda est, vel privilegio non obstante*. The obligation to comply with the *Tametsi* decree was emphasised by the provision of the synod of 1589: *quoniam in hac synodo nostra omnes Podlassiae parochi uno ore ajunt: decretum illud de clandestinis in suis parochiis et publicatum, et explicatum esse* [--], *ideo debet in Podlassia decretum illud observari* (Chodyński (Ed.), 1875, p. 40).

marriage,[8] which in early modern Europe, in both Catholic and Protestant countries, the law of churches and states dealt with in different ways, on the assumption that the observance of certain forms was necessary (e.g. see Seidel Menchi, 2016; comp. McDougall, 2022, pp. 461-462, 469; Donahue Jr., 2016a, pp. 104-110, 114-116; 2016b, pp. 288-296; Donahue Jr. & McDougall, 2016, pp. 328-329; Helmholz, 1974, pp. 26-47, 57-66, 72-73, 167; 2016, pp. 366-368).

It should be noted that the Council of Trent ordered to punish concubines, whether unmarried or married (Canones, 1864, p. 142). The provisions ordering the punishment of adulterers, including those belonging to the power elite, were also found in the set of decisions of the provincial synods (Constitutiones, 1761, pp. 304-305, 358) as well as among those of later synods, separately printed (Concilium, 1630, p. B3; Synodus, 1624, pp. C2v-C3). Also, in the consistory of Janów, there were cases of this type in which penalties of a penitential nature were usually imposed (comp. McDougall, 2022, pp. 470-471). The aforementioned cases of marriages of doubtful validity could also be classified as concubinage (see Donahue Jr., 2016b, pp. 285-286; Donahue Jr. & McDougall, 2016, pp. 332-336, 338, 340; Helmholz, 1974, p. 70; 2016, pp. 367-368). One also has to wonder, how could the public prosecutor in Janów, which is quite distant from Bielsk land, have known about the above-mentioned situations. There is no doubt – although, again, this is not usually explicitly apparent from the surviving documents – that he was notified by locals, clergy, and laity, including parish priests and district deans (comp. Pennington, 2016, pp. 19-22; Donahue Jr., 2016a, p. 117). This is all the more so because the diocesan synod of 1607 ordered that doubtful cases be referred to the bishop

[8] Iready among the oldest known synodal statutes of the Lutsk diocese from 1519 was a provision against clandestine marriages: *Nec clandestina matrimonia faciat nec eis interesse praesumat, sed matrimonia contrahantur per verba de praesenti et ante quaerantur impedimenta matrimonii, quae si occurrerint, non diffiniantur, sed ad episcopum referantur, alioquin si contrarium fecerint, et inter copulatos impedimentum emerserit, vicarius de dioecesi expelletur et curatus ab officio et beneficio per annum suspendatur* (nr 43; Sawicki, 1949, p. 95).

or official (Synodus, 1607, p. Eiijv).[9] It should be emphasised, moreover, that despite significant differences in judicial practice, the ecclesiastical courts generally acted in response to complaints brought before them (McDougall, 2022, pp. 466-471; Helmholz, 2016, p. 352, 367).

Thus, in 1726, the parish priest of Bielsk Podlaski, Father Kazimierz Ossoliński, brought a case against his parishioners Jan Niwiński and Anna Grabowska for marrying without ascertaining the death of her husband, Krzysztof Grabowski, and before a Uniate priest, i.e., also Catholic but of the Greek rite. This rite appeared on the territory of the Commonwealth as a result of the Union of Brest in 1596 and the recognition of the supremacy of the Holy See by part of the Orthodox clergy. A large number of Uniates lived in the eastern part of Bielsk land (Guzowski & Liedke, 2021, pp. 80-81, 84-86, 92-94). The defendants' representative requested an investigation into Grabowski's death, which was accepted, and both parties proposed clerical commissioners to carry it out on the spot (the appointment of such committees for the purpose of witnesses on the spot was a typical practice of the court in Janów (comp. Donahue Jr., 2016b, p. 263). It turned out, however, that the betrothed, not having any certainty about Grabowski's death, did not want to marry in their own parish and deliberately went to the Uniate parish priest in Topolany. Hence, Bishop Stefan Rupniewski of Lutsk, for contracting a marriage before a minister of another Catholic rite, defying an impediment to marriage, and committing adultery, imposed on both defendants the penalty of lying prostrate in the parish church for three masses on consecutive holy days and paying 20 marks[10] (comp. Helmholz, 1974, pp. 182-183); naturally, he also declared the marriage null. However, the sentence was not voluntarily

[9] *De quorum matrimoniis dubitant, num de iure valida sint, eosdem a die notitiae infra unius mensis spatium, ad nos aut officiales nostros, pro declaratione nostra venire iubeant*.

[10] Mark (grzywna) was a unit of account and equated to 48 pennies (grosz). For comparison, 1 złoty as a unit of account was equal to 30 grosze. The fine of 20 grzywna's was therefore equal to 960 groszy or 32 złoty's. Such fines, however, were paid in very different coins in circulation in the Commonwealth at that time, with varying silver content. In such a situation, it was not uncommon for contracting parties to reserve payment in a predetermined coin.

implemented: in December 1726, the court issued an execution order, and in April 1727, declaring Niwiński and Grabowska public adulterers, referred the case to a secular court (D 54, k. 76v-78, 100v-102v, 220v-221v; D 55, k. 62-63). Abuses of various kinds committed by clergy of both rites must have happened more frequently, since in the synodal statutes of the same year, 1726, we read about Bishop Rupniewski's letter to the Uniate bishops requesting them to warn their subordinate clergy against illegally administering the sacraments to Catholics of the Latin rite (Constitutiones, 1726, pp. N-Nv).[11]

A few years later, in 1732, Marianna Kamieńska, the wife of Wojciech Święcki, assisted by her mother, appeared in the ecclesiastical court against Father Adam Wyszyński, parish priest in Dąbrówka, who, contrary to the decrees of the Council of Trent, was to bless the marriage of her nine-year-old daughter because of the intrusive pressure of her uncle (i.e. the brother of her father) (see McDougall, 2022, pp. 461-462). The plaintiffs demanded that the marriage be declared null and void and that the punishment be pronounced. The defendant produced the certificates and admitted error in failing to check them, motivated by the absence of impediments to the marriage, which was blessed by another clergyman ministering at the parish church at that time, Father Maciej Wyszyński (he was an altarist[12]). The court, however, having found that the bride was

[11] *Requisivimus quidem fraterne per literam nostram pastoralem reverendissimos episcopos ritus Graeci in diaecesi nostra consistentes, quatenus habita ratione constitutionum Romae ex mandato Clementis Papae die 31 Augusti anno 1595 impressarum, ad tollenda in benedicendis matrimoniis sponsorum ritus utriusque inconvenientia, decretum Concilii Tridentini sess. 24 cap. 1 de reformatione matrimonii* [sc. *Tametsi*] *in linguam vulgarem typo imprimi atque pro majori suorum presbyterorum intelligentia publicari facerent, edictoque suo caverent, ne quando dicti eorum praesbyteri in administrationem sacramentorum cum praejudicio parochi Latini se se ingerant,* [--] *matrimonia sponsorum ritus utriusque sine denuntiationibus in utriusque sponsi ecclesia vel dum mulier est Latina, sponsus vero Ruthenus benedicere* [--] *audeant. Verum ut ejusmodi requisitio effectum suum sortiatur, eandem synodaliter innovamus*.

[12] An altarist was a clergyman obliged to worship at a particular altar in a parish church, collegiate church or cathedral. For this, he received the income specified in the altarist's foundation deed. An altar was therefore a type of benefice, whose assets and the altarist's duties were defined by the foundation deed.

10 years and almost 9 months old at the time of the wedding, suspended both priests from Dąbrówka for 2 weeks, adding fines to the church in Janów: 20 marks to be paid by the parish priest and 10 by the altarist (D 58, k. 192v-193v); at the same time, a case was pending on the nullity of the Święcki marriage (D 58, k. 185v-186, 195v-196v). The imposition of penalties is not surprising. As early as 1607, diocesan law ordered the clergy to determine as accurately as possible whether the newlyweds had reached the legally prescribed age (Synodus, 1607, pp. Ev-Eij).[13] Canon law, on the other hand, stipulated 12 years for women and 14 years for men as the legal age for marriage (McDougall, 2022, p. 455; Helmholz, 1974, pp. 98-99).

In 1741, the consistory instigator, upon the denunciation of the parish priest of Brańsk, Father Dobiesław Cikowski, accused the townspeople of Brańsk, Andrzej Nazarewicz and Małgorzata Harujewicz, of marrying not before their own parish priest, but a Uniate priest from Andryanki, Father Marcin Hryniewicz; in addition, the marriage was alleged to have been contracted while Margaret's first husband was still alive, which led the instigator to seek a declaration that the marriage thus concluded was null and a punishment should be pronounced. Nazarewicz confessed saying that he was not aware of any violation of the law by such a marriage, and produced testimony from certain people about the fate of his wife's first husband. Franciszek Kobielski, the Bishop of Lutsk, having listened to the parties and, on 16 September 1740, having studied the testimony of the Uniate priest about this marriage, established that he had not been authorised to assist at the marriage, that he had not sufficiently ascertained whether Małgorzata's first marriage had ended (rejecting the testimony presented by Nazarewicz *uti minus realitatem in se habens*) and, in view of the apparent nullity of the marriage, pronounced the marriage null and

[13] *Cum administrant, de aetate duodecim annorum completa in faeminis, de quatuordecim autem in masculis investigent, explorentque exactissime, de minis item et poenis ad contrahendum, si intercesserint, publice interrogent et clara voce illis respondeatur. Quae responsio, facta etiam adstantium attestatione, in librum, quo nomina contrahentium continentur, inscribatur*.

void, as requested by the plaintiff. The spouses were fined 20 zlotys or 2 miaras[14] of rye for the poorhouse in Brańsk, obliged to make a general confession, listen to three consecutive Sunday and holiday masses while lying prostrate in church with a lit candle, and pay four marks to the instigator, all within four months. In addition, under the penalty of 50 thalers[15] and, if necessary, excommunication, he forbade them to resume their marriage, and, under penalties reserved to himself, instructed the instigator to charge the Uniate priest before his superiors with unlawful action (D 71, k. 22-23).

In the same year, 1741, the instigator accused Father Motykowski, curate of Piekuty, of assisting at the marriage of Petronela Pruszyńska to Mateusz Kruszewski without banns, notifying the parish priest in charge, and the previous engagement of Petronela to a certain nobleman named Kulesza. The defendant denied everything and the court instructed an ad hoc committee to carry out an on-site investigation; unfortunately, we do not know how the case ended (D 71, k. 141-141v). A year later, the instigator accused Father Marcin Łapiński, a curate from Suraż, of assisting at a marriage in a private home and without banns; the defendant replied that the banns had been announced in a church and provided the reasons for not holding the ceremony in a church (not specified in the entry). The official, however, did not accept them and, in view of the defendant's admission of this behaviour and frequent drunkenness, ordered him to make an eight-day retreat at the Reformed Franciscans (Latin: *Ordo Fratrum Minorum Reformatorum*) in Boćki and to pay 5 marks (10 zlotys) to the instigator, all within one month (D 71, k. 179v-180). Penalties for a priest assisting at a null marriage were also imposed in 1747: an instigator

[14] In Polish reality, the measure was the smallest unit of measurement of the volume of bulk bodies (cereals, groats, flours). There were numerous local values of such units, so it is impossible to determine what volume of rye might be meant here.

[15] The thaler was a silver coin of good purity in the Polish-Lithuanian Commonwealth and therefore highly sought after. In the middle of the 18th century, it was the equivalent of as much as 120 pennies, which is relevant to the present case. The threat of a high financial penalty was probably intended to deter convicts not only from concubinage, but also from attempting an invalid marriage again.

notified by the parish priest of Kleszczele, Father Grzegorz Hornowski, accused the local townsmen, Tomasz Środkiewicz and Barbara Dolińska, and the curate of Wierzchowice, Father Marcin Sieklucki, that the marriage was officiated by a so-called strange priest (i.e. Sieklucki who was not a curate of Kleszczele's parish) well aware that Barbara's husband was alive. The defendants confessed to everything and asked for mercy, and the judge confined himself to declaring the marriage of Tomasz and Barbara null and void and a ban on resuming their life together under pain of penalties. He also obliged the curate to celebrate 15 masses for the souls in Purgatory (D 77, k. 329-330). It should be noted that already among the oldest known synodal statutes of the diocese of Lutsk from 1519, there was a provision forbidding clergymen to assist in a marriage of foreign parishioners (Sawicki, 1949, p. 95),[16] repeated in 1607 (Synodus, 1607, p. Bijv,[17] Eijv-Eiij[18]).

Another similar case dates back to 1754, when the instigator, together with the parish priest of Pietkowo, Father Karol Horbacki, accused an altarist from Topczewo, Father Michał Wysokiński, of assisting at the marriage of Michał Paszkowski and Franciszka Brzozowska without the parish priest's knowledge, demanding penalties and the pronouncement of the nullity of the marriage. The defendant asked for mercy, compromising himself by explaining that he was ignorant of the canon law; the judge, however, sentenced him to two months imprisonment in the bishop's custody in Janów with whipping every Friday, ordered him to pay 50

[16] *Nullus quoque parochianum alienum copulare vel aliis sacramentis procurare audeat nec divinis interesse permittat nisi ex causa* (nr 43).

[17] *Ne ministrent* [sc. *sacramenta*] *alieno parochiano sine proprii licenta*.

[18] *Prohibemus item districte ac severe, ne ignoti ex alia diaecesi vel etiam ex nostra, si valde remoti sunt (maxime vero, qui ex finibus Wolyniae prope Scythiam, veniunt), ad contrahendum matrimonium admittantur, nisi habeant literas testimoniales proprii parochi vel si parochia ibi non sit (ut quidem rarissimae sunt) habeant testimonium a magistratu castrensi vel civili* [--]. *Nam ratione huiusmodi personarum non possunt cognosci impedimenta per trinas ac etiam plures publicas denuntiationes. Transgressores autem prohibitionis istius nostrae, quamvis nullum emerserit impedimentum, poena sex marcarum irremissibiliter locis piis arbitrio nostro applicandarum et si solvendo non sint, carceris pro arbitrio episcope punientur*.

marks for pious purposes and 5 to the instigator. The parish priest of Pietkowo, in turn, was ordered to convalidate the marriage, which consisted in the re-submission of declarations of intent to marry by the parties (D 81, k. 192-192v). According to the *Tametsi* decree, a priest assisting in a marriage without a legal basis or a delegation from the parish priest or bishop was subject to suspension *ipso iure* (Canones, 1864, p. 179). We can therefore see that Wysokiński was punished more severely, which should not be surprising. After all, this decree was also promulgated in the set of statutes of the provincial synods (Constitutiones, 1761, pp. 248-253) and it is difficult to understand such disregard for the obvious prohibition.

Conversely, in 1766, a Uniate parish priest in Hodyszewo, Father Antoni Bańkowski, accused the altarist from Topczewo, Father Jan Moczydłowski, of blessing the marriages of his parishioners and forcing them to change their rite, against which the altarist protested, pointing out that it was the plaintiff who had encouraged the change to the Greek rite and heard confessions of Roman Catholics without the appropriate approval from the consistory of the Diocese of Lutsk. The judge ordered the case to be examined on the spot and approved the commissioners proposed by the parties; however, the witness statements were not presented to the court until the autumn of 1767, and the judgment was pronounced in early 1768. It turned out that the altarist had not forced anyone to change their rites, and that the spouses in question had done so of their own free will or at their lord's instigation even before their wedding in Topczewo. Meanwhile, the plaintiff undertook such actions himself or through third parties, in addition to hearing confessions of Roman Catholics in and out of churches without approval. Ultimately, it was he who was warned by the judge not to act in this way under pain of severe penalties (D 87, k. 202-202v; D 86, k. 11-11v, 11v-12, 21v-22). Not-so-serious allegations were made in 1769 by the parish priest in Dziadkowice, Father Wojciech Jabłoński, against the parish priest in Boćki and at the same time the dean of Bielsk, Father Tomasz Chudzicki. The former presented an accusation

of assisting at four marriages of his parishioners without prior banns in his parish and evidence of them being performed. The representative of the defendant pointed out that in two cases the certificate had not been received, and in the other two cases the relevant permits had been issued from the consistory of Janów. The judge, while confirming that the dean had not acted unlawfully, noted that he had breached the custom, practised in the diocese and approved by the diocesan authorities, of making announcements in the parishes of both newlyweds and refraining from assisting at the marriage ceremony without the certificate of the other parish priest. Therefore, he ordered to keep this custom, not to violate the rights of the neighbour, and to apologise to the parish priest of Dziadkowice (D 86, k. 278v-280v).

Another case, which concerns Bielsk land, dates from 1789 and deserves attention for some reasons. The instigator acted against Mikołaj Warpechowski from the parish of Wyszki and Zofia Truszkowska from the parish of Łubin, who had married in Warsaw despite the impediment arising from consanguinity (see McDougall, 2022, pp. 459-460). Mikołaj confirmed that he got married in a strange parish after the refusal in Łubin due to an impediment, and after living in Warsaw for 2 weeks; he also presented an extract from the marriage register and requested a renewal of the marriage in case it was defective. In this situation, the judge declared the marriage null as having been contracted outside the defendants' own parish and ordered the alleged spouses to lie prostrate during parish mass for 3 Sundays and to go to confession, as well as to pay 5 marks to the instigator. He also ordered an investigation to establish the consanguinity between the defendants for the purpose of their planned remarriage, appointing two clergymen to an ad hoc commission. Finally, the matter of the punishment of the priest who assisted in this marriage ceremony was sent to the competent court (D 90, k. 155-155v). It is noteworthy that the Council of Trent recommended caution towards the marriages of transients, ordering parish priests to present any such case to

the bishop and to obtain permission from him to assist the marriage of such persons (Canones, 1864, p. 141). Particular canon law also imposed similar obligations (Synodus, 1629, p. Gv). The desire to punish a priest flouting the law is therefore not surprising, but the lack of consideration on his part is. On the other hand, one may suspect that the appointment of a commission to recognise the consanguinity between the accused was an expression of mercy towards the poor nobility. Indeed, one of the canons of the Council of Trent expressly forbade the giving of dispensations to persons who knowingly allowed themselves to marry despite the impediment of consanguinity (Canones, 1864, p. 141).[19]

5. Cases initiated by abandoned fiancés

Finally, the most intriguing group of cases related to marriage remains to be studied. Sometimes former fiancés would request the court in Janów to prohibit the clergy from assisting in the marriage planned by their former fiancées by issuing a so-called *inhibitio*.[20] In order to lift the *inhibitio*, the other party had to take a stand in court against the plaintiff's demands (the literature points to a similar practice in medieval England of imposing a marriage ban on litigants in an ecclesiastical court over the validity of a marriage, see Helmholz, 1974, pp. 168-172). Clearly, the ecclesiastical court could not compel anyone to marry, so plaintiffs in these cases were essentially seeking reimbursement for expenses incurred for a previously planned wedding ceremony, gifts and similar items and

[19] *Si quis intra gradus prohibitos scienter matrimonium contrahere praesumpserit, separetur, et spe dispensationis consequendae careat; idque in eo multo magis locum habeat, qui non tantum matrimonium contrahere, sed etiam consummare ausus fuerit*.

[20] Of course, this legal institution, called in Latin *inhibitio exercitii iuris,* did not concern only contentious engagements. It may be applicable to all situations when someone who stakes any claim fears that he will suffer any loss or damage as a result of anyone's activity (see e.g. Can. 1672 § 1 and 2 of the 1917 Code of Canon Law and Can. 1496 § 1 and 2 of the 1983 Code of Canon Law). Contemporary canon law further states that: *In a special case, the local ordinary can prohibit marriage for his own subjects residing anywhere and for all actually present in his own territory but only for a time, for a grave cause, and for as long as the cause continues* (Can. 1077 § 1 of the 1983 Code of Canon Law; comp. Can. 1039 § 1 of the 1917 Code of Canon Law).

services that had become irrelevant. Although an obligation to marry arose from a valid engagement (c. 2, X, IV, 1; c. un. IV, 1, in VI-to), enforcing it through the courts was impossible (for the period when there were no requirements concerning the form of marriage see Donahue & McDougall, 2016, p. 329; Helmholz, 1974, pp. 25-47; 2016, pp. 366-367). It should be noted, however, that a validly entered into and legally unbroken engagement constituted an impediment to the marriage with a third party (c. 22, 31, X, IV, 1; c. 1, X, IV, 4). There were several such eighteenth-century cases from Bielsk land and all of them ended in agreements providing former fiancés with reimbursement of certain expenses, considered by the ecclesiastical court to be tantamount to an end of the dispute. There is no doubt that an ex-fiancée and her family were, as a matter of principle, keen to put a swift end to this kind of dispute, which could have been a source of embarrassment. Although breaking off the engagement was permissible even on the eve of the wedding, the other engagement and marriage that followed soon afterwards might have seemed strange to the neighbours. It was also an awkward situation for a former fiancé, who was already counting down the days to the marriage and wedding and had incurred expenses for it. Unfortunately, we do not know why in such cases – except for one – an engagement was broken off.

On 14 October 1722, a companion (i.e. member of the cavalry unit) of the Polish hussars, Jan Kossakowski, accused the parish priest and altarist of Topczewo. The former, Father Michał Pruszyński, was accused of knowing about Kossakowski's engagement to Katarzyna Mora and assisting in her marriage ceremony to Zbirowski nonetheless, and the latter, Father Sebastian Kostro, of failing to keep his promise to inform him of the date of the ceremony. The accused parish priest denied any such knowledge, whereas the altarist stated that he had notified Kossakowski of the date of the marriage ceremony. The official, in view of the defendants' insistence and the absence of any other evidence, ordered them to take an exculpatory oath, after which they were discharged from the case (D 51, k. 482v-483v).

In 1735, Mateusz Dmochowski produced in court an *inhibitio* issued to the parish priest of Wyszonki, Father Ignacy Wyszyński, not to assist in the marriage of his fiancée Joanna Kostrówna to Adam Zaleski. When questioned, Kostrówna did not want to marry Dmochowski, so the latter demanded a refund. The parish priest's representative declared that he would respect the issued *inhibitio*, and the defendants filed a motion to quash it, declaring their will to marry and return the expenses to the plaintiff. The judge, therefore, in view of Dmochowski's resignation from Kostrówna's hand, ordered the claims to be liquidated, and the plaintiff presented a register for 38 tympfs,[21] which Zaleski promised to give back. In the end, the court reduced it to 30 tympfs and ordered Dmochowski to pay: the payment was made to the court, which could immediately cancel the *inhibitio* (D 65, k. 77-78v).

In 1737, in similar circumstances, Grzegorz Gierałtowski appeared in the Janów court and obtained an *inhibitio* prohibiting the parish priest of Jabłoń, Father Jan Brzozowski, from assisting in the marriage of Kobyliński to his former fiancée, Franciszka Samborzecka; the records do not, however, indicate how this case ended (D 63, k. 200v-201v). Conversely, in the 1743 case of Stanisław Dąbrowski against the parish priest of Dąbrówka, Father Maciej Wyszyński, as well as Andrzej Dąbrowski and Zofia Moczydłowska, the end is known – the defendants denied the previous engagement of Zofia to Stanisław, and the judge, considering that Stanisław did not present any documents and Zofia stated that she had never intended to marry him, cancelled the *inhibitio* and allowed the marriage of Andrzej and Zofia to take place (D 72, k. 10-10v).

In the same year, 1743, Walenty Wojno appeared before the Janów court requesting that the *inhibitio* regarding his former fiancée Konstancja Ołdakowska and the local parish priest from Domanowo, Father

[21] Tympfs were silver coins minted in the 1660s. Their nominal value was 30 groszy (1 złoty), but in reality, they were undervalued coins, as silver of a much lower value was used in their production. This procedure, detrimental to the monetary system, was intended to enable the repayment of debts burdening the Commonwealth.

Jan Frankowski, be maintained. The defendants did not appear at the appointed time, but Konstancja, assisted by the instigator, renewed the case, requesting that the *inhibitio* be cancelled and stating that the pre-nuptial agreement with Walenty had been made against her will by her mother. Therefore, the judge annulled the *inhibitio*, with the agreement of Walenty, who requested that the case be sent back to the court of nobility for the reimbursement of his expenses resulting from the aforementioned agreement. Indeed, the court decided to do so (D 72, k. 99-99v, 107v-108).

In 1790, Jan Dworakowski invoked an *inhibitio* forbidding the parish priest of Sokoły, Father Andrzej Bruszewski, to assist at the marriage of Marcjanna Porowska to anyone, including Tomasz Perkowski, because of the promise first given to the plaintiff, the banns already announced in Sokoły and the expenditure of 100 zlotys. Tomasz Perkowski appeared as Marcjanna's representative, arguing that the *inhibitio* should be lifted as having been issued on the basis of false circumstances – Jan had not given Marcjanna a ring, nor spent anything on her needs. Faced with this turn of events, Jan demanded an on-site investigation, which the judge accepted by appointing two commissioners and stressing that accurate information about Marcjanna's promise and the expenses were needed, something the representative could not provide. The parties, however, reached an agreement as to the disputed expenses the same day at court (Jan reduced his claim to 50 zlotys), so the judge approved it and lifted the *inhibitio*, allowing Marcjanna to marry Tomasz once the sum of money specified in the settlement had been delivered to Jan (D 90, k. 171v-172; D 94, k. 7v-10).

In only one such case, as we noted above, we know the reason for the breaking of the engagement. In 1791, Antonina Grochowska from the parish of Suraż acted as her representative against Wiktor Sikorski, an officeholder of one of the nobility courts of Bielsk land. She demanded the lifting of an *inhibitio* prohibiting her from marrying a man other than Wiktor, to whom she had promised her hand and who had incurred the

considerable cost of a dress for Antonina. This is because on Sunday, in her parish church, she witnessed the announcement of the excommunication imposed by the church court in Janów on her fiancé for failing to appear in a trial for moral transgressions (specifically for entering into concubinage and having a child therein). It was this event that supposedly led her to change her decision; she also declared that the dresses received from Wiktor[22] would be returned. Wiktor's representative argued that the banns had been announced and the plaintiff had received an engagement ring; therefore, he demanded the return of the expenses included in the register and further declared that Wiktor wished to plead his case before the commissioners. The judge, on the other hand, deeming it necessary to establish whether Antonina had in fact learnt the truth when the excommunication was pronounced, or whether she had known everything beforehand and had only retracted her promise when urged to do so, appointed two parish priests to the *ad hoc* commission, giving them also the power to act in the absence of one of the parties as well as to conciliate them. The case came back to the court after 2 months: Antonina's representative delivered acts to the commission in a sealed packet requesting that it be opened, the testimony announced, and the *inhibitio* lifted. No one appeared from Wiktor's side, but the judge, on opening the packet of acts, noted that he had agreed to Antonina's witnesses being examined by the commissioners and had indeed presented his own witnesses, but when one of them was not allowed to testify by the commission, he decided to drop the action and not plead his case. Accordingly, the court held that the trial could proceed, not least because the failure of the initiator of the *inhibitio* to appear was more serious than that of the other party. Turning to the merits of the case, the judge pointed out that Antonina's witnesses had stated unequivocally that she had sincerely wished to marry Wiktor and had agreed to the banns, and that it was only after finding out what the cause of the excommunication announced in the church was that she renounced this intention and sent the

[22] The case file does not clarify how many dresses Antonina received from Wiktor.

gifts back to Wiktor. The judge also stressed that learning of the existence of even one illegitimate child of the other party and the infamy passing on to the other party in connection with marriage to a person of such ill repute are both legitimate reasons for breaking off an engagement; he referred in this connection to a decree by Pope Innocent III (c. 25, X, II, 24 *de iureiurando*), pointing out that this is a widespread view (*communis argumentatio*).[23] Consequently, *inhibitio* was obviously abolished (D 94, k. 135-137, 142-144v). At the same time, Wiktor brought an action against the instigator demanding the lifting of the excommunication imposed in a trial in absentia, in which he confessed to everything and was punished (D 94, k. 137-138v).

6. Conclusion

Spiritual cases of the nobility in the ecclesiastical court of the diocese of Lutsk in Janów concerned marriages in the vast majority. In addition, some of them did not concern the validity of the sacrament, but only related issues, such as the reimbursement of expenses of former fiancés. Undoubtedly, the nullity cases were the most important, both from the perspective of the parties and of the court itself, and their surviving records are a mine of information about customs or pathologies of private life. However, the other cases outlined above must also have been important to those concerned, since they decided to go to court and incur the associated expenses. Breaking off an engagement by a fiancée suddenly planning to marry a third person did not have such far-reaching consequences, but it inevitably harmed self-love and made the expenses incurred so far unnecessary. Depending on the circumstances of a particular case, it could also be regarded as an insult to the honour of a nobleman. Note that Wiktor Sikorski sued the instigator in the church court, the facts and circumstances of the case, however, did not allow him to win the trial. Hence, we can see that

[23] The invocation of formal law in the judgments of the court in Janów is a great rarity outside of cases involving a spouse's complaint about the nullity of the marriage and the most serious clergy offences (comp. Donahue Jr., 2016b, p. 288).

the ecclesiastical courts in the Polish-Lithuanian Commonwealth, ruling on spiritual cases, usually decided on more or less, but nonetheless important for secular life, problems of the nobility.

Attempts to conclude a valid marriage outside one's own parish are also interesting, including concealing the fact that the death of an existing spouse is not at all certain. Arguably, some of such attempts were aimed at circumventing the principle of the indissolubility of marriage using bribery or credulity. What is more surprising is the ignorance of the basic legal norms by the clergy of both Catholic rites, which is evident in some cases. This is all the more astonishing when one considers the fact that basic provisions of canon law, which should have been perfectly familiar to the clergy, were involved. After all, the abuses concerned assisting at marriages of strange parishioners, minors or the omission of banns. Benedict XIV also pointed to similar problems with the observance of the law in his letters to the Polish bishops. We can therefore see that, despite their issuance, abuses did occur and sometimes quite shocking ones. On the other hand, diocesan authorities tried to react to the detected abuses imposing both financial penalties and various forms of penance. One may wonder here whether the sanctions applied were not too lenient. The brevity of the entries in the court books makes it difficult to determine why these were imposed in specific cases. However, it can be assumed that the circumstances of the case, the character and attitude of the parties were taken into account.

Obviously, the cases presented above were not among the most important or difficult from an ecclesiastical court perspective. There is also no doubt that some fiancées managed to marry in breach of the provisions of canon law concerning the form of marriage or the prior determination of possible impediments. On the other hand, the breaking of an engagement constituted an embarrassing circumstance for the abandoned party. I believe that potential property settlements in such situations were attempted to be resolved amicably, with referral to an ecclesiastical court being a

means of putting pressure on the other party. In conclusion, there were undoubtedly more bigamists and abandoned brides in Bielsk land than there were corresponding cases in the ecclesiastical court in Janów. This also applies to cases of disregard for marriage laws or procedures by clergy.

The minor court cases discussed above represent only a small part of the picture of the functioning of the noble society in Bielsk land, the activity of the clergy and the activity of the court of the Lutsk diocese. Further research into similar trials in other dioceses of the Commonwealth will undoubtedly make it possible to approximate the scale of various phenomena.

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Masahiro Kitatani*

RECEPTION OF ROMAN MILITARY LAW IN EARLY MODERN GERMANY: CASE STUDY USING TWO TRANSLATIONS OF D. 49,16 (*DE RE MILITARI*)[1]

Summary

Law books written in German are said to have contributed to the reception of Roman law in Germany. These books provided Roman legal knowledge to a wide range of practitioners in court who had not studied law at university. While Conrad Heyden's Klagspiegel and Ulrich Tengler's Laienspiegel have been studied frequently, Justin Gobler's works remain largely unanalysed. Gobler was accused of plagiarism, and his legal texts have been considered mere casual works of his. In contrast, I analyse Gobler's translation of Roman military law into German to argue that his work was a positive proposal for improving the order of his time. By considering the works of Justin Gobler and Leonhardt Fronsberger, this paper investigates how Roman military law was received in early modern Germany. It explores Gobler's Der Rechten Spiegel (known as Rechtenspiegel), which is noted for its comprehensive character. It includes a detailed translation of Roman military law, adapting its content to address contemporary issues caused by mercenaries in 16th-century Germany. Gobler's translation retains the original text's structure while contemporising certain terms and concepts to align with the military practices and problems of his time. This adaptation reflects Gobler's intention of improving order and addressing the disruptive behaviour of mercenaries.

Fronsberger's Kriegsbuch (1573) approached this problem differently. Although his work was influenced by Gobler, Fronsberger's translation simplifies and abridges the original texts. He integrated them as historical references rather than considering them as a solution for present-day issues. By contrasting the

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[1] Some parts are also based on the author's previously published papers, Kitatani (2022) and Kitatani (2023). References are made where appropriate.

two works, the intentions, limitations, and characteristics of Gobler's book are revealed.

Keywords*: Reception of Roman law, Military law, Justin Gobler, Leonhardt Fronsberger, Early modern Germany*

1. Introduction

According to Franz Wieacker, the reception (Rezeption) of Roman law in Germany was significant not for the reception of individual legal institutions, but rather for the "intellectualisation" of law ("Verwissenschaftlichung" des Rechtslebens). The former legal system with lay people was transformed into one organised by legal professionals who had studied law at university not because Roman legal institutes were directly accepted but because Roman legal resources were the foundation for the training of jurists at universities. A recent thesis (Deutsch, 2004) on the reception took the view that law books written in German in early modern Germany transferred Roman law and Canon law directly to judges who had not studied law at university. From this perspective, the literature directly provided knowledge of Roman law and changed legal practice in early modern Germany, partly due to the large number of editions and publications.

Important works on this topic include Conrad Heyden's *Klagspiegel* (ca. 1440), Ulrich Tengler's *Laienspiegel* (1509), and Justin Gobler's *Gerichtlicher Process* (1536) and *Rechtenspiegel* (1550). While *Klagspiegel* and *Laienspiegel* have been extensively researched (Stinzing, 1867; Deutsch, 2004 and 2011), there has been little academic examination of Gobler's works. Previous studies regarded Gobler's books on law in German as not meaningful because they were not novel and were plagiarised from earlier works.[2] Deutsch (2021), a leading researcher in this field, considered Gobler's approach to writing law books in German as casual works ("nur Gelegenheitsarbeiten").

[2] For previous evaluations of Gobler's work, see also Wächter (1844), pp. 80-81; Stobbe (1864), p. 174f. Stintzing (1880), p. 583. And in recent times: Bedenbender (2016), p. 259f. Deutsch (2021), p. 128ff. Kitatani (2023). p. 83f.

However, Gobler's *Rechtenspiegel* covers a wide range of topics and differs from works such as *Klagspiegel*, which contributed for the most part to the reception of Roman law and Canon law, especially in civil and criminal law. Noteworthy in this context is the German translation of Roman military law (*Kriegsrecht*). Other law books, such as *Klagspiegel* and *Laienspiegel*, did not consider this topic. Moreover, Gobler added the contents on contemporary military law in Germany in the second edition of *Rechtenspiegel* in 1552. Here we can see Gobler's strong interest in military law.[3]

This paper thus aims to clarify the significance of Gobler's work by analysing his translation of Roman military law into German and comparing it with that of military theorist Fronsberger, whose translations were influenced by Gobler. By doing so, we can identify the characteristics and limitations of Gobler's translations.

The remainder of this paper is organised as follows. First, I examine Justin Gobler's understanding of Roman military law in his book *Rechtenspiegel* as well as the book's features (2). Next, I analyse Leonhardt Fronsberger's translation of Roman military law into German in his book *Kriegsbuch*. The characteristics of both Gobler and Fronsberger are then clarified by comparing their translations (3). Finally, I conclude by suggesting some specific characteristics of Gobler's work (4).

2. Justin Gobler (1504-1567) and his *Der Rechten Spiegel* (*Mirror of Laws*, 1550)

2.1. Gobler's career

Justin Gobler (1504-1567) was born in St. Goar, a town on the Rhine, and studied in Mainz (1516) and Erfurt (1520). After he became a court clerk in Koblenz, he again started to study in Bourges from 1531 to 1533 and in Orléans in France in the summer semester of 1535 (Deutsch, 2021).[4]

[3] On Gobler's addition in the second edition of *Rechtenspiegel*, see also Kitatani (2023), pp. 114-115.

[4] Andreas Deutsch recently provided a thorough study of Gobler's life (2021). All content in this paragraph is based on Deutsch's work unless otherwise noted.

Gobler later stated that he listened to Andreas Archart's lectures during this time (Gobler, 1565, p. 238). From 1535, Gobler lectured at the Faculty of Philosophy, University of Trier. Then from 1539 onwards, he served as adviser to the Duchy of Braunschweig-Kahlenberg (1539), chancellor for the Bishop of Münster (1545), and adviser to Nassau-Dillenburg (1549). He received his doctorate between the summer of 1541 and January 1542. In 1545, Gobler was sent to the Congress of the Schmalkaldic League in Frankfurt, and then to the Congress of the North German Princes in Hanover in March 1546. During these visits, he appealed to the officials to restrain the wandering mercenaries who were causing significant problems in Münster. His suggestions were approved by the majority at the conference. In 1559, Gobler retired from public office and lived in Frankfurt am Main for the rest of his life.

2.2. Gobler's work

Gobler was well-known for the writings composed throughout his career. As a learned legal practitioner who held positions such as adviser under various sovereigns and princes, his writings included legal knowledge that is both forensic and relevant to government in today's sense.

However, Gobler's law books written in German have not been adequately evaluated or studied. Three such books are known: *Gerichtlicher Process* (*Forensic Process*, 1536), *Rechtenspiegel* (*Mirror of Laws*, 1550),[5] and *Statutenbuch* (*Book of Statutes*, 1553).

2.3. Gobler's work on military law

Of these books, the *Rechtenspiegel* has the most comprehensive contents and includes the theory of military law. Its Chapter 10 focuses on the monarch's rule, including the history of the Holy Roman Empire, *Policey*,

[5] Gobler, J. (1550). Additional editions were published in 1552, 1558, 1560 (Dutch translation), 1564, and 1573. As a great deal of content on military law was added to the 1552 edition, that edition is used in this paper, and the book's customary title, *Rechtenspiegel*, is used. See Deutsch (2021), p. 130.

Kriegsrecht (military law), and *Zunft*. The content on military law in *Rechtenspiegel* consists of three parts: (1) Justwar theory, (2) German translations of Roman military law (from D. 49,16 and C. 12,35), and (3) contemporary German military organisation, which was added after the second edition in 1552. Gobler noted that he would examine military law in general:

> As military law is the most important of all the laws which I intended to describe and explain in this book for the benefit of the common man, and recently each that is (unfortunately) able to undertake war pays less attention to military law, I could not and should not fail to cover it here. (Gobler, 1552, Bl. 223 r.)[6]

From Gobler's perspective, the rulers who were waging war at that time had little regard for military law. As noted earlier, during his work as chancellor for the Bishop of Münster in 1546, he asked that problematic wandering mercenaries be restrained. He raised this issue again when writing *Rechtenspiegel*:

> [...] against those [soldiers] who behave annoyingly and harmfully towards the common people with their intolerable vice and outrage [...] the Landfriede of the Emperor in particular, and also of the Holy Roman Empire, was established, because they [=] would be unable to be prevented or restrained unless by a separate harmful force.
>
> That is also the case in the Policei Ordnung by the Emperor against the straying Soldiers, who are a heavy burden on the poor. [...] (Gobler, 1552, Bl. 224 r).

To understand how Gobler saw this situation, we must consider the military system in Germany in the 16th century, in which the main military force on land was mercenary. After a campaign, mercenaries were dismissed. Vagrancy was prohibited, but they wandered in groups and disrupted order. The Holy Roman Empire, Imperial circles, and each territory tried to suppress them, though it was less successful (Baumann, 1994, p. 136ff).

[6] All German texts were translated by Kitatani, except the texts from Digesta.

The damage caused by these mercenary groups led to Gobler's strong criticism of their behaviour in *Rechtenspiegel*. He refers to the imperial legislation designed to prohibit soldiers from wandering and disturbing order. This situation explains the reason for his diplomatic work and considering military law in his book. Notably, *Rechtenspiegel* was the first legal book that Gobler wrote after his mission as representative of Münster. Gobler translated almost all texts contained in the *de re militari* of D. 49,16 and C. 12,35, i.e. Roman military law into German.[7] The following section examines some of Gobler's translations to clarify the particulars of his understanding of Roman military law.

2.4. Gobler's translation of Roman military law[8]

D. 49,16,1 (*Ulpianus libro sexto ad edictum*)

Miles, qui in commeatu agit, non videtur rei publicae causa abesse.
A soldier who is on leave is not seen as being absent on state business.[9]

Vlpianus. Das erst Gesatz.

Welcher Kriegsman erlaubniß oder paßport hat ein zeitlang aussen zusein / vnd wi[e]der zukommen / oder nach prouiand auß ist / Der selb wirt nit dafür geacht oder gehalten / daß er von des Gemeynen nutzs wegen aussen sei (Gobler, 1552).[10]

Gobler's translations here are faithful to the original structure while at the same time contemporising content. Gobler interpreted the word *commeatus* in three ways, as *Erlaubnis,* "permission from a commander to leave one's original unit for a while", *Passport*, and *proviant,* "provisions". Gobler did not consider the word to be defined by only one meaning and

[7] Only C. 12,35,16 was not translated by Gobler. Abegg, Professor of Criminal Law at the University of Breslau, acknowledged the significance of Gobler's translation of Roman military law. Abegg (1835), pp. 1-29.
[8] All underlines were added by the author.
[9] All English translations of the texts are from Watson (1985).
[10] Gobler (1552), Bl. 224 r.

glossators and commentators do not comment on it specifically. At the end of the 15th century, a famous jurist and humanist, Sebastian Blant (14571521) took the word *commeatus* in D. 49,16,1 as *alimentum* in his well-respected introduction to Roman and Canon law (Brant, 1518).[11] The lexicon treats the word *commeatus* in D. 49,16,1 as meaning "permission for soldiers to leave" (Seckel, 1926). In this respect, Gobler remained open to different interpretations of the word and kept them in his translation.

D. 49,16,12 (*Macer libro primo de re militari*)[12]

pr. Officium regentis exercitum non tantum in danda, sed etiam in observanda disciplina constitit.
The duty of the commander of an army consists not only in leading but also in watching over discipline.

Marcianus. Das zwoelfft Gesatz.

[pr.][13] *Das Apmt vnd Befelch des jhenen/ der den Hauffen vnnd das gantze Heer fueret vnnd Regiert / stehet ni[ch]t allein in dem dasz er guote anweisung vnnd ehrliche gebott gebe / Sonder[n] auch darinn / daß er verschaffe vnnd daran sei / daß solches vollenzogen / gethon vnnd gehalten werde* (Gobler, 1552).

In this text, the notable word is *disciplina*, which was interpreted by Gobler as *guote anweisung vnnd ehrliche gebot*. The word *disciplina* has several meanings, but its meaning here as "military discipline" has not been disputed by the glossa or modern lexica. Gobler does not add any special meaning to the word and offers a concrete description of it.

1. Paternus quoque scripsit debere eum, qui se meminerit armato praeesse, parcissime commeatum dare, equum militarem extra provinciam duci non permittere, ad opus privatum piscatum venatum militem non mittere. Nam in disciplina Augusti ita cavetur: "Etsi scio

[11] Brant (1518), Fo. 152 r. This book was first published in Basel in 1494.
[12] The names of some jurists Gobler write differ from those of Vulgata, as shown in Table 1 (Chapter 3).
[13] The author of this paper has supplemented this number, as both Gobler and Fronsberger omit the number of the text.

fabrilibus operibus exerceri milites non esse alienum, vereor tamen, si quicquam permisero, quod in usum meum aut tuum fiat, ne modus in ea re non adhibeatur, qui mihi sit tolerandus".

1. Paternus has also written that [a general] who is mindful that he commands armed troops ought to grant leave very sparingly, ought not to permit a stallion belonging to the army to be taken outside the province, nor dispatch a soldier on his own private business or out fishing or hunting. For in the disciplina Augusti provision is made in these words: "Even though I know that it is not inappropriate for soldiers to be employed on jobs as craftsmen, I nonetheless fear that if I should permit any such thing to be imposed on this practice."

[1] Es schreibt auch der Paternus / daß der jenig / welcher dem Kriegsvolck gedenckt vorzustehn / soll in gar sparlich vnnd langsam gestatten / commeatum, das ist / erlaubniß vnnd Paßport / oder nach Speiß vnd Proviand / ihrs gefallens außzulauffen / noch ein Reysig pferdt ausserhalb des Landts zureiten verguenstigen / Vnd zu irem eygen thun vnd nutz / als zu Fischen / zu Jagen / soll er keynem kriegsknecht erlauben / Dann solches ist im Articulo Brieff vom Keyser Augusto verbotten / als nemlich mit disen worten / wie hernach folget: Vnnd wiewol vns bewust / daß es nit frembd noch seltsam ist / daß kriegsuolck in wercken so zum Bawe gehoeren / vnd die Zimmerleut betreffend / geuebt vnd gebraucht zuwerden / So besorgen wir doch / wo wir ihn etwas in dem nachgeben vnd gestatten / ob es auch zu deinem vnnd vnserm frommen vnd nutz geschehe / daß doch kein maß / die wir erleiden kuendten / darinn gehalten wuerde (Gobler, 1552).

Some glossa interpreted the meaning of *commeatus* in this section to be "a soldier's leave", as in C. 12,42.[14] Gobler translated the text concretely, which means "the permission for a leave for the foods and provisions", which is faithful to the original text and the glossa, allowing a consistent translation with that of D. 49,16,1.

Gobler also understands *disciplina Augusti* as *im Articulo Brieff vom Keyser Augusto*. Artikelbrief was the prevalent form of regulation for sol-

[14] *Parcissime. sed tempore expeditionis nullo modo : vt C. De commeatu l. i. lib. xii.* (Accrusius, 1566).

diers in early modern Germany (Meumann, 2008). This can also be interpreted as his contemporisation.

> *2. Officium tribunorum est vel eorum, qui exercitui praesunt, milites in castris continere, ad exercitationem producere, claves portarum suscipere, vigilias interdum circumire, frumentationibus commilitonum interesse, frumentum probare, mensorum fraudem coercere, delicta secundum suae auctoritatis modum castigare, principiis frequenter interesse, querellas commilitonum audire, valetudinarios inspicere.*
>
> *2. The duty of the tribunes, or those commanding the army, is to keep the soldiers in camp, to lead them out on exercise, to keep the keys of the gates, to make the rounds of the sentries from time to time, to take part in foraging for their fellow soldiers, to examine the grain [ration], to chastise fraud by those measuring [it out], to punish offenses within the limits of their authority, to be present frequently at headquarters, to hear the complaints of their fellow soldiers to inspect the sick.*
>
> *[2] Der Befelch vnd Ampt der Quartiermeyster / vnd anderer Hauptleut vnd Befelchhaber ist daß sie die Kriegsleut in den Gezelten vnd im Lager behalten / vnd sie zur uebung fueren / Die Schluessel zu den Pforten innenhaben / Die Wachten selbs zu zeiten vmbziehen vnd versehen / Auch selbs gegenwertig / mit vnd darbei sein / wann die Knecht auff die fuetterung lauffen. Zu dem sollen sie die Prouiand / Frucht vnd Speise Probiren / vnd verschaffen / daß kein falsche maß gebraucht werde / Die mißhandlung vnd uebelthat der Knecht straffen / doch nit weiter dann jr Ampt sich streckt vnd sie macht haben. Am ersten vnd vornen gemeynlich daran sein / die klagen der gesellen anhoeren / vnd der schwachen vnd gebrechlichen achtung haben / vnd jrer pflegen lassen* (Gobler, 1552).

The word *Quartiermeister* is notable in this text. This position was responsible for setting up quarters in 16th-century German armies. Some of the duties of officers, such as keeping the gate key, are included here, so the translation appears suitable. However, other listed duties clearly exceed those of a *Quartiermeister*, such as monitoring the sentries, which was the Wachtmeister's duty, while rations were supervised by the

Proviantmeister (Baumann, 1994, p. 94). It seems unlikely that Gobler was unaware of these duties, since elsewhere he mentioned them by name.[15] By translating *tribunorum est vel eorum, qui exercitui praesunt* as *Quartiermeister vnd anderer Hauptleut vnd Befelchhaber*, Gobler cited *Quartiermeister* as a representative example and showed an understanding of Roman law which was applicable to the military organisation of his time.

Another point is his understanding of *principiis*. Gobler translated *principiis semper interesse* as *Am ersten vnd vornen gemeynlich daran sein*, i.e., "to usually stay in the front". *Principia* does mean front, but this understanding of the text is not common in the glossa or modern lexica (Seckel, 1926). Gobler is striking in this respect and stands in contrast to Fronsberger, as will be discussed later.

D. 49,16,13,3 (Macer):

Missionum generales causae sunt tres: honesta causaria ignominiosa. Honesta est, quae tempore militiae impleto datur: causaria, cum quis vitio animi vel corporis minus idoneus militiae renuntiatur: ignominiosa causa est, cum quis propter delictum sacramento solvitur. Et is, qui ignominia missus est, neque Romae neque in sacro comitatu agere potest. Et si sine ignominiae mentione missi sunt, nihilo minus ignominia missi intelleguntur.

The general circumstances of discharge are three: with honor, on grounds of health, and with ignominy. Honorable [discharge] is that which is granted when the term of military service is completed; that on grounds of health, when someone is declared insufficiently suitable for military service because of a defect of mind or body; circumstances of ignominy are when someone is released from his military oath on account of a crime. A man who has been discharged with ignominy is not able to live in Rome or attend the imperial court. Even if [soldiers] are discharged with ignominy.

Der selb Marcianus. Das dreizehend Gesatz. [...]

[15] He names *Quartier[-] oder Wachtmeister* in his translation of C. 12,35,11. See Gobler (1552), Bl. 229 v.

[3] Der beurlaubung des Kriegs seind drei gemeyne vrsachen / Als / Ehrlich / vrsachlich / vnnd schmaelich oder mit schanden. Die ehrlich vrsach ist die / welche / so die zeit des Kriegs erfüllt vnd auß ist / gegeben wirt. Die verursachlich ist / so einer außgebrechen seines verstands oder leibs halben / vngeschickt / selbs vom Krieg absteht vnd den Kriegshandel versagt. Die schmaelich vnd schandtlich beurlaubung ist / so einem auß übelthat vnd mißhandelung / Eyd vnd Pflicht auffgesagt wirt. Vnnd welcher auß schmach oder von schanden wegen beurlaubt ist / der mag weder zu Rom / noch im Heiligen Reich / bei andern Kriegsleuten ziehen oder handeln. Vnd welche auch o[h] ne vermeldung oder anziehung der schmach beurlaubt seind / die selben werden nichts desto minder verstanden vnnd darfuer gehalten / als ob sie mit schmach beurlaubt w[a]eren (Gobler, 1552).[16]

According to the modern lexica, *militia* literally means "military service", so the meaning of the original text is that the term of military service comes to an end. The glossa does not address this issue. Gobler's translation reads *die zeit des Kriegs erfüllt vnd auß ist*, which translates as "the end of wartime". As already mentioned, mercenary units in the 16th century were not standing; rather, they were dismissed when the war ended. Gobler's translation is a contemporisation that fits the reality of his time.

Moreover, based on the phrase *im Heiligen Reich* in the translation of D. 49,16,13,3, we can assume that this referred to the Holy Roman Empire in the context of 16th-century Germany, while the equivalent part of the original text uses the phrase *in sacro comitatu*, which refers to the "emperor's military camp" (Seckel, 1926) or "imperial court" (Watson, 1985).

Gobler's translation has two important characteristics in general. First, his translation is faithful to the structure of the original text and does not drastically alter it. Second, Gobler contemporised the content. In both D. 49,16,1 and D. 49,16,12,1, Gobler interpreted the word *commeatus* as *Erlaubnis*, "permission from a commander to leave one's original unit for a while" and *Passport* as well as *Proviant,* "provisions". These words were added to make the original text more precise since the word *commeatus*

[16] Gobler (1552), Bl. 228 r.

was somewhat ambiguous and could not be determined in one sense. The translations of *disciplina Augusti* and *tempus militia* are also understandable from this point of view. These translations were likely informed on Gobler's own experiences and awareness of contemporary problems. As an emissary of the Bishop of Münster, he aimed to curb the mercenary incursions that were a problem around Münster at the time (Deutsch, 2021). Naturally, he must have been aware of the timeliness of the military organisation as a background to the problem of roaming mercenaries. For the abovementioned purpose of describing military law, his translation of Roman military law aimed to suppress the unrestrained actions of mercenaries.

3. Leonhardt Fronsberger and his *Kriegsbuch* (*Book on War*, 1573)[17]

Leonhardt Fronsberger was one of the most famous military theorists in early modern Germany. He is said to have been born in Bavaria, but the year of his birth remains unknown. He became a citizen of Ulm in 1548 through the mediation of Karl V. He served in the imperial army in 1553-1563 and 1568-1573. He died in 1575 as a result of an accident in a musketeer inspection. Between the 1550s and 1570s, he wrote several works on the organisation and control of the army. His book *Kriegsbuch* (1573) is analysed in this paper. The book comprises three volumes. While it primarily collects his earlier writing, it also includes new content, such as summaries of ancient military theorists (Vegetius, Frontinus, and others). Fronsberger translated D. 49,16 into German in Volume 3 of the book.

3.1. Gobler's influence on Fronsberger

Fronsberger's translation of Roman military law was strongly influenced by Gobler. This is confirmed by several points. The first is the names of Roman Jurists. In Gobler's translation, we find some conspicuous names among the ordinary ones (highlighted in Table 1; e.g. D. 49,16,2). The names

[17] For more information about Fronsberger's life and work, see Huber (1961) and Leng (2002) respectively.

on the left column of Table 1 are common in Vulgata. In the middle column are the names in Gobler's *Rechtenspiegel*, while the right column contains the names in Fronsberger's *Kriegsbuch*. The names of the jurists mentioned by Fronsberger are almost identical to those given by Gobler, including those that differ from Vulgata. While the names of the jurists in D. 49,16 are almost the same as shown in Table 1 in most works, from medieval glossators such as Accrusius to legal historians in modern times as Mommsen, the names Gobler and Fronsberger listed are somewhat curious. This demonstrates Gobler's influence on Fronsberger.[18]

Table 1

	Vulgata	*Rechtenspiegel*	*Kriegsbuch*
D. 49,16,1	*Ulpianus*	*Ulpianus*	*Ulpianus*
D. 49,16,2	*Arrius Menander*	*Furius*	*Furius*
D. 49,16,3	*Modestinus*	*Modestinus*	*Modestinus*
D. 49,16,4	*Arrius Menander*	*Arrianus*	*Arrianus*
D. 49,16,5	*Idem*	*Der selb Arrianus*	*Idem*
D. 49,16,6	*Idem*	*Der selb Arrianus*	*Idem*
D. 49,16,7	*Tarruntenus Paternus*	*Marcianus*	*Martianus*
D. 49,16,8	*Ulpianus*	*Ulpianus*	*Ulpianus*
D. 49,16,9	*Marcianus*	*Marcianus*	*Martianus*
D. 49,16,10	*Paulus*	*Paulus*	*Paulus*
D. 49,16,11	*Marcianus*	*Marcianus*	*Martianus*
D. 49,16,12	*Macer*	*Marcianus*	*Martianus*
D. 49,16,13	*Idem*	*Der selb Marcianus*	*Idem*
D. 49,16,14	*Paulus*	*Paulus*	*Paulus*
D. 49,16,15	*Papinianus*	*Paulus*	*Paulus*
D. 49,16,16	*Paulus*	*Paulus*	*Paulus*

[18] As far as I have been able to determine, only Haloander's edition gives a different name from other sources, *Tarantinus Paternus*, in D. 49,16,15. However, this is also distinct from Gobler's and Fronsberger's works. See Haloander (1529), p. 2302. Regrettably, I could not find the source of the names Gobler cited. Possibly the names Arrius Menander and Tarruntenus Paternus were unfamiliar to Gobler as these are only known with the tractates on military law. See also: Kunkel (1967), p. 219f, 233f.

3.2. Translation by Fronsberger[19]

The following section examines Fronsberger's translation and clarifies its peculiarities with the aim of explaining the similarities and differences between his work and Gobler's.

In his *Zum Leser* (to the reader), Fronsberger shared the reason behind his translation, which differs from other translators. He wrote:

> It is not for honour or other things on my part, but a poor soldier who tried to abandon his troop and was recaptured led me to do so [...] (Fronsberger, 1573, Bl. 286).

For this reason, Fronsberger believes that such soldiers must be treated according to pious law (*Gottseligen rechten*), not according to the language of the incomprehensible and talkative.[20] Fronsberger does not like to use officialese (*Cantzleiteutsch*) as it has been invented. Accordingly, Fronsberger aims to translate the Roman Military Code into German using concise words and phrases (Fronsberger, 1573).

Translation of D. 49,16,1 in *Kriegsbuch*:

> *Ein Kriegßmann der Paßbort hat / wirdt nicht geacht von gemeines nutz wegen auß sein* (Fronsberger, 1573, Bl. 282 v).

Compared to Gobler's translation, the words *Erlaubniß* and *Proviand* are omitted and the part about going out is not translated in this text. Fronsberger replaced the section *in commeatu agit* which indicates whether the person has a passport or not. As contemporary jurists, such as Brant and Gobler, translated *commeatus* as "provisions", the omission by Fronsberger is conspicuous.

Translation of D. 49,16,12 in *Kriegsbuch*:

> *Martianus. Das zwoelfft Gesatz.*
> *[pr.] Die pflicht vnd ampt eines der ein Hehr regirt / ist nicht allein an*

[19] See also Kitatani (2022), pp. 113-117.

[20] Fronsberger (1573), Bl. 286 r. *[...] nit eines jeden vnuerstaendigen Taderers rede nach / sonder Gottseligen Rechten gemmaeß werde gehandlet [...].*

> *dem gelegen / daß er mit andern das Kriegßregiment halte / sonder er selbst auch thue* (Fronsberger, 1573).

Characteristic here is Fronsberger's interpretation that the superiors themselves obey the *disciplina* as *nicht allein [...] er mit andern das Kriegßregiment halte / sonder[n] er selbst auch thue,* "not only he obeys the military discipline with others but also he himself does". In both the original text and Gobler's translation, the text indicates that the *disciplina* is monitored by superiors and imposed on soldiers, but Fronsberger's interpretation is peculiar in that it indicates that *disciplina* should also be practised by the superiors themselves. In his translations of D. 49,16,12, pr., he omitted the detailed addition by Gobler and added *mit anderen*, "with others", which is not found in either the original legal text or in Gobler's translation.

> *[1] Schreibt auch Paternus / der sich einem geharnischten vorzustehen gedencket / der soll gar selten / vrlaub geben / kein Reißpferdt ausserhalb der Landtschafft nit verreyten lassen / zu sonder eigener arbeit / gehn Fischen / auffs Gejagt ein Knecht nit schiecken / dann in dem Kriegßregiment Keyser Augusti wirts [=wirt es] verhuetet.* (Fronsberger, 1573)

Again, Fronsberger translates *commeatus* as *Urlaub* (leave). As we have already seen in D. 49,16,1, 16th-century jurists understood *commeatus* both in the sense of "leave" and "provisions", which differs from Fronsberger's translation.

Fronsberger also differs from Gobler in that he translates *disciplina augusti* as *Kriegsregiment*. Gobler understood the term to mean "Artikelbrief", a widely disseminated military code in his time. As a former soldier, Fronsberger must have been aware of this. On the contrary, Fronsberger translated it as *Kriegsregiment*. In early modern German, *Kriegsregiment* refered to military discipline and can be interpreted in that context here as well. In D. 49,16,12, pr., he understood this as "good instruction and honest commands" (*guote anweisung vnnd ehrliche gebott*), but understood

it as *im Articulo Brieff vom Keyser Augusto* (in the Artikelbrief Emperor Augustus) in D. 49,16,12,1. Compared to Gobler, Fronsberger consistently interpreted *disciplina* as *Kriegßregiment*, both in the translations of D. 49,16,12,pr. and D. 49,16,12,1. Also, in the translation of D. 49,16,12,1, Fronsberger greatly reduced the content of Augustus' *Disciplina*, which is understood as a single word *[e]s*, depicting the content of the preamble.

> *[2] Der Tribunen / oder der jenigen pflicht / so vber ein Hehr gesetzt / ist daß sie die Knecht im Laeger behalten / zur vbung außfuehren / der Gassenthoerer Schluessel zu sich nemen / vnderweilen die Wacht besichtigen / bey jhrer Spießgesellen Korenhaendel seyen / falscher maß fuerkommen / die mißhandlung nach gestalt jhres gewalts straffen / offt am Gerichtsplatz erscheinen / der Spießgesselen klag verhoeren / vnd darzu die Krancken besichtigen* (Fronsberger, 1573, Bl. 285).

In the enumeration of the duties, Fronsberger is very faithful to Gobler's translation, merely omitting repetitions or paraphrasing them. Notable in this text is the translation of *principiis frequenter interesse,* which Gobler took to mean "constant presence at the front", but Fronsberger understood as "frequent appearance in court". Glossa understood *principia* here as "court".[21] In this respect, Fronsberger is more faithful to glossa than Gobler is. At the same time, the original text can be interpreted as "frequent visits to the command centre" (Seckel, 1926).[22] In the 16th century, the court of each unit was identical to the headquarters (Baumann, 1994, p. 104). So Fronsberger's translation can be understood as a contemporisation too, with more preciseness than Gobler.

Translation of D. 49,16,13,3 in *Kriegsbuch*:

> *Der Beurlaubung seindt gemeiner vrsach drey / ein ehrliche / ein verursachte / vnd ein schandtliche / Die ehrliche ist die / so nach erfuelter zeit der Kriegßpflicht einem gegeben wirt / die verursachte*

[21] *Principia in castris erat vbi ius reddebatur [...]*, Accrusius (1569), Sp. 1690.

[22] The English translations by both Schott and Watson also interpret *principiis* as "headquarters". Scott (1973), p. 194; Watson (1985), p. 410.

> */ wann einer von verstandts oder leibs maengel wegen / zum Krieg vntauglich außgeben wirt / Die schandtliche vrsach ist / wann einer von einer mißhandlung wegen des Kriegß Sacraments ledig gezehlt wirt / vnd derselb so mit schanden beurlaubet worden / mag weder zu Rom / noch in andere heilige versamlung wohnen / vnd ob sie schon o[h]n[e] alle meldung der schandt beurlaubet seindt / verstehet mans [=man es] dennoch mit schanden beurlaubet sein*. (Fronsberger, 1573, Bl. 285 v).

Fronsberger chose similar words to Gobler's when translating the three reasons for discharge. He clearly referred to Gobler's translation here. In contrast, Fronsberger translated *tempore militia impleto* as "the fulfilment of military service", which is more appropriate to the original text than Gobler did. Also, Fronsberger interpreted *in sacro comitatu* as *in andere heilige Versammlung*, which is more faithful to the original text than Gobler's *im Heiligen Reich*.

Overall, comparing Fronsberger's translations with Gobler's can highlight some characteristics. First, Fronsberger was aware of Gobler's translation and, as he states in *Zum Leser*, condemned it as redundant, though he was influenced by it in jurists' names, the structure of texts, and many individual translations. On the other hand, there are several differences between the two translations. First, Fronsberger avoided redundancy and shortened the translation in almost all texts, as he stated in his *Zum Leser*. Second, unlike Gobler, he did not translate C. 12,35 at all. Third, Fronsberger distributed his German summary of Roman military law in the third volume of *Kriegsbuch*, between the German translation of Frontinus' work and that of Vegetius. Fronsberger covered the German military system of his time in the first volume of *Kriegsbuch*, giving it a very different status from the military knowledge of ancient Rome.

This attitude indicates that for Fronsberger, Roman military law was not directly applicable to his German contemporaries. Rather, it was a medium for the transmission of ancient knowledge, though he insisted that Roman military law should be translated for poor, common soldiers

and to some extent, he also contemporised the Roman text, as seen in D. 49,16,12,2 and D. 49,16,13,3.

Here, we find a striking difference between Gobler's and Fronsberger's attitudes towards Roman military law. Gobler considered Roman military law essential to curb the disorderly behaviour of mercenaries in 16th-century Germany, which could be applied in practice. Gobler maintained the structure of the original text in this respect, including redundancies, in order to contemporise the text and remain faithful to the polysemous interpretation. Fronsberger, in contrast, presented it as a historical source despite his alleged intention, which we can confirm from the composition and each translation. In most respects, Fronsberger omitted, deleted, and shortened the textual meaning.

4. Conclusion

Finally, we must confirm the influence of Roman military law in early modern Germany. None of the early modern German treatises on military law referred to Gobler's discussion on military law, just as other works, such as *Klagspiegel* and *Laienspiegel*, were rarely cited by jurists. These volumes were not considered scholarly works. At the same time, Fronsberger's work was subsequently referred to in the legal books on military law by jurists as late as the 18th century (Beier, 1712; Ludovici, 1715), possibly because Fronsberger was one of the most famous military theorists in early modern Germany. However, among the jurists who referred to Fronsberger, none mentioned the German translation of Roman military law. The need to refer directly to Roman law had also declined since legislation had increased at that time both throughout the empire and in each territory.

Not even Gobler considered the translation of Roman military law to be entirely suitable for his time. From the second edition of *Rechtenspiegel* (1552) onwards, he also discussed contemporary military organisation. Here, we can see a shift in Gobler's attitude toward solving contemporaneous

problems not only by direct application of Roman military law alone but also by the contemporary institution:

> […] since the long passage of time resulted in a remarkable, big change here too and because of this, this old Roman military law […] is no longer suitable or useful everywhere, I will deal with military law […] in accordance with the custom in Germany […]. (Gobler, 1552)[23]

Gobler himself recognised the limitations of applying Roman military law and therefore attempted to describe the German system of his time. This attitude parallels Fronsberger's to a certain degree. However, Gobler did not completely give up applying Roman military law; his German translations of the Roman military law remain in all following editions of the *Rechtenspiegel*.

From this, we can recognise Gobler's consistent intention to use his translations to improve the situation in contemporary Germany. His reception of Roman military law points out his originality, though re-evaluating Gobler would require a comprehensive survey of all of his writings on law. This paper offers only a suggestion of the possibilities.

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[23] Gobler (1552), Bl. 232 v. See also Kitatani (2023), pp. 112-115.

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COMPARATIVE METHODS IN ITALIAN LEGAL DISCOURSE ON LABOUR: NOTES ON THE ORIGINS

Summary

The paper aims to discuss convergences and encounters of legal cultures through the lens of 'comparative methods' employed in nineteenth- and twentieth-century Italian legal discourse on labour. The recognition of the novelty and commonality of labour problems, along with the adoption of social principles extraneous to the dogmatic apparatus of classical civil law, enhanced the use of comparison in combination with (or as a substitute for) the auctoritas of the tradition in the conception and legitimisation of legal remedies. Self-proclaimed agents of cultural unification and promoters of national unity, Italian legal scholars renewed the old worn-out language of Romanistiscs through an uneven set of confrontation practices. The large comparative component in the works of the Commissione per lo studio dei contratti agrari e del contratto di lavoro (1893-1902) will be investigated in its intersections with the scientific and political debate on the possibility of constructing common or parallel juridical paths for the factory worker and the land labourer Not circumscribed to Western legal systems or merely 'legislative' solutions, it proves the effort of shaping new categories and adapting traditional schemes to the renewed dimension of labour and raises interesting questions for the legal historian: circulation of models and adaptation of texts to contexts, pluralism of subjects and normative orders, local dimension and transnational perspective in the formation of a modern lexicon on labour matters and core concepts of the future discipline.

Keywords: *Labour Law, Italian Legal History, Comparative Methods, Meeting of Legal Cultures, Labour Contract, Agricultural labour*

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1. Nation, tradition, and comparison in late nineteenth-century Italian legal discourse

It has been recently emphasized that no age in legal history is immune to the tendency to look both backwards to its own past and outward at other legal systems (Duve, 2022; Vano, 2024). The inclination of legal discourses to cross temporal and spatial boundaries can, therefore, provide an insightful historiographical lens when choosing to read this history as the long narrative of efforts and strategies of 'juridification' or formal consolidation of political transformations and socio-economic conflicts.[1] *Longue durée* and comparison have historically supported the role of jurists as mediators between the state and society. However, during the second half of the nineteenth century, these attitudes underwent an unprecedented expansion and strongly converged.

In Italy, an overlap of the two can be observed for example both in the establishment of a unified national legal system grounded in liberal values and in the reaction to the crisis of its ordering capacity, which this paper will focus on. They occurred relatively close in time and, in some respects, within similar coordinates.

The most urgent need, once political unity was achieved in the 1860s, though not without difficulties, was to translate it into a legal order.[2]

[1] This methodological approach was strongly asserted years ago by Aldo Mazzacane (1976). His writing called for "a historical and theoretical analysis of the role played by legal doctrines and the work of jurists in various eras, [...] an identification of the structural constants that have characterized [...] the formal consolidation of class struggle" (p. 24). "To genealogically grasp, throughout the entire span of a 'long' modernity, the ambiguous intertwining and essential tension between the demands for freedom and the 'securitarian' control of vital processes" represents the 'Foucauldian' approach identified by Pietro Costa (2017, p. 102) for rethinking the historical problem of the welfare state. More broadly, see the issue of *Quaderni fiorentini per la storia del pensiero giuridico italiano* dedicated to "*Giuristi e Stato sociale*" (2017). All translations in this paper are mine.

[2] At the beginning of the 19th century, the discourse on identity permeated the European continent crosswise. Both Germany and Italy underwent a process of political unification, accompanied by the development of an ideology that portrayed the nation as an ideal and political community. Even France, which had achieved territorial and political unity as early as the 15th century, underwent a redefinition of its national identity in a legal-institutional sense.

Jurists took on the task of interpreting this transition, aiming to provide the State with 'Italian law', or more accurately, a unified and unifying image of it according to the paradigm 'one state, one law' (Costa, 2011, 2022). The construction of the portrait of the nation's law was intended to contribute to the broader process of cultural integration and consolidation of state structures. It aimed to build a consensus that could foster social cohesion and enhance the country's international recognition. Legal validation of the national identity was thus an effective vehicle and a necessary premise in the modernization of law and the restructuring of the legal system. Codification stood out as one of the main paths through which this renewal of law was realized (Caroni, 1998; Cazzetta, 2014). It endeavoured to reconcile the abolition of the plurality of private law sources, serving as a vehicle for the country's nascent political unity, with an emphasis on the connection to pre-existing legal principles.[3] Linked to the *Risorgimento* aspiration of placing a long national history behind the new State, the rhetoric of continuity was bolstered by emphasizing the heritage of Roman law, a strategy already employed a few years earlier with the penetration of the Napoleonic Civil Code into Italian domains.

However, while the nation's boundaries were reinforced through reliance on tradition, the urge to define an Italian Civil Code also triggered a strong inclination to look beyond these borders and compare legal solutions.[4] The attention to the codification experiences of other countries,

[3] Giovanni Cazzetta (2012) observed that "The Risorgimento aspiration towards a uniform law for the entire peninsula – obviously connected to the aspiration for a national state expressive of the idea of Italy as a community of language and culture—constantly refers back to the Code as a declaration of principles already existing in the legal tradition of the country; it was these principles, after all, that manifested an undeniable Italian legal identity and, with it, the absence of any arbitrariness in the unitary choice" (p. 123).

[4] The significance of comparative analysis in 19th-century European legal culture is the focus of works by Schulze (1990), Mazzacane & Schulze (1995), Padoa Schioppa (2001). Indispensable studies are those of Carlos Petit, which extensively explore the theme of comparison. Petit (2023) engages with the phenomena of circulation of legal texts and doctrines, paying particular attention to the tension between the Code as a universal expression of natural rights and the Code as an outcome of the national identitybuilding process (p. 71 ff.).

particularly those of France and Germany, manifested the aspiration towards an independent and autonomous image of the country, at times embodying a vision of Italian primacy (Vano, 2005, p. XXVIII). At the same time, the widespread comparative tension among nineteenth-century jurists, alongside the inherent versatility of the Code, also ensured the opening of a broad range of options for restructuring the legal system.

The achievement of full political unity in Italy marked both a culmination point and the beginning of a new phase for legal science, which coincided with the onset of the country's industrialisation and the redefinition of the relation between capital and labour. The increasing complexity of the social landscape and the economic transformation experienced by European countries since the end of the nineteenth century led to a decline of the liberal state form and its constitution, founded on atomistic nuclei and confined within the boundaries of the nation-state, reshaping the legal foundations of the interaction between institutions, individuals, and groups (Steinmetz, 2000). The fundamental categories of nineteenth-century law—the figure of the subject-individual and the national horizon—faced new social aggregations, interests, and problems that crossed borders and demanded shared solutions. Even at this historical juncture, jurists' mediating function between modern social relations and formalized legal theory was crucial. Reluctant to relinquish its firm position within the power structures, legal scholarship engaged with the "production of scientific tools capable of understanding and managing the increasing complexity" (Mazzacane, 1986, p. 17).

If the affair of national law construction and the "discovery of society" were almost simultaneous (Cazzetta, 2017, p. 130), the effort to construct a unified legal system for a unified state and the need to diversify this unity through special laws exploring new domains gained recognition and legitimacy within a similar field of tension, albeit renewed in purpose. Late 19th-century legal reflection oscillated between the two poles of accumulation of experience and comparative analysis.

2. Comparing labour laws: *The Commissione per lo Studio dei Contratti Agrari e del Contratto di Lavoro*

Such a complex coexistence of contradictory drives is well depicted by the contrasts operating within contract law, a sectoral echo of a wider debate that affected the entire legal system. The paradigm of contractual freedom represented a pivotal challenge in reconciling the technical-dogmatic structure of legal knowledge and the modern social movement. More specifically, the jurists' consideration of the social question almost completely coincided with, and was resolved in, the issue of the labour contract and its legal regulation.[5]

In Italy, the development of the employment contract in its final form is primarily attributable to extra legislative bodies, predominantly judicial activity and negotiation practices. However, a significant institutional shift occurred during the decade of intermittent activity of the Government *Commissione per lo studio dei contratti agrari e del contratto di lavoro*.[6] Established in 1893 in response to the outbreak of social conflict, the Commission was tasked with studying and proposing modifications to existing law regarding agrarian and labour contracts. After a difficult start, the Commission completed its work in twelve sessions, from January 8 to 20, 1894. Reconstituted in 1901, it produced a reform proposal the following year, which, however, never became law. A closer examination of the topics covered and the discursive strategies employed by its members, who were predominantly jurists rather than politicians, reveals the broader significance of this experience beyond its immediate legislative impact. The Commission's efforts contributed to defining key concepts in the field

[5] More than by legal historians (recently Cazzetta, 2023), the issue of the development of the employment contract in Italy has been widely addressed by labour law scholars. One may refer to, among others: Giugni (1979), Mengoni (2000), and Napoli (2003).

[6] References to the work of the *Commissione per lo studio dei contratti agrari e del contratto di lavoro* can be found in Pino (1984; 1989), Castelvetri (1987), Vano (1987), Passaniti (2006), Marchetti (2006), all focused primarily on the theoretical weaknesses and lack of impact inherent in its arguments.

of labour law, emerging from social complexity and developing as a more or less conscious combination of tradition and confrontation.

Discussions, as well as writings, of Emanuele Gianturco, Giuseppe Salvioli, Pietro Cogliolo, Lodovico Barassi, and Vittorio Emanuele Orlando, reveal a pervasive critique of the legal system's inadequacy to address the complexities of the unified state. Even the 'purest' legal reconstructions could not avoid confronting the inequalities and injustices that arose from applying the symmetrical principles of bourgeois law to the diverse needs of various groups and classes linked to the industrial reality.

The critique of the existing law, however, was not the only common denominator. Equally widespread within the Commission was the adherence to the liberal legal tradition and the rigid dogmatic frameworks of legal methodology in interpreting and addressing these phenomena. The renewal of legal science driven by modern transformations occurred within a still incomplete consolidation of the national unity of civil law, which pushed the first special/social laws to the margins. The response to calls for change involved constructing a systematic order that strongly reasserted the historical necessity of codified principles, forcibly rooting them in ancient law teachings (not only Roman law, as this paper will attempt to demonstrate), while also striving to broaden their original scope to include new social demands.

The Commission's preparatory works, the minutes, and the reports on subsequent legislative projects clearly show the caution in developing new categories and the effort to adapt traditional categories to the renewed dimension of labour by jurists who moved 'against' but simultaneously 'within' common civil law (Cazzetta, 2021, p. 121; 2023, p. 139). Article 1 of the ministerial decree of July 29, 1901, which reconstituted the Commission, merely referred to "modifications to be introduced into existing law regarding agrarian and labour contracts," aimed, at most, according to President Bruno Chimirri, at "filling gaps" (Chimirri, 1902, p. 13). "By adopting the form of a special law, it was not intended to change the

legal basis of the employment contract, which continues to be regulated by the general principles of the civil code" (p. 35). The program of reconciling law and society had to contend with the resistance of the ancient scheme of *locatio* and could only be presented in terms of amplification of the sparse codified regulation, certainly not its radical reversal.[7] While single remedies discussed by the commissioners—such as respective obligations of the parties, just causes for termination of the employment contract, weekly rest, rules on payment of wages, abolition of the truck system, nullity of constraints and agreements detrimental to freedom—defined the key lexicon and core concepts of the labour discourse, the celebration of the flexibility of timeless principles capable of giving "legal expression" to "new phenomena" allowed for overcoming the limits of the code while remaining within its framework (Castelvetri, 1994, p. 239).

However, it would be oversimplifying to read this story solely through the lens of legal scholarship's habitual reluctance towards novelty, or worse, as Aldo Mazzacane (1986) warned, as merely indicative of the "theoretical weakness of confused minds" (p. 21). Amidst the general crisis that challenged the values of the liberal state, the ambiguous positions of legal culture testified to the deliberate attempt to control modern social complexity by guiding it within well-defined long-standing coordinates. The intention remained to establish fair and precise norms to regulate contractual relationships that provoked the greatest frictions, "to enact a law of conciliation and social peace, for all classes, for all interests in the most sincere and rigorous respect of legal equality and contractual freedom of the parties and the purest and most valuable Italian legal traditions" (Cavagnari, 1902, p. 8).

The reconstructive tasks and legitimacy strategies accompanying the expansion of the legal realm with new social data went beyond solely resorting to the reassuring stability of the codified norms. The formalisation

[7] The regulation of dependent work in the 1865 Italian Civil Code was limited to a single provision: "No one can be compelled to dedicate their work to the service of another except for a limited time or a specific undertaking" (Art. 1628).

of social conflicts through timeless categories is certainly one of the paths along which the legal discourse on labour unfolded. Another, closely linked to the first as an identity trait of early labour law, is that of encounters with juridical cultures and crossing of national borders.[8]

Comparative analysis proved to be particularly well-suited to the reformative effort undertaken by the Commission. On the one hand, the relevance of such an approach was linked to the concurrent and more general internationalization of human affairs. On the other hand, the labour question represented a classic example of a 'modernization problem' that cut across European national experiences and required, indeed inspired, the collection of persuasive examples (Amorosi, 2020, 2023; Mazzacane, 2001). The awareness of new and common 'labour problems' by the continental lawyers enhanced the adoption of comparison in combination with (or as a substitute for) the *auctoritas* of the tradition in conceiving and legitimising legal remedies. Hand in hand with the self-representation of the jurist as a catalyst of cultural unification and a promoter of national identity, the accumulation of legal experience of the past was also soon flanked by a varied set of procedures and approaches adopted at different levels of legal cultures to "compare, contrast and introduce foreign solutions to the conflict between capital and labour" (Vano, 1990, p. 238).[9]

From this perspective, the *Lavori Preliminari* to the work of Commission by judge Camillo Cavagnari (1901), aimed at collecting and systematizing all relevant normative material, can be analyzed as an exemplary paradigm of a rather widespread attitude among all the protagonists and in all phases of the nineteenth and twentieth-century reflection on the labour contract.[10] Primarily a practitioner of law rather than an academic,

[8] On the efficacy of comparative practices in solving the most pressing problems of Italian industrial relations see Vano (1990), Gaeta (2021), Amorosi (2023).

[9] We are referring to a legal-historical stage when, due to the heterogeneous nature of the phenomenon observed and its limited methodological rigour, it is not yet appropriate to speak of comparative law as a fully established scientific discipline, which is typically recognized as a 20th-century development (Petit, 2001).

[10] Camillo Cavagnari (1853-1904) was a lawyer and judge endowed with a reformist spirit and a keen sensitivity to social issues. He is notably remembered in his role as a judge

Cavagnari devoted the first and largest part of the volume to the examination of judicial decisions and the resolutions of *probiviri*, reserving only the final section for "principles and doctrinal issues". At the centre, an entire section titled "The Labour Contract in Comparative Legislation" was dedicated to the Belgian law on labour contract of 1900. This first prototype of organic regulation of the matter, as well as the discourses of Belgian doctrine and the draft laws that preceded it, figured as an unavoidable reference[11]. The "very recent date" of its enactment, the "process followed in its legislative elaboration", the "affinity of this process with that taking shape in the scientific and practical tendency in our country", the "common necessity of Belgium and Italy to appeal to a special law regulating the contract of employment, the occasion of the revision of the civil code being lacking and still far off" (p. 164), - but at the same time without leaving the confines of the civil law: all this made Belgium the main interlocutor in defining contractual parties and obligations.

The examination of comparative legislation also extended to include provisions related to the labour world in a broader sense. Based on the premise that "some countries have adopted the system of regulating labour contracts solely through the general provisions of the civil code, others have included general rules in the code and then established specific laws and regulations for workers and workplaces, while others have adhered exclusively to the system of special laws" (p. 255), the analysis proceeded to review labour regulations within various codes (Napoleonic, Germanic, German commercial, Portuguese, Swiss, Russian, Baltic, English laws, Austrian, Spanish, Chilean, Argentine, Mexican, and "other

for the courageous decision of the Milan Court in 1894, which asserted the autonomy of contractual liability for workplace injuries, distinct from the scenario of an employer's faultless conduct. See Trib. Milano, June 27, 1894, Cantimorri v. Ferrovie del Mediterraneo, *Monitore dei Tribunali*, VIII, 614. He is also the author of numerous contributions to law and social question: see, for example, Cavagnari (1891).

[11] The 1886 workers' strikes, along with the subsequent inquiry into the social conditions of labourers, marked the starting point for the development of Belgian labour contract legislation. The long process of drafting this law is detailed in Nandrin (2019). See also Chlepner (1955) and Horion (1965).

codes") and special laws (Russian laws on agricultural workers, Russian laws on industrial establishments, Hungarian, Swiss laws on factory labour, German imperial industrial laws, Saxon laws on domestic workers, Austrian imperial industrial laws, English, Belgian, French industrial laws, and "laws of other states").

It is evident that the 'competitive drive' that characterized relations with foreigners during the years of the Unification was now being reshaped due to the predominance of 'technical objectives' and, to some extent, was softened. There was a shift towards accepting and considering labour law solutions from other countries as essentially compatible with the domestic legal system. Openness to directly incorporating these solutions into the national framework was accompanied by a recognition that studying foreign labour laws was a necessary step in developing national scientific knowledge not only because it provided new solutions but also because it offered a 'protect' way for them to enter the system: the guarantee of authority was here not linked to antiquity but to the sharing of principles. Comparative analysis became a routine tool for every jurist, no longer requiring special theoretical justification. The formulation of vague and general criteria supported the receptiveness of the legal order to such comparative approaches, such as recognizing in foreign laws and institutions an "efficacy of moral constraint beyond their borders" (Cavagnari, 1901, p. 364). From the standpoint of ethical principles like solidarity, community, brotherhood, and charity, the broad range of referenced laws could only be deemed foreign in form ("*forestiere solo di forma*").

However, the transnational component of legal reflection cannot be simplistically summarized by speaking of 'receptions' and 'imitations' of European models (such as 'Germanization' of Italian legal culture).[12]

[12] For an insight into the historiographical categories of reception, legal transplant, and legal translation see Vano (2024), who also emphasizes the limited capacity of the reception category to grasp the awareness component in the recipient's manipulation. "In addition to terms such as reception, influence, transplantation, export-import, grafting, diffusion, terms such as transfer, irritation, contamination, hybridization, legal mutation, and cultural translation have been introduced. It should be noted that the new vocabulary

Certainly because the rejection of German and French scientific despotism and the valorisation of 'national spirit' also accompanied this phase of legal science renewal dictating original features (Cazzetta, 2012, 2014). The process of consolidation of disciplinary specializations in Italy was not untouched by identitarian logic. But above all, because a creative effort characterized the development of the legal discourse on labour in Italy between the eighteenth and nineteenth centuries, linked to the specificity of national if not even regional, labour issues. Creativity manifested in the combination of a wide range of legal experiences, including those of Oriental tradition. It was precisely the 'variable geometry' of the relationship between law and society, determining the routes and technical choices of the various legal cultures, that encouraged confrontation.

3. Who are the workers? A question from the Italian countryside

The extensive use of comparisons and references to foreign solutions in labour legislation had to contend with the pressing issues of agricultural labour, which were specific to Italy and not always endowed with transnational relevance. Yet it directed the comparative focus towards distant horizons and original directions, imparting a distinctive character to the discourse on labour contracts in Italy.

By 1893, when the Commission was established, Italy was still a predominantly agricultural country. Social unrest in rural areas was a significant driving force in setting the nation's reform priorities. What Paolo Grossi referred to as "the year of grace" for the history of private law (Grossi, 1988, p. 63) saw widespread strikes among miners and factory workers in France, Germany, Belgium, and England. In Italy, it witnessed "the menacing movement, influenced by the *Fasci*, unfolding in the desolate region of

conspicuously integrates the current need to consider transfer phenomena in legal cultures in a plural manner, observing the feedback effects. Above all, it allows us to emphasize the awareness component in the path of cultural contamination of national legal knowledge" (p. 12).

Sicily" (Tartufari, 1893, p. 11). The primary goal of the *Fasci Siciliani* movement was to reform the terms of labour relations rooted in agriculture.

Their demands focused on reducing the severe exploitation that landowners and leaseholders imposed on the peasants, particularly on sharecroppers. Despite the enduring dominance of large estates, or latifundia, and the persistence of medieval contractual patterns, the social status of peasants underwent alterations that intensified internal inequalities. On the one hand, peasants had lost their common rights and civic uses following the abolition of feudalism. On the other hand, an incomplete as well as irregular penetration of capitalist management logic in the countryside transformed them into dependent workers while keeping their guise as small independent producers or partners sharing in the product (Passaniti, 2006, 2017).[13]

It was precisely the social emergency of the Sicilian countryside that prompted the institution of the Commission: that "the main form under which the labour contract must be examined is that of the agrarian contracts" (Commissione, 1895, p. 3) was a widespread conviction among the members.

The progressive inversion of the hierarchy of importance between agricultural and industrial relations at the turn of the 20th century increasingly linked the scientific development of the labour contract with the need to carve out a legal space for factory wage workers. However, the reflection on labour in industry and agriculture found a proper institutional space of intersection and overlap in the tasks assigned to the Commission (reconstructed in 1901), as well as in contractual practices and interpretive trends. Alongside wage labour based on exchange, typical of industrial reality, the problem of labour subordination involved negotiation models rooted in

[13] Despite a recent surge of interest in historical-legal studies, the historical dynamics of agrarian contracts have primarily been the focus of economic and social history research, sensitive to the changing relations of production as a result of the penetration of capitalism into rural areas and the developments within the peasant movement. Giorgetti (1974) remains a key reference on this subject.

agriculture that included association, profit sharing and risk division. In turn-of-the-century Italy, the scientific and political debate on the possibility of constructing common or parallel juridical paths for the factory worker and the labourer on the land was clearly still open. Only later would an option of legal policy reinterpret the category of subordination as the focal point and perimeter element of a more clearly defined labour law, inclined to exclude agrarian relations from its normative domain.[14]

We can turn to the studies of Cavagnari to observe how comparative methods applied to regulate dated relations, traditionally unsuitable for crossing national borders. While the flourishing of labour laws in the industrial sector fuelled the comparative enthusiasm of Italian legal scholars, the renewal of contract law in Italy had to contend with "a field still largely untouched by our legislation and that of almost all other countries: agriculture" (Cavagnari, 1901, p. 362). He admitted that "In the regulation of this changing, restless, and growing world of workers, factory workers are given preference; less attention and fewer provisions are made for land labourers" (p. 256). Evidently, the first set of issues concerned the lack of normative models. In Europe, protective legislation for agricultural workers was very late in developing, first appearing around the beginning of the twentieth century, and even later in some countries. Such a delay was probably an outcome of the conception that the employment relationship in agriculture was of a special nature, "based on residual elements of trust and subordination between master and worker, and in any case, it was considered to be of secondary importance compared with the contractual

[14] The connections between agricultural agreements and labour contracts have been primarily analysed by Italian legal historiography in terms of an alternative and mutual exclusion. Legislative deficiencies concerning farm workers have been used as evidence of the impossibility of a 'legal' history of agricultural labour in the industrial age. According to this interpretation, such history could only be defined in the negative, by its absences. For a partially different approach, see Garilli (1998), who identified "the failure to include all agricultural relations within the sphere of social situations governed by labour law" as "the result of a legal policy option that had not yet definitively emerged during the period in question" (p. 35).

model being developed in the industry" (Veneziani, 1986, p. 49).[15] It is no coincidence that the only laws referenced by Cavagnari in his review were the Hungarian law, which equated agricultural workers with domestic servants, and the Russian law concerning the service rental of agricultural labourers. These laws highlighted the workers' "ancient inferiority" (Cavagnari, 1901, p. 271), as evidenced by their obligations of obedience without question and with diligence— thus, only partially a 'virtuous' example. Another challenge mentioned was the unique extent and local specificity of Italian agrarian relations. "Foreign laws teach us many things, particularly in the industrial sector [...] in the field of agricultural labour, Italy finds itself in such a unique situation that it must, on its own initiative and based on its specific needs, provide solutions almost from scratch" (p. 259).

This isolation shaped the debate around defining the scope of the new law on employment contract. In the discussions surrounding the formulation of Article 1 by the Commission, agricultural labourers were not the primary focus. Instead, the debate intensely revolved around whether to include white-collar employees along with manual workers, rather than delving into the extent of what defined the latter group (Commissione, 1902, p. 16 ff.). Without being exhaustive, it is however important to highlight that some proposals, like Massimini's, focused solely on industrial workers. In contrast, others, such as those from Cogliolo and Gianturco, supported a broader notion of employment contracts, allowing for different subcategories, including agricultural labour contracts. Finally, the more general definition proposed by President Bruno Chimirri gained traction. "Taking into account the example of other countries, we must adopt one of these two methods: either regulate the entire matter of *locazione d'opera* in the code, or regulate with special law those more common forms that require prompt measures". His definition described "relationships of persons who provide their work under the authority, direction, or supervision of an employer or master for remuneration". It closely followed the wording

[15] On the regulation of agricultural labour and the category of *Landarbeiterrecht* in early 20th-century Germany, with a comparative focus on Italy, see Keiser (2021).

of the corresponding article in Belgian law: "*La présente loi régit le contrat par lequel un ouvrier s'engage à travailler sous l'autorité, la direction et la surveillance d'un chef d'entreprise ou patron* [...]".

The drafters of the subsequent 1902 labour contract bill were dissatisfied with this solution, considering Italy's unique context. If, in accordance with "the spirit [...] of the most advanced countries", the law was to regulate "those forms and contractual relationships that not only give rise to greater friction and more frequent disputes, but also meet the most pressing economic, legal, and social needs" (Relazione, 1902, p. 7), mere transposition of the Belgian provision was not sufficient. Their report pointed out that "the Belgian law only addresses factory workers, who are indeed the typical worker." Strict adherence to the foreign model had to address the urgency to "avoid unfair exclusions", such as those concerning "agricultural workers in their most varied categories, who, according to the common meaning of the word *operai* (*ouvrier*), could not be considered as such" — primarily sharecroppers. This led the drafters to add the words *"e altro lavoratore manuale"* ("and other manual worker") to the corresponding Italian article (p. 7).

4. "Due leggi indiane"

While predominantly influenced by solutions from European industrialized countries, Italian law scholars drew upon a broader array of legal and cultural references. The examination of Russian and Hungarian laws regulating rural labour contracts serves as an example. Furthermore, the focus on the coexistence and occasional convergence of agricultural and industrial working models enables us to identify certain late nineteenth-century comparative reflections where legal frameworks from Oriental traditions were proposed to address new or evolving social relations. The year when the Commission inaugurated its work also marked initial efforts to construct the legal framework of the employment contract in other forums. One of the first doctrinal contributions was an article by Pasquale Jannaccone, "Il Contratto di lavoro", that appeared in the Pisan journal *Archivio giuridico*

in 1894.[16] Jannaccone perceived the employment contract as "the particular form that this legal relationship has taken due to the new economic and social conditions that have resulted from the rise and flourishing of large-scale industry" (Jannaccone, p. 111). Yet, he built his essay around the significance of the ancient remuneration model of product sharing, typical in agricultural labour. The aim was to restore the principle of exchange and the proportionality between exchanged services as a fundamental element of the legal regulation of labour. He argued that, although these characters "should never be separated from the remuneration of labour", they are "gradually altering, and sometimes disappearing altogether, as in slavery, or becoming so obscured that they are hardly visible, as in pure wage labour" (p. 113). According to Jannaccone, the system of product-sharing in agricultural work instead maintained this essential correspondence. Surprisingly, this model was referenced and invoked through the definition found in Article 11 of Brihaspati's law, which stated: "A worker can be in the service of a farmer or livestock owner and must 'without any doubt' receive a share of the grain or milk" (Jannaccone, p. 114).[17]

The attention to Oriental legislation certainly fits into the broader tendency of 'legitimization through tradition."[18] The extensive focus on the

[16] The writing essentially reproduces the thesis discussed by Jannaccone in 1893 at the Faculty of Law of the University of Turin. It was later developed into a new form as an entry in the *Enciclopedia Giuridica Italiana* (Jannaccone, 1897a) and was also published independently (Jannaccone, 1897b). After devoting a series of early contributions to this topic, mostly published in the reviews *La Riforma Sociale* and *Biblioteca dell'Economista*, he eventually shifted his focus to economic studies.

[17] Indian laws were cited from the *Sacred books of the East*, vol. XXXIII, *The minor law-books* edited by the linguist Max Müller (1889). The *Sacred Books of the East* is a monumental 50-volume set of English translations of Asian religious texts, edited by Max Müller and published by the Oxford University Press between 1879 and 1910. Specifically, *The minor law-books* is a translation of the Hindu law books written about the sixth century CE by Narada and Brihaspati. Müller's work, which circulated widely in Italy as well, was probably well-known to Jannaccone. Descendant of the Anglo-Neapolitan Winspeare family, in his youthful years he was interested in English and American linguistics and literature to the extent of publishing essays of literary criticism like *Edgar Poe's Aesthetics* (1895). Certainly, however, a crucial role was played by the cultural influences of the *Laboratorio di Economia Politica* founded in Turin in 1893 by Salvatore Cognetti de Martiis, his mentor.

[18] In his 1897 essay, Jannaccone also employed Indian provisions as proof of the universality and timelessness of *locatio* as a foundational framework for labour relations, particularly

'origins' or the 'initial form' of the employment contract, with India serving as a 'living monument' to the past, was a way to lend credibility to a theoretical perspective, if not to a more structured disciplinary approach, that might otherwise seem fragile and disjointed. It mattered little that the past being referenced belonged to a society entirely different from the industrial reality in which they were operating. This was evident in Paragraph I, which dealt with the *Specific characteristics of the employment contract in its initial form. The employment contract under two Indian laws.*

However, despite being distant in space and time, the law of Brihaspati and the law of Narada transcended the limited and often disparaging narrative of the labour contract's historical evolution, and were they only the object of a rhetorical exercise. Instead, the "two Indian Laws" took on the role of true 'active' legislative models. Their agricultural institutions were invoked as references for constructing the legal framework of the labour contract addressing the challenges of industrial modernity, from which the rural world was by no means disconnected. The Oriental legislation was in fact not relegated to the opening paragraph of the historical overview. Whereas Jannaccone's entire article took the form of a collection of modern legislative solutions from more advanced industrialised countries, the *pars construens*, in the concluding paragraph only cited the traditional Indian law. "The first article of a labour contract law could, or rather should be a faithful translation of Article 8 of the Brihaspati law: "Workers are of two classes, one of those who are paid by wages, the other of those who have a share in the profit' and the law should dictate rules for the one and the other…" (pp. 171-172).

The practical scope became even clearer in the preface of the 1897 edition, where the scholar notified the readers about the abandonment of

highlighting the lack of distinction between *locazione di cose* and *locazione di opere*. Rather than the effect of mere reverence for Roman law, the legal form of the *locazione* would be *de facto* imposed in every temporal frame when the economic relations between the parties allowed one of them to make a profit. Jannaccone, however, recognized special forms of labour contracts, which were a mix of lease and partnership or purely partnership-based, depending on the different types of remuneration.

the historical expository part and the purpose to make Oriental law "serve not as a simple narration, but as a critique and construction [...]. From this, I hope, the work has benefited by becoming more organic and acquiring clarity and effectiveness" (Jannaccone, 1897, p. 2).

The first to deal with the subject through traces and memories of Indian culture (Masè Dari, 1897, p. 814), Pasquale Jannaccone was soon joined by other civilist lawyers, all involved in the effort of defining the form and the legal content of labour relations in the industrial age, without yet totally uprooting from the old scheme of *locatio*. Isidoro Modica concluded his study "Il contratto di lavoro" (1896)[19] by observing that "It is surprising to find in the two-thousand-years-old Indian legislation certain provisions on labour contracts, which are uselessly invoked by modern legislators, and which so many centuries later could certainly find an honourable place in a modern labour code" (p. 294). Elevating Indian legal tradition to a 'virtuous' example was also a significant aspect of Carlo Betocchi's work (1897). He analysed the advantages of the remuneration system involving participation in the product or profit, "a method frequently applied in the agrarian and fishing industries [...] sharecropping is a well-known form of this principle" (p. 239 ff.). The juridical-economic organization of "certain villages of Hindustan" emerged as a model: even at the time of his writing, "the benefits of an enterprise or any work are shared among the various partners, in proportion to the work supplied, the skill deployed, or the capital employed" (p. 242).[20]

[19] The study was later completed and published independently in 1897. In the same journal *Il Circolo Giuridico,* also appeared Modica's report for the 1897 IV National Legal Congress, dedicated to the "legal construction of the employment contract".

[20] The jurist referred to S. A. Jevons (1894), *The State in Relation to Labour*: "It is said that at the present day, there is a system of social partnership in Hindu villages in which the division of the aggregate profits is made according to the work, ability, or capital which each individual contributes" (p. 147).

5. On the origins: A conclusion

Those who look at the industrial age guided by the search for 'the origins' of labour law, for a 'true' paradigm of a disciplinary field defined in its object and its aim, run the risk of being disappointed. Unlike other scientific specialisms, such as administrative law, Italian labour law did not emerge programmatically mature nor armed with disciplinary statute. Without formally breaking up with the past, it was formed through a messy yet massive accumulation of foreign examples as responses to diverse and contingent 'labour problems'. The uneven paths and drives of 19th-20th century comparative discourses reveal a highly diverse landscape of weak subjects and work arrangements, not all of which aligned with the expanding industrial reality.

This study is part of a broader research aimed at rediscovering this plurality. The hegemony of the Western industrial paradigm has long led scholars to adopt a narrow lens reading the Italian legal history of labour. The category of 'transition' has been responsible for linking modernity to the shift from multiple labour relations to standardised wage labour, thereby relegating the agricultural workers within the dimension of pre-industrialism. Engaging with 'comparative methods', both as an object of study and an analytical tool, could instead provide a historiographical alternative to the most exhausted perspectives, allowing to move beyond rigid dichotomies, such as land/factory, association/subordination, tradition/renewal, national/transnational. Although it may not resolve the dilemma of labour law's 'origins', *meeting of legal cultures* can at least challenge certain supposedly 'original' features, posing new questions to "the most Eurocentric of laws" (Romagnoli, 2011, p. 441), centred around factory wage labour.

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Eugenio Ciliberti*

THE CHINESE CIVIL CODE AS AN EXPRESSION OF THE EURASIAN SOLIDARITY

Summary

With the new Chinese Civil Code, the parallelism between Roman Law – and the subsequent tradition – and the Chinese Law has become clearer, reflecting the political and legal changes that have characterized contemporary China. Some scholars identify in this parallelism the seeds of a "Eurasian solidarity", meaning by Eurasia a single continental area inhabited by very different populations, amounting today to five billion people, many of whom have used and still use the Roman legal and religious system.

The reasons for this turning point in the Chinese legal system must be identified in the ever-increasing demand for the universalism of law, which cannot ignore the close link between the legal provision and the underlying principle. This connection is best achieved in the form of the Code, which is the highest expression of the legal culture since the system represented in it does not simply constitute a rational organization of institutes that make up a given branch of law. Still, it is also a manifestation of the same plot constituting civil society. Also, it seems clear how the codification of the common law (and the connected request for the universalism of the law) goes beyond the mere stabilization of Chinese civil law, becoming a bridge that connects China to the rest of the world, a moment of breach of the isolation of a country that opens itself to the outside, without renouncing the connotations that have always distinguished it.

Keywords: *Roman Law, Chinese Law, Civil Law, codification, Eurasian solidarity*

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1. Brief overview of the 2020 Civil Code of the People's Republic of China

During the 3rd Plenary Session of the 13th National People's Congress (NPC) on May 28th, 2020, the process that led to the approval (with 2879 votes in favour, two against, and five abstentions) of the new Civil Code of the People's Republic of China (PRC) was concluded (Porcelli, 2020a).

This process began in 2014 with the Decision of the Central Committee of the Chinese Communist Party, which provided for the development of a Code that would allow the simplification and the update of the numerous provisions on civil and commercial matters contained in approximately 250 special laws (*danxingfa*). This Decision represented the natural consequence of the announcement made in January 2011 by the President of the NPC Permanent Committee, Bangguo Wu, according to whom a socialist legal system with Chinese characteristics had now been formed and civil law and commercial law were a fundamental part of it.

A further signal, in this sense, came with the promulgation, in 2017, of the General Provisions of the Civil Law of the PRC (*Zhongua Renmin Gongheguo Minfa Zongze*), welcomed by Chinese scholars and, above all, Jiang Ping, one of the most authoritative and influential legal experts in China, who, during a conference held at the People's University in Beijing a few days after the promulgation of this Law, spoke of it as the realization of a dream that lasted for sixty years (Porcelli, 2020b).

The process that led to the development of the Civil Code of the PRC was divided into two phases, defined as 'steps' (*liang bu*). During the first phase, the aforementioned General Provisions were developed, following the model offered by the previous Law on the General Principles of 1986; during the second phase, the remaining books of the Code were prepared and the General Provisions were absorbed into them after undergoing some modifications. In January 2015, the General Office of the Chinese People's Political Consultative Conference (CPPCC) and the General Office of the State Council – which is the PRC's national governing body –

released the "Plan for the work of implementation of important measures set out in the Decision of the 4th Plenary Session of the 18th meeting of the CPPCC by the relevant departments of the Central Committee". Within this document, the draft of the Code was commissioned to the Office for Legislative Affairs of the Permanent Committee of the NPC, at the same time providing that the Supreme People's Court, the Supreme People's Procuratorate, the Office for Legislative Affairs of the State Council, the Chinese Academy of Social Sciences, and the Chinese Association for Legal Science would form a Core Group, made of members of each of these five institutions and aimed to provide research assistance and help in the coordination of the work of development of the Code (Fei, 2020).

The Core Group initially dealt with the list of various problems emerging from the application of the special laws into force on these subjects, which were submitted to the so-called 'special class' of the NPC, which, from July to November 2017, dedicated itself to the elaboration of the Draft books on inheritance, contracts, marriage and family, tort liability, and personality rights (an absolute novelty for Chinese Law), sent to the Core Group as 'internal materials not to be disclosed' in order to receive observations and advice.

This led to the creation of a Draft special part of the Code, which was examined during the 5th Session of the Permanent Committee of the 13th NPC. In November 2019, the abovementioned six books were merged with the General Provisions, already in effect for two years, to form the Draft Civil Code, which corresponded to the definitive version of the text, composed of 1260 Articles divided into seven Books, respectively dedicated to: General Provisions, Property rights, Contracts, Personality rights, Marriage and Family, Inheritance, and Tort Liability. It has been authoritatively underlined that the number of the books of the Civil Code of the PRC refers to the seven parts into which the Digest of Justinian was divided, as well as to the *Siete Partidas* of the Roman-Iberian tradition (Cardilli, 2020).

In December 2019, the 15th Session of the 13th NPC examined this Draft and made it available to citizens through the official website of the NPC for the purpose of receiving further opinions and suggestions. In this regard, it should be noted that, from June 2016 to December 2019, with the various rounds of dissemination of the Drafts among the general public, the Chinese legislator received over 1.020.000 comments and suggestions from approximately 425.000 citizens. Because of the COVID-19 health emergency, the promulgation of the Civil Code took place, following the approval of the Plenary Session of the NPC, in May 2020.

Far from representing an upheaval in the Chinese legal landscape, the Civil Code of the PRC represents the arrival point of the dialogue between China and the Roman Law tradition. A dialogue that reached important milestones during the 20th century, and then reached a more complete synthesis with the aforementioned legislative text, which aims to become a landmark not only for the branch of civil law but for the entire private sector. Some of the expressions used by illustrious scholars may help to better understand the scope of the 'Copernican revolution' brought by the Chinese Civil Code. In an interview released during the days when the NPC's work that led to the approval of the Code was underway, Fei Anling defined the new Code as an 'encyclopedia of private law' (Porcelli, 2020a). Moreover, to use the effective metaphor adopted by the Argentine legislator with reference to the *Código Civil y Comercial de la Nación*, but which is also well suited to the Chinese context, the Code becomes the sun that irradiates the surrounding planets, represented by other laws (Lorenzetti, 2017).

2. Affirmation and development of Roman Law in China

In order to understand the process – above all, cultural – which led to the drafting of the text of the Civil Code of the PRC, as well as the numerous points of contact between Chinese Law and the Roman Law tradition, it is appropriate to understand how a legal system, such as that

of the Roman Law tradition, belonging to a culture that is considerably far from the Chinese one, has managed to become the reference model for Chinese Law.

The idea of justice in China was usually divided into three areas and two modalities: the area of criminal repression; the area of administrative institutions; and the area of private interpersonal relations. The first and second areas were regulated by laws and codes,[1] while the third area was governed by principles and rules of behaviour with purely moral and social values (Schipani, 2009). Families, corporations, and villages were responsible for verifying the compliance of their associates with the aforementioned moral standards. From this structure, several principles common to each of the above-mentioned areas have been derived. Those are the unity of 'rites' (*li*) and 'punishments' (*xing*); the derivation of law only from the sovereign; the inequality of people under the law; the union of 'administration' and 'jurisdiction'; the absence of a dialogue between ideal rules and actual rules; the search for conciliation, based on a deeply rooted psychological attitude aimed at avoiding judicial proceedings: administration through morality, according to the three principles, derived from the Confucianism, which can be summarized as follows: generosity and understanding for others, teaching and persuading, goodness, and rigor.

In this framework, in which law is exclusively equipped with a criminal and administrative matrix, permeated by Confucianism, Roman Law plays a fundamental role. In fact, according to the research of Chinese jurists, the first manual on Roman Law ever published in the Chinese language appeared in 1904; it was the translation of a book published in Japanese since

[1] With reference to the area of criminal repression, some fundamental works aimed at the establishment of rules dating back to the mid-1st millennium BC could be recalled: in particular, the *Fajing* (lit.: *Classic of laws*), composed by Li Kui, an illustrious exponent of the Legalist School, or the *Qinlü* (lit.: *Laws of the Qin state*), based on the previous one, which later came into force throughout the territory in order to replace the laws of other states after the unification of the empire in 221 BC. Subsequently, with the last imperial dynasty, the Qing dynasty, the *Daqinglü* (lit.: *Laws of the great Qing dynasty*) was developed.

Roman Law had spread in the so-called "Land of the Rising Sun" since the times of the Meiji Restoration, in the second half of the 19th century. It is not a coincidence that the first essay on Roman Law in the Chinese language was the work of a student who had received his legal education in Japan. Moreover, in the first Chinese universities based on the Western model, Roman Law was included among the mandatory courses.

Even after the establishment of the Republic of China in 1911, following the decree on university teaching for the two-year period 1912-1913, the Roman Law course continued to be included among the compulsory ones. It remained such until 1930, when it was included among the optional courses. In this period, Roman Law studies flourished considerably, the number of manuals grew and numerous professors were sent to countries such as Japan, France, or Belgium for their preparation.

With the foundation of the People's Republic of China in 1949 and the consequent adoption of Soviet-style legal socialism, the interest in Roman Law began to decrease, until it was completely eliminated with the so-called "cultural revolution". Although the research and teaching of Roman Law had collapsed, the studies on Roman History increased considerably. During those years, in fact, numerous translations of the great Latin classics, in particular the works of authors such as Suetonius, Tacitus, Sallust, Appian, and several others, were published. It was not until the late 1970s that Roman Law made its comeback in legal education in China. Roman Law courses were incorporated into law school teachings and new textbooks were published.

However, it was in 1989 that the dialogue between Roman Law and Chinese Law opened up to new horizons. An important meeting was held between Professor Sandro Schipani and Professor Jiang Ping in the so-called Magazines' Hall (*Sala delle Riviste*) of the Faculty of Law of the University of Rome Tor Vergata. This was the beginning of a fruitful collaboration between Italian and Chinese universities, leading to the establishment of the Observatory on Codification and Jurist Training in China in 2008 in the

framework of the Roman Legal System, as part of the activities promoted by the Department of Human and Social Sciences and Cultural Heritage of the Italian National Research Council. Within the framework of this co-operation, several Chinese Roman Law scholars had the opportunity to carry out their studies in Italy, an opportunity that provided them with the tools to conduct their research not only on Japanese, French, or German texts but directly on Roman sources. Furthermore, in this cultural context, a magazine dedicated to studies in the field of Roman Law was founded, a Latin-Chinese dictionary was published, and a Chinese translation of the *Corpus Iuris Civilis* was promoted.

At this point, we need to ask ourselves what factors led to such an interest in Roman Law in China. First of all, it is impossible to adequately understand this phenomenon if it is not related to the circulation of Western culture in China. There are numerous testimonies that trace this work of contamination to the preaching of the missionaries who, since the period of the Nestorians, started in the first half of the 7th century (635 AD), followed one another in the country, until reaching, in the 16th century, the presence of the Italian Jesuits Giulio Aleni (1582-1649) and Matteo Ricci (1552-1610).[2] In particular, the latter, along with his brother Michele Ruggeri, obtained

[2] Actually, contacts between Rome and China were even more remote and are well documented in some literary sources: Tacitus, for example, speaks of a ban, introduced by emperor Tiberius, for men to use silk (Tac. *Ann.* 2.33), which has also been the subject of some critical reflections by Seneca (Sen. *Benef.* 7.9.5), leading, a few centuries later, to Justinian's imposition of a maximum price for this fabric, as well as to the deception, narrated by Procopius of Caesarea (*Bell. Goth.* 4.17) and, in partially different terms, by Theophanes (*apud* Müller, *FHG*, 4, 1928, 270, 3), which led to the overcoming of the Chinese monopoly. Furthermore, information on the atheism of the Chinese is provided by Origen of Alexandria (*Cels.* 7.63) and, in the same way, Caesarius of Nazianzus focuses on their making traditions prevail over laws (*apud* Migne, *PG*, 1862, t.38, 2, 109) (Schipani, 2009). There is also information which allows us to believe that, due to a mistake that resulted in war imprisonment, some Roman soldiers belonging to the First Legion, led by triumvir Marcus Licinius Crassus were defeated, lost their lives in the Battle of Carrhae (53 BC), in Northern Mesopotamia, while part of his men were killed or taken prisoners; others, however, took refuge in today's Kazakhstan, where they would have been taken prisoners by a Chinese expedition against the country – which culminated in the Battle of Zhizhi (36 BC) – and taken to China, in the current district of Yongchang, where they founded the city of Lijian (or Liqian) (Cardilli, 2019b).

from the emperor the permission to reside in China, which was confirmed in 1601.[3] This phase ended in 1838, the year of the death of the last Jesuit, the Portuguese bishop Caetano Pires Pereira, even if the presence in the country of some Protestant missionaries is recorded and, among them, one of the founders of the Society for the diffusion of useful knowledge in China, Karl Friedrich August Gützlaff.

Another organized presence of no small importance was that of the Portuguese merchants, who, having first landed in Canton in 1517, initially obtained the authorization to carry out commercial activities in that area, from which they were shortly afterwards expelled because of their conduct. Only in 1557, they arrived in Macao, where they remained until 1999. During their stay, the teaching of Roman Law was introduced at the local university and several Roman sources were translated into Chinese by a special *Gabinete para a tradução jurídica* (Legal Translation Agency).[4]

These may have been the moments in which the Chinese fully realized the existence of a way of thinking different from theirs, starting to question their asserted cultural superiority. It is not a coincidence, in fact, that the word 'China' in Chinese is translated into 'Zhong guo', which literally means 'the country that is at the center of the word'. This 'cultural distress' – to use the words of a distinguished Chinese scholar, Xue Jun – became more evident with the intensification of the Western presence in China, which culminated, in the mid-19th century, with the Opium Wars, which ended with the stipulation of the so-called "unequal treaties", imposing a system of concessions and mixed consular courts that judged according to foreign law. In this context, the Chinese strove to develop a cultural idea of 'the West' that was allencompassing, but its facts proved to be

[3] Therefore, it should not be a surprise that Roman Law in China initially manifested itself in the form of Canon Law, which included the regulation of marriage and family, as well as the need for consensus in agreements and the fulfillment of consequent obligations.

[4] Beyond these notes on the settlements of the Western population on Chinese territory, for the sake of completeness it should be noted that the Spanish also arrived in China in the 16th century, without settling, as well as the Dutch, who occupied the Island of Formosa (today's Taiwan) in anti-Spanish function, only to be expelled from it in 1662.

the result of a limited and stereotyped vision, aimed at satisfying the need to draw a line of demarcation between 'them' and 'the others'. In this vision, Roman Law represented the Western tradition and this statement is confirmed by some passages contained in some legal texts published in Europe and subsequently translated into the Chinese language.[5]

It is a matter of fact that the study of Roman Law in China still has considerable importance not just as a historical phenomenon, but as a current fact on which the Chinese legal system is based – in this sense, the same Xue Jun speaks about an "actualism of Roman Law" – and the related research methodology is based on the identification of traces of a continuity between past and present which allows the transfusion of ancient institutes into the contemporary legal practice. This process has gone through various phases in China and we will focus on the most important ones in the following paragraph.

3. From the 1911 Draft Civil Code of the Great Qing Dynasty to the 1986 General principles of the civil law: The historical roots of the Chinese Civil Code

3.1. Overcoming ancient Chinese law and reception of Roman law models: the 1911 Draft Civil Code of the Great Qing Dynasty

Limiting the research to the evolution that Chinese has had since the end of the 19th century and the beginning of the 20th century, it is necessary

[5] In this sense, in addition to Henry Wheaton's *Elements of International Law*, the following should be highlighted: the 1878 Theodore Dwight Woolsey's *Introduction to the International Law Designed as an Aid in Teaching and in History Studies*, which states that modern public law in Europe was founded on Roman Law; the German work *Das Moderne Völkerrecht der Civilisierten Staatenals Rechtsbuch dargestellt*, written by Johan Caspar Bluntschli in 1880, which also contains a similar notation; the ninth volume of the *Encyclopaedia Britannica* dedicated to the International Law, published in 1894 by Edmund Robertson, as well as the *Commentaries upon International Law* by the English jurist Sir Robert Joseph Phillimore, which, especially in the fourth volume dedicated to Private International Law, contain numerous references to Roman Law. Finally, in a work dedicated to law schools in Western countries, the German missionary Ernst Faber (1839-1899) underlined the importance of Roman Law within the faculties of law of European universities as the foundation of Western legal systems.

to highlight the important contribution provided by the last Chinese imperial dynasty, the Great Qing Dynasty, in the elaboration of a first Draft Civil Code. During that period, in fact, following some internal and international political events, China started a process of opening and modernization, which also passed through the law and the reception of the legal models of the Roman Law tradition.

However, it was not the first encounter that China had had with Western law. The contact with the European powers and the United States of America, as a consequence of the so-called 'unequal treaties', required the knowledge of the International Law already at the beginning of the 1860s. This situation led to the creation of an institution acting as a ministry of foreign affairs, called *Zongli Geguo Shiwu Yamen*, and, in the summer of 1862, to the foundation of the first language school promoted by the Chinese government, known as *Jingshi Tongwenguan*, aimed at training young people in translation. The teaching of International Law was also initiated and the first translations of legal texts were made, the most important of which was undoubtedly that of Henry Wheaton's *Elements of International Law*, supervised by the American missionary William Alexander Parsons Martin and published in 1864 under the title *Wanguo Gongfa*.[6]

Still within the scope of the *Tongwenguan* activities, the translation of the so-called French 'six Codes' – and, among them, of the *Code Napoléon* – was carried out in 1880 by the French chemist Anatole Adrien Billequin, who was also the author of a French-Chinese dictionary. The first-ever translation of a Western legislative text also coincides with the adoption of the *zhufa fenli* perspective, represented by Roman Law tradition, which provides for the separation of the spheres of private law and public law, as opposed to the *zhufa heti*, a typical dimension of ancient Chinese Law.

[6] Martin's translation, subsequently adapted for Japanese use and reprinted in Kyoto in 1865, makes use of some terms taken from the Chinese tradition (for example, the English term 'law' was translated into *lüli*, a word subsequently replaced by the modern *falu*) and others invented by himself (among the most important examples, the compound word *quanli*, which corresponds to the English term 'right') (Pazzaglini, 1991).

This passage gave rise to a doctrinal debate (known as the *lifa zai zheng*), originally concerning only the field of Criminal Law and subsequently extended to other branches of law, between the opposing schools of *li* (*lijiao pai*) and *fa* (*fazhi pai* or *fali pai*). The first school, led by Zhang Zhidong and Lao Naixuan, advocated reforms based on traditional Chinese Law, considered as the expression of a structure of society still strongly rooted in China at the time. The second school, represented by Shen Jiaben and Wu Tingfang, advocated a convinced reception of Western legal models, in particular those inspired by the Roman Law tradition.

This cultural climate led, in 1902, to an Imperial Decree, issued by the Great Qing Dynasty, which appointed a commission aimed at the codification of law (*Falu bianzuanhui*) – initially Criminal Law and later also Civil Law – composed of Chinese jurists who had studied in Japan and the West, among whom Shen Jiaben, Yu Liansan, and Ying Rui stood out. They were sent to England, Spain, Peru, and the United States of America to learn about and study the legal systems in force in those countries.

The work of this commission created the conditions for the elaboration of the Draft Civil Code of the Great Qing Dynasty (*Da Qing Minlü Cao'an*), which started in 1906 and concluded in 1911. The Draft Civil Code, which saw the participation of Japanese jurists Matsuoka Yoshimasa and Kotaro Shida, is strongly indebted to the systematic and conceptual model of the German Pandectist School, as well as to the contents of Japanese Law (from which Chinese Law has drawn a lot both from a linguistic and terminological point of view) and, naturally, to Chinese traditions (Porcelli, 2016).

It consisted of 1569 Articles, divided into five Books: the general principles (*zongze*) precede the books dedicated to obligations (*zhaiquan*), property rights (*wuquan*), family law (*qinshu*), and inheritance (*jicheng*).

The numerous innovations introduced by the Draft Civil Code of the Great Qing Dynasty required a work of introjection, conducted by the Supreme Court, which proved to be burdensome because of the difficulties resulting from the concrete application of the law and the ever-living

presence of customs, which ended up hindering the modernization that had in the above-mentioned Draft Civil Code its main point of reference. Despite the complicated reception of the principles expressed therein, it is possible to adhere to the opinion that the Draft Civil Code of the Great Qing Dynasty, under the influence of the Civil Codes of the countries belonging to the Roman Law tradition, broke up with the millenary Chinese tradition and opened a new path towards codification (Fei, 2013).

3.2. The 1926 Draft Civil Code and the 1931 Civil Code of the Republic of China

With the proclamation of the Republic of China and the related establishment of the Provisional Government of Nanjing, following the Wuchang Uprising that took place on 10 October 1911, the Draft Civil Code of the Great Qing Dynasty was declared 'imperfect' on 2 December of the same year. The most immediate consequence of this declaration was the reconstitution of a codification commission (*Fadian bianzuanhui*), chaired by Wang Zhounghui. This commission was joined by the French Georges Padoux, the Japanese Itakura Matsutaro, and Iwata Shin in 1916 and professor Jean Escarra in 1921. In the two-year period of 1925-1926, a new Draft Civil Code (*Minguo Minlü Cao'an*) was published. It consisted of 1522 Articles, divided into five Books and organized according to the same order as the 1911 Draft Civil Code of the Great Qing Dynasty. This Draft Civil Code, however, ended up having no following.

The National Government of the Republic of China, following the French model, promoted the promulgation of the so-called 'Six Codes', integrated by special laws. The Civil Code of the Republic of China (*Zhonghua Minguo Minfa*), drawn up in the three-year period of 1928-1930 and entered into force in 1931, fits into this context. Illustrious personalities took part in its drafting, such as Ying Shi and Huang Youchang, who were specialists in Roman Law with research experiences in Japan, Germany, and France.

The Code, still in force in the State of Taiwan, was divided into seven chapters (*zhang*), of which the following five were taken from the 1926 Draft Civil Code: persons (chapter second), goods (chapter third), legal transactions (chapter fourth), terms (chapter fifth), and negative prescriptions (chapter sixth). The innovations were represented by the first and seventh chapters, dedicated, respectively, to the principles and the exercise of rights.

The opening provision of the Code, Article 1, according to which in civil matters, where the law does not provide, customs are to be followed and, in their absence, the principles of law are to be followed, is very significant. It followed Article 1 of the Swiss Civil Code, which aimed to eliminate, from the beginning, the presence of any gaps, which in this way were absorbed within the system. Such a dictation makes clear the adherence of the developing Chinese Law to the Roman Law tradition.

The main peculiarity linked to the 1931 Civil Code emerges within the above-mentioned provision and that is the theme of customs as sources of law, which was already widely debated in the context of the dispute between the *li* and *fa* schools. Within the text of Article 1, customs are recognized as having a binding value not only according to the law (*secundum legem*), but also beyond the law (*praeter legem*), provided that they comply with public order and public morality, without any mention being made to mandatory rules; in their absence, the *ratio iuris* would have had to be resorted to. Furthermore, Articles 667 *et seq.*, dedicated to traditional society (*hehuo*), are also worthy of attention, as well as Articles 911-927, governing the *dian*, an institute of ancient origins, similar to the antichresis (Porcelli, 2020b).

With the 1931 Civil Code, the expansion of the conceptual heritage and the further approach to the Roman Law tradition became increasingly evident. According to Pound (1954), "the Chinese Civil Code is essentially the culmination for the time being of the development which had gone on continuously from the teaching of Roman law from Justinian's codification

in the Italian universities of the twelfth century" (p. 443).[7] However, the efforts made to adapt a Chinese content to a Western legislative method ended up being limited in scope. In fact, the 1931 Civil Code was a mere object of teaching in universities and had little practical application.

3.3. The advent of the People's Republic of China: from the cultural revolution to the so-called *danxingfa* promoted by Deng Xiaoping

In Maoist China, the previous legal acquisitions were not completely abandoned; nevertheless, they were neglected for some time. The reasons behind this stalemate were mainly political, to be identified in the discretionary use that the communist regime made of the law to achieve its own ideological goals.

The doctrine operates a chronological scan between the different moments in history in which 'New China' made use of legal instruments to shape its program. From 1949 to 1957, the law was mostly used for the purpose of carrying out the expropriation of assets belonging to the bourgeoisie and landowners. From 1954 to 1957, there was a first stabilization of the sources of law, with the promulgation, in 1954, of a Constitution, which replaced the 1949 Common Program, adopted at the time of the foundation of the People's Republic of China, as well as an impulse towards codification (Porcelli, 2020b).[8]

[7] Pound (1954) also added that the highly systematized modern Roman law with its abundant and scientific doctrinal writing is much better adapted to countries which had to turn rapidly from a traditional body of ethical custom and undifferentiated social control to a body of modern law than the relatively unsystematized English and Anglo-American law with its unwieldy body of reported judicial decisions and a technique of using them as grounds of or guides to decision by no means easy to learn (p. 443).

[8] It could also be operated a schematic scan, which can be summarized as follows: 1949/1957 – the development of a new legal system based on the model of the USSR; 1958/1977 – the period of the so-called 'legal nihilism'; 1978-2010 – the period of the so-called 'Open Door Policy', the rapid economic development, the gradual development of the legal science, notable achievements in the international field in terms of economic and political agreements, renewed interest in Roman Law, increasingly convinced interest in Roman and Anglo-American legal doctrines for the renewal of the PRC legal doctrine. The use of chronological scans, however, is a fairly frequent practice in the

In 1957, this push took shape with the presentation of a Draft Civil Code in 525 Articles, divided into four Books, dedicated, to the general principles (*zongze*), property rights (*suoyouquan*), obligations (*zhaiquan*), and inheritance (*jichengquan*), respectively. It constituted a form of integration between the 1931 Civil Code and the Soviet Law, which contemplated the absence of the family law, as it had a non-patrimonial nature (Ajani, Serafino, & Timoteo, 2007). However, following some 'campaigns' promoted throughout the country, it never came into force.[9]

With the Great Proletarian Cultural Revolution (*Wuchan jieji wenhua dageming*), the period of the so-called 'legal nihilism' was introduced (*falü xuwu zhuyi*), during which the role of law in the development of society and the economy was greatly reduced.[10] This situation, about which very little is known, lasted until October 1976, when, with the isolation of the Gang of Four (*sirenbang*), a new phase began, which led, in the second half of 1962, to the development of a new Draft Civil Code (*Zhonghua Renmin Gongheguo minfa cao'an*, also known as *Shinigao*, 'test draft'), divided into three Books and 263 Articles. It was notable for the significant reduction of technical terms, the liberation from the Soviet legal model, and the disappearance of the distinction between 'natural person' (*ziran-ren*) and 'legal person' (*faren*), replaced by 'individuals' (*geren*) and 'unity' (*danwei*). Furthermore, terms such as 'property rights' (*wuquan*), 'obligation' (*zhaiquan*),[11] and 'legal transaction' (*falü xingwei*) were no longer

works of scholars, both Chinese and Italian, who address the topic of the development of Chinese Law during the years of the PRC (Jiang, 1988; Cavalieri, 2001; Terracina, 2004; Ding, 2005; Fei, 2007; Schipani, 2009).

[9] The Hundred Flowers Campaign (*Baihua yundong*), in particular, must be highlighted. It encouraged the blossoming – like flowers indeed – of new ideas; the Anti-Rightist Campaign (*Fanyou yundong*), anti-Soviet in nature, which represented a reaction to the previous Campaign; the Great Leap Forward, which turned out to be a resounding fiasco.

[10] During this period, in fact, every trace of legal certainty disappeared, laws and regulations effectively lost their validity and, under the pressure exerted by the Red Guards, courts and faculties of law completely stopped functioning (Pazzaglini, 1991).

[11] The space left free by the concept of obligation was soon occupied by that of 'responsibility' (*zeren*), which soon ended up assuming the role of the main category in this matter. In this sense, an example is given by the combined provisions of Articles 73 and 78 of the 1962 Draft Civil Code, according to which the circulation of assets could take

used and, rather than 'contract' (*hetong*), it spoke of 'relationship' (*guanxi*). However, this Draft Civil Code also proved to be a failure, partly for political reasons, attributable to the strong opposition of the left, and partly for legal reasons, because, according to the doctrine, it did not delineate the citizens' legal positions clearly enough.

In November 1979, the Legal Committee (*Fazhi weiyuanhui*) of the National People's Congress established a new codification commission, chaired by Yang Xiufeng, which, presented a Draft Civil Code divided into 501 Articles in August 1980. Following further review, a second Draft divided into 426 Articles came out. However, the law could not keep pace with the economy and, consequently, these Drafts became obsolete even before they were introduced. This paradox led to a preference for the promulgation of organic laws regulating individual branches of Civil Law rather than a complete and unitary Code. Therefore, after the publication of a fifth Draft in May 1982, the codification work was interrupted. Hence, it was preferred to proceed – to use the words of Peng Zhen, who in those years was the head of a group for the drafting of the Code, composed of 36 members – with the issuing of 'retail' regulations, which would then lead, once certain completeness has been reached, to their transfusion into 'wholesale' provisions.

Therefore, during the period coinciding with the opening and reform policies promoted by Deng Xiaoping, it was preferred to promulgate laws on individual subjects (the so-called *danxingfa*), which would have allowed – to paraphrase the thoughts of Deng Xiaoping himself – to proceed in a 'cruder way' (*cu yixie*), but 'quicker' (*kuai yixie*). In this context of strong flexibility, it was renewed the interest in the Soviet Law, which represented an important point of reference for the creation of a legal

place on the basis of what was established by the law, the plan, the contract, or orally between the parties and, in the event of non-fulfilment of the duties deriving from the circulation relationship of the assets, assumed responsibility from both an economic and administrative point of view (Porcelli, 2020).

socialism, with a strong basis established on the Civil Law model.[12] Among the special laws worthy of mention, some of which remained in force until the promulgation of the Civil Code, to the following should be highlighted: the 1980 Marriage Law (*Zhonghua Renmin Gongeheguo Hunyin Fa*), in force since 1st January 1981 and amended in 2001; the 1982 Trademark Law (*Zhonghua Renmin Gongheguo Shangbiao Fa*), amended in 1992, 2001 and, most recently, in 2013; the 1984 Patent Law (*Zhonghua Renmin Gongheguo Zhuanli Fa*), amended in 1992 and, subsequently, in 2000 and 2008; the 1985 Law of Succession (*Zhonghua Renmin Gongheguo Jicheng Fa*); the 1992 Company Law (*Zhonghua Renmin Gongheguo Gongsi Fa*); the 1999 Contract Law (*Zhonghua Renmin Gongheguo hetongfa*); the 2007 Property Law (*Zhonghua Renmin Gongheguo Wuquan Fa*); the 2009 Tort Liability Law (*Zhonghua Renmin Gongheguo Qinquan Zeren Fa*).

Of particular importance, however, were the General Principles of Civil Law (*Zhonghua Renmin Gongheguo Minfa Tongze* or, more briefly, *Minfa Tongze*), presented in November 1985 and approved at the 4th Session of the 6th National People's Congress, in force since 1st January 1987. The Law, which was drafted with the contribution of the most influential jurists of the time (Jiang Ping, Tong Rou, Wang Jiafu, and Wei Weiying), was often considered a 'small civil code', since it regulated the different areas of Civil Law, providing the basic rules. From a systematic point of view, the reception of the Roman Law model becomes an increasingly tangible result, judging from the provision of Article 5 of the Law, according to which the lawful civil rights and interests of citizens and legal persons shall be protected by law and no organization or individual may infringe upon them.

[12] In this regard, it was highlighted how some exponents of the Chinese legal doctrine, once they came out of the period of 'legal nihilism', were strongly influenced by the Soviet doctrine – a minority in China – which saw the Economic Law as a separate branch from the Civil Law. This way of thinking had an impact on the ideology underlying the Economic Contract Law (Ajani, Serafino & Timoteo, 2007).

4. The Belt and *Road Initiative*: Towards a new definition of the idea of 'Eurasian solidarity'?

The long evolutionary path described above justifies the statement according to which with the Civil Code of the PRC the parallelism between Roman Law – and the tradition that resulted from it – and Chinese Law has become more evident, reflecting the political changes, as well as legal issues, which have characterized contemporary China, a nation which, while maintaining its own peculiarities compared to Western countries, is nevertheless committed to joining them from an economic and commercial point of view, playing an important role in the global market.

Actually, the parallelism between Rome – and, by extension, the West – and China has much older roots, as it has been observed by a distinguished Roman Law scholar, as well as a member of the Italian Constituent Assembly and mayor of Florence, Giorgio La Pira. During a speech held in 1975, La Pira (1979) stated that:

> When there was unity and peace in the West, under Augustus, unity and peace also existed on the other side of the world: in Asia, there was the Chinese empire. It is not just a coincidence; it is a fact placed for our reflection. Jesus Christ was born when the whole world was at peace (p. 625).

The pacification referred to by La Pira was certainly a political pacification. Today we are able to talk about a juridical reconciliation as well, since the Chinese legal system has placed itself in the position to incorporate the Civil Law institutions developed by Roman Law, adapting them to the millenary Chinese culture.

Like any milestone, not even this one can be considered as definitive and immutable. It is known that law is subject to a continuous evolution and the way in which it regulates the order of things today does not necessarily imply that it will be the same also in the future.

What is possible to put in place in this historical moment is an attempt to predict what the results of such a goal could lead to in the medium term, also in consideration of the conditions that already exist.

In this sense, we must refer to the expression 'Silk Road', formulated in 1877 by the German scholar Ferdinand Freiherr von Richtofen, to indicate the network of land and trade routes that have connected East Asia and, in particular, China, the Middle East, and the Mediterranean area since ancient times.

This idea, far from being merely attributable to the cartographic field, was further developed on the impulse of the Chinese government, with the *Belt and Road Initiative*, launched in 2013 with the aim of improving communication routes and the interconnection between Asia and Europe, increasing commercial exchange, establishing an international financial network, and facilitating contacts between different populations, cultures and civilizations, in the attempt to create a new model of international relations, based on mutually beneficial cooperation, as well as on the development of a shared global economy and a fair and transparent trade and investment system, based on shared rules.

The routes of the *Belt and Road Initiative*, supervised by the National Development and Reform Commission, the Chinese Ministry of Foreign Affairs, and the Ministry of Commerce, are divided into a land route, a maritime route, and several trade routes (Riccardi, 2016).

The land route includes three different routes, aimed at connecting China with Europe, the Middle East, and Southeast Asia.

The maritime route is divided into two routes: the first one connects China with Europe, winding through the Indian Ocean and the Red Sea; the second one links China to the Pacific Islands across the China Sea.

Finally, with regard to trade routes, the initiative involves the creation of new routes and the strengthening of existing ones. Specifically, there are three reference land routes. The first one starts from Xi'an (the ancient Chang'an, former capital city and starting point of the ancient Silk

Road) and runs through Central Asia, crossing the cities of Almaty (Kazakhstan) and Moscow (Russian Federation), before heading towards the Baltic Sea. The second one also starts from Xi'an and extends along the Middle East, crossing, in particular, the cities of Islamabad (Pakistan), Tehran (Iran), and Istanbul (Turkey). The third route starts from Kunming and runs through Southeast Asia, ending in Delhi (India) after crossing countries such as Thailand and Myanmar. On the other hand, there are two main maritime routes. The first one originates in Fuzhou and connects China with Europe across the Indian Ocean, on a route that, passes through Kuala Lumpur (Malaysia), Colombo (Sri Lanka), and the Red Sea, terminates in Rotterdam (the Netherlands). The second one also starts from Fuzhou and reaches the Pacific Islands via the China Sea.[13]

In the development of the *Belt and Road Initiative*, there are those who identify the seeds of a 'Eurasian solidarity'. According to Catalano (2019a), Eurasia means "a single continental area inhabited by very different populations, amounting today to five billion people, partly migrants, many of whom have used and still use the Roman legal (- religious) system" (p. 30) (Catalano, 2012; Catalano, 2013; Catalano, 2019b; Porcelli, 2019; Catalano, 2020).

Therefore, it emerges how this ideal contrasts with the opposition between Europe and Asia, according to the legend of Aeneas narrated by Virgil, which sees the Trojan hero as an element of connection between Troy and Rome, thus allowing to find the 'Asian roots of the Roman tradition' (Catalano, 2016).

The latest frontier of this 'Eurasian solidarity' is represented, in fact, by the *Belt and Road Initiative*, a project which is developed, in the ways described above, along two main lines: the *Silk Road Economic Belt* (SREB) and the *21st century Maritime Silk Road* (MSR). The strategy adopted with-

[13] In this regard, Cardilli (2019a) underlined that the one above described is "a network of roads and routes passing through the cities of different states, regulated by different laws and a cultural and religious variety, which requires a particularly flexible approach in order to achieve the final result of its realization" (p. XII).

in this initiative, which involves around 65 countries with a total population of over 4.4 billion people (therefore, the majority of the world's population), was defined in 2015 with the *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st century Maritime Silk Road*, aimed at promoting the implementation of the initiative and infusing vigor and vitality into the ancient Silk Road. This action plan, whilst describing the initiative as a positive effort to seek new models of international cooperation and global governance, fails, however, to specify its boundaries, with the consequence that its implementation still needs to be clarified (Stoeva, 2019).

At the moment, what has already been accomplished concerns the creation, by the Supreme People's Court, of two courts responsible for settling commercial disputes that may arise along the so-called 'New Silk Road.' the first, based in Shenzhen (a city with the status of a special economic zone and bordering the special administrative region of Hong Kong), is entrusted with disputes arising along the maritime routes, whilst the second, founded in Xi'an, is equipped with a residual competence.

The establishment of these courts had been preceded by the issuance of the *Provisions on Several Issues Regarding the Establishment of the International Commercial Court* by the Adjudication Committee of the Supreme People's Court, aimed at the adjudication of international commercial disputes in a fair and timely manner, in compliance with the law, as well as equally protecting the rights and legitimate interests of Chinese and foreign parties and establishing stable, fair, and transparent international law. Here, it is sufficient to note that, according to Article 1 of the above-mentioned *Provisions*, this international commercial court is a permanent adjudication organ of the Supreme People's Court, which supports parties to settle their international commercial disputes by choosing the approach they consider appropriate through the dispute resolution platform on which mediation, arbitration, and litigation are efficiently linked (Article 11, par. 2).

This tool was added to others that were already put in place by some Chinese arbitration bodies in order to settle disputes related to the implementation of the *Belt and Road Initiative*. These include the establishment of the *Silk Road Arbitration Service Centre*, based in Xi'an, by the *China International Economic and Trade Arbitration Commission* (CIETAC) (Stoeva, 2019).

Naturally, such an institutional will cannot ignore a concrete implementation by private entities, who are configured as the real players of these spaces outlined by the commitments undertaken in the documents and initiatives which have just been analyzed.

5. Brief concluding reflections on the concept of 'Legal *Pax*' and the main tasks of the contemporary Roman law scholar

The above observations, although not strictly relevant to the relationship between Roman Law and Chinese Law, ended up merging into the reflection conducted on this issue, if one reads the initiatives considered above as an expression of a new *ius gentium*, which goes beyond the *global* approach prevalent today and prefers a *glocal* vision, in which the law, representing the mirror of the society of which it is an expression, reflects the differences between different communities. Thus, rather than a unification of the law, it would be more appropriate to aspire to a harmonization, to be seen as the coordinated process of homogenization of the law, which allows to maintain the individual character, while sharing common characteristics (Porcelli, 2010; Saccoccio, 2017).

Only such an instrument allows to aspire to the peace La Pira talked about and which Cicero also referred to in the *De re publica*, where, defining the population as a multitude of human beings associated with the consent of law and the communion of utility (*coetus multitudinis iuris consensu et utilitatis communione sociatus*: Cic. *de re publ.* 1.25.39), enunciates the connection between such a notion (of a political-voluntaristic

nature rather than a nationalist one) and the need for settlement that the population itself expresses.

> Cicero, *De Republica*, 1.26.41
> [...] *Hi coetus igitur hac, de qua exposui, causa instituti sedem primum certo loco domiciliorum causa constituerunt; quam cum locis manuque saepsissent, eius modi coniunctionem tectorum oppidum vel urbem appellaverunt delubris distinctam spatiisque communibus. Omnis ergo populus, qui est talis coetus multitudinis, qualem exposui, omnis civitas, quae est constitutio populi, omnis res publica, quae, ut dixi, populi res est, consilio quodam regenda est, ut diuturna sit. Id autem consilium primum semper ad eam causam referendum est, quae causa genuit.*[14]

It has been authoritatively observed by a well-known Roman Law scholar, such as Riccardo Cardilli (2019a), that:

> The reality of Roman history and expansion is marked, on the one hand, by a complexity of choices and management of the *imperium populi Romani* with the pre-existing city communities (*civitates peregrinae liberae*; *civitates foederatae*; *municipia*) which cannot be reduced to a unitary and monolithic scheme and, on the other hand, at least from a certain moment onwards, it reflects a municipal policy of city creation, which outlines a universal empire with a deeply rooted urban plot, one of the legacies still visible in contemporary Europe, Asia Minor, and North Africa. (pp. IX-X).[15]

[14] English translation of the Latin text: [...] Such an assemblage of men, therefore, originating for the reason I have mentioned, established itself in a definite place, at first in order to provide dwellings; and this place being fortified by its natural situation and by their labours, they called such a collection of dwellings a town or city, and provided it with shrines and gathering places which were common property. Therefore, every people, which is such a gathering of large numbers as I have described, every city, which is an orderly settlement of a people, every commonwealth, which, as I said, is "the property of a people," must be governed by some deliberative body if it is to be permanent. And this deliberative body must, in the first place, always owe its beginning to the same cause as that which produced the State itself.

[15] In this sense, according to Cardilli (2019a):
Civitas (i.e. 'city') is a term that unifies the human community moment and the spatial moment, unlike the *populus* (i.e. 'people') – *oppidum* (i.e. 'fortified settlement') dichotomy (Aulus Gellius, *Noctes Atticae*, 18.7.5; Verrius Flaccus: ... *'civitatem <dici> et pro loco et oppido et pro iure quoque omnium et pro hominum multitudine* ...); 'city' is used both

The *ius gentium* was born from these needs. This expression means the set of rules embodying the idea of common law to the Romans and other populations, whose institutions did not come into force *legibus* (i.e. 'through the laws'), but *moribus* (i.e. 'through customs') with the contribution of jurists (Gallo, 2003).[16] It was therefore endowed with the characteristic of universality, of which the elasticity of the principles elaborated by the jurisprudence through its theoretical-scientific-systematic constituted the emblematic manifestation (Porcelli, 2010).

With regard to this path, the Chinese legal system has embarked on a parallel course and several aspects coincident with it when, according to Schipani (2009) the Chinese legal culture has proved itself to be aware of the delicate mechanisms of our legal systems of codified law and, more specifically, of the existing complementarity between the codes and a specialized class of lawyers who produce them, then interpret them, and improve them on a daily basis; of the role of the *principium* (i.e. 'principle') as *potissima pars* (i.e. 'the most important part') of the system; of the pluralism, even linguistic, to which the system is open in the dialogue with this *principium* (p. 535).[17]

Within this framework, Roman Law finds a new *raison d'être* and begins to be studied from a historical perspective and with a purely historical

to indicate a place, such as *oppidum*, and to indicate a legal concept, such as the set of all citizens, as well as to indicate human beings, such as a multitude of men (p. IX).

[16] In this sense, it must also be highlighted that these institutions did not only take into consideration the 'will' of the Romans, but also that of the foreigners, attributable to the other different *gentes* (i.e. 'populations') who used or could in any case use these legal schemes (Gallo, 2003).

[17] Schipani (2009) also added that:

> The reflection on codes and legislative activity is accompanied by: *a*) the development of relations between Macao and Hong Kong within the framework of the 'one country, two systems' principle, as well as with Taiwan; *b*) an increasingly dense network of cultural exchanges, visits by scholars, translation of works, integration of the negotiating activity on the international level – China's accession to the WTO is an often mentioned point of reference; *c*) the adoption of the Latin notary system; *d)* the management of the increasingly complex interweaving of economic interests and the pressing presence of international professional firms, with their practices and their negotiation models, as well as of the diffusion of the English language and the direct reading of Common Law works, judgements, etc.; *d*) a silent re-emergence of its own great culture (p. 534).

method, according to Diliberto (2012), "in the awareness that that it is a law used for the present, but intrinsically belonging to the past" (p. 64).

The reasons for this turning point must be identified in the ever-increasing demand for the universalism of law, which cannot ignore the close link between the legal provision and the underlying principle. This connection is best achieved in the form of the Code, which is the highest expression of the legal culture since the system represented in it does not simply constitute a rational organization of institutes that make up a given branch of law, but is also a manifestation of the same plot constituting civil society.[18]

However, the Civil Code represents much more for China. In fact, today China has overcome the perception gained in the 19th century according to which the Western world is a threatening force that wants to destroy China. The country feels to be and really is a member of the international community of equal position and dignity with all other countries, and also for the law a dialogue between equals is developed (Xue, 2016).

Thus, it seems clear how the codification of the common law (and the connected request for the universalism of the law) goes beyond the mere stabilization of Chinese civil law, becoming a bridge that connects China to the rest of the world, a moment of breach of the isolation of a country that, in this way, opens itself to the outside, without renouncing, for that alone, the connotations that have always distinguished it.

In this sense, the new Civil Code is a crucial milestone for Chinese law, which is grafted onto the tracks of the creation of a new *ius gentium*, where the *civitates* (i.e. 'cities') of the ancient era are replaced by contemporary States, which dialogue and cooperate with each other according to the correct trend of the global market. Also, it is precisely initiatives such as the one, already mentioned, of the *Belt and Road Initiative* that

[18] In this sense, it has been observed that the political-legal input of the principles innervates the web of legal rules and makes the Code the mediation tool for the achievement of planned objectives or, simply, for the adequate management of social reality (Cardilli, 2020).

give rise to a heterogony of ends, whereby from the economic peace, favoured by an achieved juridical peace, the coveted political peace can be achieved, and this political peace would perhaps suffocate the warlike attitudes, arising from the aim of maintaining certain geopolitical balances pursued by the great powers, and, along with them, the consequent way of reasoning in opposing blocks, each characterized by its own ideology and culture, which refers to historical periods – not very distant in time – characterized by strong diplomatic tensions and much more.

The strength of law – which a Romanist, in the specific case, but not only him, is called to interpret – is embodied within this balance. Given that, according to Spantigati (2001) "every time asks Roman Law a different historical question, according to the concrete problem of balances, that society is experiencing in that period" (p. 789), the scholar is now required to come out of his 'splendid isolation' and provide legal science, which lays the foundations of contemporary positive law, with his own knowledge, method, acquisitions and – why not? – his own outlook on life. In short, we must avoid that the study of Roman Law, in the words of Emilio Betti, becomes 'an archival science condemned to perpetual stagnation.'

A revolution of thought must start from the university lecture halls where, according to Crifò (2008), the specific teaching of the History of Roman Law appears even more fundamental than the teaching of the Institutions of Roman Law, essentially notional and based on private law, could possibly be, lacking these foundations. Precisely, this should take place if we want to avoid that, going back a few centuries, Roman studies became an auxiliary discipline to some Ancient History courses (p. 40).

Far from wanting to express value judgments, the observation of an illustrious Roman Law scholar has the merit of highlighting the importance of the historiographical method that the Romanist is required to perform; a method which does not make him a historian, but rather charges him with a particular task of undoubted decisiveness for the progress of legal science.

These final considerations – which, if interpreted in the wrong way may seem like a rant to those seeking at least partial answers regarding the future developments of Chinese Civil Law – serve to convey the idea that, with the promulgation of the 2020 Civil Code, we are not facing 'the end of history', as the American political scientist Francis Fukuyama intended it, but rather with a watershed whose relevance will be discovered over the next few years, when we will fully realize the actual practical scope of the influence of the Roman Law tradition in legal relationships between private individuals not only in China, but also in those between Chinese individuals and companies with counterparts in other countries in which the aforementioned tradition has been well rooted for centuries, in order to establish with certainty whether the substance of Roman Law, in addition to its form, has also been adopted.

That said, this journey could be concluded by observing how, in light of the reflections carried out within this essay, the example of the reception of the Roman Law tradition in Chinese Civil Law must act as a stimulus for the Roman Law scholar in the study and interpretation of classical sources, so that Roman Law can be rediscovered over and over again in contemporary legal institutions, creating a dialogue between communities based on the universal language of law and aimed at achieving stable and lasting peace and prosperity.

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ELEMENTS OF ISLAMIC LAW WITHIN THE POLISH LEGAL SYSTEM

Summary

The paper discusses elements of Islamic law present within the legal system of Poland during its modern history, particularly since 1918, when Poland regained its statehood. This phenomenon is a result of the century-old presence of the Muslim minority within Polish territories. Local law and Islamic law were already having an influence on each other in the period of the Polish-Lithuanian Commonwealth. It might be exemplified well by some issues related to the wills made by Muslims at that time. However, the norms originating from the Polish-Lithuanian Commonwealth did not affect the subject matter considerably because of the partitions of Poland. The legal position of Muslims was regulated anew during the partitions of Poland in Austria and Russia. In spite of the fact that Polish legislation is the most important for the subject matter, the former partitioners' regulations, the former Russian norms in particular, are also taken into consideration. As those regulations remained in force initially, they were significant for the discussed matter, especially in the interwar period. Thus, the paper does not concern the interaction between Islamic law and Polish law only, but also between Polish law, Islamic law, and other regional legal systems.

This paper shows that state law recognized Islamic law as the applicable law in respect of certain fields. Some Islamic law institutions were adopted by Polish law. The State also affected several norms of religious law in the religious community's internal matters. The paper analyses these phenomena, focusing on the issues of marriage and divorce as well as waqfs. It aims to specify the main factors shaping them, searching the past for solutions applicable in the future.

Keywords: *Islamic banking, Islamic law, kafala, marriage and divorce, Muslim Religious Union in the Republic of Poland, Polish legal system, Polish Muslims, waqf*

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1. Introduction

The paper discusses elements of Islamic law present within the legal system of Poland during its modern history, from regaining its statehood in 1918 in particular. It analyses the norms that remain in force as well as those that have already been repealed. Moreover, the paper does not pass over the significance of the supernational and international factors. It is important to highlight that religious law is only the internal law of religious union in the modern state and it is not in effect within the state legal order. It differs from the norms of general applicability unless the state grants legally binding force to certain norms of religious law by the provisions of statutory law or ratified international agreement (Pietrzak, 2005, p. 17). State law recognized Islamic law as the applicable law in respect of certain fields. Some Islamic law institutions were adopted by Polish law. The State also affected several norms of religious law in the religious community's internal matters (Kaczmarczyk, 2023).[1] The paper analyses these phenomena, focusing on the issues of marriage and divorce as well as *waqfs*. It aims to specify the main factors shaping them, searching the past for solutions applicable in the future.

This phenomenon is a result of the century-old presence of the Muslim minority within Polish territories. Polish Tatars were the vast majority of Muslims in Poland up to the seventies of the 20th century (Tochtermann, 1935; Ciecieląg, 2016).[2] First of them settled in the Grand Duchy of Lithuania in the 14th century. The community has survived until the present, preserving its ethnic and first of all its religious identity (Kryczyński, 1938). Local law and Islamic law were already having an influence on each other in the period of the Polish-Lithuanian Commonwealth. It might be

[1] Although the government also had a significant impact on the internal structure of the Muslim Religious Union in the Republic of Poland as well as on its everyday functioning, especially in the interwar period (Kaczmarczyk, 2023), the paper passes over this issue if it is not related to the subject matter.

[2] The whole community might be estimated at up to six thousand in the interwar period. The number decreased after the Second World War and has been rising since the last decades of the 20th century. At present, the Muslim community in Poland is also much more diverse with regard to ethnicity (Tochtermann, 1935; Ciecieląg, 2016).

exemplified well by some issues related to the wills made by Muslims at that time (Borawski & Dubiński, 1986, pp. 196–198; Zakrzewski, 2003; Winnyczenko, 2017). However, the norms originating from the Polish-Lithuanian Commonwealth did not affect the subject matter considerably because of the partitions of Poland.

The legal position of Muslims was regulated anew during the partitions of Poland in Austria and Russia (Achmatowicz, 1932; Dziadzio, 2017). In spite of the fact that Polish legislation is the most important for the subject matter, the former partitioners' regulations, are also taken into consideration. Among them, the former Russian norms were particularly significant for the discussed matter, especially in the interwar period, when nearly all of the Muslims in Poland lived on the territory of the former Russian partition (Tochtermann, 1935). Thus, the paper does not concern the interaction between Islamic law and Polish law only, but also between Polish law, Islamic law, and other regional legal systems. With regard to this, it is worth underlining that five different legal orders were in force within the Polish territory when Poland regained its statehood after the First World War. These were former Austrian, German, Hungarian, and Russian legal orders as well as the legal order of the so-called Congress Kingdom of Poland (also under Russian control during the partitions of Poland), staying in force dependent on the region (Dajczak, 2012, p. 15).

2. Regulations repealed

In the first instance, the paper focuses on historical examples of the presence of the elements of Islamic law within the Polish legal system that are not in force any more.

The above-mentioned complexity of the legal system in interwar Poland also relates to the matrimonial law, resulting in secular, religious, and mixed solutions for marriage depending on the region (Dworas-Kulik, 2017, pp. 109–110). The former German regulations, remaining binding in the western part of Poland at that time, were recognizing civil marriages

performed by the civil registrars only. Divorce was under the jurisdiction of civil law and the civil courts (Kaczmarczyk, 2023, pp. 340–341). The situation was exactly the same under the Hungarian law remaining in force in the small mountain region of Spiš and Orava on the southern border of Poland (Allerhand, 1926, p. 1). Under the former Austrian law, that remained valid in the former partition which belonging to Austria covered the southern regions of Poland, there was a legal pluralism in the field of matrimonial law, i.e. marriage conclusion. Religious law of the officially recognized religions had jurisdiction over the conclusion of marriage as well as their clergy was responsible for performing marriages and recording them into the registry. However, the civil marriages, performed and recorded by the secular registrars, were possible in some circumstances, being obligatory for the believers of the religions that were not officially recognized. Although Islam was officially recognized in Austria in 1912 by the so-called Islamgesetz, pursuant to its Paragraph 7 norms on the marriage concerning believers of the non-recognized religions applied to Muslims as well. The jurisdiction over divorce under Austrian law also belonged to the civil courts (Dziadzio, 2004, 2017, pp. 136–139). Therefore, Islamic law was not the law applicable to the marriage and divorce of Muslims in these three parts of Poland.

The situation was different in the territory of the former Russian partition, covering the former Congress Kingdom of Poland (central region) and the Eastern Territories,[3] where the state recognized only religious marriages.

As for the territory of the former Congress Kingdom of Poland, Islamic law was recognized as the law applicable to the marriage of Muslims according to Article 179 of the Law of 1836 on marriage. Nevertheless, the law included a number of provisions whereby the minimal requirements or additional solutions for such a marriage were set. Among them, the

[3] So-called Eastern Territories were the eastern and north-eastern regions of interwar Poland. Nowadays, the territory is located in a part of the Podlaskie Voivodeship and abroad: in Lithuania, Belarus, and Ukraine.

most interesting ones are regulations that are stricter than Islamic law or that are unknown to it like, for example, the minimal age of consent (sixteen for women and eighteen for men), prohibition of polygamy, and the obligation to read the banns three times. Although the clergymen were registrars for their believers with regard to the Christian denominations, the registry office records for non-Christians were kept by secular municipal or police officers. When a couple of Muslims wanted to conclude a marriage, they had to fulfill the religious rituals before an imam or other superior of a Muslim community[4] first. Then they had to visit the secular registrar accompanied by the clergyman and two witnesses. When the registrar drew up the marriage certificate, the marriage was concluded (Kaczmarczyk, 2023, pp. 333–335). The issue of divorce was under the jurisdiction of the civil courts using the rules of proceedings of general applicability. Islamic law kept nevertheless its significance because according to Article 189 of the Law of 1836 on marriage, divorce was allowed only if the relevant religious law provided for such a possibility. And the Islamic law did provide. However, the role of the clergy was not so significant. The court might only ask a clergyman (as other expert witness) to issue an opinion if there existed evidence in court proceedings pointing to the possibility of granting the divorce (Kaczmarczyk, 2018a, p. 87).

With regard to the Eastern Territories, it is worth mentioning that the former Russian regulations in the field of civil law stayed in force. However, the Commissar General for the Eastern Territories rescinded all limitations of the rights of citizens related to their nationality or religion in the field of civil law and civil proceedings by Article 1 of his order of May 15th, 1919. According to Article 90 of Volume 10, Part 1, Book 1 of the CLRE,[5] Muslims as well as members of all nations and tribes had an equal right to conclude marriages in accordance with the rules of their religious law

[4] The Muslim community (Polish "gmina muzułmańska") is the smallest organizational unit of Muslims in Poland that is equal to the Jamaat of the IZBiH. For the organization as a whole (all Polish communities) will be used the word "union" (Polish "związek", that is equal to Bosnian "zajednica").

[5] Collection of Laws of the Russian Empire (Russian Свод законов Российской империи).

or custom independent of any public or Christian church authority. Therefore, Islamic law applied to the marriage of Muslims within that area. State law established only the minimal age of consent (sixteen years old for women and eighteen for men) as well as some facilitations to make the dissolution of marriage easier in the case of a missing person or woman whose husband had been enlisted in military service (Kaczmarczyk, 2023, pp. 325–327).

It is important to underline that no restrictions on polygamy had been imposed. Religious law in the field of marriage had been granted status as state law by the former Russian regulations (Świątkowski, 1959, p. 1151). Therefore, according to Article 90 of Volume 10, Part 1, Book 1 of the CLRE, polygamy was allowed as provided for by Islamic law. Although the former Russian penal code of 1903 penalized concluding and performing bigamous marriages on the basis of Articles 412 and 413, the provisions provided for an exception. Concluding and performing a bigamous marriage was not punishable if the applicable religious norms recognized by the law provided for a special permit in the matter (Ministerstwo Sprawidliwości, 1922). The above-mentioned Article 90 itself would be enough to meet this condition, but also other provisions of the CLRE referred to polygamy. Articles 80, 82, 83, 93, 94, 97, and 1113 of Volume 10, Part 1 of the CLRE regulated the relations between the spouses of a polygamous marriage including the situation of members of a polygamous marriage in the case of conversion or death of one of the spouses. What is more, the law of succession discerned the issue of polygamy as well. According to Article 1161 of Volume 10, Part 1, Book 3 of the CLRE, among Muslims one-fourth of ancestor's realty and personalty shall fall to his widows if the ancestor had no children or one-eighth of his realty and personalty shall fall to his widows if he had any children. But, in any case, the widows should inherit their share in equal parts.[6] Even the law of general applicability issued after regaining

[6] Moreover, it is worth noticing Article 1338 of Volume 10, Part 1, Book 3 of the CLRE whereby the Islamic law was recognized as applicable law in respect of the inheritance division among Muslims. These norms concerning the inheritance law of Muslims were

its statehood by Poland noticed possible polygamous marriages of Muslims. The law of December 11th, 1923 on the pension provision for the public officers' and the regular soldiers provided in Article 80 for the situation of more than one widow left after the death of an officer or a soldier being a Muslim, whereby children of all wives shall have been considered legitimate and should have received equal amount of the orphan's pension, as well as all widows shall have shared the widow's pension in equal parts.[7] That means the Muslim polygamous marriage was not only legal and valid, it also was well regulated.

In 1932 the new penal code was issued to unify the criminal law in Poland. According to Article 197, concluding and performing a bigamous marriage was penalized without any exception. However, no other changes were made in the field of civil law. Therefore, it is argued that since 1932 concluding and performing a polygamous marriage have been penalized indeed, but a polygamous marriage still remained valid even if concluded after 1932 (Kaczmarczyk, 2023, p. 355).

Because of the independence, referred to in Article 90 of Volume 10, Part 1, Book 1 of the CLRE, the authorized Muslim clergymen, who were the superiors of the Muslim communities (literally Muslim parishes according to the Russian legislation), shall have been registrars, keeping the registry office records for the Muslim population pursuant to the norms of Articles 905–910 of Volume 9, Part 1, Book 2, Article 92 of Volume 10, Part 1, Book 1, and Article 1348 of Volume 11, Part 1, Book 6 of the CLRE.

More clergymen than before the First World War got such authorization in interwar Poland because superiors of all Muslim religious communities were authorized to keep the registry office records (Archiwum Akt Nowych, w Warszawieinventory of Ministerstwo Wyznań Religijnych I Oświecenia Publicznego (further "AAN, MWRiOP"), file no. 1472, p. 11, 13–14; AAN,

repealed by January 1st, 1947 pursuant to Article I and Article XVI Clause 1 of the decree of 1946 on the provisions introducing the inheritance law.

[7] That act was repealed by Article 99 Paragraph 2 Clause 1 of the decree on the general social provision in 1954.

MWRiOP, file no. 1479, pp. 30–32, 44; Lietuvos Centrinis Valstybes Archyvas, collection no. 51, inventory no. 4, file no. 755, p. 250, 252).

Whereas religious law applied to the relations based on marriage, the Islamic law applied to the divorce of Muslims as well. According to Article 98[1] of Volume 10, Part 1, Book 1 as well as to Articles 1345, 1392, and 1399 of Volume 11, Part 1, Book 6 of the CLRE, the Muslim religious courts had jurisdiction over divorce cases. In fact, Imams were those who had jurisdiction of first instance over such disputes. Moreover, they also decided on matrimonial property rights resulting from the divorce but only based on the mutual agreement of the spouses. If one of the spouses did not agree on his jurisdiction or did not accept his judgement, the jurisdiction over such a property dispute shall have been taken over by the civil court.[8] The higher religious authorities decided on such cases of second instance.[9]

However, all the posts in the Muslim higher religious authorities had been unfilled since the First World War until 1925 when Mufti in Vilnius[10] and his deputy were elected to their posts (Kaczmarczyk, 2023, pp. 128–132, 175–195). Since then, the Mufti shall have been acting as the court of second instance for divorce cases. Nevertheless, he did something more. Shortly after the election, he issued (probably) under the pressure of the public authorities a directive of internal applicability whereby imams became obliged to hand over every judgement of first instance in the case of divorce to the Mufti for approval regardless of the intent of the parties (AAN, MWRiOP, file no. 1486, pp. 28–32).

Then the legal status of the Muslim Religious Union in the Republic of Poland (Polish "*Muzułmański Związek Religijny w Rzeczypospolitej*

[8] On the same basis of mutual agreement, Muslim religious authorities had jurisdiction over the casus of property litigation among Muslims as well as the division of inheritance among the Muslim heirs in accordance with Articles 1346, 1399, and notice to Article 1399 of Volume 11, Part 1, Book 6 of the CLRE.

[9] In accordance with the former Russian regulations, such a judgment of the higher religious authorities might be controlled by two further instances of public administration – the governor and then the minister of internal affairs.

[10] Vilnius was located within the Polish border between 1919 and 1920 as well as between 1922 and 1939.

Polskiej"; hereinafter "MRU"), which was the only religious union of Muslims in Poland at that time, was regulated anew by the Act of April 21st, 1936 on the relation between the State and the Muslim Religious Union in the Republic of Poland (hereinafter "the Act of 1936"), and by the internal statute of the MRU (hereinafter "the Statute of 1936") issued and approved by the governmental order of August 26th, 1936 on the recognition of the Statute of the Muslim Religious Union in the Republic of Poland in accordance with Article 2 of the Act of 1936. These regulations concerned some of the above-mentioned matters. The leaders of the Muslim Religious Communities lost their jurisdiction in the field of divorce. According to Article 16 of the Act of 1936 and Paragraph 14 of the Statute of 1936, if a law provided for the jurisdiction of the Muslim religious authorities in the matter of divorce or nullity of marriage, the Supreme Muslim Council, that was established on the basis of the provisions of the Act of 1936, shall have had jurisdiction over such cases of first and last instance.

However, the public prosecutor and the civil courts gained the competence to verify the lawfulness of the judgements of the Supreme Muslim Council. Where Volume 10 of the CLRE was in force, the imams retained their right to perform marriages and keep registry office records pursuant to Article 31 of the Act of 1936 and Paragraph 30 Section 2 of the Statute of 1936. If authorized by the regional public authorities at the instance of Mufti Article 31 also modified some issues related to their responsibility as registrars as well as the administrative supervision over them.

The above-mentioned norms of the Act of 1936 and the Statute of 1936 as well as the Law of 1836 on marriage, and the provisions of the Collection of Laws of the Russian Empire concerning marriage and divorce have been repealed since the beginning of 1946. At that time, the reforms of the matrimonial law, and the law on the civil status records entered into force. Since then, the state recognizes secular civil marriages only and the registry office records have been fully secular as well. Therefore, religious law has had no significance in the matter anymore (Kaczmarczyk, 2018a, pp. 82, 92–93).

After the ratification of a concordat, Poland provided the Roman Catholic clergy with the right to perform civil marriages. A number of legal acts were amended in 1998 to guarantee churches and other religious unions[11] equal rights in the matter. However, several requirements have to be met if the marriage performed in the religious form shall have an effect in the field of civil law. First of all, the nupturients shall make a joint declaration of will during the conclusion of the religious marriage that they want the marriage to have an effect in the field of civil law as well. Then the civil (secular) registrar needs to draw up a marriage certificate. The latter is constitutive of the existence of civil marriage.

Nevertheless, the catalogue of the churches and other religious unions having the right to perform civil marriages was limited to these churches and other religious unions only if their situation is regulated by an individual law that invests such a church or another religious union with that competence. That is an obvious infringement of the principle of equal rights of churches and other religious unions as expressed in Article 25 Paragraph 1 of the Polish Constitution (Pietrzak, 2005, pp. 255–256).[12] The Roman Catholic Church, the Polish Autocephalous Orthodox Church, the Evangelical Church of the Augsburg Confession, the Evangelical Reformed Church, the Evangelical Methodist Church, the Baptist Christian Church, the Seventh-day Adventist Church, the Polish Catholic Church, the Jewish Religious Communities,[13] the Old Catholic Church of the Mariavites, and the Pentecostal Church are the churches and the other religious unions that were invested with the right to perform civil marriages (Infor, 2011). The individual laws of four churches and other religious unions, including three issued before the Second World War, do

[11] "Churches and other religious unions" is a legal term used in contemporary Poland for religious organizations.

[12] This is because there are fifteen churches and other religious unions in contemporary Poland whose legal position is regulated by an individual law, and there are nearly two hundred churches and other religious unions operating on the basis of entry into the register of churches and other religious unions.

[13] It is the name of the single union formed by the Jewish religious communities.

not provide for such a possibility. MRU is one of the churches and other religious unions deprived of the right to perform civil marriages.[14] It is also important to underline that the MRU is not the only religious union of Muslims in contemporary Poland. There are four other religious unions of Muslims functioning on the basis of entry into the register of churches and other religious unions (Kaczmarczyk, 2016). These four unions have also no possibility to participate in the performance of civil marriages as well as all other churches and religious unions functioning on that basis.

It is argued that the Act of 1936 shall be amended to invest MRU with the competence to perform civil marriages as well as every new individual law regulating the position of a church or another religious union shall provide for such a competence if a certain church or other religious union expresses such an expectation. What is more, the equality of rights of all religious unions shall be guaranteed independently of the basis of their functioning.

3. Regulations in force

3.1. National regulations

The elements of Islamic law are still present within the Polish legal system, i.e., there are some provisions of national law concerning the legal institution of waqf. The provisions of the supplement to Article 1391 of Volume 11, Part 1 of the CLRE regulated issues related to waqfs in the former Russian Empire. Nevertheless, these provisions have not been exercised in Poland since regaining its statehood by Poland in 1918 (Kaczmarczyk, 2023, p. 398). Waqf (Polish "*wakuf*") was regulated anew and adopted into the Polish legislation by the above-mentioned Act of 1936. The Statute of 1936, issued under that act, also comprises some relevant provisions.

According to Article 43 of the Act of 1936, real property only may be invested with a status of waqf. The benefits of waqf shall be allocated for

[14] The other three are the Eastern Old Believer Church (position regulated in 1928), the Karaite Religious Union (position regulated in 1936), and the Mariavite Catholic Church (position regulated in 1997).

charitable or religious and educational purposes only. In parenthesis, it is worth mentioning that this regulation is partially copied into Paragraph 44 Section 1 and Paragraph 45 of the Statute of 1936. Article 44 of the Act of 1936 says that waqf is a property of the MRU as a whole that cannot be acquired by prescription, or encumbered,[15] or put up for auction, or distrained, or sold, or alienated in any way. The exchange for another real property is only allowed if approved by the Minister of Religious Affairs and Public Education (Polish "*Minister Wyznań Religijnych I Oświecenia Publicznego*"),[16] with the approval of the Minister of Treasury (Polish "*Minister Skarbu*"),[17] and the Minister of Agriculture and Agricultural Reforms (Polish "*Ministr Rolnictwa I Reform Rolnych*")[18].

However, the expropriation is possible in accordance with state law as it stands. With regard to exchange, pursuant to Paragraph 44, Section 2 of the Statute of 1936, such an exchange is allowed only if the waqf is in serious danger of damage and if the exchange does not decrease the value of and substance of the waqf. Taking the above-mentioned regulations under consideration, it is argued that the institution of waqf in Poland meets the requirements of modern national legislation as well as adopts solutions originating from the Hanafi school of classical Islamic jurisprudence (Kaczmarczyk, 2015, p. 70). Moreover, Article 45 of the Act of 936 says that the general rules on taxation apply to waqf, including

[15] It is argued that a waqf must not be encumbered not only with the mortgage but also with any right that is recorded in the land and mortgage register, the limited real rights in particular. But a waqf might be the subject of a rental or usufructuary lease (Zaporowska & Zaporowska, 2011b, pp. 91–96).

[16] The Minister of Religious Affairs and Public Education is the name of the minister functioning in the interwar period only. It is acknowledged that their competence in the matter lies in the hands of the Minister of Internal Affairs and Administration at present.

[17] Although the Minister of Treasury existed in modern Poland, their competence was completely different from the competence of the Minister of Treasury existing in the interwar period who exercised the competence of the modern Minister of Finance. Therefore, it is acknowledged that the above-mentioned approval in the matter lies in the hands of the Minister of Finance (Polish "*Minister Finansów*") at present.

[18] At present, their competence is exercised by the Minister of Agriculture and Rural Development (Polish "*Minister Rolnictwa I Rozwoju Wsi*").

concessions or tax reliefs. It has resulted in the taxation of waqfs since 1936, with various forms of land tax in particular (Kaczmarczyk, 2018b).

According to Paragraph 5, Clause 12 of the Statute of 1936, the management and supervision over waqfs belong to the Mufti of the MRU. Moreover, in accordance with its Paragraph 46, the All-Polish Muslim Congress, upon request of the Supreme Muslim Council, shall have issued the detailed provisions on the administration of waqfs as well as rules of acceptance of real properties that are to be waqfs. Nevertheless, such regulations have never been issued.

The procedure of investing a real property with the status of waqf is quite complicated. In accordance with Article 43 of the Act of 1936, if one endows the MRU with an urban or rural real property for its charitable or religious and educational purposes by a donation or will, the competent authority of the MRU may invest that estate with a status of waqf by its resolution on acceptance of the donation or bequest. Such a resolution needs the approval of the Minister of Religious Affairs and Public Education acting with the approval of the Minister of Treasury and the Minister of Agriculture and Agricultural Reforms for its validity.[19] The Supreme Muslim Council is the competent authority of the MRU in the matter pursuant to Paragraph 12, Clause 5 of the Statute of 1936. The resolution of the Supreme Muslim Council shall specify the purposes of waqf as well as the way of administering the waqf. It is important that the unencumbered real property only may be granted with the status of waqf.[20] Information on investing a real property with the status of waqf should be entered into the land and mortgage register. The approved resolution of the Supreme Muslim Council is considered a sufficient ground for making an entry of that fact into the land and mortgage register (Zaporowska & Zaporowska, 2011b, pp. 90–91).

[19] The above remarks on the nomenclature of the competent ministers apply here and below as well.

[20] Such a fixed property must not have been encumbered not only with the mortgage but also with any limited real right as well as with any limitation in the disposal of the property that is entered into the land and mortgage register (Zaporowska & Zaporowska, 2011a, pp. 143–146).

The provisions provided also the possibility to invest in the real properties that had been in the hands of the MRU before the Act of 1936 entered into force with the status of waqf. According to Article 46 of the Act of 1936, the Supreme Muslim Council shall have prepared the list of real properties that met the conditions for being invested with the status of a waqf and shall have presented it to the Minister of Religious Affairs and Public Education in six months from the day when the Act of 1936 went into effect, that shall have been not later than October 24th, 1936. The Minister acting with the approval of the Minister of Treasury and the Minister of Agriculture and Agricultural Reforms shall have accepted this list. After the acceptance, the real properties included in this list shall have gained the status of waqf.

However, the waqf status of the real properties gained in this procedure shall not prevent the individuals from laying a claim concerning such a property. This regulation was partially copied into Paragraph 47 of the Statute of 1936. The procedure, described in the previous paragraph, started and concerned nearly all real properties possessed by MRU and its legal entities at that time. The procedure was also extended to a potential new waqf based on a bequest made in 1936. Nevertheless, because of the lengthiness of the administrative proceedings as well as the severely delayed filing of the posts in the Supreme Muslim Council and the unsatisfactory performance of the MRU authorities in general, the procedure was not completed until the beginning of the Second World War.

Therefore, the real properties in question were not invested with the status of waqf. The procedure has not been reopened ever later (Kaczmarczyk, 2015, pp. 59–64, 2023, pp. 303–307, 400; AAN, MWRiOP, file no. 1485, pp. 2–8, 18–36, 41–44, 51). There is no evidence of any further attempts to invest a real property with the status of waqf. Therefore, it is argued that there is no existing real property invested with the status of waqf, referred to in the Act of 1936 as well as in the Statute of 1936, in contemporary Poland (Kaczmarczyk, 2015, pp. 70–71).

In spite of the, the regulations concerning waqfs are still in force and new waqfs may be established. It is important to underline that waqf, as a *sui generis* real right, should be based on the provisions of general applicability (Kaczmarczyk, 2015, p. 71). Therefore, it is only possible to establish such a waqf that would be owned and governed by the MRU. It is argued that such a possibility should be given to any religious union of Muslim legal positions which would be regulated by an individual law.

3.2. Supernational and international regulations

It is important to underline that Poland is an EU member state as well as a part of the global international environment, which are factors that affect its legal system.

In accordance with Article 91, Paragraph 3 of the Polish Constitution, European law shall be applied directly, having precedence over national law (Klat-Wertelecka, 2015, p. 185). One of the European regulations recognizes that Islamic banking service is available in EU member states, performing *sui generis* reception of Islamic law for assessment of the definition the Islamic banking products (Kaczmarczyk, 2017, p. 72).

Since, based on Article 509, Paragraph 1, Subparagraph 1 of the European regulation no. 575/2013 on prudential requirements for credit institutions and amending Regulation (EU) No 648/2012, the European Banking Authority shall monitor and evaluate the reports across currencies and across different business models. It also shall annually report to the Commission on whether a specification of the general liquidity coverage requirement, based on the items to be reported in accordance with the provisions of this regulation, considered either individually or cumulatively, is likely to have a material detrimental impact on the business and risk profile of institutions established in the Union or on the stability and orderly functioning of financial markets or the economy and the stability of the supply of bank lending. In doing so, it shall particularly focus on lending to small and medium-sized businesses and trade financing, including

lending under official export credit insurance schemes. In accordance with Paragraph 2, Clause i of the Article cited above, European Banking Authority shall, in the report referred to in Paragraph 1, assess among other issues the definition of Shari'ah-compliant financial products as an alternative to assets that would qualify as liquid assets for the purposes of Article 416 of this regulation, for the use of Shari'ah-compliant banks.

Indeed, Islamic banking still does not seem to be popular in Poland, but according to Finrada (2019), three banks offered an Islamic banking service in Poland in 2019. These were Dubai Islamic Bank, Noor Islamic Bank, and Shariah Islamic Bank (last paragraph).

According to Article 87, Paragraph 1 of the Polish Constitution, ratified international agreements are a source of law in Poland if published.[21] One of these agreements is the Convention on the Rights of the Child. Its Article 20 says that a child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. Such a child should be provided with alternative care ensured in accordance with each state's national laws. This care may include in particular, foster placement, kafalah of Islamic law, adoption or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background. Moreover, these provisions are strengthened by Article 5 of the Convention, saying that State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise

[21] Moreover, in accordance with Article 91 Paragraph 1–2 of the Constitution, such agreements are part of the national legal order in Poland, having direct effect and precedence over national laws if they would be incompatible with the provisions of such agreement.

by the child of the rights recognized in the Convention on the Rights of the Child.

Obviously, there are several crucial differences between kafala and adoption (Ślęzak, 2012). Because of that, kafala is a peculiar alternative care option for children deprived of a family environment (Assim & Sloth-Nielsen, 2014). It cannot be equated with adoption. What is more, the prohibition of adoption under Islamic law as well as the refusal to adopt a child in a kafala relationship do not violate the right to respect for private and family life, referred to in Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (Koumoutzis, 2021, p. 939). Therefore, although individuals in Poland are not enabled to conclude the contract of kafala, it is argued that the public authorities shall recognize the rights and obligations resulting in the kafala contract concluded abroad on the basis of Articles 5 and 20 of the Convention on the Rights of the Child.

4. Conclusion

The elements of Islamic law were and are present within the Polish legal system mainly for historical reasons. The Islamic law was the law applicable to the marriage and divorce of Muslims in interwar Poland on the territory of the former Russian partition. The Muslim religious authorities even had jurisdiction in this field within the Eastern Territories at that time. This jurisdiction could also be chosen by the parties for matrimonial property rights as well as inheritance-related cases. The Islamic law was applicable in respect of the latter as well. Obviously, state law introduced some additional regulations in the matter. That state of affairs originated in the period of partitions of Poland. The situation changed shortly after the Second World War when law in Poland was unified and secularized.

The Polish legislation also adopted an institution of waqf in 1936. Although the practical use of these regulations was unsatisfactory, the relevant norms still remain in force. Moreover, some elements of Islamic law

are present within the Polish legal system because of the international and supernational regulations.

It seems that there is still an area for development of the use of waqf in the future. Finally, it is argued that the religious unions of Muslims shall be granted the right to perform civil marriages, which would provide them with equal rights compared to other churches and religious unions in present Poland.

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The papers cover a wide range of topics, including inheritance, banking, civil procedure, marriage, military, and labour law, as well as Chinese and Islamic law. What unites them is the presentation of these topics from a developmental perspective, exploring their interaction with various - and often cross-cultural - legal traditions. Thus, the book represents a valuable piece in the mosaic of comparative legal history. It offers readers insight into the mutual influences of different legal environments, civilizations, and cultures, which are crucial for understanding today's global legal developments. The selected topics and the quality of the contributions highlight the potential of young scholars, reinforcing the belief that there is no need to worry about the future of legal history and Romanist studies - not only in Europe but also in the broader global context.

(Prof. Dr. Marko Kambič, University of Ljubljana)

The spectrum of topics discussed in the volume clearly shows the role played by legal history research in offering tools to better understand the development of different modern legal systems and the influence that ancient laws - Roman law in particular - have exerted over the centuries. In doing so, all the contributions are able to pursue the aim well described by the editors in their introduction: namely, offering a complex overview from a comparative legal history perspective of the vital process of the meeting of legal cultures that has characterized the development of legal systems since antiquity.

(Prof. Dr. Tomasso Beggio, University of Trento)

The papers span a range of topics, from new insights into ancient law and examinations of the origins of specific Roman law institutions, to contemporary legal issues and the coexistence of secular and religious legal systems in various contexts and historical periods. They may be classified into several categories, encompassing diverse fields and academic disciplines - from legal history to comparative law, and often engaging both simultaneously.

(Prof. Dr. Ehlimana Memišević, University of Sarajevo)

ISBN 978-9926-544-14-0