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INTRODUCTION

After a long break we proudly present the second volume of the UWM Law Review. This volume consists of two parts. In the first part, emphasis is put on the international courts' decisions and its implication for the national law. This discussion is very desirable as the international law and state law are connected more than ever. A very interesting article of Ondrej Hamulak discusses ratification of the Treaty of Lisbon by Czech Republic. The article of Katarina Prikazka shows the size of impact of the EU court decisions. The article of prof. Alessandro Hirata proves how interesting the study of ancient law can be, and how far it is possible to stretch the area of meaningful legal research.

The second part of the volume are the Proceedings of the Conference on the Historical Roots of Contemporary Immovable Property Law, which is organized annually. Contributions show a variety of approaches to the topic. Prof. Sitek's article discusses it from the point of view of the public law. Marek Sobczyk comments on the problem of anticipated injury to immovable property. The main goal of all this series of conferences is to show the link, between contemporary law and Roman law, and to show how important is knowledge about the common roots of the European legal systems.

We would like to thank prof. Charles Szymański, the first chief-editor and founder of the UWM LR, whose work and innovative ideas cannot be overestimated. The new team of editors hopes to keep up to the high standards established by prof. Szymański.

Editors
ARTICLES
URKUNDEN ZUM NEUBABYLONISCHEN GESellschaftsRECHT

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Abstract: Mesopotamian society experienced great development during the Neo-Babylonian period. The prominence of Mesopotamian society is clearly shown in the legal field, evidenced by the numerous documents of that period. In this article, some documents related to the establishment of the partnership harranu are evaluated. These harranu-documents form a true corporate law of this period, revealing a high development degree of the legal practice that met the need of the negotiating of that time.

1. Einleitung

Die Quellenlage aus der neubabylonischen Zeit, die am Anfang des ersten Jahrtausends v. Chr. beginnt, beinhaltet fast keine Überlieferungen von Gesetzen: Überliefert wurde uns nur das sogenannte Neubabylonische Gesetzesfragment, das auf einer Tontafel erhalten ist, von seinen 15 Paragraphen sind nur zehn lesbar. Es handelt sich um eine Schreibübung, die um 600 v. Chr. Entstanden ist. Übereinstimmungen der Normen mit Quellen der zeitgenössischen Rechtspraxis zeigen aber, dass es sich wohl um geltendes Recht gehandelt hat.

Andererseits gibt es einen Bestand zahlreicher Urkunden aus neubabylonischer Zeit, die in ihrer großen Mehrheit noch nicht publiziert worden sind.

Diese Urkunden zeigen aber, dass es sich hier um eine rechtlich und wirtschaftlich sehr hoch entwickelte Gesellschaft handelt. In der neubabylonischen Zeit kann man Verträge und geschäftliche Konstruktionen von großer Komplexität finden, was außergewöhnlich für diese Epoche ist, auch im Vergleich zu anderen Rechtskreisen.

Zweck dieser Arbeit ist es, Urkunden zum Gesellschaftsrecht -insbesondere Begründungsurkunden – in neubabylonischer Zeit zu präsentieren, um einen Überblick auf die Rechtslage über die Geschäftsunternehmen in dieser Zeit zu gewinnen. Natürlich haben diese Urkunden nichts mit dem modernen Gesellschaftsrecht zu tun\(^3\), aber sie stellen ein ähnliches wirtschaftliches Phänomen dar, was aus den Zielen dieser Verträge hervorgeht.

Das kennzeichnende Stichwort, nach dem in diesen Urkunden gesucht wird, ist das Wort „ẖarrânu“. Dies Wort bedeutet ursprünglich, wie altbabylonische Belege bestätigen, „Weg, Straße“ und dann auch „Reise, Karawane“. In neubabylonischer Zeit bekommt das Wort schließlich die Bedeutung von „Geschäftsunternehmen“. Das Wort wird mit den aus dem Sumerischen übernommenen Keilschriftzeichen KASKAL geschrieben, das eine Wegkreuzung darstellt\(^4\).

Das Quellenmaterial über die ḫarrânu-Gesellschaften besteht ausschließlich aus Vertrags-, Wirtschafts- und Gerichtsurkunden\(^5\). Es überrascht nicht, dass es in neubabylonischer Zeit keine einschlägige gesetzliche Überlieferung über das Thema gibt, im Gegensatz zur altbabylonischen Zeit, weil – wie schon gesagt – uns nur ein Gesetzesfragment aus dieser Zeit überliefert wurde\(^6\). Zeitlich sind die Urkunden von der Regierung Assurpanipals bis zum Beginn der Regierungszeit von Xerxes einzuordnen. Aus der letzten Phase der babylonischen Geschichte, der spätpersischen und der seleukidischen Ära, fehlen ḫarrânu-Urkunden völlig\(^7\).

Diese sogenannten ḫarrânu-Urkunden können, wie Lanz es in seiner ausführlichen Behandlung des Themas gemacht hat, in zwei Gruppen einge-

\(^3\) Über die Terminologie in den Keilschriftrechten, Vgl. A. Hirata, *Dogmática como instrumento metodológico na pesquisa histórica do direito*, in *Nas fronteiras do formalismo: A função social da dogmática jurídica hoje* (im Druck).


\(^6\) S. oben Fn. 2.

\(^7\) Vgl. H. Lanz, *Die neubabylonischen harrânu-Geschäftsunternehmen* cit., S. 1.
teilt werden: die Begründungsurkunden mit zweisitziger Kapitalbeteili-
gung und die mit einseitiger Beteiligung.

2. Die ḫarrânu-Begründungsurkunde mit zweisitziger
Kapitalbeteiligung

Als Beispiel für eine ḫarrânu-Begründungsurkunde mit zweisitziger Kapi-
talbeteiligung ist die Urkunde aus dem Jahr 595 v. Chr., das 10. Jahr des
Nabû-kudurru-uṣur (oder Nabukodonosor) von Babylon:

<table>
<thead>
<tr>
<th>Zeile</th>
<th>Textaufzeichnung</th>
<th>Deutscher Auszug</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2 MA.NA KÜ.BABBAR šá ¹NAV.ŠEŠ₃₄.GI</td>
<td>2 Minen Silber, das Nabû-ahḫē-šullim,</td>
</tr>
<tr>
<td>2</td>
<td>²A-šiš šá re-ḫe-ê-tû ²ES.PAP</td>
<td>Sohn des Rēḫêtu, Sohn des Sîn-nâṣir,</td>
</tr>
<tr>
<td>3</td>
<td>2 MA.NA KÜ.BABBAR šá ²ŠA.DU A-ššú</td>
<td>2 Minen Silber, das Kudurru, Sohn des</td>
</tr>
<tr>
<td>4</td>
<td>šá</td>
<td>Iqîšâ, Sohn des Egibi, miteinander zu einem</td>
</tr>
<tr>
<td>5</td>
<td>³BA₄ᵦ.a ³e.gi.bi it-ti</td>
<td>Geschäftsunternehmen eingesetzt haben.</td>
</tr>
<tr>
<td></td>
<td>a-ḥa₃₃₅₄ a-na KASKAL III iš-ku-nu</td>
<td>(An) allem, was er/sie in Stadt und Land</td>
</tr>
<tr>
<td>6</td>
<td>mim-ma ma-la ina URU u EDIN</td>
<td>erarbeitet/erarbeiten, haben sie gleichen</td>
</tr>
<tr>
<td>7</td>
<td>ip-pu-šu a-ḥa-ta šú-nu</td>
<td>Anteil.</td>
</tr>
<tr>
<td>8</td>
<td>i-di E ina KASKAL III šú-nu i-nam-di-in</td>
<td>Den Mietzins des Hauses wird er aus</td>
</tr>
<tr>
<td>9</td>
<td>⁴mu-ki-nu...</td>
<td>ihrem Geschäftsvermögen geben.</td>
</tr>
</tbody>
</table>

Hier haben sowohl Nabû-ahhe-sulim als auch Kudurru jeweils zwei Minen
Silber zu einem harranu-Geschäftsunternehmen gegeben. Der Gewinn dieser
Gesellschaft wird zwischen den beiden gleichermaßen verteilt. In Z. 5
hat man den Ausdruck „ana ḫarrâni“: Die Parteien haben das Kapital „ana ḫarrâni“ – d.h. zu einem Geschäftsunternehmen – eingelegt. Diese Begrün-
dungsklausel ist für solche Urkunden kennzeichnend.

In Z. 8 kommt eine Klausel über die Nutzung eines Grundstücks vor: „Er
wird den Mietzins des Hauses aus ihrem Geschäftsvermögen geben“. Es
ist aber unklar, ob „inamdin“ – das Verb „geben“ – sich hier auf den nicht
geschäftsführenden Gesellschafter bezieht. Es lässt sich auch nicht fest-
stellen, ob das Haus einer der Parteien oder einem Dritten gehört. Lanz⁸
schlägt die Auslegung vor, dass sich die Klausel auf denjenigen unter den
Partnern bezieht, der seinerseits das Grundstück von dem Dritten gemietet
hat.


In diesen Geschäftsunternehmen gibt es aber Besonderheiten beim Einsatz des Kapitals. Entweder investiert der geschäftsführende Gesellschafter weniger als sein Partner, so dass es sich um eine Gesellschaft mit einem wirtschaftlich stärkeren und einem schwächeren Partner handelt, oder es gibt besondere Bedingungen, wie bei der zitierten Urkunde aus der Regierungszeit von Darius.

Ferner ist zu erwähnen, dass die Gewinnverteilungsklausel bei den ḫarrānu-Begründungsurkunden mit zweiseitiger Kapitalbeteiligung immer präsent ist. Bei unserer Urkunde ist diese Klausel einfach, weil sie den Gewinn zwischen den Gesellschaftern gleichermaßen verteilt, was für die Gesellschaften mit zweiseitiger Kapitalbeteiligung typisch ist. Anderes ist es bei den ḫarrānu-Geschäftsunternehmen mit einseitiger Kapitalbeteiligung, die auch Fälle darstellen, in denen eine der Parteien einen feststehenden Betrag erhält.

⁹ Dar. 280.
3. Die ḫarrânu-Begründungsurkunden mit einseitiger Kapitalbeteiligung

Die andere Gruppe enthält die ḫarrânu-Begründungsurkunden mit einseitiger Kapitalbeteiligung\textsuperscript{10}. Ein Beispiel dafür ist die Urkunde aus dem Jahr 611 v. Chr., die erstmals von H. Lanz publiziert wurde:


\textsuperscript{11} Vgl. H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., S. 4.
Diese Urkunde enthält nur die Begründungs- und die Gewinnverteilungsklausel. Ferner gibt es Urkunden, die noch einfacher sind und nur die Begründungsklausel haben. Es ist daher anzunehmen, dass nur der wörtliche Text der Begründungsklausel keine ausreichende Konkretisierung der Gesellschaftsbeziehungen bietet. Wie gesagt, in den überlieferten Urkunden sind nicht immer Nebenklauseln vorhanden. Es müssen also anknüpfend an die Begründungsklausel gesetzliche oder gewohnheitsmäßige Regeln gegolten haben, die die Rechtsbeziehungen der Parteien in allen Fällen regelten, für die keine speziellen Vereinbarungen getroffen worden waren. Für solche Regeln gibt es aber keinerlei Belege.

Anschließend geht aus dieser Urkunde hervor, dass es sich um eine Komenda mit einseitiger Kapitalbeteiligung (mit einem sogenannten inaktiven Kommendator) handelt.

Interessanter ist die Geschäftslage einer Urkunde aus dem Archiv von Bēl-eṭēri-Šamaš, die erstmals von M. Jursa publiziert wurde, aus der Regierungszeit von Nabonidus oder von Kyros (weil in der Urkunde nicht erhalten wurde):

1. [X M] A-NA 50 GĪN KŪ.BABBAR [šā Šunu-ukīn] [x] Mine(n) 50 Sekel Silber [des Nabû-aplu-iddin]
2. [A]-šū šā IMU-GIN A šāš TIM [ina] Sohn des Šumu-ukīn aus der Familie Itinnu, [zu Lasten von]
3. IdEN-KAR-dutu A-šū šā 1 A-a Bēl-eṭēri-Šamaš, Sohn von Aplāja,
5. [a]-na KASKAL II mīm-ma ma-la ina zu einem Geschäftsunternehmen. An allem, was sie in Stadt
6. [u] EDIN ina muḫ-hi ip-pu-šu-um und Land erarbeiten,
7. a-ḫi ina ú-tur IdEN-KAR-dtu (Rasur) itti-wird Bēl-eṭēri-Šamaš (Rasur) mit
8. <<fIdEN-KAR-dtu>> (Rasur) itti-ti Nabû-aplu-iddin teilen. Spesen
10. 1-en pu-ut 2 i na-šu-ū Sie sind einer für den anderen Bürgen.
11. 4 GĪN KŪ.BABBAR IdAG-A-MU ul-tu KASKAL II


Es handelt sich hier um eine Schuldurkunde, in der der Gläubiger (derjenige, der das Kapital investiert) zugleich auch die Rolle des Schuldners inne hat, wie der andere, der nur arbeitet. Diese Konstruktion ist ungewöhnlich, aber einige Urkunden belegen diese Möglichkeit.


4. Das ḫarrânu-Geschäftsvermögen


Diese Klausel bestätigt ein Sondervermögen mit dem Zweck eines ḫarrânu-Unternehmens, sodass dieses Vermögen anders als das von den einzigen Gesellschaftern ist, insbesondere im Bezug auf den geschäftsführenden Gesellschafter. Ein gutes Beispiel für diese Struktur kann man in der Urkunde Ner 8 finden\(^\text{15}\). Es handelt sich um einen Darlehensvertrag zwischen zwei ḫarrânu-Gesellschaftern. Das Geschäftskapital, das vom Kommendator gegeben wurde\(^\text{16}\), beträgt 3 ½ Minen Silber\(^\text{17}\). Dies Kapital genügt aber nicht. Bemerkenswert ist aber, dass der Kommendator das Geschäftskapital des Unternehmens nicht erhöht, sondern nur ein Dar-

\(^{13}\) Vgl. H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., S. 18ff.

\(^{14}\) H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., S. 113ff.

\(^{15}\) Vgl. M. Jursa, Das Archiv des Bēl-etēri-Šamaš cit., S. 221.

\(^{16}\) H. Lanz, Die neubabylonischen harrânu-Geschäftsunternehmen cit., S. 116.

\(^{17}\) In der Urkunde: 3 ½ MA.NA KÙ.BABBAR šá KASKAL\(^\text{II}\) (3 ½ Minen Silber des ḫarrânu-Unternehmens).
lehen gewährt\textsuperscript{18}. Zuerst gibt er 5 5/6 Minen 2 Sekel Silber, was auch nicht ausreichend ist. Das zweite Darlehen ist von 2 2/3 Minen Silber und wird in der Urkunde Ner 8 dokumentiert.

Im Verpflichtungsschein Ner 8 wird die Unterscheidung zwischen dem Vermögen des ḫarrānu-Unternehmens und dem des Kommendators eindeutig. Auch wenn die haftungsrechtlichen Unterschiede des Kommendators im Bezug auf die ḫarrānu-Gesellschaft nicht klar sind, ist es möglich, festzustellen, dass diese Trennung des Vermögens angezeigt werden sollte.


\textbf{5. Ergebnis}


Die alltägliche Rechtspraxis in neubabylonischer Zeit zeigt auch, dass es alle möglichen Varianten für die Begründung eines Geschäftsunternehmens gab. Es ist besonders bemerkenswert, dass es -wie wir gesehen haben – möglich war, die Kapital- und Arbeitsbeteiligung bei einer Gesell-

\textsuperscript{18} Wie H. Lanz, \textit{Die neubabylonischen harrānu-Geschäftsunternehmen} cit., S. 116, schon erwähnt hat, kann man in der Urkunde nicht unterscheiden, ob die Haftung des Kommendators im Bezug auf die ḫarrānu-Gesellschaft anders als seine als Gläubiger ist.
schaft ganz frei zu bestimmen. Die uns überlieferten Urkunden zeigen, dass die Geschäftspartner je nach Wunsch ihr Geschäftsunternehmen gründen durften, was die Entwicklung hinsichtlich der wirtschaftlichen und rechtlichen Lage in neubabylonischer Zeit bestätigt.
STATE ADMINISTRATION OF JUDICIARY IN JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC: SEVERAL REMARKS TO THE CONFLICTS BETWEEN JUDICIAL AND EXECUTIVE POWERS CONCERNING ADMINISTRATION OF COURTS

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1. Introduction

The subject of this paper reflects a series of rulings of the Constitutional Court of the Czech Republic that had to deal with the problem of the state administration of courts, i.e. the relation of the executive and judicial powers, especially with respect to a necessary extent of independence of judiciary from interference of the executive power. A special attention is paid to several decisions of executive bodies (the President of the Republic, the Minister of Justice, the Government) that concerned the office of the Chief Justice of the Supreme Court of the Czech Republic (“Supreme Court”) and the Deputy Chief Justice of this Court and with which the Constitutional Court of the Czech Republic (“Constitutional Court”) dealt in the decisions I will describe below in detail.

The basic constitutional limits of the state administration of judiciary were set by Constitutional Court in the ruling Pl. ÚS 7/02\footnote{Judgement Pl. ÚS 7/02, published under No. 349/2002 Coll. Available at http://nalus.usoud.cz (in Czech) or http://tinyurl.com/yhonjbd (in English).} whereby Constitutional Court annulled passages of the Act No. 6/2002 Coll., on the Courts, Judges, Lay Judges and the State Administration of the Courts (the Judiciary Act), concerning, among others, reviewing expertise of judges\footnote{That was the institution of mandatory periodic evaluation of professional qualifications with the consequence of possible termination of the judge’s mandate.} or the state administration of courts through chief judges (chairmen) of these
In this key ruling, the Constitutional Court found as unconstitutional, among others, the concept of the performance of the state administration of courts through chief judges, and therefore the joining of the role of independent judge on one side and the “manager“ (chairman) of a court subordinated to the executive power (Ministry of Justice) on the other side in one person.

The Constitutional Court argued especially with the principles of the separation of powers and the independence of the judiciary and stated that “… the stated specific feature and the content of judicial power cannot be therefore questioned, and therefore its basic functions are not compatible either with any way of infiltration of another state power…“. As the argument, Art. 82, par. 3 of the Constitution of the Czech Republic was also used according to which “the office of a judge shall be incompatible with that of the President of the Republic, a Member of Parliament, or any office in public administration“4. As the Constitutional Court stated further, “the principle of judicial independence is, in this regard, of an unconditional nature which rules out the possibility of interference by the executive power“.

This basic philosophy of the separation of the judicial and executive powers has been then reflected in consequent disputes over chairmanship or vice-chairmanship of the Supreme Court of the Czech Republic. After the mentioned extensive derogatory judgement new legal regulations replacing the annulled provision were adopted that did not respect, however, fully the requirements expressed by Constitutional Court, which fully appeared several years later just during the below-mentioned dispute over chairmanship of the Supreme Court of the Czech Republic.

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3 For example, the annulled section 106 (1) concerning removal of court chief judges and deputy chief judges in the form read at that time: “Court chief judges and deputy chief judges (...) may be removed from office by the person who appointed them to that office if they do not fulfil their duties duly“. After annulling this provision by the Constitutional Court similar legal regulations were adopted (see below).

4 The Judiciary Act tried to avoid collision with the Constitution when it stipulated in section 74 (3) that “The office of court chief judge and deputy chief judge, secondment to a ministry, (…) membership in advisory bodies of a ministry, the Government and in bodies of the Chambers of the Parliament shall not be considered to be offices in public administration” (emphasized by M.B.). However, Constitutional Court has also annulled this provision.
2. Dispute over chairmanship of the Supreme Court of the Czech Republic

2.1. Recapitulation of key events regarding the filling of the offices of Chief Justice and Deputy Chief Justice of the Supreme Court of the Czech Republic

First, it is necessary to cover briefly key events chronologically that became the subject of fundamental disputes between the executive and judicial powers over the concept of the state administration of judiciary. I will try to cover and comment on them briefly below:

1. on 25th January 2006, the Minister of Justice asked the President of the Republic to remove Ms Iva Brožová, the Chief Justice of the Supreme Court of the Czech Republic, from the office of Chief Justice (but not from office of judge) based on (the provision valid at that time) section 106 of the Act No. 6/2002 Coll., the Judiciary Act, according to which the Chief Justice could be removed from office only by the person who appointed him to that office (the Chief Justice of Supreme Court is appointed by the President of the Republic based on Art. 62, letter f) of the Constitution of the Czech Republic),

2. the President of the Republic by his decision of 30th January 2006 after countersignature by the Prime Minister (1st February 2006) removed Iva Brožová from office,

5 Section 106 of the Act No. 6/2002 Coll., the Judiciary Act, stated in section 1 (valid at that time) that “Chief judges and deputy chief judges may be removed from office by the person who appointed them to that office if they violate their statutory prescribed duties in a serious manner or repeatedly in the course of performing the state administration of courts …“, while pursuant to section 2 “The office specified in paragraph 1 shall cease to exist on the day when the decision on removal was delivered to a judge, unless any later day was specified in the decision“.

6 Press release of the Office of the President of the Republic stated: “Václav Klaus, the President of the Republic, decided to meet the request of the Minister of Justice of 25th January 2006 and recalled Iva Brožová, the Chief Justice of the Supreme Court, from her office. The Government discussed the recalling at its session on 1st February 2006 and it was countersigned by the Prime Minister. The ruling shall come into effect at the moment of its delivery. It will be delivered to the Chief Justice of the Supreme Court still today, i.e. on
3. on the same day when the decision of the President of the Republic was delivered to the Chief Justice of Supreme Court (2\textsuperscript{nd} February 2006), the Minister of Justice asked the Deputy Chief Justice of Supreme Court for the consent with assignment of Jaroslav Bureš as a judge to the Supreme Court (the consent with assignment of a judge to the Supreme Court is granted by the Chief Justice of Supreme Court\textsuperscript{7}; with respect to removing the Chief Justice of Supreme Court, the Minister addressed his request for consent directly at the Deputy Chief Justice of Supreme Court),

4. on 8\textsuperscript{th} February 2006, the recalled Chief Justice of Supreme Court filed with the Constitutional Court the constitutional complaint contesting the decision of the President of the Republic whereby he removed her from the office of the Chief Justice of Supreme Court\textsuperscript{8}; together with the complaint the petition proposing the annulment of the mentioned section 106 (1) of the Judiciary Act\textsuperscript{9} was filed as well as the petition proposing suspend the enforceability (delay of the entry into effect) of the decision of the President,

5. on the following day (9\textsuperscript{th} February 2006) the Constitutional Court suspended the enforceability of the President’s decision on removing Iva Brožová from office\textsuperscript{10},

6. on the same day (9\textsuperscript{th} February 2006), the Deputy Chief Justice of Supreme Court informed the Minister of Justice on the phone that he agreed with assignment of Jaroslav Bureš as a judge to Supreme Court; the written expression of the consent by the Deputy Chief Justice of Supreme Court was delivered to the Minister of Justice on 13\textsuperscript{th} February 2006,

2\textsuperscript{nd} February 2006\textsuperscript{\textcopyright}, http://tinyurl.com/yj59u2a (in Czech).

\textsuperscript{7} Pursuant to section 70 of the Judiciary Act it applies that “a judge can be assigned for the performance of office to the Supreme Court only with the consent of the Chief Justice of this court\textsuperscript{\textcopyright}.

\textsuperscript{8} Complaint filed under No. II. ÚS 53/06.

\textsuperscript{9} Petition filed under No. Pl. ÚS 18/06.

\textsuperscript{10} Pursuant to section 79 (2) of the Act No. 182/1993 Coll., on the Constitutional Court, the Constitutional Court may “upon a motion of the complainant suspend the enforceability of a contested decision, if such would not be inconsistent with important public interests and so long as the complainant would suffer, due to the enforcement of the decision or the exercise of the right granted to a third person by the decision, a disproportionately greater detriment than that which other persons would suffer while enforceability is suspended\textsuperscript{\textcopyright}.
7. on 10\textsuperscript{th} February 2006, Iva Brožová informed the Minister of Justice in a letter that he does not have her consent as of the Chief Justice of Supreme Court (although recalled by the President, but with the delayed entry into effect of this ruling of the Constitutional Court), with assignment of Jaroslav Bureš to Supreme Court,

8. on 14\textsuperscript{th} February 2006, the President of the Republic appointed Jaroslav Bureš as a judge and on the same day by the decision of the Minister of Justice, Jaroslav Bureš was assigned to the Supreme Court of the Czech Republic,

9. on 9\textsuperscript{th} March, Iva Brožová filed another petition with the Constitutional Court – the petition proposing the cancellation of the decision of the Minister of Justice on assignment of Jaroslav Bureš to Supreme Court formulated as a petition proposing the solution of dispute over competences\textsuperscript{11},

10. on 11\textsuperscript{th} July 2006, the Constitutional Court decided on the annulment of section 106 (1) of the Judiciary Act that enabled to remove chief judges from office by the person who appointed them to that office\textsuperscript{12},

11. on 12\textsuperscript{th} September 2006, the Constitutional Court satisfied the constitutional complaint of Iva Brožová and cancelled the decision of the President of the Republic of 30\textsuperscript{th} January 2006 by which Iva Brožová was removed from the office of the Chief Justice of Supreme Court,

12. on 8\textsuperscript{th} November 2006, the President of the Republic appointed Jaroslav Bureš as the second Deputy Chief Justice of the Supreme Court\textsuperscript{13},

\textsuperscript{11} Petition filed under No. Pl. ÚS 17/06.


\textsuperscript{13} Press release of the Office of the President of the Republic stated: “Václav Klaus, the President of the Republic, according to Art. 62 of the Constitution appointed today, on 8\textsuperscript{th} November, JUDr. Jaroslav Bureš as Deputy Chief Judge of the Supreme Court. It is not tolerable any more for the operation of the Court so that all tasks of the Chief Judge and the Deputy Chief Judge in administration of the Supreme Court are fulfilled only by its current Deputy Chief Judge JUDr. Pavel Kučera himself. The President proceeded to the appointment after discussing this matter with the Minister of Justice and the Prime Minister“, http://www.hrad.cz/cms/cz/info_servis/tiskove_zpravy/39
13. the mentioned decision of the President of the Republic was contested by (already “confirmed“ by the Constitutional Court) the Chief Justice of the Supreme Court Iva Brožová both with the petition proposing solving the competence dispute (22nd November 2006) and with the constitutional complaint (28th December 2006),

14. on 12th December 2006, the Constitutional Court cancelled the decision of the Minister of Justice by which he assigned Jaroslav Bureš to Supreme Court (it was decided on Brožová’s petition of 9th March – it concerned assignment of Jaroslav Bureš to Supreme Court as a judge, not yet his appointment as the Deputy Chief Justice of the Court),

15. on 24th January 2007, the Constitutional Court refused Iva Brožová’s constitutional complaint of 28th December 2006 in the matter of appointing Jaroslav Bureš as the Deputy Chief Justice of the Supreme Court,

16. on 12th September 2007, the Constitutional Court decided the competence dispute in the matter of appointing J. Bureš as the Deputy Chief Justice of the Supreme Court (Iva Brožová’s petition of 22nd November 2006) in such a way that it cancelled the decision of the President of the Republic of 8th November 2006 by which J. Bureš was appointed as the Deputy Chief Justice of Supreme Court.

2.2. As to the individual rulings of the Constitutional Court of the Czech Republic

2.2.1. Cancellation of the possibility to remove chief judges and deputy chief judges of courts

The key ruling of the Constitutional Court (Pl. ÚS 18/06) that concerned the relation of the executive and judicial powers was the annulment of section 106 (1) of the Judiciary Act that enabled to remove the chief judge and the deputy chief judge of a court by the person who appointed them to that office, if “they violate their statutory prescribed duties in a serious manner or repeatedly during performance of the state administration of courts“. Thus, the given provision was annulled by the Constitutional Court already for the second time, as the law-maker after the first judgment of Constitutional Court (Pl. ÚS 7/02) laid down the new wording of

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97.shtml (in Czech). It is necessary to add to the above-mentioned that at the given time Chief Judge I. Brožová was incapable to work for a long time.

20 Michal Bartoň, *State Administration of Judiciary in Jurisprudence of the Constitutional Court of the Czech Republic: Several Remarks to the Conflicts Between Judicial and Executive Powers Concerning Administration of Courts*

section 106 based again on the principle for which Constitutional Court reproached the act in the mentioned judgement (i.e. recalling chief judges by a member of the executive power).

Here it is necessary to remind of the fact that chief judges and deputy chief judges of high, regional and district courts are appointed by the Minister of Justice, and according to the annulled provision he could remove them from office. According to the Constitution and pursuant to the Judiciary Act, the Chief Justice of the Supreme Court is appointed by the President of the Republic. However, the Constitution keeps silence about removing the Chief Justice of the Supreme Court (and, of course, also about other chief judges).

The situation with Chief Justice and Deputy Chief Justice of the Supreme Administrative Court (hereinafter referred to as “SAC“) is specific where the Constitution does not speak about appointing functionaries of SAC and the special regulation is included in the Act No. 150/2002 Coll., the Code of Administrative Justice (hereinafter referred to as “CAJ“), stating in section 13 that “Chief Justice and Deputy Chief Justice of the Supreme Administrative Court are appointed from among the judges of this Court and recalled by the President of the Republic“. Its application by the President (in terms of removing functionaries of SAC) could be considered, however, as unconstitutional with respect to the opinion of the Constitutional Court expressed in the above mentioned judgement Pl. ÚS 18/06, even if section 13 of CAJ itself was not contested or reviewed, but as far as functionaries of Supreme Court and SAC are concerned, it is a completely analogical situation.

The basic reason of the derogatory judgement of the Constitutional Court is the unconstitutional character of the contested provision consisting in the discrepancy with the principle of the independence of judicial power. The merits of the dispute are already in the concept of the state administration of courts in the Czech Republic when the central body of the state administration of courts is the Ministry of Justice. As the Judiciary Act stipulates “bodies of the state administration of courts are the Chief Justices and the Deputy Chief Justices of the Supreme Court, the Chief Justice and the Deputy Chief Justice of the Supreme Administrative Court and chief judges and deputy chief judges of high, regional and district courts. To the extent and under the conditions stipulated by law, chairpersons of senates, other judges and employees working in the respective
courts participate in the state administration of courts, while the Ministry of Justice performs the state administration of courts through chief judges of these courts. Therefore, it is such a concept of the state administration of courts that was already once classified by the Constitutional Court as unconstitutional.

While the principle of subordination is applied to the state administration generally, i.e. the person who appoints may remove, the Constitutional Court stated that this principle cannot be applied to the state administration of courts. As the Constitutional Court stated in the mentioned judgement, “the principle “the person who appoints may remove” cannot be applied to the relations in the context of court administration and … neither is it possible to construe the duality of the legal status of a court chief judge as an civil servant of state administration, on the one hand, and as a judge, on the other. Therefore, by means of the maxim expressed in Art. 82, par. 2 of the Constitution (“A judge may not be recalled or transferred to another court against his will; exceptions, ensuing in particular from disciplinary responsibility, shall be specified by law“ – note by M.B.) it is also necessary to compare the way of recalling court chief judges, i.e. also the Chief Justice of the Supreme Court; not only must the rules governing the removal of judges respect the constitutional principles of the separation of powers and the independence of the judiciary, so too must the rules for the removal of court chief judges and deputy chief judges. Then it is not possible to accept their recalling by an executive body just in such a manner that is assumed by the contested provision, while maintaining the above-analysed requirements at the same time. The conclusion on the unconstitutional character of the contested provision results from the above-mentioned, as it constitutes thereby intervention in the guarantees of the institutional and personnel independence of judiciary.

The Constitutional Court further expressed its opinion that a functionary of the judicial power should be recalled only when following the procedure that is realized inside the judicial power, not by another power in the state.

As it was already stated above, in the judgement Pl. ÚS 7/02 the Constitutional Court critically commented on the concept of state administration of courts in the Czech Republic. Its requirements, however, were not accepted thoroughly by the law-maker in the creation of new legislation. The Constitutional Court insists on the fact that “the office of court chief
22 Michal Bartoň, State Administration of Judiciary in Jurisprudence of the Constitutional Court of the Czech Republic: Several Remarks to the Conflicts Between Judicial and Executive Powers Concerning Administration of Courts judges and deputy chief judges as well as that of chairpersons of court collegia, should be considered, among others, as a career step (similarly as in the case of appointing chairpersons of senates), and therefore they should be subject to removal otherwise than on the grounds foreseen by law and on the basis of a decision of a court“.

Based on this judgement, it was necessary to prepare in the Czech Republic another model of the state administration of courts that would exclude the influence of the executive power on recalling functionaries of courts (see Conclusion below).

2.2.2. Cancellation of the President’s decision on recalling the Chief Justice of the Supreme Court

Satisfying the constitutional complaint of Iva Brožová, the Chief Justice of Supreme Court, aimed against the decision of the President of the Republic on removing her from the office of the Chief Justice, was already only a logical consequence of the above-described derogatory judgement of the Constitutional Court. If the President recalled the Chief Justice of Supreme Court based on section 106 of the Judiciary Act, while Constitutional Court annulled later the mentioned section as unconstitutional, then it was also forced to cancel the decision of the President of the Republic itself by which the given provision was applied.

In this connection, the interpretation of Art. 21, par. 4 of the Charter of Fundamental Rights and Freedoms (hereinafter referred to as the “Charter“) is essential on which the constitutional complaint was based. Art. 21, par. 4 of the Charter states that “citizens shall have access, on an equal basis, to any elective and other public office“. The removal from the office of the Chief Justice of the Supreme Court was contested in the constitutional complaint as contradictory to the mentioned article. As to this argumentation, the Constitutional Court stated that “Art. 21, par. 4 of the Charter does not apply only to access to public office within the meaning of the creation of office, but it also includes the right to its undisturbed performance, including the right to the protection from unlawful deprivation of this position. The participation in the public affairs administration that is the sense of the whole Article 21 shall not mean only mere obtaining a position, but it logically lasts for the whole term of this office. So if the aim of this Article of the Charter is to enable citizens the administration of public affairs, the entity performing the office must also enjoy the
protection from arbitrariness of the state that could prevent him from performance of public office. The right to public offices itself would not have any sense if it does not also include the protection during performance of office”\(^{16}\).

According to the Constitutional Court, thus the termination of public office caused by the application of an unconstitutional provision of law is intervention into the constitutional subjective right protected by Art. 21, par 4.

Therefore, it is possible to provide constitutional protection to this right based on the constitutional complaint and thus cancel in the commented case the decision of the President who has interfered by his decision as a public authority with the mentioned constitutional right.

Above the framework of this paper subject it is necessary to add that the Constitutional Court has not waited for the decision on administrative complaint (“complaint against a decision of an administrative authority“) filed at the same time by Iva Brožová against the decision of the President with the administrative court, though the condition for filing the constitutional complaint is using all procedural means admitted by the legal order (i.e. also administrative complaint). One of the exceptions applied by the Constitutional Court also here is the fact that the constitutional complaint significantly exceeds the complainant’s own interests\(^{17}\). With this procedure, however, no possibility was given at the same time to administrative judiciary to comment on the problem of review of the President’s decision.


\(^{17}\) The Constitutional Court commented on that that it did not refuse the constitutional complaint even in spite of simultaneous filing an action in administrative judiciary, as “uncertainty regarding the existence of administrative action as a means for the protection of the complainant’s right cannot prejudice her. At the time of filing the constitutional complaint the issue of powers of courts in administrative judiciary was not resolved regarding possible review of the decision of the President of the Republic on removal the Chief Justice of the Supreme Court from office, i.e. the issue of interpretation of ordinary law, specifically section 4 (1), letter a) of the Code of Administrative Justice. The procedure of the Constitutional Court with which the mentioned fact would not be taken into account could mean the future disabling any review of the contested decision of the President of the Republic; in relation to the complainant it could finally result in refusal of justice and violation of the right to the judicial protection guaranteed with the Constitution within the meaning of Art. 36 of the Charter”. 
24 Michal Bartoň, *State Administration of Judiciary in Jurisprudence of the Constitutional Court of the Czech Republic: Several Remarks to the Conflicts Between Judicial and Executive Powers Concerning Administration of Courts* in this matter (the possibility to review the decision of the President of the Republic in administrative judiciary is a very discussed problem also in other cases\(^{18}\) and it has not been explored much so far).

2.2.3. *Dispute over appointment of J. Bureš as a justice of the Supreme Court and then as the Deputy Chief Justice of this Court*

It follows from the above-indicated overview of events that soon after the Chief Justice of Supreme Court Iva Brožová was removed from office, J. Bureš was appointed by the President for the position of judge and assigned as a judge to Supreme Court. As I. Brožová stated on this procedure in one of her submissions to the Constitutional Court, “the decision of the Minister of Justice on assignment of JUDr. Jaroslav Bureš to the Supreme Court and the decision of the President of the Republic on her (I. Brožová - note by M.B.) removing from the position of the Chief Justice of the Supreme Court represent one unit the aim of which is a change in the chairmanship of the Supreme Court”\(^{19}\).

Pursuant to the Judiciary Act, for assignment of a justice to Supreme Court the Minister of Justice has to have the consent of the Chief Justice of this Court. The Minister asked for this consent on the day when I. Brožová was removed from office, and he asked not I. Brožová, but P. Kučera, the Deputy Chief Justice of this Court. However, the Deputy Chief Justice’s written consent was issued as late as at the time when preliminary delay of the enforceability of the decision of the President of the Republic on removing I. Brožová from office was already in force.

The Chief Justice of Supreme Court contested the decision of the Minister of Justice in the form of petition proposing solving the dispute over the extent of competences when she required the cancellation of this decision for the reason that the consent of the Chief Justice of the Supreme Court is

\(^{18}\) Actions of judicial trainees against the President of the Republic due to not appointing to the office of judges are based on the same provision of the Charter. Here Supreme Administrative Court already decided that courts are competent in administrative judiciary to review some decisions of the President (decisions 4 Aps 3/2005-35 and 4 Ans 9/2007 – 197, available in Czech at www.nssoud.cz). Any further analysis would be above the framework of this paper.

\(^{19}\) Cited according to Judgement Pl. ÚS 17/06.
necessary for fulfilment of the competence of the Minister of Justice to assign a justice to Supreme Court which was not, however, given.

The Constitutional Court\textsuperscript{20} reviewed this petition as a dispute over the extent of competences and admitted that the petitioner (Brožová) was right. It cancelled the decision of the Minister of Justice on assignment of J. Bureš to Supreme Court and stated that “the decision of the Minister of Justice (…) required for its validity the consent of the Chief Justice of the Supreme Court, as the state body competent to assign a justice to the Supreme Court is the Minister of Justice only with the consent of the Chief Justice of the Supreme Court; absence of the consent made the decision of the Minister of Justice conflicting with Art. 2, par. 3 of the Constitution and Art. 2, par. 2 of the Charter of Fundamental Rights and Freedoms”\textsuperscript{21}.

The given decision, however, was not adopted unanimously and several judges\textsuperscript{22} in their dissenting opinions protested against excessive extension of the concept of competence disputes, while they assumed that in this case it is not a competence dispute (it is clear that the competence to assign a justice has the Minister of Justice and he does not argue about it with anybody; the Chief Justice of Supreme Court does not and cannot claim this competence). Accordingly dissenting judges proposed to find petition of Chief Justice as inadmissible.

However, the majority of justices of Constitutional Court incline to the concept of reviewing also those disputes concerning the so called “shared competences”, not only classical positive or negative disputes over competence\textsuperscript{23}.

Thus, the Constitutional Court stated that “the Minister of Justice has the authorization (competence) to assign a judge to the Supreme Court. However, in order the Minister of Justice can realize this competence, he was...


\textsuperscript{21} Mentioned articles provide: “State power shall serve all citizens and may be applied only in cases, within limits and by methods defined by law” (emphasis by the author).

\textsuperscript{22} Dissenting opinions were held by chief justice P. Rychetský and by judges V. Kůrka, J. Musil, J. Nikodým.

\textsuperscript{23} This concept was already outlined by the Constitutional Court in Judgement Pl. ÚS 14/01, No. 285/2001 Coll., where the dispute was solved if the Prime Minister’s countersignature is necessary for appointing the Governor of the Czech National Bank by the President of the Republic (available in English at http://angl.concourt.cz/angl_verze/doc/p-14-01.php).
not allowed to overlooked that the process of performance of this power and the issuance of his decision required for their perfection the prior consent of the Chief Justice of the Supreme Court as a condition *sine qua non* in terms of meeting the statutory requirements laid on such a decision of the Minister. Thus, the act of the Minister of Justice on assignment of a justice to the Supreme Court is an act with subsumption, i.e. conditioned one, while a substantial defect or absence of the conditioning act also result in a non-remediable defect of the final act”.

With respect to the fact that meantime J. Bureš was appointed as the Deputy Chief Justice of the Supreme Court, a curiosity situation occurred when the Constitutional Court stated that J. Bureš was not validly assigned to the Supreme Court (however, he does not lose his position of judge 24), but according to another decision of the President of the Republic he was still the Deputy Chief Justice of the Supreme Court.

Thus, Constitutional Court had to decide the last dispute, i.e. if J. Bureš was validly appointed by the President of the Republic as the Deputy Chief Justice of the Supreme Court. The given act of the President was contested by the Chief Justice of Supreme Court I. Brožová with two different procedural means, both with the constitutional complaint and the petition proposing the solution of competence dispute. The constitutional complaint was refused by the Constitutional Court, as here Constitutional Court stated that the complainant is a person evidently without entitlement to complaint (I. Brožová here protested against interference with her freedom of speech consisting in the fact that she could not comment – as the Chief Justice of Supreme Court – on appointment of J. Bureš). Here it is necessary, however, to agree definitely with the refusal of the constitutional complaint, as here the Chief Justice of Supreme Court cannot act as a carrier (subject) of the basic right to the freedom of speech, but on the contrary she would fulfil the competence of a state body that – in this position – has not entitlement for filing a constitutional complaint.

The petition proposing the solution of competence dispute between the Chief Justice of Supreme Court and the President of the Republic, however, the Constitutional Court already admitted, as Constitutional Court again inclined to the concept of the so called “shared competences” men-

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24 Here it is possible to ask with the exaggeration if the judge “without portfolio” can exist, i.e. the judge appointed by the President, but not assigned to any court.
tioned above. In the statement of ruling, the Constitutional Court stated that “the President of the Republic is a state body competent for the issuance of decisions on the appointment of the Deputy Chief Justice of the Supreme Court from among justices assigned to the Supreme Court with the valid decision of the Minister of Justice, after the prior consent of the Chief Justice of the Supreme Court”. Pursuant to this reason Constitutional Court reversed the decision of the President of the Republic by which the President appointed J. Bureš as the Deputy Chief Justice of Supreme Court. The Constitutional Court interpreted the Constitution of the Czech Republic in such a way that a justice of the Supreme Court can only be appointed as the Deputy Chief Justice of the Supreme Court. With respect to the fact that Constitutional Court already cancelled the decision on assignment of J. Bureš to Supreme Court before, thus J. Bureš ceased to be a justice of Supreme Court, and then he could not be, according to Constitutional Court, appointed as the Deputy Chief Justice of this Court.

However, the given decision was not again unanimous and the same dissenting judges as in the previous case again protested strongly against a widely understood concept of competence dispute and accordingly against admissibility of petition of Chief Justice I. Brožová.

3. Conclusion

The above-mentioned disputes over chairmanship and vice-chairmanship of the Supreme Court of the Czech Republic and all rulings of the Constitutional Court concerning the given disputes illustrate a clear necessity of the quickest possible resolution of the issue of the state administration of courts in the Czech Republic. It will be necessary to adopt legal regulations principally different from that practiced in the Czech Republic so far. The current legal regulations of the state administration of courts is based on the principles identified by the Constitutional Court in the ruling Pl. ÚS 7/02 as unconstitutional and therefore Constitutional Court annulled a part of the Judiciary Act. The legal regulations replaced the annulled parts, however, did not reflect the requirements for more consistent separation of the judicial and executive powers, which is testified with the repeated annulment of section 106 of the Judiciary Act (regulating the removal of

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25 The wording of Art. 62, letter f) of Czech Constitution is not so unambiguous: “President of the Republic shall (...) appoint from among the judges the Chief Justice and Deputy Chief Justices of the Supreme Court“. 
Michal Bartoň, *State Administration of Judiciary in Jurisprudence of the Constitutional Court of the Czech Republic: Several Remarks to the Conflicts Between Judicial and Executive Powers Concerning Administration of Courts* chief judges and deputy chief judges by a representative of the executive power) by the Constitutional Court (Pl. ÚS 18/06).

In the Czech Republic, in the nearest future it is necessary to lay down new legal regulations of the state administration of courts in the interest of compliance with the constitutional principle of the separation of powers where the autonomy of judicial power will be considerably reinforced and some kind of judicial self-government will be created.

The current model (the Ministry of Justice performs the state administration of courts through chief judges of these courts) rather leads to the escalation of conflicts between the executive and judicial powers. The future form of the administration of judiciary should exclude any (even hypothetic) possibilities of influencing the judicial power with executive power and thus it should ensure the independence of judiciary as a foundation of each constitutional state.

The very new regulation of recalling of chief judges\(^\text{26}\) can be considered as the first positive step. According to this new regulation the chief judge and the deputy chief judge of any court should be recalled from chairman position only as a result of disciplinary proceeding conducted by courts, no longer by decision of any executive body.

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\(^{26}\) Amendment of Judiciary Act (no. 314/2008 Coll.) came into effect in October 2008.
Introduction

Law application process is understood by legal theory as a legally regulated procedure of state authorities undertaken at the proceedings, issuance of decisions, their review and execution. Authorities called upon to apply the law are courts, prosecutors, the police, executors, and various administrative bodies within civil, criminal or administrative processes before them. Each law applying body has to firstly establish the factual background of the case and subsume it under particular, generally expressed, legal rule. Thus, the core of the law application process entails the application of an abstract legal rule onto a concrete case.¹

Slovak and Polish state’s authorities are, due to the accession of Slovakia and Poland into the European Union on 1st May 2004, confronted with applying not only domestic law passed by national legislators but also Community law passed by the EU institutions. As soon as an EC legal norm comes into force by its publication in the Official Journal of the EU, it binds its addressees, i.e. EC institutions, member states and individuals.² Transposition of the norm into national law is not needed, as opposed to an international legal norm, which generally requires the transposition. The direct applicability of EC law stems from supranational nature of European Communities. In establishing treaties, member states limited execution of their sovereign rights in certain fields and transferred them onto the EC institutions. Consequently, acts adopted by them are directly binding on member states’ authorities and their nationals.

¹ Prusák, J.: Teória práva, p. 289.
² Judgment 26/63 Van Gend en Loos identified not only member states but also individuals as the addressees.
Duty to fulfill the obligations arising out of the Treaty or resulting from actions taken by the Community institutions derives from Article 10 of the Treaty establishing the European Community (hereinafter referred to as the “ECT”). This principle is basically a well-established principle of international law pacta sunt servanda, in EC law terminology better known as a loyalty principle.

How and in what legal sources is the application of the Community law governed? How important is the role of EC Court’s case law in this regard? Where is the balance between common EC goals on the one hand and national traditions and national procedural norms on the other hand? What legal means are available in case a member state fails to apply EC law correctly? These are the main questions going to be covered in the article, due to considerable complexity of the topic at least to a limited extent.

**Centralised and decentralised application of Community law**

Community legal rules are adopted by the EC institutions, mainly the Council of Ministers, European Parliament and, exceptionally, European Commission. Generally, they are designed to all member states to attain common goals envisaged by the Treaty (single market, economic and monetary union, implementing common policies and activities).

Whilst the legislation of EC law is realized exclusively at the central Community level, its factual application is predominantly decentralized and delegated on national level. It is nevertheless correct that the EC bodies do apply the EC law, as well. The Commission for instance has an important decision making power in competition law area and the EC courts apply the Community law at various judicial proceedings before them such are the action for annulment or action for the infringement of Treaty. However, it is the member states that bear the key burden in the EC law application process. In their daily practice, member states’ authorities must decide whether an EC legal rule applies to a certain case, they must interpret the rule and apply it pursuant to given factual circumstances. One must bear in mind that all states’ application law authorities ranging from high courts and central administrative bodies to bodies at the lowest level

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3 Article 2 ECT.
must carry out this duty. It is arguable, whether all of them are satisfactorily equipped, both personally and materially, to fulfill their task to properly apply often difficult and unclear Community regulations adopted in Brussels.

Decentralized application of Community legal acts brings within the potential risk that the application will not be realized in the light of the original goal envisaged by the European legislators. Conversely, the national authorities will tend to interpret and apply EC legal act in favor of national interests, which may be contradictory, and thereby impede the attainment of common goals. Moreover, national authorities ranging from one member state to another do not have to proceed in the same way due to their own differing legal systems and traditions. As a result, conditions on the common market may not be homogenous, and market freedoms and effective competition may be distorted. Undoubtedly, applying the EC law not in conformity with its original objectives and not uniformly among particular member states of the EU is an adverse phenomenon. Further chapters discuss how these negative accompanying effects are being dealt with, special emphasize put on the importance of EC Courts’ case law in this regard.

**Legal regulation of Community law application process; decisive importance of EC Courts’ case law**

Provisions of the Treaty establishing the European Community does not whatsoever regulate the application of EC law to a satisfying degree. Whether the Treaty creators, the member states, simply neglected this matter or they intentionally left it open for the interpreting competence of the ECJ is unknown nowadays. The ECJ, as an institution empowered to fill in the gaps in the Community legal order, has been gradually trying to overcome this deficit. Majority of its decisions which will be cited further on have been adopted in preliminary ruling proceedings initiated by national courts or tribunals according to Article 234 ECT. Pursuant to this provision, the Court decides on the interpretation of the Treaty, validity and interpretation of acts adopted by the EC institutions and on interpretation of statutes of bodies established by the act of Council if they so provide. Accordingly, the ECJ’s rulings serve to complement the decentralized system of EC law application process leading to its higher uniformity and efficiency.
The status of the Community legal order in the Member States and principles of its application

They key judgments that identify the legal status of Community law in relation to national and international law are judgments Van Gend en Loos 26/63 and Costa v. ENEL 6/64. As stated in Van Gend en Loos from 1963 „The European Community establishes a new legal order of international public law whose subjects are not only states but also individuals.“ The Court has modified its opinion in judgment Costa v. ENEL in 1964 in which „EC Treaty establishes its own legal order which the courts of member states shall apply.” Thus, the EC law does not belong to the international law system but derives its independence from the Treaty. Furthermore, judgment Costa v. ENEL stated the presumption of other important features of the EC law, namely supremacy and direct effect, explained below. They must be applied regardless of the national regulation and they are the key preconditions for real efficiency of EC law (effet utile).

As the ECJ noted in judgment Simmenthal 106/77, the EC law does not merge but rather co-exists with the national law. It preserves its independent status and its application on the member states’ territory is regulated by specific principles, namely direct applicability, direct effect, indirect effect, supremacy and responsibility for loss caused to an individual resulting from breach of EC law. These principles have been gradually established by the ECJ’s judgments. The Treaty itself only mentions direct applicability of regulations. For the sake of terminological purity, the term finding and naming the principles by the ECJ is more precise than establishing them because the Court has barely inferred them from the Community law in which they are already present although not expressly stated. Nevertheless, the importance of ECJ judgments in these terms is crucial and is still being developed.

Direct applicability means that a Community legal rule automatically applies on the member states’ territory without the need of reception into domestic legal order. It has direct legal effects on the member states and

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4 Judgment 26/63 Van Gend en Loos.
5 Judgment 6/64 Costa v. ENEL.
7 For instance, the ECJ has still not sorted out the issue of horizontal direct effect of directives clearly.
their citizens; it may establish individual rights and duties for them. However, it is not the case for all Community legal sources as directives do require reception.

Direct effect gives right to an individual to invoke the EC law before the national judge or another law application body in case his or her subjective right deriving from the EC law has been violated. There are two forms of direct effect, vertical one (in the relationship between state and individual) and horizontal one (in the relationship between individuals themselves). The EC Court has issued many decisions, which formulated the general conditions for direct effect, admitted direct effect for particular provisions of the treaty or dealt with the direct effect of other legal acts, mostly directives.

Indirect effect entails the so-called euro-conformal (harmonious) interpretation of national law. When a Community legal norm has no direct effect, judge will apply national law, however he must do so in light of wording and goal of Community law. The euro-conformal interpretation shall be exercised to the highest possible extent (C-106/89 Marleasing). Apart from this objective borderline, the Court has also set a subjective limitation under which he understood judge’s discretionary power (14/83 von Colson).

Supremacy principle means that when Community and domestic legal rule are in conflict, judge is obliged to apply the Community legal rule and leave the conflicting domestic rule unapplied. Furthermore, the principle obliges to annul the existing inconsistent domestic legal norms and prevents to adopt them in the future. According to the EC Court’s case law (C-285/98 Tanja Kreil), generally binding EC legal rule prevails even over member states’ constitutional norms.

Responsibility for loss caused to an individual as a result of breaching the EC law by a member state grants right to an individual who has suffered loss resulting from breach of EC law by an act or omission of a member state’s authority to claim damages before the national court. The principle has been firstly established in judgment Francovich C-6 and 9/90 and further developed in Factortame and Brasserie du Pecheur C-46 and 48/93. The Court has not only declared legal obligation to compensate the loss but it has also formulated the conditions under which the obligation arises. The injured party claims the compensation at the domestic rather than EC court which applies its own national substantive and procedural rules. However one may not forget that the principle serves as a means to restore
the breach of the EC law. Thus, granting the damages is safeguarded and regulated by the EC Court through its case law. The Court has created the principles of effectiveness and equivalence, discussed below, but also applicable to compensation claims.

**Procedural aspects of application process of the EC Law – principle of national procedural autonomy versus principles of effectiveness and equivalence**

When member states’ authorities apply the EC legal rules, they proceed pursuant to national procedural rules which determine their jurisdiction and rules of proceedings. The principle of national procedural autonomy is often emphasized in the ECJ’s judgments. However, as we have already indicated, applying different set of procedural rules within the EU causes risk that citizens who wish to benefit from a certain substantive Community right may get different treatment depending on where they live or work. Thus, differing procedural norms may affect the exercise of Community substantive rights.

The principle of national procedural autonomy has therefore its limits and the ECJ has developed two correcting and outweighing principles: effectiveness and equivalence. In some of its judgments, the Court considers the principles only as specific forms of a general principle of loyalty of member states towards the Community. In other judgments, it accepts them as independent general principles of Community law binding upon the member states even without a legal base, as is the Article 10 ECT.

Principle of equivalence means that a domestic court may not apply stricter legal rules in actions based on the EC law than are those applicable to procedures without a Community dimension but with the same subject matter. In other words, discrimination of EC law - based claims with comparable domestic-law based claims is prohibited. For instance, it would be unacceptable if an applicant relying on the EC law has to meet shorter procedural time-limits than if he relied on national law. Similarly, the ECJ

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declared a provision demanding security for costs from plaintiffs coming from other member states inadmissible in so far as it does not demand from its own citizens.\(^\text{10}\)

Pursuant to effectiveness principle national procedural regulations may not be so framed as to render virtually impossible or excessively difficult the exercise of rights conferred by EC law. Understandably, not all national provisions governing exercise of the EC legal right are contrary to effectiveness principle. Reasonable periods of limitations of actions known in all legal systems and justified by mandatory requirements of legal certainty do not infringe the effectiveness principle. Though, laying down a statute of limitation retroactively and depriving an individual of a judicial remedy would already constitute a violation of the principle.\(^\text{12}\)

**Legal means available in case of wrong application of EC Law**

Duty to carry out the obligations arising out of the Treaty or legally binding acts adopted by EC bodies, including their proper application, infers from Article 10 of ECT. It is imposed an all bodies acting on behalf of member state and its breach constitutes the state’s responsibility. As a result, action for infringement may be brought before the ECJ and a number of other legal mechanisms may come into play. Both will be discussed further on.

Action for infringement of the Treaty against a member state is enshrined in the primary law of the European Community itself, namely Article 226 and 227 of ECT. The Treaty grants the right to the European Commission and another member state. This type of proceeding has as its main goal the obedience of EC legal obligations by all member states and as such it fulfills repressive and preventive functions. The court either finds the breach or it dismisses the action. If the Court establishes the violation and member state does not take necessary measures to comply with the judgment,


\(^{12}\) C- 33/76 Rewe.

\(^{13}\) C- 343/96 Dilexport.
the Commission may institute a new proceeding including the specification of a sum of penalty. Even though the action is regulated in the Treaty itself, equally important is to consider the EC Court’s judgments, which state the content of particular provisions more in detail. The court has for instance concluded, applying an extensive mode of interpretation, that the action is applicable not only to acts violating the Treaty, but also secondary law, treaties with third subjects or legal principles (96/81 Commission v. Netherlands). The court has also dealt with the issue which of the states’ authorities are capable to violate the EC law under which he subsumed all, legislative, executive and judiciary bodies.

Nationals of member states (both natural and legal persons) do not possess the right to file an action for infringement against member state. However, they are direct addressees of rights and duties stemming from the EC law. Therefore, they must have a guaranteed chance to object violation of EC law and protect their individual rights against member state’s wrong doing. The ECJ has filled in the legal vacuum of the Treaty and overcame the absence of right to file an action. It awarded the individuals certain rights which have later become general principles of the EC law. They are the following:

1. Right of access to judicial process – each natural or legal person whose rights were injured by a member state’s action incompatible with the EC law must have a right of effective judicial protection (Johnston 222/84, Foglia 244/80, Marshall 152/84);

2. Right of provisional judicial protection – rights of an individual stemming from the EC law must be provisionally protected even though domestic law does not provide for interim measures, stay of execution or suspension of domestic acts deemed as incompatible with the Treaty (Factortame C-213/89);

3. Right of return of unjust enrichment if the unjust enrichment was a result of violation of Community legal order (Deville 240/87);

4. Right of compensation for loss suffered as a result of breach of EC law (Francovich a Bonifaci C-6 a 9/90).\footnote{Siman, M., Slašťan, M., Ivanová – Žiláková, D., \textit{Primárne právo Európskej únie}, Bratislava, 2006, p. 60.}

Furthermore, the application principles of EC law discussed in a previous chapter are as well designed for protecting individuals’ rights. They are
mostly applicable when a member state breaches its duty of proper implementation on a legislative level (most commonly instances of wrong implementation of a directive) and the law application body shall redress the failure. If the conditions for direct effect are complied with it directly applies the EC legal norm. If the Community legal norm has no direct effect it applies the national legal norm however in light of the Community legal order. If the objective cannot be reached by invoking the indirect effect neither, an individual may seek compensation. As we can observe, the EC Court has developed a specific system of exercise of Community law mainly to ensure that individuals can benefit from it regardless of member states’ violating actions.\textsuperscript{15}

**Conclusion**

As a result of supranational nature of European Communities and direct binding nature of their legal norms, all domestic law application bodies are confronted with immediate application of the EC law. As the application is predominantly decentralized on national level, it faces the risks of deviating from the original EC goals and discrepancies varying among particular member states. Application process of EC law on member states’ territory is not well regulated in the primary law of the Community. Basically, it confines itself to declaring a general duty of loyalty enshrined in Article 10 ECT and brief provision of Article 249 ECT. This legal vacuum has been filled up with the EC Court’s case law. It has defined the EC law as an independent legal order application of which is on the member states’ territory governed by special principles. These principles perform a double function. Firstly, they regulate the coexistence of domestic and Community legal systems. Secondly, they serve as protection mechanisms for the individuals guaranteeing them the chance to fully enjoy their subjective rights deriving from the EC law even in instances when the rights are injured by member state’s action violating the EC law. By establishing these principles, the ECJ has sorted out the major deficit in the application process of the EC law and made up for individuals’ absence of right to bring an action to the ECJ against the member state. Right of action for infringement is only granted to European Commission and another member state. As far as the procedural side of EC law application process is concerned, it is almost exclusively left for the national legal rules. It rep-

resents danger for effective and uniform exercise of Community legal rights, as well. Therefore, the Court has intervened once more and has founded principles of effectiveness under which national rules cannot render virtually impossible or excessively difficult the exercise of rights conferred by EC law and the principle of equivalence under which they cannot discriminate EC law based claims with comparable national law based claims. Moreover, the Court has granted certain rights to individuals that must be guaranteed in all instances when a member state breaches the EC law. These rights are right of an access to judicial process, right of provisional judicial protection, right of return of unjust enrichment and right of compensation for loss. Understandably, ensuring maximally effective and uniform realization of EC legal norms by its decentralized application is a courageous aim. It could perhaps only be reached by complete unification of procedural rules. Procedural regulations form, however, an important part of legal legacy and identity of each and every member state. Therefore, we do not demand absolute Community intervention but we rather encourage an optimal balance between the common goals and national peculiarities. Finally, taking into account the lack of states’ political will to govern the application process of the EC law including its procedural aspects by legislative means, it would probably remain the domain of the EC Court. We appreciate the contribution of its case law adopted up till the present day as regards the EC law application process and we will observe its future initiatives.
**Double “Yes” to Lisbon Treaty - Double Yes to the Pooling Sovereignty Concept. Few Remarks on Two Decisions of the Czech Constitutional Court**

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**Introduction**

The date 1st December 2009 represents one of the milestones in the history of European integration. The long reformation process, which had started in the year 2001, reached its final step in the form of final legal effectuality of the Lisbon Treaty. Process of the EU primary law reform went through a “bumpy path”\(^1\) and had to pass through several political, diplomatic and legal hurdles. The sad destiny of the first reformation attempt - so called “European Constitution” - is well known. But also its successor - Lisbon Treaty - and process of its ratification was not spared of some troubles. One sort of the legal barriers or better said legally conditioned delays is connected with the provisional reviews of constitutionality of the Lisbon Treaty before some European constitutional courts.

Czech Constitutional Court (hereinafter “CCC”) played the special role within this chapter of the Lisbon story. One reason for this extraordinary delimitation is that it was CCC who on the 3rd of November 2009 gave, by its second decision on conformity of the Lisbon Treaty with the Czech

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constitutional order, the last constitutional consecration\(^2\) to the text of the Lisbon Treaty. Second reason is that CCC got the opportunity to evaluate Lisbon Treaty and its accordance with the Czech constitutional order twice in two autonomous proceedings\(^3\).

The aim of this contribution is to point on some features of this two “November cases”. It will not cover all parts of their content. The elementary proposition is to determine and evaluate the attitude and the role of the CCC as the part of the European constitutional debate and to show how did CCC participate and enrich the notion of the constitutional pluralism accompanying the legal integration process within the EU\(^4\). This basis determines the selection of covered parts of two Lisbon decisions. The main attention will be given to CCC argumentation which deals with the question of character of the EU, sovereignty problem, range and determin-

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\(^2\) I deliberately avoid question of last formal ratification step in the form of the signature of the Czech president under the ratification document according to the art. 63 par. 1 letter b) which says that: “[President of the republic] negotiates and ratifies international treaties [...]”. Reasons for this avoidance are twofold. First the evaluation of the above-mentioned competence and determination whether it is a right or a duty is complicated and sensitive question, rather political than legal one. Second reason is practical. Some hours (03/11/2009) after adjudgement of CCC President of the Republic signed the ratification document and did not try to make other obstacles to the ratification process within Czech Republic. See Adéla Pobořilová, Klaus podepsal Lisabon, 03/11/2009 CT24, http://www.ct24.cz/domaci/71478-klaus-podepsal-lisabon/ or Jason Burke, Václav Klaus sets seal on Lisbon treaty ratification, 03/11/2009 guardian.co.uk, http://tinyurl.com/y85kxyh.

\(^3\) First decision - Pl. US 19/08 - was adjudged on the 26th of November 2008. It will be hereinafter marked as “Lisbon Treaty I”. It is available in English on the web pages of the CCC: http://www.concourt.cz/file/2339. Second decision - Pl. US 29/09 - was adjudged on the 3\(^{rd}\) of November 2009. It will be hereinafter marked as “Lisbon treaty II”. It is available in English on the web pages of the CCC: http://www.concourt.cz/file/2506.

ation of competences. The contribution is divided into three main sections.
First serves as marginal introduction to the CCC’s attitude toward EU law
principles and its application. Second and third are devoted to the eval-
uation of CCC’s Lisbon treaty decisions.

Initial note: Relationship between EU law and Czech
constitutional law from CCC perspective

ECJ findings in the set of famous decisions e.g. Costa v. Enel, Simmenthal
and Internationale Handelsgesellschaft\(^5\) form the fundamentals for the
effective functioning of EU law across the EU. However the doctrine of
ultimate primacy without exemptions sometimes crashes with the constitu-
tionally protected values of the MS. All constitutional courts as the main
defenders of that values have only two alternatives to assume.

CCC got the first opportunity to declare its own stance towards abovementioned problem in so called Sugar Quotas Case (2006). It has utilized this
case to evaluate and determine the legal effects of the huge set of EU law
sources within Czech legal order. This finding is being denoted as the
“birth of the doctrine”\(^6\) case. The centre of this case lied in the review of

\(^5\) 6/64 Flaminio Costa vs. ENEL [1964] ECR 585, 593; 106/77 Amministrazione
delle Finanze dello Stato vs. Simmenthal SpA. [1978] ECR 629; 11/70
Internationale Handelsgesellschaft mbH vs. Einfuhr und Vorratsstelle für

\(^6\) Jiří Zemánek, The Emerging Czech Constitutional Doctrine of European Law,
3 EurConst 418, 424 (2007).

This part contents only general introduction to the CCC’s doctrine on relation
between EU law and Czech constitutional order. I deal with this question in
broader way in conference paper called Some Remarks on the Czech
Constitutional Court’s Attitude towards Application of EU law (to be published
in 2010, Univerzita Komenského, Faculty of Law, Bratislava). For other
opinions on this topic see for example: Jan Komárek, Vztah práva Evropské
unie a právního řádu ČR očima tří rozhodnutí Ústavního soudu (Relation
between EU Law and Czech Law from the Perspective of three Decisions of
Constitutional Court), 14 Soudni rozhledy 357 (2008); Jiří Malenovský,
K nové doktríně Ústavního soudu ČR v otázce vztahů českého komunitárního a
mezinárodního práva (On New Doctrine of Constitutional Court of CR on the
Question of Relationship between Czech, Community and International Law),
14 Právní rozhledy 774 (2006); Richard Král, Uznání i rozpaky nad
“komunitárním” nálezem Ústavního soudu ve věci cukerných kvót
42 Ondrej Hamuľák, *Double “yes” to Lisbon Treaty - Double yes to the pooled sovereignty concept. Few remarks on two decisions of the Czech Constitutional Court*. 

constitutionality of governmental order. By this order the Community system for designation of quotas introduced by Commission regulation\(^8\) was implemented to the Czech law. The base for complaint was in affirmed discriminatory nature of the quotas system. Court had to resolve the allegation that system of quotas for the producers of sugar is not in accord with constitutional principle of equal treatment. The petitioners (group of MPs) demanded CCC to declare governmental order void because of its discordance with abovementioned principle.

Clear EU law connotations arisen. By testing the national implementing act CCC in fact was asked to measure indirectly also the European Community law. CCC did not hesitate to take this opportunity and establish the base for its own view on the principle of primacy. Result of the case was that CCC declared governmental order void. Cancelation was based on the reasoning that government had acted *ultra vires*. Adoption of the government order was according the CCC beyond the powers of government. CCC held that regulation of the sugar market forms the part of EC competences. Reservation of this act in the Czech legal system would lead to the breach of rules of the division of powers between Community and member state.

We can see that Euro-friendly result of the decision was based on the evaluation of the system of conferred powers and their exercising by the Community and state bodies. On the one hand CCC supported the essence of the supranational nature of the European Community based on the conferal of original MS powers to it. On the other hand by its broad argumentation and several *obiter dicta* it expressed some kind of conditional assent with the Act’s primacy doctrine.

What need to be said on the first place is that CCC accepted the primacy of Community law. It has stated that Community law can not be reviewed by the CCC and tested by the Czech constitutional rules. This stance has covered not only the directly effective formal sources of Community law (like Treaty or secondary legislation provisions). It has been widened also on the material Community law in form of national implementing meas-


ures which legalized the EC anticipations within internal legal order of the MS. This conclusion is deduced from the argumentation of the CCC in which it took the stance on the question of conferral and division of powers between EC and MS.

It has found out that national constitutional authorization for delegation of powers on EC has the two-way nature. On the first side, it is the basis for transfer of national competences on supranational body. On the other hand it represents the open door for the inclusion of effects and application principles of EU law inside the Czech legal system. After this reasoning CCC added that the transfer of powers is not unconditional. That means that also primacy of Community law as the consequence of this transfer is restricted by some limits as well.

Thus CCC’s resignation on the possibility of the constitutionality testing of the European law will last only on special circumstances. It will persist only as long as the exercise of the conferred powers by the EC and its institutions will be in accord with the principal values of the Czech constitutional system. CCC has held that:

„Should, therefore, these delegated powers be carried out by the EC organs in a manner that is regressive in relation to the existing conception of the essential attributes of a democratic law-based state, then such exercise of powers would be in conflict with the Czech Republic’s constitutional order, which would require that these powers once again be assumed by the Czech Republic’s national organs."

Thus CCC has kept its power to control the exercise of the conferred powers. It preserves itself the right of final word. The appearance of highly hypothetical situation of the exercise of powers by EC institutions in discordance with the core constitutional values “would entail – in opinion of the Czech Constitutional Court – a suspension of the conferred powers, depriving the respective Community act of its priority position within the

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9 Art. 10a of Czech Constitution:
“(1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.

(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum”.

Czech legal order and allowing national authorities to disregard it.”\(^\text{11}\) The concretely stated values were the foundations of state sovereignty and the very essence of the substantive law-based state. Abovementioned “as long as statement” can be determined as the Czech “Solange” attitude.

To give some final remarks there is a need to say that Sugar Quotas Case has served as ground basis for the Constitutional Court doctrine. There was no final position no final answer and no clear attitude. Several questions had remained covered. In Sugar Quotas case CCC has given only some example of the protected values which represent limits to the primacy of EC law. It has resign on the attempt to clarify where exactly lays the frontier of the Community law application in Czech legal order. We can paraphrase the Courts message by forthcoming sentence. “Our Constitution in article 10a creates the basis for the effect of Community law within Czech legal order including its primacy, so these effects are constitutional per se, but only in the situation when they are in accord with the core values of or constitutional system”. CCC determined its attitude and introduced its own limits to the Primacy principle. Problem is that named sum of core values is vague statement and for that reason it shall also be interpreted very broad. The oncoming life of European doctrine necessarily had to resolve this problem. I will attempt to portray if this was the case in forthcoming passages of this work.

“Lisbon Treaty I”

Initial remarks and procedural connotations

The first Lisbon decision of the CCC from the November 2008 was awaited event from several points of view. From EU perspective it was a necessary step for continuation or discontinuation of ratification process of reform document. From national political view it was an opportunity to express and strengthen or on the other hand weaken the national sovereignty or better said national position within integrated Europe. From legal (lawyers) point of view there were several interesting features dealing with formal as well as substantive aspects.

This proceedings before CCC was historically the first practical example of using the special power for preliminary review of the constitutionality of international treaty under art. 87 par. 2 of the Constitution. This novelty and no experience with this kind of proceedings gave rise to some question solution of which was indispensably connected with the findings of the court. I am not going to cover all of these questions because the aim of this contribution is different as was mentioned above. But there is one very interesting and crucial question which has to be mentioned.

Concretely CCC had to answer whether it in itself is bounded by the petition and so it has power to review only affected provisions of the international treaty or contrary whether it has wide discretion and is open to review treaty en bloc. In other words if there is possibility to review one concrete international treaty in several proceedings invoked by different entitled petitioners or if there should by only one potential proceeding on one particular treaty. The answer of the court was clear and afterwards appreciated by the most of authors. CCC stated that a proceeding on the

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12 Art. 87 par. 2 provides: “2) Prior to the ratification of a treaty under art. 10a or art. 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty’s conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment.” This English translation is available on the web pages of CCC: http://www.concourt.cz/view/1419.

13 The questions oscillated around the problems like petitory or non-petitory (adversarial or non-adversarial) character of the proceedings, question of res iudicata, question of criteria for evaluation of constitutionality, questions of formal character and content of petition etc. All this question gave rise do active debate within Czech academia. For details see e.g. Jan Kysela, Lisabonská smlouva v kontextu předběžného přezkumu Ústavním soudem (Lisbon Treaty in the Context of the Preliminary Review before Constitutional Court), Právní zpravodaj May 2008, at 1; Jan Filip, Lisabonská smlouva za branami Ústavního soudu (Lisbon Treaty behind the Gates of Constitutional Court), Právní zpravodaj Oct. 2008, at 1; Jan Kust & Lenka Pítrová, „Lisabonská smlouva“ a předběžná kontrola ústavnosti mezinárodních smluv (“Lisbon Treaty” and Preliminary Control of the Constitutionality of International Treaties), 147 Právník 473 (2008).

Ondrej Hamuľák, *Double “yes” to Lisbon Treaty - Double yes to the pooled sovereignty concept. Few remarks on two decisions of the Czech Constitutional Court*. Constitutionality of the international treaty is not limited on the only one attempt. The main arguments used by the CCC were: analogy with the proceedings on the constitutionality of national statutes, where petitioners have a burden of allegation, judicial character of constitutional court in general which rather than giving the advices and “academic” interpretation has to mandatory adjudge the constitutional cases, and last but not least the CCC in setting this opinion was willing to protect the right of another petitioners holding the right to invoke preliminary review of the constitutional assent of international treaty (group of deputies or senators and president of the republic)\(^{15}\).

„The Constitutional Court thus concludes that its review is concentrated on those provisions of the Treaty of Lisbon whose consistency with the Constitutional the petitioner expressly contested and for which it presented arguments contained in its petition\(^ {16}\).

**CCC’s view on the character European integration – pooled sovereignty et sequentia**

**Constitutional doubts – sovereignty at stake.** The main part of Senates petition dealt with the question of transfer of powers, their execution and control over this execution and common questions of sovereignty which arches over all mentioned topics. Concrete pleas were concerned with alleged broad sum o exclusive competences of the Union which likens Union to state-like entity; with wide and not clear determination of flexibility clause in art. 308 of the Treaty on the Functioning of the European Union (TFEU), which may (according to Senate’s view) lead to the uncontrollable expanding of the EU competences; with so called *passerelles* - transitional clauses which (according to Senate’s view) in a case of their application will lead to the non constitutional narrowing of the member states competences and interference with state sovereignty which has its reflexion also in “veto” right in the field of international decision making process; competence of the EU in external relations – where constitutional

\(^{15}\) See par. 74-76 of the Lisbon Treaty I decision. For commentary see Jan Wintr, První rozhodnutí Ústavního soudu o ústavnosti mezinárodní smlouvy (First Decision of the Constitutional Court on the Constitutionality of International Treaty), Jurisprudence 1:2009, at 21, 25.

\(^{16}\) Par. 77 of the Lisbon Treaty I decision.
doubts were connected with the position and legal force (legal value) of the international treaties concluded by EU within Czech legal order; and influence of the EC Human rights standard represented by Charter of the Fundamental rights of the EU on the national mechanisms and standards of protection and in relation with this topic petitioners had also contested constitutionality of the ruling against state before Council for the breach of fundamental principles of the EU.

**Modern concept of sovereignty.** CCC touched this issues right form the beginning of substantive part of its decision (Review of Content – General Part (Basic Starting Points), par. 95-120). In the view of CCC European Union represents entity which establishes the base for the strengthening and protection of sovereignty. According to the CCC this classical institution has gained new meaning and proportion. It is not only the basic attribute of national state and expression of its power. Today sovereignty is interconnected with the will and power of the state to cooperate and use its competence together with other subjects. It is an expression of “new order in the globalized world”\(^{17}\). CCC correctly and logically refused to measure sovereignty and question of transfer of powers to the supranational bodies from the “protectionist” point of view. CCC did not think about process of European integration as the process of loosing powers originating from state. On the contrary it understands the sovereignty as ability to determine the future of the state, ability to use, share, and transfer and co-execute the competencies which lead to easier and more efficient achievement of results.

“[…] It may seem paradoxical that they key expression of state sovereignty is the ability to dispose of one’s sovereignty (or part of it), or to temporarily or even permanently cede certain competences\(^{18}\)."

**Common European project and limits of its self regulation.** CCC expressed that in its opinion European integration process is not radical movement accompanied by effects of loosing or stealing the powers or sovereignty. It underlined the voluntariness of this movement and its added value for member states. But it is needed to say, that this was not CCC’s final position. Above described optimistic “judgement of political nature”\(^{19}\) was supplemented by the *ultima ratio* argumentation of the court. It did not forget to remark that even though that European integration is positive challenge for the Czech Republic, which enriched its sovereignty

\(^{17}\) Para 102 of the Lisbon Treaty I decision.

\(^{18}\) Para 104 of the Lisbon Treaty I decision.
by new possibilities, it has still limited character dependant on its constitutional conformity. CCC by this expression underwrote its Solange position presented in Sugar quotas case. CCC did not find any actual inconsistencies and did not adjudge the disaccord between Lisbon Treaty and Czech constitution. But this position does not mean, that it resign to fulfilment of its crucial role as the final guarantor and protector of the constitutional order.  

“[…] The Constitutional Court generally recognizes the functionality of the EU institutional framework for ensuring review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional. […] what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application. [CCC] will […] function as an ultima ratio and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution […]

**Member states as pouvoir constituant de l’Europe.** Next appraisal to the questions of character of European integration and limits of its operation were expressed in the special part of the decision. CCC has opportunity to repeat the basis of its doctrine according to which European law is not absolutely self-determinate, but its functioning has basis within the Czech constitutional order (art. 10a of the Constitution). It is Czech pouvoir constituant (or generally pouvoir constituant in all member states) not the EU itself who holds the right of competence determination a distribution. For that reason states are still responsible for the character of Union as such and for that same reason, there is no ground for the questions and anxiety about EU’s statehood or state-like character.

“[…] Treaty of Lisbon itself confirms that the legislative competence competence, i.e. the authorization to amend fundamental regulations, remains with the member states. […] if the Union does not have the competence -competence, it can not be considered either a kind of federal state or special entity, standing in every respect and always above the individual

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21 Par. 120 of the Lisbon Treaty I decision.
states. The Union can act only within the scope of powers expressly conferred on it by member states, which it can not exceed, nor can it establish new powers for itself. [...]”\(^{22}\).

**National parliament as protectors of constitutional balance.** One important thing on this part of CCC’s argumentation is emphasis added on the function and role of national parliaments in the process of determination and control of the balance in the system of pooled sovereignty within the Europe. National parliaments as the protectors of principle of subsidiarity are obtaining the strong instrument and may become one of the most important players in the field of execution of shared competences\(^{23}\). CCC stressed this growing significance. CCC gave us clear proof of its ability of sensible anticipation of mechanisms and trends behind the European legal integration. Lisbon concept of extended powers of national parliaments give rise to the notion of *a priori* control of constitutional issues and offer the space for exclusion of constitutional tenses in the stage of preparation of legislative outcomes. Inclusion of national parliaments into the group of European constitutional players gives rise to the more efficient system of cooperation and creation of multi-level constitutional system. CCC is aware of this opportunity.

“[...] Treaty of Lisbon expands the present framework [...] by including the parliaments of member states in the process of review of the exercise of competences [...]. Thus, the parliaments of member states can play an important role in protecting the limits of competences which the member states conferred on the Union. [...]. Review of observing the limits of the conferral of competences is thus the joint role of all participating bodies, both at the European level and at the domestic level”\(^{24}\).

\(^{22}\) Par. 132 of the Lisbon Treaty I decision.


\(^{24}\) Par. 140 of the Lisbon Treaty I decision.
EU as unique international entity under mastership of Member states. In the next parts of its decision CCC dealt in detail with the character of simplified changes of competences (flexibility clause, passerelles) external competencies and human rights standards end their protection. Also this long parts of its decision offers contribution to the debate on character of the EU after Lisbon reform process. Selected passages there under will offer the exact words of CCC on this topic. What can be read from it? CCC once more stressed the primary role of the states in governing the character and execution of EU’s competences. Court pointed on the international character of the EU which is formed of independent units participation of which is voluntary and not fixed.

“[…] the system of amending primary law, as enshrined by the Treaty of Lisbon, is proof that all the named international treaties remain such treaties even as regards revision of them, and therefore the European Union, even after the Treaty of Lisbon enters into force, will be a unique organization of an international law character. […] amendment of the Treaty on EU or of the Treaty on the Functioning of the EU will be possible only with the consent of all states in the Union […] Thus, even after the Treaty of Lisbon enters into force, the EU will not acquire the power to create its own new competences, the member states will still be “masters of the treaties.” Moreover, the Treaty of Lisbon newly introduces, in Art. 50 of the Treaty on EU, the possibility of withdrawing from the organization […] and this possibility, on the contrary, strengthens the sovereignty of member states […]25.

One standard of human rights protection. Not even formal expansion of the EU’s competence into the human rights field in connection with the introduction of Charter of fundamental rights as legally binding part of EU primary law was not understand as attack on the Czech constitutionality or more precisely Czech sovereignty. CCC stressed the added value of Charter, its importance for legitimating of the EU’s decision making processes and material conformity26 between Charter and national standards

25 Par. 146 of the Lisbon Treaty I decision.
26 But note that abovementioned material conformity was declared only from the abstract point of view. Pluralistic notion postulates the best guarantee for the human rights and for that reason CCC stressed that in future it will follow those standards, which offers the highest rank of protection for individual whatever source they come from. Considering this “ultimate good” solution it is possible to think about preference of both national and union standards over
of protection. In connection with potential sanctions against Czech Republic for alleged violations of human rights as fundamental principles on which EU is based it need to be said, that CCC continue in its inductive approach based on the accentuation of the role of the states as building stones of the Union. According to this notion there is (from material point of view) nothing new on the Union’s level. Union standards are built on the common base of national constitutional rules and traditions. From this point of view there is no risk of attack on sovereignty in case of imposition of sanction under art. 7 of the Treaty on EU because state actions which shall be in breach of EU human rights standard will be ipso iure in discordance with Czech constitutional standards, too.

“[…] EU Charter is in harmony not only with the material core of the Constitution, but also with all provisions of the constitutional order. […] the European institutional guarantee of the standard of protection of human rights and fundamental freedoms to be compatible with the standard ensured on the basis of the constitutional order of the Czech Republic. […]”

“[…] the leading principle in the area of human rights and fundamental freedoms is the most effective possible protection of the individual, together with the clear enforceability of the rights directly on the basis of catalogues of human rights, usually without the intermediation of other legal texts of lower legal force. […]”

“[…] the opportunity to suspend the rights that arise to a member state from the Treaties can not mean a violation of the fundamental characteristic of the Czech Republic as a sovereign, unitary and democratic state governed by the rule of law […] because this is a penalty only vis-à-vis a member state that violates the values on which the European Union is founded; these values, as stated above, are also among the fundamental principles protected by the Constitution of the Czech Republic. If the Czech Republic observes its own constitutional order, suspension of the
“Lisbon Treaty II”

Initial remarks

Second decision of the CCC on the constitutional assent of Lisbon Treaty was (not to say inevitable) for sure logical continuation of the first story. CCC in its first decision did not exclude another petitions and solution of procedural aspects of the proceedings on constitutionality of international treaty given by it logically represented open door for further pleas. This position meant that Lisbon treaty or better said its constitutionality was not protected against another attacks.

The new petition was addressed to the CCC by group of senators on 28th of September 2009. In this second attempt senators disputed about continuality of Lisbon treaty as whole. Sum of their allegations included critics of unclear and incomprehensible character of the treaty; risk for the political neutrality as basic principle of Czech constitutional law because of broad and unclear determination of EU’s goals and restrain of the principle of government of the people; “state-like” attributes of the Union e.g. representative democracy principle as a basis for EU’s functioning, European commitment as special conditions for the appointment of the candidate to the position of member of commission, common defence as future goal of the Union and procedural/formal restrictions of the rights of the states to withdraw from the Union.

Procedural aspects and related formal questions

As I have indicated above the substantive part of the decision in Lisbon Treaty II case was very similar to the first decision and in many parts included repetition of the original argumentation. This article is focused on the material aspects of the CCC’s argumentation but it is necessary to stress also some procedural aspects of second judgement, because just these aspects were followed by active discussion within the Czech legal environment. Strategic questions from procedural or formal point of view were forthcoming.

Question of *ne bis in idem* in connection with first judgement where CCC stated, that admissibility of the new petitions is restricted for the new allegations and diversity of petitioner is not enough. CCC stressed that its main role and function is judicial and refused possibility to be addressee of hypothetical and academic questions.

“[…] order of petitioners and the consequences […] do not mean that potential subsequent petitioners (or potential parties to other proceedings) may contest, over and over again, conclusions that the Constitutional Court has already stated in a judgment concerning the conformity with the constitutional order of an international treaty […]”

Question of review of whole treaty and connected question of limits for the review of international treaties was second interesting procedural aspect. The most important feature of this part of decision is positive answer of the CCC to the question of complex review of the Treaty. According to the Court the question of review of the Treaty as whole or only partially depends on the content of petition and formulation of arguments of the petitioners. In connection with the question of limits of the review (what implicitly means to express constitutional limits to the transfer of powers - what is material question) CCC continued in its cautious approach and refuse to offer final list or some other kind of delimitation.

Third (and the most problematic and questionable) aspect was connected with the courts attention devoted to the question of unconstitutional abuse of the rights to contest the international treaty by petitioners. Problematic aspect of this part lies not only in given opinion but also in the fact, that forthcoming questions mentioned by the CCC were not included in the petition. The argumentation within this part was very strict and political and given interpretation was at least very active and purposive. The first thing that has to be mentioned is interpretation of the president’s competence to ratify the international treaties. Here CCC actively cut the rope of the polemic about character and functions of the president within the ratification process and interpreted it in a way that his/her role is not decisive but rather confirming. In other words it has established the duty of the president to sign international treaty after successful ratification steps (on

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31 See (unfortunately only in Czech language) very interesting debate about this topic which took place on the pages of the legal blog Jiné právo (Another law) and lasted for a week. See http://jinepravo.blogspot.com/2009/11/lisabon-ii-vyhlasen-publikovan_03.html.

32 Par. 99 of the Lisbon Treaty II decision.
Ondrej Hamulák, *Double “yes” to Lisbon Treaty - Double yes to the pooled sovereignty concept. Few remarks on two decisions of the Czech Constitutional Court* (parliamentary level of in a case of referendum). The arguments of the court were based on the principle of commitment of international obligations and good will in international relations. It is hard to argue with this kind of arguments. But when we look at the arguments of the Court through the optic of national constitutional law its position lacks persuasiveness. CCC had crossed the river of political questions and its interpretation of the president’s role within the process of ratification of international treaty was not necessary. Probability of obstructions or fear from the president’s discretion can be hardly accepted as good ground for restrictive interpretation of the general provision which determines the competence of the head of the state. CCC had mixed the level of political and let say diplomatic obligation of the Czech Republic represented by the president and question of legal duty without use of constitutional arguments.

“At the level of international law, just by negotiating an international treaty the parties assume an obligation that they will not disproportionately draw out their definitive decision to accept or not accept the treaty, which follows from the principle of good faith […] Connected to this at the level of domestic, or constitutional law, this is the president’s obligation, without undue delay to ratify an international treaty (i.e. formally confirm externally the proper conduct of the domestic approval procedure) that was duly negotiated by the president, or by the government, based on his authorisation, and whose ratification has been consented to by a democratically elected legislative assembly […]” 33.

Another example of active and also restrictive interpretation used by the CCC is connected with the question of time limit which determines the rights of petitioners to question the constitutionality of the international treaty. Here CCC continued in the internationally conditioned logic of interpretation. The approach was same like in the question of president’s duty to sign the treaty and finish the ratification process. According to the court even though there is no exact time limit the petitioner’s right to present the petition is not absolute and the petition has to be posed without undue delay, which means as soon as possible after preparation of the basis for petition and determination of the plea (doubts) of unconstitutionality. Even though that situation in present case was not in compliance with that demand CCC did not deny the petition. It refused to apply this

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33 Para 116 of the Lisbon Treaty II decision.
opinion retroactively and postponed the consequences of given interpretation for the future cases.

**Pooled sovereignty repeated and judicial minimalism in its control**

**New petition - old pattern.** Dealing with sovereignty question and character of the Union CCC had continued in its argumentation from the first Lisbon treaty decision. We can find in many paragraphs mere transcription of its argumentation from the November 2009. That’s the evidence of stability and strong position of the court in solution of affected topics. One “new” thing that CCC had to resolve was petitioner’s motion to give clear answer on limits of EU’s competence and functioning of its instruments within the Czech constitutional order. In other words to determine the core values of Czech constitutional law, which CCC according to its argumentation (starting in Sugar quotas with case and finishing in Lisbon Treaty I decision) considers as non transferable and non touchable attributes of Czech constitutional law. The answer on this call by CCC was quite disappointing because court refused to answer it as a political question which has to be resolved apriori by legislative power and not to be resolved apos teriori within judicial disputes. Considering the (also self determined) role of the CCC as final arbiter this answer is little bit surprising. It is surprising also from another point of view. The evolution of CCC’s doctrine on effects of European law and its limits had been developed in several progressive steps and court had started to brighten above-mentioned constitutional term.

“[…]. Constitutional Court does not feel authorised to formulate in advance, in an abstract context, what is the precise content of Article 1(1)

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First judicial attempt to determine the content of the term “Substantive Heart of the Constitution” (core values) has appeared in the Lisbon Treaty I decision (par. 93). CCC had presented the demonstrative (so not closed) enumeration of the constitutional principles and values which are part of the core “untouchable” parts of the Czech constitutional order. It has stated that that principles are “[…] principle of inherent, inalienable, non-prescriptible, and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people, and separation of powers, respecting the cited material concept of a law-based state, is built to protect them. […]”.
56 Ondrej Hamuľák, *Double “yes” to Lisbon Treaty - Double yes to the pooled sovereignty concept. Few remarks on two decisions of the Czech Constitutional Court*

of the Constitution, as requested by the petitioners, supported by the president, who welcomes the attempt “in a final list to define the elements of the ‘material core’ of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law” […].”\(^{35}\).

**Court’s self-restraint.** Courts hesitation in above mentioned fields had its origin in careful approach to determination of final limits in relation between national and supranational spheres (especially in connection with flexible and living system of European constitutionality). Moreover its approach was reaction on some sort of blames and critics coming from political circles\(^{36}\). CCC endeavoured to refrain from this kind of political dispute and stressed its own subsidiary and utmost role.

“The Constitutional Court believes that it is specific cases that can provide it a relevant framework in which it is possible, case by case, to interpret more precisely the meaning of the term “sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens”. […] This does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty […]”\(^{37}\).

**Sovereignty as responsibility.** Continuing in same attitude and concept of argumentation CCC turns its attention (or better said repeat its argumentation from Lisbon Treaty I decision) to the questions of character of the Union or more precisely to the question on character of membership in the Union from the point of view of national sovereignty. Court stressed that the advantages which are resulting from the concept of pooled sovereignty have their counterpart in the legal duties on common (European as well as international) field. Its arguments may be understand in the way that CCC

\(^{35}\) Par. 112 of the Lisbon Treaty II decision.

\(^{36}\) As an example of this opinions (from myriads of critical statements!) see one of the latest opinion of the president Václav Klaus (in which it propose limitation of CCC powers!): Ondřej Kundra, Seeking Revenge, 1/10/2009 Prague Daily Monitor, http://respekt.ihned.cz/respekt-in-english/c1-38491910-seeking-revenge.

\(^{37}\) Par. 113 of the Lisbon Treaty II decision.
construes both the institution of pooled sovereignty and rights and duties stemming form it as a parts of the legal status of the states.

EU in its view is not possessor of pooled sovereignty but result or some kind of consequence of this concept and administrator of competences, which were transferred on it. Even though this transfer or more precisely conferral of powers is not time-limited, it is still under ultimate governance of the member states. Thinking about that we have to have in mind mixed concept of Union’s status which on the one side is connected with the notion to determine EU as subject *sui generis* on the other side it is still organization based on international treaty.

But this mixed concept affects not only the understanding of Union as such but determines also position of the states participating on the construction of the supranational entity. Some sort of influence on the states level is materialized in the sum of duties and formal processes which has to be adhered. This kind of duties is not in breach with national sovereignty but forms a consequence of the voluntary exercise of sovereignty partly within common project. Manifested will to participate on this project immanently includes also burden of responsible behaviour on the side of participants.

“[…] the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign’s participation in a manner that is agreed upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. […] the concept of shared – “pooled” – sovereignty, and today already forms an entity *sui generis*, which is difficult to classify in classical political science categories. A key manifestation of a state’s sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently**39.**

“[…] sovereignty does not mean arbitrariness, or an opportunity to freely violate obligations from international treaties, such as the treaties on the basis of which the Czech Republic is a member of the European Union. Based on these treaties, the Czech Republic has not only rights, but also obligations vis-à-vis the other Member states. It would contravene the

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38 What is definitely acknowledged by the Lisbon Treaty in form of clear regulation of the rights of member states to withdraw from the Union.

39 Par. 147 of the Lisbon Treaty II decision.
Final remarks

Czech Constitutional Court has had several opportunities to express its opinion to the well-established doctrines of effects and applicability principles of EU law within national legal systems. In more than five years after accession of Czech Republic to the Union, CCC has developed its own doctrine towards those issues. Even though it had drawn the inspiration from the stance of other (especially German) constitutional courts, it has established its own attitude and introduced its own elements.

Additionally in the Lisbon saga, it has great opportunity to deal with the crucial questions of the basis and fundamental principles of establishment and functioning of European integration. It has expressed its opinion to the concept of conferral of competences and its relation to the question of national sovereignty. Two clear pro-European cases of the CCC for sure enriched the contemporary debate on the limits of sovereignty or concept of sovereignty in connection with membership of the states in the sui generis European entity. CCC may receive a lot of critics for its euro-friendly argumentation as well as for its non-clear determination of the limits for operation of European law and execution of Union’s competences. But all of them will be politically or emotionally grounded. What is clear and what has to be underwritten is effort of the Court to find legally tenable arguments for the final judgement which wouldn’t put back the necessary reform of the EU structures. By this effort CCC offered fresh advocacy to the non-traditional approach to the question of sovereignty materialized in the notion of pooled sovereignty.

CCC in general may be described as euro-friendly court which is familiar with the character features of EU law and is aware of the principles of its operation. It has comprehend the logic of the relationship between EU law and national law and recognized, that Czech Republic forms part of spe-

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58 Ondrej Hamuľák, *Double “yes” to Lisbon Treaty - Double yes to the pooled sovereignty concept. Few remarks on two decisions of the Czech Constitutional Court*.

Principle *pacta sunt servanda*, codified in art. 26 of the Vienna Convention, if the Czech Republic could at any time begin to ignore these obligations, claiming that it is again assuming its powers. […] it is fully in accordance with [constitutional law requirements] that the Czech Republic would have to, if withdrawing from the European Union, observe the predetermined procedures.\(^{40}\)

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40 Par. 168 of the Lisbon Treaty II decision.
cific system which necessarily needs some principles of operation and some kind of hierarchy. On the other hand it has denoted its own role as sole and final “protector” of Czech constitutionality. According to its opinion it is the final arbiter which carries the right to denote relations between Czech constitutional law and EU law and which is open to defend the values of the Czech constitutional system.
PROCEEDINGS OF THE CONFERENCE ON HISTORICAL ROOTS OF CONTEMPORARY IMMOVABLE PROPERTY LAW (OŁSZTYN, FEBRUARY 26, 2009)
An issue nowadays is if Roman law, historic law that was in force during thirteen centuries is still important. That is, does it matter for scholars of law be it criminal, civil, administrative, etc? I say it’s an issue because there are professionals in the world of law that, even though they do not deny it, they do not admit that the origin of nearly all the precepts in the present law has its genesis in Roman law. With this I wish to show in this occasion that every time that a law scholar studies an institution, either in the field if civil law, criminal law, administrative law, etc., analysing it, from a retrospective dogmatic starting from current law until the moment of the birth of the institution, allows us to see that there exists an intimate connection between the present precept and the Roman one. On the other hand, we may be studying legal sources or Roman literature and by following the notes and in general the intermediate law, we may trace the same institution in our present-day legal system. For this occasion, we have chosen a very important subject such as fraud according to Section 251.2 of the Spanish Penal Code. Did this offence exist in Rome? Was it defined? In other words, was there a law that punished a person that sold a moveable property or land or building hiding the fact that it was mortgaged?

Recent studies about the offence of stelionate still show that the sources that study this historic phenomenon in the field of Roman criminal law are truly scarce¹. The Digest (a great piece of work by the Emperor Justinian) shows in title XX under the name of stellionatus works of jurists like Papinian in book I of Responsorum, Ulpianus book VIII comments on Sabinian and in the book VIII of Oficio Procônsul and another by Modestinus

from book III on the sentences. It is also important to highlight other works by Paulus and Ulpianus².

Amongst the recent scholars, one should emphasize on Garofalo and Mentxaka³, the first one in his work⁴ quoting Volterra shows his surprise on the fact that the regulation of the precept of stelionate does not appear in legal works of the postclassical period, especially in the Theodosian Code. This author following Volterra concludes that around the middle of the third century AD⁵ there starts a period of oblio or nearly of stelionate which Justinian ended.

We should point out the appreciation carried out by Garofalo⁶ that says that from a source point of view the expilatae offense and the stelionate offense isn’t generic as the sources of the Digest 47.19 and 47.20 do not coincide except in Ulpianus’ work in the sense that both titles of the Digest (19.20) talk about the book Off. Proc (8 and 9 responsorum).

We agree on the treatment of the mentioned Codex referring to location of both precepts as types of unlawfulness solved in an extraordinem way. From a procedural point of view, we think it raises the same problem, this is, as we will have the chance to show you, it is, without any doubt, a case of lack of definition that undoubtedly the Roman jurists knew how to solve through prudentia iuris. Garofalo⁷ thinks that crimina of the stelionate was considered from the second half the second century and that in the legal language of the classical period precisely, the behaviour forbidden by law, that is the illicit act that is considered prejudicial for social interest was punished by the State through their own governing bodies and penalized with a public sentence that fell on the person or his personal assets. All this passed through a repressive legislative reformation of the offense being studied and was dealt from three sectors that without any doubt depended for its proper functioning on the justice and the efficiency of the

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² Garofalo, L. La persecuzione..., p. 6. D. 3.2.13.8; 13.7.1.2; 13.7.16.1; 13.7.36; 17.1.29.5; 40,7.9.1; 47.11.3; 48,16,71.
³ The author focuses her work on the exegesis of texts relating to stelionate in that they appeared in the Digest and in the Codex as well as a short dogmatic exposition of the institution unlike Garofalo that focuses his work on its organic treatment.
⁴ Garofalo, ibidem. p. 12.
⁶ Garofalo, L., La persecuzione... p. 12.
⁷ Garofalo, L., p. 18.
new law of offences and sentences. From a technical point of view, the Roman jurists were inspired by the legal implementation of the principles that today we would call scientific; the political side that goes by the concept of Government and the basic instrument of the general defence that corresponds to the punitive law and the social side which is the establishment by the legislator of the cultural heritage and the feelings of the Roman people.

The reorganization carried out by the Emperor Dioclesian affects procedural law as a new procedural system will appear after *ordo iudiciurum privatorum* disappeared, name given to the litigious Roman system. When there was a widespread use of the Emperor and his public servant’s *cognition* the door open to a total unification of the criminal repression regime as well as a change from the accusing system to the inquisitive system. It’s necessary to remember that the change from *ordo iudiciurum privatorum* to *cognitio extraordinem*, name given to the Roman procedural system under the Empire, is something that does not happen suddenly but is the result of a slow evolution, which undoubtedly implies a lot more the attempt to specify exactly the private or public nature of the Roman process.

From a procedural point of view within the category of public law, we are trying to find out if this new offence of *stelionate* is protected objectively, that is, is it properly defined, which from our current point of view would guarantee legal safety. According to recent Romanist works the percept of *stelionate* does not seem to be defined in the law nor in private law, characterized by imprecise lines of comprehension of various hypothesis about fraudulent activity, without being able to qualify it specifically under the title of *reato*.

In the analysis of the genesis we should go more deeply into the sources, in the solution of the problems during practice and as a wise person would do first examine the means that our ancestors used to reach to a just and precise result and maybe discover a legal remedy that would mean a step in the evolution of law. Title 20 of book 47 deals with the topic of *stelionate* in its four fragments as we said before. Fragment 47.20.1 of Pomponius’ text first responsorum says: *actio stelionatus neque publicis*
iudicis neque privatis actionibus continetur. Garofalo\textsuperscript{11} thinks that the term *publicum* refers to the source of repression in the legitimate sense. This first fragment brings up the difficulty of not being *iudicia publica* because it does not derive from laws about the *quaestiones perpetuas*. Neither is it about *iudicia privata* as it was an offence and not an unlawful criminal act. From the texts being studied, some talk about *stelionate* generally as the following by Ulpianus\textsuperscript{12}. [...] This jurist explains that it should be known that one may accuse of stelionate to those that have done something deceitfully, that is, when he cannot be accused of another offense: what is considered deceitful in private procedures is the same as being accused of stelionate in criminal procedures. Therefore, where a title cannot be given to a special accusation, there we may accuse of stelionate. It is applicable especially in the case in which someone sells prematurely or gives cunningly in return, hiding the mortgage of a thing that was mortgaged to someone else, as all these cases are of stelionate. A person is also an offender of stelionate who changes goods in exchange of other goods or that takes away or spoils the thing mortgaged. One may also be accused of stelionate if he has acted as an impostor or has committed collusion o somebody’s detriment. It may be said that generally this crime (offense said in today’s terminology) takes place when there is no other title of accusation.

After the general enumeration, we quote other texts that deal with specific cases amongst which we quote D. 47.20.4 by Modestinus 3 de pone\textsuperscript{13} (proyección DE PERIURIO, SI SUA PIGNORA ESSE QUIS IN INSTRUMENTO IURAVIT, CRIMEN STELLIONATUS FIT, ET IDEO AD TEMPUS EXULAT). If someone swore on the document that the objects pawned were theirs, due to perjury the offense of stelionate is declared and because of this is exiled temporarily\textsuperscript{14}. Let us see how the Roman jurists evaluating the elements and circumstances established sentences according to a discretional power that we understand as known. From the two fragments commented on (D. 47.20.3.1 and 47.20.4) we can see that the common element found refers to a deceitful act on behalf the author of the offense. Act that we can observe in the following cases that lack a title of accusation.

\textsuperscript{11} Garofalo, p. 43.

\textsuperscript{12} Ulp. 8 de off. Proc. D. 47.20.3.1; B. 60.30.2; BS 11.2.47; sch. 3.25.1.1 sch. 3.

\textsuperscript{13} B. 60.30.4; BS 22.5.13.sch.12.

Case in which a thing has been sold, exchanged or left as security in favour of another thing already levied. In this hypothesis three cases are considered.

a) someone has sold fraudulently to someone else something that belonged to them and that was already levied on someone else’s name (D. 47.20.3.1)  
It should be known that someone that has done something with bad faith may be accused of stelionate, that is, when that person cannot be accused of another offense.

b) In the second case, someone exchanges something he or she possesses for something else through a special contract that takes effect by handing over one of them. The offense takes place when in the moment of the handover or exchange of the thing, this it is already pawned in someone else’s name (47.20.3.1)

c) And as the third case, a debtor gives the creditor to guarantee the payment of the debt a thing that is already mortgaged on someone else’s name (47.20.3.1)

In the three cases, here considered, the following circumstances may take place, even if it is about personal property or real estate. We think that it is more probable that it deals with real estate as this makes easier the fact of undefined encumbering in favour of one o various creditors. For example, nothing stops it from considering personal property left as security, but in these circumstances we would be talking about theft to be able to hand them in later.

In the cases considered, we now suggest, from a procedural point of view, what action will be taken against the offender? We notice that there is a relation with the right to pawn, this is, what action takes place against the person that commits the offence? In these cases, we may talk about the practice of a contrary action of pawn considered in the acussatio against the defendant y also of an offence of stelionate (47.20.3.1 and 47.20.4) We could also talk about the practice of other actions, as is the case of actio in factum, action of a general type created in the first half of the first century through which the Praetor penalizes different ways of fraudulent behaviour (Gayo 4.46). Whereas, others we that that are in reference of an incident These are the ones in which the claims are drawn up in another way,: pointing out at the beginning of the expression the incident taking place and then adding the terms with which the judge is granted the fac-
ulty to convict or acquit actio in factum that would take place in the case of exchange to claim the thing agreed on as a compensation.

Below we analyse the text by the jurist Africano included in D. 20.4.9.3. and also in Basilic 25.5.7.

_Titia praedium alienum Titio pignori dedit, post Maevio, deinde domina eius pignoris facto marito suo in dotem aestimatum dedit; si Titio soluta sit pecunia, non ideo magis Maevii pignus convaleceré placebat; tunc enim priore dimisso sequentis confirmatur pignus, quum res in bonis debitoris inveniatur. In propó sito autem maritus emtoris loco est, atque ideo, quia neque tunc, quum Maevio obligaretur; neque quum Titio solveretur, in bonis mulieris fueri, nullm tempus inveniri, quo pignus Maevii convaleceré possit; haec tamen ita, si bona fide._

_In dotem aestimatum praedium maritus accepit, id est, si ignoravit, Maevio obligatum ese._ Ticia pawned someone else’s land to Ticio and then to Mevio. Therefore, after becoming the owner of the pawned thing, she gave it to her husband in the dowry. Could it be considered that after becoming the owner the thing pawned to Mevio is confirmed?

Ticia has mortgaged a land which she does not own, we interpret that it is mortgaged and not left on pawn because Ticia should at least have the land in her possession or the ownership title to be able to hand it over to her husband. In this case in particular, Ticia has acted in bad faith.

According to Julianus’ answer D. 47.2.66 (68) _Si is, qui rem pignori dedit vendiderit eam, quamvis dominus sit, furthum facit, sive eam tradiderat creditori, sive speciali pactione tantum obligaverat, dique et Iulianus putat._

Ticia commits the offense of robbery, even though in the case of being the owner, that is, Ticia commits robbery by mortgaging the land belonging to someone else and also commits the offense of _stelionate_, something that Julianus does not say.

It may happen that a diverse object is left in pawn which was previously agreed on, in this sense the jurist Ulpianus in D. 47.20.3.1 says that the people that exchange goods are accused of _stelionate_. In regards to this case, leaving diverse objects in pawn, it is necessary to study the following texts also from the Digest and two texts by the jurist Ulpianus included in D. 13.7.1.2 and D. 13.7.36.
The first one of them says that when pawning a bronze object, the person declared it was gold and so left it in pawn. Now we have to see if the pawned thing was the bronze object or if it was considered as pawned because there was consent regarding the object, which most probably would be the case. The pawner is undertaken by the contrary action of pawning regardless of being subject to a lawsuit for the offense of stelionate too.

In the fragment 36 pr., the same jurist tells the story if a debtor when leaving the thing on pawn cheats a creditor by handing over a bronze object instead of a gold one. The question is, how is he undertaken? On this case, Sabinian rightly writes that if he would have changed bronze for the gold he had already given, it would be a case of robbery and if he changed it in the moment of the handover he acted with bad faith but he is not a robber and as many rescripts stipulate in the extraordinary procedure, the action of stelionate. The text being studied allows us to see how the Roman jurists lay down rules and principles for the cases of fraud when leaving something in pawn. That is, they try to guarantee legal safety in the following way:

Substitution in the moment of the handover:

In Sabinian’s opinion, if the change takes place in that moment, then it is a action of bad faith, but not robbery. We think that the creditor can practice in court the action of extraordinem, as expressed in the rescripts about stelionate, the action corresponding to the offense of stelionate.

Substitution after the handover:

According to Sabinian in this case, the defendant has committed robbery. In our opinion, the defendant in this case cannot practise in the procedure against the defendant the action based on the offense of stelionate. The reason that the practice of this action is not applicable, we think, is based in the elements that take place in this case that are typical of furtum possessionis.

The last fragment of title XX is the following text by the jurist Modestinus, “If somebody swore on a document that the pawned objects was his, because of perjury, the offense of stelionate takes place and due to this he is temporarily exiled” (Mod. 3 de poen.) This passage belongs to book 3 de poenis by Modestinus where they dealt with capital punishment,

says that if someone swore on a document that the objects pawned we owned by him and committed perjury, this conduct is considered as *cri-\-men stelionatus*. The assumption of fact that gave place to this hypothesis of the text may give rise to the following: a person left on pawn things belonging to someone else, declaring in writing in front of the creditor that the things belong to him. As we all know, pawning things that belong to someone else is not possible unless the owner of the object gives his consent. We can assume that this did not happen and that in a certain moment the owner claims to the creditor the things he has received to pawn, or that appear in a written document that he has a right to pawn, which empties the legal content of the right.

In these circumstances, we should not be shocked by the assumption of *stelionate*, as we have already seen in the texts discussed before; we are trying to protect the creditor against fraudulent acts of the debtor. Regarding the sentence laid down in the passage *ad tempus exulat*, it is logical, as we already pointed out in D. 47.20,3,2 for people belonging to a high social condition, the sentence imposed was of temporal exile.

From the texts studied, we think that the one by Ulpianus 8 of the Of. Procónsul is the one that gathers the most varied and ample casuistry about the offense of *stelionate*. We have analysed some assumptions of fact that lead to this offense.

It is unquestionable that only from title 20 of the Digest, under the title of offense of *stelionate*, one could draw extense casuistry as well as from the rest of the texts. In all the assumptions of fact that the sources offer us, what we are interested in pointing out is the link between offense of *stelionate* and the robbery with aggravation or robbery and in a very particular way the projection of this figure till the moment in which it enters Criminal Law from the late Roman Law where it was called *stellionatus* (as in *stellio*, scorpion that hurts treacherous and wickedly) characterized by lowness villainy.

The origin of the criminal figure that today is known as falseness appears for the first time in Roman law with the enactment of a law of the year 78 BC called *Lex Cornelia de falsis*. This law was proposed by Cornelio Sila en the year 81 BC repressing falsification, destruction and spreading of testaments, the forgery of coins, bribing witnesses and the assumption of delivery, punishing with death penalty.\(^{16}\)

\(^{16}\) Paul. 4.7, D. 48.10, C. 9.22.
Here we have to emphasise, on the one hand, the appearance of the concepts *falsum* and *crimen falsi* giving them a broad sense that may even be confused with cheating and, on the other hand, the difference between the forgery of coins and the one committed in the will. This law that initially was applicable to the cases quoted, is extended to other types of criminal conducts and among the falsification of documents, they are told apart between the legal or public documents and the private ones called from that moment onwards *Lex Cornelio de Falsis*.

In the Middle Age, the doctrine created a new *falsum*, where the cases of hereditary fraud where included and so the Roman figure of *stelionate* passed on to being a subsidiary offense different from the Roman one and the present fraud.

It is in the Fuero juzgo, within the Spanish classical law frame, the first legal text, book VII under title V “De los descubrimento de los furtos” [About the Discovery of furtos or robbery] and under tilte V “De los que falsan los escriptos” [About those that falsify the scripts] that the offense of falsifying is regulated, where the the falsification for the theft of documents is assimilated. Later, in the Fuero Real by Alfonso X, Book I title VII “De los escribanos públicos” [About the public notaries], we once again see this figure, pointing out the increase of the punishments that it introduces in relation to the Fuero Juzgo. However, the falsifications and the robberies are still punished.

In the Spanish code of the Siete Partidas o Seven Parts, from a conceptual point of view and taken from Roman law, falsification is defined as shedding of the truth. Following the Roman tendency, the definition is given a very broad sense as it comprises a great number of behaviours susceptible of being included in the title “De Falsedades” [About Falsifications] going from the personal ones to swindle and frauds. In the Partidas or Parts, double selling and simulation of encumbrances are still stopped among the unlawful civilian and, in various occasions, cheating is defined outlining in this way the first traces of the offence of fraud.

In the following legislation, even in the Spanish Nueva Recopilación (year 1567) and also in the Spanish Novisima Recopilación, the novelties are not noticed regarding the regulation of fraud in the assets. The majority of

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the jurists of that period thought that the legislation did not progress since Alfonso’s legislation.

In our legal system, the project of the Spanish Penal Code of 1831 in Section 1054 maintained the designation of stelionate. The Spanish Penal Code is the first legal text that used the word swindle. However, the penal codes from 1848 till the present one, with the only exception of the Code of 1928, gave this type of offence an individual legal treatment within the offence of fraud. In the European codification, I quote amongst others: the Swiss Penal Code that refers to fraud in Section 146 and the Italian Code in chapter II “Offence of fraud against the assets”, in Section 640 it talks about “Trufa” or fraud. Some Latin American Codes, under the influence of the Spanish Penal Code of 1848 and Napoleon’s Civil Code also controls this offence and in some cases with the name of the offence of stelionate. Like for example in the Brazilian Penal Code that in chapter VI deals with “Do estelionato e outras fraudes”, in Section 171: Obter, para si ou para outrem, vantagem ilícita em prejuízo alheio, induzindo ou mantendo alguém em erro, mediante artifício, ardil ou qualquer outro meio fraudulento”.

In the Penal Code of Nicaragua, chapter IV is about “Fraud, Stelionate and Defrauding”, Section 285 says, “The offence of stelionate is committed by the person that:

1. Knowingly sold or encumbered as free objects those that were litigious or were seize or encumbered; sold, encumbered or rented as their own property thing that do not belong to him; and sold to different people the same thing.

2. The owner of the personal property that takes it away from the person that has its legal ownership and damages it or makes it useless, to the detriment of the property or a third party.

It is important to observe, remembering what we have already seen in Roman Law, how this case was classified as robbery and not stelionate.

The Argentinean Penal Code does not talk about stelionate, but about fraud and other defraudations in chapter IV, Section 172. The Cuban Penal Code also refers to fraud in section 334.

I would like to finish this article with the following thought: History, which deals with human events in its different periods and phases, also has
to deal with rules and principles of an organized cohabitation between people, as law is the order that controls the social conducts of a group.

Historically, the criminal aspect of frauds practiced on personal property or real estate subject to encumbrances or to any other type of limitation in the world of law has been, as we have already seen, a constant Roman Law, Intermediate law, and our Positive law and specially in Criminal law.

Law is, as we have just said, an order that controls the social conducts of a group.

Therefore, where there is man, there is a society and where there is a society there is law: *Ubi homo ibi societas; ubi societas ibi ius.*
THE PUBLICITY IN THE TRANSFER OF REAL ESTATE IN ROMAN LAW

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I. An approximation to the publicity in the transfer

The transfer ownership actions that took place in Roman Law, such as mancipatio whose publicity was guaranteed by five witnesses and the lib-ripens taking part, in iure cesio, in which the performance of the judge was enough publicity for the transfer, made up primitive ways of publicity as these acts guaranteed certainty of the ownership in the commercial traffic of properties. The publicity of the transfer meant control of the property that was demanded by social ends and so in the archaic period a registering system was a determining factor in the individualization of the properties as a necessary assumption for the transfers. For example, in the transfer of res mancipi it was important to know the name of the landed property and its topographical details, the name of the slaves and, even, the livestock branding.

But Roman law did not develop a publicity system based on the registry, this deficiency may be explained due to its strong sense of ex iure Quiritum of the property its rigid transfer system, that is reflected in the two institutions aforementioned intended to give publicity, to a certain extent, to the transfers of valuable goods y the Roman primitive economy.


2 Ibid. p. 45.

3 Bartolucci, La marcatura degli animali agricoli, Catania. 1913.

4 Tradicionally amongst the civilists Roman law has been considered as an expression of a clandestinity system vid. Garcia, JM., Derecho inmobiliario registral o hipotecario, I, Madrid, 1988 p. 147. However we do not go by this
In Rome there never existed a specific property registry, something that did happen in Egypt where we can distinguish two periods:

The first one called Ptolemaico or of Greek influence\(^5\): here registries were created in the third century BC that were known as Katagrafé, with a double fiscal purpose of tax collection and real estate publicity. This involved a control over titles to own lands\(^6\), since to grant any document a registration certificate was required drawn up by the person in charge of the archives. However, with time, this became obsolete and publicity was achieved with a legally certified document known as anagrafé.

During the period of Roman ruling: towards the end of 55 AD is where we find the so-called Registry of purchase or land registry Bibliotheke ton enkteseon\(^7\) as the most remote precedent of the current Land registries, with legal purposes and not just fiscal ones\(^8\), as the transfer of titles were opinion as Romans did learn about the early stages of public registration.

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\(^5\) Alvarez Suarez, U., *Los orígenes de la contratación escrita*, Anales de la Academia Matritense del Notariado, IV, Madrid, 1948, p.60 and foll, the author points out that the Greek document put forward before witnesses and signed by them and the parties, was kept firstly in their possession, but slowly with time the custom of placing them in public archives that existed in all Greek cities prevailed. By placing the documents in public archives, there existed the possibility of being directly drawn up by the civil servants of the Archive, and so being the custody and the public authenticity in correspondence. From the deposit point of view, the Archive did not keep any original documents, only copies of these that had to be examined by the civil servants, which undoubtedly became a precedent in the registration qualification. On the other hand, it is important to emphasize that in the Attic area there was a custom of marking the mortgaged lands with oroi or boundary stones with the purpose of knowing which lands had what burdens see. Folques, R., *Los mojones del Atica o la publicidad hipotecaria en el siglo IV a.C.* in R.C.D.R, nº254-55, Madrid, 1949, p. 417 foll.


registered here. The registry was in charge of the *Biblioilakes* that drew up the *epistalma*, certifies necessary to grant the document of availability of real estate.

These so important registries of the Egyptian period that survived till the fourth century, were organized by the Romans who in their own country did not have the institution of the Registry. We have numerous documents that give evidence of the functioning of this system based on a registry in Egypt. The most recent one deals with the Petition of Dionisia to the prefect of Egypt in 186 AD for a lawsuit that concerned the lands given in dowry to her husband Horion, against her father Chaeremon. The defence claimed by Dionisa show amongst the certificates for her defence, a very important legal foundation: the Edict of M. Rufo of *tabulis possessionum fundi* prefect of Egypt in 89 AD that states the duty to register the lands in the *Bibliotheke ton enkteseon*, with the purpose to stop sale carried out by non-owners:

Rufus, præfectus Aegypti dicit: Claudius Arius Oxyrynychitii stratægus notum fecit mihi nec privatas nec publicas res eam quae deceret habere administrationem, quia in longo tempore non quemadmodum oporteret relatum esset in tabulas iuris praediorum bibliothecae, etiamsi saepe decretum esset ab eis qui ante me fuissent praefectis ut eam quae deceret acciperent emendmentem. Quod non bene procedet, nisi ab initio fient exempla. Iubeo igitur omnes possessores intra menses sex profiteri suas possessiones in iuris praediorum bibliothecam et creditorum quas habeant hypothecas et ceteros quae habeant iura, notum facientes unde unicuique bonorum obvenerit possessio. Adscribant vero etiam mulieres indiciis maritorum si secundum quoddam regionis ius tenebuntur bona similiter autem liberi quoque parentum quibus usus per publica obligatus instrumenta, possessio autem post mortem ad liberos redit, ne paciscentes per ignorantiam decipientur. Veto etiam scribas et tabelliones quicquam non iussos a librorum custodibus perficere scientes nohil prodesse talia; sed etiam ipsi ut contra mandata facientes poenam ferent eam quae par erit. Quodsi erunt in bibliotheca professiones priorum temporum, cum oni diligenter custodian tur, similiter autem et tabulae ut si quae fiat requisitio in posterum de eis quae non ut portet professa sunt ex ex illis nota fiant. Ut

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10 Bruns, *FIRA* Tübingen 1969, p. 246 ss.
Autem firmus et in perpetuum maneat tabularum usus ne iterum professione egeant, mando librorum custodibus, ut quinto quoque anno renovent tabulas ita ut transferatur in novas ultimum cuiusque nominis indicium, secundum vicos et secundum genera.

Anno nono Domitiani, mense Domitian IV.

The Edict reflecting the deficiencies that take place due to a lack of registrations binds all owners to register within a 6 month period. The registering, according to the Edict, has an effect on all the property laws emphasizing on mortgaged properties on loan guarantees and those set up in favour of the wife and children.

Keeping aside fiscal purposes, the regulation stresses on giving security in transfers as it subordinates *tabelliones or notaries* to the registration certificate, on behalf of those that keep the books where the entries of title owners are registered which are needed to have the property at ones disposal. This certificate is subject to the payment of tax, that is, it was not allowed to proceed with the transfer of the property without the preventive authorisation with the taxes paid and the according transcription of the deal registered.

The same prefect bears in mind during the *professio* the principle of time, as the first one to draw up an entry in the register is protected. There is a concern to guarantee the registration of the real estate and that is why vigilance is kept in the transfers that take place beforehand to guarantee the following transfers.

This registry has a limit in the time guarantee of publicity to third parties as it has to be renewed every five years. This is important to give credibility or accuracy to the register and so show legal maps of each land with its entire vicissitudes.

II. The intervention of the neighbors as a guarantee according to FV. 35

But what is the way of giving certainty to the transfers in Roman law? Basically sales have a diffused system of publicity that are based on:
On one hand the census, as registers with a political financial nature and on the other hand summons and statements of the neighbours that have to give certainty and security of the real title of the ownership that wishes to transfer the property.

These early stages of publicity are focused on the Fragmenta Vaticana 35 and an extract of this is included in the CTh. 3.1.2.

In the analysis of the Fragmenta Vaticana 35 we see an imbalance in the regulations which it lacks of as it mixes the explanatory preamble FV. 35., 1, 2 and 5 with the control of the regulation in FV. 35.3, 4, 6, 7 obviously the explanatory preamble of Constantine tries to justify the control referring to confusion that exists amongst those that really own the properties and those that pay the taxes.

Therefore, FV. 35.2 demands a registration when it points out, “due to some cunning people, the selling of their properties to obtain a doubtful benefit without the registration in the census is significant…”.

The imperial precautionary measures are meant to verify that everybody knows their full rights concerning buying and selling, that is the legal situation of the property, as we may appreciate in the fragments:

11 The importance of a census lies in the need to establish based on the statements of professions, amounts or fiscal quantities. The supreme civil servant was the emperor himself, who ran the census of the provinces in the Roman Spain. See Muniz Coello, El sistema fiscal en la España romana, Zaragoza 1982, his analysis emphasises on the Republic and the high Roman Empire.

12 Voci, Tradizione, donazione, vendita da Costantino a Giustiniano, IURA XXXVIII 8, 1987, 110 foll.

13 The concern of the certainty in the contractual relations are revealed in the legislation of this period as commented by ARCHI, in Indirizzi e problemi del sistema contrattuale nella legislazione da Costantino a Giustiniano, in Scritti vol III, Milano, 1981, 1779 foll.

14 The importance of the census is highlighted in the fragment as it protects to a certain extent the non domino purchases, all of this linked with a fiscal regime that punishes the sine censu sales with the confiscation of the ownership title and the price for that lack of publicity. This innovation draws attention to the publicity of the act, although in a more simple way and less bureaucratic. García Garrido and Fernández de Buján, F. carried out a study starting off from the germinations (leges genimatae) in the different legal stratum that all also objects of our study as much regarding buying and selling as donations and so, we find numerous literal coincidences between FV. 35. and CTh. 3.1.2. Although the texts of the Theodosianus Code dealt with a substantial reduction
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One FV. 35.3¹⁵ says: “These frauds, these swindles, these artifices are forbidden by a law, we isolate them with a constitution that is why, after examining the decision of a just precautionary measure, we ratify, that those that buy should fully know the rights of what they are buying and the census and that no one is allowed to buy or sell without the registration in the census”.

Another one talks about the need to give legal certainty to the transfer so as to determine that the seller is ideal, and so FV. 35.4¹⁶ states: “We would like everyone to know that we think it is right that no one should ambition to sell a property if in the moment of the transaction of the deal, the sure and true ownership of the property in the presence of the neighbours is not proved”.

and stylistic mutation on behalf of the chanceries see regarding the authors Similitudines constitutionum: publicita nelle vendite e donazioni dei fondi, AARC XII, Perugia, 1997, p. 387 and foll.

¹⁵ _Qui comparat rei comparatae ius cognoscat et censum, neque liceat aliqui rem sine censu vel comparae vel vendere. Inspectio autem publica vel fiscalis esse debetur hac lege, ut si, aliquid sine censu venierit et post ab aliquo deferetur venditor quidem possessionem, comparator vero id quod dedit pretium fisco vindicante deperdat_. FV. 35.3 – CTh. III.1.2 = Brev. III.1.2.

¹⁶ _Id etiam volumus omnibus intimari nostrae clementiae placuisse neminem debere ad venditionem rei cuiuslibet adfectare et accedere, nisi eo tempore, quo inter venditionem et emptorem contractus sollemniter explicatur; certa et vera proprietias vicinis praesentibus demonstretur: usque eo legis istius cautione currente, ut etiamsi subsellia vel ut vulgo aiunt scamna vendatur; ostendendae proprietatis probati compleatur_. CTh. 3.1.2 = Brev 3.1.2.1...._Id etiam placuit neminem ad venditionem rei cuiuslibet accedere, nisi eo tempore, quo inter venditorem et emptorem contractus sollemniter explicatur; certa et vera proprietias a vicinis demonstretur; usque eo legis istius cautione currente, ut etiamsi subsellia vel, ut vulgo aiunt scamna vendatur, ostendendeae proprietatis probatio compleatur_. Nec inter emptorem et venditorem sollemnia in exquisitis cuniculus celebrentur; sed fraudulenta venditio penitus sepulta depereat. The visigothic interpretation of the text highlights the interest of the compilers of penalising the secret transactions and the agreements against the Treasury _quod si subpressa fiscali solutione alicuius vendere ausus fuerit vel comparare praesumpserit, noverit inter quos talis fuerit secreta transactione contractus, quod et ille pretium perdat qui emptor accesserit et venditor possessionem amittat, quia iubetur; ut vicini rei quae venditur testes esse debeant et praesentes, in tantum, ut etiam de mediocribus rebus si quid in usum venditur; ostendi vicinis placeat, et sic conparsi, ne aliena vendatur._
But to these pathologies, one has to sum up others included in both constitutions under the title of *sine censu vel reliquis fundum compari* non posse CTh. 11.3.1\(^{17}\) and 2\(^{18}\), that tried to stop the failure to pay provincial taxes, as we made read in its first part where it describes the buyers, taking advantage of the economic circumstances that suffer the sellers, trying to enforce a fiscal exoneration agreement of the due and current taxes so as to be free of any fiscal responsibility. The consequence is obvious, when the buyer was claimed the taxes he would allege an exoneration agreement and at the same time, the seller would contend the absence of the ownership of the land. Faced with this situation, the Emperor declared null and void any agreement in this sense imposing the payment of the due and current taxes to the buyer, now owner of the land. This rule was extended to the *mancipatio* properties attached to the census (slaves...).

In our opinion, it seems clear that the exploited system in CTh. 11.3.1 and 2 revolves around nullity of the agreements that go against the law, punishment that is maintained in the traditional field of Roman praxis. However, FV. 35 links its regulation to the Greek environment and with a greater control of the fiscal or public inspection of what is entered in the register. Due to all this, measures of CTh. Were not very fruitful.

Faced with this outlook, it is obvious that the measures included in the text of the Fragmenta Vaticana, were of a thorough control as fiscal interests of the Empire were at stake. It is obvious that the constitution reflected not only public but also private interests with the purpose of avoiding legal disassociation or splitting between the ownership of the property sold *sine censu* and the fiscal responsibilities that should be paid to the seller.

\(^{17}\) Rei annonariae emolumenta tractantes, ut cognosceremus, quanta reliqua per singulas quasque provincias et per quae nomina ex huiusmodi pensationibus resedissent, cognovimus hanc esse causam maxime reliquirum, quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos opimos comparent et electos, ut nec reliqua eorum fisco inferant et immunes eos possideant. Ideoque placuit, ut, si quem constiterit huiusmodi habuisisse contractum atque hoc genere possessionem esse mercatum, tam pro solidis censibus fundi compar i quam pro reliquis universis eiusdem possesionis obnoxius teneatur. dat. kal. ivl Agrippinae Constantino A.V. et Licinio C.conss.

\(^{18}\) Mancipia adscripta censibus intra provincia terminos distrahantur et qui emptione dominum nacti fuerint, insciipientum sibi esse cognoscant. Id quod in possessione quoque servari rationis est: sublatis pactionibus eorumund onera ac pensitationes publicae ad eorum sollicitudinem spectent, ad quorum dominium possessiones eaedem migraverunt. Dat III. Kal. Mart Thessalonicae Constantio ex Maximo.
The buyer should fully be aware of the situation of the real estate and his information should be registered in the census. The regime reflects a greater degree if interventionism by establishing the need of fiscal inspections in order to guard the compliance of the regulation. Reason for which a punishment is established if there is a failure to comply: the confiscation of the property and the loss of the price by the buyer, a more rigid measure if compared with the nullity of the fiscal exoneration agreement of CTh. 11.3.1 and 2.

Nevertheless, we can also see reinforcement in the publicity with the statement of the neighbours FV. 35.4. Therefore, the buyer has to make sure on the rights of the seller over the real estate through *libri censualibus*, at the same time the neighbour’s statement is necessary before the drawing up of the solemn deed. In this sense, Constantine imposed a technicality, we share Aragio Ruiz’s opinion[19]: a written deed reinforced with the sure and true existence of the property in presence of the neighbours. Both from the interpretation of FV. 35.4 and CTh. 3.1.2, we can see the implementation of this rule on the sale of any country real estate and even small pieces of land[20]. This is how the term *subsellia o scamna o res mediocres como los llama la interpretatio* (CTh. 3.1.2) of the text should be interpreted, not referring to chairs or positions but to portions of land of small surfaces.

The statements of the neighbours have an important role in order to guarantee and give publicity to the transfer of the property being sold.

However, we should bear in mind that the country estate sold has to be described. In this sense, numerous fragments show the importance of stating the surface, its borders and adjacent lands[21].

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[19] Lineamenti del sistema…, op. cit. p. 31 foll.
[20] Gallo, *I subsellia in Vat. Fr 35: seggiole o porzioni di terreno*, IURA, 33, 1982, p. 114 foll. It is logical that the neighbours were unable to give certainty of the real estate.
[21] As examples of this, we may quote Alfeno D. 21.2.45, Pomponio D. 18.1.18.1, Scaévola D. 19.1.48, Javoleno. The importance of the neighbours is clearly recognised in D. 10.1.2, where the next-door neighbours are called to set the new boundaries. However, with regard to our subject, the text by Ulpianus D. 50.15.4 is especially significant: that apart from stating the demarcation, he demands evidence of who are the nearest neighbours. The latter fulfils not only the demarcation of who are adjacent, but also guarantees the statement of the ownership of the registered property. The neighbours may be summoned in case of controversy over the title of ownership.
Going back to the text of the fragmenta and regarding sales, the imbalance in the regulations once again justifies the new regulation in FV. 35.5 avoiding disputes over the ownership. And so the aim of the law not only assures public interest with the collection of taxes by placing a tax to those who it may concern avoiding disassociations, but to a private interest:

1) avoiding buying and selling without caution, any transfer apart from demanding inherent validity of the act, also demands the pre-existence of the corresponding faculty of being able to possess the thing being transferred. That is, its legitimacy as a title owner. (The principle of registration attesting and legitimacy underlies, as Constantine demanded the registering of the property in the census and the reinforcement of the guarantees of the purchase with the statement of the neighbours.)

2) avoid non dominio of the purchases, so we may understand from the interpretation of 35.6 that once again the reinforcements exists due to the necessity of the buyer of finding out through statements of the neighbours.

3) guarantee the legal safety in the circulation of real estate, not only due to the ownership of these, but by giving certainty of the purchase and, as it says in the end of fragment 35, avoid any type of fraud that stops the following purchases. With this, burying away any procedures due to eviction in the transfer, even though the imperial regulations are more general and do not point out this extreme.

22 Hinc etenim iurgia multa nascuntur; hinc proprietatis iura temerantur; hinc dominis vetustissimis molestia comparatur, cum caecitate praepropera et rei inquisitione neglecta, luce veritatis omissa perpetuitate cogitata dominii, iuris ratione postposita ad rei compartionem accedunt, omissis omnibus dissimulatis atque neglectis id properat arque festinant, ut quoque modo cuniculis nescio quibus inter emptorem et venditorem sollemnia celebrentur: cum longe sit melius, sicuti diximus, ut luce veritatis, fidei testimonio publica voce, sub clamationibus populi idoneus venditor adprobetur, quo sic felix comparator atque securus aevi diuturno persistat.

23 Quod pro quiete totius successionis eloquimur, ne forte aliquis venditor suum esse dicit, quod esse constat alienum, idque comparator malo venditore deterior incautos et credulus, cum testificantibus vicinis omnia debeat quaerere, ab universorum disquisitione dissimulet; quem sic oporteat agere, ut nec illud debeat requiri quod ex iure dicitur “si a domino res vendita sit”.
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The same regime seems to be extended to the donations\(^{24}\), in the text of FV. 249.6-7\(^{25}\), as they wish to give transparency and legal safety to the donations. These donations must be:

1) Drawn up in a deed, with the name of the donor and his rights.

2) Tradition in this case, also calls for the presence of the neighbours and other arbiters. In this case, not only do they wish to give guarantees to the purchase of lands, properties and personal properties by giving certainty to the ownership of the properties, but also, as Palma assures\(^{26}\), to attest the reasons of the donor to avoid pretence and seizure of the properties. We understand from 249.6…: “That the handover of the property should take place in a meeting with the maximum number of people present after calling the neighbourhood”.

3) Together with these requirements, the *insinuation*, registering of or establishing by protocol the minutes of mere discreitional gift is established in minutes before the judge or the magistrates. These *insinuationes*, in our opinion, form the early stages of legal publicity based on the registry

\(^{24}\) In this period the regime contained in FV. 249 and from what we see in CTh. 8.12.4 and C.8.53.25.pr, meant the abolition of the *Lex Cincia* 204 (n. 99) as now with the new requirements, the donation is transformed into a business deal that takes up the legal structure of a deed. The unity in the structure that dominates in the post classical period will make the donation in the premises of the liberty act that gathers the formalities anticipated by law: liberty act + legal form.

\(^{25}\) *Tabulae itaque aut quodcumque alius materiae tempus dabit, vel ab ipso vel ab eo quem fors sumministraverit scientibus plurimis perscribantur eaque, ut supra comprehensum est, rebus nominibus personisque distinctae; sint; ac tum corporalis traditio (in quam saepe multi talia simulando inreptes aut ni corpora capientes sollemne illud ius ac voluntarim inconcessa usurpatione praeripiunt) ea igitur ipsa rerum traditio praesentium, advocata vicinitate omnibusque arbitris quorum post fide uti liceat, conuento plurimorum celebretur. Non enim aliter vacua iure dantis res erit, quam ea vel eius voluntate, si est mobilis, tradatur, vel abscessu sui, si domus aut fundus aut quid eiusmod generis erit, sedem nouo domini pateceferit. Quae omnia consignare actis iudiciis praestast, ut res multorum mentibus oculis auribus testata nullum effugiat, cuius atu scientiam capiat aut dissimulationem tegat.\*

\(^{26}\) *Donazione e vendita advocata vicinitate nella legislazione constantiniana, INDEX 20, 1992, 491 foll.*
because by establishing the protocol, the property is under the protection of the buyer\textsuperscript{27}.

In any case, we cannot separate the fiscal regime to which they are submitted. So, we find ourselves with a constitution from the year 363 CTh. 11.3.3\textsuperscript{28} by Julianus. It approaches buying and selling and donations together, it approves the pacts that exonerate fiscal charges to the buyers and it emphasizes the need to communicate the new ownership title in the register. This, in our opinion, constitutes a main form of petition with which the changes in the register take place at the request of the parties. Therefore, the transfer and succession of fiscal charges are important. This same measure is adopted by the Emperors Teodisius, Arcadius and Honorius (391 AD) according to CTh. 11.3.5\textsuperscript{29}, that also try to guarantee the chain of transfers con the corresponding annotation in the registers of the census of all the changes that take place due to the changes in ownership title.

This precautionary measure has a double purpose: on one side, it guarantees the payment of the taxes to whom it really concerns and, on the other side, it may be used as reference in the books of the census for the possible buyers de the title of ownership. In our opinion, there are no doubts that we are looking at what we nowadays know as alteration o mutation in the ownership title\textsuperscript{30}.

\textsuperscript{27} Currently section 34 of the Spanish Mortgage Law, principle of attestation based on a register: “the third party that with good faith buys the title from a person has the power to transfer it”.

\textsuperscript{28} \textit{Omnes pro his agris quos possident publicas pensitationes agnoscent nec pactionibus contrariis adiuventur, si venditor aut donator apud se conlationis sarcianm pactione inlicita voluerit retinere, etsi necdum translata sit professio censualis, sed apud priorem fundi dominum forte permaneat, dissimulantibus ipsis, ut non possidentes pro possidentibus exigantur.}

\textsuperscript{29} Quisquis alienae rei quoquo modo dominium consequitur, statim pro ea parte, qua possor fuerit effectus, censualibus paginis nomen suum postulet adnotari ac se spondeat solunturm, ablataque molestia de auctore in succedentem capitatio transferatur.

\textsuperscript{30} In our opinion, the early stages of the legal principle of attestation based on a register takes form in the section 34 of the Spanish Mortgage Law that in the moment of formalisation of the act is protected for the third party that purchases it. “The third party that with good faith obtains for valuable consideration a right of person that in the Registry appears with faculties to transfer it, will be maintained in the purchase, once the right is registered. Even though it later gets cancelled or if it is ruled the grantor by reason of a cause
The non payment of the taxes leads to confiscation of the property and its successive auction that also gives guarantees in the adjudication according to two constitutions by Valentiniano, Valente and Graciano, C.10.3.5-6:

Quaecumque pro reliquis prodigorum in annonario titulo ceterisque fiscalisibus debitis in quibuscunque corporibus sub auctione licitanda sunt, fisco auctore vendantur, ut perpetuo penes eos sint iure domini, quibus res huiuscensmodi subsint iure dominii, quibus res huiuscemodi subhastae solemnis arbitru fiscus addixerit. Et si quidem unquam, ut a fisco facta venditio possint infringi auctoritate rescripti fuerit impetratum nullus obtemperet, quam etiam minoribus, si quando aliquid ex rebus eorum pro fiscalisibus debitis adiudicatur emtoribus, repetitionis facultas in omnem interciptiat aetatem. Si qui proscribente ac distrahente fisco, debitorum fiscarium emerint facultates, pro earum rerum tantum pretio obnoxii sint, quas eos patuerit decursis hastis et proscriptione habita comparasse. Nam ita eos munimus, ut nullius conventionis reliquorum fiscarium nomine patiamur extrinsecus subire iacturam.

The properties auctioned were of any nature from the confiscation due to the non payment of the fiscal charges, they were put on sale by the treasury and its adjudication were carried out with the formalities of an auction, avoiding any subsequent lawsuit due to fiscal residual (C.10.3.6). These auctions also form an ideal way of transfer with guarantees.

III. The evolution and establishment of insinuatio to other institutions

In the subsequent evolution of real estate publicity, we will appreciate the establishment of insinuatio to other institutions:

- In the suffragium the property is transferred in exchange of a recommendation from what is understood from the constitutions of the emperors Teodosio, Arcadio y Honorio CTh. 2.29.2 (394): Sed si quid eo nomine in auro vel argento vel in ceteris mobilibus datum fuerit, traditio sola sufficiat et contractus habebit, perpetem firmitatem, quoniam conlatio rei mobilis inita integra fide hac ratione cumulatur. Quod si praeda rustica vel urbana placitum continent, scriptura, quae ea in alium transferat, does not appear in the register”.

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31 Cerami, Pubblicità e politica fiscale nel trasferimento della proprietà immobiliare... p. 653 n. 50.
32 Colorni, Per la storia della pubblicità., p. 105.
emittatur, sequatur traditio corporalis et rem fuisse completan gesta testentur: aliter enim ad novum dominum transire non possunt neque de veteri iure discedere. Quod si quis dum solo commonitorio de sufragio nititur, bona ducerit occupanda, reus temeritatis ac violentiae retinebitur atque in statum pristinum possessio reducetur, eo a petitione excluso, qui non dubitavit invadere, quod petere dubuisset. It demands the registering of the title deed in the minutes – gestis (although the text does not mention it, it probably refers to the municipalibus).

- The same happens in the execution of a will where Arcadio and Honorio CTh. 4.4.4 (397) (C.6.23.18): Testamenta omnium ceteraque, quae apud officium censuale publicari solent, in eodem reserventur, nec usquam permitatur fieri ulla translatio. mos namque retinendus est fidelissimae vetustatis, quem si quis in hac urbe voluerit immutare, irritam mortuorum videri faciet voluntatem.

Force the registration and publicity apud officium censuale in the register. This provision supervises:

1.) the rights of the deceased laying down his last will and testament and the regime of settlement of the assets. In the same way, it supervises

2.) the rights of the heirs as the publicity obtained by registering the document in the register stops intestacy, giving this office, in our opinion, a remote precedent of what we today know as the Probate Register.

- In the donations, the need to present the neighbours statement disappears, and so in a constitution by Zenon from the year 478, C.8.53.31, traditio and insinuatio is demanded. Logically the ideal publicity vehicle

33 Archi, Interesse pubblico e interesse privato nell’ apertura del testamento, IURA, 20, 1969, p. 46 foll.
35 In donationibus, que actis insinuatur non esse necesarium iudicamus vicinos vel alios testes adhibere; nam superflum est privatum testimonium, cum publica monumenta sufficiant. Verum et illas donationes, quas gentis non est necessarium alligari, si forte per tabellionem vel alium scribantur, et sine testium subnotatione valere praecipimus ita tamen, si ipse donator vel alius voluntate eius secundum solitam observationem subscripsisset; donationibus, que sine scriptis conficiuntur, suma firmitatem habentibus secundum constitutionem Theodosii et Valentiniani ad Hierum praefectum praetorio, promulgatam.
is now focused in the insinuations\textsuperscript{36} where there is a lengthy regulation on the place and competent institution to carry it out). In the same way, the insinuation of donations is going to be compulsorily fixed for donations of certain quantities 200 solidi (wages) from Teodosio II and Valentiniano CTh. 3.5.13.; limit that Justinianus rises to 300 according to C.8.53.34 (529)\textsuperscript{37}. In the year 531, Justinianus raises the level of the wages to practice insinuation, fixing it at 500\textsuperscript{38}.

Regarding buying and selling, the need of the neighbour’s statement also disappears and the \textit{insinuatio}\textsuperscript{39} of the \textit{apud gesta} act as an instrument of publicity and fiscal control is added; so we understand from the Novel by Valentiniano 32.pr. (451 d.C.):

\textit{Censeo igitur; ut in quibuslibet administrationibus officiiis, in quocumque militae gradu positis emendi quae ceteris copia sit, dummodo emptio et venditio celebretur iure communi. Neminem volo potestatis iussu et impres-}

\textsuperscript{36} Rodriguez Diaz, E., \textit{Algunos aspectos de la donatio mortis causa en el derecho romano}, Oviedo, 2000, p. 42 foll; it indicates that the unit so that presides in the postclassic period it will make of the donation the continent of the liberality act that reunites the formalities anticipated by the law: \textit{donatio} = act of liberality + forms legal.

\textsuperscript{37} Sancimus omnem donationem, sive communem sive ante nuptias factam, usque ad trecentos solidos cumulatam, non indigere monumentis, sed communem fortunam habere, ut non usque ad ducentorum solidorum summam teneat, se in huiusmodi observationem similes sint tam comunes quam ante nuptias donationes. Si quid autem supra legitimam definitionem fuerit donatum, hoc, quod superfluum est, tantummodo non valere, reliquam vero quantitatem, queae intra legis terminos constituta est, in suo robore perdurrem, quasi nullo penitus alio adiecto, sed hoc pro non scripto vel intellecto esse credatur; exceptis donationibus tam imperialibus quam his, quae in causas piissimas procedunt. Quarum imperiales quidem donationes merito indignari sub observatione monumentorum fieri tam a retro principibus quam a nobis sancitum est, se firmam habere propriam maiestatem.

\textsuperscript{38} C.8.53.36.3: Ceteris etiam donationibus, quae gestis intervenientibus minime sunt insinuatae, sine aliqua distinctione usque ad quingentos solidos valituris. Hoc etenim tantummodo ad augendas huiusmodi donationes addendum esse ex presenti lege decernimus; anteriore tempore nostra lege praecedente moderando, qua usque ad trecentos solidos factae donationes et sine insinuatione firmitatem obtinere iussae sunt.

\textsuperscript{39} Fernández De Buján, A., \textit{Jurisdicción voluntaria en Derecho romano}, Madrid, 1986, p. 91 foll. author fits these activities in voluntary jurisdiction, distinguishing insinuatio voluntary and obligatory.
sione compelli. Volenti vendere definitam et conscriptam pecuniam oportet inferrī. Videat instrumentorum scriptor, sciant ii, apud quos venditionis documentum necesse est adlegari. Nihil refert quis emat, cum publica fide pretium venditor consequatur:

The disposition advocates for a written deed, *instrumentorum scriptor*, watching that the Price should be adequate and that there exists a proportion between the property and the Price. With all this, a public inspection emerges as regards selling, reason for which we think that the written form was introduced as a fiscal guarantee.

Therefore, the *insinuation* in the case of properties and lands helped to give attestation in transfers and gave statement of the price. Although the latter was no compulsory in the moment of the drafting of the deed, there was vigilance on behalf of the civil servants taking part during a year to check on the payment. One this period passed, the uncertainty of the ownership title disappeared. Therefore, the *insinuation* gives attestation and statement of the price.

**IV. Some references to the post Roman period**

In the post Roman period, we have done a tracking of the different regulations of our historic Spanish law noticing some signs and traces of Roman law.

It is in the Partidas where we find signs of *insinuation* that were taken from the Roman regulation: the insinuation\(^\text{40}\) of the donations is demanded when the quantity surpasses 500 gold maravedis, Partida (Part) V, Title IV, Law IX: *Emperador o Rey puede fazer donacion de lo que quisiere con carta o sin carta e valdra. Esso mismo dezimos que pueda facer los otros omes, quando quiere dar algo suyo al emperador o al Rey...ellos pueden fazer donaciones, por carta o sin ella, que los omes puedan dar a ellos, lo que quisieren en esa misma manera... Otro si dezimos que todo ome puede fazer donacion, por carta o sin ella, dado quato quisiere, para sacar cativos o refazer alguna eglesia o casa deribada, e por dote o por donacion que se faze por razon de casamiento. E aun dezimos que si algund ome quisiese fazer donacion a alguna eglesia, o a logar religioso, o a ospital, que lo pode fazer sin carta. Pero si quisiese dar a otro ome, o a otro logar, puede lo fazer fin carta fasta quinientos marauedies de oro.*

\(^{40}\) Cerami, Pubblicità e politica fiscale nel trasferimento della proprietà immobiliaria..., p. 652.
José Luis Zamora Manzano, *The Publicity in the Transfer of Real Estate in Roman Law*

If in Rome, the neighbours and other witnesses were important especially in the case of selling *sine censu* that in my opinion forms part of a rudimentary publicity, then in the Local Law Codes like in Alcalá de Henares, Baeza, Alarcón, Ledesma and Vizcaya we find what is known as confirmation or public communication of the sales before witnesses. Witnesses that represent the community, before the Church during the Holy Mass or the Town Council. Or even the sales done by advertisements or announcements\(^{41}\) held in the General Local Law Code of Navarra\(^{42}\) or in the one of Vizcaya\(^{43}\) with the aim of the town people’s withdrawal.

The Roman insinuation left traces in the Local Law Code of the Kingdom of Aragón (tit.III), of Valencia\(^{44}\) and of Cataluña\(^{45}\) and Navarra\(^{46}\) also to stop pretended donations. Although it points out that, it also gives special attention to the *animus donandi* of the grantor and the failure to comply resulted in nullity and not damaging third parties, mainly creditors.

But we have already said that in Rome there was a political-financial register, or rather of taxes where the fiscal responsibilities were captured with all its variations or changes that guaranteed their transfer to the buyer as we had the chance to confirm mainly in the Constitution held in CTh. 11.3.5.

The legal publicity based on a registry seems to be positioned in the same line and its first movements are going to move towards the Burden Register. In that sense, numerous provisions were passed in which they did

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\(^{41}\) Majorcan legislation, provision of the 20\(^{th}\) December 1413 demands the publicity of the transfer so that third parties may claim the responsibilities that on their favour are set up on the real estate.

\(^{42}\) Book III, Title 12, Chapter XIV also see the study based on the Local Law Code of Navarra (Fueros Navarros), Oliver Sola, M., *Doctrina romana sobre la donatio en los Fueros Navarros de la novenera*, Navarra, 1991.

\(^{43}\) Title XVII, law 1 that forces the publicity during three consecutive Sundays in Church.

\(^{44}\) See Fuero del Reino de Valencia (Local Law Code of the Kingdom of Valencia) 5.5.17.

\(^{45}\) It appears in the Constitutions 8.9.1 for the one that exceeded 500 guilders, but in the law in force in the compilation of 19 July 1984 the requirement of insinuation was eliminated, see in this sense Domínguez De Molina, *Sobre la subsistencia de la insinuación romana en Cataluña*, RJC, 1954, p. 504 and following.

\(^{46}\) V. Novísima Recopilación de Navarra, 3.7.2.
not establish a register but set up the obligation to declare responsibilities on the petition of the Spanish Parliament of Madrid in 1528\textsuperscript{47}. However, eleven years later, to put into effect the principle of publicity on a clear idea, although in its early stages, of an institution based on a registry, at proposal of the Parliament of Toledo, the Real Pragmática of 1539\textsuperscript{48} was passed. Although, it was never put into practice, nor the one by Felipe V in 1713. Later, Carlos III enacted in 1768 a Pragmática with which the Office of Mortgage was set up and it controlled the contents of the formal written requests subject to being registered on behalf of Escribano or notary.

The effective compliance of the modest registering system received a strong reinforcement and impulse with the final provisions: the first one implemented the mortgage tax with the royal decree of the 31\textsuperscript{st} December 1829 and the second, the organization of the registry and settlement of the tax controlled by the royal decree of 23\textsuperscript{rd} March 1845. However, this system of Offices did not work either as on the 8\textsuperscript{th} February 1861 the mortgage law was enacted. It suffered numerous modifications and reforms until the announcement of the law of 16\textsuperscript{th} December 1909 and the in force law of the 8\textsuperscript{th} February 1946 and its regulation of the 14\textsuperscript{th} February 1947, where all the mortgage principles underlie. Nevertheless, some material aspects already existed in the Roman regulation, as we have already seen, in which principles like attestation based on a register that protects third parties find a remote precedence of its existence in some analogies with the insinuatio that also has as the main purpose, to protect third parties and avoid illegal purchases.

\textsuperscript{47} Mandamos que las personas que de aquí en adelante pusieren censos o tributo sobre sus casas o heredades o posesiones en que tengan atributados o encensuados a otros primeros, sean obligados a manifestar declarar los censos y tributos que hasta entonces tuvieran cargados sobre dichas casas y heredades y posesiones; so pena que, si así no lo hicieren, paguen con el dos por ciento de la cuantía que recibieron por el censo qu así vendieren y cargaren de nuevo a la persona a quien vendieren dicho censo. Law II, Title XV, Book X of the Novísima Recopilación.

\textsuperscript{48} Por cuanto nos es hecha relación que se excusarian muchos pleitos, sabiendo los que compran los censos y tributos, los censos e hipotecas que tienen las casas y heredades que compran, lo cual encubren y callan los vendedores; y por quitar los inconvenientes que desta se siguen, mandamos que en cada ciudad, villa o lugara donde hubiere cabeza de jurisdicción, haya una persona que tenga un libro, en que se registren todos los contratos de las cualidades susodichas.
Even the sales *sine censu* in which Constantine calls the neighbours *proprietas vicinis praesentibus demonstretur* to prove the ownership title and so avoiding the non domino purchases which later the voluntary *insinuatio* is established, leaving the compulsory one for the donations of certain quantities.

Therefore, in spite of casuism and the fragmentary legislation of Roman law, we can see a glimpse of a group of scattered rules and principles that converge into assumptions that form the true early stages of the rules that guarantee the publicity of transfers in real estate. From these we can appreciate numerous traces of mortgage principles that today govern as regards real estate law based on a registry. Like for example, the ones that currently govern as regards mortgage like attestation (public and informative publicity of real estate that protect the purchasers, section 34 of the Spanish Mortgage Law) or registering legitimation (Section 37-98 of the Spanish Mortgage Law); together with the importance of the principle of mutation in the property register.

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Introduction

The legal – historical – comparative studies within the range of the public law are becoming more and more popular, chiefly within the Spanish literature. The example is a publication by A.F. De Bujan y Fernandez. Such types of researches are rarely undertaken in Polish Romanistic literature. However, C. Kunderewicz should be mentioned, who wrote between ten and twenty publications on this subject. Nowadays, the research is carried out within the range of the problems associated with the Roman public law by J. Zabłocki and B. Sitek.

One of the most interesting research areas within this range is the municipal law, which has a lot of common points with the contemporary self-government law. The researches about the municipal law in the Ancient

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2 See: C. Kunderewicz, The construction law in the Ancient Rome (II), CPH 31, 1979, 1, p. 53 and following.

3 Together with A. Tarwacka He wrote the textbook entitled The Roman Public Law, Warsaw 2005.

4 He wrote some publications, which will be discussed in the further part of this paper. It is worth to mention that he also wrote the textbook entitled The Roman Public Law, Olsztyn 2005.
Rome were undertaken by W. Bojarski and B. Sitek. In the world literature the municipalities were the subject of numerous publications. The researches about the municipality law are undertaken first of all because of numerous remaining excerpts of municipal acts. The most important of them are: Tabula Heracleensis (lex Iulia municipalis), lex Ursonensis, Lex Malecitana, Lex Salpensiana and lex Irnitana, that was discovered at the end of the twentieth century.

The analysis of previous researches about the municipalities, indicates the existing research area, which needs to be explored, namely, the ways of using the municipal land by private subjects. Within this range there is a paper written by L. Capogrossi Colognesi. Furthermore, this point was raised in the doctoral dissertation by R. Kamińska entitled The public places protection in the Roman Law. In this paper were legal texts analyzed, that come from the municipal acts published on the turn of the republic and the principate.

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5 The relationships between the Roman Empire and the local autonomies within the range of jurisdiction, [in:] History of jurisdiction, Koszalin 1999, pp. 11-20.


9 The major advisor of this doctoral dissertation was prof. dr hab. J. Zablocki, it was passed on the Law and Administration Department, in UKSW, in 2009. The dissertation was not published.
Nowadays, the way of use of the communal land was regulated in the act from 8th March 1990, about the local government\(^{10}\) and also in the act from 21st August 1997, about the real estate economy\(^{11}\). The analysis of the Roman municipal acts and the Polish law allows us to attitude to the solutions existing in the Polish law and to research the possible similarities\(^{12}\).

To understand the further way of thinking is necessary a short explanation of the terms municipality and colony. Such a division of the cities, existed over the period of the republic and at the beginning of the principate. The colonies were cities, which were founded ex nihilo, mostly as a result of settling a legion, of which members were getting retired, among other things, in this way the contemporary Beirut was set up, or by transferring some number of the Roman citizens to the province, who came most often from the poorest communities, i.e. plebs urbana. Such cities were established on the basis of the senate resolution or on the basis of the dictators’ decisions, e.g. Sula or Julius Caesar, and later by the emperors. The republican system in Rome served as example to the colonies. The municipalities, in turn, were city states in Italy, gradually incorporated into the Roman state. In these cities some of the political system arrangements were preserved, however, over time, the republic political system was imitated there.

Establishing the colony involved making a religious engraving consisted in circumscription of the city – pomerium. The circumscription was mainly to appoint the extend of the civil, judicial and ordering authority of the municipal clerks\(^{13}\). The extend included the city and about 1000 steps from its borders – mille passus\(^{14}\). The areas in some distance from the cities were divided into regions, which were ruled by curatores. The borders of those regions constituted the borders of the dioceses until the nineteenth century\(^{15}\).

\(^{10}\) Consolidated text, the Official Journal from 2001 No 142 pos. 1591.
\(^{11}\) The Official Journal from 1997 No 115 pos. 741.
\(^{12}\) References to the affirmative law will be distinctively separated in the text.
\(^{13}\) D. 2,1,20 (Paul. 1 ad ed.): Extra territorium ius dicenti impune non paretur. Idem est, et si supra iurisdictionem suam velit ius dicere.
\(^{14}\) 1000 steps equal 1479 m.
\(^{15}\) See: W. Liebenam, Städteverwaltung im Römischen Kaiserreiche, Leipzig 1900, p. 6.
The legal status of municipal lands

The legal status of the area, on which the colony or the municipality existed is difficult to determine. Because the Roman practice was to treat the conquered territories as the property of the Roman nation – *ager publicus*. The new colonies were created on those lands and in the erection act (in municipal act) the territory was administratively circumscribed to the city.

By virtue of the fact, that in the Ancient Rome the conception of the legal person was unknown, it should be assumed the dogmatic construction that the municipal lands were reckoned to the category of the lands which were described as *ager publicus*, however, administratively they were governed by the municipality authorities\(^\text{16}\). Nowadays the situation is slightly different, because the municipal administration has the legal status, and consequently is the owner of the real estate. According to the article 43 of the Act about the self government *the commune property is the ownership and the other rights belonging to the particular local commune administrations and their associations and the property of the other commune legal persons including the companies.*

The part of that land was divided among the citizens by lot, although some of the lands were assigned directly by the municipal clerks to some chosen persons, so called *fundi excepti*. Some lands were given the citizens of the colonnies, by the procedure *adsignatio*, so called *agri concessi*. Those lands, which were beyond the city lines (*deliminatio*) were sold or rented, according to the rules in Rome at *ager vectigalis*\(^\text{17}\). In the past, the assignation of lands made a lot of political and social conflicts, chiefly the

\(^{16}\) D. 50.16.198 (*Ulp. libro secundo de omnibus tribunalibus*): "Urbana praedia" omnia aedificia accipimus, non solum ea quae sunt in oppidis, sed et si forte stabula sunt vel alia meritaria in villis et in vicis, vel si praetoria voluptati tantum deservientia: quia urbanum praedium non locus facit, sed materia. Proinde hortos quoque, si qui sunt in aedificiis constitutis, dicendum est urbanorum appellatione contineri. Plane si plurimum horti in reditu sunt, vinearii forte vel etiam holitorii, magis haec non sunt urbana. Ulpian distinctively indicates, that the territory administratively belonging to the given city was divided into the municipal and suburban areas. In *Tabula Heracleensis ll*. 20-23.

agrarian reforms offered by Tiberius S. Gracchus\textsuperscript{18}, the aim of which was to limit the amount of public land being the possession of aristocracy. The further agricultural reforms were offered in \textit{lex Baebia Agraria} in 111 year B.C.\textsuperscript{19}, by the tribun Publius S. Rullus (63 year) and by Julius Caesar (59 year)\textsuperscript{20}.

The division of the public lands among the private subjects was made within the framework of breaking up of the bigger farms over the interwar period of the twentieth century\textsuperscript{21} and in the years 1944 – 1948 within the framework of the agricultural reform\textsuperscript{22}. Both, in case of breaking up and the agricultural reform, not only the farm lands were divided, but also the communal once. They were given to the individual persons to exploitation by sale or by perpetual usufruct.

The lands, belonging to the city were mostly rented to private persons, who paid a charge rent to the municipal purse. Renting the lands belonging to the cities was made on the basis of the Decurion's resolution. Renting was granted for the period of 5 years \textit{vendito neve locato longius quam in quinquennium}\textsuperscript{23}. Introducing the periodicity to the renting of public lands is something new, as in Rome such renting was without time limit\textsuperscript{24}. The


\textsuperscript{19} By this Act the action of dismantling the Gracchi agricultural reform was accomplished. Among others there was abolished the tax of Italian lands – \textit{vectigal}.

\textsuperscript{20} See: B. Sitek, \textit{Actiones polpulares in the Roman law on the turn of the republic and princepate}, Szczecin 1999, p. 25.

\textsuperscript{21} The agricultural reform in the interwar period was accepted by the Sejm Uchwałodawczy (legislative power) in 1919. It was accepted again in 1925. See: \textit{The History of Poland}, collective work, Warsaw 1980, p. 596.

\textsuperscript{22} The agricultural reform in the years 1944 – 1948 was carried out on the basis of the constitution of the Polish Committee of National Liberation (PKWN) from 1944. There were included farms, which formerly belonged to Germans and the bigger than 50 ha, whereas on the territories of the previous Prussian annection above 100 ha.

\textsuperscript{23} \textit{Lex Ursonensis, cap. 82}.

\textsuperscript{24} It is also confirmed by the text by Paulus 21 ad ed. (D. 6.3.1pr.): \textit{Agri civitatum alii vectigales vocantur; alii non. Vectigales vocantur qui in perpetuum locantur; id est hac lege, ut tamdiu pro his vectigal pendatur, quamdiu neque ipsis, qui conduxerint, neque his, qui in locum eorum successerunt, auferri eos liceat: non vectigales sunt, qui ita colendi dantur; ut privatim agros nostros colendos dare solemus.}
Loss of the rental of the public lands took place when the rent payer did not pay the due rent, what is said about in *lex Ursonensis* in part 65. The period of five years was most likely connected with the period of making the census of population by the censors. However, in practice these lands stayed on hand of the rent payers for the longer period of time.

**Renting the public lands – ager publicus**

On the basis of the legal regulation *cap. 82 lex Ursonensis*, to the municipal real estates were included fields, forests and buildings, which were granted or given to the citizens of *colonia Genetiva Iulia*. The numbered items of the municipal possession were in each municipality and the colony within the frame of the city line or nearby the city.

The fields and the forests mentioned in the article 82 of the *lex Ursonensis*, were the territories situated beyond the so called *pomierium*, that means in the region belonging to the colony in Urso. While, mentioned in the text, the buildings were located right in the city.

Nowadays the calculation of individual elements of the community possessions is not made, and this is the result of the character of the general standards. The possession of the local commune administration can be the lands together with buildings independently of their qualifications. Therefore there can be the architectural lands, the agricultural, the forest and the recreational or others. The particular categories of the lands are separately legal regulated. The agricultural areas and the woodlands governs the Act from 3rd February 1995 about protection of the agricultural areas and woodlands.

The municipal real estate resources were also the roads. On the basis of the legal regulation *lex Ursonensis* in cap. 78 the roads, the paths and the pedestrian crossings within the colony became public, independently on their possessional structure:

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27 The Official Journal from 1995, No 16, pos. 78.
Quae viae publicae itinerave publica sunt fuerunt / intra eos fines, qui colon(iae) dati erunt, quicumq(ue) / limites quaeque viae quaeque itinera per eos a/gros sunt erunt fueruntve, eae viae eique limites / eaque itinera publica sunt

In the text lex Ursonensis in cap. 78 the term via is used, it meant the street or the road, whereas the term iter meant the road, in this case the road leading out of the city, consequently the term limes meant the pedestrian crossings, the narrow paths or the field paths.

In case of roads, paths or pedestrian crossings all the citizens had the right to use them, so they were the public places – publica sunto, even when the road crossed the private lands. Such a status of the public roads in municipalities is acknowledged by the Frontonius, who wrote: omnes enim limites secundum legem colonicam itineri publico servire debent, what can be translated as: all the roads according to the municipal law should be publicly used. As the public places they should not be fenced or used in a way, so that they become less available for the society. The public places were preserved by means of interdict Ne quid in loco publico.

The legal status of the particular types of roads and streets is described in numerous legal acts. The most important of them is the Act from 31st March 1985, about the public roads. In the article No 2 part 1 of the act, there were detailed four categories of the roads in Poland: the domestic roads, the provincial roads and the communal roads. In turn, according to the article No 1, using these roads is allowed for everybody, while the restrictions in using them can be implemented on the basis of the act or the particular regulations. The article No 7 part 1 of the act about public roads it is constituted that to the communal roads there are reckoned the local roads which are not considered in other categories, they constitute the supplementary net of roads used for local needs, excluding the internal

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29 Front. 24,6-7.
98 Bronisław Sitek, *The Ways of Using the Public Places in Municipalities on the Turn of the Republic and the Principate and the Contemporary Similarities in Polish Self-Government Law*

roads. Therefore, to the category of communal roads there are not reckoned the local roads leading through the private lands.

**Purposiveness of taking the public lands on lease**

One of the elements of the Roman politics, today worth imitating, was taking the public lands on lease to make profits for the Treasure Department or for the municipal purse, in the form of the rental payments. Such a politics is mentioned in *Tabula Heracleensis* 11.73-76, where the legal foundations and also the conditions of taking the public lands on lease were defined. Therefore, this excerpt does not refer to any using of the public places or using them by private persons, for example so that to go through, but it refers to using the public places on the basis of the contract of lease concluded by the natural person from the *municipium*, represented by the clerks. The persons who rented the public lands were called the redemptores or conductores.

Regarding the nomenclature of such the contracts, the answer is in *lex Ursonensis* in part 82:

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Qui agri quaeque silvae quaeq(ue) aedificia c(olonis) c(oloniae) G(enetivae) I(uliae) / quibus publice utantur, data adtributa e/runt, ne quis eos agros neve eas silvas ven/dito neve locato longius quam in quinquentum, neve ad decuriones referto neve decur/orum consultiun facito, quo ei agri eave / silvae veneant aliterve locentur. Neve is ve/nierint, itcirco minus c(oloniae) G(enetivae) Iul(iae) sunto. Quique iis / rebus fructus erit, quot se emisse dicat, is in / iuga sing(ula) inque annos sing(ulos) HS C c(olonis) c(oloniae) G(enetivae) Iul(iae) d(are) d(amnas) / [esto, eiusque pecuniae qui volet petitio per- secularioq(ue) ex h(ac) l(ege) esto].
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33 Let nobody this field or forest or this building, which was given or granted to the citizens of *colonia Genetiva Iulia* for the public usage, let nobody this field or forest sell or rent for the period longer than five years, nor let nobody submit to debate for Decurions to legislate the decree on this matter, or let nobody from the Decurions consult this matter to sell or rent these fields or forests. Let by sale of these (lands, forests, buildings) *colonia Genetiva Iulia* do not suffer losses. This person who takes the profits from these matters, from purchasing them, this person is punished for the yearly payment 100 sesterces in the interest of the *colonia Genetiva Iulia* citizens. According to the Act, let
The contract of tenancy was defined by such notions as *vendere* or *locare*. Using both of these notions is the figure of speech called *endiada*, it consists in using two, the same notions to describe one, the same referent. The example of such understanding of both texts is the text by Gaius:

*Adeo autem emptio et uenditio et locatio et conductio familiaritatem aliquam inter se habere uidentur, ut in quibusdam causis quaeri soleat, utrum emptio et uenditio contrahatur an locatio et conductio, ueluti si qua res in perpetuum locata sit. quod euenit in praediis municipum, quae ea lege locantur, ut, quamdiu [id] vectigal praestetur; neque ipsi conductori neque heredi eius praedium auferatur; sed magis placuit locationem conductionem esse.*

Legally signed contract of tenancy entitled the tenant to achieve the profits. However, in *Tabula Heracleesnis* in ll. 73 – 76 there is an obligation of the tenant (*conductor*) to taking the activities according to the contract and not to take deceitful actions, which means *sine d(olo) (malo)*. The deceitful actions were forbidden, which could have had the goal to omit the resolutions of the Act - *in fraudem legis* – included in *Tabula Heracleensis*. It would have been constituted the misuse of authority. The transgression of the contract provisions caused the liability for damage.

The tenancy of public lands is governed by the Act from 21st August 1997 about the real estate economy. According to the article No 1, act 1, item 1 this act refers to real estate management constituting the State Treasury property and the property of some territorial local governments. The range of activities within the notion of real estate management was defined in the article No 13. The real estate can be the object of sale, exchange and resignation, also the object of giving it into perpetual usufruct, rent or tenancy, commodate, giving for permanent management, and also they can be laden by the restricted real rights, entered to the companies as non-financial contribution (apports), transferred as the equipment of the created state companies and as the property of the created foundations. The com-

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34 G.3.145.
35 More information about the meaning of the notion *vendere* and *locare* see H. Kaufmann, *Die altrömische Miete. op. cit.*, p. 253. Festus s.v. Venditiones: *Vend<itiones olim> dicebantur cenorem locationes; quod vel<ut fr> usctus locorum publicorum venibant.*
municipal lands can be given into three-year tenancy, the decision can be made by the village head, whereas the long term tenancies can be concluded on the basis of the community council resolution. The tenant contributes the rental payment.

**Prohibition of construction in public places**

In Roman law there are some legal regulations forbidding building any of the constructions in public places in the city. The basic legal–administrative act was the prohibitive interdict *Ne quid in loco publico*...

D. 43,8,2 pr. (Ulp. 68 ad ed.): *Praetor ait: "Ne quid in loco publico facias inve eum locum immittas, qua ex re quid illi damni detur, praeterquam quod lege senatus consulto edicto decretove principum tibi concessum est. De eo, quod factum erit, interdictum non dabo".*

The praetor forbade to take any actions in public places, which would have caused the decrease of their convenience. Two types of activities were defined. The first one was described by the notion *facere*, which means building constructions, illegal occupying public objects or introducing any continuing changes. The other activity was defined by the notion *imittere*, and means directing any liquid, gas or solid emissions to public places. Such activities were prohibited, except that somebody was entitled (*cession*) according to the agreement, *senatusconsultum*, edict or the emperor’s decree.

The notion of public places was explained by Ulpian.

D. 43,8,2,2 (Ulp. 68 ad ed.): *Et tam publicis utilitatisquam privatorum per hoc prospicitur. Loca enim publica utique privatorum usibus deserviunt, iure scilicet civitatis, non quasi propria cuiusque, et tantum iuris habemus ad optinendum, quantum quilibet ex populo ad prohibendum habet. Propter quod si quod forte opus in publico fiet, quod ad privati damnun redunet, prohibitorio interdicto potest conveniri, propter quod rem hoc interdictum propositum est*.

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37 More about the public places see: B. Sitek, *Actiones populares in Roman law on the turn of the republic and principate*, Szczecin 1999, p. 35 and following.

38 Ulpian states similarly further D. 43,8,2,5 (Ulp. 68 ad ed.): *Ad ea igitur loca hoc interdictum pertinet, quae publico usui destinata sunt, ut, si quid illic fiat, quod privato noceret, praetor intercederet interdicto suo.*
In the first sentence of the excerpt above there is also contemporarily known the constitutional regulation of equal protection of private and public properties. The public places belong to the society, not to the private persons, hence everybody can use them. The praetor interdict prohibits merely such using of the public property which is harmful and can limit the possibilities to use the public places by others\textsuperscript{39}.

In municipal acts the similar prohibition is in \textit{Tabula Heracleensis} in \textit{ll. 68–72}: \textit{Quae loca publica porticusue publicae in u(rbe) R(oma) p(ropius)ue u(rbei) R(omae) p(assus) M sunt erunt, quorum locorum quoisque porticus}. In this act the public places are generally listed, without their specification and porticos which are mentioned beneath. There are public places located in the city or in the one mile area. In those places (also in porticos) it was prohibited to build any constructions which could have caused any limitations to other people.

\begin{quote}
\textit{Tabula Heracleensis, ll. 69-71: … nei quis in iei locesi ine iei porticusq quid inaedificatum inmolitomue habeto, | neue ea loca porticusue quam possideto, neue eorum quod saeptum clausumue habeto, quo minus eis | locesi porticibusue populus utatur pateantue}\textsuperscript{40}.
\end{quote}

To public places there were also included the porticos (\textit{loca publica porticusue publicae}). Although, the porticos did not have their great importance in Rome, but the colonnade in public places was usually at the theatre buildings, circuses, temples or other public buildings. There were the walking places, which were also used as the covered market. The record from \textit{Tabula Heracleensis} refers to the prohibition of building constructions which could make them inaccessible to use the colonnade by others during extending them for the covered market\textsuperscript{41}. It is possible, that they


\textsuperscript{40} ... that may in these places or in these porticos nobody build any constructions, or any sort of the construction, or, may nobody illegally occupy these places or porticos, or may not fence them, as a result of which these places could become less available to the public utility. The translation by B. Sitek, \textit{Tabula Heracleensis... op. cit.}

say about the prohibition to build any fences or trade stands which would have limited the functionality of the porticos\textsuperscript{42}.

The prohibition of building the fences, continuing the construction works which consist in installing the gratings in the public utility buildings, the appliances higher than 3 metres on the construction objects, or building the small architecture objects in public places is forbidden according to article 30 of the act from 7\textsuperscript{th} July 1994, the construction law\textsuperscript{43}. Taking such kind of works demands a suitable permission issued by the entitled administrative organs.

**Use of public waters**

The flowing waters, the sea and the seashore had the particular status. According to Marcianus those waters belonged to all citizens.

\textit{D. 1,8,2 (Marcianus l. 3 inst.) Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.}

The possibility to use the flowing waters, the sea and the seashore by everybody gets out of the natural right. Therefore, everybody could use these commonweal. The same solution is in the province law in \textit{lex Ursonensis}, in part 79:

\textit{Qui fluvi rivi fontes lacus aquae stagna paludes / sunt in agro, qui colon(is) huiusc(e) colon(iae) divisus / erit, ad eos rivos fontes lacus aquas sta/gna paludes itus actus aquae haustus iis item / esto, qui eum agrum habebunt possidebunt, uti / iis fuit, qui eum agrum habuerunt possederunt. / Itemque iis, qui eum agrum habent possident ha/bebunt possidebunt, itineris aquarum lex ius/que esto\textsuperscript{44}.}

\textsuperscript{42} D. 13.5.15. (Ulp. 28 ad ed.). See also: E. Carnabuci, \textit{I luoghi dell’amministrazione della giustizia nel Foro di Augusto}, Napoli 1996, p. 66 and further.

\textsuperscript{43} Official Journal from 1994, No 89, pos. 414.

\textsuperscript{44} In the matter of the rivers, sources, ponds, flood waters and swamps which are located on the territory divided among the citizens of this colony, those who are the owners or tenants of the lands, may have the same right to go – by, to chase the animals, taking the water from rivers, streams, sources, ponds, flood waters and swamps in the same way as people whose lands reach the water reservoirs. Also those who are or will be the owners or tenants of the field,
In part 79 are mentioned following water reservoirs: river, stream, source, stagnant waters and swamps. The legislator in this text granted all the citizens of municipality the right to use the public waters, independently on the types of water reservoirs. In the municipal law, the owner of the land adjacent to the water reservoir could not forbid the other people to approach the shoreline of given water reservoirs.

The similar solution exists in Polish water law in the act from 18th July 2001 water law. In the article 34 of the act the legislator stated:

_Everybody has the right to use the inland surface public water, internal sea water together with the Gdańsk Gulf waters and the territorial sea waters, if the regulations do not state differently._

In part 79 it is mentioned about the rural servitude (servitutes praediorum rusticorum), such as: the right to take water (servitus aquaehaustus), the right to give the cattle to drink (servitus pecoris ad aquam appulsus). From this text we can see the direct servitude of taking water (servitus aquaeductus). To mention the sources among different kinds of waters suggests, that the legislator also thought about this kind of rural servitude. The servitude of taking water have not only the present owners and tenants of the lands, but also the future ones.

Water from the reservoirs commonly available was brought to the cities by aqueducts. Such a water belonged to public properties, but it was not regulated in the same way as other public places. Taking water from aqueducts may they have the access to use the waters.

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Marc. l. tertio inst. (D. 1,8,4 pr.): _Nemo igitur ad litus maris accedere prohibetur piscandi causa, dum tamen ullius et aedificii et monumentis abistineatur, quia non sunt iuris gentium sicut et mare: idque et divus pius piscatoribus formianis et capenatis rescript._ See: G. Grosso, _Appunti sulla derivazioni dei fiumi publici nel diritto romano_, ATT 66(1931), p. 369 and further.

Official Journal from 2001 No 115, pos. 1229.

was not public, but that water was delivered for a particular purpose. Constructing the aqueduct and bringing water was a public undertaking.

The legal regulation *lex Ursonensis* which is in part 99 refers to the corresponding resolution concerning constructing the aqueduct. The Decurions' resolution in this matter should have been taken by at least two thirds of them. The most important element of that resolution was to decide of the aqueduct fixed routing. It could run through the public as well as through the private possessions. In case if through the private possessions there was necessary the partial compulsory purchase, essential to carry the construction works. However, the Decurions' resolution could not state about such running of the aqueduct, which could cause the necessity to knock down the buildings, or cut the trees existing on that route 48. The body responsible for implementing that resolution were duumvirs. Any objection of the real estate owner could even cause the compulsory purchase of the whole possession 49.

The public water was brought to the cities by means of the aqueducts to provide the needs of water. However, it was forbidden to take water from the aqueduct on its way. That prohibition and the possibility of being released is mentioned in the legal regulation *lex Ursonensis in cap.100*:

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\text{Si quis colon(us) aquam in privatum caducam ducere / volet isque at IIvir(um) adierit postulabit/que, uti ad decurion(es) referat, tum is IIvir, a quo / ita postulatum erit, ad decuriones, cum non mi/nus XXXX aderunt, referto. Si decuriones m(aior) p(ars) qui / tum atfuerint, aquam caducam in privatum duci / censuerint, ita ea aqua utatur, quot sine priva/ti iniuria fiat, i(us) potest(as)que e(sto) 50.}
\]


50 If the citizen from the colony wants to bring the running water to his possession and he submits this matter to the duumvir and if he asks him to submit this matter further to the Decurions, then the duumvir who directed the matter to the Decurions, let present the matter when there are at least 40 Decurions present at the session. If the majority of the Decurions, who were present then, make the new resolution of this matter, let the water be brought to the private possession. The person let have the right to use this water, however, during the works let any damage not to be inflicted to the other private subject.
This regulation refers to so called *aqua caduca*. This notion was defined by Frontonius as: water *quae ex lacu humum accidit*. Water delivered to Rome via the aqueducts, and consequently as well to other cities being the colonies or municipalities, was intended exclusively to public usage, so to the municipal baths (hot baths), the senate buildings, temples or other public utility facilities. Water from aqueducts was delivered also to the dwelling houses located in the city.

The private persons did not have the right to take water from those reservoirs for the other purposes than mentioned above. The citizens living around the cities had in each house the water wagon (*castella privata*), where they gathered the rain water. There was the main source of delivering the drinking water to that part of society.

The exception of this rule was to allow the private persons to take water which was leaking from the aqueduct onto the ground, or from the other public reservoir. Hence, such water is called *aqua caduca* - falling water. In Rome the senate gave the agreement to take such water on payment, by the private persons, in the colony that had to be the agreement of the Decurions.

The procedure anticipated for such a circumstance consists in fact, that the person interested in taking such a water had to submit the request to the duumvir, so that the duumvir could direct that request to the Decurions, who had to be gathered in 40 of them. To make the decision it was necessary to have the majority of them voting for the acceptance of the decree project giving the permission. However, in that text it was not mentioned about any payment (*vectigal*) which the private person had to give in virtue of the public water taking. Water taken in such a way was exclusively

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53 There was also the possibility of awarding the right to take the public water to the citizen of colony acknowledging the particular contributions for the city, however such a right had the private servitude character and it did not come over the successors: …*C. Annius Prasius Ipolcobulelesis Apveaclesis incola ob honorem serviratus et gratuitum aquae usum*… CIL., XII, XD, 4760.
In Polish law, in article 34, act 1, the legislator stated that: common using the waters is for personal needs, the household or farm without using any special technological appliances, and for resting, making tourism, water sports and on separate regulations for fishing. In this regulation there was given the special way of using public waters, namely, everybody can use water for his private purposes, therefore it is forbidden to take water from reservoirs by means of special technological appliances. Delivering water is regulated by the act from 7th June 2001 about collective water supply and collective sewage. In article 6, part 1 of this act it is stated, that taking water can be done according to the contract signed between the water supply – sevage company and the service receiver. Therefore it is not allowed illegal taking water.

Conclusion

On the turn of the republic and the principate there was the well conceptionally created notion of the public place and the rules were defined how to use those places. The public places were the lands, which belonged to the state and municipalities (colonies), the public roads and the water reservoirs. The public lands, the most often located beyond pomerium of the city, there were the cultivated lands and forests. According to the Decurions' resolution, they were rented to the private persons, who paid the rental payment to the city purse. The similar solution is also used in Polish law, where the communal lands can be rented for the period from one year to 30 years.

In Roman law, the public roads and streets were reckoned to the public places. In the legal texts from that period there are a lot of kinds of roads. The notion public roads was also used for roads running through the private lands. Such roads could not be fenced and it was not allowed to construct the buildings on them, what could cause the decrease in their utility. In Polish law, the roads are divided into state roads, provincial, county roads and communal ones. The roads, which go through private

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54 Later the criminal procedure was common to trade water taken from the public reservoirs.
lands are not reckoned to the category of public roads. Such roads are called the internal roads.

The water reservoirs, lakes, rivers and the sea together with the seashore were reckoned to the public places. The basic principle used in relation to this kind of public places, was the common accessibility to these places, to use them privately. The contemporary water law has the same position as the Roman law. It is not allowed to forbid anybody to use the public water for private purposes. However, it is not allowed to use such water for industrial purposes, without appropriate permission from the administrative authority.

The specific kind of public places were aqueducts, used for delivering water to private houses in the city, to hot baths, fountains and public buildings. It was not allowed the illegal using the water from aqueducts, apart from the case, when water was leaking from the pipes, that was so called _aqua caduca_, and it was allowed to take it according to the appropriate permission. Nowadays, the law associated with the water company has a very similar rule, namely, the water can be taken on the basis of the civil contract. Every other taking is forbidden.

This short analysis of the municipal law regulations and the Polish law shows the numerous similarities in solving the same problems. The differences refer to the level of specificity. Nowadays, the solutions are more detailed in relation to these, which were used in the Ancient Rome. However, the rules stayed the same. The existing similarity can be the result of the good logical rule used by the equal generations at solving matters connected with functioning and organizing the institutional society.
PROTECTION FROM THE INJURY THREATENING FROM NEIGHBOURING PROPERTY IN ROMAN LAW AND PROTECTION FROM THE ANTICIPATED INJURY IN THE ART. 439 OF THE POLISH CIVIL CODE

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Introduction

Already in antiquity it was observed that the liability for damage already done was insufficient, because it did not cover every situation in which a man had a legitimate interest to protect his property rights; therefore it was necessary to create a mechanism of protection from the anticipated injury, in other words the injury which one was afraid of in the future. In the contemporary world this need for a preventive mechanism is much greater due to the development of civilization, which brings about many new sources of danger to one’s property and one’s right unrelated to property. In Roman law the task of a preventive measure was performed by cautio damni infecti; in contemporary Polish civil law art. 439 of the civil code has a similar function. That is why it is worth comparing these solutions of the two legal systems.

In general, cautio damni infecti was a guarantee protecting an owner of an immovable property from the injury that threatened him from a neighbouring property¹. A person who was obliged to give this guarantee promised

through stipulation\(^2\) to compensate the stipulator for damage which had its origin in the promisor’s estate\(^3\). This legal instrument was introduced by the *preator peregrinus* in the second century BC and accepted by *preator urbanus* not later than Quintus Mucius Scaevola’s time\(^4\).

The promise to compensate for damage in the neighbouring estate related to *damnum infectum*. In the sources of Roman law there is a definition of *damnum infectum* formulated by Gaius\(^5\): *damnum infectum est damnum nondum factum, quod futurum veremur* (anticipated injury is injury that has not yet occurred but which we fear may occur in the future). So it is future damage, damage not yet done, as distinct from damage that has already occurred, especially from the damage covered by the liability *ex lege Aquilia*\(^6\). Roman jurists carefully distinguished between the state of danger of damage and the state of damage already done, especially done before the *cautio* was given\(^7\); in such a situation different measures were applied\(^8\).

*Cautio damni infecti* did not relate to future damage of any kind but only to damage threatening because of a defect (*vitium*). Three kinds of defect were known: defect in a house (*vitium aedium*), defect in work (*vitium aedium*), and defect in the work of a craftsman (*vitium operis*).

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\(^2\) According to O. Lenel the stipulation had the following content: *quod aedium loci operisque q.d.a. vitio, si quid ibi ruet scindetur fodietur aedificabitur; in aedibus meis intra… damnum factum erit, quanti ea res erit, tantam pecuniam dari dolumque malum abesse afuturumque esse spondesne? – spondeo*, see. O. Lenel, Das Edictum perpetuum, Leipzig 1927, p. 55.


\(^5\) D. 39.2.2 (Gai. 28 ad ed. provinc.).


\(^7\) D. 39.2.7.2 (Ulp. 53 ad ed.); D. 39.2.9 (Ulp. 53 ad ed.).

\(^8\) D. 39.2.9.2 (Ulp. 53 ad ed.); D. 39.2.3 (Ulp. 53 ad ed.).

Protection from the Injury Threatening from Neighbouring Property in Roman law and Protection from the Anticipated Injury in the Art. 439 of the Polish Civil Code

Gaius in his commentary to a provincial edict where it is written that cautio was given to a person who feared injury because of a defect in a house or a defect in work of some sort that was being carried out in a house or in an urban or rural site, whether private or public. The same kinds of defect were mentioned by Ulpian in his commentary to edict where he wrote that to prevent the occurrence of any injury because of a defect in a house or site or piece of work, a stipulation without payment of security was introduced about such injury. Examples given in the sources prove that in practice the most important were defects in work and defects in a house, the defects in the site being less significant.

2. Defect in work (vitium operis)

The aforementioned kinds of defect require explanation. The most difficult to establish is the meaning of a defect in work, especially in order to distinguish it from a defect in a house. A clue to the understanding of the concept of a defect in work is given by Ulpianus in his commentary to edict, where it is written that the phrase “defect in work” is to be interpreted as relating not only to the time at which the work is being done but also to anything that may occur later. According to this settlement there are two meanings of “defect in work”: the first relates to the carrying out of work (opus quod fit), so the activity (facere), while the second relates to the work already done, so the result of this activity (opus iam factum, opus perfectum). This distinction is illustrated by Ulpianus with the example of a building which falls down because it was badly built.

Ulpian’s settlement supports the view that the concept of vitium operis was mostly applied to building activity and to neighbouring relations connected with buildings. This concept concerned both the situation where building-work was being carried out on one’s own land (in suo) which could be the cause of damage on another’s land (in alieno) and the situation where a building already finished had defects in its construction which could cause damage to neighbouring land. The meaning of a building should be con-
gested in the broad sense not confined to a house\textsuperscript{15}. \textit{Cautio damni infecti} was thus a promise to redress damage caused during the carrying out of building-work, and caused by a badly constructed building\textsuperscript{16}.

The liability for \textit{cautio damni infecti} did not relate to defects in work of any kind but only to defects caused by falling down (\textit{ruere}), tearing (\textit{scindere}), building (\textit{aedificare}) and digging (\textit{fodere})\textsuperscript{17}. Those terms refer to building activity; however, \textit{ruere} and \textit{scindere} are both defects in a house and defects in work, sometimes even defects in a site, while \textit{aedificare} and \textit{fodere} concern a defect in work\textsuperscript{18}.

The praetor distinguished between defects in work carried out in a site and defects in this site; \textit{cautio} could be given in reference to one of these kinds of defect or to both\textsuperscript{19}. For example, when work was carried out on public land \textit{cautio} was given in reference only to a defect in work; however, when it was carried out on private land \textit{cautio} referred to both a defect in work and in a site\textsuperscript{20}.

The examples of defect in a work given in the sources are work being carried out on public rivers (\textit{flumina publica})\textsuperscript{21} or on a public road (\textit{via publica})\textsuperscript{22}, digging a well\textsuperscript{23}, strengthening a road\textsuperscript{24}, a demolition operation\textsuperscript{25}, diversion of a water supply by means of a canal\textsuperscript{26}, making water meters or a channel.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{15} Ibidem, p. 102.
\item \textsuperscript{16} D. 39.2.15.5 (Ulp. 53 ad ed.).
\item \textsuperscript{17} See O. Lenel, op. cit., p. 55.
\item \textsuperscript{18} J. M. Rainer, Bau…, op. cit., p. 113; idem, Servius…, op. cit., p. 285.
\item \textsuperscript{19} D. 39.2.15.3 (Ulp. 53 ad ed.).
\item \textsuperscript{20} D. 39.2.15.3 (Ulp. 52 ad ed.); D. 39.2.24pr. (Ulp. 81 ad ed.).
\item \textsuperscript{21} D. 39.2.15.2 (Ulp. 53 ad ed.); D. 39.2.24pr. (Ulp. 81 ad ed.).
\item \textsuperscript{22} D. 39.2.15.6 (Ulp. 53 ad ed.); D. 39.2.31pr. (Paul. 78 ad ed.).
\item \textsuperscript{23} D. 39.2.24.12 (Ulp. 81 ad ed.).
\item \textsuperscript{24} D. 39.2.15.8 (Ulp. 53 ad ed.).
\item \textsuperscript{25} D. 39.2.24 (Ulp. 81 ad ed.).
\item \textsuperscript{26} D. 39.2.26pr. (Ulp. 81 ad ed.).
\item \textsuperscript{27} D. 39.2.30.1 (Ulp. 81 ad ed.).
\end{itemize}
3. Defect in a house (*vitium aedium*)

The concept of a defect in a house referred to the defective condition of a building which threatened to collapse. *Cautio damni infecti* was given here in case damage was caused by the partial or complete collapse of a building due to its defective condition. The basic problem to determine the meaning of *vitium aedium* is to find a criterion which allows the difference to be discerned between *vitium aedium* as a defect in a house and *vitium operis* as a defect in the construction of a house. Since *vitium operis* was related to building activity or the result of this activity, in other words it was connected with human activity, the concept of a defect in a house referred to different defects, so defects not connected with human activity. The defective condition of a building could have many different causes, not only mistakes or faults in construction. A firm building can become defective due to the passage of time or as a result of a damaging external effect operative after its construction is finished, e.g. when water slowly damages the foundations. The defective condition of a building is sometimes connected with the characteristics of the land, that is why *vitium aedium* can be caused by *vitium loci*.

4. Defect in a site (*vitium loci*)

*Vitium loci* is a defect in a site or in the land, e.g. a landslide. *Cautio* was not operative in reference to a site that was marshy or sandy, since the defect in question was inherent in the nature of the site and was not affected by human activity; therefore nobody could be liable for it. As a result, *vitium loci* referred to a defect in a site caused by human activity which changed the natural features of the site.

It is a contentious issue in the doctrine whether the defect had to exist at the time of *postulatio cautionis* or if it was verified after the damage was done. It is probable that the latter view is correct because only after the

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28 J. M. Rainer, Bau..., op. cit., p. 120.
30 P. Voci, op. cit., p. 276.
31 D. 39.2.24.2 (Ulp. 81 ad ed.).
33 J. M. Rainer, Bau..., op. cit., p. 97 f.
damage was done was it possible to establish its cause\textsuperscript{34}. In J. Michael Rainer’s opinion the existence of a defect was not a precondition of validity of stipulation\textsuperscript{35}.

5. Person obliged to give \textit{cautio damni infecti}

The most important person who was obliged to give \textit{cautio} was the owner of the immovable property which was the source of danger to another’s property\textsuperscript{36}. Apart from him the following persons were obliged to stipulate compensation: usufructuary, a holder of the right of superficies\textsuperscript{37}, a possessor \textit{bona fide}, a creditor who received a building as a pledge\textsuperscript{38}, a person who carried out work on his own or someone’s property\textsuperscript{39}. In Julian’s opinion when a superficiary tenement was defective the owner had to make an undertaking about defect of the soil and of the building or the person to whom superficies belonged had to give security about both\textsuperscript{40}. According to Celsus if the usufruct of a house belonged to someone, then either the owner had to make an undertaking against anticipated injury or the usufructuary had to give security against the same\textsuperscript{41}. Where a defective house had several owners, each of them had to make an undertaking in respect of his personal share in the house, to avoid the possibility of each individual being obligated for the whole sum\textsuperscript{42}.

6. Person entitled to request receipt of \textit{cautio damni infecti}

First of all a right to request \textit{cautio damni infecti} was conferred on the owner of the property exposed to danger\textsuperscript{43}; however, the circle of people who had this right was broad. Undoubtedly, a holder of a right of superfici-

\textsuperscript{34} Ibidem, p. 98.
\textsuperscript{35} Ibidem, p. 98.
\textsuperscript{36} D. 39.2.19pr. (Gai. ad edictum praetoris urbani titulo de damno infecto).
\textsuperscript{37} D. 39.2.13.8 (Ulp. 53 ad ed.).
\textsuperscript{38} D. 39.2.11 (Ulp. 53 ad ed.).
\textsuperscript{39} D. 39.2.30.1 (Ulp. 81 ad ed.).
\textsuperscript{40} D. 39.2.9.4 (Ulp. 53 ad ed.).
\textsuperscript{41} D. 39.2.9.5 (Ulp. 53 ad ed.); D. 39.2.13.8 (Ulp. 53 ad ed.); D. 39.2.10 (Paul. 48 ad ed.)
\textsuperscript{42} D. 39.2.27 (Paul. 78 ad ed.).
\textsuperscript{43} D. 39.2.19pr. (Gai. ad edictum praetoris urbani titulo de damno infecto).
cies and a usufructuary were entitled to cautio; what is more if both the owner of a property and its usufructuary requested the receipt of a cautio against anticipated injury, they each had to be given a hearing. In such a situation the person making an undertaking did not thereby suffer any loss so he did not have to offer either of them more than corresponded to the extent of his interest\textsuperscript{44}. The answer to the question if a creditor who received property as a pledge was entitled to request cautio was not unambiguous, Marcellus rejected this possibility, but it was accepted by Ulpianus\textsuperscript{45}. In Labeo’s view cautio had to be given to neighbours, their tenants and their tenants’ wives as well as to those who resided with them\textsuperscript{46}. Nevertheless, Sabinus said that a cautio was not to be given to tenants since either they rented a house that had been defective from the outset and they had only themselves to blame or the house had fallen into disrepair subsequently and they could institute legal proceedings under lease. Ulpianus approved the view of Sabinus\textsuperscript{47}. The broadest circle of persons entitled to request cautio was described by Paulus, who stated that a stipulation against anticipated injury was available not only to a person of whose goods the property was part but also to one who was responsible for it (cuius periculo res est)\textsuperscript{48}.

7. The procedure of giving a cautio damni infecti

Cautio damni infecti was a promise given by means of the most important Roman verbal contract stipulatio\textsuperscript{49}. This contract consisted in an exchange of a creditor’s oral solemn question do you promise to do or to give something (centum dare spondes?) and debtor’s affirmative answer to this question\textsuperscript{50}. Stipulatio is not known in the contemporary law. A promise to redress anticipated damage could be given voluntarily, without a need to

\textsuperscript{44} D. 39.2.5.2 (Paul. 1 ad ed.).
\textsuperscript{45} D. 39.2.9.11 (Ulp. 53 ad ed.)
\textsuperscript{46} D. 39.13.5 (Ulp. 53 ad ed.).
\textsuperscript{47} D. 39.13.6 (Ulp. 53 ad ed.); D. 39.2.33 (Ulp. 42 ad Sab.).
\textsuperscript{48} D. 39.2.18 (Paul. 48 ad ed.).
\textsuperscript{50} A. Berger, op. cit., s. v. stipulatio.
apply coercive measures, or could be given with the participation of magistrates who had the competence to force an obliged person to give the promise\textsuperscript{51}.

If the obliged person did not want to give a cautio voluntarily the entitled person could lodge a motion with the praetor to apply coercive measures. The person who requested the provision of cautio had first to swear an oath on the subject of malice (\textit{iuramentum calumniae})\textsuperscript{52}. The promise could be given in one’s own name or in the name of another person\textsuperscript{53}. If the person promised in his own name he made an undertaking (\textit{repromissio}), if in the name of another person he gave security (\textit{satisdatio})\textsuperscript{54}.

If a cautio was not given within the period laid down by the praetor, the plaintiff was granted \textit{missio in possessionem ex primo decreto} of the property in question, which meant either the whole property or a part thereof\textsuperscript{55}, e.g. in respect of that part of the building which appeared to be in a ruinous condition\textsuperscript{56}. If the house was so big that there was space between the defective and the nondefective parts \textit{missio in possessionem} was granted only in respect of the former, but if the defective part was closely joined to the nondefective by the construction of the building, the \textit{missio in possessionem} was to be granted in respect of the whole of the house\textsuperscript{57}. In relation to the field a solution was different - the complainant was to be granted \textit{missio in possessionem} for the part of the field from which danger was apprehended, because whereas in the case of a house the rest of the building might be pulled down by the defective part, the same did not apply in the case of fields\textsuperscript{58}. If there were several owners who had to give cautiones and one of them failed to do so, the plaintiff was granted \textit{missio in possessionem} of that owner’s share\textsuperscript{59}. If there were several persons who requested the receipt of cautiones and some had more, some less valuable houses, or they all had unequal shares of one house, nonetheless, they

\textsuperscript{51} J. M. Rainer, Bau..., op. cit., p. 97.
\textsuperscript{52} D. 39.2.9.13.3 (Ulp. 53 ad ed.); D. 39.2.7pr. (Ulp. 53 ad ed.); D. 39.2.12 – 14 (Ulp. 53 ad ed.).
\textsuperscript{53} D. 39.2.7pr. (Ulp. 53 ad ed.); D. 39.2.13.1 (Ulp. 53 ad ed.).
\textsuperscript{54} D. 39.2.30.1 (Ulp. 81 ad ed.); D. 39.2.7pr. (Ulp. 53 ad ed.).
\textsuperscript{55} D. 39.2.4.1 (Ulp. 1 ad ed.).
\textsuperscript{56} D. 39.2.15.11 (Ulp. 53 ad ed.); D. 39.2.15.13 (Ulp. 53 ad ed.).
\textsuperscript{57} D. 39.2.15.13 (Ulp. 53 ad ed.).
\textsuperscript{58} D. 39.2.38.1 (Paul. 10 ad Sab.).
\textsuperscript{59} D. 39.2.5.1 (Paul. 1 ad ed.).
were granted missio in possessionem not in accordance with the extent of their individual ownership and not in proportion to the several injuries which might occur to them, but on an equal footing.\textsuperscript{60}

The legal consequence of the missio in possessionem ex primo decreto was the right of holding of the property (detention) which was the source of danger to the entitled person’s property.\textsuperscript{61} The right to hold the property lasted until the obliged person gave the cautio or until the damage occurred. If after the missio in possessionem ex primo decreto the obliged person still refused to give cautio; the plaintiff could request the praetor to issue another decree in order to authorize him to enter into possession of the adversary’s property (missio in possessionem ex secundo decreto).\textsuperscript{62} In this way the plaintiff received possessio civilis of the property and the praetor’s protection.\textsuperscript{63} He could even take the property into his own ownership by reason of a long period of time, that means by usucapio.\textsuperscript{64}

Missio in possessionem was applied in relation to a defect in a house and a defect in a site, but as regards a defect in work only to work already completed (opus perfectum). In respect to work which was being carried out the entitled person could take advantage of another legal instrument operis novi nuntiatio.\textsuperscript{65}

Cautio damni infecti was not applied if the entitled person had an alternative remedy to protect his legal interest. Anything that could be claimed under another sort of action was in no circumstances to be brought within the scope of a stipulation against anticipated injury, e.g. when somebody

\textsuperscript{60} D. 39.2.5.1 (Paul. 1 ad ed.); D. 39.2.15.15 (Ulp. 53 ad ed.); D. 39.2.15.18 (Ulp. 53 ad ed.); D. 39.2.40.4 (Ulp. 43 ad Sab.).


\textsuperscript{62} D. 39.2.7pr. (Ulp. 53 ad ed.).

\textsuperscript{63} D. 39.2.18.15 (Paul. 48 ad ed.)


\textsuperscript{66} D. 39.2.18.9 (Paul. 48 ad ed.), cfr. D. 39.2.32 (Gai. 28 ad ed. prov.) see S. Tafaro, Il giurista mediatore tra istanze sostantiali e schema processuale: l’actio
put a superficies on soil which he leased, the owner of the soil did not have to give him a cautio because injury might occur by defect in the soil, nor did the holder of the right of superficies have to give a cautio to the owner, since they could employ actions arising respectively from lease and hire\textsuperscript{67}. Similarly, between a usufructuary and the owner of a property a cautio against anticipated injury was appropriate if the usufructuary requested receipt of cautio about defect in the soil, or if the owner of the property requested receipt of cautio about defect in any building-work that the usufructuary might be carrying out. For neither of them could request receipt of cautio from the other about the collapse of the house, the usufructuary because its repair was part of his obligation, the proprietor because the normal stipulation by which the usufructuary gave a cautio for the return of the property at the end of the usufruct extended to those circumstances as well\textsuperscript{68}.

8. Time limit of the stipulation

The stipulation against anticipated injury included a time limit within which the cautio became applicable if some injury occurred, since a person could not be bound by a stipulation in perpetuity\textsuperscript{69}. The praetor prescribed the time limit and its calculation was dependent on the nature of the case and the extent of the injury which it was expected could occur\textsuperscript{70}. As a rule cautio referred only to damage that occurred within the prescribed time limit\textsuperscript{71}. After the time limit expired it was necessary to give a new cautio\textsuperscript{72}. In some cases the time was prescribed by law, in particular, in the case of work which was being carried out on a public river or its bank the security was to be given for a period of ten years\textsuperscript{73}; in other cases,

\begin{itemize}
  \item damni infecti, Index 1974/75, nr. 5, p. 75 ff.; J. M. Rainer, Bau..., op. cit., p. 98 f.
  \item D. 39.2.18.4 (Paul. 48 ad ed.).
  \item D. 39.2.20 (Gai. 20 ad ed. provinc.), cfr. D. 39.2.18.2 (Paul. 48 ad ed.).
  \item D. 39.2.13.15 (Ulp. 53 ad ed.).
  \item D. 39.2.13.15 (Ulp. 53 ad ed.).
  \item D. 39.2.15pr. (Ulp. 53 ad ed.); D. 39.2.15.7 (Ulp. 53 ad ed.); J. M. Rainer, Bau..., op. cit., p. 97.
  \item D. 39.2.15 pr. (Ulp. 53 ad ed.).
  \item D. 39.2.7pr. (Ulp. 53 ad ed.); D. 39.2.15.2 (Ulp. 53 ad ed.).
\end{itemize}
as a rule, the praetor determined the time limit on the basis of the nature of the work involved\textsuperscript{74}.

The application of the time limit is illustrated by Sabinus quoted by Paulus: if, while building-work was going on during the period covered by the stipulation, a house fell down onto a neighbour’s wall and damaged it, the neighbour could bring an action even if the wall fell down after the time limit of the stipulation, because it was at the moment when the wall became defective that he sustained injury\textsuperscript{75}. The fact that the cause of damage came into being before the expiry of the time limit was of crucial importance, not the time when the wall fell down. The settlement concerned damage caused by the fault in building-work\textsuperscript{76} and the expiry of the time limit was not an obstacle to \textit{actio ex stipulatu}.

9. The liability for \textit{cautio damni infecti}

The liability for \textit{cautio damni infecti} was operative when the apprehended damage covered by \textit{cautio} was actually done. From this moment the plaintiff could avail himself of \textit{actio ex stipulatu} to claim redress for damage\textsuperscript{77}, provided that the preconditions of the promisor’s liability were fulfilled. The rules of the liability for \textit{cautio damni infecti} were shaped by the

\textsuperscript{74} D. 39.2.15.7 (Ulp. 53 ad ed.).
\textsuperscript{75} D. 39.2.18.11 (Paul. 48 ad ed.).
\textsuperscript{76} J. M. Rainer, Bau…, op. cit., p. 109.
\textsuperscript{77} As a rule the amount of damages was determined by the principle \textit{quanti ea res erit}, in other words it encompasses both \textit{damnum emergens} and \textit{lucrum cessans}, for details see S. Tafaro, op. cit., p. 66 ff.; J. M. Rainer, Bau…, op. cit., p. 122 ff.
republican jurist Servius\textsuperscript{78}, his pupil Alfenus\textsuperscript{79} and Labeo\textsuperscript{80} and were still in force in classical law\textsuperscript{81}. The basic precondition of the liability was the existence of one of the aforementioned defects and the fact that this defect was the cause of damage\textsuperscript{82}.

The importance of \textit{cautio damni infecti} in the Roman legal system was evident in those cases where the defect which justified the promisor’s liability was not caused by his fault. The lack of fault in itself did not suffice to release the promisor from the duty to redress damage, because the liability for \textit{cautio damni infecti} was wider than the scope of liability based on the principle of fault\textsuperscript{83}. Moreover, the plaintiff did not have to prove that the defendant was at fault. Those were the most important and distinctive


\textsuperscript{79} About Alfenus see W. Kunkel, Herkunft…, op. cit., p. 29; W. Bojarski, W. Dajczak, A. Sokala, op. cit., p. 133.

\textsuperscript{80} Marcus Antistius Labeo lived at the turn of the era. About him see W. Kunkel, Herkunft…, op. cit., p. 114; W. Bojarski, W. Dajczak, A. Sokala, op. cit., p. 142.

\textsuperscript{81} In G. Branca’s and T. Giaro’s opinion those jurists shaped the content of this institution which was not changed in the later development of Roman law. See G. Branca, op. cit., p. 339; T. Giaro, op. cit., p. 273.


features of cautio damni infecti. Owing to those features of cautio the person whose property was endangered was not left without legal protection in cases outside the scope of liability ex lege Aquilia based on fault. In those cases where damage was caused by the fault of the promisor the plaintiff could sue him through actio ex lege Aquilia instead of action ex stipulatu based on cautio.

It does not mean that the promisor was always responsible for damage caused by the existence of a defect, because there were circumstances which exonerated him from the liability. It can be inferred from the settlements of Servius (D. 39.2.24.3-4; D. 39.2.43pr.) that force majeure (vis maior) was the circumstance which released the promisor from the liability for cautio damni infecti. Labeo explained that the promisor was not liable for the damage when it was caused by an earthquake, force of river and any other events defined as casus fortuitus, because no building was firm enough to resist them. Cassius wrote that the stipulation did not hold when the injury was caused by such violence as could not possibly have been resisted. On the one hand, the exonerative effect of force majeure is to be understood in this way that if the defect which was the cause of damage on adjacent land was caused by force majeure, the promisor was not obliged to redress the damage. On the other hand, if force majeure was the

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84 G. Branca, op. cit., p. 337; J. M. Rainer, Bau..., op. cit., p. 98.
86 On force majeure see M. Sobczyk, op. cit., passim with literature there.
87 Labeo’ s statement suggests that the notion of casus fortuitus includes also force majeure.
89 D. 39.2.24.8 (Ulp. 81 ad ed.).
cause of damage, the existence of defects was irrelevant, so the promisor was exempted from liability.  

10. Protection from anticipated injury in art. 439 of the Polish civil code

The Polish legal system contains regulations on the protection from anticipated damage, including damage threatening from the neighbouring property.

The most important regulation on the protection from anticipated injury in Polish law is art. 439 of the civil code. According to this regulation everybody who is threatened with damage as a result of another person’s conduct, especially the absence of a due supervision over the activity of an enterprise or an industrial plant managed by the person or the state of the person’s building or an appliance, can demand that the person undertake measures indispensable for averting the imminent danger and, if it is necessary, give an appropriate security.

Undoubtedly, this regulation construes a claim of preventive character whose aim is to protect a person from future damage not yet done. This preventive function of art. 439 c.c. is the fundamental similarity to Roman cautio damni infecti which justifies the comparison of these two legal instruments. In contrast to cautio damni infecti the scope of application of art. 439 c.c. is not confined to the neighbouring relations and to immovable property, but it is much wider. In fact, it is irrelevant if the danger stems from neighbouring immovable property; it is enough when the entitled person is threatened with damage caused by somebody’s conduct,

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not necessarily his neighbour’s. The preventive claim can be submitted by every person whom injury threatens indirectly, without further limitation, against every person whose behaviour is the source of the threat also without further limitation.\footnote{For details see W. Bogusławski, op. cit., p. 36; W. Czachórski, Zobowiązania. Zarys wykładu, Warszawa 1994, p. 244; G. Bieniek, op. cit., note 6 to 439.}

The fundamental precondition of the application of the claim is the direct danger of damage, both damage in property and right unrelated to property.\footnote{W. Bogusławski, op. cit., p. 32 f.; W. Dubis, op. cit., note 2 to art. 439; G. Bieniek, op. cit., note 4 to art. 439; M. Safjan, op. cit., note 10 to art. 439; K. Szczepanowska is against this point of view (K. Szczepanowska, Roszczenie o zapobieżenie szkodzie a sytuacja prawna twórcy wynalazku, Przegląd Ustawodawstwa Gospodarczego 1993, nr. 7, p. 9 f.)} The cause of danger is formulated very widely, because it refers to the person’s conduct which threatens to damage another person’s right. The regulation specifies only examples of such conduct, but it does not define it. The conduct can relate to a defect in a house, site or building-work, but it does not have to do so; therefore the existence of a defect in itself is not a precondition of the claim based on 439 c.c. The indicated examples do not exhaust the possible sources of danger; they are only enumerative.\footnote{A. Agopszowicz, op. cit., p. 104; G. Bieniek, op. cit., note 5 to art. 439.} In fact, the danger can be caused by every act of omission, e.g. leaving a well open in the neighbourhood of a school, carrying out building-work without proper supervision, storage of explosives in a house.\footnote{W. Dubis, op. cit., note 4 to art. 439; G. Bieniek, op. cit., note 5 to art. 439; M. Safjan, op. cit., note 1 to art. 439.}

The very wide circle of persons entitled to the claim and persons obliged to undertake necessary preventive measures as well as the very wide scope of the possible sources of damage are the fundamental differences between Polish and Roman regulation on protection from anticipated damage.

In the view of the majority of doctrines art. 439 c.c. should be applied only in circumstances that justify the delictual liability of the obliged person.\footnote{M. Safjan, op. cit., note 3 to art. 439.} The preventive claim cannot be made in a contractual relationship due to
the fact that the creditor can take advantage of other instruments of legal protection of his interest.98

The threat of anticipated damage must be direct and real; it does not suffice that the threat is only potential, because the possibility of damage must be very high.99 The very high possibility of damage is a very important precondition of the application of art. 439 c.c. and this precondition is necessary due to the fact that many human activities in the contemporary world bring about the risk of damage, e.g. driving a car. That is why it is not enough when the risk is only potential; it must be very serious. Roman jurists did not pay so much attention to the level of danger; there are no settlements in the sources that prove that the level of danger was evaluated. It was enough that there was one of the indicated defects.

The most contentious issue connected with the preventive claim from art. 439 c.c. is the basis of the claim with reference to assessment of the behaviour which threatens damage, or the basis of preventive liability. It can be said that the doctrine is interested in art. 439 c.c. only with reference to this issue.

In this respect there are four theories of the basis of the preventive claim:

1) the conduct in question should be the cause of the threat of damage (a pure causal theory), in other words there should be a causal connection between the conduct of the person and the state of danger of damage.100

2) the conduct in question should be blameworthy; this theory rests on the linguistic interpretation of art. 439 c.c., especially on the interpretation of the premise of “absence of a due supervision”. It refers to the primacy of the principle of fault as the basis of the liability ex delicto as well. However, this theory is useless in these cases where the liability of the perpetrator of damage is not based on the principle of fault101.

3) the conduct in question should be objectively unlawful.102

98 W. Bogusławski, op. cit., p. 32; M. Safjan, op. cit., note 4 to art. 439.
100 A. Ohanowicz, Zbieg norm w kodeksie cywilnym, Nowe Prawo 1966, nr. 12, p. 1510.
4) the basis of the claim is determined by this basis of liability which should be applied where damage is actually done. So if the liability of the perpetrator for damage actually done is based on fault, the preventive claim is based on the same principle, but if his liability is based on the principle of risk or equity, the preventive claim is based on the principle in question\textsuperscript{103}.

Each of the aforementioned theories has its supporters who emphasize its value and the drawbacks of alternative theories, so it is very difficult to indicate the dominant theory. Nevertheless, the contemporary attitude to preventive liability is fundamentally different from the liability \textit{ex cautione damni infecti}. The fundamental conception of liability does not relate to the existence of certain sorts of defects but to the conduct of another person. The problem of fault of the person is much more complex today than the release from liability on the grounds of force majeure (vis maior) in Roman law. Depending on the theory the grounds for release from liability are wider or narrower in Polish law than in Roman law. Roman jurists created none of the described theories; their attitude to the problem of the basis of the preventive claim was different from today’s point of view.

There is a considerable difference between the Roman and Polish conception of protection from anticipated injury with regard to the content of the preventive claim. Roman \textit{cautio damni infecti} was limited only to the promise to redress damage which could occur in the future; the person obliged to give the promise did not have to pay anything in advance or to give a deposit. However, the fact that he promised to redress future damage induced him indirectly to prevent damage e.g. to repair the defects of a house, regardless of the fact that he was not imposed a formal duty to do so. In this way \textit{cautio} had an influence on his behaviour.

In Polish law the content of the preventive claim is much wider. First of all the entitled person can demand that the obliged person undertake the indispensable measures for averting the danger, for example introduce due supervision over the activity of his enterprise or industrial plant, give up a risky method of production, introduce additional security precautions, make necessary repairs of a defective building or appliances, reduce the emission of a dangerous gas. This very wide content of the preventive claim ensures better protection from anticipated injury in Polish law than

the protection *ex cautione damni infecti*. First of all there is a formal duty to take all necessary precautions to prevent damage and this formal duty can be executed in legal proceedings.

Moreover, the entitled person can demand that the obliged person give an appropriate security. The security does not consist in a duty to promise to redress future damage but it consists in a duty to put money in a court deposit. The amount of deposit is dependent on the estimation of the anticipated damage and the cost of necessary precautions that should be taken to avert the danger of damage\(^\text{104}\). For important reasons the security can be different, for example the temporal prohibition of certain activity or usage of a house or appliance\(^\text{105}\). The security precautions should take into consideration the level of danger and its source; however, their application cannot lead to the lasting prohibition of a lawful activity\(^\text{106}\).

### 11. Conclusions

The Roman conception of *cautio damni infecti* and art. 439 of the Polish civil code have the same fundamental function – protection from anticipated injury. Nevertheless, the two regulations are different to a considerable extent. Especially the premises of their application as well as the content of the preventive claim and the basis of the claim are different. The Polish regulation is much wider than *cautio damni infecti* in the aforementioned aspects and gives better protection from anticipated injury. These differences are so significant that there are opinion voiced that the preventive claim based on 439 c.c. is *novum* in civil law, which did not operate with the protection of so wide range\(^\text{107}\). Art. 439 of the Polish civil code is a good example of progress in law from Roman times.

\(^\text{104}\) M. Safjan, op. cit., note 12 to art. 439.

\(^\text{105}\) W. Dubis, op. cit., note 5 to art. 439.

\(^\text{106}\) M. Safjan, op. cit., note 3 to art. 439.

\(^\text{107}\) W. Boguslawski, op. cit., p. 33; J. Kaspryszyn, op. cit., p. 46.
STUDENTS' SELECTED PAPERS
WRONGFUL LIFE: ISSUE FOR MODERN EUROPEAN LEGISLATION

ADRIAN SZCZUDŁOWSKI

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The concept of wrongful life is a controversial and fascinating problem of contemporary legislation. We are able to specify three basic claims, having in common damage caused by unwanted pregnancy: wrongful life, wrongful birth and wrongful conception. Main deference between wrongful life and wrongful birth is the entity entitled to sue. In wrongful life, disabled child born in result of culpable omission or action and in wrongful birth parents. Generally disabled child commands compensation for its painful existence, and parents for expenses of having a unwanted child. The wrongful conception is parents legal action, birth is a result of incorrect birth control. Generally in this type of claims the responsible entity is a hospital, doctor or pharmacist.

Taking those remarks in consideration wrongful life should be defined as legal action in which disabled child sues a hospital or a health care provider or they both for falling to prevent its own birth. In theory it is possible because in every jurisdiction there are reasons stipulated in law when the termination of a pregnancy is acceptable. Termination is legally when according to medicine knowledge tests of a fetus give certainty the child will be disabled. The World Health Organization defines Disability as follows: “Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus disability is a complex phenomenon, reflecting an interaction between features of a person’s body and features of the society in which he or she lives.” Debatable situations appears when pregnancy could have been terminated and from some kind of reasons specialists did not make it.

Taking one step back we ought to realize the appearance of claims for wrongful life is already a quite well known problem for European judicature. It seems to be a result of medical progression and new possibilities. In 21st century women can make tests even before pregnancy to min-
imize the risk of birth a disabled child. Most important tests are the prena-
tal testing and the preimplantation genetic diagnosis. Prenatal testing is
testing for diseases or conditions in a fetus or embryo before it is born and
preimplantation genetic diagnosis also known as embryo screening refers
to procedures that are performed on embryos before the implantation.

Those tests do not give the 100% certainty and human error must always
be taken into consideration. In practice, usually health care providers are
accused of not performing proper genetic screening or not adequately
counseling prospective parents.

The essence of wrongful life claim is the defendant's negligence resulted
in the birth of a disabled child whom the mother would have aborted if she
had received adequate medical information. What is controversial is that
we make at this point a model of reasonable parents, who terminate the
pregnancy if they know the child will be defected. In real life the reactions
are very individual, many parents will not terminate the pregnancy even if
it is risky. Many of them will act responsible and knowingly as a result of
love and humanity. Authorities and lawyers are not allowed to make this
kind of orders.\

Making further explanations, the difference between wrongful life and
prenatal injuries or preconception injuries should be underline. In wrong-
ful life claim child’s defect is a result of nature, and in two others the
cause is human’s activity or failure. In prenatal injuries and preconception
injuries we simply compare healthy child with child with injuries caused
by human. In wrongful life there appears a great difficulty how to compare
existing with not-existing.

Judge J. Spigelman, said in his judgement in the NSW Court of Appeal
what is crucial to understand the problem.

“[… ] in cases of this kind, to find damage which gives rise to a right to
compensation it must be established that non-existence is preferable to life
with disabilities”.

The English High Court held that the law could not, recognize “non-exist-
ence” as a relevant comparator and therefore, there was no damage which

1 Marta Soniewicka: Regulacje prawne wobec rozwoju nowoczesnych technik
kontroli prokreacji: analiza roszczenia wrongful life, Diametros nr 19.
could be compensate. Disabled child cannot ever have and could never have had a life without disabilities it has, that the particular and individual comparison required by the law’s conception of “damage” is impossible to formulate.

In the USA, there was many wrongful life cases. Courts usually dismissed this kind of claims. In the case Berman v. Allan, the court argued that despite the frailty, a child with Down syndrome will be loved and is able to love other people. It will also be able to experience happiness and pleasure, emotions that are the essence of life. The Court considers such life as valuable. In addition, the court noted that nobody is perfect, and each of us comes into this world with smaller or larger defects. Especially it does not give grounds for believing that a person with defects is a less valuable human being.

Another argument against wrongful life claims, is a depreciation life with disabilities. Court in the Smith v. Cote case observe that legislation connected with disabled people changed for better and shows a greater understanding of their situation. The recognition of wrongful life actions would lead to the destruction of social awareness of living with disabilities.

Cases of this kind have been widely discussed, conclusions were inter alia fear of increase of abortion. If the claims of wrongful life were not dismissed, it is likely that doctors would not protect life but rather make abortion as a fear of subsequent processes. There were also cases where children sued their own parents for the fact they let them born with defects. There were also such cases when children sued their parents because they suffer of being a child born out of wedlock. (Zepeda v. Zepeda).

In cases when damages were given, courts were not interested in philosophical reflections on the value of life, the essence was to help physical handicapped children. In Curlender v. Bio-Science Labs case the court stipulated that in wrongful life actions is neither necessary to get into discussions about the mystery of existence.

In most states the wrongful life claims has been prohibited by law.

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4 Smith v. Cote case (513 A2D 341, NH).
So if we agree that wrongful life claim does not have any grounds in law, morality or ethics at the same time we must decide what about those disabled children. No doubt that they suffer everyday, most average actions are for them great challenges. Furthermore they often need 24/7 care and a lot of money to buy medicine and special medical care. The wrongful life claim is a tragic bagging for help. We cannot conduct insensibly, just simply saying it’s immoral and that’s it. Those children and their families are in a dramatic situation.

It is essential for legislator to work out a solution. In my opinion French regulations in this matter are well suited to the social reality. At first in France wrongful life claims were dismissed until Perruche case. Child was blind and handicapped as a result of undetected it’s mother’s rubella. Rubella is a disease caused by the rubella virus, it is often mild and can last one to three days. The symptoms are quite similar to the flu, the appearance of a rash on the face which spreads to the trunk and limbs. When a woman is infected by Rubella virus during pregnancy, consequences can be serious, the child may be born with congenital rubella syndrome (CRS), which entails serious incurable illnesses. On 17.11.2000 Appelate Court adjudge damages. That judgement caused a national discussion, which effects in statute regulating patient’s rights. It stipulates inter alia wrongful life claims, providing special guarantee fund. Moral doubtful wrongful life claims are now dismiss, although children and their families are not left without help. Procedure is of course much more faster than legal pleading.

In conclusion, unfortunately we must agree that from the dawn of history everyday problems appears faster than legislators are able to regulate them. It’s a task for judiciary and jurisprudence to accommodate law to new issues. In many countries also in Poland we have had already wrongful life claims e.g. Barbara Wojnarowska v Hospital in Łomża. The statute stipulation should be justified. Ought to dismiss unmoral definition of damage, stipulating child existence as loss or even non-existence as preferable situation than existence. Human life is always the greatest value and authorities should always provide special life protection. On the other side justified regulation should not leave people wronged by fate without legal

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care. General rule is to beware of protecting only unborn human being, loosing interest when it is already born. Thus French ideas of appropriate guarantee fund seem to be worth to adopt to our legislation.