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HOW FACTS BECOME NORMS (PART II)

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Abstract: *I argue that it is possible to derive norms from facts. In this second part of my enterprise I suggest that permanent human behaviour as a matter of fact produces norms as a matter of ought. I proceed to defend this suggestion in two steps. Firstly, I use Festinger's theory of cognitive dissonance applied in the particular context of judicial decision-making to demonstrate how our behaviour changes our normative attitudes. Subsequently, I try to prove that normative attitudes which stem from settled inferential practice can be understood as "the genuine ought". The objectivity of normativity is thus not a matter of reference, but a matter of inference and the meaning of our ought-terms is nothing else but the sum of practical conclusions they usually lead to.*

Keywords: *cognitive dissonance, frege-geach problem, inferentialism, one right answer thesis*

1. NORMATIVE POWER OF FACTICITY

When using is-sentences we believe that they represent some part of our factual world. If they did not and if we still wanted to keep telling the truth, we would need to change them for some other representation, some other is-sentences. If our talk about normativity is supposed to represent some part of the factual world, I suggest that this part is best delimited as subjective attitudes held by particular people. In contrast to external moral realism, the social science account of normativity can explain why certain "facts" do not need to be "queer" in order to have motivational force. That is because it is not controversial to claim that actual holding of normative attitudes motivates actual attitude-holders to act in accordance with their attitudes. This fact – holding of normative attitudes – is maybe hard to investigate, but I assume that statistics based on a set of filled-in questionnaires can do for science more work than some presupposition of some "moral facts" which somehow "supervene" on some natural facts, like for example wrongdoing on voluntary cat-burning[1] (for the discussion, see I.2[2] of this article).

So we have here normativity manifested in social science facts, and as such it can be causally determined by other facts. But even at this level of inquiry it is not easy to demonstrate how actual holding of normative attitudes changes in response to a change in some other facts. What are these facts? There may exist plenty of them, ranging from brain surgery to job loss. I suggest that from among all these facts there is one whose norm-producing power is particularly illustrative; it is persistent human behaviour. Why is just this fact in relation to normative attitudes so extraordi-

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[1] In the last section I will argue that there is no unbridgeable difference between a norm as a fact (believing, act of judging, ideation) and a norm as an ought (meaning, judgment, idea) and therefore in this part of the article I will use terms "normative attitudes" and "norms" interchangeably.

[2] The Roman numeral indicates the part of my article, while the Arabic numeral indicates the section of the respective article part.

nary?[3] Because persistent behaviour creates not only personal (autonomous) norms but also social norms[4] (and institutions) and because the possibility of a causal relation between behaviour and normative attitudes as between two distinct factual variables is established by the observation that in the ordinary course of events the latter stir the former. It is the consistency of ought-pragmatics which makes us concede that norms are not only reasons guiding our judgment, but also motives determining our behaviour. So if it is possible to establish a causal relationship between normativity and behaviour, then all we need to do in order to demonstrate how facts produce norms, is just to reverse its ordinary direction. We need to show how persistent features of our behaviour determine the content of our norms. One of the most suggestive illustrations of the normative power of facticity is from Georg Jellinek:

"The origin of the belief that our living conditions are normal inheres in a specific psychologically determined relationship between a man and factual events he encounters. Things which permanently surround him; which he constantly perceives; which he steadily does, are considered by his mind not only as facts, but also as norms for its judgments ... There is no need to look immediately at the discipline of ethics and law; it is apparent in the thousandfold norms which create our daily lives; in values which regulate our transactions and morals. To most of us it appears that our own home-made dishes are delicious; that our own lineage is handsome; that prejudices of our own sphere are praiseworthy; that lifestyle of our own social class is the right one."[5]

People are disposed to shape norms according to the facts which surround them. Whereas Jellinek considers this disposition to be a fact, John Mackie takes it only as a hypothesis which gives some support to moral relativism. According to Mackie:

"Disagreement about moral codes seems to reflect people's adherence to and participation in different ways of life. The causal connection seems to be mainly that way round: it is that people approve of monogamy because they participate in a monogamous way of life rather than that they participate in a monogamous way of life because they approve of monogamy."[6]

Leaving aside the question of how much evidence is needed to make a hypothesis become a fact, I assume that the hypothesis according to which we shape our norms to match our persistent behaviour is not unfounded. In what follows I will elaborate on this assumption with the help of the theory of cognitive dissonance.

[3] Of course, it might be said that there is an even more exclusive norm-producing fact – another normative attitude. My holding of the attitude according to which "Murder is bad" may make me hold another attitude according to which "Abortions are bad". The translation of relations between ought-sentences (justification) into relations of factually-held attitudes (explanation) might seem odd, but one appreciates its usefulness when one realises that reasons are not the only motives due to which we think that something ought to be, and on which we act. For more on the relationship between justification and explanation see LEITER, B. Explanation and Legal Theory. *Iowa Law Review.* 1996–1997, Vol. 82, pp. 905–910.

[4] On this difference see RAZ, J. *Practical reason and norms*. New York: Oxford University Press, 2002, p. 52.

[5] JELLINEK, G. *Allgemeine Staatslehre*. Prague: J. Laichter, 1906, p. 358.

[6] MACKIE, J. Ethics: *Inventing Right and Wrong*. New York: Penguin, 1977, p. 36.

1.1. Theory of cognitive dissonance

When Leon Festinger formulated the theory of cognitive dissonance some 60 years ago, his basic assumption was that *"the individual strives toward consistency within himself"*. It means that the individual's *"knowledge, opinion, or belief about the environment, about oneself, or about one's behaviour ... tend to exist in clusters that are internally consistent"*.[7] This tendency is especially noticeable in a situation when the individual fails to achieve the desired state of harmony; the situation which Festinger called "cognitive dissonance". According to Festinger, the existence of cognitive dissonance is *"a motivating factor in its own right"*, i.e. it *"leads to activity oriented toward dissonance reduction just as hunger leads to activity oriented toward hunger reduction"*.[8]

Here lies the answer for Michael S. Moore (see I.2), who cannot imagine what would compel us to be consistent in our moral judgment, if our moral attitudes were not about anything; if they were but our thoughts. Moore thinks that only a moral realist has a "natural motivation to condemn inconsistency" in her moral judgment, whereas sceptics and subjectivists have no reason to do so.[9] Festinger answers him that the "natural motivation" to strive for consistency is indeed "natural" and therefore there is nobody who would lack it and there is no need to have any "reason" to have it, in the same way as we do not need to have any "reason" to feed ourselves when we are starving. Moreover, moral consistency from the perspective of Festinger's theory explicitly includes also cognitions about one's own behaviour. In this light "to be morally consistent" means to be free not only from contradictions in one's own set of moral attitudes, but also from contradictions between one's own set of moral attitudes and one's own behaviour. So it seems that moral consistency is far less a matter of logical hygiene[10] than it is a matter of psychological hygiene. It is not only about perceiving ourselves as good reason-givers, but also as honest people, people who care about harmony between their words and their acts.

Cognitive dissonance appears when there is no such harmony. Let us imagine a typical situation of norm-following: I believe that it is right not to be a judge in any case which affects my impartiality. If I officially passed judgement in a legal dispute brought by my mother, I would do injustice, because the relation between me and her – one of the legal disputants – could impair my ability to give each disputant her own. So when my mother brought the suit before me as a judge I followed the impartiality norm because I believed it was right. Then some other judge took the case and ultimately my mother lost it. Although I did what was right, the final result of my decision made me feel regret. I simply happened to be in a state of cognitive dissonance. My norm-abiding behaviour was in dissonance with my affection to the person who gave me my life, or perhaps with my belief

[7] FESTINGER, L. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press, 1985, pp. 1–3.

[8] After decades of research it has been established that other conditions are necessary for occurrence of dissonance: "Inconsistent behavior produces dissonance: but only when decision freedom is high; but only when people are committed to their behavior; but only when the behavior leads to aversive consequences; but only when those consequences were foreseeable." COOPER, J. *Cognitive Dissonance: Fifty Years of a Classic Theory*. London: SAGE Publications, 2007, p. 73.

[9] MOORE, M. S. Moral Reality Revisited. *Michigan Law Review*. 1992, Vol. 90, No. 8, p. 2462.

[10] "The antirealist lacks any similar motivation for logical hygiene, for his moral beliefs are not about anything." Ibid.

that it was right to take care about her wellbeing. This dissonance itself makes me strive to reduce it, just like hunger usually makes me eat.

Festinger drew up a typology of situations in which cognitive dissonance usually occurs. Dissonance appears after a decision has been willingly taken, after a forced compliance has been performed, after one has been exposed to new information forcedly or accidentally, after an open disagreement in a group has been expressed or after a compelling event which produces a uniform reaction in many people has occurred.[11] All of these situations may create a background for one's norm-following or norm-transgressing, but any disjunction of the first two of them is of general application.[12] We almost inevitably experience cognitive dissonance after we have decided, willingly or coercively, whether to follow a norm at the cost of sacrificing some good or of facing some evil. Only in a perfect world would norm-following or norm-transgressing produce merely internally consistent cognitive clusters, total harmony between interests, values, wellbeing, or social acceptance. But this theodicy is not the result of a true description of our world, but a result of dissonance reduction which this world compels us to make.

In the following subsection I will focus on ways in which cognitive dissonance can be reduced. I will discuss the dissonance caused by making a decision in perplexing situations such as personal dilemmas or hard legal cases. Here the cognition about one's own behaviour (the decision) gets into dissonance with one's own normative attitudes, and the dissonance reduction may take the form of changing the latter in favour of the former. The reduction of the dissonance caused by forced compliance, such as abiding by a law under a threat of sanctions or breaking a law under a promise of reward, I will leave to the reader's imagination.

1.2. Reduction of post-decision dissonance

Reduction of cognitive dissonance can be done in various ways, *inter alia* by changing one or more of the elements involved in dissonant relations.[13] With regard to our main topic it is important that when dissonance stems from the conflict between a norm and a behaviour it can be reduced not only by changing the behaviour but also by changing the norm:

"Certainly we will all grant that cognition stirs behaviour. Consequently, any such relationship between behaviour and holding or not holding an opinion could result from this direction of causality. The theory of dissonance, however, predicts the same relation with the causality in the opposite direction."[14]

[11] FESTINGER, L. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press, 1985, pp. 261–262.

[12] Cf. COLLINS, P. M. Cognitive Dissonance on the U.S. Supreme Court. *Political Research Quarterly*. 2011, 64, pp. 363–364.

[13] FESTINGER, L. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press, 1985, p. 264.

[14] Ibid., p. 154. Today the cognitive dissonance theory is generally regarded as a theory of attitude change: "In general, it is difficult to change cognition about one's behavior. Therefore, when behavior is discrepant from attitudes, the dissonance caused thereby is usually reduced by changing one's attitude. The resistance to change of the behavioral cognition is what makes dissonance theory seem to be a theory of attitude change. Although all cognitions are important for cognitive dissonance theory, the relative ease of changing one's attitudes rather than one's behavior has made dissonance more relevant to attitudes than to any other concept." COOPER, J. *Cognitive Dissonance: Fifty Years of a Classic Theory*. London: SAGE Publications, 2007, p. 8.

Let us first look closer at the reduction of post-decision dissonance.

In the example above I refused to start dealing with my mother's lawsuit because I believed it was right not to be a judge in any case which could affect my impartiality. Nevertheless after my mother's suit was dismissed by the other judge, I felt regret, mainly because I believed it was my duty to care about her wellbeing. In order to follow one norm I transgressed another one and as a consequence I experienced post-decision dissonance. Then I could reduce it by increasing the attractiveness of the chosen alternative or by decreasing the attractiveness of the denied alternative[15] and I took both of these options. So as a result of my decision, *which was nothing other than a fact*, I strengthened the importance of a judge's impartiality and weakened the importance of care about my parents' wellbeing. Needless to say, some weeks later my mother asked me to help her in her garden and I refused to do it, even though I could have found some free time for it.

We can reasonably suppose that this is not the usual way in which judges reduce the dissonance stemming from this kind of decision. It is likely that they usually try to avoid post-decision dissonance by stressing the differences between particular social roles they play. They strictly discern between what they ought to do as judges and what they ought to do as members of their families, and thus they see potential dissonance as something that is not a matter of their internal consistency but a matter of consistency of the different social roles they play.

Nevertheless I propose that post-decision dissonance in legal practice is quite widespread, especially after passing decisions in so-called hard cases. The only way for judges to resolve these cases is to use their power of discretion, so among all possible – equally reasonable – options they have to choose the one which they themselves consider to be the rightest.[16] Since in legal disputes one's victory is another's loss, the judge's cognition that she passed judgement in a hard case is usually in dissonant relation with her cognition that some human being suffered a loss because of her. Dissonance in these situations is commonly reduced by increasing the importance of the principles upon which the decision stands. Thus principles of hard leading cases are sometimes thought to be "the law of the land" even before the enactment of decisions in which they were used for the first time.[17] Some judges or writers may go even further when they dare to say that these principles are not human-made but "natural", and consequently the share of a particular individual in bringing them into existence is reduced to zero. They could say that judges do not make law; they just declare it, and even the occurrence of hard cases cannot refute this proposition because every legal case has only one correct answer. Thus post-

[15] FESTINGER, L. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press, 1985, p. 44.

[16] Cf. DWORKIN, R. *Taking Rights Seriously*. Cambridge, Massachusetts: Harvard University Press, 1978, pp. 81–130.

[17] In common law jurisprudence this position is sometimes called "the declaratory theory". Today this theory is recognized rather as a device for preserving the authority of courts, not as a device for description of reality: "Despite (and perhaps also because of) its shortcomings as a description of reality, the "declaratory theory" expresses a symbolic concept of the judicial process on which much of courts' prestige and power depend. This is the strongly held, and deeply felt belief that judges are bound by a body of fixed, overriding law, that they apply that law impersonally as well as impartially, that they exercise no individual choice and have no program of their own to advance." MISHKIN, P. J. The Supreme Court, 1964 Term. *Harvard Law Review*. 1965, No. 79, p. 62.

decision dissonance is eliminated by proving that no real decision has ever been made.[18] Here, in the discussion on legal principles and judicial discretion, we can observe how individual behaviour begets an individual attitude on what is right, and how much this attitude is ashamed of its own parentage. We can see the usual way in which facts become norms. Yes, with a fig leaf.

Application of cognitive dissonance theory shows us how the decisions we make work as norm-producing facts. This norm-producing capacity increases if the decisions are uniform, if our behaviour is persistent. The chance that we reverse our ordinary line of behaving just because we experience qualms of conscience when we have once started out on it, becomes smaller and smaller day by day. To overcome a momentary "weakness of will" is one thing; to nourish a permanent dissonance in mind is other.

In any case, it seems that moral consistency is not posited by any imperative issued by human rationality, neither is it posited by any given moral reality "to whose outcomes no human being would turn in the seriousness and stress of life, and whose effect, therefore, in face of the storm of the passions, would be as great as an enema syringe at a raging fire."[19] It seems that moral consistency is rather a subject of human desire, desire so strong that it is maintained perhaps at all costs.

2. THE TRUTH OF THE OUGHT

Now let us recall the Humean objection against naturalistic fallacy which I depicted in I.1 of this paper: "Let us suppose that from among all the ethical theories which have been hitherto invented (or just "found") there is one which is in best accord with the up-to-date findings of the natural or social sciences. Now, what would make us think that the criterion of concordance with nature or society should guide us in solving our every moral dilemma? Is it nature or society itself?"

So how could I dare to take the norm-producing power of persistent human behaviour as a solution of the is/ought problem if this power works only at the level of explanation but not at the level of justification? In what way is my exposition of the fact-to-norm transformation different from for example the reductionist effort of Stephen Turner (see I.2), according to whom there are no genuine norms but only subjective normative attitudes acquired in communication with others by means of empathy and feedback?

Before I address these objections I would like to underline that my depiction of norm-production is not meant to replace Turner's. They can both function next to each other as mutually supplementing theories; the former stressing the inner, usually unconscious,

[18] Festinger says that revoking the decision psychologically *"is probably not a usual type of solution to the existence of dissonance"*. FESTINGER, L. *A Theory of Cognitive Dissonance*. Stanford: Stanford University Press, 1985, p. 44. When he said this he probably did not have in mind how easy it is to refuse responsibility for all the behaviour performed as part of the "application of law". Some authors have noticed that even the way legal practitioners use their language indicates that they would like not to bear any responsibility for carrying out their profession. See ENG, S. The Doctrine of Precedent in English and Norwegian Law: Some Common and Specific Features. *Scandinavian Studies in Law*. 2000, No. 39, p. 281, p. 314.

[19] Allusion to Schopenhauer's critique of Kant's categorical imperative. Cf. SCHOPENHAUER, A. *The Two Fundamental Problems of Ethics*. Cambridge: Cambridge University Press, 2009, p. 145.

striving for consistency; the latter stressing the inner, usually conscious, striving for understanding of others. There might be rare cases where only one of the theories is applicable. A dictator "knows" what is just and unjust, rational and irrational, without any need to employ her empathy and to deal with feedback from others. On the other hand a saint would never let the slightest weakness of her will corrupt her moral judgment; she would rather seek her redemption (dissonance reduction) in making sacrifices for others and in asking them for forgiveness. Despite this subjectivism, and in contrast to Turner, I see no difficulty in admitting that there is some objective, or let me say genuine, ought.

I acknowledge the cry for objective standards of behaviour. If we do not want to consider our normative argumentation only as a silly game with words, we need to admit that the justifications we offer to others to excuse our behaviour are based on norms whose existence is independent of any arbitrariness, especially of our own.[20] So how do we get to this objectivity of moral talk? Are we supposed to assume that it is based solely on representational semantics? Are there some objective connections between moral terms only because they represent some part of the factual world? And if there are, then what does the factual world look like? According to the social science account of normativity it is not controversial to concede that there are objective connections between moral terms since these represent attitudes of particular people who use them. But these connections work only at the level of explanation, from the external perspective of an observer who records what people think they are doing when they engage in moral argumentation. At the level of justification, from the internal perspective of an actor who excuses her behaviour in front of others, social science representationalism is not capable of producing such objective connections. For example it would be odd to claim that we are *reasonably* entitled to torture terrorist suspects just because *according to our subjective attitudes* we are obliged to do everything that prevents severe public security risks and just because *we think* that the entitlement to torture suspects is logically connected with the obligation to care about public security. Normative inferences are not supposed to be valid just because we think that they are. From this claim to objectivity it is usually concluded that normative terms have to be understood as representations of some objective normative facts and not of some subjective normative attitudes.[21] But is this kind of objective representationalism the only way we can make sense of our sincerely uttered justifications?

The presented objection against subjectivistic, and especially noncognitive, accounts of normativity is familiarly conceptualized in the Frege-Geach problem. According to Frege there is a difference between the action of uttering a sentence (the act of judgment) and the content of the uttered sentence (the meaning of the judgment),[22] which is clearly visible when sentences occur in unasserted contexts such as questions or conditionals. Thus we can assert for example that "If lying is wrong, then getting one's little brother to

[20] "Any analysis of the meanings of moral terms which omits this claim to objective, intrinsic prescriptivity is to that extent incomplete; and this is true of any non-cognitive analysis, any naturalist one, and any combination of the two." MACKIE, J. *Ethics: Inventing Right and Wrong.* New York: Penguin, 1977, p. 35.

[21] See for example KALDERON, M. E. *Moral Fictionalism.* New York: Oxford University Press, 2005, pp. 60–61.

[22] The distinction between judgment (*Urteil*) and act of judging (*Beurteilung*) was first realized by Lotze and Sigwart. Cf. KÖHNKE, K. CH. *The Rise of Neo-Kantianism: German Academic Philosophy between Idealism and Positivism.* Cambridge: Cambridge University Press, 1991, p. 270.

lie is wrong" without really asserting either that "Lying is wrong" or that "Getting one's little brother to lie is wrong". We can simply hold that the conditional is true without conceding that its antecedent or consequent is true as well. If this is so, then the meaning of the antecedent and the consequent is something other than the accompanying subjective belief according to which these sentences are true. And consequently, we will need to explain how it is possible to build up obviously valid normative arguments such as this:

Premise 1 (embedded context):	If lying is wrong, then getting one's little brother to lie is wrong.
Premise 2 (freestanding context):	Lying is wrong.
Conclusion:	Getting one's little brother to lie is wrong.[23]

If we admit that only the freestanding ought-sentence expresses a subjective attitude, but the embedded ought-sentence does not, then we will have a problem arriving at the conclusion without committing the fallacy of equivocation.

I assume that this logical depiction of normative argumentation is misleading. "Lying is wrong" in the conditional has no other meaning except "Lying is wrong", and therefore we in fact do not know what this sentence means and how it is used in ordinary communication. Actually, we cannot be sure even whether the conditional itself is true. Let us consider this example:

Premise 1:	If sharing an intimate life with somebody is good, then sharing an intimate life with one's own little brother is good.
Premise 2:	Sharing an intimate life with somebody is good.
Conclusion:	Sharing an intimate life with one's own little brother is good.

I claim that if "the lying argument" was obviously valid, then "the intimate life argument" is obviously invalid. We usually do not accept that sharing an intimate life with one's own little brother is a "reasonable decision", even if we usually accept that sharing this life with somebody is good. How is that so? It is because our lack of moral acceptance of the ought-sentence in the conclusion has an influence on the meaning of the ought-sentences embedded in the first premise. Indeed, the sentence "Sharing an intimate life is good" embedded in the antecedent *means* something different from when it is embedded in the consequent, and this difference we conceptualize by claiming that the meaning of the sentence is "context sensitive". So even when ought-sentences are used in embedded contexts their meaning is relative to subjective attitudes and other factual conditions.

The whole problem with the meaning of ought-sentences embedded in a conditional is that logicians think these sentences are meaningful even when the conditional itself is freestanding. But they are not. In giving full account of their meaning, we need to embed the conditional into a normative argument, the normative argument into a normative discourse, the discourse into a context of persuasion of others, the persuasion into a cultural

[23] I have taken the exposition of the Frege-Geach problem from KALDERON, M. E. *Moral Fictionalism.* New York: Oxford University Press, 2005, p. 54ff.

environment. I maintain that nobody will share an intimate life with his own little brother just because the sentence "Sharing an intimate life is good" appears at some level of the argumentation as "q" and because formal logic says that "q is equal to q". But if we change the meanings of ought-terms according to our acceptance of their practical consequences, then where is the objectivity of normative argumentation we were looking for?

To say that meanings of ought-terms are relative to subjective attitudes does not compel us to claim that there is not the slightest bit of objectivity in our ought-discourses. Formal logic tries to push us to objectivistic representationalism, to the idea that ought-terms are representations of something outside language, but if outside the language there is only the world of facts, then we cannot be pushed any further beyond actually held normative attitudes (see I.2). And it seems that if we want to keep difference between subjective/objective normative standards the only way how to do it is to understand objectivity as a matter of interpersonal relations between particular normative attitude-holders and to mix semantics and pragmatics of their ought-talk.

If the bifurcation thesis holds, then there is a difference between is-sentences and ought-sentences, between explanation and justification, causes and reasons. In order to grasp this thesis at the level of semantics, perhaps the best we can do is to apply to it the difference between reference and inference respectively. Let us look at the matter from the viewpoint of practical reasoners, such as lawyers. These reasoners do not need to bother with the meaning of sentences like "Lying is good"; they do not need to ask themselves what this kind of sentence represents. Instead what they need to be interested in during their entire career are questions like "What is lying?" or "What is the right to a private life?" In order to fix the objectivity of these terms they do not have to recourse to some special ought-reality, they need to see how these terms are applied by and large in the community to which they belong. When getting law students to understand ought-terms, law teachers usually do not show them how nice our world would look if these terms were applied in strict accordance with formal logic. Instead of this they usually show them a series of court cases. Learning the meaning of ought-terms is one and the same activity as learning the practical conclusions (or factual effects) this meaning usually leads to. So there is no proper objectivity of ought-terms except that given by settled inferential practice. At this point we can bring in Robert Brandom's inferentialism:

"Grasping a conceptual content is a kind of practical know-how: mastery of an inferential role. That is being able to discriminate good from bad material (i.e. content-dependent) inferences in which it plays an essential role either in the premises or in the conclusions. Typically, such mastery will be both partial and fallible. But one counts as grasping a concept in so far as one knows what else one would be committed or entitled to by applying it and what would commit or entitle one to do so."[24]

There are two immediate objections to this account of the objectivity of ought. First, how is this account supposed to show us that the objective normativity is a matter of fact, if the inferentialism is founded on *prima facie* normative terms like "commitment" or "entitlement"? Second, in what sense can we claim that inferentialism ensures any objectivity

[24] BRANDOM, R. Global anti-representationalism? In: Price, H. et al. *Expressivism, Pragmatism and Representationalism*. Cambridge: Cambridge University Press, 2013, pp. 94–95.

of ought-discourse at all, if we at the same time admit that it is relative to the subjective attitudes of participants in the inferential practice? I hope that both of these questions have already been answered in previous sections.

As for the first: inferentialism does not need to be founded on commitments, but just on consistency. We assert the conclusions of our premises not because we are committed to do so but because it is the easiest way to avoid potential dissonance stemming from our acting otherwise.

As for the second: to ask for more genuine objectivity than the one given by inferential practice is in effect to ask for something nonfactual, perhaps a fiction. But this fiction is not necessary to keep our ought-talk susceptible to reason. Moral realists like Michael Moore (I.2) cannot imagine how an antirealist can account for "our sense that we are fallible moral reasoners" because in the antirealist's view "there is nothing we (individually, or at least collectively, for conventionalists) could be wrong about".[25] Moore is right so long as participants in a moral discourse do not share the first premise of their argumentation and in that case this discourse will never end in a reasonable moral judgment. But this does not mean that every moral discourse is doomed to be senseless. When participants share the first premise they can still reasonably argue about what conclusions are to be drawn from it; they can test their inferences against the overall consistency of their normative positions and positions of a community to which they belong. And in the end the truth of a normative position stands and falls with the behaviour of its holder and of the community he lives in.

Finally, the reader can ask what kind of truth I am talking about when I suggest that the truth of our ought-talk can be evaluated by its conformity to what we usually do. At this point I do not let myself get drawn into a discussion on different theories of truth; I just want to recall some remarks on the general relation between truth and knowledge made by Michel Foucault.

A modern man who is the product of Western civilization cannot conceive truth any other way than in relation to knowledge. What might be noteworthy is that this conception of truth radically differs from the one which the founders of our civilization used to have. For conceptualizing this difference Michel Foucault uses notions of "philosophical truth" and "spiritual truth". The former answers the question of what the conditions and limits of true knowledge are, while the latter answers the question of what the methods of searching for one's own subject are, what the practices of renunciation and personal life experience are, with the help of which the subject can undergo a change in her own life style and thus achieve a true life.[26] Foucault noticed that with the exception of Aristotle,[27] throughout the period of Antiquity the philosophical question "How to have access to the truth?" was connected with the spiritual question "How to achieve the necessary transformations in the very being of the subject which will allow access to the truth?"[28] In our era these questions are detached from each other; neither a particular life experience, nor

[25] MOORE, M. S. Moral Reality Revisited. *Michigan Law Review.* 1992, Vol. 90, No. 8, p. 2452.
[26] FOUCAULT, M. *The Hermeneutics of the Subject: Lectures at The College de France, 1981–82*. New York: Palgrave Macmillan, 2005, p. 15.
[27] "As everyone knows, Aristotle is not the pinnacle of Antiquity but its exception." Ibid., p. 17.
[28] Ibid., p. 17.

an appeal to the moral perfection of one's own personality, but only disinterested knowledge exclusively leads to the truth. Now we may ask the following question: If there is any sense in speaking about the truth of the ought, then who holds this truth? Is it a reasoner who in the comfort of her armchair spellbindingly demonstrates how perfect the only one moral reality is; the one whose only worry is to have sufficient writing ink which she needs to make this reality more evident? Or is it the one who follows her own ought-words in all the predicaments of her life; in the fight against her own earthly passions and her formidable moral enemies? The truth of the ought is not about words; it is about living life in accordance with the words.

CONCLUSIONS

1. Normative consistency within us is rather a result of our natural inclination than a result of our rational choice. If our permanent behaviour conflicts with our normative attitudes the resulting dissonance has a fair chance to be reduced by changing the latter to match the former. Consequently, everything we repeatedly say and repeatedly do in repetitious situations has a fair chance of becoming subject of our normative attitudes.

2. Even when normativity stems from attitudes of particular people, the objectivity of ought-terms can be sustained. To understand what some ought-term *objectively* means is to understand the practical consequences it *usually* leads to. However participants in ought-discourses need not be "committed" or "entitled" to draw appropriate inferences from words they use, as they do so without necessarily employing any such normative notions. After all, the truth of a particular ought-talk can be tested only against the criterion of consistency. In order to claim the truth about how we ought to behave, the only thing we need to do is to maintain consistency between our various ought-words, and consistency between our ought-words and our acts.[29]

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THE SPECIFIC POSITION OF THE ANIMAL, ESPECIALLY A DOG IN THE ROMAN AND MODERN CZECH LAW[1]

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Abstract: *Considerable attention is paid to issue of things at the present time. The new Czech Civil Code (NOZ) introduces big changes, one of these changes is definition of things „in a wide-ranging way", including introducing the term of things we cannot touch (res incorporales of Roman Law).*

In this context, the particular importance has the concept of animal. The article examines the concept of animal in the Czech and Roman Law, especially relationship between man and dog. The legal regime of a dog in the Roman Law and in the present Czech Law is significantly different. The Roman Law considered the dog as a thing and dogs in Roma had the same status as other things (including slaves). The article deals with the legal status of dogs as things, masteręs responsibility for a damage caused by their dog (actio de pauperiae). In the Czech Law in contrary, an animal does not have the status of thing, but „entity", that is different. However, dogs in ancient Rome had the special status as well as in the Czech Republic nowadays. In Rome, dogs were considered as an example of fidelity (canis fidelis), dogs were not only hunting companions, but also pets (pets). Dogs were provided with special care by doctors-specialists, we have preserved statues of dogs and their image on headstones, together with their masters. We can find the same status of dogs also in life of present-day Czechs who invest large sums in the health care for dogs, in their diet and even in their look. Then we can see that despite the different legislation in the Czech Republic and in ancient Rome, the position of man and dog is very similar, despite all the social and cultural differences.

The article deals with the matter of roots of such position. It seeks the answer by means of evolution psychology in human race prehistory. The close relationship to the dogs is given by the fact that dogs were the first domesticated animals. The article describes the process of domestication when dogs became guards of prehistoric peopleęs home, as well as their companions on hunting. This is how the strong bond between man and dog was created and it continues until these days.

Keywords: *conception of thing (res), evolutionary psychology, history of Roman law, the position of animal in the Roman and the Czech law, legal history*

1. INTRODUCTION

"Dogs are a man's best friend". The statement was first recorded as being made by Frederick II, King of Prussia, referring to one of his female Italian greyhounds named Biche, and today it is acknowledged in many languages.[2] Quoting it we usually do not realize how deep the ties between two mammalian species *Homo sapiens sapiens* and *Canis lupus familiaris* are.

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[2] LAVEAUX J. CH. Thibault de. *Vie de Frédéric II, roi de Prusse. accompagnée d'un grand nombre de remarques, pièces justificatives & anecdotes, dont la plupart n'ont point encore été publiées.* Strasbourg 1787, p. 369: "(...) lui [the king] présenta Biche, comme son meilleur ami." (= LAVEAUX J. CH. Thibault de. *The life of Frederick the Second, King of Prussia. To which are added observations, Authentic Douments, and a Variety of Anecdotes.* London 1789, p. 521). See also its versions in different languages http://forum.unilang.org/viewtopic.php?t=3429&start=80.

Further statements are only a preliminary sketch concerning the topic and omits the differences between the regions of the vast Roman Empire, focusing on some of its universal dimensions.

First it is important to emphasize that Latin does not possess many assemblies with negative connotations containing the word *canis*, unlike many other languages, as for example ancient Greek, modern English or Polish or Czech. Many sayings and proverbs are related to dogs in Latin, with the most famous *canis fidelis* („A loyal dog") on top, which symbolically reflects the nature of the relationship between a dog and its Roman owner.[3]

Pliny the Elder (23-79 AD), in his encyclopedic *Natural history* started the unit concerning domestic animals, saying:

"Many also of the domestic animals are worth studying, and before all the one most faithful to man, the dog, and the horse. (…)"[4]

Later the writer notes anecdotes concerning dogs, especially about the examples of a dog's loyalty to their masters and the use of dogs by other peoples in war campaigns. The remarks of Pliny is full of admiration for the dog's advantages, especially their ability to recognize people and places, and their worth in hunting connected with a dog's extraordinary sense of smell.

Similarly the dog's advantages are described by other Roman writers, who called them the best guardians of human dwellings, the sheepdogs[5], the lovely pets[6], or the companions of Roman hunters[7] and soldiers.[8] Some philosophical views popular in

[3] The statement is borrowed from Roman fabulist Phaedrus (15 BC? – 50 AD?): Phaedr. 1.23. In Greek the word κύων ("dog") was insulting, and among more than one hundred combinations including this word, many are offensive too. See LILJA, S. *Dogs in Ancient Greek Poetry. Societas Scientiarum Fennica.* Helsinki 1976, pp. 126–129; WESOŁOWSKA, E. Antyczny pieski świat. In: ILSKI, K. (ed.). *Człowiek w świece zwierząt – zwierzęta w świecie człowieka.* Poznań: Wydawnictwo Naukowe UAM, 2012, p. 9, pp. 16–17. See also on example of American English: HABER, T. B. Canine terms applied to human beings and human events. *American Speech*. 1965, Vol. 40, pp. 83–101, pp. 243–271.

[4] Plin. H. N. 8.142: *Ex his quoque animalibus, quae nobiscum degunt, multa sunt cognitu digna, fidelissimumque ante omnia homini canis atque equus.* (...).

[5] Lucius Iunius Moderatus Columella (ca 4-65 AD?) in his famous treatise "Agriculture" asks even: "(...) What servant is there, that loves his master more? What companion more faithful? What keeper or watchman more less liable to bribes and corruption? What watchman can be found more vigilant? (...)" (Col. *De re rustica* 7.12.1.:[…] *quis famulus amantior domini, quis fidelior comes, quis custos incorruptior, quis excubitor inveniri potest vigilantior, quis denique ultor aut vindex constantior?* [….]). See about Roman agricultural treatises MIKOŁAJCZYK, I. *Rzymska literatura agronomiczna.* Toruń: Wydawnictwo UMK, 2004, pp. 231–256. Columella depicts different kinds of dogs: watchdogs, shepherd's dogs and hunting dogs. He thought that the farmer must have a dog, but he only approved watchdogs and shepherd's dogs, which differs in terms of the desired phenotype and character. He also gives basic information about the rearing of dogs and their medical treatment (Col. *De re rustica* 7.12.1, 10-14; 7.13).

[6] See further.

[7] The importance of dogs is presented in the didactic epics on hunting with dogs (*cynegetica*). See esp. Grat. Cyn.; Nemes. Cyn.; Oppian, *Cynegetica* (cf. also in the light of Plautus' comedies**:** GREENP, C. M. C. Did Romans Hunt? *ClAnt.* 1996, Vol. 15, No. 2, p. 243). See about techniques of Roman hunting with dogs AYMARD, J. *Essai sur les chasses romaines des origines a la fin du siècle des Antonins (CYNEGETICA).* Paris, 1951, pp. 275–293; MERLENP, R. H. A. *'De Canibus'. Dog and Hound in Antiquity.* London 1971, pp. 46–64; ANDERSON, J. H. *Hunting in the Ancient World.* University of California Press, Berkeley – Los Angeles – London 1985. Contrary to the views presented in the literature free Romans - and not just slaves and freedmen, or only shepherds – were hunting from the very beginning of Rome, and this activity was not despised (see so e.g. ORTH, F. Jagd. In: *RE* 9, 1914, col. 552 and with hesitation AYMARD, J.

Roman times placed dogs in peculiar position in comparison to other animals[9], e.g. eating dog's meat was also forbidden in general, apart from being used in extraordinary

Ad. 7 *Essai sur les chasses romaines des origines a la fin du siècle des Antonins (CYNEGETICA).* Paris 1951, pp. 25–41; ANDERSON, J. H. *Hunting in the Ancient World.* Berkeley – Los Angeles – London: University of California Press, 1985, pp. 83-100). According to those views hunting was popularized among the Romans in second century BC, who were to follow Greek customs in this regard. Correctly GREEN, C. M. C. 1996. Did Romans Hunt? *ClAnt.* 1996, Vol. 15, No. 2, pp. 222–260, with further literature. See also SŁAPEK, D. *Sport i widowiska w świecie antycznym. Kompendium.* Kraków – Warszawa: Wydawnictwo Homini – Wydawnictwa Uniwersytetu Warszawskiego, 2010, pp. 450–453. Contrary to the Greek tradition, the Romans did not consider hunting as the part of a citizen-warrior's education. See BARRINGER, J. M. *The Hunt in Ancient Greece.* Baltimore: The Johns Hopkins University Press, 2002, passim, with further literature. The Romans used also specially bred of dogs for this purpose. The most complete list of them gave Flavius Arrianus (80-160 AD) in his *Cynegeticus* (it was the redaction of the work of the ancient Greek philosopher and military leader Xenophon (430-355 BC), *Cynegeticus* ("Hunting with Dogs"). See e.g. from more recent studies PHILLIPS, A. A., WILLCOCK, M. M. *Xenophon and Arrian, On Hunting.* Warminster: Aris & Phillips, 1999, passim, and STADTER, P. A. Xenophon in Arrians's 'Cynegeticus'. *GRBS.* 1976, Vol. 17, No. 2, pp. 157–167; BOSWORTH, A. B. Arrian and Rome: the Minor Works. *ANRW.* 1993, Vol. 34, pp. 233–242. Arrianus describes the hunting dogs of different nations, adding the detailed information concerning their rearing and usage; thanks to him we can assume that the Romans known different breeds of Molossers, hounds and greyhounds. Cf. about the breeds of Roman dogs AYMARD, J. *Essai sur les chasses romaines des origines a la fin du siècle des Antonins (CYNEGETICA).* Paris 1951, pp. 235–274, with further literature. See also in general BREWER, D., CLARK, T., PHILIPS, A. *Dogs in Antiquity. Anubis to Cerberus. The Origins of the Domestic Dog.* Warminster: Aris & Phillips, 2001, passim and examples gathered in: CROCKFORD, S. J. A commentary on dog evolution. Regional variation, breed development and hybridisation with wolves. In: CROCKFORD, S. J. (ed.). *Dogs Through Time. An Archaeological Perspective.* Oxford: Archaeopress, 2000, pp. 141–190.

8 The Romans knew war dogs, which played essentially two roles. First, they took part in venationes, a kind of circus games. See e.g. SŁAPEK, D. *Sport i widowiska w świecie antycznym. Kompendium.* Kraków – Warszawa: Wydawnictwo Homini – Wydawnictwa Uniwersytetu Warszawskiego, 2010, pp. 703–708 (s.v. Venationes), with further literature. Second, despite the popular myth about dogs detachments in the Roman army, those animals usually played there the role of watchdogs and bloodhounds or greyhound. See KITCHELL, K. F. *Animals in the Ancient World. From A to Z.* London-New York: Routledge, 2014, pp. 47–53 (esp. p. 50) versus the computer game Rome Total War 2; the movie Gladiator of Ridley Scott (USA 2000). See also the funny dispute concerning this issue on: http://historum.com/ancient-history/77601-use-dogs-roman-army.html. For example Flavius Vegetius Renatus, in his Epitome rei militaris ("Concerning Military Matters"), the late antique military manual which summed up Roman knowledge concerning military matters, mentions only watch dogs (Veg. Mil. 4.26; about Vegetius and the importance of his treatise see e.g. RICHARDOT, P. *Végèce et la culture militaire au Moyen Âge (Ve–XVe siècles).* Paris: Economica, 1998, passim; CHARLES, M. B. *Vegetius in Context. Establishing the Date of the Epitoma Rei Militaris.* Stuttgart: Franz Steiner Verlag, 2007, passim). The myth the concerning use of dogs in military combats by the Romans is caused probably by the stories of Strabo (64 BC-24 AD) regarding war dogs of Gauls (imported also from the British Isles: Str. Geographus 4.5.2) and the information concerning dog's of war used by other ancient peoples. See e.g. FORSTER, E. S. Dogs in Ancient Warfare. *Greece & Rome.* Vol. 10, No. 30, 1941, pp. 114–117; FLETCHER, G. B. A. Another Word on Dogs in Ancient Warfare. *Greece & Rome.* Vol. 11, No. 31, 1941, p. 34; MALINOWSKI, G. *Zwierzęta świata antycznego. Studia nad 'Geografią' Strabona.* Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego, 2003, pp. 98-103; ZWOLSKA, P. *Pies. Antyczny przyjaciel.* Kraków: Avalon, 2014, pp. 120–126. Dogs are still used as watchdogs and bloodhounds in modern armies and military forces. See e.g. SLOANE, CH. F. Dogs in War, Police Work and on Patrol. *Journal of Criminal Law and Criminology.* 1955-1956, pp. 385-395; ROGAK, L. *Dogs of War. The Courage, Love, And Loyalty of Military Working Dogs.* New York: Dunne Books, 2011, passim; ENGLISH, T. L. *The Quiet Americans: A History of Military Working Dogs.* Lackland 2000, http://www.37trw.af.mil/shared/media/document/AFD-061212-027.pdf.

9 See DIERAUER, U. *Tier und Mensch im Denken der Antike. Studien zur Tierpsychologie, Anthropologie und Ethik.* Amsterdam: B.R. Grüner Verlag, 1977, pp. 180–187; STEINER, G. *Anthropocentrism and Its Discontents. The Moral Status of Animals in the History of Western Philosophy.* Pittsburgh: University of Pittsburgh Press, 2005, pp. 38–111. See also about the status of animals in antiquity in general: ONIDA, P. P. Dall'animale vivo all'animale morto: modelli filosofico-giuridici di relazioni fra gli esseri animati. *Diritto@Storia 7 – Tradizione Romana* 2008, http://www.dirittoestoria.it/7/Tradizione-Romana/Onida-Animale-vivo-morto-modelli-relazioni-esseri-animati.htm.

medicinal purposes.[10] The images of dogs can be found on the mosaics and sculptures documenting the everyday life of Romans and the mythological scenes, as well as among the surviving relics of Roman wall painting.[11] The multiplicity of the roles of dogs makes them "compagnon omniprésent" of the Romans, which is similar to the place which those animals hold in modern Western societies, where dogs are treated mainly as pets or even members of the family.[12] On the other hand, dogs were sometimes dirty for the Romans because those animals eat things which were recognized as polluted and because of the dog's and bitches promiscuity, which is close to the attitude towards dogs in many Non-Western cultures.[13] As it was said before, dogs were treated frequently by the Romans as pets, regardless of the cost.[14] Dogs would

[10] Living dogs, and parts of their bodies and secretions were attributed medicinal properties. For instance, according to late Roman writer Marcellus Empiricus "He who suffers from a pain in the stomach will be relieved should he girdle himself with a dog-leash" (*Corregia canina medius cingatur qui dolebit ventrem, statimque remediabitur*: De medicamentis 28.39-40). Cf. also RZEŹNICKA, Z. Rola mięsa w okresie pomiędzy II a VII w. w świetle źródeł medycznych. In: KOKOSZKO, M. (ed.). *Dietetyka i sztuka kulinarna antyku i wczesnego Bizancjum (II-VII w.). Część II. Pokarma dla ciała i ducha*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2014, pp. 218–219, p. 428. The blood of the dogs had to release the poisons while the blood of bitches prevent rabies, which aroused dread till nineteenth century because no one understood its reasons and there was no effective treatment of the malady. Cf. BLANCOU, J. Early methods for the surveillance and control of rabies in animals. *Scientific and Technical Review of the Office International des Epizooties*. 1994, pp. 361–372. See also BARATAY, É. *Zwierzęcy punkt widzenia. Inna wersja historii*. Gdańsk: Wydawnictwo w Podwórku, 2014, p. 153.

[11] See e.g. TOYNBEE, J. M. C. *Animals in Roman life and art*. London: Thames and Hudson, 1973, pp. 101–124; ZWOLSKA, P. *Pies. Antyczny przyjaciel*. Kraków: Avalon, 2014, pp. 71–76.

[12] See in detail AMAT, J. *Les animaux familiers dans la Rome antique*. Paris: Les Belles Lettres, 2002, pp. 25-92, who entitled the section concerning dogs "Le chien, compagnon omniprésent". The more important however are KELLER, O. *Die antike Tierwelt*. Leipzig: Wilhelm Engelmann, 1909, pp. 91–151 and ORTH, F. *Der Hund im Altertum*. Schleusingen: Gebrüder Lang, 1910, pp. 1–38. See also VESEY-FITZGERALD, B. S. *The Domestic Dog. An Introduction to its History*. London: Routledge and Paul, 1957, pp. 31–52; TOYNBEE, J. M. C. *Animals in Roman life and art*. Thames and Hudson, London 1973, pp. 101–124; CAMPBELL, G. L. (ed.). *The Oxford Handbook of Animals in Classical Thought and Life*. Oxford: Oxford University Press, 2014, passim, esp. pp. 271–274; BODSON, L. Les animaux dans l'Antiquité: un gisement fécond pour l'histoire des connaissances naturalistes et des contextes culturels. *Acta Orientalia Belgica*. 2001, Vol.14, pp. 1–27 and from Polish studies ZWOLSKA, P. *Pies. Antyczny przyjaciel*. Krakow: Avalon, 2014, esp. pp. 60–165. The dogs had various names pointing indirectly to the roles they played. See apart the studies quoted above: MENTZ, F. Die klassischen Hundenamen. *Philologus*. 1933, Vol. 88, pp. 104–129, 181–202, 415–442. See also http://www.unrv.com/culture/names-for-roman-dogs.php. The dogs were often, usually favorably, mentioned also in Roman comedies, which, by their nature, gives a particular image of Roman society since the third century BC. Cf. LILJA, S. *Terms of Abuse in Roman Comedy*. Helsinki: Suomalainen Tiedeakatemia, 1965, passim. The summary of the dog's status in modern western societies is given by BARATAY, É. *Zwierzęcy punkt widzenia. Inna wersja historii*. Gdańsk: Wydawnictwo w Podworku, 2014, esp. pp. 234–268, pp. 283–287.

[13] Cf. e.g. LILJA, S. *Terms of Abuse in Roman Comedy*. Helsinki: Suomalainen Tiedeakatemia 1965, p. 69; OLIENSIS, E. Canidia, Canicula, and the Decorum of Horace s Epodes. In: LOWRIE, M. (ed.). *Horace – Odes and Epodes*. Oxford – New York: Oxford University Press, 2009, pp. 160–187; SZŰCS, E., et al. Animal Welfare in Different Human Cultures, Traditions and Religious Faiths. *Asian-Australasian Journal of Animal Sciences*. 2012, Vol. 25, pp. 1499–1506. doi: http://dx.doi.org/10.5713/ajas.2012.r.02.

[14] Cf. in general LAZENBY, F. D. Greek and Roman Household Pets. *CJ*. 1947, Vol. 44, pp. 245–252 and 299–307, and BODSON, L. Motivations for pet-keeping in Ancient Greece and Rome: a preliminary survey. In: PODBERSCEK, A. L., PAUL, E. S., SERPELL, J. A. (eds.). *Companion Animals and Us. Exploring the Relationships Between People and Pets*. Cambridge: Cambridge University Press, 2005, pp. 27–41; GILHUS, I. S. *Animals, Gods and Humans. Changing Attitudes to Animals in Greek, Roman and Early Christian Ideas*. London - New York: Routledge, 2006, pp. 28–31.

be cured by vets[15], and according to the zooarchaeological research they were kept in good condition, especially small and hunting breeds.[16]

The love of the Romans for their dogs is shown in latin funerary inscriptions (even epigrams) and tombstones with the images of dogs, sometimes together with their masters. For example, one of most known tombstones of this kind from Praeneste/ Gallicano in Lazio (Italy) presents the dog, with a poem for a (female) dog called *Aeolis*: „Behold the tomb of Aeolis, the cheerful little dog, whose loss to fleeting fate pained me beyond measure".[17]

The custom of intentional burials of dogs was extremely widespread from prehistoric times, which is interpreted as an expression of the special place which they occupied in the context of religious beliefs.[18] But the Romans (as well as the Greeks) basically did not practice the burials of dogs (and other animals).[19] Those beasts were however important in Roman religion – although dogs weren't treated as divine crea-

[15] Vegetius wrote the work concerning treatment of horses (*Digesta Artis Mulomedicinae*), where one chapter regards rabies among dogs (Veg. Vet. 2.148.2). About antique veterinary see in general WALKER, R. E. *Roman Veterinary Medicine*. Toynbee 1973, pp. 303–343; FISCHER, K. D. Ancient Veterinary Medicine: A survey of Greek and Latin sources and some recent scholarship. *Medizinhistorisches Journal*. 1988, Vol. 23, No. 3-4, pp. 191–209; ADAMS, J. N. *Pelagonius and Latin Veterinary Terminology in the Roman Empire*. Leiden - New York – Köln: Brill, 1995, passim, with further literature.

[16] MACKINNON, M. 'Sick as a dog': zooarchaeological evidence for pet dog health and welfare in the Roman world. *World Archaeology*. 2010, Vol. 42, No. 2, pp. 290–309. See also the remains from Pompei described in ZEDDA, M. Ancient Pompeian Dogs – Morphological and Morphometric Evidence for Different Canine Populations. *Anatomia, Hystologia, Embryologia*. 2006, Vol. 35, pp. 319–324. Cf. also the popularity of breed Spitz – one of the smallest breed of dogs – among the Greeks, Etruscans and Romans: PETERSON, V. *An evaluation of early Spitz/Pommeranian dogs images in Greek, Etruscan and Roman art*. 2011. http://www.pomeranianproject.com/earlyspitz.html. The value of a dog for the Romans would also have been shown in the light of the dogs diet recommended by Flavius Arrianus. In the case of hunting dogs he advocated: for puppies to the ninth month, and in case of their illness - milk; for adult animals - fatty meat, chicken soup or pork with bread or baked liver; sometimes he advocated also the hunger strike (Arr. Cyn. 8). It contrasts with the diet of the majority of Romans, which was based mostly on grain. Cf. e.g. KOKOSZKO, M., JAGUSIAK, K., RZEŹNICKA, Z., WNIOSKI, Z. Conclusions. In: KOKOSZKO, M. (ed.). *Dietetyka i sztuka kulinarna antyku i wczesnego Bizancjum (II-VII w.). Część II. Pokarma dla ciała i ducha*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2014, pp. 448-455. Flavius Arrianus recommended even the owners to sleep with their hunting dogs to create the close ties between the master and dog; he criticized the joint lair for hunting dogs, especially when the dogs were lying in a small space and touching each other (Arr. Cyn. 9).

[17] AE 1994, 348: *Aeolidis tumulum festivae/ cerne catellae/ quam dolui inmodice/ raptam mihi praepete/ fato*.Available here: http://db.edcs.eu/epigr/bilder.php?bild=$AE_1994_00348_1.jpg;$AE_1994_00348_2.jpg&nr=1 See e.g. GRANINO, C. M. G. Il sepolcro della catella Aeolis. *ZPE*. 1994, Vol. 100, p. 413-416. Taf. XXII-XXIII, who quotes also other examples of dog's tombs (usually made of precious gray marble). See also the blog of Peter Kruschwitz (https://thepetrifiedmuse.wordpress.com): The Master and Margarita (Posted on April 14, 2015); Every Dog Has His Day (Posted on June 20, 2015) and translations on: https://www.thedodo.com/9-touching-epitaphs-ancient-gr-589550486.html.

[18] See MOREY, D. F. *Dogs. Domestication and the Development of a Social Bond*. Cambridge University Press, Cambridge 2010, pp. 150–187 and LOSEY, R. J. Canids as persons: Early Neolithic dog and wolf burials, Cis-Baikal, Siberia. *Journal of Anthropological Archaeology*. 2011, Vol. 30, pp. 174–189.

[19] See e.g. the examples from Roman Britain: BODSON, L. Motivations for pet-keeping in Ancient Greece and Rome: a preliminary survey. In: PODBERSCEK, A. L., PAUL, E. S., SERPELL, J. A. (eds.). *Companion Animals and Us. Exploring the Relationships Between People and Pets*. Cambridge: Cambridge University Press, 2005, pp. 27–41; SMITH, K. *Guides, Guards and Gifts to the Gods. Domesticated Dogs in the Art and Archaelogy of Iron Age and Roman Britain*. Oxford: Archaeopress, 2006, pp. 14–70.

tures.[20] It is symbolic that two guardian deities of Rome, *Lares praestites* were usually presented as two young men with the dog sitting between them, while their priests dressed in dog's leather were accompanied in religious ceremonies by the dog.[21] Great attention has been paid to the behavior of dogs and especially their barking or howling in magic practices.[22] The magical significance given to dogs is the reason that their images can be found on mosaics placed at the entrances of Roman homes, because dog (especially *Black dog*), or even its picture protected against bad omens or releases from drought· (the most famous relic of this type is from Pompeii which was further

[20] Similarly as the Greeks, through whom the Romans could also borrow participation of dogs in certain religious ceremonies. Cf. e.g. FRANKLIN, A. M. *The Lupercalia*. New York: Columbia University, 1921, pp. 74–80; BURRISS, E. E. The Place of the Dog in Superstition as Revealed in Latin Literature. *CPh*. 1935, Vol. 30, No. 1, pp. 32–42.

[21] Cf. e.g. WAITES, M. C. The Nature of the Lares and Their Representation in Roman Art. *American Journal of Archaeology*. 1920, Vol. 24, No. 3, pp. 241–261 and from modern studies: KACZOR, I. *Deus Ritus Cultus. Studium na temat religii starożytnych Rzymian*. Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2012, pp. 221–230, with further literature. These animals participated in many other rites and the dogs were also sacrificed during some public religious Festivals (Augurium canarium, Lupercalia, Robigalia - cf. e.g. DELATTE, L. Recherches sur quelques fêtes mobiles du calendrier romain (suite et fin). *AC*. 1937, Vol. 6, No. 1, pp. 93–101; TENNANT, P. M. W. The Lupercalia and Romulus and Remus Legend, *Aclass*. 1988, Vol. 31, pp. 81–93; BLAIVE, F. Le Rituel Romain des Robigalia et le Sacrifice du Chien dans le Monde Indoeuropéen. *Latomus*. 1995, Vol. 54, pp. 279–289). See also in general about Roman religion RÜPKE, J. (ed.). *A Companion to Roman Religion*. MA-Oxford: Blackwell Publishing, Malden, 2007, pp. 1–576, with further literature. Dogs could also play different roles and functions in the regional pagan cults. Cf. e.g. SMITH, K. *Guides, Guards and Gifts to the Gods. Domesticated Dogs in the Art and Archaelogy of Iron Age and Roman Britain*. Oxford: Archaeopress, 2006, pp. 14–70; GOUREVITCH, D. Le Chien, de la thérapeutique populaire aux cultes sanitaires. *Mélanges d'archéologie et d'histoire*. 1968, Vol. 80, pp. 247–281; PETRILLI, A. La figure du chien de la mythologie à la magie antique. *Ephesia Grammata*. 2009, Vol. 3, pp. 19–24. http://www.etudesmagiques.info/2009/EG_2009-02.pdf; TRCKOVA-FLAMEE, A. The Cult of Sabazios. The Cult of a Gallo-Roman God on a Relief from Arlon/Aarlen (Belgium). *Anistoriton*. 2010, Vol. 12, No. 2, http://www.anistor.gr/english/enback/2010_2e_Anistoriton.pdf.

[22] Dogs were sometimes joined with black magic and with chthonic deities (probably because the dogs were to devour the dead corps of humans - cf. GRAF, F. Genita Mana. In: CANCIK, H., SCHNEIDER, H. (eds.). *Brills New Pauly. Encyclopaedia of the Ancient World*. Leiden: Brill, 2004, pp. 755–756; RABINOWITZ, J. The 'Her' Story of the Great Witch-Goddess. Analyzing the Narratives of Hekate. Chapter III. *Amsterdam Electronic Journal for Cultural Narratology*. 2005, Vol. 2, http://cf.hum.uva.nl/narratology/a05_rabinowitz_03.html#links. [subchapter: Dogs and Dirt]). Although dogs usually were guarding the pagan temples, some of them were forbidden to all dogs. Flamines diales, the priests of the most important god of Roman pantheon – Jupiter were subjected to many restrictions and privations including not touching the dogs or even calling dogs (Plu. RQ 111). Romans also observed the feast called *Supplicia canum* ("punishment of the dogs"), an annual sacrifice in which live dogs were suspended from a cross (*crux*) or forch (*furca)* and paraded. In the same procession, geese were decked out in gold and purple, and carried in honor. Ancient sources which explains the origin of the supplicia says that the geese were honored for saving the city during the Gallic siege of Rome in 390 BC. When the Gauls launched a nocturnal assault by stealth on the citadel, the geese raised a noisy alarm. The failure of the watch dogs to bark was thereafter ritually punished each year. See e.g. HORSFALL, N. From History to Legend: M. Manlius and the Geese, *CJ*. 1981, Vol. 76, No. 4, pp. 298–311. The dogs were sometimes also included into the group animals, which were used in the archaic punishment called *poena cullei* ("penalty of the sack" - it was a type of death penalty imposed on a subject who had been found guilty of parricide; the punishment consisted of being sewn up in a leather sack, sometimes with an assortment of live animals: a cock, a dog, a monkey and a viper, and then being thrown into water). Cf. e.g.: DÜLL, R. Bruchstücke verschollener römischer Gesetze und Rechtssätze. In: *Studi in onore di Edoardo Volterra*. Milano: A. Giuffre, 1971, p. 135; KUPISZEWSKI, H. Quelques remarques sur le parricidium dans le droit romain classique et postclassique. In: *Studi in onore di Eoardo Volterra*. Milano: A Giuffre, 1971, pp. 601–614; NARDI, M. *L'otre dei parricidi e le bestie incluse*. Milano: A. Giuffre, 1980, passim; DĘBIŃSKI, A. Poena cullei w rzymskim prawie karnym. *Prawo Kanoniczne*. 1994, Vol. 37, pp. 133–146; JOŃCA, M. *Parricidium w prawie rzymskim*. Lublin: Wydawnictwo KUL, 2008, pp. 268–270.

endorsed with the inscription *Cave canem* - "beware the dog"[23]). By the way, as far as black dogs are concerned they are still considered to be aggressive in modern societies but color-based canine discrimination seems to be a disputable matter.[24]

Hence, the tombstones of dogs and their epitaphs testify to the emotional and personal relationship of Romans to their pets. Dogs were not at all affected by commodification, i.e. the transformation of them into commodities that affects some domestic animals, as cattle, pigs, goats, sheep etc. since the Neolithic times and which transformed the latter into the livestock.[25] The distinct legal status of dogs however has not been established in Roman law as it is today in the Western legal tradition in respect to all pets.[26] But there are some traces that dogs have been gradually losing their particular legal status - it seems that even the dog's position has been equalized with other domestic animals.

According to Roman law all animals were treated as things (*res*).[27] Dogs were domestic animals (*bestiae domesticae*) and quadruped (*quadrupes*)[28], but they never belonged to

[23] Pompeii, Casa del Poeta Tragico. Cf. BERGMANN, B. The Roman House as Memory Theater: The House of the Tragic Poet in Pompeii. *The Art Bulletin*. 1994, Vol. 76, No. 2, pp. 225–256. See also: https://commons.wikimedia.org/wiki/Category:Cave_canem_mosaic_(Pompeii).

[24] The validity of "big, black dog syndrome"—whereby large, black dog breeds are reportedly spurned for adoption due to negatively perceived personality attribute is discussed e.g. by LEONARD, A. The plight of "Big black dogs" *American Animal Shelters: color-based canine discrimination. Kroeber Anthropological Society Papers*. 2011, Vol. 99, No. 1, pp. 168–183; WOODWARD, L., MILLIKEN, J., HUMY, S. Give a Dog a Bad Name and Hang Him: Evaluating Big, Black Dog Syndrome, *Society & Animals*. 2012, Vol. 20, pp. 236–253; GOLEMAN, M. Syndrom czarnego psa w schroniskach dla zwierząt. *Medycyna Weterynaryjna*. 2014, Vol. 70, No. 2, pp. 122–127.

[25] See MARCINIAK, A. *Placing Animals in the Neolithic Social Zooarchaeology of Prehistoric Farming Communities*. London: Left Coast Press, 2005, pp. 39–59, with further literature. The testimony of commodification in Roman times are for example the prices of livestock and fragments of the carcass in the Price edict of Diocletian. Cf. *Edictum Diocletiani de pretiis rerum venalium*. See also ILSKI, K. Ceny zwierząt w późnej starożytności. In: ILSKI, K. (ed.). *Człowiek w świece zwierząt – zwierzęta w świecie człowieka*. Poznań: Wydawnictwo Naukowe UAM, 2012, pp. 19–31. For the modern attitude in the case of cattle and horses see e.g. BARATAY, É. *Zwierzęcy punkt widzenia. Inna wersja historii*. Gdańsk: Wydawnictwo w Podworku, 2014, pp. 57–166.

[26] See e.g. *European Convention for the Protection of Pet Animals*, 13.11.1987 or *Polish Animal Protection Act*. 21.08.1997. See JACKSON, B. Liability for Animals: An Historico-Structural Comparison. *The International Journal for the Semiotics of Law*. 2011, Vol. 24, pp. 259–289; GOETTEL, M. *Sytuacja zwierzęcia w prawie cywilnym*. Warszawa: Lex a Wolters Kluwer business, 2013, passim. Those legal rules are close to the biocentrism, a political or ethical stance which asserts the value of non-human life in nature. See EMMENEGGER, S., TSCHENTSCHER, A. Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law. *Georgetown International Environmental Law Review*. 1994, Vol. 6, pp. 545–592.; SUNSTEIN C. R., NUSSBAUM M. C. (ed.). *Animal Rights. Current Debates and New Directions*. Oxford: Oxford University Press, 2005, passim. Today *Global Animal Law* is even discussed: see the articles published in recent issue of *Transnational Environmental Law*: 2016, Vol. 5, No. 1. About Czech Law see further.

[27] Cf. e.g. Dig. 6.1.1.1: *Ulpianus libro 16 ad edictum. pr. Post actiones, quae de universitate propositae sunt, subicitur actio singularum rerum petitionis. 1. Quae specialis in rem actio locum habet in omnibus rebus mobilibus, tam animalibus quam his quae anima carent, et in his quae solo continentur*. ("Ulpian, *Edict*, book 16: After the actions available in respect of collecting the whole, we come to the action for claiming individual things. 1. This particular action *in rem* is used both in regard to all movable things, whether animate or inanimate, and in regard to land.").

[28] See e.g. JACKSON, B. Liability for Animals in Roman Law: An Historical Sketch. *Cambridge Law Journal*. 1978, Vol. 37, No. 1, pp. 122–143; PALMIRSKI, T. How the commentaries to de his qui deiecerint vel effuderint and ne quis in suggrunda edicts could be used on the ground of edictum de feris. *RIDA*. 2006, Vol. 53, pp. 323–334; ONIDA, P. P. *Studi sulla condizione degli animali non umani nel sistema giuridico romano*. Torino 2012, pp. 145–146 (*bestiae domesticae*), pp. 155–164 (*quadrupes*). See about dogs in detail RAGONI, F. A. D. Actio legis Aquiliae, actio de pauperie, edictum de feris: responsabilità per danno cagionato da cani. *Diritto@storia*. 2007, Vol. 6, http://www.dirittoestoria.it/6/Tradizione-romana/Ragoni-Responsabilit-danno-cagionato-da-cani.htm#_ftn12, with further literature.

the archaic group called *res mancipi*, which consist of lands and houses on Italic soil, beasts of burden, slaves, and rustic and praedial servitudes.[29]

The oldest way to sue the animal's owner in the Roman law was *actio de pauperie*. It was an action with which the owner of a domestic animal could be held delictually liable for damage caused by the animal, rooted already in the Twelve Tables, issued ca 450 BC.[30] The most significant aspect of the action was that it gives rise to strict liability, which was exceptional in the Roman law; the owner could free himself from liability by giving of the animal to the victim.[31] But no one knows when exactly *actio de pauperie* were applied to the dogs. Some scholars are sure that it happened in the late Roman Republic (509-27 BC)[32], but the direct information about such a possibility is given by Roman jurisprudence not until the late principate (27 BC-284 AD).[33]

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[29] Cf. GALLO, F. Studi sulla distinzione fra 'res mancipi' e 'res nec mancipi'. Con una 'nota di lettura' di Fernando Zuccotti. *RDR*. 2004,Vol. 4, http://www.ledonline.it/rivistadirittoromano/allegati/dirittoromano04gallostudi.pdf, with further literature.

[30] Leg. XII. Tab. 8.6.: si quadrupes pauperiem <faxit>... ("if a quadrupes <cause> loss..."), Text according to CRAWFORD, M. H. (ed.). *Roman Statutes*. London: Institute of Classical Studies, 1996, pp. 680-681 (other reconstructions, placed as Leg. XII. Tab. 8.5 or 8.6 – ibid., pp. 555–571). See the vast number of studies concerning leges duodecim tabularum and the reconstructions of its text: DILIBERTO, O. *Bibliografia ragionata delle edizioni a stampa della Legge delle XII Tavole (secoli XVI-XX)*. Roma 2001, passim; HUMBERT, M. (ed.). *Le Dodici Tavole. Dai Decemviri agli Umanisti*. Pavia: Ius Press, 2005, passim.

[31] Cf. e.g. WATSON, A. The Original Meaning of Pauperies, *RIDA*. 1970, Vol. 17, pp. 357-367; ZIMMERMANN, R. *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996, pp. 1096-1107; POLOJAC, M. L'actio de pauperie ed altri mezzi processuali nel caso di danneggiamento provocato dall'animale nel diritto romano. *Ius Antiquum*. 2001, Vol. 1, No. 8, pp. 81–87; ONIDA, P. P. *Studi sulla condizione degli animali non umani nel sistema giuridico romano*. Torino 2012, pp. 164–168, pp. 193–195, pp. 322–351 (about dogs: pp. 350–351). The case of damage caused by wild animals, at least for the classical epoch, could be probably added to the so-called *obligationes quasi ex delicto*. See in detail PALMIRSKI, T. *Obligationes quasi ex delicto. Ze studiów nad źródłami zobowiązań w prawie rzymskim*. Kraków: Wydawnictwo UJ, 2004, pp. 127–129; PALMIRSKI, T. How the commentaries to de his qui deiecerint vel effuderint and ne quis in suggrunda edicts could be used on the ground of edictum de feris. *RIDA*. 2006, Vol. 53, pp. 323–334, with further literature.

[32] JACKSON, B. Liability for Animals in Roman Law: An Historical Sketch. *Cambridge Law Journal*. 1978, Vol. 37, No. 1, pp. 130–135, with further literature.

[33] Dig. 9.1.2.1: *Paulus libro vicessimo secundo ad edictum. pr. Haec actio non solum domino, sed etiam ei cuius interest competit, veluti ei cui res commodata est, item fulloni, quia eo quod tenentur damnum videntur pati. 1. Si quis aliquem evitans, magistratum forte, in taberna proxima se immisisset ibique a cane feroce laesus esset, non posse agi canis nomine quidam putant: at si solutus fuisset, contra.* ("Paul, Edict, 22: This action is available not only to an owner but to anyone who has an interest, for example, a person to whom the damaged property was lent or to a cleaner, because they are likely to be held liable on their own account. 1. If someone is fleeing from somebody, perhaps from a magistrate and rushes into the nearest shop and is there injured by a ferocious dog, some authorities maintain that action cannot be brought in respect of the dog, though they think otherwise if the dog were at large." See about Paulus (ca 160-230 AD). MASCHI, C. A. La conclusione della giurisprudenza classica all'età dei Severi. Iulius Paulus. *ANRW*. 1976, Vol. 15, pp. 668–707; SPENGLER, H. D. *Dogmatik, Systematik, Polemik. Untersuchungen zu Stil und Methode des Iulius Paulus*. München 1998, passim. Dig. 9.1.1.5: *Ulpianus libro octavo decimo ad edictum. Sed et si canis, cum duceretur ab aliquo, asperitate sua evaserit et alicui damnum dederit: si contineri firmius ab alio poterit vel si per eum locum induci non debuit, haec actio cessabit et tenebitur qui canem tenebat.* ("Ulpian, Edict, 18: Take the case of the dog which, while being taken out on a lead by someone, breaks loose on account of its wildness and does some harm to someone else: If it could have been better restrained by someone else or if it should never have been to that particular place, this action will not lie on and the person who had the dog on the lead will be liable."). See about Ulpian (?-223 AD). HONORÉ, T. *Ulpian. Pioneer of Human Rights*. Oxford: Oxford University Press, 2002, passim, with further literature. D. 9.1.1.5. is discussed in detail by ZIETSMAN, J. C. Vicious dogs: a case study from 2000 BC to 2000 AD. *Akroterion*. 2000, Vol. 45, pp. 75–87. See about Roman jurisprudence in general esp. KUNKEL, W. *Die römischen Juristen. Herkuft und soziale Stellung*. Böhlau Verlag, Köln-Weimar-Wien, passim and in more popular way LITEWSKI, W. *Jurysprudencja rzymska*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2000, passim.

Dogs were not also situated among *pecudes*, the domestic animals which lived in flocks: owners of them were responsible for the damages caused by the animals according to *Lex Aquilia*, issued cca 286 BC, which provided compensation to the owners of property injured by someone's fault.[34]

The damages made by dogs used as the tool by their owners were situated among *pecudes*' damages only thanks to the interpretation of the law made later by Roman lawyers.[35] They introduced also the possibility of getting the compensation by dog's owner on the basis of *lex Aquilia*.[36]

In the late Roman Republic some amendments concerning the responsibility of the animal's owner were established by *aediles curules* in their edict.[37] It stipulated the responsibility for the consequences of the damage caused by dangerous animals at markets, which were subject to the jurisdiction of that officer and the dogs were for sure situated among them.

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[34] See about the law e.g. ZIMMERMANN, R. *The Law of Obligations. Roman Foundations of the Civilian Tradition.* Oxford: Clarendon Press, 1996, pp. 953-1049; MACLEOD, G. Pigs, Boars and Livestock Under the Lex Aquilia. In: CAIRNS, J. W., ROBINSON, O. F. (eds.). *Critical Studies in Ancient Law. Comparative Law and Legal History.* Oxford–Portland Oregon: Hart Publishing. 2001, pp. 83–92; ONIDA, P. P. *Studi sulla condizione degli animali non umani nel sistema giuridico romano.* Torino 2012, pp. 174–185 and pp. 186–193 (*pecudes*); WOŁODKIEWICZ, W. Rzymskie początki współczesnej odpowiedzialności za szkody na mieniu. *Palestra.* 2007, Vol. 11–12, pp. 187–191, with further literature. See also about the date of its issue ŚWIĘCICKA, P. "Lex Aquilia de damno" – problemy z datacją ustawy. *Krakowskie Studia Prawnicze.* 2008, Vol. 2, pp. 17–32, with further literature.

[35] Dig. 9.2.11.5: *Ulpianus libro 18 ad edictum. Item cum eo, qui canem irritaverat et effecerat, ut aliquem morderet, quamvis eum non tenuit, Proculus respondit Aquiliae actionem esse: sed Iulianus eum demum Aquilia teneri ait, qui tenuit et effecit ut aliquem morderet: ceterum si non tenuit, in factum agendum.* ("Ulpian, Edict, 18: Again, Proculus gave an opinion that the Aquilian action lies against him who, though he was not in charge of dog, annoyed it and thus caused it it to bite someone; but Julian says the lex Aquilia only applies to this extent that it applies to him who had the dog on a lead and caused it to bite someone; otherwise, if he were not holding it, an actio in factum must be brought."). The separate question is the case of dolus - Dig. 4.3.7.6: *Ulpianus libro 11 ad edictum. Si quadrupes tua dolo alterius damnum mihi dederit, quaeritur, an de dolo habeam adversus eum actionem. Et placuit mihi, quod Labeo scribit, si dominus quadrupedis non sit solvendo, dari debere de dolo, quamvis, si noxae deditio sit secuta, non puto dandam nec in id quod excedit.* ("Ulpian, Edict, 11: If your quadruped through another's fraud or malice has caused me loss, the question is asked whether I have against the latter the action for fraud. And I have decided, in accordance with what Labeo writes that if owner of the quadrupes is not solvent, the action for fraud ought to be given, although, if noxal surrender has followed, I do not think that it should be given even for the amount by which the loss exceeds [the value of quadruped].").

[36] Gai. Inst. 3.217: *Capite tertio de omni cetero damno cavetur. itaque si quis servum vel eam quadrupedem, quae pecudum numero est, vulnerauerit sive eam quadrupedem, quae pecudum numero non est, velut canem, aut feram bestiam, velut ursum, leonem, vulneraverit uel occiderit, hoc capite actio constituitur. (…) "In the third chapter, provision is made for all other kinds of damage.* ("In the third chapter, provision is made for all other kinds of damage. Therefore, if anyone wounds a slave, or a quadruped included under the head of cattle; or even one which is not so included, as for instance, a dog; or wounds or kills a wild beast, for example, a bear, or a lion; an action is authorized by this chapter. (...)". See also analogically D. 9.2.29.6: *Ulpianus libro 18 ad edictum. Hac actione ex hoc legis capite de omnibus animalibus laesis, quae pecudes non sunt, agendum est, ut puta de cane. sed et de apro et leone ceterisque feris et avibus idem erit dicendum.* ("Ulpian, *Edict,* 18: One can sue by the action under this chapter of the *lex Aquilia* for damage to all animals which are not classed as cattle, for example, damage to dogs; and the same may be said of boars and lions and all other beasts and birds.").

[37] Most important are D. 9.21.1.40-42; I. 4.9.1. See e.g. ONIDA, P. P. *Studi sulla condizione degli animali non umani nel sistema giuridico romano.* Torino 2012, pp. 172–174; PALMIRSKI, T. Odpowiedzialność za szkody wyrządzone przez zwierzęta według 'edictum de feris'. *Czasopismo Prawno-Historyczne.* 2007, Vol. 59, No. 1, pp. 173–186 with further literature.

Because of the contradictions concerning the responsibility of the dog's owners, some scholars are sure that between the Twelve Tables and the amendments of aedilian edict there were issued distinct legal enactments regarding dogs – *Lex Pesolania de cane*, but this legal enactment would be only the historical myth.[38]

Despite gradual Christianization of the Roman Empire the rules of Roman law had binding force to the end of Roman rule in Western Europe and later on in Byzantium.[39] It must be emphasized that Christianity, following some Greek philosophical traditions (especially Aristotle' idea that human beings are superior to animals because human beings have the capacity for using reason to guide their conduct and that the function of animals is to serve the needs of human beings), established in the end the drastic contradiction between a man and animals because the latter are merely instruments and exist for the sake of human beings that direct their actions.[40] We should know also that "the Israelites disliked dogs and they regarded them as 'unclean' lowly creatures (…) and may have found dogs to be useful for guarding flocks, they never considered them to be pets or companions", what partially affected the opinions of Christians concerning those animals.[41] Thus, the sense of the strong ties between man and animals, and the peculiar position of dogs, presented in the earlier history of mankind, was abandoned altogether with the rise of Christianity. But Roman law rules regarding the status of animals, and at this point also dogs were repeated in Europe after the revival of Roman law in the Middle Ages and affected European Legal Tradition regarding the liability of animals and their owners.[42]

2. THE CONCEPT OF THE PROTECTION OF AN ANIMAL WITHIN CZECH LAW

Roman Law perceived an animal strictly as a thing. The same view of the position of an animal was shared by the Czechoslovakian Civil Code (enacted 1964). In modern times,

[38] Its existence is confirmed only by postclassical Pauli Sententiae from the late third century, followed by Lex Romana Burgundionum from the sixth century in this regard. See *Pauli Sententiae* 1.15.1 and *Lex Romana Burgundionum* 13.1. See JACKSON, B. Liability for Animals in Roman Law: An Historical Sketch. *Cambridge Law Journal*. 1978, Vol. 37, No. 1, pp. 128–130; ONIDA, P. P. *Studi sulla condizione degli animali non umani nel sistema giuridico romano*. Torino 2012, pp. 170–171 with further literature. The studies concerning *Lex Pesolania* were collected at: http://droitromain.upmf-grenoble.fr/Leges/Pesulania.htm.

[39] About the dog in Byzantine culture, which was much closer to the Greeks in this respect see KOTŁOWSKA, A. *Zwierzęta w kulturze literackiej Bizantyńczyków - Αναβλέψατε εἰς τα πετεινὰ*. Poznań: Wydawnictwo Naukowe UAM, 2013, pp. 111–125, pp. 135–147.

[40] See WILSON, S. Animals and Ethics. The Internet Encyclopedia of Philosophy (IEP), 2001, http://works.bepress.com/scott_wilson/3/ http://www.iep.utm.edu/anim-eth/; GILHUS, I. S. *Animals, Gods and Humans. Changing Attitudes to Animals in Greek, Roman and Early Christian Ideas*. London – New York: Routledge, 2006, pp. 262-270. See also HALDAR, P. Zoologian Jurisprudence. *The International Journal for the Semiotics of Law*. 2011, Vol. 24, pp. 291–306.

[41] RAISOR, M. J. *Determining the Antiquity of Dogs Origins. Canine Domestication as a Model for the Consilience between Molecular Genetics and Archaeology*. Oxford: Archeopress, 2005, p. 66. Regarding the issue of dog's domestication the work is almost obsolete. Cf. further. About Christianity and animals in general see also further.

[42] See e.g. ZIMMERMANN, R. *The Law of Obligations. Roman Foundations of the Civilian Tradition*. Oxford: Clarendon Press, 1996, pp. 1107–1118; JACKSON, B. Liability for Animals: An Historico-Structural Comparison. *The International Journal for the Semiotics of Law*. 2011, Vol. 24, pp. 259–289.

the topic has been addressed by Peter Singer[43] in particular. Animals should have specific rights, different from the rights possessed by human beings, but of a special, animal-like nature. According to S. Komárek, the biggest impediment is posed by the perception of legal personality as adopted from Roman Law. "The term 'animal' is misleading to some extent and it covers creatures that differ from each other substantially."[44] Moreover, the argument that the main difference between a human being and an animal dwells in the latter's possession of reason, proves to be feeble as even human beings of no reason such as the insane or small children are endowed with 'human rights'".[45] The extent of consideration for animals tends to be lesser than our consideration for other people, nevertheless, it should not reach the zero limit.[46] Such a conception of animal rights is hindered by the legal definition of the term "right", which, according to the Czech Civil Code, must be recognized by one's reason. Furthermore, according to the legal definition only a human being can be referred to as a rights-holder.[47] Through the interpretation of this provision we can conclude that a rights-holder can be anyone who is able to distinguish between right and wrong, and who is at the same time endowed with free will and therefore can use his/her discretion to choose between right and wrong. As animals lack such ability, we cannot speak of them as having will. Any living creature which can feel pain must not be treated wantonly, but that in itself does not mean that such living creatures possess rights.[48] The acknowledgement of animal "rights" is denied by a Czech philosopher Prof. Erazim Kohák: "Unequivocally, extra-human creatures (commonly referred to as 'animals',…) have an unalienable urge to live - and we, human beings who can make choices, shall treat this urge with respect and consideration."[49] According to E. Kohák the Civil Code provides for the protection of animals, nevertheless, it protects them in the same way as property, their protection against torture is "very limited and inconsistent". No protection is provided for in terms of research and commercial use of animals.[50] L. Obrovská infers that a human being's duty is to protect and fulfill the needs of animals - the need of food, water, sleep, movement, rest, etc. In her opinion, failure to meet these needs shall be considered as maltreatment.[51] Using one's reason is not the deciding factor. The key role is played by the ability to suffer."[52]

[43] SINGER, P. *Osvobození zvířat.* Praha: Práh, 2001, p. 9.

[44] As stated by KOMÁREK, S. In: JOCH, R., KOMÁREK, S. Lidská práva i pro šimpanze? A Duel. An interview in magazine Respekt from June 23, 2006. (Available on the Internet at https://www.respekt.cz/duel/lidska-prava-i-pro-simpanze).

[45] Ibid.

[46] Ibid.

[47] Section 19 of New Civil Code.

[48] As stated by JOCH, R. In: JOCH, R., KOMÁREK, S. Lidská práva i pro šimpanze? A Duel. An interview in magazine Respekt from June 23, 2006. (Available on the Internet at https://www.respekt.cz/duel/lidska-prava-i-pro-simpanze).

[49] KOHÁK, E. *Má člověk (potažmo kůň či strom) právo žít*? http://www.animalrights.webz.cz/pravo_zit.htm.

[50] Ibid.

[51] OBROVSKÁ, L. Právní pojetí zvířete v právu římském a moderním. In: STOUKALOVÁ, K. (ed.). *Soudobé reflexe římského práva. Římské právo v moderních kodifikacích.* Praha 2015, p. 95.

[52] SINGER, P. *Osvobození zvířat.* Praha: Práh, 2001, p. 9.

3. THE CZECH LEGAL ORDER AND THE PROTECTION OF AN ANIMAL

Such perception is the point of departure for the Czech legal order. The tradition dating back to the Austro-Hungarian era[53] lays the foundation for public law legal rules against cruelty towards animals within contemporary Czech law. The attention paid to the ban of cruel treatment of animals manifests itself through the state of facts constituting a crime under Section 302 of the Criminal Code (cruelty to animals: "the person treating an animal in an especially cruel or tormenting manner").

Under the term "an animal" we understand, to a limited extent, a vertebrate (apart from a human being). The Criminal Code defines torture as an act causing pain - either intensive or repeated. Killing a dog by throwing it down from a significant height was classified as cruelty to an animal.[54] Under Section 303 of the Czech Criminal Code a crime is constituted if an animal is maltreated as a result of negligence. From the perspective of this paper, a significant fact to be taken into account is that killing an animal in a tormenting manner constitutes not only the crime of cruelty to animals but also the crime of damage to property. An animal can also become a subject of a crime of theft or embezzlement. That indicates the dual perception of an animal within the Czech legal order.

Besides the Criminal Code provisions there exists a special legal regulation: Act on the Protection of Animals against Cruelty (Act No. 246/1992 Coll.)[55] The act defines "an animal" as any vertebrate except for a human being". An animal fetus or embryo is not considered an animal.[56] The act states that animals are living creatures with the ability to feel pain and suffering. The act aims at the protection of animals against torture and unreasonable killing.[57]

The term "cruelty to animals" comprises mainly causing pain, a cruel way of putting an animal away, forcing an animal towards performance exceeding its strength, training of an animal or a public performance ending up by the animal's death or injury. Cruel treatment also includes removal of claws, teeth, venom gland or mutilation of vocal cords and also the administration of improper substances, e.g. as doping. The law also provides for a detailed regulation of the conditions for animal transport. It expressly forbids "abandonment of an animal with the intention to get rid of it." Whoever keeps an animal shall secure its welfare."[58] An animal designated for breeding shall not be sold to a person under 15 years of age without parental consent.[59]

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[53] For an analysis of the historical regulation see OBROVSKÁ, L. Právní pojetí zvířete v právu římském a moderním. In: STOUKALOVÁ, K. (ed.). *Soudobé reflexe římského práva. Římské právo v moderních kodifikacích.* Praha 2015, p. 95.

[54] JELÍNEK, J. a kol. *Trestní právo hmotné. Obecná část. Zvláštní část.* Praha: Leges, 2016, pp. 794–795.

[55] A great deal of subordinate legislation concerning the protection of animals in specific areas has been issued. More on their interpretation in DAMOHORSKÝ, M. *Právo životního prostředí.* Praha: C. H. Beck, 2010, p. 409.

[56] Section 3a of Act No. 246/1992 Coll.

[57] Section 1 par. 1 of Act No. 246/1992 Coll.

[58] DAMOHORSKÝ, M. *Právo životního prostředí.* Praha: C. H. Beck, 2010, p. 409.

[59] Ibid., p. 410.

4. THE CONCEPTION OF AN ANIMAL WITHIN CZECH PRIVATE LAW

In recent years, Czech private law has undergone an evolutionary jump in the form of the new Civil Code. The previous regulation did not state the definition of the term "animal" and an animal was considered as a movable asset. For instance, according to the Supreme Court of Justice an abandoned dog is an abandoned thing.[60] The same, according to the judgment of a Czech court a harmful act exercised upon an animal is seen as damage to property.[61] The term "animal" would appear in relation to purchase agreements - in animals the law provided for a longer period for defect complaints. (Section 599, par 1 and Section 602, par 1 of the Civil Code 1964).

The new Civil Code does not perceive an animal as a thing any more.[62] The statement of reasons expressly mentions the separation with the "Roman Law dogma of animals being mere 'mooing instruments'".[63] This regulation was inspired by Section 285a ABGB (Austrian Civil Code) and Section 90a BGB (German Civil Code). The commentary states that it reflects the general change in the relation of human beings towards nature.[64] The commentary broadens the definition of the term "animal" beyond the scope of the Criminal Code in that it considers arthropods or mollusks to be living animals as well. Contrary to criminal law the Czech Civil Code acknowledges the abandonment of an animal (Section 1048 new Civil Code). The terminology of the Civil Code is based on Roman Law terminology in that it distinguishes between e.g., tamed animals, wild animals, animals without a master, etc. In spite of the fact that an animal is not a thing, Czech law does not recognize its legal personality. Nevertheless, although an animal is not a thing, it is the subject of legislation - the Civil Code expressly regulates the assumption of proprietary rights to an animal through appropriation, acquisition of the rewards of an animal, chasing an animal on somebody else's property etc. Nevertheless, in such cases the Civil Code draws on the previous legal regulation and does not bring any significant changes.[65]

A dead animal is considered a thing under civil law. This perception has brought about much criticism as it means that killing an animal by a stranger would result in the enrichment of the animal's owner as he/she would gain ownership of a thing which he/she had not owned before.[66] Also, the definition significantly broadens the scope of "animals" connected with rights and duties (e.g. to report a lost animal to the municipality).[67] This duty could then relate to petty animals such as e.g. insects.[68] Another legal problem concerns the liability towards an animal. The Czech civil law provides for objective liability and only a breeder who proves that due care had not been neglected in the course of

[60] The Supreme Court 28 Cdo 3563/2008.
[61] The Supreme Court 4T Do 489/2013.
[62] Section 494 of Act No. 89/2012 Coll.
[63] ELIÁŠ, K. et al. *Nový občanský zákoník s aktualizovanou důvodovou zprávou a rejstříkem.* Praha: Sagit, 2012, p. 226.
[64] KOUKAL, P. *Občanský zákoník I. Obecná část.* Praha: C. H. Beck, 2014, p. 1747.
[65] OBROVSKÁ, L. Právní pojetí zvířete v právu římském a moderním. In: STOUKALOVÁ, K. (ed.). *Soudobé reflexe římského práva. Římské právo v moderních kodifikacích.* Praha 2015, p. 97.
[66] KINDL, M., ROZEHNAL, A. *Nový občanský zákoník. Problémy a úskalí.* Plzeň: Aleš Čeněk 2014, p. 95.
[67] Section 1058 par. 1 of Act No. 89/2012 Coll.
[68] KINDL, M., ROZEHNAL, A. *Nový občanský zákoník. Problémy a úskalí.* Plzeň: Aleš Čeněk 2014, p. 125.

supervision over an animal can be exonerated from it. Such an option is not available to a fancier.[69]

To sum up, the new Civil Code attempts to bring forward a new conception of an animal. However, the general provision stating that an animal is not a thing has caused much confusion in the field of juridical science for in concrete provisions of the Civil Code an animal has still been perceived as a thing. Further, the legal rules of public law are still based on a narrower conception of an animal, which is confined to vertebrates only.

The conception of the term "animal" differs greatly in the Roman law and in the modern Czech regulation. The Roman law understood animals as "objects of law" (res) while the Czech law have a special attitude towards all of the animals. Despite this legal (or conceptual) difference the real praxis of the life of ordinary Czech citizens prove that there is the special attitude only to the dogs (costly healthcare for dogs, special – and very expensive nutrition for dogs, even the special places for dogs to stay are very common in the Czech Republic). There is even a special TV channel solely dedicated to dogs and cats.

So we can conclude that the Romans and the Czechs have similar attitude to (takes the care of) the dogs. And therefore we can ask a question. What are the roots of this similar values or attitude towards the dogs? According to our point of view, the answer is to be found in human prehistory.

It must be taken into account that our understanding of many attitudes of the Romans (and also the modern people) towards dogs, together with their peculiar legal status is affected by the fact that they were first domesticated animals.

Up to today there have been many contradictions when it exactly happened. First, we should know that according to modern genetic research, dogs are not the descendants of wolves but both species possess common extinct antecessor.[70] The domestication of dogs took part probably independently a few times in Europe and Asia, and that different populations of wolves were involved in it.

In light of the controversial archaeological evidence the early examples of the hypothetical dog's domestication did not lead at the beginning to the establishment of close psychological ties between man and dog. The paleontological excavations in Belgium, Ukraine, Russia and Czech Republic dated cca thirty thousand years ago, proves

[69] Ibid., p. 126.

[70] Cf. LARSEN, G. et al. Rethinking dog domestication by integrating genetics, archeology, and biogeography. *Proceedings of the National Academy of Sciences USA.* 2012, Vol. 109, No. 23, pp. 8878-8883; FREEDMAN, A. H. Genome Sequencing Highlights the Dynamic Early History of Dogs. *PLoS Genetics.* 2014, Vol. 10, No. 1. Therefore obsolete in part are not only canonical work of KELLER, C. *Naturgeschichte der Haustiere.* Berlin: P. Parey, 1905, pp. 71–103 but even modern studies (e.g. CROCKFORD, S. J. A commentary on dog evolution. Regional variation, breed development and hybridisation with wolves. In: CROCKFORD, S. J. (ed.). *Dogs Through Time. An Archaeological Perspective.* Oxford: Archaeopress, 2000, pp. 295–316; MOREY, D. F. *Dogs. Domestication and the Development of a Social Bond.* Cambridge: Cambridge University Press, 2010, pp. 12–86; CUMMINS, B. D. *Our Debt to the Dog. How the Domestic Dog Helped Shape Human Societies.* Durham: Carolina Academic Press, 2013, pp. 3–18; ZWOLSKA, P. *Pies. Antyczny przyjaciel.* Kraków: Avalon, 2014, p. 105; MIKLÓSI, Á. *Dog Behaviour, Evolution, and Cognition.* Second Edition. Oxford: Oxford University Press, 2015, pp. 124–152).

that those animals were perhaps then sacrificed and beaten but not treated as friends or companions by ancient hunter-gatherers.[71]

Therefore the brilliant hypothesis of Pat Shipman is probably, that *Homo sapiens sapiens*' partnership with the first domesticated wolf-dogs led to the removal and extinction of *Homo sapiens neanderthalensis*.[72] On the contrary, Neanderthals contributed to the DNA of modern humans, including most non-Africans as well as a few African populations, through interbreeding. The recent genetic studies suggests that modern humans may have mated with at least two groups of ancient humans: Neanderthals and Denisovans and approximately 20% of the Neanderthal gene pool is present in a broad sampling of non-African individuals, though each individual's genome is on average only 2% Neanderthal.[73] The close relationship of man with dog born in the context of the episodes of domestication probably came much later. However, contrary to the view that a man domesticated dogs as useful hunting companions and the vigilant guardians of human habitats – the myth popularized by Konrad Lorenz, the father of ethology in his popular book "So kam der Mensch auf den Hund"(*Man Meets dog*) – the process was certainly more complicated.[74]

It was probably started by some less fearful wolves, who by stealing the food from the habitats of hunter-gatherers in Eurasia, gradually adjusted to the ecological niche created by humans, and this approach led to the increased ability of the wolves to survive.[75]

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[71] GERMONPRÉ, M. Fossil dogs and wolves from Paleolithic sites in Belgium, the Ukraine and Russia: osteometry, ancient DNA and stable isotopes. *Journal of Archaeological Science*. 2009, Vol. 36, pp. 473–490; GERMONPRE, M., LAZNICKOVA-GALETOVA, M., SABLIN, M. V. Paleolithic dog skulls at the Gravettian Předmostí site, the Czech Republic. *Journal of Archaeological Science*. 2012, Vol. 39, pp. 184–202. There are however contradictions concerning those excavations and their value. See MOREY, D. F. In search of Paleolithic dogs: a quest with mixed results. *Journal of Archaeological Science*. 2014, Vol. 52, pp. 300-307; GERMONPRÉ, M. Palaeolithic dogs and Pleistocene wolves revisited: a reply to Morey (2014). *Journal of Archaeological Science*. 2015, Vol. 54, pp. 210–216; MOREY, D. F., JEGER, R. Paleolithic dogs: Why sustained domestication then? *Journal of Archaeological Science*. 2015, Vol. 3, pp. 420–428.

[72] SHIPMAN, P. *The Invaders. How Humans and Their Dogs Drove Neanderthals to Extinction*. New York: Harvard University Press, 2015, pp. 1–288. She promotes the idea that human-animal interaction was the major factor in the evolution of genus Homo. SHIPMAN, P. *The Animal Connection. A New Perspective on What Makes Us Human*. New York: W.W. Norton & Co, 2011, pp. 204–220. This idea is also disputed. See SHIPMAN, P. The Animal Connection and Human Evolution. *Current Anthropology*. 2010, Vol. 51, No. 4, pp. 519–553, with discussion.

[73] See recently in popular form PÄÄBO, S. *Neanderthal Man: In Search of Lost Genomes*. New York: Basic Books, 2014, passim. and e.g. VILLA, P., ROEBROEKS, W. Neandertal Demise: An Archaeological Analysis of the Modern Human Superiority Complex. *PLoS ONE*. 2014, Vol. 9, No. 4; QIAOMEI, F. An early modern human from Romania with a recent Neanderthal ancestor. *Nature*. 2015, Vol. 524, pp. 216–219; MENDEZ, F. L. The Divergence of Neandertal and Modern Human Y Chromosomes. *The American Journal of Human Genetics*. 2016, Vol. 98, No. 4, 2016, pp. 728–734. doi: http://dx.doi.org/10.1016/j.ajhg.2016.02.023. About Homo sapiens neardenthalensis see also CONARD N. J., RICHTER J. (eds.). *Neanderthal Lifeways, Subsistence and Technology. One Hundred Fifty Years of Neanderthal Study*. New York: Springer, 2010, passim.

[74] LORENZ, K. *So kam der Mensch auf den Hund*. Wien: Dr. G. Borotha-Schoeler, 1949, passim. The book was translated into more than 300 languages. See: http://www.worldcat.org/. See also other Austrian scholar named Lorenz who is following unconsciously Konrad Lorenz' ideas: LORENZ, G. *Tiere im Leben der alten Kulturen. Schriftlose Kulturen, Alter Orient, Ägypten, Griechenland und Rom*. Wien-Köln-Weimar: Böhlau, 2000, pp. 23–25.

[75] See about different theories concerning dogs domestication: MOREY, D. F. *Dogs. Domestication and the Development of a Social Bond*. Cambridge: Cambridge University Press, 2010, pp. 12–86; CUMMINS, B. D. *Our Debt to the Dog. How the Domestic Dog Helped Shape Human Societies*. Durham: Carolina Academic Press, 2013, pp. 3–18; MOREY, D. F., JEGER, R. Paleolithic dogs: Why sustained domestication then? *Journal of Archaeological Science*. 2015, Vol. 3, pp. 420–428.

Foxes, raccoons, bears, and of course the wolves do this today. But contrary to modern wild animals, those antecessors of Paleolithic dogs were much more social animals, equipped incidentally by evolution with the skills to recognize the emotions of humans, another social animal; modern dogs are better in this regard even than our closer relatives – both species of Chimps.[76] Gradually individuals from such groups of wolves became entirely dependent on the presence of people, who, in turn, sometimes hugs juveniles of these dogs, initially as domestic pets and eventually started using their skills, especially in guarding and hunting.

People preferred individuals of those 'wolf-dogs' with a lower level of aggression, and they reproduced more frequently, passing this trait to future generations. The next step was the evolution of dog's phenotype: reduction of body size, especially of the skull and a lighter framework of the body, which is called "domestication syndrome" because it affect all domesticated animals.[77]

In the case of dogs the domestication and the change of phenotype most probably happened quickly. The proof of the possible pace of change in canines comes from the research of Institute of Cytology and Genetics in Novosibirsk. Since 1950s the institute began selectively breeding domesticated foxes by choosing the tamest and friendliest individuals from fur farms and within a few generations, it was able to breed foxes that not only tolerated human contact but actually sought out humans, displaying the tail-wagging and face-licking affection familiar to every dog owner.[78]

A combination of these factors has facilitated overcoming the barriers of interspecies mistrust between humans and dogs. It brings a number of benefits to man, but first to our four-legged companions.[79]

The acceleration of the dog's domestication was probably affected by the first steps of Neolithic revolution: according to the latest genetic research the ancient origin of domestic dogs was southern East Asia 33 000 years ago, while around 15 000 years ago, a subset of

[76] BEARD, M. *Laughter in Ancient Rome: On Joking, Tickling, and Cracking Up.* Berkeley-Los Angeles-London: University of California Press, 2014, pp. 46–48. Is right while noting dogs in her book concerning the laugh in antiquity. See also DOUGLAS, M. Do dogs laugh? A cross-cultural approach to body symbolism. *Journal of Psychosomatic Research.* 1971, Vol. 15, pp. 387–390.

[77] Cf. e.g. KOWALSKA, D., GUGOŁEK, A. Zmiany domestykacyjne i behawioralne wskaźniki adaptacyjne zwierząt futerkowych. *Wiadomości Zootechniczne.* 2013, Vol. 15, No. 1, pp. 31–40; WILKINS, A. S., WRANGHAM, R. W., FITCH, W. T. The "Domestication Syndrome" in: Mammals: A Unified Explanation Based on Neural Crest Cell Behavior and Genetics. *Genetics.* 2014, Vol. 197, No. 3, pp. 795-808. The „domestication syndrome" seems affecting also man himself: at least in the last tens of thousand years men became more female what is the sign of the decreasing level of testosterone. The lower level of this hormone led to the diminishing of aggression among the members of human bands, allowing men to cooperate better, what seems to be the key to the evolutionary success of Homo sapiens sapiens. Cf. CIERI, R. L. Craniofacial Feminization, Social Tolerance, and the Origins of Behavioral, Modernity. *Current Anthropology.* 2014, Vol. 55, No. 4, pp. 419–443.

[78] See the webside of the institute: http://www.bionet.nsc.ru/booklet/index.html.

[79] Although the domestication of dogs was not the major factor in the acceleration of the development of human social organization. So: SCHLEIDT, W. M., SHALTER, M. D. Co-evolution of Humans and Canids. An Alternative View of Dog Domestication: Homo Homini Lupus? *Evolution and Cognition.* 2003, Vol. 9, No. 1, pp. 57–72.

ancestral dogs started migrating to the Middle East, Africa and Europe, arriving in Europe about 10 000 years ago.[80]

Dogs became even more necessary for humans in those days; they added to the previous roles of the pet or companion during hunting, the important position of the vigilant guardian of man's wealth, which was collected more intensively by farmers than by hunter-gatherers. And those roles are still kept by dogs today in spite of that our closest friends are from a genetic point of view only wolves, with which a dog can have fertile offspring.[81]

Dogs allowed themselves, however, to be confined mostly to the eating of food supplied to them by a man, let humans take care of, returning an extraordinary devotion to their owners and forming a symbiotic relationship with humans.[82] This process started early enough that it does not matter too much the cultural differences between modern societies and the Romans. Thus, in the case of the relations between the Romans and their dogs, it is not coincident that we understand most of them,[83] and some rules of Roman law concerning dogs still inspires the modern legal rules concerning them, also in Czech law.

[80] GUO-DONG, W. Out of southern East Asia: the natural history of domestic dogs across the world. Cell Research. 2016, Vol. 26, pp. 21–33. The transition to a sedentary life could take part in some parts of the world before 15 000 – 10 000 years ago. Cf. SNIR, A. The Origin of Cultivation and Proto-Weeds, Long Before Neolithic Farming. *PLoS ONE*. 2015, 10.7 e0131422. doi:10.1371/journal.pone.0131422.

[81] See 'Wolfdog': https://en.wikipedia.org/wiki/Wolfdog.

[82] The behavioral differences between dogs and wolves genetic changes are possibly due to species-specific differences rather than only on the experience. See e. g. KUBINYI, E., VIRÁNYI, Z., MIKLÓSI, Á. Comparative Social Cognition: From wolf and dog to humans. *Comparative Cognition & Behavior Reviews*. 2007, Vol. 2, pp. 26-46.

[83] Contrary to ZWOLSKA, P. *Pies. Antyczny przyjaciel*. Kraków: Avalon, 2014, p. 105.

SURROGACY LEGAL ISSUES IN THE UK AND THE CZECH REPUBLIC[1]

Kateřina Burešová*

Abstract: *One of the basic meanings of the life of a human is to have a descendant. If the natural conception fails, people look for other options. One of them is surrogacy. Surrogacy stands for a long way with uncertain end and result. The only certain result is, some rules must change. One of them is "mater semper certa est".*

Legislation on surrogacy varries coutry to country. Some countries, like United Kingdom, recognize surrogacy on law basis for decades. Some countries, on the other hand, do not have legal bounds set. Although the surrogacy as a medical treatment is legal there. Czech Republic stands just for the country with no legislation. Comparism of these two systems may lead to the conclusion what are the challenges of surrogacy in the law field.

Keywords: *surrogacy, parental rights, maternity, parenthood*

INTRODUCTION

The theme of this article is very specific. Therefore it combines not only legal issues. Surrogacy is very delicate subject due to the ability of achieving pregnancy naturally by some people. This ability is decreasing proportionately to the increasing health care offered by the special clinics all over the world on the field of assisted reproduction. Ability of natural conception of the baby is the top topic for the countries mainly in the west Europe and the north America. The rest of the world is mainly responding to the requests made by the sterile couples or even singles as the latest phenomenon.

Surrogacy is a form of assisted reproductive technology. It is not based on achieving pregnancy of the woman that is being in care of the clinic such as other procedures of the assisted reproductive technology. These are, along with surrogacy, fertility medication, artificial insemination and in vitro fertilization (IVF). Surrogacy is being that delicate because it uses not only genetic material to achieve pregnancy, as the other procedures, but it combines genetic material with a human attribution. This means that pregnancy is not being achieved by the sterile woman as the *pacient,* but is achieved by other woman as a *surrogate* and the subject of the medical treatment.

Surrogate stands for a woman who carries a baby for a couple (single) who is not able to achieve pregnancy themselves. Contribution of a third party makes surrogacy so delicate and special. Then some moral issues bring other important questions to be answered and solved. Only surrogacy among the assisted reproduction techniques makes so different legal arrangements. Other procedures of the assisted reproduction technology are not so legally complicated and do not varies country to country that much.

The act of becoming pregnant must predates by the special agreement between a surrogate and the intended couple (single). Such agreement contains the topic what tech-

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nique will be used to achieve pregnancy, how will be a baby delivered and the parental rights transfer to the intended couple (single). Some other issues are usually the part of the agreement due to the legislation that is being set for the whole procedure.

For the purpose of this article there is generally used the term *intended couple* also for the intended *single*. Only where it is necessary to explain the dissimilarity there will the term intended single stand for a single man or woman that is in the position of the intended couple.

The goal of this article is to compare two different legislations. First one, very traditional English legislation, deals with surrogacy for over 30 years. Special law on surrogacy makes the topic legal in the bounds that are set. Law in the United Kingdom is unique. On the contrary the Czech legislation does not recognize the legal issues of surrogacy even though surrogacy is a legal medical treatment. Such comparison of two systems is able to show what challenges[2] the surrogacy means on the law basis.

At first there will be described surrogacy in general. For an introduction to the topic description also contains from the legislations of the selected countries. These are specific representatives of the legal way concerning surrogacy. Other part of this article concerns on the English legislation as a traditional unique legislation and the problems that is facing in the present. On the contrary there is the Czech legislation with no special surrogacy law and rules.

SURROGACY IN GENERAL

Surrogacy is mainly divided into two types according to the genetic material that is used. First type is called the *traditional surrogacy* and also is known as the *straight surrogacy*. The second one is *gestational* and is known as the *host surrogacy*.

Traditional surrogacy is a technique using the eggs of the surrogate and sperm of the man from the intended couple or donated by some other man. It makes a genetic connection between surrogate and the child and is usually considered as not steady. The reason lies just in the genetic connection. Some surrogates may change their minds due to the fact they give birth to the child of their own. In most countries there is no legal procedure to force the surrogate to give up the baby she gave birth to.

More often in the real life is the host surrogacy. The surrogate is being use as a carrier of the baby that is not genetically related to this woman. The method that is being usually used is the IVF. IVF stands for *in vitro fertilization* that means a technique of letting fertilization of the sperm and eggs occur outside of the human body. Sperm and eggs are called a male and a female *gametes*. Host surrogacy use the IVF because there is no other technique that would be possible for a fertilization of a donated female gametes. Male gametes may be used by the man that is a part of the intended couple. This makes the easiest legal way to adopt the child that will be born to the surrogate. If the donated sperm is used, there is no genetic relation to the intended couple nor to the surrogate.

[2] For more see APPLETON, T. C. Special topics (third-party reproduction: 5.4 Surrogacy. *ESHRE monographs*. 2002, No. 1, pp. 37–38.

It is obvious there is no simple way how to describe surrogacy and its consequences. There is no general legal definition that would be useful and able to cover all techniques and possibilities that are related to the all kinds of surrogacy. Mostly it depends on the genetic material that is used. If it is possible, due to the health assumptions of the intended couple, there is usually a mixture of the genetic material becoming from the intended couple. That makes the child to be born genetically connected to the intended couple. Legal issues are then simpler because it is almost a rule own in every legislation that protects mostly genetic contexture.

Using donated genetic material makes surrogacy legally more complicated. The final decision of the surrogate must be to surrender to the motherhood. This is very delicate act and must be done sooner before the surrogate relates to the child and may refuse to fulfill the agreement set with the intended couple. On the other hand there are usually some rules that makes such an act invalid if is made shortly after birth.

There are known only two types of surrogacy according to the cause that makes a woman to carry a baby for some other person. The first type, and most common, is the *altruistic* surrogacy. The second one, more questionable, is an *economic* surrogacy. Altruistic surrogacy is very often recognized in wider family. The surrogate may be, and often is, a mother or a sister of the sterile woman. Fulfilment of the altruistic surrogacy is then obvious. From the legal point of view the altruistic surrogacy is not forbidden in the most countries because it is considered to be a part of the medical treatment. Also there are no criminal consequences if there is no financial refund between the surrogate and the intended couple.

The economic surrogacy is considered as illegal in most countries. The reason is very simple. The law protects its citizens from the *baby trade* that is so close and tide up with this type of surrogacy. There are countries like Thailand, Ukraine or India where economic surrogacy is considered legal and there are special laws containing the related issues. In these countries usually operate unique agencies that are offering special services for both sides. They associate women willing to be a surrogate for the intended couples. They declare to provide these women with the examination of their physical and psychical condition. These women have to meet some criteria to become surrogates. The intended couple in such agency finds the correct surrogate that meets not only the general criteria but also the conditions of this couple that are set for the surrogate. Agencies then provides also the medical treatment leading to the pregnancy of the surrogate.

Ukraine is considered as a surrogacy friendly state.[3] Some advantage for Ukraine is that this country is a part of Europe that makes the false impression of a legally safe country. It has to be clear that when surrogacy is usually illegal, some people in places where it is legal, are exploiting from the huge amount of the requesting ones coming to fulfill they hope. It is not only the Ukraine's problem that some individuals are misusing the system.

Ukraine is one of that few countries that has very special law dealing with surrogacy issues and what is more important, dealing with *maternity* and *paternity* in case of baby

[3] For more see f.e. KINDREGAN, CH. P., WHITE, D. International fertility tourism: the potential for stateless children in cross-border commercial surrogacy arrangements. *Suffolk transnational law review*. 2013, Vol. 36, No.1, pp. 527–627.

being born to the surrogate. *The Family Code* of Ukraine contains the Article 123 that is called *"Establishing Maternal and Paternal Affiliation in Case of Medically Assisted Procreation and Ovum Implantation."* The first paragraph solves the paternity in case of fertilization by procreation technique. The second paragraph makes clear that parents of the child are spouses that conceived the ovum to be implanted to another woman. In the third paragraph Article 123 says that an ovum conceived by the husband with another woman is implanted to the wife of his, a child is considered to be affiliated to the spouses.

Ukraine has a unique legal view on the maternity and paternity. It has to be admitted that so great legislatures with huge history usually stand on its roots and deals with maternity and paternity the same way for hundreds of the years. It is not recognized that a woman who gives birth to a child does not have to be its mother according to the law. Well, she may not be a mother according to the missing genetic connection.

In India became surrogacy into a big problem. Due to the not existing legislature, India became known as surrogacy friendly and stands for the destiny of many intended couples desiring for a baby.[4] India then deals with a modern form of slavery. Lots of very poor women are willing to be surrogate for economic reasons. Therefore local government starting to make changes with deep believe that Indian women are being exploited. The draft of a new law is called *Assisted Reproductive Technology Bill*. This law still did not pass and right now it is not clear if surrogacy is legal or not in India.[5] This law will probably make difference and there will not be allowed for foreigners to look for a surrogate in India. This kind of service will be achievable only for Indian citizens.[6]

The same way there are changes in Thailand.[7] Thailand was well-known as surrogate friendly country and many tourists were looking for a surrogate in there. Since 2015 when the new act on assisted reproduction has passed and it is no more legal to become a surrogate for foreign intended couple. The law has changed due to the controversy incident occurred. Thai woman as a surrogate for an Australian couple gave birth to the twins. A girl was taken by the intended couple to the Australia as a part of the deal. A boy was left by the intended couple in the Thailand. The reason was that the boy was diagnosed with the Down Syndrome. He was diagnosed in the seventh month of the pregnancy and the surrogate refused the abortion of the boy that was suggested by the Australian couple due to her beliefs. Surrogate woman kept her son and opted to raise money for his care. Later on media took out the story. Ethical issues resulted into a new law called Protection of children Born from Assisted Reproductive Technologies Act.

Most jurisdictions are based on traditional Roman principle *mater semper certa est*. This principle has a simple meaning coming from the presumption that a woman who

[4] FRANKFORD, D. L., BENNINGTON, L. K., RYAN, J. G. Womb Outsourcing: Commercial Surrogacy in India. *MCN, The American Journal of Maternal/Child Nursing*. 2015, Vol. 40, No. 5. DOI: 10.1097/NMC.0000000000000163.

[5] SUGDEN, J. Indian Surrogacy Clinics Scramble to Reassure Foreigners. India realtime [online]. 2015-10-30 [cit. 2015-10-31], http://blogs.wsj.com/indiarealtime/2015/10/30/indian-surrogacy-clinics-scramble-to-reassure-foreigners/.

[6] KANNAN, S. Regulators eye India's surrogacy sector. India business report [online]. BBC WORLD, 2009, 2009-03-18 [cit. 2015-12-28]. Available from: http://news.bbc.co.uk/2/hi/business/7935768.stm.

[7] Thailand bans commercial surrogacy for foreigners. BBC NEWS [online]. 2015, 2015-02-20 [cit. 2016-01-06]. See: http://www.bbc.com/news/world-asia-31546717.

gives birth to a baby is the mother to this baby. Well, this does not apply in all cases in real life since the medical research made a huge step forward. Medical treatment can result into a baby being born to a woman that has no genetic connection to the baby. And that is the heart of the problem. A woman that has all the rights to be a mother does not have to be actual, real mother to a child. And on the other hand the real genetic mother does not have her parental rights if she does not give birth to a baby. Even more complicated this becomes if the genetic mother was a donor of the genetic material.

It becomes obvious there are more than legal issues to be discussed. Carrying a baby is a long time journey and so many things may occur on such a long way. And there is a baby involved that makes the situation even more complicated and delicate. Economic surrogacy may be considered to be wrong but on the other hand it may help some poor woman to make money for living. The intended couples desire for healthy baby and are willing to support surrogate. They usually provide her with money to eat regularly and they pay the medical costs. This makes them feel they did the best for the baby. It should be said that woman who is willing to be surrogate usually do has her own child [children] and is in a bad economic or/and social situation when there is no possibilities how to make money to take care of a baby. Therefore these women welcome to be surrogate. They usually do it only once. Clinics nor the intended couples do not seek a woman to be surrogate repeatedly.

International commissions are also dealing with surrogacy. The regular statement was held by the The International Federation of Gynecology and Obstetrics (FIGO)[8] and European Society of Human Reproduction and Embryology.[9] The special comittees do agree with surrogacy itself as a medical treatment in case of woman's fertility. They recognize the surrogacy to be ethical and they recommend to use such delicate treatment only in occasional cases. The comittees highly recommend to treat well the rights of the surrogate woman, a child and the intended couple. They see the slack of the agreement as the point of the potential problems and issues in the future.

SURROGACY IN THE UK

The United Kingdom of Great Britain and Nothern Ireland (UK) has a special law on surrogacy. It should be pointed out the UK accepted the actual law on surrogacy yet in 1985 (!).[10] *Surrogacy Arrangements Act 1985* was actually a reaction to a real case known as "baby Cotton" that occurred much earlier, in 1980.[11] In that case a woman agreed to

[8] Commitee for The Study of Ethical Aspects of Human Reproduction and Women's Health. *Ethical Issues in Obstetrics and Gynekology*. 2006, pp. 43–44.

[9] Task Force on Ethics and Law. *ESHRE Task Force on Ethics and Law 10: Surrogacy*. 2005, No. 10, pp. 2705–2707.

[10] See more in: CÍSAŘOVÁ, D., BROJÁČ, J., ROUBÍČKOVÁ, N. Parenthood and Homosexuality Within the Context of Assisted Reproduction - Are We Ready For Homoparental Families? *The Lawyer Quarterly*. 2015, Vol. 5, No. 4, pp. 289–299.

[11] MERCER, D. Britain's first surrogate mother still longs for Baby Cotton 30 years on. Express: Home of the Daily and Sunday Express [online]. 2015, 4. 1. 2015 [cit. 2015-12-28], http://www.express.co.uk/life-style/life/550033/Kim-Cotton-first-surrogate-mother-UK-misses-baby-30-years-on.

carry a baby for a Swedish couple. They used the egg from surrogate and sperm of the man from the intended couple. The surrogate agreed never to look for the baby and the intended couple remained in secret. Arrangement was set up by an American special agency therefore the surrogate and the intended couple never met each other. After the case went public the *Committee of Inquiry into Human Fertilisation and Embryology* included the surrogacy into its report.[12] This Committee recommended "that legislation be introduced to render criminal the creation or the operation in the United Kingdom of agencies whose purposes include the recruitment of women for surrogate pregnancy or making arrangements for individuals or couples who wish to utilise the services of a carrying mother; such legislation should be wide enough to include both profit and non-profit making organisations. We further recommend that the legislation be ufficiently wide to render criminally liable the actions of professionals and others who knowingly assist in the establishment of a surrogate pregnancy."[13] The Committee also recommended to make all and every agreements on surrogacy illegal. Then the report became an impuls to Surrogacy Arrangements Act that rushed thru the Government.

Surrogacy Arrangements Act 1985 made prohibited commercial form of surrogacy. Also it made prohibited to advertise that someone is looking for a surrogate [a woman willing to be a surrogate] or that any person may be willing to enter into surrogacy arrangement. According to the Surrogacy Arrangements Act 1985 surrogate mother means a woman who carries a child in pursuance of an arrangement made before she conceived pregnancy and made with a view to any child being handed over to, and the parental rights being exercised by another person.

It is obvious from the meaning of the surrogate woman, that there exists a presumption of the arrangement to be set. Strictly without any agency or other person who would get paid for that. The arrangement is set between the woman who is willing to carry a baby and the intended couple. These people are able to negotiate and also compile the necessary informations to make surrogacy agreement. The economic surrogacy is also prohibited according to the law therefore there are not allowed any payments to be set in the agreements. Unless these payments include only and not exclusively the real costs that are contexted with the pregnancy and childbirth.[14] Usually such costs include medical care, special diet, necessary clothes and so on.

Since 2008 there is a *Human Fertilisation And Embryology Act 2008* which contains integrated legal treatment for all types of assisted reproductive techniques and its repercussions on the parental rights as well as rights of the issued children. This act makes clear

[12] Department of Health & Social Security. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY*. July 1984. London: HER MAJESTY'S STATIONERY OFFICE, 1984. Available from: http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

[13] Department of Health & Social Security. *REPORT OF THE COMMITTEE OF INQUIRY INTO HUMAN FERTILISATION AND EMBRYOLOGY*. july 1984. London: HER MAJESTY'S STATIONERY OFFICE, 1984, page 47. Available from: http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf.

[14] F.e. see NAKASH, A., HERDIMAN, J. Surrogacy. *Journal of obstetrics and gynaecology*. 2007, No. 27, pp. 246–251.

who the father and mother is in certain events. It also provides the right of the child to get some information about the donors in case of a child that has been adopted or parental rights are exercised by someone else from a birth mother or father.

The Human Fertilisation And Embryology Act 2008 makes a very special treatment even for same-sex partners. This comes only 4 years after the *Civil Partnership Act 2004* became effective. From the legislative technique point of view, the law maker in the United Kingdom did not make the easy form of equality meaning equalizing rights of opposite sex marriage with the same sex partnership rights. Even though this act makes such a statement in the Chapter 50, there are other parts devoted to only the civil partnership in the Human Fertilisation And Embryology Act 2008 and these are very special. Like the Chapter 42 called *Woman in civil partnership at time of treatment*. This section makes clear that the partner of a woman who is provided with the special treatment is to be the second parent of the child unless the partner did not consent the treatment.

Surrogacy in the United Kingdom has no legal bounds set up definitelly. There are always many issues to be solved.[15] For example *maternity leave*. A group of parents were persuading the Government since 2008 to entitle the parents of babies born to a surrogate to maternity leave.[16] In accordance to few people to get advantage from such a law the Government rejected at first. Later on the Delhi Hing Court was dealing with the case where a female employee became a mother of twins by the way of surrogacy. This woman was denied 180-day maternity leave according to the fact she was no biological mother of her babies. Due to this case after all the private Member's Bill passed thru the Parliament and became effective at the end of 2015. From now on there is a special treatment for parents of babies that were born to surrogate women.

It was mentioned above the special commercial agencies are prohibited in the United Kingdom. This does not include non-profit agencies that operate on the bases of the law. They provide both parties [the intended couple and the surrogate] with informations, legal bounds, they help to make an arrangement and they help with the medical care. Very often such an agency is run by surrogates themselves to support each other.

The huge problem to be solved soon is *parental rights*. The legal bounds are not satisfying the real needs of the children that are born to surrogates. These babies very soon comes to the care of the intended couple but the parental rights are not transfered at the same time. Mother of a child is the woman who gave birth to the child. No matter what the genetical connections are, no matter what agreement was set up. The intended parents must first apply after the baby is born. There is a time of uncertainity between the application and the parental rights are granted. That brings some dangerous issues because the surrogate can change her mind meanwhile. And at this point we are back on the beginning of the delicate issue that can make the dream come true as well as dissapointment due to the weak legistature.[17]

[15] Committee for the Ethical Aspects of Human Reproduction and Women's Health. *Cover image International Journal of Gynecology & Obstetrics International Journal of Gynecology & Obstetrics*. 2008, Vol. 102, No. 3, pp. 312–313.

[16] See also http://www.brilliantbeginnings.co.uk/campaigning/our-past-successes.

[17] HORSEY, K. Surrogacy in the UK: Myth busting and reform. Report of the Surrogacy UK Working Group on Surrogacy Law Reform (Surrogacy UK, November 2015).

Also very important topic is the *agreement*. The agreement should be set between intended couple and the surrogate at the very beginning of the long way. It serves the future needs. After baby is born and some of the involved changes his mind, there is no way to set the rights and obligations but the court hearing.[18] As the 25 % of all surrogacy arrangements take place outside the United Kingdom, English courts deal specific and very variable questions[19] concerning the welfare and best interest of the children that were born to a surrogate woman.

SURROGACY IN THE CZECH REPUBLIC

The Czech Republic stands for those countries that do not deal with the surrogacy on legal matter. As described above, the United Kingdom recognize the surrogacy and its special law treatment for over 30 years. The Czech Republic still does have no legislative bounds on surrogacy and pretends there is no such a problem in real life. It is just a matter of time when a big case will come out and start the society disscussion about the surrogacy also in the Czech Republic. Until then there is no clear view of the society in the country on topics concerning surrogacy.

Surrogacy itself is not allowed expressly in any Czech law act. As well as it is not expressly forbidden. There should be mentioned that the new Civil Code (law act no. 89/2012 Coll.) was expected to deal with surrogacy.[20] Even the professional public was expecting the new rules for surrogacy. Although the new Civil Code did not fulfill any of the expectations. There is only one mention about surrogacy.[21] That is considered to be a sign the Czech law recognizes surrogacy and knows it does exist and that it is really happening in real life. The only mention in the new Civil Code deals with the barrier where a birth mother is also a mother of the fertile woman which means that this woman cannot become a mother of the child. In fact that would be a sibling of the woman. In case of surrogacy the prohibition from adopting such a baby is broken.

There is also a very special act adjusting the assisted reproduction and its issues. The Act on Specific Health Services No. 373/2011 Coll. only recognize and specify some terms and medical treatment. It does not include the issues containing the rights of the parents in specific cases.

The real cases of surrogacy deal with a vague law rules.[22] Therefore there is no treatment for woman that is willing to carry a baby for others. The intended couples usually undergo the medical care in clinics of reproductive medicine. After the woman from the intended couple is diagnosed with the fertility the clinic may suggest the couple to find a woman willing to be the surrogate. Since there is no clear legislature these clinics do not play any

[18] F.e. [2015] EWFC 36, Case No. FD14P00262, Royal Courts of Justice, London.

[19] See FENTON-GLYNN, C. The difficulty of enforcing surrogacy regulations. *Cambridge law journal*. 2015, Vol. 74, No. 1, pp. 34–37.

[20] See also: CÍSAŘOVÁ, D., SOVOVÁ, O. Náhradní mateřství v právní praxi. *Časopis zdravotnického práva a bioetiky*. 2015, Vol. 5, No. 2, pp. 13–24.

[21] See par. 804 of the law act no. 89/2012 Coll., civil code.

[22] See also: KRÁLÍČKOVÁ, Z. Mater semper certa est! O náhradním a kulhajícím mateřství. *Právní rozhledy*. 2015, Vol. 23, No. 21, pp. 725–732.

role in the process of finding a surrogate by the intended couple. They only treat the surrogate to achieve pregnancy and they are far away from any agreement set between the surrogate and the intended couple.

The intended couples are usually looking for a surrogate through the advertisement. It is the only option in the case there is no woman willing to carry a baby among relatives and friends. The advertisement is no expressly forbidden in the Czech Republic. Although it may also be the way to track people who are making a business out of the left out matter.

According to the criminal law [the Criminal Act no. 40/2009 Coll.] it is prohibited to pay any money for passing parental rights.[23] The merits deal with adoption that is prohibited to provide for any kind of payments. In other words a child cannot become an object of the transaction connected with the award. The surrogate is not allowed to receive any payment from the intended couple in case she gives up her motherhood right and let the intended couple to adopt her child. If she does so, she brokes the criminal law. There has to be pointed the payments are not including the real costs the surrogate has have in accordance to her pregnancy and the child birth. These costs are the same as in the United Kingdom and also includes loss of profits or loss of wage if the surrogate is unable to work during her pregnancy. Allowed payment means the compensation for some extra expenses because of pregnancy.

The Czech law defines a mother as a woman who gave birth to the child [see par. 775 Civil Code Act No. 89/2012 Coll.]. The fatherhood is more complicated and is more connected with the genetic connection with the child. The fatherhood is always a matter of the presumption. That is what matters in case of the assumption of the fatherhood. In case of motherhood there is no way to deny a baby by a woman who gave birth to him just for no genetic connection to the baby. The Czech law stands for this premise since the modern Czech law became into efficiency.

If the intended couple is diagnosed as fertile and needs to use the surrogate services there has to be some arrangement set up. Firts the intended couple must find the right woman. It is so hard to imagine the intended couple will satisfy just any woman willing to carry a baby. There is no doubt the woman must meet some expectations of the intended couple. At least it would be good health and some predisposition to carry a baby.

If such a woman does have a child of her own it might be a positive circumstance. Assumption is that this woman will keep the agreement and pass the parental rights according to the word that was given at the very beginning. If the surrogate is married there would be her husband considered the father of the baby. Therefore married woman is not a right choice to be surrogate in the Czech law framework. Even though it cannot be eliminated that this woman will get marry after being pregnant. If husband of the surrogate is considered to be father of the baby that is born, it is very difficult to pass the parental rights to another couple. Much easier situation is if there is a single woman as a surrogate and she makes the declaration of the fatherhood with the man from the intended couple. Such a declaration keeps the intended couple close to the baby and the full motherhood

[23] See more ŠÁMAL, P. a kol. *Trestní zákoník II. Zvláštní část. § 140–421*. 2. vyd. Praha: C. H. Beck, 2012, p. 1703.

is passed to the woman from the intended couple after baby is born. The surrogate gives up her mother rights and agrees the wife of baby's father will adopt the baby. Also it is very important the intended couple remains married. If this condition is not acomplished there is no way how to adopt the baby by the woman from the intended couple.

Short time ago the Supreme Court of the Czech Republic in the Judgement Pl. US 10/15 rejected petition of one of its chambers proposing declaration of unconstitutionality of one of the provisions of the former Family Act. This provision now is the part of the New Civil Code (par. 833). According to the Czech law adoption of the child by a partner of the parent is allowed only if they are married. The adoption result (according to the par. 833 of the New Civil Code) is the loss of the family connection between the child and its former parent. The Constitutional Court held the provision does not violate the Charter of Fundamental Rights and Freedoms nor the Convention. The reason for only married couple to have the privilage to adopt is the stability of the marriage. The Supreme Court yet use the statistic data about the marriage although there is no statistic data about cohabitation couples to be compared with. The Supreme Court then stated there is more in the interest of the children. In case of divorce the court needs to decide on the child's custody, its support and alimony.

As described above the Czech law on surrogacy is missing. Intended couples and also surrogates are acting in the grey zone and face the threat of the breaking the law on the criminal bases. So Czech law is not challenching some special topics on surrogacy. It is challenging some huge case to go public after the weak arrangement between the intended couple and the surrogate will break down.

SUMMARY

This article contains the general information about surrogacy as a special societal issue. The main goal was describing legislation concerning surrogacy in the United Kingdom and the Czech Republic. As it is impossible to compare two very different legal systems. It is also impossible to make any conclusion on each surrogacy legislation. And the aim of this article was not only comparison of law on surrogacy in two countries. The goal that was reached was describing how two countries with different legislation and law system deals with such an issue concerning the wealth and the best interest of the child.

First thing to be point out is the timeline. In the United Kingdom there is the public discussion on surrogacy on for over thirty years. In the Czech Republic there is no public discussion going on at all. From time to time some media makes a short report on surrogacy and it usually does not start any societal discussion.[24] That means the legislator is not pushed into any decision about surrogacy for no request coming from the voters. And the

[24] Surrogate mothers gave birth to dozens children even at us. On-line magazine Denik pravo & Seznam.cz [online]. [Cit. 2013-18-04]. Available at: http://www.novinky.cz/zena/vztahy-a-sex/205714-nahradni-matky-porodily-uz-i-u-nas-desitky-deti.html or The end of tabu. Hundreds of children in Czech Republic were born to surrogate mothers. The oldest child is already 21. Lidovky.cz [online]. [Cit. 2014-22-07]. Available at:http://relax.lidovky.cz/ja-nahradni-matka-0e2-/zdravi.aspx?c=A140721_204119_ln-zdravi_jzl or Disabled surrogate woman gave birth to a disabled child. Nobody wants the child, that ended at institutional care. Blesk on-line. [Cit. 2015-12-08]. Dostupné z: http://www.blesk.cz/clanek/zpravy-krimi/336468/postizena-nahradni-matka-porodila-nemocne-dite-nikdo-ho-nechce-skoncilo-v-ustavu.html.

history on this is so clear. If the problem is not publicly discussed there is no need to change the existing law. This may be the only parallel to the United Kingdom where the public indignation made the legislator to include the issue into the special report on assisted reproduction and its consequences.

Even though there is no special law that would cover the legal issues on surrogacy in the Czech Republic, there are other adjustments that are in fact the bounds for the correct behavior of the man. Therefore it could not be correct to pronounce the Czech law does not concern the surrogacy at all. Also that is one of the problems because the addressees should know their rights and obligations as well as the correct behavior. And no special legislation makes so thin border of the correct behavior.

In the United Kingdom the legislation on surrogacy is still discussing. There is big amount of surrogacy cases and the surrogates are trying themselves to make the legislators to change the law. The goal is to protect the children and the surrogates. It also should be clear who is given the parental rights including all the profits that are given to any other parent in the United Kingdom. Even though the surrogacy is very delicate, the law in the United Kingdom is not ignoring the real life problems that are the consequences of the surrogacy.

In the contrary the Czech law is missing the engine to be changed. There may be an accepted assumption there is no need of the special legislature on the surrogacy because this is happening only between relatives. The real grey zone where the intended couples are seeking for the surrogate is simply ignored. Real cases are not public. Nor the surrogate or the intended couples are willing to describe their problems on public. Mainly because there is the danger of the prosecution. The very thin line between the legal and illegal behavior in the real life makes the problem on surrogacy more actual. If the number of fertile couples is increasing, the more cases on surrogacy will occur in the Czech Republic.

At the very end it should be summarized that the law must be flexible in any modern country. By that means the law must run with the progress and be able to respond the needs of the citizens coming from the real life. In the UK there are still some issues to be questioned and regulated by the law. Even though there is a special law for surrogacy placed for so many years. The Czech Republic is missing the proper regulation even though there is legal to provide fertile couples with such a treatment using the surrogate. The law on surrogacy in both countries has to be changed and has to be adjust to correspond the real needs of its citizens.

NEUROMARKETING FROM A LEGAL PERSPECTIVE[1]

Alžběta Krausová[*]

Abstract: *Neuromarketing utilizes modern techniques of monitoring brain functioning in order to design efficient advertising contents. Due to its capacity to interfere with and to influence decision process of customers, neuromarketing is regarded as highly controversial. The article examines possible manners of protection of individuals from the perspective of personal autonomy and privacy protection. It analyzes possibilities of challenging validity of legal transactions made under influence of neuromarketing based advertising as well as applicability of unfair practices in advertising. The paper also claims that the current personal data protection legislation is not applicable. Privacy of mind is described in terms of privacy of contents and privacy of processes. Mental processes are considered as crucial for creating contents of mind as well as for an individual approach to own privacy. The article concludes that the current regulation of unfair practices as well as the regulation of privacy do not provide an appropriate level of protection and that general clauses should be complemented with specific provision on inadmissible practices in advertising.*

Keywords: *autonomy, biometric data, consumer protection, data protection, marketing, media law, neuromarketing, neurolaw, privacy, second generation biometrics*

1. INTRODUCTION

The modern society is driven by profit and, therefore, develops new techniques in order to sell more goods as well as services. In order to achieve higher effectiveness in sales, companies employ specialized researchers examining an impact of various marketing strategies as well as particular advertisements on test subjects and later evaluate efficiency of their influence on a need of test subjects to choose a particular product over the others. Within the field of a marketing science, marketers started to utilize the knowledge produced based on monitoring of brain functioning. This trend is called "neuromarketing".

Neuromarketing uses various monitoring techniques that either measure blood flow or electric activity in brain (for instance fMRI – functional magnetic resonance, QEEG – qualified electroencephalography, SST – steady-state topography) or techniques that indicate psychological or physiological arousal and changes in emotional responses of test subjects (for instance eye-tracking, galvanic skin response or facial coding).[2] With help of these techniques, test subjects are measured in order to establish what reaction a particular advertisement triggers. For instance, an emotional reaction or engagement have been proved as an efficient tool for either provoking irrational consumer behavior or for creating a memory that can later help with unconscious selection of an advertised product.

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[2] VOORHEES, T. Jr., SPIEGEL, D. L., COOPER, D. *Neuromarketing: Legal and Policy Issues. A Covington White Paper* [online]. 2011 [2016-06-15]. Available from: <https://www.cov.com/files/upload/White_Paper_Neuromarketing_Legal_and_Policy_Issues.pdf >.

From a social and legal point of view, such techniques of influencing people's brains are, however, quite controversial. Advocates of neuromarketing proclaim that the aim of neuromarketing is to understand clients and, therefore, serve them better.[3] Some authors also claim that knowledge published in books on neuromarketing actually helps customers to understand own decision-making patterns and subsequently allows them to understand whether they are being manipulated or simply influenced *"for their own benefit"*.[4] Professional literature mentions that the current effectiveness of persuasion techniques based on neuroscientific knowledge cannot lead to manipulation of consumer behavior.[5] At the same time, neuromarketing is envisioned as a great means for optimizing advertising messages in order for their content to influence a so called reptilian part of a human brain that *"makes us extremely selfish and drives our strong preference for mental shortcuts over strong deliberations"*.[6] Opponents of neuromarketing understand using such techniques as an *"effort to influence consumer decision-making at an unconscious level. In this regard, the techniques will inevitably be criticized as a tool for overriding or circumventing rational consumer choice by using powerful stimuli to provoke emotional responses to products."*[7]

Both positive and negative criticism of neuromarketing draw attention to a very important social concept of personal autonomy. Personal autonomy refers to the capacity of an individual to decide about own actions and, among others, to make an autonomous choice. Compared to traditional methods of market research neuromarketing research methods have a greater potential to limit personal autonomy. Traditional methods of market research usually involve filling in a questionnaire by a test subject who is in fact limited only by their own sense of morality and free to decide whether to tell the truth or to deceive when being questioned. Moreover, a test subject can also decide unconsciously about not disclosing some information. Neuromarketing methods, on the other hand, circumvent the subject's decision process regarding the contents of information to be provided by monitoring real bodily reactions to certain stimuli and by interpreting these reactions independently with help of neuroscience. By doing so, these research methods can also potentially interfere with the right to privacy and with the existing data protection legislation.

Consequently, neuromarketing research methods need to be examined from two legal points of view: a) protection of personal autonomy, and b) protection of privacy. The following chapters shall provide an overview of the relevant Czech legislation related to the problem of neuromarketing in the above mentioned contexts and shall also evaluate several strategies that natural persons could use for protection of their interests.

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[3] DOOLEY, R. *Brainfluence. 100 Ways to Persuade and Convince Consumers with Neuromarketing*. Hoboken: Wiley, 2012.

[4] RENVOISÉ, P., MORIN, CH. *Neuromarketing. Understanding the "Buy Buttons" in Your Customers Brain*. Nashville: Thomas Nelson, 2007, p. 10.

[5] MURPHY, E., ILLES, J., REINER, P. B. Neuroethics of Neuromarketing. *Journal of Consumer Behavior*. 2008, No. 7, pp. 293–302.

[6] MORIN, CH. Neuromarketing: The New Science of Consumer Behavior. *Society*. 2011, Vol. 48, No. 2, pp. 131–135.

[7] VOORHEES, T. Jr., SPIEGEL, D. L., COOPER, D. *Neuromarketing: Legal and Policy Issues. A Covington White Paper* [online]. 2011 [2016-06-15]. Available from: <https://www.cov.com/files/upload/White_Paper_Neuromarketing_Legal_and_Policy_Issues.pdf >.

2. PERSONAL AUTONOMY IN THE CONTEXT OF THE CZECH PRIVATE LAW

Personal autonomy is a broad and flexible concept whose meaning depends on a social context in which it is used. In general, two models of personal autonomy have been identified: a model of authenticity and a model of liberty. According to the model of authenticity *"an autonomous person is a being who has his life in his own hands, acts rationally, consistently and independently and is motivated by proper values and norms: he is able to control situations and to resist external power and hidden persuaders."*[8] According to the model of liberty, on the other hand, *"persons are supposed to be autonomous and this imposes a prima facie requirement that we should not control the choices and actions of others, except when they harm others."*[9] As opposed to the model of liberty, the model of authenticity is more of a protective model that aims to provide safeguards to individuals whose autonomy in making decisions could be endangered for instance by their own irrational behavior or a weak position in legal relationships. Traditionally, the model of authenticity is used by European countries with the tradition of civil law rather than by those with the tradition of common law.

Within the context of the Czech law, personal autonomy is defined in the Charter of Fundamental Rights and Freedoms[10] in Article 2, par. 3. According to this Article *"everyone may do that which is not prohibited by law; and nobody may be compelled to do that which is not imposed upon her by law*". In the sphere of private law this principle has been defined in terms of autonomy of will and embodied into laws as a freedom of contract (or also as a freedom of legal transaction). The new Czech Civil Code of 2012[11] that has completely reformed the system of private law in the Czech Republic emphasizes the autonomy of will as its leading principle. Protecting the autonomy of will is considered as a necessary condition for ensuring the liberty to develop private life of an individual.[12] The autonomy of will is defined in § 1, par. 2 of the Civil Code as a right of persons to negotiate mutual rights and obligations notwithstanding the provisions of the Civil Code unless the Civil Code prohibits so specifically. The Civil Code prohibits contractual provisions that violate good manners, public order or rights related to personal status including rights to personal protection and privacy.

The interesting question that raises in this regard in the context of neuromarketing is to what extent the private law protects the autonomy of will of a potential buyer of products advertised with help of knowledge gained from neuromarketing research.

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[8] RAES, K. Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern. In: ALLDRIDGE, P., BRANTS, CH. (eds.). *Personal Autonomy, the Private Sphere and the Criminal Law. A Comparative Study*. Portland: Hart Publishing, 2001, p. 26.

[9] Ibid.

[10] Resolution of the Presidium of the Czech National Council of 16 December 1992 on the declaration of the CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOMS as a part of the constitutional order of the Czech Republic. Available online in English at: <http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/prilohy/Listina_English_version.pdf >.

[11] Act of 3 February 2012 No. 89/2012 of the Collection of Laws, Civil Code.

[12] Explanatory Memorandum to the Act No. 89/2012 of the Collection of Laws, Civil Code.

As already mentioned above, it is the aim of neuromarketing to create commercials that would appeal to basic human instincts and emotions as opposed to human intellect. However, the Civil Code protects one's own will especially with regard to their intellect. The Civil Code states that one could expect from any natural person who has a full capacity to make legal acts *"to have intellect of an average person and an ability to use it with ordinary care and diligence."*[13] From this perspective it may seem that despite promoting autonomy of will the law does not provide enough means to protect it against efficient techniques manipulating with basic instincts and emotions of a person.

On the other hand, one must take in account the full notion of personal autonomy which, apart from the right to act autonomously, also entails the obligation to act autonomously and be diligent. Although neuromarketing techniques may be considered as more efficient than other marketing techniques, it would be devastating for the whole society to see an average person as someone who is unable to manage their emotions and basic instincts when facing a possibly manipulative advertisement.

Moreover, the purpose of private law is not to act in a patronizing manner but to allow persons to be active in making legal transactions and to take care of their own matters as they please compliant with an old principle of Roman law *"vigilantibus iura scripta sunt"*. In this regard, the negligence to assess an advertisement in a rational manner represents a choice of an individual as well. Its consequences then need to be respected. However, in context of marketing, the protection of autonomy of will is also regulated by specific provisions of public law that aim to protect consumers against unfair practices, such as misleading or aggressive commercial practices.

3. PROTECTION OF AUTONOMOUS WILL IN THE CONTEXT OF NEUROMARKETING ADVERTISEMENT

In case a natural person would feel their will was manipulated by a neuromarketing advertisement, there are several strategies that such a person could use for their protection. The first strategy relates to challenging validity of a particular legal transaction with regard to the missing or mistaken will of a person. The second strategy utilizes provisions of public law related to unfair practice in advertising.

3.1 Challenging Validity of a Legal Transaction

In general, validity of a legal transaction depends on fulfilling certain requirements on a quality of a legal act. A legal act is defined in § 545 of the Civil Code and refers to an expression of will that aims to cause specific legal consequences. Will in this sense, is understood as *"an inner psychological relationship of an acting person to the intended legal consequence"*.[14] According to § 551 of the Civil Code an act of a person cannot be considered as a legal act if will of a person to cause legal consequences is missing. The Czech doctrine specifies that will of an acting person is missing if the person formally performs

[13] See Article 4, par. 1 of the Civil Code.
[14] LAVICKÝ, P. et al. *Občanský zákoník I. Obecná část (§ 1–654). Komentář*. Praha: C. H. Beck, 2014. p. 1967.

an act without intending to do so, such as in the case of reflex movements, talking from sleep or when exposed to physical violence.[15] Law does not recognize legal consequences of such acts.

As opposed to missing will, the Czech legal doctrine also recognizes a situation in which will of a person has been deformed either by a mistake (§ 583 of the Civil Code) or by a threat of either physical or mental violence (§ 587 of the Civil Code). In these cases, an acting person whose will has been deformed can challenge validity of the respective legal transaction.

It is questionable whether either the objection of missing will or the objection of deformed will would be successful in challenging validity of a performed legal transaction. As an example, one can imagine a consumer who is exposed to an advertisement created based on neuroscientific knowledge which appeals to consumer's unconscious desires that she would never admit. The consumer buys the advertised product and later on she finds out that the advertisement was based on neuromarketing knowledge and might have influenced her decision process. Could she object that the transaction was made involuntarily?

From a legal perspective, the objection of missing will would be very hard to prove. The aim of neuromarketing is to persuade consumers in a more efficient way and, therefore, help them to make up their mind to buy products or services. If the will to buy is strong and long-lasting, the better for the producer as their return on investment in advertising becomes higher. Although neuromarketing techniques may compel a consumer to buy a product because specific emotions are triggered, the will itself has been formed and exercised. Whether it has been deformed is another case.

Deforming somebody's will is a concept that requires a closer inspection. Deforming somebody's will must be strictly distinguished from persuading someone to do something. Persuasion, arguments and advertisements are a common part of social life. People share their opinions, try to promote them and find support of others. In this sense many persuasion techniques are being used, including rational arguments and manipulation with feelings. However, any average person exposed to persuasion usually has a chance to mentally process pros and cons of a possible decision and form her will accordingly to her values and goals. Persuasion is an inevitable part of life and in fact stimulates the decision process.

Deformation of will, on the other hand, happens in situations when someone manipulates a decision process of a person by providing false information, not providing certain information on purpose or by presenting very negative consequences for that person if she would not form her will in accordance with what has been suggested to her. These situations are characteristic with a high degree of vulnerability of a person who is forced to use limited resources when making a decision. Her ability to make a conscious decision is controlled. A similar situation happens if a person is exposed to an efficient technique that by using an appropriate symbol triggers an affective rather than cognitive response. In that case a person is often unable to use all mental resources to form their will freely. Professional literature states that *"*[*e*]*ven if consumers are made aware of the affective re-*

[15] Ibid.

sponse, it is very difficult for them to override the affective influence with cognitive reasoning. The authors speculate that cognitive processes may not be able to finalize a decision without a "go/no go" message from an affective function of the brain."[16]

Triggering a mental process that circumvents conscious mind and prevents a person to form their will with utilizing their intellectual capacity needs to be in this sense considered as deforming one's own will. However, since a person is neither mistaken (provided with false or misleading information) nor threatened with violence, she cannot invoke either of the two provisions of the Civil Code (§ 583 and § 587) and object invalidity of a transaction. The only objection such a person can make is to claim that the content of the respective legal transaction contravenes both the law as well as good manners and, therefore, the transaction must be considered invalid.

Limiting autonomy of will by its deforming definitely violates the fundamental principle of the Civil Code as well as the notion of good manners in the society. However, ultimately it will be the courts that will decide how the problem of neuromarketing should be approached in the future. The courts will most likely do so based on expert opinions on various techniques in individual cases.

3.2 Unfair Practice in Advertising

Neuromarketing and marketing in general are activities associated with advertising. Marketing, however, needs to be understood in a broader sense than simple advertising which, in fact, represents only the result of a marketing process. Marketing involves many activities such as market research, creating a product, testing its popularity, finding out preferences of clients, determining the right pricing scheme, defining strategies of promoting a product as well as creating an efficient advertisement.

As opposed to marketing, advertising is strongly regulated by means of public law. In the Czech Republic, all advertisements need to comply with the Act of 9 February 1995 No. 40/1995 of the Collection of Laws, on Regulation of Advertising, as amended (herein after only Act on Regulation of Advertising).

According to § 1 par. 2 *"advertising means announcement, demonstration or other presentation disseminated particularly with communication media that aims at promoting entrepreneurial activity, and in particular supports the consumption or sale of goods, construction, lease or sale of property, sale or use of rights or obligations, supports the provision of services or promotion of a trademark, unless stated otherwise*".

Unfair commercial practice in advertising is prohibited in § 2 par. 1 letter b) of this Act. Ordering someone to create an unfair advertisement, delivering an unfair advertisement as well as its dissemination is punishable according to § 8a of the Act on Regulation of Advertising as an administrative offence with fine up to 5.000.000 CZK.

The definition of what is understood as unfair commercial practice can be found in the Act of 16 December 1992 No. 634/1992 of the Collection of Laws, on Consumer Protection, as amended (hereinafter Act on Consumer Protection).

[16] WILSON, R. M., GAINES, J., HILL, R. P. Neuromarketing and Consumer Free Will. *The Journal of Consumer Affairs*. 2008, Vol. 42, No. 3, pp. 389–410.

According to § 4, par. 1 of the Act on Consumer Protection *"a commercial practice is unfair if it is contrary to the requirements of professional diligence and substantially distorts or is able to substantially distort economic behavior of consumers to whom it is addressed or who are exposed to influence of this practice, in relation to a product or a service."* Professional diligence in this sense refers, among others, to fairness and general principles of good faith of consumers (§ 2 par. 1 letter p) of the same Act).

A key term with regard to advertisements based on neuromarketing is the "*ability to distort economic behavior of consumers*". In case of a dispute over the ability of an advertisement to distort economic behavior, the accused person needs to prove that the respective advertisement does not have such ability. At the same time, law requires from an average consumer to stay reasonably alert and cautious.[17]

The criterion for deciding about lawfulness or unlawfulness of an advertisement based on neuromarketing is its potential to distort behavior, not the ability to influence a decision process of a consumer. Former version of the Act on Consumer Protection that was in force until 27 December 2015 stated in § 4 par. 1 that *"a commercial practice is unfair if acting of an entrepreneur towards a consumer is contrary to the requirements of professional diligence and is able to substantially influence decision process of a consumer so the consumer can make a commercial decision that they would not otherwise make."*

Since 28 December 2015 it has been more difficult to classify certain practices as unfair and, therefore, prohibited. Ability to substantially influence a decision process can be understood as an easier condition to fulfill as a decision process is internal, hidden and much more questionable compared to objectively perceivable behavior of a person. Nevertheless, the border between these two concepts is not crystal clear and can be challenged.

Unlawfulness of a certain advertisement then depends on effects that neuromarketing techniques would have on consumer's behavior. These effect can, however, vary greatly. Therefore, each case will need to be assessed individually. Again, as in case of objecting validity of legal transaction made under influence of neuromarketing techniques, the courts will need to request expert opinions to evaluate possible effects. Right now, any specific results of such cases cannot be predicted. However, one can presume that given the rapid developments in this field and growing utilization of neuromarketing techniques a legislator will need to react soon and set up rules that would ensure efficient protection of consumers.

4. NEUROMARKETING AND PRIVACY PROTECTION

Neuromarketing practices are based on processing of data collected from research subjects based on monitoring their brain functioning. The data refers to specific neurological processes and is unique to individuals. As such it fulfills the definition of biometric data.

In the context of European law, biometric data was originally defined by Article 29 Working Party *"as biological properties, physiological characteristics, living traits or repeatable*

[17] See Explanatory Memorandum to the Act of 9 December 2015 No. 378/2015 of the Collection of Laws on Amendment of the Act No. 634/1992 of the Collection of Laws on Consumer Protection, as amended.

actions where those features and/or actions are both unique to that individual and measurable, even if the patterns used in practice to technically measure them involve a certain degree of probability"[18]

Biometric data is deemed to be special and different from other types of personal data due to its specific nature allowing unique identification of individuals.[19] This data has a character of an identifier which represents information itself as well as an identifying element linking the information with a particular individual.[20] From the privacy point of view information value of biometric data implies higher vulnerability of subjects to whom the biometric data pertains.

In the context of neuromarketing, biometric data collected from research subjects are analyzed in order to derive general principles of brain functioning that can be later used for designing an efficient advertisement. For instance, based on brain monitoring of test subjects, researchers were able to establish that if a brand refers to cultural meanings, memory of a person is activated and this person, therefore, tends to make a biased decision with regard to those relevant cultural meanings.[21]

Personal data protection legislation, however, protects only data that refer to a particular identified or identifiable person. Research test subjects usually need to provide explicit consent with monitoring their brain. On the other hand, privacy in the terms of processing biometric data of customers is not violated when people are exposed to techniques of influencing mental processes based on generalized principles. From this point of view there appears to be no problem. However, as the relevant legislation was not adopted taking in account advances in mental imaging, its application may result in negative consequences in the society.

The notion of privacy has been defined in many ways, while the most famous definition refers to privacy as to "the right to be alone". Generally speaking, one can consider right to privacy as the right to be protected against unlawful intrusion in own personal space, be it person's house, communication, body or mind. In terms of mind, privacy should be examined on two levels – privacy of contents (stored memories, formed attitudes and decisions) and privacy of processes (thinking, remembering, etc.).

Such as the society protects privacy of a household by prohibiting others to inspect what a person owns (privacy of contents) or what she does behind the walls of her house (privacy of process), this notion should be extended also to mind. However, more than anywhere else, in the mind, its contents depend strongly (if not completely) on mental processes. Therefore, if we accept a premise that human brains function the same way, the knowledge of mental processes and ways of their influencing and modification represents the key to the mechanism

[18] Article 29 Data Protection Working Party. Opinion 4/2007 on the concept of personal data. 01248/07/EN. WP 136. *European Commission* [online]. 20 June 2007 [2016-06-15]. Available at: <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf>.

[19] Article 29 Data Protection Working Party. Working document on biometrics. 12168/02/EN. WP 80. *European Commission* [online]. 1 August 2003 [2016-06-15]. Available at: <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2003/wp80_en.pdf>.

[20] Article 29 Data Protection Working Party. Opinion 4/2007 on the concept of personal data. 01248/07/EN. WP 136. *European Commission* [online]. 20 June 2007 [2016-06-15]. Available at: <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf>.

[21] MATTHEWS, S. Neuromarketing: What Is It and Is It a Threat to Privacy? In: CLAUSEN, J., LEVY, N. (eds.). *Handbook of Neuroethics*. Dordrecht: Springer, 2015.

that, in fact, defines not only mental privacy of a person, but other forms of privacy as well. As privacy is a concept that presupposes control of a person over what she wishes to keep secret and what to reveal in public, influencing mental processes of a person may also result in changing her understanding of what she needs to keep private.

Concerns about utilization of knowledge related to mental processes have been expressed already by many prominent scholars.[22] Unfortunately, absence of legislation providing clear guidelines for processing mental biometric data does not allow for efficient privacy protection. Unfortunately, the very nature of neuromarketing research currently renders privacy claims inapplicable.

5. CONCLUSION

Neuromarketing is one of the emerging fields that give rise to completely new problems in the society. These problems help us to explore and redefine existing concepts of social organization and recognized values. A possibility to efficiently influence people's behavior through knowledge of their brain functioning opens the door to previously sacred space of mind. Neuromarketing techniques are designed to influence mental processes that, in fact, themselves define contents of mind as well as individual notions of privacy. However, although neuromarketing techniques in reality interfere with privacy of a person, the existing data protection legislation cannot be utilized for individual's protection against interference with privacy based on generalized principles. The only manner in which a person can claim her rights is by referring to the fundamental right of privacy that is formulated in a general manner and is subject to interpretation. Moreover, with respect to protection against neuromarketing techniques, one can also refer to provisions related to protection of autonomous will that are set out either in the Civil Code or in the Act on Regulation of Advertising. Predicting results of such claims at court is nearly impossible. However, courts should clearly express preference for protection of individual autonomy and privacy rather than economic interests of business companies.

The reason for preference of individual's protection of autonomous will and privacy over interests of business companies lies in the increasing body of knowledge related to brain functioning and a fast pace of developments of analytical methods. Business companies have strong economic interests and highly efficient tools on how to achieve their goals compared to individuals who have not yet had a chance to learn appropriate strategies on how to react to new challenges. The law needs to recognize this need as well as the asymmetry in the business to consumer relationship. For instance, subliminal advertising is one of methods that can efficiently influence person's decision process on a subconscious level without being perceived by this person. As such, this practice had been prohibited in the Czech law until 16 August 2015. Unfortunately, this specific provision was left out of the Act on Regulation of Advertising as the Czech legislators deemed that this provision does not comply with the European Directive 2005/29/EC; so called "Unfair Commercial Practices Directive". In the future, the law should return to specification of

[22] The Committee on Science and Law. Are Your Thoughts Your Own?: "Neuroprivacy" and the Legal Implications of Brain Imaging. *Record of the Association of the Bar of the City of New York*. 2005, Vol. 60, No. 2, pp. 407–437.

methods that circumvent conscious mind and set up clear borders and guidelines on how to determine which practices are allowed and which are prohibited. This will certainly contribute to higher legal certainty and, therefore, not only to the protection of individuals but also to protection of business companies' interests in safe investments into marketing. The same specification should be done in the area of privacy protection as the relationship between generalized principles on brain functioning and individual brain functioning are strongly correlated.

TAKING HUMAN LIVES IN EXTREME SITUATIONS OF TERRORIST ATTACKS AND THE DEFENCE OF NECESSITY[1]

Petra Zaoralová*

Abstract: *The paper focuses on the issue of weighing human lives with a criminal law perspective. It addresses the criminal defence of necessity and its relationship to the most serious crimes of intentional killing occurring in emergency situations. Under extreme conditions, such as terrorist attacks, individuals are often forced to act under great fear and may therefore act differently than usual in order to protect the lives of themselves and others.*

The purpose of this paper is to provide the legal background on acting under the defence of necessity when human lives are weighed against each other, from the perspectives of Czech, German, French, and English Law.

Keywords: *necessity, murder, criminal defences, terrorism*

INTRODUCTION

The events of 11th September 2001, the January 2015 terrorist attacks at the headquarters of the satirical magazine Charlie Hebdo, the November 2015 bombings in Paris, as well as other terrorist attacks during the summer of 2016, starting with the killings in Nice, France on 14th July and several attacks in Germany – all of these events show that the issue of terrorism has reached a new dimension and has become a worldwide phenomenon.

In the last decade, the concept of terrorism has changed significantly.[2] This is seen not only in the fact that "new terrorism" does not respect state borders and has gained a transnational character, but also that the methods employed in terrorist attacks have changed in time. Taking into account the rate of such events, one can only accept the fact that similar tragic events are able to occur at any time and in any place. Consequently, the need for adequate and effective legal tools for combating these new phenomena has naturally increased.

After 11th September 2001, on which three hijacked planes were flown into the World Trade Centre and the Pentagon, causing a terrible loss of human life, the question of how governments should deal with such scenarios if they occur in the future has arisen, and whether or not the hijacked planes should have been shot down has been raised and seriously elaborated on in several documents.[3]

Since this time, many states have increased their efforts to enact laws regulating procedure in similar tragic situations in the future. Many newly adopted laws, however, do

[1] Financing and support of this paper was provided by the PROGRES Q02 project.

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[2] See. RAPOPORT, D. C. Four Waves or Rebel Terror and September 11. Antropoethics. *Journal of Generative Antropology*. 2002, Vol. 8, No. 1. MAGUIRE, M., MORGAN, R., REINER, R. *The Oxford handbook of criminology*. 5th ed. Oxford: Oxford University Press, 2012, pp. 771–782.

[3] BOHLANDER, M. In Extremis – Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law. *The Criminal Law Review*. 2006, p. 589.

not go beyond general issues of national security which broadly proclaim the importance of combating terrorism.[4] Despite the undoubtable importance of implementing guidelines for state responses in such scenarios, particular laws which would cover these situations have only been adopted in a few states.[5] The reason that governments have shown a rather lenient attitude may lie in the nature of the values in question being set. The legal situation is very problematic, as it touches upon a value of the highest importance which is very difficult to handle - the right to life.

This paper will present how the legislation of various states has responded to such extreme situations in which the value of human life has to be considered. The purpose of this paper is not to investigate relevant national provisions authorising the military or other agencies to defend airspace and state territory, but rather deals with the question of whether emergency actions in which human lives are to be sacrificed can be legally justified.

BASIC PRINCIPLES

Consider the following case:

Terrorists hijack an aircraft with 300 passengers on board with the intent to fly it into a shopping mall in the centre of a highly-populated European capital city. There is no time left for the police to initiate an evacuation of 5000 customers currently inside the building. In the event that the course of the aircraft is not diverted, it will crash into the mall, resulting in the deaths of at least 5000 people inside the building, and the potential loss of human life on the ground in close proximity to the area is even higher. The aircraft has been registered at a distance and its course provides only several minutes for national authorities to decide on armed interception of the out-of-control aircraft. A very difficult question lies before the authorities responsible: should the aircraft be shot down, causing the death of all passengers and crew members on board but saving more then 5000 people on the ground?

This hypothetical case has given rise to a balancing exercise between two protected values resulting in the taking of human life and implies a question of grand importance – is it justifiable to kill an innocent person when it is the only way to prevent many innocent people from dying? Finding an answer is not easy, as this dilemma goes beyond normative systems of law and touches on a perspective of morality in which answers to difficult cases can be found. The moral underpinnings of this uneasy decision to be made by national authorities lies in the situation of a moral dilemma called the "Trolley Prob-

[4] See the "USA Patriot Act" no. 107–56, 107th Congress from 26th October 2001 which was adopted immediately after "11/9" attacks or the French law of July 2015 often called "French Patriot Act" which allowed security forces to monitor emails and phone calls of Muslims without court authorization or the immediate reaction of French President Francois Hollande to November terrorist attacks in Paris by declaring a state of emergency in France – see also Goetz, D.: État d'urgence: l'impact de la loi sur le droit pénal, Dalloz actualité 26 juillet 2016 – available online at Dalloz.fr – [accessed 20. 9. 2016].

[5] See for example § 4 c Act No. 11/ 2006 Coll. which amended § 4 c of the Act No. 321/2002 Coll., on Armed Forces of the Slovak Republic and Act No. 143/1998 Coll., on Civil Aviation, or § 14 paragraph 3 of The Aviation Security Act in Germany – Gesetz zur Neuregelung von Luftsicherheitsaufgaben vom 11. 1. 2005, BGBI, Teil I, G 5702.

lem." This was conceived by Philippa Foot, a British professor of philosophy, in her essays on the moral philosophy of abortion, in which she put forward the example of a cave that is flooding, with one person stuck in the only exit, asking if other people stuck in the cave may kill him with dynamite in order to save their own lives.[6] In such hard cases, two solutions are possible. The first relies on utilitarian "lesser of two evils" choice which would justify killing on the grounds that it is better for some people to survive rather than for all of them to die. One may argue that such weighing of human lives is not possible, because even if more human lives are saved, the weighing up of human lives would deny the nature of human beings endowed with human dignity, as it would turn them into objects of "cold profits vs. loss balancing." The situation becomes more complicated, however, if the person to be sacrificed is not a part of the situation up until that point. What if the only solution to save all of the people in the cave would be to blow up a different part of the cave causing the death of the rescue workers trying to clear the main entrance to the cave and do not have enough time to evacuate?

These examples show that the answer to the question of whether or not it is morally permissible to sacrifice a few people to save more may be dealt with differently from the perspective of morality. Despite the fact that there is no doubt that the law should be more clear, the question of whether the people who performed the act itself of sacrificing one life in order to save more should be criminally responsible for murder is not sufficiently regulated. In those cases, acts of individuals who were saving their own or other peoples' lives may be justified by criminal defences. The laws of particular European states offer various legislative solutions, but many of them, however, have not succeeded in regulating a similar situation explicitly in their law, which leaves this question up to the interpretation of the courts.

THE CZECH REPUBLIC

In the Czech legal system, an infringement on the right to life is regulated on the constitutional level in the Charter of Fundamental Rights and Freedoms[7]. Article 6, in its first and second paragraphs, declares that *"every person has the right to life"* and that *"no one shall be deprived of this right."* At the same time, it sets forth exceptions to this rule in paragraph 4: *"deprivation of life based on an act not punishable by law shall not be considered to be a breach of this article."* This constitutional principle has been implemented in the current Czech law, particularly in Act No. 40/2009 Coll., the Criminal Code ("Criminal Code") in provisions relating to criminal defences (§ 28 – 32 of the Criminal Code).

In the event of the scenarios described in the introductory part of this paper, the most general criminal defence should apply – the defence of necessity (§ 28 of the Criminal

[6] See reprinted FOOT, P. *Virtues and Vices and other essays in moral philosophy*. Berkley and Los Angeles: University of California Press, 1978. From recent literature regarding the Trolley Problem see e.g. KAMM, F. M. *The Trolley Problem Mysteries*. Oxford: Oxford University Press, 2016.

[7] Resolution of Czech National Council no. 2 from 16th December 1992 on promulgation of the Bill of Rights into the Constitution as a part of the constitutional order of the Czech Republic (No. 2/1993 Coll.).

Code). Such extreme situations in which third parties are engaged in dangerous acts are covered not by self-defence,[8] but rather are an inherent feature of the defence of necessity, despite the danger emanating from an aggressor. The defence of necessity is based on a balancing exercise of two legally protected values in which the endangered person may be saved only by sacrificing the other. To be excused under this defence, the person acting in a state of necessity does not need to face an imminent threat to himself, but rather it is enough that said person only provides aid to other individuals found in a dangerous situation.[9] Moreover, it is accepted by the law that third parties would suffer harm resulting from defensive action. Therefore, it does not need to be the aggressor whose rights and interest are interfered with, but also any other innocent people. This statutory principle would be unthinkable to accept unless very clear and adequate legal boundaries of what harm inflicted on innocent persons in the course of defensive action might be are stipulated by law.

The question of the limit of harm allowed to be caused to third parties relies on the Czech criminal law's test of proportionality. The balancing exercise is based on weighing up possible harms. The condition of proportionality of the defence of necessity excludes from justification such acts which result in *"apparently same or even greater harm than avoided."*[10]. The term "apparently" was incorporated due to concerns of too narrow an interpretation of the conditions of the defence of necessity, enabling courts to flexibly interpret the legal conditions of necessity in order to respond to the distinct circumstances of each case.

Acting in a state of necessity must be assessed not only on an objective level, but the subjective state of mind of a perpetrator should also be taken into account,[11] and in this assessment, the hierarchy of values and interests in question (e.g. life, physical integrity, property, etc.) presents very important criteria. This should be interpreted in a way that the person acting under the defence of necessity may not be aware of the harmful result being of the same or even greater value then the harm avoided.[12] The law, however, does not clearly answer the question of whether this rule is applicable to the situation in which the most supreme values, such as human life, are taken into account.

However, weighing one human life against others seems to be acceptable when following old Czechoslovak case law from 1982. The Supreme Court of the former Slovak Socialist Republic came to the legal opinion that sacrificing one life to save more innocent people is acceptable in principle. The situation is changing, however, in cases in which the killing is motivated only by the need to save the individual's own life (i.e. that of the killer). This case was based on a balancing exercise regarding a juvenile girl who was given a choice. Her father threatened to kill her together with her three younger siblings if she did not

[8] See No. 9/1988 of Collection of Courts Decision in Criminal Cases.
[9] So-called "aid in necessity"– see JELÍNEK, J. *Trestní právo hmotné. Obecná část. Zvláštní část.* 5. vydání. Praha: Leges, 2016, p. 259.
[10] See § 28 of Criminal Code.
[11] SOLNAŘ, V., FENYK, J., CÍSAŘOVÁ, D. *Základy trestní odpovědnosti.* Praha: Orac, 2003, p. 142. See also VOKOUN, R. Vybrané aktuální otázky nutné obrany a krajní nouze. *AUC.* 1989, Vol. 35, No. 1, pp. 34–50.
[12] ŠÁMAL, P. a kol. *Trestní zákoník. Komentář.* Praha: C. H. Beck, 2012, p. 394.

strangle her grandmother to death.[13] The Supreme Court's decision clearly shows that weighing human lives for the purposes of the proportionality test of necessity is completely acceptable and suggests that the theory of "the lesser evil" should apply even if human life is taken into account.

On the other hand, one fact should not escape our attention. In the event of the defence of necessity, the balancing exercise is based on the proportionality of danger averted and *harm inflicted*. The means used to execute a necessary act in order to reach justifiable levels are not regulated. It appears that regardless of the means used to kill one person, it is sufficient, provided that all other conditions of necessity are fulfilled, that the good effect outweighs the bad. That represents a significant difference from the requirement of proportionate self-defense where the attention is primarily oriented to the way of acting. Such a discrepancy may be considered as one of the greatest problems of the Czech doctrine of necessity. A solution may be found in the requirement of subsidiarity of a necessary act[14] and the doctrine of double effect, under which only such acts in which evil is not intended as a means to the good is morally justifiable.[15] Having looked at the model scenario from the view of Czech law, it appears that according to Czech law, the shooting down of a plane hijacked by terrorists would be justifiable under the defence of necessity. It is not clear, however, whether the prerogative to justification under this defence is also granted to the state and its agents, or whether it is reserved only for private individuals with reference to Article 2, paragraph 2 of the Charter of Fundamental Rights and Freedoms, and Article 3, paragraph 2 of the Czech Constitution.[16,17] There is no particular law which authorises governmental authorities to intercept a hijacked plane with the use of weapons in the Czech legal system.[18] This "renegade" scenario is regulated, however, by subordinate legislation, particularly by administrative rules issued by the Ministry of Defense of the Czech Republic. These rules are based on a classified document adopted by the Czech Government entitled "The use of armed forces with regard to the interception of hijacked plane as a means of terrorist attack." This document suggests that in the case of identification of "renegade" aircraft, the use of armed forces to intercept such a plane is acceptable. The use of armed forces may be operated under the authorisation of the Minister of Defence, who may be substituted by his Deputy Minister or by the Commander-in-Chief of the Army, of the Czech Republic.[19]

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[13] See No. 20/1982 of Collection of Courts Decision in Criminal Cases, in particular the decision of the Supreme Court of SSR from 11th December 1980, No. 3 To 72/80.

[14] See § 28 of Criminal Code.

[15] See e.g. WOODWARD , A. P. The doctrine of double effect: philosophers debate a controversial moral principle. University of Notre Dame Press, 2001; McINTYRE, A. "Doctrine of Double Effect", The Stanford Encyclopedia of Philosophy (Winter 2014 Edition), ZALTA, E. N. (ed.) – available online – [accessed 20. 9. 2016] – http://plato.stanford.edu/archives/win2014/entries/double-effect/.

[16] Act No. 1/1993 Coll., the Constitutions of the Czech Republic.

[17] See BÍLKOVÁ, V., GŘIVNA, T, HERCZEG, J. Scénář Renegade, aneb sestřelení civilního letadla z pohledu práva. *Trestněprávní revue*. 2008, No. 11, pp. 328–335.

[18] Different approach was adopted in the Slovak Republic where after 11th September 2001 precise legal regulation was incorporated by Act No. 11/ 2006 Coll. which amended § 4 c of the Act No. 321/2002 Coll., on Armed Forces of the Slovak Republic and Act No. 143/1998 Coll., on Civil Aviation – see BÍLKOVÁ, V., GŘIVNA, T, HERCZEG, J. Scénář Renegade, aneb sestřelení civilního letadla z pohledu práva. *Trestněprávní revue*. 2008, No. 11, pp. 328–335.

[19] The Ministry of Defence of the Czech Republic, information available online – [accessed 20. 9. 2016] – http://www.mocr.army.cz/scripts/detail.php?id=52419.

FRANCE

Similar to the Czech law, French law recognizes the defence of necessity ("état de nécessité")[20] which covers extreme situations in which the present danger can by only averted by causing harm to an interest protected by law. The requirements of this defence in the French Criminal Code are comparable to those of the Czech law, but there are slight differences. One of them is that the condition of proportionality is based on weighing the means used to execute a necessary act and the severity of the present threat. According to the French law, the proportionality of the defence of necessity is satisfied unless there is *"a disproportion between the means used and the threat."*[21] According to case law[22] and part of the doctrine, the proportionality condition is satisfied also in the case of the same value interest, but opinion on this is divided.[23] There are opinions suggesting that causing a result of the same severity, such as killing one person to save one's own life, could be justified on the basis of "moral duress" ("contrainte morale").[24] Regardless of what the opinion on causing a result of the same severity by a necessary act is, however, it appears that the doctrine accepts the balancing exercise with human lives, and admits that there might be a justificatory defence to killing a few people to prevent others from dying.

This proposition is doubtful, however, following the key decision[25] of the French Supreme Court in the matter of the former Vichy regime member Paul Touvier on 21st October 1993, who was accused of complicity in crimes against humanity in connection with the killing of 7 prisoners, at least 6 of whom were Jews, in a small suburb of Lyon, France in 1944. As a justification for the mass killing, Touvier pled the defence of necessity and alleged that he had done only what was "inevitable", because he had acted with the intention of saving a much greater number of lives (23 prisoners) from the same fate. The Supreme Court refused to allow his acts to be justified on the basis of a state of necessity and argued that with regard to human life, it is not possible to decide that *"lives saved would present any superior value"*[26] than those sacrificed.

This case does not elaborately explain the dilemma of weighing human lives against others, but it suggests that the balancing exercise with people's lives is not acceptable in some cases.

The French legal system seems to leave unanswered the question of possibly sacrificing several human lives to save more in the aforementioned hijacked plane scenario. Furthermore, not even the law dealing with air defence, the Act on Air Defence of 10th October

[20] See article 122-7 Code pénal from 22nd July 1992.

[21] In original wording: *"sauf s'il y a une disproportion entre les moyens employés et la gravité de la menace."* – see article 122-7 Code pénal.

[22] Crim. 25 juin 1985, Bull. crim. n° 499.

[23] BOULOC, B. *Droit pénal géneral.* Paris: Dalloz, 2013, pp. 362–363.

[24] For differences between necessity and duress by threats in French law see FORIERS, P. *De l'état de nécessité en droit pénal.* Bruxelles, Bruylant, 1951, pp. 27–45.

[25] Cour de cassation, Crim. 21. 10. 1993, Bull. crim. n° 307.

[26] In original wording: *"s'agissant du sacrifice de vies humaines, il n'est pas possible de décider si les vies sauvegardées représentaient un intérêt supérieur".*

1975,[27] contains any relevant provisions for such emergency situations. It only provides basic air defence guidelines when it states in Article 1 that the ultimate aim of air defence is, among others, to protect the national airspace from unexpected attacks. According to Article 2 of this Act, the person legally responsible for performing such defensive acts is the Prime Minister, who appears to be also authorised, under certain circumstances, to order the interception of the hijacked plane, including the use of weapons when it is reasonably necessary for meeting the goals declared in the Act on Air Defence.[28]

GERMANY

The most well-known example of dealing with the difficulties of adopting a law which would regulate emergency situations arising out of terrorist attacks on planes is that of Germany. In 2005, the German Parliament (*Bundestag*) passed a bill which covered so-called "renegade" scenarios. The Aviation Security Act (*"Luftsicherheitsgesetz"*)[29] gave rise to controversy and was subject to broad debate even before it was passed, mainly with regard to Article 14, paragraph 3 of the Air Security Act, which authorised, under certain conditions, the Chancellor of Germany to issue an order to shoot down a plane hijacked by terrorists. Such a procedure could only be launched and the direct use of weapons against the aircraft was only be permissible in the event that *"circumstances suggest that the aircraft is intended to be used against human life and this is the only mean of averting the current threat."*[30] The law has been challenged before the German Constitutional Court with respect to its compliance with German constitutional law. In a judgment issued on 15th February 2006,[31] the Constitutional Court abrogated this provision and declared such a procedure unconstitutional. The basis of the judgment lies in the following arguments. Firstly, a human being is guaranteed the right to recognition of human dignity, and this right is violated when a person is treated as a mere object used to complete somebody else's life-saving operation by governmental authorities. It is therefore inadmissible to set one life against another in this situation, because it would literally mean that *"people on board are not treated as subjects of law with the right of life and indefeasible human rights. They would be, on the contrary, deprived of their human nature and vested rights, and their death would be merely an object for the fulfillment of saving other peoples lives."* [32] In light of the Constitutional Court's ruling, human life is seen to be of the highest value regardless of the duration of the individual person's physical existence, and shooting down the plane as a causal

[27] Décret n°75-930 du 10 octobre 1975 relatif à la défense aérienne et aux opérations aériennes classiques menées au-dessus et à partir du territoire métropolitain.

[28] See BOHLANDER, M. In Extremis - Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law. *The Criminal Law Review*. 2006, p. 589.

[29] Gesetz zur Neuregelung von Luftsicherheitsaufgaben vom 11. 1. 2005, BGBI, Teil I, G 5702.

[30] See § 14 Luftsicherheitsgesetz that states: *"Die unmittelbare Einwirkung mit Waffengewalt ist nur zulässig, wenn nach den Umständen davon auszugehen ist, dass das Luftfahrzeug gegen das Leben von Menschen eingesetzt werden soll, und sie das einzige Mittel zur Abwehr dieser gegenwärtigen Gefahr ist."*

[31] Decision of German Constitutional Court from 15th Febraury 2006, No. 1 BvR 357/05 – available online – [accessed 20. 9. 2016] – http://www.bundesverfassungsgericht.de.

[32] See paragraph 124 of German Constitutional Court decision from 15th Febraury 2006, No. 1 BvR 357/05.

contribution to the passengers' death would violate the right to dignity and the right to life guaranteed by Article 1, paragraph 1, and Article 2, paragraph 2 of the Constitution of the Federal Republic of Germany to the extent that it affects persons on board the aircraft who are not participants in the crime.[33]

German criminal law recognizes the defence of necessity in § 34 of the Criminal Code (*Strafgesetzbuch*, "StGB").[34] As in other countries, one of the requirements prescribed by law for a necessary act to be justified is the fulfilment of the condition of proportionality. In German criminal law, proportionality is based on weighing conflicting interests and the degree of danger threatening a person. In particular, to successfully plead the defence of necessity, *"the protected interest shall not substantially outweigh the one interfered with."*[35] Moreover, the act committed must be an adequate means to averting the danger. In the light of both the German Constitutional Court ruling and the prevailing opinion of the doctrine,[36] there is one exception to that balancing rule – weighing human lives against others is not accepted. There are some opinions, however, that killing people in such extreme situations might be excused on a so-called "supra-legal excusatory necessity" (§ 35 StGB).[37]

ENGLISH LAW

Looking briefly at the common law system, the question of taking human life for the greater good is essentially left to the courts' own law-making function. It is not surprising that case law in the English common law system shows great interest in deciding such situations.

In one of the most famous English legal decisions, *R v Dudley and Stephens*,[38] the court created a legal precedent that killing one person in order to save more is absolutely unacceptable under English law. The court dealt with a case of the intentional killing of a young man who was, together with his two companions, cast away in a storm on high seas in an open boat. They had no water or food on this boat, and after 7 days without food and 5 days without water, they would soon have all died of starvation. The only way for the crew to survive was for one of them to be killed; the one who was chosen was the youngest man aged seventeen or eighteen. The court expressed its fundamental opinion that necessity is not a defence against a murder charged, as there is no defence for deliberately taking another person's life to save one's own. It is unacceptable to excuse Dudley and Stephens for killing the youngest man on board as, under certain circumstances, they could all have survived and their death was not inevitable, even if the probability of their rescue was extremely low. Moreover, the choice of person to be put to death to save the rest was not performed fairly. Assuming that there had been any necessity to kill anybody, there was no greater necessity for killing the boy than any of the other three men.

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[33] Grundgesetz für die Bundesrepublik Deutschland vom 23. 5. 1949, BGBl, s. 1.

[34] Strafgesetzbuch in der Fassung der Bekanntmachung vom 13. November 1998 (BGBl. I S. 3322).

[35] See § 34 StGB.

[36] JOECKS, W., MIEBACH, K. (eds.). *Müncherner Kommentar zum Strafgesetzbuch.* Bd. I. München: C. H. Beck, 2003, § 34, marg. 116; HIRSCH, H. J. (ed.). *Liepziger Kommentar zum Strafgesetzbuch.* Bd. II. München, C. H. Beck, 2003, marg. 65.

[37] See SCHONKE, A., SCHRODER, H. *Strafgesetzbuch. Kommentar.* 27th ed. München: C. H. Beck, 2006, § 34, marg. 24.

[38] *R v Dudley and Stephens* [1884] 14 QBD 273.

This principle was subject to further discussion and judicial interpretation. In *R v Howe,*[39] the House of Lords regarded the *R v Dudley and Stephens* case as one setting down a general rule that necessity is not a defence to deliberate killing of another person.

In other cases, however, the court has come to a slightly different view of the rule that there is no defence of necessity for murder. In the case *Re A,*[40] the Court of Appeal admitted that even the intentional killing of another person may be justified under certain circumstances. Jodie and Mary were born conjoined twins. Mary, the weaker twin, could survive only through a supply of oxygenated blood from her sister. There was a difficult question before the doctors concerning whether they may perform life-saving surgery so that at least the stronger twin, Jodie, could live. If the twins were left as they were, Mary would eventually be too much of a strain on the stronger twin, Jodie, and they would both die. The Court of Appeal allowed the operation and accepted the killing of Mary, who was not capable of surviving on her own, as the proposed operation would be in the best interests of each of the twins.

This case shows us that the rule of necessity not being a defence against a murder charge may be interpreted narrowly. The inconsistent approach of English courts on the topic may be based on one factual question. If we have a look at the aforementioned cases of both *R v Dudley and Stephens* and *Re A*, we may argue that in the latter, the weaker twin, Mary, who was deliberately killed, would have died in either case. In the words of Brooke LJ, she was *"self-designated"*[41] to death. It makes a clear difference now, that in the former decision denying that necessity should be a defence to a murder charge, the boy who was killed was not in such a situation, as he was chosen to die by the two surviving crew members in a scenario in which there was at least some level of probability that all of the crew would be rescued.[42]

It appears that under common law, necessity might, under certain circumstances, represent an excuse for the killing of an innocent person to save more lives, but the situation is able to be disputed even in English statutory law.[43]

CONCLUSION

The same solution as in the *Re A* case may be applicable to the situation of the hijacked planes in which a vast number of human lives on the ground are at stake. If one can imagine the case of a weaker twin, Mary, whose inevitable fate was to die, the situation of the passengers on board the plane hijacked by terrorists can be understood in light of this. We may claim that all of the passengers on board were *designated to death*, just as Mary was, and their fate was none other than to die regardless of what decision was made by

[39] *R v Howe* [1987] 1 AC 417.
[40] *Re A (Conjoined Twins)* [2001] Fam 147 (CA).
[41] *Re A (Conjoined Twins)* [2001] Fam 147 (CA) [Brooke LJ].
[42] *R v Dudley and Stephens* [1884] 14 QBD 273.
[43] See HERRING, J. *Criminal law: text, cases, and materials.* 6th ed. Oxford: Oxford University Press, 2014, pp. 650–651.

the government concerning shooting down the plane. This sorrowful position of the passengers on board was also highlighted by the German Constitutional Court, which in its ground-breaking decision spoke about passengers as *"objects of death,"*[44] but expressly denied that they may be regarded likewise by governmental authorities.

Pursuant to the law of the other countries (the United Kingdom, the Czech Republic), it appears that this approach of killing people who are "basically dead" may be justified and the defence of necessity may be applicable even in cases of deliberate killing of innocent people. Even if French law leaves this question unanswered, one may strike this approach down on the basis of the French Supreme Court's decision in the Touvier case.

The range of possible courses may significantly differ, however, and this demands a more comprehensive legal perspective. Imagine that terrorist hijacked the aircraft only to transfer a biological agent to be released into the water supply of a major city, and the passengers were taken as hostages and were promised release after the terrorists have been transferred to their designated location along with the biological agent.[45] This should ensure that the aircraft is not shot down by armed forces before completing its "lethal goal." The passengers surely cannot be regarded as *designated to death* in this case, but the question remains concerning whether or not the aircraft should be shot down in this case.

In all of these extreme situations, it seems to be very difficult to decide what the morally correct course of action might be. The laws of different countries deal with such scenarios differently and it appears that many laws would either justify or excuse killing innocent people in order to save more.

There is nothing to do but to conclude that it is provably desirable that, pursuant to the principle of certainty of law, states ought to make an effort to regulate these situations as precisely as possible. Considering the severity of harm taken into account, it is clear that the law should provide guidance for resolving such situations, which are moreover usually connected with extreme pressure regarding time. At the same time, however, this pressure could potentially result in cases of poor judgement, leading to loss of life which could otherwise have been spared. It is therefore understandable that lawmakers are hesitant to specifically implement such regulations into their legislations as demonstrated by the decision of the German Constitutional Court.

[44] In original wording: *"Objekt der Täter"* – see paragraph 124 of German Constitutional Court decision from 15th Febraury 2006, No. 1 BvR 357/05.

[45] Similar example is mentioned by Bohlander – see BOHLANDER, M. In Extremis - Hijacked Airplanes, "Collateral Damage" and the Limits of Criminal Law. *The Criminal Law Review*. 2006, p. 581.

DISCUSSION

FOUNDATIONS RIGHT OF CHURCH ASYLUM IN THE CONTEXT OF THE COURT OF PATRIARCH IN BYZANTIUM

Nazarov Iliya*

Abstract: *The article examines the question of the moral content of the church asylum (jus asyli) in the context of patriarchal courts in Byzantium. Much attention is paid to the history of the phenomenon under investigation, as well as the justification of the need to consider criminal cases Patriarchal court in the analyzed period. The empirical material presented article quotes from legal Byzantine monuments confirming the theoretical arguments of the author. This article was prepared on the basis of pre-revolutionary works of specialists in the field of church history and canon law.*

Keywords: *the right of the church asylum, jus asyli, the patriarchal court, penance, punishment*

History of the Byzantine is closely linked to the Christian religion. In the minds of the Romans secular sovereign (the Imperator) is not only not opposed to the supreme pastor (the Patriarch), but created with him a union, which was based on the idea of harmony and consent of the authorities involved, but do not merge with each other, enrich, but enslave by its orientation.

This relationship of secular and ecclesiastical authority was reflected in the term "symphony" for the first time use in the preface to the VI novel Justinian I: "The greatest gifts of God to people of humanity over the data - the priesthood (ιερωσύνη) and kingdom (βασιλεία), one serving the divine, the other human caring and controlling - from the same start out, and put in order of human life. Therefore, there is nothing that would not be very welcome kingdom as priest's majesty, if only for himself, they always prayed to God. For if the first would be blameless comprehensively and with sincerity of belonging to God, the second right and properly entrusted to him the government would put in order, it would be kind of a good agreement, so that all the good of the human race would be donated to"[1].

Reaching Byzantine society ideals of Christianity: love for one's neighbor and forgiveness, backed by the idea of peace and prosperity based on the subjects of unanimity and harmony of the royal and the patriarchal power[2], have contributed to the expansion of the influence of the latter on all spheres of public life.

A striking example of the privileges of the Church in relation can be considered as the right of the church asylum to the secular authorities (jus asyli) according to which the

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[1] FLAVIUS JUSTINIANUS IMPERATOR *Novellae.* In: SCHOLL, R., KROLL., W. (eds.). *Corpus iuris civilis.* Berlin: Weidmann, 1895.

[2] PAVLOV, A. Greek record of a church trial of the killers, resorting under the protection of the church. *Byzantine annals.* 1897, Vol. 4, p. 342.

Christian monastery had an opportunity to give under its shelter the necessary protection to persons who are threatened with a clear risk of becoming victims of human wickedness and injustice, or, in certain cases, undergo a set of secular power penalty for the offense committed. It should be noted that all those who applied to the church asking for mercy, when the suffered injustice from the other, or for violating the law were sentenced to severe penalties, is in the temple inviolable asylum (refuge), where the refuge seeker cannot be extracted from the monastery by force, and the local bishop or the patriarch he took them under his protection and immediately petitioned the emperor for mercy.

The moral side of the church the right of asylum is more pronounced in times of political unrest, palace coups, popular unrest, when underdog rendered defenseless and doomed to the inevitable repression, and only under the protection of the church might find yourself the winner of salvation from tyranny. Thus, the temple is a debtor protection, are persecuted by cruel and unmerciful creditors, involuntary and random killers facing the death penalty, slaves, hiding from persecution and a host of anger and other persecuted and oppressed members of Byzantine society.

Since the end of the IV BC the right of the church asylum was regulated by special laws of the Byzantine imperators, which extended the effect of this legal structure is created within it certain restrictions.

Thus, the Imperator Theodosius I his law from 392 ordered to take shelter from the places of the state treasury debtors, and if the bishops and clergy refused his extradition, the latter were required to pay the arrears of the state's own funds. Emperor Arcadia Laws 397 and 398 years further limited the possibility of applying jus asyli depriving the right of asylum is not only the debtors of the treasury, but also individuals. In accordance with the law, saving the churches, took up the defense of debtors were obliged to cover their debts[3].

Imperator Theodosius II Junior edict of 409, reversed the existing restrictions on jus asyli, expanded asylum the right to the entire space around the temples, to external inputs, inclusive (ad extremas fores ecclesiae)[4]. A similar approach with regard to jus asyli was designated Emperor Leo I in the law 466 of the year[5].

Other decisions on the right of the church asylum have been made by Imperator Justinian I. reviving approach to jus asyli laid by Imperator Arcadius, he drew particular attention to the use of the rights criminals. So, I. Sokolov noting changing circle of persons entitled to asylum, has translated short stories published in the XVII year 535, in which the Imperator legalized the following: "the murderers, adulterers, thieves virgins should not provide any security in any limits (the church), but they should extract (from places of refuge) and give punishment: it is necessary to spare not those who have committed such crimes, but the victims, to the latter are not taken

[3] THEODOSIANUS Codex, lib. IX, tit. XLV (De his, qui ad ecclesias confugiunt), § 3. http://ancientrome.ru/ius/library/codex/theod/liber09.htm#45 (29. 11. 2016).

[4] THEODOSIANUS Codex, lib. IX, tit. XLV (De his, qui ad ecclesias confugiunt), § 1. http://ancientrome.ru/ius/library/codex/theod/liber09.htm#45 (29. 11. 2016).

[5] JUSTINIANUS Codex, lib. I, cap. XII (De his, qui ad ecclesias confugiunt vel ibi exclamant), § 6. http://droitromain.upmf-grenoble.fr/Corpus/CJ1.htm#12 (29. 11. 2016).

up such (unhappiness) by more daring people, in other words - the law provided security at the temples are not criminals, but the offense, and is not possible to let the one and the other, the perpetrator of the crime and the victim equally enjoyed security in places of refuge"[6].

The content of this novel is of great importance for the understanding of moral guidelines existed in Byzantium in the specified period. Saying that the perpetrator, unlike the spoiled (the victim), under no circumstances are not allowed to use the church sanctuary, Justinian, in essence, creates his own moral principles significantly different from that of Christian morality: "He saved us, not by works of righteousness , which we have done, but according to his mercy" (Titus 3: 5.); "For by grace are ye saved through faith; and that not of yourselves the gift of God: Not of works, lest any man should boast" (Ephesians 2: 8-9.); "For if ye forgive men their trespasses, forgive you your Heavenly Father. And if you do not forgive men their trespasses, neither will your Father will not forgive your trespasses" (Matthew 6: 14-15.).

This conflict is not accidental, but carries a very definite context. The purpose of the secular authority is the competent state administration, the achievement of which is carried out, in particular, by the maintenance of public and most importantly legal order. If the efforts of secular power aimed at preserving and healing "the body" of contemporary society, the purpose of church government is the preservation and recovery of its "soul". Means is an enormous difference, forcing the device with one hand, and the commandment, calling for repentance and humility, on the other.

Overcoming this conflict is reflected in § 1 title XVII Eclogue Leo Isaurian and Constantine Copronymus adopted in the year 740. According to him: "No one took refuge in the church, cannot be take out by force, but the wine must be known to harbor priest, and then to take refuge can be taken under the provision for legal investigation and consideration of his case. If anyone thinks of for any reason to lay hands on to take refuge in the church, he will receive twelve strokes, and then, as it should be, it's taken refuge would be subjected to the investigation"[7]. Similar prohibitions on forced removal of persons harboring the temple contains the title XXXIX Prohirona Imperator Basil the Macedonian (876) and the title XXX Epanalogi Basil I (885).

Published by Imperator Leo VI the Wise monument to Byzantine law - Vasiliki contains a synthesis of views on the legal jus asyli. It outlines the limits of church asylum, the question of weapons is pursued has brought with him to the walls of the monastery, confirms the acceptance of Justinian asylum limit for murderers, adulterers and thieves virgins prohibited forcibly removed from the temple of individuals to exercise this right. In addition, Vasiliki determined value of the bishop and the clergy in the direct application of this right. So, if pursued in places of refuge is not willing to speak publicly about the response of the fault, and preferred to remain within the church, the Economy invites him to submit evidence to the court under his patronage. If pursued excited against the court a civil suit, it could conduct their business in person or by means of specially authorized church attor-

[6] SOKOLOV, I. Patriarch trial of the murderers in Byzantium X-XV century: a historical sketch. *Christian reading*. 1909, Vol. 2, p. 218.

[7] *Eclogue. Byzantine legislative codex of the VIII century*. Moscow 1965, p. 68.

neys. After that, the economy presented to the court the property that the defendant brought with him to the fence of the church[8].

Thus, the church asylum law has developed in the Byzantine Empire under the auspices and with the participation of the spiritual power and regulated in civil law in connection with a favorable moral influence of the Church in the Byzantine society.

Further development of legislation in the sphere of jus asyli possible to extend the right of the church shelters and on those who have committed murder. This is evidenced, in particular, two novel Imperator Constantine VII Porfirorodnogo a church trial of the killers, to resort under the protection of the Christian Church and the Patriarch of Constantinople.

Drawing attention to the limitation of Justinian against the church of refuge for murderers, the brought in Vasiliki, Constantine VII found it possible to change it, basing their arguments on the provisions of Christian morality.

The Imperator gives the following example. The man committed murder, with murder, committed by them remains a mystery and unsolved. Subsequently, one starts to think about the moral aspect of the act committed, and with the help of confession, will seek to cure inflicted wounds. Thinking about what he had done, he comes to believe that as soon as he announced the death, it will be captured and subjected as a murderer, the court according to the law and by the archon. In order to clear the conscience and to avoid punishment, he is in the temple, proceeds to the priest and, having comprehensive safety, he brings his confession and received absolution after. Thus, the observed and the definition of the law, and the sanctity of the temple.

If we are talking about the killers explicit, to exercise the right of church asylum. These must first be subject to ecclesiastical penance in accordance with the canons, and then subjected to expulsion from the scene of the murder, followed by imprisonment in a monastery when the murder was committed deliberately and pre-cooked means[9]. Regarding penance, it was realized in accordance with rules 56 and 57 communication. Basil the Great: "Will killed, and then repented; twenty years shall be no communion of the Holy Mysteries ... captive killed ten years but is not involved in the holy mysteries"[10].

On the right of the Byzantine Patriarch ecclesiastical court judge said the killers and the story of the Imperator Manuel Comnenus of 1166. Said novel Balsamon included in the comment to Rule 8 St. Basil the Great. If the perpetrator of the murder, manages to escape and to resort to the great Church of God, the patriarch, before subjecting it to the church court and penance should ask for information about the crime to the bishop and the clergy of the diocese to which the offender belongs, as well as to the local district judge in order to more precisely determine on what grounds and how, deliberately or not, the murder was committed. And ecclesiastical judges, acting on the orders of the Patriarch

[8] SOKOLOV, I. Patriarch trial of the murderers in Byzantium X-XV century: a historical sketch. *Christian reading*. 1909, Vol. 2, p. 219.

[9] PAVLOV, A. Greek record of a church trial of the killers, resorting under the protection of the church. *Byzantine annals*. 1897, Vol. 4, pp. 155–156.

[10] *Right jurisprudence. With the blessing of Metropolitan of Tashkent and Central Asia Vladimir*. Moscow 2008, p. 764.

should be punished for the murder of a proper canonical rigor: the timing of penance not to cut at its own discretion and does not provide adequate softness beyond where it is unnecessary. Perpetrators of voluntary and premeditated murder can - by definition, short stories - and subject to the tonsure at the monastery, but this act is necessary to make with particular rigor and prudence, after the test during a sufficient time. If the perpetrator of the murder would be unworthy of vows as a monk, the emperor or his authorized - Eparch capital after the above will make a guilty church penance, exiled him in any area where it remains until the end of life[11].

Thus, in the Byzantine Patriarchal Court was made even on criminals. Heaviest of crimes, violation of divine and human laws, murder, subject to, first of all, management and review of the patriarch, who executed judgment on the basis of ecclesiastical laws, punished the offender by the verdict of the sacred canons, provided him the opportunity to atone for sin, to save his soul and, for 15 years, to protect him from the punishment of secular law and revenge murdered relatives[12], in order to fully apply the canonical penalties and moral means correcting the offender.

[11] *Right jurisprudence. With the blessing of Metropolitan of Tashkent and Central Asia Vladimir*. Moscow 2008, pp. 714–715.

[12] PAVLOV, A. Greek record of a church trial of the killers, resorting under the protection of the church. *Byzantine annals*. 1897, Vol. 4, pp. 131–132.

REVIEWS AND ANNOTATIONS

Prague Law Working Papers Series No III/2016 – New issue of Charles University in Prague Faculty of Law Research Papers

The new issue of Prague Law Facultyęs open source electronic periodical offers a set of working papers on various topics. The following provides a general outline of their content. Their full versions can be downloaded free of charge from http://www.prf.cuni.cz

Ondřej Zezulka contributed an article titled "**The Digital Footprint and Principles of Personality Protection in the European Union**". According to the author the concept of so called "Digital Footprint" represents a phenomenon of modern digital era. Natural persons who use digital services create, deliberately or unknowingly, a kind of digital imprint which contains sensitive personal information. Personal data can be relatively easily tracked by digital services providers and subsequently processed for commercial purposes, usually for targeted advertising, or misused for illegal purposes. Therefore, personal data shall be regarded as a potential threat to individual's privacy. It shall be borne in mind that awareness about digital safety within society is still low - social websites encourage users to share sensitive personal data with undisclosed range of recipients, benevolent settings of internet browsers allow to track cookies or mere visiting websites enables specialized programs to create a comprehensive behavioral profile consisting of one's private life, customs, social status or consuming preferences. The author expresses in his conclusion the opinion that consumer rights are widely spread and well-known, in contrast to internet users who are still scarcely aware of possible threats on the Internet. It must however be acknowledged that users have become more and more informed. All the hoaxes and fake winning lottery e-mails have made users more cautious and less willing to send their personal data to unknown people. A lot of threats remain not so obviously detectable though. Therefore, a balanced level of protection and responsibility must be imposed on users.

Aneta Vondráčková treated the issue of "**Regulation of virtual currency in the European Union**". Her paper introduces virtual currency and its existing regulation in the European Union, than in the Czech Republic and shortly in Germany and China. The issue of taxation of virtual currency is also demonstrated on the current case law of the Court of Justice of the European Union. In connection with the growing popularity of the use of virtual currency and with risks associated with its use raises the need of the European Union regulation. The group of users of virtual currencies extends and thereby it grows a risk of abuse of virtual currency for committing crimes such as money laundering, tax evasions, terrorism financing and more. The European Union deals with the issue of regulation of virtual currency at the theoretical level since 2012. In 2016, in connection with, inter alia, the terrorist attacks in Paris in the autumn of 2015, the Commission presented a draft amendment to the latest Money Laundering Directive, which also contemplates the regulation of virtual currency. The main impact of this regulation is to reduce the anonymous nature of virtual currencies. Thus the European Union is moving towards regulation of virtual currencies and providers of services associated with virtual currencies from nearly zero regulation to strict regulation in the next step, like the regulation of financial institutions. Whether this process contributes to the societal usefulness of virtual currencies is a question for now.

Olga Sovová contributed a paper about "**Legal issues of Intervention Regarding Human Integrity and the Rights of the Injured Patient**". In this paper she discusses health as a basic human right from the perspective of public and private law in the Czech Republic. The discourse centers around the idea of informed consent and dissent – including proper patient education – as a circumstance which precludes the legal liability. Medical law provides neither a clear-cut definition of a victim of a crime nor of an injured party, and therefore the need arises for identifying these persons and defin-

ing their rights and entitlements based on their procedural and substantive position as determined by criminal and civil law. Regarding liability, Czech law considers the essential relationship between patient and physician as an issue of the *lege artis* conduct, which is denoted as employing methods of treatment, prevention and diagnosis which are consistent with the highest level of scientific knowledge and practice. A clear-cut and unambiguous solution regarding what is the quantifiable value of human health and life damaged during the provision of health care cannot be reached by any methodology or judicial precedence, but will and must always be individualized, taking into account the circumstances of the life of a human being, his family as well as the laws, standards and practices of a given health care profession.

Finally, **Václav Šmejkal** analyzed in his paper the issue of "**The Horizontal Social Clause of Art 9 TFEU and its Potential to Push the EU towards Social Europe**". The author first introduces the so-called horizontal social clause contained in Art 9 of the Treaty on the Functioning of the EU that obliges EU, already since December 2009, to ensure that in all its activities certain social principles are reflected. The he stresses that although seven years ago a significant potential was attributed to this new Treaty provision, looking back at the post-Lisbon EU developments, Commission's documents and decisions of the EU Court of Justice, it is clear that the horizontal social clause has not changed the EU at all. The EU is still suffering from the same "social deficit" for which the European left and the unions have been criticizing it in the pre-Lisbon period and which is depriving it of the support of EU citizens. The positive effect of the horizontal social clause on EU policies would therefore require a boosting supplement, e. g. as the one suggested in the paper: to emphasize the values of the horizontal social clause by qualifying them as *fundamental* ones. Such a signal from the legislature could not be understood by the Commission and the Court of Justice (and all other EU bodies) in any other way than as a command for a fully equivalent treatment of market efficiency and freedoms on the one hand and social goals and rights on the other hand in all their activities.

Václav Šmejkal[1]

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Tretera, Jiří Rajmund - Horák, Záboj. Konfesní právo. Praha: Leges, 2015, 414 s.

Book under review provides an overview of Czech state ecclesiastical law, trying to capture this broad issue in all its complexity and comprehensiveness. In the introduction the authors emphasize that state ecclesiastical law is a section of state law, different from canon law governing the internal legal order of religious communities and composed of their own regulations. The text is very comprehensible. First, a basic outline of individual issues is provided, followed by further reading printed in smaller letters. Here the reader can find examples, individual explanations, quotes from some longer statutes and both international and national-level treaties, as well as opinions of the authors. The book is divided into five parts, divided into chapters.

Part one is entitled "Basic Concepts of State Ecclesiastical Law" (pp. 19–74) and dedicated to interpreting them in a global perspective, as state ecclesiastical law is one of the less accentuated legal branches. It is also focused on detailed definition of basic terminology related to the subject. The authors start by specifying the content and concept of state ecclesiastical law, first in general terms, then at national and international level as well as within the system of legal sciences. They also deal with religious communities, their different names, concordat law and state ecclesiastical law systems. Models of confessional legislation are classified into three groups: a) a model with mainly individualised arrangements, focusing on individual confessions and faiths and taking into account their specific features without being discriminatory; this model was used in the Czech lands until 1948, although not without exceptions; b) a model with generalised arrangements, focusing comprehensively on all faiths, which is used today; and c) a model with mixed arrangements that had been applied in our country from 1949 until 1991 when democratic church laws were adopted (Act. No. 308/1991 Sb., and then Act. No. 3/2002 Sb., as amended). Subsequently, the authors put their focus on analysis and development of the science of state ecclesiastical law in the Czech lands since enlightened absolutism to present day. At the end of this part the reader can find an overview of the most important state ecclesiastical law treatises in Europe that can be used to study this issue further.

Part two, "Contemporary Czech State Ecclesiastical Law, General Part" (pp. 75–178), starts by sources of Czech state ecclesiastical law, first at the constitutional level, then from the perspective of international treaties. Then attention is also paid to Czech laws and regulations governing state ecclesiastical law. Subsequently the authors deal with national agreements between public authorities and religious communities and their associations. Attention is also paid to the issue of individual religious freedom, first in general terms and then in various specific cases (e.g. the right to choose a status of priest or monas order). The text then turns to issues of collective religious freedom, organisational religious freedom and contractual religious freedom. The reader is acquainted with the issue of legal status of religious communities in the Czech Republic and with the overall system of state administration of these communities in all its complexity. At the end of this part the reader can find figures on religiosity in the Czech lands.

Part three entitled "Contemporary Czech State Ecclesiastical Law, Special Part" (pp. 179–262) is, together with the former part two, the core of the entire monograph. First, the authors analyse the relationship between religion and its projection into the educational process of individuals – in kindergartens, then at the level of primary, secondary, higher, and university education. The reader is also familiarised with the possibilities (i.e. rights) of an individual who is a member of armed forces in terms of implementation of his or her constitutional right to freedom of religion. This right also applies to people in prison, in custody, and in safety detention institutions. A separate set of issues related to the implementation of this right includes spiritual assistance with post-traumatic care for victims of crimes and disasters, as well as with provision of healthcare and social care. Further section of this part deals with the relationship between religion and family while paying attention to the contacts between state legal system and legal systems of religious communities, when there is freedom of choice of a public or religious authority to perform the wedding. The relationship between

religion and criminal law, law on misdemeanours and procedural law, including the issue of confessional secret, is also discussed in this part. It concludes by focussing mainly on analysis of religious communities funding and on reflection of religion in media and in culture of the entire society. There is also an overview of funeral and cemetery law as a short excursion into this administrative sector.

Part four is called "Overview of State Ecclesiastical Law in Other Countries of Europe and America" (pp. 263-265). The text here should serve as a background for understanding contemporary state ecclesiastical law arrangements in our country and briefly outline similar arrangement in countries Czech citizens come into contact with most often. Part five, "Czech State Ecclesiastical Law in the Past" (p. 281–375) maps in detail the history of Czech ecclesiastical law development from the beginnings of Czech statehood in the ninth century to the present day. This part also mentions all the most important events that determined this development (e.g. the Hussite revolution). The publication includes a comprehensive list of references, list of abbreviations, and indices of terms and names. The book also features a short English summary.

Readers are therefore provided with robust insight into the entire range of issues that this area of law encounters and addresses. Also, for the sake of comparison, this book briefly outlines this issue in other European countries and in America. State ecclesiastical law as a teaching subject was restored at the Charles University Law Faculty along with church law after a forty-year break in 1990, as a separate subject it has been taught since 1997. This comprehensive publication will be helpful not only to law faculty students in their studies, but will undoubtedly find wide audience in among readers in general. Clear and concise text can be also beneficial for state authorities that encounter these issues in their work.

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Christina Hermida del Lano, Anna-Rytel-Warzocha, Andrzej Smyt (eds.). The 80th Anniversary of Professor Herbert Schambeck, Gdańsk University Press, 2016, 102 pp.

The book under review reflects 80th anniversary of Professor Herbert Schambeck, famous Austrian constitutional lawyer and former President of Federal Assembly of the Austrian Parliament, celebrated in 2014. His colleagues from Gdańsk University in Poland and from Universidad Rey Juan Carlos in Madrid Spain decided to present a compendium of contributions from conferences at both Universities dealing with Herbert Schambeck's recent books. It is worth noting that Herbert Schambeck is a top Central European expert in legacy of Hans Kelsen whom Schambeck met for the first time in 1967 in Kelsen's house in Berkley, California. Since then Schambeck has been developing Kelsen's idea in contemporary legal science, particularly with regard to European integration.

Presentation of Schambeck's book Sein und Sollen[1] was held in Madrid at Universidad Rey Juan Carlos on 15th October 2015. It pointed out that the philosophical importance of the work by Schambeck is to have brought from the inner point of view inside the historic Vienna school of legal theory, the idea of a legal order (*Sollen*) in its relation to the human being (*Sein*). Law does not make sense, for Schambeck, if its aim is not to the good of humanity. For this reason the definition of law is a social technique that simply imputes a sanction to an illegal act, takes back a seat, and seems significantly reductive to the thesis of Kelsen that brings legal validity back to the "sense of an act of will". According to Schambeck, a legal order requires, instead of the Kelsenian *Grund-Norm*, that says nothing about the content of that order, a *Grund-Wert*, i.e. a fundamental legal value that does not fail to recognize the obligation to obey the currently established and effective construction, but starting from the "fundamental values of humanity" (*Grundwerten der Menschlichkeit*) which can really give certainty and effectiveness to the same order.[2]

Presentation of the second monograph dealt with in the book under review - Beiträge zum Verfassungs und Europarecht, (editors: Andreas Janko, Boguslaw Banaszak, Damiano Nocilla, Walter Schmitt Glaeser, Michal Tomášek) of 2014, was held at the Gdańsk University on 28th September 2016. It has already been reviewed in The Lawyer Quarterly by Assoc. Professor Josef Blahož.[3] Beiträge zum Verfassungs und Europarecht is a collection of Schambeck's studies, essays, articles, papers including questions of European unification and European law - i. e. basic principles of the European Constitutionalism, constitutional law of EU member states, the idea and problems of the European Constitution, the significance and basic aspects of the Treaty of Lisbon, European Union and direct democracy, European Union and the development of basic rights, the origin, contents, system and typology of the rights, freedoms and principles set out in the Charter of fundamental rights of the European Union, the road to social Europe and many other important questions of the unifying Europe. The most valuable is an Austrian approach influence by Austrian vison of "Union of States" (*Staatenverbund*).

A comparison of post-war European integration, the formation of European Communities and the European Union with the pre-war Austrian ideas is certainly worth pursuing. According to Kelsen, the League of Nations was in its time considered an attempt to form a superstate, *civitas maxima*, whose ideal for the future was to involve all states[4]. It is interesting to note that there were similar

[1] SCHAMBECK, H. *Sein und Sollen. Grundfragen der Philosophie des Rechts und Staates.* Heribert Franz Köck, Cristina Hermida de Llano, Antonio Incampo. Andrzej Smyt (Hrsgb.). Berlin: Duncker & Dumblot, 2014.

[2] SCHAMBECK, H. Ordung und Geltung. *Österreichische Zeitschrift für Öffentliches Recht.* Nr. 11/1961, p. 472.

[3] BLAHOŽ, J. Schambeck, Herbert. Beiträge zum Verfassungs und Europarecht von Andreas Janko, Boguslaw Banaszak, Damiano Nocilla, Walter Schmitt Glaeser, Michal Tomášek. Wien: Verlag Österreich, 2014, 461 p. *The Lawyer Quarterly.* Vol. 5, No. 1, pp. 73–75.

[4] KELSEN, H. *Allgemeine Staatslehre.* Berlin: Julius Springer, 1925 or KELSEN, H. *K reformě Společnosti národů.* Praha: Mezinárodní kulturní liga, 1938.

considerations of the theory of the state in connection with the League of Nations in the 1920's as those seventy years later in connection with the European Union. Kelsen's theory, for example, saw the League of Nations as an association of states *(Staatenbund)*, as an international society that was distinguished from a federal state *(Bundesstaat)*, formed by association as a new composite state, *civitas composita*, and superordinate to individual member states, where the new composite state has its sovereignty, legal personality of its own, and citizenship[5]. The League of Nations was not supposed to achieve such a phase. When at the beginning of the 1990's the German Federal Constitutional Court considered the actions for constitutionality of the Maastricht Treaty, it reiterated the above categories of *Staatenbund* and *Bundesstaat*, stating that the ideal of the European Union is to accentuate the features of the concept of *Staatenbund*.[6] In a similar approach Herbert Schambeck points out the formation of Austrian state as an association *(Verbund)* of German- (and for a long time Czech-) speaking countries. The new Austrian state was formed after World War I through the association of German-speaking federation states. Similarly, the European Union was formed via an association of European states. This Austrian perspective of the EU as an entity created by the association of European states gives Austria the answer to the question of what, in fact, the European Union is. In this sense, the Austrian terminology uses the concept of *Staatenverbund*. However, these are not only concepts. The Austrian approach to the EU described by Schambeck assumes strong self-confident member states of the EU.

The editorial board of The Lawyer Quarterly is very proud having Professor Herbert Schambeck with us. We wish him good health and successful research activities in favour of European integration and Central European values.

Michal Tomášek*

[5] HOBZA, A. *Úvod do mezinárodního práva mírového*. Praha: published by the author, 1933, p. 169 and the works quoted there.

[6] In more detail TOMÁŠEK, M. *Státě o Evropské unii*. Praha: Codex, 1994, p. 9 et seq.

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CONFERENCES AND REPORTS

Learning EU Law through the Moot Court Competitions, Paris, from 9rd to 12th January 2017

A moot court or mooting is a popular way of learning legal argumentation by simulating a court proceedings. Participants usually have to solve a fictive case including research and analysis of problems raised by the case, preparing a written submission and presenting oral arguments before a panel of judges. The international moot court competitions are also well known for pushing the students to think about legal problems which had not been solved in the case-law of the relevant courts or in academia.

Students of the Charles University, being assisted and coached by the personnel of the European Law Department, regularly participate at the international moot court competitions in European law.

Last year, the team of students **Kateřina Novotová, Lucie Škapová** and **Ondřej Dolenský won the Central and Eastern European Moot Competition 2016** held in Bratislava.

This weekend (9-12 January 2017), the team of students **Matěj Blažek, Tomáš Hejný, Tomáš Ochodek and Matěj Slavík successfully participated in the Regional Final of the European Law Moot Court 2017** which took place in Paris. Tomáš Ochodek was awarded a prize for the most pugnacious pleader after his excellent performance on behalf of the applicant.

The students have described their mooting experience as formative because of the need to master several skills the moot court requires. In fact, possessing these skills is not crucial only for exercising the profession of an attorney at law, which the moot court rather faithfully resembles, but for basically any legal profession. In other words, the curricula of the law studies at the Charles University still primarily focuses on knowledge of law, whilst for the majority of students the moot court is the first opportunity to experience the complex process of solving a non-trivial legal problem.

At the beginning of every moot court competition, the students have to carry out an **extensive research**.

The **use of case-law** is crucial at this stage of the competition and the students often have to learn how to read judgments, how to extract the test which the court had applied in the pertinent judgment and how to apply it to a similar situation.

The students can be caught by surprise that in the moot court competitions it is generally impossible to find the answers they are looking for. The moot court teaches the students to think independently and to come up with a solution to problems which had not been solved. The students are therefore compelled to use the relevant legal provisions and case-law only as guidelines for crafting their own arguments. Getting used to constant changes in the teamęs argumentation is also a part of the game. Finally, even in law practice, the first version of a submission is never the last one.

In the first round of the competition the team has to submit a written pleading, the **legal writing** is therefore an essential part of mooting. The legal writing for the purposes of the moot court does not however equal the academic writing. The task here is not to analyze and look for a solution in general, but to take into account the particular interests of the party which the team represents and to argue in its favor. Such a type of legal writing is often new to law students and the experience with the moot court competitions suggests that, apart from the academic writing, the training of writing legal arguments in the concise and comprehensible manner should also take place within the curricula.

The **oral presentation of arguments** before a panel of judges usually put a considerable stress upon the students. This stage of the competition tests the ability of students to present orally and their actual understanding of their arguments. It is the habit that the moot court judges ask many question to test the responsiveness of the pleaders, the general knowledge of EU law and their ability

to orientate themselves in the argumentation. An excellent pleader is persuasive and possesses solid knowledge of the applicable law and case-law which he creatively uses to answer the questions of the judges.

Undoubtedly, the **team work** is not the most common activity during the law studies. Personally, I appreciate that the moot court is one of the rare teaching method in which the students have to cooperate, divide the workload and work in teams. Naturally, the workload is seldom shared equally, and it can happen that from various reasons some members of the team work less than others. On the other hand, such a situation also teaches the students to organize more effectively and make sure that the division of workload is manageable and at least acceptable for everyone.

In the moot court competitions it is therefore essential to master a set of soft skills. However, these soft skills should not be associated merely with mooting. They should not be considered anything extra but rather the standard abilities that every law student should manage. Neither memorizing legal provisions nor the moot court competitions as such make a good lawyer. Nevertheless, if the objective of legal education is defined as becoming a good lawyer – whether an academic or practitioner is at this moment utterly irrelevant – my claim is that the aforementioned soft skills have an added value and should become the standard part of legal education.

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