Bulla Aurea
The Hungarian Golden Bull and its European parallels
Conference
Szeged, 1–2. December 2022

Lectiones Iuridicae
33

The surviving copy of the Hungarian Golden Bull from 1351

Invitatio

– ad conferenciam Szegediensem nominatam de Bulla Aurea

Propugnacula iuris, Pannoniamque tuerit,
Aurea Bulla monet, regna, columna sui
constituere, potest per gent(em) et Hungaricarum
iudicium dare, aspida nostri iacit.
Gloria magna secundi regi Arpadiensi,
a filio Belae, quod bene edit(a) erat:
usque ad ann(um) praesent(em) laudabile nunc hodiernum,
is genitor legum, traditionis erit!
Ad memorabil(em) event(um) proxime posteriores,
eductis studiis, illiciemus. Age!

Paulus Diószegi Szabó

Prepared at the University of Szeged
Faculty of Law and Political Sciences
Department of European Legal History.

Head of Department:
Tamás Antal
Professor

Bulla Aurea

The Hungarian Golden Bull and its European parallels

Conference
Szeged, 1–2. December 2022

Editor
Elemér Balogh

Iurisperitus Publishers
Szeged, 2024

Lectiones Iuridicae

Series Editor:
Elemér Balogh
Professor

Peer Reviewers:
Samantha Joy Cheesman
Ibolya Almási

The publication of the book was supported by
CO-OP Star Zrt. Jászberény.

Technical Editor:
Ildikó Kovács

Responsible Publisher:
Márta Görög Dean, President of the Pólay Elemér Alapítvány board of trustees
Prepared by Innovariant Ltd.
Senior Editor: *György Drágán*
ISSN 2062-5588
ISBN 978-615-6268-41-9

Tartalom

Balogh Elemér
Professor, University of Szeged

GOLD BULLS IN MEDIEVAL EUROPE
FOREWORD

The Golden Bull, issued in 1222 by King Andrew II of Hungary, was a milestone among contemporary Hungarian constitutional documents and a significant European document that still has a place in the relevant literature. It was drafted and published 800 years ago, and it can be said that its significance is still alive and well, and it is a lively topic of modern constitutional law thinking. 800 years is a long time, and a round anniversary is a good time to take stock. The Department of European Legal History of the University of Szeged organised an international conference on 1–2 December 2022, where Spanish, German and Hungarian historians and legal historians presented their views on the medieval golden bulls.

The significance of the Hungarian Golden Bull is unique in the development of our constitution, from the 13th century to the present day. The oft-voiced statement that our country has been living in a state of backwardness from the West from the very beginning, even if it is true in many respects, was, so to speak, in sync with contemporary political and legal developments in Europe during the very phase of development represented by our Golden Bull. The 13th century was the century of the Golden Bulls in Europe, as not only in our country, but throughout the continent, legal documents with similar content and character were produced, such as the *Magna Carta Libertatum* (1215) in England, the Danish constitution (1282), and a century later the German Golden Bull (1356). The name „golden bull." itself refers to a kind of ceremonial exceptionalism; the use of the metal seal (*bulla*) was adopted from Byzantium and was used mainly by the papal court from the 6th century onwards. The material used for this pendant metal seal was usually lead, which was also malleable, but on special occasions seals were also made of precious metals, mainly gold. The first mention of such a gold seal is found in a charter of King Géza II (1153), and it was regularly used by our Byzantine-born King Béla III (1172–1196) to seal important charters. In the Middle Ages, the use of the seal was in itself a highly important authentication procedure, since it provided a visible and tangible proof of the identity of the issuer to the largely illiterate members of society, indirectly indicating the importance of the content of the document.

The most important question is what public law and constitutional content the Hungarian Golden Bull and its European counterparts carried. Such royal charters were basically letters of privilege. Often they were based on real social movements, on discontent with the central power, on forces that felt strong enough to act in a united and organised way to defend their rights and interests effectively. It is worth pointing out here a characteristic feature of the legal order of medieval and early Europe up to the time of the bourgeois

transformation, which can be summarised briefly as the absence of an abstract citizenship, with each person having only as many rights as he or she could assert and, if possible, secure for himself or herself through legal guarantees. This could be done individually or as a group. Individual privileges were part of a system of feudalism, while the rights acquired by larger groups in society tended to be more in the direction of the development of a system of order. The golden bulls can also be seen as the borderline institutions of the two (legal) historical periods of feudalism and polity, i.e. constitutional documents that were conceived on the intellectual ground of feudal law but were manifestations of an approach and a demand that were already oriented towards the political and legal concepts of polity.

In the Middle Ages, there was open inequality of rights, but there was still a sense of equality, not on the material plane, but in the dimension of transcendence. All men were equal before God. This idea of equality should not be underestimated, because philosophically it provided a solid foundation for human dignity, and this human dignity is the very core, the very foundation of human rights in our time. The most prominent personalities in European history have referred to it boldly and openly, and as long as it was a matter of public social conviction, it could be counted on as a mobilising and stabilising force.

The development of the legal culture of the 13th century is inextricably linked to the development of literacy. It had long been known and accepted that the written word was more powerful and, above all, more durable than the spoken word (*verba volant, scripta manent*). Yet literacy spread very slowly: for about a thousand years of the Middle Ages, Europe was – in a broad social sense – virtually illiterate. The 'privilege' of literacy was largely held by the clergy, and it was only from the 14th century onwards that a significant number of secular 'intellectuals' began to appear, not least thanks to the universities that were being established at this time. It is no coincidence that the content of the most important documents of literacy, especially in medieval Hungary, was for centuries predominantly legal, and thus the literacy was largely represented by jurists.

The role and significance of the Hungarian Golden Bull in our constitutional history is highlighted by the fact that, although no autograph manuscript has survived, the exact literal transmission of the text is certain, which in itself shows the importance attached to this document over the centuries. The Hungarian orders have succeeded in making it an unexceptionable practice for the monarch to confirm the Golden Bull of 1222 at the coronation, with the two exceptions that since 1351 there has been no mention of the right of free will and since 1687 the king has not been threatened by the ancient weapon of resistance.

It can be said that, in modern circumstances, both legal institutions are firmly based on solid foundations, not in violation but rather in fulfilment of the aspirations of the ancients: today, the guarantees of the constitutional rule of law provide a safe haven against arbitrary state power. It is perhaps worth mentioning here that the members of the Hungarian Constitutional Court, established in 1990, have an exact replica of the royal seal of the Golden Bull around their necks, and the walls of the meeting rooms of the regular deliberations of the constitutional judges are decorated with a facsimile of the Golden Bull.

Almási Tibor
egyetemi docens, Szegedi Tudományegyetem

AZ ARANYBULLA KORÁNAK NEMESSÉGE (MEGJEGYZÉSEK AZ ARANYBULLA-KORI „*NOBILIS*” FOGALOM TARTALMÁHOZ)

A 12–13. század fordulójának időszaka korszakos változásokat hozott a magyar társadalom életében.[1] Megbomlott a királyság közel két évszázadon keresztül érvényesülő rendje, és részint a trónviszályt kísérő pártharcok, részint pedig II. András király „új berendezkedésnek” nevezett megújító politikája nyomán kiéleződtek a belső feszültségek. Mindezek következtében mélyreható átrendeződés indult meg a világi társadalom rétegződésében. Utóbbi tekintetben a legmarkánsabb jelenségek egyrészt a nagybirtokosi pozíciókat szerző világi elit megerősödésében – azaz a nagybirtokosi arisztokrácia kiformálódásában –, másrészt pedig a társadalom szerényebb szinten élő szabad birtokos tömegeinek törvényben rögzített kiváltságokhoz jutásában ragadhatók meg. Mondandóm ez utóbbi mozzanathoz kapcsolódik, nevezetesen a *nobilitas* megjelöléssel illethető társadalmi csoport vagy – hogy egy korábbi terminológia kategorizálásához nyúljak vissza – osztály kialakulásának kérdéséhez. Azt is előrebocsátom, hogy elsősorban egy problémakört szeretnék detektálni, elismerve, hogy a biztos és megnyugtató válaszok pillanatnyilag messze nem állnak rendelkezésre még a taglalandó kérdésekben.

A kiindulásban egy ugyancsak a 13. század elejétől kiteljesedő – s a *nobilitas* formálódásának folyamatától látszat szerint távol álló – új gyakorlat szálát veszem fel, mégpedig a névhasználat terén azon gyorsan terjedő jelenségét, miszerint a nevek mind gyakrabban kiegészültek a nemzetségi hovatartozás megadásával. Ez olyan módon történt, hogy a névhez *de genere* – azaz ’nembéli’, ’nemzetségből való’ – szófűzéssel odaillesztették annak az úri nemzetségnek a nevét, amelyből az adott személyeket származtatták.

---

[1] A kérdéssel kapcsolatos könyvtárnyi irodalomból most csupán az elmúlt évtizedek legfontosabb szemléletformáló, illetve áttekintő jellegű ismeretekben bővelkedő néhány munkáját kiemelve, ld. Zsoldos Attila: *Az Árpádok és alattvalóik. Magyarország története 1301-ig*. Csokonai Kiadó, Debrecen, 1997.; Kristó Gyula: *Az Aranybullák százada*.Kossuth Kiadó, Budapest, 1999., Engel Pál: *Szent István birodalma. A középkori Magyarország története.* MTA Történettudományi Intézet, Budapest, 2001.; Kristó Gyula: *II. András király „új intézkedései”*. Századok, 2001/2. 251–300.; Zsoldos Attila: *II. András Aranybullája*. Történelmi Szemle, 2011/1. 1–38.; Zsoldos Attila: *A 800 éves Aranybulla*. Országház Könyvkiadó, Budapest, 2022. (továbbiakban: Zsoldos, 2022.); Zsoldos Attila: *Az Aranybulla királya*. Városi Levéltár és Kutatóintézet, Székesfehérvár, 2022.; Zsoldos Attila: *Az Aranybulla. A törvény története.* Varadinum Kulturális Alapítvány, Nagyvárad 2022.; Almási Tibor: *Társadalmi változások az Aranybulla korában*. In: Mayer Gyula – Szovák Kornél – Rácz György (szerk.): Andreae II regis Hungariae decretum anni 1222 bulla aurea roboratum. Tanulmányok az Aranybulla kibocsátásának 800. évfordulójára. Bölcsészettudományi Központ Moravcsik Gyula Intézet Eötvös Loránd Kutatási Hálózat – Magyar Nemzeti Levéltár, Budapest, 2022. 135–156.

A nemzetségek kétségkívül nagy régiségre visszamenő patriarchális, vérségi, kötelékkel összefűződő rokoni csoportok, amelyek létezését illetően kettős megközelítési lehetőség adódik. Objektív alapon az emberek rokoni kapcsolatrendszerében mindig megvannak azok az összekötő szálak, amelyek egy valós közös ősig visszavezethetők, így az ilyesformán egybekapcsolódó emberek kiterjedt csoportjait éppenséggel nemzetségnek lehet nevezni. A nemzetségi összetartozásnak van azonban egy tudati oldala is, amely jóval törékenyebb ennél. Az idők múltával a közös ős emléke elhalványul és elbizonytalanodik, s e személy az időbeli távolság elnyúlásával nem egyszer inkább fiktívnek tetszik már. A rokonságok egy idő után nem a nyilvántartott pontos ismereteken, hanem esetenként a „rosszul tudáson", és feltételezett összetartozásokon alapulnak, a gyökerekre vonatkozó biztos tudást pedig esetenként a fantázia világában fogant, fokozatosan besulykolódó, téveteg meggyőződések pótolják. Köztudott, hogy a magyar társadalom úri nemzetségeivel kapcsolatos kérdéseknek tengernyi irodalma és rengeteg lezáratlan vitakérdése van,[2] ezek fölött azonban célszerű most mégis átsiklanunk. Szempontunkból e téren csak annyit érdemes pillanatnyilag rögzíteni, hogy a nemzetségi múlt hangoztatása és felmutatása a 13. század elejétől vált hangsúlyossá, és ennek gyakorlata a kezdeti időszakban mindenekelőtt a világi előkelők táborában látszik jellemzőnek.

Belátható, hogy a nemzetségi múlt felértékelődésének és dicsfénybe vonásának eredője egyik aspektusból a birtokszerzési lehetőségek ekkoriban jelentkező kiszélesedésében keresendő. A korábbi szolgálatteljesítések megbecsültségéhez és elismeréséhez képest elképzelhetetlenül bőséges juttatások elérhetősége gyorsan és megfoghatóan átformálta a világi elitnek az érdemdús szolgálatokkal kapcsolatos vélekedését. Egyként beszédesek e tekintetben a 13. század elejétől sokasodni kezdő oklevelek megfogalmazásai, illetve az ismeretlen kilétű gestaíró Anonymusnak[3] a honfoglalás eseménymenetét ekkortájt megörökítő gondolatai. Az áldozatos szolgálatteljesítés hősi cselekedetei és a birtokjutalmak között a gondolkodásban szoros, szinte normává emelkedett összefüggés szövődött. A teljesített szolgálati érdemek a korabeli közfelfogásban a birtokjogok legtermészetesebb fundamentumát képezték, ezáltal pedig az új szerzemények olyan belső tartalmi alátámasztást nyertek, amely a birtokbírást a kedvezményezettek, illetve utódaik érdemesültségének és elvitathatatlan jogosultságának alapjára helyezte. E látószögből Anonymus munkája is alapvetően a messzi múltból eredeztetett birtokjogok igazolásának törekszik megfelelni. Elbeszélésében a névtelen jegyző a honfoglalóknak dicső hőstettek véghezvivőiként állít emléket, akik érdemeikért Árpád vezértől sorozatosan nagyvonalú adományokat

---

[2] A nemzetségekre vonatkozó legteljesebb ismerettár Karácsonyi János: *A magyar nemzetségek a XIV. század közepéig. I–III.* Akadémiai Kiadó, Budapest, 1900–1901. című munkája. (Egy kötetbe foglalt reprint kiadása: Nap Kiadó, Budapest, 1995.). A főbb vitakérdéseket illetően ld. Kristó Gyula: *Néhány megjegyzés a magyar nemzetségekről*. Századok, 1975/5–6. 959–967., ld. még továbbá kifejezetten a problematika alapvető historiográfiai vetületeinek összefoglalásával Kubinyi András: *Gondolatok „A magyar nemzetségek a XIV. század közepéig" új kiadása alkalmából*. (Karácsonyi János fentebbi műve idézett reprint kiadásának utószavaként megjelent közlemény, pp. 1405–1418).

[3] Noha a közelmúltban Anonymus személyét illetően két újabb, alapos érvelésen nyugvó állásfoglalás is napvilágot látott, ezek eltérő eredményeire tekintettel a kérdés lezártnak semmiképpen sem tekinthető. Vö.: Juhász Péter: *Anonymus. Fikció és realitás. Az Álmos-ág honfoglalása*. Belvedere Meridionale, Szeged, 2019. – a gesta íróját a 12. század középső harmadában működő és alkotó Barnabás királyi jegyzőben véli megtalálni; Horváth Gábor: *Anonymus feledésbe merül? P.-nek mondott mester Gestája, kora és Pusztaszer*. Gerhardus Kiadó, Szeged, 2020. – a névtelen szerzőt Kalán pécsi püspökben látja.

kaptak.[4] Munkájában igen nagy fontosságuk van a nemzetségeknek, hiszen a honfoglalás megköltött szereplői és saját kora között a rokoni kötelékeknek keretet adó eme patriarchális rokonsági egységeken keresztül teremtette meg az összekötő szálakat. A régmúlt anonymusi megírása – illetve joggal mondható, megköltése – történeti alapokon adott bátorítást, egyszersmind igazolást az előképként felmutatható dicső ősök példájából erőt merítő 13. század eleji birtokszerző törekvéseknek.

A nemzetségi emlékezetben megőrződött névadó ősök valójában különböző korokban éltek, a legrégibbek Szent István korában, mint például Aba, Csanád, Ajtony, Rád, Keán vagy a Hont-Pázmány nemnek nevet adó német jövevény testvérpár. Sokszor azonban a 12. században élt személyektől eredt a nemzetségnév, mint például az Atyusz, a Héder vagy a Bár-Kalán nemzetség esetében, mely utóbbinak a második néveleme éppenséggel a kortárs pécsi püspök személyéhez, Kalánhoz kapcsolható. Ha nem is minden esetben, de jellemzően mégis a nemzetség rangját megalapozó, egykori tekintélyes birtokszerző őstől eredeztették magukat a 13. század elején feltűnt úri nemzetségek.[5]

Bár alkalomszerűen a 11. század vége óta korábban is előfordult egy-egy utalás a nemzetséghez tartozásra, e jelenség intenzitása azonban a 13. és a 14. század időszakában nyert szembetűnő erőt, azután pedig alkalmazása a 15. század elejére félévszázadnyi sorvadozás után tökéletesen kikopott a gyakorlatból. Hiteles oklevélben egyébként 1208-ban fordult elő először nemzetségnév,[6] utoljára pedig – Karácsonyi János megállapítása szerint – 1408-ban fordult elő megadása. Forrásaink hozzávetőleg 200 nemzetség nevének őrizték meg az emlékét, ámbár e szám csaknem felének, mindössze egyetlen előfordulása ismert. Olykor függő helyzetben élő rétegek – várjobbágyok, udvarnokok – is számon tartották nemzetségekbe tartozásukat. Számos nemzetség igen csekély vagyonú volt, és tagjaik – ismereteink szerint – nem játszottak szinte semmilyen politikai szerepet. Esetükben a névhasználatot bizonyára nagyban és meghatározóan befolyásolta a szokáshoz, a divathoz való alkalmazkodás. II. András időszakában viszont a *de genere* megjelölés kitételével túlnyomórészt világi főemberek, a társadalmi elithez tartozók neve mellett találkozunk. Abból a körülményből pedig, hogy a birtokgyarapodás nekilendülésével szembetűnő párhuzamot mutat a személynevek mellett feltűnő nemzetségnevek hirtelen megsokasodása, indokoltnak tűnik e két dolog kapcsolatban állítása egymással. A *de genere* formula használatának viharos terjedése áttételesen összefügghet a kiszélesedő birtokszerzési lehetőségekkel, a földtulajdonlással, a birtokigények és birtokjogok igazolásával. A jelenség terjedésében bizonyos fokig tetten érhető a gondolkodásmód változása, a családi múltból merítő öntudat felébredése. Ahogyan a világi magánuradalmak a 13. század során egyre hatalmasabbakká terebélyesedtek, úgy szült az ezzel párhuzamban nekibátorodó öntudat nemzedékről nemzedékre egyre merészebb gondolatokat a fejekben múltról, ősökről, érdemről, előjogról, szerzésről és hatalomról.[7]

---

[4] E tekintetben igen beszédes Anonymusnak a vérszerződés kapcsán elkotott esküszövege, amely kimondja, hogy a főemberek mindegyikének részesednie kell a közös vállalkozások során szerzett javakból. („*Az eskü második szakasza így hangzott: Hogy ami jószágot csak fáradalmaik árán szerezhetnek, mindegyiküknek része legyen abban*.” Ford. Pais Dezső. In: Anonymus: Gesta Hungarorum. Béla király jegyzőjének könyve a magyarok cselekedeteiről.Magyar Helikon – Európa Kiadó,. Budapest, 1977. c. 6., 83.

[5] Kristó Gyula: *Magyarország története 895–1301*. Osiris Kiadó, Budapest, 1998. 207–209.

[6] Wenzel Gusztáv (közzé t.): *Árpádkori új okmánytár I – XII.* Eggenberger, Pest, 1860–1874.; VI. 324.

[7] Az érdemszerzés és a birtokadományok összefüggésében különös figyelmet érdemel az éppen ekkoriban nekilendülő magyarországi oklevelezésnek az adománylevelek szerkesztésében megfigyelhető azon sajátos gyakorlata, miszerint az iratszerkesztő az előzményeket összegző *narratio* formulájában nem üres sablonok-

Mindezeken túl azonban egy másik összefüggés átgondolása is tanulságokat ígér, nevezetesen a nemzetség és a nemesség fogalmak közötti kapcsolaté. A nemzetségnevek odafigyelő feltüntetése ugyanis beláthatóan összefüggésben áll a társadalmi státusjelölő nemesség fogalom tartalmának formálódásával is. A magyar nyelvben a nemzetség és a nemesség szavak jelentései nyilvánvalóan azonos tőről fakadnak. A '*nemzetség*' – vagy rövidebb formájában '*nem*' – szó jelentéstartalmát latinul a *genus* kifejezés adja vissza. A nyelvünkben főnévként és melléknévként egyaránt használatos nemes kifejezés jelentéstani magva félreérthetetlenül ugyanezt a '*nem*', '*nemzetség*' jelentéstartalmat hordozza magában.[8] Eredendően az tekintendő tudniillik '*nemes*'-nek, akiről elmondható, hogy '*valamilyen nemhez/nemzetséghez tartozó [személy]*', illetve '*aki mögött áll valamilyen nem/nemzetség*', vagy másként '*aki rendelkezik valamiféle felmutatható, hivatkozható nemmel/nemzetséggel*', magyarán leegyszerűsítve nemes az, '*akinek van neme/nemzetsége* [latinul: *genus*-a]'. A latinban a *genus* főnév a '*nemz*', '*szül*', '*teremt*' jelentéstartalmú ősi formájú '*geno*', illetve későbbi '*gigno*' és '*genero*' igékkel áll értelmi összefüggésben. Ha szabályos jelentéstani megfeleltetéssel akarnánk visszaadni a *genus* főnévből kiindulva latinul a '*nemhez/nemzetséghez tartozó [személy]*' jelentéstartalmat – amelyet a magyar '*nemes*' szó fentebb kibontott értelme hordoz –, akkor a megfelelő szóalak a '*generosus*' lenne. A magyar azonban a '*nemes*' szót fordításban elsődlegesen mégsem ennek a kifejezésnek a megfeleltetéseként használja, hanem a latinban melléknévként és főnévként egyaránt létező, társadalmi csoportjelölésre alkalmazott '*nobilis*' szóalak jelentésének visszaadását oldja meg vele. A latin '*nobilis*' szó mindazonáltal a maga jelentéstartalmában közvetlenül nem kapcsolódik sem a '*genus*' főnév, sem a vele összefüggő '*gigno*', illetve '*genero*' igék jelentésével, hanem gyökerei az '*ismer*', '*kiismer*', '*ráismer*', '*megismer*' értelmű latin *nosco* igéig vezetnek vissza. Eredendő jelentéstani érvénye olyan személyekre terjedt ki, akik azáltal voltak *nobilis*-ek (azaz: '*ismerhetők*'), hogy a velük kapcsolatos [jó] tapasztalatok alapján kitűntek környezetükből, közismertséget, elismertséget, tekintélyt szereztek és élveztek. A magyar nyelvben érvényes, sajátosan egyedi, és ezért jelentéstanilag kétségkívül valamiféle magyarázatot igénylő *nobilis* = '*nemes*' szótári megfeleltetés megokolása aligha nyugodhat más alapon, minthogy a középkori magyar társadalom egyik pólusán formát öltő, azonos előjogok élvezetében egységesülő földbirtokos elit kialakulásának folyamatában a nemzetségek kérdéskörére ugyancsak hangsúlyos figyelemnek kell irányulnia. Kevéssé tűnik valószínűnek, hogy a magyarországi latinságban a *nobilis* társadalmi rangjelző és csoportjelölő kifejezés már eleve magában hordozta volna jelentésében a nemzetségi háttér meglétének tényét vagy igényét mindazokra nézve, akiket ezzel a megjelöléssel illettek, mert nemigen van megjelölhető oka annak, hogy ennek valamiért is így kellett volna lennie.

A világi társadalom élén kiváltságokat élvezők megjelölésére Szent László király idejétől volt használatban a *nobilis* minősítés,[9] ám arra nézve, hogy ehhez a kor a maga köz-

kal, hanem részletező egyedi megörökítésben törekszik belefoglalni a megjutalmazottnak az adomány, illetve a további birtokjog alapjául szolgáló dicső, és viszonzást érdemlő cselekedeteit. Zsoldos Attila: *Karászi Sándor bán és utódai*. Századok, 2001/2. 398–405. A kérdésben született álláspontok és szakirodalom legutóbbi alapos összefoglalását adja. Süttő Szilárd: *„Érdemdús" oklevelek. A részletező középkori magyar narratiók problémáihoz.* In: Bárány Attila – Dreska Gábor – Szovák Kornél (szerk.): Arcana tabularii. Tanulmányok Solymosi László tiszteletére. I–II. Debreceni Egyetem, Budapest – Debrecen, 2014. 187–198.

[8] Zsoldos, 1997. 126–129., különösen 127.

[9] Szent László király III. törvénykönyve 2., 12. tc. Szövegközlése: Bak, János M. – Bónis, György – Sweeney, James Ross (ford., szerk.): *The Laws of the Medieval Kingdom of Hungary (1000–1301). Decreta Regni Medievalis Hungarae. I/1.* Schlacks, Bakersfield, 1989. 17–23., magyarul: Makk Ferenc – Thoroczkay

napi magyar nyelvén pontosan milyen kifejezést társított, nem rendelkezünk semmilyen ismerettel. Minthogy a 13. század elejéig nincs jele annak, hogy a nemhez, nemzetséghez tartozásnak súlya és jelentősége lett volna a *nobilis* megjelöléssel illetett előkelők kiváltságos helyzetével összefüggésben, nehezen hihető, hogy a kiváltságosok körébe számító világi elit tagjainak magyar szóval történő megnevezése éppen ennek a körülménynek adott volna kiemelt hangsúlyt. Erősen kétséges, hogy a *nobilis* státussal minősítettekkel szemben II. András uralmi időszakát megelőzően bármiképpen is felvetődhetett olyasféle igény vagy elvárás, miszerint nekik nemhez, azaz nemzetséghez tartozóknak – magyarul '*nem*-*es*'-eknek – illene vagy kellene lenniük.

Hogy kik tekintendők, illetve kik tekinthetők *nobilis*-eknek, a 12. század végéig nem merült fel különösebben éles, nehezen megválaszolható kérdésként. Az ellátott fontos szolgálatok, az uralkodó látókörében kifejtett működés, valamint az udvar-közeli lét meglehetős egyértelműséggel körvonalazhatóvá tették a kiváltságokat élvező világi elit táborát. Ennek a helyzetnek a stabilitása bomlott meg az Aranybulla-kori társadalmi változásokkal, elsősorban is a szerviensek összefüggésében. Nagy létszámú, ám igen változatos körülmények között élőkből összetevődő társadalmi csoportjuk II. András nevezetes 1222. évi rendelkezése jóvoltából főbb vonalaikban ugyanazon kiváltságok birtokába jutott, amelyek addig a *nobilis* megjelöléssel illetett világi elit helyzetét jellemezték. A korábbi állapotok e nagy horderejű módosulása hosszú időre kinyitotta a „kik tekintendők *nobilis*-eknek" kérdését, amelyre a válaszadás csak a 14. század közepére zárult le annak az elnyúló folyamatnak az eredményeként, amely a kiváltságokat élvező világi birtokos-társadalom joghelyzetének országos egységesüléséhez vezetett. Természetszerűleg a szerviensek törekvései szinte kezdettől a *nobilis*-fogalom érvényének olyan irányú kiterjesztését célozták, amely révén önmagukra – a hatalmi befolyás és a vagyoni különbségek tekintetében fennálló szakadéknyi távolság ellenére is – a világi arisztokráciával megegyező jogállapot élvezőiként tekinthettek. Szemükben a *nobilis* fogalom társadalmilag a megkülönböztetett, rangot és tekintélyt hordozó, a független birtokosi létnek alapot adó kiemelt státus élvezetének zálogával volt egyenértékű.[10]

Egészen másként érintették ezek a változások a *nobilis* megjelöléssel hagyományosan illetett udvari elitet. Számukra a korábbi állapotok módosulása addigi kitüntetett helyzetük felhígulásának kényszerű és rossz ízű megélését vonta maga után. A meginduló jogi kiegyenlítődéssel szemben természetes igényként merült fel részükről hatalmi és presztízsbeli erőfölényük hathatós és elvitathatatlanul érzékelhető kifejezésének megtalálása. Az abbéli gyanút, hogy a messzi régmúltból eredő nemzetségi gyökerek hangsúlyos felmutatásának igyekezetét egy ilyesféle – önnön megkülönböztetettségük arisztokratikus érzékeltetésére irányuló – ambíció is táplálhatta, több figyelemre méltó körülmény támogatja. Ilyen mindenekelőtt, hogy a szerviensi társadalmi státus feltűnésével, illetve az így megjelöltek kiváltságokkal történő felvértezésével lényegében egy időben indult meg robbanásszerűen a *de genere* ('nembéli') kitétel – azaz a valamely nemzetséghez tartozás hivatkozásszerű

Gábor (szerk.): *Írott források az 1050–1116 közötti magyar történelemről.* Szegedi Középkorász Műhely, Szeged, 2006. 87., 92.

[10] Noha Zsoldos Attila párhuzamot von a *nobilis* fogalom magyarországi feltűnése és a *de genere* kitétel első szórványos megjelenései között – Zsoldos, 2022. 86. –, ám a megállapított összefüggés kapcsán reflektálatlanul hagyja a *nobilis* fogalom '*nemes*' szóformát öltő magyar nyelvi megfeleltetésének a *genus* jelentésmagra utaló sajátságos és egyedi tartalmában rejlő problematikáját.

feltüntetésének – alkalmazási gyakorlata, és ezzel a gyorsan terjedő névhasználati formával a 13. század közepéig elsősorban az udvari elithez tartozók körében éltek. Szembetűnő az is, hogy a 13. században működő krónikaírók gondolkodásában – Anonymustól Ákos mesteren át egészen Kézai Simonig – mindvégig kifejezetten erős az érzékenység a genealógiai szempontú megközelítés iránt, és a figyelem középpontjában gyakran kifejezetten a nemzetségi viszonyok tisztázása, rendjének és szerepének nyomon követése áll. Mintha a társadalmi értékrendben a szabadságok és előjogok élvezeti lehetőségét megadó státusok formálódásával egyidejűleg, de azok fölött kezdett volna utat törni magának egy leszűkítő, a jog kiegyenlítőképességét felülíró, magasabb szintű elvárást támasztó elitképzési szempont, amely az előkelőséget elsődlegesen a messzi múltba visszavivő archaikus rokonsági kötelékek meglétének idealisztikus igényéhez kötötte, és a névhez kapcsolt *de genere* kitétel eredendően az ennek való megfelelést jelezte hangsúlyosan vissza. Végeredményben e folyamatnak a magyar nyelv őrzi a legerősebb lenyomatát azzal, hogy a társadalom azonos előjogokat élvező világi birtokos szegmensét magyar megnevezésében nemzetséghez/nemhez tartozó mivoltában – azaz mint ’*nemes*’-t (latinul: *generosus*-t) – minősíti és jelöli meg, ezáltal pedig a szóban forgó társadalmi csoport latin megjelölését (*nobilis*) sajátos és egyedi, nyelvi értelemben feltétlenül magyarázatra szoruló jelentéstartalommal tölti fel. E tény aligha függetleníthető az Aranybulla korának azon párhuzamosan kibontakozó – és nyelvi megfontolások alapján vitathatatlanul összefüggő – két jelenségével, amelyet egyrészt az egységes kiváltságokkal felvérteződő társadalmi csoport meginduló kiformálódása jelentett, másrészt pedig, amely a ’*de genere*’ névhasználati forma intenzív alkalmazási gyakorlatában érzékelhető.

Összegzésképpen végeredményben érdemes néhány megállapítást rögzíteni.

1. A magyar ’*nemes*’ szó a latin ’*nobilis*’ kifejezés magyar megfeleltetése voltában nem öröktől való szülemény, hanem egy adott kontextusban fogant történeti fejlemény, egy meghatározható korszakhoz köthető történeti „termék”.
2. A magyar ’*nemes*’ szó taglalt jelentéstartalma igen nagy valószínűséggel a „*de genere*” elterjedő névhasználati forma hatása alatt formálódott ki.
3. ’*Nemes*’ szavunk feltöltődése sajátos, a latin ’*nobilis*’ szóformát magához hajlító tartalmával, illetve szójelentésével a 13–14. század idejére feltételezhető.
4. Nagy óvatosságot igényel a 13. század közepe előtt a latin ’*nobilis*’ kifejezést ’*nemes*’ értelmű magyar fordítással visszaadni. Valószínűleg helytállóbb a latin kifejezés korai, a 13. század első évtizedeit megelőző használati időszakában a szó forrásául szolgáló ’*nosco*’ ige jelentéstartományához közelebbi magyar megfeleltetéssel kísérletezni, olyan lehetőségek számbavétele mellett, mint például az ’*ismert*’, ’*közismert*’, ’*elismert*’, ’*elfogadott*’, ’*híres*’, ’*jó hírű*’, ’*hírneves*’, ’*híres-neves*’, ’*nevezetes*’, ’*tekintélyes*’.
5. A magyar nyelv ’*nemes*’ kifejezésének jelentéstörténeti analízise mit sem módosít a források terminológiájában élő ’*nobilis*’ megjelölés használatával kapcsolatban feltárt társadalomtörténeti ismeretek helytálló voltán, pusztán egy új aspektus – nevezetesen a nemesség és a nemzetség történeti jelenségeinek határozott összekapcsolhatósága – felvetésével árnyalja és finomítja a 13. század meghatározó jelentőségű társadalmi átalakulására vonatkozó képünket.

The nobility of the Golden Bull era (Observations on the content of the concept of "nobilitas" during the Golden Bull era)

(Summary)

The Latin term nobilis appears to designate the secular elite of Hungarian society in the 1070s, in the III. law of King Saint László. Although the written provision did not specify the exact content of the designation, nor to whom it was typically applied, these questions could be answered with more or less certainty until the early 13th century. The designation was applied to wealthy persons of free status, who, by virtue of the important services they performed, their activities in the ruler's circle of vision, and their lifestyle close to the court, were undoubtedly considered, together with their families, to belong to the secular elite. Their distinguished position was expressed primarily by the privilege of being exempt from the judicial power of county bailiffs, of conducting their trials at the royal court, and, presumably, of being able to administer justice on their estates, at least in minor cases. In the early years of King Andrew II's reign, the status of serviens regis was established, the main content of which was outlined in the Golden Bull of 1222. This meant that the privileges of the old secular aristocracy, labelled nobilis, were largely extended to a large mass of free property owners, most of whom were modest and less wealthy with less land, which had a detrimental effect on the prestige of the traditional elite. The fact that privileges widened, created a sense of the dilution and devaluation of the privileged status, while those who had suddenly risen to prominence felt the need to make the use of the designation nobilis acceptable to themselves. By the last third of the 13th century, when King Béla IV and his sons passed a law in 1267, the latter effort had finally come to fruition.

A parallel phenomenon was that from the 1210s onwards, the practice of members of the secular landowning society – initially mainly members of the traditional elite – adding a de genere to their names, i.e., indicating the noble lineage or genus from which they originated, spread with rapidity. This custom seemed to be flourishing for more than a century, just at the time when the nobility (nobilitas), unified in legal terms, was formed in the Kingdom of Hungary. Then, from the second half of the 14th century, it began to decline, and at the beginning of the 15th century, it was abandoned. Since the etymological meaning of the word nobilis 'noble' in the Hungarian language is a person who belongs to a gender/nation [genus]' [= Latin: generosus], it seems reasonable to assume that the two phenomena – i.e., the social widening of the validity of the Latin nobilis adjective in the period of the Golden Bull and the spread of the use of the distinctive genus designation alongside names – are probably related.

The lecture deals with the issue of the supposed connection between nobility and genus, by suggesting that the Hungarian 'noble' meaning of the Latin word nobilis was formed and fixed precisely as a result of these parallel processes and phenomena. At the same time, it also attempts to explain the possible content, motives, social interests, and aspirations behind this peculiar linguistic development – namely, the fact that the Hungarian meaning of the term 'nobilis' was coined in the sense of 'generosus'.

Biró Zsófia
research fellow, University of Pécs

THE GOLDEN BULL AND ITS CONFIRMATIONS[1]

1. Prologue

In 2022, on the occasion of the 800th anniversary of the Golden Bull, a number of conferences and later studies were initiated, but prior to that, in earlier years, even in the early 20th century, scholars of the time had already shown great interest in the decree and its adaptations. In the context of the present study, the word 'confirmations' in the title takes on a double meaning. On the one hand, it briefly describes the 1231, 1267 and 1351 adaptations of the Decree of 1222, and on the other hand, it brings together and sometimes contradicts the views of historians and legal historians, their own interpretations, and, so to speak, "individual adaptations", which have been collected over more than a century.

The two defining legal documents of the Hungarian Middle Ages were the Golden Bull of 1222 by Andrew II and the provisions of 1351 by Louis I. These two decrees contained the collections of noble liberties and laid the foundations for the unification of the customary law of the nobility, which was later organised into an order, and for the development of the exercise of power, by the order. The Golden Bull is in fact nothing more than a royal decree with a golden seal, in which the king recognised the servientes as a part of the orders with rights, which rights could not be violated by the lords and the monarch.

This document mentions the annual congregation to be held in Fehérvar on the occasion of the feast of the Holy King.

Two elements of Article 1 should be highlighted. The first is the substitution of the king in his absence, and the second is the authorisation of the participation of royal servants, which refers to the transformation of the assembly. This is supported by the fact that before the 13th century, royal servants had not participated in such assemblies. The fact that the king allowed his servants to attend, changed the nature of the assembly, giving them the opportunity to bring their grievances to him. This is coupled with a favour which gives the royal servants a right which is peculiar to their legal position: they can only be sued by legal summons and have the most serious judgment passed on them or the sentence executed on them by legal process.[2] This right would later become one of the cardinal liberties of the nobility.

The majority of authors in the literature agree on this, but this paper sets out to present the ideas of a few authors who refined and put into a deeper context the provisions that stand alone, and to show how research on the Golden Bull has produced new results over time.

[1] Supported by the ÚNKP-22-4-I New National Excellence Program of the Ministry for Culture and Innovation from the source of the National Research, Development and Innovation Fund.

[2] Rady, Martyn: *Hungary and the golden bull of 1222.* Banatica, 2014/2. 92.

2. The origin and setting aside of the Golden Bull

In 1790, *Márton Kovachich* identified the Golden Bull and other decrees only as laws passed by Parliament.[3] This was confirmed by *György Bónis* in 1976: he pointed out that it is completely unjustified to separate decrees issued during national assemblies from other decrees.[4]

Turning to the circumstances of its formation, *Barna Mezey* believed in 1995 that although the decrees were made under pressure from the discontented, they were an expression of the King's will, even if this meant, in part, nothing more than self-limitation.[5] In 2000, *Gábor Béli* stated that the Golden Bull of 1222 was initiated by the nobles of the king who were excluded from the exercise of power in relation to those in the king's immediate entourage.[6] The opinion of *Attila Zsoldos* published in the year of the 800th anniversary further nuances this picture: according to the author, this is not only about nobles left out of the exercise of power, but about a party who used to be supporters of the late King Emeric II and took advantage of the tense situation between Andrew II and his son, Prince Bela, which the king sought to calm by publishing the Golden Bull, but preserving his own ideas.[7]

As for the immediate years following the publication of the bull, its oblivion is emphasized in 2001 by *Pál Engel,* who described that the movement that forced the bull was overcome in a short time and its influence was more pronounced in its afterlife, especially since in 1318 the orders tried to reconfirm it, but this only happened in 1351 – but in this form from the 15th century it was considered the fundamental law of the country and a collection of noble privileges.[8] In 1948, *György Bónis* also argued for the oblivion of the Golden Bull, saying that the precocious order had not yet been able to properly enforce sanctions against the ruler in case of non-compliance with the bull, and therefore its provisions could not be enforced, which is why it was not invoked outside the renewals. It owes its written survival to the attempted ratification of 1318, which bore the seals of two archbishops and two bishops.[9]

Ferenc Eckhart in 1932 also stated that the Golden Bull could not be enforced in the 13th century and was thus forgotten, as the king did not keep the terms of the Golden Bull, despite its confirmation in 1231. However, in the 14th century, the new ruling family was to

---

[3] Kovachich, Martinnus Georgius: *Vestigia comitiorum apud Hungaros ab exordio regni eorum in Pannonia, usque ad hodiernum diem celebratorum. Insertis decretis comitialibus, partim anecdotis, partim sparisim hactenus editis, quae in Corpore Juris Hungarici vel penitus desiderantur, vel textu non integro referuntur*. Typis Regiae Universitatis, Budae, 1790. 29–30.; Kelemen Emericus: *Institutiones juris Hungarici privati, Liber I. (de personis)*. Typis Joannis Thom. Trattner, Budae, 1818. 81., 84.

[4] Bónis György: *Decreta regni Hungariae. Gesetze und Verordnungen Ungarns. 1301–1457*. Akadémiai Kiadó, Budapest, 1976. (DRH). 49.

[5] Mezey Barna – Beliznai Kinga: *A feudális állam szervei*. In: Mezey Barna (ed.): Magyar alkotmánytörténet. Osiris Kiadó, Budapest, 1995. 76.

[6] Béli Gábor: *Árpádkori törvényeink*. JURA, 2000/1–2. 38.

[7] Zsoldos Attila: *A 800 éves Aranybulla*. Országház Könyvkiadó, Budapest, 2022. 151–152., 154. (hereinafter: Zsoldos, 2022.)

[8] Engel Pál: *Szent István birodalma*. MTA, Budapest, 2001. 81–83.

[9] Bónis György: *Hűbériség és rendiség a középkori magyar jogban*. Osiris Kiadó, Budapest, 2003. 141–142. Originally published: Nagyenyedi Bethlen Nyomda, Kolozsvár 1948.

be made aware of the privileges, and so they became the cornerstone rights of the nobility, which were also adopted in Werbőczy's Tripartitum.[10]

János Karácsonyi in his 1899 work "The origin and first fate of the Golden Bull", not only anticipates but also explains the reasons for the Golden Bull's oblivion, among which it is worth highlighting that the pro-Emeric II party which had won the rights contained in the decree only briefly occupied the highest dignities, and in time Andrew II put his own people back in important chairs. This, according to *János Karácsonyi,* led directly to the non-observance of the provisions of the Golden Bull of 1222: 'the Golden Bull became an invalid, abrogated law (…)'.[11]

The oblivion is also supported by *Gábor Béli*'s study of 2022 on this subject, saying that Article 31 only gave the nobles the right to resist, the sanction in the clause, as *Ferenc Eckhart* rightly stated, only empowered them to resist, but did not contain the means of coercion of the king. In the absence of any instrument, the resisters would not have had any real possibility of taking action against the king, and if, in the absence of a binding legal form, they had resorted to the use of force, the threat, coercion or rebellion would have been illegal. This line of reasoning seems to be confirmed by the letter of 1217 to the Church of Zagreb, in which it was stated that if a royal descendant did not comply with the regulations, he could not claim the crown or any property beyond the paternal curse: '[...] *And if any ban or prince, in spite of the foregoing rights, should dare to do anything which we do not believe he should do, if he were a royal descendant, let him be cursed with the curse of paternal hatred for ever, and let him not claim the crown which he may possess by right of succession, but let him be a wanderer and an outcast all his life, and let him not be able to support himself, but let him beg continually* […]'.[12]

3. Literature opinions on the "renewals" of 1231 and 1267

The next "bull renewal"[13] of 1231 was carried out by Andrew II issued under ecclesiastical pressure: Pope Gregory IX sent a letter in March 1231, in which he lamented the conditions in the Kingdom of Hungary: the activities and dignity of Muslims and Jews, and that the estates were also taken from the ecclesiastics, that they also paid taxes and were still forced to go to secular courts, and even marriage cases were heard by a secular court.[14] In response to this, Andrew II essentially repeated the content of the Golden Bull of 1222,

[10] Eckhart Ferenc: *Jog- és alkotmánytörétnet*. In: Hóman Bálint (ed.): A magyar történetírás új útjai. Magyar Szemle Társaság, Budapest, 1932. 316.

[11] Karácsonyi János: *Az Aranybulla keletkezése és első sorsa*. MTA, Budapest, 1899. 27–28.

[12] Eckhart Ferenc: *Magyar alkotmány- és jogtörténet.* Osiris Kiadó, Budapest, 2000. 35.; Béli Gábor: *II. András korabeli jogforrások, különös tekintettel az Aranybullára*. In: Zsoldos Attila (ed.): Aranybulla 800. Budapest, Országház Könyvkiadó, 2022. 137.; Fejér, Georgius (ed.): *Codex diplomaticus Hungariae ecclesiasticus ac civilis I–X*. Typ. Universitatis, Budae, 1829–1844. CD III/1. 210. (The decree is considered false by historians, See at: Györffy György: *Szlavónia kialakulásának oklevélkritikai vizsgálata*. Levéltári Közlemények, 1970/2. 223–240.)

[13] The literature refers to the decree of 1231 differently, sometimes as a renewal – See at: Zsoldos, 2022. 202., 205.; Zsoldos Attila: *Az Aranybulla útja a történeti mitológiába*. Pontes, 2022. – and some see it as the second Golden Bull – Dreska Gábor: *Az Aranybulla megújításainak politikai háttere*. Rubicon, 2022/6. https://rubicon.hu/cikkek/az-aranybulla-megujitasainak-politikai-hattere (2022.08.08.).

[14] Zsoldos, 2022. 205.

in which he actually confirmed the provisions of the so-called priestly bull of 1222, and instead of the right of resistance, the threat of ecclesiastical fulmination was included in the document.[15] *György Bónis* already highlighted the reason for this in 1948: in 1231 the king and his sons swore to the bull, but in 1222 this did not happen, and the breach of oath brought the monarch under ecclesiastical jurisdiction.[16] *Gyula Pauler* also pointed out the manifestation of the influence of the church in 1899, in his opinion the bull of 1231 was not prepared according to the pressure and perception of the gentry, but on the basis of the agreement of the prelates and lords.[17]

In connection with the "bull renewal" of 1231, in line with *Pál Engel*'s monograph of 2001, *Attila Zsoldos* did not write about repeating the content of the Golden Bull of 1222 in 2022, but notes that – although there are places where version 1231 literally follows its earlier provisions – basically a strongly modified version was born.[18] Similarly, *Gábor Béli* stated in the same year that although the provisions of 1231 were indeed partly based on the Golden Bull of 1222, since it contained new provisions, it is not a question of ratifying the original, since even at that time it would have been a condition that the legislation to be kept in force should have been explicitly referred to in ratification, but this did not happen, Thus, the document of 1231 should be regarded as a new royal decree.[19] In terms of fate, according to *Alajos Degré*, the "renewal" of 1231 was also forgotten.[20]

In 1260, a serious internal conflict broke out between King Béla IV and Prince Stephen, because the Styrians had defeated the Hungarians, so he was given Transylvania to govern, not Styria, which he despised and rebelled against. As a result, his father granted him the title of king junior in 1262 and ceded the country to him to govern all the way to the eastern bank of the Danube. This still did not resolve the conflict. To put an end to this, Béla IV invaded his son's territories in 1264, but he counter-attacked in the winter and defeated his father at Isaszeg. Under the 1266 Treaty of Margaret Island, the earlier division of the country was maintained,[21] but to prevent a resumption of fighting and to gain the loyal support of the barons and nobles in 1267 Béla IV, his son King Stephen and Prince Béla Jr. issued a joint decree at the request of "the royal servants called nobles", with the consent of the barons:[22] "*habito baronum nostrorum consilio et assensu*".[23] The decree of 1267 repeats the essence of the Golden Bull for ten articles, without referring to it. It recognised the counties, also introduced ecclesiastical excommunication instead of the resistance clause.[24]

Pál Engel pointed out, that the essence of the decree of 1267 was therefore that the king issued it with the consent of the barons, which meant that it was no longer just the

---

[15] Zsoldos, 2022. 212–213.

[16] Bónis, 2003. (1948). 140. This is also confirmed by Béli. See at: Béli, 2022. 138.

[17] Pauler Gyula: *A magyar nemzet története az Árpádházi királyok alatt. 2. köt.* Atheneum Irod. és Nyomdai R. Társulat, Budapest, 1899. 109.

[18] Zsoldos, 2022. 209.

[19] Béli, 2022. 134–135.

[20] Degré Alajos: *Magyar alkotmány- és jogtörténet*. Publikon Kiadó, Pécs, 2009. (1950). 65–66.

[21] Engel, 2001. 92–93.

[22] Degré, 2009. 66.

[23] Szűcs Jenő: *Az 1267. évi dekrétum és háttere. Szempontok a köznemesség kialakulásához*. In: H. Balázs Éva – Fügedi Erik – Maksay Ferenc (ed.): Társadalom- és művelődéstörténeti tanulmányok. Mályusz Elemér emlékkönyv. Akadémiai Kiadó, Budapest, 1984. 342.

[24] Degré, 2009. 66.

king's right to legislate, but a form of joint exercise of power, also with his son the younger King Stephen, because their peace, their consolidation and retention of power depended on their cooperation with the barons and nobles, without whose support their power could have been shaken again.[25]

Gyula Pauler, anticipating Engels by about 100 years, stressed that both Béla IV and Stephen needed the support of their men, but also called the 1267 decree necessary because in the past 45 or 36 years the provisions of the earlier decrees had become largely obsolete.[26] From the viewpoint of the nobility, regarding the content, *Gábor Béli* also emphasized that the ratification and adoption of the decree of András II of 1222 in 1351 is of decisive importance for the history of the Hungarian constitution: the legal status of serviens regis or regalis and that of nobilis became identical at the end of the 13th century, which was first realized with general effect in the decree of 1267. By virtue of the identification of the two statuses, the provisions relating to serviens regis and nobilis were inherited together as noble liberties.[27]

4. The "old-new" solution of 1351

In November 1351, Louis I called a Diet, where he confirmed the Golden Bull, except for Article 4 on the right of free disposal: "*if a serviens dies without a successor, his daughter shall keep a quarter of his estate, and he may dispose of the rest as he pleases*"[28] – and if he could not make a will, his nearest relatives would inherit, and in their absence the king would inherit. Under the contemporary interpretation of the "repealed" Article 4, the royal servant was free to dispose only of the estates he had acquired. With the abolition of this right, Louis I introduced the so-called "ancestral law": the regulation of the inheritance of hereditary (i.e. ancient) noble estates in Hungary. The law of Louis I of 1351 abolished the free testamentary disposition of ancestral estates and stated that the hereditary estate would automatically pass to the male descendant, either lineal or lateral, in the event of a dispute between the father and his sons. If the male branch of the family died out, the estate reverted to the king. According to this rule, the king was ostensibly abolishing free disposition and 'confirming the right of inheritance of the kinship', but in fact, a legal principle that had existed for several centuries was written.[29]

The decree of Louis I of 1351 proved to be of decisive importance for the fate of the Hungarian nobility. With the inclusion of Andrew II's decree of 1222, the benefits and fixed rights granted to servientes and nobiles were summed up as noble rights.[30] After its confirmation in 1351, the decree of 1222 took on a new life, because the two noble classes

[25] Engel, 2001. 92.

[26] Pauler, 1899. 266.

[27] Béli Gábor: *Magyar alkotmány- és jogtörténet jegyzet, 1. félév*. Magánkiadás, Pécs, 2016. 7–9.

[28] Csukovits Enikő: *Az Anjouk Magyarországon II. I. (Nagy) Lajos és Mária uralma (1342–1395).* MTA Bölcsészettudományi Kutatóközpont. Történettudományi Intézet, Budapest, 2019. 51.

[29] Csukovits, 2019. 52.

[30] See at: II. András első dekrétuma 1222: Aranybulla. 4. A serviensek örökléséről. See at: Mezey Barna (ed.): *A magyar jogtörténet forrásai. Szemelvénygyűjtemény.* Osiris Kiadó, Budapest, 2000. 113.; Béli, Gábor: *Die Basisinstitut des Privatrechts.* In: Máthé, Gábor (ed.): Die Entwicklung der Verfassung und des Rechts in Ungarn. Dialóg Campus Kiadó, Budapest, 2017. 179.

(nobiles and serviens) were merged. Of the provisions of the Decree of Andrew II of 1222 concerning the serviens, Article 4 deserves particular attention: "*Si quis serviens sine filio decesserit, quartam partem possessionis filia obtineat, de residuo, sicut ipse volnerit, disponat. Et si morte preventus disponere non potuerit, propinqui sui, qui eum magis contingunt, obtineant. Et si nullum penitus generationem habuerit, rex obtinebit*" i. e. "*if a serviens dies without a son, his daughter shall inherit a quarter of his estate, and he shall dispose of the rest as he pleases. And if he is unable to do so by reason of an unexpected death, let those relatives who are closer to him inherit. And if he have no kinsmen at all, the king shall take them into his possession.*"[31]

Some 20th century authors concluded that, in the absence of a descendant heir, the serviens was free to dispose of his estate, regardless of the rights of his relatives. This was also formulated by *György Bónis* in 1972: "*in the absence of a successor, the son of a royal serviens is free to dispose of his property*".[32] In 1998, *Gyula Kristó* stated in relation to Article 4 that Louis I abolished the right of free will granted to servientes by the Golden Bull and replaced it with the alienation of the noble estate, which *Kristó* called living customary law. He also stated that this decree was a milestone on the road to the unification of the nobility into a legal order.[33]

In comparison, *Ferenc Eckhart* pointed out as early as 1932 that Andrew II gave up the right of reversion, granted the nobleman who had no descendant the right of free disposition in the donation estate, the ancestral mode of inheritance remained unchanged, and if the possessor did not exercise the right of free disposition, the clan inheritance was also valid in the donation estate and the king only inherited if the clan had died out completely. This is therefore a recognition of the clan succession, not the introduction of a new succession. Also in 1267, Béla IV did not establish a mode of succession, but clarified the royal reversion, and in the decree of 1351, *Eckhart* stated that from the point of view of succession law, the provision did not introduce anything new, but merely declared the operation of the previous practice, which had been in force for several hundred years.[34] In 1948, even *Bónis* came to the same conclusion: "*it expresses the free-ownership of the serviens.*"[35]

However, *Gábor Béli* pointed out that here it was actually a question of the serviens, as a free owner, being able to dispose of his property. So the servientes did not expect Andrew II to introduce a new system of succession, they only wanted the king to recognise the right of the nobles to dispose of their property. The reason for these differences was that the servientes were mostly castle servants, tied to the castle, and could not alienate their property on their death, except by royal permission. When the king freed the serviens from the castle, he freed him together with his estates, as described in Article 4, as a general principle. Another reason for the misunderstanding may have been that the 13th century conception of law was different in terminology from that of the 14th century. At the beginning of the 13th century, it was all about whether one was a free owner or not. As castle servants,

---

[31] II. András első dekrétuma 1222: Aranybulla. 4. A serviensek örökléséről. See at: Mezey, 2000. 113.

[32] Bónis György: *Középkori jogunk elemei*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1972. 94.

[33] Engel Pál – Kristó Gyula – Kubinyi András: *Magyarország története 1301–1526.* Osiris Kiadó, Budapest, 2005. 88–90. (first edition: 1998!).

[34] Eckhart Ferenc: *Jog- és alkotmánytörténet*. In: Hóman Bálint (ed.): A magyar történetírás új útjai. Magyar Szemle Társaság, Budapest, 1932. 292–294.

[35] Bónis, 2003. (1948). 120.

servientes were not free owners because they were bound to a castle. When they became freed servientes, they became free owners and could dispose of their property freely, without royal approval.[36]

From 1351, thanks to its reinforcement the forgotten Golden Bull became the bearer of noble rights and served as the basis of the four fundamental rights of the nobility set out in the Tripartitum: a nobleman can only be convicted in legal proceedings, he is under the power of the legally crowned king alone, he can enjoy his estates freely and tax-free, in return for which he is obliged to defend the country militarily, and he can exercise the right of resistance together with his noble companions, if the king violates the noble liberties.[37] So the Golden Bull contained the cardinal rights of the nobility from 1351, and from then on we can refer to it as one of the sources of the historical constitution.[38] As for the connection between the Golden Bull and the historical constitution, *Zsolt Zétényi* stated in 2010 that the Golden Bull, "*the fundamental law of King Andrew II of Hungary, issued in 1222, can be called the cornerstone of the historical constitution*".[39] Furthermore, *Gábor Béli* pointed out in 2016 that the Golden Bull became the basis of the constitution of the Order with its confirmation in 1351.[40]

5. Concluding reflections based on István R. Kiss and Gyula Pauler

This study concludes with the findings of *István R. Kiss,* who already pointed out in 1925 that the popular belief that Louis I (the Great) founded the ancestral estate with the aim of preventing the fragmentation of the noble estate is wrong. He pointed out that the documents of the Árpád-era show that the organisation of the clan, the clan estate and its ancient order of succession were maintained by customary law and underlined that the preamble to the decree of 1351 shows that the nobility itself requested that an article of the Golden Bull be annulled by the king.[41]

Another interesting finding is contained in the commentary of *István R. Kiss,* namely that the author considered the 1231 bull revision valid, and even stated that the latter annulled the 1222 Golden Bull. It is no coincidence that the decree of 1267 is also based on 1231. In his view, it follows that Louis I should have confirmed the 1231 decree, but that the king chose to revive the invalid 1222 decree. There are three possible reasons for his decision. The first reason is that in 1351 the axiom that the newer law – and here

[36] Béli Gábor: *Magyar jogtörténet. A tradicionális jog*. Dialóg Campus Kiadó, Budapest – Pécs, 2000. 79–80.; See at: II. András első dekrétuma 1222: Aranybulla. 4. A serviensek örökléséről. See at: Mezey, 2000. 113.; Béli, 2017. 179.

[37] Béli, 2017. 180.

[38] Szalay József – Baróti Lajos: *A magyar nemzet története I–IV. kötet*. https://www.arcanum.hu/hu/online-kiadvanyok/MagyarNemzetTortenete-a-magyar-nemzet-tortenete-9A23/szalaybaroti-a-magyar-nemzet-tortenete-9A24/magyarorszag-a-vegyes-hazakbol-szarmazott-kiralyok-koraban-8F7/i-az-anjouk-kora-8FF/4-iv-maria-13821387-ii-vagy-kis-karoly-13851386-AD9/ (2018.06.23.).

[39] Zétényi Zsolt (ed.): *A történeti alkotmány. Magyarország ősi alkotmánya*. Magyarországért kulturális egyesület, Budapest, 2010. 110., 123.

[40] Béli, 2016. 36., 51.

[41] R. Kiss István: *Nagy Lajos és az ősiség.* In: Lukinich Imre (ed.): Emlékkönyv Dr. Gróf Klebersberg Kuno negyedszázados kulturpolitikai működésének emlékére. Születése ötvenedik évfordulóján. Rákosi Jenő Budapesti Hirlap Ujságvállalata R.–T. Nyomdája, Budapest, 1925. 241–242.

he calls the decree law – invalidates the earlier one was probably not yet recognised or accepted. *R. Kiss* considers this to be a primitive reason, since, in his opinion, there were already lawyers at court at that time. The second possible reason is that more copies were made of the decree of 1222 than of 1231, so it is possible that the former became more widely known, or that the latter was forgotten – but *R. Kiss* does not think this is possible either, since the decree was in the custody of the Archbishop of Esztergom for such a short time. A third possible reason is that its content may have led to the decision to revive the Golden Bull of 1222.[42] his is, by the way, what *Gyula Pauler,* cited earlier, and referred to in 1899: in the decree of 1231 the ideas of the Church prevailed.[43] By contrast, the decree of 1222 was issued to the nobility by Andrew II and established their right of resistance, and a separate papal bull was issued earlier in the same year for provisions affecting the church. In 1231, however, the two classes were uniformly provided only one common document, and instead of a right of resistance, the bull was threatening by the excommunication of the Archbishop of Esztergom, which Louis I was keen to avoid.[44]

For the present study, this is the most reasonable explanation for the resurrection of the Golden Bull of 1222 in 1351, if for no other reason than that Louis I (and Charles I) had created a new court loyal to the monarch, whose inner circles were shaped by Angevin politics, and so there was less to fear from their rebellion than from the Church's annoyance.

[42] R. Kiss, 1925. 242–243.
[43] Pauler, 1899. 109.
[44] R. Kiss, 1925. 242–243.

Bónis Péter
associate professor, Károli Gáspár University of the Reformed Church in Hungary, Budapest

THE HUNGARIAN GOLDEN BULL AND THE CONTEMPORARY LEARNED LAW (IUS COMMUNE)

1. The Hungarian Golden Bull and its sources

The Hungarian Golden Bull[1] is a privilege in which the king agreed to limit his power and recognised the freedoms of the lesser royal men, the royal servants, and this privilege was solemnly confirmed by the Hungarian king with his golden pendant seal. Its significance lies in the fact that the king of Hungary then recognised the existence of a social class whose rights could not be infringed by the king.

The Golden Bull did not mark the beginning of the Hungarian feudal state, but it was the first written document to set out the rights of the servientes regis in detail, taking care to ensure that the list of privileges was complete. The Golden Bull therefore occupies a very important place in the history of the Hungarian constitution.

The Golden Bull was issued in 1222 by King Andrew II, but it was amended several times and reissued with a more or less changed text. No original copies of the Golden Bull of 1222 have survived. The oldest surviving renewal from 1231 is preserved in the Vatican Archives.

The sources of the Golden Bulls of 1222 and 1231 have already been the subject of a number of findings in the legal historian literature.[2] Comparisons have been made

---

[1] The most important editions of the Hungarian Golden Bull: Besenyei, Lajos – Érszegi, Géza – Pedrazza Gorlero, Maurizio (ed.): *De Bulla Aurea Andreae regis Hungariae MCCXXII*. Valdonega, Verona, 1999.; Bak, János M. – Bónis, György– Sweeney, James (ed.): *The Laws of the Medieval Kingdom of Hungary, 1000–1526. Vol. 1. 1000–1301*. Schlacks, Idyllwild, 1999. The Latin text and the English translation of the Golden Bull is quoted from the Decreta Regni Mediaevalis Hungariae, vol. I. (cited as DRMH I).

[2] Blazovich, László: *The origins of the Golden Bull and its most important provisions as reflected in Hungarian constitutional and legal history.* In: Besenyei–Érszegi–Pedrazza Gorlero, 1999. 181–190.; Blazovich, László: *L'ambiente storico della Bolla d'Oro*. In: Besenyei–Érszegi–Pedrazza Gorlero, 1999. 113–120.; Blazovich László: *Demográfia, jog és történelem. Válogatott tanulmányok*. Csongrád Megyei Levéltár, Szeged, 2013. 153–159.; Balogh Elemér: *Az Aranybulla helye a magyar alkotmánytörténetben.* In: Besenyei–Érszegi–Pedrazza Gorlero, 1999. 61–77.; Balogh Elemér: *Az Aranybulla értékelése.* In: Varga Zs. András – Patyi András – Ábrahám Márta (ed.): Bulla Aurea 800. Nyolc évszázad közjogi üzenete. Kúria, Budapest, 2022. 19–27.; Balogh Elemér: *Az európai jogtörténelem fősodrában. A magyar Aranybulla*. In: Mezey Barna (ed.): Az Aranybulla a joghistóriában. MFI, Budapest, 2022. 19–53.; Horváth Attila: *Az 1222. évi Aranybulla, mint a történeti alkotmányunk sarkalatos törvénye*. In: Varga Zs. András – Patyi András – Ábrahám Márta (ed.): Bulla Aurea 800. Nyolc évszázad közjogi üzenete. Kúria, Budapest, 2022. 95–127.; Zsoldos Attila: *II. András Aranybullája*. Történelmi Szemle, 2011/1. 1–38.

with the English *Magna Charta Libertatum,* which dates from 1215, its textual affinity with some Aragonese privileges has been suggested, and the connection between the Golden Bull and certain customary law books of the Kingdom of Jerusalem have been pointed out.[3]

All these attempts, however, have failed to fully resolve the problem of the origins of the Golden Bull. The Hungarian Golden Bull was not created under the influence of a single contemporary constitutional charter or a charter of liberty by adopting their provisions, therefore any attempt to find a single legal source was condemned to fail.

The Golden Bull was the result of a longer development, and the nobility had been able to use the rights and privileges set out in the Golden Bull long before 1222. The list of rights of the servientes regis set out in the Golden Bull were not entirely new, but it has reflected a longer constitutional history.

All the contemporary sources, be it English, Aragonese or from the Crusade States, indicate a common legal culture what medieval learned men called *ius commune.* All these European privileges had their roots in Western legal culture, in the Roman and canon law systems taught in universities, and were part of the contemporary legal culture. This explains why the English, Aragonese or Jerusalem sources of law listed as possible sources of the Golden Bull also show many similarities, i.e. they point to a common source, the ius commune, the Western legal culture in the 13th century.[4]

The *ius commune* is *not* simply ancient Roman law, because ancient Roman law was obsolete in the Middle Ages, it was not adapted to the needs of medieval society, but useful principles (*argumenta*) could be extracted from it. Roman law needed to be modernised, and radically rebuilt. Roman law had been modernised by canon law and by the interpretation of the glossators of civil law, and therefore the *ius commune includes Roman law, canon law and feudal law, as expounded and adapted by the glossators*.[5]

The present paper will compare some of the more important provisions of the Golden Bull with the works of the learned teachers of medieval law, the glossators of Roman, canon or feudal law, who may have been the source for the local legal scholars who formulated not only the Hungarian Golden Bull but also other contemporary constitutional documents or privileges.

---

[3] D'Eszlary, Charles: *Magna Carta and the Assises of Jerusalem*. American Journal of Legal History, 1958/2–3. 189–214.; Rubin, Jonathan: *John of Ancona's Summae. A Neglected Source for the Juridical History of the Latin Kingdom of Jerusalem*. Bulletin of Medieval Canon Law, 2011/12. 183–218.

[4] Zlinszky János: *Kitonich János véleménye a jogászok jogfejlesztő szerepéről.* Jogelméleti Szemle, 2007/2.; Zlinszky, János: *Legal Studies and Works of János Baranyai Decsi.* Acta Ethnographica Hungarica, 2000/3–4. 327–336.; Zlinszky János: *Werbőczy jogforrástana.* Jogtudományi Közlöny, 1993/10. 375.; Andrási, Dorottya: *I rapporti giuridici tra Italia ed Ungheria nel XII–XIV secoli.* In: Jankovics József et al. (ed.): A magyar művelődés és a kereszténység. A IV. Nemzetközi Hungarológiai Kongresszus előadásai. Nemzetközi Magyar Filológiai Társaság, Budapest, 140–146.; Komáromi, László: *Ungarische Rechtsentwicklung in der gemeinsamen europäischen Rechtskultur*. In: Zlinszky, János (ed.): Durch das römische Recht, aber über dasselbe hinaus. Pan, Budapest, 2008. 321–324.; Blazovich László: *A Tripartitum és forrásai*. Századok, 2007/4. 1011–1023.

[5] Calasso, Francesco: *Introduzione al diritto comune*. Giuffrè, Milano, 1951. 75.; Bellomo, Manlio: *The Common Legal Past of Europe, 1000–1800*. Catholic University of America Press, Washington, 1995.

2. The main goal of the Hungarian Golden Bull was the protection of natural and vested rights of the Hungarian servientes regis

The Golden Bull was born out of the discontent of the *servientes regis*.[6] The servientes of the king were unhappy with the king's policies, accusing him of violating their acquired rights, taking their estates and distributing them to others, or imprisoning them without justification. They believed that their natural rights had been violated.

The Golden Bull was created to protect the rights of the servientes regis. In order to enforce their claims, romano-canonical principles were invoked. Such an important principle was that no one should be deprived of his rights without fault and without just cause (*nullus potest privari iure suo sine culpa et sine causa*). This was the *basic idea behind the Hungarian Golden Bull,* although it is not stated literally in the Golden Bull, but it is undeniable that this principle formed the basis of many of its provisions.

This principle was formulated by the canon law, and it appeared also in the Brocarda of Damasus Hungarus, the Hungarian professor of canon law in Bologna around 1217.[7] Most of the provisions of the Golden Bull are nothing more than a concretisation of this principle, a concretisation of the protection of natural or vested rights of the servientes regis which cannot be impaired or taken away. The protection of natural rights appears in the protection of property rights, in the protection of personal liberty, in the fight against excessive taxation, and in many other areas of the Hungarian Golden Bull.

3. The protection of personal liberty in the Golden Bull and the ius commune

According to the Golden Bull of 1222 the king expressed his wish that "neither we nor our successors should at any time arrest or cause the ruin of any serviens for the suggestion of some magnate, unless they first be summoned and duly sentenced by judicial process."[8]

Subsequent legislation has confirmed the protection of personal freedom of the servientes regis, e.g. the privilege of 1267 ordered that "no noble on account of evil counsel should

---

[6] The *servientes regis* were free warriors and the precursors of the lesser nobility. The rights granted to them in the Golden Bull later became largely the rights of the noblemen. Therefore it is perhaps not excessive to translate servientes regis as noblemen, although there are some important differences.

[7] Damasus Hungarus, *Brocarda,* nr.2 (ms. Paris, Bibliothèque Nationale, ms. lat. 14320, fol. 213rb): "Nunquam est privandus quis iure suo sine culpa et sine causa." Although this legal principle was not literally mentioned in the Golden Bull, it appears in Hungarian charters. Cf. Fejér, Georgii: *Codex diplomaticus Hungariae ecclesiasticus ac civilis. Tomi IX. Vol. 1.* Typ. Universitatis, Budae, 1833. 497.: "nos neminem suo iure priuari"; *Tomi X. Vol. 6.* Typ. Universitatis, Budae, 1844. 360.; *Tomi V. Vol. 1.* Typ. Universitatis, Budae, 1829. 34.; *Tomi X. Vol. 7.* Typ. Universitatis, Budae, 1843. 863.: "Et quia nos neminem regnicolarum nostrorum suo iusto iure, nequaquam indebite, destitui volumus et priuari." *Tomi X. Vol. 7.* 344.: "Conuentum ipsorum iustis iuribus sic minus iuste et sine lege destitui nolumus et priuari." *Tomi VIII. Vol. 2.* Typ. Universitatis, Budae, 1832. 644.: "omnia iura canonica et ciuilia in haec concordent, et tradant manifeste, quod ante cognitionem causae nullus iure suo priuari debeat, imo ante omnia restituendus sit spoliatus."

[8] "Volumus eciam quod nec nos nec posteri nostri aliquo tempore servientes capiant vel destruant favore alicuius potentis, nisi prius citati fuerint et ordine iudiciario convicti." The Latin text and the English translation of the Golden Bull is quoted from Bak, János M. – Bónis, György – Sweeney, James Ross (transl., ed.): *The Laws of the Medieval Kingdom of Hungary (1000–1301). Decreta Regni Medievalis Hungarae. I/1*. Schlacks, Bakersfield, 1989.

be arrested, imprisoned, or harmed in his person or goods without a judicial hearing, but having been brought into court he should be judged in the presence of barons without wrath, hatred, or favor according to the rule of law."[9]

The doctrine of due process and the protection of personal freedom was acknowledged in many other contemporary charters and privileges throughout Europe. E.g., Article 39 of the English Magna Charta stated: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land."[10]

These provisions are rooted in the ius commune. In his Decretum (C.2 qu.1), Gratian wrote that no one can be condemned without due process ("*nullus sine iudiciario ordine dampnare ualeat.*")[11] Gratian proved this principle with many authorities. E.g., he quoted Pope Gregory the Great who stated: "Just as without a judgment we do not wish anyone to be condemned, thus what was decided justly, we shall not allow to be deferred with any excuse."[12] Gratian quoted a letter of Pope Melciades who called on that everything should always be examined diligently, and be judged with justice and love, and should be no condemning without a just and true trial (C.2 qu. 1 c. 13).

This legal principle was probably well-known to many Hungarian jurists not only because Gratian's Decretum was the most diffused textbook of canon law in Hungary and throughout Europe, but also because it appeared also in the Summa decretalium of Damasus Hungarus: "*Item nota neminem sine iudicio condempnandum*."[13]

As we have shown above, according to the principles of ius commune no one should be arrested, imprisoned, or harmed in his person or goods without a judicial hearing. In Hungary and throughout Europe, ecclesiastical courts have consistently enforced the principles of canon law.[14] This principle has been introduced in the Hungarian Golden Bull not only because this was an important demand of the servientes regis, but also because it would have seemed natural for Hungarian clerics educated at medieval universities to acknowledge this well-known principle of the learned law.

---

[9] DRMH, I.105.

[10] Baldwin, John: *Due process in Magna Carta.* In: Griffith-Jones, Robin – Hill, Mark (eds.): Magna Carta, Religion and the Rule of Law. Cambridge University Press, Cambridge, 2015. 31–50. For further reading in Hungarian language about the English legal history see: Antal Tamás: *Ranulf Glanvill és a common law születése.* Acta Jur. et Pol. Tom. 76. 2014. 11–22.; Antal Tamás: *Az angol esküdtszék fejlődése a közép- és a koraújkorban. A Magna Chartától Morus Tamás peréig*. Jogtudományi Közlöny, 2015/10. 477–486.; Antal Tamás: *Ranulf Glanvill jogkönyve és az angol esküdtszék.* Jogtudományi Közlöny, 2014/9. 401–410.; Varga Norbert: *Angolszász jogtörténeti értékelések*. Klió, 2002/1. 5–7.

[11] Richter, Aemilius Ludwig – Friedberg, Emil: *Corpus iuris canonici. Pars prior. Decretum magistri Gratiani.* Tauchnitz, Lipsiae, 1879. coll. 438.

[12] C. 2 qu. 1 c.3

[13] Damasus Hungarus, *Summa* in tit. De iudiciis (ms. Paris, Bibliothèque Nationale, ms. lat. 14320, fol. 155rb)

[14] Balogh Elemér: *Egyházi és világi bíróságok joghatósága a középkori Európában.* Acta Jur. et Pol. Tom. 58. 1997. 1–41.

4. The protection of possessions and properties of the servientes regis in the Hungarian Golden Bull

According to the Hungarian Golden Bull of 1222 "possessionibus etiam quas quis iusto servitio obtinuerit, aliquo tempore non privetur." i.e. "no one shall at any time be deprived of possessions acquired by honorable service."

This provision of the Golden Bull was designed to protect tenures acquired through righteous services. It is likely that we should also look for a model for this provision in canon law or in the feudal law.

According to Johannes Teutonicus, no one can be deprived of his tenure without his fault (*nullus debet privari suo beneficio sine culpa*).[15] In another place Johannes Teutonicus wrote that no one can be deprived of his right unless he has committed a serious crime.[16] In feudal law these serious crimes were called *feloniae*.

The feudal contract implied giving and receiving of landholdings in return for loyalty and services, and in case of felony the overlord could recover the lands, it being unjust that a party be held bound to fulfill his promises when the other violates his. But if there is no breach of contract and no disloyalty, no one can be deprived of his right. The Libri Feudorum also emphasised that the nature of the feudal relationship is that the prince cannot take away the tenure of his vassals without their fault.[17] The Hungarian Golden Bull stated the same using *ius commune* as a model.

According to the Hungarian Golden Bull of 1231 "since on account of our descensus, that of the lady queen and our sons as well as that of the archbishops, bishops, barons, and our nobles we appear to have caused intolerable damage and hardship throughout our whole kingdom, we decree that it be strictly established that nothing should be received by our kitchen or theirs *unless a just price has been paid.* Similarly, no cereals, wine, or other necessities shall be received *unless a just price has been paid.*"[18]

From this passage, the phrase "*dato iusto precio*" (*unless a just price has been paid*) in particular caught my attention. Although this phrase is only found in the Golden Bull of 1231, it shows a thorough knowledge of the learned law (*ius commune*). Not only does the passage suggest that the Golden Bull protects property against unlawful interference by the king and obliges the sovereign to pay the full market price, but it also indicates that the authors of the Golden Bull was familiar with the terminology of the ius commune.

[15] Johannes Teutonicus, Gl. *nisi gravi* ad C. 16 qu. 7 c.38., (Lugduni 1584, coll. 1171): "Item arg. quod nullus debet privari suo beneficio sine culpa sua, ut 56. dist. c. satis perversum (D.56 c.7)."

[16] Johannes Teutonicus, Gl. *satis perversum* ad D. 56 c.7., c. satis perversum (Romae 1582, coll. 391.): "non enim privandus est quis iure suo, nisi pro gravissimo delicto."

[17] Libri Feudorum 1.7.: "Natura feudi haec est ut si princeps investierit capitaneos suos de aliquo feudo, non potest eos disvestire sine culpa."; Libri Feudorum 1.21(22).2.: "Sancimus ut nemo miles eiiciatur de possessione sui beneficii nisi convicta culpa."

[18] Theiner, Augustinus: *Vetera monumenta historica Hungariam sacram illustrantia.* Typis Vaticanis, Roma, 1859. I.109.: "Super domos servientum vel villas nec agasones, nec falconarii, nec caniferi, nec curriferi nostri descendant ipsis invitis; ubicumque autem alibi nos vel dictos officiales nostros descendere contingerit, iustam extimationem solvi faciemus, sicut continetur in sequentibus. Et quia preterea tam propter descensus nostros et domine regine ac filiorum nostrorum, quam etiam archiepiscoporum, episcoporum, baronum et nobilium nostrorum intolerabilia dampna et gravamina per totum regnum fieri videbamus, districte statuendo precipimus, ut nichil recipiatur ad coquinam nostram vel nostrorum, nisi dato iusto precio. Similiter de annona et de vino, et aliis necessariis nichil recipiant, nisi dato iusto precio."

However, to fully understand the point I am making, I have to start from further back. The chronicle of Otto Morena tells the following episode.

When Frederick, the emperor was once riding on a horse (palfrey) between Bulgarus and Martinus, he asked them whether he was lord [dominus, the word also means 'owner'] of the world. And Sir Bulgarus replied that he was not owner (dominus) so far as property was concerned. Sir Martinus, however, replied that the emperor was lord (dominus).

As a result, Martinus was rewarded with a horse, and Bulgarus with nothing. Sir Bulgarus, however, concocted this elegant turn of phrase: "Amisi equum, quia dixi equum, quod non fuit equum." (I lost an equine, because I upheld equity, which was not equitable.)[19]

Odofredus loved to amuse his audience with hilarious stories, and he commented it as follows: "Here Sir Martinus wanted to gather that the emperor is owner of every single thing. Again for his opinion he cited the law which says that the emperor can give our lands to soldiers for their support. .... and thus he responded to emperor Frederick, when he was at Roncaglia, through fear or favor. But Bulgarus said to the contrary in the same place.

We say to the contrary, because since someone has an action to vindicate his own thing, therefore the emperor does not have the action to vindicate, because two people cannot be completely and entirely the sole owner of the same thing. Sir Bulgarus understood what is said here "all to the prince" to apply to protection or jurisdiction, or, more truly, things belonging to the treasury and tax matters. It is no objection that there are laws which say that the emperor may give our lands to his soldiers for support, because this is true only when the just price has been paid to us."[20]

The Golden Bull protects possession against state interference in the same way that Bulgarus and Odofredus thought.[21] Bulgarus and Odofredus were against such an interpretation of Roman law that the emperor was the ruler of the world without any legal limits.

In medieval universities, it was at this time that the tendency to narrow the scope of power and to subject those who exercised public authority to the rule of law appeared. The noblemen must not be under despotic king, but under God and under the law, because law makes the king. No one can be above the law, in particular above the natural law.

This was the message of the ius commune, the Magna Charta and the Golden Bull. The Golden Bull and the English Magna Charta were precisely this, emphasising the rights of the servientes regis, the rule of law rather than the rule of the sovereign.

---

[19] Pennington, Kenneth: *The Prince and the Law, 1200–1600. Sovereignty and Rights in the Western Legal Tradition*. University of California Press, Berkeley, 1993. 31–39.

[20] Odofredus, *Lectura* in C. 7.37.3.pr., *de quadriennii praescriptione,* l. *bene a Zenone* (Lugduni 1552, fol. 111va): "Hic voluit colligere dominus Martinus, quod imperator sit dominus omnium rerum singularium. Item pro sua opinione inducit legem que dicit quod imperator potest dare predia nostra militibus ob stipendia, ut ff. de rei uendic. l. item si uerberatum (D. 6.1.15) et f. de euict. l. Lucius (D. 21.2.11). … Item pro sua opinione inducit ff. de offic. pretor. l. Barbarius (D. 1.14.3) et sic respondit imperatori Frederico seniori, dum esset apud Ronchaliam, timore vel amore. Sed Bulgarus dixit contra in eodem loco. Set dicimus contra, quia cum quis habeat rei uendicationem pro sua re, ut supra de rei uendicat. l. Doce. (C.3.32.9); ergo imperator non habet rei uendicationem, cum duo non possunt esse domini unius rei insolidum, ff. commod. l. Si ut certo § Si duobus uehiculum (D.13.6.5.15). Et intelligebat dominus Bulgarus quod dicitur hic, quod 'omnia sunt principis' quo ad protectionem vel jurisdictionem vel verius 'omnia sunt principis', scilicet, fiscalia et patrimonialia. Non obstat leges que dicunt quod licet imperatori dare predia nostra militibus ob stipendia, quia uerum est dato nobis pretio, ut supra pro quibus causis. l. servi. (C. 7.13.2)."

[21] As to Odofredus and Hungary cf. Bónis, Péter: *Odofredo e l'Ungheria. Alcune osservazioni sulla Lectura odofrediana di D. 2.14.39*. Tijdschrift voor Rechtsgeschiedenis, 2004/3–4. 269–282.

5. The restitution of despoiled noblemen in the Golden Bull

According to the Golden Bull of 1231 "it is further our wish that neither we nor our successors should at any time seize or cause the ruin of any one, unless he first be summoned and duly sentenced by judicial process. And since these provisions had been confirmed by our oath and that of our magnates, whoever has been despoiled by us, our sons, or anyone else without judicial sentence since that time, namely, since the seventeenth year of our reign, complete restitution shall be made to him."[22]

This provision of the Golden Bull was meant to ensure a further protection to the property rights of the servientes regis. The enforcement of a more efficient legal protection was ensured by ordering that whoever has been despoiled by the king, his sons, or anyone else without judicial sentence since that time, namely, since the seventeenth year of his reign, complete restitution shall be made to him.

Canon law has long urged the restitution in case of despoilment, and demanded that the despoiled holder be immediately reinstated without delay. The canon *Redintegranda* of Gratian's Decretum (C.3 qu.1 c.3), which provided that bishops and later all persons deprived of their possessions were entitled to be reinstated, had a particularly great impact on legal history.

The fourth Lateran Council (c.39) also urged the restitution. This canon later entered in the Liber Extra (X.2.13.18). After the fourth Lateran Council a lot of new decretals were issued on this topic. The Compilatio tertia contains some decretals on this issue, too. Around 1215-1217 Johannes Teutonicus also reiterated the principle contained in the Decretum, when he wrote: "*Exspoliatus est prius restituendus*."[23] The Gloss 'In continenti' of Johannes Teutonicus was perhaps a model for the Golden Bull.

This legal principle was probably well-known to many Hungarian jurists, too, because it appeared also in the Brocarda of Damasus Hungarus: "*Spoliatus ante litis ingressum principaliter sit restituendus*".[24]

The widespread use of this legal principle is demonstrated by the fact that Accursius also wrote a similar gloss, where he stated: "*Est enim spoliatus statim restituendus*."[25]

This passage of the Golden Bull is also very similar to the canon 7, Title 13 of the Second book of the Liber Extra of Pope Gregory IX. The Liber Extra (X.2.13.7) stated:

---

[22] Theiner, 1859. I.109.: "Volumus, quod nec nos nec posteri aliquos unquam capiant vel destruant, nisi prius ordine iudiciario conveniantur. Et cum ista sacramento nostro et principum nostrorum fuerint confirmata, si qui per nos vel per filios nostros, vel per quoscumque post idem tempus, scilicet decimo septimo anno regni nostri sine iudicio sunt spoliati, plene restituantur."

[23] Pennington, Kenneth: *Johannis Teutonici Apparatus glossarum in Compilationem tertiam.* Biblioteca apostolica vaticana, Vatican City, 1981. 216.: Johannes Teutonicus, Gl. *in continenti* ad 3Comp. 2.6.3. As to the sources of canon law, see Erdő, Péter: *Storia delle fonti del Diritto Canonico*. Marcianum, Venezia, 2008.; Erdő, Péter: *Die Quellen des Kirchenrechts*. P. Lang, Frankfurt am Main, 2002.; Erdő, Péter: *Storia della scienza del diritto canonico. Una introduzione.* Pontificia Università Gregoriana, Roma, 1999.; Erdő Péter: *Az egyházjog forrásai. Történeti bevezetés.* Szent István Társulat, Budapest, 1998.; Hartmann, Wilfried – Pennington, Kenneth: *History of Medieval Canon Law in the Classical Period, 1140–1234. From Gratian to the decretals of Pope Gregory IX.* Catholic University of America Press, Washington, 2008.

[24] Damasus Hungarus, *Brocarda*, nr.38 (ms. Paris, Bibliothèque Nationale, ms. lat. 14320, fol. 215rc)

[25] Accursius, Gl. *ad recuperandam* ad D. 43.15.1., *de vi et vi armata,* l. *praetor* (Coloniae Allobrogum 1612, coll. 673.): "Est enim spoliatus statim restituendus."

Spoliatus etiam a iudice, iuris ordine praetermisso, ante omnia restituatur." ("Whoever has been despoiled, without judicial sentence, complete restitution shall be made to him.")[26]

Although the Liber Extra was issued in 1234, and the Hungarian Golden Bull was reissued in 1231, it is obvious that the Liber Extra needed a longer time of preparation, and perhaps during this time, around 1231 the editor of the Liber Extra, Raymundus de Pennaforte has already formulated this legal principle in a way that entered in the Hungarian Golden Bull.

Although this famous legal principle was not new at the time of the Golden Bull, but was an old legal principle established by legal custom and canon law, the wording used in the Golden Bull is very close to the above-mentioned phrase of the Liber Extra, and it is perhaps not presumptuous to suggest that Raymundus de Pennaforte may have had an influence on the Hungarian Golden Bull's formulation, as regards the version of 1231. If not, we suggest to take into consideration the Gloss 'In continenti' of Johannes Teutonicus, which has perhaps influenced the Golden Bull.

6. The *quarta puellaris* in the Hungarian Golden Bull

According to the Golden Bull of 1222, "if a serviens regis dies without a son, his daughter shall receive a quarter of his possessions, but he shall dispose of the rest as he wishes. And if he shall not have been able to make disposition, those relatives closer to him shall obtain the possessions. If he shall have no relatives at all, the king shall obtain them."[27]

This is the first mention of the filial quarter (*quarta puellaris*)[28] in the Hungarian legal history. Antal Murarik[29] suggested in 1938 that this institution had derived from Roman Law, in particular from the Lex Falcidia.

The lex Falcidia was a plebiscitum in the ancient Roman Empire that restricted the testator's capacity to charge his testament with legacies, namely sums of money or objects the heir must transfer to a third person (legatum). According to the lex Falcidia, no one could bequeath more than three quarters of his property in legacies. In consequence, the heir must receive at least one fourth of the estate free from legacies. Later, this part was named quarta Falcidia.

József Gerics, an outstanding researcher of the Hungarian medieval law stated: "In the Golden Bull, this specific legal provision shows the influence of Roman law through canon law. Murarik's argument about the filial quarter can be confirmed, and the mediating source, which has escaped his attention, can be more precisely identified. The closest cousin

---

[26] This legal principle was well-known in Hungary. Cf. Fejér, Georgii: *Codex diplomaticus Hungariae ecclesiasticus ac civilis. Tomi VIII. Vol. 2.* Typ. Universitatis, Budae, 1832. 644.: "omnia iura canonica et ciuilia in haec concordent, et tradant manifeste, quod ante cognitionem causae nullus iure suo priuari debeat, imo ante omnia restituendus sit spoliatus."

[27] DRMH I.34.: "Si quis serviens sine filio decesserit, quartam partem possessionis filia obtineat, de residuo – sicut ipse voluerit – disponat. Et si morte preventus disponere non potuerit, propinqui sui, qui eum magis contingunt, obtineant. Et si nullam penitus generationem habuerit, rex obtinebit."

[28] Homoki-Nagy Mária: *Magánjogi intézmények az Aranybullában.* In: Mezey Barna (ed.): Az Aranybulla a joghistóriában. MFI, Budapest, 2022. 99–101.; Homoki-Nagy, Mária: *Institutions of private law as reflected in the Golden Bull.* In: Besenyei–Érszegi–Pedrazza Gorlero, 1999. 225–236.

[29] Murarik Antal: *Az ősiség alapintézményeinek eredete.* Sárkány Nyomda, Budapest, 1938. 163–193.

of the 4th article which introduce the filial quarter, and certainly its model, is a passage in Gratian's Decretum (D.2 c.6), taken from Isidorus, which says: 'Sub eodem quoque imperatore Falcidius tribunus plebis legem fecit, ne quis plus extraneis testamento legaret, quam ut quarta pars superesset heredibus, ex cuius nomine lex Falcidia nominata est.'[30]"[31]

Although I agree with Gerics regarding the Romano-canonical origin of the Hungarian filial quarter, I do not think that the direct source was the quarta Falcidia, as it was mentioned in Gratian's Decretum, because the *quarta Falcidia* is different from the *quarta legitima.*

For Hungarian clerics educated at medieval universities, it would have seemed natural to set the birthright portion (portio debita) of daughters at a quarter of the estate, as the *quarta legitima* (named also *quarta iure naturae*) was the denomination of the birthright portion (forced share) in the canon law of the Middle Ages.

In 1210 pope Innocent III issued the *Compilatio tertia* decretalium which included the decretal *Raynutius* (3Comp. 2.18.13). The decretal *Raynutius* became part of the Liber Extra later in 1234.[32] According to this decretal, there was a litigation between two daughters of Raynutius, Alterocha and Adiecta.

Johannes Teutonicus made an apparatus glossarum to the Compilatio tertia. Regarding the decretal Raynutius he remarked that there are three types of quarta: *a)* quarta Trebellianica, *b)* quarta Falcidia, *c)* quarta legitima or quarta iure naturae.

He said: "Est tertia quarta quae debetur filiis iure naturae, et hanc semper tenetur pater relinquere filio, nisi eum ex iusta causa exheredet."[33] In other words, Johannes Teutonicus explained that there is also a third quarta which is due to the children by natural law, and the father is always obliged to bequeath this quarta to his children.

The Glossa ordinaria of the Liber Extra repeated the gloss of Johannes Teutonicus with little changes, in line with the general experience that Bernardus Parmensis usually made only minor changes to the text.[34]

A fragment of the above-mentioned Apparatus glossarum of Johannes Teutonicus is now kept in a library in Győr, Hungary.[35]

Formerly, the birthright portion (debita portio) always consisted in a fourth part of the intestate share of the birthright heirs, whatever their number might be, but subsequently

---

[30] The Decretum was quoted from Richter–Friedberg, 1879. coll. 4.

[31] Gerics József: *A korai rendiség Európában és Magyarországon*. Akadémiai Kiadó, Budapest, 1987. 237.

[32] X. 3.26.16., *de testamentis,* c. *Raynutius,* e.g. printed in Friedberg, Emil: *Corpus iuris canonici. Pars secunda Decretalium collectiones.* Tauchnitz, Lipsiae, 1879. coll. 544.

[33] Pennington, 1981. 333.: "Ad intelligentiam huius nota quod triplex est quarta. Una dicitur quarta Trebellianica, ut cum aliquis est institutus heres, et rogatus est alii restituere totam hereditatem; talis potest retinere sibi quartam de tota hereditate, et hec dicitur quarta Trebellianica. Est alia quarta que dicitur Falcidia, et hec est debita iure institutionis, ut cum aliquis est institutus heres, et hereditas illa est exhausta per legata uel fideicommissa, tunc heres institutus potest detrahere tantum de singulis legatis seu fideicommissis ut habeat quartam, ut instit. de fideicom. hered. § Set quia. Est tertia quarta que debetur filiis iure nature, et hanc semper tenetur pater relinquere filio, nisi eum ex iusta causa exheredet, et hec quarta uocatur debitum bonorum subsidium. Et si sunt iiii. filii, uel pauciores, habebunt trientem. Si plures, habebunt semissem, ut C. de inoffic. testa. authen. Nouissima. Quandoque tamen pater necesse habet relinquere tres partes sue substantie suis filiis, quarta parte suo arbitrio reseruata, scilicet si sunt ei filii curiales uel filie nubentes, ut in authen. de triente et semisse § Excipiatur, coll. iii. jo."

[34] Gl. *quartam partem per Trebellianum* ad X. 3.26.16., *de testamentis,* c. *Raynutius* (Lugduni 1581, coll. 1184)

[35] Vizkelety, András – Erdő, Péter (ed.): *Mittelalterliche lateinische Handschriftenfragmente in Győr*. Balassi, Budapest, 1998. frag. nr. 41, fol. 1r was reproduced under Abb. 17.

Justinian increased the birthright portion in his Novellae, and ordained that when there are existing four or less of the testator's descendants, the birthright portion should be a third of the intestate share but when there are existing more than four, it should be one half the intestate share. Hence in the Pandect and Codex it was usually termed "the quarta."

Since in the Digest and in the Codex this legal institution was constantly called quarta, because only later it became a third, the glossators of Roman and canon law and learned jurists continued to call the birthright portion *quarta legitima,* so much so that even in the 17th century Arnoldus Vinnius called the birthright portion *quarta legitima,* and distinguished it from the quarta Falcidia.[36]

In the light of the above, we can only agree with the eminent author quoted above, who said: "The Golden Bull is thus direct evidence of the Romano-Canonical influence on the Hungarian law."[37]

However, I think that the direct source of the Hungarian filial quarter mentioned by the Golden Bull was the *quarta legitima* explained by the glossators of the decretal 'Raynutius', especially the Gloss 'Etiam quarta' of Johannes Teutonicus, and not the quarta Falcidia.

7. The duty of military service in case of offensive and defensive war

According to the Golden Bull of 1222 "if the king, however, wishes to lead an army outside the kingdom, the servientes shall not be obligated to accompany him unless it be at his expense and, after his return, he shall not permit judgment against them concerning the campaign. If, however, the army of an enemy should advance upon the kingdom, every one without exception is obligated to go. Also, if we lead an army beyond the realm, all those who hold counties or receive money from us are bound to accompany us."[38]

According to the Golden Bull of 1231 "when we lead the army outside the kingdom, the nobles do not have to come with us except for the counts, hired soldiers, castle warriors, and both those who are obliged to serve by reason of their office and those to whom we have granted substantial possessions. If, however, the army of an enemy should advance upon the kingdom, everyone without exception is obliged to oppose the enemy for the defense of the fatherland."[39]

One of the questions of feudal law was whether the vassal was obliged to go to war with his lord in all cases, or whether he was obliged to support his lord by going to war only in defensive warfare. The question, which appears not only in the Hungarian Golden

---

[36] Vinnius, Arnoldus: *In quatuor libros Institutionum imperialium comentarius*. Lugduni Batavorum, Venetiis, 1736. 450. Similarly Donellus, Hugo: *Opera omnia. Tomus quintus.* Joannis Riccomini, Lucae, 1764. 459.: "De quarta legitima quae dicitur debita portio."

[37] Gerics József: *A korai rendiség Európában és Magyarországon*. Akadémiai Kiadó, Budapest, 1987. 237.

[38] DRMH I.34.: "Si autem rex extra regnum exercitum ducere voluerit, servientes cum ipso ire non teneantur, nisi pro pecunia ipsius et post reversionem iudicium exercitus super eos non recipiet. Si vero ex adversa parte exercitus venit super regnum, omnes universaliter ire teneantur. Item – si extra regnum cum exercitu iverimus – omnes, qui comitatus habent vel pecuniam nostram, nobiscum ire teneantur."

[39] Theiner, 1859. I.110.: "Nobis facientibus exercitum extra Regnum, nobiles nobiscum ire non tenentur, nisi comites et stipendiarii et iobagiones castri, et qui ex officio debito tenentur, et quibus amplas concessimus possessiones. Si vero exercitus super regnum venerit, universi et singuli ad defensionem patrie contra inimicos se opponere tenantur."

Bull, but also in the customary law of the Kingdom of Jerusalem and in the laws of many other medieval European states, was not unknown in the learned law of the time, as it was also dealt with in the ius commune. Indeed, the Libri Feudorum, part of the Corpus iuris civilis, also dealt with this issue.

According to the Libri Feudorum, "*adiuvet eum ad eius defensionem; ad offendendum vero eum adiuvet, si vult*." If the feudal lord starts a legitimate, i.e. defensive war, the vassal is obliged to help him with arms. The answer is the same if there is a doubt as to whether the war is legitimate or not. However, if it is clear that the war is not legitimate or justified, the vassal should not support his feudal lord, because the self-defence is always legitimate, but the aggression is condemned by the Church and is considered a moral sin. A vassal is under no obligation to help his lord with arms in a war of aggression.

According to Obertus de Orto, the view that the vassal must always support his lord with arms, whether the war is defensive or offensive, cannot be accepted, because the vassal is not under obligation to support the sin or assist the excommunicated lord, because the Church considers that the lord's breach of oath has released him from his obligations of fealty.[40] The canonists like Huguccio and Hostiensis[41] expressed the same view in their books.[42]

Jacobus Arditionis (Jacobus de Ardizone) also addressed the question of whether the vassal was obliged to serve the absent lord. In his opinion, the vassal was also obliged to serve the absent lord. However, since the feudal lord himself had changed his place of residence, the financial consequences thereof should also be borne by him, and the vassal was therefore obliged to serve[43] the absent lord only at the expense of the lord. If the emperor travels to Rome for the coronation, or if he is abroad at war, the vassal is still obliged to go with him and must serve him. Jacobus Arditionis stated in general terms that outside the territory of the state the vassal is obliged to serve his lord if the lord pays his expenses[44], but if the lord does not pay his expenses, the vassal is not obliged to serve him. The Hungarian Golden Bull adopts the same solution.

In the later editions, the two books of the Libri Feudorum were followed by an appendix of various writings, decretals and imperial constitutions on feudal law of very different origin. Jacobus de Ardizone also compiled such an appendix, called *Capitula extraordinaria Jacobi de Ardizone*. It contains the following passage: "We have acknowledged it to be

[40] Libri Feudorum 2.28.pr.: "Domino guerram facienti alicui, si sciatur quod iuste aut cum dubitatur, vasallus ut eum adiuvet tenetur. Sed cum palam est quod irrationabiliter eam facit, adiuvet eum ad eius defensionem; ad offendendum vero eum adiuvet si vult. Sed si eum adiuvare noluerit, non tamen feudum perdet: Obertus et Gerardus. Alii vero sine distinctione dicunt semper debere eum adiuvare, sed Obertus et Gerardus eo utuntur argumento quod quemadmodum dominum excommunicatum vel a lege bannitum, non est obligatus vasallus ad adiuvandum vel servitium eum praestandum, immo solutus est interim sacramento fidelitatis, nisi ab ecclesia vel a rege fuerit restitutus ita nec istum iniuste guerram alicui facientem."

[41] Hostiensis, *Summa* in X.3.20., *de feudis,* no. 11 (Venetiis 1574, coll. 974.): "Quoniam non tenetur vasallus dominum adiuvare, si velit aliquem offendere; nisi ad domini defensionem, vel nisi dubitetur iuste vel iniuste guerram faciat."

[42] Hugutius, *Summa* in C.22 q.5 c.18, s.v. *consilium et auxilium:* "Quid si uelit inuadere illum uel res eius? In hoc casu non ei tenetur obedire nisi iustum esset bellum."

[43] Ardizone, Jacobus de: S*umma sive Epitome Iuris Feudorum*. Apud Ioannem Birckmannum et Theodorum Maumium, Coloniae, 1569. fol. 10r: "Vasallus debeat servire etiam absenti domino non suis expensis, sed expensis domini."

[44] Ardizone, 1569. fol. 10r: "Vasallus debet servire domino extra civitatem, si dominus vult praestare expensas, ut dictum est, alioquin non."

corroborated by practice that vassals render services at the lords' expense, if it were not otherwise agreed upon; for it is only fair that they should get a payment in the time they render their service, because no one can be obliged to serve in the military at his own expense, especially if they must act outside their own city for the purpose of performing services."[45]

This passage is in full accordance with the Summa feudorum of Jacobus de Ardizone where he stated that if the overlord wishes to lead an army outside the territory of his state, the vassal is not obliged to serve his lord unless the lord pays the expenses, but if the lord refused to pay his expenses, the vassal is not obliged to serve him. It is very important that this passage was published as a part of the Summa under the chapter entitled *De feudis et beneficiis constitutiones imperiales* in the printed editions of the Summa feudorum of Jacobus de Ardizone. E.g., in the printed edition of Coloniae 1568, at fol. 216v, this text was printed, too. It is likely that all the printed editions go back to the same manuscript, so we can assume that the original handwritten copy had also contained this passage, and the compilers of the Hungarian Golden Bull could have used the Summa alone even without consulting the Libri Feudorum.

We can assume that there is a very close connection between the Hungarian Golden Bull and the *Summa feudorum of Jacobus de Ardizone,* respectively the *Capitula extraordinaria Jacobi de Ardizone*. The connection between the Hungarian Golden Bull and the works attributed to Jacobus de Ardizone is stronger than the connection between the Golden Bull and the Libri Feudorum 2.28.pr. Presumably, the compilers of the Golden Bull used either Jacobus de Ardizone's Summa or a copy of the Libri feudorum with the Capitula extraordinaria attributed to Jacobus de Ardizone as an appendix. At the time when the Golden Bull was written, Jacobus' Summa was among the most up-to-date legal literature, so it is likely that the Summa feudorum of Jacobus de Ardizone may have been one of the sources of the Hungarian Golden Bull, rather than the somewhat outdated Libri Feudorum without the *Capitula extraordinaria Jacobi de Ardizone.*

8. The term "universi et singuli" in the Hungarian Golden Bull

The Hungarian Golden Bull used the Romano-canonical term "*universi et singuli*", and this indicates a deeper knowledge of medieval Roman law and canon law. Indeed, one of the terms used in the jurisprudence of the time was "*universi et singuli*", which meant that servientes or lords could exercise a right not only individually, but also collectively.

In addition to individual action, it was the possibility of collective action that gave the Golden Bull its forward-looking significance, because although there were no orders in Hungary at that time, by the end of the century the servientes had already formed a noble

[45] Ardizone, 1569. fol. 216v: "Antiquatum esse ipsis rerum experimentis nos ipsi cognovimus, fideles, nisi aliud contractibus pactiones insertae desiderent, dominorum sumptibus eisdem servitia ministrare. Justum namque est, ut illi consequantur stipendium, quo tempore suum commodare reperiuntur obsequium, praesertim cum nec quisquam propriis cogatur impendiis militare, maxime cum extra civitatis suae territoria servitiis exhibendis eos convenit fatigari."

order, which demanded that they should also be granted the right to legislate in the context of a parliament.[46]

The works of Gratian and the 13th century canonists clearly show that "universi et singuli" was a legal term. This is significant because the term appears in different contexts in both the Golden Bull of 1222 and 1231. The Golden Bull of 1222, in its famous clause on the violation of its provisions, gives the right to contradict the king without any fault of felony, "both the bishops and other lords and nobles of our country, in their entirety and individually" (tam episcopi, quam alii jobagiones ac nobiles regni nostri universi et singuli).

9. The tithe paid in coin in the Hungarian Golden Bull

According to the Golden Bull of 1222 "the tithe should not be paid in silver, rather, as the earth brings it forth, it should be rendered in wine and grain, and should the bishops object, we shall not support them."[47]

In the Middle Ages, the Catholic church in Europe collected a tax of its own, which was called a tithe. Tithe (decima) means "one-tenth", because people were supposed to give the Church one-tenth of all the income they earned.

The tithe (decima) is the tenth part of the increase, yearly arising from the profits of lands, from the stock upon lands, and from the personal industry of the inhabitants. The first species being usually called predial, as of corn, grass, hops, and wood; the second mixed, as of wool, pigs, consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross. The third one was called personal, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.

Tithes could be paid in goods produced by the peasant farmers or in money. The tithe paid in coin usually caused a lot of hardship and was very unpopular, therefore the servientes demanded that the tithe should not be paid in silver coin, rather, as the earth brings it forth, it should be rendered in gross.

The reluctancy of the producers to the obvious attempts of the church to collect the tithe in coin, which forced them to market their crops, was not successful; within a year, on 29th March 1223 Pope Honorius III rescinded the validity of this article.[48] After the letter of pope Honorius III, it was obvious that the renewal of the Golden Bull in 1231 omitted it.

This shows the great political influence of the papacy, since the Roman Pontiff was able to force the king to modify an already enacted law according to the wishes of the Roman Pontiff. The Roman Pontiff, who had exercised universal supremacy over the whole of Western Christendom since Pope Gregory VII, had a say not only in the choice of rulers and emperors, but also in the legislation of individual countries. By the universal coercive power of canon law, he could order this earlier provision on the tithe of the Golden Bull of

[46] Gerics József: *A középkori rendiség egyes terminusainak római és kánonjogi vonatkozásairól.* Levéltári Szemle, 1987/4. 9–15.

[47] DRMH I.34.: "Decimo argento non redimantur, sed – sicut terra protulerit – vinum vel segetes persolvantur et si episcopi contradixerint, non iuvabimus ipsos."

[48] Theiner, 1859. I.38–39, Nr. 78–79.

1222 to be set aside by the king. Therefore the omission of this passage attests the influence of canon law on the Golden Bull.

Perhaps a passage of the Notabilia written by Paulus Hungarus is related to this issue. Paulus Hungarus wrote: "Item in decimis exigendis et persolvendis consuetudo regionis debet observari, et est notandum pro clericis Hungarie."[49]

Paulus Hungarus's overly concise notabilia do not allow us to know exactly which details of tithing the author is referring to, nor do we know what he means by the customary law he mentions in favour of the Hungarian clergy.

Pope Honorius III rejected the Golden Bull's original provision on tith (which prohibited the tithes to be claimed in silver coin), because it was in breach of earlier legal custom and immemorial usage, as the Roman Pontiff stated. Perhaps this is what Paulus Hungarus refers to, and what he means by the custom in favour of the Hungarian clergy, which allowed the tithes to be claimed in money by the clergy. This was very favorable to the clergy, but very detrimental to the servientes regis who sought help from the king against the excessive taxation.

10. The excommunication as a punishment in case of infringement of the Golden Bull

According to the Golden Bull of 1231 "we agree of our free will that if we, our sons, or our successors attempt to infringe upon this liberty which we have granted, the archbishop of Esztergom shall have the authority, after proper warning, to bind us, or them, in the chains of excommunication."[50]

Even before the Golden Bull was issued, the Church claimed to have the power to punish and disempower kings, to excommunicate them, to remove them from their office and to release their subjects from the duty of obedience.

According to the statement of Gregory I that a king who opposes his decisions "shall lose his office, dignity and power", and if he does not repent, he shall be excommunicated and suffer the final damnation. While Gregory I referred to excommunication, Gregory VII interpreted this text as justifying not only the king's excommunication but also his deposition. Gregory VII's premise was that excommunication, which is spiritual in nature and thus a punishment far greater than the deprivation of temporal office, also implies the loss of a purely temporal power.

Gregory VII similarly quoted Gelasius' famous sententia: "There are two things which govern this world essentially: the sanctified authority of the bishops and the power of kings. Of the two, the task of the priests is more difficult, inasmuch as they are accountable to the divine tribunal for the kings themselves."[51] Then, after a few words of interjection, he

---

[49] Kapitánffy István – Szepessy Tibor: *Paulus Hungarus Notabiliájának magyar vonatkozású helyei*. In: Horváth János – Székely György (eds.): Középkori kútfőink kritikus kérdései. Akadémiai Kiadó, Budapest, 1974. 285–288.

[50] Theiner, 1859. I.110.: "sive nos sive filii nostri et successores nostri hanc a nobis concessam libertatem confringere voluerint, Strigoniensis archiepiscopus, premissa legitima admonitione, nos vinculo excommunicationis et eos innodandi habeat potestatem."

[51] Caspar, Erich (ed.): *Gregorii VII Registrum*. Weidmann, Berlin, 1955.

says: "You know, then, that in such matters you are subject to their judgment, not they to your will."

Later, not only the church, the pope or the bishops were able to take action against kings who broke the church's laws or their own oaths, but also the lords were given a powerful weapon by the development of medieval legal doctrines on the contractual origins of public power. According to this, the nobles entered into a contract with the sovereign, which was confirmed by the king's oath, and from which mutual rights and obligations arose. If one of the parties broke the contract, the other party was not obliged to fulfil it, i.e. could ask for the contract to be dissolved. A feudal oath was dissolved when either the lord or the vassal broke the contract.

Ancient Roman law only allowed withdrawal from a contract in case of non-performance in innominate real contracts. In the case of named contracts (e.g. sale of goods), Justinian law did not allow this. As the Glossa ordinaria put it, "*si contractum venditionis celebrasti et perfectus est, emptore invito ab eo recedere non potest*." If the obligor failed to perform, the creditor could sue him, but could not withdraw from the contract. This was the view of the civil glossators. Accursius, for example, held that if the buyer did not perform, he could only be sued for payment of the purchase price, but could not be avoided.

This rigid view of Roman law caused many difficulties. It was cumbersome and costly to sue the defendant and, above all, it took a long time. The interest of the claimant would have been better served by a *resolutio*. However, Justinian's law only allowed this in the case of innominate real contracts.

Adherence to Roman legal sources was less binding for the decretists. Around 1188, the famous decretist, Huguccio argued in his Summa decretorum that one who fails to fulfil his obligation, should not expect to receive the counter-performance (*fides non est servanda ei, qui frangit fidem*). The principle that a material breach of a treaty by one party entitles the other party or parties to denounce the contract or withdraw from the treaty was repeatedly applied in his Summa, for example in the feudal law or in marriage law.

If the overlord fails to fulfil his obligation, the vassal is also released from his obligation. The prelate must respect his subordinates, for he can only demand that they fulfil their obligations, if he himself had fulfilled his obligations to them.

According to Huguccio, there must be reciprocity between the superior and the subordinate.[52]

This principle seems to have been first applied to civil contracts by Goffredus Tranensis.[53] According to Goffredus, the sanction for a party who breaks a contract is that the other party is not obliged to fulfil it. Hostiensis held the same view.

Speaking of the oath, Hostiensis considers the principle *fides non est habenda cum infidelibus* as a kind of implied condition (*conditio tacita*). In his view, every contract

[52] Huguccio, *Summa* ad C. 28 qu. 2 c. 2., c. *si infidelis,* s.v. *nec est fides ei servanda* (Paris, Bibliothèque Nationale, ms. lat. 15397, fol. 72rb): "arg. quod fides non est servanda ei, qui frangit fidem."; Huguccio, *Summa* ad D. 95 c. 7 (Paris, Bibliothèque Nationale, ms. lat. 15396, fol. 95v): "Et hic est arg. quod non petat debitum, qui quod debet, non impendit, nec enim fides videtur servanda ei, qui fidem non servat, ar. xxxii q. vi, Si ducturi iniquum, xviii q. ij, Abbatibus. Debet enim esse inter praelatos et subditos quaedam reciprocatio, ut xxii q. v c. Prodest." Cf. D. 95 c. 7.; Fitting, Hermann: *Die Summa Codicis des Irnerius.* Guttentag, Berlin, 1894. 26.: "Iniquum est enim ei qui contra fidem fecit fidem servari."

[53] Goffredus Tranensis, *Summa* in X. 1.35., *de pactis,* n. 8 (Venetiis 1586, fol. 55ra): "poena non servantis pactum est ne alius teneatur stare pacto et poena apposita committatur."

must include the implied condition that the contract is binding only if the other party keeps his promise.[54] This was also considered an implied condition by pope Innocent III in a decretal (X.2.24.25).

11. The prohibition against the promotion of Jews to public offices

According to the Golden Bull of 1222 "ishmaelites and Jews shall not be allowed to become counts of the chamber of the mint, of salt, and of tolls [or] nobles of the realm."[55]

The Golden Bull of 1222 instituted a prohibition against the promotion of Jews to public offices as the could not be become counts of the chamber of the mint or of salt. These offices in the chambers were to be reserved for nobles of the realm.

The Fourth Lateran Council (1215) confirmed the prohibition of the council of Toledo against the promotion of Jews to public offices (Conc.IV. Lat., Tit. 69, Mansi, XXII: 1057). This restriction was reiterated by the Decretals of Gregory IX (X.5.6.16: "prohibentes, ne Iudaei publicis officiis praeferantur"). Having regard of the prohibition of the Fourth Lateran Council, it is obvious that this passage of the Golden Bull reflects the influence of the Fourth Lateran Council.

12. Conclusions

As we have seen from some of the examples mentioned above, neither the Hungarian Golden Bull, nor any other European constitutional charter was born in a legal vacuum, from nothing, but charters setting out the rights of nobles and sometimes burghers were developed and were formulated in the Middle Ages under the influence of Romano-canonical legal science taught in European universities.

The Golden Bull of 1222, and especially the Golden Bull of 1231 contains many references to sources of medieval Roman law, canon law and feudal law. A textual comparison shows that Johannes Teutonicus, Damasus Hungarus, Jacobus de Ardizone, the Libri Feudorum and papal decretals had a significant influence on the Hungarian Golden Bull. All this demonstrates that the Hungarian Golden Bull reflects the influence of European legal ideas and that the ius commune had a significant influence on its text.

---

[54] Hostiensis, *Summa* in X. 2.24., *de iureiurando,* n. 3 (Venetiis 1574, coll. 670): "Non servanti enim fidem, non est fides servanda. Ideo iuramentum non ligat qui praestitit, dum is cui praestitum statuerat, servare negligit quod promisit."

[55] DRMH I.: Comites camere monetarii, salinarii et tributarii nobiles regni, Ismaelite et Iudei fieri non possint.

Marta Cantín Larumbe
PhD candidate, University of Valencia

FROM THE FUERO DE SOBRARBE TO THE FORMULA OF NAVARRE 'LAWS BEFORE KINGS'

1. Introduction

The recognition of the existence of rights corresponding to the members of a community requires the existence of political power. However, the abusive exercise of political power requires, in the same way, institutions that place limits on the full power enjoyed by the monarchs.[1]

The juridical-political regime of the Kingdom of Navarre has often been called *pactism*.[2] The pactism supposes the limitation of the monarchic power, conditioning the exercise of its sovereignty to the clauses included in the pact. This pact took place with each king who acceded to the throne by means of the oath of his own laws and privileges.

On the contrary, the term absolutism is identified with the absence of a social counter-power capable of confronting the exercise of royal sovereignty.[3]

This discourse was based on an interpretation of the origins of the monarchy and the precepts contained in the prologue and first chapter of the *Fuero General.*[4]

However, the *Fuero Antiguo* already laid the foundations of a constitutional system.[5] The kings, fruit of the election of the kingdom, are born with a specific and limited purpose: to watch over the fulfillment of the law of the kingdom to which, therefore, they are submitted.[6]

Bearing this in mind, the following lines aim to analyze the origin of the *fueros* in Navarre and to study those precepts that limited the royal power. In order to understand their foundations and historical evolution, reference will also be made to the *Fueros de Sobrarbe,* as well as to the *Fuero de Tudela* – brief and extensive – and the *Fuero General.*

---

[1] Masferrer, Aniceto: *The making of dignity and human rights in the Western tradition. A retrospective analysis*. Springer, Cham, 2023. 35–36.

[2] García Pérez, Rafael: *Antes leyes que reyes. Cultura jurídica y constitución política en la Edad Moderna, Navarra 1512–1808*. Griuffé, Milano, 2008. 16.

[3] García Pérez, 2008. 16.

[4] Mikelarena Peña, Fernando: *La refutación absolutista del discurso pactista navarro*. Cuadernos de Historia del Derecho, 2011. 241–267.

[5] Como expondremos, el Fuero Antiguo fue denominado Fuero de Sobrarbe.

[6] García Pérez, 2008. 173.

2. The *Fuero de Sobrarbe*

The *Fueros de Sobrarbe* are known as the legendary *fueros,* the first since the Muslim invasion of the Iberian Peninsula, which would have been created by the Christian refugees in the mountains of Sobrarbe.

Sobrarbe, as a region, seems never to have existed. However, it is in Sobrarbe where the birth of the Kingdom of Aragon is located. According to legend, after the Muslim invasion, a group of Christians settled on the *plateau of the Mount,* with the intention of launching a campaign against Aínsa. To do so, they elected García Jiménez as their leader. As a result of the victory, they proclaimed García Jiménez king and called his kingdom Super Arbore (Sobrarbe). Here began the dynasty of the legendary kings of Sobrarbe. His son, García Iñiguez (758–802), even occupied Pamplona for a short time. These two kings were followed by Fortún Garcés (802–815) and Sancho Garcés (815–832). After Sancho Garcés the ancient dynasty was extinguished, giving way to the reign of Iñigo Arista, who transferred the struggle to the kingdom of Navarre or Pamplona, as it was called until King Sancho III *el Mayor.* According to Jerónimo de Blancas, the *Fueros de Sobrarbe* were those that the first settlers of Sobrarbe wrote during the interregnum between their fourth and fifth king, that is, between Sancho Garcés and Iñigo Arista.

According to tradition,[7] these *fueros* contained a series of principles limiting royal power:

I. In peace and justice you will rule the kingdom, and you will give us better privileges.
II. When the Muslims are conquered, let it be divided not only among the rich men but also among the knights and the noblemen; but the foreigner should not receive anything.
III. It shall not be lawful for the king to legislate without hearing the judgment of his subjects.
IV. Of starting war, of making peace, of settling a truce, or of dealing with anything else of great interest, thou shalt refrain, o king, without the consent of the council of the seniors.
V. And so that our laws and liberties may not be harmed or undermined, a middle Judge shall watch over them, to whom it shall be lawful and permitted to appeal from the King, if he should harm anyone, and to reject injuries if perhaps he should inflict them on the republic.
VI. If he should hereafter tyrannize the kingdom against the privileges or liberties, the kingdom would be free to choose another king, even if he were a pagan.

However, as Konrad Haebler points out, the tradition of the *Fuero de Sobrarbe* does not seem to have been part of the legend of the kings of Sobrarbe. Sancho III the Great raised the *Fuero de Sobrarbe* to the status of a kingdom when he died in 1035 and divided his estates among his four sons, and Gonzalo was given the territories of Sobrarbe and Ribagorza as King. When Gonzalo died in 1045, Ramiro I of Aragon added the kingdom to his crown. From then on, the kings of Aragon added the titles of Sobrarbe and Ribagorza to their own titles, until Sancho Ramírez, in 1086, transferred them to his first-born son Pedro.

---

[7] In agreement with Jerónimo Blancas, who in his work establishes that the future king shall be bound to the observance of the following laws. Blancas, Gerónimo de: *Comentarios de las cosas de Aragón.* Imprenta del Hospicio, Zaragoza, 1878. 37–38.

It would not be surprising, and it has been believed on certain occasions, that the territory of Sobrarbe had its own *Fuero,* either when it became a kingdom under González Sánchez or after Ramiro I incorporated the territory into his crown. However, there is no direct source to clarify the veracity of the facts; all we know about them is through mentions in other documents.

These fueros are mentioned for the first time in the *Fuero de Tudela,* whose introduction reads as follows: "in the name of our Lord Jesus Christ, who is and will be our salvation, we begin this book for the eternal remembrance of the *Fueros de Sobrarbe* and the exaltation of Christianity".[8]

There is a great historiographic study about the existence of the *Fueros de Sobrarbe.* According to the legend, after the Conquest of Tudela by Alfonso I, the monarch granted the city the good *Fueros de Sobrarbe* infanzones. However, Ángel J. Martín Duque[9] and Horacio Arrechea[10] proved that the supposed text of 1119 is a forgery, possibly based on a population charter granted by the Battler between 1119 and February 1124.

Until the end of the 19th century, some historians put forward all kinds of arguments in defense of both the Kingdom of Sobrarbe and its privileges. However, it is not possible to prove the existence of a Sobrarbe's own law, since there is no evidence of any of the so-called minor fueros granted by a king to this region, nor that it was elaborated there.[11]

Tomás Ximénez de Embaún, in 1878, was the first to question the veracity of the existence of both the Kingdom of Sobrarbe and its Fueros.[12] Vicente de la Fuente considers them apocryphal and affirms that they never existed.[13] On the other hand, other historians, such as E. Mayer[14] or Konrad Haebler,[15] defend the idea that the *Fuero de Sobrarbe* did exist and that it was granted by King Sancho Ramírez to the primitive nobility.

In fact, K. Haebler states that what is called the *Fuero de Sobrarbe* is, in a broad sense, the *Fuero General de Navarra;* and in a narrower sense, the *Fuero Antiguo* contained in the latter, and that was probably invented by the Navarrese nobility to change dynasties. Thus, the *Fuero de Sobrarbe* was granted by Sancho Ramirez in the second half of the 11th century to the primitive nobility of this territory, in gratitude for the help given in the war, and 16 articles have been preserved through the *Fuero de Tudela.*[16]

Be that as it may, and there are numerous studies that are in charge of elucidating the truth, this will not be the objective of our study, but to study the limits that were established to the royal power.

---

[8] Marín Royo, Luis María: *El Fuero de Tudela. Estudio y trascripción del apócrifamente llamado Fuero de Sobrarbe*. Gobierno de Navarra, Pamplona, 2010. 36.

[9] Martín Duque, Ángel J.: *Hacia la edición crítica del Fuero de Tudela*. Revista Jurídica de Navarra, 1987/4. 17–19.

[10] Arrechea Silvestre, Horacio: *Fuero de Tudela. Estudio y edición crítica.* Tesis doctoral inédita. Universidad de Navarra, 1994.

[11] Marín Royo, 2010. 30.

[12] Ximéez de Embaún, Tomás: *Ensayo histórico critico acerca de los orígenes de Aragón y Navarra*. Imprenta del Hospicio, Zaragoza, 1878. 90–91.

[13] Fuente, Vincente de la: *Estudios críticos sobre la historia y derecho de Aragón*. Imprenta y fundición de M. Tello, Madrid, 1885.

[14] Mayer, Ernst: *Studen zur spanische Rechtsgeschichte. Der Fuero de Sobrarbe*. Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung, 1919/1. 236–278.

[15] Haebler, Konrad: *Los fueros de Sobrarbe*. Anuario de historia del derecho español, 1936–1941. 30–31.

[16] Haebler, 1936–1941. 30.

3. From the *fuero de Sobrarbe* to the *fuero Antiguo.* The limitation of royal power in Navarre

3.1. The Fuero Antiguo

The arrival to the throne of Navarre of Theobald I (1234), a foreign king, after the death of Sancho VII "the Strong", caused confusion in the kingdom; the Navarrese nobles feared this monarch, since he came to reign without knowing their language, privileges or customs, so, before raising him as King, Theobald I promised on the day of his coronation that he would keep them from their privileges and customs. However, in reality, he tried to fight the *Juntas de Infanzones* by all means.[17]

The *Juntas de los Infanzones* were assemblies of the Infanzones of Upper Navarre, defenders of customs, who claimed the right and justice counteracting the power of the monarchs of the Kingdom of Navarre and the high nobility (rich men, the bishop and the bourgeoisie). It was formed by the social group of noblemen, knights, clergymen and farmers.[18]

The lawsuits between the nobles and the monarch were constant, so that, in the assembly of Estella, on January 25, 1238, it was agreed to send delegates to Rome to the Pope, both from the monarch Teobaldo I and from the knights and *infanzones*.[19] At that meeting, the king reconfirmed the privileges that he had sworn on the day of his coronation. This not being enough, and so that the fueros would be known, he ordered them to be put in writing.[20] The result of this compilation was not the *Fuero General,* but a compilation of twelve chapters which, with the prologue of the loss of Spain, constitutes what has been called the *Fuero Antiguo.* Therefore, the Fuero Antiguo, dates from 1238.[21]

Tudela's rulers probably took advantage of this occasion to retouch or completely falsify their Carta Puebla, making reference to the "good *fueros de Sobrarbe*". For this reason, the so-called *Fuero de Sobrarbe* is nothing more than the *Fuero Extenso de Tudela.*[22]

This writing recreated the fall of Spain at the hands of the Muslims, due to the treason of King Rodrigo and the resistance of the Christians in the northern mountains, from Ainsa to Sobrarbe. In these mountains three hundred knights met to elect a king and put

---

[17] Marín Royo, 2010. 59.

[18] En este sentido García Arancón, María Raquel: *La Junta de Infanzones de Obanos*. Príncipe de Viana, 1984/173. 527–560.: "Sancho el Fuerte toleró la Junta, pero no así sus sucesores (1234–1274), los reyes Teobaldo I y Teobaldo II, champañeses acostumbrados al ejercicio de un poder personal en su condado francés, que la consideran subversiva porque usurpa funciones públicas, como la ejecución de la justicia".

[19] Marín Royo, 2010. 60.

[20] Según Lacarra (Lacarra, José María: *Fuero General (de Navarra). Edición crítica*. IV Semana Internacional de Historia del Derecho español. Universidad de Navarra, Pamplona, 1969. 717–725.) la Comisión concluyó el trabajo el mismo año de 1238. Sin embargo, Martín Duque (Martín Duque, Ángel J.: *Fuero General de Navarra. Una redacción arcaica*. Anuario de Historia del Derecho español, 1986. 781–861.), sobre la base de que en 1246 Teobaldo I reconoció haber jurado el Fuero Antiguo, supone que ya en el momento de la toma de posesión del rey – 5 de junio de 1234 – este estaba vigente. Y lo que habría intentado elaborar la Comisión fue "una primera recopilación hoy desconocida o quizás nunca acabada de preceptos tradicionales referentes a la condición infanzona o nobiliaria en términos globales".

[21] Jimeno Aranguren, Roldán: *Los fueros de Navarra*. Agencia Estatal Boletín Oficial del Estado, Madrid, 2016. 9.

[22] Marín Royo, 2010. 90.

an end to the continuous disputes over the distribution of the spoils. After consulting Pope Aldebrano and the Lombards and the French, the latter advised them to establish a *fuero* before electing Don Pelayo king.[23] As Marín Royo says, the nobility wanted to emphasize that their laws were prior to the monarchy itself and that the monarchs should respect those laws without imposing their authority over them.[24]

This text, drawn up by the main social and political forces of Navarre, was incorporated as a preamble to the *Fuero General*.[25] It set out the legal principles on which the Navarrese monarchy would be based. The content of this legal body is, therefore, the basis of Navarre's pacifism through the reciprocal oath.[26]

In the following, I will briefly refer to some of the chapters that contain these principles.[27]

Chapter II contains the appointment of the King. First of all, he had to swear on the cross and the gospels that he would comply with the law and that he would always improve his privileges. The rite of his elevation is also foreseen:

> "Let the king rise in the chair of a bishop or archbishop and stand during the night during his vigil and hear his mass in that church and offer purple and of his coin and take communion.
>
> And when he lifts it up, let him come up on his shield, the rich men holding it and shouting three times: Royal! Royal! Royal! Then let him expand his coinage up to 100 sueldos. And by way of signifying that no other king (on earth) has no power over him, let him himself gird on his sword which is in the likeness of the cross. And he must not be made (be armed) that day another knight, and the 12 rich men or wise men must swear to the king on the cross and the gospels to take care of him and help him faithfully to maintain the land and they must kiss his hand."

Chapter V guarantees the private property of the nobility:

> "And it was forever established that no king that there is, shall not take land from a rich man unless it is in judgment and that he shows him why and if (this one) wants to repair there repair the wrong that he has, that he can repair it and if he did not want to repair it that he takes away his honor."

Chapter VI also limited the length of pretrial detention, establishing a maximum limit of 30 days:

> "And no king of Spain shall have the power to retain the honor of a rich man for any reason longer than 30 days. (...)"

Chapter XII provided that the king or lord shall establish his justice in his kingdom:

> "It was accepted by right that the king or lord should lay down his justice in his kingdom, that he should be a native of the kingdom and not a defamed man, and

[23] Trascripción del Libro I del Fuero Antiguo en el Manuscrito de la Academia de la Historia. Elaborada por Marín Royo, 2010. 65.

[24] Marín Royo, 2010. 61.

[25] García Pérez, 2008. 161. La transmisión del Fuero Antiguo se realizó a través del Fuero de Tudela, mientras que el Fuero general de Navarra fue la parte receptora. (Utrilla Utrilla, Juan F.: *El Fuero General de Navarra. Estudio y edición de las redacciones protosistemáticas (Series A y B). Vol. I.* Gobierno de Navarra. Departamento de educación y cultura. Institución Principe de Viana, Pamplona, 1987. 17.)

[26] Jimeno Aranguren, 2016. 19.

[27] Véase la transcripción realizada por Marín Royo, 2010. 65.

> that he should be a good messenger of the king or lord, and that the rich men and the noblemen should receive him there. And in the towns that they obey his rights and undo (the injustices) and that he be a neighbor".

It also established that the jurors of any town council elect thinking of God three of the most named neighbors and that the king or lord chooses the one he likes the most (Chapter XIII).

Likewise, it was possible to hold trials if there was no king in power. For this case, Chapter XIII, foresees that the mayor summons two jurors and, in their absence, seven good men to make a report of what the plaintiff and the defender say. The trial held in this manner would not be revoked.

Chapter XVI establishes that there is no court without three rich men: "it is the law of the *Infanzones hijosdalgo* that no king of Spain should hold court in his court unless there are three or more of his rich men (...)".

Chapter XVII provides for proof of innocence of the accused:

> (...) and if the accused says "I want to prove my innocence, as is the law", the king must have the lawsuit settled and the mayor must give them 30 days where the king is, within the vicinity of the land where they are, on the day that the parties are ready to do battle as they please. (...).

Chapter XIV regulates the rights of the ensign as head of the noble estate.

The requirement of the oath before the uprising highlighted the origin of the royal power and at the same time limited its power.[28] From this moment on, king and kingdom would constitute the two poles of this regime of government that historiography would eventually call *pactista*.[29]

3.2. The fuero de Tudela

3.2.1. The *fuero breve de Tudela*

The fueros breves are characterized by their limited extension. They are basically founding charters of a town, which contain a very general regulation: they are limited to a few precepts, basically penal and fiscal.[30]

After the conquest of Tudela by Alfonso I the Battler in 1119, it was granted some charters, drawn up between 1119–1124.[31] However, as mentioned above, these were supposedly manipulated a century later, in 1234, with the change of dynasty to the House of Champagne, introducing the myth of the *Fueros de Sobrarbe,* so that the new king of Navarre, Theobald I of Champagne, would recognize the privileges of the nobility.

In 1127, Alfonso I the Battler confirmed and extended the *Fuero* with a new letter called *tortum per tortum,* which defined the municipal boundaries and communal uses, gave the town its own legal organization, and granted it the means to defend the freedoms granted.[32]

[28] García Pérez, 2008. 163.
[29] García Pérez, 2008. 166.
[30] Pérez Martín, Antonio: *Los fueros extensos y el derecho común*. Anales de Derecho, 1997. 77.
[31] Jimeno Aranguren, 2016. 374.
[32] Jimeno Aranguren, 2016. 371.

3.3.3. The *fuero extenso de Tudela*

However, the *fueros breves* were gradually transformed into the so-called *fueros extensos,* because as the municipality developed, the precepts contained in the founding Letter were insufficient. This is what basically happened in Tudela. The *Carta Puebla* granted between 1119–1124 continued to be reworked and refined with local custom and jurisprudence, until it reached an extensive form in the 13th century, a period in which this populous Navarrese municipality seems to have developed an important legal school where the *fuero extenso* would have been drawn up, based on the aforementioned compilation of local custom and jurisprudence, to which the Navarrese-Aragonese territorial legislation and other extensive local Navarrese charters of the time were added.[33]

Three manuscripts of the so-called *Fuero Extenso de Tudela* are known: the oldest (14th century), located in the Academy of History of Madrid; the second manuscript of the *fuero* is preserved in the Kongelige Bibliotek of Copenhagen (15th century); the last one is in the Faculty of Law of Madrid, dating from the 15th or early 16th century.

This *Fuero Extenso de Tudela* includes the provisions contained in the *Fuero Antiguo,* as well as other new precepts. Above all, the *Fuero Extenso de Tudela* – which regulated both public and private law – provided a series of rules that guaranteed the judicial process:

Thus, Chapter XXIII of Book IV provided for the figure of the procurator:

> "Every lord in a lawsuit must comply with what the mayor orders by law and, if he wishes, place a procurator before the justice and the mayor. (...) And that procurator can do everything that the lord of the lawsuit could do, except to attach or recognize, manifest, swear, put witnesses, or make battles, which things must be done by the lord and not by the procurator."

It also limited the mayor's prerogatives in dispensing justice, as he could only decide according to the reasons given:

> Book 5, Chapter XIV: Whoever goes to court with another must bring with him to court two or three friends so that they can be witnesses of what was demanded or answered so that their reason is not changed, because the mayor can not and should not judge except according to the reasons brought.
>
> Book 8 [no chapter number recorded]: the alcalde cannot by law hold a trial without judging for more days than from the time he receives the deed, up to three terms, that is, up to 15 days; and if after these he has not judged it, he can no longer hold a trial or hold the deed.

3.3. The Fuero General de Navarra

During the 12th century, the content of the *Fuero Antiguo* was expanded with provisions taken from municipal charters – such as those of Tudela, Pamplona and Estella-, with other materials taken directly from popular custom, with the jurisprudence of the "Cort" and fazañas, forming a piecemeal body of law called *Fuero General.*[34]

[33] Jimeno Aranguren, 2016. 379.
[34] Utrilla Utrilla, 1987. 19–20.

The *Fuero General,* a private and anonymous work, regulated the main institutions of public and private law based on common law. Technically, as it was a private work, it had no official character. However, in practice, it was effective. Jesús Lalinde considers as an indirect sanction the provisions of the Amejoramiento of 1330 of Felipe III, who obliged himself by means of an oath to maintain and improve the Law.[35]

The *Fuero General* was structured as follows:[36]

> The First Book establishes the foundations of Navarre's public law, which would be developed later.
>
> Book II deals with the judicial organization of Navarre, as well as Procedural Law, regulating, among others, trials, lawsuits and disputes.
>
> El Libro III se ocupa de normas eclesiásticas, la condición social de las personas, rentas reales, la propiedad y tenencia de tierras, las relaciones entre señores y vasallos, la compraventa y el arrendamiento.
>
> Book IV includes the regulation of marriage, its economic matrimonial regime, filiation and crimes affecting the family, mainly force and adultery.
>
> Book V covers criminal law and its procedure.
>
> Finally, Book VI establishes the precepts of the rural police and the communal economic regime.

The *Fuero General* served for five centuries as a legally legitimizing reference in the construction of the political discourse of the kingdom. From the 16th century onwards, the laws approved by the king in the *Cortes,* as well as the resolutions of the Council of Navarre and other provisions that were no more than compilations of the customs and uses of the general life of the Kingdom would be added to the *Fuero General.*[37]

However, despite the promulgation of laws of the kingdom, the *Fuero General* maintained its pre-eminent position as the foundation of the kingdom's own law, especially in its political or "constitutional" dimension.

4. Final considerations

In short, the *Fuero Antiguo* already imposed on the monarch the oath and compliance with a series of rules to accede to the throne. Simple and basic as they were, they served to limit the absolute power of the king. Some of these limitations were the respect for private property or the establishment of procedural guarantees, such as pre-trial detention or the election of judges.

The limitation of royal power in Navarre was not an exception in Spain. In 1188 the first *Cortes de León* took place, convened and presided over by Alfonso IX. The king, aware of the need to reinforce his social and political legitimacy, decided to submit a set of decrees for approval. These decrees included the recognition of a set of rights and liberties, such as the inviolability of the home and the mail, the obligation of the monarch to convene

---

[35] Galán Lorda, Mercedes: *Los Amejoramientos al Fuero General de Navarra en los manuscritos de Pamplona*. Revista jurídica de Navarra, 1989/7. 97–132.

[36] I took this classification from Utrilla Utrilla, 1987. 14.

[37] García Pérez, 2008. 123.

the *Cortes,* as well as the guarantee of various rights, both individual and collective. As Masferrer states, the Decrees of *León* are, in the Iberian Peninsula, the oldest document comparable to the *Carta Magna,* in which the king committed himself before the social classes to guarantee a set of procedural norms.[38]

[38] Masferrer, Aniceto: *The Spanish origins of limiting royal power in the medieval Western world. The Cortes of León (1188)*. In: Balogh, Elemér (ed.): Golden Bulls and Chartas. Legal Heritage. Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing, Budapest – Miskolc, 15–41.

(Diószegi) Szabó Pál
Research Fellow, MTA-ELTE Legal History Research Group (ELKH), PhD

THE ROMAN RECEPTION OF THE "*CRIMEN LAESAE MAIESTATIS*" AND THE MONARCH'S SPECIAL "IMPERIAL IMPEACHMENT" IN THE GERMAN GOLDEN BULL (1356)

1. Specificities and translation of the German Golden Bull

The German Golden Bull differs in many ways from the main features of European "golden bulls". Not only in the absence of a precisely worded right of resistance, but also in the fact that among the provisions of this imperial legislation, there are several articles of private and criminal law, which reinforces its code-like character. It also regulated in detail the public law relations of the German states and electorate principalities – within the fragmented empire – with the German king and emperor. In modern terms, it confirmed the foundations of electoral, "member state" sovereignty. In the meantime, the medieval German-Roman Empire (officially known as the Holy Roman Empire) became a confederative monarchy, with the imperial assembly as its unique imperial authority in the 14th century. From this point of view, the German Golden Bull can be considered the first imperial legislation, a constitution in today's terms, which was in force until 1806, when the Union of the Rhine was established. The significance of the German Golden Bull is recognised worldwide, and in 2013 it was declared a UNESCO World Heritage Site.

Its articles are the result of the decisions of two imperial assemblies, and the legal text can therefore be divided into two main parts. The decision of the first assembly (Court Day), held in Nuremberg on 10 January 1356, brought together 23 articles. On Christmas Day, 25 December 1356, the Imperial Assembly, meeting in Metz, added eight more articles to the existing 23 articles of the German Golden Bull.

In 2022, on behalf of the *Ferenc Mádl Institute of Comparative Law,* in connection with the anniversary of the Hungarian Golden Bull (1222), I translated the complete Latin text of the document into Hungarian for the first time.[1] In the course of my work, philological analyses were inevitable, because the Latinization of the individual articles also showed slight differences. I was also able to establish a deeper contextual link in one particularly important article, in which a German reception of Roman law was directly evident. Eventually, this thread led me to the study of the legal liability of the monarch.

[1] *Német Aranybulla* (transl. Diószegi Szabó Pál) [The German Golden Bull]. In.: Mezey Barna (ed.): Az Aranybulla a joghistóriában [The Golden Bull in history of law]. Mádl Ferenc Összehasonlító Jogi Intézet, Budapest, 2022. 303–344. The Latin edition: Fritz, Wolfgang D. (ed.): *Monumenta Germaniae Historica, inde ab anno Christi quingentesimo usque ad annum millesium et quingentesimum. Constitutiones et acta publica imperatorum et regum. Tom. XI.* Hermann Böhlaus Nachf, Weimar, 1978–1992. 560–633. (MGH GB 1978–1992.)

2. Protection of the monarch and the elector princes

The protection of the life and limb of the monarch and of the elector princes, the offence of insulting the sovereign (*crimen laesae maiestatis*), was included in the German Golden Bull through Article 1 of the Diet of Metz – or with my new numbering, Article 24, This Article defines the concept of the offence of insulting the sovereign and the penalty:

> "If any man with princes, knights, or privateers, or any persons of the people, shall enter into any wicked conspiracy or conspiracies, or shall take an oath to murder our and our venerable and most excellent Emperor, and the ecclesiastical and secular electors of the Holy Roman Empire, or any other of them – for they are part of our body, and it is the will of the laws that the intention of this perpetration should be punished with the same severity as severity as the perpetration of the crime – for this person, as one who commits an offence against the majesty (maiestatis reus), should perish by the sword, and all his goods should be condemned to our treasury."[2]

If we analyse this voluminous article, the conduct is that of entering into an evil conspiracy (*scelestam faccionem aut faccionis*) or taking an oath to kill the emperor and the ecclesiastical and secular electors! What is also remarkable is that this article also protects the lives of the electors, not just of the monarch. And the legal justification is the so-called corporative conception of the state, also found in other medieval legislation, which compared the whole state to a natural human body, with the ruler as the head and the subjects as the members.[3] It is worth noting here that in several articles of the German Golden Bull, the elective princes were considered to be part of this "body of state", including this article, "because they are part of our body" (*pars corporis nostri*).[4]

We also see that even the conspiracy to commit murder is sufficient to establish the perpetration, i.e. without the accomplished criminal stage, the provable existence of premeditation is enough. The legal theory of contemporary times also explains the article: "*it is the will of the laws that the intention of this perpetration should be punished with the same severity as severity as the perpetration of the crime*"[5] The person guilty of such an offence (maiestatis reus) was to be deprived of his head and goods: he "*should perish by the sword, and all his goods should be condemned to our treasury*".[6] However, the penalties also extended to the perpetrator's relatives.

Article 24 (2) established private penalties for descendants, firstly for the son/sons of the person found guilty. Although their life/lives are spared by law, they cannot inherit from their father. Here the article also banned them from inheriting from their grandfather and mother and all other relatives for specific preventive purposes ("*to make the heirs fear the crime*", i.e.: from committing it). They were to be "*destitute and poor*" (*sint egentes et pauperes*) and this was accompanied by the Roman legal origin of the *infamia*

---

[2] My translation. *Német Aranybulla,* 2022. 335.; MGH GB 1978–1992. 616., 618., 620.

[3] Rigó Balázs: *Az állammá vált test, a korporációs eszme a köznyelvben* [The body turned into a state, the concept of corporatism in the popular language]. Jogtörténet. Az MTA-ELTE Jogtörténeti Kutatócsoport (ELKH) blogja. https://mtajogtortenet.elte.hu/media/6b/86/8a15927742886504b0c70ea8838c72f681a759fcf5339755abe120e00783/Rigo-Balazs-korporacio.pdf (2022.08.15.).

[4] *Német Aranybulla,* 2022. 335.

[5] *Német Aranybulla,* 2022. 335.

[6] *Német Aranybulla,* 2022. 335.

punishment: "*never to hold any office, nor to swear an oath*". In summary, as the law puts it, "*let* [them] *have death as consolation and life as capital punishment*" (*sit... mors solacium et vita supplicium*).[7]

Before proceeding to the provisions on the fate of the daughter child, and before appreciating the piety of German imperial legislation, it is worth at this point to consider the legal history of the crime of treason, its ancient Roman legal antecedents.

3. Analysis and textual parallelism of a perfect reception of Roman law in the German Golden Bull

The classical Roman legal bearing of case of the high treason (*crimen laesae maiestatis*) was already developed in the period of the Roman Republic. The *Lex Iulia de maiestate* (46 BC), which was named after Iulius Caesar, included the offences of conspiracy and treason against external enemies; acts against the state and its lawful order; conspiracies; such offences committed by magistrates; forgery of documents and violation of sacred law.[8] This was transferred to imperial criminal law and supplemented in 397 AD by the Eastern Roman emperors Arcadius (395–408 AD) and Honorius (395–423 AD) of Western Rome, by their edicts (in city of Ancyra/ today Ankara), which were published and preserved in the Iustinian codification, the *Codex* (*Ad legem Iuliam maiestatis*).[9]

What occurred to me for the first time is that this sanction of the German Golden Bull and an earlier decree of the Emperors Arcadius and Honorius of 397 – quoted in my earlier study on the Byzantine practice of the punishment of blindness – show a clear textual identity and correspondence. The perpetrator of the offence (*crimen maiestatis*) was punished in the same way by the loss of his head and goods, and his property was assigned to the treasury (C. 9. 8. 5. pr.). "*ipse quidem, utpote maiestatis reus, gladio feriatur, bonis eius omnibus fisco nostro addictis*".[10] Insult to majesty is perpetrated by those who, with soldiers or privateers or strangers, have determined to kill those eminent men "*who are partakers of the councils and of our* [imperial] *council, and of the senators who are part of our body, and finally of any others who are soldiers for us*". The aforementioned corporative state ideology here considers imperial councillors and senators as part of the body of the Roman state.

Continuing with the analysis of the private law sanctions for descendants of the German Golden Bull, we can see that they also copy this Ancyrian decree. According to this provision, the son/sons of the convicted person are survivors, but they cannot inherit, they cannot share in the will of another, as already mentioned above. As an additional punishment, they must live in perpetual poverty and are subject to *infamia:* "*sint perpetuo egentes*

---

[7] *Német Aranybulla,* 2022. 335.

[8] Hoffmann Zsuzsanna: *A felségsértés Caesar korában* [The insult of majesty in the age of Caesar]. In: Felföldi Szabolcs (ed.): Abhivādana. Tanulmányok a hatvanéves Wojtilla Gyula tiszteletére [In Abhivādana. Studies in honour of the sixty-year-old Gyula Wojtilla]. SZTE Ókortörténeti Tanszék, Szeged, 2005. 186., 194–195.

[9] (Diószegi) Szabó Pál: *"effodit oculos", a megvakítás büntetésének bizánci eredetű gyakorlatáról a XI–XIII. századi Magyarországon* ["effodit oculos", on the Byzantine practice of punishing the blind in Hungary in the XI–XIII centuries]. Jogelméleti szemle, 2011/2. http://jesz.ajk.elte.hu/szabo46.html (2022.11.15.).

[10] Herrmann, Emil – Kriegel, Albert (eds.): *Corpus Juris Civilis. Pars 2.* Baumgaertner – Kohlhammer, Lipsiae – Stuttgart, 1887. 583. (Codex, 1887.) "*Ad legem Iuliam maiestatis. 5. Impp. Arcadius et Honorius.*"

et pauperes, infamia eos paterna semper commitetur, ad nullos unquam honores, nulla prorsus sacramenta perveniant sint postremo tales, ut his, perpetua egestate sordentibus, sit et mors solatium et vita supplicium."[11]

In fact, the further analysis of Article 24 of the German Golden Bull is already identical to the analysis of the Roman emperors' Ancyrian edict. In the Latin edition of the MGH, Wolfgang D. Fritz, using italics, indicates the textual correspondence, which – independently of me – is clearly confirmed.[12] For easier comparability, the two Latin texts are presented in parallel in the Appendix at the end of my study.

Unlike sons, daughters are granted some inheritance by law. This makes it easier to understand why the article of the German Golden Bull 'refers1 here to the *lex Falcidia.* For, daughter children, however many they may be, are entitled to a quarter share of the maternal inheritance under the Falcidian law. The late Roman legal principle, which was also adopted in the German Golden Bull, was that "*daughters should have a moderate maintenance rather than the whole of the gain and that the name of heirs (nomen heredis) should follow them. With regard to them the sentence should be more lenient, for we strongly trust that they, on account of the weakness of their sex, are less bold*" (24. 4.).[13]

If there has been an emancipation from paternal authority, which has taken place, neither sons nor daughters should have the right (24. 5.). Returning to the special privileges of women, dowry and donations should likewise, even if justly made when such conspiracy was first contemplated, be null and void (24. 6.). If the perpetrator's wife received a gift from her husband to keep for their son(s), it too becomes the property of the imperial treasury! Sons may not receive anything, and the quarter of the Falcidia may only be taken into account for daughters (24. 7–8.).[14]

The punishment of accomplices and participants is the same as that of the perpetrator (accomplices, participants, servants, 24. 9.). The German Golden Bull also took over from the Ancyra decree the reward for voluntarily informing the conspiracy in preparation (24. 10.).

Although the edict of the emperors Arcadius and Honorius ends here, the Golden Bull went on to adopt Chapter 6 of Title 8 of Title 9 of the Iustinian Codex 9. However, it was adapted to the offence against princes elect. C. 9. 8. 6 quotes an excerpt from Paul's book on public accusations (*Liber singularis de publicis indiciis*). The German Golden Bull adopted this: if it is reported that an insult to the majesty has been committed, it must be investigated even after the death of the accused, if it has been committed "*against an ecclesiastical or secular elector*" (24. 11.). In the text of the law, the compiler has added the phrase "*princes*" and replaced the phrase "*it is customary to investigate*" (*instaurari solere*) with a stronger injunction (*possit*).[15] Here, the clause "*an offence against the sovereign elector*" (*in principibus electoribus suis*) is added to the original Roman Latin phrase, instead of "*an offence against the emperor*" (*laesam maiestatis imperatoris*) (24. 12.). In this passage, the torture of the (suspected) lord's servants is also better interpreted on the basis of a Roman decree which has survived in the Iustinian Codex. The phrase "*in caput domini servi torquentur*" can refer to either the incriminating interrogation of a servant

[11] Codex 1887. 584.
[12] MGH GB 1978–1992. 616., 618–619., 620.
[13] My translation. Cf. *Német Aranybulla,* 2022. 335–336.; Codex, 1887. 584.
[14] *Német Aranybulla,* 2022. 336.
[15] *Német Aranybulla,* 2022. 336.; Codex, 1887. 584.

against his master or to the interrogation against the master's head. The Iustinian codifier refers here to Book I of the Roman jurist Marcianus, who wrote the law on high treason for Iulius Caesar (*De publicis iudiciis ad legem Iuliam Maiestatis*).[16]

Criminals may be prosecuted after their death, and if the dead are found guilty, they may be punished by the abolition of memory (*damnatio memoriae*) and their goods taken from their heirs (24. 13.). This time the only reference omitted in the text is to "*the decree of the divine emperor Marcus*". No legal transaction is valid with such a perpetrator, he cannot be alienated, liberated, or discharged by right of debt (24. 14.). Even in the case of an insult against the ecclesiastical or secular electors, the servants are subject to torture against their masters (24. 15.). We learn from the Codex that it is as "*decreed by the divine emperors Severus and Antoninus*". If a person dies, the heirs being uncertain of his identity, his property is considered as if the person deceased had been accused of such a crime (24. 16.). In this concluding provision of the article of the German Golden Bull, the reference to the "*rescriptum of the emperors Severus and Antoninus*" is omitted.[17]

To conclude, Article 24 of the German Golden Bull, which deals with treason, is unique in that it is almost entirely a transcription of Codex 9.8. Among the articles of Metz (24–31), it is the only one! Nor is such a direct reception to be found in the Nuremberg articles (1–23). This proves that the Iustinian codification was certainly used here when the text of the German Golden Bull was compiled.

4. The possibility of a special dethronement of the monarch before and after the German Gold Bull

The German Golden Bull, however, not only regulated crimes against the monarch, but also gave the elector princes the possibility to hold the monarch impeachable. According to Article 5 (2) of the German Golden Bull, the Palatine Count of the Rhine could legally and judicially take action against the German monarch:

> "Although the emperor or king of Rome, in the cases in which he is accused, is obliged, as is said to have been introduced by custom, to answer before the Palatine Count of the Rhine, as imperial chief magistrate and elector, yet this judgment the Palatine Count can exercise nowhere else but in the imperial court, where the emperor or king of Rome will be present."[18]

This could be a special kind of prosecution of the monarch – to use a medieval English legal parallel, "imperial impeachment" – but it could never be directed against the life and physical integrity of the German monarch. This right could only be exercised by a Palatine Count of the Rhine in the court where the emperor was present. In such a case, the electors, by vote, replaced the German monarch. It was not until 1298, before the Golden Bull was issued, and later, under the rules of the Golden Bull, until 1399, that the events which are worth recalling in more detail, because they unfolded in practice the legal principle, not yet codified, which was "broadened" as a basis for impeachment.

---

[16] *Német Aranybulla,* 2022. 336.; Codex, 1887. 584.; Cf. Appendix.
[17] *Német Aranybulla,* 2022. 336.; Codex, 1887. 584.; Cf. Appendix.
[18] My translation. Cf. *Német Aranybulla,* 2022. 317.

The reason for the deposition of Emperor Adolf Nassau (1292–1298) was probably his policy in Thuringia. At Pentecost 1297, the Elector and Margrave of Brandenburg, the Duke of Saxony and the King of Bohemia joined forces to assert their interests. This group was joined by the Archbishop and Elector of Mainz, Gerhard II. On 1 May 1298, the Archbishop of Mainz invited the King to his court to settle the dispute. Archbishop Gerhard claimed that he had the right to do so as Archbishop and the Imperial Chancellor of Germany, according to an old legal principle, i.e. he could convoke the elector princes to a council in an emergency.

The Emperor Adolf, with the armies of his allied electors, tried to stop the Austrian Prince Albert and his troops crossing the Rhine, but was defeated and died in battle on 2 June at Göllheim. The meeting scheduled for 15 June to settle the dispute did not take place. The Archbishop of Mainz was supported by the Duke of Saxony and the elector Margrave of Brandenburg. The Archbishop of Cologne and the King of Bohemia had already authorised the Archbishop of Mainz to act on their behalf. Archbishop and Chancellor Gerhardt initiated a lawsuit against the Emperor, accusing the King of a number of offences (perjury, breach of oath), including the continued violation of the Peace of Thuringia and the breach of promises made to the Archbishop of Mainz. The list of accusations included desecration of the Lord's Supper and the crime of *simonia*. On 23 June 1298 Adolf was judged unworthy of his office and lost his royal dignity.

We also have to recognise that this procedure was unprecedented. Adolf was also killed in the battle, which made the litigation easier. One of the legal complications was that, since Adolf had been legitimately elected and crowned, he was – according to the belief of the contemporary time – chosen by God to rule, and it was now in fact the princes who had broken their oath of allegiance to the king. The other legal difficulty was that there was no imperial legal procedure for deposing the king. Under canon law, only the Pope had the power to do this, following an excommunication. I should also point out here that the German Golden Bull no longer even mentions any role or involvement of the Pope in the election of the future German king. Rather, the elector princes relied on their right to vote, from which they derived the right to replace the king. Ultimately, Albert I Habsburg (1298–1308) was elected King of Germany in Frankfurt on 27 June 1298.[19]

The other such case of deposition of a monarch was already made with reference to the provisions of the German Golden Bull. King Wenceslas of Luxembourg (1376–1400) was accused by the four electoral princes of the Rhineland (the palatine count of the Rhine, Ruprecht III and the archbishops of Mainz, Cologne and Trier) of not maintaining peace and not eliminating the schism. On 1 April 1399, the electors of Mainz, Cologne and Palatine Count declared that they would act together, invoking the protection of their rights under the German Golden Bull. They were later joined by the Archbishop of Trier and the Duke of Saxony. The electors, invoking their right to elect a new king, called an electoral assembly for 10 August 1400, to which Wenceslas was invited. The votes of the four princes-electors present, at the time of the vote, constituted a majority of the princes-electors. Thus, on 20 August 1400, the electors, meeting in the castle of Oberlahnstein, declared King Wenceslas of Luxembourg dethroned for "futility, inactivity, negligence and carelessness" and elected Ruprecht, Palatine Count of the Rhine, as their king at Rhens.

[19] Pósán László: *Németország a középkorban* [Germany in the Middle Ages]. Multiplex Media, Debrecen, 2003. 219–220.

Although Wenceslas remained king of Bohemia, refused to accept this successor's decades-long reign and took no action against Ruprecht.[20]

The deposition of Wenceslas was also commemorated by Eberhard Windecke, who wrote a biography of Emperor Sigismund of Luxembourg. At 1400 (Chapter 5) he noted that "*It was also at this time that Prince Ruprecht of Heidelberg was elected by the princes in Frankfurt against King Wenceslas of Bohemia, on the basis of the twelve articles which were read out from the chair at Rhenish*".[21]

It is also worth looking into these "charges", because a specific legal basis has been formulated for the prosecution. Fortunately for us, Windecke lists some of these in his work. The king seceded the city of Genoa from the "Holy Roman Empire" and gave it to the French king (point 1). In this, Wenceslas was accused of a weak policy in Italy in opposition to French expansion. The accusations were mainly directed against the monarch's procedures without elector princes. Thus, the appointment of Giovanni Galeazzo Visconti as Duke of Milan was made without their advice or knowledge (point 2). Furthermore, Wenceslas had given away, transferred into foreign hands or disposed of fiefs of the realm without the obligation of a fief oath, and of course without the consent of the electorates (point 3).

We also read of a whole series of legal infringements. He "*tortured innocent seculars, ecclesiastics, educated men and other honest men without crime and without right*" (4). King Wenceslas tolerated theft, murder, arson, did not prevent it (5), and was tardy in "*the peace of the Holy Roman Empire*", "*though he swore to promote it*" (7).[22]

The last two "charge-points" could refer to the failure to comply with the so-called imperial peace decree (*Constitutio Pacis*), which generally prohibited private combat and was last issued for the entire empire by Emperor Frederick II in 1235. King Wenceslas "*summoned a great many people before the tribunal of the Roman Empire, not for any wrongdoing, but because he wanted to obtain money*" (9.).[23] This point concerned a violation of Article 11 of the German Golden Bull, which expressly forbade all counts, barons, nobles, vassals, lords of castles, knights, retainers, burgesses and townsmen to be summoned to any other court outside the territories of the churches of Cologne, Mainz and Trier, to be tried in such cases and to be sentenced and executed.[24]

In conclusion, a comparison of these two deposition cases and an analysis of Article 24 shows us the result of the new protection of the life and physical integrity of the monarch and at the same time the imposition of liability on the monarch, which was established both by the German Golden Bull of 1356 and by the imperial application of the law, which could legally include the action of the elector princes against the monarch.

---

[20] Pósán, 2003. 276–277.

[21] My translation. Cf. Skorka Renáta (transl. …): *Eberhard Windecke emlékirata Zsigmond királyról és koráról* [Eberhard Windecke's Memoirs of King Sigismund and his reign]. MTA Történettudományi Intézet, Budapest, 2008. 22.

[22] My translation. Cf. Skorka, 2008. 33–34.

[23] My translation. Cf. Skorka, 2008. 34.

[24] Rigó Balázs: *A büntetőjog történetéből* [From the history of criminal law]. In.: Földi András (ed.): Összehasonlító jogtörténet [Comparative history of law]. 5. ed. ELTE Eötvös Kiadó, Budapest, 2022. 315–316.

Appendix

Edict of Emperors Arcadius and Honorius (AD. 397). Ad legem Iuliam maiestatis (Codex 9. 8. 5.)		**24. Article German Golden Bull (1356)**	
(pr.)	Quisquis cum militibus vel privatis, barbaris etiam scelestam inirerit factionem aut factionis ipsius susceperit sacramenta vel dederit, de nece etiam virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam (nam et ipsi pars corporis nostri sunt) vel cuiuslibet postremo, qui nobis militat, cogitaverit (eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt), ipse quidem utpote maiestatis reus gladio feriatur, bonis eius omnibus fisco nostro addictis;	(1)	Si quis cum principibus, militibus vel privatis, seu quibuscumque personis plebeis eciam scelestam faccionem aut faccionis ipsius inierit sacramentum vel dederit de nece venerabilium et illustrium nostrorum et sacri Romani imperii tam ecclesiasticorum quam secularium principum electorum seu alterius eorundem (nam et ipsi pars corporis nostri sunt; eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt), ipse quidem utpote maiestatis reus gladio feriatur, bonis eius omnibus fischo nostro addictis;
(1)	Fili vero eius, quibus vitam imperatoria specialiter lenitate concedimus (paterno enim deberent perire supplico, in quibus paterni, hoc est hereditarii criminis exempla), a materna vel avita, omnium etiam proximorum hereditate ac successione habeantur alieni, testamentis extraneorum nihil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullos unquam honores, nulla prorsus sacramenta perveniant, sint postremo tales, ut his, perpetua egestate sordentibus sit et mors solatium et vita supplicium.	(2)	filii vero eius, quibus vitam imperiali specialiter lenitate concedimus (paterno enim deberent perire supplico, in quibus paterni, hoc est hereditarii criminis metuuntur exempla), a materna vel avita, omni eciam proximorum hereditate et successione habeantur alieni, testamentis extraneorum nichil capiant, sint perpetuo egentes et pauperes, infamia eos paterna semper comitetur, ad nullum unquam honorem, nulla prorsus sacramenta perveniant, sint postremo tales, ut hiis perpetua egestate sordentibus sit et mors solacium et vita supplicium.
(2)	Denique iubemus etiam eos notabiles esse sine venia, qui pro talibus unquam apud nos intervenire tentaverint.	(3)	Denique iubemus eciam eos esse notabiles sine venia, qui pro talibus unquam apud nos intervenire temptaverint.

Edict of Emperors Arcadius and Honorius (AD. 397). Ad legem Iuliam maiestatis (Codex 9. 8. 5.)		**24. Article German Golden Bull (1356)**	
(3)	Ad filias sane eorum, quolibet numero fuerint, Falcidiam tantum ex bonis matris, sive testata sive intestata defecerit, volumus pervenire, ut habeant mediocrem potius filiae alimoniam, quam integrum emolumentum ac nomen heredis. Mitior enim circa eas debet esse sententia, quas pro infirmitate sexus minus ausuras esse confidimus.	(4)	Ad filias sane eorum, quolibet numero fuerint, falcidiam tantum ex bonis matris, sive testata sive intestata defecerit, volumus pervenire, ut habeant mediocrem pocius filie alimoniam, quam integrum emolumentum ac nomen heredis consequantur; micior enim circa eas debet esse sentencia, quas pro infirmitate sexus minus ausuras esse confidimus.
(4)	Emantipatio, quae a praedictis sive in filios, post legem duntaxat latam, sive in filias fuerit collata, non valeat.	(5)	Emancipatio quoque, que a predictis sive in filios post legem dumtaxat latam, sive in filias fuerit collata, non valeat,
(4)	Dotes, donationes, quarumlibet postremo rerum alienationes, quas ex eo tempore qualibet fraude vel iure factas esse constiterit, quo primum memorati de ineunda factione ac societate cogitaverint, nullius statuimus esse momenti.	(6)	dotes, donaciones quorumlibet, postremo item alienaciones, quas ex eo tempore qualibet fraude vel iure factas esse constiterit, quo primum memorati de ineunda factione ac societate cogitaverint, nullius statuimus esse momenti.
(5)	Uxores sane praedictorum, recuperata dote, si in ea conditione fuerint, ut, quae a viris titulo donationis acceperunt, filiis debeant reservare, tempore, quo ususfructus absumitur, omnia ea fisco nostro se relicturas esse cognoscant, quae iuxta legem filiis debebantur;	(7)	Uxores sane predictorum, recuperata dote, (si in ea conditione fuerint, ut, que a viris titulo donacionis acceperunt, filiis debeant reservare), tempore quo ususfructus absumitur, omnia ea fisco nostro se relicturas esse cognoscant, que iuxta legem filiis debebantur;
(5)	Falcidia etiam ex his rebus filiabus tantum, non etiam filiis deputata.	(8)	Falcidia eciam ex hiis rebus filiabus tantum, non eciam filiis deputetur.
(6)	Id, quod de praedictis eorumque filiis cavimus, etiam de satellitibus, consciis ac ministris filiisque eorum simili severitate censemus.	(9)	Id quod de predictis eorumque filiis cavimus, eciam de satellitibus, consciis ac ministris filiisque eorum simili severitate censemus.
(7)	Sane si quis ex his in exordio initae factionis, studio verae laudis accensus, ipse prodiderit factionem, et praemio a nobis et honore donabitur. Is vero, quis usus fuerit factione, si vel sero, incognita tamen adhuc, consilium arcana patefecerit, absolutione tantum ac venia dignus habebitur.	(10)	Sane si quis ex his in exordio initae factionis, studio verae laudis accensus, ipse prodiderit factionem, et praemio a nobis et honore donabitur. Is vero, quis usus fuerit factione, si vel sero, incognita tamen adhuc, consilium arcana patefecerit, absolutione tantum ac venia dignus habebitur.

Edict of Emperors Arcadius and Honorius (AD. 397). Ad legem Iuliam maiestatis (Codex 9. 8. 5.)		**24. Article German Golden Bull (1356)**	
(-)	[…] Meminisse oportebit, si quid contra maiestatem imperatoris commissum dicatur, etiam post mortem rei id crimen instaurari solere, postanteaquam divus Marcus Depitiani, utpote senatoris, qui Cassianis furoris socius fuerat, bona post mortem fisco vindicari iussint, et nostro tempore multis heredibus ablata sunt.	(11)	Statuimus insuper, ut, si quid contra supradictos principes electores ecclesiasticos vel seculares commissum dicatur, eciam post mortem rei id crimen instaurari possit.
(-)	In hoc item crimine, quod ad laesam maiestatem imperatoris pertinet, etiam in caput domini servi torquentur. Marcianus lib. I. de publicis iudiciis tit. ad legem Iuliam Maiestatis.	(12)	In hoc item crimine, quod ad lesam in principibus electoribus suis maiestatem pertinet, eciam in caput domini servi torquentur.
(-)	Post divi Marci constitutionem hoc iure uti coepimus, ut etiam post mortem nocentium hoc crimen inchoari possit, ut, convicto mortuo, memoria eius damnetur, et eius bona successori eius eripiantur;	(13)	Volumus insuper et presenti imperiali sanccimus edicto, ut eciam post mortem nocencium hoc crimen inchoari possit, ut convicto mortuo memoria eius dampnetur et bona eius successoribus eius eripiantur;
(-)	nam ex quo sceleratissimum quis consilium cepit, exinde quoadmodo sua mente punitus est.	(14)	nam ex quo sceleratissimum quis ceperit consilium, exinde quoadmodo sua mente punitus est.
(-)	Sic et divus Severus et Antoninus constituerunt, ex quo quis tale crimen contraxit, neque alienare neque manumittere eum posse; nec ei solvere iure debitorem, magnus Antoninus rescripsit.	(14)	Porro ex quo quis tale crimen contraxit, neque alienare neque manumittere eum posse nec ei solvere iure debitorem decernimus.
(-)	In hac causa in caput domini servi torquentur, id est propter causam maiestatis.	(15)	In hac causa in caput domini servos torqueri, statuimus, id est propter causam faccionis dampnande contra principes electores ecclesiasticos et seculares, ut premittitur.
(-)	Et si decesserit quis, propter incertam personam successoris bona observantur, si in causa maiestatis fuisse mortuus arguatur, ut Severus et Antoninus literis ad Rationales missis rescripserunt.	(16)	Et si decesserit quis, propter incertam personam successoris bona observentur, si in causa huiusmodi fuisse mortuus arguatur.

José Franco-Chasán
Assistant Professor, Universidad Rey Juan Carlos, Madrid

THE TERRITORIALISATION OF THE LIMITS TO THE ROYAL POWER IN MEDIEVAL SPAIN: FROM THE *COSTUM DE VALÈNCIA* (1238) TO THE *FURS DE VALÈNCIA* (1271)

1. Introduction

The legal history of Spain is rather complex. After the Iberian Peninsula was invaded by the Moslems in the year 711, more than eight-hundred years elapsed under the dominion thereof.[1] The Christians, heirs to the Visigoth Hispania,[2] resisted in the north and progressively expelled the Moslem invaders down the south.[3] For those readers who never heard of this situation, let them draw a horizontal line uniting the cities of Lisbon and Valencia. Shift this line up and the Moslem faction wins; shift this line down and the Christian faction wins. In a nutshell, the objective was to restore the old Christian Visigoth Kingdom in the whole peninsula and the "natural" border between the two factions. The Strait of Gibraltar would separate Christian Europe from Moslem north Africa.[4]

The manner in which such a reconquest was carried out differed very much from what one might think: it was not a linear process.[5] An oversimplified approach to the history of Spain is often used. Even if it is somehow useful to conceive the basics, it should be disregarded since it does not faithfully depict the truth. There were countless political, legal, religious, military and economic reasons conforming the big picture.[6] Those nuances

---

[1] The most extended term in the Middle Ages was "moor", an exonym which was applied indistinctively to Berbers, European Moslems and Arabs.

[2] This point has been criticised by the current historiography, since it is too epic and does not consider the fact that the northern mountainous regions such Asturias or Cantabria not only rejected the Moors, but long before they had rejected the presence of the Visigoths as well.

[3] The way in which the two "factions" are referred to might seem limited nowadays, since religion is conceived as an additional characteristic of a given society. Yet the world's view of that time allowed this cosmovision to flourish and to effectively describe the dynamics of theocentric societies. It has been often criticised not only for the excessive Manicheism, but for deliberately excluding the influence of Tartessian, Turdetan, Iberian, Lusitanian, Celt, Roman, Greek, Carthaginian, Phoenician, Aquitanian and Byzantine communities nurturing the Spanish and Portuguese identities.

[4] Several exceptions to this respect take place for political reasons such as Ceuta, Melilla, some minor islands and the well-known Canary Islands.

[5] The borders were gained in a very slow mode: they were conquered, then reconquered, then gained back from one of the sides, regained by the other one, and so on and so forth.

[6] Menéndez Pidal, Ramón: *Historia de España*. Espasa-Calpe, Madrid, 1935–. In its Tomo VII ("La España cristiana de los siglos VIII al XI") the Christian Hispania is analysed; whereas in its Tomo VIII ("La España musulmana de los siglos XI al XV"), the Moslem Hispania is addressed.

offered a much more realistic explanation than the long-standing narrative "Christianity-Islam", although it does not fully cancel it.[7] Rivalries between Christian kings emerged, wars between Moslem factions took place, and alliances between Christians and Moslems were forged in order to attack another Christian "allies" and vice versa.[8]

Regarding the Moslem factions, they were very different and sometimes they had nothing to do with each other. Undoubtedly, the history of the Moslem faction was convoluted.[9] For instance, Moslem Andalusia was far more diverse than the northern regions of Africa and their governing dynasties: they were less belligerent and less prone to bigotry and radical decisions,[10] especially when it came to the Almoravids and the Almohads:

> "In the eyes of the refined Andalusian society, the Almoravids are nothing but illiterate fundamentalists, stinky nomadic warriors who were violent and superstitious. […] The Almoravid leaders, in turn, despised Andalusian kings: a hedonist society which they condemned for being sinful and decadent, incapable of defending itself because they deviated from the path that Islam establishes."[11]

Despite their numerous accomplishments in medicine, science and the legal system,[12] it was clear that for the Almoravids the Andalusians were not "real" Moslems: they had stopped being loyal to the Calipha of Bagdad (supposed to be maximum spiritual superior), they consumed alcohol, the aforementioned coexistence among Jews, Christians and Moslems

---

[7] Pareja, Félix M. – Bausani, Alessandro – Hertling, Ludwig: *Islamología. Vol. I y II*. Razón y Fe, Madrid, 1954.

[8] That was the case of the origin of the Moslem invasion in 711. The supporters of Agila II, who disputed the throne of Toledo, had called the Berbers and the Arabs to help them fight the troupes of their rival Rodrigo. Once the agreement was met, the invaders liked the fruitful area of Hispania so much that they decided to stay.Vid. Menéndez Pidal, 1935. Tomo IV, "España musulmana (711–1031). La conquista, el Emirato, el Califato".

[9] Briefly, the power was residing at the Umayyad Caliphate, since they invaded the peninsula. The distribution of lands was unequal. The richest lands were granted to Arabs and the most desertic, mountainous areas were given to the Berbers. Thus, the dissatisfaction between those groups grew bigger and it ended up with the Berber revolt in 739, which the Arabs would win, both in Al-Andalus and in the north of Africa. In fact, later in 750, the Abbasid Caliphate would take over and the orders would be prescribed from Damascus. Later, the Umayyad family was killed. Its last remaining family member alive was Abd al-Rahman I in Hispania, and he founded the independent Umayyad Emirate of Córdoba. In 929, Abd al-Rahman III would establish the Caliphate of Córdoba. In 1031, the Caliphate would be abolished, and the kingdoms of *taifas* would begin. After the conquest of Toledo in 1085 by Alfonso VI (Christian faction), the weak Moslem *taifas* kingdoms asked for help to the other side of the strait. In 1086, the Almoravids, a radical, warlike dynasty came to the peninsula and won several places. In 1147, another even more intolerant, extremist Moslem faction came from Africa: the Almohads. Those latter would end with the Almoravid rule. The situation lasted until 1230, when the Nasrid Kingdom of Granada was founded. Finally, in 1492 the Kingdom of Granada was defeated and incorporated into the Christian Kingdom of Castile. The Reconquest was officially over.

[10] The Andalusian part had little in common with the Almoravid dynasty. The Almoravids were an imperial Berber Muslim dynasty established in the current area of both the Western Sahara and Morocco. They established an empire in the 11th century that stretched over the western Maghreb and Al-Andalus, starting in 1050 and lasting until its fall to the Almohads in 1147. Vid. Menéndez Pidal, 1935. Tomo VIII, Vol. II, "El retroceso territorial de Al-Andalus. Almorávides y Almohades. Siglos XI al XIII".

[11] Escolar, Arsenio – Escolar, Ignacio: *La nación inventada. Una historia diferente de Castilla.* Ediciones Península, Barcelona, 2010. 140–141.

[12] Martínez Almira, María Magdalena: *El valor de la tradición jurídica andalusí en el régimen de aguas. Consenso y Acuerdos del pasado para el agua en el futuro*. e-Legal History Review, 2018/27.

was allowed,[13] they permitted the "study of astrology" and they were the "subject of an infidel."[14] All of this violated the strictest norms of Islam.[15] Resulting from this new political panorama, several Churches and Synagogues were attacked by the Almoravids.

Indeed, purging the current Andalusian regime was the main objective of the Almoravids. They would soon unify the several parts of Al-Andalus. Once they did so, they replaced their kings, who were banished to the north of Africa. In this period, the Moslem faction became stronger than the Christian one and it would reap numerous victories. Yet, this rather fundamentalist, warlike approach of the Almoravids had negative consequences:

> "The Almoravid invasion, therefore, triggered a double, undesired goal. Not only the governors from Al-Andalus were radicalised, but also, as a reaction, the hatred towards Islam ignited within the Christian kingdoms."[16]

Besides, the different factions revolted against each other. After the Almoravids accomplished their objective, they made themselves comfortable in the rich Al-Andalus. Therefore, another fundamentalist faction, the Almohads, would reach the peninsula and would fight the Almoravids.[17] Once the job was done, the Almohads decided to stay in Al-Andalus too. However, their lack of education and their initial radicalisation did not diminish over time, and they would adopt radical decisions until their final defeat against the Christians.[18]

Regarding the Christian factions, the forge of the Kingdom of Valencia proved all those introductory ideas to be accurate. In the first place, it felt within this push-back-and-forth dynamic. Its history showed how this process was not static. The city was first recovered in 1092 by the Cid,[19] just to be gained back again two years later by the Moslems.[20] In

---

[13] In Al-Andalus, Moslems respected Christian and Jewish populations given the fact that they constituted the three Abrahamic religions. Even if they were not part of the Islamic community, they would remain protected and they would preserve their own rites.

[14] Escolar–Escolar, 2010. 141.

[15] *L'expulsió dels moriscos: conseqüències en el món islàmic i el món cristià. Congrés Internacional 380è Aniversari de l'Expulsió dels Moriscos* (Sant Carles de la Ràpita, 5–9 de desembre de 1990), online, Generalitat de Catalunya, Departament de Cultura, 1994, 140. http://hdl.handle.net/20.500.12368/424. (12.05.2023): "However, these voices, which were addressed to the internal forces of al-Andalus, had ended with the deterioration of the situation and turned towards the shores of North Africa, where young dynasties had just been born, animated by a great warrior ardour for the defence of Islam: first the Almoravids and the Almohads, then the Merinids and the Hafsids."

[16] Escolar–Escolar, 2010. 141.

[17] The founder of this political faction was Ibn Tumart, who remained very radical and critical against the Almoravids living in Spain. He was scandalised by certain aspects, such as the tolerance of alcohol. It was also told that Almohads started to poke fun of Almoravids since, whereas the women were not required to cover their faces, male Almoravids did. However, it was their custom to protect themselves from the sandy winds of the dessert. Fake news and deliberately trying to slander the adversary are nothing new.

[18] One of the most radical decisions was the expulsion of the Jews in 1146. Maimonides, one of the most famous Spanish personalities, had to emigrate from the Iberian Peninsula, in the first place, and from the north of Africa, in the second place, due to the religious intolerance and radicalism of the Almohads. He was a doctor, a theologian and a philosopher. This was followed by posterior, later expulsion of the Moslems in 1609. Vid. Bernabé Pons, Luis F.: *Notas sobre la cohesión de la comunidad morisca más allá de su expulsión de España*. Al-Qanṭara, 2008/2. 307–332.

[19] Thus, originating the so-called *Cantar de mio Cid* in 1200, the oldest Castilian epic poem of which we have records.

[20] Even before, the city had been subject to a previous attempt of reconquer in 1065 by Ferdinand I of the Kingdom of Leon (Christian).

1238, the city was finally re-gained back by James I the Conqueror.[21] In the second place, factions changed constantly even between Christians and Moors. The last Moorish king of Valencia, Zayyan ibn Mardanish, had become king because he overthrew the previous monarch: Zayd Abu Zayd. The latter met the King James I,[22] seeking for protection and revenge, and made an oath to serve him. It was also used as an excuse to intervene the region. In the third place, the reason behind this was not purely military, yet it was mostly economic: some authors pointed out that the reason of the conquest of Valencia was the "reluctance of the Moorish king to pay his taxes to the king of Aragon."[23] Thus, after the city was sieged, and after many battles, the king Zayyan "signed the capitulation of the city on 28th September, on Saint Michael's eve."[24]

2. The Kingdom of Valencia and its legal sources

The territory of the newly created kingdom of Valencia (13th century) was under Moslem dominion for over five hundred years. There are certain institutions and ideas which contributed to the forming of a singular legal culture.[25] However, it should be noted that the official legal sources remained that of the Christian faction. After the repopulation process, the legal sources from Arab origin were erased: "the king imposed the law he considered to be most appropriate to the Kingdom he had conquered, without taking into account the earlier law."[26] Therefore, in this article, we will only focus on the official Christian sources. A rather schematic way to do so is by dividing it into three main periods: the prevalence of local laws (1238–1261), the territorialisation of the *costum* (1261–1707) and the enactment of the *Nueva Planta* decrees (1707–1978). In this article, however, only

[21] Even nowadays, there is a strong political narrative attaching a different meaning to each of those conquests. Groups stressing out the relevance of the Cid's military campaign are prone to highlight the Castilian relevance in Valencia, and its more Spanish-Castilian identity, whereas the ones stressing out the importance of James I, stress out its Catalan-speaking nature. Again, these are narratives that oversimplify the reality behind a much more complex phenomenon. James I the Conqueror was the King of Aragon, Valencia and Majorca, count of Barcelona and Urgell, lord of Montpellier and of other feudal territories in Occitania. Critical perspective to prevent from establishing dogmatic, closed, ideological categories in this historical topic is strongly advised.

[22] James I the Conqueror was known as *Jaume I el Conqueridor,* in Catalan, and *Jaime I el Conquistador,* in Spanish.

[23] This assertion is based upon the *Llibre dels fets.* Cfr. Masferrer, Aniceto: *Spanish Legal Traditions. A comparative legal history outline.* 2. ed. Dykinson, Madrid, 2012. 191.

[24] Jaume I, Rey de Aragón: *Llibre dels fets*. Bromera, Alzira, 2008. 164.

[25] Prof. Martínez Almira, from the University of Alicante, has extensively studied the topic of the Arab contribution to Spanish legal history with a rather innovative perspective. Vid. Martínez Almira, María Magdalena: *Evolución y pervivencia de las fuentes e instituciones del Derecho andalusí. El amal en materia de matrimonio.* In: Al-Andalus y el mundo árabe (711–2011). Visiones desde el arabismo. Sociedad Española de Estudios Árabes, Madrid, 2012. 157–200.; Martínez Almira, María Magdalena: *La filiación materna y paterna en el Derecho Islámico. Derecho sustantivo y reformas en los sistemas jurídicos actuales*. Feminismos, 2006/8. 87–113.; Martínez Almira, María Magdalena: *Derecho procesal malikí hispanoárabe*. Edizioni scientifiche italiane, Napoli, 2006.; Martínez Almira, María Magdalena: *Estudios e investigaciones sobre las fuentes, derecho privado, penal y procesal islámico en Al-Andalus. Una aproximación historiográfica*. Interpretatio. Revista de historia del derecho, 2002/8. 17–227.

[26] Masferrer, 2012. 192.

the two first periods are thoroughly analysed, since the third one falls out of the period and lacks relevance for this specific topic.

2.1. Local laws (1238–1261)

Since both the Reconquest and the repopulation processes had been carried out by Aragonese and Catalan nobles, so would be the laws that the Kingdom of Valencia would receive. Several repopulation charters were enacted for numerous cities and villages.[27] Thus, the new demographic reality would be profoundly diverse, resulting from the coexistence of Aragonese, Catalans and Moors.

Specifically in the legal sphere, this would entail a triple basis for the legal sources used then: Aragonese, Catalan and Roman/Canon law. Firstly, Aragonese law determined the legal order by means of which up to 45 cities would be governed.[28] Secondly, Catalan law would govern up to 11 cities, by using the *Costums de Lleida* (*Consuetudines Ilerdenses,* 1228),[29] *Consuetuts de Barcelona* (*Recognoverunt proceres,* 1284),[30] and the *Costums de Tortosa* (*Consuetudines deturtenses,* 1277–1279).[31] Thirdly, the concessions based upon Roman/Canon law were particularly relevant as for the city of Valencia, which received its own *costum* in 1238.[32] Given the fact that it was based upon Roman and Canon law, it followed that, at least initially, it strengthened the king's rights. Resulting from this most beneficiary legal order, the different cities and villages of the region of Valencia along the 13th century would opt out of Aragonese or Catalan law and would apply this purely Valencian legal order.

2.2. Territorialisation of the costum (1261–1707)

A territorialisation of the *costum* took place. Originally, it was applied to the city of Valencia, and afterwards, it was extrapolated to the whole Kingdom of Valencia. This *costum* was initially granted only to the city of Valencia in 1238, yet it was translated from Latin into Romance in 1261, and it acquired validity for the whole Kingdom of Valencia:

---

[27] Known as "*cartes de poblament*".

[28] Mostly in Castellón: "Morella (1233), Vallibona (1233), Burriana (1233–1235), Fredes, Bójar and Benicarló (1236), Vilanova, Mola Escabosa, Corachar, Peña de Arañonal and Almazora (1237), Salsadella (1238), Benasal, Albocácer, Catí, Castell de Cabres and Villafranca (1245), Villafamés and Vinaroz (1241), Villanueva de Alcolea and Tirig (1245), Forcal (1246), Arañonal, Les Cingles (1250), Vistabella (1251), Chodos (1254), Vall d'Alba (1264), Azdaneta (1272), Villareal (1274) and others until 1383" (Masferrer, 2012. 193.).

[29] Valls y Taberner, Fernando – Botet, Guillermo: *Las Consuetudines Ilerdenses (1227) y su autor Guillermo Botet.* Universidad Complutense de Madrid, Madrid, 1913.

[30] Barcelona's City Hall Archive, https://ajuntament.barcelona.cat/arxiumunicipal/es/el-recognoverunt-proceres: "It was the privilege granted by the King Peter the Great to the citizens of Barcelona in 1284. It constitutes the most relevant source of municipal law of the city, given that it allowed for acquiring both autonomy and sovereignty to such a degree it had never had it before" (09.05.2023).

[31] *Costums de Tortosa,* Tortosa: Universitat Nacional d'Educació a Distància, Centre Associat de Tortosa, 1979: "On 24th May 1279 another *costum* was added, thus closing the long period of the making of the *Costums* which, henceforth, did not undergo any other further variation".

[32] No original copies from it are preserved, yet most of the chapters are included in the *Furs*.

> "The main source of territorial character was the *costum,* a legal work drafted by a committee of jurists, including Vidal de Canellas, and promulgated by Jaime I in 1238. Being initially of local character, it underwent several reforms (by adding, for example, *Furs* and royal privileges), turning the original *costum* (promulgated by Valencia-city) into the *Furs de València* (territorial text granted to the whole Kingdom of Valencia)."[33]

It should be noted that the very nature of both terms (*costums* and *furs*) might sometimes be difficult for experts dealing with the original texts. Juan Beneyto held that the Castilian *furs* were essentially the Catalan *costums*.[34] He would even consider establishing an analogy between *furs* and *costums* in certain cases.[35] Other authors such as Lalinde Abadía or Bartolomé Clavero would speak of analogous contents coined by different words.[36] However, there were other authors who would argue that they were completely different things.[37]

Be as it may, this territorialisation of the Valencian *Furs*[38] did not please Aragonese nobility. The latter would have preferred to keep applying their laws in Valencia so that they could keep their privileges. They felt betrayed to such an extent that in 1264 they met in the *Cortes* of the king and expressed their concern. In 1283, Peter the Great would allow anybody who wished to be governed by the Aragonese laws to do so. However, in 1329–1330, the king Alfonso II of Valencia established the so-called "jurisdicción alfonsina".[39] Among other aspects,[40] it essentially offered jurisdictional privileges to those Aragonese nobles who decided to waive their Aragonese *fueros* and opted for submitting themselves to the Valencian law. The move was a complete success.

Legal historians have discussed the nature of this legal code. They remain "uncertain whether its scope was local or territorial", yet it is out of discussion that from the very beginning "legislators intended to formulate a single set of laws for the whole Valencian territory".[41] The original text proves this in a clear way:

---

[33] Masferrer, 2012. 193.

[34] Beneyto, Juan: *Fuero, costumbre y doctrina en el Derecho medieval español*. Revista general de legislación y jurisprudencia, 1969/3. 395–403.

[35] He referred to the moment in which the *Fuero de Ávila* is granted to Evora.

[36] Lalinde Abadía, Jesús: *Derecho histórico español*. Ariel, Barcelona, 1974.; Clavero, Bartolomé: *Temas de historia del Derecho. Derecho común*. Secretariado de Publicaciones de la Universidad, Sevilla, 1977.

[37] Oliver y Esteller, Bienvenido: *Historia del Derecho en Cataluña, Mallorca y Valencia. Código de las Costumbres de Tortosa.* Imprenta de Miguel Ginesta, Madrid, 1876.

[38] The relevance of the *Furs* was enormous. It was said to constitute the first manifestation in the Iberian Peninsula (and the second in Europe) of a legislative text, built on the ancient institutions of Roman law. Vid. Generalitat Valenciana, *Els Furs,* https://elsfurs.gva.es/es/els-furs-valencians. (23.02.2023.).

[39] Real Academia Española, "jurisdicción alfonsina", *Diccionario panhispánico del español jurídico,* enlace: https://dpej.rae.es/lema/jurisdicci%C3%B3n-alfonsina. (18.05.2023.): "In the *Cortes* of Valencia of 1329–1330, Alfonso II of Valencia and IV of Aragon, in an attempt to unify the law having as its basis Valencian law, creates the so-called 'jurisdicción alfonsina' […] by means of which the spread of Valencian law is encouraged, at the expense of the Aragonse one, and to compensate the areas of seigneurialism, thus favouring the jurisdictional sphere, as long as the voluntary waiver of Aragonese law and submission to Valencian law takes place".

[40] Its origin was the signature of the document *De Iurisdictione omnium iudicum* in 1329 by Alfonso IV of Aragon (Alfonso II of Valencia). Also, this was helpful for the Christianisation of the kingdom, since it required a place with, at least, fifteen "old Christian families".

[41] Garcia Edo, Vicent: *La Costum de la ciutat i Regne de València de 1238*. Anuari de l'agrupació borrianenca de cultura, 2019. 9–21. http: //dx.doi.org/10.6035/Anuari.2019.30.1

> "*Costums,* in this royal city of Valencia, and in the whole kingdom, and in every village, castle, farmstead, *torre,* and in every other places […] we create and order its enforcement".[42]

Therefore, the own legal tradition of the Kingdom of Valencia had to be newly implanted. The *Furs* would, thus, be a mixture of the *Codex Iustinianus,* the Digest, the *Liber Iudiciorum,* the Decretals, the Decree of Gratian, the *Usatges de Barcelona,* the *Consuetudines Ilerdenses,* etc. All along this period we might find different recompilations of these sources: *furs,*[43] repertoires,[44] privileges,[45] and the doctrine in Valencia.[46]

2.3. The Nueva Planta Decrees

In 1700, the king Charles II died without descendants, which triggered the Spanish Succession War. The two candidates to the throne were Philip of Anjou and Charles of Austria. Philip V was finally proclaimed king, and after the Battle of Almansa in 1707, Philip V effectively took over the Valencian region. The first thing he did after coming to the throne was to promulgate the *Nueva Planta* Decrees, which abolished all the Valencian *furs*. However, a significant number of legal institutions were maintained through custom, so it can be said that Valencian foral law did not disappear completely.

Almost three centuries later and with the arrival of democracy, the Valencian territory became an Autonomous Community. After the reform of the Statute of Autonomy in 2006, the Generalitat has acquired broad powers for the conservation, development and modification of Valencian Foral Civil Law. The ancient *Furs de València* are now relevant again, yet the last judgements of the Constitutional Court still show reluctances to its restoration.[47]

3. The *Furs de València:* an effective obstacle to the king's prerogatives

Once the *Furs* were enacted, the vast power and prerogatives of the nobility came to an end. The newly conformed legal order allowed for the limitation of power coming from the

[42] Valencia's Cathedral Archive, "prologue", *Els Furs:* "Consuetudines in hac regia civitate Valencie, necnon et toto Regno, et universis, villis, castris, alqueries, turribus et locis aliis in hoc regno hedificatis et hedifficandis [...] dignum duximus compilandas".

[43] Mora de Almenar, Guillén Ramón: *Volum e recopilació de tots los furs y actes de cort que tractem dels negocis y affers respectants a la Casa de la Deputació y Generalitat de la Ciutat y Regne de València*. 1604.; Palmart, L. – Arinyo, L.: *Príncipe*. 1482; Pastor, Francisco Juan: *Fori Regni Valentiae*. Valentina, 1547–1548.

[44] Hieroni Taraçona, Pere: *Institucions dels Furs i Privilegis del Regne de València*. 1580; Ginart, Berthomeu: *Reportori general i breu sumari per orde alphabètich de totes les matèries dels Furs de València*. 1608.

[45] Alanya, Luis: *Aureum opus regalium privilegiorum*. 1515.

[46] Pere Belluga, P.: *Speculum principum ac iustitiae.* 1441.; Cerdán de Tallada, T.: *Comentarii super fori.* 1598.; Antonio Morlá, P.: *Emporium utrisque iuris quaestionem.* 1599.; Gerónimo León, F.: *Decisiones Sacrae Regiae Audientiae Valentiae.* 1620–1646.; Bas y Galcerán, N.: *Theatrum iurisprudentiae.* 1690.; Matheu y Sanz, L.: *Observationes illustratae decisionibus Sacrii Supremii Regnii Aragonum Consilii.* 1670.; Matheu y Sanz, L.: *Tratado de celebración de las Cortes valencianas.* 1680.

[47] Andrés Durà, Raquel: *Cinco años (o 314) sin derecho civil valenciano*. La Vanguardia, 27.04.2021. https://www.lavanguardia.com/local/valencia/20210427/7369316/cinco-anos-sin-derecho-civil-valenciano.html (12.03.2023.).

king too. All the monarch's successors had to swear the *Furs* in Valencia before completing a month of reign.[48] With its logical nuances, the subjection of the king to the *furs* entailed the constitution of the Kingdom of Valencia as a sovereign entity.

Many cities and villages obtained privileges and freedoms from the monarchs in order to elect municipal authorities. The cities were areas of a significant greater freedom than the rest of Mediaeval Spain:

> "In the peninsula, against the Moslem presence, in the *fueros* of the borders, liberties and the power of election of their judges and mayors".[49]

Altogether with it, this permitted the creation of a society which was freer, economically active and less prone to accept hierarchy. Unsurprisingly, Valencia became the most important kingdom within the Crown of Aragon. The normative development favoured trade and culture, which led to the Valencian Golden Age: a period of great economic and cultural development in the 14th century.[50] Naturally, this also affected the emerging legal order and, therefore, the ancient Kingdom of Valencia had a complete law based on the most modern law of the time, which to a large extent, although with transformations, survives today in Spanish and European law.

Indeed, the dynamics of political power experienced a notable change towards the Late Middle Ages. Feudal lords, the military and most of ecclesiastic hierarchy, (since a significant amount of them were holding fiefs themselves) were constantly interfering with the king's power (if not directly depriving the monarch from the power or even being much superior to it). Thus, the monarch sought to establish an alliance with the inhabitants from the cities and the universities in order to grow his political power and support. Very much afterwards, this would describe the path towards absolutist monarchies in some European nations.[51]

Even if to some extent it was true that the feudal hierarchy was maintained over centuries,[52] in Valencia it was diminished for two reasons: the role of pactism and the *ius commune.* On the one hand, pactism was a political principle very widespread in Aragon, Catalonia and Valencia itself whereby "a law (or legal provision, a *Fur* in Valencia) promulgated in *Cortes* had a contractual character", thus, a "legal disposition" unilaterally created by "the king" should not violate it.[53] On the other hand, the influence of the *ius commune* was almost complete. For starters, the constitutive elements of the *Furs* were the Digest and other Roman-Canon law sources, so it is not that *ius commune* influenced it, but rather that *ius commune* was actually part of it. Besides, the legal education of the jurists was heavily relying upon the *ius commune* and, therefore, when the legal experts were to apply the law, their interpretation would be made according to what they had

---

[48] Peter III, son of James I, also swore the fueros in 1277.

[49] Peset, Mariano: *Els Furs de València. Un texto de leyes del siglo XIII*. In: Palao Gil, Francisco Javier – Hernando Serra, M. Pilar (eds.): Los valencianos y el legado foral. Historia, sociedad, derecho. Universitat de València, València, 2018. 42.

[50] One of the most important works of the Valencian literature dates back from this period: Martorell, J.: *Tirant Lo Blanc.* 1490.

[51] Castile would be a good example of this, as opposed to what happened to Aragon, which rejected this system, due to its own diverse nature and to the strong presence of pactism.

[52] Peset, 2018. 42.

[53] Masferrer, 2012. 194.

previously studied: the *ius commune*. Also, as Professor Masferrer pointed out, the *Furs de València* contained a provision establishing natural sense and equity as a subsidiary law, but since *ius commune* was considered as the *ratio scripta,* i.e. the clearest expression of the common and natural sense, it was obvious that this would lead to the application of the *ius commune*.[54]

Despite the previously explained unwritten alliance between the king and his citizens, the fact that this Roman law could not be easily controlled generated a growing unease among the kings. Even James I, precursor of the *Furs,* was both eventually and increasingly showing his concerns for how the amount of freedom of interpretation of Roman law texts could threaten his authority within the newly born Kingdom of Valencia. He wanted to maintain all his legislative and interpretative powers. Yet, the *Furs* were such a guarantee against the royal power that, when it was too late for James I to undo everything he had created, he attempted to restrict its interpretation and application in the Courts. In 1251, he promulgated some measures against practitioners appealing to Roman law.[55] In 1264, similar measures were reiterated.[56] In 1270, another amendment allowed for the Natural law to be appealed, but prohibited the Decree of Gratian, the *Liber Extra* or any Roman law provisions. This even happened to other regions of Hispania.[57] Be as it may, nor James I neither the following kings in Valencia were successful.[58] It was simply impossible.[59]

> "Symbolic of the Roman triumph are the concordances in the margins of Pastor's edition, which lurk over his *fueros,* while the glosses of Gregorio López embrace – almost drown – the texts of the *Partidas*."[60]

One could say that James I fell victim to his own trap, yet such assertion would entail a blatant oversimplification. It was rather a logical consequence of this back-and-forth pushing dynamic that very often characterises the political power (number of concerns which is increased regarding the complex nature of the *ius commune*).[61] James I, helped by his own jurists, used it, whereas at the same time he did prohibit it, in order to assert his

---

[54] Masferrer, Aniceto – Obarrio, Juan A.: *The ius commune as the 'ratio scripta' in the civil law tradition. A comparative approach to the Spanish case*. In: Moréteau, Oliver – Masferrer, Aniceto – Modéer, Kjell Å. (eds.): Comparative Legal History. Edward Elgar, Cheltenham, 2019. 232.

[55] Jaume I, *Aureum Opus*, Privilegio 37.

[56] Jaume I, *Aureum Opus,* Privilegio 65.

[57] The same story about restricting the application of *ius commune* was repeated in other territories of Iberia in the subsequent *Leyes de Briviesca* (1387), *Leyes de Toro* (1505), in the *Nueva Recopilación* (1567), and in the *Novísima Recopilación* (1805).

[58] Peter III in 1238, James II in 1309, Peter IV in 1358, among others.

[59] A similar event took place prior to the Moslem invasion. In 654, the Visigothic king Recesvint promulgated the Code of Recesvint. This text ruled that, in order to solve any dispute, the particulars could only resort to the *Liber Iudiciorum*. It prohibited the application of foreign laws (Roman laws).

[60] Peset, 2018. 51.

[61] Masferrer, Aniceto – Obarrio, Alfredo: *Curso de ius commune. La recepción en la tradición jurídica valenciana*. Dykinson, Madrid, 2012.; Decock, Wim – Masferrer, Aniceto – Obarrio, Alfredo: *Ius Comune e Historia del Derecho*. GLOSSAE. European Journal of Legal History, 2016. 1–4.; Masferrer, Aniceto: *Ius Commune y tradición jurídica europea. Notas sobre la contribución del Prof. Antonio Pérez Martín a la historiografía jurídica europea*. GLOSSAE. European Journal of Legal History, 2013. 1–47; Masferrer, Aniceto: *El 'ius commune' en la historiografía penal española. Una apuesta metodológica de apertura hacia lo supranacional y europeo*. In: Condorelli, Orazio (ed.): Panta rei. Studi dedicati a Manlio Bellomo. Vol. 3. 2004. 563–587.

power of legislating and judging.[62] This should be conveniently stressed out, since history cannot be forced to fit into a wished narrative. Just as no legal historian could sensitively assert that the *Furs* were an untouched, immutable entity of some sort: Valencian law did not stop there. Between the 14th and 17th centuries, the Valencian *Cortes* would update the core of Valencian law through new *Furs* "notebooks" promulgated by them.

4. Four major extracted examples

4.1. "On the judgements and judicial records, on the writ of summons and the expenses."[63]

If a judgement is given yet it does not contain a decision in terms of absolution or conviction, such "judgement" must not hold this name, nor does it have validity.

Judges must give the rulings in romance language and in written to the parties asking for it. This means that vernacular languages in that time were used instead of Latin, in order to make this guarantee effective: everyone would be able to understand its content.

The *Furs* also protected the plaintiff in case the defendant avoided the judgement. In case someone was called upon judgment once, twice or three times (peremptory way by the court) and would not show up at the Court (by he himself or with representation), several options could be enforced. If it was a real action (movable or immovable property), they would let the plaintiff have it. However, if it was a personal action (someone was asking for a certain quantity of money), they would let him have the goods of the defendant. The king himself foresaw within those *Furs* that if such refusal ever took place, the defendant could be imposed a penalty on top of that, regardless from the aforementioned solution.

Additionally, there was another protection within this section. Should a certain doubt emerge during the process at any time during confessions, answering, writ of summons, judicial review or any other issue, they should not be solved according to what the Court thinks, but strictly according to what the records of the process state. Those ideas were written down in the so called "book of the Court". All of the considerations by the public notaries of the kingdom ought to be taken into account as if they were holding absolute truth.

Also, the citizen who wished to challenge the judge's ruling should be warned that in case he was found guilty again, he would have to face the payment of the Court costs. The defendant should, as well, pay to the plaintiff the costs he caused him. In case the Court did not act rightfully and did not cover the plaintiff's costs or did not charge to the defendant the Court costs, it will have to pay for those costs itself. Both in criminal and civil law cases, the legal claims shall always be brought before the court in writing.

Finally, the court is protecting both the plaintiff and the defendant from unfair outcomes of the judgment. Should the defendant be absent because he is abroad or simply out of the kingdom, the court will establish a curator administering the goods of the defendant in order to pay pack to the plaintiff. Nevertheless, if the defendant comes back before a year, he is entitled to recover the possession of its patrimony and not to see the court taking it away.

---

[62] Peset, 2018. 28.

[63] *Els Furs,* 125. I have used the edition of Arcadi García i Sanz (Vicent García Editores).

4.2. "On the penalty imposed on the judge who made and unfair/illegal ruling."[64]

If the judge ordered to take away something from someone in an unfair manner, all those things would be restored to the one suffering this judicial overstep. Similarly, if the judge, in order to obtain a benefit himself, intentionally executed the one who should not be executed; or he absolved a person who should be convicted, the judge should be punished.

4.3. "On the execution of penalties."[65]

The sentences would lack validity if:

a) there was a tacit mistake within the ruling.
b) if the judgment had been pronounced before the lawsuit had been brought.
c) the judgment had ruled against the defendant who had not been properly summoned to court according to the *costums de València.*
d) if the ruling went against cases that had been rendered before.
e) if the ruling went against a previous *res iudicata* (10 days after the sentence without appealing).

4.4. "On judgements grounded upon false deeds and false testimony."[66]

This last section was far shorter than the rest. Essentially, two conditions were stated. The first one would dispose that the judgement would be revoked if it was proved that the judge had ruled based on false deeds or false testimony. The second one foresaw that if someone successfully obtained a favourable judgement by means of relying on false deeds or false testimony, it would be declared void and it would have no effects.

5. Conclusions

It was decisive for the Kingdom of Valencia having received the so-called *Furs*. Due to its remarkable Roman law sources, the *Furs* allowed Valencia to be a freer place than other places of the Crown of Aragon. Even outside, Castile would fall into absolutism in an easier fashion than Valencia. It was precisely because of the use of Roman law texts that they could prevent the compulsory use of royal legislation. Even if, as it has been previously indicated, numerous attempts at limiting the use of *ius commune* had taken place, the truth is that they never got to avoid its use. It never happened nor in the forensic practice, neither in theory, since many jurists alleged that they were resorting to the first part of the *Furs* which stated that where these *costums* fell short, the ones judging should lawfully resort to the common sense and to equity.[67]

[64] *Els Furs,* 127. I have used the edition of Arcadi García i Sanz (Vicent García Editores).
[65] *Els Furs,* 128. I have used the edition of Arcadi García i Sanz (Vicent García Editores).
[66] *Els Furs,* 125. I have used the edition of Arcadi García i Sanz (Vicent García Editores).
[67] *Els Furs,* 23. I have used the edition of Arcadi García i Sanz (Vicent García Editores): "Volem que lla hon aquestes costumes no poran abastar:aquells que jutgaran puixen leeriuament recorrer a natural seny e a egualtat", 23.

Frey Dóra
Universitätsoberassistentin, Andrássy Gyula Deutschsprachige Universität, Budapest

TEIL DER HISTORISCHEN VERFASSUNG ODER HISTORISCHES DOKUMENT? DIE ROLLE DER DEUTSCHEN UND UNGARISCHEN GOLDENEN BULLE IN DEN JEWEILIGEN VERFASSUNGSTRADITIONEN

1. Einführung

Ziel des Aufsatzes ist, die Rollen von den zwei Goldenen Bullen, des ungarischen und des deutschen in den späteren Verfassungsentwicklung der beiden Länder zu untersuchen. Ich bin keine Mediävistin und auch keine Expertin der Verfassungsgeschichte des Mittelalters, so konzentriere ich auf die Wirkung in der späteren Verfassungsentwicklung und auf die moderne bzw. heutige Betrachtung der zwei Dokumente.

In der vormodernen Zeit waren die beiden Goldenen Bullen von großer, aber von unterschiedlicher Bedeutung. Eine größere und weitreichendere Rolle spielte die deutsche Goldene Bulle aus dem Jahre 1356, da es die Regeln der Wahl des deutschen Königs (der später deutsch-römischer Kaiser wurde) bis zu Ende des Heiligen Römischen Reiches Deutscher Nation bestimmte.

Warum sprechen dann in Ungarn im verfassungsrechtlichen Kontext viel mehr über die ungarische Goldene Bulle? Warum tragen die Richter des ungarischen Verfassungsgerichts eine Abbildung des Siegels der Goldenen Bulle über ihren Talaren? Und warum wären die Mitglieder des deutschen Bundesverfassungsgerichts höchst verblüfft, wenn sie das Siegel der deutschen Goldenen Bulle tragen sollten? Die Antworten auf diese Fragen liegen nicht im Mittelalter, sondern in der späteren Verfassungsentwicklung der beiden Länder und sollen in diesem Aufsatz untersucht werden. Insbesondere soll der Frage nachgegangen werden, wieso die ungarische Goldene Bulle so eine bis heute reichende Bedeutung in den ungarischen Verfassungstraditionen erlangen konnte und wieso es bis heute nachwirkt.

2. Die ungarische Goldene Bulle und das Konzept der historischen Verfassung

Gerade am Vorabend der von der Universität Szeged organisierten Konferenz am 1. und 2. Dezember, wurde in dem offiziellen Blatt von Ungarn „Magyar Közlöny“ das Gesetz Nr. 46 von 2022 veröffentlicht „Über die Bedeutung der Goldenen Bulle aus dem Jahre 1222 und über den Tag der Goldenen Bulle“.[1] Laut Präambel des Gesetzes: „es wird anerkannt, dass

[1] *Magyar Közlöny,* 2022/197. 30. November 2022. 7975.

der Ideengehalt der Goldenen Bulle in bestimmten Gesichtspunkten als ideengeschichtlicher Vorläufer der Demokratie der modernen Zeit betrachtet werden kann".[2] Es mag vorerst hingestellt bleiben, wie aus einem Dokument, der aus der Zeit, der sich gerade ausbildenden ständischen Gesellschaft stammt, ideengeschichtliche Vorläufer der heutigen Demokratie abgeleitet werden können, aber die hier zu Tage gelegte Betrachtungsweise zeigt welche Bedeutung dem Dokument zugeschrieben wird. Überhaupt die Tatsache, dass die Goldene Bulle in einem eigenen Gesetz gewürdigt wird, und sogar ein „Tag der Goldenen Bulle", der am 24. April gefeiert werden soll bestimmt ist, zeigen von ihrer besonderen Stellung in der heutigen Verfassungsdenken.[3]

Warum hat aber die Goldene Bulle in Ungarn diesen hohen Stellenwert? Keineswegs nur wegen seiner Bedeutung im Mittelalter. In der Zeit, wo König Andreas II. es herausgab, war es ein wichtiger Schritt Richtung der sich formenden ständischen Gesellschaft und bekräftigte die Rechtsstellung der so genannten königlichen Servienten, also der Personen, die nur dem König unterstanden und von denen später der Adel sich herausbilden wird.

Es wurde noch zu Lebzeiten des Königs erneuert, allerdings geriet es danach als Urkunde weitestgehend in Vergessenheit. Sie war einer der vielen königlichen Urkunden, von den durch König Andreas herausgegebenen Privilegien hatte im Mittelalter das so genannte Diploma Andreanum, der die Rechtsstellung der Siebenbürger Sachsen regelte und deren jahrhundertelang bestehende Autonomie begründete, viel größere praktische Bedeutung. Ganz vergessen wurde die Goldene Bulle jedoch nicht, die einzelnen Bestimmungen lebten in der späteren Gesetzen und Dekreten und im Gewohnheitsrecht weiter.[4] Sie wurde vom König Ludwig I. bekräftigt und wurde so Teil der königlichen Inaugurationsurkunden als eine der frühen Zusammenfassungen der Begrenzung des Alleinmachts des Königs. Es floss dann auch in das so genannte Tripartitum von István Werbőczy aus dem Jahre 1514 ein und wurde damit endgültig Teil der „ständischen Verfassung", also denjenigen Rechte und Freiheiten, die die ungarische Stände für sich beansprucht haben – auch gegenüber des jeweiligen Königs.[5]

Im 16. Jahrhundert war nicht mehr die Rechtstellung der Servienten als entscheidende Punkt der Goldenen Bulle betrachtet, denn die Rechte und Stellung des Adels waren vielseitig gesichert, sondern das ius resitendi, also das Wiederstandrecht,[6] die laut des Dokuments den Noblen des Landes zustand, wenn der König die Rechte aus der Goldenen Bulle nicht berücksichtigen sollte. Da das Wort „nobiles" anders als im 13. Jahrhundert es der Fall war,[7] später den ganzen Adel bezeichnet hat, war es so interpretiert worden, dass der Adel das Recht hat, gegen den König aufzubegehren, wenn er die Rechte und Freiheiten des Landes (und des Adels) nicht achten sollte.[8] Im Mittelalter kam dieses Widerstands-

---

[2] Alle Übersetzungen von Gesetzestexten stammen von der Autorin.

[3] Gesetz Nr. 46 von 2022.

[4] Zsoldos Attila: *Az Aranybulla útja a történeti mitológiába*. Pontes, 2022/5. 14.

[5] Horváth Attila: *Az 1222. évi Aranybulla ellenállási joga mint történeti alkotmányunk vívmánya*. In: Mezey Barna (Hrsg.): Az Aranybulla a joghistóriában. MFI, Budapest, 2022. 109. [Horváth, 2022.]

[6] Zusammenfassend dargestellt: Stipta István: *Az Aranybulla ellenállási záradéka és a nemesi vármegyék rendeletfélretételi (vis inertiae) jogosultsága*. In: Mezey Barna (Hrsg.): Az Aranybulla a joghistóriában. MFI, Budapest, 2022. 155–194.

[7] Zsoldos, 2022. 27

[8] Timon Ákos: *Magyar alkotmány- és jogtörténet, különös tekintettel a nyugati államok jogfejlődésére*. 4. bőv. kiad. Hornyánszky, Budapest, 1910. 109.

recht nie zur Anwendung, einen späteren Ausdruck hat es jedoch nach der Herrschenden Meinung der ungarischen Verfassungshistoriker in dem so genannten vis inertiae, also im Recht der Komitaten vor 1848, Gesetze oder sonstige königliche Anordnungen außer Acht zu lassen, wenn diese gegen die ständische Verfassung – und Rechte des Adels verstoßen.[9] Die Möglichkeiten der Weiterführung bzw. des Weiterlebens dieses Rechts generierten Diskussionen bis ins späte 19. Jahrhundert hinein, allerdings stand es im Widerspruch zu der Rechtssicherheit und das vis inertiae wurde daher nicht mehr als Recht der Komitate, die sich zu Verwaltungseinheiten mit einer gewissen Selbstverwaltung entwickelten, betrachtet und somit kein Teil der historischen Verfassung mehr.[10]

Die heutige herausragende Bedeutung von der Goldenen Bulle kann also nicht nur mit seiner Wichtigkeit im Mittelalter und/oder frühen Neuzeit begründet werden, damals war es eine der vielen Dokumente, auf denen die ständische Verfassung basierte. Wieso errang eine seiner Zeit bedeutende, aber nicht unbedingt herausragende mittelalterliche Urkunde eine bis heute währende Bedeutung? Die Antwort auf diese Frage soll nicht im Mittelalter, sondern im 19. Jahrhundert und in einer Besonderheit der modernen ungarischen Verfassungsentwicklung gesucht werden.

Es liegt in einem speziell ungarischen Pränomen der Verfassungsentwicklung der so genannten historischen Verfassung, ein Begriff nicht nur in der ungarischen Verfassungsgeschichte und der historischen Wissenschaften insgesamt, sondern auch im geltenden Verfassungsrecht, da das neue, im Jahre 2011 verabschiedete und seit dem 1. Januar 2012 geltende Grundgesetz Ungarns auf diese, bzw. auf seine Errungenschaften hinweist. Was ist die historische Verfassung Ungarns? Es ist kein altes, nicht mehr geltendes Verfassungstext, sondern eine im englischen Sinne verstandene historische Verfassung bestehend aus einer Vielzahl von Gesetzen, aus Gewohnheitsrecht und Rechtsprinzipien.[11] Anders als in der überwiegenden Teil der europäischen Länder erfolgte in Ungarn im Zeitalter der Konstitutionalismus keine Verfassungsgebung, sondern man verwendete weiterhin die tradierte Dokumente der ständischen Verfassung, ergänzt mit Elementen einer konstitutionellen Monarchie, die in Ungarn nach der Revolution 1848 und besonders nach dem Ausgleich mit Österreich 1867 auch entstand. Die historische Verfassung, als Konzept wurde von den Wissenschaftlern – nicht nur von Historiker, sondern vor allem durch Juristen – als Alleinstellungsmerkmal Ungarns auf dem europäischen Kontinent beschrieben und galt als unbedingt erhaltenswert.[12] Es bestand in Ungarn bis zum kommunistischen Verfassung aus dem Jahre 1949 – mit kurzweiligen Übergangslösungen der Räterepublik 1919 – kein einheitliches Verfassungstext, sondern eine Reihe von verschiedenen Rechtsnormen aus unterschiedlichen historischen Epochen ergänzt mit Gewohnheitsrecht und grundlegenden Rechtsprinzipien bildeten die ungarische Verfassung.[13] Es war aber auch keine „ungeschriebene“ Verfassung, denn die historische Dokumente, Gesetze, Dekrete – so auch

[9] Horváth Attila: *Az 1222. évi Aranybulla és a történeti alkotmány*. In: Horváth Ciprián et al. (szerk.): Királyok és szentek. Az Árpádok kora. Magyarságkutató Intézet,Budapest, 2022. 149.

[10] Stipta István: *Közjogi viták a vármegyék rendeletfélretételi (vis inertiae) jogáról.* Miskolci Jogi Szemle, 2020/1. klsz. 270–276

[11] Takács Imre: *Az alkotmány és az alkotmányosság fogalma.* In: Kukorelli István (Hrsg.): *Alkotmánytan*. Osiris Kiadó, Budapest, 2002. 31.

[12] Timon, 1910. 13

[13] Mezey Barna – Bódiné Beliznai Kinga: *A törvénykezés szervei.* In: Mezey Barna (Hrsg.): Magyar alkotmánytörténet. Osiris Kiadó, Budapest, 2003. 207.

die Goldene Bulle – waren ja geschrieben, das Gewohnheitsrecht und die grundlegenden höchstgerichtlichen Urteile wurden in Rechtsbücher und Sammlungen zusammengefasst, wie das Gewohnheitsrecht im Tripartitum von István Webőczy (1514) oder die Gerichtsurteile im Planum Tabulare (1769).[14]

Die Goldene Bulle, war obwohl über den genauen Inhalt der historischen Verfassung keine Einigkeit herrschte,[15] ein fester Bestandteil dieser, sie war sogar das erste tatsächlich Vorhandene, schriftlich überlieferte Dokument der historischen Verfassung. Es waren nämlich auch eher legendäre Elemente als deren Teil verstanden, so zum Beispiel der so genannte Urvertrag oder Blutsvertrag, der irgendwann im 9. Jahrhundert irgendwo in der osteuropäischen Steppenlandschaft von angeblich sieben Stammesführer (oder Fürsten) der Ungaren geschlossen werden sollte, und das ewige Bündnis der Stämme und Bestätigung der Nachkommen von Fürst Álmos als Herrscher der Ungaren beinhalten sollte.[16] Nach herrschender Meinung der mit der ungarischen Frühgeschichte befassenden Historiker ist diese Urvertrag nicht mehr (und nicht weniger) als eine historische Legende, die die Herrschaft des Árpádenhauses, die erste Königsdynastie in Ungarn (die Nachkommen von Álmos waren) legitimieren sollte.[17]

Gegenüber diesen aus Gesichtspunkt der positivistischen Geschichtswissenschaft (und der Verfassungslehre) schwer hinnehmbare Vorstellungen über den Inhalt der historischen Verfassung[18] war und ist die Goldene Bulle greifbar, sie ist in mehreren mittelalterlichen Exemplaren überliefert und so den Wissenschaftlern zugänglich.

Wegen der zeitlichen Nähe der beiden Dokumente zueinander wurde die Goldene Bulle auch als das „ungarische Magna Chara" bezeichnet und ihr eine ähnliche Bedeutung zugeschrieben, wie das Magna Charta in der britischen Verfassungsentwicklung und in der historischen Verfassung Großbritanniens hat.[19] Dabei wurden die bedeutende Unterschiede bei der Entstehung und Fortwirkung beider königlichen Privilegien stets missachtet, genauso wie die auch nicht unbedeutende Abweichungen der allgemeinen Verfassungsentwicklung beider Länder, eine direkte Zusammenhang der beiden Dokumente ist auch nicht nachweisbar.[20]

Diese Stellung als „ungarische Magna Charta" und als „Grundstein der historischen Verfassung" behielt die Goldenen Bulle auch in der Zeit nach 1848, als es inhaltlich eigentlich größtenteils obsolet wurde, da die Adelsprivilegien und die ständische Unterschiede

---

[14] Rixer Ádám: *A történeti alkotmány lehetséges jelentéstartalmai*. Jogelméleti Szemle, 2011/3. http://jesz.ajk.elte.hu/rixer47.html

[15] So bereits in der Zeit der Aufklärung wurden Überlegungen diesbezüglich getroffen, siehe dazu: Csizmadia Andor (veröff. red..): *Hajnóczy József közjogi-politikai munkái*. Akadémiai Kiadó, Budapest, 1958. 236–240.

[16] Zétényi Zsolt: *Történeti alkotmányunk vívmányai és a 2011. évi Alaptörvény.* Néhány gondolat 2015 telén. Kairosz, Budapest, 2015. 77.

[17] Kristó Gyula: *Szempontok Anonymus gestájának megítéléséhez*. Acta Universitatis Szegediensis. Acta historica, Tom. 66. 1979. 54.

[18] So etwa: Tóth Zoltán József: *Magyar közjogi hagyományok és nemzeti öntudat a 19. század végétől napjainkig*. Adalékok a Szent Korona-eszme történetéhez. Szent Isván Társulat, Budapest, 2007.; Zétényi, 2015.

[19] Timon, 1910. 291

[20] Eckhart Ferenc: *Magyar alkotmány és jogtörténet*. Politzer, Budapest, 1946. 30–33. Entgegen aller historischer Erkenntnissen hält sich die Auffassung über die ähnliche Bedeutung der beiden Dokumenten bis heute, so etwa: Szájer József: *Gondolatok a Magyarország Alaptörvényének elfogadása körül folyó vitákról*. In: Kiss György (Hrsg.): Államszervezet és államiság Magyarország alaptörvényében. Dialóg Campus, Budapest, 2017. 20.

im Zuge der bürgerlichen Revolution durch die Aprilgesetzen (die später auch als Teil der historischen Verfassung angesehen wurden) allesamt aufgehoben wurden.[21]

Durch die positivistische Gesichtswissenschaft, und die daran orientierte rechtshistorische Forschung, die vor allem durch den Namen von Ferenc Eckhart gekennzeichnet ist, wies in der Zwischenkriegszeit nach, dass die tatsächliche (rechts)historische Bedeutung von der Goldenen Bulle zeitgenössisch geringer als bis dahin angenommen und vor allem von relativ kurzer Dauer war, sowie dass die Vergleiche mit dem Magna Charta wegen des völlig verschiedene historischen und gesellschaftlichen Hintergrundes nicht angebracht seien.[22] Entgegen der romantischen und romantisierenden Auffassung der Historiker und öffentlich Rechtler im 19. Jahrhundert[23] lässt es sich auch festhalten, dass die Goldene Bulle nicht als Verfassungsgebung gedacht war, diese Begrifflichkeiten waren dem 13. Jahrhundert völlig fremd. Sie war, genauso wie die Gesetzgebung dieser Zeit keine im Voraus geplante Kodifikation, sondern Reaktion auf aktuell bestehenden Probleme – im gegebenen Fall auf die Unruhen unter den königlichen Servienten, die eine Verschlechterung ihrer Rechtstellung und dadurch ihren gesellschaftlichen Status als freie nur dem König unterworfenen Personen befürchteten.[24]

Obwohl im geltenden Verfassungsrecht in der zweiten Hälfte des 19. Jahrhunderts wegen den oben genannten Faktoren auch keine Rolle mehr spielte und spielen konnte, behielt die Goldene Bulle doch seine symbolische Bedeutung als „Grundstein der historischen Verfassung" in der ganzen Zeit der Geltung der historischen Verfassung – also im Grunde genommen bis zum Zweiten Weltkrieg.[25]

3. Die historische Verfassung und das Grundgesetz Ungarns

All die Überlegungen über die Goldene Bulle und deren Rolle in der historischen Verfassung könnten der Verfassungsgeschichte und der Wissenschaftsgeschichte angehören, wäre es in der jüngeren ungarischen Rechtsgeschichte nicht zu einer entscheidenden Änderung gekommen. Im Jahre 2011 kam es zu einer neuner Verfassungsgebung in Ungarn, deren Ergebnis das seit dem 1.1.2012 geltende Grundgesetz Ungarns ist. Diese heißt deswegen Grundgesetz, weil der Begriff „Verfassung" laut Auffassung des Verfassungsgebers der historischen Verfassung vorbehalten ist.[26]

Die Frage der historischen Verfassung rückte ins Interesse der Verfassungsrechtler als das ungarische Grundgesetz sie aufgegriffen hat und in dessen Text an mehrere stellen erwähnt wird. Diese Verbindung zur historischen Verfassung wird von einigen begrüßt,[27]

---

[21] Varga Norbert: *Ideiglenesség és jogfolytonosság. Történeti jogintézmények szerepe a magyar alkotmányozásban*. De iurisprudentia et iure publico. Jog- és politikatudományi folyóirat, 2011/2. 313.

[22] Eckhart, 1946. 33.

[23] Ruszoly József: *Alkotmány és hagyomány. Historikus észrevételek három alkotmányozási előmunkálatra.* Acta Jur. et Pol. Tom. 47. 1996. 129.

[24] Zsoldos, 2022. 13.

[25] So etwa: Egyed István: *A mi alkotmányunk*. Magyar Szemle Társaság, Budapest, 1943. 105.

[26] Halász Iván: *Az alaptörvény szimbolikája, szimbólumok az alaptörvényben*. In: In: Kiss György (Hrsg.): Államszervezet és államiság Magyarország alaptörvényében. Dialóg Campus, Budapest, 2017. 151.

[27] Rixer, 2011. 5.

von einigen als unzureichend betrachtet,[28] andere sehen sie als ein Mythos, was jegliche praktische Anwendbarkeit entbehrt,[29] oder behaupten, dass die Regelung diesbezüglich keine tatsächliche Rechtswirkung haben wird.[30]

Zum einen erwähnt die Präambel des Grundgesetzes von 2011, genannt „Nationales Bekenntnis", die historische Verfassung wo wie folgt Bezug genommen wird:

> „Wir ehren die Errungenschaften unserer historischen Verfassung und die Heilige Krone, die die verfassungsmäßige staatliche Kontinuität von Ungarn und die Einheit der Nation verkörpert. Wir bekennen uns dazu, dass die Verteidigung unserer auf unserer historischen Verfassung basierende Identität grundlegende Pflicht des Staates ist."[31]

Auch wenn die Normativität einer Präambel nicht bejaht wird, wird ersichtlich, dass der Verfassungsgeber der historischen Verfassung einen hohen Stellenwert bemessen hat, und sie als Grundlage der Identität bezeichnet, die durch den Staat zu schützen gilt.

Es stellt sich natürlich nicht nur die Frage, was die ungarische historische Verfassung ist, sondern auch die Frage, inwieweit sind die ungarische historische Verfassung bzw. die Errungenschaften der ungarischen Historischen Verfassung heute überhaupt noch brauchbar, und wie spiegeln sie sich in der Praxis wider. Diese Fragestellung ist jedoch nicht nur aus Hinsicht des Inhalts der historischen Verfassung von Bedeutung, sondern stellt die Verfassungsrechtler vor neuen Herausforderungen auch von den Begriffen und der Herangehensweise.[32] Das Rechtspositivismus, was die ungarische Rechtswissenschaft stark geprägt hat, kann mit einem so unbestimmten und auch teilweise unbestimmbaren Begriff und dessen Inhalt wenig anfangen, und sucht nach Lösungen, wie überhaupt der Begriff historische Verfassung zu handhaben ist, unabhängig von deren Inhalt.[33]

Abgesehen von dem eher deklarativen nationalen Bekenntnis findet sich die historische Verfassung auch im Normtext des Grundgesetzes, und zwar im Kapitel Grundlagen Artikel R. Dieser Artikel regelt den Aufbau der ungarischen Rechtsordnung – nennt das Grundgesetz als deren Basis und erklärt, dass Grundgesetz und die sonstigen Rechtsnormen für alle verpflichten seien. Absatz 3 regelt die Auslegung des Grundgesetzes:

> „Die Bestimmungen des Grundgesetzes sollen im Einklang mit deren Zielen, dem in ihr enthaltenes nationales Glaubensbekenntnis und den Errungenschaften unserer historischen Verfassung ausgelegt werden."[34]

Nicht direkt die historische Verfassung wird also als Auslegungsmaßstab und/oder Auslegungshilfe herangezogen, oder sie gar wie von einigen befürchtet wurde, wieder in Kraft gesetzt, sondern die Errungenschaften der historischen Verfassung sollen berücksichtigt werden. Ein Änderungsvorschlag zum Entwurf des Grundgesetztes die nicht nur die Errungenschaften, sondern auch die gesamte historische Verfassung für das Verfassungsgericht als Entscheidungsgrundlage (und nicht als Auslegungshilfe) vorgeschrieben

[28] Zétényi, 2015. 54–57.

[29] Szente Zoltán: *A 2011. évi alaptörvény és a történeti alkotmány összekapcsolásának mítosza*. Közjogi Szemle, 2019/1. 3–5.

[30] Jakab András: *Az új Alaptörvény keletkezése és gyakorlati következményei.* HVG-Orac, Budapest, 2011. 199.

[31] Grundgesetz Ungarns, Nationales Bekenntnis, Satz 21–22.

[32] Rixer, 2011. 5.

[33] Szente, 2019. 2.

[34] Grundgesetz Ungarns, Art. R Abs. 3.

hätte, wurde innerhalb von kürzester Zeit wieder zurückgezogen, obwohl es vom János Lázár, dem damaligen Fraktionsvorsitzenden der Regierungspartei FIDESZ stammte.[35]

Die Frage, wann diese historische Verfassung galt, wird von der Präambel beantwortet: „Wir anerkennen die Aussetzung unserer historischen Verfassung während fremden Belagerungen nicht."[36] Die – nicht anerkannte – Aussetzung beginnt demnach mit der deutschen Besatzung Ungarns am 19. März 1944, die dann im weiteren Laufe des zweiten Weltkrieges in eine sowjetische Besatzung überging. Diese Annahme wird von dem nationalen Bekenntnis bestätigt in der Passage: „Wir rechnen die Wiederherstellung der am 19. März 1944 verlorenen staatlichen Selbstbestimmung unserer Heimat ab den 2. Mai 1990, die Konstituierung der ersten frei gewählten Volksvertretung."[37]

Demnach galt die historische Verfassung Ungarns bis zur deutschen Besatzung, aber danach nicht mehr, so sind weder die 2. Republik (1946–1969) ein Teil davon – während das Gesetz Nr. 1 von 1946 ein wesentliches Vorbild für die Ausgestaltung der Rechtstellung des heutigen ungarischen Staatspräsidenten ist. Der „kommunistischen Verfassung von 1949", also dem Gesetz Nr. 20 von 1949 wird allgemein die Gültigkeit abgesprochen,[38] obwohl es mit dem Gesetz Nr. 31 von 1989 einer Totalrevision unterzogen wurde und 1990 schon von dem ersten demokratisch gewählten Parlament noch einmal stark modifiziert wurde.[39] Allerdings verweisen die Schlussabstimmungen des neuen Grundgesetztes darauf hin, dass „die Landesversammlung verabschiedet dieses Grundgesetz anhand des § 19 Absatz (3) Punkt a) und § 24 Absatz (3) des Gesetzes XX. vom Jahre 1949"[40] – diese waren die Verfahrensregel zur Verfassungsänderung der alten Verfassung. Die „alte Verfassung", das Gesetz Nr. 20. von 1949 nimmt aber in der Tat einen viel größeren Einfluss auf die heutige Regelungsinhalt des ungarischen Grundgesetzes als die herbeigeschworene historische Verfassung.[41] Die Ausgestaltung vor allem des Staatsorganisationsrechts blieb nach Inkrafttreten des Grundgesetzes nahezu unverändert – einige Bezeichnungen wurden geändert, so wurde aus dem Obersten Gerichtshof wieder Curia, angelehnt an der historischen Bezeichnung, eine nennenswerte Änderung fand aber nicht statt, wenn man von der Einschränkung der Befugnissen des Verfassungsgerichts absieht.

Gemäß der oben beschriebenen sind also die Errungenschaften der historischen Verfassung in der verfassungsmäßigen Ordnung vor dem 19. März 1944 zu suchen. Deren Inhalt ist aber wegen der bereits beschriebenen Umstände – kein einheitliches Verfassungstext, Vielzahl von Rechtsnormen, die in Betracht kommen – nicht einfach, wenn gar unmöglich, und wegen den uferlosen Deutungsmöglichkeiten sogar gefährlich, wie es viele Verfassungsrechtler behaupten.[42]

Es ist auch fraglich, welche Errungenschaften die historische Verfassung hat, die im heutigen Normtext des Grundgesetzes nicht geregelt sind, also inwieweit es praktisch

[35] Änderungsvorschlag Nr. 2627/99 vom 28.03.2011 zur Gesetzesvorlage T/2627 zurückgezogen am 08.04.2011.
[36] Grundgesetz Ungarns, Nationales Bekenntnis, Satz 23.
[37] Grundgesetz Ungarns, Nationales Bekenntnis, Satz 27.
[38] Grundgesetz Ungarns, Nationales Bekenntnis, Satz 25.
[39] Zur Kontinuität und Verfassungsrevision: Kulcsár Kálmán: *Az alkotmányosság és a kontinuitás*. Valóság, 1991/8. 1–16.
[40] Grundgesetz Ungarns, Schluss- und gemischte Bestimmungen, Punkt 2.
[41] Rixer, 2011. 6.
[42] Szente, 2019. 5.

notwendig ist, darauf zu berufen. An sich fehlte der Begriff Errungenschaft (Ungarisch „vívmány") bis zum Inkrafttreten des Grundgesetzes aus der ungarischen Rechtsdogmatik, und dass er nicht unproblematisch in der Auslegung sei, wird auch von denen anerkannt, die die Errungenschaften der historischen Verfassung als Auslegungsrahmen für das Grundgesetz grundsätzlich begrüßen.[43] Denn all die Errungenschaften, die oft erwähnt werden, wie Gewaltenteilung, die Prinzipien der Parlamentarismus oder Solidarität, Pressefreiheit, richterliche Unabhängigkeit sind Teil des geltenden Grundgesetzes.[44] Es ist auch eine in der Fachliteratur häufig vertretene Meinung, dass dieser Bezug zur Errungenschaften zur historischen Verfassung als ein Versuch der Identitätsbildung sei, die ein Hinweis auf die gemeinsame Geschichte und auf gemeinsame Werte ist und die „gemeinsame Erbe aufzeigt".[45] Dagegen ist zu erwähnen, dass das fehlende Konsens über Inhalt, Deutung und Wertung der historischen Verfassung diese identitätsstiftende Wirkung sicher nicht begünstigt, wenn gar unmöglich macht.

Hinsichtlich der Goldenen Bulle stellt sich auch die Frage, inwieweit eine Urkunde aus dem Jahre 1222, deren Erlass vor kurzem zum 800-mal jährte irgendeine Errungenschaft in sich tragen kann, was im Jahre 2023 (aber 2022 war es auch nicht groß anders) zu der Auslegung des ungarischen Grundgesetzes beitragen kann. Was sind Errungenschaften, die aus der Goldenen Bulle abzuleiten und in einem Rechtsstaat im 21. Jahrhundert anwendbar und brauchbar sind. Die von der Präambel des Gesetzes Nr. 46 von 2022 erwähnten „bestimmten Gesichtspunkten" die als „ideengeschichtlicher Vorläufer der Demokratie der modernen Zeit" sind sehr vage. Die Rechtstage in Fehérvár, an den die Servienten Gehör von dem König finden sollten, werden als eine der Vorläufer der späteren ständischen Landesversammlungen angesehen,[46] von einer demokratischen Institution waren sie trotzdem wie entfernt.

Ein weiterer Gesichtspunkt, die in Zusammenhang mit dem Fortwirken von der Goldenen Bulle sich findet, ist das Fortbestand des ius resistendi, also des Widerstandsrechts.[47] Das Recht und Pflicht jeder gegen gewaltsame Machtausübung von jedermann aufzutreten wird als moderne Folgeinstitution des Widerstandsrechts gesehen und wird im Grundgesetz Ungarns im Art. C Abs. 2 wie folgt normiert: „Die Tätigkeit von niemandem darf darauf abzielen, die Macht gewaltsam zu erobern oder auszuüben bzw. ausschließlich auf sich zu vereinigen. Alle sind berechtigt und verpflichtet gegen solche Vorhaben auf gesetzlichem Wege vorzugehen." Allerdings hat diese Regelung einen anderen Ursprung, der auch historisch ist, aber nicht auf das 13. Jahrhundert, sondern auf die Zeit der demokratischen Transition Ungarns zurückgeht. Es wurde nämlich in der alten Verfassung, in der revidierten Fassung des Gesetzes Nr. 20 von 1949 wortgleich geregelt im §2 Abs. 3. Diese Regelung des Widerstandsrechtes ist wiederum – wie die Regelung vieler Rechtsinstitutionen – stark an das deutsche Grundgesetz angelehnt, das im Art. 20 Abs. 4 allen Deutschen das Recht gibt gegen Versuche der Beseitigung der verfassungsmäßigen Ordnung der Bundesrepu-

---

[43] Horváth, 2022. 103–104.

[44] Vörös Imre: *A történeti alkotmány az Alkotmánybíróság gyakorlatában.* Közjogi Szemle, 2016/4. 45–47.

[45] Zusammenfassung darüber bei: Drinóczi Tímea: *Az alkotmányos identitásról. Mi lehet az értelme az alkotmányos identitás alkotmányjogi fogalmának?* MTA Law Working Papers, 2016/15. 23–29.

[46] Mezey Barna – Bódiné Beliznai Kinga: *Az országgyűlés.* In: Mezey Barna (Hrsg.): Magyar alkotmánytörténet. Osiris Kiadó, Budapest, 2003. 107.

[47] Szmodis Jenő: *Az Alkotmány magja és annak védelme.* Jogelméleti Szemle, 2013/2. 163.

blik Deutschland sich zu währen.[48] Die ideengeschichtliche Vorläufer dieses allgemeinen Widerstandsrechts, die in vielen Verfassungen zu finden ist, liegen nicht im Mittelalter, sondern in bestimmten Ansätzen in der Antike, gemäß unserer heutigen Verständnis in der Zeit der Reformation, vor allem bei deren calvinistischen Zweig und in der Aufklärung bei John Locke und später Immanuel Kant.[49]

Somit ist es schwierig eine Errungenschaft der historischen Verfassung in der Goldenen Bulle festzustellen, die heute noch relevant und brauchbar wäre, was angesichts der Tatsache, dass es sich dabei um ein spätmittelalterliches Dokument handelt, kaum überrascht. Die symbolische Bedeutung in der Verfassungstradition ist wegen der seit langem postulierten Zugehörigkeit zur historischen Verfassung gegeben, sie verkam im Laufe der Jahrhunderte zu einer Symbol der ungarischen Staatlichkeit und Verfassung.

4. Die deutsche Goldene Bulle und ihre Nachwirkung

Die direkte Wirkung der deutschen Goldenen Bulle war sowohl zeitgenössisch als auch in den späteren Jahrhunderten des Mittelalters und der frühen Neuzeit viel größer als die ihrer ungarischen Pendant. Auf die erheblichen Unterschiede bei der Entstehung soll in diesem Rahmen nicht eingegangen werden, aber auch schon die über 130 Jahren, die zwischen der Ausgabe beider Dokumente stehen, erklären vieles davon. Die deutsche Goldene Bulle ist als kaiserliches Gesetzbuch erlassen worden, das aber größtenteils bestehendes Gewohnheitsrecht gefestigt, und soweit dieses Begriff für das Mittelalter überhaupt anwendbar ist, kodifiziert hat. Es wurde genauso wenig als „Verfassung“ erlassen, wie die ungarische Goldene Bulle, es ordnete zwar das staatliche Gemeinwesen des Heiligen Römischen Reiches, entspricht aber ansonsten nicht den modernen Verfassungsbegriff.[50] Als wichtigstes Regelungsinhalt wird vom Nachwelt die Regelung der Wahl des deutschen Königs (und nach Bestätigung durch den Papst deutsch-römischen Kaisers) betrachtet, es hat aber auch die Stellung und Autonomie der Kurfürsten bestätigt, auch auf dem Gebiet der Gerichtsbarkeit und der Finanzen und festigte damit die territoriale Herrschaft der Kurfürsten (bei gleichzeitiger Sicherung der Unteilbarkeit der Kurländer). Somit wurde auch das Fehlen einer starken zentralen Macht im Heiligen Römischen Reich Deutscher Nation besiegelt, die Territorialisierung vorangetrieben und damit die Entwicklung der deutschen Staatlichkeit bzw. das Fehlen einer gesamtdeutschen Staatlichkeit bis zum 19. Jahrhundert maßgeblich geprägt.

Anders als die goldene Bulle in Ungarn war die deutsche Goldene Bulle mit einigen Änderungen bis zum Auflösung des Heiligen Römischen Reiches im Jahre 1806 eine der

---

[48] Isensee, Josef: *Widerstandsrecht im Grundgesetz*. In: Enzmann, Birgit (Hrsg.): Handbuch politische Gewalt. Formen, Ursachen, Legitimation, Begrenzung. Springer, Wiesbaden, 2013. 143–162.

[49] Szlávik Gábor: *Az „ellenállási jog” fogalma és megjelenése Dión Chrysostomos műveiben.* Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tom. 30/1. 2012. 191–193.

[50] Schneidmüller, Bernd: *Ordnung unter acht Männern. Die Goldene Bulle von 1356 und ihre rituellen Regeln für das Reich.* In: Brackhoff, Evelyn – Matthäus, Michael (Hrsg.): UNESCO-Weltdokumentenerbe Goldene Bulle. Symposion und Festakt anlässlich der Überreichung der UNESCO-Urkunde am 8. Dezember 2014. Societäts Verlag, Frankfurt am Main, 2015. 33–34.

wichtigsten Rechtsgrundlagen des Reiches, vor allem durch die Regelung der Königswahl[51] – auch wenn diese Wahl in den letzten Jahrhunderten eher symbolischer Natur war.[52]

Danach wurde die Goldene Bulle jedoch, anders als in Ungarn es der Fall war zu einem historischen Dokument, die anstatt in verfassungsrechtlichen Diskussionen nur in der Geschichtsschreibung und natürlich in der Verfassungsgeschichte eine Bedeutung hat. Das Konzept der historischen Verfassung ist in Deutschland unbekannt, im Zuge der Konstitutionalismus erhielten alle frühere Gliedstaaten des Heiligen Römischen Reiches nach und nach eine Verfassung, genauso wie das entstehende Deutsche Kaiserreich 1871.

Das Grundgesetz nimmt sehr wenig direkte historische Bezüge, und die sind nicht im Mittelalter, sondern in der Zeit der Weimarer Republik zu finden, aus der Weimarer Reichsverfassung wurden die Bestimmungen des Staatskirchenrechtes übernommen.

Natürlich geriet die Golden Bulle nicht in Vergessenheit, zum 650-jährigen Jubiläum 2006 wurde es in vielfältiger Weise gewürdigt, es fanden Tagungen statt, es kam zu einer Aufschwung der diesbezüglichen Publikationen.[53] Auch in der breiteren Öffentlichkeit war das Jubiläum präsent, von einer großen Ausstellung in Frankfurt am Main bis zu einer Briefmarke der Deutschen Post. 2013 wurde die Goldene Bulle vom UNESCO zum Teil der Weltdokumentenerbe erklärt, und in Deutschland hat sie auch den Status der historischen Erbe – wichtig und gewürdigt, allerdings ohne praktische Bedeutung für unsere heutige Zeit.

5. Zusammenfassung

Zusammenfassend kann festgestellt werden, dass die deutsche und die ungarische Goldene Bulle eigentlich nur ihre Bezeichnung teilen, ansonsten sind sie weder in der mittelalterlichen und frühneuzeitlichen noch in der neuzeitlichen und heutigen Wirkung vergleichbar. Die deutsche Goldene Bulle war bis zum frühen 19. Jahrhundert geltendes Recht (die letzte Königswahl fand 1792 statt) und somit ein Grundgesetz des Heiligen Römischen Reiches. Die ungarische Goldene Bulle hatte wie oben gezeigt viel weniger praktischer Relevanz zu ihrer Entstehungszeit, wurde aber vor allem wegen der Widerstandklausel zu einer Art Mythos der ungarischen ständischen Verfassung (die aber nie zur Anwendung kam) und spielte auch bei der historisch-theoretischen Begründung der Adelsprivilegien eine wichtige Rolle.

Das ungarische Konzept der historischen Verfassung trug die eigentlich spätestens 1848 obsolete gewordene ungarische Goldene Bulle mit in das moderne Verfassungsdenken, während die deutsche Goldene Bulle 1806 zum historischen Dokument „verkam" und diese Status hat sich auch seither nicht mehr geändert.

Dadurch erlangte die deutsche Goldene Bulle nie das symbolische Wert im Verfassungsdenken und Verfassungsidentität wie die ungarische Goldene Bulle in Ungarn. Sie hat weiterhin eine große symbolische Bedeutung, verstärkt durch die Herangehensweise

---

[51] Forgó András: *A „régi birodalom" utolsó évszázadai. A Német-római Császárság a vesztfáliai békétől a napóleoni háborúkig*. In: Dévényi Anna – Forgó András – Gőzsy Zoltán (Hrsg.): Az abszolutizmus kora. Fejezetek a kora újkori Európa történetéből. Kronosz, Pécs, 2019. 83.

[52] Forgó, 2019. 85.

[53] Als beispiel genannt sei das Tagungsband: Hohensee, Ulrike et al. (Hrsg.): *Die Goldene Bulle. Politik, Wahrnehmung, Rezeption. Vol. 1–2.* Akademie-Verlag, Berlin, 2009.

im neuen ungarischen Grundgesetz aus dem Jahre 2011, das die Errungenschaften der historische Verfassung als Auslegungsrahmen für das Grundgesetz bestimmt. Wie oben gezeigt wurde, ist diese Bedeutung wirklich nur symbolisch, es sind wenig Errungenschaften in einem Urkunde aus dem Jahre 1222 zu finden, die 800 Jahre später in einem modernen Rechtsstaat zu gebrauchen wären. Die Symbolwirkung ist aber zweifelsohne da, und wird durch die Gedächtnispolitik gepflegt und sogar gestärkt.

Gönczi Katalin
Bis 2020 Wissenschaftliche Mitarbeiterin, Sächsische Akademie der Wissenschaften zu Leipzig

DIE MAGNA CARTA UND DIE VERFASSUNGSRECHTLICHE RECHTSPRECHUNG IN DEN USA

Sucht man nach Zusammenhängen innerhalb der europäischen bzw. allgemeinen Verfassungs- und Rechtsgeschichte, so stellen die Goldene Bulle von König Andreas II. und die Magna Carta Libertatum wichtige Forschungsgegenstände dar.[1] Im Hinblick auf die Magna Carta stellt sich auch die Frage, ob dieses Verfassungsdokument aus dem Jahre 1215 eine Auswirkung auf die neuzeitliche Rechtsgeschichte hatte. An erster Stelle kommen Rechtssysteme des common law als Empfängerkulturen in Betracht; so werden in der folgenden Studie die Verbindungen zwischen der Magna Carta Libertatum und der US-amerikanischen Rechtsgeschichte untersucht.

1. 1215 – Magna Carta und der Terminus "due process of law"

Der Schutz der freien Männer im Artikel 39 wird als eine der bedeutendsten Bestimmungen der Magna Carta Libertatum betrachtet. Auch die intensive Rezeption der Magna Carta ist auf diesen Artikel zurückführbar,[2] denn hier wurde die Reichweite der persönlichen Freiheiten vergrößert. Denn zum Kreis der vor königlicher Willkür Geschützten gehörten nun alle freien männlichen Mitglieder der Gesellschaft. Artikel 39 gewährte den freien Männern Schutz vor Verhaftung, Ächtung oder Verbannung, die nur bei einem rechtmäßigen Urteil ihrer Standesgenossen (*per legale judicium parium suorum*) oder aufgrund der Landesgesetze (*per legem terre*) möglich war.[3]

Auf den Artikel 39 der Magna Carta wird eine zentrale Institution des US-amerikanischen Rechtssystems, die so genannte due process-Klausel, zurückgeführt. Der Terminus

[1] Der Beitrag ist eine Erweiterung von Überlegungen, die die Verf.in im Anschluss an ihre Studien bei Prof. Charles J. McClain (University of California at Berkeley) publiziert hatte: *Angol alkotmány- és jogtörténet* [Englische Verfassungs- und Rechtsgeschichte] und *Amerikai alkotmány- és jogtörténet* [US-amerikanische Verfassungs- und Rechtsgeschichte], In: Bónis Péter – Gönczi Katalin – Stipta István: Egyetemes állam- és jogtörténet. Patrocínium, Budapest, 2017. 2. Aufl., 2019. 185–210. und 289–346.

[2] Eickels, Klaus van – Esch, Claudia: *Magna Carta Libertatum*. In: Cordes, Albrecht (Hrsg.): Handwörterbuch zur deutschen Rechtsgeschicht. Bd. 3. 2. Aufl. Schmidt, Berlin, 2016. 1144–1149.

[3] „Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae." Magna Carta Libertatum, Art. 39. hier zitiert nach Carpenter, David (Übersetzer): *Magna Carta.* Penguin Classics, London, 2015.

due process ist erstmals in der Erneuerung der Magna Carta durch König Edward III. im Jahre 1354 nachweisbar.[4] Der Artikel 39 der Magna Carta wurde so ergänzt, dass der Terminus „free man" eine noch umfassendere Bedeutung erhielt. Wie in der Urkunde festgehalten wurde, waren Männer unabhängig von ihrer Standeszugehörigkeit und den Lebensverhältnissen Subjekte des Schutzes von Leben, Freiheit und Eigentum gegen die Willkür der Regierenden.[5] Der Artikel 39 der Magna Carta wurde außerdem so erweitert, dass statt dem Ausdruck „legem terrae" der Terminus „due process of law" eingeführt wurde. Die Ursprünge der due process-Klausel, als Garantie des Lebens, der körperlichen Unversehrtheit und des Eigentums gegen Willkür, findet man daher in den englischen königlichen Urkunden und in der Gesetzgebung.

Die due process-Klausel wurde auch in das englische *common law* inkorporiert.[6] Sie fand ab dem späten 16. Jahrhundert Eingang auch in die englische juristische Literatur, so in die Werke von Edward Coke und William Blackstone. Coke hielt z.B. gegenüber den königlichen Handlungen die Dominanz des common law aufgrund der Magna Carta fest. Bei der Auslegung des Ausdrucks „nisi per legem terre" verwendete Coke den Ausdruck „due process of the law" bzw. „due process of the common law".[7] Die englischen Kommentare von Coke und Blackstone vermittelten diese Klausel auch in die neue Welt. So fasste der due process Fuß in den kolonialen Rechtsauffassungen des 17. Jahrhunderts, zusammen mit den protestantisch-puritanischen Vorstellungen des Rechts.

2. Koloniale Zeit der US-amerikanischen Geschichte

Die frühe Rechtsgeschichte der USA prägten im Wesentlichen zwei Kolonien: Plymouth und Massachusetts. So entstand in der amerikanischen Geschichte erstmals 1636 in Plymouth ein Katalog der Freiheitsrechte, das so genannte Plymouth-Gesetz. Aus diesem Grund sah der Historiker George Haskins den Tonfall des Plymouth Gesetzes als ein „Echo" der Magna Carta.[8] Die Erklärungen des Plymouth-Gesetzes zum Schutz des Lebens, der Freiheiten und des Eigentums wurden später in die Verfassungen von mehreren Einzelstaaten übernommen.

Als das Massachusetts-Gesetz (1692) entstand, wurde eine wesentliche Formulierung aus der erwähnten Auslegung der Magna Carta im Jahre 1354 aufgenommen: das Gesetz vom Jahre 1692 bezog sich auf das Jury-Verfahren und verankerte die Garantie des Lebens, der körperlichen Unversehrtheit und des Eigentums.[9] Eine Einschränkung dieser Garantien war

---

[4] Sullivan, Thomas E. – Massaro, Toni M.: *The Arc of Due Process in American Constitutional Law*. Oxford University Press, Oxford, 2013. 8.

[5] Baker, John: *The Reinvention of Magna Carta 1216–1616.* Cambridge University Press, Cambridge, 2017. 33., 41.

[6] Baker, 2017. 43.

[7] Coke, Edward: *The second part of the Institutes of the lawes of England. Containing the Exposition of many ancient, and other statutes ...* M. Flesher & R. Young, London, 1642. 50.

[8] Haskins, George L.: *The Legal Heritage of Plymouth Colony.* In: Friedman, Lawrence M. – Scheiber, Harry N. (Hrsg.): American law and the constitutional order. Historical perspectives. Harvard University Press, Cambridge, 1978. 38–45., hier 44.

[9] "That no freeman shall be taken and imprisoned or be disseized of his freehold or libertys or his free customes, or be outlawed or exiled, or in any manner destroyed, nor shall be passed upon, adjudged or condemned, but

nur durch ein rechtsförmiges Urteil der Standesgenossen oder durch ein Landesgesetz erlaubt. Die Formulierung wurde an die koloniale Zeit angepasst: statt „law and the land" stand in der Norm „law of the province". Nur wenn es das Landesgesetz, also die *lex terrae,* erlaubte, durften Leben, Freiheit und Eigentum der freien Männer eingeschränkt werden. Zudem wurde die Formel "due process of law" bereits in das Massachusetts Gesetz aufgenommen.[10] Die prozessuale Garantie sollte also für die Sicherheit der Männer ohne Berücksichtigung der Standeszugehörigkeit oder der Lebensverhältnisse sorgen. Die Klausel aus der Magna Carta richtete sich gegen die Autorität des Monarchen und zielte auf die Einschränkung der Willkür. Die Gesetzgeber von Massachusetts haben hingegen mit der Aufnahme der Klausel das *fair* Verfahren, also den "due process of law" hervorgehoben. Auf diese Weise verankerte sich die prozessuale due process-Klausel in der Gesetzgebung der Kolonien. Folglich findet man hier die historischen Wurzeln der due process-Klausel in den Vereinigten Staaten.

3. Die Zusatzartikel zur Verfassung der Vereinigten Staaten

Mit der Verfassung wurde 1787 die zentrale Staatsgewalt in den Vereinigten Staaten rechtlich definiert. Um die Ansichten der Befürworter und Gegner des föderalen Staates anzunähern, wurde die Verfassung um zehn Zusatzartikel ergänzt. Diese Artikel wurden im Jahre 1791 als Bill of Rights ratifiziert; sie sollten die Freiheiten der Individuen und der Bundesstaaten vor der Willkür der Bundesgewalt garantieren.[11] Der Fünfte Zusatzartikel regelte unter anderem den Schutz des Lebens, der Freiheit und des Eigentums; zudem wandte sich der Artikel gegen das Verhängen von Strafen ohne ordentlichen Gerichtsprozess. Diese Verfassungsergänzung richtete sich wiederum gegen Eingriffe der *federal power* in Leben, Freiheit und Eigentum der Individuen. Einschränkungen waren nur bei Einhaltung eines fairen Verfahrens möglich. Der Fünfte Zusatzartikel verschaffte daher eine prozessrechtliche Garantie.[12]

Die erste Auseinandersetzung mit der due process-Klausel und dem 5. Zusatzartikel in der Rechtsprechung des US-Supreme Court führt der Historiker Kermit Hall auf das Jahr 1856 zurück. Damals argumentierte der Supreme Court Richter Benjamin R. Curtis in seinem Votum, dass die due process-Klausel des Fünften Zusatzartikels inhaltlich mit der "law of the land"-Formel übereinstimmt, die zum ersten Mal von dem Artikel 39 der Magna Carta festgelegt worden war.[13]

---

by the lawful judgment of his peers or the law of this province." Massachusetts-Gesetz von 1692. Chapter 11. Art. 1. Ames, Elis (Hrsg.): *The acts and resolves, public and private, of the province of the Massachusetts Bay. Bd. 1. 1692–1714.* Wright & Potter, Boston, 1869. 40.

[10] "No man, of what state or condition soever, shall be put out of his lands or tenements, nor be taken nor imprisoned nor disherited nor banished nor any ways destroyed, without being brought to answer by due process of law." Massachusetts-Gesetz vom 1692, Chapter 11, Art. 5. Ames, 1869. 40.

[11] Zur Geschichte der Verfassung der USA und der Bill of Rights umfassend Hall, Kermit L. (Hrsg.): *The Oxford companion to American law*. Oxford University Press, Oxford, 2004.

[12] "No person […] shall be deprived of life, liberty, or property, without due process of law […]" Bill of Rights, 1791, 5. Zusatzartikel.

[13] Hall, Kermit: *The Oxford guide to United States Supreme Court decisions*. 2. ed. Oxford University Press, Oxford, 2009. Als Grundlage diente ein Urteil im Fall Murray's Lessee v. Hoboken Land & Improvement Co. (1856).

Für die Interpretation der due process-Klausel ist die Zeit nach dem US-amerikanischen Bürgerkriegs (1861–65) von zentraler Bedeutung, als die Verfassung um drei Zusatzartikel ergänzt wurde.[14] Die durch den 14. Zusatzartikel (1868) etablierte Garantie band nun nicht mehr nur die Organe auf der *federal* Ebene, sondern sie war auch bindend auf der Ebene der *states*.[15] Mit dem 14. Zusatzartikel begann zudem die Ausweitung des due process in der Rechtsprechung, insbesondere die Erweiterung des Maxime des „fairen Verfahrens" auf das materielle Recht.

Gemäß dem 14. Zusatzartikel sind die Garantien des Lebens, der Freiheiten und des Eigentums nicht nur verfahrensrechtlich auszulegen, sondern der Rechtsschutz wurde nun auch als Vorgabe für die Gesetzgebung formuliert. Die Gesetze durften daher das Recht zum Leben, die Freiheiten und das Eigentum nicht „without due process of law" einschränken. Diese Erwartungen gegenüber der Gesetzgebung begründeten den so genannten materiellrechtlichen, also den „substantive due process". Dadurch erhielt auch der Normenkontrollmechanismus in den Vereinigten Staaten eine neue Struktur, denn dieser Zusatzartikel wurde zum „Motor der Normenkontrolle durch die Judikative": In den Folgejahren verzehnfachte sich die Zahl der Fälle vor dem Supreme Court, in denen es um due process-Angelegenheiten ging.

In der Rechtsprechung der US Supreme Court wurde anfangs die substantive due process Klausel nur für den Schutz von Minderheiten angewandt. Der Umfang der Garantien wurde stufenweise um den Schutz der wirtschaftlichen Rechte und die Rechte der Unternehmen vergrößert. Stephen J. Field, Richter am Supreme Court, hat den due process auch für den Schutz der wirtschaftlichen Minderheiten angewandt. In einem Sondervotum [zu den so genannten Slaughterhouse-Fällen] formulierte Field, dass alle Privilegien eine Einschränkung der Grundrechte bedeuten.

Der Anwendungsbereich des ursprünglich prozeduralen due process erhielt im Laufe des 20. Jahrhunderts eine weitere Vergrößerung. Im Jahre 1905 erfolgte die Entscheidung im Fall Lochner v. New York – nun wurde die due process-Klausel vom Supreme Court auch auf die Wirtschaftspolitik angewandt, und daher bezeichnete man die Zeit des Laissez-Faire-Konstitutionalismus und – Wirtschaftslenkung auch als Lochner-Ära.[16] Der Supreme Court erklärte in diesem Fall ein Gesetz des Staates New York verfassungswidrig, in dem die Arbeitszeit der Bäcker auf täglich maximal zehn Stunden festgesetzt wurde. Gemäß der Entscheidung beschränke das Gesetz der Vertragsfreiheit insbesondere derjenigen, die täglich länger als zehn Stunden arbeiten wollten. So wurde die verfassungsrechtliche Garantie des 14. Zusatzartikels umgedeutet: der Schutz der Freiheit von Personen wurde zum „Eckstein" des Wirtschaftsliberalismus. Diese Form der justiziellen Normkontrolle von wirtschaftspolitischen Entscheidungen dauerte von 1880 bis zum New Deal-Ära. In der Zeit des substantive due process zwischen 1880 und 1937 wurde daher eine große Zahl von progressiven, wirtschafts*regulierenden* Gesetzen außer Kraft gesetzt.

---

[14] Brugger, Winfried: *Demokratie, Freiheit, Gleichheit. Studien zum Verfassungsrecht der USA.* Duncker und Humblot, Berlin, 2002. 41.

[15] „No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law." 14. Zusatzartikel, 1868, Art. 1.

[16] Hall, 2009.

Das Jahr 1937, als Präsident Roosevelt neue liberale Richter am Supreme Court ernannt hatte, brachte fundamentale Änderungen in der bisherigen due process-Praxis. Von jetzt an bestätigten die Urteile des Supreme Courts die Wirtschaftslenkung des New Deal, so z.B. im Hinblick auf Regelungen zur Krankenversicherung und zum Mindestlohn. Damit war der Schwerpunkt von due process-Verfahren nun wieder die Garantie von Rechten im Strafprozess; zudem wurden diese Regelungen wichtig im Hinblick auf den Umgang mit den Rechten segregierter Minderheiten.

4. Fazit

Die US-amerikanische Verfassung enthält zwei due process-Klauseln, deren Ursprünge auf die in der Magna Carta festgelegten Freiheitsrechte zurückgehen. Die große Zahl der *due-process*-Fälle in Zusammenhang mit Gefängnissen, Schulen, Krankenversicherungen, öffentlich-rechtlichen Dienstverhältnissen und weiteren Rechtsbereichen zeigt, dass diese Klausel seit mehreren Jahrhunderten eine kontinuierliche und zentrale Bedeutung hat. Die von der Rechtsdogmatik viel diskutierte Institution des due process, die im Artikel 39 der Magna Carta wurzelt, prägt bis heute das US-amerikanische Verfassungsrecht.

Herger Cs. Eszter
Universitätsprofessorin, Universität Pécs

DIE AUSLEGUNG UND PRAXIS DES IUS RESISTENDI IM KÖNIGREICH JERUSALEM (1099–1187)[1]

„Denn die Herrscher sind kein Schrecken
für das gute Werk, sondern für das Böse"
Römer 13:3a

1. Interpretationsrahmen

Die zitierten Worte des Apostels *Paulus* über die Haltung des Einzelnen gegenüber der Staatsgewalt warnen davor, dass das wahre Wesen der Ausübung der Staatsgewalt darin zu sehen ist, ob sie das „*Böse*" bestraft und das „*Gute*" belohnt. Der Gehorsam gegenüber einer solchen Autorität wird von *Paulus* als eine Verpflichtung des Einzelnen beschrieben (Römer 13:1–7), die in den vom Christentum beeinflussten Rechtskulturen in den letzten etwa zweitausend Jahren regelmäßig angeführt wurde, um die Unanfechtbarkeit der Autorität zu demonstrieren, wobei die Bedingung im ersten Halbsatz von Vers 3 ignoriert wurde. Ohne die moralphilosophische und verfassungsrechtliche (wertbezogene) Auslegung des Begriffs vom „*Guten*" und „*Bösen*" (Recht und Unrecht) im Rahmen der Rechtsstaatlichkeit zu erörtern, kann als Ausgangspunkt für diese Untersuchung akzeptiert werden, dass es Machtformen gibt, denen gegenüber Gehorsam im absoluten Sinne und in seinen verschiedenen Graden nicht erwartet werden kann.

Die historische und theoretische Rechtfertigung des Rechts auf Widerstand (*ius resistendi, right of resistance, droit de résistance*) gegen ungerechtfertigte Machtausübung – als höchste Form des politischen Ungehorsams – hat seine Bedeutung bis heute nicht verloren. Wie der französische Diplomat und politische Philosoph *Alexis de Tocqueville* (1805–1859) im Teil I seines Werkes *De la démocratie an Amérique* (1835)[2] scharfsinnig feststellte, birgt auch der auf der Grundlage von Lehren über den idealen Staat errichtete Verfassungsstaat die Gefahr, dass der Machtausübende das Wesen der öffentlichen Gewalt verfälscht, indem er verfassungsmäßige Mittel für verfassungswidrige Zwecke einsetzt, und das gilt nicht nur für die US-Verfassung, wie es unter anderen die europäische Verfassungsentwicklung der Zwischenkriegszeit nachgewiesen hat. Das in der Verfassung verankerte Recht auf Un-

[1] Die Studie ist die redigierte und erweiterte Version des Beitrages der Autorin, der an der Konferenz „The Hungarian Golden Bull and Its European Parallels" (Szeged, 1–2. Dezember 2022) vorgetragen wurde.

[2] Tocqueville, Alexis de: *Democracy in America I.* 2. ed. Sever and Francis, Cambridge, 1863. 553–559. https://archive.org/details/democracyinamer04tocqgoog/page/n4/mode/2up?view=theater (22.10.2023). Siehe dazu: Tangian, Andranik: *Analytical Theory of Democracy*. Springer, Cham, 2020. siehe besonders Capture VII: Dictatorship and Democracy, 317–351.

gehorsam kann daher immer als eine Garantie betrachtet werden, die nicht mit der Pflicht zum Ungehorsam gegenüber einem naturrechtswidrigen Befehl gleichzusetzen ist, die eine Gewissenspflicht darstellt. Die letztgenannte Pflicht hat jedoch die naturrechtliche Rechtfertigung für das erstgenannte Recht geliefert, und ihre ideologische Entwicklung in der europäischen (jüdisch-christlichen) Rechtskultur war zweifelsohne miteinander verbunden.[3]

Die moderne politische Philosophie und Rechtstheorie führt jedoch die historische Entwicklung des *ius resistendi* in der Regel nur auf antike Denker zurück. *Merio Scattola* unterscheidet zwischen einem impliziten Widerstandsrecht und einem expliziten. Ersteres gab es schon in der Antike; Ausgangspunkt für es – meint er – „*war die Vorstellung, dass das politische Gemeinwesen und die Regierung den Bürgern (volle) Freiheit und politische Teilhabe gewähren müssen, um ihnen ein gutes und glückliches Leben zu ermöglichen (Aristoteles, Politik 3.9)*". Einschränkungen von Freiheit und Teilhabe gefährdeten daher die menschliche Entfaltung. Die Weigerung, eine solche Entartung zu akzeptieren, wurde als das Recht eines jeden Einzelnen angesehen, konnte aber auch an eine bestimmte Gruppe delegiert werden und verschiedene Formen annehmen. Das Widerstandsrecht konnte institutionalisiert sein, wie im Fall der Ephoren in Sparta gegenüber den Königen (*Xenophon, De re publica Lacedaemoniorum* 8.4; 15.7.), oder einzelnen Bürgern anvertraut werden, deren Handlungen rückwirkend gerechtfertigt wurden, wie in Athen 514 und 404 v. Chr. *Scatolla* erwähnt auch mögliche Mischformen, wie den Vorwurf der Tyrannei (*Aristoteles, De re publica Atheniensium,* 8.4?f.; 16.10), die Ächtung und den möglichen Vorwurf der Verkündung unrechtmäßiger Gesetze, bzw. weist aufgrund *Ciceros* Werk (*De officiis,* 44. v. Chr.) auch auf die ähnlichen Erscheinungen in Rom hin, wo *Cicero* den Standpunkt vertrat, dass ein Tyrann mit allen Mitteln beseitigt werden müsse.[4]

Es ist eine unbestreitbare Tatsache, dass der biblische Grundsatz („*Man muss Gott mehr gehorchen denn den Menschen*" [5]), der das Prinzip des Vorrangs des göttlichen Gesetzes widerspiegelt, ein grundlegender Bestandteil der biblischen Lehre zur Staats- und Sozialpolitik ist. Die Themen und Beispiele des Handelns gegen unrechtmäßige, tyrannische Machtausübung ziehen sich durch das Alte und das Neue Testament, finden sich in den Werken vieler christlicher Autoren wieder, und haben zu einer Vielzahl politischer Ereignisse geführt, die bis heute nachwirken. Es ist auch unbestreitbar, dass die Thora und die sich daraus entwickelnde Praxis im antiken Königreich Israel um Jahrhunderte den Ideen von *Aristoteles* oder *Cicero* vorausgingen. Die Bedeutung des, bereits in der biblischen Zeiten als explizites Recht funktionierendes *‚ius resistendi*' – wird in der modernen und postmodernen Wissenschaft in der Regel ignoriert, während das protestantische Naturrecht im 16. und 17. Jahrhundert auf den Grundsätzen und *‚case law*' des Alten und Neuen Testaments und auf den mittelalterlichen Naturrechtslehren beruhte.[6] Ohne Rücksicht auf den

---

[3] Dies Studie wurde im Rahmen des OTKA-Forschungsprojekts K138899 gefertigt.

[4] Scattola, Merio: *Ius resistendi (the right of resistance)*. Encyclopedia of Early Modern History Online. https://referenceworks.brillonline.com/entries/encyclopedia-of-early-modern-history-online/ius-resistendi-the-right-of-resistance-COM_030344 (24.10.2023).

[5] Apostelgeschichte 5:27–29. „*Und als sie sie brachten, stellten sie sie vor den Rat. Und der Hohepriester fragte sie und sprach: Haben wir euch nicht mit Ernst geboten, daß ihr nicht solltet lehren in diesem Namen? Und sehet, ihr habt Jerusalem erfüllt mit eurer Lehre und wollt dieses Menschen Blut über uns führen. Petrus aber antwortete und die Apostel und sprachen: Man muß Gott mehr gehorchen denn den Menschen.*"

[6] Mészáros István László: *A joguralom elvét megalapozó elemek a Vetus Testamentumban és a Novum Testamentumban* [Elemente, die das Prinzip der Rechtsstaatlichkeit im Vetus Testamentum und Novum Testamentum

expliziten Charakterzug des biblischen Widerstandes und mit sehr begrenzter Rücksicht auf die mittelalterlichen Naturrechtlehren über den gerechten Wiederstand innerhalb der Kanonistik stellte *Scatolla* fest, dass das mittelalterliche Widerstandsrecht auf drei unterschiedlichen Quellen (den Grundsatz der Lehnstreue und der Gefolgschaft, das Lehnsrecht und die verbrieften Privilegien der Reichsstände und das im römischen Recht anerkannten Begriff der Selbstverteidigung) zurückging, und wandte seine Aufmerksamkeit der Typen des modernen (objektiven und subjektiven) Widerstandsrechts[7] zu.

An der Wende vom 19. zum 20. Jahrhundert, und dann während des allmählichen Abbaus der Rechtsstaatlichkeit in der Zwischenkriegszeit, wandten sich viele Vertreter der ungarischen Geschichtsschreibung (u. a. *Sámuel Szánthó, Bódog Schiller, Elemér Hantos, Henrik Marczali, Gyula Pauler, Bálint Hóman*)[8] mit großem Interesse der Geschichte und Interpretation der ungarischen Goldenen Bulle von 1222 und der Bedeutung des *ius resistendi* in der ungarischen Verfassungsentwicklung und politischer Philosophie zu. Nach dem mittelalterlichen Wurzeln des Widerstandsrechts suchend verglich *Adorján Divéky* 1931 die ungarische Goldene Bulle mit der Verfassung des Königreichs Jerusalem[9] und beschäftigte sich elf Jahre später mit den Auswirkungen der ungarischen Goldenen Bulle auf das polnische Recht.[10] Der Historiker *Divéky,* der auch Direktor des Ungarischen Instituts in Warschau war, wählte als Arbeitsmethode für seine Forschungen die historische Rechtsvergleichung,[11] führte aber keine Quellenanalyse durch, sondern synthetisierte die Ergebnisse der damaligen französischen und deutschen Forschung, wo die theoretische Begründung nicht hervorgehoben wurde. In den letzten hundert Jahren, seit *Divékys* Zusammenfassung, blieb das Thema der Machausübung im Königreich Jerusalem außerhalb der Aufmerksamkeit der ungarischen Rechtsgeschichtswissenschaft. Daher wird – Anlässlich der Zweihundertjahrfeier der ungarischen Goldenen Bulle 2022 – die Ausdeutung und die Praxis des *ius resistendi* im Kreuzfahrerstaat Jerusalem in diesem Beitrag im Vergleich zur

begründen]. Díké, 2022/1. 182–200.; Mészáros István László: *Az ellenállási jog értelmezése és gyakorlata a Vetus Testamentumban és a Novum Testamentumban* [Die Auslegung und Praxis des Widerstandsrechts im Vetus Testament und im Novum Testament]. Díké, 2023/2. 118–143.

[7] Scattola.

[8] Siehe unter anderen: Szánthó Sámuel: *Az Arany Bulla keletkezése összehasonlítva az angol Magna Chartával* [Die Entstehung der Goldenen bulle im Vergleich mit der Magna Charta]. Stein Nyomda, Kolozsvár, 1881.; Schiller Bódog: *Az Arany Bulla* [Die Goldene Bulle]. In: Szász József (Hrsg.): Politikai Magyarország I. Magyarország története az arany bullától 1795-ig. [Ungarns Politik I. Geschichte von Ungarn von der Goldenen Bulle bis 1795]. Magyar Könyvnyomda, Budapest, 1912. 62–63.; Hantos, Elemér: *The Magna Carta of the english and of the hungarian constitution*. Kegan Paul, London, 1904.; Pauler Gyula: *A magyar nemzet története az árpádházi királyok alatt. 2. köt.* [Die Geschichte der ungarischen Nation unter der Herrschaft der Könige des Arpadenhauses. Bd. II.]. Akadémia, Budapest, 1899. 501.; Marczali Henrik: *Magyarország története az Árpádok korában* [Die Geschichte Ungarns in der Arpadenzeit]. Athenaeum, Budapest, 1896. 407.; Hóman Bálint – Szekfű Gyula: *Magyar Történet 2. köt.* [Ungarische Geschichte. Bd. II.]. Egyetemi Nyomda, Budapest, 1929. 85.; Erdélyi László: *Az Aranybulla társadalma* [Die Gesellschaft zur Zeit der Goldenen Bulle]. Franklin Nyomda, Budapest, 1918. 89–90.

[9] Divéky Adorján: *Az Arany bulla és a jeruzsálemi királyság alkotmánya. Értekezések a történeti tudományok köréből* [Die Goldene Bulle und die Verfassung des Königreichs Jerusalem. Beiträge zu Geschichtswissenschaften]. Akadémia, Budapest, 1932.

[10] Divéky Adorján: *Az arany bulla hatása a lengyel jogra. Értekezések a történeti tudományok köréből* [Die Auswirkung der Goldenen Bulle auf das polnische Recht. Beiträge zu Geschichtswissenschaften]. MTA, Budapest, 1942.

[11] Divéky, 1932. 21.

Divékys Studie in neue Interpretationsrahme gelegt, auf der Grundlage zeitgenössischer und aktueller Forschung. Bei der Ausdeutung der Parallelen zwischen den jüdisch-christlichen und römischen Wurzeln unserer Rechtskultur, neben den biblischen Grundsätzen und der Rechtsprechung oder den antiken Denkern, die nach der idealen Staatsordnung suchten, darf nicht übersehen werden, dass kurz nach der Zeit, als sich die Praxis des *ius resistendi* im Königreich Jerusalem entwickelt hatte, auch die theoretische Begründung dafür im mittelalterlichen christlichen Naturrecht entstanden war.

2. Herrschaftsstruktur und dessen Folgen

2.1. Herrschaftsgebiet und Vasallen

Die historische Entfaltung des *ius resistendi* werden in den durch die Kreuzzüge gegründeten Ländern vermutet, denn das in Westeuropa vorherrschende Feudalsystem mit seiner hierarchischen Organisation, die keine Gleichheit duldet, war nicht geeignet, eine Rechtsauffassung zu entwickeln, die ein Widerstandsrecht hervorbringen würde.[12] Die Geschichte des *Regnum Hierosolymitanum* lässt sich in zwei Teile gliedern. Die erste Periode[13] dauerte von 1099 bis 1187, bis zur Eroberung fast des gesamten Landes durch *Saladin* (*Salah ad-Din Yusuf ibn Ayyub ad-Dawīnī*), kurdischstämmigen Sultan von Ägypten (ab 1171) und Syrien (1174).[14] Dieser Überblick konzentriert sich auf diesen Zeitraum. In der zweiten Periode war Akkon, das während dem Dritten Kreuzzug nach 683 Tagen Kampf im Juli 1191 zurückerobert wurde, bis 1291 das neue Zentrum des Königreichs.

Das Königreich Jerusalem wurde nach der Eroberung Jerusalems durch die Kreuzfahrer am 23. Juli 1099 gegründet. Kurz danach erweiterte sein erster König, *Balduin I.* das Königreich der *franci,* wie die Fremdbezeichnung der europäischen Kreuzfahrer lautete, um die Hafenstädte Akkon, Sidon und Beirut und erlangte auch die Oberhoheit über die anderen Kreuzfahrerstaaten im Norden. Das Fürstentum Antiochia, die Grafschaft Edessa und die Grafschaft Tripolis wurden als Vasallenstaaten dem König von Jerusalem untergeordnet. In kultureller und religiöser Hinsicht war der Raum der Kreuzfahrerherrschaften durch zahlreiche unterschiedliche Gruppen bestimmt. Nicht nur die *franci* waren in unterschiedlichen Interessensgruppen zergliedert, sondern auch die dort ansässige Bevölkerung war heterogen zusammengesetzt. Amtssprache waren Latein und Französisch, Mehrheits-

---

[12] Laferrière, Firmin: *Histoire du droit francais.* Joubert Libraire-Éditeur, Paris, 1838. 510. https://gallica.bnf.fr/ark:/12148/bpt6k23528v.pdf (01.12.2022).

[13] Über die Entstehung des Königreichs Jerusalem im Allgemeinen siehe unter anderen: Röhricht, Reinhold: *Geschichte des Königreichs Jerusalem (1100–1291)*. Wagner, Innsbruck, 1898.; Spalding, Karl August Wilhelm: *Geschichte des Kristlichen Königreichs Jerusalem. Teil 1.* Milius, Berlin, 1803.; Wilken, Friedrich: *Geschichte der Kreuzzüge nach morgenländischen und abendländischen Berichten. Teil 1. Gründung des Königreichs Jerusalem.* Crusius, Leipzig, 1807.; Prawer, Joshua (Yehoshu'a Praver): *The Latin kingdom of Jerusalem. European Colonialism in the Middle Ages.* Weidenfild and Nicolson, London, 1972.; Mayer, Hans Eberhard: *The Latin east, 1098–1205*. The new Cambridge medieval history, 2004/2. 644–674. Weitere Literatur: Mayer, Hans Eberhard: *Bibliographie zur Geschichte der Kreuzzüge*. Hahn, Hannover, 1960.

[14] Möhring, Hannes: *Saladin. Der Sultan und seine Zeit 1138–1193.* 2. Aufl. Beck, München, 2012. 48 und 61 ff; Röhricht, Reinhold: *Der Untergang des Königreichs Jerusalem*. Mitteilungen des Instituts für Österreichische Geschichtsforschung, 1894/15. 1–58., https://www.vr-elibrary.de/doi/10.7767/miog.1894.15.1.1 (23.10.2023).

sprache waren aber neben dem Griechischen syrische Dialekte des Arabischen.[15] Während der Regierungszeit von *Balduin I.* wuchs die Zahl der lateinischen Einwohner des Landes kontinuierlich an und ein Lateinischer Patriarch von Jerusalem[16] wurde berufen.

2.2. Die Institutionen der Ausübung der monarchischen Souveränität

Das Machtgefüge des Königreichs Jerusalem basierte auf der Triade aus König, königlichen Ämtern und königlichem Rat.

Gottfried von Bullion lehnte eine Krönung ab, erklärte sich am 22. Juli 1099 jedoch bereit, dennoch die Herrschaft zu übernehmen. Als Herr über den neuerrichteten Kreuzfahrerstaat wurde *Gottfried* meist *princeps* (Fürst), selten jedoch auch *advocatus sancti sepulchri* (Beschützer bzw. Vogt des Heiligen Grabes) genannt. Nach *Gottfrieds* Tod im Juli 1100 übernahm sein Bruder *Balduin* die Herrschaft und wurde in Bethlehem zum König gekrönt. Seine Macht wurde durch die Idee des „christlichen Königtums" legitimiert, die sich während der Herrschaft der Merowinger-Franken entwickelt hatte.

La Monte beschrieb[17] die sechs wesentlichen Ämter des Königreichs Jerusalem 1932 folgenderweise: Der Konstabler (1) kommandierte die Armee, bezahlte Söldner und richtete in Rechtsfällen, die das Militär betrafen. Er war der wichtigste Beamte eines Reichs, das sich fast ständig im Kriegszustand befand. Der Marschall (2) war dem Konstabler untergeordnet und offensichtlich auch dessen Vasall. Er führte die Söldner und kümmerte sich um die Pferde der Armee (den Marstall) und verteilte die Beute aus einer siegreichen Schlacht. Der Seneschall (3) war in Jerusalem weniger wichtig als in Europa; er richtete die Krönungszeremonie aus und überwachte den königlichen Rat (*Haute Cour*) in Abwesenheit des Königs, beaufsichtigte die königlichen Burgen, organisierte die königlichen Finanzen und nicht zuletzt sammelte auch die königlichen Steuern ein. Der Kämmerer (4) war mit dem königlichen Haushalt und dessen Dienern befasst, hatte darüber hinaus weitere ehrenvolle Pflichten, wie die Abnahme von Gelübden. Er hatte sein eigenes Lehnsgut, aus dem er sein Gehalt bezog. Die Pflichten des Mundschenks (5) sind nicht bekannt, es scheint sogar so zu sein, dass das Amt den Wegzug aus Jerusalem nach Akkon nicht überstanden hat. Die Kanzlei bestand aus nur wenigen Sekretären und Schreibern und wurde nie eine große Verwaltung, wie in Europa. Kanzler (6) waren oft Kleriker, Bischöfe oder Erzbischöfe, behielten dabei manchmal ihr Amt als Kanzler bei.[18] Die vergleichsweise Unwichtigkeit des Kanzlers spiegelt die relative Dezentralisierung der königlichen Autorität verglichen mit Staaten wie Frankreich oder England wider, die zur gleichen Zeit immer mehr zentrale

[15] Mayer, Hans Eberhard: *Latins, Muslims and Greeks in the Latin Kingdom of Jerusalem.* History. The Journal of the Historical Association, 1978/208. 175–192.

[16] Kirstein, Klaus-Peter: *Die lateinischen Patriarchen von Jerusalem. Von der Eroberung der Heiligen Stadt durch die Kreuzfahrer 1099 bis zum Ende der Kreuzfahrerstaaten 1291.* Duncker & Humblot, Berlin, 2002.

[17] Zur Frage der Herrschaftsstruktur siehe: La Monte, Johann L.: *Feudal Monarchy in the Latin Kingdom of Jerusalem. 1100 to 1291.* Mediaeval academy of America, Cambridge, 1932. https://de.wikipedia.org/wiki/Beamte_des_K%C3%B6nigreichs_Jerusalem (11.11.2022).

[18] Siehe noch Mayer, Hans Eberhard: *Die Kanzlei der lateinischen Könige von Jerusalem. Bd. 2. Monumenta Germaniae Historica*. Hahn, Hannover, 1996.; Mayer, Hans Eberhard: *Einwanderer in der Kanzlei und am Hof der Kreuzfahrerkönige von Jerusalem*. In: Mayer, Hans Eberhard (Hrsg.): Die Kreuzfahrerstaaten als multikulturelle Gesellschaft. Oldenbourg Wissenschaftsverlag, Berlin, 1997. 25–42.

Autorität entwickelten. Zeitweise gab es auch andere Ämter (7–10). Der Bailli/bailiff (7) verwaltete das Königreich in Abwesenheit des Königs oder seiner Minderjährigkeit mit den Kompetenzen eines Regenten (8), zum Beispiel während der Gefangenschaft *Balduins II.* und der Jugend und Krankheit *Balduins IV.* Im 13. Jahrhundert regierte der Bailli im Wesentlichen selbst wie ein König und war der mächtigste Mann im Reich, zumal die Könige üblicherweise ausländische Monarchen waren, die nicht dauernd im Nahen Osten lebten. Die beiden Ämter wurden manchmal von einer Person wahrgenommen, manchmal von zweien. Manchmal war aber auch eines oder beide Ämter nicht besetzt. Sie wurden vom König ernannt und bewohnten den Davidsturm, ihre Aufgaben jedoch sind nicht genau bekannt. Der Vizegraf (9) nahm wohl Aufgaben der Rechtsprechung, Verwaltung und wirtschaftlichen Nutzung der gesamten Krondomäne wahr, während der Kastellan (10) für Verwaltungsaufgaben in der Stadtfestung Jerusalem zuständig war, vermutlich mit einem militärischen Schwerpunkt. Mit der zunehmenden Verteilung der Ländereien der Krondomäne als Lehen an Vasallen des Königreichs Jerusalem verlor das Amt des Vizegrafen an Bedeutung und verschwand anscheinend schließlich. Das Amt des Kastellans von Jerusalem wurde nach dem Verlust der Stadt an die Muslime 1187 überflüssig und nicht wieder besetzt.[19] Im Wesentlichen entstammten diese Ämter dem nordfranzösischen Feudalismus des 11. Jahrhunderts, der Heimat des Kreuzritteradels von Outremer.[20] Während sie sich in Frankreich und England zur gleichen Zeit weiterentwickelten, geschah dies nicht im Königreich Jerusalem, wo ihre Entwicklung beinahe zum Stillstand kam. Deshalb unterschieden sich Inhalte und Funktionen der Ämter bald von denen der Herkunftsländer der Kreuzritter, wobei die Ämterstruktur des Kreuzfahrerstaates im Vergleich zu den moderneren europäischen Monarchien archaisch wirkte. [21]

Das dritte Element des Machtsystems war der königliche Rat (*Cour de Liges/ Haute Cour*), der sich aus Baronen und Priestern zusammensetzte und dem der König oder, in seiner Abwesenheit, einer der höchsten Würdenträger vorstand. Diese Patrimonialherrschaft, die dem fränkischen Modell folgte und etwa sechshundert Jahre später als die merowingische Herrschaft errichtet wurde, erinnerte in anderer Hinsicht an das westliche Nachfolgerstaat des Frankenreichs. Da die Anführer und Teilnehmer des Ersten Kreuzzuges überwiegend *franci* waren, wurde das französische Feudalsystem in seiner ausgereiften Form in das neue Königreich verpflanzt. Das östliche Lehnsystem machte dann eine besondere Entwicklung durch, die durch lokale politische Faktoren beeinflusst wurde: Die Bewohner des Königreichs Jerusalem lebten aufgrund der regelmäßigen Angriffe islamischer Kräfte in einem Zustand ständiger Unsicherheit. Infolgedessen wurde hier die westliche „politische und zivile Feudalherrschaft" (*féodalité politique et civile*) in eine „Militärfeudalherrschaft" (*féodalité militaire*) umgewandelt, wie die französische und deutsche Geschichtsschreibung des 19. Jahrhunderts einhellig urteilte.[22] Einerseits hat die ständige Kriegsbereitschaft zu

[19] Ehrlich, Michael: *L' organisation de l'espace et la hierarchie des villes dans le royaume latin de Jérusalem.* Cahiers de civilisation médiévale Poitiers, 2008/203. 213–222.

[20] Runciman, Steven: *The families of Outremer. The feudal nobility of the crusader kingdom of jerusalem, 1099–1291*. University of London, London, 1960.

[21] Mayer, Hans Eberhard: *Problem des lateinischen Königreichs Jerusalem*. Variorum Reprints, London, 1983.; Mayer, Hans Eberhard: *Herrschaft und Verwaltung im Kreuzfahrerkönigreich Jerusalem.* Stiftung Historisches Kolleg, München, 1996. 4–48.

[22] Divékys zusammenfassende Folgerung aufgrund der französischen und deutschen Literatur seiner Zeit siehe: Divéky, 1932. 5.

einer aristokratischen Haltung der Militärelite geführt. Der König war oft gezwungen, den Militärdienst des Adels in Anspruch zu nehmen: Während im Westen die Adligen 40 Tage und 40 Nächte im Jahr dienen mussten, betrug der Militärdienst im Königreich Jerusalem wegen der ständigen Bereitschaft 365 Tage. Das Ergebnis war, dass die Rechte des Königs allmählich auf den königlichen Rat übertragen wurden und die Träger der Souveränität in Wirklichkeit die in Ständen organisierten gesellschaftlichen Gruppen waren, wie *Divéky* behauptete, oder zumindest die Souveränität mit dem König teilten.[23]

2.3. Die Begrenzung der königlichen Macht

Während sich der königliche Rat in der Frühzeit des Königreichs nur aus den Kronvasallen zusammensetzte, durften nach 1162 auch ihre Vasallen an den Sitzungen teilnehmen. Der Monarch hatte nur in Kriegsangelegenheiten uneingeschränkte Macht, während er in allen anderen Angelegenheiten an die Zustimmung des Rates gebunden war, der damit zu einem unverzichtbaren Faktor in der Rechtssetzung, Regierung und Rechtsprechung wurde.

Die Rechtssetzung war ein zweistufiger Prozess: Die Entwürfe des Königs mussten dem Rat vorgelegt werden, der sie feierlich debattierte und beschloss, und der angenommene Entwurf trat als Assisen in Kraft.[24] Ohne die Zustimmung des Rates konnte der König weder königliche Ländereien noch Lehen vergeben. Der Rat fungierte auch als Gericht: Ohne sein Urteil konnte der König seinem Vasallen weder sein Lehen noch seine persönliche Freiheit entziehen.[25] Die letztgenannte Einschränkung der Macht wurde so formuliert, dass der König, wenn er einen freien Mann ohne Beschluss der Versammlung verhaftete oder verstümmelte, seinen Eid brach und sich gegen Gott versündigte (Livre au Roi, chap. XXV).[26] Die alttestamentliche Lehre über den Eid des Schöpfers zur Bestätigung seiner Verheißungen an den Menschen im Bund mit ihm,[27] über die Einhaltung des Eides gegenüber Gott,[28] weiterhin das Verbot des Meineids[29] und seiner übernatürlichen Folgen[30] wurde zur Zeit der theokratischen Stammesföderation der Stämme von Israel und

---

[23] Divéky, 1932. 6. Die frühesten Forschungsergebnisse zum Thema siehe: Rösch, Fabian: *Rechtskonstruktion und adeliger Herrschaftsanspruch im Königreich Jerusalem. Die Erfindung Jerusalems durch Recht.* Dissertation. Justus-Liebig-Universität, Gießen, 2018. http://geb.uni-giessen.de/geb/volltexte/2020/15079/pdf/RoeschFabian_2018_10_09.pdf (23.10.2023).

[24] Dodu, Gaston: *Histoire des institutions monarchiques dans le royaume latin de Jérusalem, 1099–1291.* Hachette, Paris, 1894. 183–184.; Völderndorff und Waradein, Otto von: *Ueber die Assisen des Königreichs Jerusalem von Otto Freiherrn von Voelderndorff*. Fr. Vieweg & Sohn, Braunschweig, 1858. 2. Die Quellen siehe Grandclaude, Maurice: *Liste d'Assises remontant au premier royaume de Jérusalem (1099–1187).* In: Fournier, Paul (Hrsg.): Mélanges Paul Fournier. De la Bibliothèque d'histoire du droit publiée sous les auspices de la Société d'histoire du droit. Scientia, Aalen, 1982. 329–345.

[25] Dodu, 1894. 162. Siehe dazu: Mayer, Hans Eberhard: *Von der „Cour des Bourgeois" zum öffentlichen Notariat. Die freiwillige Gerichtsbarkeit in den Kreuzfahrerstaaten*. Harrassowitz Verlag, Wiesbaden, 2016.

[26] Zitiert von Dodu, 1894. 167.

[27] Unter anderen: II. Mose 6:8, V. Mose 29:12. Siehe dazu Jüngling, Hans-Winfried: *Eid und Bund in Ez 16–17.* In: Zenger, Erich (Hrsg.): Der neue Bund im alten. Studien zur Bundestheologie der beiden Testamente (QD 146). Herder, Freiburg, 1993. 113–148.

[28] Unter anderen: V. Mose 6:13., V. Mose 10:20.

[29] Unter anderen: III. Mose 19:12; II. Chroniken 18:15.

[30] Unter anderen: V. Mose 27:15–26., V. Mose 28:1.

dann des jüdischen Königreichs in vielen konkreten Fällen manifestiert und ausgedeutet.[31] Die Lehre *Jesu Christi* über den Eid hat diese Ausdeutung nicht abgeschafft, sondern den übernatürlichen Charakter des Eides verstärkt. („*Ihr habt weiter gehört, dass zu den Alten gesagt ist: »Du sollst keinen falschen Eid schwören und sollst dem Herrn deine Eide halten.« Ich aber sage euch, dass ihr überhaupt nicht schwören sollt, weder bei dem Himmel, denn er ist Gottes Thron; noch bei der Erde, denn sie ist der Schemel seiner Füße; noch bei Jerusalem, denn sie ist die Stadt des großen Königs. Auch sollst du nicht bei deinem Haupt schwören; denn du vermagst nicht ein einziges Haar weiß oder schwarz zu machen. Eure Rede aber sei: Ja, ja; nein, nein. Was darüber ist, das ist vom Bösen.*“)[32] So wie das mittelalterliche Kirchenrecht im Westen und Osten den Eid als vertragliche Garantie und als Beweismittel betrachtete, so spiegelte sich diese Auffassung in den Machtverhältnissen im Kreuzfahrtenstaat Jerusalem wider.[33]

Der erste schriftliche Beweis dafür, dass der König für die Verabschiedung von Assisen auch die Zustimmung der Bürger einholen musste, stammen aus dem Jahr 1131, und ab 1135 wurde dies zu einer regelmäßigen Praxis bei der Ausstellung königlicher Dokumente.[34] Die Chronik von *Wilhelm von Tyros* berichtet auch darüber, dass *Balduin IV.* 1182 eine außerordentliche Steuer erhob, um den Angriff des Sultans *Saladin* abzuwehren, und dafür die Zustimmung der Herren, Prälaten und Bürger einholte. Die *Cour de Bourgeois* tagte bis 1187 in Jerusalem und nach dessen Fall in Tyros, Nablus oder Bethlehem. Bei diesen Treffen wurden Krieg und Frieden besprochen, Bündnisse geschlossen und Botschafter gewählt, die ins Ausland entsandt werden sollten. Sie erörterten auch innenpolitische Fragen, von denen die Abstimmung über die Steuern die wichtigste war.[35]

Gleichzeitig wurden die Rechte des Nobiles und der Barone weiter ausgebaut.[36] Eines dieser Rechte bestand darin, dass die Barone verpflichtet waren, den König nur innerhalb der Grenzen des Landes in den Krieg zu begleiten. Sie waren nur in drei Fällen verpflichtet, außerhalb ihrer Grenzen in den Krieg zu ziehen: (1) wenn es darum ging, den König oder seine Kinder zu heiraten, (2) wenn es darum ging, den Glauben oder die Ehre des Königs zu verteidigen und (3) wenn das Königreich in Schwierigkeiten war und das gemeinsame Interesse auf dem Spiel stand. Diese Punkte gaben in der Praxis Anlass zu zahlreichen Auseinandersetzungen zwischen den Baronen und ihrem König, die schließlich 1271 während der Herrschaft von König *Hugo III.* von Zypern (1267–1284) in eine scharfe Fehde ausarteten (Livre de Jean d’Ibelin CCXVII. chap., Livre au Roi XXIX. chap.).[37] Der König berief sich in seinem Schreiben an die Barone auf die frühere Praxis: Er behauptete, dass die Vasallen des Königreichs Jerusalem seit *Gottfried von Boulloni* ständig außerhalb der strengen Domäne des Königreichs in den Vasallenstaaten gedient

---

[31] Horst, Friedrich: *Der Eid im Alten Testament*. Evangelische Theologie, 1957. 366–384.

[32] Mattheus 5:33–37.

[33] Mayer, Hans Eberhard: *Eid und Handschlag bei den Kreuzfahrerkönige von Jerusalem*. Mitteilungen des Instituts für Österreichische Geschichtsforschung, 2010. 61–81.

[34] Dodu, 1894. 164.

[35] Dodu, 1894. 24.

[36] Mayer, 1996. 4–48.

[37] Greilsammer, Myriam (Hrsg.): *Livre au Roi*. Académie des inscriptions et belles-lettres, Paris, 1995.; Beugnot, Arthur Auguste (Hrsg.): *Assises de Jérusalem ou recueil des ouvrages de jurisprudence composés pendant le XIIIe siècle dans le royaumes de Jérusalem et de Chypre*. Impr. nationale, Paris, 1841. 453–468. Beide sind zitiert von Dodu, 1894. 12.

hätten, sowohl zu Lande als auch zur See. Der König argumentierte auch, dass die Barone seinen unmittelbaren Vorgänger *Hugo II.* begleitet hatten, als der österreichische Fürst und der ungarische König das Meer überquerten.[38] Die Antwort wurde von *Jakob (Jacques) von Ibelin* (1249–1276), dem Sohn des Kodifikators *Johann (Jean) von Ibelin,* verfasst, der betonte, dass die Barone ihren Dienst zu Pferd verrichteten, was sie davon abhielt, auf See zu kämpfen, und dass sie, selbst wenn sie dies auf dem Land außerhalb der Grenzen taten, dies nicht auf Befehl, sondern für Gott und ihren Herrn aus freiem Wille taten. Der Konflikt in diesem Fall endete mit einem Kompromiss, demzufolge alle Vasallen verpflichtet waren, vier Monate im Jahr außerhalb der Insel Zypern zu dienen, sofern die Armee vom König oder seinem Sohn geführt wurde.[39] Der Adelige konnte im Falle seines Todes frei über seine Güter verfügen. Wenn er kein Testament gemacht hatte und keinen gesetzlichen Erben hatte, erbte der König das Lehen als Lehnsherr (Livre des Assises de la Cour des Bourgeois, Punkt 196). Die Schwierigkeit bei der Auslegung besteht darin, dass die in der Literatur verwendete Terminologie unklar ist. Die Quelle bezieht sich auf das Recht des freien Mannes, die Literatur bezieht sich auf den Adel.[40] Die Tatsache, dass die Organisation der gesellschaftlichen Gruppen in Stände noch nicht abgeschlossen war, kann diese Schwierigkeit nur zum Teil erklären.[41]

Die früheste Institution zur Begrenzung der königlichen Macht war das *ius resistendi.* Dies bedeutete, dass die Untertanen, wenn der König seinen Eid nicht einhielt, nicht verpflichtet waren, die widerrechtliche Ausübung der Macht zu dulden, was in der Literatur als die primitivste Form des Widerstandsrechts bezeichnet wurde. In einem späteren Manuskript (Livre des Assise de la Cour des Bourgeois chap. XXVI.) wurde dies wie folgt beschrieben: „*Et c'il (le roi)avient puis, en aucune manière, que il vaise contre ses sairements, el renée Dieu, puisqu'il fauce ce que il a juré. Et ne le deivent soufrir ces homes ni le peuple.*“ [42] („*Sollte der König in irgendeiner Weise gegen seinen Eid verstoßen, so würde er sich gegen Gott versündigen, weil er seinen Schwur nicht einhält. Und das soll nicht geduldet werden, weder von den Vasallen noch vom Volk.*“) *Gaston Dodu* findet dieses Prinzip 1894, zur Zeit der III. Republik in Frankreich erschreckend,[43] während *Prutz* in seiner Monographie *Kulturgeschichte der Kreuzzüge* 1883 im frisch vereinten deutschen Kaisertum feststellt, dass man den Vasallen geradezu „e*in gewisses Recht der Revolution*“ einräumte.[44]

Etwa 100 Jahre später systematisierte *Thomas von Aquin* die damalige Auffassung über das menschliche Gewissen in seinem Werk *Summa Theologiae.* Seine Ideen stammten aus eigener Bibelausdeutung und den Schriften der früheren Kirchenväter. Er bemerkte treffend, dass die Unterordnung nur dann im Einklang mit dem Naturrecht steht, wenn der Herr seinen Untergebenen nicht zu seinem eigenen Vorteil benutzt, und dass Gesetze nur dann das Gewissen binden, wenn sie in ihrem Inhalt nicht ungerecht sind. Für den Menschen selbst ist es besser, den Tyrannen zu tolerieren, um größeren Schaden (z. B. Bürgerkrieg)

[38] Dodu, 1894. 13.
[39] Dodu, 1894. 14.
[40] Divéky, 1932. 11.
[41] Mayer, 1996. 4–48.
[42] Zitiert von Dodu, 1894. 170.
[43] Dodu, 1894. 170.
[44] Prutz, Hans: *Kulturgeschichte der Kreuzzüge*. E.S. Mittler, Berlin, 1883. 165.

zu vermeiden, aber die Gemeinschaft kann den tyrannisierten König zurückhalten oder sogar ersetzen.[45] Diese Grundsätze des christlichen Ungehorsams, der nicht nur ein Recht, sondern eine Pflicht gegen ungerechtes Recht und Gebot ist, sind sowohl in der rabbinischen Rechtsprechung[46], die das mosaische Gesetz auslegt, als auch in den Lehren der früheren Kirchenväter enthalten. Ein Herrscher, der dem so genannten *Lex Rex* der Thora[47] unterworfen war, war, wenn er über dieses Gesetz hinausging, wie *Ahab,* der sich den Weinberg *Naboths* durch eine Verschwörungsklage aneignete.[48] Was die Schriften der Kirchenväter[49] betrifft, so dominierte bis zum *Thomas von Aquin* die Glosse des *Hieronymus* (ca. 342–420) über die Vision des *Hesekiel*[50] das Denken über das Gewissen,[51] die die Dualität (die unfehlbare göttliche und die fehlbare menschliche Seite) des Gewissens (*synteresis/synderesis*) betonte.[52] *Thomas von Aquin* hingegen leitete die *synderesis* aus dem Naturrecht ab und betrachtete sie daher als unfehlbar und unauslöschlich.[53] Dieses kulturelle Milieu und im gewissen Maße die Bibel selbst haben auch die Denkweise der Kreuzritter und der Priester in Jerusalem[54] beeinflusst, so wie *Thomas von Aquin* von der Frage des Gewissens und der Sünde zum Widerstand gegen die Tyrannei überging.

Es ist eine anerkannte Tatsache in der Rechtsgeschichtswissenschaft, dass sowohl das englische als auch das ungarische Königreich Erfahrungen über die Entstehung und Ausübung des Widerstandsrechts in Jerusalem machten. Es ist bezeichnend, dass sich der Widerstandsgedanke in Ländern verbreiten konnte, die aristokratisch geprägt waren, in denen die königliche Macht schwach war und der König brauchte die militärische Unterstützung des Adels. Die Mitglieder des Heeres von *Richard Löwenherz* erlebten die Praxis des Widerstandsrechts im politischen Kontext des Heiligen Landes im Jahr 1189, während die Gefolgsleute von *Endre II*. im Jahr 1217 Erfahrungen damit sammelten. In Bezug auf das Widerstandsrecht in Aragon kann die englische Vermittlung im Lichte der lebendigen ibero-englischen Beziehungen interpretiert werden, während in der mittelalterlichen polnischen Verfassung das Widerstandsrecht durch die tschechische und ungarische Vermittlung unter der Herrschaft der *Luxemburger,* die sich die französische Kultur zu eigen machten, und der französischstämmige *Anjou, Ludwig des Großen* und seiner Tochter *Hedvig* erklärt wird. Das *ius resistendi,* das sich aus den alltäglichen Machtverhältnissen im Königreich

---

[45] Molnár Attila Károly: *Az engedetlenség kötelessége, a modern politika egyik forrásánál* [Die Pflicht zum Ungehorsam, eine Quelle der modernen Politik]. Acta Humana, 2020/4. 127–149., hier: 140.

[46] Ruff Tibor: *A szólás- és tanszabadság elve a mózesi Törvényben és a rabbinikus jogban* [Der Grundsatz der Rede- und Lehrfreiheit im mosaischen und rabbinischen Recht]. Díké, 2022/1. 104–113.

[47] V. Mose 17:14–20. Die Ausdeutung des Lex Rex siehe bei Mészáros, 2022. 182–200.

[48] I. Könige 21:1–15.

[49] Molnár, 2020. 128–132.

[50] Ezekhiel 1:4–14.

[51] *Jerome, Commentary on Ezekiel 1.7.* In: Potts, Timothy C. (Hrsg.): Conscience in Medieval Philosophy. Cambridge University Press, Cambridge, 1980. 79–80.

[52] Molnár, 2020. 132.

[53] Die Unterscheidung zwischen der unfehlbaren *synderesis* und der *conscientia,* die aus der unfehlbaren *synderesis* einen Fehlschluss zieht und daher zu schlechtem Verhalten führt, sollte – unter stoischem Einfluss – das Problem der Sünde (Verletzung des göttlichen Gesetzes) lösen. Siehe dazu Molnár, 2020. 132–136.

[54] Hiestand, Rudolf: *Der lateinische Klerus der Kreuzfahrerstaaten. Geographische Herkunft und politische Rolle.* In: Mayer, Hans Eberhard (Hrsg.): Die Kreuzfahrerstaaten als multikulturelle Gesellschaft. Oldenbourg Wissenschaftsverlag, Berlin, 1997. 43–68.

Jerusalem entwickelte, regelte aber nicht die praktische Umsetzung des Wiederstandes, und war andernorts eher lokal ausgerichtet.[55]

3. Weiterleben der Verfassungsurkunde des Königreichs Jerusalem

Die erste ‚Verfassungsurkunde' Europas ist keine moderne Schöpfung. Die *Lettres du Sépulcre,* die die Machtstruktur des christlichen Königreichs des Heiligen Landes im 12. Jahrhundert beschreibt, wurde vom König, dem Patriarchen von Jerusalem und dem Vicomte gesiegelt und unterschrieben, dann in eine Lade gelegt und in der Grabeskirche hinterlegt. Die Lade durfte nur in Anwesenheit von neun Personen geöffnet werden (dem König, dem Patriarchen, den fünf Adligen des Königreichs und zwei Geschworenen der *Cour des Bourgeois*).[56] Das einzige Manuskript ging verloren, als nach der Niederlage bei Hattin im Juli 1187 am 2. Oktober Jerusalem fiel.[57]

Nach der Nachricht vom Fall des Königreichs Jerusalem wurde der Dritte Kreuzzug unter der Führung von *Friedrich Barbarossa, Richard Löwenherz* und *Philippe Auguste II.* gestartet. Dies führte zu einem Vertrag, der es den Christen erlaubte, die Küste zwischen Akkon und Jaffa zu behalten. Im Jahr 1192 gründete *Guido Lusignan* jedoch sein Königreich auf der Insel Zypern neu, das die ‚Rechtsgewohnheiten' des Königreichs Jerusalem (*Assises de Jerusalem*) weiterführte und sie während seines Bestehens sogar in der Praxis weiterentwickelte.[58] Obwohl eine Assisen schriftlich verfasstes Recht zu rekurrieren scheint, lässt sich in den meisten Quellen keine konsequente Trennung zwischen dem Begriff *assise* und *coutume, usage, droit, raison* u.a. erkennen, und die Literatur des 19. und 20. Jahrhunderts folgten diesem verwirrenden, rechtlich ungenauen Vokabular, wie auch Rösch hervorgehoben hat.[59] Es ist umstritten, ob diese Assisen lediglich aus dem Gedächtnis und aus der täglichen Praxis übernommen wurden oder ob offizielle Aufzeichnungen über die frühere Verfassung erhalten geblieben sind, obwohl es ist vermuten, dass ohne solche Aufzeichnungen die Annahme der Assisen kaum möglich gewesen wäre.[60] Eine ähnliche Übernahme fand in Antiochia und im Lateinischen Kaiserreich statt, das von den französischen Rittern des Vierten Kreuzzuges 1204 in Konstantinopel gegründet wurde. Kaiser *Balduin* wandte sich an König *Amaury (Amalrich von Lusignan)* von Zypern mit der Bitte, ihm eine Abschrift der Assisen zu schicken, die dann einige Änderungen erfuhren und unter dem Namen *Assises de Romanie* bzw. *Liber consuetudinum Imperii Romaniae* zur Gesetzessammlung des Lateinischen Reiches wurden.[61] Diese Assisen wurden dann

---

[55] Divéky, 1942. 3., 19. Siehe noch: Baranowski, Ignacy: *Królestwo Jerozolimskie*. Wydawn. M. Arcta, Warszawa, 1917.; Kern, Fritz: *Gottesgnadentum und Widerstandsrecht im frühen Mittelalter*. Koehler, Leipzig, 1914.

[56] Dodu, 1894. 39–42.; Laferriere, 1838. 477.

[57] Siehe dazu Edbury, Peter W.: *Law and Custom in the Latin East. Les Letres dou Sepulcre*. In: Edbury, Peter W. (Hrsg.): Kingdoms of the Crusaders. From Jerusalem to Cyprus. Ashgate, Aldershot, 1999. 71–79.

[58] Siehe die Folgerung von Röhricht (Anm. 15) 1, in dem er sich auf Dokumente Nr. 1066, 1164, 1285, 1307 und 1364 seiner diplomatischen Quellensammlung (Röhricht, Reinhold (ed.): *Regesta regni Hierosolymitani*. Wagner, Oeniponti, 1893.) stützt.

[59] Rösch, 2018. 14.

[60] Prutz, 1883. 220.; Laffariére, 1838. 483.

[61] Prutz, 1883. 231–233.; Laffariére, 1838. 479. Siehe noch Zygadinos, Nikolaus: *Zur Frage des Assisenrechtes (1099–1571). Eine Studie über die Entstehungs-Geschichte und Bedeutung der ‚Assisen von Jerusalem*

auf das Gebiet von Morea ausgedehnt, so dass ein großer Teil der Balkanhalbinsel von 1204 bis 1261, als die griechischen Kaiser von Nizäa Konstantinopel zurückeroberten, an sie gebunden war.

Im *franci* Königreich Zypern[62] wurden die Assisen von Jerusalem neu verfasst, die während der Herrschaft *Heinrichs II.* (1218–1253), zwischen 1252 und 1253 vom italienischen Chronisten und Legist *Philippe de Novare* (um 1195–um 1265)[63] und seinen Mitarbeitern und später von *Johann von (Jean) Ibelin* (1215–1266), Graf von Jaffa, Herrn von Ramla und für kurze Zeit (1254–1256) Bailli des Königreichs Jerusalem[64] durchgeführt wurde. Wie umfangreich die Arbeit der Kodifikatoren war, zeigt die Tatsache, dass die *Assises de la Haut Cour* 273 Punkte enthielten, während das *Livre des Assises de la Cour des Bourgeois*[65] 304 Punkte umfasste. Die beiden Sammlungen wurden zweimal (1368 und 1531) teilweise erneut. 1368 wurden sie unter Verwendung der Handschriften, die es für die authentischsten hielt, neu zusammengestellt. Der Text wurde in der Schatzkammer der Kathedrale von Nikosia in eine Kiste hinterlegt, die der Obhut von vier königlichen Vasallen anvertraut war. Die Kiste durfte nur in ihrer Anwesenheit während einer feierlichen Zeremonie geöffnet werden. Diese Version wurde Anfang des 16. Jahrhunderts durch ein Feuer zerstört.[66] Die Venezianer, die die Insel inzwischen in Besitz genommen hatten, ließen die Assisen 1531 auf der Grundlage der vorhandenen Handschriften neu schreiben und ins Italienische übersetzen. Dieses große Werk, von dem das Originalmanuskript und die italienische Übersetzung in Venedig erhalten geblieben sind, wurde von *Florio Bustron,* dem Historiker Zyperns, verfasst.[67] Der kulturelle Einfluss des Königreichs Jerusalem, insbesondere bei der Formulierung des *ius resistendi,* reichte jedoch im heutigen Europa weit über die Grenzen Zyperns hinaus.

---

und Cypern'. Mit besonderer Berücksichtigung der ‚Assises Bourgeois', nach dem griechisch-cypriotischen Text. Athen, 1928.; Teichmann, Albert: *Ueber die Assisen von Jerusalem und von Antiochien*. In: Heusler, Andreas (Hrsg.): Festgabe der Juristischen Fakultät der Universität Basel zum siebzigsten Geburtstag von Andreas Heusler. Helbing & Lichtenhahn, Basel, 1904. 35–58.

[62] Coureas, Nicholas: *How Frankish was the Frankish Ruling Class of Cyprus? Ethnicity and Identity*. Epeteris, 2015. 61–78.

[63] Siehe zu seinem Leben und Tätigkeit Edbury, Peter W.: *Philip of Novara and the Livre de Forme de Plait.* In: Edbury, Peter W. (Hrsg.): Law and history in the Latin East. Ashgate, Farnham, 2014. 555–565.; Bromiley, Geoffrey N.: *Philip of Novara's Account of the War between Frederick II of Hohenstaufen and the Ibelins.* Journal of Medieval History, 1977. 325–337.; Brundage, Arthur James: *Latin Jurists in the Levant. The Legal Elite of the Crusader States*. In: Shatzmiller, Maya (Hrsg.): Crusaders and Muslims in Twelfth-Century Syria. Brill, Leiden, 1993. 18–42.

[64] Siehe zu seinem Leben und Tätigkeit Mayer, Hans Eberhard: *Ibelin versus Ibelin. The struggle fort he regency of Jerusalem 1253–1258.* Proceedings oft he American Philosophical Society, 1978/1. 25–57.; Edbury, Peter W.: *John of Ibelin's Title to the County of Jaffa and Askelon*. English Historical Review, 1983/386. 115–133.; Edbury, Peter W.: *Kingdom of the Crusaders. From Jerusalem to Cyprus*. Ashgate, Aldershot, 1999. 604–610. Siehe auch die Quellenausgabe Edbury, Peter W. (Hrsg.): *John of Ibelin, Le Livre des Assises*. Brill, Leiden, 2003.

[65] Beugnot, Arthur Auguste (Hrsg.): *Assises de Jérusalem ou recueil des ouvrages de jurisprudence composés pendant le XIIIe siècle dans le royaumes de Jérusalem et de Chypre*. Impr. nationale, Paris, 1843. 5–226.

[66] Docen, Bernhard Joseph: *Die ‚Assises dou Reaume de Chipre'. Beyträge zur Geschichte und Literatur*. Lindauer, 1807. 1278–1286.

[67] Dodu, 1894. 56.; Prutz, 1883. 229.

Bernd Kannowski
Universitätsprofesszor, Universität Bayreuth

DIE GOLDENE BULLE VON 1356 ALS GRUNDGESETZ DES HEILIGEN RÖMISCHEN REICHES DEUTSCHER NATION

Der offizielle Name der heutigen deutschen Verfassung lautet nicht „deutsche Verfassung". Er lautet „Grundgesetz". Es würde zu weit führen und nichts zu unserem Thema beitragen, wenn ich erklärte, warum das so ist. Durchaus in Verbindung mit unserem Thema aber steht, was das deutsche Wort „Grundgesetz" bedeutet, beziehungsweise woher es kommt. Es ist einfach die deutsche Übersetzung des lateinischen „Lex fundamentalis". So hießen seit dem Mittelalter besonders wichtige Gesetze, die als Grundordnung des Alten Reiches verstanden wurden. Sie waren unter eben dieser Bezeichnung „Leges fundamentales" in eigenständigen Sammlungen zu finden[1] und galten als wegen ihres Vertragscharakters jedenfalls nicht durch den Herrscher allein veränderbar.[2] Und eines dieser Grundgesetze des Heiligen Römischen Reiches Deutscher Nation – vielleicht das wichtigste überhaupt – war die Goldene Bulle,[3] um die es in meinem Vortrag heute geht. Sie blieb bis zum Ende des Alten Reiches im Jahr 1806 in Kraft und regelte somit für 450 Jahre Wahl und Krönung der deutschen Könige.

Dabei schuf die Goldene Bulle kein neues Recht.[4] Sie schrieb nur fest, was bereits seit langer Zeit in Übung gewesen war. Die Ähnlichkeit in ihrer Bezeichnung mit dem ungarischen Dokument, das Anlass dieser Tagung ist, liegt allein in einem äußeren Umstand. Das deutsche Dokument von 1356 erhielt in Anbetracht der Bedeutung, die ihm die Zeitgenossen zusprachen, ein großes Siegel aus Gold. Deshalb heißt es Goldene Bulle, auf lateinisch „Aurea bulla".[5] Üblich wurde dieser Name allerdings erst im 15. Jahrhundert. Die zeitgenössische Bezeichnung durch Karl IV. (1346–1378) selbst lautete „unser keiserliches rechtbuch".

Wie die Benennung „Rechtsbuch" erahnen lässt, handelt es sich dabei nicht um etwas, das – wie etwa die englische Magna Charta von 1215 – auf einem einzigen Blatt Pergament Platz hätte. Die Goldene Bulle ist vielmehr ein kleines Buch, das in einer heute gängigen

---

[1] Etwa in Klaute, Johann Balthasar (Hrsg.): *Sacri Rom. Imperii Leges Fundamentales, Pacificationes Principaliores, Recessus Novissimus, Diversae Sanctiones Pragmaticae, Et Id Genus Alia Ad Rem Publicam Romano Germanicam Spectantia*. Harmes, Kassel, 1701.

[2] Mohnhaupt, Heinz: *Leges fundamentales*. In: Cordes, Albrecht (Hrsg.): Handwörterbuch zur deutschen Rechtsgeschichte (HRG). Bd. 3. 2. Aufl. Schmidt, Berlin, 2016. 693–695.

[3] Umfassende Literaturübersicht bei Laufs, Adolf: *Goldene Bulle*. In: Cordes, Albrecht (Hrsg.): Handwörterbuch zur deutschen Rechtsgeschichte (HRG). Bd. 2. 2. Aufl. Schmidt, Berlin, 2012. 448–457.

[4] Laufs, 2012. 450.

[5] Bulla aurea Caroli IV. Romanorum imperatoris.

Druckausgabe knapp 50 Seiten füllt.[6] Der Text ist nicht auf einmal entstanden, sondern auf zwei unterschiedlichen Hoftagen des bereits genannten deutschen Königs Karls IV. Der erste Teil wurde auf einem Nürnberger Hoftag am 10. Januar 1356 verkündet, der zweite in Metz am Weihnachtstag des gleichen Jahres.

Im Alten Reich war es seit seinen Anfängen tatsächliche Übung, dass der König gewählt wurde. Es gab allerdings eine ganze Reihe von Unsicherheiten in Bezug auf das Verfahren. Diese führen immer wieder zu der unschönen Situation, dass verschiedene Gruppen von Wählern verschiedene Kandidaten wählten und sich der Konflikt dann nur militärisch lösen ließ. Das letzte Mal hatte es eine solche Lösung auf dem Schlachtfeld in der Kontroverse zwischen Friedrich dem Schönen aus dem Hause Habsburg und Ludwig dem Bayern aus dem Hause Wittelsbach im Jahr 1314 gegeben. Ludwigs Rivale und Nachfolger Karl IV. führte solche Streitigkeiten dann in Form der Goldenen Bulle einer dauerhaften Lösung zu.

Dabei war zur Zeit Karls IV. keineswegs selbstverständlich, dass Könige überhaupt Gesetzgebung betreiben. Erst in der Stauferzeit hatten die deutschen Monarchen damit begonnen. Friedrich Barbarossa hatte sich mit den vier Doktoren von Bologna arrangiert, die ihn gegen die Einräumung von Privilegien als „dominus mundi" nach Maßstäben des römischen Rechts bezeichneten. Die deutschen Könige verstanden sich nunmehr als legitime Nachfolger der römischen Herrscher und bewahrten damit das Recht im Schreine ihres Herzens (in scrinio pectoris). Somit ging es bei der Goldenen Bulle keineswegs allein um Konfliktbefriedung. Der König inszenierte sich als Gesetzgeber und präsentierte damit eine neue Seite seiner Macht. Novas leges condere:[7] Dieses Recht oblag allein ihm und vielleicht noch dem Papst. Aber gerade der wird in der Goldenen Bulle in keinem Wort erwähnt, so dass der König gegen ihn triumphiert.

Der erste, in Nürnberg entstandene, Teil der Goldenen Bulle reguliert in erster Linie das gesamte Wahlverfahren äußerst detailgenau. Wer muss unter welchen Umständen was wann und wo tun, nicht nur für die Kurfürsten, auch für die Einwohner von Frankfurt,[8] wo die Wahl abzuhalten war?[9] Ebenso beschäftigt sich die Goldene Bulle mit der Anreise der Kurfürsten nach Frankfurt und sagt für die umliegenden Fürsten, wer wem freies Geleit durch sein Territorium zu gewähren hat.[10] Die Entscheidung, die Wahl in Frankfurt zu halten, legt Zeugnis von einer Tradition ab, die auf die Tage des ostfränkischen Reiches zurückgeht. Danach sind sowohl die Wahl wie auch die Krönung auf fränkischer Erde abzuhalten. Dabei war die örtliche Festlegung der Wahl nicht die einzige, die sich in der

---

[6] Buschmann, Arno (Hrsg.): *Kaiser und Reich. Verfassungsgeschichte des Heiligen Römischen Reichs Deutscher Nation vom Beginn des 12. Jahrhunderts bis zum Jahr 1806 in Dokumenten. Teil 1. Vom Wormser Konkordat bis zum Augsburger Religionsfrieden 1555.* Nomos, Baden-Baden, 1994. 108–156.; Ähnlich bei: *Die Goldene Bulle. Nach König Wenzels Prachthandschrift. Mit der deutschen Übersetzung von Konrad Müller und einem Nachwort von Ferdinand Seibt.* 3. Aufl. Harenberg, Dortmund, 1989. 98–142. Nach dieser Ausgabe zitiere ich im Folgenden die Goldene Bulle.

[7] Dilcher, Gerhard: *Der mittelalterliche Kaisergedanke als Rechtslegitimation.* In: Willoweit, Dietmar (Hrsg.): Die Begründung des Rechts als historisches Problem. De Gruyter, München, 2000. 161, 169.; Stolleis, Michael: *III. Condere leges et interpretan. Gesetzgebungsmacht und Staatsbildung im 17. Jahrhundert.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung, 1984/1. 89–116.

[8] Art. 1 Abs. 2, 3 (Goldene Bulle nach König Wenzels Prachthandschrift, wie Anm. 4, 102), 19, 20 (107f.).

[9] Art. 1 Abs. 16 (106).

[10] Art. 1 Abs. 1, 2 (101f.), 5–14 (103–105).

Goldenen Bulle findet. Danach soll ferner die Krönung in Aachen und der erste Reichstag nach der Krönung in Nürnberg stattfinden. Die Wahl musste nach 30 Tagen abgeschlossen sein. War das nicht der Fall, so sollten die Kurfürsten fortan nur noch Wasser und Brot erhalten, so lange, bis sie zu einer Entscheidung gekommen waren.[11]

Eine der bekanntesten Bestimmungen der Goldenen Bulle legt die Wähler endgültig fest, was Doppelwahlen und ein nicht eindeutiges Ergebnis für die Zukunft vermeiden sollte. Es sind sieben Wähler und damit eine ungerade Zahl, was eine Pattsituation ausschließt. Drei geistliche und vier weltliche Kurfürsten sind es, namentlich die Erzbischöfe von Köln, Mainz und Trier, dann der Pfalzgraf bei Rhein, der Herzog von Sachsen, der Markgraf von Brandenburg und schließlich der König von Böhmen.[12] Damit ist das Mehrheitswahlrecht erstmals auf Reichsebene festgeschrieben. Vier von sieben Stimmen sollten für die Wahl eines neuen Königs ausreichen, die anderen müssen dann dieser Mehrheit folgen. Die Kurfürstentümer wurden für unteilbar erklärt,[13] so dass für alle Zukunft klar sein sollte, wie viele Stimmen es gibt und wer diese haben sollte. Insofern ist die Goldene Bulle ein Meilenstein für die Entstehung eigenständiger und stabiler Staaten, was sich knapp 300 Jahre später im Westfälischen Frieden des Jahres 1648 manifestieren sollte.

Warum ausgerechnet diese sieben in der Goldenen Bulle genannten Fürsten als so wichtig angesehen werden, dass allein sie das Königswahlrecht haben, ist bis heute nicht klar. Klar ist wie gesagt, dass sie diese privilegierte Stellung nicht erst seit der Goldenen Bulle innehaben. Bereits im Sachsenspiegel, einem bedeutenden um 1230 entstandenen deutschen Rechtsbuch, sind genau diese sieben Fürsten als Königswähler genannt.[14] Das aber liefert natürlich keine Erklärung, sondern verschiebt die Frage nur um circa 130 Jahre nach hinten. Eine ältere Auffassung will die Bedeutung dieser Fürsten mit der so genannten Erzämtertheorie erklären.[15] Genau diesen sieben Fürsten nämlich haben bei der Regierung und Verwaltung des Reiches beziehungsweise bei förmlichen Hoftagen herausragende Funktionen. So ist der Erzbischof von Trier der Kanzler von Gallien, der von Köln Kanzler von Italien und der Mainzer Erzbischof der von Germanien. Die weltlichen Kurfürsten hatten traditionelle Aufgaben beim königlichen Mahl. Der Pfalzgraf bei Rhein hatte die Speisen zu reichen, der König von Böhmen die Getränke. Der Markgraf von Brandenburg hatte sich um die Unterkünfte zu kümmern und der Herzog von Sachsen um die Pferde.

Das mag zwar alles auf eine mittelalterliche Art sehr anschaulich sein, doch verschiebt es wiederum nur das Problem. Nun kommt nämlich die Frage auf, woher es kommt, dass eben ausgerechnet diese Fürsten diese Ämter haben. Die Erzämtertheorie dreht sich also im Kreis. Eine Erklärung, die sich nicht im Kreise dreht, ist die Theorie von den ottonischen

---

[11] Art. 11 Abs. 3 (109).

[12] Art. 1 Abs. 8–12 (104f.), 15 (105f.) und öfter.

[13] Art. 20 (129f.).

[14] Sachsenspiegel Landrecht III 57 § 2, hier verwendete Ausgabe Homeyer, Carl Gustav (Hrsg.): *Des Sachsenspiegels. Erster Theil. Das Sächsische Landrecht.* Dümmler, Berlin, 1861.: „In des keiseres kore sal die erste sin die bischop von megenze; die andere die von trere; die dridde die von kolne. Under den leien is die erste an'me kore die palenzgreve von'me rine des rikes druzte; die andere die herthoge van sassen die marschalk; die dridde die marcgreve von brandeburch die kemerere. Die schenke des rikes die koning von behemen, die ne hevet nenen kore, umme dat he nicht düdesch n'is …".

[15] Willoweit, Dietmar – Schlinker, Steffen: *Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands.* 8. Aufl. Beck, München, 2019. 82.

Tochterstämmen.[16] Diese Theorie hat einen gewissen Charme, weil sie auf eine mittelalterliche Geschlechterparität abzielt. Sie besagt, dass sich die Kurfürsten genealogisch auf Töchter aus dem Hause der Ottonen zurückführen ließen, die bei der Königswahl nicht zum Zuge kamen, weil sie Frauen waren. Als eine Art Ausgleich für diesen Mangel an Macht hätten sie dann das Recht erhalten, bei der Auswahl des Herrschers zumindest ein gewichtiges Wort mitzureden. Die Forschungen hierzu sind allerdings ausgesprochen komplex und im Detail kaum nachvollziehbar.

Neben der Regulierung der Königswahl finden sich in der Goldenen Bulle noch einige andere Bestimmungen. So war dem König daran gelegen, den Einfluss der mächtigen Städtebunde zurückzudrängen,[17] die seinem großen Vorgänger Barbarossa 180 Jahre zum Verhängnis geworden waren. Insofern stärkt die Goldene Bulle die Position von Adel und König zu Lasten der kommunalen Bewegung. Ebenso schwächt die Goldene Bulle die Position des Papstes, der keinerlei Mitspracherecht bei der Wahl des Königs haben soll. Ein Bestätigungsrecht des Papstes in welcher Form auch immer, wird nicht erwähnt. Da der damalige Papst Innozenz VI. (1352–1362) die Unterstützung Karls IV. in einem militärischen Konflikt brauchte, wollte er die guten Beziehungen nicht aufs Spiel setzen und legte deshalb gegen die Goldene Bulle keinerlei Widerspruch ein. Das Dokument war ein geschickter Schachzug seines Schöpfers. Er nutze einen Moment der Schwäche bei seinen Gegnern dafür, seine Position mit dauerhafter Wirkung zu verbessern und diese Verbesserung in der Reichsverfassung festzuschreiben.

Der zweite Teil der Goldenen Bulle, der wie gesagt auf einem Reichstag in Metz verabschiedet wurde, beschäftigt sich in erster Linie mit Dingen, die wir heute vielleicht als diplomatisches Protokoll bezeichnen würden. Immer wieder geht es dabei um die Sitzordnung, in der symbolkräftig zum Ausdruck kommt, wer welche Bedeutung hat. So soll der König allein an einem Tisch sitzen, der alle anderen Tische im Saal um sechs Fuß überragen soll. Drei Fuß tiefer ihm zur Seite soll seine Frau sitzen. Wiederum drei Fuß tiefer sollen die Kurfürsten sitzen, und zwar alle auf der gleichen Höhe. Niemand außer ihnen darf dabei mit ihnen am Tisch sitzen.[18]

Die UNESCO hat die Goldene Bulle im Jahr 2013 in das Register „Memory of the World“ aufgenommen. Wir haben heute noch sieben Originalausfertigungen aus der Zeit Karls IV. Die einzige davon, die sich heute noch an ihrem ursprünglichen Platz befindet, ist die Fassung, die die Bürger meiner Heimatstadt Frankfurt damals erhielten. Dass diese aber überhaupt noch existiert, ist wirklich ein großes Glück und letztlich ein reiner Zufall. Als Adolf Hitler im Jahr 1938 die Stadt Frankfurt besuchte, drängte die nationalsozialistische Stadtregierung darauf, das Frankfurter Original der Goldenen Bulle Hitler als Gastgeschenk darzureichen. Am Ende erhielt er dann aber nur eine deutsche Übersetzung aus dem 15. Jahrhundert zum Geschenk. Das ist schlimm genug, denn dieses wertvolle Dokument ist verschollen und nie wiederaufgetaucht. Es mag eine göttliche Fügung sein, dass das lateinische Original aus dem 14. Jahrhundert nicht zu den zahlreichen Verlusten zählt, die wir durch den Nationalsozialismus und den Zweiten Weltkrieg zu beklagen haben.

---

[16] Dazu zahlreiche Arbeiten von Armin Wolf, einen guten ersten Überblick gewährt ders., Wolf, Armin: *Die Entstehung des Kurfürstenkollegs, 1198–1298. Zur 700-jährigen Wiederkehr der ersten Vereinigung der sieben Kurfürsten*. Schulz-Kirchner Verlag, Idstein, 1998. 2. bearb. Aufl. 2000.

[17] Art. 15 (124f.).

[18] Art. 28 (138f.).

Auch wenn es Karl IV. gelang, die königliche Machtposition durch die Goldene Bulle zu festigen, so konnte er sich doch nicht in jedem Punkt durchsetzen. Die Privilegien der Kurfürsten fanden ebenfalls Festigung und Anerkennung. Hiervon allerdings profitierte Karl IV. auch selbst, war doch auch er als König von Böhmen einer der sieben Kurfürsten, und zwar nicht gerade ein unbedeutender. Auf diese Weise konnten sich wichtige regionale Machthaber ihre Positionen in einem zentralen Dokument der Reichsverfassung dauerhaft sichern. Der Föderalismus, der Deutschland prägen sollte und bis heute prägt, findet hierin seinen Ausdruck. Deutschland wurde nie ein Zentralstaat, so wie etwa England oder Frankreich, was seine Vor- und Nachteile hat. Jedenfalls war eine kulturelle und sprachliche Vielfalt schon im Jahr 1356 angelegt. Dies kommt zum Ausdruck in einer Regelung zum Sprachunterricht für die jungen Erben von Kurfürsten.[19] Sie sollen neben ihrer deutschen Muttersprache mit dem Beginn ihres siebten Lebensjahres zusätzlich Unterricht in der lateinischen, der italienischen und der slawischen Sprache erhalten. Bis zu ihrem 14. Lebensjahr sollten sie alle diese vier Sprachen beherrschen. Das Heilige Römische Reich war erklärtermaßen vielsprachig und multikulturell. Für mittelalterliche Könige war das offenbar kein Problem.[20]

[19] Art. 31 (141f.).
[20] Laufs, 2012. 448.

Kelemen Roland
senior lecturer, Széchenyi István University, Győr

HISTORICAL OVERVIEW OF THE INSTITUTION POSSE COMITATUS FROM ITS ENGLISH ORIGINS TO THE POSSE COMITATUS ACT

1. Introduction

The posse comitatus is an ancient English institution that allowed the sheriff to summon (call upon) men over the age of fifteen to preserve peace, enforce laws, suppress riots, and apprehend criminals.[1]

According to the traditions of the institution, the local community has the right to collectively apprehend and bring to court individuals who disturb the peace of the community. This right was utilized by feudal rulers in the absence of law enforcement agencies to maintain public security, reaffirming the citizens' right multiple times. Over the centuries, however, the institution of posse comitatus has taken on other meanings too, such as the right to bear arms as a necessary basis for the implementation of the Magna Carta's resistance clause, or the tightening of the capture of fugitive slaves in the United States.

This paper aims to present the institution of the posse comitatus, focusing mainly on its development in the United States in the 18–19th centuries. An outline of its English roots and basic characteristics is also essential for an understanding of the legal institution. Its adaptation in the United States of America will show that its expanded interpretation has, in several periods, created the possibility for the executive to use military force domestically against its own citizens.

2. The Origins and Development of Posse Comitatus in England

The institution of the posse comitatus is traced back to the 9th century, to the time of Alfred the Great. Early sources wrote that the (royal) Reeves[2] led armed troops to pursue thieves. The reeve was the predecessor of the sheriff in the Anglo-Saxon period, responsible for

---

[1] Jenkins, John Philip: *Posse comitatus.* Encyclopedia Britannica, 31 Mar. 2016. https://www.britannica.com/topic/posse-comitatus

[2] It is worth distinguishing the reeve appointed by the king from the reeve in the administration of the estate, who is very similar to the Hungarian housekeeper. In rural England, the most important person in the administration of the manor was the reeve. He was one of the three chief officers; along with the steward and the bailiff. The reeve was himself a serf, elected by the other serfs. He was responsible for all activities on the estate, as well as for the livestock. See also *Reeve*. Writer's Perspective, 2016. November 6. https://aprilmunday.wordpress.com/2016/11/06/the-reeve/

speaking county taxes, adjudicating and keeping the peace. The position was created in the period of the heptartica (meaning the seven kingdoms) in an effort to organise a territorial (county) administration that obeyed the king and mediated the royal will.[3] The term 'sheriff' is a combination of the words 'shire' and 'reeve', which is recorded in sources dating from before the reign of Alfred, but which became established from then on, thanks mainly to the reforms of the reign.[4]

Alfred the Great implemented two relevant reforms in order to build up effective self-defence against continuous Viking attacks. One was the organisation of militias. He envisaged that every free man should have the ability to use arms in order to defend the local community and the state.[5] His other reform concerned the sheriff's office. It fixed the boundaries of counties and made them the basic units of state self-defence. The sheriff was an important part of this system, so in many places he was the head of the local militia and of course the holder of the posse comitatus, the right to call together those in arms in the county, and therefore had control over the power or force of the county.[6]

The basis of the posse comitatus was the same as in other Germanic tribal states, namely the right and duty of free men to bear arms[7] and to use them in the interests of the tribe. It is therefore likely that the institution of the posse comitatus was not created by Alfred the Great, but rather by his centralising activities and efforts to make state defence more effective, which went hand in hand with recognising the right to bear arms.

By the Norman period, both institutions were fully established. The Leges Henrici Primi of 1115, a law of Henry I which summarised and confirmed the previous law, reserved the right of criminal jurisdiction to the king, but gave the right of investigation and arrest to the sheriff, who could use the posse comitatus to ensure its effectiveness. In 1181, Henry II required all free men to carry arms. This document was a confirmation of his decree of 1154 which, in addition to the above, expected all those with arms to be obliged to defend their rights and customs.[8]

King John of England also curtailed these rights in the period before the Magna Charta was issued, in order to obtain more shield money (scutage) and to build up a more effective army. Dissatisfaction with the actions of the monarch led, as we know, to the publication of the Charter, which is significant for the subject of this study because Article 61 of the Charter proclaimed the right of armed resistance, which essentially maintained the freedom to bear arms for free men in the centuries to come, since without this right, this section would have been meaningless.[9]

---

[3] Abels, Richard: *Alfred the Great. War, Kingship and Culture in Anglo-Saxon England*. Longman, London, 1998. 268–274.

[4] Kopel, David B.: *The Posse Comitatus and The Office Of Sheriff. Armed Citizens Summoned To The Aid Of Law Enforcement*. Journal of Criminal Law and Criminology, 2015/4. 769.

[5] Abels, 1998. 194–208.

[6] Kopel, 2015. 771–772.

[7] Härke, Heinrich: *The Rite to Bear Arms.* Handgunner, 1996/ April–May, 46–53.; Ferdinandy Gejza: *A királyi méltóság és hatalom Magyarországon*. Kilián Frigyes M. K. Egyetemi Könyvárús Kiadás, Budapest, 1895. 138.

[8] Hays, Stuart R.: *The Right to Bear Arms. A Study in Judicial Misinterpretation.* William & Mary Law Review, 1960/2. 384.

[9] McKechnie, Williem Sharp: *Magna Carta. A Commentary on the Great Charter of King John.* James Maclehose and Sons, Glasgow, 1914. 465–477.

This was in contrast to the Stuart monarchs' ambition to use the shield money to create their own standing army. And after the Stuart Restoration, James II and Charles II raised an even larger army. In addition, Charles II forbade the right to bear arms to anyone who did not own land at a rent of at least a hundred pounds. However, the Bill of Rights issued after the Glorious Revolution reaffirmed this right for English citizens.[10]

The idea of the bearing of arms and of the citizen being employed to maintain law and order is deeply embedded in the English constitutional tradition, and was still evident in two institutions in the 19th century. This was necessary because, as Dicey explained, the English constitution did not recognise the institution of martial law,[11] which had only been used in the territories outside the mother country after the Petition of Rights.[12] They therefore had to resort to other means of maintaining internal order. One such instrument was the Riot Act, which was designed to break up assemblies that were unlawful and threatened public order and safety.[13] According to Dicey, it was not only the government that had the right and duty to act, but also the quiet citizens, who could therefore maintain public order even at the cost of the necessary sacrifice of blood and property.[14] The domestic applicability of the army was derived from this principle and confirmed by Justice Holroyd in Redford v Birley, when he argued for the applicability of the army on the basis that the law did not distinguish between private citizens and soldiers. A soldier is still a citizen with the same duties and powers, which are none other than to keep the King's peace. So if one citizen is obliged to intervene when called upon, so is the other; if one can use arms where arms are needed, so can the soldier in such situations. Of course, like civilians, soldiers were required to act in subordination to civilian authorities, but if the danger was urgent and immediate, they were obliged to do whatever they deemed necessary to avert disturbances and to protect human life and property.[15]

The other institution is the preservation of the posse comitatus as a sheriff's power. The Sheriffs Act 1887 provided that every person in the county should be ready to attend the arrest of a criminal on the sheriff's warrant. Any person who failed to do so was guilty of an offence.[16] However, although this option had been in place for almost a century, the

---

[10] Hays, 1960. 386.

[11] Dicey, Albert Venn: *Bevezetés az angol alkotmányjogba.* Magyar Tudományos Akadémia Könyvkiadó Vállalata, Budapest, 1902. 266–267.

[12] Finlason, William Francis: *Martial Law.* Law Magazine and Review, 1872/May–June. 4.

[13] In order to exercise it legally, at least twelve persons were required to take part in an unlawful assembly which, in the opinion of the authorities, was a threat to public order. In such cases, the justice of the peace, or his deputy, the mayor or other official, could order its dissolution. A proclamation to this effect was read before the assembly. The proclamation had to quote the law precisely, as failure to do so could invalidate the proceedings. If the participants did not cease their unlawful act within one hour, they had committed an act of disloyalty, and the police, or the military if necessary, or other individuals called upon to do so, could disperse the assembly by force, even by the use of weapons. *An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters.* https://web.archive.org/web/20090211132844/http://reactor-core.org/riot-act.html

[14] Dicey, 1902. 266.

[15] Wise, Edward: *The Law Relating to Riots and Unlawful Assemblies. Together with a View of the Duties and Powers of Magistrates, Police Officers, Special Constables, the Military, and Private Individuals, for their Suppression; and a Summary of the Law as to Actions Against the Hundred.* Shaw and Sons, London, 1848. 74–75.

[16] An Act to consolidate the Law relating to the office of A.D. 1887. Sheriff in England, and to repeal certain enactments, relating to Sheriffs which have ceased to be in force or have become unnecessary. https://www.legislation.gov.uk/ukpga/1887/55/pdfs/ukpga_18870055_en.pdf

rapid development of law enforcement since the early 19th century had rendered it relative,[17] and the Criminal Law Act 1967 consigned this right to history.[18]

3. Posse Comitatus in the North American Colonies and the United States Until After the Civil War

The emerging colonies in the North American territories were also familiar with the institution of the posse comitatus and the sheriff, and it was natural to adopt them. However, there was a significant difference in principle, for while in the mainland it was a royal prerogative, i.e. a means of enforcing the will of the centre, here it was more an embodiment of self-government.[19] The American colonies were largely frontier territories in the 17th and 18th centuries, so it was in everyone's interest to arm the population, as it was a way for smaller communities to protect themselves from Indian attacks.[20] Hence the posse comitatus was used to organise colonial militias. The first was in 1636 near Massachusetts against the threat of the Pequot Indians.[21]

During the constitution-making process, a dispute arose between federalists and anti-federalists over the powers to be granted to the federal government, including the question of posse comitatus. The anti-federalists did not want the federal government to be able to dispose of militias and regular military forces or to use them against the member states. It is therefore no accident that the Constitution does not provide expressly for posse comitatus. This is why the federalist states were initially reluctant to accept the constitution. However, Hamilton, in the 29th Federalist Letter, argued that the necessary and proper clause of the constitution[22] included the institution of posse comitatus. This has been adopted in constitutional practice. In fact, as Supreme Court Justice Joseph Story explained, the next level of action for the maintenance of peace and security in the event of inadequacy of posse comitatus is the use of the militia or the armed forces.[23] This is essentially reflected in the second amendment to the Constitution, which declares: "well armed and well regulated militia being the best security of a free country: but no person religiously scrupulous of bearing arms shall be compelled to render military service in person".[24] The right to bear arms, posse comitatus and militias were thus constitutionally intertwined, and for a time the possibility of the internal use of military force was linked to it.

The United States Constitution contains neither an express authorization nor a prohibition of posse comitatus and its English Riot Act interpretation, i.e. the use of the armed forces against civilians. The first Congress, although it was rejected in principle, was quick to provide for the possibility of posse comitatus: the circumstances in which the militia could be used against

[17] Smith, Daniel: *The History of Firearms in the British Police.* Historic UK. 26. November 2019. https://www.historic-uk.com/HistoryUK/HistoryofBritain/Firearms-in-the-British-Police-Force/

[18] Criminal Law Act 1967. https://www.legislation.gov.uk/ukpga/1967/58/pdfs/ukpga_19670058_en.pdf

[19] Kopel, 2015. 792.

[20] Härke, 1996. 388.

[21] Jenkins, 2016.

[22] Spalding, Matthew: *Az amerikai függetlenségi nyilatkozat és alkotmány alapelvei.* Századvég, Budapest, 2011. 59–60.

[23] Kopel, 2015. 794–795.

[24] Second Amendment to the United States Constitution.

civilians if necessary. These powers could be divided into two main categories: the first, broadly interpreted, was the authorization of the President to suppress rebellions and insurrections. The second was the power of the armed forces to assist civil law enforcement authorities.

The first made it possible to deal effectively with early rebellions, which was finally finalised by legislation in 1807. The second was a wide range of powers of a law-enforcement nature. The coexistence of the two interpretations at federal level was both necessary and logical in this period.

On six occasions in the decades following the Revolutionary War, state or federal governments sent military troops to suppress rebellions, always after seeking authorisation from the legislature. And in granting that authority, they always followed the precedent set by Massachusetts Governor James Bowdoin during Shays's Rebellion in 1786, when he ordered the state militia to act only on the orders of civilian officials, and thus state and federal law enforcement agencies restored order with military assistance.[25]

Shays' Rebellion highlighted the need for a federal solution, but the final push came from the Whiskey Rebellion, sparked by the 1791 excise tax on spirits. This in turn created a major problem for farmers on the western frontier, who were already struggling with Indian raids. Organised resistance began in July 1791 with a meeting at Fort Redstone. They refused to pay the tax and in several cases attacked the tax collectors, in some cases turning them into tar and feathers. The revolt spread like wildfire, so President Washington issued a proclamation in 1792, although it became clear that the issue could no longer be settled peacefully.[26] Congress had to act to provide an effective defence while upholding the constitutional principles[27] of the newly formed state. On 2 May 1792, the legislature passed the First Militia Act. This act gave the president the power to call out the various state militias in the event of an invasion or threatened invasion of the United States, or if a conspiracy of such magnitude arose in any state that the local regular civilian authorities could not handle it.[28] In addition, the Civil Disturbance Regulation was created in 1792, which allowed the marshal to call in the military to maintain order or apprehend a criminal.[29] These two acts created the possibility of a type of action against internal resistance or rebellion that seriously challenged public order, where the President could call upon both the militia and the federal military.

Some thirteen thousand militiamen from the surrounding states marched with President Washington to put down the rebellion; no actual battle took place, but nearly one hundred and fifty rebels were arrested, most of them released for lack of evidence. Only two were convicted of sedition and later pardoned. Washington made use of this power, but it clearly did not lead to excesses, and although this presidential power of the Act of 1792 only lasted for two years, it was made permanent by Congress in the Militia Act of 1795.[30]

---

[25] Dennison, George M.: *Martial Law. The Development of a Theory of Emergency Powers, 1776–1861.* The American Journal of Legal History, 1974/1. 55–56.

[26] Hogeland, William: *The Whiskey Rebellion. George Washington, Alexander Hamilton, and the Frontier Rebels Who Challenged America's Newfound Sovereignty.* Scribner, New York, 2006.

[27] Beke-Martos Judit: *Az Amerikai Egyesült Államok. Egy egyedülálló kísérlet.* In: Beke-Martos Judit (szerk.): Összetett állammodellek és a hatalommegosztás elve. Gondolat Kiadó, Budapest, 2022. 112–125.

[28] Militia Acts of 1792. https://www.mountvernon.org/education/primary-source-collections/primary-source-collections/article/militia-act-of-1792/

[29] Engdahl, David E.: *The New Civil Disturbance Regulations. The Threat of Military The New Civil Disturbance Regulations. The Threat of Military Intervention Intervention.* Indiana Law Journal, 1974/4. 583–590.

[30] Militia Act of 1795. https://www.loc.gov/resource/rbpe.22201300/

Two events in the following years deserve special mention. The first, during the presidency of John Adams, was the Fries Rebellion (1799), which also erupted over taxes. Hundreds of farmers took up arms under the leadership of John Fries, who was captured by the Confederates and sentenced to death for treason, but was pardoned by President Adams in 1800.[31] The Burr Rebellion was notable in Jefferson's time. Aaron Burr, as third vice-president of the United States, allegedly used his international connections to create a separate state in the south-western United States with the support of American planters, politicians and some army officers. He was arrested for this in February 1807 on the orders of Thomas Jefferson. The action was carried out by General Wilkinson. Burr was acquitted of treason by the court.[32]

Recent events have made it clear that presidential powers in such cases need to be clarified again, as General Wilkinson, ignoring habeas corpus writs issued by local courts, carried out presidential orders and the Supreme Court, led by John Marshall, had to intervene. The legislature declared the practice established in the past and passed the Insurrection Act of 1807, which still did not allow the suspension of habeas corpus by the President and the imposition of martial law, but it did provide that in case of insurrection or obstruction of the execution of the laws, the President of the United States may lawfully employ the militia of the States and the land and naval forces of the United States to the extent necessary, but he must do so within the limits of the law, i.e, leaving intact the subordination of the military to civil power.[33]

The use of the institution for law enforcement and state self-defence was justified in the early period, but by the end of the era the two institutions had become separated, so that in the following decades the use of posse comitatus at the federal level became rare and sporadic, and in this context the federal authorities did not instruct local authorities with posse comitatus powers, such as county sheriffs.[34] During this period, it was mainly the federal courts that called upon the military to enforce their decisions or to provide protection for the courthouse when judging certain cases. And in the western frontier, for a very long time they were essentially the sole law enforcement agency. In the electoral process, they were also given a task, namely to guard the polling stations.[35]

The interpretation of the institution of posse comitatus was again broadened in 1850. In 1849, California applied to join the Union, which would have upset the balance of slave-owning and non-slave-owning states in the Senate. This in turn precipitated a constitutional crisis. The 31st Congress had to deal with a number of thorny issues accordingly. These included the accession of California as a free state, the organization of the territories acquired from Mexico, the border dispute between Texas and New Mexico, and the question of slavery, including action against fugitive slaves. The public mood was that the Union was in danger of breaking up, which some representatives of the northern states wouldn't have minded at the time. President Zachary Taylor was powerless to resolve the situation, so

[31] Longley, Robert: *What Happened During the Fries Rebellion of 1799? The Last of Three American Tax Revolts.* ThoughtCo. 27. November 2020. https://www.thoughtco.com/fries-rebellion-tax-revolt-4151992

[32] Stewart, David O.: *American Emperor. Aaron Burr's Challenge to Jefferson's America.* Simon & Schuster, New York, 2011.

[33] Insurrection Act of 1807. https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/2/STATUTE-2-Pg443a.pdf

[34] Kopel, 2015. 796.

[35] Campisi, Dominic J.: *The Civil Disturbance Regulations. Threats Old and New*. Indiana Law Journal, 1975/4. 767–770.

a few prominent members of the legislature – Henry Clay, Daniel Webster and Stephen Arnold Douglas – tried to break the deadlock. On 29 January 1850, Henry Clay introduced an eight-point bill in the Senate in an attempt to reach a compromise that would avoid a deeper crisis between the North and the South. The seventh point of the bill called for more effective prosecution of fugitive slaves.[36]

According to southerners, this was necessary because fugitive slaves were often supported by northern abolitionists. For example, the Vigilance Anti-Slavery Committee in New York State reported that its members had helped one hundred and fifty-one slaves escape in 1849. As a result, Southerners increasingly demanded stricter legislation. Although the first Fugitive Slave Act of 1793 provided that fugitive slaves should be returned to their owners by non-slaveholding states, in many cases this was not done. Slaveholding states that bordered non-slaveholding states, such as Maryland, Virginia, Kentucky and Missouri, suffered the most, but it was the representatives of the more southern states who called for stricter enforcement.[37]

Finally, laws passed as part of the Constitutional Reconciliation of 1850 provided for the abolition of the slave trade in Washington, the admission of California to the Union, the establishment of local governments in Utah and New Mexico, the settlement of the Texas-New Mexico boundary dispute, and the amendment of the fugitive slave laws to favour the South.[38]

The Fugitive Slave Act of 1850 brought a major change in the application of posse comitatus from previous decades. Under Section 5 of the Act, the authorised officer was the marshal and his deputy, i.e. a federal officer. They had the duty to carry out the orders of the court, i.e. to arrest and return the fugitive slaves, and if they failed to do so, whether through negligence or wilfulness, they could be heavily fined. If they considered it necessary, they could call upon the community of the county concerned, i.e. the posse comitatus, to enforce the judicial decision. This section of the law explicitly stated that all citizens were obliged to obey this order and to assist and support its swift and effective execution.[39] Thus, citizens of non-slave-holding states were also obliged to participate in the capture of fugitive slaves in their territory, if posse comitatus was ordered. This was contrary to the basic purpose of the institution, which was set up to enable the local community to deal with those who threatened public safety, but this provision of the act essentially turned them into an extended arm of the Southern slave owners.[40]

However, after the law came into force, only abolitionist groups opposed the implementation of the law, but at least as large a proportion of the population was understanding of the Southerners' grievances and actively supported its implementation, while a large majority of society, while disagreeing with the provisions of the law, acquiesced in it for the sake of the Union's unity.[41] The turning point came after 1854 with the passage of the Kansas-Nebraska Act. The Act created Kansas and Nebraska, but it required the

---

[36] Campbell, Stanley W.: *Slave Catchers. Enforcement of the Fugitive Slave Law. 1850–1860*. University of North Carolina Press, Chapel Hill, 1968. 3–5.

[37] Campbell, 1968. 6–8.

[38] Russel, Robert R.: *What Was the Compromise of 1850?* The Journal of Southern History, 1956/3.

[39] Fugitive Slave Act 1850. https://www.battlefields.org/learn/primary-sources/fugitive-slave-act

[40] Kopel, 2015. 797.

[41] Campbell, 1968. 50–79.

support of southerners in the legislature, who initially refused to agree to create territories where slavery would have been prohibited by the Missouri Compromise, which prohibited slavery in areas north of 36°30' N latitude. With the passage of the Act, this Compromise was overturned and it was left to the discretion of the inhabitants of the area to decide whether or not slaves could be kept in the area. As a result, pro-slavery and anti-slavery activists flocked to the area, eventually resulting in bloodshed between them. This in turn caused irreversible divisions between North and South.[42] This was compounded by the sometimes extremely brutal treatment of fugitive slaves. Thus, increasingly, the posse comitatus could not be used as members of local communities resisted, and more and more the force enforced the law. In such cases, it was argued that the soldiers were not participating in the posse comitatus call as members of the force, but as citizens.[43]

The use of military force by civilian authorities became standard practice. However, it was not until the reconstruction period following the Civil War (1865–1877) that the institution again had a significant political resonance. The amendments to the Insurrection Act of 1807 were particularly important, as the 1861 amendment allowing the President to use such measures against the will of the states in the event of rebellion against the authority of the US government became the public policy basis for post-Civil War reconstruction. The Civil Rights Act of 1866, which granted citizenship to formerly enslaved people of colour, also authorised the use of posse comitatus to uphold its provisions, meaning the use of military force in such circumstances.[44] The 1871 amendment to the Act was originally intended to protect citizens of colour from the Ku Klux Klan. Similar to the way the 1850 Act had been passed in the North before, it provoked opposition in the South, so the military was called in here, for the same reason as before, that these were in fact persons performing their civil duty.[45]

Real change came with the presidential election of 1876. In the southern states, the marshals were assisted by the military to enforce the provisions of the Electoral Act. Because the law required that former Confederate officials be prevented from voting. The election was eventually won by the Republican candidate Rutherford B. Hayes by a very close margin, but it is widely believed that the large deployment of troops intimidated Southern voters. Thus, in 1878, the resulting Congress – with a Democratic majority – passed the Posse Comitatus Act.[46]

The Posse Comitatus Act ended the possibility of an expansive interpretation of the institution of posse comitatus, and allowed the internal use of the armed forces only in cases authorized by the Constitution and by an act passed by Congress. Violators could be subject to a substantial fine and/or imprisonment for up to two years.[47]

---

[42] Sutton, Robert K.: *The Wealthy Activist Who Helped Turn "Bleeding Kansas" Free.* Smithsonian Magazine. August 16. 2017. https://www.smithsonianmag.com/history/wealthy-activist-who-helped-turn-bleeding-kansas-free-180964494/

[43] Kopel, 2015. 797.

[44] Bank, William C.: *Providing „Supplemental Security. The Insurrection Act and the Military Role in Responding to Domestic Crises.* Journal of National Security Law & Policy, 2009/1. 42.

[45] Kopel, 2015. 801.

[46] Felicetti, Gary – Luce, John: *The Posse Comitatus Act. Setting the record straight on 124 years of mischief and misunderstanding before any more damage is done.* Military Law Review, 2003/March. 109.

[47] Posse Comitatus Act of 1878. https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/20/STATUTE-20-Pg145.pdf

However, the Posse Comitatus Act does not cover the militia (from 1916 the National Guard), as they are under state control until called into federal service, and can be authorised to restore public order by order of the Governor. It should also be pointed out, as William Winthrop has highlighted, that notwithstanding the Posse Comitatus Act, the President could invoke the provisions of the Insurrection Act,[48] so that the armed forces could still be used domestically in cases of insurrection, rebellion, and mass unlawful acts that obstructed the enforcement of federal laws or deprived citizens of rights guaranteed by the Constitution,[49] and in cases of the need for support of state militia.

4. Afterword

The posse comitatus is an ancient Anglo-Saxon right of the community to take collective action to bring individuals who are disturbing public safety before a lawful body. The posse comitatus has come a long way and, at one time, was interpreted in both states under review as an extension of the domestic use of the armed forces.

In the United Kingdom, through the Riot Act, its expanded conception was in force longer (until 1973) than its traditional interpretation, the county power as a sheriff's power, since it was repealed by the Criminal Law Act 1967.

In the United States, posse comitatus has been interpreted broadly in the early federal government and in the pre-Civil War and post-Civil War periods. This transitional state of affairs was brought to an end by the Posse Comitatus Act in a manner that appears to have been definitive. However, the ancient meaning of posse comitatus persisted after the Act, and even lived its heyday in the Wild West thereafter. Today, Colorado has such communities in nearly twenty county sheriff's offices, but they are now organized on a voluntary basis rather than by call.[50]

The purpose of the Posse Comitatus Act was to ensure that the federal forces could not perform law enforcement duties, or could only do so on a limited basis. This was illustrated by the 1878 incident in New Mexico when a band of bandits terrorised the local population. The governor asked the local military commander to assist in arresting the criminals, but he refused, citing the Posse Comitatus Act, arguing that the law prohibited the military from assisting in ordinary arrests. Eventually, the situation escalated to the point where the intervention of the armed forces was necessary. The Ministry of Defence also pointed out that the Posse Comitatus Act prevented the crisis from being resolved at a lower level of escalation.[51] A constant criticism of the law to this day is that it hinders effective law enforcement or, for example, the fight against terrorism. The internal use of military force remains. In the four decades following the adoption of the Act, the army was used to break major strikes, culminating in twenty-nine actions against labour movements in 1919/1920.[52]

---

[48] Elsea, Jennifer K.: *The Posse Comitatus Act and Related Matters. The Use of the Military to Execute CivilianLaw.* 2018. 22. https://fas.org/sgp/crs/natsec/R42659.pdf

[49] This was invoked in enforcing school desegregation orders in Mississippi (1962) and Alabama (1963).

[50] Kopel, 2015. 808–812.

[51] Elsea, 2018. 39.

[52] Elsea, 2018. 34–36.

László Balázs
lecturer, University of Pécs

THE LEGAL STATUS OF THE MONARCH IN THE GOLDEN BULLS OF ANDRÁS II

1. Introduction

When talking about the Golden Bulls of András II – the decree of 1222[1] and that of 1231[2] – both historical literature and the general public usually put emphasis on their articles declaring and confirming the rights and privileges of the royal servants (or the optimacy in some measure) and the Church. Even legal historians often describe them – and mainly the first and most well-known one, the Golden Bull of 1222 – as some kind of an early written constitution or the fundamental charter of the feudal constitution.[3] The reason for this is that while some historians clearly recognize, that these decrees in fact did not have a significant legal effect in the 13th century – what is more, they were quite ignored and forgotten[4] –, the majority of the historians (over-)estimates these Golden Bulls in the light of the afterlife of the decree of 1222 from the middle of the 14th century when it was rediscovered and – by certain political interests – became a base of references.

József Holub delivered quite a progressive opinion on the interpretation and evaluation of the provisions of the Golden Bull: 'when we examine its significance, we must take good care of ignoring all those theories which were related to it later and only keep in mind the real circumstances of its formation and the political situation of which the consequence it was'.[5] Even for *Holub,* it was however quite difficult to comply with these frames. He was correct to recognize, that the Golden Bull is a statute according to the contemporary interpretation as the source of its provisions is the royal will, and its purpose was not to

[1] Endlicher, Stephanus Ladislaus (ed.): *Rerum Hungaricarum Monumenta Arpadiana.* Scheitlin & Zollikofer, Sangalli, 1849. 412–417.

[2] Endlicher, 1849. 428–433.

[3] Horváth Attila (ed.): *Magyar állam- és jogtörténet* [Hungarian legal and constitutional history]. Nemzeti Közszolgálati Egyetem, Budapest, 2014. 44–45.; Varga Zs., András: *Alkotmányosságunk élő jogforrása, az Aranybulla* [The living source of law of our constitutionalism, the Golden Bull]. Alkotmánybírósági Szemle, 2022/1. 44.

[4] Degré Alajos: *Magyar alkotmány- és jogtörténet. Készült Dr. Degré Alajos egyetemi tanár 1950/51. tanévben tartott előadásai nyomán* [Hungarian legal and constitutional history. By lectures of professor Alajos Degré given in the 1950/51. sessions]. Publikon Kiadó – PTE ÁJK, Pécs, 2009. 65–66.; Marczali, Henrik: *Világtörténelem, magyar történelem* [World-history, Hungarian history]. Gondolat Könyvkiadó, Budapest, 1982. 80–81.

[5] Holub, József: *A magyar alkotmánytörténelem vázlata I. A legrégibb időktől a mohácsi vészig* [Drafts of the Hungarian contitutional history. From the earliest times to the disaster of Mohács]. Dunántúl Pécsi Egyetemi Könyvkiadó és Nyomda R.–T., Pécs, 1944. 91.

limit the royalty or to grant further privileges to the royal servants.[6] On the other hand, he describes the Golden Bull as some kind of agreement as it is a privilege established and set out after negotiations between the monarch and his greater subjects, and also emphasizes, that some of its provisions concerning the realm and protecting the royalty 'are quite peculiar, as they represent how little the oppositionists coming into power considered their own interests and how little they wanted to take adventage of the political circumstances'.[7]

The 800th anniversary of the Golden Bull of 1222 makes a good opportunity for us to try to re-find and re-interpret the perspectives of examination required by *József Holub* and to examine the Golden Bull of 1222 – and the decree of 1231 often (but incorrectly) called 'the renewal of the Golden Bull' – in their own essence ignoring all the theories and narratives later related to them. This time – on occasion of the anniversary – the reason for this is not to explain whether the decrees of András II really grant further privileges and allowances to the recipients or not, nor to examine the real effect of these provisions. On the other hand, it is the remarkable anniversary after all, that makes it important and appropriate to seek for a fuller recognition and a subtler evaluation of this 800-year-old piece of our history, by examining the provisions of the Golden Bulls of András II not only in the usual way, from the aspesct of the recipients but also in a different light, from the aspect of the monarch and the royalty.

2. The Goldan Bulls as sources of law

In accordance wirh the usual distinction of the medieval written sources of law, the Golden Bulls of András II are usually regarded as decrees, as both consist of general rules of behaviour.[8] After reading these decrees, we can obviously find, that they consist of mandatory rules of behaviour indeed. Further legal characteristics of the decrees of 1222 and 1231 can be found in their preliminary texts – hardly varying from one another – preceding their main regulations.

Beyond their new regulations the preliminary texts of both the decree of 1222 and that of 1231 refers to the liberties of nobles and other dependants (in 1231: barons and servants of the realm) established by the Holy King, István I (the Saint). These references may however point not only to the decrees of István I but also to the conventions of customary law, elements of which – by sometimes also being conventionally ascribed to the Holy King – may also bring a strong legitimation. There is however a not overthinkable but not much insignificant difference between the events and processes leading to the establishment of the decree of 1222 and that of 1231.

Through the statutory promises and the resistance clause of the Golden Bull of 1222, András II further limited the royalty to some extent. It means, that if the king infringes the liberties granted in that decree, the recipients enumerated in the resistance clause may plead not only their rights and privileges granted by the former kings or the customs but also the Golden Bull itself. Although their contents are quite similar to each other, the decree of 1231 does not cite the Golden Bull of 1222, and the later decree is not a simple transcription

[6] Holub, 1944. 90–91.
[7] Holub, 1944. 88., 90.
[8] Béli Gábor: *Árpád-kori törvényeink* [Statutes of the Árpád era]. JURA, 2000/1–2. 35.

or confirmation of the former one, as the later consists of more regulation in some ways and less in others. Thus the usual designation of the decree of 1231 'the renewal of the Golden Bull' seems incorrect. The second Golden Bull is more likely another declaration of former liberties and unredeemed promises induced by the actual political circumstances.

In both decrees, the higher secular dependants are clearly and definitely no more than petitioners, while the king is the one that – desiring to fulfil their requests in all respects – salubriously ordains. There is no sign of an agreement or a mutual act of legislation of the monarch and his dependants (or some kind of their parties). Anyway, we can not find any signs of this kind of agreements in the written documents of that era, in the first half of the 13th century there were not any entities (incorporating the whole of the dependants or at least some of their parties) which could be opposable or commensurate to the monarch as a contracting party in the sense of public law. Thus it is the reasonable discretion of the monarch of protecting his own political interests (and not an organized and legally provided feudal action of the higher secular dependants) that stands in the background of the regulations of András II. An evidence of that can be found in the preliminary text of the Golden Bull when it refers to the requirement of the better preservation of the royal dignity. It also means, that the phrase of both the decrees of 1222 and 1231 '*ut tenemur*' does not refer to the limitation of the royalty or an obligation based upon (public) law, but one based on policy.

According to the interpretations of 'statute' and 'legislation' in the Árpád era, in the frames of the theoretically unlimited royalty of the 'personal monarchy', the royal will establishing mandatory rules of behaviour is – irrespective of its form of appearance – a statute,[9] and it is fully binding for everyone and at all times. This quasi-definition also means, that the monarch can not establish any laws inferior to statutes, and there is no hierarchy of the laws established by the monarch. Thus the Golden Bull can not be considered to be a fundameltal law or some kind of constitution superior to other statutes of the Árpád era.

3. Resistance clause and righ of resistance

Beyond their characteristics as sources of law, another crucial point of the characteristics and legal essence of the Golden Bulls of András II is the resistance clause. However when we examine and interpret these clauses, we can not ignore the statements of the previous part of these decrees, the so-called *corroboratio*.

In the corroboration clause following the substantive regulations of the Golden Bull of 1222, the king ordains, that his grant and ordinance shall be valid in his time as well as in that of his successors in perpetuity. He adds, that the nobles and others should not deviate from it while enjoying their liberties, they should remain ever faithful to him and his successors and hold not refuse the obligations rightly due to the royal crown. It shows, that in fact András II wanted this decree to be the guarantee of his own prerogatives at least as much as it may be a guarantee of the liberties of the royal servants, thus the Golden Bull strengthens the royalty in many ways.[10] In this sense, the well-known resistance clause

[9] Béli, 2000. 44.
[10] Marczali, 1982. 79.

of this decree – by which the bishops, other barons and the nobles, singularly and also in common, have the right to demand the enforcement of their statutory rights and allowances from the king without the charge of high treason – is the reasonable consequence of the fact, that the regulations of the Golden Bull consist of the will and commitments of the monarch, who recognizes these regulations to be binding on himself as well.[11]

The resistance clause of the Golden Bull of 1222 seems to be quite extensive, thus it seems to limit the royalty significantly. We can not ignore the fact however, that the Golden Bull itself does not describe how to rightfully exercise the right to resist and speak against the king (or his successors) without the charge of high treason. Moreover, we can not find any contemporary written sources describing it. In respect of this resistance clause, the description given by *Mihály Párniczky* – according to which the king ab ovo did not want some of the regulations of the Golden Bull to have real effect and limit the royalty that much, thus the wording of the decree is wilfully quite imprecise[12] – seems to be mostly correct. Namely, in the age of the 'personal monarchy' one should have been quite bold to openly oppose or resist the will of the king based only on the indefinite wording of the Golden Bull, without any explicit and well-known order of resistance procedure defined by statutory or customary law.

The resistance clause of the decree of 1231 is quite different from that of the Golden Bull of 1222. The *corroboratio* of the later decree emphasizes that beside the king his sons also acknowledge the binding force of its regulations, and they all ratify it with a common oath and their own seals.

The resistance clause following this – without any mention of the bishops, barons os nobles – declares that if the king or his sons or successors attempt to infringe the liberties granted in the decree, the archbispoh of Esztergom 'shall have the authority, after proper warning, to bind them in the chains of excommunication'. What was quite an empty declaration nine years earlier, becomes here – at least as a statutory regulation – real and enforceable right of resistance, as an order of resistance procedure is finally defined.

In the Árpád era, the threat of ecclesiastical punishment can not be considered to be of low importance. Besides reasonable discretion and political interests of the monarch, another real and effective limit of the royalty, and at the same time, one of the most significant characteristics of its legitimation is that the king of Hungary is a Christian king. This ideal – in the words of *József Deér* – means, that 'despite his authority of blood, the monarch does not enjoy such irresponsibility as his pagan ancestors; he may govern his people severely or even in despotic ways, but just as long as his actions comply with the ideal of gracious, just and peaceful kings, as he clearly respects the divine laws, and as he protects and enforces and does not alter the sacred laws living in customs and traditions'.[13] In this context, the Christian Church must be the one to have the effective toolbar and

[11] Béli Gábor: *II. András korabeli jogforrások, különös tekintettel az Aranybullára* [Sources of law form the age of András II, with special regard to the Golden Bull]. In: Zsoldos Attila (ed.): Aranybulla 800. Tudományos konferenciák az Országházban [Goldan Bull 800. Scientific conferences in the Hungarian parliament]. Országház Könyvkiadó, Budapest, 2022. 140.

[12] Párniczky Mihály: *A magyar ius regium az Árpádházi királyok korában. De iure regio Hungarico tempore regum stirpis Arpadianae* [The ius Regium in Hungary during the age of the Árpád dynasty]. Budapesti Magyar Pázmány Péter Tudományegyetem Jogtörténeti Szemináriuma, Budapest, 1940. 36–37.

[13] Deér József: *Pogány magyarság keresztény magyarság* [Pagan Hungarians, Christian Hungarians]. Királyi Magyar Egyetemi Nyomda, Budapest, 1938. 146.

power to enforce these honors from the monarch. Several written sources from the Árpád era – for example charters and chronicles reporting on the actions of apostolic legates in Hungary – show that ecclesiastical punishments (or at least the threat of them) may prevail even against the authority of the monarch.

Among the medieval criminal ecclesiastical punishments, *Elemér Balogh* differentiates between the suspension or deposition of prelates and *excommunication* applied more frequently and also imposed on secular individuals. The third type of these punishments is in fact a special form of the latter, the *interdictum* applied by clerks of a higher rank with a personal or territorial extent, by which the prohibition of attending ecclesiastic ceremonies and receiving sacraments prevails as a collective punishment.[14] An *interdictum* – in itself or besides excommunication of particular individuals – may serve as a political exertion of influence against secular power, especially against the monarch. We can see several examples of this in the Árpád era, like in the early 1230s, in the social and political circumstances – partly based on the discontent about the breaches of the promises made by the king in the Golden Bull of 1231 and in the Bull of clergy of 1222 – leading to the conventions of Bereg,[15] or during the reign of László IV, just before the issue of the decrees concerning Cumans. It also shows the political characteristics of the *interdictum,* that just in the case of András II, the pope must have expressly forbidden for his legate to apply the *excommunication* against the king personally, beyond the *interdictum* applied by the archbishop of Esztergom,[16] which – without the *excommunication* – descended directly upon the dependants, but also could have come hard on the monarch in a political aspect.

To sum up, while the resistance clause of the Golden Bull of 1222 only allows the bishops, other barons and the nobles to resist the king singularly or in common, the threat of ecclesiastical punishment in the decree of 1231 soon became reality in practice. And although the purpose of this punishment applied by the archbishop of Esztergom – and sometimes with the assistance of the apostolic legate – was rather political, several political and also legal consequences of every *interdictum* applied in the Árpád Era can be found in royal charters and chronicles. It is clear however, that the church does not want to resort to the imposion of ecclesiastical punishment against the monarch in case of every single breach of his promises or his regulations considered to be statutes, nor in order to fully

[14] Balogh Elemér: *A középkori egyház hatékony büntetőjogi szankciója, az interdictum* [The effective criminal punishment of the medieval church, the interdictum]. In: Peres Zsuzsanna – Bathó Gábor (eds.): Ünnepi Tanulmányok a 80 éves Máthé Gábor tiszteletére. Labor est etiam ipse voluptas [Salutatory essays/studies in honour of 80-year-old Máthé Gábor. Work itself is pleasure]. Ludovika Egyetemi Kiadó, Budapest, 2021. 53–54., 56–57.

[15] Pauler Gyula: *A magyar nemzet története az Árpádházi királyok alatt I.* [The history of the Hungarian nation during the age of the kings of the House of Árpád]. Athenaeum Irod. és Nyomdai R. Társulat, Budapest, 1899. (repr.: Állami Könyvterjesztő Vállalat, Budapest, 1985.) 113–117.; Szovák Kornél: *Az egyházi Aranybulla 1222-ből* [The Golden Bull of clergy of 1222]. In: Zsoldos Attila (szerk.): Aranybulla 800. Tudományos konferenciák az Országházban [Goldan Bull 800. Scientific conferences in the Hungarian parliament]. Országház Könyvkiadó, Budapest, 2022. 48–50.; Zsoldos Attila: *A 800 éves Aranybulla* [The 800-year-old Goldan Bull]. Országház Könyvkiadó, Budapest, 2022. 214–218.

[16] Balogh, 2021. 56.; Fraknói Vilmos: *Magyarország és a Római Szent-Szék. I. kötet. 1000–1417. Magyarország egyházi és politikai összeköttetései a Római Szent-Székkel a magyar királyság megalapításától a konstanczi zsinatig* [Hungary and the Holy See of Rome 1000–1417. Ecclesiastical and political connections beween Hungary and the Holy See of Rome from the founding of the Hungarian monarchy to the synod of Konstancz]. Szent István Társulat, Budapest, 1901. 53.

enforce each and every right or liberty of his dependants established in a certain statute (the Golden Bull of 1222 or that of 1231 for examle). They mostly do so to put political pressure on the king in order to their claims being allowed and to serve as a remedy for their own detriments. Thus, neither the resistance clause of the second Golden Bull provides the royal servants and nobles with an effective instrument to enforce their rightful liberties through public law.

4. The privilegial characteristics of the Golden Bulls

Although the Golden Bulls of András II are usually regarded as decrees due to their extent, subject and the dependants affected by their regulations, both clearly bear some of the characteristics of privileges. Several regulations of the first Golden Bull are related to the legal status of royal servants, discerning them from any other dependants – especially form those of lower status. The same stands for the second Golden Bull, of which several regulations are also related to the support and protection of the church, discerning its clerks from laics.

The disclosure of the privileges, rights and obligations defining the legal status of people belonging to a particular group of dependants, the manifestation of the so-called *ius singulare,* is the attribute of letters patent, privileges. However in the Árpád era, it is quite usual, that some regulations of a statute conventionally considered to be a decree – such as the Golden Bulls of András II – also bear some characteristics of privileges. The decrees of László IV concerning Cumans – the regulations declared in the assembly held in Buda on the 23rd june 1279 and the regulations of the assembly held in Tétény from the 13th to the 25th july 1279 put in the royal charter of the 10th august 1279 – consist of several privilegial rules concerning the legal status of Cumans, while the decrees of András III – the regulations of the assembly held in Óbuda in 1290 and the assembly held in Pest in 1298 – does so concerning nobels (else but barons). To sum up this phenomenon of the sources in the words of Gábor Béli, 'a common characteristic of the decrees of the 13th century – contrary to those of the early Árpád era – is that they bear forms of letters patent'.[17]

With regard to these characteristics, in order to interpret the privilegial regulations of the decrees of András II correctly, we must highlight another attribute – practical and also considerable in a legal sense – of the contemporary privileges. Namely, privileges – similarly to royal donations, which are also often parts of letters patent, but a number of royal charters can also be found, which consist of the donation itself or no more than the rights and obligations directly attached to it – are never mere gifts, but rules of behaviour, which draw their normative power from the royal will and consist of immanent or often express rights of the recipients and adverse obligations of those obliged to stand and abstain. Privilegial regulations do not only imply what the recipients may expect from the monarch, but also – even though sometimes less apparently – what the monarch may demand from them, and the margins over which the royal interests and prerogatives can not be opposed or decreased. Also similarly to royal donations, other privileges usually are the countervalues of former rewardable services and allegiance and the obligation of further services and loyalty.

[17] Béli, 2000. 37.

In exchange for the privileges, the rights of the monarch may show themselves in several ways, both expressly and through intellective interpretation. For example, if the essence of a privilege stands in the alleviation of a former obligation or in a preference compared to other obligants, we also have to see, that the monarch holds true to maintain and demand the remaining wages or services. Furthermore, every former service and obligation, which has not been abolished or decreased in a later privilege, must stand and remain intact. Conditionated exemptions and preferences mean, that in default of corresponding to the conditions, former services and obligations must also stand and remain intact. In addition, exemptions and preferences assigned to a certain legal status mean, that those of a lower status cannot have and enjoy the same liberties in the same way.

5. Judicial power

In the age of the 'personal monarchy'the king is the main source and main addressee of judicial power in his own kingdom. The monarch judges personally – in the first and only instance without appeal or after or in case of the negligence or default of another judge as a quasi-second-instance court – on the one hand, and on the other hand, every judicial power and jurisdiction derives from his will and power throughan appointment to an office, a particular delegating or a confirmation after an election based on the privilege of a community. We can also recognize and identify several elements of this supreme judicial power in the Golden Bulls of András II.

Concerning the juridical days in Fehérvár, the wording of both decrees makes it clear, that the participation – and there the hearing and judging of the cases – is first of all the right (and undertaken duty) of the monarch. The count palatine may only proceed there as a deputy and in the name of the king in case of his absence. Although in 1231, András II amends this regulation, and promises to dismiss the count palatine (as his deputy) in case of the complainants were dissatisfied with him, the final reason of this – in the words of th second Golden Bull – is not the prejudice or dissatisfaction of these complainants, but that 'if the count palatine should badly manage the affairs of the king and the kingdom'.

Both the Golden Bull of 1222 and – except clergy – that of 1231 declare, that the count palatine shall judge all the people of the realm, but concerning nobles, he – and according to the decree of 1231, any judges – can not conclude cases threatening with condemnation to capital punishment and loss of possessions without the king's knowledge. The aim of requiring the king's knowledge to conclude the severest cases of higher secular dependants is to make sure that no one of the highest secular judges dare proceed and act against the followings of the monarch in spite of his will, weakening his political hinterland. The regulation concerning the extensive jurisdiction of the judge of the royal court, which orders that he shall judge or at least start the cases in the royal court, surely serves the same purpose. Furthermore, the limitation of employing deputy judges prevents the judges personally appointed, delegated or confirmed by the king from frittering the judicial power deriving form the monarch through further subdelegations.

Among the general regulations of the Golden Bulls of András II concerning jurisdiction, we can find some more, provisions whose aim is to secure the protection of the monarch against the abuses of the higher judges, and tend to limit the excessive power and the

influence on jurisdiction of the higher secular dependants. One of these regulations is the prohibition of the deprivation of possessions acquired by honourable service in the Golden Bull of 1222. Another one is the prohibition of arresting a higher person or ruining his estates without judicial decision for the benefit of another magnet in both the decree of 1222 and that of 1231, as such verdict – as written above – can not be returned without the king's knowledge. As an inverse of these regulations, the first Golden Bull declares, that if anyone has been duly sentenced in judicial proceedings, no magnate should defend him. The purpose of this rule is to preserve the authority of judicial decisions in general, and to protect the royalty, as those who have been sentenced by the king or by a judge with the knowledge and consent of the king – especially the enemies of the monarch and those who committed crimes of infidelity –, must not be acquitted or protected by any judge or higher person against the royal will.

It is also important in the economic sense, that the decree of 1231 declares the royal will, that the villages (or any estates) of those who has been sentenced to loss of possessions should not be burnt down. This express and unconditional prohibition of the destruction of confiscated estates allows further utilization of the value of these estates. The regulation also makes it clear, that it is the right of the monarch to decide whether to utilize these values directly or indirectly, in other words, to decide whether to retain these confiscated estates for the royal treasury or to re-donate them.

6. The excessive power of the dependants

Beyond the aforementioned rules concerning judicial power, in the Golden Bulls of András II we can find several further regulations, of which the purpose is to limit the excessive power of the dependants. For example, the decree of 1222 declares that no one – except the cout palatine, the ban (of Slavonia), the judge of the royal court and the judge of the queen's court – shall hold two or more offices. Both decree declare the prohibition of donating estates pertaining to castles as a hole or any dignities in perpetuity. This makes it difficult to the king to confine the better part of all the dignities, goods and power to a close party of his followings, but on the other hand, it also serves to prevent the higher dependants possibly conspiring against the monarch from gaining more and more dignities and growing their wealth and influence.

However, as beyond the fees of judicial procedures only the counts (land-stewards of the counties) enjoyed pecuniary and other incomes of their offices, the appointment to the dignity of count serves good – not in perpetuity but temporarily, for a certain period of time, as *honor* – for the motivation and awarding of further services, that is why the higher officers of the royal court may attain to one or more appointments to count providing incomes, with or instead of royal donations.[18] Thus it is likely, that the regulations of the decrees of the 13th century limiting or prohibiting the accumulation of dignities do not tend to the absolute prohibition of bearing a dignity in the royal court and in the counties at the same time. Or at least the contemporary written sources do not show and prove the existence of such an absolute prohibition. And although in the royal charters and other

[18] Mezey Barna (ed.): *Magyar alkotmánytörténet* [Hungarian constitutional history]. Osiris Kiadó, Budapest, 2003. 133.

written sources we can find several names of officers, who had a long career through several offices in the royal court and in the counties (sometimes even during the reign of two or more kings),[19] not even the wealthiest and most outstanding ones of them could achive to make their dignities hereditary.[20]

Concerning the prerogatives of the monarch, we can find a particular meaning of the regulation of the Golden bulls of András II, according to which castle warriors shall be preserved in the liberties established by the holy king (István I the Saint), and foreingn guests of whatever nationality shall be preserved in the liberties originally granted to them. To the recipients it clearly means the prohibition of decreasing their former rights and privileges. However, it also includes, that they are not allowed to claim more than that, and no one shall hold out hopes of greater or further liberties for them, so no one can take advantage of their economic and military capacitiy against the king.

7. Going to war

One of the most well-known group of regulations of the Golden Bulls of András II is that concerning the duty of soldiering. According to the decree of 1222, if the monarch wishes to send an army outside his kingdom, the royal servants shall only go at his expense, while counts shall only do so when the monarch personally leads his army. Meanwhile, according to the decree of 1231, nobles are not obliged to accompany the king outside the kingdom, except for counts, those serving for military pay, castle warriors and those who are obliged to go on account of their offices or were awarded with greater donations. Both decrees declare however, that if the army of an enemy advance upon the kingdom, all the royal servants and nobles shall go to war for the defence of the realm, furthermore, according to the second Golden Bull, even those who are only obliged to go to war in the realm, shall pursue the retreating enemy for revenge.

From the point of view of the recipients, the essence of these regulations is surely the liberty, which provides their personal safety and also exempt them from the high expenses of taking part in campaigns abroad. It is however at least of the same importance to make it clear, that in case of an inland attack of the enemy, all of them must be of assistance in arms to the monarch. Moreover, quid pro quo, royal servants shall also go to war beyond the realm if the king repays their expenses, according to the decree of 1222, while those who were awarded by the king with higher offices or revenues, shall also go, according to both the first and second Golden Bulls.

Finally, it is also important, that these privilegial regulations and liberties only concern royal servants and nobles. Thus, all the dependants of the realm, who are obliged to go to war by their former legal status, and do not enjoy the same or greater liberties as nobles do, shall continue to go to war as they did before, except for those, who particularly enjoy the same or greater liberties based on a letter patent or customary law.

---

[19] Hóman Bálint – Szekfű Gyula: *Magyar történet I.* [Hungarian history I.]. Királyi Magyar Egyetemi Nyomda, Budapest, 1935. 512., 520., 608., 616.

[20] Degré, 2009. 42.

8. Economic provisions

Several provisions of the decrees of András II concern the economic basis of the royalty, the pecuniary prerogatives of the crown. The most well-known of these provisions may be the regulation of both the Golden Bull of 1222 and that of 1231, according to which the king shall obtain the possessions of royal servants passing away in lack of heirs and testament due to the hereditarian rules of *caducitas*. The essence of this hereditarian regulation is that royal servants gain the same right to freehold and possessions from the king as nobels enjoy.[21] On the other hand, in lack of the disposal – established either among alives or in a testament – of the legator and after the run-out of he heirs apparent, it is the king (the treasury) that claims the possessions.

Both decrees declare, that counts must not vindicate bucket taxes, tolls, ox-tax and the two(-third) parts of the castle dues, as these duly go to the king (the treasury), and the king shall dispose of them – for example by distributing them, as mentioned in the decree of 1231. This provision also protects the royalty from the evolution of the excessive economic and political power of the higher dependants, especially the counts.

According to the Golden Bull of 1222, the new coins of the king shall be valid for a year, from Easter to Easter. Concerning this provision it is usally emphasized, that the monarch (the treasury) shall not introduce new coins more frequently, which limits the incomes of the treasury. However on the other hand, this regulation clearly means, that once in every year the monarch obviously and lawfully claims the benefits of coinage. Similarly, in the second Golden Bull the king promises not to collect a tithe beyond the twentieth that is due to the king by the ancient custom, which also includes, that the monarch holds true to claim he twentieth. The remaining claims of the monarch appear more obviously in the decree of 1231, when the king promises not to gather any taxes, levies or chamber's profits, but also clearly declares the exception of those, who are obliged to pay a certain amount of rent defined by statutory or customary law.

9. The role of the count palatine

In the closing section, the eschatocol of the Golden Bull of 1222, we find a provision highlighting the significance of the person and the office of the count palatine. It declares, that the king orders seven exact copies to be drawn up, one of wich goes to the count palatine – as the only secular depository –, who will keep it in his custody 'having this document always in his sight, should not deviate from the foregoing terms in any respect, nor permit the king, the nobles or anyone else to deviate from is'.

The wording makes it clear, that the count palatine not only keeps the royal charter incorporating the provisions of the Golden Bull phisically, but he is also the one to guarantee that the king, the nobles and everyone else will stick to its provisions. He mostly does so towards the dependants through his judicial power, but his toolbar towards the monarch is not detailed in the decree. Comparing the role of the count palatine to the resistance

[21] Béli Gábor: *A nemesek négy bírója. A szolgabírók működésének első korszaka 1268–1351.* [The four judges of the nobles. The first period of the procedures of noble judges 1268–1351]. Dialóg Campus Kiadó, Budapest – Pécs, 2008. 27–32.

clause of the Golden Bull – by which the bishops, other barons and the nobles, singularly and also in common, have the right to demand the enforcement of their statutory rights and allowances from the king without the charge of high treason – there are likely two possible solutions. On the one hand, as the first and highest officer of the king, the count palatine may exercise the right of resistance prior to anyone else. On the other hand, it seems not to be excluded, that according to the promises of the Golden Bull, the count palatine should enforce the provisions of the decree in particular cases in his own jurisdiction and authority even against the will of the king. Yet that is another question, whether András II really wanted to be observant to this regulation, and – as mentioned above – how much the resistance clause of the decree of 1222 was enforceable.

On the one hand, the count palatine have more efficient methods to enforce the provisions of the Golden Bull against the dependants than against the king. Furthermore, we can not ignore the political characteristics of the office of the count palatine. Namely, it is obvious, that throughout the Árpád era, among all the decisions of the monarch, the significance of his personal impression and confidence (above economic and political consideration for example) is the most important in the case of the selection and appointment of his higher officers, especially the count palatine, despite any statutory promises concerning these appointments and the swings of political power relations. It is important to the monarch beyond any doubt to have reliable – and also talented – officers in his court, and to apply them in the ways and as long as it fits best for serving and maintaining his reign. Thus in the 13th century some palatines did not even spend a single year in office, while others were in place for years. Throughout the Árpád era, the kings sticked to the right to appoint the count palatine, and they obviously appointed ones of their trustworthiest followings. So the king can always trust – and surely aims to require –, that his reliable count palatine would rather enforce the rights and requirements of the monarch than those of the royal servants and other dependants in any dubious cases.

10. Afterword

To sum up, I see it quite verifiable, that while the Golden Bulls of 1222 and 1231 seem to try to limit the royalty, the effective power of the monarch, several provisions of them – what is more, most of their provisions – in fact imply – at least immanently, but often expressly – the margins over which the rights and privileges of royal servants and other dependants cannot expand, and the royal interests and prerogatives cannot be opposed or decreased. Thus the decrees of András II tend to protect the political and legal status of the monarch at least as much as they seem to support the privileged status of a particular group of dependants.

We can also hardly doubt, that – as long as the factuality of the royalty and the political circumstances allow it – the king himself or by his followings and by those who are beholden to him (for example the count palatine highlighted in the closing section of the decree of 1222) surely would have tried to act immediately and efficiently on behalf of his own prerogatives and interests based on the regulations of these Golden Bulls. On the other hand, the possibility of enforcing interests of the favoured dependants – having also regard to the swings of their political influence – were not strengthened with appropriate

legal instruments and guarantees (except maybe for the threat of ecclesiastical punishment applied by the archbishop of Esztergom under the decree of 1231).

Adding or taking nothing to and from the text of the Golden Bulls of András II, just examining and interpreting them from the aspect of the king actually disposing and being in power, it is possible and also necessary to reveal, and it can not be concealed even on occasion of the 800th anniversary, that the Golden Bull – considering its contemporary characteristics, purpose and significance and ignoring all the theories and narratives later related to it – is by no means applicable for verifying the theories overrating the weakening of the royalty and exaggerating this weakening in the sense of public law.

Aniceto Masferrer
professor, University of Valencia

THE SPANISH ORIGINS OF LIMITING ROYAL POWER IN THE MEDIEVAL WESTERN WORLD: FROM THE CORTES OF LEÓN AND THEIR DECRETA (1188) TO THE DECRETA AND FUERO OF LEÓN (1017)

1. Introduction: law, human rights and history

Men and women are not only social or political beings – as Aristotle rightly affirmed –, but also historical. Human beings cannot get rid of history. In fact, they necessarily lived throughout history. This does not mean that everything is relative, or that there is no truth beyond history. It rather means that truth can only arise and rule human society inside – not outside – history. Law, as part of society and culture, is also a historical reality.

To affirm that Law – including current Law – is a historical reality, or is essentially historical, does not mean defending that Law is a merely historical product, as the 19th-century German Historical School of Law did. According to this school, in Law everything can change, everything is ephemeral or circumstantial, and there is nothing that remains outside of dynamism, nothing is permanent.

Those who sustain this thesis need to prove why the Law of different traditions, civilisations and epochs has so many common aspects. The fact that man is in constant progress, just as Law is in permanent development, does not mean that man has ceased to be human and that Law, consequently, can cease to be the reflection – more or less faithful – of the human being, the inescapable framework and reference of Law and rights.

If Law in general has its history, human rights in particular also have theirs. Accepting the existence of natural rights – as Bartolomé de las Casas, Vitoria, Suárez, Grotius, Locke, Pufendorf and so many others did – does not mean denying or undervaluing the historical context in which the recognition and protection of such rights became a reality. To affirm that the recognition of human rights is the result of a historical process does not mean to maintain that their origin and foundation are just historical. To defend the contrary would be to erect history as a source of legitimacy for law and rights, as if history were the source of morality on which to base social peace and justice. Experience shows the opposite. Not every historical episode constitutes a model of morality that can serve as a reference for universalisable human conduct that promotes just and peaceful societies.

In fact, the history of human rights shows this reality. The recognition of certain rights has been, on many occasions, the response to morally unsustainable social situations. Untenable was the treatment of the indigenous people in America by some colonists (16th century); untenable were the abuses of religious freedom and the consequent wars of religion (16th

and 17th centuries); untenable was the omnipotent power of absolute monarchies (18th to 19th centuries); untenable were the conditions of the majority of workers the undignified treatment of women, children, unemployed, sick or disabled people (19th to 20th centuries); unsustainable is the global dualism that exists today, where some live in the most complete opulence at the expense of many others who lack the essentials to live with a minimum of dignity (drinking water, food, housing, education, communication, etc.), while the rest contemplate – or even justify – the two world wars (20th century). It is unsustainable that a part of the world leads a consumerist and hedonistic life, justifying the trampling of the rights of the defenceless, of the most vulnerable beings,[1] of those who cannot fend for themselves, or of those who when they come will no longer be able to enjoy the world and the environment that we enjoy today.

If human rights can be defined as "a core of morality based on the idea of human dignity",[2] it is clear that the referent or foundation of human rights is not history – especially when history itself does not show the convenience of giving a charter of nature to everything that happens in time –, but human dignity – or the 'dignity of human nature', as the authors of the 17th and 18th centuries used to say[3] –, despite the fact that these always arise as an achievement in a precise historical context. If human rights transcend history, then history cannot fully explain their origin and foundation, nor, on many occasions, of their content and scope. However, history is essential to explain the emergence and development of human rights.

If laws and human rights are historical, history is supposed to explain its (historical) origin and development. In doing so, two different paths might lead to the same goal: going from the past to the present or, conversely, from the present to the past, that is, reconstructing and looking historical development in a retrospective way. This is what I somehow will do here, as I did in other occasions dealing with the making of dignity and human rights,[4] for two reasons: first, because social institutions and legal texts never come out of the blue, but frequently have their own precedents and necessarily appear within a particular context marked by diverse conditions or factors (social, cultural, political, economic, etc.) that help to understand and explain their emergence; and second, because, in this case, there is a clear connection between the *Cortes* of León and their *Decreta* (1188) – upon which I recently worked[5] – and their main precedent, the *Decreta* and *Fuero* of León (1017).

---

[1] Masferrer, Aniceto – García-Sánchez, Emilio (eds.): *Human Dignity of the Vulnerable in the Age of Rights. Interdisciplinary Perspectives.* Springer, Dordrecht, 2016.

[2] Peces-Barba, Gregorio: *Los nuevos derechos humanos y la ley.* In: Aguilar, Ricardo et al. (eds.): Cicles Nous Drets Humans. 1998, 1999 i 2001. Ajuntament de Sabadell, Sabadell, 2004. 145–159. specifically, 148.

[3] Masferrer, Aniceto: *Taking Human Dignity more Humanely. A Historical Contribution to the Ethical Foundations of the Constitutional Democracy*. In: Masferrer – García-Sánchez, 2016. 221–256.

[4] Masferrer, Aniceto: *The making of dignity and human rights in the Western tradition. A retrospective analysis.* Springer, Cham, 2023. [Masferrer, 2023a.]

[5] Masferrer, Aniceto: *The Spanish origins of limiting royal power in the medieval western world. The Cortes of León and their Decreta (1188)*. In: Balogh, Elemér (ed.): Golden Bulls and Chartas. European Medieval Documents of Liberties. MFI, Budapest, 2023. 15–42. DOI: 10.47079/2023.eb.gbac.1_2 [Masferrer, 2023b.]

2. Limiting royal power: from the *Cortes* of León (1188) to the Council of León (1017)

As I stated elsewhere, "the history of human rights is closely linked to the limits placed on political power over time."[6] It is well known that "the European liberal revolutions precisely had the purpose of establishing limits to political power", but note that the threat of the abusive exercise of power is something connatural to any political power, also to an incipient one such as the early-medieval monarchy, because "[a]lthough monarchies became absolute from the 16th and 17th centuries onwards, the seed of absolutism was present from their origins, because the Roman Law that legitimised and justified their existence granted them absolute power…"[7]

However, the weaker the political power is, the less the danger to abuse of it. Hence, "[a] s kings did not enjoy much political power in many European territories in the 11th and 12th centuries, there was no reason to limit royal power."[8] Moreover, in such circumstances – that is, when the royal power did not guarantee peace and security –, monarchs rather sought to resort to assemblies and legal institutions such as the assemblies of peace and truce of God[9], the *curia regis,* councils (where kings were supported by secular and ecclesiastic nobility), and charters of the population (where nobility and freemen supported military undertakings by occupying new territories reconquered from Muslims). In those cases, "[s]uch assemblies did not appear to limit royal power, given that, at that time, the king, was a *primum inter pares* or looked for support to remedy his weakness."[10]

As shown elsewhere, the Cortes of León and their *Decreta* (1188) were the consequence of an incipient and weak royal institution that, taking advantage of the difficult circumstances it was going through, decided to resort to representatives of the whole society. The final outcome of such decision was the drafting and approval of the *Decreta* of León (1188), the earliest European document in which the king Alphons IX committed himself before the social estates, including the citizens, to respect the law and guarantee a set of procedural rules (which is today called the "right to due process").[11]

The merit of Alphons IX was – no doubt – to properly manage such a difficult episode, turning a dangerous crisis into an opportunity to strengthen his power under the condition of respecting the law, or exercising his power under the rule of law. The idea of recognizing procedural guarantees, including for those who were detained, and forbidding prison without following a legal procedure, were logical limits to the exercise of a power that was not

---

6 Masferrer, 2023a.

7 Masferrer, 2023a.

8 Masferrer, 2023b. 21.

9 Hoffmann, Hartmut: *Gottesfriede und Treuga Dei*. Hiersemann, Stuttgart, 1964.; Head, Thomas – Landes, Richard (eds.): *The Peace of God. Social Violence and Religious Response in France around the Year 1000.* Cornell University Press, New York, 1992.; Kosto, Adam J.: *Reasons for Assembly in Catalonia and Aragón, 900–1200*. In: Barnwell, Paul S. – Mostert, Marco (eds): Political Assemblies in the Earlier in the Middle Ages. Brepols Publishers, Turnhout, 2003. 133–149.; Masferrer, Aniceto: *Peace and Liberty in the Catalan Medieval Legal Tradition. A Contribution to the Interaction between Religious Law and Secular Law in the European Middle Ages*. In: Sunde, Jørn Øyrehagen (ed.): Constitutionalism before 1789. Constitutional arrangements from the High Middle Ages to the French Revolution. Pax, Oslo, 2014. 28–48., particularly 31–39.

10 Masferrer, 2023b. 22.

11 Masferrer, 2023b. 17–18., 26.

above the law, but under its supremacy. This idea was neither discovered by Alphons IX, nor original in the 12th-century Europe. Moreover, the *Decreta* of León of 1188 insists on the idea that offenses or damages must be repaired or remedied through the enforcement of the law (mainly, the *Fuero* of León, 1017) and in court (rather than resorting to private revenge), calling for the respect of the judicial procedure and right conduct of judicial proceedings.

In this vein, the 1188 *Decreta* made some explicit references to the ancient law (called *fuero*). Chapter V, seeking to protect the alleged offender – or accused – ("so he will not suffer any harm"), allowed him/her to "present a guarantor or give a guarantee according to the ancient law [*fuero*]." Chapter XVI, in addressing the rule of law, prescribed that nobody shall be accused or tried by either royal or city court unless established by law. Prescribing that no one should go to trial before the royal curia or the court of León "unless for those causes for which he should go according to their own ancient laws [*fueros*]", was the logical consequence of the royal commitment to respect "the good customs" established by his predecessors (Ch. I) to proceed "according to the ancient law [fuero]" (Ch. V) and act in conformity with the privilege and ancient customs of his land (Ch. VIII). Such explicit references to the ancient law (*fuero*) when establishing the rule of law – in a notably similar to what would later be drafted in chapters 39 and 40 of the *Magna Carta*[12] –, clearly reveals the relevance of the previous laws (*Decreta* and *fuero*) that had been ruling the kingdom and the city of León from the beginning of the 11th century (1017).

As I concluded elsewhere, "for now, the first documented precedent of the rule of law and representative democracy in the Western world can be found in 1188 in León, a city that had enacted its law (*Fuero* de León) in a council presided by Alphons V in 1017. Thus, the people of León already appreciated what the law was about."[13]

To which extent was the *Decreta* of 1188 indebted to its precedent text of 1017? Would it be consistent to affirming that, to some extent, the *Fuero* of León of 1017 (instead of the *Decreta* of 1188) was in fact the first documented precedent of the rule of law? Was the eleventh-century León already familiar with the idea of limiting the abusive exercise of political power through laws that somehow constitute a precedent of some constitutional rights? If that was the case, was such usage of law something peculiar of León or was rather a characteristic trait of the Iberian Peninsula? If that was the case, one might ask whether there is any reason that may explain why in the Spanish territories those laws or legal documents appeared so early in the Middle Ages, in comparison to other European territories or kingdoms.

Before answering these questions, let us first give an overview of the laws that were approved by Alphons V in a council of León in 1017, and see their possible connections with the *Decreta* of the Cortes of León of 1188.

---

[12] *Magna Carta,* ch. 39: "No free man shall be arrested or imprisoned or deprived of his rights or property, nor put outlawed or banished or otherwise deprived of his rank, nor shall we use force against him or send others to do so, except by virtue of judicial sentence of his peers or by law of the realm"; ch. 40: "We will not sell, deny or delay to anyone his right or justice."

[13] Masferrer, 2023b. 31.

3. The *Decreta* and *Fuero* of León (1017)

3.1. The birth of the kingdom of León and the Imperial idea

The Astur-Leones kingdom started with the *asturorum regnum,* with the capital in Oviedo (for this reason, also called the kingdom of Oviedo, 718–910), after the reconquest at the beginning of the eleventh century. With the advance of the repopulation up to the Duero line, and particularly after the reconquest and repopulation of León by Ordoño I in 856, León, that was geographically at the center, became the capital of a kingdom. On the death of Alfonso III (910), the royal court moved to León. The kingdom of León (910–1230), whose territorial dominions extended to León, Asturias, Galicia, Castile and Extremadura del Duero – Tormes, Tajo, Guadiana –, was ruled by kings – independent from Castile – until Fernando III, son of Alfonso IX (1157–1230), who founded the crown of Castile by uniting the kingdoms of León and Castile. From a legal perspective, the 10th-century kingdom of León was governed under a legal culture based upon Visigoth principles (stemming from the *Liber Iudiciorum*) and customs (*usus terrae*). Such basic legal order was particularly developed by Alfonso V (999–1028), who in July 1017 promulgated some territorial dispositions, *fueros* for the city of León, and granted other *fueros* and privileges to noble knights of León and Carrión. All these laws and privileges would be confirmed in 1109 by the Queen Urraca (1109–1126).[14] The last kings of the kingdom of León respected such legal order: Alfonso VII (1126–1157) Fernando II (1157–1188) and Alfonso IX (1157–1230).

It has been argued that the early legislative activity Leonese kings – such as Alfonso V – reveals a shift from a king-judge to a king-legislator,[15] not as a consequence of the influence of the Justinian Roman law or *ius commune,* but as the cultural legacy of Visigoth legal tradition:

> "The Leonese monarchs, by proclaiming themselves heirs of that tradition, were called to intervene in the organization of the kingdom, materializing their justice in early official legislation."[16]

From the very beginning Leonese kings connected their kingdom with the Hispanic Visigothic one, considering themselves as the continuators of that Christian political power against the Muslim one. Since the Astur-Leonese kingdom took the lead of the reconquest of the whole Hispanic territories, King Alfonso III of Asturias started the imperial idea in

---

[14] See Muñoz y Romero, Tomás: *Colección de fueros municipales y cartas pueblas de los reinos de Castilla, León, Corona de Aragón y Navarra*. Jose Maria Alonso, [Ediciones Atlas], Madrid, 1847. (reimp. Madrid, 1970), 96–98.; Reilly, Bernard F., *The Kingdom of Leon-Castilla under Queen Urraca (1109–1186).* Princeton University Press, Princeton, 1982.

[15] On this matter, see, for example, Marongiu, Antonio: *Un momento típico de la Monarquía medieval. El rey juez*. Anuario de historia del derecho español, 1953. 677–715.; Kampers, Franz: *Rex et sacerdos*. Historische Jarhbuch, 1925. 495–515.; Fernández del Pozo, José María: *Alfonso V, rey de León. Estudio histórico-documental.* In: León y su Historia IV. Centro de Estudios e Investigación San Isidoro, León, 1984, 11–262.

[16] Coronas González, Santos M. (ed.): *Fueros Locales del Reino de León (910–1230). Antología*. Agencia Estatal Boletín Oficial del Estado, Madrid, 2018. 25.; on the Leonese kings, see Arvizu y Galarraga, Fernando de: *La colección de retratos de reyes del Ayuntamiento de León. Semblanzas de treinta y un reyes.* Ayuntamiento de León, León, 1998.

the 9th century.[17] In 867 named himself as *Adefonsus totius Hispaniae imperator.* In 877 it appeared as *Adefonsus Hispaniae imperator* and in 906 as *Adefonsus…Hispaniae rex.*[18] Some of his successors also adopted the imperial title. Later, Alfonso VI granted himself the imperial title in a more explicit way. Indeed, although since 1072 he called himself *rex Spanie,* after annexing the territories of Álava, Vizcaya, part of Guipúzcoa, La Rioja and La Bureda, in 1077 he adopted the title of *Imperator totius Hispaniae* (Emperor of all *Hispania*), also as a way of facing Pope Gregory VII's claims to exercise temporary dominance over the conquered peninsular territories, based on the false document (from the 8th century) that supposedly gave evidence of Constantine's donation of the territories of the Western Roman Empire to Pope Silvestre. All these formulas that associated the Leonese throne with the empire of Hispania, with all the nations that comprised it ("*constitutus imperator super omnes Ispanie nationes*"), acquired a particular relevance after the conquest by Alfonso VI of Toledo (1085), capital of the Spanish Visigothic kingdom.[19] Alfonso VII, son of Queen Urraca and grandson of Alfonso VI, following the imperial idea of his predecessors – especially Alfonso III and Alfonso VI – was crowned as *Imperator totius Hispaniae* (Emperor of all *Hispania*) on May 26, 1135.[20] Alfonso VII titled himself as *Imperator Hispaniarum* until 1139, then as *totius Hispaniae Imperator.* Later, he lowered his Spanish imperial claim, using the expression *Regnum Imperium Legionensis.* At the end of his life the titles used were: *pius, felix, inclitus, triumphator et semper invictus, totius Hispaniae divina clemencia famossisimus imperator.* The most expressive documentary formula is that of *Imperatore regnante* [or *imperante*] *in Legione, in Toleto, in Sarragozia, in Naiara, in Castella, et in Galletia.*

---

[17] On the imperial idea of León, see the classical works by Menéndez Pidal, Ramon: *Adefonsus imperator toletanus magnificus triumphator*. Boletín de la Real Academia de la Historia, 1932. 513–538.; Menéndez Pidal, Ramon: *El imperio hispánico y los cinco reinos. Dos épocas en la estructura política de España*. Instituto de Estudios Políticos, Madrid, 1950.; see also Hüffer, Hermann J.: *La idea imperial española*. Blass, Madrid, 1933.; Schramm, Percy Ernst: *Das kastilische Königtum und Kaisertum während der Reconquista (11. Jahrhundert bis 1252)*. In: Nürnberger, Richard: Festschrift für Gerhard Ritter zu seinem 60. Geburtstag. Mohr, Tübingen, 1950. 87–139.; for a different view, see García-Gallo, Alfonso: *El Imperio medieval español*. In: Historia de España. Estudios publicados en la Revista Arbor. CSIC, Madrid, 1953., 108–143.; Gibert, Rafael: *Observaciones a la tesis del Imperio hispánico y los cinco reinos*. Arbor, 1951/63. 440–456.; Sánchez Candeira, Alfonso: *El «regnum imperium» leonés hasta 1037*. Escuela de Estudios Medievales, Madrid, 1951.; Saitta, Armando: *Un problema storiografico. L'imperio spagnuolo medievale*. Revista Storica Italiana, 1954/3. 240–409.; Bermejo, José Luis: *En torno al Imperio Hispano medieval*. Anuario de historia del derecho español, 1989. 737–750.; for a general overview, see Sirantoine, Hélène: *Imperator Hispaniae. Les idéologies impériales dans le royaume de León (IXe –XIIe siècles)*. Casa de Velázquez, Madrid, 2012.; see also the 'Introduction' by Coronas González, 2018. 24.

[18] On Alfonso III, see, Martínez Díez, Gonzalo: *Alfonso III.* Diputación Provincial de Palencia, Oviedo, 1993.; Martínez Díez, Gonzalo: *El Condado de Castilla (711–1038). La historia frente a la leyenda.* Junta de Castilla y León, Valladolid, 2005.

[19] Barrero García, Ana María: *La política foral de Alfonso VI*. In: Estudios sobre Alfonso VI y la reconquista de Toledo, Instituto de Estudios Visigótico-Mozárabes, Toledo, 1987. 115–156.

[20] Martínez Díez, Gonzalo: *Alfonso VI. Señor del Cid, conquistador de Toledo*. Temas de Hoy, Madrid, 2003.; Mínguez Fernández, José María: *Alfonso VI/Alfonso VII. Soberanía imperial frente a soberanía papal*. Argutorio. Revista de la Asociación Cultural 'Monte Irago', 2009/23. 30–33.; González Jiménez, Manuel: *La idea de imperio antes y después de Alfonso VI*. In: Suárez, Fernando – Gambra, Andrés (ed.): Alfonso VI. Imperator totius orbis Hispaniae. Sanz y Torres, Madrid, 2011.

3.2. The approval of the first laws for the kingdom and city of León: the Decreta and Fuero of 1017

Leonese kings were fully aware that a fundamental part of the legal order of their kingdom was immutable, but they could partly modify it by resorting to the "*utilitas populi* or to the defense of faith and religion":

> "A royal legislation that respects the parallel validity of the traditional civil and canonical order and that of the ancient *mores,* but that at the same time establishes and restores that order in a kingdom convulsed by the terrible attacks of Almanzor."[21]

In doing so, the Leonese kings put the foundations of a complex legal order that was composed of "Visigothic legal tradition, the customary of the *villae* and lands (*more terre*), the royal territorial legislation, the first municipal charters and the letters of seigniorial privileges, both secular and ecclesiastical."[22]

The first step in that direction was the approval of the *Decreta* and the *Fuero* of León by Alfonso V in July 1017.[23] Both texts have been extensively studied by scholars, historians[24] and legal historians[25] – or by those who graduated as both[26] –, sometimes

---

[21] Coronas González, 2018. 25.

[22] Coronas González, 2018. 25.

[23] As it is held by Sánchez-Albornoz, Claudio: *Sobre la fecha del Fuero de León*. In: Cuadernos de Historia de España 5. Facultad de Filosofía y Letras, Buenos Aires, 1946. 136–139.; Sánchez-Albornoz, Claudio: *El fuero de León. Su temprana redacción unitaria.* In: León y su Historia. Vol. II. Centro de Estudios e Investigación San Isidoro, León, 1973. 11–60.; Martínez Díez, Gonzalo: *Los fueros leoneses (1017–1336).* In: El reino de León en la Alta Edad Media. Vol. I. Cortes, concilios y fueros. Caja de Ahorros y Monte de Piedad, León, 1988. 283–352.; for different views, see Menéndez Pidal, Ramón: *Fecha del Fuero de León*. Anuario de Historia del Derecho Español, 1928. 547–549.; García-Gallo, Alfonso: *El Fuero de León. Su historia, texto y redacciones.* Anuario de Historia del Derecho Español, 1969. 5–172.; for a relatively recent historiographical account on the date of approval of these laws, see Coronas González, 2018. 37–42.

[24] See, for example, Vázquez de Parga, Luís: *El Fuero de León. Notas y avance de edición crítica.* Anuario de Historia del Derecho Español, 1944. 464–498.; Rodríguez, Justiniano: *Los fueros del reino de León. 2 vols.* Ediciones Leonesas, León, 1981.; Valdeavellano, Luis G. de – Alfonso, Isabel: *El Fuero de León. Comentarios.* Hullera Vasco-Leonesa S.A., Madrid, 1983.; Barrero García, Ana M. – Alonso Martín, Maria Luz: *Textos de Derecho local español en la Edad Media.* Consejo Superior de Investigaciones Científicas. Instituto de Ciencias Jurídicas, Madrid, 1989.; Pérez González, Maurilio: *El Fuero de León. Aspectos básicos y los textos más importantes*. Boletín de la Real Academia de la Historia, 2022/1. 7–28.

[25] Gibert, Rafael: *El derecho municipal de León y Castilla*. Anuario de Historia del Derecho Español, 1961. 695–753.; Martínez Díez, 1988. 283–352.; Martínez Díez, Gonzalo: *La tradición manuscrita del Fuero de León y del Concilio de Coyanza.* In: El reino de León en la Alta Edad Media. Vol. II. Ordenamiento jurídico del reino. Centro de Estudios e Investigación "San Isidoro", León, 1992. 117–183.; Iglesia Ferreirós, Aquilino: *Derecho municipal, derecho señorial, derecho regio*. Historia. Instituciones. Documentos, 1977. 115–197.; Arvizu Galarraga, Fernando de: *El Derecho foral de León*. Feje. Revista del Instituto Leonés de Cultura, 2023/1. 229–266.

[26] Muñoz y Romero, 1847.; García-Gallo, Alfonso: *Aportación al estudio de los fueros.* Anuario de Historia del Derecho Español, 1956. 387–446.; Sánchez-Arcilla Bernal, José: *El derecho especial de los fueros del reino de León (1017–1229)*. In: El reino de León en la Alta Edad Media. Vol. II. Ordenamiento jurídico del reino. Centro de Estudios e Investigación "San Isidoro", León, 1992. 189–380.; Pérez-Prendes, José Manuel: *La potestad legislativa en el Reino de León. Notas sobre el Fuero de León, el Concilio de Coyanza y las Cortes de León de 1188*. In: El Reino de León en la Alta Edad Media. Vol. I. Cortes, concilios y fueros. Centro de Estudios e Investigación "San Isidoro", León, 1988.495–545.

working collaboratively,[27] so there is no need to deal with them. It is enough now to mention the historical circumstances that led Alfonso V – also eloquently called "*el de los buenos fueros*"[28] – to summoned the council in which these laws were approved: while the county of Castile ceased to be danger as a consequence of the death of Count Don Sancho – *infidelissimus, qui die nocteque malum perpetrabat apud nos* –, Alfonso V just managed to subjecting the counts of Saldaña and Monzón and to calm down the rebellious nobles Galicians,[29] the city of León was in need of being populated because –as the text of the *Fuero* reads – it had been depopulated by the Saracens –in the time of the king Vermudo II (985–999) – due to the terrible commotion caused by the military campaigns of the Muslim leader Almanzor at the end of the 10th century. That was the historical context in which Alfonso V decided to celebrate a council – or *curia plena* – in the cathedral of Santa María, in order to enact a series of provisions, both local and territorial, being the latter the first sample of territorial legislation in the Spanish High Middle Ages.

In doing so, Alfonso V intended to restore the order of the kingdom (with territorial precepts) and the city (with local norms) that, although in conformity with the old tripartite distribution of affairs – ecclesiastical, royal and popular – in line with the style of the councils of Gothic Spain, he also pursued to promote the life of the *civitas regia* with its *fueros* – or charters – and privileges, exemptions and liberties. Hence, the 1017 council approved two different set of provisions, although we received both together in a text, the *Ovetensis* (*Liber Testamentorum,* from Oviedo, Spain),[30] and just the territorial provisions in another one, the *Bracarensis* (*Liber Fidei Sanctae Bracarensis Ecclesiae,* from Braga, Portugal).[31] While the first has been edited several times,[32] the second one was discovered in the cathedral of Braga by Sánchez-Albornoz.[33]

As the tittle shows, in 1017 Alfonso V approved both the *Decreta* and the *fueros* (or the *Fuero* of León).[34] Although the *Liber Testamentorum* contains both kinds of provisions

---

[27] See, for example, the collective monograph entitled *El reino de León en la Alta Edad Media. Vol. 2. Ordenamiento jurídico del reino.* Centro de Estudios e Investigación "San Isidoro", León, 1992.

[28] On Alfonso V, see Fernández del Pozo, José María: *Alfonso V (999–1028), Vermudo III (1028–1037)*. Editorial la Olmeda, Burgos, 1999. particularly 7–228.; Arvizu, 1988. 35–37.

[29] Arvizu, 2023. 232.

[30] For an exhaustive account of the discovered manuscripts (34), see Coronas González, 2018. 44–47.

[31] Coronas González, 2018. 35.: "The original texts are not preserved, although copies of them are found in two later cartulary codices: the *Liber Testamentorum* of the church of Oviedo, drawn up in Bishop Pelayo's desk around 1118, and the *Liber Fidei Ecclesie Bracarensis,* which brought together the most interesting diplomas, according to the opinion of the *cabildo* of the headquarters of Braga (Portugal) until the middle of the 13th century." The *Ovetensis* dates back more than a century after the event (between 1126 and 1129). According to Sánchez-Albornoz and García Gallo, that text reproduces neither fully nor faithfully the original text of the model. Concerning the Bracarensis one, its content is notably mutilated and altered, and, unlike the *Ovetensis,* the local provisions (28, out of 48) are is missing.

[32] There are many. The most commonly used is that edited by Muñoz y Romero, 1847. 61–72. (in Latin) and 73–88. (in Romance); Fernández del Pozo, 1984. 197–201.; see also Valdés Gallego, José Antonio: *El Liber Testamentorum Ouetensis. Estudio filológico y edición.* Real Instituto de Estudios Asturianos, Oviedo, 1999. 547–553.; Coronas González, 2018. 62–83.; for an exhaustive account of the manuscripts, see Coronas González, 2018. 51–56.; I'm using the most recent one, Pérez González, 2022. 13–18. (in Latin), 18–22. (in Spanish).

[33] Sánchez-Albornoz, Claudio: *Un texto desconocido del Fuero de León*. Revista de Filología Española, 1922/9. 317–323.; Coronas González, 2018. 58–61.

[34] On the historiography of these texts, see Coronas González, 2018. 35–37.

(from I to XX, the territorial *Decreta;* from XXI to XLVIII, the municipal *Fuero*), it would be wrong to refer to the *Ovetensis* with the expression '*Fuero* of León' because it contains both, the local provisions called *Fuero* and the territorial dispositions called *Decreta*.[35] As has been rightly pointed out, "[t]he Decree of Alfonso V of 1017 and the *fueros* of León (…) form a set of territorial and local laws of great interest for the legal history of the Asturian-Leonese kingdom and, by extension, due to its early drafting, for the [Iberian-] Peninsular and European legal history."[36] Indeed, there is no other text like this drafted and approved that early in Spain and probably in the whole European continent. Besides, no matter whether there might be concordances or not with the *Decreta* approved in the first European parliament, the *Cortes* of León of 1188, there is no doubt that Alfonso IX intended to connect these *Decreta* with a Leonese tradition that stemmed from the Spanish Visigoth kingdom:

> "The union of the new legal order with the old Goth was a guarantee of its fundamental continuity, manifested by Alfonso IX, the last *privative king of León,* when declaring the essential principles of the *constitution* of the kingdom before the first Cortes of León in 1189, in the manner of a glorious epigone of the Leonese monarchy."[37]

In fact, the *Decreta* of 1017 clearly followed the Visigoth usage in prescribing the order of issues to deal with: first the ecclesiastical matters, then the royal ones, and finally, the issues of the people.[38] As said, Alfonso V sought "to restore the order of the kingdom and the city with territorial and local norms that, while maintaining the old tripartite distribution of affairs, ecclesiastical, royal and popular in the style of the councils of Gothic Spain, he

---

[35] As Arvizu concludes in his recent work, Arvizu, 2023. 236.: "Secondly, that the name of fuero should not be given to territorial decrees or vice versa, because they are different things,… And, thirdly, that there is no reason to call the Oviedo text *Fuero de León,* since it contains two essentially different types of precepts; and not all local provisions belong to Alfonso V"; Coronas González, 2018. 33.: "Generally accepted the dual interpretation of Menéndez Pidal on the different nature of the texts known under the name of the 'Fuero de León', which distinguishes the territorial Decrees of the kingdom of León and the particular laws of the city,…".

[36] Coronas González, 2018. 35.

[37] Coronas González, 2018. 27.; the expression *privative king of León* means the last king of León before that kingdom was definitively united to the kingdom of Castile, giving birth to the crown of Castile in 1230; note that 'constitution' is precisely the expression used by Alfonso V in the last paragraph of the Fuero of León: "Whoever of our or foreign lineage will knowingly attempt to violate this our constitution…".

[38] Coronas González, 2018. 25–26.: "In their initial role of the kingdom's legislation, the Decrees of 1017 established the order to be followed by the *curia plena* and councils when dealing with common affairs, essentially adjusted to the old Gothic conciliar order: first of all they would see the causes of the Church, then the affairs of the king and, lastly, the causes of the people. Applying this doctrine, the Decrees specified those norms related to the firmness of ecclesiastical property, excepting their immovable property from the general terms on acquisitive prescription; they also recognized the jurisdiction of the bishop over fugitive abbots, monks and abbesses, and forbade theft of ecclesiastical property, fixing pecuniary penalties *more terre* to the thieves, finally entrusting to the king's justice the persecution of those who killed ecclesiastics. This first regulation was followed by a series of precepts of general validity throughout the kingdom on various issues: null sales of private, fiscal and ecclesiastical servants; conditional sales of *iuniores* or *mozos* and the way to prove their condition juridical and social; the freedom of movement of the men of behetría, the obligations *solito more* of the *milites* and tributaries; the attributions of the *sayón*; the *caloñas* or pecuniary penalties corresponding to the king; the election by the king of counts and judges in León and in other cities (*comites et imperantes, iudices*) to resolve the causes of the people, the regulation of extrajudicial pledges, false testimony, etc."

also intends to promote, with his privileges and privileges, exemptions and freedoms, the life of the *civitas regia*."[39]

4. The rule of law in León: from the *Decreta* and *Fuero* (1017) to the *Decreta* (1188)

Whereas in 1017 Alfonso V pursued to promote the life of his kingdom through a legislation based upon the Visigoth heritage (since the Leonese kingdom assumed the grave and great responsibility of taking the lead in the reconquest of the old Spanish Visigoth kingdom), in 1188 Alfonso IX sought for his kingdom a new legal order based upon its own tradition (or historical 'constitution'[40]). This explains why the 1188 *Decreta* contains three explicit references to the old *fueros* (chapters 5, 8 and 16). In this regard, the validity of the old order is quite clear in ch. 16, where it is prescribed that "nobody should go to trial in my curia or to trial in León unless for those causes for which he should go according to their own ancient laws (*fueros*)." Besides, two additional references are made to the old customs of the kingdom (chapters 1 and 8). In ch. 1, Alfonso IX promised to "respect (…) the good customs that have been established by my predecessors", while ch. 8 ordered that "whoever denies having acted violently to avoid such penalty, should present a guarantor according to the old law (*fuero*) and the ancient customs of the land."

As can be seen, the idea of the rule of law, or, in other words, the idea that laws were needed not just to settle legal disputes among individuals but also to limit the exercise of royal power, appeared very early in the legal culture of the kingdom of León. The *Decreta* and *Fuero* approved by Alfonso V constituted a sign of it and contributed to consolidate that legal culture. It seems clear to me – as we will see later – that both the Visigoth legacy (particularly with the *Liber iudiciorum*) and the peculiar context of the reconquest and repopulation notably contributed to it. Besides, both kinds of provisions (territorial – *Decreta* – and local – *Fuero* –) approved by Alfonso V followed their own paths, being repeatedly confirmed[41] and extended to other territories of the kingdom, either in direct way or indirectly, through the *Fuero* of Benavente (1164–1167),[42] that contained and enlarged the *Fuero* of Léon. In this vein, the remarkable repopulation enterprise of the last privative kings of León, Fernando II (1157–1188) and Alfonso IX (1188–1229), notably increased the number of villages that were ruled by the same *fuero,* from Galicia and Asturias to Extremadura.[43]

Although both texts (1017 and 1188) do not contain concordances, the abovementioned idea of the rule – or the primacy – of law is clearly present. As seen, ch. 16 of the *Decreta* of the Cortes of León (1188) stated as follows: "I also ordered that nobody should go to trial in my curia or to trial in León unless for those causes for which he should go according

[39] Coronas González, 2018. 30.

[40] On the expression 'constitution, Coronas González, 2018. 27.

[41] In this regard, particularly relevant were, for example, the confirmatory clauses of Queen Urraca, on September 10, 1109, to please the people of Leon and undoubtedly at the request of the city council; of this matter, see Arvizu, 2023. 250–251.

[42] On this Fuero, see Coronas González, 2018. 123.

[43] Coronas González, 2018. 30.

to their own ancient laws (*fueros*)." This text is notable connected to some chapters of the *Decreta* and *Fuero* of 1017.[44] Ch. XIX of the *Decreta* stated as follows:

> "We also order that in León and in all the other cities and for all the municipal districts they have judges chosen by the king who judge the causes of all the people."

The *Fuero* of León contained more provisions in the same direction. In this vein, ch. XX established that the city of León had been governed by the agreed and approved *Fueros,* which should not be violated:

> "We also establish that the city of León (…) be repopulated by these subscribed *fueros* and that they are never violated."

If that was not clear enough, ch. XXIX ordered – in line with ch. XIX of the *Decreta* – that all residents of territories close to León (or its *alfoz*) who might have legal disputes with Leonese people, should go to León and sue as plaintiff or defendant:

> "All men who live within the following terms: Santa Marta, Quintanillas on the way to Cea, Cifuentes, Villoria, Villafeliz, Las Milleras, Cascantes, Villavellite, Villar de Mazarife, the Ardón Valley and San Julián, because of the litigations that they have against the people of Leon come to León to sue as defendants or as plaintiffs…"

The *Fuero* also prescribed – in ch. XXX – that all legal disputes should be settled by resorting to the same law, namely, the *Fuero:*

> "All the inhabitants inside and outside the walls of said city always have and possess the same *fuero*."

The last paragraph of the *Fuero* was particularly unambiguous in punishing those who intently attempted to break the law of the city:

> "Whoever of our or strange lineage knowingly attempts to break this our constitution, with his hands, feet and neck broken, his eyes gouged out, his intestines scattered, struck down by leprosy, together with the sword of anathema in eternal damnation, suffer the sorrows with the devil and his angels."

Having all these legal provisions – both *Decreta* and particularly the *Fuero* of 1017 – as precedents in León, it would be inconsistent to deny that the consecration of the rule of law laid down in ch. 16 of the *Decreta* of the Cortes of León (1188) was indebted to the Leonese legal tradition in general and to the *Decreta* and *Fuero* of León (1017) in particular.

As said, the *Liber Testamentorum* contains the *Decreta* (chs. I–XX, territorial or general law for the whole kingdom, including León, Galicia, Asturias and Castile) and the *Fuero* of León (chs. XXI–XLVIII, municipal law applicable to the city of León). As seen, both kinds of provisions, which were approved in the *Curia extraordinaria* summoned by Alfonso V on 30 July 1017, laid down the supremacy of law, so legal disputes should be settled by royal judges who, appointed by king, would enforce the law applicable, keeping both the substantive and the procedural rules.

Moreover, both texts (*Decreta* and *Fuero*) regulated other aspects. Summing up, the *Decreta* for the kingdom of León can be found in the first twenty chapters of the *Liber*

[44] The chapters of the *Decreta* and the *Fuero* of León (1017) will be cited with Roman numerals, as they appeared transcribed in the Appendix at the end of my text.

Testamentorum (or Ovetensis text). The first provisions regulated the peaceful possession of property by the Church (chs. I–IIII). It also sought to protect its members, both from secular and regular clergy, confirming their judicial authority and the direct authority of the bishop (ch. V). The text also showed a certain judicial autonomy, and some minimum legal guarantees (chs. IX ff.). It also regulated the relationship between king and people (chs. VII, IX), the obligation to pay taxes to the monarch (chs. XIII, XV), containing some rules to protect the people and their property (chs. VII, IX, X, XII–XIV, XIX, XX). A rule dealt with the woman, protecting her property and her right to inherit (ch. XI). The *Decreta* also established the obligation to go to the *fonsado,* that is, to the war appeal, except for newlywed knights, because they had to father a child (ch. XVIII).

Chapters 21 to 48 of the *Liber Testamentorum* contained the local *Fuero* of León, that was supposed to be applied to the city of León and its suburbs. A provision defined the territory of the Alfoz de León, including Santas Martas, Quintanilla del Camino de Cea, Cifuentes, Villoria, Villafeliz, Milleras, Cascantes, Villadelid, Villar de Mazarife, the Ardón Valley and the territory of Los Oteros (ch. XXIX). All these people depended on the city and had some obligations, aiming at favoring residence in the capital, attracting population, especially artisans and merchants: coopers, bakers, butchers, etc. All of them would be under the royal protection, and the king corresponded by reducing taxes and granting some privileges, such as not paying the toll at the entrance (ch. XXIX). The *Fuero* regulated private property and the inviolability of the home (ch. XLII) and the immunity to the wife in the absence of the husband (ch. XLIII). It also stipulated the obligation of the people of Leon to establish once a year – it used to be in Lent – the measures of bread, wine and meat, and the salary of the workers (ch. XXX). The *Fuero* also protected the "Market peace" on Wednesdays, imposing sanctions on those who violate it (ch. XLVIII). Besides, it also established some means of evidence and forms of inquiries (ch. XLI). Craft trades were also regulated, so that each one only worked in his trade (chs. XXX, XXXIIII, XXXVI, XXXVIII, XL, XLIIII–XLVI).

5. A contextual interpretation to the *Decreta* and *Fueros* of León (1017) within the early-medieval Europe

As seen, the *Decreta* of León (1017) – contained in chapters 1 to 20 of the *Liber Testamentorum* – was not only the first territorial – or general – law of León, but also of the Spanish territories and Europe. Besides, the *Fuero* of León (1017) – contained in chapters 21 to 48 of the same document – granted some freedoms, immunities and privileges in a relatively extensive way for the first time in Spain and probably to Europe.[45] Two points

[45] The *Fuero* of León was the first of the kingdom of León, but the second one in the Spanish territories, since the first one was the *Fuero* of Brañosera (Palencia), 824; on this *Fuero*, see García-Gallo, Alfonso: *En torno a la carta de población de Brañosera*. Historia Instituciones Documentos, 1984. 1–14.; Martínez Díez, Gonzalo: *El primer Fuero Castellano. Brañosera, 13 octubre 824*. Anuario de Historia del Derecho Español, 2005. 29–65.; the town charter of Brañosera is not only the first of all the Castilian fuero or population charters, but also the oldest one of all the Christian kingdoms and territories of Spain. It is true that a capitulary was granted by Charlemagne around the year 801, welcoming under its immunity and protection the Goths and Hispanics of the city of Barcelona and the castle of Tarrasa and regulating their legal status, but this text has not been preserved, being just reconstructed on the basis of the news that about are stated in another capitular of his

seem to be undeniable about these texts. First, it was approved very early in the Middle Ages, at the beginning of the 11th century, not from 12th century onwards, as it happened in other Spanish and European territories. Second, it was granted by a king with the support of the nobility, not as a consequence of an agreement – or pact – between the king and the nobility (as would happen with the English *Charta Magna* in 1215 or the Hungarian *Golden Bull* in 1222), or between the king, the nobility and the citizens (as would happen with the *Decreta* of the Cortes of León in 1188). How might these two peculiarities be explained?

Concerning the first point, the question is why these legal texts – *Decreta* and *Fuero* of León (1017) – appeared so early in Spain, particularly in León. I think there are two main reasons that explain this fact, namely, i) the peculiar historical circumstances of the Spanish territories (reconquest and repopulation), and ii) a legal cultural factor (caused by the *Liber iudiciorum*).

i. The reconquest and repopulation were something unique in Spain, giving rise to the need for granting freedoms and privileges as means – or tools – to promote and encourage people to leave their houses and lands and to move to other territories that had been reconquered. In doing so, people highly contributed to the cause of the Christian reconquest, getting rid of the overlord regime, starting to have their own land and governing themselves. Unlike the rest of the early-medieval European territories, in the Iberian Peninsula, the emergence of cities necessarily involved the granting of legal privileges and, consequently, the self-governing power of citizens.[46] The concession of fueros and population charters by kings and lords were designed to consolidate the military reconquest by encouraging the repopulation of the new territories. This could not have been possible without appealing incentives and advantageous conditions that might effectively ensure that people would be willing to move and start a new life in other parts of the royal or seigniorial dominions.
ii. Before the Muslim invasion, the Spanish Visigoth monarchy had been ruled by two laws, one secular (*Liber iudiciorum*), the other ecclesiastical (*Colección Hispana*). The validity of the Liber iudiciorum as the unique legal text applicable in the Spanish Visigoth period had important consequences during the Muslim dominion of the Iberian Peninsula,[47] and particularly in the context of the reconquest and repopulation. In that period, there was no doubt about the meaning of the expression *lex,* namely, the *Liber iudiciorum.* This text was legally in force in important areas (Catalonia, Leon and Toledo), but it was at least culturally present in the whole Spanish territory.[48] This needs a further explanation.

grandson Carlos the Bald in the year 844; on this matter, see Font Rius, Jose Maria: *Cartas de población y franquicia de Cataluña*. 1. Textos. Consejo Superior de Investigaciones Científicas, Instituto Jerónimo de Zurita, Escuela de Estudios Medievales, Madrid – Barcelona,1969. 3–4.

[46] The Christian reconquest constituted a cause as powerful as it would be – some centuries later – for the 18th-century American thirteen colonies to be freed from the English dominion or to 19th-centuy Spaniards to regain control against the French invasion over Spain.

[47] Note that the *Liber Iudiciorum* had been preserved under the Muslim dominion, "as Christians were permitted the use of their own laws, where they did not conflict with those of the conquerors, upon the regular payment of tribute; thus it may be presumed that it was the recognized legal authority of Christian magistrates while Hispania remained under Muslim control" (Masferrer, Aniceto: *Spanish Legal Traditions*. Dykinson, Madrid, 2012. 118).

[48] In the 10th-century Galicia, for example, some monastic charters make explicit references to the *Liber iudiciorum.*

The early medieval law of the Iberian Peninsula has been described as dominated by three legal orders depending on the geographical areas: *fazañas, fueros* and *Liber iudiciorum*. According to this description, some areas were mainly governed by decisions made by judges according to their own opinion (*fazañas*). Others were ruled by *fueros* granted by kings or overlords to a city or town with the intention of establishing a new legal regime – based upon liberties, privileges and franchises for its population – or extending an already existing one that had proven to be insufficient. Finally, other territories were governed by the *Liber iudiciorum.* However, such simple description does not accurately depict the real complexity of the early-middle-ages legal systems, since they were not rarely entwined in the same geographical area. One might think that *fazañas* and *fueros* emerged in the territories where there was no written legal source, and conclude that, where the *Liber Iudiciorum* was in force, there was less room for *fazañas* y *fueros,* and the opposite. In doing so, it seems that the legal validity of the *Liber iudiciorum* preclude the one of *fazañas* and *fueros*. This is not true in many cases because, as said, the general rule of the presence of *Liber iudiciorum* all over the Spanish territory, legally or culturally in force. In any case, it was the insufficiency and/or inadequacy of the *Liber iudiciorum* what caused the emerging of the other legal sources (*fazañas* and *fueros*). This means that in each territory, although at different periods, it is possible to see the coexistence of the three types of legal systems described. For example, although the *Liber Iudiciorum* was the main legal text in Catalonia during the early Middle Ages, there were also *fueros* and *fazañas* in force. In Castile – territory of *fazañas* –, there were *fueros* in force too. Many *fueros* – and other legal sources such as *fazañas* and the *Usatges de Barcelona* – were granted or issued taking into account or on the basis of the *Liber iudiciorum.*[49] In short, the *Liber Iudiciorum* impregnated all the law of the early-medieval Spain, although its influence varied from region to region.[50] The *Liber iudiciorum* highly contributed to create a legal culture in the early-medieval Spain that cannot be compared to that of any other early-medieval European kingdom or territory.

The reasons explained above might help to answer a relevant question: was the emergence of legal texts – such as the ones of León (1017) – laying down a rudimentary principle of the rule of law something exclusive or peculiar of León or of the Iberian Peninsula? My answer is partly affirmative and partly negative. Negative, in the sense that in the Middle Ages similar texts emerged in other territories of Spain and Europe. They stemmed, either from agreements between the royal power and the nobility (such as the 1017 *Decreta* of León), or from *fueros* – or population charters – granted by kings and nobles establishing a privileged regime to a city or town and its population (such as the 1017 *Fuero* of León). General or territorial and local – or municipal – texts arose all over Spain and Europe. As well known, the municipal regime was connected to the idea of freedom, since it constituted the alternative to the overlord regime. In this vein, a city or town charter (called, generically, municipal *fuero* or charter) was a legal document creating or establishing a municipality such as a city or town. The concept developed in Europe throughout the Middle Ages. Traditionally, the granting of a charter gave a settlement

[49] On this matter, see Alvarado Planas, Javier: *La creación del derecho en la Edad Media. Fueros, jueces y sentencias en Castilla*. Thomson Reuters Aranzadi, Cizur Menor, 2016.

[50] In Catalonia, for example, the *Liber Iudiciorum* was explicitly prohibited (1251), but despite this prohibition, many scholars claim that the L*iber Iudiciorum* was still commonly used.

and its inhabitants the right to town privileges under the overlord regime. People who lived in chartered towns were burghers, as opposed to peasants who lived in rural areas or villages dominated by lords who exerted patrimonial or jurisdictional faculties. Thus, towns were considered "free" in the sense that they were not submitted to the overlord regime, enjoying privileges, rights and exemptions. The municipal council was attributed legal faculties to exert the jurisdiction, being able to create law, apply it and collect the necessary taxes to finance their own budget. The German saying 'Stadtluft macht frei' ('City air makes you free') nicely captures the relationship between municipal regime and freedom.[51] In many medieval Spanish and European territories similar texts – both local and territorial – were enacted, particularly in the 13th and 14th centuries, period in which the royal power reached agreements not only with nobles but also with citizens or burghers, whose increasing economic weight contributed to gradually empower the king before the nobility. It was in that context of struggle between the royal and noble powers and the emergence of the burghers when some important medieval legal documents were agreed (*Decreta of Cortes de León,* 1188; *Magna Charta,* 1215; and *Golden Bull,* 1222), enabling scholars to compare them.

Having said that, the peculiarity of Spain is due, above all, to its early appearance. The fact that the *Decreta* of León was much earlier than any other similar European legal document (almost three decades earlier than the *Magna Charta*) is not by chance, but rather revealing of the – already mentioned – two factors that explain why such texts appear in Spain that early: the deeply rooted legal culture based upon the *Liber iudiciorum* as the only secular, Christian law in force in Spain from the middle of the 7th century (654/681), and the reconquest and repopulation, a historical context that serve as a powerful engine of a machinery to regain the rule of the old Christian (Visigoth) monarchy. Note that many *fueros* and *population charters* – starting with the first one, the *Fuero* of Brañosera, 824 – were used strategically, as a political tool to consolidate military achievements. Both factors, the legal culture based upon the *Liber iudiciorum* and the Christian reconquest of the Iberian Peninsula, clearly explain the early emergence of these legal sources in the early-medieval Spain in comparison to other European territories, and also why in the Iberian Peninsula the granting of charters that brought with it the creation of medieval cities necessarily implied not only the concession of privileges but also self-governmental faculties for their citizens, that somehow constitute the precedent of the early-modern state.

[51] "*Stadtluft macht frei* ("city air makes you free"), or *Stadtluft macht frei nach Jahr und Tag* („city air makes you free after a year and a day"), is a German saying describing a principle of law in the Middle Ages. From settlements around castles and monasteries, from the 11th century, free purchased serfs and other members of the Third Estate founded settlements that emerged alongside the old Roman or Germanic cities. There were always more serfs going to the cities, where they became, for their masters, untraceable. It was customary law that a city resident was free after one year and one day; after this he could no longer be reclaimed by his employer and thus became bound to the city. This scheme was admitted to statutes in 1230s" (Masferrer, 2012. 82.).

DECREES OF KING ALFONSO AND QUEEN ELVIRA*

* English translation from the manuscript *Liber Testamentorum,* Archivo Catedral, Oviedo, perg., 113 folios, 36 x 24 cm, Visigoth writing, year 1118, f. 54v–57r, contained in Maurilio Pérez González, "El Fuero de León: aspectos básicos y los textos más importantes", *Boletín de la Real Academia de la Historia,* t. 219, Cuaderno 1, 2022, pp. 7–28 (pp. 13–18, original versión, in Latin; pp. 18–22, Spanish translation; pp. 23–25, glossary).

On the 30th of July 1017, in the presence of King Alfonso and his wife Queen Elvira, we met in León in the see of Santa María, all the bishops, abbots and magnates of the kingdom of Hispania, and by mandate of the said King we decreed the following provisions, to be firmly observed in the times to come:

I. First of all, therefore, We decree that in all councils which shall henceforth be held, Church trials shall be judged in the first place and shall obtain a just judgment without falsehood.

II. We also command that the Church shall firmly possess whatever she has granted and confirmed by documents at any time. If anyone should wish to challenge what has been granted in documentary form, whatever it may be, let the document be presented to the council and let truthful men examine it as to whether it is authentic, and if the document is found to be authentic, let no judgment be passed upon it, but let the Church peaceably possess forever what is written therein; And if the Church possesses anything by right, and has no document of it, let the stewards of the Church declare upon oath that right, and thereafter let it (the Church) possess it forever, and within thirty years let not the acquired right, or document be obstructed, for he defrauds God who rescinds a property of the Church for an uninterrupted period of thirty years.

III. We also decree that no one shall withhold or dispute from the bishops the abbots of their dioceses or the monks, abbesses, nuns, or fugitive rebel members of the clergy but that all shall remain under the jurisdiction of their bishop.

IIII. We command that no one shall dare to steal anything from the Church; but if anyone shall take anything within the sacred precincts by robbery, let him pay for the sacrilege and return as robbery what he has taken therefrom; but if he unjustly takes anything from the Church outside the sacred precincts, let him return the property and pay the penalty (*caloña*) to the administrators of that Church according to the custom of the land.

V. We likewise decree that if by chance someone should kill a man of the Church and the Church itself cannot obtain justice, the representation of the trial will be granted to the King's *merino,* and they shall divide in half the trial's *caloña.*

VI. Therefore, when the trial of the Church is concluded, and justice has been administered, let the King's cause be dealt with.

VII. Then that of the people.

VIII. We likewise decree that no one shall buy property from the servant of the Church, or from the King, or from any man. Whoever buys it shall forfeit it together with the money given.

VIIII. We likewise command that the murders and violent acts of all ingenuous men shall be paid in full to the King.

X. We also order that no nobleman or person from a *behetría* seigniory shall buy a plot of land or orchard from any junior, but only half of the land outside, and in this half which he buys, he shall not repopulate until the third villa. But the junior who shall transfer title (*mandación*) and buy the inheritance of another junior, shall possess it in its entirety if he dwells therein; and if he does not wish to dwell therein, he shall move to an *ingenua* villa until the third transfer of title, and shall possess half of the said inheritance, except for the lot and the orchard.

XI. And whoever takes a *mandación* wife and marries there, let him serve for the wife's inheritance and keep it; but if he does not wish to reside there, let him forfeit the inheritance. And if he marries into an *ingenua* estate, let him keep the wife's inheritance in full.

XII. We also decree that, if anyone who dwells in a *mandación* shall affirm that he is neither a junior nor the son of a junior, the King's merchant of the said *mandación,* by means of three good men of well-established lineage (and) inhabitants in the said *mandación,* shall ascertain by an oath that he is a junior and the son of a junior. And when he has been sworn, the junior shall dwell in the said estate and possess it, serving for it. And if he does not wish to dwell therein, he shall go free wherever he pleases with his horse and tack after leaving the whole estate and half of his goods.

XIII. We also command that he whose father or grandfather went out to till the King's estates or to pay the taxes of the treasury shall likewise do the same.

XIIII. We further command that a man who is *de behetría* shall go free wherever he pleases with all his goods and inheritance.

XV. And whoever shall injure or kill the King's *sayon* shall pay five hundred *sueldos*.

XVI. Whoever breaks the King's seal shall pay one hundred *sueldos,* and whatever he takes from under the seal he shall pay as plunder if there is an oath on the part of the King: half of the money to the King and the other half to the owner of the inheritance. And, if on the part of the King the oath is not taken, the accused shall have licence to swear and shall pay as rapine as much as he swears.

XVII. Likewise, if a vassal should take a pledge in the jurisdiction of another vassal, he shall pay the pledge in the same manner as if he were not a vassal since his power to take the pledge is not the same as if he were not a vassal, and he shall pay the pledge to the King.

XVIII. In the same way, those who go out to the *fonsado* with the King, with the counts, with the *merinos,* must always go according to custom.

XVIIII. We likewise order that in León and in all other cities and municipal districts, there shall be judges elected by the King to judge the causes of all the people.

XX. And whoever takes a pledge from anyone without first having claimed it from his lord shall restore twice as much as he has taken in pledge without trial. And if he takes a pledge from anyone before the demand has been made and removes anything from the pledge,

he shall clearly restore twice as much without trial. And if the demand is made before the judges on suspicion, he of whom they have a suspicion, let him defend himself by oath and with water from Caldaria by the intervention of good men. And if the complaint be true and not on suspicion, let truthful men investigate it. And if a true enquiry cannot be made, let witnesses be prepared on both sides with such men as have seen and heard, and whoever is found to be the victor shall pay according to the custom of the land that for which the claim was made. If it should be proved that any of the witnesses had testified falsely, let him pay to the King 60 *sueldos* for the falsehood, and to him of whom he presented false testimony, let him pay in full what he lost by his testimony and let the houses of the false witness be destroyed from their foundations, and let no one hereafter receive him as a witness.

XXI. We also decree that the city of León, which was devastated by the Saracens in the days of my father King Vermudo, shall be repopulated by these subscribed charters and that they shall never be violated. We order, therefore, that no junior, cooper or weaver who comes to dwell in León shall be removed from here.

XXII. We likewise order that a servant who is unknown in the same way shall not be taken from thence nor be given to anyone.

XXIII. And the servant of whom it shall be proved by truthful men that he is a servant, whether of Christians or of Muslims, let him, without any dispute, be given to his owner.

XXIIII. No clergyman or layman shall give to any man any abduction, *fonsadera* or *mañería*.

XXV. If any man commits murder and manages to flee from the city or from his house and is not captured within nine days, let him come safely to his house and beware of his enemies, and let him pay nothing to the *sayon* or to any other man for the murder he has committed. And if he is caught within nine days and has wherewith to pay in full for the murder, he should pay for it. And if he has not wherewith to pay, then the thief or his lord shall take one-half of his chattel, while the other half shall remain for his wife and children or relatives, with the houses and all the inheritance.

XXVI. Whoever has a house on another's land and has no horse or ass shall give the owner of the land once a year ten loaves of wheat, half a cannel of wine and a good loin; and let him have whatever lord he wishes and let him not sell his house or raise his building under obligation. But if of his own free will he wills to sell his house, let two Christians and two Jews appraise his building, and if the lord of the land wills to give the price appointed, let him give it, also with his own *alboroque*. And if he will not, the owner of the building shall sell it to whomsoever he will.

XXVII. If a gentleman in Leon has a house on the land of another, he shall go twice a year to an assembly with the lord of the land on such conditions that on the same day he may return to his house; and let the lord have what he will, and let him make his house as above written, and let him not give it to any lord.

XXVIII. But whosoever hath no horse, but hath asses, let him also twice a year give his asses to the lord of the soil, but in such a manner that he may return to his house the same

day, and the lord of the soil shall provide for him and his asses; and let the lord have what he will, and let him do with his house as aforesaid.

XXVII. All the men who dwell within the following terms: Santa Marta, Quintanillas del Camino de Cea, Cifuentes, Villoria, Villafeliz, las Milleras, Cascantes, Villavellite, Villar de Mazarife, the valley of Ardón and San Julián, on account of disputes they may have against the Leonese come to León to plead as defendants or as plaintiffs, and in time of war and discord they shall come to León to guard the walls of the city and to restore them in the same way as the citizens of León, and they shall not give portage for all the things they sell there.

XXX. All the inhabitants inside and outside the walls of the said city shall always have and possess the same charter, and on the first day of Lent they shall come to the chapter of Santa María de Regla and establish the measures of bread, wine and meat and the wages of the workers in such a way that the whole city shall have justice in the year. And if anyone should break this precept, he shall give the King's *merino* five *sueldos* of royal money.

XXXI. All the vintners who live here shall give their asses twice a year to the King's merchant, so that on the same day they may return to their homes and give them and their asses plenty of food. And for every year the vintners shall give six shillings to the King's merchant, once a year.

XXXII. If anyone diminishes the measure of bread and wine, he shall pay five *sueldos* to the King's *merino*.

XXXIII. Whoever shall bring his ground grain to market and shall have stolen the King's *maquilas,* pay them double.

XXXIIII. Every inhabitant of the city shall sell his milled grain in his own house for a straight measure without *caloña.*

XXXV. Bakers who falsify the weight of bread shall be whipped the first time, but the second time they shall pay five *sueldos* to the King's *merino*.

XXXVI. All butchers shall sell by weight pork, goats, rams (and) cows with the consent of the council and shall give a meal to the council together with the *zabazoques*.

XXXVII. If anyone should wound another and the wounded person should denounce him and give his representation to the King's *sayon,* he who has caused the wound shall pay the *sayon* one canon of wine and make amends to the wounded person. And if he does not give his representation to the sheriff, he shall pay him nothing but only make amends with the wounded man.

XXXVIII. No woman shall be taken against her will to make the King's bread unless she is his servant.

XXXVII. No *merino* or *sayon* shall go into a man's orchard against the will of the owner of the orchard to take anything from it unless he is the King's servant.

XL. Whoever is not a vintner by charter may sell his wine in his own house as he pleases, for the legal measure, and therefrom the King's official shall receive nothing.

XLI. A man who lives in León and within the aforesaid limits shall not give surety for any *caloña* except for the sum of five *sueldos* of the currency of the city and shall take the oath and the proof of the caldaria water by the intervention of good priests or an enquiry by means of truthful inquirers, if it pleases both parties. But if he should be accused of having already committed theft, treasonable homicide, or other perfidy, and should be convicted thereof, he who is found to have done so, shall defend himself by oath and fight with arms.

XLII. And we order that neither the merino, nor the sayon, nor the owner of the land, nor any lord shall enter the house of any man living in Leon for any reason whatsoever, nor shall the doors of his house be taken from him.

XLIII. No woman in León shall be imprisoned, nor tried, nor prosecuted in the absence of her husband.

XLIIII. The bakers shall each week give *arienzos* to the king's sayon.

XLV. Every year at the time of the grape harvest, each year all the butchers of León shall give to the King's butchers one good wineskin and one piece of tallow.

XLVI. Fish from the sea and from the river and meat brought to León to be sold shall not be taken by force in any place, neither by the *sayón* nor by any other man. And whoever does so by force shall pay five *sueldos* to the council, and the council shall give him one hundred lashes, carrying him in his shirt through the city square with a rope around his neck; and likewise regarding all other things that are brought to León to be sold.

XLVII. Whoever with naked weapons, namely, with swords and spears, disturbs the public market which has been held on Wednesdays since ancient times, shall pay sixty *sueldos* of the city's currency to the King's *sayon.*

XLVIII. Whoever on the day of the said market, from morning till sunset, seizes anyone who is not his debtor or guarantor, and these outside the market, shall pay sixty *sueldos* to the King's official and double the pledge to the one whom he seized. And if either the *sayon* or the *merino* on that day should take a pledge or by force take anything from anyone, the council, as it is written, shall scourge them with a hundred lashes and (each one) shall pay the council five *sueldos;* and, on that day, no one shall dare to contradict the *sayon* about the right that belongs to the King.

Whoever of our or foreign lineage knowingly attempts to break this constitution of ours, let his hands, feet and neck be broken, his eyes plucked out, his intestines scattered, his bowels scattered, struck down by leprosy, and together with the sword of anathema in eternal damnation, let him suffer the penalties with the devil and his angels.

LEXICON

Violent acts, *rausos, rausus,*-i: Fines or compensation to be paid to their lord by those who commit violent acts, especially abductions.

Church administrators, *cultores Ecclesie:* Servants of God or good, i.e., any administrator, ruler or protector of a church/monastery/*cenobio* and its goods.

Agua caldaria, aqua calida: Ordeal or God's trial, in which an accused person had to draw pebbles from a cauldron filled with boiling water with his own hand, which was then bandaged and not uncovered until three or four days later. If the burns had disappeared, the accused was considered innocent.

Alboroque, aluoroc: Initially, among the Jews it expressed the closing of a deal with the congratulations of the buyer to the seller. But in medieval León it indicates the extra price received by the buyer at the conclusion of a contract. This surcharge was agreed between the buyer and the seller and was an essential part of the sale.

Anathema, anathema,-atis: Execration, curse, excommunication.

Aparejos, atondo: Utensils, set of utensils, equipment necessary for an activity (grinding grain, tilling the fields, household accessories, etc.).

Arienzo, argenzo: Silver coin, arienzo, the most frequent form of which in Asturian documentation was arenzo-s, followed by argenzo-s and argenteo-s. It should be borne in mind that in the 9th–10th centuries (and the beginning of the 11th century) legal transactions were dominated by barter and by the fact that the coin was a unit of account.

Arrelde: A measure of weight equivalent to four pounds, about 1,840 grams, although its value varied from place to place.

Assembly, aiunta,-e: Meeting or assembly of whatever rank.

Behetría, benefactoria: The action of entrusting oneself to a benefactor, under whose protection the men of *benefactoria* or *behetría* were placed with their goods, but without losing their freedom. The men of *behetría* were free to choose their lord, with the power to break their ties with him at any time, and this without any detriment to their property or their freedom. Although there were many nuances, the situation of the men of *behetría* was intermediate between that of serfs and freemen.

Knight, miles,-itis: In medieval times miles,-itis meant "knight" as opposed to "infant, peon". They used to be vassals dependent on a lord.

Caloña, calumpnia,-e: Pecuniary penalty, fine, *caloña,* whether as a result of injury, accusation, complaint or cultural claim.

Canadiella, kannatella: Measure of capacity for liquids. Its value used to vary from region to region.

Butcher, mazellarius,-i: Mazellarius, formed on macellum,-i "meat market", has a value very similar to that of carnicerius,-i.

Denarius, denarius,-i: A coin of real existence, which in the Middle Ages had a much lower value than a *salario.*

District(s) municipal(s), alfoz(e): Municipalities, *pagos,* municipal districts, which usually depended on a town, but also on a castle, etc.

Fonsadera, fossataria,-e: Tribute consisting of the payment of a pecuniary sum for the exemption of going to the *fonsado.*

Fonsado, fossatum/s,-i: Army recruited by order of the King for a military expedition of an offensive nature, or the military expedition of an offensive nature undertaken by the King.

Fuero, forum/s,-i: Statute or *fuero* in the sense of "right, privilege".

Ground grain, ciuaria,-e: Bread cereal, grain that is ground for flour.

Ingenuous men, *homines ingenui:* This was the name given to those who enjoyed free legal status, full freedom, but did not enjoy privileges like the nobility and clergy.

Truthful men, homines ueridici: Men considered qualified to deliver or testify in a trial.

Junior, iunior: Their name alludes to their lower social status as opposed to *seniores* or seniors. The juniors had to live on the plot of land to which they were attached and pay the charges and benefits inherent to the cultivation of a tributary land, but they were also allowed to go and live wherever they wished under conditions such as those described in the Charter of León.

Mandation, mandatio,-onis: Circumscription or district under the dominion of a lord, to which the colonists of the *mandatio* were more or less subject.

Mañería, mannaria,-e: The right of the lord to recover the land given in *prestimonio** to a colonist when he died without offspring. This right of the lord was soon replaced by a tax that the *mañero* paid to his lord in order to be able to pass on the enjoyment of the land to his closest relatives or even to whomever he wished.

(*Prestimonio: transfer of land for a fixed period of time or for life, for the cultivation of the land in exchange for a price; it could often be inherited)

Maquila, maquila,-e: A tax in kind paid to the King for the sale of grain in the market. Although not in this context, the *maquila* was also a tax by which the inhabitants of a domain gave their lord a quantity of ground grain in exchange for the use of the lord's mill.

Merino, maiorinus,-i: Authority appointed by the King or a great lord to exercise important fiscal, economic, judicial and even military functions in a territory.

Nuntius, nuntius/m,-i: Tribute that had to be paid to the lord of an estate in order to pass it on to descendants. It usually consisted of the heirs handing over to the lord the best head of cattle, a piece of household goods or, as a last resort, a sum of money. This was done when the death of the colonist was announced to the lord, hence the name nuntium.

Portazgo, portaticum/s,-i: A tax on the circulation of goods or on market transactions, levied at the city gates or in the market place itself.

Rapto, rausus,-i: Violent act, abduction, mainly abduction of women; but it can also refer to the fine or compensation to be paid to their lord by those who commit abduction.

Sacred enclosure, cimiterium: sacred and inviolable space of ground around a church. In other contexts, it also means "cemetery" or "monastery".

Fugitive rebel religious, refugani: Clergy who have irregularly abandoned their Order or who do not fulfil their obligations; apostates.

Sayon, sagio,-onis, saio,-onis: A junior official in the administration of justice, whose duties included summoning litigants to trial, seizing property, arresting wrongdoers, and executing corporal and pecuniary penalties. As time went by, the functions of the "sayón" evolved.

King's seal, sigillum (regis): The King's seal or sigillum (regis) served to authenticate documents and make them enforceable.

Lord, senior, dominus: One who has dominion and ownership over something or/and someone, usually a territory and its people (of any category).

Sueldo, solidus,-i: A coin of account which, like all coins of account, was a ponderal unit, since it was valued for its intrinsic value (precious metal content) and not for its face value. In the case of the *sueldo,* it was equivalent to about 20.5 g of silver (*solidus de argento*) or gold (*solidus aureus*). However, the term solidus was also applied to real silver coins in circulation, of a weight similar to that mentioned above.

Weaver, aluendarius,-i: From the Andalusian ar. albánd = classical ar. band (< Persian band "flag") and the suffix -arius > -ero, aluendarius is the weaver of albendas or banners.

Cooper, cuparius,-i: A cooper or cooper, i.e. one who makes and sells barrels or casks.

Zabazoque, zauazouke: Inspector or prefect of the market. In the Christian kingdoms, the *zabazoque* or *almotacén* was a council official in charge of maintaining the "peace of the market" or security situation under the protection of the public authority, as well as guaranteeing the faithful comparison of weights and measures, to avoid fraud.

Patricia Plana de Juan
PhD candidate, University of Valencia

LIMITING ROYAL POWER IN ARAGÓN IN THE MIDDLE AGE: FROM THE FUERO OF SOBRARBE TO THE PRIVILEGES OF THE UNION (1287)

1. Fueros of Sobrarbe

1.1. Historical context

The Sobrarbe territory is located on the southern slopes of the Pyrenees, close to the County of Aragon and Ribagorza.[1] The so-called Fueros of Sobrarbe originated in this territory, a clear example of the struggle between the aristocratic and monarchic powers in the Middle Ages.

There has been a great debate about the date that should be attributed to these Fueros, there being a current that holds that their origin is at the end of the ninth century and another that opts for dating them in the eleventh century. The first of these are mostly Aragonese historians or chroniclers, the most important representative being Jerónimo de Blancas with his work *Aragonensium rerum Comentarii* of 1588.[2] Blancas narrates as part of his chronicle the origin of these Fueros in a way that other authors have classified as mythical.

According to this myth, the Fueros of Sobrarbe appear in the context of the struggle between Christians and Arabs in the Aragonese territories, including Sobrarbe, at the end of the 9th century. King Sancho Garcés of Sobrarbe died without any succession to the throne, at a time of great advance and great victories of the Muslim army.[3]

As the situation in Sobrarbe was precarious, an interregnum was established during which the public affairs were entrusted to twelve men who were called "*seniores*", later "*ricos-hombres*",[4] while the new monarch was elected. This form of government was maintained for some time due to the incursions of the Muslims and, in turn, because of the reluctance to submit again to one man, the king. It is said that they consulted the pontiff Adriano II and that he ruled as follows:

> "That, after taking suitable precautions and establishing the appropriate laws, after taking an oath, they should proceed to the election of a king, rejecting all foreign domination, and taking care that the one elected should not belong to the highest

[1] Habler, Konrad: *Los fueros de Sobrarbe*. Anuario de Historia del Derecho Español, 1936–1941. 5.

[2] The original version of this work by Blancas is written in Latin. For this study we use the version translated into Spanish by Manuel Hernández in 1878.

[3] Blancas, Jerónimo de : *Comentarios de las cosas de Aragón.* Imprenta del Hospicio, Zaragoza, 1878. 33.

[4] Blancas, 1878. 36. The expression "ricos-hombres" is a genuine expression of Aragonese history and is literally translated as "wealthy-me n" o "rich-men", alluding to a moneyed group of people.

> class, nor to the humblest; for if he were superior, he would oppress the inferiors; and if inferior, he would be the derision of the magnates".[5]

After this, the *seniores* concluded that they had to write the appropriate laws, which would mean a limiting power for the monarch, giving rise to the Fueros of Sobrarbe.

On the other hand, there are researchers who argue that this version of Blancas is not very historically accurate, focusing more on the political thought that this story conveys about the origin of the kingdom.[6] They argue that it is more appropriate to situate the Fueros of Sobrarbe around the second half of the 11th century, being granted by Sancho Ramírez as a reward for the war support given by those "ermunios infanzones".[7] According to these authors, the original version was written in Latin, and part of its content is preserved in a version of the Fuero de Tudela.

1.2. Limitation of the royal power

The Fuero of Sobrarbe was made up of the following laws:[8]

> "*1st. You shall rule the kingdom in peace and justice, and you shall give us better fueros.*
> *2nd. Whatever is conquered from the Moors, shall be divided not only among the ricos-hombres, but also among the knights and the infanzones; but the foreigner shall not receive anything.*
> *3rd. It shall not be permissible for the king to legislate without hearing the opinion of his subjects.*
> *4th. From starting a war, making peace, settling a truce, or dealing with anything else of great interest, you shall refrain, o king, without the consent of the council of the seniores;*
> *5th. And to ensure that our laws and liberties are not harmed or undermined, a «juez medio» shall watch over them, to whom it is lawful and permitted to appeal*

---

[5] Blancas, 1878.

[6] Álvarez-Ossorio Alvariño, Antonio: *Fueros, Cortes y Clientelas. El Mito de Sobrarbe, Juan de Austria y El Reino Paccionado De Aragón (1669–1678).* Pedralbes. Revista d'Història Moderna, 1992. 277. https://raco.cat/index.php/Pedralbes/article/view/100929. He points out on this issue: "From my point of view, Blancas' greatest interest does not lie in his work as a historian, but in his political thought. For behind the new impetus to the legend of the mountain laws lay an unequivocal formulation of the role of Aragon in the Catholic monarchy".

[7] Haebler, 1936–1941. 30. This term refers to a class of nobles below the "ricos-hombres" who were exempt from certain military and tax obligations.

[8] See Foz, Braulio: *Historia de Aragón. Vol. V.* Roque Gallifa, Zaragoza, 1848. 45. This author gives the following wording to the Fueros of Sobrarbe:
"1. Rule the kingdom in peace and justice, and establish for us better fueros;
2. Divide the spoils of the Moors, not only among the ricos-hombres, but also among the knights and warriors; but the foreigner shall take nothing;
3. The king may not make laws without the consent of his subjects;
4. Let the king beware of making war, of making peace, of making truces, or of dealing with grave matters without the consent of the seniores;
5. And that our laws or liberties may suffer no harm or injury, let him set up a Juez medio, to whom it shall be lawful to appeal from the king in case he shall offend any person, and to prevent injury if any be done to the republic".

> *against the king, if he harms anyone, and to reject insults if he might inflict them on the republic.*"[9]

According to Blancas, these are the five main laws in the Fuero of Sobrarbe, which were drafted during the interregnum in which the *ricos-hombres* ruled. Another law was added to these laws once Iñigo Arista, who was already king of Pamplona, was proclaimed king of Sobrarbe. According to this chronicler's version, it was the monarch himself who granted this *fuero*:

> "*If he should henceforth tyrannise the kingdom against the privileges or liberties, the kingdom should be free to choose another king, even if he were a pagan.*"[10]

The first of the laws refers to a more general duty to govern according to the principles of peace and justice, and also alludes to the fact that the monarch should "give better *fueros*". In other words, the king had to improve the concessions he made in the *fueros,* and these could not remain unchanging over time. The second law dealt with the distribution of all that was conquered from the Muslims. It was to remain in the hands of knights and *infanzones,* as well as *ricos-hombres,* and it was forbidden to grant it to foreigners.

The third law made the monarch's legislative power subordinate to a prior hearing of his subjects, rejecting any laws that came into being without their knowledge. The fourth law, similar to the previous one, compels the monarch to consult on matters of general interest, such as war or peace, not with his subjects, but with a council of *ricos-hombres.*

The fifth law establishes a guarantee that is clearly stated as such, "t*o ensure that our laws or liberties are not harmed or undermined*". It provides that if the king should act against these liberties or the public thing, a *Juez medio*[11] may intercede to watch over them. Lastly, the sixth law, according to the legend given by Iñigo Arista himself, also provides a criterion of closure and guarantee for these laws. Thus, if the monarch decided not to observe these laws or liberties, not only could they turn to that *Juez medio,* but they could also elect another king for not complying with the previous one with due respect for the laws.

Generally speaking, these laws are a limitation of monarchical power in favour of aristocratic power. Although the third law mentions that the king must listen to his subjects before legislating, this is the only mention made that tends more towards democratic power. The rest of the laws, as has been made clear, curtail the king's power by handing it over to the *ricos-hombres,* since it is they who benefit from the fueros, receive lands (along with the knights and *infanzones* in this case), are heard before the king legislates, must consent to what the king decides on matters of war or peace, are protected by the middle judge against abuse of power and are the ones who can depose the king if he does not respect the laws or liberties.

Although these six laws complement each other and show this limiting tendency, there are some that carry more weight than others, especially the last three laws. The monarch was to seek the approval or consent of a council of *ricos-hombres* or *seniores* for matters of great general interest and for peace and war. If this were not the case, the seniors might not obey the king and not show their support for him in war, for example.

---

[9] Blancas, 1878. 38.

[10] Blancas, 1878. 40. See also Foz, 1848. 62. This author places to this moment of the election of King Iñigo Arista the formula: "We who are worth as much as you, and who together can do more than you, make you king if you will rule us well, and if not, we will not".

[11] The literal translation stands as "middle Judge".

Also of great importance is the fifth law, which mentions a *Juez medio,* who was initially given the name of "*Justicia Mayor*" (Mayor Justice) and was later called "*Justicia de Aragón*" (Justice of Aragon).[12] This figure was envisaged as a way of denouncing abuses of the laws or liberties that the king or his ministers and courts could make of power.[13]

> "(…) the *Juez medio* was destined to maintain the equality of justice, it being a very reasonable and equitable thing that the loyalty of the kings to their vassals should be similar and proportionate to the loyalty of the vassals to their kings, (…) nothing being known to eternalise a monarchy as useful as an intermediate civil power that (…) represses the outbursts of the monarch against to the laws."[14]

In short, this fifth law of the Fueros of Sobrarbe stipulated not only that the laws had to be respected, but also that their non-observance had consequences, and that the *Juez medio* could be called upon to watch over the balance between the power of the monarch and the liberties of the kingdom.

Lastly, the sixth law stressed that if the king made excessive use of his power to the point of tyrannising the kingdom, he could be deposed and another one could be elected. In other words, the monarch's office was not guaranteed for life, but according to this law he had to answer to the inhabitants of the kingdom, especially to the *seniores* who chose him, and if they observed that their laws and liberties were not being respected, they could choose a new king. This goes far beyond the simple consideration of a guarantee, since, as it is presented in the Fueros of Sobrarbe, the observance of these laws by the king is a necessary and prior condition, a precondition to be able to hold the royal power.

2. Privileges of the Union

2.1. Historical context

In 1205, Peter II of Aragon imposed a tribute that strained relations between the monarchy and the aristocratic power, and the latter decided to join forces. This gave rise to the Union, made up mainly of *ricos-hombres* and some cities in the kingdom, as a way of defying the king, on the understanding that they owed no obedience or loyalty to him.[15]

> "(…) the *ricos-hombres* and the cities and towns joined forces to resist the arbitrariness and autocracy that was being manifested, and to oppose the usurpation and violence of their *fueros*' rights."[16]

Consequently, it was first granted in the General Privilege, which had as its fifth rule "the privilege of Union"[17] and recognised the Union as a legal institution.[18] Although the act subsequently failed to pass at the Cortes (Parliament), this did not prevent *ricos-hombres*

[12] Blancas, 1878. 40.
[13] See also Foz, 1848. 32.
[14] Blancas, 1878. 267.
[15] Foz, 1848. 149.
[16] Foz, 1848. 149.
[17] Foz, 1848. 149.
[18] See also Foz, 1848. 151. The relevance of this privilege of union in the General Privilege is not the granting of the right of union, since, as Braulio Foz points out, the *ricos-hombres* had already been exercising this

and cities from continuing to exercise the right of union and pursuing their claims to the monarch on behalf of the Union. Thus, since the General Privilege was first granted in 1283 and was not respected, this was the "cause and pretext"[19] for the demands that crystallised in the Privileges of the Union in 1287.

In a context of rebellion[20] against monarchical power, the Unionists had made a series of requests to the monarch Alfonso III, including the convening of Cortes. The king excused himself for a time on the grounds of a pressing trip to England to meet with the monarch of that kingdom.[21] Meanwhile, the Union did not like this response and delay in convening the Cortes, and went so far as to state the following:

> "1st. That they will break the oath of allegiance and obedience (they will «take their leave»)
> 2nd. That they will abandon the defence of the land they hold in honour,
> 3rd. They will seek any help against the king («we will demand and seek all the help and support that we can find»),
> 4th. In the meantime, not only will they not serve the monarch, but they will also seize all the rents and rights in Aragon, Valencia and Ribagorza."[22]

At a date close to the granting of the privileges under study, the Union continued its struggle and made great demands of the monarch,[23] a clear sign of the agitated and convulsive context in which they were granted later in 1287. A climate in which the aristocracy made clear its intention to disobey the royal power if they were not listened to, using the Union as a channel of expression.

As a final point to contextualise these Privileges of the Union, it should be noted that there is general agreement among historians that they were not granted in the Cortes.[24]

---

right for some time. What is important is that "it was recalled again, declared in use and made a fuero of the kingdom, granted by the king at the present time as the dissidents requested".

[19] Danvila y Collado, Manuel: *Las libertades de Aragón. Ensayo histórico, jurídico y político.* Impr. de Fortanet, Madrid, 1881, 131.; see also 193.: "The recognition of the Union as a legal institution by James I led to the General Privilege of Peter III, and the General Privilege produced the Privilege of the Union of the third Alfonso". This statement can be interpreted as meaning that the succession of these concessions was an unstoppable issue for the monarchs, as if once the Union was recognised as an institution it was really impossible to stop the power that the Unionists were gradually gaining.

[20] This rebellion is confined to its aristocratic or oligarchic character, without any real tendency towards democratisation or any reference to the power of the people. See the consideration given to the signing of the Privileges of the Union itself in González Antón, Luis: *Las Uniones aragonesas y las Cortes del reino (1283–1301)*. Superior de Investigaciones Cientificas Escuela de Estudios Medievales, Zaragoza, 1975. 203.: "If it is to be accepted that these Privileges are granted by and for the Union, they are the best evidence that at present rebellion is reduced to its minimum expression, especially as far as the popular classes are concerned."

[21] González Antón, 1975.182.

[22] González Antón, 1975.182.

[23] See Danvila y Collado, 1881. 177. About the demands made by the Union, which would later be granted, beyond the two major power-limiting provisions discussed later in this study: "That the evils and damages that those of the kingdom of Valencia had done in Aragon be amended; that the goods be restored to the neighbours of Tarazona, and that satisfaction be given for the deaths that had been executed by order of the King, as the war had been moved by his fault; that he order the payment to the innkeepers of their innkeepers for the past time; (…) and that D. Fortuño, bishop of Zaragoza, be restored to the peaceful possession of the peaceful possession of his kingdom. Fortuño, Bishop of Zaragoza, to the peaceful possession of the bishopric."

[24] González Antón, 1975. 202. This author summarises the positions of some of the most relevant historians of the Aragonese chronicle, understanding as the most solid position the one held by Zurita the most accurate

They were granted in Zaragoza in presence of only certain *ricos-hombres* of the Union, who are referred to on several occasions in the text of the privilege as "Jura", a clear sign that the Unionists had internal problems.[25]

2.2. Limitation of the royal power

The Privileges granted by Alfonso III in 1287 were finally two:

> 1st. "The king was obliged not to proceed against the *ricos-hombres,* knights or other persons of the Union without the prior sentence of the *Justicia* and without the advice and consent of the courts, for which security he gave sixteen castles in his name and his successors', with the power to dispose of them as they saw fit; and in the case of failure to fulfil this commitment, he agreed that from then on they would not have him or his successors as king and lord, but that they could choose another as they wished."[26]
>
> 2nd. "He was obliged to convene every year in the month of November in Zaragoza General Courts of Aragonese, granting those who gathered there the right to elect and appoint the persons who were to make up the King's council, on the condition that they would swear that they would advise him well and faithfully, and that they would never take gifts or bribes."[27]

Starting with the first of these, three parts of the privilege can be distinguished: the content of the privilege itself, the guarantee and the consequence of non-compliance or non-observance. The content of the first privilege was that the king could not act against *ricos-hombres,* knights or other unionists in the first instance. If he wished to punish them, they had to first receive a sentence from the *Justicia of Aragon* and, furthermore, the Cortes

---

and honest of the chroniclers of the kingdom, he states categorically: «they were granted in as much discord as there was about it among the *Ricoshombres* and in contradiction of most of them, and for this reason and because they were not granted in agreement with the king or in general courts, as was customary, they were never confirmed by those who later reigned». See also Foz, 1848. 152.: "(…) and it was requested that everything agreed should be granted in court. This solemn granting was not carried out, being what was lacking in legitimacy, as they were content with the king promising and swearing an oath."

[25] González Antón, 1975. 206: "The compromises are signed in presence of and for the few unionists gathered in Zaragoza, the same who have stood up with arms against the king and his loyal party, and the same, always very few, who have formulated the harsh conditions of peace ten days before". See also también Foz, 1848. 153.: "As not all the *ricos-hombres* and not all the communities had entered the *Jura de la Unión,* there was always some cause for unease and tempers gradually frayed, until finally a furious civil war broke out in the reign of D. Pedro IV".

[26] Lafuente, Modesto: *Historia General de España. Tom. IV*. Montaner y Simon, Barcelona, 1888. 228. See also Danvila y Collado, 1881. 177., which summarises the two main claims of the Unionists that later crystallised in the content of the Privileges as follows: "That henceforth none of the members of the Jura could be killed or wounded without the preceding sentence of the Justice of Aragon, with the advice of the Court assembled in Zaragoza; (and) that this was to be granted in a general Court, assembled in Zaragoza, and that all the *ricos-hombres* and knights and procurators of the kingdom should swear that if he or his successors should come against this privilege, that henceforth they could elect King and lord, and that he should receive and have in his council such persons as the Union might appoint, with whose opinion and agreement he would govern and administer the affairs of the kingdom of Aragon and Valencia."

[27] Lafuente, 1888. 228.

had to know and consent to this sentence. It is, therefore, a subordination of the king's decisions to the decisions taken by the Justicia de Aragón and the Cortes in order to be able to take action against these people.

Furthermore, as a way of persuading the monarch to comply with this prerogative, sixteen castles were to be handed over to the Unionists. And because of the non-observance of this privilege, the provision that can surely be described as the harshest or most incisive for the royal power was established: the power to depose the monarch or his successors and choose another.

The fact that the king himself approved and sanctioned this provision is described by some authors as the granting of a "right of insurrection to his subjects".[28] However, insofar as the privileges were in favour of the Unionists, it would be the Unionists who would demand respect for them and who would claim their right of insurrection against the monarch if he did not comply.

> "[On the Privileges of the Union] Its novelty and revolutionary character lies fundamentally in the fact that King Alfonso accepts the dethronement and even the change of dynasty (...). Now the king signs an instrument that includes a similar condition and he himself absolves the kingdom in advance of the oath of obedience and fidelity."[29]

As for the second privilege, two different implications can also be noted, one referring to the Cortes and the other to the council. The first is that the Cortes was to meet once a year around November. This question of the periodic meeting of the Cortes had already been recognised in the General Privilege, so the relevance of this privilege does not lie in this question. What is significant is the reason why the privilege mentions this periodic meeting, which is for the election of the members of a council to advise the king.

The idea of a council as a body distinct from the Cortes and which would have to be heard by the king is not genuine to this privilege. A year before it was granted, the Unionists had tried to impose this council on the king, who never recognised it as binding or "obliged to submit to its dictates".[30] The novelty of the Privileges of the Union in this sense, therefore, lies in the monarch's recognition of the existence of a body to which he was expressly bound and which was to be composed of those who were elected annually in courts.

In addition, the *ricos-hombres* qualified as a precaution that this council was to advise the king "well and faithfully" and its members were to fulfil this function with honesty, swearing "that they would never take gifts or bribes". The consequence of contravening this was the removal of the councillors in question, without the support of a majority of the Cortes being necessary:

> "(…), they would be removed from office in part or as a whole provided that «a la Cort visto será, o a aquella part de la Cort con la qual acordarant los procuradores o los jurados de Çaragoça»."[31]

---

[28] González Antón, 1975. 206.

[29] González Antón, 1975. 206. He goes on to point out that although it was a proclamation that the Union had previously demanded, it was not until the Privileges were granted that it was finally recognised: "A threat that the Union repeated on various specific occasions, but which had not been included in the General Privilege or in any of the concessions or confirmation of privileges and customs."

[30] González Antón, 1975. 206.

[31] González Antón, 1975. 206.

Therefore, in this second privilege, the king recognises a council made up of those elected annually in courts and to whom the king is bound, and the councillors, for their part, must faithfully fulfil their duties and not accept favours at the risk of being removed.

In this way, these Privileges create a parallel and simultaneous existence of three figures of power: the king, the Cortes and the council.[32] Undoubtedly, the power of the king was to the detriment of the other two, since the Cortes had to meet compulsorily once a year without the need for the monarch to call a meeting, and, in addition, it had to hear a council elected by the Cortes itself in order to make decisions.

In general terms, the Privileges of the Union granted in 1287 recognised, on the one hand and referring to individual liberties, that the monarch could not kill or condemn any person of the Union, any *rico-hombre* or knight, without a sentence from the Justice of Aragon and without the consent of the Cortes. If the monarch did not respect this, his subjects were freed from obeying him and could choose a new king.[33] On the other hand, it recognised the binding force for the monarch of a Council that assisted him, and it had to be elected by the Cortes, which had to meet annually for this purpose.

Overall and on a purely theoretical level, these Privileges were a limitation on monarchical power in Aragon in favour of the *ricos-hombres,* since they had to be heard in the Council, their individual liberties had to be respected in terms of condemning them and they had the "right of insurrection" if these were not respected. Great powers are conferred on this aristocratic class in this text, and the saying "that in Aragon there were as many kings as there were *ricos-hombres*"[34] has become widespread. Some authors have pointed out that such was the depth of the incision into royal power that the monarch was "reduced to the status of hereditary President of an aristocratic republic",[35] with these Privileges being "a forced abdication of royal authority".[36] Although the application or implementation of this text was far more moderate than the literal wording suggests, this should not tarnish the substance of the Unionist claims that were finally recognised.[37]

3. Comparative analysis and conclusions

Both the Fueros of Sobrarbe and the Privileges of the Union are examples of the struggle to limit the monarchical power of the nobility in the kingdom of Aragon in the Middle Ages. And not only do they have this point in common, but they are also closely connected. It could be understood that the Privileges of the Union of 1287 are the result of the maturation and development over time of the principles that were established in the Fuero of Sobrarbe.

---

[32] González Antón, 1975. 206. González Antón takes up here García Gallo's opinion on this aspect: "in this way, alongside the Cortes Generales of the kingdom, the Union of the nobles and cities is recognised as a supreme body over them and the King".

[33] See Danvila y Collado, 1881. 181., who understands that this gave rise to "organised *lawlessness*".

[34] Lafuente, 1888. 228.

[35] Danvila y Collado, 1881. 179.

[36] Danvila y Collado, 1881. 179.

[37] González Antón, 1975. 208–209. This author collects Klüpfel's opinion on the value of the Privileges: "the limits that established a moderate dam to the royal power (…) were exceeded in such a way that the strength and course of Aragonese politics had to suffer considerably."

This can be seen in three key aspects of both texts: the councils of *seniores* and *ricos-hombres,* the figure of the *Juez medio* or Justice of Aragon and the so-called "right of insurrection". In the Fuero of Sobrarbe, the fourth law stated that the king was to refrain from acting or dealing with things of great interest without consulting a council of seniors. In the same way, the second Privilege of the Union established that a council, appointed annually by the courts, would advise the king well and faithfully. Both bodies are of an aristocratic type and were to be heard by the monarch.

Secondly, in both texts, the figure of the average Judge or Justice of Aragon is of great importance. The Fuero of Sobrarbe refers to the average Judge as a person who watches over the liberties of the kingdom and who can be appealed to if the king damages them. A similar mention is made in the first of the Privileges of the Union about the Justice of Aragon. In order for the king to be able to take measures against a *rico-hombre* or unionist, the Justice must first pass sentence condemning him, in addition to the courts consenting to such measures. Thus, in these two texts, the Justice of Aragon appears as an intermediary between the king and the seniors or *rico-hombre* for the protection of the liberties of the kingdom.

Finally, both the sixth law of the Fuero de Sobrarbe and the first of the Privileges of the Union in detail recognise what some historians have called the "right of insurrection". Both documents stipulate that they could depose the king and choose another one if he did not respect the privileges or liberties, in the case of Sobrarbe, or if he proceeded against the Union without the sentence of the Justice or the consent of the Cortes, in the case of the Privileges. This shows that in Aragon, at least in theory, kings could not exercise absolute power in contravention of the individual and kingdom freedoms they had been granted, at the risk of losing the throne.

Pósán László
egyetemi tanár, Debreceni Egyetem

ARANYPECSÉTES (*SIGILLUM AUREUM*) OKLEVELEK A STAUF-CSÁSZÁROK URALKODÁSI GYAKORLATÁBAN

A késő antikvitás keresztény római császárjainak legfőbb hatalmát szimbolizáló aranypecsét a birodalom eszményét és politikai realitását feltámasztó német-római uralkodók kormányzati gyakorlatában is nagy szerepet kapott. III. Ottó korától szinte majd mindegyik adott ki ilyen okleveleket, de a Stauf-házi császárok (1138–1250) korában különösen megszaporodtak a *sigillum aureum*mal megerősített diplomák. Ez szorosan kapcsolódott politikájuk egyik legfontosabb céljával, a birodalom helyreállításának (*renovatio imperii*) szándékával.[1] Az aranypecsét a császári egyetemes hatalom és tekintély kifejezésének egyik eszköze volt, amely nemcsak az így megpecsételt oklevélben foglalt tartalmak, rendelkezések fontosságát és jelentőségét hangsúlyozta, vagy különleges presztízzsel ruházta fel a megadományozottat, hanem a Róma örökségét megtestesítő uralkodói szuverenitás egyik közjogi jelképévé is vált.[2] Azzal, hogy a Stauf császárok elődjeikhez képest sokkal nagyobb számban bocsátottak ki aranypecsétes okleveleket, azok jóval szélesebb körben válhattak a császári főhatalom politikai eszményét hordozó üzenetté.[3]

A német-római birodalom első Stauf-házi uralkodója, III. Konrád (1138–1152) már német királlyá választásával császárnak, azaz az a több, a német, az itáliai és a burgund királyságot magába foglaló *Imperium* egészének legitim urának tekintette magát, amihez nem szükséges a pápa általi császárkoronázás szertartása. Okleveleiben 1139-től rendszeresen *Romanorum rex Augustus*nak titulálták, így a császári cím pápai koronázás nélküli használatával megkérdőjelezte a Szentszék szerepét e méltóság elnyerésében.[4] Az egyházi-akra és világiakra egyaránt kiterjedő hatalmát volt hivatva az 1145-ben Utrechtben kiadott aranypecsétes oklevele, amelyben Holland grófjának törekvéseivel szemben megerősítette az itteni káptalan kiváltságait és javait, s egyértelművé tette, hogy a grófnak semmi köze sem lehet a püspöki szék betöltésének kérdésében, az a koronát illető felségjog.[5] Azt kö-

[1] Dilcher, Gerhard: *Die staufische Renovatio im Spannungsfeld von traditionalem un neuem Denken. Rechtskonzeptionen als Handlungshorizont der Italienpolitik Friedrich Barbarossa.* Historische Zeitschrift, 2003/3. 613–646.

[2] Erben, Wilhelm: *Rombilder auf kaiserlichen und päpstlichen Siegeln des Mittelalters*. Universitäts-Buchhandlung Leuschner und Lubensky, Graz, 1931. 15–17.

[3] Pósán László: *I. (Barbarossa) Frigyes és II. Frigyes császárok aranypecsétes oklevelei.* In: Mayer Gyula – Szovák Kornél – Rácz György (szerk.): Andreae II regis Hungariae decretum anni 1222 bulla aurea roboratum. Tanulmányok az Aranybulla kibocsátásának 800. évfordulójára. ELKH BTK Moravcsik Gy. Intézet, Budapest, 2022. 67.

[4] Pósán László: *Németország a középkorban*. Multiplex Media – DUP, Debrecen, 2003. 109.

[5] Hausmann, Friedrich (szerk.): *Die Urkunden der Deutschen Könige und Kaiser. Bd. IX., Die Urkunden Konrads III und seines Sohnes Heinrich*. Böhlau, Wien, 1969. 292. (továbbiakban: Urkunden Konrads III.).

vetően, hogy 1146 karácsonyán számos német előkelővel és VII. Lajos francia királlyal együtt keresztes fogadalmat tett, 1147 márciusában tízéves fiát, Henriket német királlyá és a Birodalom örökösévé koronáztatta. A főhatalom egyértelmű, és a császári méltóságnak a Szentszéktől való önállóságának a deklarálása volt az, amikor erről aranypecsétes oklevélben tájékoztatta a reimsi zsinatra érkező pápát.[6] Erről Freisingi Ottó is megemlékezett a krónikájában (*Venerunt ad predictum concilium cum bulla aurea nuncii iunioris regis Heinrici…*).[7] Másfél hónappal később a császár követei egy újabb aranybullával megerősített levelet adtak át Párizsban a reimsi zsinatra utazó III. Jenő pápának, amely nemcsak Konrád fiának uralkodóvá koronázásáról emlékezett meg, hanem a Birodalom fennhatósága alá tartozó Lengyelország belső helyzetéről, a II. Władisław és testvérei közötti viszályról is beszámolt.[8] Mivel az utódjának szánt fia, Henrik 1150-ben meghalt, III. Konrád az unokaöccsét, Barbarossa Frigyes sváb herceget jelölte ki örökösének, akit két héttel az uralkodó halála után, 1152. március 4-én a német egyházi és világi méltóságok királlyá választottak, öt nappal később pedig Aachenben meg is koronáztak.[9]

Frigyes uralkodói tekintélyének hangsúlyozására már trónra lépésétől kezdődően nagyon tudatosan alkalmazta az aranypecsétes okleveleket. Alig másfél hónappal az aacheni koronázás után vörös selyemzsinóron függő aranypecsétes diplomával erősítette meg Corvey kolostorának korábbi kiváltságait, s vette védelmébe az apátságot (1152).[10] Két évvel később (1154) a szász hercegséghez tartozó püspökségekben (Oldenburg, Mecklenburg, Ratzeburg), és az újonnan meghódított pogány szláv földeken létrejövő püspökségekben az egyházi invesztitúra jogát a Welf-házi Oroszlán Henrik szász hercegnek adományozta. Az erről szóló oklevelet aranypecsétjével erősítette meg.[11] Így nyomatékosította, hogy az invesztitúra a korona fennhatósága alá tartozó uralkodói jog, és azt tetszése szerint tovább is adományozhatott. Amikor 1154 júniusában a goslari birodalmi gyűlésen a bajor hercegséget visszaadta Oroszlán Henriknek, s ezzel véget vetett a Staufok és Welfek közötti hosszú trónharcoknak, erről szintén aranybullát állított ki, amelyben felhatalmazta a Welf herceget, hogy Szászország mellett Bajorországban is invesztitúra jogot gyakoroljon.[12] Azzal, hogy a leghatalmasabb német fejedelmi ház elfogadta ezt az aranybullát, elismerte, hogy az invesztitúra nem a pápát, hanem a császárt illeti, és az egyház a császár hatalma alá tartozik. Barbarossa Frigyes az egyetemes főhatalom letéteményeseként rendelkezett az egyház belső ügyét és hierarchikus rendjét illetően, amikor megerősítette a brechtesgadeni Ágoston-rendi

---

[6] Böhmer, Johann Friedrich (szerk.): *Regesta Imperii. Bd. IV, Teil 2–4. Die Regesten der Kaiserreiches unter Friedrich I. 1152–1190.* Böhlau, Wien, 2011. 460. (továbbiakban: RI IV, 2.).

[7] Freising, Otto von: *Gesta Friedrici*. In: Waitz, Georg: Monumenta Germaniae Historica. Scriptores Rerum Germanicarum Bd. 46. Impensis Bibliopolii Hahniani, Hannover, 1912. 81. (továbbiakban: MGH SSrerGerm. 46.)

[8] RI IV, 2. 465.; MGH SSrerGerm 46, 81.

[9] Pósán, 2003. 113.

[10] Appelt, Heinrich (szerk.): *Die Urkunden der deutschen Könige und Kaiser. Bd. X, Teil 1. Die Urkunden Friedrich I. 1152–1158.* Hahnsche Buchhandlung, Hannover, 1975. Nr. 11. (továbbiakban: Urkunden Friedrich I. X,1.)

[11] Urkunden Friedrich I. X,1. 80.

[12] Deér, Josef: *Die Siegel Kaiser Friedrichs I. Barbarossa und Heinrichs VI. in der Kunst und Politik ihrer Zeit.* In: Beer, Ellen J. (szerk.): Festschrift Hans R. Hahnloser zum 60. Geburtstag 1959 Birkhäuser Verlag, Basel, 1961. 54.

kolostor birodalmi jogállását, a püspöki fennhatóság alóli mentességét.[13] Császárrá koronázását (1155) követően a regensburgi birodalmi gyűlésen (1156) egyértelműen deklarálta a császári főhatalmat, amikor Ausztriát leválasztotta a bajor hercegségről, megkurtítva ezzel a Welfek uralmi területét, és az új világi fejedelemséget hercegséggé emelte.[14]

Rainald von Dassel kölni érseknek, birodalmi kancellárnak köszönhetően jelent meg 1157-ben a császári oklevelekben a *Sacrum Imperium* kifejezés, amely a Staufok okleveles gyakorlatában hangsúlyos elemmé vált.[15] A Birodalom „szent" mivoltának hangsúlyozásával szakrális tartalmat kapott a császáreszme, ami az *Imperium* és az *imperator* isteni rendeltetését, küldetését állította a középpontba. Ahogyan az egyház „szent" és „római", úgy a Birodalom is az, amely fölött közvetlenül az Isten áll.[16] A Staufok okleveles gyakorlatában a *Romaorum rex* és az *augustus* címek szorosan összekapcsolódtak, ami egyúttal azt is jelentette, hogy a német egyházi és világi fejedelmek által választott uralkodó a pápai koronázástól függetlenül is a római császárok utóda lett, azaz a fejedelmek által választott uralkodó a pápai koronázástól függetlenül a római császárok utóda lett, tehát a fejedelmek választása egyben császárválasztás is volt. Ahogyan a katolikus egyházban a bíborosok által megválasztott pápa azonnal Szent Péter utóda, hivatalba lépő egyházfő lett, úgy a német uralkodó is azonnal *augustus*ként a Birodalom urává vált. Egy 12. század közepe táján írt császárkrónika nem tett különbséget a császár és a német király között, a kettőt egynek és ugyanannak vette.[17] A német uralkodók titulusai között ezért a 12. század második felétől ott szerepelt a *futurus imperator* vagy *futurus caesar* kifejezés. A megválasztott uralkodót a római birodalom uraként római királynak nevezték, aki egyúttal a mindenko-

[13] Urkunden Friedrich I. X,1. 140.; Weinfurter, Stefan: *Die Gründung des Augustiner, Chorherrenstiftes. Reformidee und Anfänge der Regularkanoniken in Brechtesgaden*. In: Brugger, Walter – Dopsch, Heinz – Kraume, Peter Franz (szerk.): Geschichte von Berchtesgaden. Bd. I. Zwischen Salzburg und Bayern (bis 1594). Plenk, Brechtesgaden, 1991. 253.

[14] Urkunden Friedrich I. X,1. 151.; Appelt, Heinrich: *Privilegium minus. Das staufische Kaisertum und die Babenberger in Österreich.* Böhlau, Wien, 1973.; Erben, Wilhelm: *Das Privilegium Friedrichs I. für das Herzogtum Österreich.* Carl Konegen, Wien, 1902.; Opll, Ferdinand: *Die Regelung der bayerische Frage 1156. Friedrich Barbarossa, Heinrich der Löwe und Heinrich Jasomirgott, Gestalter und Mitgestalter.* In: Schmid, Peter – Wanderwitz, Heinrich (szerk.): Die Geburt Österreichs. 850 Jahre Privilegium minus. Schnell & Steiner, Regensburg, 2007.

[15] Appelt, Heinrich (szerk.): *Die Urkunden der deutschen Könige und Kaiser. Bd. X, Teil 2. 1158–1167.* Hahnsche Buchhandlung, Hannover, 1975. 254., 267., 342., 358., 369., 405., 406., 410., 413., 445., 500., 516., 532., 536. (továbbiakban: Urkunden Friedrich I. X,2.); Appelt, Heinrich: *Die Kaiseridee Friedrich Barbarossas*. Böhlau, Wien, 1967. 15., 22.; Herkenrath, Rainer Maria: *Reinald von Dassel als Verfasser und Schreiber von Kaiserurkunden*. Mitteilungen des Instituts für Österreichische Geschichtsforschung, 1964. 59–60.; Sulovsky, Vedran: *The concept of sacrum imperium in historical scholarship*. History Compass, 2019. 2–3.

[16] Ehlers, Joachim: *Imperium und Nationsbildung im europäischen Vergleich.* In: Schneidmüller, Bernd – Weinfurter, Stefan (szerk.): Heilig, Römisch, Deutsch. Das Reich im mittelalterlichen Europa. Michael Sandstein Verlag, Dresden, 2006. 111.; Herkenrath, Rainer Maria: *Regnum und Imperium in den Diplomen der ersten Regierungsfahre Friedrichs I.* In: Wolf, Gunther (szerk.): Friedrich Barbarossa. Wissenschaftliche Buchgesellschaft, Darmstadt, 1975. 323–359.; Koch, Gottfried: *Sacrum Imperium. Bemerkungen zur Herausbildung der staufischen Herrschaftsideologie.* Zeitschrift für Geschichtswissenschaft, 1968. 596–614.; Petersohn, Jürgen: *Rom und Reichstitel „Sacrum Imperium".* Steiner, Stuttgart, 1994. 93–94.; Schneidmüller, Bernd: *Magdeburg und das geträumte Reich des Mittelalters.* In: Schneidmüller, Bernd – Weinfurter, Stefan (szerk.): Heilig, Römisch, Deutsch. Das Reich im mittelalterlichen Europa. Michael Sandstein Verlag, Dresden, 2006. 10.

[17] Schröder, Edward (szerk.): *Die Kaiserchronik eines Regensburger Geistlichen.* Hahn, Hannover, 1892. 362–379. (továbbiakban: Kaiserchronik 1892.)

ri császár (*Romanorum rex semper augustus*) is.[18] A *Sacrum Imperium* kifejezés többet jelentett a császár személyénél és egyetemes hatalmánál. Magába foglalta a választásban részt vevő egyházi és világi fejedelmeket, méltóságokat, akik éppúgy isteni indíttatásra (*denuntiatores divine providentio*) választották meg a Birodalom urát, mint az egyházon belül a bíborosok a pápát. A császár így Isten akaratából ülhetett a trónra, és gyakorolhatta a főhatalmat, ami az egyház és a pápaság feletti fennhatóságot is jelentette. A császár és a fejedelmek együtt testesítették meg a *Sacrum Imperium*ot, ami az uralkodó személyén kívül a Birodalom előkelőinek is bizonyos szakralitást adott, akik így érdekeltté váltak a császárság egyetemes főhatalmának támogatásában és fenntartásában.[19] Freisingi Ottó a „szent" jelentését az *Imperium* minden lakójára kiterjesztette, amikor a Birodalmat Izrael utódjának, népét pedig Isten választottjának (*populus Dei*) nevezte.[20] Egy korabeli császárhimnusz a világ urának (*mundi dominus*) és a Föld fejedelmeinek fejedelmének (*princeps terre principum*) titulálta a császárt.[21] Barbarossa Frigyes az antik császáreszményt követve birodalmi tartományi helytartóknak (*reges provinciarum regulus*) tekintette a keresztény királyokat, fejedelmeket, akik felett a Birodalom ura, római mintára, *imperialis auctoritus*t gyakorolt.[22] A császárság és a Birodalom lényegében Isten háza (*domus Dei*) a Földön, és ebben a „házban" van a helye a császár fennhatósága alatt álló keresztény fejedelmeknek, egyházi méltóságoknak, és e „ház" fejének joga volt bárkit különböző egyházi vagy világi tisztségekbe ültetni, királyi címet és koronát adományozni.[23] Ennek a politikai eszménynek, felfogásnak a jegyében ruházta fel I. Frigyes királyi címmel II. Vladislav cseh herceget, de ez kizárólag az ő személyének szólt, s nem volt örökíthető.[24]

A császári kancellária Barbarossa Frigyes korától hivatkozott arra, hogy az *Imperium* és az egyetemes császári főhatalom régebbi, mint az egyház és a pápaság. Jézus Krisztus a római birodalomban született, és e birodalom keretei között épült ki a római egyház is, amelynek méltósága, tisztelete, dicsősége így egyet jelentett a Birodalom és Isten tisztele-

---

[18] Koch, Walter: *Die Reichskanzlei unter Kaiser Friedrich I.* Deutsches Archiv, 1985. 327–350.; Müller-Mertens, Eckhard: *Imperium und Regnum im Verhältnis zwischen Wormser Konkordat und Goldener Bulle. Analyse und neue Sicht im Lichte der Konstitutionen.* Historische Zeitschrift, 2007. 561., 582.; Riedmann, Josef: *Studien über die Reichskanzlei unter Friedrich Barbarossa in den Jahren 1156–1166*. Mitteilungen der Institut für Österreichischer Geschichte, 1967. 322–402.; Riedmann, Josef: *Studien über die Reichskanzlei unter Friedrich Barbarossa in den Jahren 1156–1166.* Mitteilungen der Institut für Österreichischer Geschichte, 1968. 23–105.

[19] Koch, Gottfried: *Auf dem Wege zum Sacrum Imperium. Studien zur ideologischen Herrschaftsbegründung der deutschen Zentralgewalt im 11. und 12. Jahrhundert.* Akademie-Verlag, Berlin, 1972. 187–189.; Miethke, Jürgen: *Politisches Denken und monarchise Theorie. Das Kaisertum als supranationale Institution im späten Mittelalter.* In: Ehlers, Joachim (szerk.): Ansätze und Diskontinuität deutscher Nationsbildung im Mittelalter. Thorbecke, Sigmaringen, 1989. 121–144.; Müller-Mertens, 2007. 561.; Renna, Thomas: *Was Frederick Barbarossa the first Holy Roman Emperor?* Quidditas, 2014. 52.; Schlick, Jutta: *König, Fürsten und Reich (1056–1159). Herrschaftsverständnis im Wandel.* Thorbecke, Stuttgart, 2001. 173–178.

[20] Möhring, Hannes: *Der Weltkaiser der Endzeit. Entstehung, Wandel und Wirkung ein tausendjährigen Weissagung.* Thorbecke, Stuttgart, 2000.143.

[21] Krefeld, Heinrich (szerk.): *Der Archipoeta. Lateinisch und deutsch.* Akademie Verlag, Berlin, 1992. 72.

[22] Gerics József: *A korai rendiség Európában és Magyarországon*. Akadémiai Kiadó, Budapest, 1987.174.

[23] Weinfurter, Stefan: *Wie das Reich heilig wurde*. In: Weinfurter, Stefan et al. (szerk.): *Gelebte Ordnung, gedachte Ordnung. Ausgewählte Beiträge zu König, Kirche und Reich.* Thorbecke, Ostfildern, 2005. 361–384.

[24] Engels, Odilo: *Die Staufer*. Kohlhammer, Stuttgart, 1993. 69.; Lehmann, Johannes: *Die Staufer. Glanz und Elend eines deutschen Kaisergeschlechts.* C. Bertelsmann Verlag, München, 1978. 103.; Uhlhorn, Friedrich – Schlesinger, Walter: *Die deutschen Territorien*. Deutscher Taschenbuch Verlag, München, 1977. 258.

tével és elfogadásával.[25] Az *Imperium,* az egyetemes főhatalom, annak isteni rendeltetése, küldetése a rómaiaktól (Bizánctól) Nagy Károlyra és a frankokra öröklődött, onnan pedig a németekre (*Romanorum imperium in persona magnifico Karoli a Grecis transtulit in Germanos*).[26] A *translatio imperii* politikai ideológiája így folyamatos kapcsolatot teremtett a középkori német-római császárság és az egykori római *imperium* között. A keresztény római birodalomhoz hasonlóan, ahol a császár Istentől, s nem a pápától nyerte el méltóságát, úgy Barbarossa Frigyes is közvetlenül Istentől kapta koronáját. Egy 1162-ben kelt császári oklevélben például *Romanorum imperator a deo coronatus magnus et pacificus inclitus thriumphator et semper augustus* megfogalmazás olvasható.[27] A császári politikai gondolkodás szerint a különböző feladatokat Isten három részre osztotta szét. A *sacerdotium,* azaz az egyház ügyeit Itáliára, a *studium,* a tudás dolgát Franciaországra, az *imperium*ot pedig a világ feletti egyetemes főhatalommal (*dominium mundi*) együtt Németországra bízta, ezért a császári méltóságot csak a német uralkodók tölthetik be.[28] 1158-ban a roncagliai birodalmi gyűlés kinyilvánította, hogy minden hatalom a császáré, és minden méltóságviselő, aki bíráskodási vagy más hatalmi jogokat gyakorol, az *imperator* tisztségviselője, ezért hűségesküt kell tennie a császár előtt.[29] A bolognai jogtudósok a késő császárkori római jog recepciójával támasztották alá a keresztény világ feletti császári főhatalom politikai eszményét.[30]

A császárnak az egyházi és világi fejedelmek feletti hatalmát demonstrálta a würzburgi birodalmi gyűlésen (1168) kiadott aranybulla is, amely a würzburgi püspök birodalmi egyházfejedelmi jogállását és kiváltságait foglalta írásba.[31] A birodalmi egyházfejedelmi ranggal a császár kivette a würzburgi püspökséget az Oroszlán Henrik herceg által Bajorországban gyakorolt invesztitúra jog hatálya alól, és közvetlenül az uralkodó alá rendelte.[32] A bajor hercegség egyházi ügyeibe történő uralkodói beavatkozást követően – számos más kérdéssel is összefüggésben – egyre hűvösebbé és feszültebbé vált Barbarossa Frigyes és Oroszlán Henrik viszonya. Ez végül odáig fajult, hogy 1180-ban a Gelnhausenben tartott birodalmi gyűlésen kiadott aranypecsétes oklevél megfosztotta a Welf-házi herceget birtokaitól.[33] Az aranypecséttel történő megerősítés tényét a császári kancellária ekkor először az oklevél szövegébe is beleírta (*et hanc nostram constitutionem presente privilegio aurea excellentie nostre bulle*),[34] s később, II. Frigyes uralkodása idején ez általános kancelláriai gyakorlattá vált. A gelnhauseni aranybulla feldarabolta a hatalmas területre kiterjedő szász törzsi hercegséget. A keleti részek új ura Medve Albert brandenburgi őrgróf fia, Bernhard lett, a nyugati területek pedig a kölni érsek fennhatósága alá kerültek. A Welf-ház egyedül

[25] Urkunden Friedrich I. X,2. 327., 367., 382., 437., 480., 481., 516.

[26] Canning, 2002. 178.; Goez, Werner: *Translatio Imperii. Ein Beitrag zur Geschichte des Geschichtsdenkens und der politischen Thgeorien im Mittelalter und in der frühen Neuzeit*. Mohr, Tübingen, 1958. 62–137.

[27] Urkunden Friedrich I. X,2. 358.

[28] Roes, Alexander von: *Schriften*. Hiersemann, Stuttgart, 1958. 139.

[29] Urkunden Friedrich I. X,2. 238.

[30] Erről ld. Post, Gaines: *Studies in Medieval Legal Thought. Public Law and the State 1100–1322*. Princeton University Press, Princeton, 1964.

[31] RI IV, 2,3. 546.

[32] Engels, 1993. 95–96.

[33] Engels, 1993. 100–101.; Heinemeyer, Karl: *Der Prozeß Heinrichs des Löwen*. In: Patze, Hans (szerk.): Der Reichstag von Gelnhausen. Ein Markstein in der deutschen Geschichte 1180–1980. Gesamtverein der Deutschen Geschichts- und Altertumsvereine, Marburg, 1981. 1–60.

[34] RI IV, 2,3. 2540.

csak öröklött családi birtokát, Braunschweiget és Lüneburgot tarthatta meg.[35] Bajorországról a császár már korábban leválasztotta Ausztriát és Karintiát, most pedig ugyanezt tette Stájerországgal is, amit önálló hercegséggé emelt. A kisebb kiterjedésű bajor hercegséget az eddigi palotagróf, Otto von Wittelsbach kapta meg.[36] Egy évvel később (1181) I. Frigyes Meránia hercegévé emelte Berthold von Andechs isztriai őrgróf fiát.[37] 1185-ben Ascoli püspökét, 1187-ben pedig Prága püspökét ismerte el birodalmi fejedelemnek. Az erről szóló oklevelek mindegyikét aranypecséttel erősítette meg.[38]

A Birodalom egyházi és világi előkelő mellett Barbarossa Frigyes a városoknak szóló kiváltságlevelei közül is sokat aranypecséttel látta el, elsősorban azokat, amelyek arról rendelkeztek, hogy a megadományozott város kikerült eddigi tartományura fennhatósága alól, és közvetlenül a korona alatt állóvá vált. Ilyen aranybullát kapott Aachen (1166),[39] Worms (1184),[40] Cambrai (1184),[41] Montefiascone (1185),[42] Würzburg (1186),[43] vagy Lübeck (1188).[44]

Nem közvetlenül Barbarossa Frigyes nevéhez fűződik, de személye mégis megkerülhetetlen volt annak az 1186. évi aranybullánál, amit a fia, Henrik adott ki, amikor Milánóban feleségül vette a szicíliai trón örökösét, Konstancát. Ezzel együtt a fejedelmek választása alapján apja örökösévé (*Romanorum rex*), a császári trón várományosává (*futurus imperator*) koronázták, és megbízták Itália kormányzásával.[45] Ebben az aranypecsétes oklevélben megerősítette Baume-les-Messieurs kolostor birodalmi apátsági rangját és függetlenségét a clunyi apátságtól.[46] A Birodalom leendő ura a császár egyetértésével érvénytelennek nyilvánította III. Orbán pápa azon döntését, amely a kolostort Cluny fennhatósága alá rendelte.[47]

Hosszú, 37 évnyi uralkodása alatt I. Frigyes a Birodalom német, itáliai és burgundiai területeire vonatkozóan mintegy 80 aranybullát adott ki, azaz évente átlagosan kettőt, de volt, amikor többet is.[48]

---

[35] Engels, 1993. 101.

[36] RI IV, 2,3. 2562.

[37] RI IV, 2,3. 2581.

[38] RI IV, 2,4. 2919., 3060.

[39] RI IV, 2,2. 1539.

[40] Bönnen, Gerold: *Die Blütezeit des hohen Mittelalters. Von Bischof Burchard zum Rheinischen Bund (1000–1254).* In: Bönnen, Gerold (szerk.): Geschichte der Stadt Worms. Theiss, Stuttgart, 2005. 159.; Opll, Ferdinand: Das Itinerar Kaiser Friedrich Barbarossas (1152–1190). Forschungen zur Kaiser- und Papstgeschichte des Mittelalters. Böhlau, Wien, 1978. 81.

[41] RI IV, 2,2. 2768.

[42] Polock, Marlene: *Unbekannte Kaiserdiploma für Montefiascone*. Quellen und Forschungen aus italienischen Archiven und Bibliotheken, 1985. 105.

[43] Bosl, Karl: *Die bayerische Stadt in Mittelalter und Neuzeit*. Altbayern, Franken, Schwaben. Pustet, Regensburg, 1988. 140–141.

[44] Böhmer, Johann Friedrich – Techen, Friedrich (szerk.): *Urkundenbuch der Stadt Lübeck. Bd. I. 1139–1470.* Friedr. Aschenfeldt, Lübeck, 1843. 7. (továbbiakban: UBL I.); Walther, Helmut G.: *Kaiser Barbarossa Urkunde für Lübeck von 19 September 1188.* Zeitschrift des Vereins für Lübeckische Geschichte und Altertumskunde, 1989. 11–48.

[45] Engels, 1993. 89.; Lehmann, 1978. 176–177.

[46] Ertl, Thomas: *Studien zum Kanzlei- und Urkundenwesen Kaiser Heinrichs VI.* Verlag der Österreichischen Akademie der Wissenschaften, Wien, 2002. 117.

[47] Schmidt, Ulrich (szerk.): *Papstregesten 1124–1198. Teil 4. 1181–1198*. Böhlau, Köln, 2012. 70.

[48] Erben 1931. 15.; Türck, Verean: *Beherrschter Raum und anerkannte Herrschaft. Friedrich I. Barbarossa und das Königreich Burgund*. Thorbecke, Ostfildern, 2013. 224.

Utóda, VI. Henrik császár viszont csak egyetlen aranypecsétes oklevelet bocsátott ki, amikor Namur grófjának, Balduin von Hennegaunak őrgrófi címet adományozott, s ezzel a Birodalom legfelső világi előkelőinek sorába emelte. Az erről szóló oklevél sajnos nem maradt fenn (összesen 39 oklevelét ismerjük), csak Gislebert de Mons krónikájából tudjuk, hogy Henrik császár birodalmi aranypecsétjével erősítette meg Namur tartomány őrgrófságá tételét.[49] Halála után (1197) öccse, Sváb Fülöp követte a trónon, aki két aranypecsétes oklevelet adott ki, de ezek sem maradtak fenn.[50]

VI. Henrik fia, II. Frigyes hosszú uralkodása alatt 2700 oklevelet állított ki az uralkodó kancelláriája (évente átlagosan 51–52 darabot), s ebből 180 aranypecsétes diploma volt.[51] Az első, az ő nevében kibocsátott aranypecsétes oklevelet 1200-ban foglalták írásba. Az ekkor még csak hatéves Frigyes nevében a szicíliai királyságot kormányzó régenstanács aranypecséttel erősítette meg VI. Henrik egykori hadvezérének, Markward von Annweilernek a hatalmi törekvéseivel szembeni szövetségesének, Genovának a kiváltságait.[52] A diploma szerint Szicília törvényes királya, II. Frigyes 10000 uncia aranyat ígért Genovának, hogy a kereskedőváros a flottájával az ő oldalára álljon. Országában vámmentességet adott a genovai kereskedőknek, akik Messinában, Syrakusában, Tarepaniban és Nápolyban kereskedelmi telephelyekkel, raktárakkal és egyéb ingatlanokkal rendelkezhettek, és korlátozások nélkül vihettek ki a királyságból élelmiszereket, különösen gabonát. 1208 decemberében Frigyes nagykorú lett, s ettől kezdve már maga adta ki okleveleit. Az első, saját elhatározása és döntése alapján aranypecséttel ellátott kiváltságlevelét a német korona megszerzéséért folyó küzdelmekkel összefüggésben állította ki 1212-ben Bázelben, amelyen a szicíliai királyi pecsét szerepelt aranyba nyomva. Ez az ún. szicíliai aranybulla valójában három oklevelet jelentett, melyből kettő I. Ottokár cseh fejedelemnek, egy pedig annak testvérének, Henrik morva őrgrófnak szólt.[53] A szicíliai királyság aranypecsétjével ellentétben azonban az okleveleket Frigyes nem a sziget királya minőségében adta ki, hanem megválasztott római császárként (*Romanorum imperator electus*). Az első aranypecsétes diplomában megerősítette I. Ottokárnak és utódainak királyi címét, amit 1198-ban még Sváb Fülöp adományozott neki, és a cseh nemeseket ruházta fel azzal a joggal, hogy megválasszák a mindenkori cseh királyt. Az első jelölt a király elsőszülött fia lehetett, és ha a személyével

---

[49] Mons, Gislebert de: *La chronique de Gislebert de Mons. Avec carte du comté de Hainaut à la fin du 12e siècle.* Commission royale d'histoire, Brüssel, 1904. 261.

[50] Rzihacek, Andrea: *Die Edition der Urkunden Philipps von Schwaben für die Diplomata-Reihe der Monumenta Germaniae Historiae. Planung, Durchführung, Aspekte*. In: Rzihacek, Andrea – Spreitzer, Renate (szerk.): Philipp von Schwaben. Beiträge der internationalen Tagung anlässlichseines 800. Todestages, Wien, 29 bis 30 Mai 2008. Österreichische Akademie der Wissenschafte, Wien, 2010. 157.

[51] Erben, 1931. 17.; Vogeler, Georg: *Rechtstitel und Herrschaftssymbol. Studien zum Umgang der Empfänger in Italien mit Verfügungen Friedrichs II. (1194–1250).* De Gruyter, Berlin, 2019. 375–378.

[52] Koch, Walther (szerk.): *Die Urkunden Friedrichs. II. Teil 1. 1198–1212.* Hahn, Hannover, 2002. 26.

[53] Böhmer, Johann Friedrich (szerk.): *Regesta Imperii. Bd. V. Jüngere Staufer 1198–1272. 1. Abt., 1. Lief: Die Regesten des Kaiserreichs unter Philipp, Otto IV, Friedrich II, Heinrich (VII), Conrad IV, Heinrich Raspe, Wilhelm und Richard, 1198–1272.* Wagner, Innsbruck, 1881. 671., 672., 673. (továbbiakban: RI V, 1,1.); Friedrich, Gustav (szerk.): *Codex diplomaticus et epistolaris regni Bohemiae. Tom. II.* Acad. scient. Bohemoslovenicae, Pragae, 1912. 96., 97., 98. (továbbiakban: CDEB II.); Hruza, Karel: *Die drei Sizilischen Goldenen Bullen Friedrichs II. von 1212 für die Přemysliden. Zu einen neuen Buch, diplomatischen Fragen und einer Historikerdebatte in der tschechischen Forschung.* Atchiv für Diplomatik, Schriftgeschichte, Siegel- und Wappenkunde, 2007. 213–249.; Wihoda, Martin: *Die sizilischen Goldenen Bullen von 1212. Kaiser Friedrich II. Privilegien für die Přemysliden im Erinnerungsdiskurs*. Böhlau, Wien, 2012. 39–40., 77–78.

a nemesek egyetértettek, a császár csak megerősítette a méltóságában az így megválasztott új uralkodót. Csehország már a 11. századtól a Birodalom hűbéres tartománya volt. IV. Henrik császár 1085-ben ugyan királyi címmel ruházta fel II. Vratislav (1061–1092) herceget, de ez csak a megadományozott személyének szóló rang volt, nem örökletes. Ugyanígy tett I. Frigyes is 1158-ban, amikor királynak ismerte el II. Vladislavot, vagy Sváb Fülöp 1198-ban. Az utódokra is átszálló, örökletes királyi cím II. Frigyes 1212. évi aranybullájától létezett Csehországban.[54] Ebben az oklevélben Frigyes invesztitúra jogot adományozott a cseh királynak, és ezzel egyértelművé tette, hogy elődjeihez hasonlóan ezt a Birodalom urát megillető jognak tartotta. Ottokár és utódai csak akkor voltak kötelesek megjelenni a császári udvari gyűléseken, ha azokat a cseh határokhoz közeli helyszíneken tartották. A császárok koronázási ünnepségén Rómában azonban a cseh királynak 300 lovasból álló kísérettel kellett megjelennie, hogy ezzel kifejezze és mindenki számára nyilvánvalóvá tegye, ő a Birodalom urának hűbéres fejedelme. Ha ennek személyesen valamilyen okból adódóan nem tudott eleget tenni, 300 márka ezüstöt volt köteles fizetni a császári kincstárnak.[55] Különböző birodalmi javakat és birtokokat is adományozott Ottokárnak, s rögzítette, hogy a cseh koronához tartozó morva területeket Ottokár öccse, Henrik őrgróf kormányozza.[56] II. Frigyes ezekkel a kiváltságokkal köszönte meg a Přemys-háznak, hogy a birodalmi trónharcokban a Staufok oldalára állt, és a jövőt illetően is biztosította a cseh fejedelem lojalitását. Az 1212. évi aranypecsétes okleveleket négy évvel később egy újabb Csehországra vonatkozó aranybulla követte, amelyben Frigyes megerősítette I. Ottokár elsőszülött fiának trónörökössé választását.[57] Huszonöt évvel később, amikor a császár a németországi belső helyzet rendezésével és Henrik fiának a lázongásával foglalkozott, 1231-ben újból aranybullába foglalta Csehország kiváltságait a Birodalom keretein belül.[58] 1213-ban az Eger (Cheb, Csehország) városában kiadott aranypecsétes oklevelébe (*presens privilegium conscriptum maiestatis nostre aurea bulla iussimus communiri*) foglalt széles körű kiváltságokkal a pápaságnak és a német egyháznak köszönte meg a támogatását a Birodalom trónjáért vívott küzdelemben. Németországban lemondott az invesztitúra jog gyakorlásáról, s ettől kezdve a püspököket a káptalanok választhatták. Elismerte, hogy egyházi ügyekben a német klérus fellebbezhet a pápánál, az egyházi fejedelmek földjein pedig lemondott az uralkodót eddig megillető spolia- és regálé jogokról. Ígéretet tett az eretnekek elleni fellépésre, s megerősítette, hogy a szicíliai királyságot nem fogja egyesíteni a császársággal. Itáliában jelentős területeket (spoletói hercegség, anconai őrgrófság, bertinorói grófság, toszkán őrgrófság, ravennai exarchátus és Pentapolis) engedett át a pápaságnak.[59]

[54] Janišová, Jana – Janiš, Dalibor: *King, estates and the Czech Crown. The legal sources of the ideas of freedom in the medieval and early modern Czech lands*. In: Rau, Zbigniew – Żurwski vel Grajewski, Przemysław – Tracz-Tryniecki, Marek (szerk.): Magna carta. A Central European perspective of our common heritage of freedom. Routledge, London, 2016. 80–82.

[55] RI V, 1,1. 673.; CDEB II. 98.

[56] RI V, 1,1. 672., 673.; CDEB II. 97., 98.

[57] Hruby, Václav (szerk.): *Archivum Coronae regni Bohemiae. Tom. I. 1086–1346*. Ministerium scholarum et instructionis publicae, Prague, 1935. 6.; Wihoda, 2012. 217–218.

[58] Weiland, Ludwig (szerk.): *Monumenta Germaniae Historica. Constitutiones et acta publica imperatorum et regum Tom. II.* Hahn, Hannover, 1896. 154. (továbbiakban: MGH Const. II.).

[59] MGH Const. II. 48.; Koch, Walther (szerk.): *Die Urkunden Friedrichs II. Teil 2. 1212–1217.* Hahn, Hannover, 2007. 204. (továbbiakban: Urkunden Friedrich II. T.2.); Laufs, Manfred: *Politik und Recht bei Innozenz III. Kaiserprivilegien, Thronstreitregister un Egerer Goldbulle in der Reichs- und Rekuperationspolitik Papst Innozenz III.* Böhlau, Köln, 1980.

A IV. (Welf) Ottóval a trónért vívott háború során II. Frigyes 1214-ben Waldemar dán királlyal is szövetkezett, s Dánia támogatása fejében aranybullában ismerte el, hogy az Elba és Elde vonalától északra fekvő területek a dán király németországi hűbérbirtokai.[60] Az aacheni ünnepélyes német királlyá koronázását (1215) követően belső helyzete megerősítése és stabilizálása érdekében számos kiváltságlevéllel jutalmazta híveit, s ezek közül néhányat még aranypecséttel is megerősített. Aranybullába foglalta Aachen (1215),[61] Bern (1218),[62] és Basel (1218) privilégiumait.[63] E két utóbbi oklevél a Németország és Itália közötti alpesi útvonalak közül a legfontosabb, a Szent Bernát-hágón át vezető út közelében fekvő városoknak szólt, azaz Frigyes ezeket a katonai felvonulási utakat igyekezett stabilan az ellenőrzése alatt tartani. Amikor egyes városokat birodalmi városi rangra emelt (s ezzel kivette őket egy-egy tartományi fejedelem fennhatósága alól), többnyire szintén aranypecsétes oklevéllel tette meg, mint például Lübeck (1226),[64] Köln (1236),[65] vagy Regensburg (1245) esetében.[66]

Németország mellett Itáliában is gyakran aranybullába foglalta a híveinek tett adományokat. Pavia korábban szerzett privilégiumait aranypecséttel erősítette meg (1219),[67] és ugyanígy járt el Genova (1220) esetében is.[68] Az 1230-as években Frigyes számos aranypecsétes oklevelet állított ki az észak- és közép-itáliai városok számára.[69] Amikor Parma városa hű szolgálataiért, anyagi és katonai támogatásáért megkapta Grondola várát és a hozzá tartozó birtokokat (1245), az erről szóló oklevelet a császári kancellária aranypecséttel látta el.[70]

1219-ben és 1220-ban aranybullával tette nyomatékosabbá a pápának tett ígéreteit, hogy keresztes hadat fog vezetni a Szentföldre, és Szicíliát nem egyesíti a Birodalommal,[71] és ugyanígy tett 1225-ben is.[72] 1220-ban aranypecsétes oklevélben tudatta Lombardia, Romagna és egész Itália népével, hogy Itáliába fog menni, és érkezésének előkészítésére oda küldi kancellárját, Konrád metzi érseket. Ő fogadja majd az uralkodó nevében az alattvalók hódolatát, bíráskodik a vitás ügyekben, s kérte, hogy mindenki engedelmeskedjen neki.[73] Mielőtt útra kelt volna Itáliába, aranybullában erősítette meg az utrechti püspökség vámokra vonatkozó kiváltságait,[74] a német területek rendjének és békéjének biztosítására a birodalmi fejedelmek körében jóval nagyobb létszámú egyházi méltóságokat testületileg

[60] MGH Const. II. 53.
[61] Urkunden Friedrich II. T.2. 316.
[62] Homburger, Otto: *Das goldene Siegel Friedrichs II. an der Berner Handfeste.* Berner Zeitschrift für Geschichte und Heimatkunde, 1941/4. 220–222.
[63] Koch, Walther (szerk.): *Die Urkunden Friedrichs II. Teil 3. 1218–1220.* Hahn, Hannover, 2010. 453. (továbbiakban: Urkunden Friedrich II. T.3.).
[64] UBL I. 35.
[65] Grote, Manfred: *Köln im 13. Jahrhundert. Gesellschaftlicher Wandel und Verfassungsentwicklung*. Böhlau, Köln, 1998. 111.
[66] RI V, 1,1. 3483.
[67] Urkunden Friedrich II. T.3. 544.
[68] Heuberger, Richard: *Allgemeine Urkundenlehre für Deutschland und Italien*. Vieweg+Teubner Verlag, Wiesbaden, 1921. 42.
[69] MGH Const. II. 125., 156., 183., 184.
[70] RI V, 1,1. 3502.
[71] Urkunden Friedrich II. T.3. 555., 601.
[72] MGH Const. II. 102., 103.
[73] Urkunden Friedrich II. T.3. 607.
[74] Urkunden Friedrich II. T.3. 610.

széles körű privilégiumokkal ruházta fel. A *Confoederatio cum principibus ecclesiasticis* elnevezésű, arany és vörös (*aurei et ruboi coloris*) szalagon függő aranypecsétes oklevél (1220) az egyházi fejedelmeket adószedési, pénzverési, várépítési, vámszedési, területeiken törvényhozási és bíráskodási jogokkal ruházta fel, ítéleteik végrehajtásához pedig kérhették az uralkodó segítségét. Deklarálta, hogy az egyházi törvényszékek ítéletei egyúttal császári ítéletet is jelentenek, így az egyházi exkommunikáció birodalmi átokkal párosul. Az egyházi fejedelmek kiváltságait az uralkodó garantálta, és aki nekik kárt okozott vagy kiváltságaikat megsértette, az uralkodó rendelkezése értelmében az okozott kár kétszeresét volt köteles megtéríteni, büntetésképpen pedig 100 márka ezüstöt kellett fizetni a császári kincstárnak.[75] Tizenkét évvel a *Confoederatio cum principibus ecclesiasticis* kiadása után a *Statutum in favorem principum* (1232) néven ismertté vált, 42 milliméter átmérőjű aranypecsétes oklevelében a világi fejedelmek is megkapták a német egyházi méltóságokat megillető jogok és kiváltságok többségét.[76] Ez a kiváltságlevél a világi hatalmasságok hűségét és lojalitását volt hivatva biztosítani a II. Frigyes és IX. Gergely pápa közötti konfliktusban, valamint a császár fiának, Henriknek a lázongása miatt.[77]

Amikor egész tartományok, grófságok jövőjéről, hovatartozásáról hozott döntéseket, azokat Frigyes ugyancsak aranybullában rögzítette. Így járt el akkor, amikor Flandria és Hennegau tartományokat I. Vilmos, Holland grófja kapta meg hűbérként (1220),[78] vagy megerősítette e tartományok feletti hűbéri jogát az akkori grófnőnek, Margitnak (1245).[79] Aranybullába foglalta azt az ígéretét is, hogy visszaadja Amadeus savoyai grófnak Rivoli várát és a hozzá tartozó uradalmat.[80] 1235-ben aranypecsétes oklevelet állíttatott ki a Welf-ház utolsó élő leszármazottja, Gyermek Ottó számára. Szászországról leválasztotta Braunschweig és Lüneburg tartományokat, és ezt a birtokkonglomerátumot hercegséggé emelte, s birodalmi hűbérként Ottónak adta.[81]

Szentföldi keresztes hadjáratának megkezdése előtt, 1228 júniusában aranybullában utasította közép-itáliai tisztségviselőit, hogyan járjanak el a pápasággal és az egyházzal kapcsolatos kérdésekben,[82] egy másik aranypecsétes oklevelében pedig a Szentszéktől visszavett itáliai területekről rendelkezett.[83] 1228–1229. évi keresztes hadjárata során II. Frigyes harc nélkül, diplomáciai tárgyalásokkal elérte, hogy a keresztények visszaszerezzék a Jeruzsálem feletti fennhatóságot, amit az 1229. évi jeruzsálemi manifesztumában Isten különleges kegyeként és akarataként értelmezett. Ebben az oklevélben nyilvánította ki azt is, hogy a Stauf császárok a bibliai Dávid házából származnak, így a Birodalomhoz hasonlóan a császári ház is régebbi és tekintélyesebb, mint az egyház és a pápaság.[84]

Nagy Constantinus császár korától az *Imperium*ot a kereszténységgel azonosították, az *Imperium Christianum* császárát pedig Isten földi helytartójával, akinek a hatalma az

---

[75] Urkunden Friedrich II. T.3. 620.; MGH Const. II. 73.; RI V, 1,1. 1114.
[76] MGH Const. II. 171.
[77] Abulafia, David: *Herrscher zwischen den Kulturen*. *Friedrich II. von Hohenstaufen.* Büchergilde Gutenberg, Frankfurt am Main, 1992. 255–256.
[78] Urkunden Friedrich II. T.3. 639.
[79] RI V, 1,1. 3494.
[80] RI V, 1,1. 3504.
[81] MGH Const. II. 197.
[82] MGH Const. II. 117.
[83] MGH Const. II. 118.
[84] MGH Const. II. 122.; Caumanns, Volker: *Die Kreuzzugsmotivation Friedrichs II.* Crusades, 2009. 156.

Úrtól származik, ő maga pedig *propagator et defensor fidei* (a hit terjesztője és védelmezője). Ez a politikai felfogás missziós feladatokat tulajdonított a császárságnak, melynek isteni küldetése az, hogy mindenhol győzelemre vigye a kereszténység ügyét.[85] A hit terjesztésének kötelességéből fakadóan a császárságnak nem voltak szilárd határai. Úgy növekedett, ahogyan a kereszténység egyre nagyobb területeken terjedt el. A keresztény *Imperium* úgy növekedett, amilyen buzgósággal szorgoskodtak a császárok a kereszténység terjesztésén.[86] A császárság isteni küldetésének ilyen értelmezéséből következett az a felfogás, hogy a Birodalom hatalma és befolyása az igazgatási és jogi értelemben vett határain kívülre is kiterjedt, ezért a császároknak jogában állt a pogányterületekről is rendelkezni.[87] 1224-ben II. Frigyes a császárság védelmébe (azaz politikai befolyása alá) vette a Balti-tenger délkeleti és keleti partvidékén élő pogányokat, Livónia, Észtország, Samland és Poroszföld népeit.[88] Az egyetemes főhatalmi igényekkel fellépő pápaság azonban a kereszténység terjesztését, a missziók szervezését a 12. századtól igyekezett a maga befolyása alá vonni. II. Frigyes manifesztumára válaszul III. Honorius 1225-ben a Szentszék oltalma alá vette az újonnan megtérő balti népeket.[89] A baltikumi misszió és hatalmi befolyás kérdése így a 13. századtól az *Imperium* és a *Sacerdotium* közötti egyetemes főhatalomért folyó küzdelem részévé vált. 1226-ban a császár egy aranypecsétes kiváltságlevelet állított ki a Német Lovagrend nagymestere, Hermann von Salza számára. Ebben a lovagrendnek adományozta a pogány poroszok lakta földeket, amelyeket majd a lovagok a jövőben meghódítanak. A bulla a német egyházi fejedelmeknek adott 1220. évi kiváltságlevélben foglaltakhoz hasonló privilégiumokkal ruházta fel a lovagrendet.[90] Az 1224. és 1226. évi császári oklevelek nem befolyási övezetként vagy elvi főség kinyilvánításaként, hanem a Birodalom közvetlen fennhatósága alá tartozó területként (*terre ipsa sub monarchia imperii est*) szóltak a megnevezett balti földekről, és Albert rigai püspök (Baltikum), illetve Hermann von Salza nagymester (Poroszföld) személyében azok leendő urait is kijelölte. A rimini aranybulla a császári főhatalom egyértelmű deklarálása volt, mely szerint az uralkodó, az *imperator Romanus* a világ ura (*dominus mundi*), aki az egyház felett áll, s ebből következően az egyház oltalmazója, világi karja.[91] A kereszténység terjesztésével összekapcsolódó császári főhatalom eszménye és

---

[85] Canning, Joseph: *A középkori politikai gondolkodás története 300–1450*. Osiris, Budapest, 2002. 19.

[86] Hagende, Othmar: *Weltherrschaft im Mittelalter.* Mitteilungen des Instituts für Österreichische Geschichtsforschung, 1985. 257–278.; Weinfurter, Stefan: *Vorstellungen und Wirklichkeit vom Reich des Mittelalters.* In: Schneidemüller, Bernd – Weinfurter, Stefan (szerk.): Heilig, Römisch, Deutsch. Das Reich im mittelalterlichen Europa. Sandstein, Dresden, 2006. 464–465.

[87] Schieffer, Rudolf: *Konzepte des Kaisertums.* In: Schneidemüller, Bernd – Weinfurter, Stefan (szerk.): Heilig, Römisch, Deutsch. Das Reich im mittelalterlichen Europa. Sandstein, Dresden, 2006. 451–474.

[88] Philippi, Rudolf – Woelky, Carl Peter – Seraphim, August (szerk.): *Preussisches Urkundenbuch. Bd. I. Teil 1.* Hartungsche Verlagsdruckerei, Königsberg, 1882. 52. (továbbiakban: PUB I,1.)

[89] PUB I,1. 54.

[90] PUB I,1. 56.

[91] Bachteler, Kurt: *Die Goldene Bulle von Rimini*. In: Albrecht, Kurt (szerk.): Die Staufer. Herkunft und Leistung eines Geschlechts, Bd. I. Verl. Die Karawane, Ludwigsburg, 1968. 110–118.; Dygo, Marian: *Wielki mistrz Zakonu Krzyżackiego i Rzesza w świetle Złotej Bulli z Rimini Fryderyka II (1226).* Przegląd Historyczny, 1987. 517–531.; Gouguenheim, Sylvain: *L'empereur, le grand maître et la Prusse. La bulle de Rimini en question (1226/1235)*. Bibliothèque de l'École des chartes, 2004/2. 381–420.; Matison, Ingrid: *Zum politischen Aspekt der Goldenen Bulle von Rimini.* In: Wieser, Klemens (szerk.): Acht Jahrhunderte Deutscher Orden in Einzeldarstellungen. Festschrift zu Ehren Sr Exzellenz P. Dr. Marian Tumler O.T. anlässl. seines 80. Geburtstages.

politikai célja jelent meg II. Frigyes 1245. évi veronai aranybullájában is, amelyben a Német Lovagrendnek adta a pogány Litvániát, Semgalliát és Kurlandot.[92] A pogányok lakta földekről rendelkező aranybullák a császári hatalom egyetemességét és teljességét hangsúlyozták. Azt, hogy ezek mennyire kapcsolódtak az egyetemes főhatalom, a pápaság és császárság közötti küzdelem kérdéséhez, a Szentszék reagálásai mutatják. A rimini bullát követően IX. Gergely pápa kinyilvánította (1234), hogy azok a földek, amelyeket a Német Lovagrend meghódított, vagy a jövőben meghódít, nem a Birodalomhoz tartoznak, hanem Szent Péter (azaz Róma) tulajdonát képezik és a pápaság fennhatósága alá tartoznak.[93] A veronai bulla után 1251-ben IV. Ince a litván területeket vette Róma oltalmába és pártfogásába.[94]

Az 1230-as évek második felében a pápaság – császárság közötti politikai küzdelem már fegyveres konfliktussá terebélyesedett, és II. Frigyes hadserege még az egyházi államot is megszállta (1240). A pápaság Franciaországba menekült, ahol a lyoni egyetemes zsinat (1245) egyházi átokkal sújtotta a császárt, és kinyilvánította a trónról történő letételét.[95] A zsinati döntéssel szemben II. Frigyes a keresztény királyoknak írt levelét (1245) aranypecsétjével erősítette meg.[96] Petrus de Viena birodalmi kancellár a császár nevében ünnepélyesen még azt az oklevelet is aranypecséttel látta el, amelyben írásba foglalták, hogy a császár feleségül kérte az angol király testvérét, Izabellát (1235).[97]

Azt, hogy uralkodása alatt II. Frigyes igen sok aranybullát adott ki, mintegy száz évvel később IV. Rudolf osztrák herceg a saját érdekében igyekezett kihasználni, és egy Frigyes kori hamis aranypecsétes oklevelet készíttetett, amit 1245-re datáltak. Az *Innovatio constitutionis ducatus Austriae,* vagy közismertebben az osztrák *Privilegium maius* néven ismertté vált diploma szerint a Stauf uralkodó főhercegi címet (*archidux*) adományozott az osztrák hercegnek és utódainak, s ezzel a méltósággal a választófejedelmek rangjára emelte a Habsburg-házat. Az oklevél megengedte, hogy az osztrák főherceg egy koronához hasonló diadémot viselhessen, amelyre még egy birodalmi keresztet is erősíthetett (*concedimus enim nostro illustri principi duci Austrie crucem nostri dyadematis suo principali pilleo suffrendo*).[98] A *Privilegium maius* ugyan hamisítvány volt, de a Habsburgok a leghatalmasabb Stauf császártól igyekeztek származtatni az abban szereplő tartalmat, hogy azoknak nagyobb nyomatékot adjanak. Ez a tény II. Frigyes aranypecsétes okleveleinek tekintélyét és presztízsét mutatta, s azt, hogy az utókor számára is nagy megbecsülést jelentettek.

Verlag Wissenschaftliches Archiv, Bad Godesberg, 1967. 53.; Pósán László: *„... quod terra ipsa sub monarchia imperii est". Az Imperium Romanum és a Német Lovagrend állama a középkorban.* In: Frank Tibor (szerk.): Németföldről Németországba. Magyar kutatók tanulmányai a német történelemről. Gondolat, Budapest, 2012. 17–22.

92 RI V, 1,1. 3479.; Bunge, Friedrich Georg (szerk.): *Liv-, Est- und Curländisches Urkundenbuch. Bd. I., Teil 1.* J. Deubner, Riga, 1852. 185.

93 PUB I,1. 108.

94 Theiner, August (szerk.): *Vetera monumenta Poloniae et Lithuaniae gentiumque finitimarum historiam illustrantia Tom. I.* Typis Vaticanis, Romae, 1860. 102.

95 Houben, Hubert: *Kaiser Friedrich II. (1194–1250). Herrscher, Mensch und Mythos.* Kohlhammer, Stuttgart, 2008. 73–82.

96 RI V, 1,1. 3517.

97 MGH Const. II. 191.

98 MGH Const. II. 260.

Die Goldbullen der Staufer

(Zusammenfassung)

Die Praxis der Bestätigung der Urkunden mit einer goldenen Bulle erschien unter Einfluss von Byzanz, mit der Neugeburt des politischen Ideals des christlichen römischen Kaiserreichs im lateinischen Westen. Die goldene Bulle symbolisierte die Vollständigkeit der Macht des Herrschers, seine Souveränität, betonte gleichzeitig die Wichtigkeit und Bedeutung des Inhalts der Urkunden. Was die Urkunden der Kaiser des Deutsch-römischen Reiches betrifft, war das sigillum aureum ein Mittel um die kaiserliche Macht und Autorität, die symbolische Politik der kaiserlichen Hoheit auszudrücken. Die goldene Bulle betonte nicht nur den Inhalt der Urkunde, sondern verlieh den Empfängern ein besonderes Prestige, und bestätigte die Treue und Loyalität der Empfänger.

Zu der Zeit der Staufer erhöhte sich die Anzahl der goldenen Bullen, die dadurch in einem viel breiteren Kreis das Ideal und politisches Programm der kaiserlichen Hoheit verbreiteten. Friedrich I., genannt Barbarossa, verlieh während seiner fast 40 jährigen Herrschaft etwa 80 goldenen Bullen, also jährlich durchschnittlich zwei. Sein Enkelkind, Friedrich II. stellte während seiner Herrschaft von einem mehr als halben Jahrhundert mehr als das Zweifache der Bullen seines Großvaters, 180 goldene Bullen aus. Dies bedeutete 6,6% (2700 Stücke) aller goldenen Bullen.

Anhand des Inhaltes und der Empfänger können die Bullen der Staufer in mehreren Gruppen eingeteilt worden. Zu der ersten Gruppe gehören die Urkunden, die der Kirche verliehen wurden. Nachdem Friedrich I. der Herrscher von Burgunden geworden war, verfasste er die Privilegien des Bischofs von Lyon 1157 in einer goldenen Bulle. Neun Jahre später, 1168 bestätigte eine goldene Bulle die kirchenfürstliche Rechtsstellung des Würzburger Bischofs. Auch eine goldene Bulle von 1185 bewies der kaiserliche Schutz über dem Bistum von Ascoli in Italien. Sein Sohn, Heinrich bestätigte 1186 in einer goldenen Bulle die Unabhängigkeit eines burgundischen Klosters von der Abtei von Cluny. 1213 verfasste Friedrich II. in einer goldenen Bulle die breiten Privilegien der deutschen Kirche und des Papstes. Der Fakt, dass zur Bestätigung der Urkunde eine goldene Bulle verwendet wurde, wurde auch in der Urkunde vermeldet: presens privilegium conscriptum maiestatis nostrae aurea bulla iussimus communiri. Diese Formel wurde später eine übliche Praxis der Kanzlei im Hof von Friedrich II. Die kaiserlichen Zusagen für Papst Honorius III., dass der Kaiser Sizilien und Süditalien nicht mit dem Reich vereinige, oder dass er Kreuzzüge in das Heilige Land führen werde, wurden meistens in Goldbullen verfasst. 1220 verlieh er den kirchlichen Fürsten des Reiches viele Privilegien. Diese Goldbulle verlieh den kirchlichen Fürsten das Recht des Steuereinzugs, der Münzprägung, des Burgbaus und des Zollrechts. Auf ihren Gebieten bekamen die Fürsten das Recht der Gesetzgebung und vollständiger Gerichtsbarkeit. Die Privilegien der kirchlichen Fürsten wurden von der kaiserlichen Macht garantiert. Diejenigen, die diese verletzten, mussten das Zweifache der Schuld rückerstatten. Als Strafe mussten sie 100 Mark Silber für die kaiserliche Schatzkammer zahlen.

Neben den kirchlichen Fürsten erhielten auch die weltlichen Fürsten etliche Goldbullen zu der Zeit der Staufer. Friedrich I. verlieh den Welfen das bayrische Herzogtum und auch

das Recht der Investitur in einer Goldbulle. Mit dem goldenen Siegel betonte der Kaiser, dass das Recht der Investitur ein Regal, also ein kaiserliches Recht sei, dass er nach Belieben sogar weitergeben könne. Mit dem Empfang der Belehnung anerkannten die Welfen die kaiserliche Oberhoheit über der Kirche. Mit einer Goldbulle von 1156 erhob Friedrich I. Österreich auf den Rang eines Herzogtums, und gleich damit trennte er es vom bayrischen Herzogtum ab, und machte das Herrschaftsgebiet der Welfen kleiner. Er verstärkte das Privileg für Albert, Graf von Pavia 1164 mit einem goldenen Siegel. Damit drückte er die kaiserliche Oberhoheit über Italien aus, und verstärkte die politische Position und das Ansehen seines Anhängers. Mit dem Thronfolgekrieges nach dem Tod von Kaiser Heinrich VI. hing die sizilianische goldene Bulle von Friedrich II. aus dem Jahre 1212 zusammen. Diese Bulle verlieh dem böhmischen Fürsten Ottokar I. erblichen königlichen Titel, und das Recht der Investitur in Böhmen. Fredrich II. betrachtete, genauso wie sein Großvater, die Investitur als sein Hoheitsrecht. Friedrich dankte Ottokar mit dieser Urkunde, dass er im Kampf um den Tron an der Seite der Staufer stand. Die Privilegien von Böhmen im Reich wurden 1216 und 1231 mit neuen Goldbullen verstärkt. 1232 erhielten die weltlichen Fürsten des Reiches die Mehrheit der Privilegien der kirchlichen Fürsten in einer goldenen Bulle verfasst. Diese Bulle versicherte die Loyalität und Treue der weltlichen Fürsten wegen Konflikt des Kaisers mit Papst Gregorius IX. und der Rebellion seines Sohnes, Heinrich. Als er 1235 von Sachsen Braunschweig und Lüneburg abtrennte und aus diesen ein neues Herzogtum formte, erließ er eine goldene Bulle. 1245 bestätigte er das Feudalrecht von Margarete, der Gräfin von Flandern über die Grafschaft Namur und sein Versprechen, dass er die Burg Rivoli und die dazugehörenden Landgüter Amadeus, Graf von Savoyen zurückgebe.

Das Imperium wurde ab der Zeit von Constantinus mit dem Christentum, das Imperium Christianum mit dem Gottes Stellvertreter auf Erden, der der Verbreiter und der Verteidiger des Glaubens (propagator et defensor Dei) war, identifiziert. Diese politische Auffassung schrieb dem Kaiserreich Missionsaufgaben zu, wessen göttliche Mission sei, die Sache des Christentums überall zum Siege zu führen. Mit je größerer Begeisterung die Kaiser an der Verbreitung des Christentums arbeiteten, desto größer wurde das christliche Imperium. Laut dieser Auffassung überreichte die Macht und der Einfluss des Reiches die administrativen und rechtlichen Grenzen, so hatten die Kaiser auch über die von den Heiden bewohnten gebieten zu verfügen. Friedrich II. erließ mehrere Urkunden mit diesem Inhalt. 1224 nahm er in Catania unter den Schutz (also unter den politischen Einfluss) des Kaiserreiches die heidnischen Völker von der südöstlichen und östlichen Seite der Ostsee. 1226 schenkte er in Rimini dem Deutschen Orden die Gebiete der heidnischen Preußen östlich von der Weichsel, und verlieh dem Orden Privilegien, die 1220 auch die deutschen kirchlichen Fürsten bekamen. 1245 wurde dem Deutschen Orden in der Bulle von Verona Litauen, Kurland und Semgallen verliehen.

Neben den kirchlichen und weltlichen Würdenträgern bestätigten die Staufer auch die Privilegien der Städte mit einem goldenen Siegel. Diese Urkunden bestätigten, dass die Empfänger aus der Gerichtsbarkeit der Provinzialherren und der Fürsten geraten, und unmittelbar unter die Krone gestellt wurden. So eine Goldbulle erhielt Aachen 1166 von Friedrich I. und 1215 von Friedrich II., Worms und die Städte in Cambrai 1184, Lübeck in den Jahren 1188 und 1226, Genova 1220, Bern und Basel 1218, die italienischen Städte 1226, Köln 1236, Regensburg 1245.

Die Wichtigkeit eines Geschehens wurde zu der Zeit der Staufer auch mit einer Goldbulle ausgedrückt. Im Frühling von 1220 teilte Friedrich II. mit einer Goldbulle den Würdenträgern und den Völkern von Italien mit, dass er anlässlich seiner Kröning zum Kaiser nach Rom komme. Im Juni 1228, vor seiner Kreuzzug in das Heilige Land, gab er in einer Goldbulle seinen italienischen Würdenträgern Instruktionen, damit es jedem eindeutig wurde: Sie handeln im Auftrag des Kaisers. 1235 bestätigte Kanzler Petrus de Viena die Urkunde mit einem goldenen Sigel, in der aufgezeichnet wurde, dass Friedrich II. Isabella, die Schwester des englischen Königs heirate. Als der Kaiser 1245 auf dem Konzil von Lyon verbannt wurde, versah Friedrich II. den Brief, den er an die christlichen Fürsten schreib, mit einem goldenen Siegel, um den Inhalt des Briefes zu betonen.

Rosta István
professor emeritus and ordinary member, Szent István Science Academy

THE HISTORIC DETAILS OF THE 1922 GOLDEN BULLA MONUMENT

Prior to discussing the topic indicated in the title, let me respectfully commemorate Professor Dr Géza Érszegi in a few words. He belonged to the most renowned experts in the Hungarian Aranybulla (Golden Bull) research. He died in 2022, the year of the 800th anniversary of the issue of Golden Bulla. He was the chief archivist and deputy head of Hungarian National Public Records Office. He also gained the degree of Doctor of Historic Sciences at the Hungarian Science Academy and became an ordinary member of Szent István Science Academy. He achieved significant research findings after paying a study visit to the Vatican Secret Records Office. His grave lies in the columbarium of Farkasréti parish church in Budapest. He died at the age of 78. His memory will be preserved with devotion.

In 1922, for the 700th anniversary of the issue of Golden Bulla, Székesfehérvár erected a memorial. In fact, the Horthy era was featured by exploiting historic values in Székesfehérvár. The opening ceremony took place on the Mount Csúcsos on 19th November in 1922, on the day of Saint Elizabeth from Árpád Dynasty. Mount Csúcsos is approximately 5 kms from Székesfehérvár, whose mayor at the time was dr. Aladár Zavaros.

In addition to county government commissioner Pál Nagy, deputy mayor Lajos Lipcsey and National Assembly member Earl József Károlyi, other high rank state leaders such as governor, prime minister, minister of education, can be found among the personalities supporting the erection of the monument. A part of financial sacrifice was settled by the citizens of Székesfehérvár who set a respectable example of unity and perseverance of tradition.

On the day of the opening ceremony the town held a ceremonial assembly. The ceremony started with a church mass. The statement of the ceremonial assembly recorded the text of a document which was placed into the foundation of the monument. The first sentence of the text says:' Royal awareness has risen upon you today, Alba Regia' and then then continues and ends with the following words: 'On the footsteps of glorious ancestors shall we walk, …for the glory of the God of Hungarians, we the community of free royal town of Székesfehérvár.' (extracts from the statements of municipal assembly, 22 November, 1922., pages 552 and 553, Municipal Registry Office and Research Institute, Székesfehérvár)

The government was represented by university professor and academic of Medieval History, Dr Antal Áldássy who, beside the Golden Bulla, also mentioned the history of 13th-century Hungary in his speech.

Áldássy was mainly dealing with genealogy, church history and was studying archived documents. Reports of his remarkable inauguration speech appeared in the contemporary newspapers the Est, the Budapesti Hírlap and the Magyarság as well.

The sculptor and stonemason junior Lajos Havranek was the creator of the monument, which was made from limestone. On the front side of the foundation of the column-shaped monument an apostolic double cross (crux gemina) was seen. The beautiful monument was ruined by a Russian tank and the rubbles were removed in 1950. Since 1990, a new monument has been standing in its place.

This new monument was completed in 1972 and could be seen in Budai street between 1972 and 1990.

Szabó István
Universitätsprofesszor, Pázmány Péter Catholic University, Budapest

DIE GOLDENE BULLE IN DER NORMENHIERARCHIE

Im Jahr 2011 wurde die historische Verfassung Ungarns mit dem neuen Grundgesetz nach fast sieben Jahrzehnten Pause wieder Teil des geltenden öffentlichen Rechts. Eine lebendige historische Verfassung ist flexibel. Im Laufe der Zeit kommen neue Elemente hinzu, und veraltete Teile werden entfernt und werden Teil der Verfassungsgeschichte. Die sozialistische Verfassung von 1949 brach jedoch vollständig mit ihr, so dass die historische Verfassung in ihrer Gesamtheit zur Verfassungsgeschichte wurde. In diesem Zustand verlor sie ihre Flexibilität, so dass keine neuen Elemente hinzugefügt wurden. Ihr fehlen die Veränderungen der fast sieben Jahrzehnte bis 2011, so dass seine Verbindung an die Verfassungsordnung des 21. Jahrhunderts nicht perfekt ist. Aber die Probleme sind nicht unüberwindbar. In meinem heutigen Vortrag werde ich ein solches Thema im Zusammenhang mit der Goldenen Bulle ansprechen: die Normenhierarchie. Dieses Konzept war bereits vor 1949 bekannt, aber sein Inhalt war nicht ganz derselbe wie heute. Die Pause von fast sieben Jahrzehnten ist auch hier spürbar.

Die Normenhierarchie ist im ungarischen öffentlichen Recht seit dem Spätmittelalter bekannt. Nach der Einrichtung des Reichstages im 14. Jahrhundert trat neben das Gesetz eine neue normative Rechtsquelle, die Verordnung. Der König konnte nicht einseitig von den im Konsens mit dem Reichstag getroffenen Entscheidungen abweichen. Das Gesetz war eine Rechtsquelle, die im Einvernehmen mit dem Reichstag geschaffen wurde, während die Verordnung vom König unabhängig erlassen wurde. Zwischen den beiden Normen wurde eine hierarchische Beziehung hergestellt.[1]

Heute jedoch steht die Verfassung an der Spitze der Normenhierarchie, und die Gesetze müssen mit ihr in Einklang stehen. In meinem Vortrag werde ich die Stellung der Verfassung in der Normenhierarchie vor 1949 untersuchen. Hier war die Ähnlichkeit nicht so groß wie bei der Beziehung zwischen Gesetz und Verordnung.

Im 19. Jahrhundert bedeutete – in Ungarn – die Verfassungsschutzfunktion der Komitate (vis inertiae), dass sie sich weigern konnten, Verordnungen (Massnahmen) der zentralen Regierungsbehörden zu vollstrecken, wenn diese als gesetzwidrig angesehen wurden.[2]

---

[1] Timon Ákos: *Magyar alkotmány- és jogtörténet, különös tekintettel a nyugati államok jogfejlődésére* [Ungarische Verfassungs- und Rechtsgeschichte, unter besonderer Berücksichtigung der Rechtsentwicklung der westlichen Staaten]. Grill, Budapest, 1919. 627–630.

[2] Stipta István: *Az Aranybulla ellenállási záradéka és a nemesi vármegyék rendelet-félretételi (vis inertiae) jogosultsága* [Die Widerstandsklausel der Goldenen Bulle und das Recht der adligen Komitate, dem Verordnungen zu widersprechen (vis inertiae)]. In: Mezey Barna (Hrsg.): Az Aranybulla a joghistóriában. Mádl Ferenc Összehasonlító Jogi Intézet, Budapest, 2022. 172–184.

Heute handelt es sich jedoch nicht mehr um das, was wir als Verfassungsschutz bezeichnen würden, sondern vielmehr um die Überwachung der Gesetzmäßigkeit, da die Gesetzmäßigkeit der von den Verwaltungsbehörden getroffenen Entscheidungen geprüft wird. In diesem System war die Verfassung noch nicht in den Rang eines Gesetzes erhoben, sie war eine Gesamtheit von Gesetzen. Ákos Timon[3] schrieb Folgendes über vis inertiae: „(…) den Komitaten hielten es für ihr Recht und ihre Pflicht, die zentralen Regierungsbehörden, die dem Reichstag nicht unterstellt war, unter dem Gesichtspunkt der durch die Gesetze garantierten Verfassung zu kontrollieren (…)“[4] Der Ausdruck „durch die Gesetze garantierte Verfassung“ impliziert eindeutig, dass die Verfassung die Gesamtheit der Gesetze ist.

Im 20. Jahrhundert vertritt Móric Tomcsányi[5] in der 1932 erschienenen Ausgabe seines Lehrbuchs des ungarischen öffentlichen Rechts eine etwas merkwürdige Auffassung von der Prüfung der materiellen Verfassungsmäßigkeit von Gesetzen: „Unter den neueren Verfassungen gibt es jedoch bereits einige, die nicht einmal vor diesem letzten Schritt zurückschrecken und dem eigens eingerichteten Verfassungsgericht das Recht anvertrauen, die materielle Verfassungsmäßigkeit von Gesetzen zu prüfen (…)“.[6]

Im Jahr 1943 schrieb István Csekey[7] über die Entthronung von 1921 Folgendes: „Heute ist es jedoch ein Grundsatz der Verfassungsordnung, dass der Monarch rechtlich nicht entthront werden kann.“[8] Kurz darauf fuhr er fort: „Was die Gültigkeit des so genannten Entthronungsgesetzes von 1921 angeht (…) Jede Interpretation, die die Ungültigkeit dieses Gesetzes (…) aus seinem Inhalt ableiten will, widerspricht der Auffassung unseres Verfassungsrechts, das nur den formalen Begriff des Gesetzes anerkennt.“[9]

Ein hierarchisches Verhältnis zwischen der Verfassung und den Gesetzen wird hergestellt, wenn auch die materielle Verfassungsmäßigkeit des letzteren, d.h. sein materieller Widerspruch zur Verfassung, geprüft wird. Das ist es, was ein Verfassungsgericht heute tut. Widerspricht ein Gesetz in der Sache der Verfassung, erklärt das Verfassungsgericht es für verfassungswidrig und hebt es auf. Tomcsányi erwähnt die materielle Verfassungsmäßigkeit wörtlich, aber er findet es seltsam, dass sie geprüft wird. Csekey hingegen schreibt in den letzten Jahren der historischen Verfassung deutlich, dass die Ungültigkeit eines Gesetzes nur unter formalen Gesichtspunkten geprüft werden kann, und dass die Ungültigkeit nicht aus einem inhaltlichen Widerspruch abgeleitet werden kann. Im ungarischen öffentlichen Recht hat sich also auch zwischen den beiden Weltkriegen kein hierarchisches Verhältnis zwischen der Verfassung und den Gesetzen entwickelt.

Vor diesem Hintergrund ist es verständlich, dass vor 1949 in Ungarn kein besonderes Bedürfnis bestand, die Verfassung in eine eigene schriftliche Rechtsquelle zu überführen. Eine klare Trennung von den Gesetzen wäre notwendig gewesen, wenn sie in einem hierarchischen Verhältnis zueinander stünden. So hat sich in der ungarischen Terminologie des öffentlichen Rechts der Begriff der formellen Verfassung, wenn sich die Verfassung klar von der übrigen Rechtsordnung abgrenzen lässt, nicht entwickelt. Auch in der öffentlich-recht-

[3] Ákos Timon (1850–1925) Professor für Rechtsgeschichte in Budapest 1890–1925.

[4] Timon, 1919. 733.

[5] Móric Tomcsányi (1878–1951) Professor für Verfassungsrecht in Budapest 1922–945.

[6] Tomcsányi Móric: *Magyarország közjoga* [Öffentliches Recht Ungarns]. Királyi Magyar Egyetemi Nyomda, Budapest, 1932. 36.

[7] István Csekey (1889–1963) in Tartu (Estland) / Szeged / Kolozsvár / Pécs 1923–1951.

[8] Csekey István: *Magyarország alkotmánya* [Die Verfassung Ungarns]. Renaissance, Budapest, 1943. 112.

[9] Csekey, 1943. 102–103.

lichen Literatur zwischen den beiden Weltkriegen wird zur Definition der Verfassung nur der materielle Verfassungsbegriff herangezogen, der den Inhalt der Verfassung bestimmt.[10]

Aber auch die Abgrenzung in der formellen Verfassung schuf nicht automatisch ein hierarchisches Verhältnis zwischen der Verfassung und den Gesetzen. Diese hierarchische Positionierung der Verfassung ist recht neu und wurde selbst zu Beginn des 20. Jahrhunderts nicht allgemein anerkannt.

Bei der Lektüre der verfassungsrechtlichen Literatur der Weimarer Republik in Deutschland erschien mir der Begriff der „stillschweigenden Verfassungsänderung", wie er von Garhard Anschütz[11] beschrieben wurde, lange Zeit seltsam.[12] Demnach konnte jedes Gesetz von der Verfassung abweichen, wenn es vom Reichstag mit der für eine Verfassungsänderung erforderlichen Mehrheit verabschiedet wurde. Diese Gesetze blieben formell außerhalb der Verfassung und wurden nicht einmal als Verfassungsänderung gekennzeichnet. In Anschütz war die einzige Bedingung für die Verfassungsmäßigkeit der Gesetze, dass sie ordnungsgemäß erlassen wurden. In diesem Fall hätte die Aufgabe eines Verfassungsgerichts lediglich darin bestanden, die Sitzungsprotokolle des Reichstages daraufhin zu überprüfen, ob das Verfahren zur Änderung der Verfassung eingehalten wurde.

Anschütz betrachtet, wie Csekey, nur die formale Seite. Seiner Ansicht nach muss der Reichspräsident die Verfassungsmäßigkeit von Gesetzen prüfen, wenn sie verkündet werden.[13] Weichen sie von der Verfassung ab, muss er prüfen, ob die für die Änderung der Verfassung vorgesehenen Regeln eingehalten wurden. Wenn ja, muss er sie verkünden, denn eine inhaltliche Diskrepanz stellt keine Verfassungswidrigkeit dar. Und wenn sich aus dem materiellen Widerspruch keine Verfassungswidrigkeit ergibt, gibt es auch kein hierarchisches Verhältnis zwischen den beiden Rechtsquellen. Die Verfassung ist lediglich ein Gesetz, das in einem besonderen Verfahren angenommen wurde.

Der Vorrang der Verfassung vor dem Gesetz war also auch in der ersten Hälfte des 20. Jahrhunderts nicht allgemein anerkannt und hing auch nicht davon ab, ob ein Land eine geschriebene Verfassungsurkunde oder eine historische Verfassung hatte. Zu Beginn des 21. Jahrhunderts ist die Hierarchie zwischen den beiden Rechtsquellen jedoch klar: Die Verfassung steht über die Gesetze. Daraus ergibt sich eindeutig, dass die Elemente der historischen Verfassung, die zur Auslegung des Grundgesetzes herangezogen werden,

---

[10] Im Folgenden werden einige Beispiele für Definitionen des Begriffs "Verfassung" aus der öffentlich-rechtlichen Literatur vor 1944 aufgeführt:
"Die Verfassung ist die Lebensform der Nation, die Lebensordnung des ungarischen Staates. Die Verfassung regelt die Organisation des Staates, die Art und Weise der Ausübung der Staatsgewalt, die Rechte und Pflichten der Bürger." (Egyed István: *A mi alkotmányunk* [Die unsere Verfassung]. Magyar Szemle Társaság, Budapest, 1943. 36.)
"Die Verfassung ist die Grundordnung des Staates, aus der sich alle anderen Rechte ableiten. (…) Genauer gesagt ist das Verfassungsrecht der Teil des öffentlichen Rechts, der sich mit der Rechtsstellung, der Funktionsweise und den Befugnissen der Staatsorgane befasst. Es befasst sich auch mit dem Verhältnis der Staatsorgane zueinander und zu den Bürgern." (Csekey, 1943. 30., 31.)
"Zur Verfassung des Staates gehört alles, was mit der staatlichen Souveränität eng zusammenhängt, sei es organisatorisch oder operativ. Die Verfassung ist also (…) kurz gesagt, allgemein gesprochen, nichts anderes als die Organisation des Staates in seiner Souveränität." [Tomcsányi, 1932. 31.]

[11] Gerhard Anschütz (1867–1948) Professor für Verfassungsrecht in Heidelberg 1900–1933.

[12] Anschütz, Gerhard: *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis.* Scientia, Aalen, 1987. 401–402.

[13] Anschütz, 1987. 368.

nicht aus Verfassungsbegriffe aus der Zeit vor 1949 abgeleitet werden können. Wenn alle Gesetze aus der Zeit vor 1949 an die Spitze der Hierarchie gestellt werden, führt dies zwangsläufig zu Verwirrung.

Die gesamte historische Verfassung kann also nicht zur Auslegung des Grundgesetzes herangezogen werden, aber ich möchte die Definition der Verfassung von Pál Teleki[14] zitieren. Obwohl Teleki kein Jurist war, beschäftigte er sich als Politiker und Ministerpräsident intensiv mit der Frage der Verfassung, die er wie folgt definierte: „[…] unsere Verfassung ist ungeschrieben – eine Reihe von Gesetzen und Rechtsbräuchen, die in das Blut der Nation übergegangen sind – von denen die Zeit etwas auslöschen kann, aber die Handlung eines einzelnen Mannes, die Handlung eines einzelnen Parlaments oder sogar die Stimmung einer einzelnen Generation – niemals."[15]

Telekis Verfassungsdefinition sieht eine Verfassung an der Spitze der Normenhierarchie. Sie trennt von der materiellen Verfassung die Teile ab, die seit Generationen bestehen und als Kompass für den aktuellen Gesetzgeber dienen. Es handelt sich um Verfassungsgrundsätze, die nicht durch einen Gesetzgeber (Verfassungsgeber) geschaffen werden, sondern durch ihre dauerhafte (jahrhundertealte) Akzeptanz an die Spitze der Hierarchie gestellt werden. Sie wurden jedoch aus logischen Gründen nicht aufgeschrieben, aber es ist nicht möglich, sie in dem Zeitrahmen einer Viertelstunde zu erörtern.

Das zentrale Thema meines Vortrags war die Stellung der Verfassung in der Normenhierarchie. Die Verfassung stand nicht von Natur aus an der Spitze der Hierarchie der Rechtsquellen und diente als Kompass für das übrige Rechtssystem. Die Rolle des Kompasses ist jedoch nicht notwendigerweise an schriftlichen Verfassungsurkunde gebunden, sondern kann auch in historischen Verfassungen auftauchen.

Abschließend möchte ich auf den Titel meines Vortrags zurückkommen: die Goldene Bulle in der Normenhierarchie. Meines Erachtens kann kein Zweifel daran bestehen, dass die ungarische Goldene Bulle von 1222 zu den Gesetzen gehört, die im Laufe der Zeit in der Normenhierarchie den Status eines Gesetzes erlangt haben. Sie erfüllt die Kriterien einer Verfassung in unserer Zeit.

[14] Pál Teleki (1879–1941) Ministerpräsident Ungarns 1920–1921, 1939–1941.

[15] Teleki Pál: *Válogatott politikai írások és beszédek* [Ausgewählten politische Schriften und Reden]. Osiris, Budapest, 2000. 443.

Thedor Wanninger
Wissenschaftlicher Mitarbeiter, Universität Bayreuth[1]

DAS REICHSINDIGENAT IM HEILIGEN RÖMISCHEN REICH VOM DIFFERENZIERUNGSKRITERIUM ZUM INTEGRATIONSINSTRUMENT

Unter den Reichsgrundgesetzen wurden die Rechtsquellen, die alle wichtigen Aspekte des staatlichen Lebens im Reich regelten, verstanden. Insbesondere zählten dazu die Goldene Bulle von 1356, der ewige Landfrieden, die Reichskammergerichts- und Reichshofratsordnungen, der Augsburger Religionsfrieden von 1555 sowie der Westfälische Frieden von 1648. Als „überhaupt eines der allerwichtigsten Deutschen Reichs- Grund-Gesetze“[2] galt zudem die jeweils aktuelle Wahlkapitulation. Die Wahlkapitulationen wurden zwischen den Fürsten und dem frisch gewählten Kaiser geschlossen und hegten dessen Herrschaftsmacht ein. In ihnen sicherten sich die Fürsten Mitspracherechte und Machtpositionen. In diesen Wahlkapitulationen findet der Aspekt seinen Ausgangspunkt, um den es hier geht.

In der Wahlkapitulation von Karl V von 1519, in der er den Reichsständen und insbesondere den Kurfürsten ihre Machtposition garantierte, ist in Artikel 13 geregelt, dass die Reichsämter nur an „geborene Deutsche“ verliehen werden sollen.[3] Dies ist eine Regelung, die alle Wahlkapitulationen in dieser Eindeutigkeit oder in leicht veränderter Form beinhalteten. In der ursprünglichen Variante taucht die Formulierung in den Wahlkapitulationen von der Karl V 1519 bis zu der von Ferdinand II von 1619 auf.[4] In der Wahlkapitulation von Ferdinand III von 1636 wurde die Formulierung so abgeändert, dass die Besetzung von Militärämtern als Anwendungsfall besonders betont wurden[5] – eine Formulierung, die aufgrund des gerade tobenden Dreißigjährigen Krieges wenig verwundert. Ab dem Projekt einer beständigen Wahlkapitulation von 1711 findet sich in allen Wahlkapitulationen eine erhebliche Einschränkung. Die genannten Ämter konnten auch von Personen übernommen

[1] Der Autor ist Wissenschaftlicher Mitarbeiter an der Universität Bayreuth, Lehrstuhl für Bürgerliches Recht und Rechtsgeschichte (Prof. Dr. Bernd Kannowski). Dem Beitrag liegt ein Vortrag auf der Konferenz „A magyar Aranybulla és európai párhuzamai“ am 1. Dezember 2022 in Szeged zugrunde.

[2] Moser, Johann Jacob: *Compendium Juris Publici Regni Moderni Germanici oder Grund-Riß der heutigen Staats-Verfassung des Teutschen Reichs*. Verlag derer Gebrüdere Cotta, Tübingen, 1731. 27.

[3] Art. 13 der Wahlkapitulation Karl V vom 3. Juli 1519, in: Burgdorf, Wolfgang: *Die Wahlkapitulationen der römisch-deutschen Könige und Kaiser 1519–1792.* Vandenhoeck & Ruprecht, Göttingen, 2015. 25.

[4] Art. 13 der Wahlkapitulation Karl V vom 3. Juli 1519, in: Burgdorf, 2015. 25.; Art. 12 der Wahlkapitulation Ferdinand I vom 7. Januar 1531, in: Burgdorf, 2015. 38.; Art. 12 der Wahlkapitulation Ferdinand I vom 14. März 1558, in: Burgdorf, 2015. 52.; Art. 13 der Wahlkapitulation Maximilian II vom 30. November 1562, in: Burgdorf, 2015. 65.; Art. 12 der Wahlkapitulation Rudolf II vom 1. November 1575, in: Burgdorf, 2015. 81.; Art. 13 der Wahlkapitulation Matthias vom 18. Juni 1612, in: Burgdorf, 2015. 97.; Art. 12 der Wahlkapitulation Ferdinand II vom 28. August 1619, in: Burgdorf, 2015. 116.

[5] Art. 15 der Wahlkapitulation Ferdinand III, in: Burgdorf, 2015. 136.

werden, die „dem Reich mit Lehen-Pflichten verwandt, des Reichs Weesens kundig und von Uns dem Reich nützlich erachtet werden, die nicht niedern Stands noch Weesens, sondern nahmhaffte hohe Personen und mehrentheils von Reichs-Fürsten, Graffen, Herren und von Adel oder sonsten guten tappferen Herkommens“[6] waren. Diese Formel findet sich auch noch in der letzten Wahlkapitulation, nämlich der von Franz II von 1792.[7] Die Voraussetzung, ein „geborener Deutscher“ zu sein, ist also in verschiedenen Formen in allen Wahlkapitulationen der deutschen Kaiser zu finden. Es handelte sich um eine Sicherung vor fremden Einflüssen, an der die Reichsstände beständig Interesse hatten.[8]

1. Fragestellung und Quellenlage

Im Folgenden geht es somit um Fragen, die auch aufgrund dieser Regelung in einer lex fundamentalis[9] Relevanz entfalteten; die Frage, welche Bedeutung diese Beschränkung in der Rechtsposition für die jeweiligen Inhaber hatte, sowie die Frage, wer eigentlich als geborener Deutscher angesehen wurde. Im Folgenden wird dafür der zeitgenössische Fachbegriff verwendet, nämlich der des Indigenats. Dieser bezeichnete die hier relevante Eingeborenenstellung, wobei oftmals die damit verbundene Rechtsposition gemeint war. Daneben wird in den Quellen zuweilen das sogenannte Inkolat als Begriff verwendet. Manchmal wird dies als Synonym,[10] zuweilen als Gegenstück verstanden. Sofern es als Pendant zum Indigenat verwendet wurde, ist dies die durch Naturalisation erlangte Eingeborenenstellung im Gegensatz zur angeborenen Eingeborenenstellung des Indigenats.[11] Über lange Zeit wird es wenig intensive Beschäftigung mit der Thematik gegeben haben. Die Frage, wer ein geborener Deutscher war, wird sich in erster Linie aus dem allgemeinen Sprachgebrauch ergeben haben. Die Zunahme der Regelungen, die mit dem Indigenat zusammenhingen, sorgte auch für eine Intensivierung der wissenschaftlichen Bearbeitung des Themas. Meine Ausführungen werden sich überwiegend auf die wissenschaftliche Beschäftigung mit der Thematik im 18. Jahrhundert beziehen. Neben den – wie immer sehr umfangreichen, jedoch viele Wiederholungen aufweisenden – Werken Johann Jacob Mosers[12] liegt für diese Zeit eine fast unüberschaubare Anzahl an Quellen vor. Zumindest kurze Ausführungen zu dem Thema sind geradezu omnipräsent. Dabei beschränkte sich die Beschäftigung nicht nur auf

[6] Art. 23 des Projekts einer beständigen Wahlkapitulation vom 8. Juli 1711, in: Burgdorf, 2015. 303.

[7] Art. 23, § 4 der Wahlkapitulation Franz II vom 5. Juli 1792, in: Burgdorf, 2015. 810.

[8] Schmidt, Georg: *Deutsche Freiheit statt Monarchisierung. Die föderale Einheit im alten Reich.* In: Willoweit, Dietmar (Hrsg.): Föderalismus in Deutschland. Zu seiner wechselvollen Geschichte vom ostfränkischen Königtum bis zur Bundesrepublik.Böhlau Verlag, Wien, 2019. 167.

[9] Zu den Wahlkapitulationen als leges fundamentales: Kleinheyer, Gerd: *Die kaiserlichen Wahlkapitulationen. Geschichte, Wesen und Funktion*. C.F. Müller, Karlsruhe, 1968. 123.

[10] So z. B.: Benekendorff, Carl Friedrich von: *Oeconomia Forensis oder kurzer Inbegriff derjenigen Landwirthschaftlichen Wahrheiten welche allen sowohl hohen als niedrigen Gerichts-Personen zu wissen nöthig. Bd. 2.* Berlin, 1776. 211.; Krug, Leopold: *Geschichte der staatswirthschaftlichen Gesetzgebung im preußischen Staate. Bd. 1.* Realschulbuchhandlung, Berlin, 1808. 7.

[11] Gönner, Nikolaus Thaddäus: *Teutsches Staatsrecht*. Philipp Krüll, Landshut, 1804. 67.

[12] Zu Moser: Landsberg, Ernst – Stintzing, Roderich von: *Geschichte der deutschen Rechtswissenschaft. Abt. 3. Halbd. 1.* Unveränd. Nachdr., München, 1898. 315.; Stolleis, Michael: *Geschichte des öffentlichen Rechts in Deutschland. Bd. 1. Reichspublizistik und Policeywissenschaft 1600–1800.* C.H. Beck, München, 1988. 258.; Stolleis, Michael: *Juristen. Ein biographisches Lexikon*. C.H. Beck, München, 1995. 442.

die Wissenschaft des Reichsstaatsrechts und die Reichspublizistik. Vielmehr wurde in der Tradition des römischen Rechts und der römischen Bürgerschaft auch in Abhandlungen des Zivilrechts auf die Frage des Indigenats eingegangen.[13] Es handelte sich somit um ein sehr breit diskutiertes Thema der Rechtswissenschaft im 18. Jahrhundert, das nicht nur den engen Bereich des Reichsstaatsrechts, sondern auch das Zivilrecht betraf.

2. Bedeutung des Indigenats

Bei dieser breiten wissenschaftlichen Behandlung der Frage überrascht es nicht, dass deren Bedeutung nicht auf die Ämtervergabe im Reich beschränkt war. Es muss nämlich beachtet werden, dass das Indigenat für die Rechtswissenschaft des 18. Jahrhunderts auf drei hierarchisch differenzierten Ebenen existierte. Neben dem Indigenat auf Reichsebene wurde meist in engem Zusammenhang Entsprechendes für die Territorien im Reich und die Gemeinden genannt.[14] Insofern unterschieden sich auch oft die Rechtspositionen, die durch das Indigenat den „eingeborenen Untertanen" exklusiv zustanden. Damit fand eine Abgrenzung von Fremden statt, denen rechtliche Möglichkeiten versagt blieben und die sich damit in einer minderwertigen Rechtsposition wiederfanden. Typische Materien waren neben der Vergabe von Ämtern und der Freiheit von Nachsteuer auch der Erwerb von Immobilien.[15] Die Limitierung des Erwerbs von Immobilien ist eng mit der Frage der Ämtervergabe verbunden, da auch mit der Inhaberschaft vieler Immobilien, insbesondere Rittergütern, in der noch agrarisch geprägten Welt des 18. Jahrhunderts politische Rechte im Rahmen von Landstandschaften verbunden waren.[16]

Diese hierarchische Dreiteilung des Indigenats zeigt, dass es auch auf der Ebene der Territorien einen Bedarf gab, zwischen eingeborenen Landeskindern und sonstigen Personen zu unterscheiden. Einen Überblick über die Motive für diese Regelungen gab 1776 der preußische Jurist Karl Friedrich von Benekendorff[17] in seinem Werk Oeconomia forensis. Er schrieb: „Denn daß die Eingebohrne, da sie und ihre Vorfahren die Lasten des Staats schon so lange tragen helfen, und öfters ihr Blut und Leben zur Wohlfahrt des Vaterlandes gewaget und aufgeopfert haben, zu den Landesbedienungen und Ehrenämtern vorzüglich

---

[13] Vgl. Estor, Johann Georg: *Bürgerliche Rechtsgelehrsamkeit der Teutschen. Bd. 1.* Weldige, Marburg, 1757. 48.; Cocceji, Samuel: *Project des Corporis Juris Fridericiani. Bd. 1.* Wäysenhaus, Halle, 1750. 13.; Kreittmayr, Wiguläus Xaver Aloys: *Anmerkungen über den codicem maximilianeum bavaricum civilem*. Vötter, München, 1753. 62.

[14] Schnaubert, Hofrath: *Anfangsgründe des Staatsrechts der gesammten Reichslande*. Akademische Buchhandlung, Jena, 1787. 35.; vgl. auch Moser, Johann Jacob: V*on der Teutschen Unterthanen Rechten und Pflichten*. J.G. Garbe, Frankfurt – Leipzig, 1774. 512.; Weinbach, Joseph: *Exercitatio juris publici de singulari incolatus jure exterorum in Bavaria*. Luzenberger, Ingolstadii, 1772. 5.; Kreittmayr, 1753. 63.; Estor, 1757. 49.

[15] Zusammenfassend: Gönner, 1804. 66.; zu Beschränkungen durch das Indigenat als ständische Forderung vgl. auch: Opgenoorth, Ernst: *Stände im Spannungsfeld zwischen Brandenburg-Preußen, Pfalz-Neuburg und den niederländischen Generalstaaten. Cleve-Mark und Jülich-Berg im Vergleich.* In: Baumgart, Peter – Schmädeke, Jürgen (Hrsg.): Ständetum und Staatsbildung in Brandenburg-Preussen. De Gruyter, Berlin – Boston, 1983. 254.

[16] Vgl. zusammenfassend und m. w. N. Wanninger, Thedor: *Art. Rittergut.* In: Cordes, Albrecht et al. (Hrsg.): Handwörterbuch zur deutschen Rechtsgeschichte. (im Erscheinen).

[17] Zu Benekendorff: Skalweit, August: *Benekendorfs Oeconomia Forensis*. Zeitschrift für Agrargeschichte und Agrarsoziologie, 1953. 40–55.

genommen werden, ist der Gerechtigkeit und Billigkeit gemäß." Das Indigenat sei „einerstheils eine sehr gerechte Schutzwehre wider das allzukünftige Eindringen der Fremden, und anderntheils gereicht es einer ganz besonderen Aufmunterung in der Erlernung nöthiger und nützlicher Wissenschaften"[18]. Benekendorff ist jedoch nicht so zu verstehen, dass er eine xenophobe Abgrenzung der Territorien anstrebte. Ausdrücklich betont er, dass eine solche Abschottung gegen Fremde auch schädlich sein könne. Es sei ein angemessenes Verhältnis zwischen dem Zuzug von Fremden und der Bevorzugung von Landeskindern zu halten.[19]

Auf der Reichsebene ging es zumeist um Ämtervergaben. Neben den in den Wahlkapitulationen genannten Reichsämtern, die ab dem Projekt einer beständigen Wahlkapitulation von 1711 näher bezeichnet sind als „Protectio Germaniae, Gesandschafften, Obristhoffmeister, Obristen Cämmerers, Hoff-Marschallen, Hatschier- und Leib-Guarde-Hauptmanns und dergleichen"[20], also wichtigen weltlichen Positionen am kaiserlichen Hof und im diplomatischen Dienst, ging es auch um die Besetzung kirchlicher Ämter. Zumindest existierte die Rechtsbehauptung einer solchen Beschränkung in der Ämtervergabe im kirchlichen Bereich.[21]

Viele hohe weltliche und kirchliche Ämter im Reich hingen also von der Voraussetzung ab, dass die Kandidaten „geborene Deutsche" waren und damit das Reichsindigenat besaßen.

3. Voraussetzungen

Nur geborene Deutsche sollten also die wichtigen Ämter im Reich ausüben. Aber wer war nun Deutscher? Nach welchen Kriterien konnte dies bestimmt werden? Dies waren Fragen, die 1783 im Kontext der Besetzung kirchlicher Ämter von Johann Jacob Moser diskutiert wurden. Diese untersuchte er in einer untypisch kurzen Schrift von nur 32 Seiten anlässlich der Neubesetzung des Bischofsamtes von Passau und des Gerüchts einer Besetzung mit einem Prinzen der Toskana.[22] Zentral für seine Argumentation ist – wenn von ihm auch nicht ausdrücklich benannt – das Reichsherkommen. Dabei geht er nicht nur auf die rechtliche Gewohnheit ein, sondern berücksichtigt auch die wahrscheinlichen politischen Reaktionen, mithin die Akzeptanz der jeweils diskutierten hypothetischen Zulassung zu einem Amt.[23] Nach Moser ist die Eigenschaft, Deutscher zu sein, unabhängig vom allgemeinen Sprachgebrauch. Es handle sich vielmehr um eine davon zu trennende rechtliche Frage.[24] Das Indigenat ist bei Moser damit eine Rechtskategorie, kein vorrechtlicher Zustand. Moser verwirft sowohl die Muttersprache der Person,[25] als auch den Ort der Geburt,[26] als auch

[18] Benekendorff, Karl Friedrich: *Oeconomia Forensis oder kurzer Inbegriff derjenigen Landwirthschaftlichen Wahrheiten welche allen sowohl hohen als niedrigen Gerichts-Personen zu wissen nöthig. Bd. 2.* Pauli, Berlin, 1776. 212.

[19] Benekendorff, 1776. 212.

[20] Art. 23 des Projekts einer beständigen Wahlkapitulation, in: Burgdorf, 2015. 303.

[21] Vgl. Moser, Johann Jacob: *Von der Ausländer Fähig- und Unfähigkeit zu Teutschen Geistlichen Würden*. 1783. 4.; Feine, Hans Erich: *Die Besetzung der Reichsbistümer. Vom Westfälischen Frieden bis zur Säkularisation, 1648–1803.* Ferdinand Enke, Stuttgart, 1921. 63.

[22] Moser, 1783. 3.

[23] Vgl. z. B. Moser, 1783. 12., 14.

[24] Vgl. Moser, 1783. 7., 10.

[25] Moser, 1783. 7.

[26] Moser, 1783. 8.

den Ort des Aufenthaltes[27] als maßgebliche Kriterien für die Bestimmung. Vielmehr sei zwischen hohem Adel und sonstigen Personen zu differenzieren. Beim hohen Adel komme es auf den Besitz eines reichsständischen Territoriums an, also eines Territoriums, mit dessen Besitz ein Teilnahmerecht am Reichstag verbunden war.[28] Zumindest aber müsse die Familie eines tauglichen Kandidaten ein solches Territorium innehaben.[29] Bei sonstigen Personen komme es hingegen darauf an, ob die Vorfahren der Person Inhaber von reichsunmittelbaren Gütern waren oder ihren ständigen Aufenthalt im Reich hatten. Die Anzahl der deutschen Vorfahren, die ein tauglicher Kandidat vorweisen müsste, seien nach Moser spezialgesetzlich bestimmt. Nicht möglich sei eine Erlangung des Reichsindigenates durch Naturalisation.[30] Das, was manchmal als Inkolat bezeichnet wurde, also eine erworbene Eingeborenenstellung, bestand nach Moser damit auf Reichsebene nicht.

Die bemerkenswerte Differenzierung bestand damit innerhalb der Gruppe derjenigen, die das Indigenat innehatten. Die Voraussetzungen unterschieden sich je nach ständischer Zugehörigkeit, wobei entweder der Besitz reichsständischer Territorien oder eine Anzahl an im Reich ansässiger Vorfahren nötig war.

4. Fortleben

Mit dem Ende des Reiches war das Reichsindigenat obsolet. Da es nun keine Reichsämter mehr zu vergeben gab, fiel der Hauptanwendungsbereich weg. Es erlebte jedoch eine in diesem Hinblick erstaunliche Karriere. Zunächst sorgten die Änderungen im Reich durch den Frieden von Luneville und den Reichsdeputationshauptschluss dafür, dass das Verfassungsrecht des Reiches neu überarbeitet wurde.[31] Das, was im 18. Jahrhundert Reichsindigenat genannt wurde, wurde 1804 von Nikolaus Thaddäus von Gönner[32] von der klassischen Verbindung mit dem Landesindigenat und dem Gemeindeindigenat getrennt und mit einer neuen Bezeichnung versehen: Er benannte es als „Reichsbürgerrecht".[33] Zudem sah er die Möglichkeit einer Naturalisation durch den Reichstag.[34] Aber auch die Bezeichnung „Indigenat" erlebte noch eine gewisse Kariere. Die bayerischen Gesetze über die Staatsangehörigkeit von 1812[35] und 1818[36] trugen die Bezeichnung als Edikte über das Indigenat. Auch die Regelung des Art. 3 der Verfassung des Norddeutschen Bundes von

[27] Moser, 1783. 9.
[28] Moser, 1783. 10., 16.
[29] Moser, 1783. 11., 16.
[30] Moser, 1783. 13., 16.
[31] Stolleis, Michael: *Geschichte des öffentlichen Rechts in Deutschland. Bd. 2. Staatsrechtslehre und Verwaltungswissenschaft 1800–1914*. Beck, München, 1992. 53.; Aretin, Karl Otmar: *Das Alte Reich 1648–1806. Bd. 3. Das Reich und der österreichisch-preußische Dualismus (1745–1806)*. Klett-Cotta, Stuttgart, 1997. 502.
[32] Zu Gönner: Stolleis, 1995. 242.; Mertens, Bernd: *Gönner, Feuerbach, Savigny. Über Deutungshoheit und Legendenbildung in der Rechtsgeschichte.* Mohr Siebeck, Tübingen, 2018. 5.
[33] Gönner, 1804. 58.
[34] Vgl. Gönner, 1804. 60.
[35] „Edikt über das Indigenat, das Staatsbürger-Recht, die Rechte der Forensen und der Fremden in Baiern", 6. Januar 1812: Königlich-Baierisches Regierungsblatt, 1812. 209–226.; Kotulla, Michael: *Deutsches Verfassungsrecht 1806–1918. Eine Dokumentensammlung nebst Einführungen. Bd. 2. Bayern.* Springer, Berlin – Heidelberg, 2007. 1089–1098.
[36] „Edict über das Indigenat", 26. Mai 1818: Gesetzblatt für das Königreich Baiern, 1818. 141–148.

1867,[37] wortgleich mit Art. 3 der Verfassung des Deutschen Reiches von 1871,[38] sprach von einem gemeinsamen Indigenat. Geblieben ist hier aber nur die Bezeichnung: Der Inhalt ist beinahe diametral entgegengesetzt. Mit diesem Inhalt gelingt es mir nun auch einen Bogen in die Gegenwart zu schlagen. Bei dieser Vorschrift, aber auch der inhaltlich ähnlichen Vorschrift des § 134 der „Paulskirchenverfassung“[39] ging es nun nicht mehr um ein Vorrecht des Eingeborenen vor anderen, eine Reservierung von Machtpositionen für die eigenen Landeskinder, eine Verhinderung von fremder Einflussnahme. Vielmehr war das gemeinsame Indigenat Ausdruck einer Gleichbehandlung, einer Nichtdiskriminierung im Binnenraum des entstehenden geeinten Deutschlands. Ein Grundsatz, der an die heutige Integration im Binnenmarkt der Europäischen Union mit ihrer Unionsbürgerschaft erinnert.

In der Bezeichnung des Indigenats findet sich eine bemerkenswerte Begriffsänderung: Aus einem in seinen Voraussetzungen ständisch geprägten Ausschluss der Fremden wurde ein Grundsatz der Nichtdiskriminierung in einem rechtlichen Binnenraum.

[37] „Verfassung des Norddeutschen Bundes“, 26. Juli 1867: Bundes-Gesetzblatt des Norddeutschen Bundes, 1867. 3.; Kotulla, Michael: *Deutsches Verfassungsrecht 1806–1918. Eine Dokumentensammlung nebst Einführungen, Bd. 1. Gesamtdeutschland, Anhaltische Staaten und Baden*. Springer, Berlin – Heidelberg, 2006.1167–1184.

[38] „Verfassungs-Urkunde für das Deutsche Reich“: Bundes-Gesetzblatt des Deutschen Bundes, 1871. (Nr. 16 vom 16. April 1871) 65.; Kotulla, 2006. 1261.

[39] „Verfassung des Deutschen Reiches“, 23. März 1849: Reichs-Gesetz-Blatt, 1849. (16. Stück vom 28. April 1849) 101–147.; Kotulla, 2006. 1061.

Lectiones Iuridicae

Series Editor:
Balogh Elemér
Professor

1. *Az Alkotmánybíróság és a rendes bíróságok – 20 év tapasztalatai*. Szeged, 2011.
2. *Kérdőív az alkotmányozásról*. Szeged, 2011.
3. *A szerződés interdiszciplináris megközelítésben*. Szeged, 2012.
4. *Az államok nemzetközi jogi felelőssége – tíz év után. In memoriam Nagy Károly (1932–2001)*. Szeged, 2013.
5. *A jó állam aspektusai, perspektívái. Az önkormányzatok változó gazdasági, jogi környezete*. Szeged, 2012.
6. *Das neue ungarische Grundgesetz*. Szeged, 2012.
7. *Opuscula Szegediensia 5. A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók ötödik konferenciája*. Szeged, 2013.
8. *Az alapjogvédelem nemzeti, nemzetközi és jogösszehasonlító aspektusai*. Szeged, 2013.
9. A *mi Alapvetésünk. A Szegedi Tudományegyetem Állam – és Jogtudományi Kara alkotmányjogi tudományos diákkörének tanulmányai az Alaptörvény Alapvetéséhez.* Szeged, 2014.
10. *Geistiges Eigentum und Urheberrecht aus der historischen Perspektive*. Szeged, 2013.
11. *Opuscula Szegediensia 6. A Munkajogi és Szociális Jogi Doktoranduszok és Pályakezdő Oktatók hatodik konferenciája*. Szeged, 2014.
12. *Jogvédelmi kaleidoszkóp. A jogvédelem elmúlt öt éve (2009–2014) Magyarországon*. Szeged, 2015.
13. *Fundamental Rights in Austria and Hungary. Research Seminar*. Szeged, 2015.
14. *A történeti alkotmánytól az Alaptörvényig*. Szeged, 2015.
15. *Jogalkotás és kodifikátorok. Vladár Gábor emlékülés*. Szeged, 2016.
16. *Alapjogok diákszemmel. A Szegedi Tudományegyetem Állam- és Jogtudományi Kara alkotmányjogi tudományos diákkörének tanulmányai egyes alapjogok magyar és nemzetközi vonatkozásairól*. Szeged, 2016.
17. *Húsz év mérlegen. Közbeszerzésünk múltja, jelene és jövője*. Szeged, 2017.
18. *A modern állam 21. századi közjogi kihívásai. Az állami funkciók változásai az európai integrációban.* Szeged, 2017.
19. *Recent Challenges of Public Administration. Papers Presented at the Conference of* '*Contemporary Issues of Public Administration*'. Szeged, 2017.
20. *Recent Challenges of Public Administration 2. Papers Presented at the Conference of* '*2nd Contemporary Issues of Public Administration*'. Szeged, 2018
21. *Válási mediáció a gyerekek szempontjából*. Szeged, 2018.
22. *Gazdasági tendenciák és jogi kihívások a 21. században*. Szeged, 2018.
23. *Recent Challenges of Public Administration 3*. *Papers Presented at the Conference of* '*3rd Contemporary Issues of Public Administration*'. Szeged, 2019.
24. Kádár Noémi: *A közjegyző szerepe az Európai Unión belüli követelésbehajtásban*. Szeged, 2019.

25. *Gazdasági tendenciák és jogi kihívások a 21. században, 2*. Szeged, 2020.
26. Juhász Krisztina: *A szabálytalan migráció elleni uniós fellépés közép- és hosszú távú intézkedései az Európai Migrációs Stratégia alapján*. Szeged, 2020.
27. *Centenaria. Ende des langen 19. Jahrhunderts. The End of the Long 19th Century.* Szeged, 2020.
28. *Rendkívüli helyzetek és jog. Kalandozások a jog peremvidékén a COVID-19 apropóján*. Szeged, 2021.
29. *Recent Challenges of Public Administration. Papers presented at the conference of '4th Contemporary Issues of Public Administration' on 10rh December 2021*. Szeged, 2022.
30. *Gazdasági tendenciák és jogi kihívások a 21. században, 3*. Szeged, 2022.
31. *Strafrechtsvergleichende Beiträge im Spiegel der digitalen Herausforderungen. Aufsätze ungarischer und deutscher Studenten. Konstanz – Szeged – Tübingen – Göcek.* Szeged, 2022.
32. *Gazdasági tendenciák és jogi kihívások a 21. században, 4*. Szeged, 2023.
33. *Bulla Aurea. The Hungarian Golden Bull and its European parallels*. Szeged, 2024.