ÉVA JAKAB

ELEMÉR PÓLAY*

(1915–1988)

I. Biography

The present volume takes the professors at the University of Szeged, Faculty of Law and Political Sciences prior to 1945 into consideration, it undertakes to sum up their academic and tutorial work. Technically, Elemér *Pólay* could not take part in this review since it is avowed that his career began in Miskolc and/or Debrecen, and he came to Szeged in 1949, after the war. However, it is a fact that Elemér *Pólay* was a leading professor of the faculty between 1949 and 1985 – the one, who may have had the greatest international respect and the most affluent academic work. His university career had already begun before the years in Szeged because he taught at the Evangelical Legal Academy of Miskolc[1] since 1945. He habilitated at the University of Debrecen in 1946, after which he held lectures for some semesters there with the titles of "The role of the praetor in the development of Roman private law" and "The edicts of the praetors and aediles curules".[2] His educational and academic work outside Szeged, however, covers only some years – his university career evolved actually in Szeged.

Elemér *Pólay* was born on 23 August 1915 in Zombor. Initially, his family originated from Upper Hungary; maybe this is why his father, who was a teacher in a high school, could start a new life in Miskolc after the catastrophe of Trianon. *Pólay* grew up in Miskolc, he passed through his schools there and he finished his legal studies there as well. He owed his classical literacy to the excellent teachers of the Royal Catholic György Fráter High School of Miskolc, who sowed the seed of respect for the ancient cultures deeply into the students. Elemér *Pólay* was an eminent student, he finished the studies with distinction. After the matura examination, he enrolled at the Evangelical Legal Academy of Miskolc in 1933, where he also stood out from his fellow students. At that time, seminars were organized for talented students, where they had the possibility to familiarise with the basics of academic research under the leadership of a renowned professor. Documents and later publications testify that *Pólay* excelled in two such seminars: by Károly *Schneller* he learnt

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1 *Pólay* was an extraordinary legal academic teacher from 1945; after his habilitation, he became an honorary ordinary professor of the Legal Academy from 1946. Cf. STIPTA 2009, 83.

2 P. SZABÓ 2015, 46.

the basics of Statistics and Sociography, and he became familiar with the basics of researching Roman law and ancient legal history with the leadership of Zoltán *Sztehló*. We are going to return to his experience from the seminar later.

After the completion of the legal academic studies, he took his final exams at the University of Pécs: in 1937, he obtained his legal and in 1938, his political doctorate (*doctor utriusque iuris*). Meanwhile, he took part in two study visits abroad, both times in Berlin. The longer trip in 1938 was especially significant considering his latter career; we discuss his experience in detail in the next segment of the study.

He started to build his career at the university and the court simultaneously after he had returned home: during the war, he worked in Debrecen, then in Miskolc for a few years. He got to Szeged in 1949, after the closure of legal academies and the Faculty of Law in Debrecen. The university career of Elemér *Pólay* evolved in Szeged, at the Faculty of Law and Political Sciences. He became the leading and acclaimed researcher of the domestic and international romanistics from here and he educated generations of lawyers with excellent educational work and taught them the basics of private law here. All his students learnt that guideline of civilistics, which was formulated by Ulpian in the golden age of the classical Rome that is still valid today and Professor *Pólay* interpreted it authentically: "*honeste vivere, alterum non laedere, suum cuique tribuere*."[3]

The significance of his academic work is testified by seven monographs, 140 studies and the several conference lectures on both domestic and international conferences. In the frame of the current study, we could only deal with the studies of the early years from his affluent work.

II. Academic work

The beginning of the educational and academic career

My study deals only with the studies of *Pólay* which were born before or during the war and tries to examine them in their context so embedded in their political and university milieu when possible.[4] The starting point of the examination is an early, less known work of *Pólay*: *The legal perception of the national socialism and the Roman law.* According to the bibliographical data, the study was published in 1939. However, it was published in the 7-8th (September-October) and 8-9th (October-November) issues of the *Miskolci Jogászélet [Juristic Life of Miskolc]* in 1938, in two parts.[5] It is avowed that

[3] Ulp. D. 1,1,10,1; It is quoted in the chapter „A jog fogalma általában és a jogalkalmazás a rómaiaknál" *[The definition of law in general and application of the law by the Romans]* in the legendary textbook: BRÓSZ – PÓLAY 1986, 64.

[4] This study does not intend to cover the bibliography of Elemér *Pólay.* For the topic cf. JAKAB 2015, 17–32. MOLNÁR 1999a. MOLNÁR 1999b. 7–12.

[5] The *Juristic Life of Miskolc* was the official journal of the Legal Academy of Miskolc of the Tisza Lutheran Diocese, its responsible editor had been Béla *Zsedényi* university private professor, ordinary teacher of the legal academy. BRUCKNER 1996, 108–109. highlights that the *Juristic Life of Miskolc* was considered to be a popular and "sellable" academic journal which had a high reputation in professional circles. Its profile included discussing current professional issues in a critical spirit. At the same time, it sought to address "new

Pólay studied in Berlin with the scholarship of the Evangelical Legal Academy of Miskolc in 1938 at the University of Friedrich-Wilhelm. He listened there to the Roman law lectures of Paul *Koschaker*[6] and the economic historical lectures of Werner *Sombart.*[7]

His examined study summarised his experience, which derive supposedly from his experience in Berlin mainly. However, the attacks of the NSDAP against the Roman law left a mark in Hungary as well.

The Hungarian jurisprudence was traditionally German oriented, the history of the country predetermined it. In the interwar period, the official policy of culture mutually urged (both from the Hungarian and the German side) the strengthening of the bilateral and scientific relations.[8] For example, an extended delegation of lawyers visited Hungary for a week in 1935, with the support of the NSDAP, with the leadership of Walter *Raeke*[9] to expand the official German ideology.[10] The Department of Foreign Affairs of the *Akademie für Deutsches Reich* founded in 1933 urged legal comparative researches and formed a working group for the Hungarian relationships (*Arbeitsgemeinschaft für Deutsch-Ungarische Rechtsbeziehungen*), and they elected several acclaimed Hungarian scholars to its corresponding members.[11] Several studies examined the legal policy of the Nazi Germany in that time in Hungary.

So, the "national socialistic legal perception" flowed into Hungary through several channels. The German political campaign against the Roman law exploded especially at the National Conference of Tertiary Education, where some of the participants made a speech against the education of Roman law.

It is probably not a coincidence that the Roman law was discussed at that time in Hungary. Although point 19[12] of the *Parteiprogramm* of the NSDAP, which initiated the attack against the Roman law on an ideological basis, is dated back to 1920, the new *Studienplan* (curriculum) by Karl August *Eckhardt*[13] came into force in Germany in 1935 decreasing the number of Roman law lectures at the universities significantly.[14] It is enough to highlight a short quote from *Eckhardt*'s 1935 work to illustrate the severity of the situation: *"*Noch immer lebt die deutsche Rechtswissenschaft in den Gedankengängen des römisch-gemeinen Rechts [...], die geistige Grundhaltung wird heute noch durch das Pandektensystem bestimmt. Diesem System gilt unser Kampf." It is plausible that the

constitutions and social issues in countries near and far" through in-depth studies. *Bruckner* mentions *Pólay*'s related study here.

6 We discuss the oeuvre and the years in Berlin of Paul *Koschaker* later.

7 Although Werner *Sombart* (1863–1941) became an emeritus in 1933, but he taught at the Friedrich-Wilhelm University until 1938. *Sombart* is a well known sociologist and economist, who was a member of the *Akademie für Deutsches Recht* from 1933, but the *Preussische Akademie der Wissenschaften* and the *Bayerische Akademie der Wissenschaften* also elected him into their memberships.

8 For the topic cf. HERGER 2019, 95. 97–100.

9 *Raeke* was a representative in the *Reichstag*, and the chairman of the *Deutscher Anwaltsverein*, HERGER 2019, 97–98., who aki excelled as one of the coryphei of the racist purge of the German Bar Association.

10 HERGER 2019, 97.

11 HERGER 2019, 99. mentions the names of Zoltán *Magyary,* Ödön *Mikecz*, István *Oswald*, József *Stolpa*, Géza *Töreky*, Gábor *Vladár* and László *Radocsay*.

12 For this point of the party programme of the NSDAP cf. PIELER 1990, 440. BEGGIO 2018a, 227–230.

13 Karl August *Eckhardt*, member of the NSDAP and *SS Sturmbannfürer*, the spiritual father of the reform.

14 Cf. BEGGIO 2018b, 645–646. FRASSEK 2000, 294.; FINKENAUER 2017, 2. The related text is quoted by ECKHARDT 1935, 7.

events in Germany urged some representatives of the domestic profession to the frontal attack against the Roman law.

Finally, Gábor *Vladár* (later Minister of Justice) snubbed the attackers in the fiery debate on the congress: "[…] those wishes which emerged in favour of the repression of the education of Roman law could feed upon the fashion deriving from Germany."[15]

Regarding the German changes, the moderate view of Gábor *Vladár* is well illustrated by for example his Preface written for *The Legal Professions in the Nazi Germany* by Béla *Csánk* (published in 1941). The first paragraph is still about that deep impact that the exposition of the changes in the legal system of Germany inflicted on the reader. He continues, however, that the newer knowledge shall be compared with our existing knowledge and evaluate them in the light of that.[16] Moreover, he highlights that the German change is a "revolutionary" phenomenon, which "shows the picture of six-seven years of turmoil. The Germans themselves illustrate the legal life of this era with the expressions of »Umbau«, »neue Grundlegung«, »Revolution« and other that mean rooted innovation."[17] Such basic theorems were questioned in this "legal revolution" like the hierarchy of the sources of law, the relationship between law and judge, the relationship between public and private law or the connection between law and moral. *Vladár* emphasises the process, in which the "battle of ideologies" gained a great role, has not finished; the inertia of the revolutionary momentum led to many abuses.[18] Then he cautioned carefully that the Hungarian import of the national socialistic ideas should not be hurried: "The simple adaption to the changes is not »development« itself. It becomes development if it comes with evaluation, so with the examination whether the progression towards the change is valuable from the point of view of the nation, it is not more rightful to prevent or […] at least neutralise the change (cocoon as the song says: »If I see the beginning of the tempest, I tip my hat.«).[19] The reduction of the education of Roman law was taken off the agenda in 1936 – in which the determined standpoint had a huge significance – so the eight hours through two semesters of Roman law remained in the curriculum.[20]

Pólay was not a member of the academical circles in 1936 since he had not finished his university studies yet. It is avowed that he studied at the Evangelical Legal Academy of Miskolc between 1933 and 1937 and he took his final exam (*rigorosum*) at the University of Pécs:[21] as we have previously mentioned, he became a doctor of law in 1937, then doctor of political sciences in 1938.[22] He faced the tensions of the tertiary education just after, during his studies in Berlin and after his return.

The national socialistic attacks were a real threat, to which the domestic representatives of Romanistics reflected again and again. The writings of Nándor *Óriás* and Kálmán *Személyi* pointed out the Christian elements embodied in the Roman law, they referred to

[15] Gábor *Vladár's* opinion is also referred to by PÓLAY 1972, 8. The era is analysed in more detail in this volume by POZSONYI 2020, from fn 31. (in printing).
[16] VLADÁR 1941, IV.
[17] Ibid.
[18] Ibid. V.
[19] Ibid. VI.
[20] POZSONYI 2020, fn 34.
[21] According to contemporaries, Lutheran students mostly chose Pécs to pass their doctoral examinations.
[22] JAKAB 2015, 18.

this when justifying the importance of Roman law.[23] Albert *Kiss* examined the relation between Roman law and Germanic law and came to the statement that the deep difference between the two systems propagated by the NSDAP cannot be sensed.[24] Since the national socialistic attacks concerned primarily the form of the Roman private law built by the Pandectists, Nándor *Óriás* recommended put the Roman public law at center stage and introduce it into the education.[25]

Károly Sándor *Túry*, representing the University of Szeged at the National Congress of Tertiary Education, who taught commercial law highlighted that those parts of Roman law shall be taught (and those shall be in every case) which "express thoughts existing in modern legal systems as well", so which may be considered to be a modern *ius gentium*.[26]

Although Elemér *Pólay* did not belong to the university lecturers he could notice the danger threatening Roman law from his teachers or the press. He certainly faced closer the national socialistic conception and its emerging consequences on the German university education during his studies in Berlin. Before having a closer look at the political attacks against the Roman law, it is worth reviewing the life, the work and a study being important in our topic of the Berliner mentor of *Pólay*, Paul *Koschaker.*

Berlin 1938

As we have already mentioned, Elemér *Pólay*, who just became a Doctor of Law, was awarded with the scholarship of the Evangelical Legal Academy of Miskolc, with which he enhanced his legal knowledge. At this time, Austrian born professor, Paul *Koschaker* (1879-1951) taught Roman law, who was one of the Romanists with the highest prestige.[27] *Koschaker* began his career in Graz whence he got to Prague after his habilitation, where he began teaching in 1909. Later he stood on the lecture platform in Leipzig between 1915 and 1936, where he turned his attention to tables with cuneiform. An excellent cohort of professors gathered in Leipzig at that time, which was favourable to the formation of multidisciplinary trends. *Koschaker* founded the *Keilschriftsrecht* in this period, which was the trend researching the law of clay tablets.[28] He was invited, however, to the department of Römisches Rechts und vergleichende Rechtsgeschichte in Berlin in 1936, where he could develop the academic research of the tables with cuneifrom and the early Eastern legal cultures apart from the Roman law.[29] *Koschaker* is one of the fathers of "comparative legal history", who pointed out that there is much Eastern influence in Greek and Roman legal systems.[30] He organised a research group to study the ancient Eastern laws in Berlin as well (*Seminar für Rechtsgeschichte des Alten Orients*).

[23] ÓRIÁS 1936. SZEMELYI 1939. Cf. PÓLAY 1972, 17–18.
[24] KISS 1937, paricularly from 9.
[25] ÓRIÁS 1936, 7–8.
[26] Magyar Felsőoktatás *[Hungarian Tertiary Education]* Vol. II. 93.; quotation based on PÓLAY 1972, 18.
[27] *Koschaker* was born in Klagenfurt, absolved his legal studies in Graz, then obtained a doctoral degree there (*sub auspiciis Imperatoris*). His teacher in Graz, *Hanausek* sent him to improve in Leipzig to Ludwig *Mitteis,* with whom he found it hard to get along with, but later became his loyal student. Cf. BEGGIO 2018a, 33–35.
[28] KOSCHAKER 1929, 188–201. PFEIFER 2001, 11.
[29] BEGGIO 2018b, 660–662.
[30] Cf. RIES 1980, 608. VARVARO 2010–2011, 303–315.

The personality and the research of *Koschaker* had a great impact on *Pólay* – since he had been receptive to the comparative research which took the legal systems of the ancient East into consideration on Zoltán *Sztehló*'s Roman law seminar; this is reflected by the choices of topic regarding some of his early studies: the criminal law of the Code of Hammurabi[31] and the culture of irrigation in the old Egypt.[32] The features of the research movement represented by *Sztehló* and *Koschaker* were on the one hand the strong theoretical vein and on the other hand, the comparative legal ambition and the multidisciplinary approach[33] – which proved to be decisive on the approach of *Pólay* throughout his entire work.

Supposedly the long study of 1938 was the processing of the impressions made on *Pólay* in Berlin. The title of the study is confusing at the first glance: *The Legal Perception of the National Socialism and the Roman Law*. However, the first lines of the study gives an authentic picture about the true confession of the author: *"»The national socialism – says Wilhelm Coblitz, the leader of the German Rechtsrechtsamt – sees his historical task in that it shall give German law to the German people.« This sentence makes it clear why the situation of the Roman law is questionable in the national socialistic German Empire."*[34]

It is a striking coincidence that Paul *Koschaker* published an 86 page long small monograph in 1938 with the title of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, which contains the extended version of his lecture on the December 1937 session of the *Akademie für Deutsches Recht*.[35]

These were such years in the history of German romanists that the lectures of several acclaimed legal historians were suspended or even banned, many acclaimed professors were dismissed from their positions urging them to leave even the country if possible.[36] The Roman law embodied the liberal, non-national civil law in the eyes of the national socialistic politics, which they intended to substitute with the "real national" law based on the Germanic custom law. Several young scholars became the spokesmen of the national socialistic concepts, for example Franz *Wieacker* or Ernsst *Schönbauer.*[37] *Koschaker*, however, stood upon the traditional values. This belief and attitude were brought home to Hungary by his student, Elemér *Pólay* as well.

Pólay's creed in addition to Roman law

Elemér *Pólay* published an extensive study in 1938 on the columns of the *Legal Life of Miskolc* about the legislative and jurisprudential concepts of the national socialistic

[31] PÓLAY 1936a, 53–58.
[32] PÓLAY 1936b, 218–223.
[33] BEGGIO 2018a, 50.
[34] PÓLAY 1939, 125.
[35] It is part of *Koschaker's* career that he was also elected a member of the *Akademie für Deutsches Recht*, which was formed in 1933 under the chairmanship of Hans *Frank.* This stage of his life path is critically analysed by BEGGIO 2018a, 83.; GIARO 2001, 166.; BEGGIO 2018b, 647.
[36] It is sufficient to refer to the fate of Fritz *Schulz* here, whose adversity was documented in detail by ERNST 2004, 105–203.
[37] The publications of a Finnish research group led by Kaius *Tuori* report on the careers of prominent Roman lawyers during dictatorships. "*Reinventing the Foundations of European Legal Culture 1934–1964*".

party, the second part of which (pages 173-204) defends the Roman law specifically against the strengthening attacks. There are no bibliographical data, but it is obvious that the teachers in Miskolc, maybe Béla *Zsedényi*, the editor responsible for the *Legal Life of Miskolc* asked the young man returning home from the research trip in Berlin to present the German relations in detail. The first sentence already quotes the basic theorem of the German party programme through the interpretation of Wilhelm *Coblitz* (leader of the *Reichsamt*), which led to the inevitable collision with the Roman law: *"the historical task of the national socialism is to give German law to the German people."*[38] The Roman law is not the product of the German folk spirit, but it is a foreign law being the basis of the law of the ancient Roman Empire. Then it influenced the German legal development in the form of the *ius commune* having been educated at the universities of North Italy, which led to the complete reception through the *Reichskammergerichtsordnung* of 1495.[39]

The other main argument against the Roman law formulated in point 19 of the *Parteiprogramm* as well was it transmits materialistic world order, which became the basis of the capitalist private law through the theory of the German Pandectistics of the 19th century. "So, the task of the national socialism is dual in the legal field: […] on the one hand, it shall force the law being foreign for the German folk spirit to the background firstly then oust it completely and establish a German law based on the old German principles; on the other hand, […] it shall exclude the Roman law principles »serving the materialistic world order« and, instead of that, establish the (German) legal system based on the principle of »Gemeinnutz vor Eigennutz«, which defends not only the individual interests and it makes the public service fundamental for the law."[40]

In the first part of the study, *Pólay* outlines the national socialistic legislature (pp. 129–134.) then the baselines of the law of the national socialistic state (pp. 134–155.) objectively, in a descriptive style. Most of the enacted acts on the influence of the national socialism concerned public law, administrative law, racial and family law, law of succession, labour law relations and the protection of some cultural values. Regarding the public, the German unity and the almightiness of the Führer were established by the *Gleichschaltung der Länder* of 1933 and the *Gesetz über den Neuaufbau des Reiches* of 1934.[41] The national socialistic racial theory rewrote the family law strongly as well since the family policy was connected to the protection of the "purity of the race", especially through the prohibition of marriage and sexual intercourse with Jews. (*Blutschutzgesetz*, 1935). The ideology of "Blood and Soil" made the soil and the agricultural peasantry as one of the main basic pillars of the state. The current rules of property and succession were amended in light of this.[42] It fought against the Marxist doctrines in labour law to bring down the organisation of the working class and its attempts of class struggle (e.g., prohibition of strikes). The "Aryanisation" of the culture belonged to the

[38] PÓLAY 1939, 125.
[39] BRÓSZ – PÓLAY 1986, 88–89.
[40] PÓLAY 1939, 127. cites the introductory words of *Coblitz* to the *Handbuch* of *Franz* in Hungarian translation.
[41] Ibid. 129–130.
[42] Ibid. 181–182. He lingers in the presentation of land distribution statistics. This evokes reminiscences for his Jurate-era participation in the Statistics Seminar, where he wrote a professional study on the distribution of land holdings and the relationship between population density in the Mezőcsát district under the leadership of Károly Schneller, cf. BRUCKNER 1996, 193–194.; even HORVÁTH 1993, 13. mentions *Pólay* as a talented student of *Schneller* – I would like to say thank Richárd *Gyémánt* for the reference.

protection of cultural interests which led to the persecution of Jewish artists and creators and the destruction of their works many times ("*entarntete Kunst*").

The extensive argument of the national socialist organisation of law and state can not be the aim of this study. I would highlight those thoughts from *Pólay*'s informative description which are important to understand the attacks against Roman law. The propaganda centered the focus of the German people and its reasonings, it reshaped the constitution and the cardinal parts of the legal system referring to its interests.[43] The community, the public interest was highlighted in such a way to make it possible to deny the individual freedoms. The idea of "community" became a central category also in private law to deny the theoretical basic principles of Pandectists deriving from Roman law. They defined law arbitrarily and subjectively; the following sentence became a common saying: "Alles was dem Volke nützt, ist Recht, alles was ihm schadet, ist Unrecht".[44] Hans *Frank* added that "[…] Recht ist das, was arische Männer für Recht finden."[45]

These few quotes already show that the definition of law and the border of law and unlawfulness fell under a completely subjective judgment in the national socialist concept: *"The national socialism considers the people and not the state to be the source of every law. A certain act, which is the canon of every law, is written in the soul of the people from time immemorial. This is the »eternal legal idea« whose carrier is the people, the source of every law."* quotes *Pólay* the argumentation of the German coryphei. The idea of the "protection" of race and soil led to the reshaping of the law of property on soils and the law of succession (*Reichserbhofgesetz, REG,* 1933).[46] The enumeration could be continued far further…

However, let us turn our attention to the problems relating directly to Roman law.

In the second part of his study, *Pólay* shortly summarises the history of the German reception of Roman law and the pandectist jurisprudence. This part of his writing is mainly reminiscent of reasons of *Koschaker*'s *Kampfschrift* of 1938. He maps the history of the revival of Roman law from the works of glossators in the 12th-13th century to introduce the process of the formation of the unique European legal development, the supranational *ius commune*.[47] He highlights that Roman law was the treasure trove of the "educated and destined ones" for centuries which did not leave a mark upon in the laws of the German cities. However, it was the scholarly law and the basis of the public and private law in the Holy Roman Empire (surmounting the laws of the provinces), firstly under custom law, then accepted by a specific legislative act from the 15th century.

It is remarkable that *Pólay* implicitly challenges the national socialist charges when introducing the "law of pandect": he emphasises that the German customary law had a big impact on the received Roman law: *"The spread of the law of pandect, however, did not involve that some German legal theorem did not remain valid. They stayed as local customary law."*[48]

The development of the German private law occurred along two parallel lines: the sciences of the law of pandect and German private law. This process was ended with the

[43] PÓLAY 1939, 134.
[44] Ibid. 128. cites the text of *Frank* and *Coblitz* 1935, XIV.
[45] PÓLAY 1939, 128.
[46] Ibid. 151.
[47] Ibid. 155.
[48] Ibid. 158–159.

enactment of the BGB: the *Bürgerliches Gesetzbuch* (enacted on 18 August 1896; came into force on 1 January 1900) created a unified private law in the Empire.[49] *"The aim of the national socialism was to eliminate this private law order to replace it with a German system of private law rooted in the German soul and in German soil."*[50] *Pólay* emphasises that not the "pure Roman law", primarily the classical law of the ancient Rome was targeted by attacks but *"the law, which based on the codification of Justinian and was applied to the relations of modern life infiltrated by German legal reference. It considers the basic principles and basic institutions of the Roman law to be incompatible with the principles of national socialism, not its detailed rules."*[51] *Pólay* fights to clear and make Roman law presentable in order to rescue it from the line of fire of national socialist attacks.

He then points out that the national socialists have been proclaiming their new perception for ten years, but they only published "the principles of the new private law", the detailed regulation is still awaiting. In his opinion, such code is not expectable in the foreseeable future, so the BGB based on Roman law will not be overturned for a while. He warns about the importance of the international and European basic principles and institutions of private law based on historical foundations; it would not be practical for Germany to break away from European culture.[52]

Pólay examines the national socialist charges against Roman law; he emphasised again that the basis of the attacks was not the ancient Roman law but the liberal ideas of the 19th century embodied in the BGB. According to the national socialism, liberalism is promiscuity which lead to license and the degeneration of freedom; therefore, it shall be eliminated.[53] In their opinion, Roman law is too technical, practical, stern and a legal system being insensible to social problems, which puts individual interest at the foreground. *Pólay* emphasises that these features are rather virtues than mistakes of Roman law; he then debates the pertinence of the charge of social insensibility. The main points of his reasoning: Roman law has its roots in the past, but the German folk spirit also has historical roots, it is not just modern law; sanity is a virtue of every legal system; the respect of individual interest is natural in private law; Roman law also has its ethical principles and so on. Undoubtedly, reading the rough, harsh attacks of the German jurists committed to the national socialism, *Pólay*'s enthusiastic reasoning seems to be aimless fight. Let us cite another example: *"According to Kersten, Roman law obfuscates the national consciousness as well and makes the individual selfish, whereas the German law gives direction to the individual for his behaviour and this direction is prescribed by the public will […]. While Roman law is the law of individualism, German law is the community's law.*"[54]

Pólay then examines each legal area to point out the differences between Roman law and national socialist private law (emphasising again that the new code promised by the NSDAP was not ready; at the time of closing the manuscript, only the regarding policies of the party programme are known). He highlights, for example, that the Roman law of persons knows the subjects and objects of the law and it *"classifies humans* [to the

[49] Ibid, 160.
[50] Ibid.
[51] Ibid.
[52] Ibid. 161.
[53] Ibid. 162. with contemporary national socialist literature.
[54] Ibid. 164–165.

subjects of law] *without any individual, racial etc. differences*"; whereas the national socialism makes distinctions based on race and it excludes a certain number of persons from some rights.[55] The "new" legal concept is not homogeneous regarding the objects of law, i. e. the things as well since it differentiates between living and non-living objects. Another reason against Roman law was that the doctrine of legal persons remained mainly unfinished. *Pólay* points out in the law of things that although the definition of things in the classical law was general and unified, but the archaic law differentiates between *res mancipi* and *res nec mancipi* from the point of view of "peasantry law"; *"this categorisation of the archaic law all defended the protection of Italian estates."*[56] Several leading Roman jurists at that time tried to develop this saving thought to prove the sensibility of Roman law to social and economic aims and to introduce that the Roman property was not always and not solely individualist phenomenon. Let us turn our attention to the monographs regarding the property of the young Max *Kaser*.[57] The national socialist acts took trees, living animals, some natural treasures (cliffs, springs etc.) and soils being farming estates out of the general definition of things and gave them special protection.[58]

According to national socialists, property is "extended to impurity in Roman law"[59] since the owner may do anything with his thing, without any regard to the necessities of the community. Therefore, the national socialist legislature set up restrictions regarding the property and introduced a form of property declared to be new by the *Reichserbhofgesetz* (1933, fundamental of *Blut-und-Boden-Ideologie*). It was a hereditary farmland which was under the supervision of the state and the right to dispose of it was restricted both between living ones and in case of death as well. Furthermore, it was also restricted regarding the subjects based on racial, economic, and moral aspects.[60]

The right to dispose of the *Erbhof* was qualified a new property being different from Roman law. Many jurists were committed to national socialism. Especially the name of Franz *Wieacker* was associated with this view; in his opinion, there is a completely new definition of property which is not based on the principles of Roman law anymore.[61] He stressed that the entitled person of the *Erbhof* has a *Gemeinschafts- und Pflichtgebundenes Sondereigentum* since it is not just a simple property but the essential of this right is „eine verantwortliche und sozialrechtlich beschränkte eigene Zuständigkeit des Gemeinschaftsgliedes."[62] *Pólay* also cites the opinion of *Wieacker*: *"According to Wieacker, every experiment is superfluous which want to ensure consistency between the property of BGB so that the Roman law and the definition of property of the REG."*[63] The new order of ownership thus created of course is not based on the principles of Roman law, where everything is equal from the point of view of ownership, but it suits the new perception of ownership that makes a profound difference between things.[64]

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[55] Ibid. 168.
[56] Ibid. 174.
[57] KASER 1939. KASER 1943.
[58] PÓLAY 1939, 176.
[59] Ibid. 177. – quoting *Lange*'s words.
[60] For the institution see Ibid. 177–189.
[61] WIEACKER 1934, ss. 1446. Cf. RÜTHERS 2012, 177–178. ISENSEE – KIRCHHOF 2010, § 173.
[62] WIEACKER 1936, 36. WIEACKER 1934, Sp. 1449. Cf. for the topic Akademie für Deutsches Recht XV.
[63] Emphasis taken from *Pólay*.
[64] PÓLAY 1939, 184.

Pólay strongly criticised *Wieacker* that he wants to divide things *„according to the size of liability which the owners retain against the community."*[65] Thus, several different forms of property would arise, which would put the obligations (and not the rights) of owners in the foreground.

Pólay reviews the experiments of the German jurisprudence to the theoretical classification of the *Erbhof* founded by the *REG*. Then he asserts that the *Erbhof* is not a *sui generis* new property but a strongly restricted form of the Roman property; similar constructions exist in other European legal systems as well: *"In our opinion – no matter how pleasing the recent perception may seem – we are forced to join to the second group that sees a severely restricted form of property in the property on the EH."*[66] Then he emphasises that the Roman property was not unlimited as well. In contrary, we know several boundaries that make differences in some cases regarding the types of things (e.g., *res mancipi – res nec mancipi*). The national socialist concept differs from it since it increased the extension of the restriction of property significantly.

It is worth having a closer look at the situation of the law of obligations, its relation to the national socialist principles since Roman law was fiercely attacked in this area as well. According to the allegations, the doctrine of legal transactions, the theory of principles of will and declaration are too individual since the idea of duty should be subordinated to community ideas that go beyond obligations. The principle of will shall be rejected; in its place, the economic equality of the contracting parties shall prevail and the conclusion of the contract shall be dependent on whether the given *obligatio* "is allowed by the law" and "if it is compatible with the community thought"[67] The liberal private law based on Roman law grants *"the creditor a monopolistic situation against the debtor"*; it orders the obligation to be completed even if *"it resulted in the complete economic destruction of the debtor."*[68] *Pólay* raises the following question concerning this: *"Let us examine whether the aforementioned principles were foreign to the national socialism which introduced such a principle into its legal system based on the Roman law, so was the basis of these principles in Roman law?"*[69]

Some early studies of Pólay – against the national socialist legal concept?

Hereinafter, I would like to mention two studies from *Pólay* whose choice of topic and reasoning take – in my opinion – his aforementioned thoughts further, contextualizing them in an academic dissertation.[70]

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[65] Ibid. 184–185.
[66] Ibid. 185.
[67] Ibid. 190.
[68] Ibid. 191.
[69] Ibid.
[70] The core of both studies was formed in the years of the Law Academy of Miskolc, where *Pólay* was a diligent and enthusiastic member of the Roman law seminar of Zoltán *Sztehló*. He was already involved in academic life here and won the prize for three consecutive academic years for his dissertations on Roman law: in topics of interest (academic year 1933/34), *patria potestas* (next year) and *datio in solutum* (academic year of 1935/36), cf. BRUCKNER 1996, 197.

The whole academic work of *Pólay* was characterised by the affinity for the law of obligations. This could be the reason why his early studies on Roman law draw on the law of obligations. Reading his study debating the national socialist legal concept, the reader has the impression that the choice of topic of his studies published before or during the war were determined by his fierce opposition which first appeared here.

Pólay went into more depth in these topics by processing them in such a way so that he could implicitly deny the charges of the national socialist propaganda against Roman law. This effort is particularly conspicuous in case of *"Datio in solutum"* and *"Interest"*.[71] Both topics concern the intersection of economy and law and in both cases, it is about that the legislature reflects on the dysfunctions of the economic life.

It is without doubt that Roman law stands on the gound of private autonomy: the will of the parties is primary in contract law, the terms of contracts were called also *lex contractus* in the sources; the parties enact an "act" with the consensual and bilateral will for the legal relationship between them.

Pólay, however, has already indicated in his study concerning national socialism that *"there already had been such legal provisions in the oldest times when they sought to defend the debtors willing to ease the strictness of the ancient acts of debt."*[72] He covers the acts restricting the interest in a few lines, which appeared from the time of the Twelve Tables in Rome: *"Based on these, Roman law was falsely accused with the charge that it made the creditor unilaterally dominant with making the will of the parties sovereign and it sank the debtor to slavery."*[73]

The copy of *Datio in solutum* also has the seal of the "Roman law seminar of the University of Debrecen" *Pólay* began with the study of terminating the obligation, analysing the legal effects of the performance of contract in the light of the Pandectist theory. He cites *Steiner, Koschaker, Partsch*[74] and other representatives of the "ancient legal history" to justify that the private law of the ancient East also had already known the possibility of giving in payment and the difference between *Schuld* and *Haftung;* similarly, their impression upon the old-German law could be observed (the reference to the old-German law is also a reason against the national socialist charges).[75] The execution on the body of the insolvent actor showed – without doubt – the strictness of Roman law and the weaker situation of the debtor, but *Pólay* highlighted that acts defend the debtor as early as the 4th century BC against the cruelty of the creditor.[76] The giving in payment (*datio in solutum*) appeared early in Roman law with the mutual will of the parties; so the parties had the possibility to change the object of the obligation if the debtor could not offer the original service for performance (*in solutum dare* and *accipere, pro debito accipere*).[77]

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[71] PÓLAY 1938a, 51. és PÓLAY 1943, 24. Géza *Marton* praised his clear pandectist reasoning of *Datio in solutum* in particular.

[72] PÓLAY 1939, 191.

[73] Ibid. 192. On the following pages, *Pólay* describes the national socialist concept in housing and employment contracts, as well as in family law and law of succession. These arguments cannot be detailed in the present study due to lack of space.

[74] PARTSCH 1909. STEINER 1914. KOSCHAKER 1911. PÓLAY 1938a, 6.

[75] PÓLAY 1938, 16–17.

[76] Uo. 8–9.

[77] Ibid. 12.

The Pandectists did not like this legal institution since an *aliud* service occured. Some scholars tried to insert the phenomenon into a stricter theoretical system, so as to evaluate the legal institution as *compensatio,* exchange, sale or settlement. *Pólay*, in the end, follows the definition of *Steiner*, according to which in case of *datio in solutum*, it is about a dissolution of liability with the consensus of the creditor with the service of *"other what has been agreed."*[78] *Pólay* emphasises that the *datio in solutum* is the transaction in the *communis opinio,* so the agreement of the equal parties based on mutual trust.

Later, Justinian's law made it compulsory for the creditor in some cases to accept "the other service" to protect the debtor being economically vulnerable.[79] All this testify the social-economic sensibility of the "equitable Roman law" and that it took the interests of the community into consideration at the expense of the individual interest.[80]

*Pólay'*s study on the interest show similar considerations: the author tries forging reasons against the national socialist attacks against the Roman law. The interest (*foenus*) is the legal institution of the credit life: *Pólay* presents – obviously under the influence of the seminar in Berlin – the related rules of the old-Babylonian, Hebrew, Greek, Egyptian and the German laws in a comparative legal chapter. It is interesting that according to Tacitus, Germans were unaware of the interest.[81]

The study reviews the provisions restricting the interest in six chapters in the around thousand-year history of Roman law, which aimed to repel usury.[82] He can introduce several examples to justify that the Roman law scolded the individualist approach as well as the too liberal protectionist approach. He also demonstrated that the Roman law took into consideration not only the "dominance of the creditor" in the law of obligations but it respected the interest of the debtor (and the community with that) as well.

He then corrects that although the old German customary law and canon law did acknowledge the rationale of the interest, but it is not only reasonable from the economic side but necessary as well: *"In general, the legal institution of interest was known in the legal systems of all ancient people in general. This institution owed his existence to economic rationality; in case it was not obvious that when the fruit of the estate and animals etc. were due to the owner as a reward for the work invested. However, the money lent or otherwise invested and circulated: the capital shall not bring any benefit for the owner who takes risk possibly up to the entire capital with its investment and circulation. It is natural, therefore, that the material Roman perception had the principle that there is quid pro quo for the usage of the capital."*[83]

Finally – due to the limits of the study –, I would refer shortly to the habilitation work of *Pólay* with titled *A praetor szerepe a római magánjog fejlődésében [The role of the praetor in the development of Roman private law]* published in 1944 in Miskolc also reflected several times – in defence of the Roman law – on the national socialist attacks. These criticisms could be diagnosed not explicitly but "between the lines"; however, knowing the 1939 study of *Pólay*, the reading is obvious. For example, he phrases the

[78] Ibid. 16, 27.
[79] Ibid. 28.
[80] Ibid. 48–49.
[81] PÓLAY 1943, 5–6.
[82] Ibid. 7.
[83] Ibid. 22.

evaluation of *edict* of the *prateor* as legislative phenomenon as follows: *"During the creation of the edictal rules, the praetor takes the practice controlled by the decrees as a basis, so as a result, validates the legal conviction of the people in it. […]."*[84]

Then he clarifies that it is a common act of the people and the magistrate (who proclaims the *edict* based on his *imperium*), so it has the *"consensual will of the people and the magistrate."* Roman law also knew the importance of "folk spirit" and took it into consideration in the legislation. The assertion is unfounded that the role allocation of *Volksgeist* is the "foundation" of the national socialism.

To sum up, it can be stated that Elemér *Pólay's* comprehensive study about the national socialist legal concept is really interesting from many aspects, an important work for the body of academic history. On the one hand, he visualises a detailed picture about the legislation induced by the party programme of the NSDAP in Germany in an objective manner. He covers briefly the acts enacted in the topics of laws of persons, family, property, succession, and obligations. He seeks to give a critical classification and theoretical evaluation of the changes executed in the legal system, measuring them in the system of private law perfected by Pandectists. On the other hand, he advocates in the defence of his chosen discipline, the Roman law. He tries to deny the national socialist attacks against Roman law, systematically point by point, for example, he resolutely attacked *Wieacker*'s theories of property being celebrated in Germany. *Pólay*'s study is a valuable proof of the Hungarian situation, the spread of the national socialist studies and the trends against them.

Some remarks about Pólay's work

Finally, I would like to return to the praise of the oeuvre of *Pólay*. His work for the habilitation has an outstanding significance among the academic works before the war which deals with the legislative work of the *praetor* being decisive in the development of the preclassical and classical Roman law. It is a well-known principle that *"praetor ius facere non potest."* The *praetor* is not a legislator but someone who applies the law: his primary task is the seizure and supervision of the jurisdiction (*iurisdictio*). It can be observed, however, from the early stage of the development of Roman private law that the statements of the parties and the decision of the magistrate about the recourse and through the fixation of the cause of the case, the *praetor* actually forms, changes, corrects the substantive law. This study of *Pólay* is still a guide for Hungarian romanists. He returns to the topic one more time in his oeuvre: around thirty years later, he extends his analysis to the thinking of Roman jurists in general. He enlightens the relationship between magistrate and jurisprudence, pointing out that the scientific approach has a constant and fertilising influence on the legal practice. His pioneering work, which had a great international resonance was the monograph introducing the contracts of the waxed boards of the Roman Dacia versatilely. Its chapters were published in foreign language, in foreign journals and volumes. His works about pandectistics are fundamental: it is well known that this German jurisprudential trend of the 19th century was fefining in the

[84] PÓLAY 1944, 166–167.

creation of the German Civil Code. The influence of pandectistics, however, went far beyond borders: its system, definitions, legal institutions and elaboration of its theory still has influence on the continental and even in the common law systems on the theory of private law. *Pólay* presents in depth, with a monographic demand, the main strands of German pandectistics and then its impact on the development of the Hungarian private law. The last significant research topic of his oeuvre was the *iniuria*. The *iniuria* includes the real- and verbal forms of the personal injury, the infringement of personality rights; thereby drawing the attention of the profession to a field of private law, which, in the 1980s, was a novelty even in the realm of legal history. In addition to his research published in monographs, he wrote several other private law studies; I would like to refer in particular to his work on succession and family law.

The academic work of Elemér *Pólay* is outstanding, it was unique in the Hungarian jurisprudence. His numerous monographs and studies serve as examples to his descendants. However, quality is more important than quantity: his writings reflect such a high professional-research standard and ethics, such an honest determination, desire for knowledge and innovative thinking that stands out high from the post-war jurisprudential landscape. His impact and significance are also marked by the fact that he was able to appear in international forums even in the period of isolation and was able to keep pace with the very high quality of international Roman legal research. He also published his monographs and studies in a foreign language and undertook and actively engaged with international competition. His work and humanity set an example for us all.

III. His selected works

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