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Papinianus on the Stage: A Martyr of Law or a Modern Model?

Abstract. This paper discusses Andreas Gryphius's tragedy (*Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel*) about the death of Papinianus, the famous Roman jurist of the Late Classic era. The author analyzes the historical context of the death of Papinianus in detail, and he also examines how Gryphius used the historical sources and his poetic imagination in writing his drama. The second part examines Gryphius's ideas about the law and state and argues that he followed Jean Bodin's teaching when he declared that the sovereign is bound by divine law and natural law. Additionally, the author also discusses the message of this 17th century drama for the contemporary lawyers. His main argument is that the *exemplum* of Papinianus encourages modern lawyers to create their professional value system and to insist on it conscientiously.

Keywords: Aemilius Papinianus, Andreas Gryphius, Jean Bodin, drama and law, moral resistance, passive resistance

I.

It is probably a rare occurrence in the history of world literature that the protagonist of a work of "high literature" is a jurist. Even though the historical tragedy of Andreas Gryphius (1616–1664), one of the most important Baroque poets from Silesia, titled *Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel* (title of English translation: *Papinianus*) is not primarily about the professional activities of a lawyer, and not even about his life, but rather about his death, it may still be of interest to readers who wishes to discuss the relationship between law and literature, as well as interprets literary works (also) as legal professionals.

Our job as jurists is to identify legally relevant facts, reconstruct the facts of a case, find solutions and answers (provided they exist) and evaluate those solutions. In the present case we only have limited opportunities to do this. Although—if we really insist—the historical facts of the case (in the legal sense of the word) can be reconstructed, yet it is not primarily the interpretation of the literary historical facts of the case that we are faced with, but rather the investigation and comprehension of the circumstances and motives that are behind the reconstructed events.

Our situation is complicated by the fact that the events need to be reconstructed on two levels. When readers/interpreters defines themselves as historians and the author depicts well-known or easily identifiable events in history, the desire will inevitable emerge in the readers to know how much fiction encroached upon history. Historians compulsively compare and contrast the factual statements of a literary work that reaches back into the past with the historical facts identified by themselves: in addition to (before) outlining the

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sequence of events in a the literary work—in our case, a drama—they must also outline the historical events on which the plot is built.

It is evident that the task of approaches applying the historical method is not only to identify the antecedents of the solutions to certain problems that are, or appear, as accepted today. It is also their task to reconstruct such other possible solutions that were or may have been entirely accepted in their own age, but due to different—usually very complex—reasons have become worn out of practice or pushed into the background by more recent interpretations and solutions of problems. For this reason, the interpretation of Gryphius's text is also realized in several (historical) layers, on multiple levels. In other words, we will attempt to consider the message of the drama through the eyes of its contemporaries, and will examine what it may have had to say to audiences/readers of its own time. Further, we will also examine whether it is possible for a work written and frequently staged three and a half centuries ago, in a particular set of historical and intellectual circumstances, with certain, easily identifiable intentions—which were the characteristics of the given historical era—to speak (“convey a message”) to the readers/legal professionals of our present age.

The historical hero—the history of the hero

Aemilius Papinianus¹ was a Roman jurist in the Late Classic era. His origins are uncertain: some sources mention African, while others Syrian origins, but neither is certain. He was born around 150 AD, during the reign of Marcus Aurelius, and he was a student of the jurist Cervidius Scaevola, together with the would-be emperor, Septimius Severus.² He started his career as a *advocatus fisci*. Under Septimius Severus he became the *assessor* of the *praefectus praetorio assessor*,³ then the *chief of the bureau of the imperial chancery concerned with petitions (magister libellorum)*,⁴ and finally from between 203 and 205 he was *praefectus praetorio*, the commander of the Praetorian Guard, the highest ranking imperial officer and *de facto* deputy of the emperor.⁵

Traditional sources assert that he was in close friendship with the emperor (some sources even say they were brothers-in-law). This was the reason why the two sons of the emperor (Caracalla and Geta) later asked Papinianus to support them as co-emperors.⁶ A few months after the death of Severus, Caracalla (who is called Bassianus in some of the sources) ordered Geta to be murdered, for reasons and in circumstances that are still debated by historians, and soon afterwards Papinianus also fell victim to the “cleansing” by the emperor, sometime early in 212.

In the Late Antiquity—due to his traditionally accepted martyrdom⁷—he was considered as the greatest of jurist, “a sanctuary of law and treasure-house of jurisprudence” (“*asylum*

¹ On his life and work, see Kunkel, W.: *Herkunft und soziale Stellung der römischen Juristen*. Graz–Wien–Köln, 1967. 224–229; Schulz, F.: *Geschichte der römischen Rechtswissenschaft*. Weimar 1961. 126 and 296–302; Vécsey T.: *Aemilius Papinianus pályája és művei*. Budapest 1884.

² *Hist. Aug. vita Caracallae* 8, 3. Cf. Knütel: *ibid.* 485.

³ *Digesta* 22, 1, 3, 3. *praefectis praetorii suasi*.

⁴ *Digesta* 20, 5, 12, pr. ...*libellos agente Papiniano*...

⁵ *Hist. Aug. vita Severi* 21, 8.

⁶ *Hist. Aug. vita Caracallae* 8, 3.

⁷ Knütel: *ibid.* 485. Nörr, by contrast, started out from the position that due because, among other things, the real reasons for the killing of Papinianus were unclear in the Antiquity, a cult of martyrdom could not be formed around his person, and he therefore assumes that its appearance dates

et doctrinae legalis thesaurus"). The evaluation of Papinianus as a jurist was extremely positive in the Middle Ages and also in the Modernity. It is enough to refer here to the notions of Jacobus Cuiacius. As one of the most important legal humanist—following the value judgment of St. Jerome, who considered Papinianus, as the teacher of *lex caesaris*, on par with the Apostle Paul, the teacher of *lex Christi*—he regarded Papinianus as *Summus Iurisconsultus*, the paragon of jurists of unattainable professional and moral heights.⁸ In this he followed the tradition of the Late Antiquity in which Papinianus was considered the most important jurist.⁹

The "historical facts of the case"

Why Papinianus had to die is not clear on the basis of the sources. The diversity of the explanations given as the cause of his fall can already be seen in the *Historia Augusta*.

According to one version, Papinianus became a victim of Caracalla, aiming at tyranny, because he was one of the supporters of the agreement (*fautor concordiae*) between the co-emperor brothers.¹⁰

This is the most neutral explanation, in which Papinianus appears as an entirely passive character.

According to another explanation, later regaded as the "official" one, Papinianus had to die because he took the side of Geta.¹¹ It is easy to see why this became the official version more often embraced by historians, since Caracalla was not subjected to a *damnatio memoriae* after his death; on the contrary, his successors (especially Elagabalus) referred to his reign as grounds of legitimation. It would have contradicted with subsequent dynastic aspirations to find anything to object to in the reign of Caracalla, and naturally it was also not in the interest of the historians to diverge from this explanation.¹²

The view that Papinianus had to die because he disobeyed the orders of the emperor, and almost "impertinently" even justified his refusal, did not initially square with official historiography. Nevertheless, as a debatable claim it did find its way into the *Historia Augusta* and thus into common historical knowledge.¹³ What is more, Spartianus (the author of the given part of the *Historia Augusta*) only presents this version when describing the life of Septimius Severus, who "*slew, because he refused to absolve him of his brother's murder, Papinian, a sanctuary of law and treasure-house of jurisprudence...*"¹⁴

The hesitation of the author of *Historia Augusta* among the reasons leading up to the execution of Papinianus shows that, contrary to the official position, the historians of later periods (early 4th century) also started to consider other possibilities. In any case we can

back to the age of humanism. Nörr, D.: Papinian und Gryphius: Zum Nachleben Papinians. *Savigny-Zeitschrift für Rechtsgeschichte, Romanistische Abteilung*, 83 (1966), 309–310.

⁸ Behrends, O.: Papinians Verweigerung oder die Moral eines Juristen. In: Mölk, U. (ed.): *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart*. Göttingen, 1996. 248.

⁹ See also Giuffré, V.: Papiniano: fra tradizione ed innovazione. In: *Aufstieg und Niedergang der antiken Welt* II. 15. Berlin–New York, 1976. 632–666.

¹⁰ *Hist. Aug. vita Caracallae* 8, 2–4.

¹¹ *Hist. Aug. vita Caracallae* 8, 7.

¹² Behrends: *op. cit.* 264.

¹³ *Hist. Aug. Vita Caracallae* 8, 5–6.

¹⁴ *Hist. Aug. Vita Severi* 21, 8.

start out from the assumption that there may have been some grounds in reality for the reasons later becoming dominant (and proposed last), which established the reputation of the uncompromising Papinianus for subsequent centuries: already in the Late Antiquity, the *praefectus praetorio* was viewed as a protector of justice, who became a victim of his consistency of principle.¹⁵ This approach survived the Middle Ages and became generally accepted in the Early Modernity, since even those who did not think highly of his “sacrifice for justice” began the evaluation of his action from these historical facts of the case. (The most famous among them, as we will see, was Jean Bodin.)

Gryphius and his historical raw materials

As we have seen, it was debated already in the Antiquity whether Papinianus was indeed executed for refusing to absolve Caracalla of his bloody actions. Gryphius also knew this well; nevertheless, he consciously accepted this explanation and took it as the *communis opinio*, as the basis for his drama.¹⁶ In his notes written for the drama,¹⁷ he discusses why, from among the several possibilities that can be found in the historical sources as the cause of the death of Papinianus, after weighing their historicity, he chose the refusal to compose a speech defending the emperor as the most likely one.¹⁸ Although Gryphius reconstructs the external events leading to the death of Papinianus mainly on the basis of the ancient sources,¹⁹ in elaborating the character of Papinianus (due to dramatic constraints) he also relied on his own poetic imagination and didactic intentions. He relies on poetic liberty where he has to fill in certain gaps or to move the plot of the drama toward a purpose set by himself.

In the light of this it may appear as odd to the contemporary reader that Gryphius also added footnotes to the manuscript of his drama, much as if it was a scholarly work. The reason for this is that in Gryphius's time the aim of history, as the teacher of life, was to give examples (*exempla*) for the future generations.

However, for a historical event to be exemplary, it had to be “true”, and the truth content consisted less in the—often uncritical—reconstruction of the historical connections, but rather in the faithful representation of the details.²⁰ Accuracy of the details is important,

¹⁵ There is no agreement in the literature or in the modern era either: most frequently, historians phrase their words so carefully that all possible reasons for an execution could be understood. Perhaps the most characteristic phrasing is the following: “Caracalla had him executed in connection with the killing of Geta.” Cf. Bund, E.: Papinianus. In: Ziegler, K.—Sontheimer, W. (eds): *Der Kleine Pauly. Lexikon der Antike*, Bd. IV. München, 1979. 487–488.

¹⁶ Modern analysts are divided on this issue, too: Dieter Nörr finds it more likely that Papinianus was executed for political reasons, because he was a follower of Geta. Okko Behrends, on the other hand, considering the available sources once again, accepts that the specific reason for Papinianus's death was his refusal to fulfil the request of the emperor. Nörr: *op. cit.* 308; Behrends: *op. cit.* 257–261.

¹⁷ *Andreas Gryphii Kurtze Anmerckungen über seinen Papinianum*. In: Barth, I.-M. (pub.): *Andreas Gryphius: Großmütiger Rechtsgelehrter oder Sterbender Aemilius Paulus Papinianus: Trauerspiel*. Stuttgart, 2000. 117–135.

¹⁸ *Anmerckungen* III. 510.

¹⁹ His insistence on details is emphasized by many scholars. Heckmann, H.: *Elemente des barocken Trauerspiels am Beispiel des “Papinian” von Andreas Gryphius*. Darmstadt, 1959. 15–16; Keller: *op. cit.* 145; Michelsen: *op. cit.* 48; Nörr: *op. cit.* 317.

²⁰ Nörr: *op. cit.* 346; Michelsen: *op. cit.* 48.

therefore, but larger historical connections are not to be discarded either, since the *exempla* cannot only be presented as models but also at the same time serve as evidence, and appropriate truth content is indispensable for this. Scholastic philosophers (and similarly also the Stoics in the Early Modernity) deduced the correctness of a statement from the *consensus omnium*; however, *exempla* that have been “historically” verified on the basis of the *consensus* also serve as proof for the existence and content of the *consensus* at the same time.²¹

II.

The first reading—Gryphius’s theory of law and state

For Gryphius and for contemporary readers, however, the “story” of Papinianus, with potential to develop it into an *exemplum*, offered opportunities for much more. *Papinianus* is not only one among the many martyr or tyrant dramas, which were “fashionable” at the time: the protagonist not only serves as a model, but his canonized decision was also debated in the Early Modernity, and thus served as a good moot point in university education. The conflict of the contemporary statesman is concretized through the example of Papinianus. One possibility is ensuring survival through energetic action, whereby we create the conditions of a good life for our fellow human beings. While the other is committing ourselves to a moral order and personifying it by way of identifying, preserving and supporting the basic convictions and aims of the given community.²²

With his tragedy, Gryphius also wanted to take a standpoint in this contemporary debate related to (what we would call today) the theory of law and state.

At the beginning of the work, the dramatic Papinianus is not only a prestigious jurist and much sought expert on the *responsum* tax, but also a politician, in two senses of the word. On the one hand, he holds a high public office, and on the other hand, he is also an experienced expert, familiar with the basic principles of *politica*.²³ Naturally, Gryphius is not fashioning his protagonist into a modern “politician,” but it is clear from the entire drama that Papinianus is well-versed in the “political” discourses of Gryphius’s age (and so are also his adversaries). This is manifested in such sentences,²⁴ that unmistakably reflect the constitutional debates of the second half of the 16th century, and this underlines, time and again, the topicality of the example of Papinianus. Gryphius, in his great introductory

²¹ Nörr: *op. cit.* 317.

²² Kreuz, R. G.: Überleben und gutes Leben: Erläuterungen zu Begriff und Geschichte der Staatsräson. *Deutsche Vierteljahresschrift für Literaturwissenschaft und Geistesgeschichte*, 52 (1978), 207.

²³ The science of *politica* was a university discipline, emerging at the time, responding to the theoretical questions raised by the early absolutist states, which stood on the foundations of the received Roman law and attempted to draw up normative principles of the rules and regularities of the *ratio status*, looking for illustrations in the works of Tacitus. Cf. Die Lehre der Politik an den deutschen Universitäten vornehmlich vom 16–18. Jahrhundert. In: Oberndörfer, D. (ed.): *Wissenschaftliche Politik. Eine Einführung in Grundfragen ihrer Tradition und Theorie*. Freiburg, 1962. 59–116; Maier, H.: *Die ältere deutsche Staats- und Verwaltungslehre*. München, 1986³.

²⁴ For example: V, 119.

monologue, presents to the audience a protagonist confronted primarily with political questions and exposed to political attacks.²⁵

Indisputably, the person of Papinianus was debated in this age. Large intellectual storms were caused by the antagonism between the views of Melanchton and Bodin concerning the role of divine and human law, as well as the issue of responsible action in an absolutistic state.²⁶ The experiences gained in the French civil war, but especially the questions of state philosophy and political actions related to the then forming early absolutist state, made the *exemplum* of Papinianus particularly important for contemporary philosophers. The recurring discussions of the case of Papinianus in scholarship and literature indicate that this model reflects not only the basic dilemma of jurists and politicians (the intelligentsia) but also of the emerging bourgeoisie. The latter accepted and supported court centralization, on the one hand, which could ensure order and peace; on the other hand, however, they also had to reckon with the appearance of individual and group interests (primarily the interests of the ruler and his circle).²⁷

1. Gryphius's *Papinianus* reflects a peculiar understanding of the concept of state, which also highlights the final essence of the author's perceptions on political theory. Gryphius's dramas in this respect show some development: while in his earlier drama on Charles Stuart he clearly just positioned himself against the monarchomachs (those opposed to absolutism),²⁸ in *Papinianus* (since it does not treat a contemporary issue) he had more leeway for clashing different political views. The rhetoricization of Macchiavellistic opinions (Laetus), the absolutist standpoint (Bassian, Cleander) and the pragmatic *prudential*-consideration tied up with the situation (Hostilius) makes this work much more multilayered from the point of view of the history of ideas than his other tragedies are.²⁹

Gryphius does not deal with the question of whether or not the monarchy is a natural form of government. This, however, is much more the result of keeping out of the contemporary debates between monarchists and those advocating popular sovereignty³⁰ than the lack of a standpoint. In practice, on the analogy of monotheism, it was the

²⁵ Barner, W.: Der Jurist als Märtyrer. In: Mölk, U. (ed.): *Literatur und Recht: Literarische Rechtsfälle von der Antike bis in die Gegenwart*. Göttingen, 1996. 324.

²⁶ Hinrichs, E.: *Fürstenlehre und politisches Handeln im Frankreich Heinrichs IV. Untersuchungen über die politischen Denk- und Handlungsformen im Späthumanismus*. Göttingen, 1969.

²⁷ Kühlmann, W.: Der Fall Papinian. Ein Konfliktmodell absolutistischer Politik im akademischen Schrifttum des 16. und 17. Jahrhunderts. *Daphnis. Zeitschrift für Mittlere Deutsche Literatur*, 11 (1982) 1–2, 252.

²⁸ Fetscher, I.–Münkler, H. (eds): *Pipers Handbuch der politischen Ideen*. Bd. 3. *Neuzeit: Von den Konfessionskriegen bis zur Aufklärung*. München–Zürich, 1985. 107–124.

²⁹ Gryphius's models with regard to his theories of state are discussed in detail in H. Hildebrandt: *Die Staatsauffassung der schlesischen Barockdramatiker im Rahmen ihrer Zeit*. Diss. Rostock, 1939.

³⁰ On the debate between proponents of popular sovereignty (Althusius) and monarchic sovereignty (Bodin), which was also interpreted as the debate between the republic and autocracy. Cf. Scupin, H. U.: Gemeinsamkeiten und Unterschiede der Theorien von Gesellschaft und Staat des Johannes Althusius und des Jean Bodin. In: Dahm, K.-W.–Krawietz, W.–Wyduckel, D. (eds): *Politische Theorie des Johannes Althusius*. Berlin, 1988. 301–311; Scupin, H. U.: Der Begriff der Souveränität bei Johannes Althusius und bei Jean Bodin. *Der Staat*, 4 (1965), 1–26.

monarchy that appeared to Gryphius as the state of government most corresponding to natural law.³¹

At the same time, Gryphius's work also reflects Luther's perception of the state.³² According to Luther's doctrine of two kingdoms,³³ the representatives of both the secular and the ecclesiastical authority are ordained by God. Accordingly, the sovereign is not entirely *legibus solutus*, but is subordinated to the power of God. The subjects, on the other hand, are required to obey the sovereign ordained by God, which means that active resistance is impossible.³⁴ At the same time, according to Luther's notions, passive resistance is allowed in such a way that the subject disobeys certain orders.³⁵ Influenced by Luther's teachings, Gryphius also differentiated between the sovereign's claim to power and one's conscience, and divided the spheres of *ratio status* and *ius divinum* sharply.³⁶

On the basis of several passages in the text we can assume that Gryphius's concept of sovereignty is not based on the contract theory. This is somewhat unusual, since in the 17th century the various theories of state (both the defenders of absolutism and those advocating popular sovereignty) generally reached back to the tenet of the contract with the state. By contrast, Gryphius starts out from the divine origin of the sovereign's power: the gods are those, who delegate power to the sovereign.

Building upon the above theoretical foundations, in *Papinianus* Gryphius takes sides in the most important questions of his age related to the theory of state.

First of all, he rejects the paramount importance of state interests on moral grounds. As Cleander refers to *ratio status*, which may overrule any right (*Die Stat-Sucht wischt das Recht bei allen Völckern aus*), Papinianus immediately provides the already quoted maxim-like answer: *Wo Stat-Sucht herrscht: verfällt der Fürsten Stul und Haus*.³⁷ With this, Gryphius joins into one of the most topical debates of his age: while Cleander sees a legal horizon created by way of *consensus omnium gentium* in the *usus gentium*, which can be placed above conscience, Papinianus claims that sovereigns must, despite all this, remain immaculate, and there is no exemption from a gross violation of the law.³⁸ Papinianus (i.e. Gryphius) is willing to accept that the state interest requires minor infringements on the part of the sovereign,³⁹ but he finds the sins that shake the entire world,⁴⁰ even if committed with reference to state interests, unbearable. This standpoint of Gryphius very much

³¹ Heckmann: *op. cit.* 87–89.

³² Barner: *op. cit.* 241–242; Keller: *op. cit.* 152; Michelsen: *op. cit.* 50 and 58; Nörr: *op. cit.* 332.

³³ Most recently, see N. H. Gregersen: *Religion in der Öffentlichkeit. Die Zwei-Regimente-Lehre zwischen Privatisierung und Gouvernentalisierung* [<http://s6.rewi.hu-berlin.de/online/fhi/articles/pdf-files/0808 greger-sen.pdf>].

³⁴ Luther: *Von weltlicher Obrigkeit*. In: *Dr. Martin Luthers Deutsche Schriften theils vollständig, theils in Auszügen I*. Pub. F. W. Lomler. Gotha, 1816. 341.

³⁵ Luther: *op. cit.* 342. Cf. also Heckel, J.: *Widerstand gegen die Obrigkeit? Pflicht und Recht zum Widerstand bei Martin Luther*. In: Wolf, G. (ed.): *Luther und die Obrigkeit*. Darmstadt, 1972. 1–21.

³⁶ Franck, L.: *Die Papinian-Tragödie des Andreas Gryphius: Eine Lektürehilfe für Juristen. Zeitschrift für das Juristische Studium*, (2009) 1, 108.

³⁷ III, 491.

³⁸ Barner: *op. cit.* 235.

³⁹ V, 119–122.

⁴⁰ V, 123–125.

resembles the theory of Justus Lipsius analyzing the various forms of *fraus*.⁴¹ Gryphius is certain that, using conscience, it is possible to differentiate between violations of law that can be explained by state interests and those that cannot.

Gryphius is also formulating his position in the *ratio status* debate when Hostilius, Papinianus's father, using pragmatic considerations, tries to convince his rebelling son, who has already been sentenced to death. It is argued by Hostilius that contrary to the mere stubbornness of the emperor, Papinianus would have an opportunity, by way of delivering the speech they want him to, stabilize the state and save the empire.⁴² In its most interesting part, Hostilius's argumentation makes the claim that active deeds that may result in the saving of the state are at least as virtuous as Papinianus's stoic, reactive and rebellious persistence.⁴³

In addition to denying the omnipotence of the state interests, however, Gryphius also rejects the active resistance to the tyrant. He considers the ideal of passive martyrdom in the sphere of politics as valid as on the level of the individual: there is no opportunity for resistance, but the imperial power can only destroy the body, not the soul.⁴⁴ Phrased in extreme terms we could say that Papinianus is prepared to obey the emperor if the latter wishes him to die, rather than to disobey the divine law.⁴⁵

Gryphius's position on the theory of state is very clear and received quite a bit of attention from his contemporaries. His work was quickly elevated into the *ratio status* discussion of his age, which is also indicated by the fact that the tragedy was staged unusually often over a short period of time.⁴⁶ The drama had several adaptations until the 18th century in the German-speaking world⁴⁷ and also in Hungary.

2. As we can already see from the above, there is a peculiar perception of law behind the political notions of Gryphius, which, of course, may also reflect the ideas of his contemporaries.

In *Papinianus* there are two legal positions clashing:⁴⁸ on the one hand, the sovereign's "natural law" claim for obedience by his subjects, and on the other hand, the possibility (obligation) of resisting the orders of the sovereign violating the natural law, also with a reference to natural law.⁴⁹

⁴¹ In his work of political theory, Lipsius differentiates between allowed (*fraus levis, fraus media*) and not allowed *fraus* (*fraus magna*). What he calls *fraus magna* so much contradicts virtues and laws that it must be entirely avoided. The *fraus levis* used by the sovereign, may be useful to the state, while the *fraus media* is still tolerable. Lipsius: *Politiorum libri*, IV, 14. See also Nörr: *op. cit.* 328–329.

⁴² V, 87–90.

⁴³ Barner: *op. cit.* 236.

⁴⁴ III, 478.

⁴⁵ This is what he said at the execution of his son: V, 257–259.

⁴⁶ Cf. Gryphius, A.: *Dramen*. Pub. E. Mannack. Frankfurt am Main, 1991. 1003–1007.

⁴⁷ Barner: *op. cit.* 322–323.

⁴⁸ Nörr: *op. cit.* 325.

⁴⁹ Gryphius, therefore, examines the "evergreen" theme of the conflict between law and justice (positive law and natural law) using the approach of "law in literature" and using a specific historical example. Cf. H. Szilágyi I.: Előszó: A "Jog és irodalom" szimpózium előadásaihoz [Foreword to the lectures of the "law and literature" symposium]. *Iustum Aequum Salutare*, 3 (2007) 2, 8.

These legal positions are clashed in case of Gryphius not only in the form of dry arguments, as is the case in contemporary writings on the theory of state, but in the full life-likeness of dramatic action. Caracalla and his courtiers represent the unlimited application of the principle of *princeps legibus solutus*, while Papinianus stands for the natural law (manifested with the use of different concepts),⁵⁰ the principles of which cannot restrict the autonomy of the sovereign.

An important question is on what basis does Gryphius, advocating the theocratic nature of absolutism, accept the existence of law that is independent of the sovereign's power or can be located outside of it. The answer to this question is given by Papinianus when he has to administer the collection of laws deprived of his power.⁵¹ The "right" law of Papinianus stands above the positive law of the *praefectus praetorio* (*Das Käyserliches Buch der hohen Ampts-Gesetze*—"the imperial book of official laws"⁵²), and for the sake of the latter he does not want to violate the general law that governs the world.⁵³ There is, therefore, opposed to and above positive law, a certain "general law," which was written by God into our souls. Gryphius clearly refers here to the Epistle of Paul to the Romans.⁵⁴ This idea of Paul reflects the stoic, natural law notions about a law given by nature, which also played an important role in the elaboration of theory of natural law in the Early Modern Age. Thus, in Gryphius's conception, the "divine law," rooted in the heart and in the conscience, is merged with the natural law (*Natur-Recht*) that we were born with.⁵⁵

Caracalla, by contrast, refers to a distorted natural law, which forbids subjects to judge the actions of the sovereign and—at least in the opinion of Laetus—stands above the people's right (*Völker-Recht*).⁵⁶

In Gryphius's text, the law above the emperor is personified by Themis: she is the divine law and order, judge and avenger in one person. To die for Themis is sweeter than to sacrifice ourselves for our motherland.⁵⁷ Themis, the avenger, the "dreadful," still wears an antique gown, but the hymn of the dying Papinianus already praises her as a divine figure who brings healing, and the pagan goddess is thus somewhat "Christianized."⁵⁸

By allowing the acts of Papinius to be governed by the naturally given law in the conscience, rather than positive law, Gryphius remains entirely within the theoretical boundaries of Neostoicism. Thus, indeed, conscience as the highest judge is the primary motif of *Papinianus*. The protagonist is a moral hero of rare purity, whose conscience (the "sacred law") is in the centre of the drama. The emperor has power over everything, except his conscience, which is untouchable. The preservation of this purity is the highest gain and glory of the protagonist: *Diß ist der höchste Sieg / daß mein Gewissen rein*.⁵⁹

⁵⁰ Due to the poetic language Gryphius cannot be expected to use legal terms always in the technical sense. Therefore, concepts such as the people's right (*Völkerrecht*), divine right (*göttliches Recht*), conscience (*Gewissen*) and Themis cannot be sharply differentiated.

⁵¹ IV, 335–342.

⁵² IV, 335.

⁵³ IV, 336–338.

⁵⁴ *Romans* 2, 14–15.

⁵⁵ Michelsen: *op. cit.* 52–53.

⁵⁶ II, 68–69.

⁵⁷ III, 514–6.

⁵⁸ V, 343–346.

⁵⁹ V, 266.

The only question is how one can act rightly in the given situations, lead by one's conscience. Gryphius provides the following guidance: in all cases where conscience—rooted in the “sacred law,” the *ius divinum*—does not forbid, one must be obedient, and suffer all vicissitudes without even thinking of resistance.

At the same time, Gryphius's Papinianus also lives in this world, and he is willing to shut his eyes to many things. However, fratricide that serves as the foundation of tyranny does not belong in this category. The *Heilige Recht* does not allow him to accept fratricide and to absolve it with his speech. This is shown by his arguments raised in response to the arguments of his father.⁶⁰ Disobedience starts here and also comes to an end, since when the defending his conscience brings him to deadly peril, he rather chooses glorious death.⁶¹

By his poetic depiction of the relationship between positive and higher law, Gryphius addressed one of the highly debated issues of his own time in a very original way. As it is proved by the drama, in the debate about the principle of *princeps legibus solutus*, Gryphius occupied a middle position: he stood between those who advocated the sovereignty of the emperor above natural law (this position is best represented in the drama by Laetus) and those who insisted that the sovereign was fully bound by law.⁶² In the opinion of Gryphius, the sovereign is bound by *leges divinae et naturales*, but otherwise he is *legibus solutus*. In this respect he followed Bodin.⁶³

Papinianus is characterized by an acknowledgement of the transhistoricity of natural law, meaning that it is not only identifiable in the Christian world order.⁶⁴ As a peculiar dilemma, however, Gryphius's concept of natural law may be interpreted to some extent as conflicting with his obligation of obedience (toward the sovereign in power at all times), which derives from his Lutheran faith. The ideological content of Gryphius's drama is measured against the touchstone of the obligation of obedience,⁶⁵ based on the Epistle of Paul to the Romans. His choice of topic and the answer he attempted to give clearly testify to Gryphius's courage and intellectual anxiety, which elevates him from among his contemporaries not only as a lyric poet and dramatist, but also as political and legal thinker, and explains the high popularity of *Papinianus* in his own age and thereafter.

The second reading—Papinianus “reloaded”

We have examined through the eyes of a jurist what message Gryphius's drama, *Papinianus's exemplum*, may have conveyed to the intelligentsia and educated bourgeoisie of the 17th century. What may they have thought upon reading or seeing the dramatic depiction of the last day in the life of Papinianus.

Finally, let us turn our attention to the drama through the eyes of a present-day reader, a jurist of the 21st century. Can a three-hundred-and-fifty-year-old drama that—unlike the works of Shakespeare, which are only two generations older—is no longer performed on the stage teach us anything?

⁶⁰ V, 118–126. (see above); V, 131–134.

⁶¹ V, 223–224 and 227–229.

⁶² Althusius was a typical representative of this view, according to whom the sovereign is *lex viva, exsecutor, custos et minister legis, qui nihil nisi lege iubente velit, faciat vel omittat*. Althusius: *Politica* 24, 48. Quoted by Nörr: *op. cit.* 327–328.

⁶³ *Ibid.* 328.

⁶⁴ Kühlmann: *op. cit.* 250.

⁶⁵ *Romans* 13, 1.

First of all, it is important to note that, however didactic the tragedy may have aimed to be, Gryphius was not looking for answers to simple questions and did not present the audience with the gift of *dixit*. And the lines of Gryphius may lead to many reflections also in today's readers—even despite the fact that certain approaches (such belief in suffering, martyrdom and a higher justice) are rather far from both today's jurists and people in general. It is not just a historical curiosity since—as we had mentioned before—the text probes constantly recurring questions. As is usual for all literary works, we have an extremely large number of interpretive possibilities, and in the present case it is a legal historian who is going to provide his analysis.

It is obvious to us that Papinianus did not just have to prove his perseverance, but Gryphius also puts him to an intellectual test, and in this respect he apparently places much emphasis on ensuring that Papinianus can support his conduct in comparison with other standpoints and possible solutions.⁶⁶

Gryphius, however, does not simply present his protagonist with the simple choice of “you either obey or you die,” but actually opens up several possibilities (temptations) with which he can react to the emperor's challenge. All temptations appeal to Papinianus with rational arguments. It is not sufficient either that the title character should repel these “attacks” schematically, by way of reference to Themis or his legal consciousness building on his conscience, but he is forced to bring forward objective—one could almost say “professional”—counterarguments, thus overcoming the temptations. Fighting a two-front intellectual war, he does not only have to justify why he refuses to comply with the emperor's request, but also why he abandons the possibility of resistance beyond the refusal of obedience. Conducting and following this discussion apparently had major significance for the author and not only his contemporaries (spectators and fellow scholars), but perhaps also for the posterity:⁶⁷ What are the principles on which Papinianus is basing his standpoint? How does he answer all those questions raised from both sides to challenge his own position?

Among the “temptations” that Papinianus—relying on higher legal and moral principles—must face, two may be of interest from the perspective of the theory of state: the reference to the state interest (*raison d'état*)⁶⁸ and—perhaps the more important one—the call for rebellion against a tyrant.⁶⁹

1. Caracalla and his followers attempt to justify both the obvious violation of law that fratricide constitutes and the claim formulated against Papinianus by saying that it was, or would be, in the interest of the state.⁷⁰ In the final analysis it is the state interests that force

⁶⁶ See Schnabel: *op. cit.* 560–565.

⁶⁷ Michelsen: *op. cit.* 50 and 54.

⁶⁸ On the appearance of the notion of the “*raison d'état*” in the German empire, cf. Schönnemann, B.: Staatsräson im Alten Reich der Frühen Neuzeit und im Deutschen Bund. In: Heydemann, G.–Klein, E. (eds): *Staatsräson in Deutschland*. Berlin, 2003. 23–44; Schnur, R. (ed.): *Staatsräson. Studien zur Geschichte eines politischen Begriffs*. Berlin, 1975.

⁶⁹ Roth, K.: Geschichte des Widerstandsdenkens: Ein ideengeschichtlicher Überblick. In: Roth–Ludwig (eds): *op. cit.*

⁷⁰ III, 419: “Die Noth zwingt Fürsten oft, was auß der Bahn zu gehn.”—It is not difficult to recognize in this the principle of (“Necessity has no law”), which functioned in the 17th and 18th centuries as a basic political principle. Cf. Oestreich: *op. cit.* 57.

Caracalla, against his own intention, to have Papinianus executed,⁷¹ since on the one hand his perseverance would generate sympathy in the population and turn the people against the emperor, and on the other hand the killing of his son would certainly prompt Papinianus to take revenge against the emperor. What Caracalla finds suspicious in Papinianus's behaviour is exactly that he knows: the *praefectus* is intelligent enough to recognize that the sovereign has to leave the path of unswerving lawfulness.⁷²

Formally, therefore, it would be easy for Papinianus to explain the deed of Caracalla in such a way that it would not extend beyond the powers vested in the *princeps*. However, he did not explain it in such a way, and this—based on our current knowledge—can only (perhaps) be explained with his specific view of law and his conscience.

Reference to state interests appear even graver when coming from Papinianus's environment: he is warned that by his death he jeopardizes the existence of the empire. In the arguments set forth by his father and the responses that Papinianus gives, Gryphius deliberates all the points of view that Jean Bodin expounded in connection with Papinianus's behaviour. The position of the father, Hostilius, is summarized in the following lines: "*Schön ist / mit einem Wort / den Geist vors Recht hingeben / Doch schöner Recht und Reich erretten durch sein Leben.*"⁷³

This suggestion stems from the virtue of *prudentia*, and it enlists such arguments that were explained in detail by Bodin. Bodin—who necessarily also started out from the fact that Papinianus disobeyed the order—condemned Papinianus's deed because with his (in itself commendable) perseverance he did not improve the public state of affairs, but rather deteriorated it. He expounds his criticism in the chapter of his work *The Six Books of the Commonwealth*⁷⁴ in which he raises the question whether public officials must obey laws that contradict "natural law"?

As a first step, Bodin sets up the basic principle that in such a case the official – in order to avoid being in conflict with *leges divinae* and *leges naturae*—resign his office. In this case, *constantia* can protect the state and also the sovereign himself from many bad things.

His opinion is different, however, if *constantia*, perseverance rather deteriorates the situation, as it happened in the case of Papinianus, since his death caused much more damage to the empire than the violation of the higher values would have, if he had absolved the emperor from fratricide.⁷⁵ Bodin, of course, starts out from the assumption that, after his surrender, Papinianus would have actually had an opportunity to have a moderating influence on Caracalla. Bodin, therefore, explicitly criticized Papinianus's conduct,⁷⁶ determined by tradition, since it did not help at all, and in fact caused much damage to the Empire. This criticism even questions Papinianus's stoic behaviour, since in his opinion the former *praefectus* was motivated in his act by an impulse that is inadmissible for a stoic: he let his pain control him.⁷⁷ Gryphius may have adopted these arguments either directly from

⁷¹ V, 297–298 and 307–308.

⁷² IV, 24.

⁷³ V, 87–88.

⁷⁴ *Les Six Livres de la Republique* de Jean Bodin Angeuin., Cartier, 1608.

⁷⁵ *Ibid.* 421–422.

⁷⁶ Nörr: *op. cit.* 313–314; Kühlmann: *op. cit.* 228–230.

⁷⁷ Kühlmann, W.: Der Fall Papinian. Ein Konfliktmodell absolutistischer Politik im akademischen Schrifttum des 16. und 17. Jahrhunderts. In: *Europäische Hofkultur im 16. und 17. Jahrhundert*, II. (Hrsg. Buck, A.–Kauffmann, G.–Spahr, B. L.–Wiedemann, C.), Hamburg, n.d. 249.

Bodin's work or from authors who counted as Bodin's followers in contemporary debates on law. Yet, Papinianus does not heed the advice of his father (Bodin): his decision, however, is not based on principle, but is prudential, applied to the given situation. He explains his decision with the seriousness of the emperor's crime and the unavoidability of the situation.

2. The other temptation—which could point beyond conscientious resistance to the emperor's order—is active resistance, the possibility of a rebellion against tyranny. It is very telling that Gryphius even flashes up this possibility for his protagonist. This is because if Gryphius's aim would have simply been to emphasize the martyrdom of his protagonist, then he—more in line with the historical sources and the constellation of the events—could have easily isolated the title character from the very emergence of the possibility of active resistance. This way, however, he would have excluded himself from the discussion of the right of active resistance against rulers. Papinianus would have been a great hero, the martyr of law, even without this. But Gryphius did not want to stop here, and by way of giving Papinianus the opportunity to actively influence the course of history, to act rather than to simply suffer the consequences, he also made his own further aims obvious.⁷⁸

Papinianus (and Gryphius) represent the type of monarchistic absolutism that is responsible only to God. Accordingly, the sovereign who is put in his position by God has only one obligation: to discharge his office in accordance with the natural and the divine law. However, individuals (the subjects) have no grounds for forcing their sovereigns to do so. Their only possibility is patient, suffering obedience.⁷⁹ Since the sovereign received his power from God alone, he can only be judged by Him. The subjects have no power to judge the sovereign.⁸⁰ At the same time, the divine tribunal passing judgment over the tyrant cannot exempt the subjects from the obligation to comply with the requirements of divine law.

All of this conforms with the teachings of Luther, as well as of the proponent of sovereign monarchy, Bodin. It is more important to obey God than to obey man: *regibus obedientia debetur, sed post deum immortalem*.⁸¹ It follows from the above that active resistance to the sovereign is forbidden; however, passive resistance, i.e. the disobedience of orders that contradict the divine law, is outright an obligation of the subjects.⁸² For office-holders, the obligation that follows from this is that they must resign their office if requested to do something that violates the divine or the natural laws.⁸³

Papinianus discards the possibility of active resistance on the same basis that he mounts his unswerving passive resistance on: the basis of "law."⁸⁴

In the interest of preserving his principles, Gryphius even goes as far as leading his protagonist into what appears to contemporary readers a dead-end street: there is no active way out if a contradiction emerges between the obligations toward a sovereign put on the throne by God and the divine legal order. The surrender of the right of resistance stems

⁷⁸ Michelsen: *op. cit.* 56.

⁷⁹ Troeltsch, E.: *Naturrecht*. In: *Die Religion in Geschichte und Gegenwart*. Bd. IV. Tübingen, 1913. 701.

⁸⁰ IV, 411–412.

⁸¹ Bodin: *De republica* I, 8, 99.

⁸² Bodin: *De republica* I, 8, 99. Kühlmann: *op. cit. Daphnis*, 233.

⁸³ Bodin: *De republica* III, 4, 294.

⁸⁴ Michelsen: *op. cit.* 59.

from the pessimistic realization that a struggle for a good cause may itself lead to suffering and lawlessness.

At the same time, the idea that the subject should passively accept unlawful death even was certainly welcomed by absolutistic monarchies. No matter how justice and ideology encounter in this conflict, for the people of the 17th century it was only suffering similar to Christ's that could mean transcendence of the ephemeral world and the only possible realization of human freedom.⁸⁵

3. Perhaps still the most important question of the drama is why Papinianus died. What forced him to undertake this fate? As the original title of the tragedy suggests, Papinianus died for law. But how is this to be understood?

The law for which Papinianus died is an absolute value. In his eyes, law stands above the orders of humans and of emperor: it is the gift of heavens (*Himmels Gabe*),⁸⁶ burnt into the soul.⁸⁷ The law is sacred,⁸⁸ God and law are one.⁸⁹ Papinianus, therefore, is not interested in the consequences of his conduct.⁹⁰ It is not the public good he wants to serve with his death, he only wishes to give testimony, to be a placatory offering, whose death contributes to the survival of law in the world: *Mehr wenn das Recht dadurch erhalten in der Welt*.⁹¹

The death of Papinianus teaches that the evil powers of this world destroy the just. At the same time, some "recompense" is available in the fact that the just are elevated by their fall, while the—seemingly victorious—unjust are sinking to the depth.⁹² The judgment of a sovereign's sins falls in the jurisdiction of the divine tribunal.⁹³ Therefore, all left for an individual (Papinianus) confronted with the unlawful demands of the sovereign is endurance and suffering. However, the harmony between conscience and law makes it possible to rise above needs, transience and human fear. Obedience to conscience, which is linked to the divine law, earns one a lasting reward, which points beyond death.⁹⁴

Of course, for contemporary readers all of this is not satisfactory, since Gryphius leaves judgment to a transcendent forum, and even that does not work. This may have been an acceptable (although even then a not very practical) solution for the intelligentsia and bourgeoisie of the 17th century, but in our age the prevailing idea is that human jurisdiction can also restore the proper order of things and that a conflict between law and justice (positive law and principles of natural law) can be resolved still in this world.

Contemporary readers may see the failure and complete un-lifelikeness of Gryphius's solution in the fact that Papinianus's martyrdom does not restore anything and does not recreate lawful conditions. What is more, this is something that Papinianus also had to see in advance. Furthermore, he must think it most likely (and historical sources also evidence

⁸⁵ Nörr: *op. cit.* 332–333.

⁸⁶ I, 224.

⁸⁷ IV, 340.

⁸⁸ I, 92. II, 258. III, 474. IV, 330. V, 66. V, 259.

⁸⁹ V, 154. V, 288.

⁹⁰ III, 499–504.

⁹¹ III, 515.

⁹² The opposite movement, rise and fall, which is generally characteristic of Baroque dramas can be observed throughout this text: Bassianus's fate is to become a tyrant, Papinianus's to end up as a martyr. Cf. Keller: *op. cit.* 155.

⁹³ IV, 509–410.

⁹⁴ Keller: *op. cit.* 150–151.

this) that after his death Bassianus will exercise his despotic power even more uncontrollably. His son's dramatic fate also warns him of this. Papinianus's son himself discloses to the spectators the point of view which demonstrates the terrible circumstances in advance: *Wer nur das Recht ansieht schlägt Kinder in den Wind*.⁹⁵

The fate of the son unmistakably foreshadows that the strict legal position of Papinianus—on which he bases his refusal of the emperor's request—will be the source of further injustice, including such that would not have happened otherwise. Paradoxically, the unwavering insistence on law gives rise to the lawlessness, and even prevents the possibility that, by way of strictly insisting on his own position the occurrence of these injustices could really be avoided. Of course, this is a situation stretched to the extremes. Gryphius made sure that Papinianus is faced with an extreme alternative: he either becomes an active agent in the interest of the public good, and thereby also positions himself across from "law" in the absolute sense of the word, or he follows his conscience only and thus accepts that this will also cause others to suffer negative consequences.⁹⁶

Bodin saw it only too well that politically Papinianus was defeated. With his self-sacrifice (in which his political, moral and legal identities appear) he practically submits to the representatives of an unscrupulous sovereignty. Gryphius attempts to present on the stage the contradiction that emerged in his age in the rhetorical literature concerning the evaluation of Papinianus. However, as we can sense, he cannot find a satisfactory way out of the dilemma.

If we examine the teachings of Gryphius, which he professes by way of the dramatic presentation of Papinianus's action, in the (even contemporary) political context, then—at first sight—the "failure" of Papinianus seems obvious, since it only offers the possibilities for the common man to either save himself—even if reluctantly—by way of being a partner in crime or to fall victim of the circumstances without any actual countersteps other than declaring his disobedience. The common man, therefore—in this constellation—can only choose between falling into sin himself or becoming persecuted: either committing a sin or being a victim of it.⁹⁷ These are disappointing prospects. Consequently, to avoid this, in Papinianus's fate we can only see a warning against the individual to participate in public life, in politics. One should withdraw, live a simple life, far from the grandeur and misery of the court.⁹⁸ Armed with conscience alone, one can only lose in the arena of politics.⁹⁹

A careful examination of the development of Gryphius as a poet and thinker, however, reveals that he moves beyond the proclamation of the "withdrawal from the world." In our reading of *Papinianus* the model to follow is no longer necessarily turning away from politics, but the demonstration of the politically (still more) active *virtus*, which serves perseverantly and committedly ideal aims, and is thereby able to lend politics certain sense

⁹⁵ IV, 310: "He who only sees law trusts his child to the wind."

⁹⁶ Michelsen: *op. cit.* 63.

⁹⁷ *Ibid.* 59–60.

⁹⁸ This is clearly the conclusion drawn in two earlier dramas of Gryphius: according to *Leo Armenius* and *Carolus Stuardus*, withdrawal from politics and burying oneself in private life is the proper life for a humanist. Lenk, W.: Das Schicksal der Regenten: Zur Trauerspielkonzeption des Andreas Gryphius. In Honsza, N.–Roloff, H.-G. (eds): *Daß eine Nation die ander verstehen möge. Festschrift für Marian Szyrocki zu seinem 60. Geburtstag*. Amsterdam, 1988. 512.

⁹⁹ Michelsen: *op. cit.* 63.

and values.¹⁰⁰ This is also manifested in the fact that Papinianus does not run away, but stands up for his own legal and political principles. And in the given situation this insistence can have a huge weight.

4. In any case, for a contemporary reader, a jurist in particular, Papinianus appears as a rather un-lifelike character: he is the complete opposite of the turncoat or (to use a milder expression) opportunist—and in this sense modern—image of jurists, having no difficulty in changing their standpoints. A modern jurist is an opportunist *ex officio vis-à-vis* the state power and the values it represents.¹⁰¹

This, of course, does not mean that the self-reflection of contemporary jurists could be exempt from the questions raised by the example of Papinianus. It is evident that the acts of Papinianus could be evaluated differently if we relativize the human being and law, as soon as the necessity of self-preservation and, in connection with this, the preservation of society and the state replace absolute values. This is something that, to soothe their conscience—in the interest of the abovementioned objectives—European intellectuals of the 20th century were very much inclined to do, and—in the eyes of many—especially inclined among them were the members of the legal profession on the Continent who traditionally received a positivist education. Papinianus's upholding of the banner (which led to failure, if viewed pragmatically) was hardly ever followed by jurists who accepted, supported or served autocratic systems. It is commonly known that major traumas were necessary for such questions to be formulated in the thinking of Continental European legal professionals that Gryphius confronted his protagonist centuries before.

However, while individuals in the Early Modernity could at least rely on—or believe more directly in—divine guidance (even in the form of Themis), jurists of our age stand alone with their conscience.

Gryphius's Papinianus *exemplum* can be regarded as the warning of a Christian humanist utopia, since, in a certain sense, we can also regard the conservative standpoint of the author as an indictment of the political reality. The reality, however, even at that time obeyed the laws of political schemes and games rather than the principles of justice and rationality. For us—in my opinion—even the possibility of the utopia is gone.

Even if the example of Papinianus is not capable of shedding light on how a jurist should actively proceed in a situation when his or her own value system and the orders of the power are in conflict, it will nevertheless encourage us to form our own (even professional) value system. And once this value system is established, we should insist on conscientiously, and be vocal about it, even if we are left alone in this.

¹⁰⁰ Lenk: *op. cit.* 512.

¹⁰¹ The notion that personal moral dignity and the professionalism of a jurist can be separated from each other, and that in fact the exclusion of moral doubts is the proof of professionalism only gained ground in the thinking and self-image of jurists in the 19th century. Cf. Behrends: Papinians Verweigerung... *op. cit.* 248.