SIC ITUR AD ASTRA

IV

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Collection of papers on Hungarian and Croatian legal history 2019

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Croatian–Hungarian Legal History Summer School

The Croatian–Hungarian Legal History Summer School was organised for the first time in 2016 in Budapest as a result of the cooperation of the Eötvös Loránd University, Faculty of Law and the University of Zagreb, Faculty of Law. The two History of State and Law Departments of these universities published the best student presentations in the books entitled *Sic itur ad astra I* (ISBN 978-963-284-935-5, Eötvös Loránd University Faculty of Law, Budapest, 2017, 64 p.), *Sic itur ad astra II* (ISBN 978-963-284-935-5, University of Zagreb Faculty of Law, Zagreb, 2018, 64 p.) and *Sic itur ad astra III* (ISSN 2631-181X, Eötvös Loránd University Faculty of Law, Budapest, 2019, 134 p.).

Our fourth summer school was organized again in Zagreb in 2019. The topic was „The development and the progress of the civil law's institutions". Fourteen, Master and Ph.D. level students held their presentations, all of them – beside the publication of Dr. Kinga Beliznai Bódi who held the Professor's Lecture – are listed in this book.

We hope that our students will actually reach the stars and that we will find their names and scientific achievements in similar publications in the future as well.

Zagreb–Budapest, 2020

The Editors

Dr. Kinga BELIZNAI BÓDI: The history of judicial robe in Hungary in a nutshell

Eötvös Loránd University, Faculty of Law

„The fashion of the judicial gown is nice and smart, because this gown always warns the judge that whilst practising his profession he is obliged to leave behind all one-sidedness and all biases, as well as all prejudices and all subjective aspects."[1]

1. Judicial Costume in Europe

Legal and judicial dress has its origins in royal and ecclesiastical history. University professors and scholars started to wear robes in the 12th century for two reasons. First, the long garments kept the wearers warm in the cold buildings and second, long robes indicated the status of the individual. The legal profession began to acquire its own distinctive form of dress modified from lay person dress during the medieval period.[2] Judges adjudicated usually in a knee-length robe or even as long as falling to the ankles, which was fastened with a belt at their waist, and wearing a cap of the same colour as their robe.

Judicial dress was far from being uniform, neither in colour nor in cut. Whilst a Welsh judge would wear a green robe, a count in the Kingdom of Germany in the 13th century would wear a tightly fitting yellow garment and a cap adorned with yellow and red ribbons when deciding a case in his own countship.[3] In Cologne a municipal judge dispensed justice wearing a blue knee-length robe with buttons and a similarly blue sleeveless cape reaching mid-shin.[4]

[1] Bírói ítélet [Judicial judgement]. *Világ [World],* No. 146, 1924, p. 1.

[2] HARGREAVES-MAWDSLEY, W. N.: *A History of Legal Dress in Europe.* Oxford, 1963, Clarendon Press, p. 3.; *Innocent Diversions: Australian Legal Fashion.* An exhibition in the Sir Harry Gibbs Legal Heritage Centre, September 2014, https://media.sclqld.org.au/documents/lectures-and-exhibitions/2014/innocent-diversions-exhibition-catalogue.pdf [Access on July 22, 2019]

[3] WERKMÜLLER, Dieter (ed.): *Handwörterbuch zur deutschen Rechtsgeschichte* (*HRG)*. vol. IV, Berlin, 1990, p. 1044.

[4] ARLINGHAUS, Franz-Josef: Gesten, Kleidung und die Etablierung von Diskursräumen im städtischen Gerichtswesen (1350–1650). In: BURKHARDT, Johannes, WERKSTETTER, Christine (ed.): *Kommunikation und Medien in der Frühen Neuzeit*. München, 2005, De Gruyter Oldenbourg, p. 472.

In the 14th and 15th centuries judges and lawyers started wearing an attire similar to the long cassock of the clergy. Such simple dress was considered appropriate as secular clothing enabled „too much finery and personal vanity", when „the calm and reserved representative of the immutable law could not be a man of fashion". Such uniform also helped those seeking legal services as judges and lawyers were easily distinguishable from clients by their clothing.[5]

The judges of the highest judicial forum of France, the Parliament of Paris, were among the first who following the fashion of the royal court started wearing full-size long-sleeved robes with an ermine[6] collar. The judges of different ranking were distinguished by the fabric, colour, quality and adornment of their respective gowns. From the 15th century the colour of the gown was mainly black, but the judges of the towns having „the privilege of the glaive" (that is the right of imposing and carrying out the execution of a death penalty) wore a scarlet gown whilst adjudicating. In some countries (for instance, Switzerland or Italy) the black gown – in Spanish style – was decorated with a white ruff.[7]

The English judicial dress is also rich in traditions and symbols. There were no strict rules in the early Middle Ages as to the colour or fabric of judicial dress. Judicial costume changed with the seasons. It was only customary that judges' winter robe was lined with fur and summer robes finished with taffeta. By the beginning of the 15th century the colour of winter garments was violet, green during summer, and red on ceremonial occasions.

Following publication of the scholarly work *The Discourse on Robes and Apparel* in 1625, the Commission of Westminster passed a Royal Decree on court dress. The *Judges' Rules* set out guidelines for the dressing of judges of the Inns of Court in 1635, however they failed to introduce any novelties; they only summarised the practice established by the 17th century. The judges of Westminster Hall (today's High Court) wore black[8] or violet gowns during sittings accompanied with a cape and hood of the same colour. Their headwear consisted of a coif made of linen, covered by a round velvet clerical skullcap, and finally a four cornered

[5] (D.): Ügyvédi és bírói uniformis [The uniform of attorneys and judges]. *Pesti Hírlap [Pest News],* No. 186, 1912, p. 6.
[6] The ermine is the symbol of power and authority. Wearing a robe or mantle (or cloak) made of ermine or padded with ermine was the privilege of kings and as well as of noble families. The ermine collar of judges has been for centuries also the emblem of spotless justice and strictest integrity.
[7] *HRG.* Vol. IV, p. 1093.
[8] The black colour of the gown derives from a mourning dress adopted by the Bar after the death of Charles II in 1685.

black hat of limp *(pileus quadratus)*. For ceremonial occasions they were dressed in a scarlet robe trimmed with silk or ermine depending on the season.[9] The fabrics were traditionally bestowed on the judges by the monarch.

The wig embodying judicial authority came into use by French influence[10] during the reign of Charles II (1660–1685). He and the royal court returned to England, bringing with them the practice, for gentlemen to wear wigs. All of fashionable society adopted this habit, and so the judges and lawyers – being dedicated followers of fashion – did the same.

Originally, judges and barristers alike wore long, or „full-bottomed" wigs. The powdered bush wig was part of a judge's ordinary attire, even when not sitting in court.[11] By the late 18th century, judges had bowed to fashion and, perhaps, comfort, by adopting an „undress" wig – a short wig with one vertical curl at the back and two queues behind, for ordinary sittings in court – reserving the full-bottom for ceremonial occasions.

Until the beginning of the 18th century wigs were made of black horsehair, which required constant care, perfume and hair-powder. The ointments and powdering corroded the material of the expensive judicial gowns, thus the end of short wigs were tied in small black rosettes or dress bags. To reduce the constant need to maintain wigs, Humphrey Ravenscroft[12] in 1822 patented the curly judicial wig made of white horsehair, which did not require any further frizzing, curling or powdering.[13]

Lord Taylor, upon his appointment as Lord Chief Justice in 1992, precipitated a debate on judicial attire by expressing his desire to abolish wigs in court.[14] Due to modernisation endeavours judges hearing civil and family law cases were no longer required to wear old-fashioned wigs in England and Wales since 1 October, 2008.

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[9] KENGYEL, Miklós: *Perkultúra – A bíróságok világa, a világ bíróságai [The Culture of Litigation – The World of Courts, Courts around the World]*. Budapest–Pécs, 2010, pp. 252–253.

[10] The wig had been in use since Louis XIII went prematurely bald and disguised his baldness with a wig in 1624. MCLAREN, James G.: Legal dress. A brief history of wigs in the legal profession. *International Journal of the Legal Profession*, No.2, 1999, p. 224.
Louis XIV of France was compelled to wear a wig because of some hair illness; it is just a matter fact that no court person could have been imagined without wearing a wig. Such fashion therefore derived from the covering up of a physical imperfection. RÁTH-VÉGH, István: Királyok divatjától a divatkirályokig [From the Fashion of Kings to the Kings of Fashion]. In: HATVANY, Lili (ed.): *Öltözködés és divat [Dressing and Fashion]*. Budapest, 1936, p. 50.

[11] FERGUSON WALKER, J.: Judicial Costume in England. *The Green Bag,* No. 12, 1900, p. 615.

[12] Wigs are still manufactured by Ede & Ravenscroft, which is London's oldest tailor and wig maker. It was founded in 1689 and has been supplying specialist legal wear tailoring and wig making for over 300 years.

[13] https://legal.edeandravenscroft.co.uk/EvolutionOfLegalDress.aspx [Access on July 14, 2019]

[14] MCLAREN 1999, p. 241.

In 1868 it was Sir Robert Collier who first urged the abolition of wigs.

> "During the last two days the learned judge and the bar have been sitting without their wigs, and in opening a case Sir Robert Collier called attention to the innovation and apologised for not appearing in full forensic costume. His lordship said he had set the example of leaving off the wig in consequence of the unprecedented heat of the weather as he thought there were limits to human endurance. Sir Robert Collier expressed that his precedent might be generally followed and hoped the obsolete institution of the wig was coming to an end – a hope in which many of the profession concur."
>
> *(The Times, 24 July 1868)*[15]

Similar reform ideas also popped up at the beginning of the 20th century, as according to English public law „a judgement delivered bald or sitting down may not be good or fair".[16] However, unusually hot weather in London upset traditions on a number of occasions, for instance in 1934, when a judge took off his wig – in the middle of a trial – and „eventually wiped off his forehead dripping with sweat".[17]

2. The judicial gown in Hungary

"The gown has arrived at the borders of Hungary." – informed the *Jogtudományi Közlöny (Jurisprudential Bulletin)* in January 1898. In Austria the ministerial decree issued on 9 August, 1897 (RGBl. No. 187/1897) rendered the wearing of official attire mandatory. Accordingly, as of 1 January 1898 every judge and prosecutor, as well as all expert lay judges were obliged to wear the official dress consisting of a black gown and beret at trials.

[15] McQueen, Rob: Of Wigs and Gowns. A Short History of Legal and Judicial Dress in Australia. *Law in Context,* No. 1, 1998, p. 37.
[16] Paróka nélkül [Without a wig]. *Népszava [Word of People],* No. 150, 1934, p. 7.
[17] *Ibid.*

The gown reaching until the ankles was made of a light woollen cloth, „thickly plaited" and buttoned on the front. The neckline was made from violet velvet, the sleeve of the gown was ornamented with black and violet silk stripes. The attire was supplemented with a bow tie made of glossy black silk and a white shirt. The decree specified in detail how many buttons, of what size and type were to be sewn on the gown, and where should the pocket be placed. The beret had to be worn when delivering judgements and making oaths. On the neck of the gown and the beret there were six different signs denoting ranking. The gown of the President of the *Oberster Gerichtshof* was ornamented with a twelve centimetres wide ermine collar, and his beret also had a violet velvet stripe, the attire of the Vice-President only differed in that his ermine collar was only six centimetres wide.[18]

In Hungary judges did not wear an official uniform. The judges heard a case in their national dress, and at the regional courts they only girded their sword, which was more of a sign of their nobility and not as a symbol of adjudication. Between 1869 and 1912 a number of enthusiastic or less eager opinions was expressed in Hungary in daily newspapers, law journals, and discussed among lawyers and jurists relating to the judicial dress. Devotees of a judicial uniform regarded the introducing of such a dress as a token of judicial authority, but there were others who stressed that maintaining the dignity corresponding to the judicial profession has more to do with the individual character of a judge, his qualification, knowledge and sense of justice rather than wearing a uniform.

The *Jogtudományi Közlöny (Jurisprudential Bulletin)* reported on the real cavalcade of attires and colours of the courtrooms. At one of the hearings of the Royal Court of Budapest in 1892

> „the president was ruling wearing a grey sacco suit, a more fashionable judge due to vote a yellow jaquet suit, the other voting judge a brown double-breasted coat and blue trousers. The royal prosecutor represented the State in yellow-black checked clothing. Such colours orgy was somewhat dimmed by the black coat of the defence".[19]

[18] Judicial robe – black gown and beret – of defence attorneys and clerks in Austria was regulated by the *Decree of the Minister of Justice,* 17 June, 1904 (Verordnung RGBl. No. 59/1904).
[19] SZAKOLCZAI, Árpád: „Minima" [„Minim"]. *Jogtudományi Közlöny [Jurisprudential Bulletin],* No. 39, 1892, p. 310.

In July 1898 a long debate ensued among our renowned lawyers as to what should the official attire look like in the Hungarian courts (gown or national dress „atilla"), and whether it should be compulsory only for the judges or also for the prosecutors and attorneys. Many jurists expressed their opinions in the *Országos Hírlap (National News)*.

According to the arguments of Leó Zsitvay, the President of the Royal Criminal Court of Budapest:

> „Let us beware of exaggerations, which regard the Hungarian judges as Hungarian men who are all soldier-like, a born horse rider, like a hero, and wanting him to wear full-size tight apparel with shiny trimmings. […] let us consider the modern Hungarian man who toils day in day out and only straightens up with difficulty under a heavy workload to give the impression of a somewhat attractive figure, and let us also consider that we do have good judges who may hardly be able to be impressive wearing some 'festive dress' due to their less fortunate appearance. So, maybe because of the cut of the judicial attire the presidents of regional courts will look like old-fashioned hussar colonels, who competing will only recruit others based on an impressive figure."[20]

Jenő Hammersberg, Chief Royal Prosecutor of Budapest, did not find it necessary or reasonable to introduce a special official attire:

> „Our courts have had to date and still have the required respect and dignity, and I do not believe that a gown or any kind of special attire would be able to enhance such respect or the public trust vested in their adjudication. The source of a judge's dignity should not be derived from his attire or other formalities, but from his moral and

[20] Talárt a bíráknak [Gown for the judges]. *Országos Hírlap [National News],* No. 189, 1898, p. 4. http://epa.oszk.hu/00200/00242/00231/pdf/00231.pdf

intellectual characteristics, his conscientious carrying out of his duties, his serious conduct, and the fairness of his judgements."[21]

According to the opinion of Dezső Márkus, a judge at the Royal Court of Budapest,

„Though the salon suit is beyond doubt the best option, it may not be made mandatory as it is rather costly, and even though I believe it to be the most suitable and because of its simplicity the most elegant solution for any work carried out in public, I would choose the gown [...], because I find it more expedient for the following reasons: the gown is cheap, comfortable, it equalises, covers any physical imperfections, and provides a solemn and dignified appearance for the trial [...]. The Hungarian national dress is not practicable because: it is expensive; tight trousers, boots, a sword – are not really comfortable for everyday wear, and it is not as easily put on and taken off at the office as the gown, consequently it should be worn all throughout the day; it calls for different degrees of ornamentation [...], which may be rather inconvenient […] when considering that a great number of people judge you by the appearance; finally, it highlights the physical imperfections, let alone that the Hungarian dress with all its accessories is not advantageous for all Hungarian men, even if fair and sound."[22]

Only a few years later, the legislator dealt with the issue of judicial dress. §104 of Act 54 of 1912 on the implementation of the Code of Civil Procedure (Act 1 of 1911) authorized the Minister of Justice „to order by decree the wearing of specific dress for the judges". According to the reasoning of the Act:

„The issue to introduce an appropriate judicial attire has been raised several times. It is true that neither would it be beneficial for the honour of the justice nor for the dignity of the courts if members of the courts or the prosecution wore bright colours

[21] *Ibid.*
[22] *Ibid.*, p. 7.

or some ostentatious clothing whilst practising their profession before an audience, therefore this proposal allows for the regulation of the judicial attire by decree. The proposal does not contemplate a uniform or a gown as is the case at foreign courts, but a kind of dress, which conforms to the solemnity of their function while retaining their Hungarian character and also taking convenience into consideration."[23]

3. Application for the design of the judicial cap and gown (1912)

The Ministry of Justice announced an application in September 1912 for the design of a judicial cap and gown. The Hungarian Association of Applied Arts was called upon to be in charge of the application; apart from members delegated by the association to the committee assessing the applications two further members were nominated by the Minister of Justice.

Pursuant to the call for application:

„A small-scale coloured design is required of the judicial (prosecutors, scriveners included) gown, a full-size design of the judicial insignia, and a small-scaled design of counsels' cap and gown which is of the same cut as the judicial cap and gown but still easily distinguishable. The applicant must take into consideration that the Hungarian judicial dress may not be an imitation of some foreign judicial attire in any way, and it must feature the necessary solemnity and have an individual character; finally, the gown must be able to cover the ordinary clothes fully. St Stephen's crown is the most suitable as a form of insignia as being the source of the Hungarian judge's power."[24]

[23] *Képviselőházi irományok [Papers of House of Representatives],* 1910, vol. XI, 280-347, XXXI–XXXVII, No. of papers 1910-330, p. 325.
[24] The detailed call for application, „Application for the design of the judicial attire (gown) and cap" was published in the journal *Magyar Iparművészet [Hungarian Applied Arts]*, No. 6, 1912, p. 236.

The applications were evaluated by the assessment committee in January 1913.[25] Forty-four applications were submitted. The 1st prize was awarded to Nándor Honti, lithographer and graphic designer, the 2nd prize went to Jenő Jeney, painter, and the 3rd prize was awarded to János Böhm, stamp designer.

According to the winning design of Nándor Honti:

„The fabric of the gown is black lustre, the collar and cap is made of black moiré. The President, judge and prosecutor is distinguished by a medal of St Stephen's crown hanging from the neck on a chain or golden braid. The clerk wears the medal as a badge without a lace pinned over his heart. Counsels do not have a badge. The cut of the gowns are the same, the gown of the President of a superior court is red from the inside, and that of the President of a lower court is blue inside, as for all the others it is all fully black."[26]

The winning designs were submitted to the Minister of Justice by suggesting that before making the final decision, the gowns designed should be made by the tailor's workshop of the Hungarian Royal Opera, and only subsequently should the choice be made as to which gown design would be ultimately used as the official attire for judges (and prosecutors, etc.).

Though the competing designs were submitted in 1913, and from 1914 a decree issued by the Minister of Justice obliged the judges, prosecutors, scriveners and counsels to wear a cap and gown, the introduction of the gown was dropped as „the war came and its misery did not allow our judges to wear gowns".[27]

[25] The chairman of the committee was Ignác Alpár the Vice-President of the Hungarian Association of Applied Arts, and its members were Dr Gyula Rickl, ministerial advisor delegated by the Minister of Justice, and Dr János Marschalko, justice of the Royal Court of Appeal, Elek K. Lippich, ministerial advisor delegated by the Hungarian Association of Applied Arts, and Jenő Kéméndy, painter, costume designer and scenist, Chief Scenist of the Opera.
[26] A bírói talár [The judicial gown]. *Vasárnapi Ujság [Sunday News],* No. 6, 1913, p. 115.
[27] A bírósági tisztviselők egyenruhája [The uniform of the court officers]. *Esztergom és Vidéke [Esztergom and its Region],* No. 50, 1914, p. 3.

4. The judicial dress in the 20th century

In the first decades of the 20th century no single viewpoint developed on the introduction of a uniform judicial dress. And it was not considered to be the right time to discuss the issue. A judge wore a dark suit and a tie as an everyday apparel in Hungary between the two World Wars, however at trials of greater publicity something more solemn had to be worn. By the beginning of the 1950s this „required elegance" disappeared, judges who remained (and even were left) in their position, and the newly qualified people's cadre of judges who just finished the one-year judicial academy all endeavoured to meet the requirements of the days.

The appearance of women judges brought about a new situation as far as dressing is concerned. The elegance expected in the courtroom was dependent on the actual fashion trends in their case. The first bigger shock happened when the mini skirt appeared in the end of the sixties. According to the wording in the second half of the eighties the judge „should dress in a manner worthy of his or her position", that is „women judges are not to adjudicate in miniskirts, or shorts, and men judges are not to wear short-sleeved shirts without a tie" when delivering decisions.[28]

In the spring of 1990, the judges of the Constitutional Court appeared in a dark blue gown in public. Nearly a year later the judges of the Supreme Court were dressed in a black gown. The President of the court announced in December 1990 that the justices of the Supreme Court will be wearing a gown henceforth.

The first judges to deliver judgements in a gown – as of September 1993 – were the judges of the Komárom-Esztergom County Court.[29] After Komárom-Esztergom County, judges of some other counties also joined in wearing a gown, however in different forms. The National Judicial Council provided for the general introduction and wearing of an official judicial attire in 1999 in its regulation, thus as of 1 June, 2000 wearing a black gown with violet trimmings became mandatory for all judges.[30]

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[28] KENGYEL, Miklós: Talárban és talár nélkül. Öltözködési kultúra a bírósági tárgyalóteremben [With or without a gown. Dressing culture in the courtroom]. *Bírák Lapja [Paper of Judges],* No. 3–4, 1993, p. 4.
[29] Bírák – talárban ... [Judges – wearing a gown …]. *24 óra [24 Hours],* No. 244, 1993, p. 1.
[30] Júliustól minden bírónak kötelező a talár [The gown is mandatory for all judges as of July]. *Népszabadság [People's Freedom],* No. 108, 2000, p. 6.

„conveys judicial dignity, which enhances the respect of the courts. This has to be expressed in the attire of a lay judge and of the recorder participating at a hearing, or of a court secretary conducting such procedure".

(Directive No. 9/2012 of the President of the National Office for Judiciary)

The National Office for Judiciary announced an application in September 2016 for the students of Moholy-Nagy University of Art and Design Budapest (MOME) to design a new judicial gown. The assessment of the thirteen designs submitted was carried out by members of the Gown Committee[31] as well as of the judiciary. According to a preliminary survey the judges still prefer the black colour for the judicial gown and found no reason to distinguish between the gown of women and men judges.

Students taking part in the application presented their sample gowns in the autumn of 2016 for the first time, which were later improved and changed both in their fabric and ornamentation based on the observations of the judges. The announcement of the winning design took place in June 2017. The most successful applicants received an award and a certificate of merit.[32]

[31] Members of the Gown Committee were: President of the National Office for Judiciary, President of the Curia, President of the National Judicial Council, presidents of the courts of appeal and the regional courts, artists and I.

[32] The students having received an award and a certificate of merit: Eszter Béla, Júlia Ilona Horváth, Alma Vetlényi and Noémi Gyimóthy. The designs and a detailed description of the project are available in the 2016 Yearbook of the MOME, as well as on the website of the National Office for the Judiciary. https://birosag.hu/hirek/kategoria/birosagokrol/lezarult-talarpalyazat

Luca VARGA: Mistrust or rationality? - The history of the marriage settlement

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1. Introduction

Nowadays there are only a few marriages that have not had the root that the would-be-married ones make a marriage settlement before their wedding. The marriage settlement has the purpose that if the spouses want to get divorced, they do not have to go to the court for a long litigation because of their properties' ownership. To make a valid contract is cheaper, than have a matrimonial cause.

The main part of my essay will be about in what ways and how successfully you can validate your marriage settlement according to the breakdown reasons. In this part I will also present that although between the spouses the divorce and the matrimonial properties' trial are two different litigations, how their divorce's trial can have an impact on their other litigation. To understand all of this system, we need to know the meaning of the matrimonial property laws, and the meaning and content of the marriage settlement. We also need to discuss how the properties' owners change after the divorce, namely the things that the spouses bring into their marriage to increase their wealth.

Last but not least, I am going to write about the prenuptial agreements' present. In this part I will make verifications about the marriage settlement's present and what impact it would have on the future couple's decisions. My verifications are about if the marriage settlement will be as popular as it is nowadays or it will lose its popularity and the pairs will go back to the idea, that they would not be able to separate and live happily ever after.

2. The history of the civil marriage in Hungary

The wish of the religious marriage was spreading extremely fast as the Christianity appeared in the countries, although before Christianity there were also some religious habits between

the old Jewish people and the heathen people who converted to Christianity and brought their old habits that could be fitted into the new religion with minor changes.[1]

In Hungarian legal history the oldest data about the church wedding was from the time of King Coloman the Learned (1095–1116). His act on marriage probably never had any practical significance, but it was a good example of how they wanted to implant the church wedding.[2] There were two opinions around this marriage law. The main opinion about the law was that the clandestine marriages were banned before the Council of Trent, which was held in 1563. Sneaky marriage means that the marriage happens without any help of the church. This approach changed with the Act 7 of 1791, which said: "*The law considers marriage only as a civil contract. The legislative power shall establish for all inhabitants, without distinction, the method by which births, deaths, and marriages are to be declared, and it shall designate the public officials who are to receive and preserve the records therefore.*"

In Hungary, after the foundation of the state, the Church had the right to make the legislation about marriages. The state was supportive about the question and observant of the church's supremacy. The old habits like marriage by abduction or marriage by purchase remained until the 12th century and spread a principle rested on the canon law that "marriage is the result of a bilateral nuptial will between man and woman (consensus facit nuptias).[3] From the beginning, there were bans of the marriages like consanguinity. The marriage was banned between the relatives. Since they did not have control of this, after the Lateran synod of 1215, Pope Gregory IV. refilled this regulation with the rule of uneven collateral relatives banned.[4]

During the 16th century, there were chaotic situations because of the spread of the Protestantism. Where the decree annunciation did not happen, the Protestant people got married according their religion's rules. The regulation of the Council of Trent said that in mixed marriages (when there is a catholic and a not-catholic person, who get married) one

[1] ROSZNER, Ervin: *Régi magyar házassági jog [Old Hungarian Marriage Law].* Budapest, 1887, Franklin Társulat, p. 90.
[2] *Ibid.*, p. 91.
[3] HERGER, Csabáné: *A nővételtől az állami anyakönyvvezetőig – A magyar házassági köteléki jog és az európai modellek* [*From buying of woman until the state registrar - The Hungarian marriage law and the European models*], Budapest-Pécs, 2006, Dialóg Campus Kiadó, p. 75.
[4] ROSZNER, *op. cit.*, p. 192.

member had to relinquish about their religion (characteristically it was the protestant one), so they got married by the catholic rules.[5]

In the 19th century, there were two regulations, which had the function to solve the situation until an utter regulation. The one of them was the Act 48 of 1868 about the litigations of mixed marriages saying that both of the spouses was judged by the religion's regulation. The other was the Act 53 of 1868.[6] This said that for valid mixed marriages it is enough if one denomination's clerk announced the wedding. The new rule also declared that the newborns had followed their parents' religion by their genders, so if the baby is a girl and the mother is catholic, the baby was also catholic.[7] The utter rule for the civil marriages was born on 9 December 1894, when Franz Joseph I sanctioned the Act 31 of 1894 about the civil marriage.[8]

3. The matrimonial property rights and the marriage settlement

In the Hungarian law, the parts of the matrimonial property rights are: the separate property, the dotal property, the community property, dower and the marriage settlement.[9] The separate property is the spouses' property, which they have by the time of their wedding or something they earned during their marriage for free. The spouses exclusively give orders about their separate properties. The dotal property is a kind of assets, which has been given by the marrying woman or somebody (as usual her family) to the newly husband to reduce the bulk of the marriage. The dotal property is the property of the wife, but the husband has the right of fruition on it. If the marriage is coming to an end, the husband's right would be no more and would be obligated to give back the settlement to the woman or her heir.

The community property is the whole bulk of things that the spouses earned during their marriage, except the ones, which were free. The community properties were handled by the

[5] HERGER, *op. cit.*, p. 76.
[6] RÁCZ, Lajos: A polgári házasság intézményének megvalósulása Magyarországon [The realization of the institution of civil marriage in Hungary]. *Jogtörténeti Értekezések* [*Essays on Legal History*] 4, Budapest, 1972, p. 22.
[7] *Ibid.*, p. 22
[8] BALÁZS, Réka: *A magyar házassági bontójog fejlődése* [*The evolution of the Hungarian matrimonial law*]. SZTE-ÁJK Department of Civil Law and Civil Procedure Law, Masters of Law, p.12.
[9] JANCSÓ, György: *A házassági vagyonjogról* [*About the matrimonial property*]. Budapest, 1898, p. 191.

one who earned it but at the end of the marriage, the community property was split in equal parts.

The dower has two breeds, but the more important one has the same confiscation as the marriage settlements.[10] The marriage settlement can made before the wedding and during the wedding, so this is the reason why the prenuptial agreement is not a perfect title for it. If the would-be-married ones make their contract before their wedding, the title of it is prenuptial agreement. If they make it after their wedding, during their marriage the name for the contract is marriage settlement agreement. According to the revised fourth Draft of Legislative Proposal on the Civil Code for Hungary in 1928 "*with the help of the marriage settlement agreement the spouses have the choice to make different regulations from the law about the community property's ownership*". [11]

The object of the marriage settlement can be the things mentioned above also the holding. According to the marriage settlement, the woman can decide how much she wants to conduce the costs, the system of the community properties. The marriage settlement is valid till the end of the marriage, if the spouses had not make an appointment for the availability or get divorced.[12]

The main goal of the marriage settlement is that if it comes to divorce, the ex-married ones get the properties which they brought to their marriage and a fair part of the community property. The community property has to be separated by the facts that if one of the spouses could not be able to conduce to the charges, there were other ways to do it, like raising their child or housekeeping.[13] For a valid marriage settlement agreement these contracts have to be certified by a notary, so the assign body sets it down. Its function is to provide the content of the contract.[14] If one of the spouses was the reason of the end of the marriage, the other one has the right to decide if their marriage settlement agreement is in force or leaves off. If no one caused the divorce just they hate each other the marriage settlement agreement is invalid.[15]

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[10] *Ibid.*, p. 192.
[11] Draft of Legislative Proposal on the Private Law Code for Hungary in 1928, 165. §
[12] RAFFAY, Ferenc: A házassági szerződések [The marriage settlements]. In: RAFFAY, Ferenc: *A magyar magánjog kézikönyve* [*The handbook of the Hungarian Private Law*] I. Győr, 1909, p. 491.
[13] *Ibid.*, p. 489.
[14] HERCEGH, Mihály: A házassági vagyonjog Magyarországban [The matrimonial property in Hungary]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1873, no. 24., p. 183.
[15] *Ibid.*, p. 184.

4. The presence and the future of the marriage settlement

The popularity of the marriage settlements is accomplished. But what is the reason of this popularity? As It was written it in the beginning of my paper, the marriage settlements are cheaper than the matrimonial causes. Making of a marriage settlement can be seemed as mistrust, and I am sure that some of the older generations think it is straightforward shocking, but on the other hand, we can see it as a very rational decision, because the marriage settlement proves what the would-be married ones bring into their marriage, and it gives some freedom for the parties to know what their separate properties are. My opinion about the marriage settlement is, that they will not be less popular than nowadays, because the growing up generations see the advantages of the marriage settlements in their environments' divorces.

Noémi KOVÁCS: Marriage impediments in 19th century in Hungary

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1. Introduction

In my study I would like to present the marriage impediments in 19th century in Hungary. These impediments were enacted in the Act on civil marriage in 1894. The Act was an important step in the modernisation of the Hungarian private law system because it helped to minimize the presence of the church in the legal field. Prior to the Act the church had total control over the marriages but in 19th century it became unacceptable. Although the political leaders considered the country not to be ready for the introduction of the civil marriage yet therefore, they postponed the draft for a couple of decades. In 1894 the Parliament enacted the Act on civil marriages which meant that the only legal way of marrying was the civil ceremony presented by the state. The Act was largely instrumental in the makeover of the Hungarian legislation.

2. Marriage impediments

In the following part I would like to present the marriage impediments based on the Act of civil marriage (1894). This Act regulated the marriages and stated that only civil marriages will be accepted as civil contracts. The Act also declared the impediments which make the marriage illegal. These impediments can be divided into two groups: impediments are either diriment, which invalidate an attempted marriage, or prohibitive, which make a marriage illicit, but it remains valid. The diriment impediments are the following[1]:

The first impediment was incapability. When someone cannot gain rights and obligations, naturally it means that they cannot marry anyone. Being under-aged is also an impediment, the Act stated that women under 16 years old and men under 18 years old cannot contract a marriage. The minister of justice could give an exemption in well-founded

[1] MESZLÉNY, Arthur: *Házassági jog és bírói gyakorlata* [*The marriage law and its judicial practice*]. Budapest, 1930, Grill Károly Könyvkiadóvállalata, pp. 6–10.

cases. Similarly, to under-aged people minors also cannot marry without the consent of their legal representative. This means that minors under the age of 20 cannot marry without the consent of the parents, if the legal representative is someone else. If the minor does not have a parent, then the guardianship authority will give the consent. The guardianship authority also gives the consent if the parent refuses to give it and the case is well-founded. The authority is obliged to follow the minor's requests if possible. There are several other supplements to this rule, firstly, the entitled to give the consent is the father. If the father is not present or the child is born out of wedlock, then it is the mother. The other supplementary rule is that if the parents divorced then the entitled person is the mother, if she is not present then it is the father.

The diriment impediments include the ones that forbid the marriage between relatives. This means that marriage was forbidden between lineal blood relatives, siblings, and sibling's direct descendants. This rule served as the protector of moral values. In the 19th century the marriage of relatives was no longer accepted, in contrary with the previous centuries. The monarch could give an exemption in well-founded cases. It was also forbidden to marry the spouse's blood relatives after the divorce. Although there was no blood relation between these people it was still important to protect the morality of marriage even after the divorce. This rule concerns only to the lineal relatives (ascendants, descendants). Therefore, for instance the widow can marry the late spouse's sibling. The Act does not make any difference between siblings and half-siblings or illegitimate siblings. Those siblings who do not have common parents can marry each other.

3. Prohibitive impediments[2]

The most unequivocal impediment is an already existing marriage. The Act stated that those people who have valid previous marriage cannot marry. According to the Act marriage is also forbidden if one party tried to murder the other party's previous spouse. This rule averts those murders which would happen due to make possible a new marriage without divorce. Marriage is forbidden if one party is under the process of being placed under curatorship

[2] *Ibid*., pp. 11–14.

because of being deaf-mute or having a mental-illness in the following cases: a temporary curator was appointed; they are under closure or if one party have been placed under curatorship but the verdict has not been made yet. People under curatorship (because being deaf-mute or having a mental illness) cannot marry without the consent of the curator. These rules protect those who are not fully capable of making such decisions like marriage. With these impediments it is impossible to take advantage of the vulnerable situation they are in.

According to the Act it is forbidden for minors over the age of 20 to marry without the consent of the parents. There is also an impediment between cousins. The minister of justice had the right to give an exemption in well-founded cases. This rule concerns only first-degree cousins.

The Act has a very extensive regulation in the field of adoptive relationships. Marriage is forbidden between adoptive parent and adoptee because this relationship was considered to be similar to a parent-child relationship and therefore its moral value was to be protected. The rules expanded to the relationship between adoptee and adoptive parent, adoptee and adoptive parent's previous spouse, adoptive parent and adoptee's previous spouse, adoptive parent and adoptee's descendant or descendant's previous spouse and between adoptee and adoptive parent's descendant or descendant's previous spouse. In the two latter cases the minister of justice had the right to give an exemption. The Act does not make difference between legitimate and illegitimate origin.

Similar to adoptive relationship marriage is forbidden between guardian and pupil as long as the tutelage consists because of the same reasons. Marriage is forbidden between those who have been interdicted from marrying each other because of adultery. The monarch had the right to give an exemption in well-founded cases. Spouses cannot marry until the previous null and void marriage is still valid. This impediment makes it impossible to have two marriages at the same time. To avoid the consisting of two marriages the Act forbid marriage when it was proved that the legally dead person outlived the date of the presumption of death and the spouse is aware of this fact. Marriage is forbidden for those who have committed murder on their previous spouse. This rule concerns those as well who attempted murder on their spouse. The monarch could give an exemption in well-founded cases.

For women there was a special rule regarding the marriage impediments. They cannot marry after the end or the invalidation of their previous marriage for 10 months. This rule does not concern those women who have given birth within the 10 months. The minister of justice had the opportunity to give an exemption in those cases where he found it reasonable. This rules purpose was to avoid any misunderstanding about the father's identity.

The consent of the church for people who are part of any ecclesiastical order is required to marry, without it marriage is not possible. Marriage is also forbidden without marriage license. This rule concerns to the soldiers of the National Army. They are required to ask a permission from the minister of defence. To marry it is required to make proper annunciation, when it is not made then the marriage is not possible. The administrative authority could give an exemption.

4. Averting the marriage impediments[3]

When creating the Act of civil marriage, it was highly important to establish impediments which protect the moral purity of this new rule. Although it was well-known by the lawmakers that the Act cannot regulate every single detail about the marriages because that would be too restrictive. Therefore, besides determining marriage impediments they also created the rules which can avert these impediments. In the following section I would like to present these possibilities. The impediments can be divided into two groups based on whether they can be averted or are not avertable.

The marriage impediments which are not avertable serves higher moral purposes and therefore there is no possibility to avert them. For instance, blood relatives cannot marry in any circumstances because it is strongly against moral values. These impediments are the following: between blood relatives (except one's sibling with one's descendant) and lineal in-laws. When someone has an existing (not null) marriage or existing (null) marriage or attempted to murder the spouse or is under curatorship (either because of being deaf-mute or having a mental illness). It is also unavertable to outlive the presumptive date of death.

[3] RAFFAY, Ferencz: *A magyar házassági jog* [*The Hungarian matrimonial law*]. Budapest, 1902, Grill Károly cs. és kir. udvari könyvkereskedése, pp. 79–85.

All the other impediments are avertable because in those cases the regulation does not have to be rigid to protect the moral values.

The tools of averting the marriage impediments are the following: the monarch or the minister of justice could give an exemption but only in cases where the Act made it possible. An exemption was an option only prior to the marriage. Giving an exemption is a discretional authority therefore it could be denied without justification. Ex-post approval makes the marriage valid from the date of marrying. It can avert the following impediments: incapability, being under-aged, being minor, compulsion, error and deception. Cohabitation averts the impediment ipso facto when the marriage is null because of essential modal deficiency and the cohabitation lasts more than one year. In other cases, it averts the impediment conditionally, then it is similar to the ex-post approval and averts the same impediments. The impediment based on minority can be averted with the consent of the parent, legal representative or the guardianship authority. In the cases of minors marrying under 20 years old the consent of the parent or the guardian is not needed if they gave their consent prior.

The abolition of adoption averts all the impediments based on the adoption. Likewise, the abolition of tutelage averts all the impediments based on tutelage. Childbirth averts the 10-months long period while the woman cannot marry after their previous marriage. A foudroyant fatal illness averts the impediment of proper annunciation. The last tool of averting the marriage impediments is desuetude, it consumes the possibility of legal actions in cases of diriment impediments.

5. Summary

When creating the Act of civil marriage, it was highly important to produce a rule that would serve the Hungarian law system for a long time effectively. The lawmakers aimed to regulate and modernize the field of marriages and when making the rules of the civil marriage it was also important to state the marriage impediments as well. These impediments were essential to protect the morality of the marriage and cannot be said that they were irrationally strict. Many of these impediments are part of the Hungarian marriage law today (for instance the prohibition of blood relatives or the previous valid marriage). These new

rules were completely based on modern law principles and followed the Western-European trends.

The Act of civil marriage was an important step in the process of modernizing the Hungarian law system at the end of the 19th century. The new regulation of the marriage law was essential in order to catch up with the Western-European law systems which were far ahead of the Hungarian system at that time. With the modernisation of the public law system Hungary became a developed and advanced country which later gained a leading position in the Central-European region.

Panna BÁLITS: Legal regulation of divorce in Hungary at the end of the 19th century

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1. Introduction

As we know, human relationships can come to an end. People make mistakes, they choose the wrong person, they change, and these can all cause the end of a relationship. As one of the most important human relationships, a.k.a. marriage was institutionalised, its ending had to be institutionalised as well, so was divorce created. The regulation of divorce had more and more effect on people's lives as the nature of marriage changed and divorce became more frequent. When the law regulated divorce reasons strictly, it was more difficult to end a marriage, but today's regulation is more permissive, and the unredeemable marriage can be ended even by the mutual agreement of the spouses.[1]

The Hungarian regulation of divorce was softened in 19th century due to the Act 31 of 1894 on Civil Marriage. The Act regulated divorce actions more allowing than the private law before 1848, although there are still some major differences between the recent divorce regulation and the Act's rules.

2. The significance of religion

The dissolution of marriage was always affected by the church since state and law exist. Divorce was regulated strictly in the Roman law despite of the fact that personal liberty was harmed by this strictness. Later the Christian emperors drew distinction between different divorce reasons, unjustified divorce was punished and the dissolution by mutual agreement was oppressed with financial disadvantage. Although marriage is sacred according to the Catholic Church, and therefore it cannot be annulled, the institution of divorce still existed in the medieval Christian countries.

[1] 2013. évi V. törvény a Polgári Törvénykönyvről [Act V of 2013 on the Civil Code], 4:21. §(1)

As long as the Church had a significant effect on the Hungarian law, the divorce regulation was stricter, but as legislation got more and more influenced by the concept of equal rights and rule of law the indissolubleness started to fade and the regulation became more permissive[2]. The Act regulated the possibility of divorce and so extended the personal liberty, which was a major progress compared to the divorce regulation before 1848. The Law's starting point is that marriage meant to be for a lifetime, however it makes allowance for the common truth that relationships can to go wrong and end.[3]

3. Reasons for divorce

There are three ways to end a marriage according to the Act. Normally and most frequently, the dissolution is caused by the death of a spouse. Marrying someone new after the previous spouse disappeared and was declared *dead in absentia* ended the bonds of the former relationship. The third possibility was the divorce decree, which ended the marriage and the divorce action. The Act did not mention any other ways of ending a marriage that caused the invalidity of other transactions (for example the mutual agreement between the spouses.)

The regulation of divorce decree was based on culpability, therefore the reason for divorce could only be such a behaviour that included the intention of breaching marital. This concept excludes those reasons where both spouses contributed in violating their duties. Act determined the divorce reasons in §76 to 80 and did not authorise the court to consider other reasons *ex officio*.[4]

[2] GOSZTONYI, Gergely: Szabadságjogok [Fundamental freedoms]. In: KÉPES György (ed.): *A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban* [*The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration*]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 217–232.

[3] GROSSCHMID, Béni: Különös rész [Special Rules], In: GROSSCHMID, Béni: *A házasságjogi törvény* [*The Act on marriage law*], Budapest, 1908, Politzer-féle Könyvkiadó vállalat, pp. 643–645.

[4] NAGY, Domonkos – TÓTH, György: *A házassági jog és a kuria gyakorlata* [*The marriage law and the practice of the Curia*], Budapest, 1940, Attila-Nyomda Rt., pp. 121–125.

4. Absolute reasons

According to the Act the divorce action can be brought by a spouse when the other spouse commits crime against sexual morality or marries someone else knowing about the existence of the first matrimony.[5] Adultery had specific conclusion of facts. To be considered as adultery, the spouse had to have intentional sexual intercourse with a partner other than his/her spouse. The act had to happen during the conjugal community and had to be the reason for the union to end. The judicial practice did not presume that the sexual intercourse happened therefore it needed specific evidences. It almost seems absurd for us how some facts were not considered as enough evidence for adultery, for example when the evidence only proved that the spouse spent time in the room of a prostitute. Even the fact that the wife had a child while her husband was away, was not an absolute evidence for the presumption of fatherhood. The intent meant that the intercourse happened with the sense and will of the partners. This rule meant to ensure that only the culpable behaviour was punished. To prove the intercourse, the third person had to be named, so there could not be any divorce sentence if the third person was unknown. To be considered adultery the act should have happened while the spouses were living together. This meant sharing household, however the judiciary accepted other cases as well, for example when a spouse was away because of military reasons, sickness or for work. If the union did not end in consequence of the adultery, the judge assumed that the act was forgiven and dismissed the divorce action.

The restrictive interpretation of adultery did not harm but helped the spouses, because the judge could end the marriage anyway based on §80. The divorce decree based on the §76 however, was followed by more serious sanctions, for instance the guilty spouse could not marry the person he/she committed adultery with, therefor the child born out of wedlock could not be legitimized.[6]

The Act mentioned crimes against sexual morality as a divorce reason to give everyone with good morals a chance to end their relationship with a sinner. The law did not give any details about the meaning of the sexual crimes but authorised the court to ponder the facts

[5] NAGY – TÓTH, *op.cit.*, p.137.
[6] *Ibid.*, pp. 129–134.

and decide whether the case fits into this divorce reason or not.[7] The Act also talks about treacherous abandonment as a divorce reason. The abandoned spouse could ask for a judicial order six months after the conjugal community was dissolved or one year after the other spouse's location became unknown. If the leaving spouse did not come back without any righteous reason, the abandoned spouse could start a divorce action. The conjugal community is the base of matrimony, without it the marriage cannot function as it supposed to, however the judicial practice considered only a couple cases treacherous abandonment.

Leaving for work or military reasons were not considered as treacherous abandonment, because in these cases there were no intention for ending the union. The most common reason for dissolving the conjugal community is that the place the married couple lived in was unsuitable. Another term of treacherous abandonment is that the abandoned spouse had to have intention for setting back the union, so if the spouse only asked for the judicial order to later file a petition against the leaving spouse, the judge dismissed the divorce action.[8]

Another reason for divorce was the endangerment of the spouse's life or health, which was a result of the non-functioning relationship[9]. During the divorce action the seriousness of the endangerment was considered, for instance infecting the spouse with syphilis resulted a divorce decree, while in case of smaller outrages the judge dismissed the action. The judge also examined how the spouse's behaviour affected the relationship, and only ended the marriage when the married couple's relationship was beyond all bearing.[10] The judge ended a marriage on request of the spouse, when the other spouse was sentenced to death or more than five years of high - or medium - security prison after the wedding. This rule meant to save the innocent spouse's honour, because the sentence affected the partners' credits equally.[11]

[7] GROSSCHMID, *op.cit.,* p. 676.
[8] MESZLÉNY, Arthur: *Házassági jog és bírói gyakorlata* [*The marriage law and its judicial practice*]. Budapest, 1930, Grill Károly Könyvkiadóvállalata, p. 59.
[9] GROSSCHMID, *op.cit.*, pp. 687–689.
[10] MESZLÉNY, *op.cit.*, pp. 85-86.
[11] GROSSCHMID, *op.cit.*, p. 694.

5. Relative reasons

The §80 shows relative divorce reasons, in which cases the divorce decree is based on the judicial discretion. In these cases, the judge considered the damage in the relationship caused by the culpable spouse and dissolved the marriage if the couple's relation was beyond repair. One of the relative divorce reasons was the intentional breaching of the marital duties, which was not specified by the law because of the multifariousness of human behaviour. The nature of marriage requires love, respect and appreciation, and people invented all kinds of ways to harm them.[12] Insobriety, spending too much of the spouse's money, leaving the husband for becoming an actress, or the valid suspicion of the spouse starting a sexual relationship with someone else could be considered as enough reason for a divorce decree.[13]

Another reason for divorce is when the spouse tempted the family's children to immoral behaviour or committing crime, for example when a spouse helps her daughter commit adultery.[14] The Act considers immoral lifestyle a relative reason for divorce as well. The judge considered the spouse's insobriety, gambling addiction and infamous job, such as prostitution, and usually ended the marriage when the spouse did not show any ambition for making a change in his/her lifestyle.[15] Based on the judge's consideration, the marriage could be dissolved if one of the spouses was sentenced to less than five years of high or medium security prison or low security prison because of misdemeanour on account for greed of gain.

6. A glimpse into the improvement

Through the 20th century, the legal regulation of divorce became more and more permissive. The divorce decree wasn't only based on culpability anymore, and even the safety of women got more attention. In the second half of the 20th century the Hungarian divorce regulation

[12] GROSSCHMID, *op.cit.*, p. 698–702.
[13] MESZLÉNY, op.cit., pp. 87–91.
[14] NAGY – TÓTH, *op.cit.*, pp. 206–207.
[15] MESZLÉNY, *op.cit.*, p. 107.

required serious and solid reason and evidence for the divorce decree, however later on the married couple could end the marriage based on mutual agreement. The new regulation intended to save the institution of marriage by the two-round divorce action and the placating hearing, which gave time to the couple to reconsider the dissolution of marriage. Current rules extend personal liberty in the regulation of divorce as well and let people handle their relationships at their own discretion.[16] I hope I managed to demonstrate that the first step towards a more liberal and more humane divorce regulation in the Hungarian legal system was the Act of 1894 on Civil Marriage.

[16] NAGY, Márta: A házasság megszűnése [The dissolution of marriage]. In: JAKAB, András – FEKETE, Balázs (eds.): *Internetes Jogtudományi Enciklopédia* [*Internet Encyclopedia of Jurisprudence*] (HEGEDŰS, Andrea (ed.): Family Law) http://ijoten.hu/szocikk/a-hazassag-megszunese (2018). [6] – [7]

Ana TURIĆ: The marital relationship and inheritance in Croatia – a historical overview

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1. Introduction

Marriage is the living community of a woman and a man in whom personal and financial relations are realized, with a possible inheritance aspect.[1] Throughout history, both Croatian and general, a surviving spouse did not always have the right to inherit a part of the estate of the deceased spouse. Moreover, if the spouse had that right, he/she was often discriminated against in the way that he/she was equal with the relatives of the deceased in a further order of succession. Particular attention should be given to the case where a widow is a surviving spouse, who in one period was directly legally and really discriminated, and in the second, formally equal with a man, but in reality, unequal which was an indicator of her position in society.

The aim of this study is to show how marital relationship as a foundation of inheritance evolved in Croatia from the period of feudalism through the period of validity of the Austrian General Civil Code and the period of socialism until today, when we can say that marriage is fully recognized as a foundation of inheritance.

2. The right of succession according to the Tripartitum

In the period of feudalism inheritance law was marked by the variety due to the distinction of the estate in terms of acquisition and some other criteria.[2] Also, the right to inherit was arranged differently for certain classes so it was important whether they were members of

[1] Croatian family law determinates that marriage is a living community of a man and woman regulated by law. Obiteljski zakon Republike Hrvatske [The Family Law of the Republic of Croatia], Narodne novine, no. 103, Zagreb, Art. 12

[2]The law of succession was different for the inherited and acquired property and for the movable and immovable property. See more: KREŠIĆ, Mirela, PILIPOVIĆ, Matea*: De succesione colonorum: O nasljednom pravu kmetova u Kraljevini Hrvatskoj i Slavoniji* [*De succesione colonorum: On the peasants' right to inherit in the Kingdom of Croatia and Slavonia*]. Povijesni prilozi, vol. 49, no. 49, 2015, pp. 211–233.

the nobility, citizens or the peasants.[3] The main law on succession of the feudal period in Croatia and Slavonia was the *Tripartitum* made by István Werbőczy in 1514. It was in force in Croatia until the introduction of the Austrian General Civil Code in 1853.

The *Tripartitum* does not recognize the succession rights of the spouses. In accordance with its provisions, the deceased's widow had certain rights to her husband's estate, and she had to claim them to the successors of her deceased husband. She was entitled to a portion of immovable property, that is, the right to an apartment and maintenance that are appropriate to her status and the right to equipment in the case of her re-marriage. Such right was called the widow's right, and it consisted only of the right to *usufruct*, but not the ownership right. However, certain items were attributed to the widow after the husband's death: the suit he was wearing most, his wedding ring, horses and carts most often driven by spouses, a certain portion of the horses and a part of the movable and pledged immovable property of the deceased equal to the parts given to his children. On the other hand, husband did not exercise any rights to the property of his late wife. If she died without descendants, her property should belong to her parents or relatives in the indirect order of succession.[4]

Marriage is finally recognized as a foundation of inheritance by the Act 9 of 1687 by the Hungarian Parliament. Nevertheless, it has introduced mutual intestate succession of spouses who had no children in marriage, or who had not disposed their assets *mortis causa*. Furthermore, the possibility of mutual inheritance was narrowed to acquire movable property and pledged real estate. Acquired real estate entered that circle only if the name of the acquirer's spouse was mentioned in the acquisition certificate. For the widow, the rule was that she had the right to heritable movables only if there were no male relatives, but she had no rights to the heritable real estate.[5]

[3] *Ibid*., p. 229
[4] LANOVIĆ, Mihajlo: *Privatno pravo Tripartita* [*Private law according to the Tripartitum*]. Zagreb, 1929, p. 115.
[5] *Ibid.*, p. 118, 312.

3. The law of succession according to the Austrian General Civil Code

The Austrian General Civil Code was introduced in Croatia and Slavonia in 1852, entered into force in 1853 and it put all previous regulations and practices in the area of civil law, namely the *Tripartitum*, out of force. It has removed the difference between the inherited and acquired and movable and immovable property, and the class of the deceased and the successors has become irrelevant.[6] In other words, most of the features of feudalism have been removed from the law of succession by the General Civil Code.

The legal basis of inheritance was the inheritance contract, a will and law. The application of the inheritance contract was limited to married or engaged couples if they marry eventually. On the other hand, the testator could almost completely freely dispose of his/her possessions by will. The only limitations were legal heirs determined on the basis of kinship and marital relationship.

3.1. The surviving spouse as legal heir

The General Civil Code speaks of "On the intestate succession of husband and wife"[7] although this expression is not quite accurate with regard to the content of its provisions. Namely, the surviving spouse's right to inherit was in most cases in competition with the rights of the deceased's relatives in the first order of succession, i.e. descendants. Because of that, the surviving spouse only had the right to *usufruct*. If his/her right to succession was combined with inheritance rights of relatives from further orders of succession, or if they did not exist, the surviving spouse enjoyed the position of the legal heir.

The premise that should have been met in order for the surviving spouse to exercise his/her right to inherit was a lawful marriage with the deceased that lasted until the death of a spouse. If the marriage was declared null or void, or if they were divorced, the surviving

[6] KREŠIĆ, Mirela: *Zakonsko nasljeđivanje bračnih drugova prema Općem građanskom zakoniku na hrvatsko-slavonskom pravnom području* [*The legal succession of the spouses according to the General Civil Code on the Croatian and Slavonian legal area*]. Zbornik Pravnog fakulteta u Zagrebu, vol. 60, no. 2, 2010, p. 529.
[7] Opći građanski zakonik [General Civil Code], Art. 757–759.

spouse would lose the right to the estate. A null marriage was the marriage at whose conclusion existed one of the legally anticipated obstacles.[8]

Special provisions of the General Civil Code also regarded to the case of separation from bed and board. It did not necessarily lead to the loss of the right to succession. If the surviving spouse had been separated from the bed and board by his/her own fault he/she could not claim any rights to the estate,[9] and if that was not the case, the right to inherit remained intact. This right was retained even if the spouses lived separately, but did not initiate a process for separation from the bed and board. If the proceedings were initiated and the spouse died before its termination, the decisive fact was whether the spouses lived separately or not. If they did not live separately, the surviving spouse had exercised the right to succession and if they did not live together the right depended on the guilt of the surviving spouse for separation. Evidence were brought by the deceased's successor by protesting to the successor's statement given by the surviving spouse, challenging his right to *usufruct* or the right to own. If the guilt was not proved, the surviving spouse exercised his right to inherit the deceased spouse regardless of the initiation of separation proceedings.[10]

3.1.1. The surviving spouse and the right of *ususfructus*

As already mentioned in the previous excerpts, the surviving spouse could exercise the right to succession in the form of ownership or in the form of the right to *usufruct*. Which of these two forms would take place depends on who are the successors of the deceased. If potential legal heirs of the deceased were his descendants, the right belonging to the spouse was solely the right to use a certain part of the estate while the ownership right was reserved for his children.

The surviving spouse had the right of *ususfructus* independently of his/her financial situation and regardless of remarrying. It did not cover the entire estate but only one portion

[8] *Ibid*., Art. 44–136
[9] *Ibid*., Art. 759.
[10] RUŠNOV, Adolf: *Tumač općemu austrijskomu gradjanskomu zakoniku – knjiga II* [*Commentary of the Austrian Civil Code – book II*]. Zagreb, 1910, pp. 156–157.

of it determined by the number of deceased's children.[11] If the deceased had less than three children, the surviving spouse was granted the right to enjoy 1/4 of the estate, and if the number of children was equal to three or more, the surviving spouse had the right to enjoy the same part as any of the children.[12] It should be emphasized that the right to succession did not depend on whether the children of the deceased are also the children of the surviving spouse as well. Moreover, the children often denied the right to succession to the widow of their late father.[13]

The provisions of the General Civil Code concerning the part of the estate available for *ususfructus* were not exclusive. The testator could alter the lawfully prescribed portion of the estate that the surviving spouse would enjoy for a lifetime after his death. However, the deceased could not convey the right to own a particular part of the estate to the spouse but only to increase the part foreseen for *ususfructus*.[14]

3.1.2. The surviving spouse as owner

The General Civil Code also regulates the situation when the deceased does not leave any descendants behind. Then his potential legal heir are relatives of the following five orders of succession and surviving spouse who receives ¼ of the estate.[15] Unlike the case where the deceased leaves the children behind who become the owners of the estate, and the spouse is the beneficiary, here the spouse acquires the ownership right over the corresponding part of the estate and can indeed be considered as the legal heir of the deceased. Although such proprietary position of a surviving spouse at first sight is considered to be preferable, it should be taken into account that he/she only acquired a small part of what the spouses gained and maintained together, and the bigger part of the estate goes to relatives of the deceased which was clearly unjust.

[11] Under the name „the deceased's children "were considered the deceased's children born in marriage, and the legitimized and adopted children. If the late spouse was a wife, children born out of marriage also belonged to that circle. See more: General Civil Code, *op.cit*. Art. 752–755.
[12] *Ibid*., Art. 757.
[13] Krešić, *op.cit*., p. 534.
[14] *Ibid*., p. 535.
[15] General Civil Code, *op. cit*., Art. 758.

The last solution provided by the General Civil Code was the possibility that a surviving spouse became an exclusive legal heir.[16] This was only possible if there were no relatives of the deceased from the six orders of succession which practically did not happen in practice.

3.1.3. The widow as a surviving spouse

The law of succession of the General Civil Code introduces gender equality. In other words, it becomes irrelevant whether a surviving spouse is a man or a woman. Nevertheless, this principle was not fully respected in practice, which manifests itself in cases where a surviving spouse is a woman. The position of women is generally subordinated in the General Civil Code. Women could not be tutors or custodians, nor witnesses of the will. The husband was the head of the family and he had the right to manage the household and the right to represent his wife.

He was also obliged to provide the wife with a decent support regardless of whether she had her own property. The wife was obliged to take her husband's last name, his residence, execute his orders and make sure that others were also executing them.[17] If it was not arranged differently by the marital contract, each spouse is the owner of the estate that he/she brought into marriage. Nevertheless, *presumptio muciana* from the Roman law was included into provisions of the General Civil Code.[18] According to that presumption, the property that was gained in marriage, and in regard which existed a doubt to whom of the spouses it belongs, is considered to be husbands.

However, women were allowed to carry out an independent vocation that took them out of the shell, in which they were considered as mothers, wives and housewives, and included them in the processes of urbanization and industrialization. Finally, women, by their involvement in economic life, have contributed to the gradual weakening of stereotypes about them, and have become entrepreneurs, teachers, clerks, etc. The position of women in Croatia has changed in different directions from the 19th to 20th century, but the increased economic significance of women over time has become one of the main factors that

[16] KREŠIĆ, *op.cit.*, p. 539.
[17] General Civil Code, *op.cit*., Art. 91–92.
[18] General Civil Code, *op.cit.,* Art. 1237.

ultimately provided women with the same rights as men. Today, discrimination based on sex is prohibited by the Constitution of the Republic of Croatia and by a special law.

4. The law of succession in Croatia in the second half of the 20th century

At the time of the Kingdom of Yugoslavia and the Independent State of Croatia, an attempt was made to replace the General Civil Code with the new Civil Code and the rules regarding succession were also amended. Nevertheless, these amendments never came into force, so the General Civil Code remained in force in Croatia until 1946 when it was extinguished by the Law on the irregularity of legal provisions issued before April 6, 1941, and during enemy occupation.[19] The importance of the General Civil Code for Croatian legal history is manifested in the fact that even after its validity some of its provisions have been applied and this possibility existed in the legal order of the Republic of Croatia.[20]

In its further development, the Federative People's Republic of Yugoslavia and later the Socialist Federative Republic of Yugoslavia has almost entirely been included in the socialist legal circular which, in terms of inheritance law, stands out with certain characteristics. These are the overcoming of intestate succession as opposed to the dispossession of property by will, the narrowing of the circle of potential legal heirs, the empowered position of the spouse as a legal heir, the equality of women and men as spouses, and the appreciation of the specific circumstances and needs of particular heirs, such as spouse or parents.[21] An important regulation for this period is the federal 1955 Law on Succession, which was drawn up in accordance with Swiss law of succession. It has put the surviving spouse as a potential legal heir side by side with the deceased's relatives with a substantially enhanced position in relation to the one he/she had under the General Civil Code.[22] The condition that should have been met was a valid marriage that lasted until the death of the deceased. However, if

[19] Zakon o nevažnosti pravnih propisa donesenih prije 6. travnja 1941. i za vrijeme neprijateljske okupacije [The law on the irregularity of legal provisions issued before April 6, 1941, and during enemy occupation]. Službeni list FNRJ, no. 86, Art. 1–2.
[20] Zakon o načinu primjene pravnih propisa donesenih prije 6. travnja 1941. [The law on the application of legal provisions issued before April 6, 1941]. Narodne novine, no. 73, Art. 1–2.
[21] GAVELLA, Nikola, KLARIĆ, Petar, STIPKOVIC, Zlatan i ost.: *Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalno-europskom pravnom krugu: teorijske osnove građanskog prava* [*Civil law and affiliation of Croatian legal order with the continental-European legal family: theoretical basis of civil law*]. Zagreb, 2005, p. 97.
[22] *Ibid*., pp. 96–97.

the deceased has initiated divorce proceedings during his/her lifetime, and after his/her death it was found that the lawsuit was established, the spouse would lose the right to inherit. The same was true if, after the death of the spouse, it was established that the marriage was improper, and the surviving spouse knew the cause of its invalidity at the time when marriage was concluded. Finally, the surviving spouse would lose the right to inherit if the marriage union with the deceased has permanently ended, either by the fault of the surviving spouse or on the basis of his agreement with the deceased.

5. Conclusion

The development of marital relationship as a factor that provided certain rights to inherit was long-lasting. At the beginnings of development, the only secured rights were the right to use a certain part of the estate and/or a small part of ownership rights. Today, in accordance with the Law on Succession of the Republic of Croatia, the surviving spouse is considered as the forced heir together with the descendants, the adopted children and their offspring.

The beginning of such development was initiated by the Act 9 of 1687 which recognized marriage as a foundation of inheritance. Furthermore, great contribution was given by the General Civil Code where the marriage bond had a dual role. It has been used to establish a marriage kinship which is important for determining the potential circle of legal heirs, but also as a factor that enables surviving spouse to exercise certain rights on the estate of the late spouse. Nevertheless, the position of the spouse as a user or owner of a small part of the estate in relation to the relatives of the deceased was considered unjust. Because of that, in the socialist period the position of the spouse was improved, and he/she became a forced heir. Furthermore, the position of a woman as a surviving spouse was also advanced and she was no longer subject to discrimination in this field.

Today, in Croatia, the marital relationship is fully recognized as a factor that puts the spouse in a position to inherit the deceased spouse with equal rights as the descendants, whereby they inherit the same parts. If the deceased did not leave any descendants, the estate is divided between his/her parents and the surviving spouse, where the spouse is entitled to half of the inheritance while the other half is shared between the parents where

each gets a quarter of the estate.[23] If both of the deceased's parents died before the deceased, the entire estate will belong to the surviving spouse.[24] In other words, the marital relationship has evolved as the foundation of inheritance so that under certain circumstances the surviving spouse can become the sole successor of the deceased. Finally, it is a reflection of a modern era in which the role of a nuclear family in society is strengthened, further related ties are weak, which also reflects in a modern inheritance law where such relatives do not enter a circle of potential legal heirs.

[23]Zakon o nasljeđivanju Republike Hrvatske [The Law on Succession of the Republic of Croatia]. Narodne novine, no. 48, Zagreb, Art. 11.
[24] *Ibid.*

Alen ŠUKURICA: Regulation of the parent – child relations during the 20th century Croatia

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1. Introduction

The relation between parent and child is one of the foundations of family law, as today we can see numerous thesis about family being a subject that encompasses parents and their children. This relation is a sensitive and delicate matter since, *eo ipso*, children are minors and in legal view they do not have full legal capacity. That fact means that children cannot fully exercise and therefore protect all their rights on their own. Naturally due to that fact, parents are, in most cases, the ones that jump in position of having responsibility for children, for protection and exercise of their legal rights. This idea of having two elements of the parent – child relations has already been seen in Croatian family law theory, which says that these two elements are biological and social element. The biological element emphasizes the fact that parents give birth to children and that children cannot take care of themselves, so their parents take care of them. The social element gives a framework, most importantly a legal one that sets out the rights and obligations which parents have over their children. The biological element was, and remains the same, but the social one changed throughout history.[1] In that manner the relation of parent – child relations plays a key role.

2. Legal theories on parent – child relations: a brief historical overview

Throughout history, there has been several theories on relations between children and parents that have developed consequently with social and historical developments. First traces were seen in ancient Greece where the term *filia* was used for family that falls into the natural law theories. In ancient Greece Aristotle attributed the subordinacy of children to parents with the rule of ancestors and progeny, meaning that each one once had an

[1] PROKOP, Ana: *Odnosi roditelja i djece* [*Parent – Child Relations*]. Zagreb, 1972, p. 11.

ancestor and that at one time in the future will be himself an ancestor.[2] Roman law as it is commonly known also had a specific patriarchal family and social system that gave full and absolute power to the father of the family over the children. This meant that the father could e.g. sell his child or even kill him since he had the right called *ius vitae ad necis*.[3] The middle ages developed the children – parent relations on hierarchy, conventionalism and functionalism.[4] Hierarchy says that parents have *potestas* over children that comes from the Roman law *ius in personam* (rights over the person); this theory's biggest lack is comparing a child with an object.[5] Conventionalism on the other hand claims that the parental right, *potestas,* derived from the consent of the child that parents can perform parental rights.[6] Lastly, in the Middle Ages functionalism as a theory sees parental rights over children as a natural thing in a way that it exists over the fact that children cannot take care of themselves and that is where parents jump in. Members of this legal theory school saw this parent – child relations mainly from the purpose perspective and viewed the rights and obligations of parents from that angle. [7]

3. Austrian General Civil Code as a base for the regulation of parent – child relations in Croatia from 1852 to 1947

The ABGB (*Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie*) went into power by the Emperor patent in 1852 in the Kingdom of Croatia and Slavonia and made an effect *inter alia* also in family law, and specifically for the topic of this paper, a legal source for the parent – child relations.[8] Even though it is called a Civil Code, it has within itself a patriarchal system, meaning that the father of the family still had most of the rights focused in his person. The important articles

[2] HRABAR, Dubravka: *Dijete – Pravni subjekt u obitelji* [*The Child – Legal Subject in Family*]. Zagreb, 1994, pp. 16–17.
[3] PROKOP, *op. cit*., p. 11.
[4] *Ibid.*, p. 18.
[5] *Ibid.*
[6] *Ibid.*
[7] *Ibid.*, p. 19.
[8] Cesarski patent od 29. studena 1852. kriepostan za kraljevine Ugarsku, Hrvatsku i Slavoniju, vojvodinu srbsku i tamiški banat, kojim se za ove krunovine uvodi sa više stegah i s potanjim ustanovami obći gradjanski zakonik od 1. lipnja 1811., i u kriepost stavlja počamši od 1. svibnja 1853. In: RUŠNOV, Adolf: *Tumač općemu austrijskomu gradjanskomu zakoniku – knjiga I* [*The Commentary on Austrian Civil Code – Vol. 1*]. Zagreb: Naklada Hartman (Kugli), 1910, 19–26.

of the ABGB that are relevant for the topic are those from the Third Chapter on the rights of parents and children, articles 137 to 186, which were a legal source until the December 1st 1947 when they were put out of force by the Basic Law on Parent – Child Relationship (*Osnovni zakon o odnosima roditelja i djece*).

Firstly I will analyse the first article of the Third Chapter, §137 which says that the legal source of the regulation of parent – child relations is the fact that rights from this relation are derived from marriage in essence, so if children were born out of wedlock they do not have the same rights as children born in a marriage.[9] Also, §138 defines legitimate children as those born in a marriage or those born ten months after the wife's husband died.[10] Then in §139 the ABGB sets out general principles of the duties and rights parents have over their children. Those are their obligation to raise their children, foster about their life and health and to give them sufficient maintenance, develop their physical and mental powers and teach them religion and useful knowledge for their future happiness.[11] Interestingly, in my regard for that time advanced, is that the ABGB talks about religious upbringing of children saying that the laws establish in which religion will the child be raised, also concerning marriages in which there are mixed religions, and as well when does the child have the right to choose his religion different from the one he/she was raised in.[12]

The first of the patriarchal characteristics can be seen in §141 that says that the father has a duty to take care of his children until they cannot take care of themselves. On the other hand, it also says that the mother is especially obliged to take care of their body and health.[13] In the next article the ABGB discusses who of the parents take care of the children if they divorce or can't agree on who takes care of the children, so the ABGB sets a rule that the mother must take care of the male children until their age of four, and take care of the female children until they are seven. Nevertheless, the father must spend for their upbringing and care. Continuingly the ABGB sets out principles that are visible in modern legislation as well, it claims in §143. If the father is poor, the mother must spend for their children. If they do not have a mother, or she is poor as well, then this duty falls on the father's parents and after them on the mother's parents.

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[9] SPEVEC, Franjo Josip (ed.): *Opći austrijski građanski zakonik* [*The General Austrian Civil Code*]. Zagreb, 1911, p. 53.
[10] *Ibid.,* p. 53.
[11] *Ibid.,* p. 54.
[12] *Ibid.*
[13] *Ibid.*

Regarding the child's activities, the parents here in common agreement have the right to control those activities and the children must respect their decisions. This *example gratia* falls apart from modern understandings, today in modern family law the child has a right to choose his path of education.[14]Also differently from today, and more of an example of the patriarchal system is the fact that the child inherit their father's surname, his coat of arms and all his other rights. In the following articles of the ABGB, now, can be blatantly seen the patriarchal element of the family law system of the codification. §147 deals with *patria potestas* and says that rights that belong to the father as head of the family make the *supra* said power of the father. Furthermore, that power is consisted of the father's ability to regulate these aspects regarding: a) child's class, b) property and c) child's duties. The first aspect concerning child's class prescribes that the father can choose to raise his child in the class he deems appropriate. Here the child, when it has grown up in age, can complain to the court to choose a different path if believes he/she will have more success in life. One interesting fact from that time's practice is of minors joining military service - if a minor has joined military forces without permission of his father or tutor then if the father or tutor asks the court to dismiss the minor from military service it will be so that the minor will be dismissed.[15] Secondly, regarding property of children, the ABGB prescribes that whatever the child gains from property in a legal way the management of that property will belong to the father. However, the incomes of that property shall be used for the care and raising of the child. If the child is not taken care of from their parents, at that instance the child can freely use what it has gained of income. Thirdly, concerning the duties of children the ABGB in articles 152–154 sets out the obligations. Children, which are still under the power of the father, cannot take legal obligations until their father has approved them.[16] Here the father also has an obligation to represent their underage children.

In further §§155–172 the ABGB discusses the position of legitimate and illegitimate children, i.e. those born in and out of wedlock. In §155 the ABGB explicitly states that illegitimate children do not enjoy the same rights as legitimate children do. §§156–159 discuss terms and legal facts of when a child is considered legitimate, the time of birth of the child or if the father denies his parenthood. In §§160–164 is discussed how the illegitimate

[14] ALINČIĆ, Mira, HRABAR, Dubravka, JAKOVAC-LOZIĆ, Dijana, KORAĆ, Aleksandra: *Obiteljsko pravo* [*The Family Law*]. Zagreb, 2006, p. 251.
[15] SPEVEC, *op.cit.,* p. 56.
[16] *Ibid.,* p. 57.

children can become legitimate - the cases when the legal obstacle for marriage is removed, innocent non-knowledge of the husband and wife of the legal obstacle, by a next marriage in which the children that born out of wedlock can become legitimate to husband and wife, parents, in a new marriage, by mercy of the ruler, by proof that there is a father of the illegitimate child. Then in §§165–172 the ABGB discusses the legal regulation of the relations between parents and illegitimate children. Illegitimate children do not have the right of their family and relatives, they do not have the right to their father's family name and they receive their mother's last name. Nevertheless, illegitimate children also possess the right to their parents for care, raise and provision. Illegitimate children are not under the legal power of their father, but a guardian represents them. Their father is responsible for giving care to those children, and if he is not capable then that obligation falls onto their mother. The mother until she can and will to raise the illegitimate child on her own, the father of the illegitimate child must not take the child away from her and should provide for provisions for the child. If the mother would not be taking good care for the child, the father has a duty to take care of the child. The parents, father and mother, can freely arrange the agreement between them that regard raising the child, providing for the child, but it must not harm the rights of the child.

Finally, important for the purpose of the paper is the moment when does the power of the father, *patria potestas*, end. It ends the moment the child has become of age, but the father can appeal for prolonging his power for reasons if the child has mental or physical disadvantages that implicated that the child could not take care of himself, if while under age the child went into big debts that would require him to be under his father's supervision. Children can also exit their father's power before they turn 24 years of age if their father dismissed them by permission of a court or if the father allowed his 20-year-old son to run his own household. Regarding father's underage daughters, they would by marrying go into power of their husband, but regarding property rights, the father had the right until they become adults the rights of a guardian. If their husband would die, then they would return to the power of their father. Also in §§176–178 was prescribed how the father could lose power over his children. Those are cases when the father would completely not take care of his children, if he would disappear, if he would use his power by neglecting and deteriorating children's rights.

For the time when the ABGB was in force in Croatia there is a quite modern for that time institute, and that is some kind of adoption, meaning that people that do not have their own children could take other children for their own which would become their stepchildren. In order to "adopt" children in that way there was legal prerequisites, the person had to be at least of 50 years of age and children would have to be at least 18 years younger than their stepparents. If the child was a minor, he/she could be "adopted" if it was accepted by their legal father. The relation between those parents and those children would then be equated with the relation between parents and legitimate children, the stepdad would then receive the power of the father, *patria potestas*.

4. The parent – child relations during socialism

We will not go into depth of the changes that were made in socialist Yugoslav regulation but only give a brief overview of the constitutional and legal framework that was set up regarding parent-child relations in the first years of the existence of new legal order. Articles 24–26 of the 1946 Constitution set forth the general principles of a new family law, including equality of women with men in all fields, regulation of marriage and family relations and state protection of the family and minors.[17] These principles were elaborated upon by enactment of special laws.

The concept of parent – child relations has been fully changed solely on the fact that the power of the father was replaced by parental equality i.e. parental rights that belonged to the father and mother in common (§2) respectively and were prescribed by the Basic Law on Parent – Child Relationship *(Osnovni Zakon o odnosima roditelja i djece*, OZORD).[18] Even by changing the term "power" into "parental rights" we can see a significant step towards modern ideas of protecting child's interests. Also, following the constitutional principles, the illegitimate children were put on a par with the legitimate one (§3).[19]

[17] Ustav Federativne Narodne Republike Jugoslavije [Constitution of the Federal Peoples Republic of Yugoslavia], Službeni list FNRJ, 1946.
[18] Osnovni zakon o odnosima roditelja i djece [The Basic Law on Parental – Child Relationship] Službeni list FNRJ, no. 104/1947.
[19] The principle of equality of illegitimate and legitimate children was also introduced into the inheritance law by the Law on Succession (1955).

Parental rights by OZORD was defined as a set of rights and duties. These were listed as following: 1. care and upbringing, 2. provision, 3. property management and 4. representation. The care and upbringing consisted physical care, moral-political care and intellectual care. Provision was duty to economically sustain for these rights of a child: place to live, food, clothes, electricity, heat, medical care, schoolbooks and other school necessities, and other general cultural education (visiting theatres, cinemas and other similar events). Property management was consisted in general principle that the parents should manage their property for benefit of their children. A significant step was made in the child's right to have his own responsibility for property rights so a child turned 14 could go to work and manage his income from that work by his own will. Lastly, representation of children was a duty of the parents, and a right. This representation was to be in interest of the child as a principle, here also this belonged to both parents respectively. In addition, the parental rights could be taken away from parents if they did maliciously care for their children, against their interests and the purpose of parental rights.

The parental right would *ex lege* end by maturity of the child, marrying before reaching maturity, by death, by decision of the court to remove parental right, by decision of the court to extend parental right and lastly by adoption.[20]

5. Conclusion

20th century Croatian family law and specifically relations between parent and child were firstly regulated by the Austrian General Civil Code introduced in Croatia and Slavonia in 1852 by the Emperor's Patent. The Austrian General Civil Code was an expression of a patriarchal system in family law relations which was seen through the regulations which gave men i.e. father most of the power over children, especially those regarding representing children and having control over their property. On the other hand, mothers did not have the same rights as fathers in family, but they did have obligations of care over children, which is one of the fundamental rights children have, but also accompanied with provisions that the father had to give provisions for child's care. We can conclude that the

[20] PROKOP, *op.cit.* p. 194.

ABGB set out a system that had a lot of protection for children, which we can also see today, with the biggest flaw being the fact it did not give equal status to both parents in these relations and the fact that there was a division between legitimate and illegitimate children.

After World War II and with the establishment of Yugoslavia family law principles on parent – child relations have changed by a significant margin. The most important change being giving the mother of the child same legal value in raise of their children as father, having the same power in deciding over care of their children and their upbringing and completely removing patriarchal system that was in effect until then. The changes that happened by Yugoslav regulation and their impact can be seen in only one word as mentioned *supra* in the text, "power of the father" was now defined as parental rights introducing the parental equality.

Nevertheless, in essence, we can see that even in the ABGB the rights of children were protected at a reasonable level for that time period and that the biggest injustice we could say today was towards illegitimate children and making a difference in their rights compared to at that time legitimate children. In conclusion, parent – child relations were, as are today, an important part of everyday life as family is *nucleus* of a society and were given special attention in legal regulations, which was in ABGB especially very thorough. Therefore, we can say that the ABGB was core of family law regulation throughout Croatian legal history and set up a foundation for further family law making.

Marija ŽAMBOKI: Women's position in the Croatian Labour market during the 20th century

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1. Introduction

The position of women as a workforce throughout history is closely linked to women's rights and men's perception of what a woman should be and what she should do. The World War I was the main driving force behind changes associated with the position of women in society, as well in the labour market. Until then Croatia was a part of Austro-Hungarian Monarchy, administratively divided between the Austrian and Hungarian half of the country.[1] After 1918 it became a part of a Kingdom of Yugoslavia. The World War II even more contributed to the better position of women when they demonstrated their strength through participation in the Yugoslav Partisan movement. After the war, the UN has brought many documents that regulates discrimination against women. From the second half of the 20th century, more and more women entered politics. One of the most important leaders in modern Croatian history was Savka Dabčević-Kučar, the first female Prime Minister in Croatian history, but also the first woman in West Europe to serve in such capacity.

2. The beginning of the 20th century

The legal position of women at the beginning of the 20th century was a representation of their family status and exclusion from political public life. Women didn't have a right to vote and they were subordinated to the husband's authority in the family. In Croatia and Slavonia women were given the partial right to vote in the municipal elections[2] in 1920 by a special

[1] Međimurje and Baranja were part of the Hungarian part of the monarchy, as well as the Kingdom of Croatia and Slavonia. Dalmatia and Istria were in the Austrian part, while Rijeka was directly subordinated to Budapest.

[2] Prior to this, tax paying women were given right to vote in the municipal election during the ban Ivan Mažuranić. Although lasted shortly (just a few years) this extension of right to vote was very important. KREŠIĆ, M.: *Žensko pitanje u reformama bana Ivana Mažuranića* [*The Woman Question in the Reforms of ban Ivan Mažuranić*]. In: Intelektualac, Kultura, Reforma: Ivan Mažuranić i njegovo vrijeme. Zagreb, 2019, pp. 240–242.

decree that laid down additional conditions for women to be able to vote and to be elected as men: "if they independently managed their own and family farms on their own or cooperative property, public crafts or trade, or if they worked in public or private service and could prove that they had successfully completed four grades of primary school.[3]

Their right to vote was supported by the Croatian Peasant Party, Social Democrats and Clerics, but, despite the pressure, on the Constitutional assembly elections in November 1920 women didn't gain the right to vote.[4] The Austrian General Civil Code from 1811., which was in force in that time for the territory of Croatia and Slavonia, was based on the principle of equality in family and marital law, but on the other hand, it regulated woman's position in marriage by giving the superior position to the husband. He was the „head of the family" and, as such, he had the right to manage a household and to represent his wife in all occasions.[5] Austrian Civil Code, unlike some other European Civil Codes, guaranteed women a high degree of economic independence not limiting their freedom of practising independent professions. Nevertheless, at the turn of the 20th century Croatian women were mostly employed in agriculture. Also, many jobs that women did were so-called unpaid jobs and consequently they did not earn a tangible income. Finally, the income that working women earn was not high due to the unequal pay on the labour market.[6]

Social reality changes in the mid-20th century by entering women at all levels of education, mostly paid, public work outside the home. Unfortunately, legislation slowly follows this process, doesn't meet the new needs of women, especially in the field of employment, job advancement and equal valuation of work. The first women who applied for equal working conditions and equal wages for women and men was teacher Marija

[3] Uredba o izboru gradskih zastupstava za gradove Hrvatske i Slavonije od 1. studenog 1919. [Decree on the election of city representations for the cities of Croatia and Slavonija from November 1919.]. In: PEIĆ-ČALDAROVIĆ, D.: *„Ženska posla" između obitelji i profesije (profesionalna djelatnost žena u Hrvatskoj 1918–1941 u društveno ekonomskom kontekstu*., Zagreb, 1999–2000, p. 68

[4] BOBAN, B.: *„Materinsko carstvo", Zalaganje Stjepana Radića za žensko pravo glasa i ravnopravni položaj u društvu [„Maternal empire", Stjepan Radić's devotion for women's right to vote and equal status in society*]. Žene u Hrvatskoj: Ženska i kulturna povijest, Feldman, A. (ed), Ženska infoteka, Zagreb, 2004, p. 205.

[5] EISNER, B.: *Privatno-pravni položaj žene po današnjem pravu Jugoslavije i njegovo uređenje u jedinstvenom Građanskom zakoniku za Jugoslaviju* [*The private legal status of women under today's Yugoslav law and its regulation in the Uniform Civil Code for Yugoslavia*]. Spomenica Mauroviću o njegovoj šestogodišnjici, Štamparija Globus, Beograd, 1934, p. 8.

[6] KREŠIĆ, M.: *Praesumptio muciana and the Status of Croatian Women with Respect to the Law of Succession according to the ABGB* In: DRUWE, W., DECOCK, W., ANGELINI, P., CASTELEIN, M. (eds): "Ius commune graeco-romanum". Essays in Honour of Prof. Laurent Waelkens, Leuven: Peeters, 2019, pp. 234–236.

Jambrišak back in 1871 at the First General Croatian Teachers' Meeting in Zagreb.[7] One of the main problem was that highly educated and qualified women were faced with the impossibility of material and status progress. Furthermore, career was actually only desirable for unmarried women. For example, teachers had to apply for special permits in order to marry and work their profession and by the end of 1930 they were dismissed from service due to the unemployment of male teachers who had the advantage that way.

Progress among the two World Wars was also seen through the Croatian women's professional associations. There were many charitable and social ones because women considered that they will fulfil their true feminine nature through the care of children, the poor and the sick ones. In that way, women compensated non-existent organized social welfare. Associations formed from 1990 to 1920 were more humanitarian, such as the Housewife's Club, the Association of Female home services and the Association of Teachers of the Kingdom of Croatia and Slavonia, and those formed from 1920 until World War II were focused on the emancipation of women, as well as professional and social promotion of members, like Club of Fine artists, Society of Croatian female writers and the Association of university-educated women.[8] However, some very important women of that time in Croatia weren't members of women's associations of their profession, but they emancipated individually, like Marija Jurić Zagorka and Ivana Brlić Mažuranić, famous Croatian female writers. But the women who pointed out the most in that time was Katarina Matanović Kulenović who became the first female graduate pilot in Croatia in 1936., the first female parachutist in Eastern Europe in 1938 and the first female military pilot in the Air Force NDH (The Independent State of Croatia).[9]

3. Women's position in Yugoslavia

On the territory of the former Yugoslavia, as well as Croatia, which was an integral part of it, women were unequal to men in all public affairs until World War II. In the Kingdom of

[7] BLASIN, B.; MARKOVIĆ, I.: *Ženski vodič kroz Zagreb* [*Female guide through Zagreb*], Meandarmedia, Zagreb, 2006, p. 77.
[8] RUDANČIĆ, M.: *Žena, majka, radnica: Zaposlenost žena u središnjoj Hrvatskoj u međunarodnom razdoblju (1918–1941)* [*Wife, mother, female worker: Employment of women in central Croatia in the interwar period*], Diplomski rad, Sveučilište u Zagrebu, Filozofski fakultet, Odsjek za povijest, p. 86.
[9] *Ibid.*, p. 92.

Yugoslavia, women didn't have the right to vote and, for the most part, did not have primary education. During the 1940s, 28% of the female population were employed, mainly in occupations with the lowest wages as textile, catering, etc.[10]

The Communist Party of Yugoslavia recognized the problem of women's inequality. Women of Yugoslavia gained their rights in socialist times primarily through equal participation in the National Liberation Fight. The courage and determination of female participants, both Partisans and those who contributed in other ways, such as nurses, have largely contributed to the struggle against fascism and the struggle for the better world for them and their children. Also, equality of women was a part of the communist ideology.

The Anti-fascist Front of Women (AFF), founded in 1942, was a mass organization that gathered women's energy to improve the position of women in society.[11] It was a kind of school where women learned to be active in the public and political life of the country. The work was conducted under the leadership of the Communist Party of Yugoslavia and it was based on the fundamental commitments that women are equal with men in all segments of life and work. In the post-war period, it had a great emancipatory role. It also had its own press, which was a great weapon for spreading the ideological plan of Socialist Yugoslavia.

In the first Constitution of the Federal People's Republic of Yugoslavia in 1946 women formally won the right to vote.[12] On the parliamentary elections for the Constituent Assembly of the People's Republic of Croatia, in November 1946, for the first time in history, the parliament has elected 6 female representatives. In addition to the right to vote, women have gained several important legal options in socialism. Through the marriage law of the 1946, the position of women and men in marriage was equalized. The Law on Social Insurance also introduced insurance for all risks, which included paid maternity leave and substantiation of the right to a pension under the same conditions for both men and women.[13]

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[10] LEINERT-NOVOSEL, S.: *Žena na pragu 21. stoljeća – između majčinstva i profesije* [*Woman on the threshold of 21st century – between motherhood and the profession*]. Ženska grupa Tod i Edac, Zagreb, 1999.

[11] ĐOKANOVIĆ, B., DRAČO, I., DELIĆ, Z.: *Zabilježene – žene i javni život Bosne i Hercegovine, III. Dio: 1945–1990. Žene u socijalizmu – od ubrzane emancipacije do ubrzane repatrijarhalizacije* [*Recorded – women and public life in Bosnia and Herzegovina, III. Part: 1945–1990, Women in socialism – from accelerated emancipation to accelerated repatriarchalization*]. Sarajevo, 2014, p. 106.

[12] Article 24 states that all citizens, without discrimination of gender, ethnicity, race, religion, education and place of residence, who are 18 years of age, have the right to elect and be elected to all state authorities.

[13] ĐOKANOVIĆ, DRAČO, DELIĆ, *op. cit.*, p. 109.

In order to facilitate somehow the life obligations of women workers, primarily of their family and domestic responsibilities as well as the upbringing of children who were only a woman's obligation, the socialist government has also adopted a series of decrees to address the issues of children and maternity and enable women to regardless of family establishment, remain dedicated to activities in the public sphere, but also to facilitate their work on physically demanding jobs. For example, by the decree on women's labour during pregnancy to menstruation, women were relieved of work. Although the purpose of these decrees was to facilitate women's business, they were still kept in the frames of biological frameworks.[14]

On the labour market women were concentrated around certain professions (for example, the textile industry) and very few were in the leading positions. They were the majority workers in hotel industry, tourism, leather industry and elementary schools, while there only few female journalists, professors and judges. One of the reasons for these professional divisions was the risk that the employment of women in individual jobs would lead to the dismissal of male labour force that would have produced family conflicts.[15]

From 1950 to 1953 the AFF was ending and ended, caused by obscure directives given at the Third Congress in 1950.[16] The unprofessional character of the organization was determined in which activity soon became voluntary, and previously employed members were transferred or dismissed. The AFF was characterized by the fact that men could not prohibit women from going to AFF meetings because the AFF was a part of the National Front under the statute. Therefore, a large number of women attended these sessions and meetings where they felt secure, exchanged ideas and opinions and where they were educated, emancipated and had a political activity.[17] So, the abolition of the AFF was a huge loss for women of Yugoslavia because it really represented an organization that took care of the establishment of new life for women in the socialist society. The place of abolished AFF was occupied by the Association of Women's Societies, which under the pressure of 1959 to 1961 has grown into a Conference on the Social Activity of Women.[18] In the Resolution was emphasized that the issue of women's equality is a common social issue and that women

[14] *Ibid.*, p.115.
[15] *Ibid.*, p.115.
[16] ĐOKANOVIĆ, DRAČO, DELIĆ, *op. cit.*, p. 121.
[17] *Ibid.*, p. 122.
[18] *Ibid.*, p. 123.

should not be separated into special political organizations. Therefore, any political association of a large number of women was practically impossible.

3.1. The mid-seventies

In the mid-seventies, the second wave of feminism slowly came to Yugoslavia, triggered by student demonstrations in 1968. The generation of young and educated women from urban centres was a core of the new feminist movement of the early seventies. In 1978, an international gathering "Comrade Woman. Women's Question: New approach?" was held in the Student Cultural Centre in Belgrade, which was the first burst of the emergence of feminists on the public scene in a socialist country and the first international conference on the position of women in Yugoslavia.[19] The focus on the women's issue and the problem of gender division of jobs are underlined by the imaginative slogan of the conference: „Proletars of all countries – who is washing your socks?".

The conference pointed to all the hypocrisy of the regime that claimed that women's issue was solved in women's socialism and that women were equal with men. The significance of this conference is that it addressed women's issues and problems that no one in the country was dealing with. Special significance at the conference was given by the feminists of the developed West, who spoke almost the same story, but about how the West, which is so proud of its democracy, is in fact democracy without women.[20] It is interesting to note that the conference was attended by a significant number of men, which was one of the reasons for the controversy between Yugoslav and Western feminists. It is even more important to mention that for many issues that were important in Europe (for example, abortion), in Yugoslavia due to advanced legislation these issues were not attached to some great importance.[21] The conference was very well-attended by the media and it served to unite women and create feminist movements in the larger urban centres of Yugoslavia – in Zagreb, Ljubljana and Belgrade, and joint cooperation among feminists from these centres.[22]

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[19] *Ibid.*, p. 132.
[20] *Ibid.*, p. 133.
[21] The right to an abortion was enabled by the Law from 1951. Constitution from 1974. (SFRJ) guaranteed the full right to free birth. According to the Law from 1978, which is still in force, abortion can be done on request up to 10 weeks after conception, and after that in special circumstances.
[22] ĐOKANOVIĆ, DRAČO, DELIĆ, *op. cit.,* p. 133.

In 1979, the SFRY signed the Convention on Elimination of All Forms of Discrimination against Women, adopted at the General Assembly of the UN.[23] In 1987, the First Yugoslav Feminist Meeting in Ljubljana was held, followed by three in Zagreb and Belgrade and the last one was held in 1991 in Ljubljana.[24]

3.2. Savka Dabčević Kučar

Savka Dabčević-Kučar was one of the most important leaders in modern Croatian history. She was a Croatian social democratic politician who, together with Miko Tripalo, became one of the leaders of the Croatian Communist Party. She served as Prime Minister of the Socialist Republic of Croatia from 1967. She was, as it was already mention, the first female Prime Minister in Croatian history but also the first woman in West Europe to serve in such a capacity.[25] In May 1969 she became 6th Secretary of the League of Communists of Croatia. She became a living symbol of the popular movement known as the Croatian Spring which, despite its brief duration, crucially determined the subsequent development of both Croatia and Yugoslavia. In December 1971 Tito held a party leadership conference in Karađorđevo, Serbia, and publicly turned against the Croatian Spring. This led to Dabčević-Kučar's response to the critic, in which she accepted all criticism except those intended to show her as nationalist, and enemy of the socialist self-governing system, to which she publicly expressed loyalty. She resigned from the Central Committee of the Croatian Communist Party and, ultimately, from public life. It is interesting that she was replaced by another woman, Milka Planinc.[26] When multi-party democracy finally arrived in Croatia, Dabčević-Kučar and Tripalo returned to the public stage, using their long-accumulated reputation. They refused to endorse a single party, and instead initiated the formation of a broad coalition of the moderate middle, called the Coalition of People's Accord. With the coalition falling apart, Dabčević-Kučar and Tripalo formed their own party, the Croatian People's Party

[23] Convention entered into force 3.9.1981 as global, comprehensive and legally binding international treaty which established Committee on the elimination of discrimination against women which controls how the Convention applies through reports which states are required to submit

[24] ĐOKANOVIĆ, DRAČO, DELIĆ, *op. cit.*, p. 134.

[25] http://www.enciklopedija.hr/natuknica.aspx?id=13632

[26] JURČIĆ, LJ., VOJNIĆ, D.: Quo vadis Croatia? *Od samoupravnog socijalizma i društva blagostanja preko ekonomije i politike tranzicije do divljeg kapitalizma i tržišnog fundamentalizma – Hrvatska na putu u Europsku uniju* [*From self-governing socialism and welfare society through economy and transition policy to wild capitalism and market fundamentalism – Croatia on its way to European Union*]. 2012

(HNS) in late 1990. This new party was intended to attract moderates and had high hopes for the 1992 presidential and parliamentary elections, being perceived as the strongest opposition party in Croatia.[27]

4. Post-socialist transition

In the 1990s, during the wars in the Yugoslavia, the economic downturn, inflation and unemployment continued to grow, causing general job destruction. Deeply affected by these changes was textile industry. The result of privatization, deindustrialization and loss of workers' social protection was the deterioration of the social and economic position of textile workers.[28] Feminist theory explored the negative impact of war and militarization on gender relations, emphasizing the process of redistributed retraditionalisation and re-illumination of patriarchal values caused by nationalist discourses and violent conflicts.

Women were mostly employed in the feminized professions, more vulnerable to discrimination when entering the labour market and often work in positions below their educational qualifications.[29] They also become a huge „invisible "labour force on an informal labour market, where they work for a minimum fee and no registration. Also, there was a need for the economy to adapt to the needs of defence, which changed the position of women and access to gender roles. In addition to the economy suffering great damage, the demographic picture of Croatia was also in poor condition, so the role of the woman as a mother began to magnify again.[30]

The dependence of women within the family has increased in times of social and economic insecurity. Militarization of post-conflict societies and male unemployment have led to a rise in domestic violence. At the same time, family-based solidarity networks have again started to serve as a survival unit, which had led to the revival of extended families in the 1990s and 2000s, especially in lower- and middle-class families in suburbs or provincial

[27] http://www.enciklopedija.hr/natuknica.aspx?id=13632

[28] BONFIGLIOLI, C.: *Orodnjavanje socijalnog građanstva: tekstilne radnice u postjugoslavenskim državama* [*Engendering social citizenship: female textile workers in post-Yugoslav states*]. 2014, p.131.

[29] *Ibid.*, p. 132.

[30] DŽAJA, M.: *Položaj žena na tržištu rada u Hrvatskoj i Rusiji: komparativna analiza* [*The position of women in the labour market in Croatia and Russia: a comparative analysis*]. Završni rad, Sveučilište u Zadru, Odjel za socioogiju, Preddiplomski sveučilišni studij sociologije, Zadar, 2016., p. 9.

towns and villages. Family networks as a form of „social capital "that overcomes the loss of social security are a characteristic element of the post-socialist transition.

The Catholic Church also had a strong influence during that period in Croatia by emphasizing the care of children and the household as the main role of women in society and by spreading the view that a woman who aims to pursue a career is neglecting her family.

5. Conclusion

To sum up, it has been shown that, due to traditional and renewed forms of gender discrimination in the productive and reproductive sphere, women remain vulnerable to unemployment and pushed to the margins of the labour market, as well as in the sphere of informal economy. The textile industry in Croatia has remained marginalized, under – recognized by state institutions, and the necessary interventions have not been implemented.

In the time of socialism in Yugoslavia, women exercise social rights, the right to education, political participation and work, but they do not achieve substantive equality. The socialist system didn't address the issue of patriarchal gender division of labour, but focused on the way that, both men and women, serve to the ideological project of socialism.[31] Today, women are represented in all spheres of life, even though men still play a leading role in politics, legislation, industry and management.[32] The traditional division of roles in the family and society has largely changed, though it is still present. Examples show that, although in a small number, women have managed to compete with some of the highest state functions. For example, during the time of writing this paper the president of Croatia is a woman, Kolinda Grabar Kitarović. Changes in the status of women in society are noticeable throughout the years, however, there are still various examples of sex discrimination at work and women are still underpaid. Therefore, there are still many spaces for progress.

[31] *Ibid.,* p. 10.
[32] MATOTEK, V.: *Prava žena kroz povijest* [*Women's rights through history*], Hrvatski povijesni portal, 2010, http://povijest.net/2018/?p=1456

Tamás SVEDA: The Formation of the Hungarian State's Civil Liability for Damages caused by Legislation and its Current Recognition

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1. Introduction

Nowadays, the Hungarian State is sued many times in order to establish its liability for the damages caused by legislation and to claim compensation for that. For instance, on January 1 in 2014 the Parliament modified the Act No. 122 on agricultural land properties in a way that the usufruct of these properties created for a definite time became terminated from 1 May 2014 without prompt and adequate compensation of the affected farmers. Therefore, Constitutional Court stated that as the Parliament omitted to regulate the compensation of these affected farmers, it resulted in an unconstitutional situation. The Court of Appeal of Szeged drew the conclusions in 2018 and stated that: *"the legislative power, the Parliament and the Government, which is responsible for the initiative of an act, are liable for the omission of legislation"*.[1]

However, a lot of time and development in Hungarian civil law had to be passed and made in order to get such important decisions. In this essay, I aim to present this development tendency beginning from the end of the 19th century – when this phenomenon only appeared in some decisions of the Supreme Court of Hungary and lectures of the Assembly of Lawyers – which established the current perception. I will begin with the presentation of the contradiction between State immunity and liability. After that, I will examine the development tendency in Hungarian civil law practice during the 19th and 20th centuries, when the liability of the State for damages caused by legislation could not develop completely because of the dominant perceptions all among European states as well. Lastly, I will present two recent and important decisions of the Hungarian court practice, which will lead us to the conclusion that even David can triumph over Goliath, namely, the individuals can successfully claim compensation from the State for the damages caused by legislation.

[1] BDT. 2018. 3816.

2. The nature of immunity

To present immunity, I would like to rely on the definitions created by László Kecskés, who is one of the most frequently cited scholars when it comes to damages caused by legislation. He defines immunity as the irresponsibility of the State.[2] Immunity has a procedural nature and grants the State the right not to be liable for wrongful acts. The reason that made the Hungarian State impossible to sue for damages caused by legislation for so many decades was actually its immunity.

In the beginning, state immunity was absolute, which made the state irresponsible for every act it committed, unless it waived its discretional right not to be sued. In customary international law the doctrine of relative immunity started to become more and more frequent in the 20th century. It means that state acts can be divided *iure imperii* and *iure gestionis,* those made with public authority and those with commercial ones. Today, this theory makes it possible to declare the state liable in case of international trade of goods, concluding loan agreements or based on contracts that have trading, industrial nature.[3] Besides these doctrines, the so called *fiscus* theory also has to be mentioned which makes it possible to sue only some parts and organs of the state, for example the treasury.[4]

3. The liability of ministers during 1848

The idea that State organs shall be liable for damages caused to individuals appeared in the 19th century. During the civil reform of 1848, the founding fathers of the modern and civil Hungary wished to create a State model based on democratic and liberal theories. We can state that the liability of the State for damages caused by legislation appeared during these movements and covered the civil liability of the ministers. The §18 of the Act No. III of 1848

[2] KECSKÉS, László: A jogalkotásért és a jogharmonizációért való állami kárfelelősség összekapcsolódása [Connecting the State's liability for damages caused by legislation and harmonization]. *Jura,* 2001/1. p. 265.
[3] KENDE, Tamás – NAGY, Boldizsár – SONNEVEND, Pál – VALKI, László: *Nemzetközi jog* [International Law]. Budapest, 2014, Wolters Kluwer Kft., p. 273., p. 281.
[4] STIPKOVITS, Tamás: A *jogalkotással okozott kár megítélése alkotmányjogi és polgári jogi szempontból* [*Liability for damages caused by legislation from the point of view of constitutional law and civil law*]. https://dfk-online.sze.hu/images/optimi nostri/2017/stipkovits.pdf, p. 262.

stated that *"each minister is liable for the directive he signs."* The §32 further expanded the liability of ministers and specified that *"the ministers are responsible for every act and decree that violates (…) individual freedom or property."* Based on this regulation, it is clear that the civil reform in 1848 considered individual freedom and property as so important constitutional interests that required the liability of ministers to be expanded in the above-mentioned way. Based on such perceptions, the countersigning ministers became liable for the decrees passed by the sacrosanct monarch.[5] Nowadays, the countersigning also means takeover of the liability of the Head of State. Based on the above-mentioned declarations of the legislative acts, not only the political but maybe the civil law liability was taken over by the ministers as well.

4. The "results" of neoabsolutism

The enthusiasm at the beginning was soon torn down after the defeat of the revolution and civil war and with the beginning of the era of neoabsolutism. At the top of all that, the Austrian law forced on Hungary. The Civil Code of Austria, the ABGB did not want to hear about the liability of the State organs, moreover, the liability for the damages caused by the state officials was not regulated either.[6] We can see that the development tendency regarding the State liability for the damages caused by legislation was tore down relentlessly by the Austrian monarchy. This forced perception soon became to influence and determinate the Hungarian state court practice and the viewpoint of the scholars in Hungarian civil law.

5. Building the system of State liability during the 19th-20th centuries

The establishment of State liability started again in the 1870's. The liability of the state officials for their unlawful behaviour and the State liability for unlawful conviction were soon

[5] NAGY, Ernő: *Magyarország közjoga* [*Public Law of Hungary*]. Budapest, 1905, Athenaeum Irodalmi és Nyomdai R-T., pp. 358–359.
[6] KECSKÉS, *op. cit.*, p. 251.

recognized. The first legislative act in this particular case dates back to 1871. The articles 19 and 73 of the Act No. VIII of 1871 made the State liable besides the embezzlement of judges and court officials.

Beside the fact the legislative power started building the system of State liability step by step, this phenomenon was soon at the centre of attendance and debates of the Assembly of Lawyers as well. At the 5th and 6th sessions held in 1874 and 1876 the need for the effacement of State immunity became more and more urgent.[7] In order to establish the State's liability for the damages caused by state officials, they used the construction of the liability of the legal person for their employees. The individual who suffered damages could only turn to the courts against the State if they exploited all the possible legal remedies. It is interesting to realize that this rule can still be found after centuries in the effective Civil Code of Hungary.[8]

After the above-mentioned regulation, a groundbreaking decision was made in 1878. The Curia, the Supreme Court of Hungary rewarded compensation against the Treasury for damages caused by legislation. In that case the damage was caused based on the Acts 8 and 9 of 1848[9] because these acts did not contain rules on due compensation after expropriation.[10] In this decision, the Supreme Court applied the principles of 1848 and stated that: "*In case of an expropriation the general rule shall be applied that no one can be expropriated without compensation and the judge may be relieved applying this rule only in case the act has already rendered compensation or the legislative power found rights in private means abolished so clearly that the individual cannot claim for compensation.*"[11] Based on this decision, we can see that even without a codified statute laying down the doctrine of the prohibition of expropriation without prompt and adequate compensation, it was applied and recognized by the court practice.

The proposal on the Civil Code of 1913 did not recognize the liability of the State for the damages caused by legislation *expressis verbis*. However, the scope of liability was extending

[7] DÁRDAI, Sándor: A VI. magyar jogászgyűlés tárgyalásainak eredményei [Results of the negotiations of the 6th session of the Hungarian Association of Lawyers]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1876/27. p. 261.
[8] 2013. évi V. törvény a Polgári Törvénykönyvről [Act No. V of 2013 on Civil Code] 6:548. §(1)
[9] The Act 8 regulated the common charges and the Act 9 was about the taxes of the villain.
[10] LAJER, Zsolt: Felelősség a jogszabályalkotással okozott károkért a magyar jogban [Liability for damages caused by legislation in Hungarian law]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 2001/2. p. 74.
[11] *Döntvénytár* [Case-book], Volume XXI. 1879. Judgment No. 74

continuously. The proposal made the State liable for the procedures of the state officials in the scope of their authority or if they exercised public authority and caused damage unlawfully to third persons. Moreover, in the cases regarding judicial deposit and the land registration, the State also became liable for the wrongful procedure of the authorities if the state official with authority was culpable. A very important criterion also appeared – which is in use nowadays as well – that the State could not be sued if the individual could have prevented the damages with legal remedies, however he/she omitted to act so negligently.

The interesting side of the regulation was that it never came into effect because the liability of the State was regarded as a common affair with Croatia-Slavonia-Dalmatia. Therefore, a separate act would have been necessary to be passed.

What differentiated the liability of the State and the liability of the ministers was that according to the regulation of the Act 3 of 1848 and the Act 10 of 1920 on the liability of ministers, their liability could prevail only through a special commission of Parliament. The authors criticized this method already at the beginning and added that *"the question of compensation was exactly the same as in the proceedings against state officials as in the proceedings against the minister*". Therefore, they urged the importance of extending the authority of state courts instead of the procedure of the commissions of Parliament.[12]

6. The liability of the State nowadays

Here, I would like to close the analysis of the topic from a legal historical point of view and in the last part of my essay I will present the current state court practice of Hungary through two recent decisions: one based on national law and the other based on the law of the European Union. By way of introduction we can say that the Hungarian court practice was on the point of view until the middle 2010's that: *"the entry into force of a legal norm that causes damages to individuals will not create a civil law obligation between the State and the individuals. Therefore, in such cases the rules of civil liability cannot be applied."*[13] The courts

[12] TOMCSÁNYI, Móricz: *A vagyoni felelősség elve a közigazgatásban: az állam (közhivatalnokok) vagyoni felelősségének rendszere* [*The principle of the financial liability in the administration: the system of the State's (state officials) financial liability*]. Budapest, 1905. Politzer, p. 173

[13] EBH 1999.14.

were on the opinion that the State enjoys immunity, and this makes it irresponsible from the point of view of civil law.

However, by the drafting of the new Civil Code of 2013, this perception changed radically. The drafters recognized that there is no doubt that the State can cause damage to individuals by unconstitutional legislation or by violating the obligation of implementation of the law of the European Union. According to the reasoning of the minister, in such cases, the individual can claim for compensation against the State based on the general concept of non-contractual civil liability.

7. Liability based on the national law of Hungary

After a great amount of cases, where the court refused to award damages to the plaintiffs in case of damages caused by legislation, in 2014, the Court of Appeal of Budapest terminated this court practice. In the underlying case the Prime Minister of Hungary appointed Péter Kaderják as the president of the Hungarian Energy Authority for six years starting from February 1 in 2002. His mandate suddenly ended before the six-year period would have expired, when on October 30 in 2003 the Hungarian Parliament modified the Act 42 on gas supplying. The most interesting part of the regulation was §85, which reads as the following: *"the Minister invites entries for a competition in 15 days from the entry into force of these provisions for the presidential and vice-presidential positions of the Authority. The mandate of the president of the Authority terminates in 90 days from the entry into force of these provisions."* Analysing this rule, we can see that the legislative power did not issue a normative act. Contrary to that, we face a customized act issued as a part of a legislative act. The Constitutional Court declared that the legislation is dysfunctional if the legislative power makes a customized decision in a normative regulation subject.[14] According to the decision of the Court of Appeal of Budapest, this dysfunctional regulation makes the conduct unlawful not only from the point of view of public law, but from civil law as well. Furthermore, it was also a very important statement of the forum that the Parliament does

[14] Decision of the Constitutional Court No. 5/2007 (II. 27.)

not have civil law personality. Therefore, without legal capacity in a procedure, the Hungarian State is liable for its dysfunctional regulation towards the damaged individual.[15]

8. Liability based on the law of the European Union

In the other case, the plaintiffs concluded a contract with a travel agency that soon went bankrupt. Therefore, the agency was not able to pay back those millions of Forints that have been paid by the plaintiffs in advance, moreover, their holiday has not been realized either. Their claim was based on the Article 7 of the Directive of the European Union that regulates package tours and package holidays. Based on this regulation, the contracting consumers must be granted a refund if the travel agency cannot make their travel happen based on causes in its interest. They argued that the Hungarian State did not implement the directive correctly as it regulated the amount of guarantee that it was not sufficient enough to satisfy the damages of the consumers. Even before the procedure, the ECJ in 2013 declared – in a preliminary ruling procedure – that the Hungarian legal grounds for the amount of the guarantee of the travel agencies are not in harmony with Article 7 of the Directive. As a matter of fact, the Court of Appeal of Budapest considered the claim admissible and rewarded almost 37000 EUR for the three plaintiffs and its default interests. The court recognized that in such cases the omission of the legislative power has to be attributed to the State; therefore, it is the member State of the European Union that is liable for violating the obligation of implementation.[16]

9. Summary

As a summary, we can say that the State's liability for damages caused by legislation can be considered as one of the most recently discovered and continuously developing fields of civil law. Only a few judgments of the Supreme Court and some lectures held among the Assembly of Lawyers let us draw the conclusion that only the basic theories of the State'

[15] 1/2014 PED
[16] PJD2018. 24.

liability from this aspect have appeared in the discussed era. Until the middle 2010's the court practice was on the point of view that there is no relation regulated by civil law between the damaged individual and the State in connection with damages caused by legislation. Finally, thanks to the new conception of the Civil Code of 2013, by the mid 2010's the state court practice has changed radically. We reached the point that we can declare that even David can triumph over Goliath, namely the individual can successfully claim damages against the State if he/she suffers damages because of legislation.

Ákos KOVÁCS: „Lineal succession": special rules for intestate succession regarding particular assets in the Hungarian Private Law

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1. Introduction

Humans have been thinking a lot about their fortune after death. There is a serious debate about the existence of the "other world" and we may never get an answer for that. Today's knowledge we know that life goes from birth to death for certain and during our life we acquire rights and incur liabilities, that's how our means come into existence. But what will be the fortune of these means after our death? For this question the law of succession gives the answer. Within the law of succession there is a huge role of consistence[1], it is proved by many facts especially that some expressions from the Hungarian law of succession date back to the Provisional Judicial Regulations (referred to "PJR") from 1861 and the Act 16 of 1876. During the creation of the Act V of 2013 (referred to "The new Civil Code") the changes in the rules of law of succession were justified by changes within the society as the increasing significance of private property and the increasing value of estates.[2]

Nowadays, in the constantly changing legal system there is one particular point within the law of succession – which dates back to the *entail* and the *Tripartitum* of István Werbőczy – and this is the *"lineal succession"*. In my study, I am going to describe the evolution of *lineal succession* and I am going to present the heated debates concerning to its existence.

2. Connection between the entail and the lineal succession

The lineal succession relates to the entail and because of that connection it was, and it is a controversial legal institution. Let's examine this connection beginning with the definition

[1] VÉKÁS, Lajos: *Magyar polgári jog – Öröklési jog* [*Hungarian Private Law – Law of succession*]. Budapest, 2014, Eötvös József Kiadó. p. 9.

[2] MENYHÁRD, Attila: *Az új Polgári Törvénykönyv* [*The new Civil Code*]. In.: JAKAB, András – GAJDUSCHEK, György (eds.): A magyar jogrendszer állapota [The state of the Hungarian legal system]. Budapest, MTA Társadalomtudományi Kutatóközpont, Jogtudományi Intézet, pp. 342–343

and presentation of entail. The development of the feudal Hungarian private law before 1848 was determined by Werbőczy's because of the system of donations relating to nobleman's estate and the entail.[3] In the intestate succession there was a significant role of the entail because there were some binding rules based on that:

- Principle "*paterna paternis, materna maternis*": The father's property was inherited by the father's inheritors and the mother's property was inherited by the mother's inheritors. That's why the entail is rooted in the definition of clan[4], because if the property's owner was the clan, the property could escape neither way of marriage nor succession.
- The order of inheritors: It was strictly determined, first the descending line, in the lack of the descendants the ascendants and in the lack of ascendants the collateral relatives.
- The closer relatives precluded from the succession the farther relatives.

"The proprietor could dispose over his land openly if there was nobody who had the right of succession based on unity on title."[5] However, thanks to the changing condition of ownerships the entail became an exploded idea, because the nobleman's estate couldn't be seizure by a bailiff, prevented the economic development and the disintegration of feudal conditions.[6] Because of these arguments, in István Széchenyi's reform plans, it was one of the first thing to do, to abolish the entail, which had happened with the Act 15 of 1848, but practically only the royal command on 29th November 1852 abolished it.

The High Judge Conference in 1861 introduced the lineal succession into the order of intestate succession. In some aspects, the lineal succession reminds us to the entail and this situation generates a long term debate. Gusztáv Szászy-Schwarz summarised excellently the pros and cons referring to the lineal succession. The supporters firstly, bring forward the national origin of the lineal succession; secondly, keeping the assets in the family; finally, prevention of breaking-up the assets. The opponents firstly, refer to the anachronistic background of this legal institution; secondly, the modern condition of ownerships; finally,

[3] MEZEY, Barna (ed.): *Magyar jogtörténet* [*Hungarian legal history*], Budapest, 2007, Osiris, (4th ed.), p. 86.
[4] *Révai Nagylexikon* [*Big Encyclopedia of Révai*]. Vol. XV. Budapest, 1922, Révai Testvérek Irodalmi Részvénytársaság. p. 52.
[5] *Ibid.*
[6] MEZEY, *op.cit.*, p. 217.

the modern European tendency that each European country abolished the lineal succession.[7]

But why is there such a strong relationship between the entail and the lineal succession? Furthermore, why do we originate the lineal succession from the Middle Age and the feudal law? First of all, the Hungarian law like the Western European law distinguish the allodial property and the property acquired in common. This distinction served efficiently the feudal order of property, because it kept in one piece the family's assets, increased the assets and encouraged to saving. However, vainly the feudal order of property was wounded up, there are a considerable number of factors which gave the reasons to create the lineal succession.[8]

3. The importance and basic definitions of law of succession[9]

The duty of the law of succession that the inheritance doesn't become unclaimed. The rules of law of succession have to make sure that the testator dispose over his means without restrictions, but the state duty to hinder the freedom of testamentary disposition due to the matrimonial relationship and the child-parent relationship. So, the law of succession determines the future of the testator's inheritance. The condition of ownerships has a huge impact to the law of succession. In Hungary, the inheritance is distributed proportionally among the successors. The succession can be justified in three different ways. Firstly, the intestate succession is put into practice when there isn't a will. Secondly, the succession based on a will, when the testator cut off the intestate succession with a will or with a testamentary contract. Thirdly, when the successors can get by inheritance in spite of the will.

After the "April Acts" in 1848, the new acts had not affected efficiently to the order of succession, so in the cases relating to succession the courts passed sentences based on the ancient law. After this temporary period, with the help of the Provisional Judicial Regulations, the Hungarian private law was restored. In the Provisional Judicial Regulations,

[7] SZÁSZY-SCHWARZ, Gusztáv: Ági öröklés és özvegyi jog [Lineal succession and jointure]. In: *Újabb magánjogi fejtegetések* [*New private law wrtitings*]. Budapest, 1901, Politzer Zsigmond és Fia Kiadása, p.153.
[8] SZÁSZY-SCHWARZ, *op.cit.*, pp. 173–174.
[9] MEZEY, *op.cit.*, pp. 189–190.

a new order of succession was created with regard to the abolition of entail. However, the lineal succession was created which is reminds us to the entail as a legal institution.

4. The creation of lineal succession

The High Judge Conference was held from 23rd January to 4th March 1861, the members of this conference were the most prominent representatives of the legal profession. The task of this conference was to limit the scope of application of the Austrian private law rules and take effect the rules of Hungarian private law. This body had to recreate the rules of Hungarian private law and root out the feudal originated rules. The conference had really good results. The Provisional Judicial Regulations had 8 parts, the rules for the private law were in the first part.

The High Judge Conference wasn't a democratically elected legislative body, so due to the rules of constitutional law, it wasn't the part of the legislation. That's why the House of Commons declared on its session in 12th June 1861 that the old private law acts had to apply, but in some cases where the old rules would be inapplicable the Provisional Judicial Regulations should be applied. Furthermore, the Hungarian Supreme Court declared that courts should apply the Provisional Judicial Regulations. *"So, the Provisional Judicial Regulations became the part of Hungarian private law through the customary law."*[10]

The rules of the lineal succession were the part of the intestate succession from 10 to 12 Articles. Article 10 says that *"In the lack of descendants, the father and the mother should inherit up to that value which had fallen to the testator from the father or the mother, or from their line; the property which originated from the paternal line descends to the father and the property which originated from the maternal line descends to the mother."* Consequently, the marriages without children gave the importance of the lineal succession, because if the mother or the father had given property to their child, this ancestral property would have devolved to the survivor spouse in case of the death of the testator and in this way, it would have devolved to an outsider family. However, if we apply the rules of the lineal succession, *"the property's*

[10] *Ibid.*, p. 159.

fair devolution will happen."[11] Referring to article 11 of TJR, if neither the father nor the mother lives, then the father will be represented by the paternal side, the mother will be represented by the maternal side collaterals. If neither the parents, nor the collaterals live, then the grandparents and their collaterals will inherit. Even the great-grandparents and their collaterals would inherit the ancestral property. The rules of the lineal succession were applied if there weren't descendants and exclusively in connection with the ancestral property. But, among the Provisional Judicial Regulations, we can't find the exact definition for the ancestral property.

5. The dispute of István Teleszky and Béni Grosschmid

After the Compromise of 1867 the Government wanted to create a Civil Code to western European impact. During the codification process only partial results sprang up, among them one of the first one was István Teleszky's[12] proposal[13]. This proposal left out entirely the traditional legal institutions in connection with the law of succession like the lineal succession. Teleszky's proposal was divisive in spite of that the Hungarian Academy of Sciences appreciated it and the Parliament had a debate about it. But the jurists had serious critics, for example Béni Grosschmid defined his position many times, moreover he made a counterproposal, which contained the lineal succession.[14]

So, during the codification of the law of succession, the biggest debate was about the sustainability of the lineal succession. Teleszky – as one of the opponent of the lineal succession – wanted to reform the Hungarian law of succession, he referred to that the lineal succession is not a Hungarian legal institution and then he quoted that it is originated from

[11] VÉKÁS, Lajos: Az ági öröklés "hamleti vívódásához" [About the agony of the lineal succession]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1973/5., p. 286.
[12] *Pallas Nagylexikon* [*The Big Encyclopedia of Pallas*]. Vol. XVI. Budapest, 1897, Pallas Irodalmi és Nyomdai Rt., p. 56.: *„Under-secretary in the Ministry of Justice, writer and codifier. In 1874, he was elected to representative from Nagyvárad."*
[13] TELESZKY, István: *Az általános magánjogi törvénykönyv tervezete. Öröklési jog* [*The proposal of Hungarian Civil Code – Law of succession*]. Budapest, 1882, Egyetemi Nyomda
[14] GROSSCHMID, Béni: Öröklési jogi tervezet [Proposal about the law of succession]. In: *Magánjogi tanulmányok, tervezetek és kisebb dolgozatok főként az öröklési, kereskedelmi és családi jog köréből* [*Essays on private law, proposals and papers on law of succession, commerce and family*]. Budapest, 1901, Politzer Zsigmond és Fia, pp. 589–743.

the feudal law and the entail.[15] Furthermore, he brought forward that after the testator's death that relative should inherit, who had been the closest relative.[16] Finally, Teleszky mentioned the difficulties relating to the verification process in the probation. Teleszky's proposal have never became an act, the Minister of Justice instructed Béni Grosschmid to make the proposal of the new Hungarian Civil Code.

Grosschmid was one of the most enthusiastic supporters of the lineal succession and he had serious arguments relating to the continuance of it. Grosschmid's first argument was that the lineal succession has Hungarian origin and it is embedded into the society's mind. Secondly, he mentioned the saving of family's assets and thirdly, he brought forward the unity of family.[17] Grosschmid's proposal contains the rules relating to the lineal succession from article 31 to 42. Article 31 says that: *"The descendants or the collaterals in the family line can wish the inheritance excluding the spouse and other relatives."* So, the lineal succession is applicable only in the lack of descendants. The proposal defines the ancestral, so we can consider as an ancestral property the followings (Article 32):

- those assets which devolve to the testator from one of his/her parents,
- those assets which devolve to the testator from one of his/her grandparents,
- those assets which devolve to the testator from one of his/her further ascendants,
- finally, that assets which replaced the ancestral property.

Up to present, the most difficult action in connection with the lineal succession is the demonstrability of the property's origin, because it results the protraction of probates.

6. The appearance of the lineal succession in the private law proposals of 1900 and 1928

In the codification process of the Hungarian Civil Code, time to time came up the question of existence of the lineal succession and in the same time the supporters and the opposers

[15] TELESZKY, István*: Öröklési jogunk törvényhozási szabályozásához* [*To the legislation of our law of succession].* Budapest, 1876, Franklin

[16] CSIZMADIA, Andor: The legal traditions as the obstacles of legal reforms in Hungary in the 19th century. *Jogtudományi Közlöny* [*Jurisprudential Bullettin*], 1979/1., p. 36.

[17] GROSSCHMID, *op.cit.*, p. 21.

brought forward nearly the same arguments. In 1900 the first unified private law proposal came out thanked to the previous years' codification work. The "unified" proposal was the summary of the partial proposal that's why it was criticized by many jurists because they told that *"it couldn't be a unified work either in structure or in contain."*[18] The proposal from 1900 [19]contained the rules of lineal succession from article 1811 to 1816 among the rules of the intestate succession but the legal institution wasn't named *explicit verbis*.

Article 1811 says "*Those assets which devolved (through succession or donation) from the parent or from his/her ascendants to the testator can be required by the parent under article 1805 and 1806. If the parent died sooner, this right is his/her descendants' legal due."* Thus, the ancestral property in the proposal of 1900 is those assets which devolved (through succession or donation) from the parent or from his/her ascendants. Article 1811 contains two references to two further articles, the lineal succession is possible when there are no descendants of the testator or if there is no survivor spouse, the parents can inherit half-and-half portion. If there are no living parents, the ancestral property devolves to the collaterals so the sisters and brothers. If neither the parents nor the collaterals live the grandparents will be the successors. If there are no survivor grandparents, the ancestral property devolves further to the descendants of the grandparents, so the sisters and brothers of the parents concluded the aunts and uncles. In article 1815, there is an interesting rule: *"Those means which had devolved more than thirty-two years before the testator's death, the ancestral property can't be inherited under the rules of lineal succession."* This rule is very logical, because the origin of the property is hardly provable back to more than thirty-two years. Finally, article 1816 assures the widow's beneficial interest till her death on the half of her child's inheritance and on the entire ancestral property.

After the Great War, the codification of the Hungarian civil law came up again, so with the leading of Béla Szászy – who was one of the under-secretary of Ministry of Justice – a committee was formed, which started to codify with the help of many western European Civil Codes. This proposal was the most worked out and the best, but because of the economic crisis it has never became an act. In spite of this, the courts started to apply these rules. This proposal contained the rules relating to the lineal succession from article 1795 to

[18] MEZEY, *op.cit.*, p. 163.
[19] *Az általános magánjogi törvénykönyv első tervezete* [*The first proposal of Hungarian Civil Code*]. Budapest, 1900, Grill Könyvkiadó, pp. 405–407.

1811. In this proposal the rules were more worked out than any other proposals of law of successions.

In the proposal of 1928, the rules of the lineal succession could be applied when the testator had no descendants, and there was an ancestral property. This proposal contained precisely the definition of the ancestral property: *"In the inheritance, the ancestral property is that pure value which devolved through free legal transaction or succession from one of the common ascendants to the testator except the occasional donations and the expenses of the provisions and schooling."* Relating to the amount of occasional donations the judicial custom is decisive and about the provisions and schooling we can refer to the testator's costs of education. The inheritance above the ancestral property is property acquired in common and it belongs to the rightful successors. The proposal contains rules to determine the value of ancestral property: we have to consider the present value or the value at the time of sale or using up. The proposal contains rules when the ancestral property loses this quality. Article 1805 states *"The ancestral property loses this quality, when through legal transaction between living person devolves to a person who is outside the circle of the common ascendants or his/her descendant and the ancestral property doesn't retrieve this quality if the testator get back from another source."* So, if the ancestral property falls out from the family it becomes property acquired in common. There are assets which aren't the part of the ancestral property: those assets which were destroyed before the testator's death, those assets which are the part of the common household except the gold and silver and other treasures (for example: paints, statutes etc.) and the accessories of the common house. The ancestral property can demand in cash, but there are some exceptions when it can demand in nature. Furthermore, it's a rebuttable presumption that the property is a property acquired in common and the lineal successors have to prove the lineal origin.

Judge of the Curia, István Sándorfalvi Pap expounded in his study[20] the importance of lineal succession. He enumerated the opposers arguments. The origin of the lineal succession is hardly provable and that results the protraction of probate and in the course of this the family members will quarrel with each other. In spite of this, he wished the survival of the lineal succession because *"it is such an original, national and beautiful creation which*

[20] SÁNDORFALVI PAP, István: Az ági öröklés [The lineal succession]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1931/31., pp. 254–255.

we have to preserve, and we can't draw back to it."[21] The lineal succession serves the familial community of property and the familial connection. Moreover, he expounded that the Supreme Court tried to eliminate the contradictions in connection with the lineal succession.

7. The controversy about the lineal succession in connection with the old Civil Code

When the socialist era set in Hungary, the Hungarian jurists had to acquaint themselves with the oddities of the soviet law, but the negative effects avoided the law of succession. Act 18 of 1948 limited the lineal succession that the circle of successors closed with the first cousins. In 1959 the first Hungarian Civil Code came into effect, so it took almost 80 years to codify the Hungarian private law. But the Marxists' and communists' principles had a huge impact on this act, and it resulted that the lineal succession almost disappeared from the Code. Because of the feudal origin of the lineal succession and because of the connection with the entail it was qualified as the survival of the old social system. *"Many people referred to the feudal origin of the lineal succession in such a period when even the feudal form of ownership's memory had gone."*[22] However, Miklós Világhy disproved this statement in his study: *"it is not necessary to change the rules of law of succession which is habitual and mainly the peasantry feels fair and right."*[23] So the social and economic circumstances were wound up, but nothing accounted for the cessation of this legal institution because there were other standpoints which insured the reason of existence of it.

Before the first significant amendment of the Civil Code the debates had flared up again, three studies were published on the columns of the Hungarian Law Journal which supported or opposed the lineal succession. The first one is József Boros' study[24] who was a big opposer of the lineal succession because it became old-fashioned. According to him, there is no place for the lineal succession in a socialist Civil Code because it is a feudal relic. He said that the lineal succession defends the feudal property. In response to this study

[21] *Ibid.*, p. 254.
[22] VÉKÁS, *op.cit.*, pp. 114–115.
[23] VILÁGHY, Miklós: Az ági öröklés a polgári törvénykönyvben [The lineal succession in the Civil Code]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1966/1–2., p. 20.
[24] BOROS, József: Az ági öröklés jövője [The future of lineal succession]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1972/ 11., pp. 559–565.

László Réczei also published his thoughts about the lineal succession, he disproved Boros' arguments one by one and he tried to find out why this legal institution stayed in the socialist Civil Code.[25] Firstly, he mentions that the lineal succession is not just relating to estates but to personal property as well, so that's why is absolutely not exploiting. Moreover, the private estate practically has been disappeared during the socialist era because of the collectivization but, the standard of living increased and it appeared in buying valuable real estates and personal property. In the short-term, childless marriages, it is important that these valuable estates don't get to an unknown family and don't result an unfair situation due to the public opinion.[26] Réczei argued Boros' statement which said that the modern family become closer and closer that's why the law should protect this closer circle. However, what would happen with those old people who had donated a valuable gift to the testator. If the lineal succession didn't exist and the testator hadn't got any descendants, the ancestral property would be inherited by the survival spouse's family. Boros said that the lineal succession is not an often-used legal institution, thus the lack of that wouldn't be such a big deal. For that statement, Réczei put a funny question: *"Isn't it offensive to threaten the whole country with the Criminal Code when just a small part of the society commits crimes?"*[27] Finally, Réczei concluded that it would be regrettable to abolish the lineal succession if the legislators wouldn't make an alternative rule.

This scientific debate was closed with the Lajos Vékás' study. Vékás is clearly the supporter of the lineal succession. Vékás has a very appropriate expression: he resembles this scientific debate to a struggle in a Shakespeare drama, because the main question in connection with the lineal succession is the same like in the Hamlet: *"To be, or not to be: that is the question."* Vékás also points out, that the condition of ownerships has changed comparing to those conditions which existed at the time of the "born" of the lineal succession. Vékás writes in his study that in the socialist economy, the number of agricultural lands in private property practically decreased to zero in comparison to that time when the lineal succession was born. But this legal institution is accustomed in the Hungarian society so the maintenance of it is justified and useful. Vékás highlights that the lineal succession is very important when there is a valuable real estate or personal property. Gyula Eörsi was on the same side with

[25] RÉCZEI, László: Az ági öröklés jelene [The present of lineal succession]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1973/ 4., pp. 218–221.
[26] VÉKÁS, *op.cit.*, p. 286.
[27] RÉCZEI, *op.cit.*, p. 220.

Vékás, because in his opinion the lineal succession is for *"the satisfaction of real needs"*[28] and *"only with the help of lineal succession can be secured the legal order of succession."*[29] Finally, Vékás concludes that the lineal succession should be maintained but it is needed to exclude the applicability for usual furnishings and equipment.

We can establish that the first bigger amendment of the Civil Code didn't touch the rules of lineal succession, so the supporters won. Let's see the rules of the lineal succession in the old Civil Code! We can apply the rules of the lineal succession if the testator has no descendants or not the descendants are the intestate successors and if the testator had got assets through free legal transaction or succession. Furthermore, we can apply the rules of lineal succession from brother or sister or from their descendants if they got assets through free legal transaction or succession from the ascendant who is common with them and the testator. That person should prove that the property is ancestral who refers to that legal title. So, the parents inherit those assets which the testator had got from them or their ascendants. If there are no survival parents, the testator's collaterals will inherit. If there are no parents, no collaterals, then the grandparents will inherit and if the grandparents died, the further ascendants will inherit. If nobody is ancestral successor, the ancestral property will become be the part of the inheritance. There are certain cases when we can't apply the rules of the lineal succession:

- that ancestral property which is not available at the time of the testator's death,
- those assets which were bought on the price of the ancestral property,
- the usual amount of donation.

If the marriage took fifteen years, we won't be able to apply the rules of lineal succession for usual furnishings and equipment. In most cases the ancestral property has to be required in nature but if it's impractical than it can be required in money as well.

[28] EÖRSI, Gyula: Megjegyzések a Legfelsőbb Bíróság Polgári Kollégiumának iránymutató döntéseire [Comments to the decisions of the Supreme Court's Civil Council]. *Állam- és Jogtudomány* [*Political Science and Jurisprudence*], 1966/2., p. 254.
[29] *Ibid.*

8. The rules of the lineal succession in the new Civil Code of 2014

After the fall of the Iron Curtain, it was a priority to harmonise the Civil Code with the new political and economic environment, so it had been transformed based on a democratic and capitalist society's requests. However, the rules of the lineal succession haven't changed both in content and in placement. It's worth to examine the commentary about the old Civil Code relating to the lineal succession. *"The High Judge Conference in 1861 wanted to preserve something from the entail and the created the lineal succession to preserve the property of testator's family."*[30] Due to the commentary, the lineal succession's basic idea was that the ancestral property had to stay in that family who had obtained it before. The fundamental stipulation of the application of the rules of the lineal succession is that the testator hasn't got descendants, or the descendants are excluded from the intestate succession. For lack of descendants, we must separate the ancestral property from the other party of the inheritance.[31] In the next few paragraphs, I would like to analyse the rules of the lineal succession in the new Civil Code, also I would like to present the judicial practice and the judicial literature.

In 2014, on March 15th the new Civil Code came into effect in Hungary. Many articles were written about the similarities and differences of the new and the old Civil Code. It's more important to compare the rules of the lineal succession in the old and the new Civil Code and find the place of this old legal institution in our legal system. According to the Commentary the lineal succession is for *"release the smaller contradictions and amounts of injustice in the in the intestate succession."*[32] But what are these smaller contradictions? The corrections offered by the lineal succession are needed in those marriages where there are no children and the spouses died in a short period of time. In this case, the ancestral property which was given by the testator's family can easily come to another family's property. It's a rare situation, but it can happen that the testator is an infant and the ancestral property can be shared between the two ancestral lines. In this situation, the lineal succession is a kind of fairness. According to another commentary, the lineal succession is an exceptional order of

[30] GELLÉRT, György (ed.): *A Polgári Törvénykönyv magyarázata* [*Commentary on the Hungarian Civil Code*]. Budapest, 2007, p. 1822.
[31] *Ibid.*, p. 1890–1891.
[32] VÉKÁS, Lajos – GÁRDOS, Péter (eds.): *A Polgári Törvénykönyv magyarázata* [*Commentary to the Civil Code*] vol. 2. Budapest, 2018, Wolters Kluwer Kft. p. 2624.

succession within the intestate succession. We must distinguish the ancestral property from the other parts of the inheritance because the rules applied to them are different. On the other hand, the Court can't take into consideration the property's ancestral character officially.[33]

Article 7:67. the Civil Code determines the assets belongs to the ancestral property and article 7:68. refers to the ancestral successors, these parts are unchanged comparing to the old Civil Code. When we attempt to determine the definition of the ancestral property, we have to take into consideration the notion number 81 of the Civil Council which says: *"Ancestral property contains real and personal assets which were bought by the testator's ascendants or if the testator's ascendants gave the purchase prices to the testator."* Article 7:69. contains new rules for the spouse's beneficial interest on the ancestral property. The act is clear, the survival spouse has beneficial interest on the ancestral property until his/her death. Both the ancestral successor and the survival spouse can claim the redemption of the beneficial interest. However, the beneficial interest on the apartment and the belonged furnishing can't be redeemed. According to paragraph 3 of article 7:69. the survival spouse gets one third of the ancestral property in case of redemption.

Though, the assets which don't belong to the ancestral property has significantly changed comparing to the old Civil Code. On the one hand side, the proposal ceased the prohibition of redintegration. This means that the rules of the lineal succession cover those assets which were bought on the purchase price of the ancestral property and those assets which replace the ancestral property. On the other hand, the second bigger amendment that the effective law doesn't maintain the fifteen year timeout, according to that *"no claim can be filed, on the grounds of lineal inheritance, for furnishings and/or household accessories of common value against a surviving spouse or registered partner after a marriage or registered partnership of fifteen years."*[34] The rules of the lineal succession can't be applicable to the usual amount of donations. It's hard to determine what we consider to usual amount of donation, but we can rely on the judicial practice, the economic situation of the family and the social customs. So, it can be a usual amount of donation a car or a valuable asset. The

[33] WELLMANN, György (ed.): *Bevezető és záró rendelkezések. Az ember mint jogalany, öröklési jog. A PTK. magyarázata.* I/IV. [*Introductory and final clouses. The man as legal entity, law of succession. Commentary to the Civil Code*. 1/VI.] Budapest, 2014, HVG-ORAC Lap- és Könyvkiadó Kft., p. 281.
[34] Act IV of 1959 Section 613 paragraph 3

successors inherit the ancestral property in nature, however if the inheritance in nature is impossible or impractical, then the ancestral property must be given up in cash.

9. Conclusion

The lineal succession generates serious debates since its existence. Many jurists think that the lineal succession is an old-fashioned legal institution and in the socialist time the arguments got a strong ideological influence. However, the supporters said that the lineal succession is a needed correction and equity in the intestate succession. The judicial practice and the probates in front of the notaries show that the application of the rules of the lineal succession is not that common. As if the society would forget about that opportunity, as if less and less people would keep on file what is in the ancestral property. Maybe, when there will be a bigger amendment of the Civil Code, the legislators will refashion the lineal succession or entirely terminate it.

András SZABÓ: History of the joint-stock companies

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1. Judgement of joint-stock companies

The establishment of corporations made changes all around in the world in people's lives. According to words of the German professor, Heinrich Dernburg, which are drawing up what the establishment of corporations gave to humanity: with the help of this form of companies, empires were grounded, changed the shape of the world, by digging sees and drilling mountains through, built huge highways and increased the production unbelievably…[1]

Not just Dernburg but also other legal experts were praising the joint-stock companies. According to Eugené Thaller, our world cannot be imagined without joint-stock companies.[2] This view is shared by Georges Rippert, because he cannot imagine the life in big cities without them. He supports his statement with the followings: it would be impossible to dwell, heat, light, move, have fun and even die in the biggest cities. If we see the example of today's big cities, he is right about it, because most of the water and the sewage works and the construction companies are operating in this form.

Among Hungarians István Széchenyi was the first, who paid attention to joint-stock companies in his work *"Hitel"* ("Credit") and wrote about them: the united work is stronger, because that is the only way that a mortal is able to succeed everything.[3] Despite all these, the first manufacture, which tried to launch shares was not linked to Széchenyi but to the county family Forgách, who founded a textil factory in 1767 and tried to launch shares while expanding the enterprise.[4]

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[1] DERNBURG, Heinrich*: Bürgerliches Recht*. Berlin, 1884, 1st edition, p. 252.
[2] HORVÁTH, Attila: *A részvénytársaságok és a részvénytársaság jog kialakulása Magyarországon* [*Joint-stock companies and the evolution of the joint-stock company law in Hungary*]. Budapest, 2005, Rejtjel Kiadó, p. 10.
[3] SZÉCHENYI, István: *Hitel* [*Credit*]. Pest, 1830, p. 32.
[4] HORVÁTH, Attila: Széchenyi István részvénytársaság-alapításai [Foundation of joint-stock companies by István Széchenyi]. *Jogtörténeti Szemle* [*Review on Legal History*], 2003/2, p. 20.

2. The evolution of the joint-stock company law in Hungary

Because of the demolition of the Turks, the commerce fell back, and the industry was neglected, namely the first goal was to start the agricultural production. It was not substantial to bring in new achievements into the country, because there were so many wasteland, that by using the old technology, they could produce enough food.

The conditions of founding a joint-stock company started to evolve after the 1830's. To this belonged the modernization of agriculture, increasing of accumulation of capital, inner investments, founding the food industry, start of configuration the modern transportation and infrastructure, the rising amount of manufactures and factories, the growth of import (so the Hungarian enterprises could have bigger profit), creation that part of the population, which wants to fund their savings, shaping of an economical intellectual layer which became gradually suitable for operating the technics of the industrial revolution and for its development.[5]

Prior to this, there was a longer process, which secured the opportunity the foundation of commercial companies. We can deem the Act 67 of 1790 as the beginning of commercial law's codification, which stays that a committee should have to be put together.[6] In 1795 an amendment was filed in to the parliament about the commercial courts, about proper commercial, insolvency and bill law. But this was not negotiated by the parliament, its revision was only ordered by the parliament 1825-1827, which got the name "*Opinio*". In its first part was the exchange law, in its second part was proper commercial and insolvency law. The counties had to negotiate first, from where the amendment did not get forth, so only the next two parliament could negotiate it.[7]

The Parliament in 1840 was pretty productive connected to the joint-stock company law[8]. The bill of exchange was created as well as the act about merchants, about factories legal

[5] HORVÁTH, *op. cit.* 2005, p. 110.
[6] *Ibid.*, p. 151.
[7] *Ibid.*, p. 152.
[8] GOSZTONYI, Gergely – BÓDINÉ BELIZNAI, Kinga: Az országgyűlés [The Parliament]. In: Képes György (ed.): *A hatalommegosztás államszervezete, 1848–1949. Magyar alkotmány- és közigazgatástörténet a polgári korban* [*The state structure of separation of powers, 1848–1949. History of Hungarian constitution and public administration*]. Budapest, 2013, ELTE Eötvös Kiadó, pp. 91–117.

relationships and about general partnerships.[9] They set up a committee, which got the task to draw up and formulate an act about commercial law. This committee was not supported by Vienna after all, so the committee did not get help from them. So the members of the committee got information form the merchants from Bratislava, Vienna and Prague.[10] Their amendment was written so good, that the parliament altered it only a little and accepted it as Act 18 of 1840.[11]

3. Definition of joint-stock companies

Many tried to define joint-stock companies, but until today no one succeeded to find out a definition that was not contradicted by a legal expert in a whole book, who found out another one, which was contradicted by another. In these attempts, it was common, that they mention a big capital with lot of owner which means, that more people are bearing the risks which made this company form. The first general rules were codificated by the Commercial Code, after the first joint-stock companies were grounded on permission granted by privilege letters.[12]

This was followed by the German Commercial Code accepted on 24. June in 1861, which defined the joint-stock companies: the commercial company, whose partners are taking part only by their deposit without taking any personal liability. The capital of the company can be divided into shares or partial shares which cannot be divided, and can be bearer share or inscribed share.[13] The joint-stock companies were first regulated in Hungary by the Act 18 of 1840 and the aforementioned bearer share was forbidden by it.[14]

Act 37 of 1875 tried to define the joint-stock companies: that company is a joint-stock company, that was founded with a capital, which stays out of shares, that has predetermined, equal value and amount and where the owners are responsible only with their shares.[15] Levin Goldschmidt highlights the limited responsibility which appears at most

[9] Act 15, 16, 17, 18 of 1840
[10] HORVÁTH, *op. cit.* 2005, p. 110.
[11] *Ibid.*
[12] *Ibid.*, p. 15.
[13] *Ibid.*, p. 16.
[14] Act 18 of 1840: sec. 54–67.
[15] Act 37 of 1875: sec. 147.

of the legal experts and in my opinion, this is the only attribute of joint-stock companies that remained until now.[16]

4. Sources of joint-stock company law

The primary source of joint-stock company law was the aforementioned Act 37 of 1875, named as Commercial Act. During the interpretation of this act, the law enforcer could use those foreigner sources of law, which were the ground of the Hungarian act.[17] This act regulated it when a joint-stock company could have been deemed as established: the capital had to be secured, the bylaws of the company are accepted and the company had to be registered into the company register.[18]

Secondary source of the joint-stock company law was private law at the end of 19th century, which became primary according to §19 in the Act 10 of 1923, because commercial law had been put under general private law in the hierarchy of source of law.[19] In this act the warranty for animals was regulated, which had to be used despite the general warranty in Commercial Code.

Other source of joint-stock company law is the Act 27 of 1876 about the bill of exchange, the Act 23 of 1898 about cooperatives, the Act 57 of 1908 about business transmission, the Act 17 of 1881 about Industry, Act 25 of 1883 about usury and about harmful credit transactions and if specific acts allowed it then the rules of the Budapest commodity and stock exchange.[20]

The common law served also as a source of joint-stock company law, because the legislation was a reaction for the new forms of company, solutions, and institutions. Legislation was necessary because of the establishment of new organizations, which was sometime replaced by judiciary custom if the legislation have not done it.[21] For this there are many examples from the 19th century: share subscription insurance, judicial control,

[16] HORVÁTH, *op. cit.* 2005, p. 19.
[17] *Ibid.*, p. 42.
[18] Act 37 of 1875: sec. 149.
[19] HORVÁTH, *op. cit.* 2005, p. 43.
[20] *Ibid.*, p. 44.
[21] *Ibid.*

requiring the realistic operation of joint-stock companies by the opportunity to repeal the general meetings decision, establishing the private responsibility of the member of the supervisory board and the board for directors, defining the condition of a capital increase, securing the old shareholders, and joint-stock companies interest in case of a new potential shareholders buy in, regulating the legal position of the general manager.

Act 18 of 1840 was based on Commercial Code and defined in its first paragraph joint-stock companies: "companies where none of the members are named in the title and the whole capital is shared for predefined amount of equally valued shares and the shareholders are risking only the money they spent on their shares, they are not obliged with other part of their fortune. These companies are named joint-stock companies.[22] §54 stays, that everyone can buy a share and be part of a joint-stock company (this is limited by the founder's rights). It was not necessary to get a permission to found a company, the members only had to sign an agreement about it. Only limited datas of the joint-stock company should have been submitted to the so called bill courts: purpose of the company, datas which served as base for reaching this purpose, amount of the necessary capital, amount of shares, time of its pay in and rule of their distribution, the public parts of the shares and the preparatory bylaws. The act forbade the bearer shares, which meant that registered shares were only allowed. It was also forbidden to ask for interest after the shares and the maximum amount of votes were limited in ten on corporate meetings independently from owning shares.[23] But the joint-stock companies inner leadership, structure and the shareholders control rights were not regulated in the act.[24]

The Act in 1840 was followed by the Act in 1875, which re-regulated joint-stock companies. There were three proposals for the new act. Writing a completely new act, which could have been too different from the international norms. A Commercial Code could have been taken over from another country, which had been against the countries dignity and independence or - which the parliament chose - another country's Commercial Code could have been individualised.[25] This is why the differences between the German and the Hungarian Commercial Code has to be mentioned in my presentation. In Hungary, the joint-

[22] Act 18 of 1840: sec. 1 point b.
[23] Act 18 of 1840: sec. 59–60.
[24] HORVÁTH, *op. cit.* 2005, p. 159.
[25] APÁTHY, István: *A magyar kereskedelmi törvénykönyv tervezete* [*Proposal of the Hungarian Commercial Code*]. Budapest, Franklin, 1873, pp. 13–14.

stock companies could not get their own shares and these shares could not have been pledged.[26] The limited joint-stock companies were not taken over, as well as the silent partnership and maritime law. The last one is today is obvious, but at the acceptance of this act Hungary still had coast for forty years.

But there were some new regulations in the Hungarian, which was not in the German. These were the part about the cooperatives, depositories, mainland insurances. Along cooperatives, limited partnerships, general partnerships and joint-stock companies were also regulated.[27] Joint-stock companies were define by this act: joint-stock companies are those companies, which are having from predefined amount, equally valued (whole or part) shares staying capital and where the owners of shares are responsible only limited to their shares.[28]

5. Normative system of joint-stock company's foundation

Before the 19th century there was no state regulation, because it depended from the kings will, who, with what conditions, what ground rules and with which shareholder circle, how big company people can establish. In Germany the regulation consisted the need of a state permission for establishing a joint-stock company only after 1838. Its conditions were however defined in 1845: the company had to have an activity that is useful the public purposes, which is worthy to support. Another important factor was, that the new company could not endanger the existing industry. After these, a sharenovel was accepted on 11th of June 1870, which introduced the normative system instead of the state permission system. This meant, that the king or the public body could not measure about giving the permission if the joint-stock company was conforming to the legal requirements, it had to be put in the register. Only they legitimacy could have been checked by the courts.[29]

[26] Act 37 of 1875: sec. 161
[27] PAPP, Tekla: *A magyar társasági jog fejlődése* [*The improvement of the Hungarian corporate law*], In: Acta Universitatis Szegediensis: acta juridica et politica, Szeged, 2000, p. 413.
[28] Act 37 of 1875: sec. 147.
[29] HORVÁTH, *op. cit.* 2005, p. 213.

6. Foundation of joint-stock companies

The state needed to focus on the foundation of joint-stock companies, because the big amount of participants represented national economically a huge capital. In my opinion it was necessary to put the foundation under national inspection, because lot of people's money counted on these companies and it caused certain public outcry if a joint-stock company just got the money of the shareholders but did not fulfil its purpose, leaving the shareholders bumped. The most outcries were connected to railway constructions and some joint-stock companies should have been taken over by the state because they were only founded for speculative reasons.

There were two options the ground a joint-stock company: simultaneously or successive.[30] Simultaneously meant, that the founders subscribed the shares and only after the foundation will be the shares published for signing. Successive meant that the founders went to the public so that they get enough investor to sign the shares.[31] The Hungarian legislation chose the successive method, which was criticized by Ödön Kuncz, by a Hungarian legal expert, because in Hungary the other type of foundation was widespread, so the act did not regulate what it supposed to.

The "General Decisions" chapter of the Commercial Code regulated the progress of the foundation. It defined it from the beginning, from signing the shares, through the acceptance of the bylaws from statutory meeting, the rules of announcement, the registration and the publication. In the following chapters were regulated those questions, which are important for today's joint-stock companies also. About the rights linked to the shares, the obligations of the shareholders, the protection of minority, the organization of the company, the ceasing reasons and the capital decrease.[32]

[30] *Ibid.*, p. 203.
[31] *Ibid.*
[32] PAPP, *op. cit.*, p. 414.

7. Founders of joint-stock companies

Those natural and legal persons counted as founders, who called the public on for signing the shares and not those who were actually founding the company.[33] The actual founders had many advantages from founding a company. Everyone got preferred stock, they had pre-emption right for the future launched shares, they could name the first director together, they got reward and they deserved a defined amount of money and the got the defined percent of the profit. They got the right to decline anyone's share signing, if in that person they did not see guaranteed the fulfilment of their duty.[34]

But the founders were responsible in the direction of the company. They were privately responsible for the reality of the datas mentioned in the bylaw-draft, for the income from signing the shares, for the duties that came from deals before registry and publishing of the company, and for damages caused by those shares that were signed before registry and publishing, and for assembling the general meeting after closing the foundation process.[35] The founders had criminal liability also if they shared false datas or the committed something during the foundation of the company which broke the Penal Code.[36]

8. The draft

The foundation of a joint-stock company needed a draft according to Commercial Code, from which the future shareholders can have knowledge about the company which shares they are about to buy. This sheet had to consist the subject of the company and its contents, the amount of the ground capital, the amount and value of common stocks and preferred stocks, and the end of time for signing the shares. It had to be published also, whether the founders or someone else wanted to take part in the company with shares that are not out

[33] HORVÁTH, *op. cit.* 2005, p. 204.
[34] *Ibid.*
[35] Act 37 of 1875: sec. 150–152.
[36] HORVÁTH, *op. cit.* 2005, p. 206.

of money, and what kind of privileges are secured for the founders and the preferred shareholders. For the content of this draft, founders were joint and several responsible.[37]

These informations were written on the share-signing paper and if according to this anything did not happen, then the shareholder could charge his signing. If the content of the draft was accepted by the general meeting, then its content became part of the joint-stock company's bylaws and it became obligatory for those who signed a share.

9. Bylaws of a joint-stock company

The bylaw of the joint-stock company defines the organization, the purpose, and how the company wants to reach its goal. First the Act 18 of 1840 dealt with bylaws of a joint-stock company which did not make obligatory to show the bylaws for the bill of exchange courts.[38] The regulation in 1875 made up some requirements for the bylaw, which the act in 1840 did not consist. It had to contain the seat of the joint-stock company, the amount of the capital, amount and value of shares, the way of paying for the shares and consequences of a late payment. The amount and value of preferred stock had to be also written in the bylaws and the exact rights linked to these shares. The bylaws had to consist rules about the invitation to the general meeting, how the general meeting works, when it takes part and its authorities so that no one could change these autocratically only with the majority. It was also part of the bylaw how the directory board had to be chosen, because it prevented someone's autocratical takeover.

10. The stock

The stock itself would have been before decades just a piece of paper which today as it appears from its names: securities. This was made by the business life, because near money and other value a new form of asset acquisitions was needed. Working out the conception was not linked to the legislation, because they could not give adequate definition, so first

[37] Act 37 of 1875: sec. 150.
[38] HORVÁTH, *op. cit.* 2005, p. 213.

the jurisprudence worked out the definition of securities and in it the definition of stocks.[39] Exactly Friedrich Carl von Savigny was the one who gave first a scientific definition securities and started the development this field of law.

In Hungary, Ferenc Nagy was the first who started the development of securities: every instrument is a security, if it is set out about a right and which embodies this right and which has some kind of value.[40] To this definition I would like to add my opinion, because I think it is important that a stock has got that much value as people maintain to them just like as they do at money. With economical terms: everything that much value, how big their demand is.

Issuing securities had a simple reason: by buying one of these someone got the right to benefit from it and has to opportunity to horn into the work of the company. The paper and the rights cannot be separated; they can be sold only together because in another way it would be impossible to proof the ownership of the stocks.

The stock is a security, issued at the foundation of the joint-stock company or at the increase of capital, which represents a predefined proportion and value of the company's capital.[41] This definition grabs the essence, because it is not specifying the rights linked to the stocks or what obligations do the owner has. From this definition is deductible, that the capital is shared for predefined amount parts, which narrows the number of assigned stocks, which is written in the bylaws.

Between the stocks, there are two type of them: the signed stock and the bearer stock. In the first type, the owner of the stocks was registered into the register of shareholders, they had different value and a permission was necessary to convey the shares. The bearer stock was the one that has been established later, at that time when todays system has been established, that the owner of the paper has the shareholders right. At this time stocks became able to be transferred at the stock exchange.

[39] *Ibid.*, p. 216.
[40] *Ibid.*
[41] *Ibid.*, p. 217.

10. Rights of shareholders

The shareholders' liability is limited to their shares for the company's debts, which is the biggest benefit this form of company, because the risks were divided and this brought people's fun to invest. The rights of shareholders can be divided into two groups: those which can be altered by the general meeting, and those which cannot because they are based on law or the bylaw of the company.[42]

The rights can be divided into three other groups: financial rights, membership rights and minority rights. To the first belongs the right for those part of the company's property that belongs to the value of the stock.[43] From this was deducted the right for dividend, and for liquidation quota. To the membership rights belongs the right to take part on the general meeting and the right to decide about the foundation. With the second right only that shareholder could live with, which signed shares at the foundation at the acceptance of the draft. Every shareholder had the participation right, where they could address on the meeting, could vote and could have a motion linked to the company's work. The prior regulation consisted a limit of votes in 10 which were modified by the Commercial Code and let the bylaw to regulate this.[44] The minority rights became important when the interest of majority's became different from the minorities. They got the right for inspection, which could have been used if enough shareholders were on the same opinion.

[42] OPPLER, Emil: A részvényes külön (egyéni) jogai [The special (individual) rights of a shareholder]. *Jogállam* [*Rule of Law*], 1917, p. 89.
[43] Act 37 of 1875: sec. 147 and 163.
[44] HORVÁTH, *op. cit.* 2005, p. 232.

Réka HERNÁDI: The history and role of the commercial papers during the civil period in Hungary

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1. Introduction

In the 19th century not only the art and the political regime changed a lot, but also the commerce developed so fast. Due to this improvement commercial law became even more important. Legislators tried to create the rules of the commercial law quite precise. The first commercial partnerships like joint-stocks companies appeared that time, and more and more banks opened their gates too. Tradespeople recognized that they could pursue their work according to better conditions in a company. In this century the rules of the bankruptcy law became even more elaborate. Beside money commercial papers had a special role because of these facts.

2. The concept and features of the commercial paper

It is not easy to tell what was a commercial paper because it had no concrete concept despite that legal experts like Gusztáv Wenczel, István Apáthy, Ferenc Nagy, Ödön Kuncz and Géza Magyary dealt with this question.[1] In general we can say that these papers were documents, which incorporated entitlement and had some kind of value. On the other hand Savigny said that *„Commercial papers are papers, in which a debit or demand incorporates, and exists only by the papers."*[2] According to these definitions the papers included some kind of value in connection with private law[3] and this could be validated against the bank or the exhibitor.

Commercial papers had several different types which could be used for disparate purposes, however most of the features were in common. The concept of commercial paper[4]

[1] SZÉCSÉNYI, László: *Értékpapírjog* [*Law of the commercial paper*]. Budapest – Pécs, 1995, Dialóg Campus, pp. 35–36.
[2] MEZEY, Barna (ed.): *Magyar jogtörténet* [*Hungarian legal history*], Budapest, 2007, Osiris, (4th ed.), p. 215.
[3] SZÉCSÉNYI, *op. cit.*, p. 26.
[4] *Ibid.*

included several general characteristics. These papers incorporated rights connected to wealth, which could not be separated from the document, so they were special thing, not only a right but also they were goods, too.[5] So their owner could validate his entitlement only with the document together, the right not only incorporated in the paper, but also became a property.[6] Rules of the property law and the law of the obligations were also used for these papers.[7] The debtor was bound to accomplish the demand, if the entitled showed him the commercial paper. If the entitled changed, the property of the commercial paper had to be transfer to the new person.

Furthermore, if the document perished or vanished, that meant the perishing of the demand, too. [8] In addition, these papers were negotiable, so they could change their owner easily and the entitlement came to the new person.[9] They were indivisible, so the possessor got the whole right, which was incorporated in the paper.[10] The person got only the entitlement included in the commercial papers, not all of the rights of the previous possessor. What is more, the debtor could use only that excuses which were named in the paper.[11] However, some commercial papers assigned the person of the entitlement, who could validate it. The fact that, the rights could be used only by showing it to the adequate people, protected the debtor and the entitled, too. Because of these facts commercial papers functioned as proof, so they had to be written, and in this way, they became an authentic document.[12] First, they were written by hand, but it was not the best solution as the papers were became widespread. After that, the exhibitors created these commercial papers in printing houses and tried to make all pieces to be a special, different one in order to avoid falsification.[13] In 1914 30% of the Hungarian national wealth was presented in commercial papers.[14]

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[5] BÁCSKAI, Tamás – BÁNFI, Tamás – JÁRAI, Zsigmond – SULYOK-PAP, Márta – SZÁZ, János: *Értékpapírok és értékpapírpiac*ok [*Commercial papers and markets of the commercial papers*], Budapest, 1991, Közgazdasági és Jogi Könyvkiadó, (2nd ed.), p. 43.
[6] MEZEY, *op. cit.*, p. 215.
[7] SZÉCSÉNYI, *op. cit.*, p. 27.
[8] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 43.
[9] MEZEY, *op. cit.*, p. 216.
[10] SZÉCSÉNYI, *op. cit.*, p. 63.
[11] *Ibid.*, p. 31.
[12] *Ibid.*, p. 28.
[13] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 43.
[14] MEZEY, *op. cit.*, p. 215.

Unfortunately, there were no standard legal regulations in connection with the commercial papers, only some special act referring to the several types. Because of this fact, in Hungary the activity of the judge and jurisprudence had a special role.[15]

3. Types of the commercial paper

As it was mentioned previously, the commercial papers had several different types especially because of dissimilar purposes and features of the trade. These types can be sort according to several aspects.[16] The most important ones are the next. We can distinguish between short (like the bill of exchange), middle (treasury bills), long term (like the mortgage-bond) and commercial papers without expiration (like stocks).[17] Furthermore, we can speak about constitutive papers, if the exhibition was necessary by the entitlement and declarative, if this action was not indispensable.[18] According to the rules of the substantive law we can make difference between three types. First ones are the papers which incorporated demands and the documents were created to prove these requirements for example the cheques and the bill of exchange. On the other hand, some types of the papers included participation, which certified that the owner added money to the capital stocks and entitled to dividend. The most important example was the stock. The last one are the commercial papers of the property law, which provided ownership or mortgage on the object like the mortgage-bond.[19]

4. The bill of exchange

One of the most important and widespread commercial paper was the bill of exchange. A deferred payment was incorporated in this document. It was a one-sided promissory note, which was created according to strict rules.[20] It is also necessary to mention that this paper

[15] *Ibid.*
[16] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 45.
[17] *Ibid.*, p. 47.
[18] SZÉCSÉNYI, *op. cit.*, pp. 52–53.
[19] MEZEY, *op. cit.*, p. 216.
[20] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 49.

was an abstract, constitutive, short term commercial paper and was applied to a certain amount of money.[21] The bill of exchange was the pawn of the commercial lending.[22] Because of the development of the trade it was becoming even more important in the industry.

We have to mention the endorsement, which made the paper complete and with the help of endorsement the bill of exchange could change its owner.[23] By these commercial papers there was a legal relationship which was especially in connection with loan, as the bill of exchange was widely used as pawn of the commercial lending. The exhibitor obligated himself to pay the loan back.[24] However it was abstract, so was independent from this relationship.[25] The bill of exchange was favourable for the entitled as he could get the money faster. It was especially used for short term loans, so became widespread in the commerce and in the industry, too.[26] Another important feature that the bill of exchange was negotiable, but only in a complete and unconditional way and with the help of endorsement.[27] There were two different kinds of the document. By the unknown bill of exchange the exhibitor promised the paying for another, third person, however by the own paper he obligated himself to pay the certain amount of money.[28]

As was mentioned previously, the bill of exchange had to meet with strict requirements which made it valid. For example, the document had to include the title of bill of exchange, the certain amount of money, the debtor's name, date and place of the exhibition, and it had to be signed.[29] Lately, there were no standard regulations referring to the bill of exchange, but there were some acts in connection with this paper. The first attempts were in the 18th and in the 19th century. In the time of the neo-absolutism legislators introduced the German Act of the bill of exchange, however later the Hungarian regulation came back. Unfortunately, this act was not adequate, so the Parliament adapted a new bill in 1876

[21] SZÉCSÉNYI, *op. cit.*, p. 117.
[22] ADAMECZ, Péter – KOMLÓS, János: *Értékpapírok a gazdaságban* [*Commercial papers in the economy*], Budapest,1986, Pénzügyi Szervező és Tanácsadó Vállalat, p. 11.
[23] MEZEY, *op. cit.*, p. 217.
[24] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 49.
[25] SZÉCSÉNYI, *op. cit.*, p. 117.
[26] MEZEY, *op. cit.*, p. 218.
[27] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 52.
[28] MEZEY, *op. cit.*, p. 218.
[29] SZÉCSÉNYI, *op. cit.*, pp. 131–133.

(1876:27), which was created by a famous representative, István Apáthy. In addition, Hungary adapted the contract of Geneva, which was signed in 1930.[30]

5. Cheque

Another important example for the commercial paper was the cheque. It was similar to the previously mentioned paper, however there were several differences, too. It was a short-written voucher. Compare to the bill of exchange by the cheques banks had a special role, as there was a contract or agreement between the exhibitor and the bank. If someone showed this commercial paper to the bank, it had to pay the certain amount of money to that person.[31] According to these facts this paper was used between private people instead of trade companies.[32]

It did not function as the pawn of commercial lending, people used it as a payment instrument. On the other hand, this paper needed to fit strict rules in order to be valid. As I have mentioned previously some regulations were also adaptable for the cheque and it was also a negotiable instrument. The commercial paper had to include the title of cheque, the certain amount of money, the banks' name, whom the exhibitor had contract with, the place of the payment, the date and place of the exhibition and it needed to be signed. If one of the requirements was missed the commercial paper was not valid.[33] Another rule could be that the bank accepted the cheques which were created only by that bank.[34] The cheque was also negotiable, however it was not so important, because this commercial paper had to be fulfilled in a short time.[35] Firstly, it was not so typical in the everyday life, but after that it limited and even replaced money.[36] It became necessary to regulate the paying by cheques, so for the first time in 1888 the Bank of the Astro-Hungarian Monarchy made it possible.

[30] MEZEY, *op. cit.*, p. 218.
[31] *Ibid.*, p. 218.
[32] SZÉCSÉNYI, *op. cit.*, p. 185.
[33] *Ibid.*, p. 85., pp. 193–194.
[34] ADAMECZ – KOMLÓS, *op. cit.*, p. 17.
[35] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 59.
[36] ADAMECZ – KOMLÓS, *op. cit.*, p. 17.

The next step of the legal regulation was to accept the first Act about cheques in 1908, which was used till 1930. It was also significant that Hungary joined the Agreement about Cheques in 1931, but it was valid only till 1965.[37] At the end of the century cheques became very important because people did not need to have much money if they went somewhere or pay attention to that, so life and trade became easier and safer.[38]

6. Bond

The third important commercial paper was the bond. This bill incorporated demand, and the exhibitor obligated himself to pay the previously determined money (the nominal value of the bond)[39] and certain percentage of interest. In contrast to the other ones it was usually for long terms, however it was also negotiable.[40] First these bonds were got out by the state, loan offices, or certain companies.[41] That is the reason why in the 1870s several bonds were got out by the Hungarian State and were bought by Austrian salesmen. The bonds were sold in the stock-market with the stocks. These commercial papers were secure as the state did not go bankrupt easily, so the chance of any risk was smaller.[42] This document proved only the legal relationship,[43] and despite the stocks it did not assure any special rights.[44]

7. Stock

It incorporated participation and proved that the owner added money to the capital stock and entitled to dividend. These papers had no expiration date. Stocks could also change their owner. Compare to the other papers with this commercial paper the owner became

[37] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 61.
[38] MEZEY, *op. cit.*, p. 219.
[39] ADAMECZ – KOMLÓS, *op. cit.*, p. 16.
[40] MEZEY, *op. cit.*, p. 219.
[41] SZÉCSÉNYI, *op. cit.*, p. 219.
[42] MEZEY, *op. cit.*, p. 219.
[43] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 62.
[44] SZÉCSÉNYI, *op. cit.*, p. 16.

the member and even the owner of the corporation.[45] It counted as commercial paper because the entitlement could be validated only by the paper.[46]

The bills were sold and bought in the stock market and made profit for the owners. It was riskier than the bond, but the profit was also bigger.[47] These papers compare to the other ones incorporated rights connected to membership. Like the other papers, it also had to meet strict rules. The document had to include the name and the seat of the joint-stock company, rights, the types, the value of the capital, the date of the exhibition and it had to be signed by two leaders.[48] The owner could not return the stocks, if he wanted to give away he had to sell it to another person.

It is necessary to mention the joint-stocks companies, because their appearance made stocks indispensable. For their start or establishment huge amount of capital was needed, and that was provided by the stocks. With the buying of the bills, the owners guaranteed the capital and became members, so they had rights to take part in the company. Their responsibility was not unlimited. Because of this facts, the joint-stock companies had more advantages than other companies, even the profit could be bigger, but the risk could be smaller.[49] In Hungary in the 19th century there were only a few of them, but in the 20th century the number increased rapidly, nearly 3500 companies were that time.[50]

8. Mortgage-bond

It was the most typical *ius in re* commercial paper. Mortgage-bond was a special paper, as the loanee insured mortgage on the possession, usually on an estate and the loaner provided loan in parts. This bond proved these affairs. For fulfilling the mortgage-bond the company or the institute was responsible with its own property, too.[51]

[45] MEZEY, *op. cit.*, p. 220.
[46] SZÉCSÉNYI, *op. cit.*, p. 209.
[47] MEZEY, *op. cit.*, p. 221.
[48] SZÉCSÉNYI, *op. cit.*, p. 216.
[49] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, pp. 73–78.
[50] MEZEY, *op. cit.*, p. 204.
[51] *Ibid.*, p. 220.

It was different because the cover was mortgage on a real estate and its interest was fix.[52] However, it was also a negotiable commercial paper, the owner could give it away. The mortgage-bond was used especially in the agriculture as it was adequate for long term plans and beneficial for the equipment. Beside it fitted to the claim of the market and agriculture.[53]

Most of the mortgage-bonds were used in the time of the Dualism, they were carried out by the Bank of Astro-Hungarian Monarchy. After that the cover was not only the farmers' field, but houses and buildings, too. What is more, mortgage-bond played special role in the year of the Millennium, when the thousand years' anniversary of the Hungarian Settlement was celebrated. That time several new buildings, monuments were built.[54] Beside the common commercial papers there were several other types, which presented in the second half of the 20th century. For example, the treasury bills, investment bill, deposit bill and the property bill.[55] These commercial papers became widespread after 1945 in the economy.

9. Summary

To sum up, commercial papers' appearance was a huge step in the development of the economy. It enabled the move of bigger amount of capital, which influenced the number of investments and the measure of the improvement, so for economic reason this was a big effort. On the other hand, because of these documents the use of the cash decreased, and it became easier to pay bigger amount of money. These papers were payment instrument and also the pawn of the commercial lending, and with the help of it bigger amount of ware could be sold. Furthermore, they played special role in the investment market.[56]

[52] BÁCSKAI – BÁNFI – JÁRAI – SULYOK-PAP – SZÁZ, *op. cit.*, p. 102.
[53] ADAMECZ – KOMLÓS, *op. cit.*, p. 15.
[54] MEZEY, *op. cit.*, p. 220.
[55] SZÉCSÉNYI, *op. cit.*, p. 12.
[56] *Ibid.*, pp. 38–39.

Mateo VLAČIĆ: The Codification of the Commercial Law in the interwar Yugoslavia – Why lasted so long and what happened at the end?

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1. Introduction

The Kingdom of Yugoslavia was a heterogeneous state, with different legal, political, cultural and economic heritage. The legal particularism caused a specific legal structure of the state marked by the existence of many different legal areas.[1]

Each of the legal areas had its own legal regulations. Such legal particularism prompted the government making of laws that would be valid for the whole Kingdom eliminating collisions between legal areas. The process of unification sought to speed up and make law-making easier through a shortened legislative process. However, we will see that working on equalizing was not simple and finally legal unification in Yugoslavia was not even ended in some branches of the law.[2]

The perfect example of the aforementioned problems, as well as the lengthy work on codification in the efforts to draft a single law, was commercial law. Despite some branches of the law completed unification, having the law valid for the whole state area, commercial law remained, after all, unified postponing the new commercial law into force.

2. Legal areas, its sources and the reason for codification

2.1. Legal areas

In the Kingdom in the area of commercial law, legal particularism was in power. It was manifested in the existence of six legal areas with their valid Commercial Codes. The law in force in the Dalmatian-Slovenian legal area was the Austrian Trade Law (1862). Also Austrian

[1] KREŠIĆ, Mirela: *Yugoslav private law between two World Wars. Modernisierung durch Transfer zwischen den Weltkriegen.* Vittorio Klostermann, Frankfurt am Main, 2007, pp. 153–154.
[2] *Ibid.*

law with the Trade Law of Bosnia and Herzegovina (1883) was applied in the legal area of Bosnia and Herzegovina. Montenegro had its own Trade Law (1910), as well as Serbia (1860), but in some parts of Serbian legal area the Bulgarian Trade Law was in force (1898). The Croatian-Slavonian area and so-called Hungarian legal area applied the Hungarian (-Croatian) Trade Law (1875).[3]

It is important to differentiate between the trade laws made under the influence of the 1861 German Trade Law (Austrian, Hungarian (-Croatian), and Bosnian-Herzegovinian trade laws) and those made under the influence of the 1807 French Code de Commerce (Serbian and Montenegrin trade laws).[4]

2.2 Why codification?

The codification of the commercial law was necessary because keeping legal heterogeneity disrupted legal transactions and caused legal inequality, especially regarding economic development. The heterogeneity of the Yugoslavia's legal system included working on equalizing the law with the goal of making the state united in the legal aspect. Although working on equalizing the law started within the first days of the existence of the new state, it was shown that it was extremely complicated and long-lasting.[5]

3. Commercial jurisdiction

There were not so many commercial courts in the Kingdom of Yugoslavia. In the period after 1929 (when started harmonization of commercial judiciary, as a part a harmonization of state judicial organization) operated only two specialized commercial courts stipulated by the Act on the organization of the ordinary courts.[6] One was in Belgrade (established in 1859), while the other was new one established in 1939 in Zagreb. In rest of the country

[3] KREŠIĆ, Mirela, PASTOVIĆ, Dunja: Koenigreich Jugoslawien (1918–1941). In: Martin Loehnig und Stephan Wagner (hrgs.): *Das ADHGB von 1861 als gemeinsames Obligationenrecht in Mitteleuropa.* Tuebingen, 2018, p. 227.
[4] *Ibid.*
[5] *Ibid.*, p. 254.
[6] Zakon o uređenju redovnih sudova za Kraljevinu Srba, Hrvata i Slovenaca od 18. januara 1929. [Act on the organization of the ordinary courts], Službene novine Kraljevine Srba, Hrvata i Slovenaca od 25. januara 1929., no. 20-X.

there were a county courts with a commercial division where one of the judges was so-called commercial judge – "honourable" judge recruited from respected members of business community.[7]

According to the Act and in relation to the their jurisdiction, "they keep registers of commercial companies and act as first instance courts in civil and non-contentious, commercial and bills of exchange cases according to the regulation on actual jurisdiction in the laws on court proceedings and in other laws."[8] Although significant changes in commercial jurisdiction were expected with the introduction of the Code on Court Procedure in Civil Litigations,[9] they did not occur and it retained its previous characteristics. The presence of a trader as a member of the panel in cases where the defendant is a merchant and the parties did not agree on the jurisdiction of a regular court or arbitration indicated that the expertise of the courts could still not be discussed. In addition, there were discussions regarding the jurisdiction of ordinary councils of county courts and commercial division of county courts, as well as the existence of a special commercial court or councils of commerce that bring difficulties regarding "honourable" judges in relation to their passive and indecisive role.

It is worth noting that commercial disputes could also be brought before institutional or *ad hoc* court of arbitration. There were three types of institutional court of arbitration: Exchange court of arbitration, Arbitration court at chambers of commerce and Arbitration court at association of merchants and industrialists. Exchange courts of arbitration had the most widespread activity, they were effective and quick as well reliable.[10]

4. Codification of Commercial Law

As it was mentioned, more or less extreme legal particularism that existed in Yugoslavia induced intense governmental efforts to eliminate collisions between the areas through a

[7] SIROTKOVIĆ, Hodimir: *Pravosudne strukture u hrvatskim zemljama od 1918. do 1945. godine* [*Judicial structures in Croatian countries from 1918 to 1945*]. VIA, no. (1) 32, 1991, p. 21.
[8] *Ibid.*
[9] Zakon o sudskom postupku u građanskim parnicama (građanski parnični postupak za Kraljevinu Srba, Hrvata i Slovenaca) [Code on Court Procedure in Civil Litigations (Civil Litigation Procedure for the Kingdom of Serbs, Croats and Slovenes)]. Službene Novine Kraljevine Jugoslavije, no. 179-LXXV, 1929.
[10] KREŠIĆ, PASTOVIĆ, *op.cit*., pp. 270–271.

unification of Yugoslav law, which began soon after the common state had been founded. The unification process, according to 1921 Constitution (Art. 133),[11] had to be completed within a five-year term. However, the legislators subsequently made use of their constitutional right to prolong this deadline.

Unification and codification of commercial law also started very early. What actually is a "unification"? It is the process of approximating several legal systems and achieving some measure of integration where previously there was diversity. Unification aims at complete unity in substance and detail. A new law is made and substituted for the diverse national laws which existed before; they are repealed and replaced by the new law.[12]

4.1. What kind of a trade code to make?

Unification of the law was responsibility of the Ministry of Justice alongside the Ministry of Legal Unification. In the Ministry of Justice, the Legislative Council was founded (1919), and its duties were divided among three departments: private-law, criminal-law, and public-law. Based on the decisions made by the Minister of Justice, the Private-Law Department of the Council oversaw the working on unification of the trade legislature.[13]

Work on the trade law started in 1921. The main question to be resolved was what kind of a trade law to make. Should one of the existing laws be chosen that its validity would be extended to the entire state? An aggravating circumstance was that all valid laws were made in the second half of the 19th century when different economic conditions were in place. By choosing this way of unification, the lawmaker would have to modernize the chosen trade law. The other option included longer process of making a new, modern, unique trade law which required a number of principal questions to be decided such as what foreign trade law would be taken as example.[14]

The Unification Board of the Trade Law decided to follow the 1912 Serbian Bill of the Commercial Law as a base, accompanied by the 1897 German Commercial Law, as well as

[11] Ustav Kraljevine Srba, Hrvata i Slovenaca [The Constitution of the Kingdom of Serbs, Croats and Slovenes]. Službene Novine, no. 142a, 1921.
[12] SCHMITTHOFF, Clive M.: American and European Commercial Law. *Journal of Legislation*, vol. 6, no. 1, 1979, p. 45.
[13] KREŠIĆ, PASTOVIĆ, *op.cit*., p. 254.
[14] SLADOVIĆ, Eugen: *Trgovačko pravo* [*Commercial Law*], Zagreb, 1934, pp. 120–121.

the 1920 Austrian Draft of the Commercial Law. German and Austrian sources were used because of the interrelations between commercial and civil law for whose codification the Austrian General Civil Code with novellas was used as base.[15]

Furthermore, the original content of the Commercial Code was supposed to be included regulations on maritime law, cooperative regulations, regulations on the right to insurance, on unfair trade competition and copyright law, while the provisions on the bond and cheque were to be contained in the new special laws. Afterwards it was agreed that by special laws would be regulated private maritime law and the refutation of unfair competition.[16]

4.2. Objective or subjective system?

While drafting the unique trade law, the area of application of the trade law, i.e. the acceptance of an objective, subjective or mixed system popped up as one of the key questions. Using usual criteria to define concept of commercial law, merchant or commercial transaction, we can say that trade codes used both sets of criteria without one being clearly more important than the other. So, the German type codes primarily regulated who is a merchant, but included rules on so-called objective or absolute commercial transactions applying also to non-merchant, as well as rules applicable to a non-merchant in so-called mixed transaction (between merchant and non-merchant). Speaking of Serbian trade code and trade code of Montenegro, we already said that they were modelled upon French code. According to Serbian Trade Code, merchants are those who are engaged in commercial transactions and make them their habitual profession. The Code does not provide any guidelines or definitions what these "commercial transactions" are. Trade Code of Montenegro also define who is a merchant, but unlike Serbian Code, define as well "commercial transaction".

The consequence of adopting the objective system would allow the strict regulations of trade law of obligations would've been applied to parties neither of which was a trader or

[15] KREŠIĆ, PASTOVIĆ, *op.cit*., p. 255.
[16] *Ibid.*

knew the way of trading, while the subjective approach stated to which regulations are merchants subjected and who they are. Ultimately, the Board opted for subjective system.[17]

4.3. Process of codification

Warnings about the need for compatibility between civil and commercial law could be achieved in a mutual process of codification, so the preparation for the trade code was supposed to happen at the same time as the preparation for the civil law, or at least follow it. For as an example Germany was given, where the new Trade Code was made based on the Civil Code.[18] Unification of civil law started immediately, and, according to the agreement, it should have been based on ABGB, or to be more precise its Croatian translation from 1853. This drafting process was slow in advancing, it was even stopped for a short period, so the result was finally out in 1934 – Preliminary Principles of the Yugoslav Civil Code – but, never became a code. But, its existence, and continuing work on this project influenced the codification of commercial law since drafting the part of commercial code connected to the real property and obligation was put on hold waiting to see what will be with the Civil Code.

For waiting in the process of making the new trade law were multiple reasons. Firstly, it was necessary to make draft of bills on the bond and cheque law. Another problem were drafts of new trade laws in post-war Europe, especially parts on joint stock and other trade companies which had to be taken into consideration as well as the criticisms of those drafts. In the end, contemporary solutions from a number of other European codes were included in the Draft of the Commercial Law – Polish Law on Stock Companies (1928), the Civil Code of Liechtenstein (1926), the Swiss draft amendments to the law of Obligations and the Italian trade law draft (1925).[19]

In the beginning of 1928 enough material was prepared to be able to start having sessions. However, the code was not worked on for two years because of the change in membership and the fact that due to the proclamation of January 6th dictatorship (1929) the Legislative Council and the Private-Law Department were abolished. Although the Supreme

[17] KREŠIĆ, PASTOVIĆ, *op.cit*., p. 258.
[18] KREŠIĆ, PASTOVIĆ, *op.cit*., p. 261.
[19] KREŠIĆ, *op. cit*., p. 164.

Legislative Council was a new body founded within the Ministry of Justice, with the same authority, and the Minister of Justice was authorized to establish a commission of experts if needed, it was done so in 1930, when the commission continued its work in a new structure.[20]

In the same year, in two readings the first part of the draft of the law was completed, thereafter next year Titles I, II, and V from the second part of the draft were completed with explanation such as first part of the draft. Title III of the second part with explanation was proclaimed in two reading by February 1932, and Titles IV and VI by May 1933.[21]

The critical opinions of all Yugoslavian law schools, higher courts, trade, attorney, and notary chambers, as well as other economic organizations and institutions on the adopted parts of the draft were systematically processed as the base for the third reading during 1934.[22] After two-year consideration the new Commercial Code of the Kingdom of Yugoslavia was adopted in the National Assembly in 1937, and sanctioned according to the then-valid constitutional regulations by the King.[23]

Content-speaking, the adopted Code was not complete. It encompassed the regulations on the trader and merchant staff, as well as regulations on trade associations and secret associations, but not commercial and legal norms of property law and law of obligations. It was considered purposeless to pass it before a unique civil law was passed, given that it was tightly connected to civil law.[24]

According to the last paragraph of the Code, the day of coming into the force of the Code had to be decided by a special law. However, the mentioned law was never passed in the coming years. Mostly, because the Yugoslav bankers whose activity would be affected by the Commercial Code managed to put its application off *ad infinitum*. Also, the WW2 started soon so as a result the Commercial Code was not put into effect and the regulations valid until then continued to apply.[25]

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[20] KREŠIĆ, PASTOVIĆ, *op. cit*. p. 256.
[21] *Ibid.*
[22] *Ibid.*
[23] Trgovački zakon za Kraljevinu Jugoslaviju [Commercial Code for the Kingdom of Yugoslavia] Službene novine Kraljevine Jugoslavije no. 245 – LXXIV, 1937.
[24] KREŠIĆ, PASTOVIĆ, *op. cit*. p. 258.
[25] *Ibid.*, p. 257.

5. Conclusion

The obvious example of the legal particularism in interwar Yugoslavia were six legal areas with their applicable laws including different trade codes. The elimination of heterogeneity of law system through unification was general approach, accepted also in the field of commercial law by drafting a unified state-wide law.

During the drafting of the code, a subjective system was chosen, while it was agreed to choose for the base of the making the new Yugoslav trade code the Draft of Commercial Code for the Kingdom of Serbia (1912) followed by the German Commercial Code as well as Austrian Draft of the Commercial Code. There were lots of obstacles for the new Commercial Code, but one of the main problems was frequent change of government in the interwar Yugoslavia, which additionally delayed its adoption.

At the end, commercial legislature, despite the efforts made and even with the unification process completed, remained non-unified postponing the new Commercial Code coming into force.

Mia MILANOVIĆ: Stabilisation of the dinar in the Kingdom of Yugoslavia – Legislative framework

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1. Introduction

After World War I, in 1918, the Kingdom of Serbs, Croats and Slovenes was formed. According to the first constitution of the SCS Kingdom called St. Vitus' Day Constitution (1921) the new state was a parliamentary and heredity monarchy. The Kingdom suffered from political crisis, economic backwards and inter-ethnic disputes. Despite its unitary and centralistic administrative organisation, the Kingdom was characterised by variety in the organisation of the judiciary and law taken over from the previous legal systems. As a result, there were six legal areas in the SCS Kingdom which caused a lot of legal issues. Legal particularism remained characteristic of the state during its existence. In 1929, in circumstances marked by further ethnic conflicts, economic underdevelopment and political crises (i.e. 1928 assassination of Stjepan Radić, the leader of the Croatian Peasant Party), king Alexander proclaimed dictatorship on January 6th and abolished the 1921 Constitution changing the name of the country into the Kingdom of Yugoslavia. After few years, in September 1931, King proclaimed a new constitution, so-called Octroyed Constitution. It didn't change the former political regime but offered a pseudo - parliamentarism together with an official legitimation for covert absolutism.[1]

During the interwar period the Kingdom pursued liberal economic policy but due to the Great Depression the State was forced to pursue a serious intervention measures. One of the fundamental issues that had to be addressed it the first years was the issue of monetary policy - the unification of money and the remediation of currency chaos. Why? Because after the War and at the beginning of a new State five currencies were in circulation: the *dinar* of the ex-Kingdom Serbia, the *perper* of the ex-Kingdom of Montenegro, the Bulgarian *lev* and

[1] KREŠIĆ, Mirela: *Yugoslav private law between two World Wars. Modernisierung durch Transfer zwischen den Weltkriegen.* Vittorio Klostermann, Frankfurt am Main, 2007, pp. 151–155.

the German *mark* and in the largest part of the country was the Austro-Hungarian *krone*.[2] So, at the beginning of the paper I will describe the process of monetary unification and its consequences. In the second part I will be focused on the stabilization of a *dinar* and the legal aspect of it, as well as why it was so needed. At the very end, I'll give some final remarks.

1. Monetary unification

As it was mentioned, one of the fundamental issues that had to be addressed was the issue of monetary policy - the unification of money and the remediation of currency chaos. The solution for the monetary issue was related to the interpretation of the newly created state. There were two possible answers: the SHS Kingdom was a new state or the SHS Kingdom was a political continuity of the Kingdom of Serbia. This problem needed to be resolved because economic, political and legal problems came from this unclear situation. This legal doubt opened up the possibility for the lump sum application of legislation in the sphere of finance and economic policy general.[3] Following the idea of political and legal continuity of ex-Kingdom of Serbia in the SCS Kingdom, the most striking example of this was the acceptance of Serbian *dinar* and the replacement of other currencies, especially the Austro-Hungarian *krone*, with the *dinar*.[4] The first monetary policy measures followed as early as December 12, 1918 when a decision was taken to ban the entry of *krone* from abroad into larger denominations than a thousand. One of the results was a large shortage of a small denominations coins which resulted in an increase in food prices. Also, fake banknotes circulated so money had to be checked and handed carefully.[5] After that, the Government made the decision to stamp validate all *krone* denominations in the country (1919). The process was ill-prepared so the next step was labelling the previously stamp validated *krones*

[2] KOLAR DIMITRIJEVIĆ, Mira: *The History of Money in Croatia 1527–1941*. Croatian National Bank, Zagreb, 2018, p. 147.

[3] KRŠEV, Boris N.: *Monetarna politika i problem unifikacije novca u Kraljevini Srba, Hrvata i Slovenaca (1918–1923*) [*Monetary policy and the problem of unification of money in the Kingdom of Serbs, Croats and Slovenes (1918–1923*], Civitas, MMXII, no. 3, p. 114.

[4] The replacement of crowns had to be done pursuant to Article 206 of the Treaty of Saint-Germain which, in addition to the stamping, required all countries in which the crown was in circulation, including Hungary and Austria, to replace the stamped banknotes by their own currency within 12 months after the treaty came into effect. PANTELIĆ, Svetlana: *Dinarsko – krunske novčanice* [*Dinar-Crown Banknotes*], Bankarstvo, 2017, vol. 46, issue 3, p. 133; see also BECIĆ, Ivan M: Za dinar ili za krunu – ko je dobio, a ko izgubio [For the dinar or for the kruna – Who lose? Who won?], *Historija 20. veka*, 2/2013, pp. 41–58.

[5] KOLAR DIMITRIJEVIĆ, *op. cit*., pp. 148–149.

(1919-1920).[6] After labelling the *krone* notes was completed, the Government began initiative on the transformation of the Privileged National Bank of the (ex) Kingdom of Serbia into the National Bank of the SCS Kingdom as the leading financial institution that was granted the privilege of banknote issue by the state.[7] National Banks first task was to finish the monetary reform so for this purpose the Ministerial Council passed the Act on the unification of money. According to it, begins the withdrawal and conversion of all those found currency for the newly issued the *krone* - *dinar* banknotes, which apart from the names of the two former currencies, also contained their parity ratio of 4: 1.[8] From a legal point of view it was a precedent in monetary policy because a single banknote was issued that reads in two currencies which are individually withdrawn from circulation and whose countries of origin do not formally exist. Unlike the *krone* the Serbian *dinar* hardly devalued. Thanks to French and English loans, first and foremost, as well as guarantees allies, the *dinar* represented a relatively stable and convertible currency. The Bulgarian *lev* was exchanged for the *krone* - *dinar* without major fluctuations and was replaced on a 2: 1 parity basis. Montenegrin *perp* was the last caught currency in progress in April 1921 and it was exchanged on a parity basis of 1: 1.[9]

By the end of 1921 a complete unification of money was made in the SCS Kingdom and the only banknotes in the circulation were *krone – dinar* banknotes. Then it was decided that the only currency will be the new *dinar*, so starting from the 1923 all legal entities were obliged to use only *dinar* for their business transactions.[10] Although dinar was stabilised at an overly high exchange rate soon it caused economic stagnation which continued in the following years. All of this led to inflation and overall instability.

[6] BIĆANIĆ, Rudolf: *Ekonomska podloga hrvatskog pitanja* [*The Economic background of the Croatian issue*], Zagreb, 1938, pp. 41–42.
[7] Zakon o Narodnoj banci od 26. januara 1920 [The Act on the National Bank], Službene novine Kraljevine Srba, Hrvata i Slovenaca, no. 22.
[8] KOLAR DIMITRIJEVIĆ, *op. cit*., p. 155.
[9] KRŠEV, *op. cit*., pp. 120–121.
[10] PANTELIĆ, *op. cit*., p. 133.

2. Dinar stabilization

The value of the *dinar* was influenced by a financial policy that was reckless, based on a fiction about the unification accomplished by war reparations, symbolic donations and positive credit arrangements with foreign creditors. All of the above could not change the reality and developments in the money market where the new currency was experiencing its first historical sunrise. Neglecting investment in the economy rebuilding the country, the state spends almost all its resources on servicing wages of an over-employed state administration. Political disorder with the unresolved border issues and inter-ethnic conflicts of interest additionally impedes and adversely affects the economic development of the country and its value currency.[11]

In response to solve the problem of inflation and economic instability, measures were adopted to stabilise monetary relationships in the country. The stabilisation lasted from 1925 to 1931 and it started with the reforms to stabilise the *dinar*.

2.1. *De facto* stabilization

The strengthening of the *dinar* began in 1923, and it was reached in 1925. Period of *de facto* stabilised dinar lasted for six years, from 1925 till 1931. In the meantime, all the pre-war and war debts had been regulated, which influenced favourably the state's creditworthiness abroad and indirectly also the trust in the Yugoslav currency. Owing to its interventions on world money markets the National Bank managed to maintain the exchange rate of the dinar in the range between 9.12 and 9.13 Swiss francs against 100 dinars. The state apparatus had been set up, the need for stringent border security measures had ceased and new state loans both in the country and abroad, were not incurred till 1931. Government revenues rose from 9.8 to 13.4 billion dinars. Revenues generated from all sources grew alike, both from direct and indirect taxes and from the state economy The increase in the government revenues was partially a proof of strengthening of the economic power of the

[11] KRŠEV, *op. cit*., pp. 122.

population and economic growth during the observed period, whilst at the same time resulting from the tax system unification and modernisation. [12]

Nevertheless, this *de facto* stabilisation had negative impact on the economy of the previous Austro-Hungarian provinces who had, compare to Serbia and Montenegro, quite developed monetary economy and because of that seriously felt every currency and monetary changes. For example, the initial weakening of the Croatian economy after 1918 started in the field of monetary politics, yet the collapse of Croatian private banking which occurred after 1918 in the field of monetary politics, as well as the fall of private banking in Croatia after the Great Depression, totally destroyed the economic domination of former Austro-Hungarian provinces in the Kingdom of SCS/Yugoslavia.[13] Political crisis, stagnation and deflation have affected the distrust of citizens in the government, so stabilizing the dinar was one of the solutions to restore hope in the government.

2.2. ***De iure*** **stabilisation**

De facto stabilisation didn´t mean *de iure* stabilisation. Despite the efforts, the first *de iure* stabilisation failed in 1928.[14] So, following a period of a *de facto* stabilisation, Kingdom again undertook legal measures towards its *de iure* stabilisation in 1931 as one of the latest European countries to do that. To stabilise currency legally meant establishing the value of national currency against a certain quantity of a gold. Every country that undertook this measure gave an additional stability element in foreign transactions. Currency stabilisation was either preceded by a long-term gradual strengthening of gold and foreign exchange reserves of the central bank or by means of huge foreign loans thus creating conditions for an instant and considerable strengthening of gold and foreign exchange reserves of the central bank.[15]

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[12] GNJATOVIĆ, Dragana: *Foreign Exchange Policy in the Kingdom of Yugoslavia during and after the Great Depression*. The Experience of Exchange Rate Regimes in South-eastern Europe in a Historical and Comparative Perspective, Second Conference of the South – Eastern European Monetary History Network, April 13th 2007, pp. 334–335.

[13] BIĆANIĆ, *op. cit*., pp. 45–46.; KOLAR DIMITRIJEVIĆ, *op. cit*., p. 167.

[14] For more about these attempts see: RUPČIĆ, Vjenceslav: *Zakonska stabilizacija dinara i zlatni standard u Kraljevini Jugoslaviji* [*Legal stabilisation of the dinar and the golden standard in the Kingdom of Yugoslavia*]. unpublished, 2018, pp. 27–32.

[15] GNJATOVIĆ, *op. cit,* p. 336.

Basically, de *iure* currency stabilisation envisaged that the total banknote contingent that was in circulation had to be covered for by a legally prescribed amount of gold and foreign exchange reserves. In order to secure such a guarantee, the Yugoslav government took a stabilisation loan from French banking consortium (May, 8th 931).[16] Shortly after, on May 11th 1931, Act on the Currency of the Kingdom of Yugoslavia was brought and it stipulated that the value of dinar equalled to 26.5 milligrams of pure gold.[17] For the purpose of application of the Act, the Agreement on the Execution of the Currency Act between the State and the National Bank was brought on 13 June 1931.[18] Based on this Act, the French monetary system was accepted, with the coverage of banknotes and sight obligations of 35%, of which 25% was in gold and 10% in foreign currency.[19] Also, the National Bank was under obligation to exchange all amounts surpassing 250 millions of dinars for either golden bullions or foreign exchange. According to this Act, the exports of gold and foreign exchange were free, that is, the foreign exchange regime of restrictions was formally abolished. When the Act on the Currency came officially into effect on 28 June 1931, the gold exchange standard was formally established in the Kingdom of Yugoslavia for the first time. Following the changes in the position of the National Bank two additional laws was brought, the Act on the National Bank of 17 June[20] and the Statute of the National Bank of 25 June[21], creating a legislative framework for the stabilisation of the dinar in 1931. For the first time National Bank was define as a public institution responsible for determining and implementing the monetary and foreign exchange policies. The influence of the National Bank grown gaining for example the advisory role in completing the loans. Although legal stabilization was expected to facilitate the lending of the economy by the National Bank, the introduction of gold parity increased the dependence of the *dinar* currency on its reserves, which significantly limited the lending capacity of the National Bank. Moreover, with this new role,

[16] For more see: JELČIĆ, Božidar: *Razvoj javnih financija u Jugoslaviji* [*The development of public finance in Yugoslavia*]. Zagreb, 1985, pp. 107–111.
[17] Zakon o novcu Kraljevine Jugoslavije od 11. maja 1931. godine [The Act on the Currency], Službene novine Kraljevine Jugoslavije, no. 107-XXXII.
[18] Ugovor za izvršenje Zakona o novcu između države i Narodne banke od 13. juna 1931. godine [The Agreement on the Execution of the Currency Act between the State and the National Bank], Službene novine Kraljevine Jugoslavije, no. 112.
[19] RUPČIĆ, *op. cit*., p. 34.
[20] Zakon o Narodnoj banci od 17. juna 1931. godine [The Act on the National Bank], Službene Novine Kraljevine Jugoslavije, no. 137.
[21] Statut Narodne Banke od 25. juna 1931. godine [The Statute of the National Bank], Službene Novine Kraljevine Jugoslavije, no. 140.

lending has become merely a side activity of the bank.[22] Introduction of the golden *dinar* was seen as a huge success although it was carried out during a very inconvenient period, at the peak of the Great Depression. *Dinar* remained stable but monetary conditions in the Kingdom were affected by the collapse of *Wiener Kreditanstalt*, a large Viennese monetary institution and the Hoover Moratorium of 20 June 1931 on payments of Germany's war reparations and debt, which decreased foreign currency inflows by 450,000,000 dinars annually in net terms. This was followed by an event that caused a widespread distrust in the currency: the abolition of the gold standard in England, on 21 September 1931.[23]

But, after only three months of applying the Act (i.e. after 101 days), at the moment when both economic and financial crises were already seriously afflicting the country, the Government was forced, as well as other European governments to reintroduce restrictions in both domestic currency and foreign exchange transactions. On 7 October 1931, a Book of rules regulating foreign exchange transactions was brought.[24] It sustained various amendments and stayed valid till the end of the period in between the two World Wars. The stipulations in this Book of Rules legislated exclusively for monetary transactions whereas trade in goods remained free.[25] Introduction of these restrictions meant that a *dinar* convertibility was abolished.

3. Conclusion

In the interwar Yugoslavia in order to solve the problem of different currencies, namely the unsettled financial situation, monetary unification was started. From the text it is possible to conclude how complicated the procedure really was. After the decision on the unification of money began the withdrawal and conversion of all found currency. Subsequently, over the next years it was decided that the *dinar* would be the national currency. The new currency was more than inflationary, experiencing dire crashes in the money market. Stabilization of

[22] RUPČIĆ, *op. cit*., p. 34.
[23] KOLAR DIMITRIJEVIĆ, *op. cit*., p. 170.
[24] Pravilnik o regulisanju prometa devizama i valutama od 7. oktobra 1931. godine [The Book of Rules regulating foreign exchange transactions], Službene novine Kraljevine Jugoslavije, no. 239.
[25] GNJATOVIĆ, Dragana: Sto ine n dan konvertibilnega dinarja med svetovnim vojnama [The One hundred and one days of dinar convertibility between the Two World Wars], *Prispevki za novejšo zgodovino* XLVI – 2/2006, pp. 27–40.

dinar satisfied the politicians, economic and government interests. Namely, for the Yugoslav political leaders and businessmen a strong dinar was not only an economic interest but a matter of national prestige as well.

The process of stabilisation lasted long as well. After a period of a *de facto* stabilisation (1925-1931), during which a first attempt of legal stabilisation failed, Kingdom again undertook legal measures towards its *de iure* stabilisation in 1931 as one of the latest European countries to do that. The beginning seemed satisfactory although the circumstances were quite unfavourable primarily because of the Great Depression and difficult economic and political situation in the Yugoslavia and Europe. But very soon economic and financial crises start to influence the country and the Government was forced to abolish convertibility of a *dinar* only after 101 days.

Ivana KUNIĆ: Code on Court Procedure in Civil Litigations (1929) in the Context of the Unification of the Law in interwar Yugoslav state from 1918 until 1941

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1. Introduction

The Kingdom of Yugoslavia (further in text: Yugoslavia) was a multinational Southern Slavic state that existed from 1918 until 1941. Its legal system was not unified, therefore the process of equating of laws started soon after the common state was constituted.[1] The paper seeks to explore the creation of the first unified Yugoslav code of civil procedure adopted in 1929 under the name "Code on Court Procedure in Civil Litigations". The significance of the Code derives from two reasons. First, the process of the creation of the Code considered not to be an easy path because, as previously mentioned, Yugoslavia consisted of several legal areas with diverse legal rules and principles, and unstable social and political circumstances. Second, the Code was almost a literal copy of the 1895 Austrian Code of civil procedure (the so-called *Zivilprocessordnung*) which means that the Code accepted a new procedural model introduced by the Austrian Code.

According to that, intention of this paper is to show that the legal particularism was extreme and to settle a unified law was a demanding task, not just in a single codification but in practise too. Also, the difficulties that emerged during the unification process, i.e. the creation of the two legal fronts, lead us to the conclusion that only two laws (Austrian and Serbian) were taken into the consideration while drafting the Code. So, can we talk about the two main sources? The central part of the paper is referred to the drafting of the uniform civil procedural law in relation to the unification process in general. Also, a significant part of the paper deals with result of that process - adoption of the Austrian procedure and its main characteristics. In the end I will try to answer why the unification of laws in Yugoslavia

[1] On 29 October 1918 Slovenes, Croats and Serbs residents of the Austro-Hungary constituted a new state – "State of Slovenes, Croats and Serbs", which on 1 December the same year with Kingdom of Serbia founded a common state - "Kingdom of Serbs, Croats and Slovenes". In 1929 the state is renamed the Kingdom of Yugoslavia. See more: KREŠIĆ, Mirela: *Yugoslav private law between two World Wars. Modernisierung durch Transfer zwischen den Weltkriegen*. Vittorio Klostermann, Frankfurt am Main, 2007, pp. 151–155.

is significant and what was the role of the civil procedural law within the process of unification.

2. Legal areas in the Interwar Yugoslavia

The new state was divided into the six legal areas. Each legal area was applying different legal sources and had a separate jurisdiction, meaning that Yugoslavia at that time formed a vast network of legal sources. As follows, areas are divided into the three groups with common procedural principles and only the most important legal sources are allocated.

The first group consists of three legal areas which were largely governed by Austrian law and had incorporated the principle of orality and immediateness, and the principle of free assessment of evidence.[2] Those areas were Slovenia and Dalmatia (autonomous regional laws were also in force), Vojvodina, Međimurje and Prekomurje (with Hungarian law also in force) and Bosnia-Herzegovina (with many other sources in force of which the Sharia law is significant).[3]

Areas of the second group applied Serbian laws in force which were considered national regardless of the fact that it were mainly consisted of the reception of French, Austrian, Prussian and other German countries.[4] There also ruled the principle of the free assessment of evidence, but only the procedure in the first instance had been immediateness and oral.[5] Those areas were ex Kingdom of Serbia and ex Kingdom of Montenegro (with its laws preceding 1918).[6]

The last legal area is ex Kingdom of Croatia and Slavonia[7] which was governed by autonomous Croatian law of the *Sabor* and the provincial government, Croatian-Hungarian

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[2] WERK, Hugo: *Teoretsko-praktični priručnik jugoslavenskog građanskog parničnog prava, Prvi deo: GPP u teoriji i praksi.* [*Theoretical-Practical Manual of Yugoslav Civil Procedural Law, First part: Civil Procedural Law in theory and practice*]. Tisak nadbiskupijske tiskare u Zagrebu, Zagreb, 1932, p. 1.

[3] See more: KREŠIĆ, *op. cit.*, p. 154.

[4] PAVLOVIĆ, Marko: Problem izjednačenja zakona u Kraljevini Srba, Hrvata i Slovenaca / Jugoslaviji. [The Unification of Laws in the Kingdom of Serbs, Croats and Slovenes / Yugoslavia], *Zbornik Pravnog fakulteta u Zagrebu*, Zagreb, vol. 68, no. 3-4, 2018, p. 494

[5] WERK, *op. cit*., p. 1.

[6] KREŠIĆ, *op. cit*., p. 154.

[7] In Croatia and Slavonia from 1 January 1853 in force was the Temporary Rules of Civil Procedure of 1852. Its main principles were almost exact contrary to the ones with which they were replaced in 1929 by accepting the new civil procedural model. See more: ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu od*

law approved by the *Sabor,* and also by Austrian law - the so-called recipient law introduced during the Bach's absolutism.[8] In this legal area ruled the principle of free disposition of the parties and the principle of the formal truth, and this legal area turned to be exclusively in written form.[9]

3. Two Legal Fronts

This brief review of different legal areas clearly indicate that two sources of law prevail within the new legal system, which was confirmed during the unification process. "The game of imposing the law" has begun when lawyers separated into the two legal fronts. The lawyers from the parts of the former Austro-Hungary, known as Prečanian lawyers, have shown a tendency to extend the Austrian legislation to other parts of the country in which it wasn't introduced. On the other side, lawyers from the territory of the former Kingdom of Serbia, who generally performed as members of the "Serbian front", stressed that they could not reject the results of Serbian legal evolution, especially where the experience of the certain legal institutions responded to the needs and legal comprehension of Serbians. They were for keeping those of Serbia's legal institutions that have yielded positive results and accepting those Austrian institutions which are not sooner introduced but should have been introduced in the past, as well as in certain cases the laws of other European countries.[10]

4. The Unification of Civil Procedural Law

The most important task of the new government was drafting the new legal codes that would apply throughout the whole territory of Yugoslavia. Work on new legislation was

srednjeg vijeka do suvremenog doba. [*Croatian legal history in the European Context from Middle Ages to Contemporary Period*], Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2016, pp. 154–155.

[8] See more in: KREŠIĆ, *op. cit.*, p. 154.

[9] WERK, *op. cit.*, p. 1.

[10] One example of the dispute between Serbian and Prečanian lawyers is the dispute over the ban of witnessing in disputes with a value exceeding 2000 dinars. This prohibition was considered a part of Serbia's legal tradition and an element of legal identity. Contrary to Serbians, Prečanian lawyers energetically advocated the expansion to the entire country of the institute of unrestricted use of witnesses from the Austrian civil procedure. Legislator accepted the Prečanian proposition. PAVLOVIĆ, *op.cit*, pp. 494, 502–505.

supervised by the Ministry of Justice, as well as by the Ministry of Legal Unification. Soon the Permanent Legislative Council was drawn up by a decree of the Ministry of Justice. The body consisted of 34 members (permanent, honorary and temporary) and three departments: the Department of private law which dealt with civil procedural law, the Department of criminal law and the Department for public law.[11]

Till the Vitus' Day Constitution of 1921 no significant work has been done.[12] The new constitution constituted Legislative Committee which has been entrusted with two tasks: legalization of earlier government decrees and enacting the laws by shortened procedure, but on government proposal. This legislative procedure, with which the government remained the decisive legislative factor, did not serve its purpose. For the equating of laws, a five-year term has been foreseen, with possibility of statutory extension of this deadline. Due to a numerous of replacement of the governments, the Legislative Committee was completely ineffective body and the work was extended in June 1926. The culmination of political crisis was the assassination in the People's Assembly on 20 June 1928.[13]

On 6 January 1929 the King Alexander brought the proclamation of Royal Dictatorship and parliamentarism came to its end. Most of the laws were uniformed during this period. Mainly because the government has been empowered to impose the laws without the approval of the legislative body. But the reason why the legislative activity is reinforced during the Dictatorship lies in the fact that the dictatorship itself rests on the foundations of creating a national unity. Accordingly, most of the enacted laws in the first year of the Dictatorship had administrative nature and their aim was to settle rules on the organisation of state.[14]

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[11] See more in: DRAKIĆ, Gordana: Formiranje pravnog sistema u međuratnoj jugoslovenskoj državi. [The Formation of the legal system in interwar Yugoslav state], *Zbornik radova Pravnog fakulteta u Novom Sadu*, Novi Sad, vol. XLII, no. 1-2, 2008, pp. 647–652.

[12] Ustav Kraljevine Srba, Hrvata i Slovenaca [Constitution of the Kingdom of Serbs, Croats and Slovenes], Službene Novine, no. 142a, Beograd, 1921. The Constitution of the Kingdom of Serbs, Croata and Slovenes known as "The Vitus' Day Constitution" introduced the basic principles of democracy and in the time of its validity all legislation in the country should be rested on these principles.

[13] See more in: DRAKIĆ, *op.cit.*, pp. 647–652.

[14] See more in: ČULINOVIĆ, Ferdo: *Jugoslavija između dva rata, knjiga 2.* [*Yugoslavia between two World Wars, second book*], Historijski institut Jugoslavenske Akademije znanosti i umjetnosti, Zagreb, 1961, pp. 10–14.

One of the codes drafted in the period of the Dictatorship was also the Code on Court Procedure in Civil Litigations.[15] The Code was adopted on 13 July 1929, but it hasn`t entered into force until 1933. Entering into force was delayed due to the principle of purposefulness and unfinished work around the Rules of procedure for the court finally adopted in 1932.[16] Therefore, it is interesting to note that at the same day when these two acts entered into force Yugoslavia created one cultural heritage in the field of civil procedural law.[17]

5. Austrian Code on judicial proceedings in civil litigations

As a basis for their work on the new Code that will regulate civil procedure, the draft editors adopted the Austrian Code on judicial proceedings in civil litigation (*Zivilprozessordnung*) from 1895 - which was effective in Slovenia and Dalmatia, and in Vojvodina in the Hungarian edition, while in the Bosnia-Herzegovina its principles were also applied. They highlighted that *Zivilprozessordnung* is one of the most perfect modern procedures, based on the principles of interpretation, immediateness and free assessment of evidence, ensures fast and simple procedure and prevents the tightening of litigation and "abuse of rights" by the parties.[18]

6. Social Function of Civil Litigation – a new model of civil proceedings

Austrian *Zivilprozessordnung* contained principles contrary to those introduced by French code in 1806, which dominated the European legal scene for most of the 19th century. Due to the ideas of the “welfare state”, the French non-interventionist liberal model of civil litigation in which the judge didn`t have an active role because civil procedure was a "kind of battle" between the parties, was replaced by the new Austrian model at the end of the

[15] Zakon o sudskom postupku u građanskim parnicama (građanski parnični postupak za Kraljevinu Srba, Hrvata i Slovenaca) [Code on Court Procedure in Civil Litigations (Civil Litigation Procedure for the Kingdom of Serbs, Croats and Slovenes)], Službene Novine, no. 179-LXXV, 1929.
[16] Sudski poslovnik za sudove prvog i drugog stupnja od 25. listopada 1932 [Rules of the procedure for the courts of the first and second instance], Zbirka zakona i uredaba, Zagreb 1933 (1–19).
[17] WERK, *op. cit.*, p. 4.
[18] WERK, *op. cit.*, p. 2.

19th century. The new model rests on the so-called social function of civil litigation which meant that the litigation should not only be considered as a means to solve individual lawsuits between private litigants but should serve the public interest and had to be viewed from an economical perspective as well.[19]

In order to create a new procedural model in which the social function of civil litigation was recognized, it was necessary to find a new balance between the powers of the judge and those of the parties. The most important characteristics of the new model were:

a) Case management powers of the judge and the search for the substantive truth. The judge was in charge for the duration of the lawsuit and exercised important powers in the area of the fact gathering by asking questions *ex officio* and also by the collecting of evidence on the judge's initiative. This active role of the judge promotes the search for the substantive truth. The substantive truth means that the judgement should base on the facts as they had occurred, as opposed to the formal truth; the truth as advanced by the parties. The substantive truth also implies that every party can ask her opponent questions, or have questions asked, about facts and circumstances unknown to her as well as about proof.

b) Division of the lawsuit into a written preparatory stage and an oral main stage. The intention of that kind of division of the lawsuit was to increase the speed of litigation. During the mainly written preparatory stage the judge was provided with instruments to prepare the case to such an extent that it could be decided in a single session in the oral main phase. Also, apart from adjournments that were explicitly provided by law, the judge was under no circumstances to allow other adjournments. Exception is that the case could be stalled for a period of time at the request of both parties.

c) The pushing back of the role of preliminary defences. Well-known fact is that preliminary defences have the delaying effects, because the judge usually had to decide on these preliminary defences in a separate judgement and until this judgment was pronounced, the proceedings were halted. Limitation of the raising of preliminary defences was achieved in a way that preliminary defences were only to be permitted at the moment that the case came before the judge the first time. And the appeal

[19] See more about the French model of civil litigation, and about Franz Klein, the author of the new Austrian model, in: VAN RHEE, C.H. (ed.): *European Traditions in Civil Procedure. Ius Commune Europaeum.*, Intersentia, Antwerp–Oxford, 2005, pp. 5–12.

proceedings concerning preliminary defences were simplified and the pace of the hearing of these proceedings was increased. Besides this, it was left to the judge's discretion whether to decide by separate judgement about a preliminary defence raised. In this manner he could leave the possibility of appeal against this judgment open or postpone the decision about the preliminary defence until the final judgement.

d) A strict implementation of the Preclusion principle. The Preclusion principle is the principle that specific procedural steps cannot be taken anymore after the given time period has expired. In this way, a quick and easy process was ensured.[20]

7. Implementation of the Code in the practice and its repealing

The Code on Court Procedure in Civil Litigations was adopted in 1929 and entered into force in 1933. But, one fact is significant. The Code was literally translation of the *Zivilprozessordnung*[21] and even though the new procedural principles were accepted, they were never fully implemented in reality because the law in action continued its own autonomous way. Both the prevailing practice of earlier written, formal and secret proceedings, as well as new doctrine created a specific mixture of forms. So, the model of quick, efficient, simple and concentrated proceedings never became a complete reality in the territory of Yugoslavia.[22]

The reasons for unsuccessful implementation also laid in constant political crisis and moreover, only ten years had passed since the adoption of the *Zivilprozessordnung* until the beginning of World War II, which represents a relatively short period of time for a profound transformation of the sluggish legal institutions.[23]

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[20] VAN RHEE, C. H.: *Judicial Case Management and Efficiency in Civil Litigation*. Intersentia, Antwerp–Oxford, 2005, pp. 13–16.

[21] UZELAC, Alan: Turning Civil Procedure upside down: From Judges' Law to Users' Law. Van Rhee, C.H ; Heirbaut, Dirk ; Storme, Marcel (ed.): *The French Code of Civil Procedure after 200 years. The civil procedure tradition in France and abroad.* Wolters Kluwer Belgium, Mechelen, 2008, p. 416.

[22] UZELAC, Alan: Accelerating civil proceedings in Croatia – A history of attempts to improve the efficiency of civil litigation. Van Rhee, C.H. (ed.): *The Law's Delay. Essays on Undue Delay in Civil Litigation. Ius Commune Europaeum*. Intersentia, Antwerp–Oxfort–New York, 2004, pp. 288–-289.

[23] UZELAC, Alan: Ist eine Justizreform in Transitionsländern möglich? Das Beispiel Kroatien. [Is judicial reform possible in transition countries? The example of Croatia], *Jahrbuch für Ostrecht*, 43, 2002, p. 180.

In 1946 the Yugoslav Federation enacted the Law on immediate voiding of regulations passed before 6 April 1941 and during the enemy occupation, which was also valid for the Code on Court Procedure in Civil Litigations.[24] The Law has determined that the provisions of law in force until that date can be applied as legal rules, provided that the underlying matter is not regulated by the new regulation and that the rules are in line with the new order.

All provisions from the first unified Yugoslav code has ceased to be valid when the Code of Civil Procedure of 8 December 1956 came into force on 24 April 1957.[25] Procedural legislation in the Socialist Federal Republic of Yugoslavia continued to follow earlier models, but it was adjusted in some respects to socialist political doctrine. The inquisitorial elements and judicial activism of the Austrian procedural legislation became a socialist instrument with the primary purpose of protecting the state from party autonomy and the uncontrolled actions of civil society.[26]

8. Peculiarity of Yugoslav Law Unification Process and Civil Procedure

Doubtless, the importance of creating a single legal system in each country is reflected in the need for legal certainty and the equality of citizens before the law. However, the unification of laws in Yugoslavia was of far greater importance because it was a multi-ethnic country that emerged under the great transformation of countries in southeast Europe, which occurred after World War I. The state, which brought together different political, cultural and economic heritage, and had unresolved national relations, as well as weak economic development, had the only integrative factor in a single legal system.[27] Furthermore, the unification of procedural legislation was only a part of the new political trend of unitarisation, so the main function of the adoption of the Austrian *Zivilprozessordnung* was unification and not an improvement in the quality of procedural law. The reception of *Zivilprozessordnung* was largely mechanical, textual and technical,

[24] Zakon o nevaženju pravnih propisa donesenih prije 6. travnja 1941. i za vrijeme neprijateljske okupacije [Law on immediate voiding of regulations passed before 6 April 1941 and during the enemy occupation], Službeni list FNRJ, 86/1946.
[25] Zakon o parničnom postupku [Code of Civil Procedure], Službeni list FNRJ 4/1957.
[26] See more in: UZELAC, 2004, *op. cit.*, p. 289.
[27] KREŠIĆ, *op. cit.*, p. 167.

without great reflections on what one wanted to achieve with it in essence because the main reasons for Austrian reform, the social and ideological reasons for its introduction, the ideals which they sought to establish, and the criteria for the success of its introduction were never subject of a more detailed discussion.[28]

By taking into the consideration the previous thesis on legal and political unitarism, one fact arises as controversial. Till the breakdown of Yugoslavia in 1941 only its public law was unified. Not entering into a deeper discussion as to why it is so, while well-known fact is that legal particularism in property relations has negative influence on the economic state of a country, I'll try to compare non-unified substantial civil law with civil procedural law. Maybe the reason that substantial civil law was not unified in the period up to 1941 was the fact that it didn't bothered legal life of citizens so much because institutions of civil law didn't differ in a great degree.[29] In contrary, civil procedure seeks to be equal to all because it deals with protecting substantive rights of citizens. Furthermore, I would venture to say that the Preliminary Principles of the Civil Code has never become law because of the irreconcilable differences between peoples, e.g. retaining a religious marriage.[30]

9. Conclusion

Considering the short validity of the Code on Court Procedure in Civil Litigations of 1929, and its slow and almost non-existent implementation into the real life of citizens, my personal opinion is that it is much more important to observe this Code in the context of the general unification of law in the Yugoslav state, and not in the view of its most important characteristics. As aforementioned, the process of unification of laws in Yugoslavia, which despite of its purpose and its role, was slow, inefficient and in some branches of law never completed, remains one major controversy. The question arises why the unification of law did not approach more seriously, why it was stalling. The process of creating the Code of civil procedure was also too long, which is completely inexplicable due to it was only translation of the Austrian *Zivilprozessordnung* with minor modifications. Accordingly, a

[28] See more in: UZELAC, 2002, *op. cit.*, pp. 176–181.
[29] See more in: KREŠIĆ, *op. cit*., pp. 155–156.
[30] See more in: ČEPULO, *op. cit.*, p. 282.

process that is one of the few that has bore fruit is yet another failure of the Yugoslav legal profession and Yugoslav legislation. Despite of that, the Code from 1929 will remain remembered in the legal history of the Yugoslav nations as the first law which established a unified court procedure and introduced more advanced civil procedural law institutes. As such, it was a good basis for drafting further laws and for the development of civil procedural law in former Yugoslav countries.

Anna GERA: The trustee in bankruptcy – who was he and what role did he play in the bankruptcy proceedings throughout the 19th century?

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1. Introduction

Although bankruptcy has a significant economic importance ever since the appearance of the early forms of trade, its comprehensive legislation only developed in the 19th century. Earlier in the feudalist society, the legal consequences of going bankrupt were regulated by customary law, which was uncertain in several aspects and also stated that the regulations have no legal bearing on the aristocracy. It was the economic growth and the trade boom that evoked the need for a codified, detailed and inclusive bankruptcy law and resulted in Act 22 of 1840, the first attempt of drafting a bankruptcy legalisation with the aim of abolishing the differences between social classes. However, the true success of the era was the adoption of Act 17 of 1881, the first modern bankruptcy law drafted by István Apáthy, who also created the first complex and modern Commercial Act, Act 37 of 1875.

The trustee in bankruptcy played an important role in the bankruptcy proceedings as he was responsible for administering the bankruptcy estate and representing the creditors' interests in front of the authorities. He appeared in the proceedings as an outsider since the terms of his appointment included him not being personally concerned in the bankruptcy, yet he had a high level of responsibility: he created the bankruptcy estate by rounding up the debtor's property, he sold the bankruptcy estate and he also distributed the payments to the creditors at the end of the proceeding. His role was therefore significant, thus the regulation regarding it was elaborated in detail and often raised questions among judges and in jurisprudence. In my article, I present the core principles of the legislation and also address some questions which were answered differently by jurisdiction and jurisprudence.

2. Act 22 of 1840

Act 22 of 1840 was a particularly important step in the evolution of bankruptcy law as it broke the tradition of privileges connected with nobility and created a legislation equally binding for debtors of every social status. The act contained regulations on both substantive and procedural law, however, the two fields were not separated yet. After defining certain terms and clarifying key concepts, this chapter focuses on describing the bankruptcy proceeding as regulated in Act 22 of 1840, with special regards to the trustee's position as well as his interaction with other actors in the proceeding.

Although the act lacks the definition of "bankruptcy", this word was commonly used to describe a state when a debtor had multiple creditors and was unable or reluctant to satisfy them. According to the definition, bankruptcy law was only applicable in case of multiple creditors, otherwise the single creditor could only initiate a civil procedure against the debtor. The bankruptcy proceeding aimed to satisfy all creditors of the insolvent debtor to the greatest possible extent while respecting the requirement of proportionality and equal treatment.

The proceedings took place before and was conducted by the bankruptcy court. The interests of the creditors were represented by the creditors' committee, whose members were elected by the assemblage of the creditors, from among their number. According to Act 22 of 1840, there were two people helping the court's work, the trustee and the clerk, with the latter being responsible for the legal representation of the bankruptcy estate and the prior taking care of only the trusteeship as a merely financial task.

In accordance with Act 22 of 1840, the bankruptcy proceedings are opened by a court's decision called "proceeding-opening decision"[1], which could have been initiated by either the debtor or the creditors (but not by the court itself)[2]. The decision includes the court's order to round up the debtor's property and the appointment of the clerk and the trustee[3]. Firstly, the clerk claims the debtor's previous demands, then the court makes a second decision called "assembling decision"[4], setting a specific date for the creditors to assemble.

[1] Act 22 of 1840, also known as the first Bankruptcy Act [hereinafter: fBA] §6.
[2] fBA §5.
[3] fBA §11.
[4] fBA §25.

When the day comes, the creditors (or their delegates) come together to elect the committee members[5].

The clerk also examines the creditors' claims, which marks the beginning of a long process aiming to secure that every claim is valid[6]. First, the clerk examines them and give remarks about their acceptability, which remarks are forwarded to the creditors by the court. After that, the creditors are allowed to answer these remarks, according to which the clerk prepares the court's decision. Lastly, the creditors have a second opportunity to reflect on the clerk's work and after that, the court finally makes its decision on whether the claims are valid, and if so, what type of claims each creditor has (this latter defines the priority ranking). Against this decision, an appeal can be lodged by any of the creditors, and also by the clerk.

Meanwhile, during this process, the trustee rounds up the debtor's property and when the creditors assemble, he reports his calculations regarding the bankruptcy estate to the creditors' committee[7]. With regards to the court's decision on the validity of the claims, the committee makes a decision on the realisation of assets[8]. The immovable property, if it is not part of the noble legacy, will be auctioned by the committee, otherwise the court is authorized to hold the auction. The court also responsible for verifying the trustee's calculations.

The realisation of assets is followed by the establishment of the priority ranking[9] by the trustee, which the court forwards to the creditors. The costs of the legal proceeding, including the salaries of the clerk and the trustee are on the top of the ranking, therefore those will be payed even before the satisfaction of the creditors. Having this settled, the trustee repays the creditors' claims in the presence of a so called "judicial member"[10] who is appointed by the court. The trustee is also responsible for reporting the court about the distribution of the payments and handing over the documents of justification. Finally, the court issues a statement called the "end-of-throng" statement that closes up the proceeding[11].

[5] fBA §51.
[6] fBA §§65–78.
[7] fBA §94.
[8] fBA §95.
[9] fBA §80–85.
[10] fBA §§114–115.
[11] In Hungarian, the word "csőd" stands for "bankruptcy", and the word "csődület" meaning "throng" also origins from that as when someone went bankrupt, it evoked a lot of people's attention and created a throng.

To sum up, Act 22 of 1840 regulated the bankruptcy proceedings in detail and was applicable on debtors of every social status. According to it, besides the trustee, the clerk also played an important role in the proceedings: the clerk was responsible for the legal aspects of administering the bankruptcy estate, while the trustee took care of the financial tasks, therefore only the clerk was obliged to have a lawyer degree to exercise his profession. When Act 17 of 1881 entered into force, this system significantly changed as the clerk's position ceased to exist and the trustee become responsible for both the legal and financial aspects of the administration.

3. Bankruptcy proceedings according to Act 17 of 1881

It was the trade boom that evoked the need of detailed bankruptcy regulations, and although Act 22 of 1840 was sufficient for a certain period of time, the further economic growth raised new questions. Act 17 of 1881, creating an even more detailed regulation, was adopted as an answer to these questions, and according to this, one of the most significant changes introduced by the act was that it separated the commercial bankruptcy from the pre-existing ordinary form of going bankrupt. The distinction was not as elaborated as today since commercial bankruptcy appeared as a special form of going bankrupt and in case of the lack of special rules, the ordinary bankruptcy's general regulation had to be applied, still, this was a significant step towards creating a separate bankruptcy system.

Act 17 of 1881 also made a few changes regarding the actors of the proceedings. As I mentioned before, the position of the clerk ceased to exist, and two new positions were introduced with one being the bankruptcy receiver and the other the trustee's assistant. The receiver[12] was one of the court members (either a judge or a notary qualified for judicial office) and he was responsible for taking all judicial measures that were not reserved for the court. The trustee's assistant's[13] position, according to the Act, was equivalent to the trustee's, however, in practice, it was uncertain whether his appointment was obligatory, and in case of being appointed, whether there was hierarchical relation between the trustee and him.

[12] Act 17 of 1881, also known as the second Bankruptcy Act [hereinafter: sBA] §93.
[13] sBA §95.

The bankruptcy process was opened by the court's proceeding-opening decision[14] which could have been initiated by the debtor or any of the creditors. It ordered the seizure of the debtor's property and appointed the receiver, the trustee and his assistant. The decision was followed by the promulgation of the bankruptcy issue[15], which shared the most important information about the bankruptcy (e. g. the name of the debtor, the deadline for lodging claims and the day of the trial). The creditors were called upon to declare their claims and liens (if they had any), and also to show the objects they possessed in order to have them evaluated.

Firstly, the receiver made the inventory list[16], and based on that, the bankruptcy issue was announced. After the creditors claimed their debts, the trustee drew up a statement on these claims and prepared a plan for the estate's distribution (if according to the court's decision, the proceedings had to end so). The receiver was in charge of leading the distribution process[17], in the course of which the creditors were satisfied according to their position in the priority ranking[18]. Similar to the process established by Act 22 of 1840, the costs of the legal proceeding were on the top of the ranking meaning that the receiver's, the trustee's and his assistant's salaries were payed before the satisfaction of the creditors.

4. The main responsibilities of the actors in the bankruptcy proceedings, according to Act 17 of 1881

According to Act 17 of 1881, the three main actors of the bankruptcy proceeding were the bankruptcy receiver, the trustee in bankruptcy and the creditors' committee[19]. As a member of the court, the receiver conducted the trials by himself and was entitled to take every measure and make every decision that was neither reserved for the court, nor the responsibility of the trustee or the committee. He mainly had executional and administrative duties like conducting the committee's election and issuing the certification of the

[14] sBA §§82–87.
[15] sBA §§88–89.
[16] sBA §§114–117.
[17] sBA §134.
[18] sBA §§59–71.
[19] The III. Chapter of the second Bankruptcy Act regulates the position of the actors.

appointment[20] or calling upon the debtor to claim their property[21]. Working conjointly with the trustee, he made the inventory list and he also approved the distribution plan created by the trustee[22].

The creditors' committee represented every creditor's interest and was responsible for supervising and helping the trustee[23]. According to Act 17 of 1881, two types of committee's existed: the temporary[24] and the permanent[25] one. The members of the temporary committee were appointed by the court, while the members of the permanent committee were elected by the creditors from among their number. If the creditors did not elect a permanent committee, its competences were exercised by the court and the creditors' assembly. From among their number, the committee's members elected their president and notary: only the notary was entitled for salary, the members could only claim the costs related to the proceeding[26].

The trustee was responsible for overseeing the bankruptcy estate and performing various duties required by law, regarding the administration and liquidation of the estate. His tasks were the following: (1) accepting heritage in the name of the debtor[27], (2) participating in suits initiated by or against the debtor before he went bankrupt[28], (3) executing or terminating legal transactions concluded by the debtor[29], (4) challenging these transactions and initiating actions against the debtor when appropriate[30], (5) challenging the claims accepted by the debtor when appropriate, and (6) helping the criminal court in case of fraudulent bankruptcy.

The trustee was appointed by the court, among the judges practicing in the given territorial division[31]. The court could not choose amongst the close relatives of the debtor therefore could not appoint their linear ascendants or descendants, brother in law, sibling,

[20] sBA §106.
[21] sBA §118.
[22] sBA §181.
[23]sBA §109.
[24] sBA §96.
[25] sBA §106.
[26] sBA §111.
[27] sBA §4.
[28] sBA §9.
[29] sBA §18–25.
[30] sBA §139.
[31] sBA §95.

cousin, spouse, fiancé, the spouse of their sibling or the sibling of their spouse[32]. The trustee was obliged to perform his duties according to the principle of "*bonus et diligens pater familias*" and to give a detailed account on the estate's administration, and he was also responsible for every damages he caused by his failure to act diligently[33].

The trustee was entitled salary and also to claim the costs related to his work, the bankruptcy process could not be closed up before paying or securing these claims. However, if the trustee failed to execute his duties properly, he could have been sentenced to a fine or removed from his position at the request of the receiver or the committee, or even ex officio by the court[34].

5. Inconsistencies concerning the position of the trustee in bankruptcy

5. 1. The nature and extent of the trustee's mandate

According to the procedural regulations, the trustee's role therefore was to represent the bankruptcy estate before third parties, the court and the authorities, yet, we cannot say that he was an agent in an agency relationship as the bankruptcy estate was (and is) not a person since a person cannot be an object of property. We cannot talk about transaction management either: the trustee cannot act on behalf neither of the creditors nor the debtor, since he is appointed by the court, yet there is no transaction management relationship between the court and him. *"The position of the trustee is a completely unique creation of the law that cannot be squeezed inside the Procrustes-bed of general principles."*[35]

Since he is appointed by the court, which is a public authority, his mandate could be considered as a public mandate. The fact that the trustee serves public interest through his actions can support this standpoint: he rounds up the debtor's property which is indispensable to start the bankruptcy proceedings, he exercises the state's execute power and organises a bankruptcy procedure serving every creditors' interests and he also has a certain right of objection to prevent the creditors from procuring an unjustified advantage

[32] sBA §97.
[33] sBA §100.
[34] Cstv. §104
[35] LADÁNYI, Béla: A tömeggondnok ügyvivői jogköre [The trustee's mandate]. *Ügyvédek lapja* [*Lawyers' Journal*], 1904/4., pp. 4–6.

to the detriment of the other creditors. However, sometimes it is hard to separate serving public interest and private interest from each other, just like the last example showed. Yet the trustee still cannot be considered as an agent, since there is no person, he could be the agent of, he acts on his own behalf in lawsuits and concludes contracts in his own name within the legal framework.

Therefore, the trustee's mandate is formally a public mandate and substantively rights and obligations conferred by law[36]. However, in practice, his mandate tends to be considered as a form of agency and in accordance with this presumption, it is interesting to address two issues: firstly, whether it is possible to ask for a protest for better security of the bill of exchange from the trustee and secondly, whether he can act as a substitute private prosecutor.

The first issue is connected with the law for bills of exchange. If the drawee goes bankrupt, the possessor of the bill, according to the Act on Bills of Exchange[37], could ask for a protest for better security in order to ensure that he can also count on the acceptance of the bill he possesses. However, it was uncertain whether the trustee was entitled to give such a protest.

A decision made by the Curia in the 7th of March, 1899, stated that the trustee was indeed entitled to give the protest for better security since *"according to the Bankruptcy Act, he has to be sufficiently informed on the debtor's financial state and the debtor is obliged to give him every required information."* However, the court's standpoint was controversial. It was pointed out in the *Jogtudományi Közlöny (Jurisprudential Bulletin)* [38] that it is not possible according to the Bills of Exchange, and also not explicitly permitted by Bankruptcy Act that the trustee is the one to give the protest for better security. Besides, it is necessary for the trade certainty and security to deny the trustee the right to give such a protest, as the drawee can be identified with no hardship yet the trustee's appointment is surrounded by uncertainty.

The question of the substitute private prosecutor was also raised by a decision of the Curia. According to the 4789/1903. decision, *"the trustee, by the rights conferred on him for the*

[36] *Ibid.*
[37] Act 27 of 1876 on Bills of Exchange, §29, point 4.
[38] S. J.: Felvehető-e a biztonság hiánya miatti óvás a tömeggondnoknál? [Is it possible to ask for a protest for better security of the bill of exchange from the trustee?]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1899/34., pp.189–190.

sake of the procedures' unification, is the agent of every creditor, therefore he represents the unity of creditors, thus, in case if a lawsuit is initiated because of the infringement of the creditors' interests, it is not each creditor but the trustee who is entitled to act as a substitute private prosecutor if the public prosecutor drops the charge. This standpoint was challenged by Ferenc Vargha, who pointed out that according to the Bankruptcy Act, the trustee has rights only in the bankruptcy proceeding, he is not entitled to act as a prosecutor in any way.

It is the victim of a crime who has the right to prosecute the perpetrator as a private prosecutor, the position of being the victim itself creates the title. Similarly, only the victim is entitled to act as a substitute private prosecutor, precisely, the victim who decides to act as a prosecutor after the public prosecutor drops the charge or decides not to represent it at all[39]. On the contrary, the trustee is appointed by the court that can only choose someone not personally concerned about the bankruptcy at all. Moreover, the end of the bankruptcy proceedings means the end of the trustee's mandate, therefore it is only possible for him to act as a substitute private prosecutor if a separate contractual relationship creates a basis for it.

To conclude, the trustee in bankruptcy exercised powers and performed duties defined by law, which were strictly limited to the period and the0 subject matters of the bankruptcy proceedings. However, the practice had a tendency to elaborate a wider range of powers and duties, which could have been able to satisfy the current needs but contradicted the legal regulation.

5 2. The appointment of the trustee in bankruptcy

It was a new rule introduced by Act 17 of 1881 that according to the terms of appointment, only a lawyer could have been chosen as a trustee, moreover, he could not have been personally concerned in the bankruptcy proceedings (e. g. as a creditor) or the close relative of the debtor. However, there were no other restrictions, therefore the critics tended to emphasise the high risk of corruption carried by the appointment. They pointed out the danger of judges appointing a certain lawyer only because they had previously agreed on sharing the trustee's salary, which, besides the moral concerns, also entails the trustee

[39] Act 33 of 1896 on Criminal Proceedings, §42.

asking for higher payment on the expense of the bankruptcy estate, therefore against the interests of the creditors.

As a solution to these potential threats, Gerzson Szendrey suggested the adaption of a new regulation[40] according to which the lawyers could have been appointed to be a trustee in a certain predetermined order. In his draft, he wrote: *"the practicing lawyers will be appointed by the court without exceptions and unconditionally in a way that no one could be appointed more times than the others."* Among other arguments, he emphasised how the Act of Bankruptcy is one of the most important exam subjects, therefore the lack of experience will not be a disadvantage when the trustee is appointed to administer the bankruptcy proceedings of an estate of high value. This draft was amended by István Bartha[41], who pointed out that without a bond system, it is highly unsafe to restrict the court's competency of choosing the trustee. He proposed the elaboration of a system in which any lawyer could be appointed, but those who are willing and able to pay a bond will be appointed in a predetermined order. However, neither of the proposals was accepted.

5. 3. The salary and the responsibility of the trustee in bankruptcy

The trustee's salary was amongst the items on the top of the priority ranking. Occasionally, the need for a certain limitation of this primacy was addressed by academic writers as well as the jurisdiction (e. g. the 89/1903. decision of the Curia stated that the mortgaged immovable property was a distinct legal entity, therefore the trustee was not entitled to receive payment from it, even if no other property belonged to the estate), however, generally, paying the trustee's salary precluded the satisfaction of the creditors.

The amount of the payment was decided by the court, even though it was the interested parties (therefore the committee, the debtor and the assemblage of the creditors) who had to previously agree on it. The court was thereby enabled to change the amount of payment in its final decision, even though, as it was pointed out in the *Jogtudományi Közlöny (Jurisprudential Bulletin)*[42], this should only have been acceptable in case if the parties had

[40] SZENDREY, Gerzson: A csődtömeggondnok kinevezése körüli visszásságok [Inconsistencies around the trustee's appointment]. *A jog* [*The law*], 1889/8., pp. 75–76.
[41] BARTHA, Iván: A csődtömeggondnok kinevezése körüli visszásságok [Inconsistencies around the trustee's appointment]. *A jog* [*The law*], 1889/8., p. 102.
[42] B. L. [probably BUCHWALD, Lázár]: A tömeggondnok díjazása [The payment of the trustee]. *Jogtudományi Közlöny* [*Jurisprudential Bulletin*], 1883/18., pp. 150–151.

failed to come to an agreement (as the court was only enabled to decide the amount of payment in that case).

The fact that the trustee was entitled to payment, and also that he accepted the appointment voluntarily, entailed strict requirements of liability. As previously mentioned, the trustee was obliged to perform his duties according to the principle of "*bonus et diligens pater familias*", he had to give a detailed account on the estate's administration, and he was also responsible for every damages he caused by failure to act diligently. In case of his failure of executing his duties properly, he could have been sentenced to paying the relatively high fine of 200 forints or removed from his position (the latter could have been requested by the receiver or the committee, and also could have been executed ex officio by the court).

However, besides the strict culpa levis liability requirements, the 4948/1912. decision of the Curia stated the following: *"The trustee, who, by mistake, leaves such claims out of the distribution plan that were already accepted but not yet satisfied by the previous trustee, is not liable for the damage he caused as it occurred because the creditor did not inquire about the distribution plan and did not request its alteration."* The court's decision evoked mixed reactions. Simon Medgyes, for instance, pointed out that when preparing the distribution plan, it is inevitable that the trustee notices the possibility of having a previously satisfied claim, and in this case, he cannot refer to the previous trustee's notes but instead has to take measures to make sure whether the claim was indeed satisfied.

To sum up, the trustee in bankruptcy was a highly qualified person who accepted his appointment voluntarily, therefore his payment was secured: its amount was decided collaboratively by the court and the interested parties, and its satisfaction was placed on the top of the priority ranking. This eminent salary was partly justified with the strict culpa levis responsibility the trustee had, that included removal from his position as a potential sanction.

6. Conclusion

The 19th century's bankruptcy proceedings were firstly regulated in detail in Act 22 of 1840, which was then followed by Act 17 of 1881, and according to both legal sources, the trustee

in bankruptcy played an important role in the process. He was appointed by the court but accepted the appointment voluntarily, therefore his payment was eminent and he had culpa levis responsibility. During the bankruptcy proceedings regulated by Act 17 of 1881, he collaborated with the creditors' committee and the bankruptcy receiver, and he also had an assistant.

The second act entrusted him wider functions and responsibilities: he was responsible for both the financial and legal administration of the bankruptcy estate, therefore only a lawyer could have been appointed for the position. However, besides being a lawyer, the trustee had to be competent in financial issues. Therefore, he had to be a highly qualified person to perform the duties required by law: *"He had to be a craftsman, a merchant and a jurist, all rolled into one, moreover, he had to be perfectly qualified in each and every one of these professions."*[43]

[43] *Ibid.*