SIC ITUR AD ASTRA

VI

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DUNJA MILOTIĆ

Collection of papers on Hungarian and Croatian legal history 2022

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University of Zagreb / Faculty of Law / Chair of Croatian History of Law and State / 2023

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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 articles 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 978-953-270-116-6, University of Zagreb Faculty of Law, Zagreb, 2018, 105 p.), *Sic itur ad astra III* (ISSN 2631-181X, Eötvös Loránd University Faculty of Law, Budapest, 2019, 134 p.), *Sic itur ad astra IV* (ISBN 978-953-270-133-3, University of Zagreb Faculty of Law, Zagreb, 2020, 135 p.) and *Sic itur ad astra V* (ISBN 978-963-489-439-1, ISSN 2631-181X, Eötvös Loránd University Faculty of Law, Budapest, 2022, 123 p.).

Our sixth summer school was organized in Zagreb in 2022. The topic was „The development and the progress of the civil law's institutions". Thirteen Master and PhD level students held their presentations, all of which are listed in this book. We also have a guest article on the War of the Roses in England.

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

Zagreb–Budapest, 2023

The Editors

Violetta VAJDA: Private law provisions in the April Laws

Eötvös Loránd University, Faculty of Law

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1. The April Laws

It is important to highlight the significance of the April Laws, since their articles represented an important milestone in the modernisation[1] of Hungarian private law. These laws were adopted at the last feudal Diet, in full compliance with the rules of the historical constitution. All 31 Acts were ratified by Ferdinand V on 11 April 1848, and their provisions followed the objectives that were laid out in the proposal of Lajos Kossuth on March 3, 1848.[2] Their enactment was an important step, because the April Laws transformed Hungary into a constitutional monarchy. It is important to note that in Hungary, unlike in the countries of Western Europe, the civil transformation was led by the nobility instead of the politically and economically weightless bourgeoisie.[3] Therefore, it is no coincidence that the April laws chose the path to extend the noblemen's privileges to the whole nation instead of disenfranchising them. At the same time, they were willing to give up some of their privileges, such as tax exemption,[4] to ensure the country's development. However, it is clear from the wording of the articles of law that to avoid conflicts, the legislators avoided detailed regulation.[5] Instead, they enacted temporary, declarative rules. Many provisions of the April Laws

[1] LÁBADY, Tamás: *A magánjog általános tana* [*General Theorem of Private Law]*. Budapest, 2017, p. 68.
[2] DEÁK, István: *A törvényes forradalom: Kossuth Lajos és a magyarok 1848-49-ben [The Lawful Revolution – Louis Kossuth and the Hungarians 1848-1849]*. Budapest, 1994, p. 15.
[3] *Ibid.*, p. 27.
[4] FÓNAGY, Zoltán: Deák Ferenc és a jobbágyfelszabadítás [Ferenc Deák and the serf liberation] In *A Batthyány-kormány igazságügyminisztere – Zalai gyűjtemény [The Minister of Justice of the Batthyány Government – Collection of Zala]*. Zalaegerszeg, 1998, p. 23.
[5] KÉPESSY, Imre: 1848 alkotmányos forradalma - előzmények és kontextus [Constitutional Revolution of 1848 – Antecedents and Context]. *Jogi Tanulmányok [Legal Papers]*, Budapest, 2016, pp. 251–252.

tasked the newly established Government (Ministry) to prepare and present the details in the near future.

The main problem with this approach was that despite the changes adopted in the Spring of 1848, the tension between the Hungarians and the Viennese court and other nationalities remained very high, and by the autumn of 1848, the War of Independence had broken out. After its suppression, Emperor Franz Joseph suspended the Hungarian constitution. Furthermore, the government led by Felix zu Schwarzenberg aimed to centralise the Austrian Empire. This went hand in hand with a dramatic restructuring of the state organisation.

Moreover, since the April laws defined the relationship between the various branches of government and protected the rights of the citizens,[6] there is an argument to be made refer to these legal norms as the Constitution of 1848, even though no written fundamental law was enacted at the time. In short: these Acts laid down the legal framework of the Hungarian Government (Ministerium) and they extended the suffrage. From there on, the Parliament had to assemble every year. Moreover, the serfs were emancipated and the "*aviticitas*" was abolished. In this study I will explain the changes made in private law in 1848.

2. Changes in private law

Looking at the Hungarian private law institutions before 1848 and comparing them with the country's contemporary legal system, we can notice fundamental differences - especially in the rules concerning real estate. There were three barriers to free property before 1848: the donation system, the *aviticitas* and the manorial system.[7] The continued existence of these outdated systems in the 19th century can be explained by the fight against the Austrian centralization, i.e. the guarantee of autonomy through

[6] GOSZTONYI, Gergely: A polgári szabadságjogok [Civil liberties]. In: MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian constitutional history].* Budapest, 2020, Osiris Kiadó, p. 285.
[7] SZLADITS, Károly: *Magyar magánjog 1. Általános rész, személyi jog [Hungarian private law 1. General part, personal law].* Budapest, 1938, p. 77.

the ancient right to property. Furthermore, the *aviticitas*. In other words, the Hungarian statesmen tried to strengthen the country's independence through the ancient right to property. Furthermore, the old law of *aviticitas* was intended to prevent the fragmentation of the family's landed property, while the donation system ensured that estate donated by the king would remain in the family. Moreover, the manorial system regulated the relationship between noblemen and serfs. In contrast, the civil codes enacted in the 19th century were already based on equality of rights, free property, and free movement. Therefore, the Hungarian private law institutions could not serve the demands of the capitalist economy.

For the sake of civil transformation, the April Laws started with a clean slate in the field of private law (tabula rasa).[8] The old property law was completely abolished with the abolition of the *aviticitas*[9] by Act 15. Similarly, Act 9 abolished the manorial system using the so-called compulsory emancipation of serfs, which gave property to the disenfranchised serfs, who made up around 90 percent of the society. A common feature of the two articles was that the Government had been entrusted to draft detailed regulations in the form of future bills. Still, it was clear from the very beginning that the aim of these changes was to replace the outdated institutions with a legal system based on legal equality and free property. In the paper, I will focus on the two most important regulations of the April Laws from the point of private law: the abolition of the *aviticitas* and the emancipation of serfs.

3. Aviticitas

Traditionally, *aviticitas* was considered part of the Hungarian legal system since the law of King Louis the Great in 1351,[10] but the social demand behind the creation of this

[8] SZLADITS, *op, cit.*, p. 78.
[9] LÁBADY, *op, cit.*, p. 68.
[10] TÓTH, Lőrincz: *Az ősiségi s egyéb birtokviszonyokat rendező 1852. nov. 29-ki legfelsőbb nyiltparancs ismertetése es magyarázata [Description and Explanation of the Supreme Open Decree of 29 November 1852 Regulating the Aviticitas and Other Estates]*. Pest, 1854, p. 68.

legal institution had been present since the conquest. As established by Martyn Rady: the "*nobleman held his land conjointly with his relatives, and indeed with all those kinsmen who were descended from the original beneficiary of the royal grace.*"[11] Furthermore: "*the Hungarian nobleman did not really own his land at all. He held it of the ruler, to whom it might eventually revert, and at the same time as a trust on behalf of his sons, heirs, and kinsmen.*"[12] This was ensured from two sides. Firstly, the ancestral or hereditary property was inherited automatically by the descendants.[13] The right to make a last will was restricted only in the case of the so-called acquired property, which the noble acquired during his lifetime, but in the absence of testament, the main rule under the system of legal succession was the parental system.[14] Accordingly, the ascendants inherited after the descendants, and after them the lateral heirs,[15] and only in the absence of all these relatives did the succession to the crown take place, unlike in the case of the donated property, where in the absence of the descendants the succession to the crown took place immediately.

In addition, regarding ancestral property, an important legal institution was the daughter quarter, which was an example of gender inequality, as it meant that girls inherited a quarter of the hereditary property in total, while boys shared three quarters. Although, the daughters inherited unencumbered.

The *aviticitas* also imposed a huge limitation on the right to property, since it restricted the right of free disposal and the freedom of alienation fundamentally. This was emphasised by Count István Széchenyi in his book Credit,[16] which was first published in 1830. In his opinion, the impossibility of land mortgage was the main

[11] RADY, Martyn: *Customary Law in Hungary*. Oxford, 2015, Oxford University Press, p. 85., https://doi.org/10.1093/acprof:oso/9780198743910.001.0001
[12] *Ibid.*, p. 85.
[13] TÓTH, *op, cit.*, p. 116.
[14] SUHAYDA, János: *A magyar polgári anyagi magánjog rendszere az országbírói értekezlet által megállapított szabályokhoz és azóta a legújabb időig hozott törvényekhez alkalmazva [The Hungarian system of private substantive civil law as applied to the rules laid down by the Conference of the Judges of the Republic and to the laws enacted since then until recent times]*. Budapest, 1874, p. 484.
[15] TÓTH, *op, cit.*, p. 121.
[16] SZLADITS, *op, cit.*, p. 78.

culprit of the underdeveloped Hungarian economy. In his work, he explained that many agricultural workers could not accumulate enough money needed for the modernisation. Therefore, they would have had to take a loan.[17] However, they were unable to establish a lien on their estate in favour of the banks, and therefore, they were unable to obtain the capital they needed to develop agricultural techniques.

Even if we may assume that the abolition of *aviticitas* implied the abolition of the donation system as well, the April Laws contained no provisions on this matter. Yet, I would like to give you an overview of this legal institution briefly. The royal donation[18] was one of the ways of acquiring real estate in feudal Hungary, along with private donation and purchase, which was defined in the first part of the Tripartitum[19] by István Werbőczy. As I already mentioned, the donation system ensured that the property stayed in the family since it could be inherited only by the male descendants of the beneficiary. While in the early days, ennoblement always involved the donation of estate, the royal donation did not involve ennoblement initially. However, from the end of the 14th century, it did, since the noblemen were generally expected to serve in the military[20] on account of his donated estates. Werbőczy's Tripartitum, which influenced the development of many legal institutions until 1848, stated that if the king had granted any living person a donation of real estate, the donation ennobled him[21] without any other conditions. In the absence of the specified heirs, the donated property reverted back to the crown. With the abolition of the donation system, the king could no longer donate noble titles and estates, which can also be linked to the issue of equality of rights, given that the acquisition of a donation was considered a privilege.

[17] SZÉCHENYI, István: *Hitel [Credit]*. Pest, 1830, p. 25.
[18] BÉLI, Gábor: *Magyar jogtörténet. A tradicionális jog [Hungarian legal history. The Traditional Law]*. Budapest, 2014, p. 7.
[19] WERBŐCZY, István: *Tripartitum*. 1514, I. 4.
[20] BÉLI, *op, cit.*, p. 11.
[21] WERBŐCZY, *op. cit.*

4. The abolition of aviticitas

Based on what has been said so far, the existence of this legal institution and the donation system could not serve the basis of a modern private law based on free property, which is why Act 15 of 1848 abolished it. Still, there was not enough time to work out the detailed rules, thus, in the 1. § the government was tasked with drafting a proposal for a new civil code, while the 2. § stated that until the adoption of the new code, all judicial proceedings concerning *aviticitas* were to be suspended ex lege.[22] Although the April Laws aimed to abolish the distinction between ancestral and acquired property, they did not contain any rules neither on the donation system nor on differences between sons and daughters (regarding the inheritance).[23] After the suppression of the War of Independence, the old Hungarian property law was abolished by the *Avitizitätspatent* of 29 November 1852 and by the enactment of the Austrian Civil Code (ABGB)[24] in Hungary from the 1st May 1853. Consequently, a completely new property law[25] was established.

The royal decree extended the provisions already enunciated in the April Laws. Moreover, it abolished the royal and the palatine donation system,[26] the right of succession of the Holy Crown, the distinction between ancestral, acquired, donated and other estates, the distinction between the succession of sons and daughters. Moreover, it unified[27] the different types of estates. It has become a general rule that succession is to be determined by the law in force at the time of the testator's death. It is important to point out that the royal decree left the fideicommissum untouched, the significance of which was that the testator could create from his acquired property an inalienable estate subject to the succession order he had determined, which thus became like the

[22] BÉLI, *op, cit.*, p. 192.
[23] SUHAYDA, *op. cit.*, p. 449.
[24] LÁBADY, *op, cit.*, p. 68.
[25] GROSSCHMID, Béni: *Magánjogi előadások. Jogszabálytan [Lectures on private law. Jurisprudence]*. Budapest, 1905, p. 43.
[26] BÉLI, *op, cit.*, p. 193.
[27] SUHAYDA, *op, cit.*, p. 450.

ancestral property. In addition, the patent allowed the alienation of former noble estates only before the land registry authorities. Moreover, on 15 December 1855 the Austrian Land Registry Ordinance[28] came into force in Hungary. Therefore, a public register of real estate was started.

To summarize, the April Laws and the *Avitizitätspatent* ensured freedom of wills and free property, which allowed people to take loans and alienate their estates, thus helped the Hungarian economy's development. However, besides the abolition of the *aviticitas*, we must not forget about the emancipation of serfs, which also played a major role in the civil transformation of private law.

5. Feudal inequality

The situation of the serfs in feudal Hungary was characterised by disenfranchisement. Up until 1848, approximately 90 percent of the population lived in serfdom, and their interests were not represented in the Parliament by any of the estates. They had no privileges, their landlord judged them in the manor court, and after 1514 they were not allowed to leave their serfplots.[29] Not as they had much opportunity to do so, as they carried a lot of burdens on their backs; they paid the crop tax, the ninth, the church tax, the tithe, and owed their landlord socage (52 yoke days or 104 days of work on foot per year for a whole serfplot) and gifts, among other formalities. In contrast, nobles enjoyed privileges, such as the habeas corpus, and they did not pay any taxes[30].

The great statesmen of the reform era, the nationalist and liberal[31] Miklós Wesselényi, Lajos Kossuth and István Széchenyi recognised the inefficiency[32] of serfdom, therefore the need for wage labour and the indispensability of free labour to promote modernisation. Many supported the abolition of the nobles' tax exemption.[33]

[28] BÉLI, *op, cit.*, p. 194.
[29] *Ibid.*, p. 9.
[30] DEÁK, *op, cit.*, p. 24.
[31] *Ibid.*, p. 26.
[32] SZÉCHENYI, *op, cit.*, p. 100.
[33] FÓNAGY, *op, cit.*, p. 23.

They thought that it was more beneficial for the economy if the nobles also paid taxes, and they wanted to remedy the differences caused by the inequality of rights.[34]

In the 1840s, the nobles living on serfplots were taxed, and to the non-nobles was given the right to hold estates. Moreover, their ability to represent themselves before the courts was extended, and the reformers even abolished the limitation of holding offices.[35]

6. The emancipation of serfs

The issue of the emancipation of serfs was also a matter of deliberations among the Hungarian statesmen during the reform era. Two forms were proposed, the voluntary and compulsory emancipation of serfs. The difference between the two methods was the following. In the case of voluntary redemption, the serfs were only to be freed, if they had enough money. They, in agreement with their landlords, could buy their plots of land and their freedom in exchange for money. However, the compulsory emancipation of serfs in Hungary meant that all serfs acquired ownership of their serfplots and the compensation for landlords became the future task for the state.

During the Diet of 1840, voluntary redemption of serfdom was enacted into law[36], but the law did not really achieve its goal: only 1% of serfs had the amount of money to redeem their property and freedom. Moreover, it should be emphasised that the landlord was not compelled to emancipate the serfs.

In Spring of 1848, it became clear to the legislators that serf emancipation could only be achieved effectively through the compulsory redemption of serfdom and the complete abolition of the manorial system. Therefore, Act 9 of the April Laws stated that serfplots should be abolished and given to into property, together with the abolition of the landlord's property by state compensation and provided for the

[34] DEÁK, *op, cit.*, p. 12.
[35] SUHAYDA, *op, cit.*, p. 20.
[36] FÓNAGY, *op, cit.*, p. 21.

complete abolition of the manorial system. The abolition of serfdom included the abolition of serf duties, such as the socage, the ninth, the vineyard tax, the pecuniary payments, and even the church tax, the tithe, was abolished by Act 13.

Article 10 of the April Laws of 1848 declared the separation of the serfdom,[37] which meant the settlement of the former common use areas such as forest, pasture, reeds, vineyards, etc[38] proportionally to the size of the serfplots. The abolition of the serfdom was accompanied by the abolition of manor courts, together with ius gladii, as proclaimed by Act 11. Moreover, Act 13 made provisions on the conversion of the abolished properties into debts.

7. The Urbarial Patent

Like the abolition of *aviticitas*, the details of the abolition of serfdom were worked out by the Austrian government during the era of the so-called neo-absolutism. The legal and property relations that remained from the abolished manorial relationship were regulated by the Urbarial Patent from 2nd March 1853.

It stated that full ownership was given to the former serfs regarding the plots they held previously, which were registered in the manorial tables as former serfplots. It also determined the acquisition of serfs' property from the common use lands by implementing the manorial separation. It resolved the forfeiture of rights and emoluments resulting from the manorial relationships and the landlord's jurisdiction by means of state compensation, the amount of which was determined for each county.[39] The law also established state compensation for the land redeemed between 1840 and 1848.

[37] SUHAYDA, *op, cit.*, p. 21.
[38] BÉLI, *op, cit.*, p. 192.
[39] SUHAYDA, *op, cit.*, p. 224.

In the manorial courts established by the patent, proceedings lasted for decades sometimes,[40] due to conflict of interest between the noblemen and their former serfs. It was to the detriment of the serfs that the patent decreed that only manorial lands would be compensated by the state, while all other estates had to redeemed by themselves. Residual lands were not considered manorial lands and thus noblemen could even charge interest on their redemption.

At the same time, the situation of former landlords didn't improve as state compensation became a task of the uncertain future, while the loss of income and the need for investment in livestock, equipment and buildings were pressing factors at the time.[41] Although he criticised the new rules several time, Ferenc Deák also expressed his pleasure at the emancipation of serfs in his speech as the Minister of Justice[42] back in 1848, since he had seen the problem not in the provision itself but in the lack of transience.

8. Conclusion

The April Laws were important milestones of the civil transformation, which led to the abolition of feudal institutions[43] and the establishment of a civil legal system. The time for implementing the changes to private law envisioned in 1848 was delayed, and they were not enacted in accordance with the original will of the legislators. The suppression of the 1848/1849 War of Independence was followed by a decade of neo-absolutism in Hungary. The Hungarian Constitution was suspended by the monarch, who did not convoke the Hungarian Parliament until 1861. The imperial royal state courts operated[44] throughout his empire, and a foreign code of private law,[45] shaped by the results of Austro-German-Roman jurisprudence, came into force in Hungary.

[40] FÓNAGY, *op, cit.*, p. 23.
[41] FÓNAGY, *op, cit.*, p. 24.
[42] *Ibid.*, p. 25.
[43] *Ibid.*, p. 68.
[44] SZLADITS *op, cit.*, p. 80.
[45] LÁBADY, *op, cit.*, p. 68.

It cannot be denied, however, that some aims of these laws of 1848 were embraced by the Austrian Government, to the declarative statements was given substance, and their implementation was ensured by the patents issued in the 1850s.[46] Consequently, a modern private law system was established which, while meeting the needs of a capitalist economy, was in some respects quite different from the domestic traditions. This was particularly evident in the provisions of the ABGB on the law of succession.

With the implementation of serf emancipation and the abolition of the *aviticitas*, an economy based on free movement of people, free flow of money and property was created, which facilitated the development of a market economy, the modernisation of agriculture[47] and the development of industry. The society of Hungary moved much closer to the equality of rights, as its citizens enjoyed various private freedoms such as the right to free disposal and inheritance, freedom of property, the right to private property, freedom of movement and the right to sue. Among public rights, the right to vote was extended and the limit on holding office was abolished.

All in all, the April laws were the first in Hungary to proclaim the provisions and freedoms that were essential for the establishment of a modern legal system. The transformation of our private law institutions took decades and as the 1850's show, the line of development was not without its detours. The role of 1848 regarding the development of Hungarian private law is perhaps best captured by the fact that the articles of law adopted at that time clearly set the direction of the future, from which there could be no deviation.

[46] KÉPESSY, Imre: The Consolidation of Hungarian Legal Practice with the Austrian Norms in 1861. *Studia Iuridica,* No. 80, 2019, p. 162., https://doi.org/10.5604/01.3001.0013.4797
[47] DEÁK, *op, cit.*, p. 26.

Leo KOJČINOVIĆ: General Civil Code in Croatia and Slavonia from 1853 to 1918

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1. Introduction

Along with the French *Code Civil* and the Prussian *General Landlaw*, the General Civil Code is considered one of the first European codifications of private law. Systematized on the model of Gaius' *Institutiones*, the General Civil Code is characterized by a simple style and language, short and concise formulations of legal terms and institutions, and abstractly conceived rules.[1] The General Civil Code was called "general" because it was valid for all citizens regardless of their class affiliation. The introduction of the General Civil Code in Croatia opened the way to the affirmation of the civil class and the establishment of a civil society, but also the incorporation of the Croatian legal order into the modern Central European legal system, which is exactly what this paper deals with.

2. From Maria Theresa's initiative to the "first" European codification of private law

With the absolutist rise of the state in the second half of the 18th century, the systematic development of law began in Austria, which was especially reflected in the adoption of the General Civil Code, on which work began as early as 1753 on Maria Theresa's own initiative. Thirteen years later, i.e. in 1766, a draft of the civil code called *Codex Theresianus iuris civilis* was prepared, but Maria Theresa rejected it due to its

[1] Opći građanski zakonik [General Civil Code]. Hrvatska enciklopedija, mrežno izdanje [Croatian encyclopedia, online edition]. Leksikografski zavod Miroslav Krleža, 2021, http://www.enciklopedija.hr/Natuknica.aspx?ID=45220 [Access on November 1 2022].

excessiveness and numerous ambiguities and sent it for further refinement. The jurist and court adviser Benjamin Horten reworked the first part of the Codex, but further modifications were requested with certain instructions. Part of Horten's revised *Codex* was sanctioned in 1786, and in 1787 it entered into force as the *Josephine Codex* in all Austrian successor states.[2]

After the 1766 revision of the *Codex*, which included its first part that was in force as the Josephine Codex, in 1797 the fourth draft of the Codex came into force in the Austrian province of Galicia. After verifying its institutes through practical application, the *Galician Code* was revised under the leadership of the distinguished Viennese university professor and judge Franz von Zeiller and was proclaimed by imperial patent on June 1, 1811, and on January 1, 1812, it entered into force in the Austrian successor states and Military Border.[3]

The General Civil Code came into force after the Prussian General Land Code of 1794 and the French Code Civil of 1804. Although younger, unlike the Prussian General Land Code, the General Civil Code was the first true codification of private law, while the Prussian General Land Code regulated almost the entire legal order.[4]

3. Basic features of the General Civil Code

The General Civil Code is an extensive codification made up of 1502 articles divided into three parts based on the example of Gaius' *Institutiones*. The first part consists of provisions on the law of persons (personal and family law). The second part deals with institutions of real, mandatory and hereditary law (e.g. ownership, pledge, servitude,

[2] KREŠIĆ, Mirela: Nasljednopravna načela Općega građanskog zakonika u praksi hrvatsko-slavonskih ostavinskih sudova [General Civil Code Inheritance Principles in the Practice of Croatian-Slavonian Probate Courts], *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 63 No. 5–6, 2013, p. 1097.
[3] ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba* [*Croatian legal history in the European context from the Middle Ages to modern times*], Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2021., p. 27.
[4] BRAUNEDER, Wilhelm: The "First" European Codification of Private Law: The ABGB, *Zbornik Pravnog fakulteta u Zagrebu*, Vol. 63 No. 5-6, 2013., pp. 1019–1020.

certain types of contracts), while the third part contains provisions common to the law of persons and real law (emergence and termination of rights and obligations, statute of limitations and succession).

The General Civil Code represents a successful combination of the German legal tradition in the form of received (pandect) Roman law and the ideas of the school of natural law characteristic of the enlightened 18th century in which it was mainly created.[5] Precisely because of this, but also because of its simplicity and comprehensibility, it has been used for a long time. In addition, it significantly influenced other legal systems as a model in creating their own civil codes, such as the Swiss cantons of Bern, Lucerne, Solothurn and Aargau, as well as Moldova, Serbia and Montenegro.[6]

Private property, despite the prevailing type of shared property at the time, represented the backbone of the General Civil Code and suffered almost no restrictions. Such a relationship with private property caused a double effect. On the one hand it encouraged the development of capitalist entrepreneurship and individualization, while on the other hand it encouraged the process of disintegration of household cooperatives that were based on collective ownership and which were the basis of existence for the poor peasantry anyway.

4. "The other side of the coin"

In addition to the previously highlighted natural law and individualistic features, the General Civil Code also contained visible influences of feudal law and conservative and patriarchal provisions aligned with the general social understandings of that era. Thus, according to the General Civil Code, there was no possibility of marriage between members of Christian and non-Christian religions, while illegitimate children were excluded "from the rights of family and relatives", even in the case of subsequent

[5] ČEPULO, *op. cit.*, p. 156.
[6] BRAUNEDER, *op. cit.*, p. 1023.

adoption.[7] In addition, despite the principle of inviolability of private property and freedom of bequests, the General Civil Code nevertheless recognized family fideicommissum, as an inalienable hereditary asset, and status class rights, such as the noble right to a coat of arms.

5. Introduction of the General Civil Code in Croatia and Slavonia

The General Civil Code in Croatia and Slavonia entered into force on May 1, 1853, based on the imperial decree of November 29, 1852. Its introduction into the legal order of Croatia and Slavonia represented a necessary break with the earlier feudal legal and social order.[8]

The entry into force of the General Civil Code meant the establishment of a legal and social order based on the postulates of individualism and liberalism, which paved the way for the affirmation of the civil class and the establishment of civil society, as well as the incorporation of the Croatian legal order into the modern Central European legal system.

Nevertheless, the introduction of the General Civil Code initially had few positive repercussions. Those whose interests based on the feudal system were threatened by new individualistic and liberal norms. In addition threatened were also those who were guided by conservative views and those who were fundamentally opposed to all Austrian laws because of the way they were introduced in Croatia and Slavonia.[9]

[7] ČEPULO, *op. cit.*, p. 157.
[8] GAVELLA, Nikola: *Teorijske osnove građanskog prava. Građansko pravo i pripadnost hrvatskog pravnog poretka u kontinentalno- europskom pravnom krugu* [*Theoretical foundations of civil law. Civil law and belonging to the Croatian legal order in the continental-European legal circle*]. Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2005., p. 32
[9] *Ibid.*, p. 33.

6. The fate of the General Civil Code after the fall of absolutism

The October diploma of 1860 introduced a provisional constitutional arrangement. Because of this, a fierce agitation began against all laws that were introduced as common during the time of absolutism for the entire Habsburg Monarchy. This process was particularly prevalent in Hungary, so after the Hungarian Table of Seven was organized, the so-called the Judexcurial Conference, which after the deliberations were completed, proposed the re-establishment of the earlier Hungarian homeland law, i.e. the repeal of the General Civil Code, which the Hungarian Parliament accepted. This re-established the earlier Hungarian law in Hungary, but with certain inevitable changes caused by new social circumstances, which mainly related to inheritance law and maintenance and to civil law institutes in connection with the 1855 land order.[10]

Despite different views, in Croatia the General Civil Code remains in force as part of the Croatian legal system. Such a conclusion is derived from the Instructions for the temporary arrangement of Croatian counties drawn up in early January 1861 by the Ban conference under the chairmanship of ban Josip Šokčević, which stated that the previous laws would remain in force until further notice.[11] The Croatian Parliament in 1861confirmed the position of the Conference on maintaining the Austrian laws, introduced through patents during the period of absolutism, until they are explicitly repealed or modified. In addition, a strong reason for keeping the General Civil Code in force in Croatia and Slavonia was the intense economic connection with neighbouring countries under the Austrian crown, but also the high opinion of the lawyers of the new generation, especially those who were educated at Austrian universities, about the quality of the General Civil Code.[12]

[10] DERENČIN, Marijan: *Tumač k obćemu austrijskomu gradjanskomu zakoniku* [*Interpreter to the Austrian General Civil Code*]. Zagreb, 1880–1883., p. 17.
[11] KREŠIĆ, *op. cit.*, pp. 1098–1099.
[12] MAUROVIĆ, Ivan: *Das österreichische allgemeine bürgerliche Gesetzbucht in Kroatien* [*The Austrian General CIvil Code in Croatia*]. Vienna, 1912, p. 699.

7. Croatian-Hungarian settlement of 1868 and the amendments to the General Civil Code

With the conclusion of the Croatian-Hungarian settlement of 1868, Croatia was granted complete autonomy with regard to legislation and administration in all internal affairs, worship, education and the judiciary. Accordingly, since it was not repealed, the General Civil Code continued to be valid, but as the Croatian Civil Code, and no longer as the Austrian Civil Code, which is why its content was not affected by later Austrian amendments from 1914, 1915 and 1916 nor Austrian case law.

Novels from 1914, 1915 and 1916 represent a series of adaptations of the General Civil Code to the changed social environment. Since they were implemented in the Austrian legislation, they were introduced only in the countries under the Austrian crown, and thus also in Istria and Dalmatia. The main changes introduced restrictions on property rights with the aim of reducing the abuse of that right, expanded the reasons for annulment of legal transactions, improved the position of women as legal heirs, and recognized illegitimate children as having the necessary right of inheritance towards their mother's relatives.[13]

8. Attempt to amend the "Croatian General Civil Code"

Attempts to amend the "Croatian General Civil Code" in the period up to 1918 came in three waves.[14] The first wave of these attempts was in the period between 1860 and 1870 and was characterized by the fact that the retention of the General Civil Code in force in Croatia was seriously questioned. In that period, the Parliament established a judicial committee, which created the Basics of the Croatian General Civil Code, as a version of the General Civil Code, made up for the most part from the literal adoption of the rules of the General Civil Code. Since the parliamentary plenum did not discuss

[13] ČEPULO, *op. cit.*, p. 157.

[14] MAUROVIĆ, Ivan, *Nastojanja i pokušaji da se reformira Opći građanski zakonik* [*Efforts and attempts to reform the General Civil Code*]. Zagreb, 1940, pp. 86–91.

the Basics of the Croatian General Civil Code on two occasions, the first in a series of attempts to amend the "Croatian General Civil Code" ended unsuccessfully.

The idea of reforming the "Croatian General Civil Code" began to be discussed again at the initiative of Franjo Spevac, who proposed revising the General Civil Code with the adoption of provisions that correspond to Croatian conditions and the addition of provisions for the independent regulation of relations different from Austrian ones. Like the previous attempt to create a new code, this attempt to reform the General Civil Code was unfortunately not successful.

In the third wave, in 1917, the Croatian Land Government entrusted Slavoljub Popović with revising the "Croatian General Civil Code" according to the Austrian amendments from 1914, 1915 and 1916, with instructions to completely adopt Austrian norms wherever possible and add only necessary changes. However, with the collapse of the state in 1918, Popović's successfully completed task did not become law.

9. Conclusion

The effect of the General Civil Code in Croatia and Slavonia was twofold. On the one hand, its introduction paved the way for the incorporation of the Croatian legal order into the modern Central European legal and social order based on the postulates of individualism and liberalism, which encouraged the development of capitalist entrepreneurship and individualization. On the other hand, with the introduction of the General Civil Code, the process of dissolution of household cooperatives, which were based on collective ownership and which were the basis of existence for the poor peasantry anyway, was strengthened. Nevertheless, in the end it is important to emphasize that the General Civil Code, by successfully combining the German legal tradition in the form of received (pandect) Roman law and the ideas of the school of natural law characteristic of the enlightened 18th century, had a deep and lasting impact in the Central European and Croatian environment.

Dorián DEME: Mortmain in the Hungarian legal system

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1. The emergence of legal institutions restricting the marketability of property in Europe

Following the edict about religion of Theodosius I in 380, Christianity became the sole leading religion, if not of the world, then of Europe for several centuries. However, we can see that after the very moment that the Christian church became able to acquire property within the Roman Empire and expanded its dominion, a tendency emerged in Western European countries to limit the alienability of property and with it the ability of the church to acquire it in various ways. These limitations of alienating property are called entailment and mortmain.

However, sources mention various forms of entailment prior to the emergence of feudal Christian Kingdoms, for example by the time of Germanic tribes, French customary law, or even English law. The Germanic tribes had a law of descent and distribution in form of the *Lex Salica* as early as the 500s, pursuant to the law the estate called *terra salica* passed *ipso iure* to the son of the testator upon his death, and if he had no male heir, it passed to the nearest male relative.[1] The Burgundian law can also be mentioned here, which similarly limited the testamentary rights of the father of the family for the purpose of keeping his property together.[2]

With the rise of Christianity in Western Europe, a much more detailed system of entailment was established. At the beginning of the 12th century, Henry I, King of

[1] CSEMEGI, Károly: *Az egyházi holtkéz a magyar törvények szerint [The mortmain of the church according to Hungarian law]*. Magyar Jogászegyleti Értekezések, Volume 14, No. 1. Budapest, 1897, Franklin-Társulat Könyvnyomdája, pp. 12–13.

[2] *Ibid.*, pp. 13–14.; DAEMPF, Sándor: *A holt-kézi törvény (lex amortisationis) Magyarországon: Magánjogi tanulmány [The lex amortisationis in Hungary. A private law study]*. Pécs, 1891, Engel Lajos, p. 20.

England, followed the trend and revised the system of succession in his country by classifying estate into two groups. These were the self-earned assets and the inherited Bockland, which bore the characteristics of entailment. The Bockland, similarly to the aforementioned terra salica, was inherited "from father to son, and from the son to his son".[3] Within the framework of this legal institution, in the absence of a male heir, the brother(s) of the testator was(/were) favoured. Almost all the kings within the Christian-dominated territories made similar provisions. The purveyors of the ideas without which entailment could never have taken such deep roots were the ius commune, the ius cannonicum and their powerful influence.

Similar provisions were enacted in Hungary as well, but with a certain delay regarding this area. The Golden Bull of 1222 cannot be omitted as a predecessor of the Hungarian entailment laws also known as the aviticitas. The Golden Bull of Andrew II, issued in Székesfehérvár, is the first decree issued by a Hungarian king, which establishes the rights of the Hungarian nobility. However, one currently-disputed cornerstone of the provision goes against the ongoing trend of Western Europe. It does not limit the right of family fathers to make wills, but gives them a concession. Under this provision, a legator who died without children was free to leave his property to anyone, even to the Church.[4] Hungary had to wait more than 100 years to get back on the "right" track, when the ideas and laws that had pervaded the West for centuries arrived with the accession of the Anjous.

In the 9th year of his reign, the second Anjou king, Louis the Great renewed the Golden Bull of András II almost completely: instead of the testamentary concession introduced in 1222, he introduced restrictions, thus creating the Hungarian law of aviticitas. With the Decree of 1351, Louis the Great wanted to strengthen the nobility and prevent their impoverishment. This was also due to one of the ideas imported from the West, the new military system called the banderium. King Charles Robert reorganised the army, making the nobility its backbone, so a weak nobility also meant

[3] CSEMEGI, 1897, pp. 16–17.
[4] DAEMPF, 1891, pp. 48–58.

a weak Hungarian kingdom. Therefore, the Anjous had a clear interest in making the Hungarian nobility strong and wealthy.[5] The Decree of 1351 was considered by many to be the first mortmain law, i.e. the first law that restricted the churches' ability to acquire property, since a noble testator could not leave his property to the church, among others. However, this provision was not aimed exclusively at the churches, nor was it in Louis the Great's interest to see his relationship with the church deteriorate. The main reason for this was the circumstances surrounding the accession of the House of Anjou. In 1301, the House of Árpád died out, the throne became vacant, and an interregnum set in. From the struggle for the Hungarian throne, Charles Robert of Anjou emerged victorious. His success was largely due to the support of the Christian church, which he had good relations with. The good relations between the house and the papacy were maintained by his son, therefore he had neither the interest nor the power to weaken the Church which supported him. [6]

Consequently, the laws of entailment and the laws of mortmain cannot be mentioned in the same group, but both institutions have in common that they aim to restrict the right of the nobility to dispose of property.

2. The development, history and application of mortmain laws in Hungary until the 19th century

2.1 Prelude of the first mortmain law and the law itself

Similarly to the entailment, the development of the mortmain laws started in Western Europe. The church in the Roman Empire was originally a forbidden society, so it could not acquire property. This only ceased later, when it became the state religion, however

[5] CSEMEGI, 1897, pp. 20–22.
[6] *Ibid.*, pp. 16–17.

following that, gradual restrictions on their ability to acquire property came in force, but we cannot speak of mortmain laws yet.[7]

The mortmain laws became necessary after the strengthening of the Church and its wealth. In accordance with Church teachings and in the hope of salvation in the afterlife, people left their property both during their life and at their death in such a way that it would be transferred to the Church and to various Church officials. This had two effects. The noble fathers, disregarding their families and their members, left all their property to the Church in their wills. After their deaths, the will came into force, their assets were removed from the family and the new fathers had to manage without a penny to their name. Needless to say, this phenomenon led to the ruin and disappearance of many noble families. The weakening of the noble families weakened the kingdom itself, so kings had to stand up strong-handedly.

Thanks to the provisions and disposals to the Church, the Catholic Church has acquired great wealth. This fuelled the greed of the priests and other church leaders even more. Contrary to the teachings of the church, they lived in splendour and luxury, which resulted in the power and wealth of the church competing with the state and the king. In some areas, the authority of the Church was already greater than that of the ruler. The biggest problem, however, was that the church's estates were in a state of mortmain, which meant that the church itself was not allowed to alienate estates, in other words what once became the property of the church fell out of the economic cycle.[8] Thus, one of the most important institutions of the feudal system could not prevail, since the Church, unlike the dynasty and the family, could not "die out", go extinct, and therefore the estates could not be passed back to the Crown. Including this reason, the kings of the feudal age could not afford to allow the church to continue growing and gaining more ground.

[7] DAEMPF, 1891, pp. 19–21.; HOFFMANN, Pál: *Közönséges és magyar részszerű katholikus egyházjog alapvonalai [Common and Hungarian Catholic Church law basics]*. Pozsony, 1865, p. 244.
[8] DAEMPF, 1891, p. 17.

Nevertheless, we cannot speak of direct aims to weaken the church until the 14th century, when the balance tipped in favour of the state. This was due to the great Western schism, or schism, in which two popes, whose authority could not be asserted in all the Catholic countries, were elected after the 70-year-long „Avignon Captivity". Europe became divided and the situation became so dire that by the beginning of the 15th century there were three elected popes. The Council of Constance put an end to this in 1417, but by then the damage was already done, the negative effects of the previous period had become irreversible. The papacy, and with it the whole Church, lost its prestige, could not fully assert their authority and was all in all weakened.[9] This gave Christian rulers the perfect opportunity to stop the flow of wealth to the church for good. One by one, laws were introduced which made the promulgation of papal bulls subject to royal permission or restricted the acquisition of church property.

The Kingdom of Hungary was not left out of the new trend sweeping across Europe, as in Hungary, like in Western European countries, it was necessary to limit the acquisition of property by the Church. The first law of mortmain dates back to 1498. However, the law was the preceded by a lengthy process. Compared to the rest of Europe, the Church had even greater influence in Hungary, which led to various movements that tried to oppose the clericity. The precursor of Act 1498:55 was also such a movement, which was headed by István Báthory the elder, who not only acted as patron of the impoverishing nobility, but also had personal motives against the most influential man in the Hungarian Christian Church, Tamás Bakócz.[10] The pressure exerted by István Báthory and his movement was so impactful that it could no longer be ignored. Thus, in 1498, the first law of mortmain was enacted, which remained part of the legal system until the end of the 19th century.[11] According to the law, all contracts with the church and ecclesiastical persons concerning property and the right to property are null and void. It is important to note that the law also covers all contracts

[9] CSEMEGI, 1897, p. 27.
[10] DAEMPF, 1891, pp. 80–83.
[11] *Ibid.*, pp. 84–85.

concluded by church persons as individuals, and applies to both inter vivos and mortis causa. In addition to Act 55, it is necessary to mention Act 1498:65, which stated that such contracts were null and void, even in case of payment of money, and with retroactive effect. After the introduction of these two acts of law, no property could be transferred to the church and not even a royal approval could help that.

2.2 Mortmain law during the reign of the Habsburgs in Hungary

The rules of 1498 proved to be only a temporary solution as people broke them regularly and they failed to have the intended effect of weakening the church. The possibility of introducing new rules was caused by the Reformation wave in Europe, following the rise of a new branch of the Christian church, namely Protestantism, which began to take hold in 1517 after the actions of Martin Luther. The new trend spread like wildfire among the Hungarian nobility in the 16th century thanks to which the Catholic Church lost its primacy as Protestantism proved to be a worthy opponent. As result the nobility became divided. This division provided an opportunity to take further and more assertive actions against the clergy. As the leaders of the new movements, it is important to mention István Bocskai and Gábor Bethlen. Bocskai is responsible for the Assembly of Korpona and its conclusion, Act 1608:1, in which the Protestant Church was recognised as a denomination. Furthermore, Gábor Bethlen weakened the position of the Church at the Diet of 1619 in Pozsony. [12]

Nevertheless, the greatest changes came about thanks to George I Rákóczy and the 30-year war. The clashes, also known as the world war of the 17th century, were dominated by the Protestant-Catholic conflict. Most countries in Europe, including the former Principality of Transylvania, were drawn into the war and as the Prince of Transylvania, George I Rákóczy, came to the defence of the Protestants. The war was doubtful for a long time, but this changed with the external defeats of the Habsburgs, when Ferdinand III lost his favourable position and was forced to negotiate a peace

[12] *Ibid.*, pp. 96–97.

deal with the Transylvanian parties. He had to give in to the pressure in his peace treaty with György Rákóczy. Following the peace treaty of 1646 and the closely related Diet of 1646/47, the right of Protestants to practice their religion freely was guaranteed. In addition, the Parliament passed Act 1647:17, which completely renewed the acts of 1498.[13] This was the second attempt in Hungarian history to weaken the churches, but as we can see from the events of the following centuries, similarly to the first mortmain law, it was not successful.

Even after the renewal of the mortmain laws in the 17th century, the provisions of the laws could not be enforced for various reasons. This stems from the relationship between the Habsburgs and the Ottomans as similarly to the previous years, the two sides were in constant conflict. Until the beginning of the next century, Hungary was divided into several parts between the Ottomans, the Habsburgs, and the Transylvanian Principality. Logically, the laws of the Hungarian kings could only be enforced in the territories, which were dependent from them. This period was characterised by sovereignty problems that arose from the constant border feuds. The problems could only be resolved in the early 18th century, when the Habsburgs managed to recapture the Ottoman-controlled territories of the Hungarian Kingdom (1699) and to take back the Transylvanian Principality after the defeat of Rákóczy's War of Independence (1711).

In the following period, King Charles III of Hungary, in addition to his many measures, also put emphasis on the laws of mortmain. The main purpose of his laws was to relax the relatively high degree of severity while maintaining the existing laws. This is how, among other things, Act 1715:16 was born, which also restricted the churches' ability to acquire property, but unlike the previous laws of mortmain, it provided certain concessions. Thus, property could be finally transferred to the churches in exceptional cases, however, the consent of the highest dignitary, the king, was required for this to be valid, otherwise it was not allowed to leave property to the

[13] *Ibid.*, pp. 98–100.

church.[14] In addition to this act, two other ones were enacted in the same year. The first of them being act 1715:71, which regulated a special case of the transfer of property to the Church. Specifically, when the person with the claim to the property joins a monastic order. This was mainly problematic because of the triple vow of the monks, who, among other things, had taken the vow of poverty of Jesus, so that they had to give up all their property, usually for the benefit of the monastic order. Thus, according to the law, they could claim only one tenth of their inheritance, exclusively in cash and only up to five thousand forints.[15]

Act 97 of the same year, however, also took contrary measures, since the law stated that "The chiefs of the monks shall also be bound to keep the contracts of their predecessors with the laity, duly and solemnly concluded and confirmed by authentic writing." At first sight, this is a provision that runs counter to previous laws, and to the essence of the laws enacted in the previous 200 years. At the same time, it may be concluded that this provision applies only to other contractual relationships outside the law of mortmain. The purpose of the law was to prevent clergymen from using the provisions of the mortmain laws as an excuse to evade their obligations.[16] From the laws of 1498 onwards, one of the main aims of the jurisprudence in the field of the laws of mortmain was to limit the alienation of property to the Church, and therefore it would be absurd to assume that, in the same year there were laws of mortmain enacted, and paradoxically, another law would abolish the institution. Hence, the conflict between Act 97 and the preceding acts of law does not exist.

2.3 The effects of the Hungarian civic transformation on the laws of mortmain

For the next more than hundred years, the mortmain laws remained relatively untouched in the legal system. Only one royal decree, issued in 1774, imposed a specific limit on the maximum annuity allocated to monastic orders. After that, there

[14] *Ibid.*, pp. 102–104.; CSEMEGI, 1897, p. 31.
[15] DAEMPF, 1891, pp. 107–108.
[16] *Ibid.*, p. 113.

was no mention of new laws on the alienation of estate, considering both the aviticitas and the mortmain laws, until the high point of the Hungarian reform era, the 1848 legislative period. The most important aim of the reform era from 1825 onwards was to modernise Hungary, which had lagged behind, was old-fashioned compared to Western countries, and to bring it up to European standards. Achieving these goals were impossible without abolishing the laws that had severely hampered the Hungarian economy and were still in force. These laws were the laws restricting the alienation of property, i.e., the aviticitas laws for almost five centuries and the mortmain laws of 1498. These were attempted to be remedied at the Diet of 1848/48, but as the strict, backward orderly legislative process was still in place at that time, it would have proved impossible to fully develop new laws within the system. Despite the strict procedural requirements, the National Assembly succeeded in getting Ferdinand V to sanctify, among other provisions, the Act 1848:15. The aim of the law was to dismantle the system of entailment, but it was only partially successful, as it was declarative and undeveloped. The detailed law was intended to be drafted under the reformed system, but the events that followed the Diet, the Revolution and the War of Independence, made this impossible. The legislation of 1848 made no provision regarding the mortmain laws, so they remained part of the legal system after the failure of the War of Independence. [17]

In the period following the restoration of the legal system after 1848, several attempts were made by the Habsburgs to reform the legal system, including provisions on the marketability of estate. However, these were met with resistance from the Hungarian side, as in the name of passive resistance, they did not recognise the new Austrian regulations and refused to implement them, but the attempts are still worth mentioning. One of the most important of these attempts occurred on 13 November 1855, when the Josephine reforms were annulled in the Austrian Empire, after which the Roman Catholic Church regained its primacy within the empire. It made the

[17] *Ibid.*, p. 131.

Church's property inviolable and restored its freedom to acquire property. It de facto repealed all laws that contradicted it as well, including the laws of 1498, 1647 and 1715.[18] However, the above-mentioned passive resistance caused the same problem, so the provisions never became part of the legal system. Similar aims could have been achieved by the introduction of a land register in December 1855.[19] The main purpose of the legal institution was to create a registration system in which the most important information about real estate could be kept. The land register system did not recognise any restrictions on the acquisition of property by churches and church officials, which would have allowed them, among others, to acquire property freely, but for the reasons already mentioned, this was not accepted by the Hungarians.

When the Austrian Emperor Franz Joseph realised that Hungary could not be governed as part of the Austrian Empire and its legal system, he realised that something had to be done. This was attempted by the Lord Chief Justice Conference of 1861, convened by György Apponyi, at which the country's intellectuals drew up the Provisional Judicial Rules.[20] These rules, made outside of Parliament, were not laws due to their lack of legitimacy, but they were able to become part of the legal system. The rules re-enacted the entire Hungarian legal system, with the addition of a few provisions from the neo-absolutist era that proved useful. There was no explicit provision for mortmain laws and since they were not contradicted by the new Austrian provisions, it can be concluded that the mortmain laws remained part of the legal system. An interesting situation arose where the laws of the mortmain were in a legal grey area. De facto, they were still in existence, but they also encountered obstacles in principle and in practice, as well as some provisions were repealed or rendered obsolete by the changed legal system. For example, the mortmain violated the principle of equal rights, as the laws distinguished monks and clerics in a discriminatory way. Moreover, the provision of the laws of the mortmain preventing churches and

[18] *Ibid.*, pp. 130–130.
[19] CSEMEGI, 1897, pp. 43–44.; DAEMPF, 1891, p. 131.
[20] DAEMPF, 1891, pp. 132–133.

ecclesiastical persons from acquiring noble goods as royal donations became irrelevant, since the imperial patent about the entailment of 1853 abolished the donations of the king and the palatine.

After more than 30 years, the mortmain laws were revisited, namely at a plenary session of the Royal Curia No. 63 held on 1 February 1896, at which the laws were abolished by a case-law decision.[21] By their reasoning, the restrictions on the mortmain, and therefore the mortmain laws, are obsolete. They are no longer needed in the present circumstances, and therefore Acts 1498:55, 1498:65, 1647:18 and 1715:16 have been repealed by the customary law.

3. The justification for mortmain laws

The laws of the mortmain tried to create a balance between the churches and the nobles, as well as between the churches and the state. Their importance was invaluable in the age of feudalism, when the nobility constituted the military power of countries and the bulk of the state apparatus. However, in practice, for various reasons, they have not been able to take hold. The lack of state coercion, questions of authority and the everyday importance of Christianity all played a part in preventing the laws of the mortmain from taking root. In Hungary, thanks to this, the laws relatively quickly disappeared from the jurisprudence, formally when the aforementioned session of the Curia declared them obsolete, but we can say that they failed to have their intended effect already in the previous years. This process happened relatively quickly compared to other countries. For instance, in the United Kingdom, dead-hand laws were formally repealed in 1960, and in some Commonwealth countries, they are still in force.[22]

[21] NÓTÁRI, Tamás: A magánjog fejlődése és kodifikálása Magyarországon [Codification of private law in Hungary]. In: OSZTOVICS, András: *A Polgári Törvénykönyvről szóló 2013. évi V. törvény és a kapcsolódó jogszabályok nagykommentárja I. kötet [Act 5 of 2013 on the Civil Code and related legislation. Volume I]*. Budapest, 2014, OPTEN Informatikai Kft., p.14.

[22] Charities Act 1960.

However, we can also talk about different alternatives to the Mortmain laws, which were designed to solve the same problem. The most successful of these attempts was carried out by Henry VIII when he dissolved all monastic orders by 1541 and deprived many members of the Church of their lands.[23] The bishops were still left with a relatively large amount of land, but he managed to tip the scales permanently in favour of the state and solved the problem. However, in the Kingdom of Hungary, such a thing could never have been done, because of the head of state's close ties to the Church. Because of the founding works of the Church of St Stephen, Hungarian kings were entitled to the title of Apostolic King, and the king in Hungary functioned as the head of the Church, so a radical solution such as the one in England would have weakened his position completely.

Finally, the question arises as to whether, without the problems of feudalism, there would be a place for the law of the mortmain in the modern legal system. In spite of the fact that the technical conditions are met, it would probably quickly disappear from the modern legal system. The main reason for this is that the original purpose of the Mortmain laws has already been fulfilled. The church and Christianity have lost their central role and their everyday relevance. Atheism, or even anti-churchism, is gaining popularity, while Christianity is becoming increasingly deserted. Hence, the churches are no longer a "threat" to families, and there is very little chance of them becoming impoverished by leaving their assets to the church in their wills. Thus, in my opinion, the fate of the mortmain laws in the modern legal system would be similar to that was laid down by the Curia in 1896.

[23] GASQUET, Francis Aidan: *Henry VIII. and the English monasteries*. Fine facsimile edition. San Francisco, 1972, Ayer Company Publishers, pp. 244–246.

Daniella SCHLAFFER: Adoption in Hungary after 1848

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1. Introduction

The purpose of adoption is entirely different today than when this legal institution appeared in Roman law. The term itself can be traced back not only to the fact that we accept someone into our family, but also carried the function of making him an heir[1], and it was primarily the latter that caused this legal institution to develop over the course of thousands of years, i.e. the adopter wanted to ensure to find an heir to his wealth during his lifetime. The suppression of the 1848-49 War of Independence and the subsequent Austrian rule resulted in many changes in the domestic legal system. The laws enacted in this era included the Austrian Civil Code (ACC), which entered into force in our country in 1853. This was necessary due to the lack of modern rules.

Despite the Provisional Judicial Rules of 1861, which restored traditional Hungarian private law, its rules regarding the adoption remained in force until the Act 20 of 1877.[2] In addition to all of this, it is also worth mentioning the Act L of 1879, which regulated the issue of international adoption, as well as the Private law Bill of 1928, which was ultimately not accepted by the Parliament, but it provisions was

[1] JOBBÁGYI, Gábor: *Személyi és Családi Jog [Personal and Family Law]*. Budapest, 2009, Szent István Társulat, p. 11.

[2] VÉKÁS, Lajos: Az osztrák Polgári Törvénykönyv hatása a magánjog fejlődésére [The impact of the Austrian Civil Code on the development of private law]. In: RÁCZ, Lajos (ed.): *A német-osztrák jogterület klasszikus magánjogi kodifikációi, Tanulmányok az OPTK és a BGB évfordulói alkalmából [Classical private law codifications of the German-Austrian legal area, Studies on the occasion of the anniversaries of the ABGB and the BGB]*. Budapest, 2011, pp. 22–28.; RÉKASINÉ ADAMKÓ, Adrienn: Aki megment egy életet: az örökbefogadás az osztrák és a magyar magánjog rendszerében a polgári korszakban [Who saves a life: adoption in the Austrian and Hungarian private law systems in the modern era]. *A Márkus Dezső Összehasonlító Jogtörténeti Kutatócsoport Folyóirata [Journal of the Márkus Dezső Comparative Legal History Research Group],* No. 1, 2018, p. 99., https://doi.org/10.15170/DIKE.2017.01.01.07

incorporated into domestic legal practice. In the following, I would like to present the impact of these laws on the regulation of adoption and the related judicial decisions.

2. Implementation of the Austrian Civil Code in Hungary

With the establishment of neo-absolutism, the Austrian empire enacted the Austrian Civil Code in 1853 in the territories of the Holy Crown, which, due to its modern rules, was an important step forward in legal disputes related to adoption. This is also reflected in the fact that, despite the Provisional Judicial Rules of 1861 – which restored a large part of traditional Hungarian private law – the rules on adoption remained in force until the end of Act 20 of 1877 on the settlement of guardianship and guardianship cases.[3]

The ACC contained three conditions for adoptive parents. First of all, it stated that, on the one hand, *"those who have not solemnly accepted celibacy, if they do not have legitimate children of their own, may adopt children; the adopting person is called the adoptive father or mother, and the adopted person is called the adopted child"*[4], and on the other hand, it stipulated that the adopter must be at least 50 years old, and there should be at least an 18-year age difference[5] between the child and the parent.

The act also allowed the adoption of minors and adult children. The difference was only in whose consent was required for the adoption. The adoption of a minor was possible "*only with the consent of the legal father or, in his absence, only with the consent of the mother, guardian [and the court]"*[6]. In the case of an adult child, if the legal father was still alive, his consent was also required.[7] If the consent was refused without sufficient reason, a complaint could be lodged with the court. However, if the consent

[3] VÉKÁS, *op. cit.*, pp. 22–28.; RÉKASINÉ ADAMKÓ, *op. cit.*, p. 99.
[4] Civil Code of Austria § 179.
[5] *Ibid.,* § 180.
[6] *Ibid.,* § 181.
[7] *Ibid.*

was given, it had to be reported to the government office for confirmation and to the competent court for registration.[8]

Regarding the legal effects of adoption, the law provided about naming and noble titles, and about family relationships. Regarding the former, it stated the following: *"adoption has an essential legal consequence: that the adopted person takes the name of the adoptive father or the family name of the adoptive mother; but at the same time he keeps his former family name and the family nobility that belongs to him. If their adoptive parents want their own nobility and crest to transfer to the adopted child, they must ask for the prince's permission"*[9]. In terms of family relations, the adopted child had the same legal status as the adoptive parents' own children. However, *"the relationship between the adoptive parent and the adopted child has no influence on the other members of the adoptive parent's family"*. however, as a counterbalance to this, the adopted child did not lose his own family rights.[10]

The parties could contractually deviate from the *"rights between adoptive parents and adopted child"*, as long as the essential legal consequences of the adoption were not affected and the rights of others were not "abbreviated" thereby.[11] The act also provided for the possibility of terminating the adoption, keeping in mind the interests of the minor child. During this, the relationship could only be terminated with the consent of the minor's representatives and the court. After that, the minor was once again under the control of his legal father.[12]

It was also possible for someone to adopt a child just for "care". The rules of adoption did not apply to this case, anyone could do this. However, if the parties wanted to enter into a contract and they wanted to impose restrictions or "special obligations" on the "foster child", it was necessary to confirm the contract by the court. Since anyone could freely decide to take the child in for "care", the "foster" could not

[8] *Ibid.*
[9] *Ibid.,* § 182.
[10] *Ibid.,* § 183.
[11] *Ibid.,* § 184.
[12] *Ibid.,* § 185.

claim the costs incurred.[13] Progress can be seen in this regulation of adoption by prioritizing the interests of the child. However, the real change will only be observed at the end of the civil age.

3. The Act 20 of 1877 and its relevant provisions regarding adoption

One of the important sources of Hungarian legal history is the Tripartitum of István Werbőczy, which already contained provisions regarding adoption. It was possible to adopt both minors and adults, but at that time inheritance was still among the primary goals of this legal institution. In addition, adoption as children and brothers was also known in Hungarian law, the latter of which was only possible among nobles. Of course, there could be other goals behind the adoption, such as obtaining citizenship or taking over the family name and noble title, but in Hungarian feudal law, the main emphasis was always on "inheritance".[14]

The primary nature of adoption[15] was somewhat changed by Act 20 of 1877 on the settlement of guardianship, when it was stipulated that paternal authority is also transferred to the adoptive father, if no contrary agreement was reached.[16] However, it is also important to note that the legislation related to adoption still regulated this issue around this time incompletely. According to the law, it was still possible to adopt adults. There were two forms of adoption of minors depending on the transfer of paternal power: *adoptio plena*, if it was transferred and *adoptio minus plena*, if the father's power was not transferred.[17]

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[13] *Ibid.,* § 186.

[14] KATONÁNÉ PEHR, Erika: Örökbefogadás [Adoption]. In: JAKAB, András – FEKETE, Balázs (eds.): *Internetes Jogtudományi Enciklopédia [Internet Encyclopedia of Law],* 2018, p. 4., https://ijoten.hu/szocikk/orokbefogadas [Access on April 11, 2022]; BEKE-MARTOS, Judit: Az örökbefogadás jogtörténeti megközelítésben [Adoption in a legal historical approach]. *Családi Jog [Family Law],* No. 4, 2009, pp. 18–23.

[15] KATONÁNÉ PEHR, *op. cit.*, p. 4.

[16] Act 20 of 1877, § 15.

[17] KATONÁNÉ PEHR, *op. cit.*, p. 4.

Since the so-called guardianship act covered adoption in only a few sections, I would like to present the relevant provisions based on a description of a situation[18] for easier understanding. According to the case, A.'s husband and wife were legally separated. The parties actually separated during the divorce proceedings, and the woman gave birth to her son 3 months after the divorce. A. did not recognize the child as his son and stated that he started the divorce (marriage dissolution) because of his wife's "pregnant state". To avoid the legal presumption and the scandal, he recognized the child as "born from a legitimate bed", but he never took care of him. After the divorce, the woman married B. and the question of who should raise the child arose during the guardianship hearing. A. did not even want to know about the son's upbringing and the exercise of paternal authority, so he agreed to appoint B. as the child's guardian. In the meantime, the mother died, and B. wanted to adopt his ward, the then 11-year-old boy, as he was childless and wanted to appoint him as the heir to his huge fortune. However, A. was also childless and wealthy and stated that he would consent to the adoption only if the appointed guardian and the adopter waived the right of inheritance after him on behalf of the minor child. The question that arose during the facts was that whether the adoption could take place despite the opposition of the father, and whether the minor could take the name of the adopter? According to the judge's reasoning, the answer to both questions was yes. Since the (alleged) father did not want to learn about the upbringing of his minor son, and agreed to appoint B. as guardian, as a result of these facts he lost the Act 20 of 1877 20. § a) of the law contained his right and the exercise of his duty, according to which *"the father exercising paternal authority is obliged to seek the approval of the guardianship authority in the following cases, if his own minor child is adopted by someone else*". The fact that B.'s appointment as guardian took place before the entry into force of the cited law does not change the circumstances of the case either, because the guardianship measure that deprived him of the exercise of paternal authority is based on his own

[18] See: Nyilt kérdések [Open questions]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 21, 1883, p. 168.; SIMON, Endre: Felelet az örökbefogadásra vonatkozó nyílt kérdésre [Answer to the open question about adoption]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 26, 1883, p. 208.

will and therefore, it has become "legal". Based on the facts, A. can be considered legally deprived of the exercise of paternal authority in the Act 20 of 1877 according to Article 22, which says *"paternal authority can also be terminated if the father completely neglects the care and education of his child (...)"*. As a result, the guardian will already be obliged to seek the approval of the guardianship authority in the case of the adoption of the minor[19], that is, the competent guardianship authority would have acted legally even if it had omitted to hear A., because he no longer had the right or obligation to do so. Since in this case B. is also the child's guardian and adopter in one person, the appointment of a temporary guardian acting in the interests of the minor is absolutely necessary, which was done. If the guardianship authority finds B.'s adoption offer beneficial to the interests of the minor, in this case, A.'s objection must be ignored, due to the above, and in accordance with Article 276 of the Act of 1877, because the cited provision states that *"the guardianship authority can generally ignore the statements and comments of the parents (...) only if they cannot be considered beneficial for the interests of minors for good reasons"*. In this case, the latter provision is also correct. The minor thus acquires a "hopeful right" to B.'s property through adoption, and even if this property is transferred immediately, his status as a descendant in the direction of A. will not change in that case either, i.e. his right to inherit will still be preserved. If the guardianship authority were to accept the conditions imposed by A., it would also exceed its authority, as this would affect an issue to be decided by the court. The other question, which related to the inclusion of B.'s family name, is also no obstacle, as long as this is included in the adoption contract and the approval of the guardianship authority also covers this. According to the judge's argument, there is no law or legal practice in the event that the inheritance of a minor in father A's property would be endangered as a result of the name change. Summing up the facts, the minor's right to inherit from his legal father is not jeopardized or lost as a result of the adoption or the adoption of the adopter's family name. It can

[19] Act 20 of 1877, § 113. 3. point

therefore be seen from the regulation that, during adoption, inheritance aspects will continue to take precedence over the establishment of kinship relationships.

4. The relationship between adoption and citizenship

Although the Act 50 of 1879 on the acquisition and loss of Hungarian citizenship does not go into detail about the effect of adoption on citizenship, I consider it important to mention its provisions, which set out some benefits in the case of the naturalization of a foreign adult. This was based on the fact that according to Article 8, in the case of foreign adoptees, it was possible to waive proof that *"they have lived in the country without interruption for five years"*[20], "*have enough assets or a source of income from which, compared to the circumstances of their place of residence, he can support himself and can support his family"*[21] and *"has been entered in the register of taxpayers for five years"*[22], if the adopting Hungarian citizen met the above-mentioned property and tax conditions. If the naturalized man has acquired Hungarian citizenship, it *"extends to his wife and minor children under the father's authority"*[23].

Of course, as stated in the law, the application of this benefit is only one possibility, that is, it does not follow that if these conditions are not met, Hungarian citizenship could be granted to the adopted person. In fact, the Minister of the Interior, the Croatian-Slavonic-Dalmatian Ban and the national authority in the border region decided on the subject of naturalization applications[24], that is, whether they release or require the fulfilment of the conditions.[25] When entering a contract of adoption, foreign law had to be taken into account, and the Hungarian Royal Ministry of Justice did not

[20] Act 50 of 1879, § 8. 3. point
[21] *Ibid.,* § 8. 5. point
[22] *Ibid.,* § 8. 6. point
[23] *Ibid.,* § 7.
[24] *Ibid.,* §§ 10-11.
[25] VIRÁGH, Gyula: Külföldiekből magyarrá lett egyének házasságbontó perei Magyarországon [Divorce lawsuits in Hungary by individuals who have become Hungarians from foreigners]. *Jogtudományi Közlöny [Journal of Jurisprudence],* No. 14, 1915, p. 176.

approve a contract that did not comply with the domestic law of the Hungarian or foreign individual.[26]

5. Regulation of adoption in the light of the bill of the 1928 Hungarian Private Law Code

On March 1st, 1928, the Minister of Justice Pál Pesthy submitted the bill on the Hungarian Private Law Code (HPLC) to the House of Representatives. He emphasized that the proposal should be discussed as soon as possible. The provisions of bill summarized the regulations that had been in place for a longer time and covered the procedure related to adoption in more detail, which had one of the most important effects among family law institutions.[27] Because of the war, many families were torn apart or were unable to provide for their children also urged the final regulation of adoption as soon as possible.[28]

The Hungarian civil code was not enacted in 1928. However, well-known representatives of private jurisprudence have summarized the provisions of private law in their scientific works based partly on written law and partly based on judicial practice. Notable among them is the university professor and lawyer Artúr Meszlény, who in 1931 supplemented the work named Hungarian Private Law of his former professor, Dezső Márkus, based on bill of 1928. He added provisions of written and customary law, as well as the Curiae decisions, to the corresponding sections of the bill. This was also necessary because private law codification was unsuccessful in our country, although indirectly, this method facilitated the adoption and application of the

[26] *Ibid.*

[27] GÁL, Dezső – NYÁRÁDI, László: *Az örökbefogadás, különös tekintettel a gyakorlati eljárásra [Adoption, especially with regard to the practical procedure].* Budapest, 1941, p. 3.; BAGI, István: Az örökbefogadás és az öröklési jog kapcsolata a magyar polgári jogfejlődésben Werbőczytől a XX. század végéig [The relationship between adoption and the right of inheritance in the development of Hungarian civil law from Werbőczy until the end of 20th century]. In: *(L)ex Cathedra et praxis. Ünnepi kötet Lábady Tamás 70. születésnapja alkalmából [(L)ex Cathedra et praxis. Festive volume on the occasion of Tamás Lábady's 70th birthday],* Budapest, 2014, Pázmány Press, p. 27.

[28] GÁL-NYÁRÁDI, *op. cit.*, p. 101.

"uncodified code" into legal life.[29] In the following, I would like to present the regulation of this bill and its practical appearance in more detail.

5.1. The conditions of adoption on the adopter's and adoptee's side

The Bill of 1928 laid out three important conditions that had to be fulfilled in order for someone to be an adoptive parent, i.e. to "adopt as a child": they must be of legal age, have no offspring and be at least sixteen years apart in age between themselves and the adopted person.[30] According to Article 175, the offspring was to be understood as a descending relative, and according to Article 16, an adult was to be understood as a person who had reached the age of twenty-four. The bill refers to "adoption as a child" - not the adoption of a child - that is, it enabled the adoption of not only minor children, but also adults. According to the bill, *"if the adopter has an adopted child, this does not prevent him from adopting another child."*[31] However, in a case deserving of special consideration, the Minister of Justice *"can confirm the contract even if the adopter has offspring by blood, or if the requisite age difference is missing, but the adopted is at least twelve years younger than the adopter"*.[32] However, it is important to emphasize that HPLC's provisions were not always put into practice, as it remained only a draft law throughout, even though it served as a guideline in many cases. Thus, for example, the current legal regulations did not require the adopter to be childless, and he was also entitled to adopt someone else's child even if he had his own legitimate child.[33]

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[29] RÉKASINÉ ADAMKÓ, Adrienn: *Az örökbefogadás a modern magyar családjogban 1861-től napjainkig (PhD-értekezés) [Adoption in modern Hungarian family law from 1861 to the present day (PhD thesis)]*. Pécs, 2021, p. 55.; RÉKASINÉ ADAMKÓ, 2018, *op. cit.*, p. 105.

[30] Private law Bill of 1928, § 207.

[31] *Ibid.*

[32] *Ibid.*

[33] MESZLÉNY, Artúr (ed.): *Magyar magánjog. Törvények, rendeletek, szokásjog, joggyakorlat, magánjogi törvénykönyv szövegével és rendszerében. II. kötet. Jogforrások, személyi és családi jog [Hungarian private law. With the text and system of laws, decrees, customary law, jurisprudence, private law code. II. volume. Legal sources, personal and family law]*. Budapest, 1928, Grill Károly Könyvkiadóvállalata, p. 444.; 20307/1886. I . M. sz.

5.2. Legal effects of adoption

Two important provisions are worth highlighting from HPLC, which were also found in numerous judicial rulings. According to Article 215, *"with adoption, the adopted person becomes the legal child of the adopter"*, and Article 217 stated that *"with adoption, the adopter does not acquire inheritance rights after the adopted person"*. Both provisions are important primarily because of their relevance to inheritance law, as the adopted party had the right of inheritance after the adoptive parents, but this was not possible in the reverse case. If in the adoption contract, the parties still stipulated a right of inheritance in favour of the adopter, this provision was deemed invalid.[34] A child adopted "by observing the legal formalities" had equal rights with the direct heirs of the adoptive parents in the division of the estate.[35] The adopted child was also entitled to challenge the gift that violated his duty part, and of course, this was only possible if the contested gift was established after the date of adoption.[36]

The other important legal effect of adoption is related to the name change, according to which the adopter and, in the case of a joint adoption, the husband could transfer his own family name to the adopted child. The parties could also agree that the family name should be used by the adopted person in connection with his own family name or by omitting it.[37] It is clear from the provisions of HPLC that this was not obligatory, however, in practice, the family name of the adopted person was often changed.[38]

5.3. Dissolution of Adoption

If the interests of the parties so desired, the adoption could be terminated by contract. In this case, the termination agreement also required the confirmation of the Minister

[34] 590. IM. 1890.; MESZLÉNY, *op. cit.*, p. 457.
[35] Lfi. 2065/1889. sz.; MESZLÉNY, *op. cit.*, p. 457.
[36] C. 4082/910. sz.; MESZLÉNY, *op. cit.*, p. 457.
[37] Private law Bill of 1928, § 216.
[38] RÉKASINÉ ADAMKÓ, 2021, *op. cit.,* p. 64.

of Justice. The adopter had to conclude this contract with the adoptee, and if the adoption affected the children of the adoptee, their consent was also required. If the adopter died, the adoption could still be terminated. At that time, the adopter had to conclude the contract with his children. In the case of adoption as a joint child, termination of the contract was only possible with the consent of both spouses while the spouses were alive.[39]

If there was no consensus between the adopter and the adopted regarding the dissolution, i.e. one party backed out, while the other insisted on the contract, then the Minister of Justice refused to confirm and warned the parties via the Orphan's Court to "take the dispute to the normal course of the law". And if the validity of the contract was declared during the judicial process, in this case, the documents had to be submitted again with the confirmation of the government authority.[40]

Either party could initiate judicial termination of the adoption contract, if one of them *"committed an act that could cause the parent to disown the child or the child to disown the parent, or if the adoptee or the adopter deliberately violated the duties associated with the adoption in such a serious way that because of this, maintaining the adoption became unbearable for the other party"*.[41] However, the case[42] where the adopted adult girl left and got married in another village without the consent of the adoptive parents cannot be considered as such a reason.[43]

After the termination of the adoption, the adopted person and his or her children, who were affected by the termination, could no longer bear the family name of the adopter.[44]

[39] Private law Bill of 1928, § 223.
[40] 36946/920. I. M. sz.; MESZLÉNY, *op. cit.*, p. 465.
[41] Private law Bill of 1928, § 224.
[42] P. I. 5875/1903., MD. IV. 51.
[43] MESZLÉNY, *op. cit.*, p. 465.
[44] Private law Bill of 1928, § 226.

6. Summary

The primary inheritance purpose of adoption - i.e. naming an heir - did not change much after 1848, however, due to regulations and established practices, adoptees could increasingly find themselves in a more advantageous situation. The application of the Austrian law represented a step forward compared to the previous regulation, but the subsequent guardianship law also failed to fully regulate this issue. In my opinion, the real progress in this age will be brought by a private law bill that is also incorporated into judicial practice.

Josipa JERABEK: Adoption according to the General Civil Code

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1. Introduction

Nowadays, world and society are really concerned with human, especially with children rights and well-being. In accordance to that, modern concept of the best interests of a child is widely accepted and incorporated in legal institutes.[1] One of them is adoption, a legal institute that exists from the period of Ancient Rome. During the history it had different concepts and aims depending on politics, religious beliefs, socioeconomic customs, mindsets and attitudes in some society. Modern legislative regulations are tending to become more connected with a concept of adoptive family, but it was not always the case. One of examples is General Civil Code, one of the best-known and long-lasting European codifications of civil law that in first part contained provisions on adoption. Articles 179 – 186 determine form of adoption, active and passive legal capacity of contractual parties, legal consequences and dissolution of adoption. Process of adoption was regulated as non-litigation procedure by other legal source called "Izvanparbeni postupnik" (Law on non-litigation procedure of 1854). Compared to the present, purposes of adoption were completely different but in the end adoption has always resulted in creating a fictive relationship between an adopter and an adoptee.

2. Adoption as secure inheritance

The institute of adoption historically originates from the Roman law period but after the fall of a Roman Empire, adoption has almost disappeared from most Western

[1] Convention on the Rights of the Child. https://www.unicef.org/child-rights-convention/convention-text [Access on September 4, 2022].

European legal systems.[2] In its first beginnings, adoption used to put an adopted person under the parental power of the adopter. At that time, main purpose was a creation of a new, artificial bond among people and in that way to prevent a family extinction. Welfare and interests of adopted person were almost irrelevant. In the first Western European civil codes in 19th century that were inspired by Roman law, adoption was still serving only as a way for obtaining an heir for an individual or a family and it was only possible to adopt adult person.[3]

3. Concepts: simple adoption vs. full adoption

As a legal institute, adoption had to follow the various types of changes and movements in society. That process resulted in knowing two main forms of adoption that were historically present: simple (incomplete) adoption and the full (complete, plenary) adoption. Simple adoption creates a relation between adopter and adoptee that differs from the natural parent-child relationship. In contrast, today is widely accepted the concept of full adoption that provides for adopted person the same position as for the biological child.[4] However, all political, demographical, economical changes in society marked concept of adoption and in that way influenced on the legislative regulation in different part of world as well.

4. Introducing adoption in the Austrian General Civil Code

[2] It was mostly because of fear for the heritage and the assumptions that an adopted person could bring "bad blood" in a family. Moreover, immanent was also the fear that adoption would prevent people from having their own heirs in which way there would be less people for the all other society needs. MIGNOT, Jean-François: Child Adoption in Western Europe, 1900-2015. *HAL (open archive)*, 2019, pp. 3–4., https://doi.org/10.1007/978-3-319-99480-2_14

[3] MIGNOT, Jean-Francois – DEPLEDGE, Roger: Adoption in France and Italy: A Comparative History of Law and Practice (Nineteenth to Twenty-First Centuries). *Population (English edition, 2002-)*, Vol. 70, No. 4, 2015, pp. 759–760; HUARD, Leo A.: The Law of Adoption: Ancient and Modern. *Vanderblit Law Review*, Vol. 9, No. 4, 1956, p. 743.

[4] GREBLER, Anne Marie: Adoption in European Counties. *Child Welfare*, Vol. 42, No. 10, 1963, p. 496.

Austrian General civil code is a codification of a civil law that was gradually introduced and was expression of a bourgeois social order and feudal elements. It entered into force in Austria in 1812, but in Croatia, Hungary and Slavonia in 1853. In general, it was classified in three parts. The first one was concerning the law of persons (personal and family law), the second one concerned the right to property (real, hereditary and mandatory law), and the third one included common provisions regarding the rights of persons and rights to property (on establishing, modifying and canceling rights and obligations; statute of limitations and succession). It consisted of many feudal categories such as class, nobility, coat of arms, birthright, but also had strict patriarchal arrangement with paternal and husband authority that were largely emphasized in a field of a family law and in that way adoption as well. Adoption was regulated within articles 179-185 of the first part of the General Civil Code.[5]

4.1. Form and procedure of adoption

According to the General Civil Code, adoption was a contract on the basis of which male or a female person or a couple would take someone else's child as their own. Contract was legally relevant only if was written in a form of a public document. That specifically means it had to have a form of a notarial act or it had to be certified by a court of notary. Nonetheless, it had to be submitted to the government of a province for the confirmation and it had to be submitted to the competent tribunal of the adopters and the adopted child for the entry in judicial acts. Those elements were necessary for constitutive effect and validity of a contract.

Procedure of the entering into an adoptive contract was regulated as non - litigation procedure in articles: 258-262 in a law called: "Izvanparbeni postupnik" (Law

[5] ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu, Od srednjeg vijeka do suvremenog doba* [*Croatian Legal History in European Context, From Middle Ages to Contemporary Period*]. Zagreb, 2021, p. 156.; LACHNER, Višnja: *Institut posvojenja prema Općem građanskom zakoniku na hrvatsko – slavonskom području* [*Institute of adoption according the General Civil Code on the Croatian – Slavonian area*]. *Zbornik Pravnog fakulteta u Zagrebu*, Zagreb, Vol. 63, No. 5-6, 2013, pp. 1171–1172.

on non-litigation procedure) from 9th August 1854. In general, the procedure of adoption was divided in two phases: the first one is marked as a relinquishment of the biological parents while the second one implies a process of adopting by the new parents.[6]

4.2. Contractual parties

As a contract, adoption was a result of expressed unanimous wills of contractual parties with their legal capacities. Art. 179 regulates that parties who were entering into contract were called adopters (stepmother and stepfather) and the adoptee (stepson or stepdaughter). Adopters had to fulfill prerequisites for having an active legal capacity and in that way were capable to become fictive parents of the adoptee and take care for him as for their own biological child. On the other hand, adoptee was adopted person and in that way had to fulfill legal prerequisites for coming under another parental power and care.[7]

4.3. Active and passive legal capacity of parties

Active legal capacity could be carried out by a person or a couple who was adopting. For them, in general, was necessary to have a legal capacity, to be at certain year of age and there had to be 18 years of difference between the age of the adopter and adoptee. First of all, adopter had to have a legal capacity in order to be able to unanimously express own will and enter into any kind of a contract, so into adoptive contract as well. Moreover, adopter had to be more over 50 years old. In a case that couple wanted to adopt, each person had to be over 50 years old. In that way, lawmaker aimed to prevent people to adopt while there was a possibility to have their natural children. However, provisions refereeing to ages were also present in a way that was

[6] LACHNER, *op. cit.*, p. 1178.
[7] General Civil Code for All German Hereditary Provinces of the Austrian Monarchy. First part. Translated by MINIWARTER, Joseph Chevalier de, Vienna, 1865, pp. 42–43.

trying to be in accordance with natural course of life. Namely, Art. 180 stipulates that age difference between adopters and adoptee had to be more than 18 years. Logic of that provision is strongly connected with a Latin sentence "*Adoptio natura imitator*" and is relevant because it was not usual for people to have children before they were 18 years old.[8]

Related provisions are also the ones representing possible obstacles in the adopting process. Person could adopt only if they did not have some of professional or family characteristics. In that way, potential adopter could become the real one only if that was a person without legitimate children of their own and a person that have not solemnly vowed to remain unmarried.[9]

Passive legal capacity was carried out by an adoptee as a person who was subjected to the process of adoption. General Civil Code mostly does not contain any direct provisions about requirements that must or must not exist but these requirements could be easily seen from other provisions. It was possible to adopt a child or an adult person, but the necessity was that the difference between their ages is more than 18 years. Art. 181 regulates the question of a consent of the legitimate father for valid adoption. Adoptee must have a consent of his legitimate father, and it was irrelevant if an adoptee was a minor or an adult. Difference was in a situation when adoptee would not have a father. As people under 18 years did not have legal capacity, they could not enter into a contract alone. In a lack of father's consent, minor had to have a consent of a mother, guardian and a competent tribunal. Mentioned regulation presents obvious example for patriarchal arrangement in which father is head of family and his decision should not be questioned.[10]

There were no provisions that would prevent adopters from adopting more than one person and there were no provisions that were not allowing them to adopt one

[8] DERENČIN, Marian: *Tumač k općemu austrijskomu gradjanskomu zakoniku. Knjiga 1.* [*Commentary on the Austrian General Civil Code. Book 1*]. Naklada Sveučilišne knjižare Albrechta i Fiedlera, Zagreb, 1880, pp. 542–543.
[9] General Civil Code for All German Hereditary Provinces of the Austrian Monarchy, *op. cit.*, p. 42.
[10] DERENČIN, *op. cit.*, pp. 542–543.

person after another. Immanent freedom of adoption was limited in a way that one person could not be adopted by more than one adopter or a couple. Adoptee could also be a person that is or is not married and it was not relevant if adoptee was already in some way related to his adopters.[11]

Particular situation was if biological parent(s) wanted to adopt their unlawful child. On the one side, those were children that were not born or conceived in pretended or valid marriage. On the other side, they could be born in that kind of a marriage but their parents were bond by a holly or a solemn vow to remain unmarried in a time of a conception. In that case, biological parents were not allowed to adopt their child. They had the possibility to legitimize that child and in that way to become legally bonded with him.[12]

4.4. Purposes and effects of adoption

The main purpose of the adoption was to have an offspring who will in that way preserve a family name and obtain a legal heirship. *De facto*, this was a way of extending a family that could be possible even when it comes to a person without own biological children.

Adoption as a part of a General Civil Code had private legal consequences. *Inter partes* effect of the contract, enabled adoption to effect only on the personal life of contractual parties. State was not directly affected by the adoption because it had not influence on citizenship or a national affiliation. Provisions regarding surname were *essentialia negoti* of adoptive contract and secured creation of a new legal relation. In that way, those provisions enabled adoptee that from the moment of the adoption, *ipso iure* has two family names. According to Art. 182 adoptee would retain a prior family name but would also receive a family name of his adopters. If he was adopted

[11] LACHNER, *op. cit*., p. 1175.
[12] RUŠNOV, Adolfo: *Tumač općemu austrijskomu gradjanskomu zakoniku. Knjiga 1.* [*Commentary on the Austrian General Civil Code. Book 1*]. Tisak i naklada knjižare Lav. Hartmana (Kugli i Deutsch), Zagreb, 1893, p. 336.

by a male adopter, adoptee would receive his family name but in a case the person was adopted by a female adopter, adoptee would get her maiden name. Different was with a passing a nobility. In a case that adoptee had nobility, he or she would retain it but the sovereign's consent was a prerequisite for a passage of nobility from the adopter to adoptee.[13]

4.5. New relationship between adopter and adoptee: rights and duties

After perfection of a contract, parties were becoming in different ways connected with their new and previous family. Stepfather got the paternal authority over the adoptee while the biological father automatically lost it. Stepmother was in the same position as the biological mother of the adoptee. She was entitled to raise and take care of life and health of adoptee, enable him to have a decent living and take care of their physical and intellectual powers, etc.[14]

Adoption was an expression of legal fiction that was a substitute for natural relationship. After the moment of adoption, adoptee and his descendants were legally in the same position as they were adopter's biological children. According to the Art. 183 they had the same rights and duties toward their stepfather and/or stepmother and different regulation was permitted only if it would not infringe the rights of a third party. Given possibilities were mostly used in cases connected with a law of inheritance. Moreover, modifications of the provisions connected with a surname were also not allowed. Adoptees would not lose connection with previous family and in that way would preserve the same rights toward them as they have stayed under their parental power and care. They were still entitled to inheritance from their biological parents and could demand a support if they could not get any from adopters.[15]

[13] RUŠNOV, *op. cit.*, p. 340.; LACHNER, *op. cit.*, pp. 1178–1182.
[14] DERENČIN, *op. cit.*, pp. 548–549.
[15] RUŠNOV, *op. cit.*, pp. 340–343.

When it comes to their rights, adoptees were in favorable position toward previous and new family but they were also bound by duties toward both of them. Duties toward biological parents and prescribed support order show that biological relation was important even after the establishment of adoption. According to Art. 154 adoptees had an obligation of providing decent support for their impoverished biological parents. Moreover, in a case when biological parents and adopters would simultaneously be in some need that requires help and support, adoptee was firstly obliged to help his biological family and only after that, he was allowed to give support to his adopters.[16]

4.6. Dissolution of adoption

According to the Art. 185, parties had a possibility to terminate the contract at any time. The only prescribed prerequisite was a consent of an adoptee. If adoptee was an adult, he could give his own consent but there were situations when adoptee was still a minor. In that case, it was necessary to have a consent of his representative or a competent tribunal. However, dissolution indicated the end of a relation which existed between previous adopters and adoptee. After that moment, adoptee would *ipso iure* come under his biological fathers authority.[17]

5. Adoption is not just secure inheritance

In the meanwhile, public concern and awareness of the well-being of a children and adoptees started to rise and their interests started to become wider and stronger. Movements in late 19th century represent a start of protection against child work and abusive families.[18]

[16] DERENČIN, *op. cit.*, pp. 548–561.
[17] *Ibid.*, p. 552.
[18] MIGNOT, *op. cit.*, p. 4.; MIGNOT – DEPLEDGE, *op. cit.*, pp. 743., 760–761.

Furthermore, 20th century brought modern tendencies that aimed to provide a family for deprived children. The main goal was to facilitate adoption as a natural relationship which also supposed to strengthen public control over protection of an interests of a child and it has resulted as todays "adoptive family concept".[19]

6. Conclusion

Institute of adoption historically was a reflection of different segments that were influencing society and legislation. General Civil Code as one of the best known European codification, promoted patriarchal arrangement and concept of simple adoption. It gradually introduced adoption as just a formalistic contract in which adopter(s) and adoptee could enter by a non-litigation procedure. In order to make that contract legally bounding, parties (or their legal representatives) were obliged to fulfill prerequisites prescribed for their legal capacities. Legislation did not have a role in securing the welfare of weaker contractual party, the only concern was that those prescribed requirements were approved. However, through that contract, parties would become part of new, fictional relation that primarily supposed to secure their assets. Adopters could secure their surname and inheritance while adoptees could secure their material life conditions. Finally, it was just one of many legal acts that did not aim to have an impact on emotional, sociological or family aspect as it has today.

[19] GREBLER, *op. cit.*, pp. 495–496.

Mátyás Kolos GYIMÓTHY: Early development and first legal regulation of copyright law in Hungary

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1. Introduction

Copyright, although in modern form and under statutory regulation can only be traced back to 18th century England, it has always been an exciting sector of civil law. In accordance with our modern private law concepts, copyright is "the exclusive right of the author or his successor over an intellectual product falling within the scope of literature or art."[1] It can thus be seen that this modern legal institution has both personality law and property law features, thus combining the characteristics of these two branches of civil law[2]. Today we consider this kind of civil rights protection of intellectual and artistic products to be completely evident, yet it may be shocking that this legal institution appeared in the form of legislative regulation only 300 years ago, in the case of our country less than 200 years ago.

Of course, even before these rules, intellectual, literary and artistic works were entitled to some protection, and the reproduction of these works was limited, but this did not seem to be a satisfactory solution, just think of the Iliad litigation, which began in 1826 and was notorious in literary circles, when prominent figures of Hungarian literature clashed over an unclear case of plagiarism. A similar problem is outlined in Act 16 of 1884, which was the first to successfully codified copyright law in Hungary. The general explanatory memorandum of the Act states that the artistic community has often felt the lack of legal regulation and has repeatedly initiated the creation of

[1] *Magyar Jogi Lexikon VI. [Hungarian Cyclopaedia of Law VI.]*. Budapest, Pallas Irodalmi és Nyomdai Rt., 1907, p. 397.
[2] BALÁS P., Elemér: Szerzői jog [Copyright]. In: SZLADITS, Károly: *Magyar Magánjog I. [Hungarian Civil Law]*. Budapest, Grill Kiadó, 1941, p. 664.

this legislation before the Parliament.[3] It can therefore be seen that the systematization and protection of copyright law at the state level became increasingly urgent, which eventually took place in the second half of the 19th century, preceded by a long trial procedure. However, the question arises, in what process had the Hungarian copyright regulation reached this moment, what direct precedents were the birth of the aforementioned law, and in what regulatory system did the Hungarian legislature implied copyright?

2. General development history

Although modern regulation is only a product of the last 300 years, copyright has its roots all the way back to ancient Rome. Even in the period of *ius civile*, quasi-contractual solutions were known that clarified the possibilities of reproduction of literary works between authors and booksellers, and applied traders' business habits to publishing spheres as well. Nevertheless, in Roman law, sources of law do not mention the right to reproduce writers' works in a single word, nor did there be an action to enforce claims arising from such transactions. It can therefore be stated that at that age, although the legal institution itself existed in a rudimentary form, these transactional agreements were not legally protected[4].

The Middle Ages brought about a big change in copyright protection in this regard. The book-printing revolution started by Johannes Gutenberg brought a new level of reproducibility to literary works, and also gave way to the development of press products, which implied the changes and incentives that led to the widespread dissemination of written works and encouraged the writing and artistic communities to disseminate their writings and ideas to a wider audience.[5]

[3] Preamble of Act 16 of 1884 about copyright.
[4] MEZEI, Péter: A szerzői jog története a törvényi szabályozásig [The history of copyright until its legislation (Act 16 of 1884)]. *Jogelméleti Szemle [Jurisprudential Muster]*, No. 3, 2004.
[5] *Ibid.*

In addition to this material stimulus, one should not forget about the theoretical and ideological side. By the 15th century, the early medieval period, dominated mainly by religious works (in which most of the written works were seen as divine inspiration, which meant that there was no real close protective relationship between the work and its author), had been replaced by the Renaissance, a human-centred spirit, more humanist, individualist ideology, which gave a greater role to the work of the creator, and thus the need for some form of legal reward for this work and some form of encouragement for the arts[6].

On the third side, it was the social change itself that reformed the attitude towards printing products. Firstly, by making printing more cost-effective, more and more people could afford to buy books, so interest in this sector has boosted economically. In addition, of course, literary and reading have become more and more prominent in noble and civic environment, so people have developed a sense of need for the consumption of press products and the possession of books.[7]

As a result of these factors, it can be observed that with the growing demand and the business part of literary and scientific publishing, the need for some kind of regulation or protection appeared on both the creative appreciation and the property side of the activity. However, because of the double image, this regulation could not be developed along the general private law regulations and commercial patterns so that it was necessary to bring to life a completely new way to create a legal form to solve this phenomenon.[8]

The first such legal solution appeared in the system of granting certain privileges. These privileges, patents granted legal advantages either to the author or to the publisher, but in the early days only to the publisher.[9] These special privileges were therefore granted to certain persons in order to ensure that a certain work has a

[6] *Ibid.*
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

monopoly on printing and publishing. The granted privilege was laid down in a charter of privileges, which specified the works covered by the patent, the content of the legal relationship between the author and the publisher, and the temporal nature of the patent.[10] Two types of these privileges can be separated in this era. The first type generally granted the author party the exclusive right to print books, an activity from which it therefore intended to prohibit everyone else. Another form of privilege letter differs from the former in that it granted the privileged printing and publishing rights only in relation to specific works, but in this case, everyone else could not continue to publish this work.[11]

This causal and highly personalised method could only be substantially reformed by a new breakthrough after the Enlightenment, which led to the introduction of legislation in the field of copyright. In Western Europe, the first general state-wide regulation was introduced in England in the statute under the reign of Anna Stuart, but this process began to appear on the continent only towards the end of the century.[12] As a common element of these statutory regulations, it can be noted that they have already turned to the authors from the publisher, their claim and protection of rights became the main criterion, and thus all infringements (unauthorised reprinting) were punished by sanctions.[13]

The third stage in this history of development involved international contracts, since the publication of foreign works in other countries has also grown increasingly. These treaties and conventions have been implemented by the Contracting Countries into their own internal legal systems in such a way as to satisfy the conditions contained in the contract as much as possible[14]. Here, therefore, we can see that these contracts had to be incorporated directly into their own legal system by legislation or decree issuance.

[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*

Considering the stages of development, we can therefore see that more and more general rules have become characteristic of copyright from causal, individual treatment[15]. In addition to domestic legislation, there is also the international dimension, which generally takes the form of contracts and, more generally, general clauses incorporated into the domestic legal systems of the contracting States. It should be noted, however, that this procedure was not the only one that was known in the continental system, since in some states the equality of rights of foreign authors in the field of copyright was inherently guaranteed by law (e.g. Saxony). A common feature of the trends in content regulation is that, following the exclusive protection of literary works, scientific and artistic developments have led to the copyright protection of performances and then of works of visual art.[16]

3. History of Hungarian copyright

There is little data available on the first period of copyright law in Hungary, but there are some sources that prove that the Hungarian legal system also knew about the privilege-based protection of publishers, but not much of these documents have survived[17]. One of the most significant and certainly legally relevant letters of pure privilege in the field of publishing law dates from 1584, granting the college of Nagyszombat the exclusive right to publish and print the Corpus Iuris Hungarici, and penalising the reprinting of this work by a third party with a compensation of ten gold marks[18]. Based on this patent, we can therefore see that although the legal institution in Hungary was known, its sanctioning did not have a perfect framework, and, together with many other legal institutions, the era was strongly characterised by causality[19].

[15] *Ibid.*
[16] *Ibid.*
[17] TOLDY (SCHEDEL), Ferencz: Az írói tulajdonról [About the copyright of authors]. *Budapesti Szemle [Budapest Muster]*, 1840, p. 192.
[18] *Ibid.*, p. 192.
[19] MEZEI, *op. cit.*

The first country-wide copyright law is also linked to a decision of the Locotenential Council in a specific case, as Ádám Takács, Calvinist pastor of Göny, drew the attention of the Locotenential Council to the fact that the first volume had been published by the Landerer printing house, along with the Paczkó printing house, which had published his funeral orations, and thus the Paczkó printing house had stopped the second edition, in order to avoid incurring losses from the publication[20]. It was thanks to this case that the Locotenential Council created Royal Decree 12157 of 1793, which transformed the provisions of an Austrian Decree of 1775 into the Hungarian legal order. This decree punished reprinting in Hungary with severe penalties, confiscation and compensation, but did not extend these provisions to books already published abroad or reprinted by others in Hungary, so anyone could publish them without any further consequences. In addition, the royal decree included the transfer of copyright rights to successors in the event of death, and already provided for the statute of limitations on copyright, which meant that after a certain period works became "public property" and could be published by anyone, but the detailed regulations were not yet in place[21]. This provision was supplemented by Royal Decree1812 of 1794, which prohibited the reprinting of Hungarian works in Austria and the reprinting of Austrian works in Hungary[22]. The scope of the protected works was expanded with copper and woodcuts in addition by Court Decree 4232 of 1831, except for fashion images and drawings[23].

However, the real breakthrough in Hungarian legislation was brought by the second half of the 19th century, when the Hungarian artistic achievements reached their peak. It was at this age that press products with a wide range of topics began to become widespread for the first time. Literary life boomed with the birth of great works such as Bánk bán, Toldi, Csongor and Tünde, as well as the poems of Petőfi, Arany and

[20] KELEMEN, Mór: Adatok az írói tulajdonjog hazai történelméhez [Data to the domestic history of copyright]. In: *Budapesti Szemle [Budapest Muster]*, 1869, Vol. 14., p. 311.
[21] MEZEI, *op. cit.*
[22] KNORR, Alajos: *A szerzői jog magyarázata [Explanation of copyright]*. Budapest, 1890, Ifj. Nagel Otto.
[23] MEZEI, *op. cit.*

Vörösmarty. Hungarian acting began to develop as well, the first Hungarian theatre company was formed, and increasingly impressive works were born in the field of fine arts, not to mention the musical world. However, there has been an increasing frequency of violations due to the insufficiently developed structure of copyright law, which have also reached legislation in the form of complaints[24]. One prominent example of this is that N. G. published more than half of the works of Dániel Berzsenyi, without the permission of the heirs.[25] It can therefore be seen that due to Hungarian conditions, the need for a comprehensive law has developed in society, which both the Hungarian and Austrian legislatures felt this as their task.

One of the great initiators of this movement was the Kisfaludy Society of literary interest, which handed a bill drafted by convention to Bertalan Szemere for proofreading in 1844. During the revision, Szemere created the final bill based mainly on the Prussian copyright law of 1837 and the Hungarian criminal law concept of 1843, which eventually got stuck in the legislative procedure, as Ferdinand V criticised the gaps and lack of normative clarity of the law in his letter, so he sent it back to the Parliament for a new discussion. However, the renegotiation never took place because of the dissolution of the Parliament. The real reason for the royal letter was that there was already a copyright patent to be issued for the entire empire at the Austrian court.[26] The patent was published in 1846, and at the same time it was proposed for its inclusion in the Hungarian legal system, through the revision of the Szemere bill, but eventually this initiative was hampered by the ever-upcoming political events, and thus in Hungary it continued to be The Royal Decree of 1794 remaining prevalent.[27]

During revolutionary atmosphere, the April laws did not bring much change in this matter, even though freedom to spread thought was declared, and Articles 18 and

[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*

30 abolished censorships for theatres and printers,[28] yet copyright as with so many other specific regulations, the legislature has been deferred to subsequent Parliamentary Assemblies[29].

Of course, after the defeat of the War of Independence, the Austrian court carried out its coveted legal harmonisation when, by imperial decree of 1853, it enacted the 1846 patent in our country, alongside the Civil Code of Austria, which was in force until 1861[30]. This condition was changed by the National Magistrates' Conference convened in 1861 for the purpose of legal settlement, which did not wish to inherit the Austrian copyright system, so it was decided in principle that intellectual goods were the subjects of property as any physical object.[31] The significance of this decision was the transfer of copyright disputes previously covered by criminal law to the jurisdiction of civil courts, but the practical reality has not yet been established here, so the courts had a huge margin of manoeuvre in the judgment of such cases. This also explains the fact that the authors did not really put their disputes on the judicial path, thus creating another barrier to a more uniform application of the law.[32]

The next stop was the bill compiled by the Kisfaludy Society of 1867, which, in the absence of the criminal law concept, did not come before the legislation and did not come closer to the vote after the revision by the Hungarian Society of Fine Arts[33]. The next attempt was launched by the Society of Hungarian Writers and Artists, led by Gyula Kováts in 1874, but this initiative went into the background because the trade law was under construction. The irony of fate is that in Part II of Act 37 of 1875, a separate title was devoted to publishing and copyright relations. This legislation defined the concept of a publishing transaction, the content, formation and

[28] GOSZTONYI, Gergely: Censorship and law in Hungary in the past. *Romanian Journal of Legal History*, 2021, No. 1., pp. 37–46.
[29] KNORR, *op. cit.*
[30] MEZEI, *op. cit.*
[31] *Ibid.*
[32] Kelemen, *op. cit.*, p. 315.
[33] MEZEI, *op. cit.*

termination of the contract, the rights and obligations of the two parties, as well as provision for respect and liability, as well as the creation of a separate copyright law.[34]

The series of codification experiments (providing a framework for this initiative) ended with the assistance of the Kisfaludy Society. In this case, the Society also involved the Hungarian Academy of Sciences in the process of drafting the law, and the wording was entrusted to László Arany. The bill was submitted to the House of Representatives on 20th November 1882 before the Minister of Justice Tivadar Pauler. The bill was accepted with unified satisfaction by the National Assembly, and the final text of the proposal was certified by the House of Representatives on 12th March 1884, and the Upper House adopted it unchanged on 28th March. The emperor finally promulgated the first Hungarian copyright law on 7th May 1884, Act 16 of 1884, which is the first independent and uniform copyright law in the legal history of Hungary.[35]

4. Regulation and justification of the law[36]

Act 16 of 1884 ultimately prepared detailed regulations not only for Hungary, but as stated in Section 9 of Act 30 of 1868, the regulation of copyright is considered a common matter with Croatia and Slavonia, so these rules, except for photographic works, were also incorporated into the Croatian legal system at the same time[37]. In the justification of the law we can read that the purpose of legislation was not to define theoretical issues, such as what could be considered a work of art, what is the actual content of copyright, but in addition, the legislator also tried to avoid caustics and thus introduce a general regulatory system.

The law itself is divided into seven chapters, the first of which is about writers' works, in which separate titles include the exclusivity of copyright, the content of this right, the forms of punishment in the event of infringement, the basic procedural

[34] *Ibid.*
[35] *Ibid.*
[36] Act 16 of 1884 about copyright – Preamble of Act 16 of 1884 about copyright.
[37] MEZEI, *op. cit.*

provisions, the details of which are laid down by decree, the statute of limitation and enactment provisions. The Act then states that the provisions relating to works of writers shall apply, with minor differences, hereinafter referred to musical works, musical and theatrical performances, works of fine art, certain scientific or technical drawings and diagrams, as well as photographic works.

The provisions of the law itself have many similarities with the copyright measures we know today, of course, not yet so mature. In the exclusivity of copyright, the law protects, of course, works derived from individual productions, for which the author is the number one entitled, both for publication and reproduction, but he may have transferred this right to others in a certain form (contract or in the event of death). Furthermore, the Act deals specifically with works created by several authors, for which it distinguishes between separable and non-separable co-authors, and defines the powers of enforcement and disposition on this basis. In addition, in some cases, the law provided the editor himself with the possibility of legal protection (Article 2). It should also be noted that the law specifically states that the State does not have a right to control copyright, so that right is terminated in the absence of any perpetual or traditional nature, and the work becomes public domain, which can then be considered freely available. Then, the law defines the cases of infringement of intellectual works, including the reproduction of unlawful translation and legitimate translation (Article 5-8), but it also defines cases in which the exclusive rights of the author cannot be enforced, such as the quotation of a minor work or the inclusion of another work in a larger but independent work, as well as publications from certain press products. The protection of rights, as the current legislation on copyright is determined in two time periods, during the author's lifetime, as a personal right, he was entitled to legal protection until the end of his life, and after his death his successors were entitled to this right for 50 years, and in the case of translations the legislator set the limitation period at 5 years, but the only stipulation was that the author's name must appear at least once in a place in the work, failing which no legal remedy could be sought.

In the area of penalties, the legislation also imposed three sanctions in the event of infringement. First, it imposed an obligation to compensate the infringer towards the author or his successor, and in addition, he was punishable by a maximum fine of 1000 Crowns. If this was not possible, then avoiding the possibility of going unpunished, a jail penalty could be imposed, the specific content of which was not specified by the law, only that a daily jail penalty can be imposed per 10 Crowns. The only possibility of exemption was if the defendant proved that the infringement was neither intentional nor negligent. The third sanction was the confiscation of the means of reproducing the pirated work. A similar penalty could be imposed on a third party to the infringement, and a more lenient penalty could be imposed if a person failed to include the author's name during the reproduction or indicated it against his will.

From the penalty, it can therefore be seen that civil sanctions prevailed more in the case of copyright law, so there was no question that, as in the previous legislation, the judicial jurisdiction of civil courts was the legislature. In addition, it was stipulated that only the claimant had the right to initiate the proceedings, so, as with other personal rights, only the claimant himself could bring the action, the limitation period of which was set for three years (Articles 36-37). In addition, the legislature established expert bodies in both Budapest and Zagreb that could provide expert opinions to the courts on disputes. The detailed procedural rules, as I have already mentioned, were derived from the law to regulation.

Among other branches of art, musical works are classified under similar protection by law as literary works, full copying was completely prohibited here, while minor citations and receipts were allowed here as well. However, a freer space was provided for the performances of musical works, because, in the opinion of the legislator, musical works are intended directly for performance purposes, so the consent of the author is not necessary for these performances. In the case of theatrical works, however, a piece could only be performed if the author himself gave his consent to the performance. In the case of works of fine art, the purpose of legislation was to protect independent artistic works, so illegal reproduction and copying were punished

by law, but a small number of copies were allowed. In addition, it was stipulated that in the case of sculptures and reliefs, it is only possible to make copies of the work freely in other branches of art. In the case of photography, a regulation similar to that of fine art has been adopted, except that when it comes to an image of another work of art, the photographer is protected only for a certain period of time in relation to this piece of his work. In addition, it was recorded that only the customer has the right to reproduce the picture in the case of portrait photographs.

5. Epilogue

We have seen how the development of copyright in general and in our country has evolved until the first comprehensive legislative regulation, and how this law provided for copyright law. After its creation, Hungary also had the opportunity to channel the masterpieces of foreign art into domestic public life by concluding bilateral agreements with other countries, the first example of which was the contract concluded with Austria in 1887[38]. Although the law was not without its gaps, and in some respects left something to be desired, and new legislation was inevitable because of the continuous development, for almost 40 years this law was the governing law in copyright disputes, and it was only in 1921 that new legislation was needed on this issue.

[38] *Ibid.*

Máté Zsolt BAKOS: The history of the Hungarian stock market

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1. The foundation of the Hungarian stock exchange

In the second half of the 17th century, bills of exchange were already common in the western countries of Europe, yet in Hungary, this method of payment was nonexistent. In Austria, the first stock exchange opened in 1771, but it did not have any impact on the Hungarian economic environment, irrespectively of the common monarch and the common monetary system. The lack of capital in Hungary further delayed the establishment of the Hungarian stock exchange, a situation that could only be ameliorated by the introduction of bills of exchange and the formation of joint-stock companies.[1] As early as 1830, Count István Széchenyi proposed the introduction of securities in his work entitled Hitel (Credit). 'The Hungarian landowner is poorer than he ought to be in relation to his property', Széchenyi argues in the first sentence of the relevant chapter.[2] Act 15 of 1840 defines the concept of a bill of exchange in this way: *„A bill of exchange is a document by which the issuer binds himself under conditions more strict than those of public law, either to pay himself some specified sum of money at a certain place and time, or to have it paid by another."*[3]

The reform era brought radical changes for Hungary and, in addition to social and cultural achievements, the industry and the economy also received a new impetus. This impetus brought with it the successive establishment of joint-stock companies, the later pillars of the Hungarian stock exchange, such as the railways, the milling industry and financial institutions. Thus, the Pozsony (Bratislava)-Nagyszombat Railway

[1] KORÁNYI G., Tamás – SZELES, Nóra: *Tőzsde születik [A stock exchange is born]*. Budapest, 2005, Budapesti Értéktőzsde, pp. 8–9.
[2] SZÉCHENYI, István: *Hitel [Credit]*. https://mek.oszk.hu/06100/06132/html/hitel0005.html [Access on Nov 11, 2022].
[3] Act 15 of 1840 – The introduction of the Law of Bills of Exchange.

LLC was founded in 1837, the Pesti Hengermalom (Pest Milling) LLC in 1839 and the Pesti Magyar Kereskedelmi Bank Rt. (Hungarian Commercial Bank of Pest LLC) in 1841.[4]

The agricultural nature of Hungary raised important questions during the reforms, and it became increasingly urgent to bring the centralised trade in grain within a framework and ensure the conditions that would make this possible. In the 1840s, the centre of the grain trade in Pest was a café. The importance of the café and the nature of its visitors is reflected in the name of the place, then known as the Exchange and Commerce Atrium Café (Börze és Kereskedői Pitvar Kávéház).[5] The revolution and the War of Independence of 1848-49 put an end to regular meetings. The renaissance of the grain trade was brought about by the state-initiated Pest Lloyd Association, which established the grain hall in the Lloyd Palace the following year. This association can be considered the forerunner of the commodity exchange.[6]

It was in the above mentioned grain hall that the country's grain merchants met, but the deals were not yet made in writing and the transactions occurred between themselves. The wholesalers felt the need to form a closer organisation and these enterprising individuals became the 'founding fathers' of what was to become the stock exchange. The events of the time, such as the Crimean War, the Russian Serf Liberation of 1861, the Second Italian War of Independence, the Second Schleswig War and the Austro-Prussian war, led to a surge in demand for grain, and the Hungarian grain merchants were in their heyday, with the new grain exchange in Pest becoming one of the most important associations and price-setting players in Europe at the time.[7]

In Austria, stock exchanges were established and operated as state-controlled bodies. The Viennese government wanted to introduce the same model in Hungary, where an imperial patent of 1860 provided for grain exchanges operating under state rules in the big cities of the empire. The Pest Chamber of Commerce and Industry was

[4] KORÁNYI G. – SZELES, *op. cit.,* p. 9.
[5] MaNDA – Hungarian National Digital Archive, https://mandadb.hu/tetel/444920/Lloyd_Kavehaz_Budapest_1830as_evek [Access on Nov 11, 2022].
[6] KORÁNYI G. – SZELES, *op. cit.,* p. 10.
[7] *Ibid.*

also called upon to set up a stock exchange in the city, but this plan was not implemented. In 1863, the Pest Lloyd Society received a similar call, and in response, the Society submitted a draft that went beyond the original expectations, including the idea of a stock exchange in addition to the grain exchange. The preparatory committee for the stock exchange was headed by Frigyes Kochmeister, who later became the first chairman of the stock exchange. The imperial approval arrived quickly and the Pest Stock Exchange was established. Initially, the Grain Exchange and the Securities Exchange were separate organisations, but they were located at the same site and members of both exchanges could visit each other without further ado. So, after some tensions between the two exchanges had been overcome, the two institutions merged in 1873 to form the Pest Commodity and Securities Exchange.[8]

It is only possible for the stock exchange to fulfil its complex role because of its high degree of autonomy. In the period, two forms of stock exchange autonomy were known: in England and America, stock exchanges were set up by private bodies, while in continental Europe the state gave permission for the establishment of them. In terms of autonomy, the Hungarian stock exchange was closer to the English and American models than the other stock exchanges of the continent. The Budapest Stock Exchange (BSE) was a free association, with a high degree of freedom in its management, and its statutes were approved by the government.[9] A council was elected by the members to govern the institution. Initially, any man of impeccable character could be a stockbroker. In 1897, the admission to membership was tightened. The restrictions meant only those whose profession warranted it and who were recommended by three other members who had officially belonged to the stock exchange for at least three years could become members. The names of those so recommended and the details of their application were displayed for a week on a notice board in the Exchange's building, so that any members who opposed their admission could make a statement.

[8] *Ibid.,* pp. 10–13.
[9] HORVÁTH, Attila: A tőzsdebíróság intézményének megszervezése Magyarországon [The organisation of the stock exchange court in Hungary]. *Jogtörténeti Szemle [Legal History Review]*, 1992, No. 2.

The decision on the admission of members was then taken by the Exchange Council. However, even after admission, the proposers remained morally responsible for the actions of those proposed by them.[10]

2. The heyday of the stock market

In 1864, the first year of the stock exchange, 9 bills, 11 foreign currencies, 17 shares and 1 pledge were listed. The shares included securities of financial institutions, mills, insurance companies, the Chain Bridge, the Lloyd Building and the Balaton Steamship Company, among others. The list included almost all joint stock companies in Hungary at the time.[11]

Towards the end of the 19th century, there was a resurgence of investment, fuelled by the general investment drive of the time and the elevated public mood of the millennium. The worldwide demand for gold mine shares is illustrated by the fact that the Budapest list was published in Vienna, Frankfurt, London and Paris. Hungarian gold mining shares were sold worldwide, and of course gold mining companies were also formed in Hungary. There were even serious plans to set up an Anglo-South African-Hungarian bank. However, in the autumn of 1895, share prices began to fall. On 5 November, a wave of mass bankruptcies broke out on the Vienna stock exchange, affecting the Hungarian market. Although the Hungarian stock exchange was not so badly influenced, contemporaries were appalled by the 'collapse' of the Pesti Hungarian Commercial Bank, which actually was not a collapse at all, with the bank's share price falling from HUF 1348 to HUF 1260 in a week.[12]

The story of the broker Jakab Tauber is worth mentioning. On his boss's orders, he rushed to the post office in the Buda castle every evening, because the telegrams

[10] BARNA, Attila – HORVÁTH, Attila – MÁTHÉ, Gábor – TÓTH, Zoltán József: *Magyar Állam-és Jogtörténet [History of Hungarian state and law]*. Budapest, 2014, Nemzeti Közszolgálati Egyetem Közigazgatás-tudományi Kar, p. 502.
[11] KORÁNYI G. – SZELES, *op. cit.,* p. 13.
[12] *Ibid.,* p. 15.

arrived there a few minutes earlier than at the post office in Pest. Tauber would read the closing papers of the Vienna stock exchanges and then, from the promenade above the tunnel, he would signal Pest with a coloured flag or sheet, or, in poor visibility, with coloured lanterns. His colleague watched the events with binoculars in front of the then stock exchange building on what is now Eötvös Square, and then dashed in to make a deal on the basis of the information he had received. As there were only a few high-turnover shares on the market at the time, the simplicity of the communication method was not a problem. Anyway, the BSE building was equipped with telegraphs and later with telephone lines.[13]

The Hungarian stock exchange was at the height of its power and influence during the millennium. In 1891 the decision was made to build a new stock exchange palace. It happened between 1902 and 1905 on the site of the barrack-like building from the time of Joseph II, in an eclectic Art Nouveau transitional style, designed by Ignác Alpár, the architect behind many iconic buildings of Budapest. The new palace constructed at a cost of 4.5 million crowns, was Europe's largest stock exchange building, measuring 2,640 square meters. Its grandiose dimensions were a result of the rivalry between Vienna and Budapest, which was typical of the period. The traders of the stock exchange built this majestic palace at their own expense in order to make Budapest a trading centre of European importance and scale.[14]

Around the turn of the century, 310 securities were traded on the stock exchange, and before World War I, some 500. Grain trading was also steadily increasing, with one and a half million tonnes of grain traded on the exchange before World War I, making BSE the leading grain exchange in Europe. The number of members was also steadily increasing, from 332 at the beginning to 1,809 in 1913.[15]

[13] *Ibid.*
[14] *Ibid.,* pp. 46–49.; BÁN, Dávid: *Úgy maradt… A tévészékházként ismert Tőzsdepalota története [It stayed that way… The story of the Exchange Palace, known as the TV Headquarters]*. 16 Aug 2020, https://epiteszforum.hu/ugy-maradt--a-teveszekhazkent-ismert-tozsdepalota-tortenete [Access on Nov 11, 2022].
[15] KORÁNYI G. – SZELES, *op. cit.,* p. 17.

The stock exchange was welcomed by the public. Volume 13 of the Hungarian Universal Encyclopaedia puts it this way: *„[...] Both commodity and stock exchanges promote industry and commerce, although they also provide opportunities for harmful gambles and speculations like games of chance. Commodity exchanges exist in many places in our empire, especially in Budapest and Temesvár. [...]"*[16]

Needless to say, there were strict rules on stock exchange trading from the very beginning. This is how a stockbroker of the time, Pál Tárai recalled the daily life of the stock exchange: *„I had my own capital, admittedly a small amount, at that time I could have had 30,000-40,000 crowns... At that time, I was already going to the stock exchange as a dispatcher and stockbroker, and I was adored by old gentlemen for information, because they saw that I was a competent man. They tried to approach me with various offers, which I refused to accept. I was never willing to do a dishonest deal..."*[17] The following activities were strictly forbidden:

1. the cunning manipulation of exchange rates, the conclusion of fictitious transactions;

2. the charging of prices which did not exist and could not be justified at the time of the execution of the order and at the expense of the party placing the order;

3. the use of business conditions contrary to the integrity of the trader;

4. engaging in speculation in a manner unbefitting an honest trader;

5. entering into speculative stock exchange transactions with persons who are not independent and in a vulnerable economic situation.[18]

[16] *Egyetemes Magyar Encyclopaedia 13. Só-Zwingli [Universal Hungarian Encyclopaedia 13. Salt - Zwingli]*. Budapest, 1876, p. 16.
[17] KÖVÉR, György: *Biográfia és társadalomtörténet [Biography and Social History]*. Budapest, 2014, Osiris, p. 329.
[18] BARNA – HORVÁTH – MÁTHÉ – TÓTH, *op. cit.,* pp. 502–503.

Those who broke the rules could expect a reprimand from the Exchange Council and a ban from the exchange. The Stock Exchange operated as an institution with a high degree of autonomy, over which the Hungarian government's control and supervision consisted only of the fact that the Exchange's statutes and customs had to be submitted for approval, and the deliberations of the freely elected Exchange Council were held under the supervision of a government commissioner delegated by the Ministry of Commerce. The Hungarian stock exchange was different from the other overseas exchanges of continental Europe, being closer to the English and American institutions. The decisions of the court composed of the members of the Exchange Council were also taken in the presence of the Government Commissioner but the Government Commissioner was only present as an observer and had no influence on the outcome of the case. The autonomy of the exchange was significantly increased and the security of transactions was enhanced by the existence of the Exchange Court. This court settled cases before it orally, informally and very quickly. Its members were professional traders who had not only expertise but also the trust of other members of the exchange.[19]

3. The stock market between the two World Wars

The day before the outbreak of World War I, the Austrian government ordered the closure of the Vienna Stock Exchange, a move the Hungarian government had to follow. The closure of the stock exchange was supposed to last only three days, but it was extended until the end of the war. This was the case in all the belligerent countries except the United States. The BSE had set up a war hospital in the stock exchange hall, but non-military brokers continued to trade in the commodities hall, and trading was semi-officially acknowledged by the government.

In March 1916, 'controlled private trading' was allowed, but this only covered cash transactions. Future transactions in securities were described as harmful and

[19] *Ibid*.

speculative, so, on these grounds, strictly prohibited. The turnover of government securities was further restricted, with only 12 trusted agents allowed to trade with them. By the end of the war, inflation, which was already at a massive rate, caused share prices to rise at a similar rate. The upsurge in turnover is illustrated by the fact that in 1918, 7.2 million shares were already changing hands in semi-official form.

During the Hungarian Soviet Republic, the stock exchange was closed and the exchange palace was confiscated. The invasion of the Romanian troops in August 1919 led to considerable losses for the companies listed on the stock exchange as well as for the assets of the BSE. Yet, the institution reopened at the end of October. The losses caused by the Peace Dictate of Trianon resulted in staggering inflation, which paradoxically pushed stock market turnover to unprecedented heights. With the depreciation of the korona, the middle class turned to equities and companies started issuing shares to satisfy the needs of "amateur investors". The companies already listed on the stock exchange increased their share capital every three months, and in 1922 hundreds of new companies applied for listing.

The end of the inflation was marked by the loan from the League of Nations of 250 million gold crowns taken out in 1924. In 1925, the new currency, the Pengő, was introduced. These measures led to the devaluation of many major companies. Price falls also shook investor confidence, and stock market turnover fell sharply.[20] The 1929 New York stock market crash was not felt as badly by the Hungarian stock market, which was in a period of stagnation, with only export-oriented companies seeing their share prices fall, and the Pengő initially strengthened against several currencies. Hungary was hit by the crisis only in its second year, resulting in bank failures and, again, the closure of the stock exchange. Following the closure of the German stock exchange the previous day and bank failures across Europe, the Hungarian government allowed banks to reopen only after suspending repayment of foreign currency loans. However, the stock exchange remained closed. The official reopening came only in

[20] KORÁNYI G. – SZELES, *op. cit.,* p. 20.

April 1932, first with the authorisation of trading in bonds and then in the 18 most traded shares. Of course, there was also unofficial trading during the closure. Shares were badly affected by the closure, losing roughly 13% of their previous value after the reopening, but by the end of 1932 they had lost more than 30% of their value. The resurgence only resumed with the recovery from the crisis and peaked in 1936, when the Hungarian government ordered nostrification to artificially separate the domestic and foreign bond markets. Nostrification meant the registration of bonds and shares also in circulation abroad. Nostrification made it impossible to attract cheap supply from abroad, causing the value of the securities listed to increase by about a third in a matter of weeks.[21]

In the years leading up to World War II, rates rose steadily on commodity exchanges, but fluctuated on stock exchanges. In 1937 a worldwide downturn in the stock market occurred, and the Budapest Stock Exchange, which had been thought to be shielded from foreign influences, was also affected. Again, there was a 30% fall followed by a rapid recovery, but a 1 billion pengő property tax announced in the Darányi government's Győr programme was imposed on joint stock companies, and the same fall occurred. The Jewish Laws affected many stock market members, first their incomes and later their lives were threatened. In 1944, hundreds of the members of the stock exchange were deported.

Hungary's entry into the war on the German side brought an unprecedented rise in the stock market, with heavy industry and military stocks in particular rising by hundreds of percent, amid double-digit inflation. In 1944, the government interfered harshly with the stock exchange's autonomy, tightening its statutes and restricting transactions to certified brokers acting on behalf of trustees who were in contact with the public. It was up to the Stock Exchange Council, which had been completely

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

restructured by the Jewish laws, to appoint the authentic brokers and commission agents.[22]

Prime Ministerial Decree No 700/1942, which transformed the stock exchange, doubled the tax on securities transactions, prohibited private trading in shares and capped the daily price movement at 5 % and later at 1 %. However, the stock exchange remained open until December 1944 when the siege of Budapest began, though, after the German invasion, rates began to fall.[23]

4. The stock market after the war[24]

The Exchange Palace only suffered minor damage during the siege, and reopening was envisaged immediately after the siege. In April 1945, the remaining 700 members of the Exchange elected a new Exchange Council, including candidates from the Communist Party. The Commodity Exchange resumed operations, but the Allied Control Commission refused to allow the opening of the Stock Exchange. At the time, there was a high level of activity, partly in the damaged Exchange Palace and partly in the surrounding cafés. Gold was the best-selling commodity as it was the only currency that could hold value. The forint has restored the national currency's role as a measure of value, a medium of exchange and a safeguard of national wealth. Both the public and politicians had high hopes for its long-term, durable value. Unfortunately, the country's economic situation, tight investment plans and the need to meet international payment obligations dashed these hopes, and the currency started to depreciate almost as soon as it was introduced.[25] The official reopening of the stock exchange took place on 1 August 1946, after the partial restoration of the Exchange Palace, timed to coincide with the introduction of the new currency, the Forint. No

[22] *Ibid*., p. 24.
[23] *Ibid.*
[24] *Ibid.,* p. 25.
[25] BOTOS, János: *Banki értékpapírok Magyarországon [Bank securities in Hungary]*. Budapest, 2008, Szaktudás Kiadó Ház, p. 142.

payments were made on the bonds denominated in crowns and pengős, and because of the war losses, no dividends were paid by the joint-stock companies, so the prices fell steadily.

In fact, it came as no surprise to anyone that after the nationalisation of a large part of Hungarian industry, the stock exchange was also in the political spotlight. On 25 May 1948, the government officially dissolved the "stronghold of capitalist exploitation", its building on Liberty Square and all its assets became state property. The privately owned securities had to be handed over to the Hungarian National Bank and the Financial Institutions Centre under a decree that was soon to be issued, but not everyone complied. The old securities appeared on the shelves of antiquarian bookshops more than two decades later, during the Kádár era, when their possession was no longer politically sensitive. The government made payments to foreign bondholders but did not deal with the bonds that remained at home.[26]

5. Bonds and the Stock exchange during Socialism

In 1949 the so-called Plan Loan Bonds were issued, followed by the Peace Loan Bond in 1950. These securities, which were not freely tradable, were lottery bonds to be drawn over a 10-year period, and only compulsory subscription saved them from total failure. In 1968, after several years of preparation involving hundreds of economists, the first phase of the New Economic Mechanism came into force. The relaxation of centralised distribution gave hope to economic operators and boosted agriculture by allowing self-management and backyard farming. The importance of a strong currency is recognised, which will strengthen export-oriented economic policies. In addition, partial market management is introduced, which in reality leads to market substitution. The second phase of the reform is planned around banking and currency reform, and

[26] KORÁNYI G. – SZELES, *op. cit.*, p. 25.

accession to the IMF was also envisaged. However, the Soviet leadership vehemently opposed the move and it was eventually scrapped with the first phase.

In 1972, under pressure from the Soviet Union, an anti-reform policy emerged, the economic policy stagnated. The US government had just suspended the convertibility of gold into dollars, the Bretton Woods currency system collapsed and the price of oil exploded. The regime was artificially holding back foreign trade losses from rising commodity prices in order to maintain living standards. The losses were financed by foreign loans from the Hungarian National Bank, which lasted until May 1981 – this way new loans have to be taken out to repay the old ones.

In 1982, the debt trap and the lack of new foreign loans forced the Hungarian National Bank (HNB) to join the International Monetary Fund (IMF), a move that had earlier triggered Moscow's opposition to the New Economic Mechanism. The IMF opened up the possibility of new loans, but this was conditional on a restructuring of the economic structure. In the Eastern bloc, joint ventures were to appear for the first time, first with Hungarian majority ownership and then with increasing foreign ownership. In the same year, the first form of small business, the economic working community, was authorised in order to increase tax revenues.[27]

In order to create a domestic market for securities, the Economic Policy Committee of the Hungarian Socialist Workers' Party decided on 21 October 1982 to introduce the possibility of issuing bonds in Hungary. The Political Committee was informed of the decision on 9 November and it supported the implementation of the proposal. Under the decision, a government bond would be issued to finance the internal deficit of the state budget, which would function as a security and could be purchased by the public. In addition to government bonds, this type of security could be placed on the market by councils at various levels to achieve Community objectives,

[27] *Ibid*., pp. 54–55.

by financial institutions to raise funds and by entrepreneurs to finance their development.[28]

Legislative Decree No 28 of 1982 authorised the issue of bonds „*in order to make more efficient use of and supplement the revenue available in the national economy",* in fact in order to maintain internal financial equilibrium. It was implemented by Council of Ministers Decree No. 65/1982. The issue of corporate and government bonds, the forerunner of the new-age securities market, was initiated. Before the regulation came into force, some banking instruments known as bonds had already existed, issued by the monopoly retail bank OTP (National Savings Bank) under the name of Communal Bond. However, the project was not a success, with only HUF 32 million of the HUF 62 million issued being subscribed by the public.

The background to the authorisation of the bond market was the country's crumbling financial situation. Socialism had become unsustainable due to the economic crises of the 1970s, the state could no longer cover the economy from the redistribution of national production, and so it allowed prosperous companies to invest in bonds issued by companies with insufficient resources, thus keeping them afloat. In practice, therefore, state enterprises lent to state enterprises, with state guarantees, because a state enterprise could not go bankrupt. The funds raised in the bond issue could only be used for the purposes specified in the issuance plan of the company.[29]

The first bonds that could be purchased by the public appeared in 1984, and the main requirement for bond issuance until the 1990 Securities Act was one year of operation in addition to the preparation of an issuance plan, with all retail bonds being fully guaranteed by the state. The first bond issuers experimented with non-cash prizes or services rather than just cash interest payments for individuals. The Centrum department store used to raffle off a car every year to those who subscribed to its

[28] BOTOS, *op. cit*., p. 157.
[29] KORÁNYI G. – SZELES: *op. cit*. p. 53.

bonds, and the Hungarian Post Office issued bonds promising telephone connections, a considerable luxury at the time.

The first real bond that anyone could buy, with interest only in cash, was the Pest County Industrial Goods Trading Company's bond, issued in March 1984. This bond was issued by the State Development Bank (Állami Fejlesztési Bank), which set up a separate bond office. The bond office soon became very popular with companies, and demand for bonds continued to grow. Initially, bankers issued new bonds on the basis of pre-war bonds on the stock exchange, prospectuses from antiquarian bookshops and archives, and the Act 37 of 1875 on Trade. Until 1988, a licence from the Ministry of Finance was required to issue bonds to the public. The predecessors of the municipalities, the then town and community councils, also issued bonds. It gradually became clear to all market participants that bonds could be traded. The prospectus for the bond issue stated that it was transferable, so the bonds had to be priced. Investors and bankers alike often priced the bonds, and those who could calculate well were encouraged to invest heavily.[30]

By 1986, the variety of bonds and their terms had increased. The Borsod Chemical Kombinat made the interest rate dependent on its own operating result, but this bond was not a great success because the company set a too narrow interest rate range. After 1988, new forms were tried, such as the convertible bond. The National Mechanization Enterprise issued such convertible bonds before it was even a joint stock company. The conversion was carried out but the company soon went bankrupt.

With the establishment of the two-tier banking system in January 1987, the market was also reorganised, with the HNB's bond portfolio being inherited by several banks. Secondary turnover on the bond market increased from HUF 2 billion in 1986 to HUF 10 billion, oversupply replaced excess demand and competition could have started, but the inflation that then emerged caused bonds to fail. For the first time in

[30] *Ibid*., p. 56

40 years, the deterioration of currency was acknowledged, the population began to panic, wanting to turn their bonds into cash to buy durable consumer goods.[31]

6. The birth of the modern stock exchange

The sense of insecurity of the Hungarian population at the end of the eighties, the existential threat and at the same time the realised possibility of getting rich quickly through non-work, produced a mass of speculators and forced investors. Rather than trying to realise the part of their wealth and income that did not threaten their security, they risked everything because they believed that this was the only way out of their tight situation.[32]

In 1987 János Kádár resigned, and the bankrupt economy called for radical reforms.[33] Privatisation was still to come, but the private sector was on the increase, with more than 20 thousand economic working communities operating in the country by that time. A reform of the tax system was also underway, with the introduction of VAT in Act 5 of 1987 and personal income tax in Act 6 of 1987. The only way to remedy the economic asymmetry and the rapid deterioration of the currency was to develop the market in a coordinated way and to create an institution to facilitate the enforcement of market mechanisms.[34] On 25 July 1987, in the HVG weekly journal, almost all the banks and insurers made a joint statement in favour of coordinated development of the bond market. This coordinated effort soon bore fruit: the Securities Trading Agreement (STA) was signed by 22 banks, insurers, the Ministry of Finance and the Chamber of Commerce. The content of the STA reflected the institutional model envisaged, inspired by foreign experiences and literature. Two weeks after the

[31] *Ibid*., pp. 58–59.
[32] HUNYADI, György – SZÉKELY, Mózes (szerk.): Gazdaságpszichológia [Economic psychology]. Budapest, 2003, Osiris, p. 438.
[33] GOSZTONYI, Gergely: A parlamentarizmus helyreállítása [Restoring parliamentarianism]. In: MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian constitutional history]*. Budapest, 2020, Osiris Kiadó, pp. 507–511.
[34] KORÁNYI G. – SZELES, *op. cit*., p. 64.

signature of the STA, the Securities Trading Secretariat was established, with Ilona Hardy as its first chairwoman. The team she led organised the first Stock Exchange Day on 19 January 1988. The event, originally planned for once a month, but due to the massive curiosity of the masses, held three times a week, gave bankers and future brokers the chance to meet each other, but it was also attended by students and covered by television. The word 'stock exchange' was becoming a buzzword.[35]

The market was organised as a team effort. the Secretariat tried to get as many entrepreneurs together as possible. They started to publish the bond price index in the economic journal Ötlet (Idea), which was the arithmetic average of the net price of 16 bonds. At that time, however, there were still regulations in force prohibiting private individuals from buying shares in public limited companies.

Major reforms were already being planned in the ministries. The Company Act (Act 6 of 1988) and the Transformation Act (Act 13 of 1989), which allowed socialist enterprises to be transformed into companies, were passed. At that time there were already 170 joint stock companies in the country. In addition to these two laws, the creation of the stock exchange was facilitated by the Securities Act, which entered into force on 1 March 1990.

Hungary was the first of the former Eastern Bloc countries to establish a stock exchange, six months after the fall of the Berlin Wall. The news of the opening of the stock exchange was an international sensation. IBUSZ shares accounted for most of the 60 million forints traded on the first day, although of course they were not the only shares traded.[36]

[35] *Ibid*.
[36] *Ibid*., pp. 67–71.

Kíra VARGA: The Introduction of Civil Marriage with Act 31 of 1894, with special reference to the impediments to marriage

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1. Introduction

The institution of marriage has long been present in people's lives. Today, marriage is regulated by the Civil Code. It provides that a marriage is contracted when a man and a woman, present together, declare in person before a registrar that they are getting married.[1] It is understood that legally no ecclesiastical confirmation is required for the marriage to be valid. This was not always the case, however, since before the advent of civil marriage, the Church had full regulatory power in this area.

2. Marriage law before the Austrian-Hungarian Compromise of 1867

2.1. The beginnings

In the early days of the Hungarian nation, there was a complete community of women among the members of the tribes. This meant that all the men belonging to the tribe had access to all the women belonging to the tribe from adolescence. Consequently, men became indifferent towards women belonging to their tribe and therefore lusting after strangers. This led to the custom of abduction, which developed because the custom of the time was that a foreign woman could only be taken from her tribe by force. As the custom of abducting women developed, so did the idea of private property, since the man who took a foreign woman was as much his own as the prey he had taken, and the woman he had taken at the risk of his life was not to be given to those who had not helped him to take her. It was the development of this custom that

[1] Act V of 2013 on the Civil Code, 4:5.§

undoubtedly led to the abolition of the female community, and in it, we can trace the origin of the institution of marriage, its first system.[2]

In time, this violent method of acquisition was superseded by the need for cohesion between the tribes and replaced by the abduction of women for marriage. This involved the man buying the woman from the holder of the patrilineal power. This was the beginning of the Christian marriage (matrimonial).

2.2 Christian marriage

From the time of the monastic period until the Reformation, Roman Catholicism was the dominant religion in all European states. When St. Stephen introduced Christianity in Hungary, religion greatly influenced the creation and development of the Hungarian state. The Hungarians were not closed off from Western civilization, the main feature of which was the rule of the Church. Throughout Western Europe, the legal order was based on ecclesiastical law, which derived its authority from the divine will. It was natural that in Hungary, too, ecclesiastical law should become state law and, with the adoption of Christianity, a living law. As a result, the institution of marriage, the most intimate union of man and woman based on the divine ordinance, was also regulated by the Church.[3]

Later, however, the Reformation shook the long-established Roman Catholic Church. The newly emerging Protestant tendencies attracted people in droves and the Catholic religion, which had once dominated the whole of Europe, declined. In Hungary, in 1523, the Diet of Buda declared Lutherans heretics and punished them with death and confiscation of their property. Then, the Diet of Cracow in 1525 takes an

[2] ROSZNER, Ervin: *Régi magyar házassági jog [Old Hungarian Marriage Law].* Budapest, 1887, Franklin Társulat, pp. 2–3.
[3] TÓTH, Gáspár: *A magyar házassági jog rendszeres kézikönyve [Systematic Handbook of Hungarian Matrimonial Law]*. Budapest, 1896, Eggenberger, p. 1.

even more severe measure and gives freedom to burn Lutherans, both clerical and secular.[4]

The restoration of order in the church was expected from the universal synod. The then reigning Pope, Paul III, opened the synod on 1 November 1542, but it was immediately dissolved and did not resume until two years later. The synod lasted for 18 years, with some interruptions and others, but it did not live up to expectations. The Catholic Church distanced itself from the newly-formed denominations and refused to grant any favors. The Synod tightened up the existing rules on marriage: if marriage was contracted without any ecclesiastical procedure, it would be considered invalid. It also confirmed the indissolubility of marriage and established a procedure for marriage, the so-called form Tridentine. It reaffirmed the doctrine that marriage is established by the mutual consent of the two parties, and made it obligatory to proclaim the prospective marriage three times before the marriage was solemnized, and anyone who had any knowledge of an obstacle or prohibition between the spouses had to report it.[5]

After Mohács, the situation of Royal Hungary and Transylvania should be mentioned separately. In the territory of Royal Hungary, the organization and canon law of the Catholic Church remained unchanged. In addition, new religious congregations appeared one after the other, but their legislation was delayed. Later, the synods of Zsolna in 1610 and of Szepesváralja in 1614, the Evangelicals and the Reformed in 1626, and the synod of Komjáti, outlined their ecclesiastical organization and the establishment of canonical law. Protestant marriage matters were left under the jurisdiction of the Catholic cathedrals and were governed by this law. A change was brought about by Joseph II's patents, in which he declared that marriage was a civil contract that needed to be regulated by the state. For example, the delegates the

[4] RÁCZ, Lajos: A polgári házasság intézményének megvalósulása Magyarországon [The Implementation of the Institution of Civil Marriage in Hungary]. *Jogtörténeti Értekezések [Papers on Legal History]* Vol. 4., 1972, p. 7.

[5] *Ibid.*, pp. 8–9.

adjudication of matrimonial matters to the state courts. The state law and jurisdiction he introduced did not prove to be long-lived, as, after his death, Leo II suspended his measures. In the Diet of 1790-92, he restored sectarian rights. In the articles of a law passed, the Protestants were recognized as having jurisdiction over their ecclesiastical sees. Mixed marriages were governed by Catholic canon law. Although there was a view at the time that it was important to maintain a uniform state marriage law, this could not be enforced in the absence of support.[6]

In Transylvania, the renewal of the faith took place with less discord. The Diets of Torda in 1557 and 1558, and of Sighisoara in 1564, had declared the free exercise of religion. A change was brought about by the patents of Joseph II, which also came into force there, and was then revoked and the original situation restored.

In 1848, after the declaration of the Union between Hungary and Transylvania, Act 20 of 1848 declared equality between the denominations. After the suppression of the War of Independence, the Habsburg neo-absolutism introduced the Austrian Civil Code in Hungary. In Hungary, it excluded Roman Catholic, united Greek, and non-united Greek worshippers from its scope, and in Transylvania, it also reserved the Protestant churches. Article 43 of 1868, on the reunification of Transylvania with Hungary, emphasizes that the laws which applied to the religious denominations legally established in Transylvania and Partium remained in force.[7]

3. The creation of Act 31 of 1894 on Marriage Law

3.1. Background to the submission of the bill

Immediately after the Reconciliation, the reform of marriage law was discussed in Parliament. The views in the House of Representatives and the House of Lords were that there were two options for reform: a) each denomination should be given

[6] *Ibid.*, pp. 11–15.
[7] *Ibid.*, pp. 19–20.

jurisdiction over its church, b) or abolish all ecclesiastical jurisdiction and allow the state courts to rule on matrimonial matters.

The Parliamentary Committee on Legal Affairs recommended the latter, as the introduction of the former would be "*an unjustifiable step backward in our times*". The central committee of the House of Representatives, however, said that while it was justified to raise the issue, it would be inappropriate to do so immediately. Instead, the government should be instructed to bring forward a bill on the issue of ecclesiastical courts as soon as possible. The Parliament finally adopted this position.

Pending a final resolution of the issue, two important laws were passed. The first was Act 48 of 1868. This provided for mixed marriages to be subject to double jurisdiction and for each party to be bound by the judgment of its competent court. The other important law was Article 53 of 1868, which was later regarded as the basis of the Protestant Equality Act. This stated that the proclamation of the clergyman of one of the parties was sufficient for mixed marriages to be contracted and that children born of mixed marriages followed the religion of the parents according to their sex.[8]

On 25 February 1873, Daniel Irányi submitted a draft resolution, which was unanimously adopted two days later. The proposal essentially reiterated the resolution of the 1868 Diet, which had called for the government to submit a proposal on the free exercise of religion and the equality of denominations as soon as possible. In 1880, Irányi also made a motion to the House of Representatives to instruct the Minister of Justice by resolution to submit the indicated proposal. This was adopted by the House of Representatives. On 22 March 1881, the Minister of Justice, Tivadar Pauler, submitted a bill entitled 'Civil Marriage between Christians and Israelites and outside the country. The House of Representatives did not like the proposal and expected many more changes. However, governments were characterized by their vigilance over the

[8] *Ibid.*, p. 22.

institutions inherited from the feudal era in a capitalizing Hungary, which still had many feudal features.[9]

3.2. Discussion of the bill

After he was appointed Prime Minister, Sándor Wekerle announced church policy reforms, including a program of compulsory civil marriage, to overcome the baptismal controversy. Preparatory work on marriage law, initiated by the Ministry of Justice in 1890, was still explicitly based on the maintenance of sectarian marriage rights. However, when the government saw that there was no other way out of the situation, it amended its original draft with the help of Béni Grosschmid, Lajos Králik, and László Sipőcz, and the final version of the bill now provides for compulsory civil marriage. In August 1893 the proposal was finalized and submitted to Franz Joseph, who gave his approval for the proposal to be discussed in Parliament.[10]

In the Chamber of Deputies, the discussion of the proposal was delayed until April 1894, and a vote was held on 12 April, with 271 deputies voting in favour and 106 against, so that it was adopted as the basis for detailed discussion, and on 17 April the final stage of the proposal was adopted and only the House of Lords was left to discuss it.[11]

The Estates-General was the most conservative grouping in Hungary at the time. The general discussion of the bill began on 7 May. The vote was 118 in favour and 139 against, so the bill failed in the House of Lords for the time being. This failure led to a government crisis, with Wekerle resigning on behalf of his government. Franz Joseph then came to Hungary to resolve the situation and entrusted the Croatian ban Kiaroslav Khuen-Héderváry with the formation of the government, but the governing party refused to back Wekerle and was forced to give Wekerle the job again. On 12 June, his

[9] *Ibid.*, pp. 24–26.
[10] GROSSCHMID, Béni: *Házassági jog I. [Marriage Law I.]*. Budapest, 1908, Politzer, pp. 310–312.
[11] *Ibid.*, p. 60.

new government had already made its debut at the General Council. At the meeting on 21 June, the proposal was finally adopted, but one amendment was made during the detailed negotiations: the law left the religious obligations on marriage untouched. The amendment was agreed upon by the House of Representatives and ratification took place on 9 December 1894.[12]

4. Act 31 of 1894 on Marriage Law

The Marriage Act made a radical break with the previous denominational legal systems, regulating marriage entirely from a civil law perspective. It is important to note that the legislation does not confer any special legal effect on the engagement, but only provides for a right of compensation against the party who wrongfully withdraws, up to the amount of the costs incurred.

From then on, a valid marriage could only be contracted before a civil official. Such an official was, for example, the registrar, the chief magistrate, the mayor of a town with a regular council, or the first clerk of the legislature.

Under the article of the law, marriages that had been fundamentally broken could be dissolved, but only on the grounds for dissolution provided for by law and only by a court judgment. The different grounds for dissolution were always based on the fault of one of the parties and distinguished between two types of grounds for dissolution: conditional and unconditional. In the case of one of the unconditional grounds for dissolution, the judge is always obliged to order the dissolution of the marriage. An example of such an unconditional ground for annulment was:

1. adultery, fornication, a double marriage
2. desertion (only if there is a good reason for it)
3. serious abuse
4. criminal conviction

[12] *Ibid.*, pp. 66–69.

If one of the conditional grounds for dissolution applies, the judge may dissolve the marriage after examining the life circumstances of the spouses and after finding that the marriage bond is not durable. Such conditional grounds for dissolution include:

1. if one of the spouses is in serious breach of his or her marital obligations
2. if he/she has led an immoral life
3. if he or she persuades or tries to persuade a child of the family to commit a crime or lead an immoral life
4. if one of the parties is sentenced to imprisonment for a term of fewer than 5 years after the marriage.

One of the most important innovations of the article was the permission to divorce. However, the generalization of the institution of separation was important. Separation from bed and board provided for the separation of Catholic believers without a final divorce and without compromising Catholic beliefs.[13]

5. Impediments to marriage under the Act on Marriage

Marriage impediments were dealt with separately in the Act, after the provisions on betrothal. This provision was based on the first draft of the German Imperial Code.[14] In the introductory explanatory memorandum to the government bill, it was stated that, in laying down the impediments to marriage, the bill sought to reconcile the requirements of individual liberty with the essence and moral purity of marriage and its solidity as an institution on which the state was founded. The enforcement of the principle of individual liberty leads to the fullest possible recognition of the capacity to marry, whereas the essence of marriage, its moral character, and important state interests require its restriction. Striking the right balance between these two opposing aspects is the main task of good law. These considerations have necessitated the

[13] *Ibid.*, pp. 77–81.
[14] GROSSCHMID, Béni: *Házassági jog II. [Marriage Law II.].* Budapest, 1909, Politzer, p. 50.

removal of those impediments to marriage in existing law which were based solely on the credo of individual religious denominations. These included, for example, spiritual kinship, based on baptism and confirmation. In addition, it was necessary to modify several marriage impediments and create entirely new ones. The proposal distinguished between two types of marriage impediments: diriment and prohibitive. Diriment impediments are based on facts that are contrary to the very essence or moral nature of marriage. Such an impediment not only precludes the marriage from taking place but also makes its existence impermissible. Prohibitive impediments are set up to protect certain interests which are important in making the marriage impermissible. The difference between the two types of impediments is also apparent from the wording of the paragraphs. The proposal makes a distinction between diriment impediments by using the term 'shall not' and prohibitive impediments by using the word 'forbidden'. The majority of the prohibitive and prohibitive impediments were those which could not be dispensed with because they were incompatible with the nature and morality of marriage. The proposal conferred the right of exemption on the King in the case of impediments of greater moral importance and on the Minister of Justice in the case of impediments of lesser importance.[15]

Marriage could not be contracted in cases of incapacity: this included persons under 12 years of age, the mentally ill or deprived of the use of their reason, persons under guardianship for reasons of insanity, deaf-mutes unable to understand signs or whose minority had been extended for this reason. Women were generally not allowed to marry before the age of 16, men not before the age of 18, although the Minister of Justice could grant an exemption. However, the consent of the parents, legal guardian, or guardianship authority was required for the marriage of minors. A special rule applied to persons under guardianship proceedings on the grounds of incapacity, who were not allowed to marry-until the end of the proceedings.[16] Marriage required the mutual consent of the parties, which, by its very nature, could only be based on the

[15] GROSSCHMID, *op. cit*., pp. 64–67.
[16] RÁCZ, *op. cit.*, p. 78.

self-determination of the couple. In cases in which self-determination is precluded by lack of capacity to consent, marriage cannot take place. This is the reason why persons who are incapacitated, as persons whose will and expression of will are not valid, cannot marry.[17]

The law also made provision for impediments arising from lack of free consent, such as coercion, but here only the fear of serious threats can be taken into account. The Curia clarified this in a decision. Several witnesses questioned during the trial testified that the plaintiff's mother had stated that the plaintiff had to get married or she would disown him. Another witness testified that the parents had said before that the plaintiff did not want to marry, but that they had already promised their daughter to the defendant and encouraged her to marry, and that her father had said that if she did not do so, there would be no more room on his land. The Curia held, however, that these statements by the parents, given the applicant's circumstances and the fact that the applicant was 22 years old at the time of the marriage and therefore of age to exercise her will, could not be regarded as a threat of such a magnitude that the fear which they created would have placed the applicant in a situation of duress.[18]

Such impediments included mistakes and misrepresenting the other spouse's essential personal qualities. The latter gave rise to a right of action. The practice also included the bar of misrepresentation, i.e. the impossibility of divorce. This impediment gave rise to the following case: the plaintiff based her action on the fact that her husband, the defendant, with whom she had married on 4 January 1893, was incapable of performing the conjugal obligations at the time of the marriage; that after almost four years of cohabitation she had not divorced him. She did not know of her husband's sexual impotence at the time of the marriage and could not have inferred it from the circumstances, and she is seeking annulment of the marriage based on Article 54(c) of

[17] MÁRKUS, Dezső: *A házassági jog és az anyakönyvi törvény kézikönyve [Handbook of Marriage Law and Civil Registration Law]*. Budapest, 1895, Grill Károly Cs. és Kir. Kiadó, p. 8.
[18] MÁRKUS, Dezső: *Felsőbíróságaink elvi határozatai [Decisions in Principle of our High Courts]*. Budapest, 1900, Grill Károly Cs. és Kir. Kiadó, p. 102.

Act 31 of 1894. The medical examiner's examination confirmed that the marriage had not been dissolved and found that the defendant was impotent. The plaintiff claimed that until she returned to her parents and they informed her of the illness, she was unaware of it. However, the Curia held that a marriage may be attacked for fault under section 54(c) of Act 31 of 1894 if one of the spouses was permanently unable to perform the marriage debt at the time of the marriage and the other spouse did not know this nor could have inferred it from the circumstances. For this reason, the marriage is to be contested under § 57(c) within one year from the date on which the spouse became aware of the error. Considering that the parties to the action, according to the enclosed certificate of marriage, were married on 4 January 1893 and, according to the plaintiff's admission, separated in October 1896 and thus lived together for almost four years, the plaintiff's claim that the defendant only became aware of his infertility in October 1896 cannot be taken into account. In these circumstances, given that the plaintiff did not bring the action until 13 February 1897, the marital bond between the parties could not be declared invalid.[19] In addition, the impediments arising from the relationship of kinship were also important:

- consanguinity, which prevented marriage between blood relatives in the direct line, between a brother and his brother's blood descendant, and between cousins. According to judicial practice, the last impediment exists only between first cousins.[20]
- civil affinity, or adoption, which was a prohibition rule that applied only to the duration of the adoption.

The guardianship relationship was also a marriage impediment, with marriage between the guardian and his descendant and the ward being prohibited during the

[19] MÁRKUS, 1900, *op. cit.*, p. 104.
[20] MÁRKUS, Dezső: *Magyar magánjog mai érvényében. Törvények, rendeletek, szokásjog, joggyakorlat. I. kötet [Hungarian Private Law in its current version. Laws, decrees, customary law, jurisprudence. I.]*. Budapest, 1906, Grill Károly, p. 123.

guardianship. A valid marital relationship also existed as an impediment until the previous marriage was dissolved or annulled.

Two offenses were listed as impediments: adultery and adultery. The marital impediment was the clerical order and monastic vows. The waiting period remained a prohibition against marriage. It was forbidden for a woman to marry before 10 months had elapsed, in the event of the termination or dissolution of her previous marriage. Any widow wishing to marry within the waiting period was obliged to wait until the waiting period had expired, regardless of her age.

6. Conclusion

Civil marriage has come a long way. For many years, the Church had so dominated people's lives that it became difficult to break away from it. In Article 31 of the Marriage Act of 1894, it is still evident that, although the rules of the Church's marriage were broken, it was not possible to break away from them completely. Such an influence can be seen, for example, in the institutionalization of separation from bed and table, where the rules were adapted to the Catholic faith. The law was a major step forward in codifying a legal system that was largely customary law. As Károly Szladits put it in 1940: "*The whole of our private law today is still a customary law, interspersed with very few laws. Family law is the part of our family law which can be said to be the most codified.*"[21]

[21] RÁCZ, *op. cit.*, p. 83.

Marija VUKOŠIĆ: Marriage Law in the Kingdom of Yugoslavia

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1. Introduction

After the World War I, several new states were created in Europe with the Kingdom Yugoslavia being one of them. It emerged in 1918 as a rather heterogeneous state.[1] It officially recognised three nationalities (Slovenians, Serbs and Croats), but many others lived on this territory and a significant number of religions were legally recognised. This created numerous problems in practice, legal particularism being one of them, threatening the strength of this state. The pledge of the durability of the new state was reflected in the construction of a unique legal system which "*would become the link of a new unified nation and bridge mutual differences*".[2] It meant dismantling its constituent historical units and thus creating conditions for a unitary and centralised state. But, the practice showed that it wasn't an easy task at all. Certain legal areas, such as marriage law, were the embodiment of chaos existing in this multinational and multi-religious state.

Marriage rights posed legal, religious, cultural, political and national problems. This area of law was characterised by the concurrent validity of both religious and civil marriage, with the religious type of marriage ceremony prevailing. Such a legal order, in which not only lawyers were involved, but also religious communities, could have been interpreted as a fertile ground for the onset of "inter-religious war".[3] The existing

[1] The State of Slovenes, Croats and Serbs which was created in 1918 later unified with the Kingdom of Serbia and Montenegro and formed the Kingdom of Serbs, Croats and Slovenes. In 1929 that state was renamed the Kingdom of Yugoslavia.

[2] ČEPULO, Dalibor: *Od srednjeg vijeka do suvremenog doba* [*Croatian Legal History in European Context, From Middle Ages to Contemporary Period*]. Sveučilište u Zagrebu, Pravni fakultet, Zagreb, 2021, p. 283.

[3] MILIĆ, Ivo: Za opšte obvezni građanski brak [For the Mandatory Civil Marriage]. *Letopis Matice Srpske*, Novi Sad, Vol. 309, No. 1–2., 1926, p. 7.

non-uniformity of marriage law became the most important and essential discussion in the standardisation process where doubts about the introduction on civil marriage as either in obligatory or optional form emerged. The work on this issue continued throughout the entire inter-war period.

2. Legal particularism in the Kingdom of Yugoslavia

The term "legal particularism" refers to the co-existence of several legal areas in the Kingdom of Yugoslavia. These areas used different legal and judicial systems and sources of law since they were parts of different states before the unification. There was a plan to establish a court of cassation as the highest court which would standardise the judicial practice throughout Yugoslavia, but until the realisation of the idea, the former supreme courts of the territories were considered sections of the single court of cassation. They also maintained their status of supreme courts within each legal area. Consequently, there was a highly decentralised organisation of regular courts, in whose area of jurisdiction different substantive and procedural law was applied. Regulations which were in force in 1918 still remained valid in the Kingdom of Yugoslavia and their implementation was envisaged until the adoption of unified Yugoslav Statutes.[4] Therefore, the term "legal federalism" is also appropriate to describe the legal system which existed in this state.[5] Even after the foundation of the mentioned court of cassation, the standardisation process did not achieve the wanted results.

We are speaking about six associated legal areas which were kind of relics of previous legal systems: The Serbian, the Montenegrin, the Bosnian-Herzegovinian, the so-called former Hungarian area, the Dalmatian-Slovenian and the Croatian-Slavonian legal area. In addition to everything mentioned above, the existence of these

[4] KREŠIĆ, Mirela: Much Ado About Nothing: Debates on the Type of Marriage in Yugoslavia between the Two World Wars. In: LÖHNIG, Martin (ed.): *Kulturkampf um die Ehe. Reform des europäischen Eherechts nach dem Großen Krieg*, Mohr Siebeck Tübingen, 2021, p. 190.
[5] ČEPULO, *op. cit.*, p. 287.

mentioned legal areas also implied the differences in the regulation of the Church-State relationship which created additional confusion in this field. Considering the rootedness of differences and the complexity of problems in the area of marriage law, it does not surprise that the process of standardisation was long and in certain areas not even completed, at least not within the scope and in the way intended.

3. An overview of marriage law in the Kingdom of Yugoslavia

As a result of the co-existence of different legal areas, the concurrent validity of two types of marriage law and the recognition of many religions, there were multiple different sources of marriage law. A solution that was adopted was that the constitutionally recognised religious communities were granted the status of legal entities that were tied to the state and through the transfer of jurisdiction they were tasked with executing some state affairs (marriage and jurisprudence in marital affairs, too).[6] But, as we will see, this did not lead to the wanted results.

3.1. The Serbian Legal Area

This legal area comprised the area of the pre-war Kingdom of Serbia which had its Court of Cassation in Belgrade with appellate courts in Belgrade and Skopje. Here, only religious marriage was valid. The most numerous population was Orthodox so it is no wonder that the application of the rules of the Orthodox Church was explicitly prescribed. Also, bodies of the Orthodox Church had jurisdiction to conduct marriages involving Orthodox believers.

When it comes to other Christian (non-Orthodox) populations, there was a law from 1861which regulated marriage related questions in accordance with their religious rules.[7] Speaking about the Roman Catholic Church, the application of its rules

[6] KREŠIĆ, *op. cit.*, p. 190.
[7] Act on Court jurisdiction in Marriage Cases between non-Orthodox Persons dated 8 December 1861.

was confirmed by concluding the Concordat in 1914. Laws of Jews and Muslims were not specifically mentioned as the relevant marriage-regulators, but by analogy they applied as well. In theory, all non-Orthodox believers were subject to civil courts. But, reality was quite various since the practice of courts of every religious community was recognised: Jews had their courts, Sharia courts had jurisdiction over Muslims, and the courts of the Roman Catholic Church had jurisdiction over Catholics who were subject to the marital rules from *Codex juris canonici*.

In 1921, all Orthodox Churches in Yugoslavia were unified into a single Serbian Orthodox Church (SOC) which brought certain novelties considering the Orthodox population throught Yugoslavia and with regard to the regulation of marriage law. Novelties were primarily introduced by the Constitution of the SOC from 1931[8] and its Marriage rules from 1933.[9]

3.2. The Montenegrin Legal Area

This area comprised the area of the pre-war Kingdom of Montenegro and had the Grand Court and the Appellate Court in Podgorica. The situation considering marriage law in this legal area was the same as in the previous case: it was not possible to have a civil marriage and rules applied on a concrete case depended on the religious affiliation of citizens. The Orthodox Church enjoyed the status of state religion, and in addition to it, recognized religious communities included the Roman Catholic Church and the Islamic religious community.[10]

[8] The Constitution of the Serbian Orthodox Church, SN KJ dated 24 November 1931, no. 275–LXXXVI.
[9] Marriage Rules of the Serbian Orthodox Church. In: *Official organ of the Serbian Orthodox Patriarchate*, dated 7 September 1933, no. 34-35; KREŠIĆ, *op. cit.*, pp. 191–192.
[10] KREŠIĆ, *op. cit.*, p. 192.

3.3. The Bosnian-Herzegovinian Legal Area

This legal area comprised the today's territory of Bosnia and Herzegovina and it had the Supreme Court and the Appellate Court in Sarajevo. Marriage law was as well connected to the religious affiliation of the citizens and the only type of marriage permitted was religious, but the whole system was even more complex than in the previous cases. Five religious organisations were recognised on this territory, each having an impact on the topic: Orthodox, Roman and Greek Catholic, Evangelical of the Augsburg and Helvetic Confession, Jewish and Islamic. The last one mentioned enjoyed the status of state religion.

Marriage disputes were under the jurisdiction of religious courts, whereas civil courts, including Sharia courts (who ruled according to Sharia law), had jurisdiction over property rights disputes between the spouses.[11]

3.4. The so-called Former Hungarian Legal Area

This legal area comprised the (Slovenian) Prekmurje region, the (Croatian) Međimurje region, Baranya, Bačka and western Banat. Section B of the Belgrade Court of Cassation in Novi Sad and the Appellate Court in Novi Sad had jurisdiction on this territory. The term "Hungarian" indicates that this area used to be in the Hungarian part of the Austro-Hungarian Monarchy which became part of Yugoslavia according to the provisions of the Trianon Peace Treaty (1920). The background story about the history of this legal area had its impact on the regulation of marriage law.[12] The relevant and the main source of law was the Hungarian Act on Matrimonial Law (Act 31 of 1894). Unlike the previous cases, civil marriage was valid here, regardless of the religious

[11] According to Art. 1 of Civil Procedure Act for Bosnia and Herzegovina Sanctioned by the Supreme Decision dated 14 April 1883. KREŠIĆ, *op.cit.*, pp.192–195.

[12] GOSZTONYI, Gergely: A polgári szabadságjogok [Civil liberties]. In: MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian constitutional history].* Budapest, 2020, Osiris Kiadó, p. 285.

affiliation of its inhabitants. Consequently, marriage ceremony was officiated by a clerk in the presence of two witnesses and civil courts had jurisdiction.

Although the Act continued to be valid through the existence of first Yugoslav state, its application became highly questionable with time: this was a Hungarian act, and the population considered ignoring Hungarian acts equal to removing the Hungarian supremacy so the efforts that aimed at eliminating, not only this one, but other Hungarian acts as well, were constantly present. Also, Church circles (Catholic and Orthodox) became extremely powerful and they championed the abolishment of mandatory civil marriage.[13]

In the Prekmurje region, the application of the valid Hungarian regulation was obstructed by Slovenian lawyers who were transferred to this territory and weren't acquainted with Hungarian law nor language. They administered justice according to Austrian acts and introduced the legislation that was in force in the Slovenian-Dalmatian legal area. Since that ensued the possibility of introduction of religious type of marriage ceremony with no chance of divorce, they also enjoyed the support of the Catholic Church circles.

When it comes to Međimurje, marriages were performed exclusively before a priest. There were some attempts, by the commissioner who was in charge of this area, to force the stricter application of the Act, but the issued decree was not completely implemented since clerks had poor knowledge of Hungarian law. *De facto*, civil marriage here existed in an optional form. Due to untenability of such a situation, a compromise solution was to gradually introduce optional religious marriage. But, despite the brief validity of it, civil marriage officially remained mandatory in this legal area.

[13] KREŠIĆ, *op. cit.*, p. 196.

3.5. The Dalmatian-Slovenian Legal Area

This legal area comprised the area of Dalmatia and Slovenian lands where Austrian legislation was in force, which was the South Slavic area of the Austrian part of the former Austro-Hungarian Monarchy. Section B of the Table of Seven in Zagreb and the Appellate Courts in Split and Ljubljana had jurisdiction on this territory.

Here, as well, civil marriage law was applied, regardless of the religious affiliation of the inhabitants. Although, according to the Austrian General Civil Code, religious marriage was standard at first with the mentioned form being subsequently allowed. Civil courts had jurisdiction. But, this order of introducing the forms in which marriages could have been concluded caused confusion.[14]

Persons not affiliated to any religion (or if they were Muslims) were obliged to have a civil marriage, while this type of marriage was also allowed in an optional form. This involved situations in which one partner in the betrothal was not a member of a recognised faith, or was a member of the Jewish faith and the other was Christian. Subsequently, the possibility of mixed marriages of Christians who were allowed to get married by a religious body representing either partner, rather than exclusively in the Roman Catholic Church, was introduced.

The specialty of this area is so-called "emergency civil marriage" (Ger. *Notzivilehe*). It was possible in all those cases where the Church did not want to participate in marriage ceremony for reasons not recognised as marriage impediments by the ABGB. The marriage in this form was officiated by representatives of state authorities, in the presence of two witnesses and a scribe.

[14] *Ibid.*, p. 198.

3.6. The Croatian-Slavonian Legal Area

This legal area comprised the area of the Kingdom of Croatia and Slavonia located in the Hungarian part of the former Austro-Hungarian Monarchy. Here, the jurisdiction was exercised by the Section A of the Table of Seven in Zagreb and the Appellate Court in Zagreb. When this area was a part of the previous state, it had autonomy in home affairs, judiciary, religion and education on the basis of the Croatian-Hungarian Compromise (1868) which had its consequences on the organisation of marriage law in the Kingdom of Yugoslavia.

Here, the concurrent validity of both religious and civil marriage law is the best expressed. Nevertheless, the whole system is well organised with precisely defined sources of law and addressees of norms. Even the Table of Seven has highlighted it in its ruling: "*The privilege of spiritual judicature was granted just to the enumerated religions, and cannot be extended to other religions.*"[15]

Religious marriage law was applied to Roman and Greek Catholics and Orthodox believers with religious courts having jurisdiction. The relevant sources of law for Catholics were the Art. X of the Concordat (1855), the Act Concerning the Marriage of Catholics (1856), the Instructions to Ecclesiastical Courts in Matrimonial Causes (1856) and the *Codex juris canonici* (1917). When it comes to marriages of Orthodox believers, they were regulated by the *Systema Consistoriale* from 1782 and, of course, the Marriage Rules of the SOC.[16] Jews, Evangelicals and Muslims were subject to the ABGB and the provisions on marriage cases from the Temporary Rules of Civil Procedure of 1852.

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[15] Plenarna rješidba Stola sedmorice od 23. siječnja 1919. br. 2711, ex 1918. In: VRAGOVIĆ, Aleksa: *Zbirka rješidaba Kr. Hrv. Slav. Dalm. Stola sedmorice kao vrhovnog suda u gradjansko-pravnim predmetima, vol. 2, Rješidbe br. 533–950* [*The Collection of Rulings of the Table of Seven of the Kingdom of Croatia-Slavonia-Dalmatia as the Supreme Court in Civil Law Matters vol. 2, Decisions no. 533–950*], No. 539, Zagreb, 1927–1928, p. 5; KREŠIĆ, *op. cit.*, p. 202.

[16] But, only with regard to the requirements for valid marriage, divorce from bed-and-board and divorce, and only to the extent they were not contrary to other regulations valid in this area.

4. Consequences of legal particularism in marriage law

As we can see, conflict of laws was one of the main characteristics of marriage law in the Kingdom of Yugoslavia, and it manifested on many levels: it existed between religious and state (civil) legislation throughout the territory of the state, between different legal areas, among different marriage laws in individual area and finally, among individual religious laws.

Simply said, it basically meant that some citizens in Yugoslavia were obliged to enter a civil marriage, while others were obliged to get married in church, and yet, other could enter a *Notzivilehe*. It also meant that some citizens were allowed to get married in a manner not allowed in another legal area, although they are the citizens of the same state. Consequently, the person could have been considered as married according to one legal area, but not according to another. The same worked for questions of validity of marriage and divorce. The fact that a person could have been divorced and remarried in one legal area and not in another, ensued a completely new question: polygamy, which was obviously impossible to regulate adequately. The described confusion that existed in terms of divorce was also a suitable platform for bypassing the law (have in mind that Roman Catholics couldn't get a divorce, while others could.) Everything presented was in support of the conclusion that constitutionally guaranteed principle of equality of citizens was undoubtedly violated.

In addition, the composition of society was constantly changing its structure. Differences in the approaches of different religious groups were often reasons why people in some parts of the state converted. That wasn't encouraging when it comes to conflicts between religious groups which existed since in such a disorderly state it wasn't unusual that individual religious courts would overstep their jurisdiction. Not only converting was the reason of restructuring, but people would often even migrate within the state in order to change their municipal affiliation to a different legal area.

Further doubts were focused on the property rights-status or the issue of mutual inheritance by spouses, the mixed marriages and the legal status of children born within such marriages. Considering everything mentioned, we can conclude that the fact that the type of marriage depended on geographic longitudes and latitudes caused disorderly state and legal uncertainty.[17]

5. Yugoslav constitutions about marriage

Described situation can justifiably encourage us to seek into the most powerful source of law which would have the potential to unify legal chaos, but even the constitutional provisions on marriage turned out to be a dead letter. During the existence of the first Yugoslav state, two constitutions (1920 and 1931) were adopted, both of them referring to marriage in one single provision which is an indication for the relevance of marital questions for constitution makers. This indication is definitely confirmed by the way one of the constitutions was made: it was a reflection of the amount of interest among MPs to deal with the mentioned problems in this area of law.

An imposed 1931 Constitution in Art. 21 mentioned that: "*Marriage, the family and children enjoy the protection of the state*". On the other side, Art. 28 of the 1921 Constitution stated that: "*Marriage enjoys the protection of the state*". This Constitution was a result of the regular constitutional procedure, in which Assembly could debate and decide on the constitutional proposal that was put forward by a specially formed Constitutional Committee. During the general debate in the Assembly, it was stated by just three MPs that the wording in the Constitution is "an unclear provision" and that it is unclear what lies behind these words. Obviously, so broadly descripted provisions were unable to satisfy the concrete needs for unification of marriage law in this state. However, these statements weren't sufficient to begin a constructive discussion.

[17] KREŠIĆ, *op. cit.*, pp. 202–205.

In addition, when it comes to regulating specific conflict of law issues, a general rule was declared in Yugoslavia, by which every judicial decision with an execution clause (which was delivered by a court in one legal area) must be deemed final and enforceable in other legal areas as well. Consequently, the accepted opinion was that it is not necessary to issue special legal rules intended exclusively to resolve inter-provincial conflicts since it was held that general legal regulations are sufficient to serve as provisional legal rules to properly eliminate existing problems. That certainly served as the foundation for the above presented lack of interest among MPs which can also be interpreted as the acceptance of the direction for the future regulation of marriage law. But, despite of the flaws, these constitutional provisions did provide a framework for a reform of marriage whereby the regulation of marital relations was supposed to be a part of the state's activities.[18]

6. Debates and proposals

Despite some proposals to retain the existing system with couple of modifications, it was finally concluded that religious rules are not an adequate basis for regulating the marriage law. They are characterised by unchangeability and even conservatism which are never desirable features for modern legal systems that need to be in accordance with fast-happening changes of the society. So, the proposal to introduce the civil type of marriage was accepted, since it could give the state what belonged to it, by entrusting it with the care of citizens' social needs, rights and obligations, without taking anything away from religious communities. The only thing uncertain was whether it should be mandatory or optional.

Mandatory civil marriage could definitely fulfil the constitutionally guaranteed equality of all citizens and ensure the legal certainty. By eliminating the conflicts existing between religious communities and also between them and the state, it would

[18] *Ibid*., pp. 208–209.

contribute to the creation of a unified state. It was also considered as a simpler way to the wanted unification.

However, considering the real social structure in this state, optional form of civil marriage imposed itself as the most suitable for meeting both the constitutional principles and practical needs. It could provide the satisfaction of the state, the Church and individual interest which would mitigate the response of conservative and clerical circles and cause fewest upheavals in society. In the end, it suited the best for the two cultural backbones of the state: Christianity and Roman law.[19]

7. The Preliminary Principles of the Yugoslav Civil Code

As stated above, the work on the unification of law began right after the unification of the state. Since only one area wasn't familiar with the ABGB,[20] it was logical to take this source as a basis for drafting the *Preliminary Principles of the Yugoslav Civil Code* (1934).

Marriage law provisions can be found in Part 1, Chapter 2 and according to them, the authors[21] of the *Preliminary Principles* championed the introduction of optional civil marriage. They considered the acceptance of mandatory civil marriage as a degradation of marriage to a simple legal transaction from everyday life harming its reputation. It was also stated that a preference for civil marriage was the opinion of a minority. In order to be in accordance with social reality, the solution that was accepted referred to the religious affiliation of citizens because it allowed the marriage to be officiated by a representative of a recognised religious community. It also provided the possibility to enter *Notzivilehe*. But, the provision on religious marriage was an

[19] *Ibid*., pp. 209–214.

[20] The ABGB was in force in the Dalmatian-Slovenian and the Croatian-Slavonian legal area. It indirectly applied to Bosnia and Herzegovina, and the Serbian Civil Code (1844) was a shortened translation of the ABGB. That means that the only legal area in which the ABGB did not apply in any form was the Montenegrin.

[21] Draft on marriage law was made by a commission of professors of cannon law from the Yugoslav Schools of Law. KREŠIĆ, *op. cit.*, pp. 215–216.

exception since the marriage law was regulated on a non-religious basis and the religious significance of marriage was not relevant to the state. However, this attempt of standardisation also never succeded because it was never enacted. Nothing changed in terms of marriage law or marriage type.

8. Conclusion

As one author stated, it seems "that a quarter-century of debate and advocacy for reform of marriage law and the introduction of civil marriage was actually just a *vox clamantis in deserto*".[22] All these presented attempts of better, more transparent, efficient and uniform regulation of a marriage law have found their realisation only in the legal order of the socialist Yugoslavia during and after the World War II. It finally managed to achieve the wanted results by separating the church and the state. Consequently, marriage lost its value as a sacrament and was presented exclusively as a contract and an issue for the state and part of daily life.

[22] *Ibid.*, p. 221.

Josipa SUDAR: Development of civil law in Croatian territories from 1918 to 1945

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1. Introduction

The goal of this paper is to present the process of development of civil law in Croatian territories in the period from 1918 to 1945. I will explain how various historical, social and economic circumstances influenced the development of civil law and the application of the provisions of civil law. In this period we can't talk about Croatia itself as it wasn't an independent state as we know it today. Instead, we are talking about Croatian territories that were previously part of the Austro-Hungarian Monarchy, and then together with other provinces were united into different state-legal communities.

2. What is civil law?

Civil law is set of legal norms that regulate social relations that people enter into regarding things, actions and property. It is branch of law that includes obligatory law, real law, family law and inheritance law[1]. It applies in relations between natural and/or legal persons. Civil law is very important part of law as we all directly or indirectly encounter it on a daily basis and it has a great influence on our everyday life. Also, principles that civil law is based on are the principle of autonomy, the principle of equality, the principle of traffic flow and the principle of property sanctions.[2]

[1] GAVELLA, Nikola (ed.): *Građansko pravo i pripadnost hrvatskog pravnog poretka kontinentalnoeuropskom pravnom krugu: teorijske osnove građanskog prava. [Civil law and affiliation of the Croatian legal order with the continental-european legal family: theoretical basis of civil law].* Pravni fakultet u Zagrebu, Zagreb, 2005, p. 7.
[2] *Ibid*., p. 6.

3. Brief history of civil law until 1918

Civil law developed from Roman law, so called *ius civile*. Roman law enabled the acquisition of rights and provided freedom of disposal and use of these rights. From such an understanding of law, general law or *ius commune* developed, and civil law followed on from it. The development of civil law began at universities where theory was gradually transferred into judicial practice. Even though civil law started to develop independently from Roman law and it was under the influence of various political, economic and social changes, it still retained its foundation which derives from Roman law.[3] Over time, legislative bodies took over the role of creating civil law, which was especially the case during the 17th and 18th centuries when states began to enact civil codes. The peak of the codification of civil law was during the 19th century when French Code Civile from 1804 and Austrian Allgemeines Bürgerliches Gesetzbuch (ABGB) from 1811 were adopted. Since than the development of civil law acquired its national character instead of the previous universal one.

4. General Civil Code

The most important moment of the development of civil law for Croatian territories was the moment of introduction of Austrian General Civil Code. It was first brought in Austria in 1811, and over time it was introduced to the rest of Habsburg Monarchy. In the period 1812-1820 it was introduced in Vojna Krajina, Istria and Dalmatia, and only in 1852 in Hungary, Croatia and Slavonia. The introduction of General Civil Code modernized Croatian law. The Code was typical continental-European code consisting of three parts: law of persons, real law including inheritance law and obligatory law, and common provisions. It applied to all residents regardless of class affiliation. The main principle of the Code is the principle of legal equality along the freedom and

[3] *Ibid*., p. 5.

consent of parties and freedom of bequest.[4] At the heart of the code is private property as the most important institute. It received three amendments (in 1914, 1915 and 1916). Amended Code was applied only in Austrian territories including Dalmatia and Istria.[5]

5. Period division

In this paper I decided to divide timeframe from 1918 to 1945 into two sections or periods of time depending on crucial political and social changes that influenced the development of civil law on Croatian territories. First period is from 1918 to 1941 and second one is from 1941 to 1945. I took the year of 1941 as a dividing year because that's the year when Croatian territories had kind of different role in the international community than in previous years, and it was consequence of World War II. It's also year between two periods which were significant for efforts made to create civil code. It's important to have in mind that in further text we don't talk about Croatia as one state, but about Croatian territories that were previously part of Austro-Hungarian Monarchy and then part of other state-law communities. Also, when we talk about Croatian territories, we talk about Croatia, Slavonia and Dalmatia, while Istria was part of Italy according to the Rapallo Treaty.

5.1. From 1918 to 1941

In 1918 Croats united with Slovenians and Serbs in the State of Serbs, Croats and Slovenians which existed from 29th October 1918 to 1st December 1918. It covered former territory of the Austro-Hungarian Monarchy inhabited by Serbs, Croats and Slovenians.[6] On 1st December of 1918 the state united with the Kingdom of Serbia. From that on the Kingdom of Serbs, Croats and Slovenians had been established. The

[4] ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba. [Croatian legal history in European contex from middle age to modern era]*. Pravni fakultet u Zagrebu, Zagreb, 2021, p. 156.
[5] *Ibid.*, p. 157.
[6] *Ibid.*, p. 261.

kingdom changed its name in 1929 into the Kingdom of Yugoslavia. During all the period it was a unitary state and most of the time the legislative jurisdiction belonged to the king and to the parliament in Belgrade. Because of that Croatia couldn't pass its own laws in the field of justice, and therefore neither laws in the area of civil law.[7] Thus, we can say that the development of civil law within Croatia itself, i.e. in Croatian territories, stagnated during that period. However, the development continued within the framework of the Yugoslav state. There was an aspiration to establish unified civil legislation for the entire state. Until such legislation was enacted, it was decided that the civil laws that had been in effect until then would still apply.

5.1.1. Legal areas

In such the Yugoslav state, there were six legal areas: Croatian-Slavonian, Dalmatian and Slovenian, Bosnian – Herzegovinian, Serbian, Montenegrin, Vojvodina.[8] The Croatian-Slavonian and Dalmatian and Slovenian legal areas covered most of Croatian national territory. In the Croatian territories that were previously under Austrian rule, General Civil Code was still valid. For the rest of Croatian territories the Code was valid but without amendments. Each legal area had its own supreme court, which was considered as part of a single court of cassation. In Zagreb, such a supreme court was the Table of Seven with two divisions: division A (for amended Code) and division B (for non-amended Code).[9] The decisions of the Table of Seven, in addition to the Code itself, were the immediate source of civil law. The Yugoslavian laws governing civil, non-litigation and enforcement proceedings were based on the Code.[10] Basically, the entire civil law was based on the Code or it was directly valid in Croatian territories and therefore it had a certain liberal connotation, which was certainly commendable.

[7] GAVELLA, *op. cit.*, p. 41.
[8] ČEPULO, *op. cit.,* p. 287.
[9] GAVELLA, *op. cit.*, p. 42.
[10] *Ibid.,* p. 43.

5.1.2. Uniform codification

There was a great desire for a unified codification and harmonization of all law, including civil law within the Yugoslavian state. *"Since the proclamation of new state, unification of law became one of the supreme political values and a priority task of the government."*[11] Work on this began immediately after the unification in 1919, when the Permanent Legislative Council was established at the Ministry of Justice. In 1929, when Kingdom of Yugoslavia was established, this work was taken over by the Supreme Legislative Council. The jobs were divided into sections according to the content of the General Civil Code, and one editor was in charge of each section. Some sections were, for example, *On Limitation and Maturity, On Matrimonial Law, On Property,* etc.[12] The main goal was to unify the law, which was quite different in those six legal areas. Therefore, the goal was not to reform, but to uniform law.

The basis for the new Civil Code was, of course, the General Civil Code, which was applied in Croatia. There were two reasons for such decision.[13] First, the General Civil Code had a lot similarities with other sources of civil law in other legal areas. Second, legal science and judicial practice knew Austrian law very well, which was the basis for the functioning of such a civil law system and for its further development. The work on this "project" lasted twelve years before *The Pre-basis of Civil Code for the Kingdom of Yugoslavia* was printed in 1934. According to the Pre-basis, the civil code should have had a structure of 13 paragraphs of *the Introduction, On personal law, On property law* (including real and obligatory law) and *Common Orders*.[14] German, Swiss, Liechtenstein, Czech and Hungarian civil codes were also used as inspiration in the creation. The Pre-basis was also subjected to some criticisms, such as that it was not modern enough, that it should have moved away from the General Civil Code as a

[11] PAVLOVIĆ, Marko: Problem izjednačenja zakona u Kraljevini Srba, Hrvata i Slovenaca/Jugoslaviji. [The problem of equating laws in the Kingdom of Serbs, Croats and Slovenes/Yugoslavia]. *Zbornik Pravnog fakulteta u Zagrebu,* Vol. 68., No. 3–4, 2018, p. 523.
[12] GAVELLA, *op. cit.,* p. 44.
[13] *Ibid*., p. 45., bilj. 70.
[14] RADOVČIĆ, Vesna: Pokušaj kodifikacije građanskog prava u staroj Jugoslaviji. [Attempt to codify civil law in the old Yugoslavia]. *Izdavački servis Liber*, Vol. 7., No. 1, 1975, p. 262.

model for the civil code, and that customary law should have been considered more.[15] In the end, we don't know what would have happened with this code civile if it came into force as further work on it died down and nothing came out of it.

5.1.3. Influence of the Decree on the Banovina Croatia

In 1939 the Decree on Banovina Croatia entered into force, which gave to that part of the state certain independence and jurisdiction to enact laws. Thus, Banovina Croatia should have adopted its own civil code, but without the part of obligatory law.[16] That was another reason why the Pre-basis would not have come to life - it could not be applied in that area, and that topic was no longer so relevant next to the Decree at the time.[17]

5.2. From 1941 to 1945

This period is the period of World War II, which in 1941 *de facto* led to the disintegration of the Kingdom of Yugoslavia. Although the international community recognized the refugee government, in the circumstances of war and unrest, the forces of the Triple Pact occupied Croatian territories, i.e. the territories of the Yugoslavian state, and divided them among themselves. This is how the Independent State of Croatia was born. In such a situation, a trinity was established on the Croatian territories - the government of the Independent State of Croatia, the government of the Partisan movement, and the government of the Yugoslavian government in exile.[18]

[15] *Ibid*., p. 261.
[16] *Ibid*., p. 257.
[17] GAVELLA, *op. cit.,* p. 49.
[18] ČEPULO, *op. cit.,* p. 298.

5.2.1. Application of civil law during the World War II

While a world war is raging outside Croatian territories, internal unrest is raging in its territories, so the question arises as to how much space there is for the development of law. It could have developed in a period when there were no war operations or they were of lower intensity, under the influence of judicial activity. Namely, the government of the Independent State of Croatia took over the courts that existed before, while the partisans tried to destroy those courts and introduce the so-called "people's judgement". That was the idea of judging according to the people's understanding of justice, not according to the laws. They categorically rejected the General Civil Code and the laws of the Independent State of Croatia and the laws of the Kingdom of Yugoslavia. Both sides opposed the liberal and individualistic principles that were woven into the law based on the General Civil Code.[19] Unlike those principles, the Independent State of Croatia gave priority to the collective interests of the nation and the family. In such circumstances arises the question of the application of General Civil Code and in which direction the law will develop in the future. So, the partisans did not apply General Civil Code at all, while the authorities of Independent State of Croatia did, but only if that was not contrary to other provisions that derogated norms of the General Civil Code. What is more, Croatian territories were still divided into those to which the amended and those to which the non-amended General Civil Code was applied.[20] So, there still wasn't unified codification, but there were certain intentions to create a Croatian national code.

5.2.2. Work on the Croatian Civil Code

A new civil code was needed in order to harmonize everyday life with the ruling ideology. In just two years, *The Basis of the Civil Code for the Independent State of Croatia* was created. The base was the aforementioned Pre-basis created for the former

[19] GAVELLA, *op. cit.*, p. 50–52.
[20] *Ibid.*, p. 53–54.

Kingdom of Yugoslavia, which in turn was based on General Civil Code. The Basis was supposed to regulate only general civil private law, which would include the law of persons, family law, real law, obligatory law and inheritance law. There was an idea of adoption of the so-called special laws that would regulate special legal groups such as trade, labor relations, peasant law and the special law of Muslim Croats. The Basis itself rested on the principles of the national-socialist worldview. More precisely, there were certain sayings that represented direct instructions to everyone. Some sayings were: *The highest law is the people's good, All movable and immovable things are the people's property*. In the beginning, the importance of household cooperatives and the development of peasant property law were emphasized. The peasant law should have protected the peasantry from decay.[21] There were still certain racist provisions on the protection of Aryan blood and the honour of Croatian people. Those regulations applied to Jews and Gypsies, mostly about marriage-related affairs.[22] Neither the Basis nor the Pre-basis came into force during the existence of the Independent State of Croatia. Even if they did, with the collapse of the ISC in 1945, it would have ceased to be valid. Thus, the General Civil Code remained valid in Croatian territories.[23]

6. Conclusion

During the long history of Croatian law, many more or less significant changes took place that influenced and directed the development of Croatian law towards what we have today. If we look at the development of law, i.e. the development of civil law from 1918 to 1945 and even earlier, perhaps the only constant throughout that time was the General Civil Code. From time it entered into force in Dalmatia and Istria in 1810s and in Croatia-Slavonia in 1852, it was maintained and directly or indirectly applied in the following decades. We can see this through the fact that it was the basis for the creation

[21] KREŠIĆ, Mirela: Nasljednopravna načela Općeg građanskog zakonika u praksi hrvatsko-slavonskih ostavinskih sudova. [Inheritance principles of the General Civil Code in the practice of Croatian-Slavonian probate courts]. *Zbornik Pravnog fakulteta u Zagrebu,* Vol. 63., No. 5–6, 2013, p. 1101.
[22] GAVELLA, *op. cit.,* p. 56.
[23] *Ibid.*, p. 57.

of the Pre-basis and the Basis, and it remained in force until 1946, when the Law on Invalidation of Legal Regulations passed before 6th April 1941 was passed.[24]

[24] KREŠIĆ, *op. cit.,* p. 1102.

Dóra KARSAI: The commercial companies from the beginning till today

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1. Introduction

Nowadays, not a day goes by without some direct or indirect contact with a commercial company. From using a mobile phone in the morning to shopping in the evening, there are countless occasions when we use or pay for the services of a company. We just often don't think about it. The concept of a commercial company often seems foreign and overly technical, even though the meaning of the term is obvious to even the most inexperienced. One of the aims of my study is to bring the reader a little closer to this concept, the broad structure behind it, and how it has evolved, by presenting this system, which is found in many areas of life, and thus to give the reader the opportunity to gain a better understanding of the structure of the commercial companies that are an integral part of our everyday lives.

2. Historical background

The first formation of commercial companies in Europe appeared in the 13th century with the spread of the technical revolution, which led to the beginnings of the capitalist economic system. Here came the realization that, by combining economic and intellectual forces, capital could be better provided by a well-organized comprehensive industrial and commercial system, and as a result, performance would increase, the risk would be shared, better quality products could be produced, and thus the company would be more competitive, a key characteristic for the survival of the firm under capitalism. The first version of companies was called guilds or guilds. These two

advocacy organizations had essentially the same purpose, only the name differed as time went on. The sum of it was that craftsmen/merchants/tradesmen in towns and cities engaged in the same activity were grouped together within a king-backed trade association to limit competition between them. However, as the prelude to capitalism had already appeared, the transport was not yet so advanced that if one could not compete properly in one town, one could transport to another town in a way that was worthwhile for him, including travel costs, and relocating a firm to another town was a much more difficult, almost impossible, task in this era. Hence the solution mentioned a few lines above so that all merchants could prosper properly while protecting each other against the emergence of a competitor. As well as protecting internal interests, this was also beneficial to the townspeople and the state, as it created an orderly industrial system with less turmoil, and the guilds often performed public functions in ensuring the defense or development of the town.[1]

A significant milestone in the development of commercial companies was the great geographical discoveries that began in the 16th century, as this opened up the possibility of overseas trade, which proved to be much more cost-effective than its predecessors. The emergence of colonialism was another consequence of overseas trade and played a major role in the expansion of commercial companies. With this opening up of opportunities for commercial companies worldwide, large companies emerged, which can be seen as the forerunners of today's multinationals. Here, it was no longer enough to have a local internal code, as in the case of guilds but needed something more serious, more general, recognized worldwide, and sufficiently broadly based. The solution was the development of a set of technical legal principles that provided general conditions for those joining a trade association. Compliance with them was compulsory and at the same time benefited the members and the operation of the company. For example, the assets of the members and the organization could be separate and independent, i.e. the members had 'private' assets which were not part

[1] HORVÁTH, Attila: *A magyar magánjog történetének alapjai [The Foundations of the History of Hungarian Private Law]*. Budapest, 2006, Gondolat Kiadó, pp. 354–356.

of the assets of the company and the members were liable only for the amount contributed to the company. This was to ensure that the labour/capital needs of growing commercial companies were met while at the same time preventing the members from going bankrupt in the event of a bankruptcy. This conditionality also acted as an incentive for individuals, which was essential to encourage them to join in order to continue to grow and compete.[2]

The 19th century is considered to be the golden age, as the operating system of capitalism was fully developed by then, but the size of companies and their production was not yet such as to overwhelm the capacity of the individuals involved, or to allow their operation to be brought under the control of a bureaucratic apparatus, which is also a major constraint. Coming back to trade, rapid development and geographical expansion have made it necessary for countries to regulate its operation themselves, establishing their order with certain limits (the extent of which has varied over the ages), and in extreme cases even to involve it in the centralization of state management. Such a regulatory process was also initiated in Hungary, greatly influenced by the structure and provisions of the German Commercial Code.[3]

In Hungary, the liberal oppositionist István Széchenyi made the nationalization of trade, including the emerging commercial companies, a major demand of the reform era. He was also responsible for the establishment of the first significant commercial companies, which were known as the Chain Bridge (Lánchíd) Joint Stock Company (1837) and the Pest Milling (Pesti Hengermalom) Joint Stock Company (1838).[4] The laws of the time, which were beyond European standards, were still in force during the neo-absolutist period. These laws were the Merchants Act[5], the Factories Act[6], the

[2] *Ibid.*, p. 356.
[3] *Ibid.*, pp. 357–359.
[4] GOSZTONYI, Gergely: A polgári szabadságjogok [Civil liberties]. In: MEZEY, Barna – GOSZTONYI, Gergely (eds.): *Magyar alkotmánytörténet [Hungarian constitutional history].* Budapest, 2020, Osiris Kiadó, p. 285.
[5] Act 16 of 1840.
[6] Act 17 of 1840.

Companies for Public Purposes Act[7], and the Merchant Boards and Brokers Act[8]. However, after the Reunification, the economic situation in the country changed, and trade also required new regulations. In the light of this, the then Minister of Trade asked István Apáthy and Ödön Kuncz to submit a new, unified law, which was promulgated on 16 May 1875 and came into force on 1 January 1876 as the Hungarian Trade Act[9] (HTA).

To keep Hungarian commercial law at an international level, several sections of the HTA are simply translated from the German Commercial Law. The main objective was modernization, which included, for example, the adoption of Western European legal institutions, but also took into account the domestic context to apply them properly and achieve the best possible effect in Hungary. This was achieved, as industrial production was raised from 8 percent in 1850 to 25 percent in 1913. The Act deals with five types of a commercial companies, namely the general partnership, the limited partnership, the joint-stock company, the limited liability company, and the cooperative society. Although it is not included in the legal text, in practice there was an additional company, the so-called silent partnership, but this was eventually abolished in the course of the dynamic developments. This large-scale progress was hindered first by World War I, then by the Great Depression, and then by the Soviet dictatorship that followed World War II, which completely froze the capitalist operation of trade and the economy, and thus the market economy in Hungary ceased to exist for a time.[10]

3. Commercial companies during the socialism

The proclamation of the Hungarian People's Republic on 20 August 1949 marked the beginning of the reign of the socialist dictatorship. This brought with it, first of all, the

[7] Act 18 of 1840.
[8] Act 19 of 1840.
[9] Act 37 of 1875.
[10] HORVÁTH, *op. cit.*, pp. 374–385.

emergence of the planned economy. In practice, the planned economy meant that, on the one hand, the state eliminated the possibility of privatization in the economy by creating a single state property, and, on the other hand, it implemented the three- and five-year plans under the control of a central office (which in Hungary was the National Planning Office). At that time, the primary objective of a (state) enterprise was to achieve the required efficiency, and it did not have the autonomous discretion to take on a legally and economically risky option in the light of market conditions, but was only required and allowed to perform the tasks assigned to it.[11]

In addition to the nationalized companies, cooperatives still existed as a type of commercial company. The distinction between the cooperative and the state-owned enterprise was later completely blurred with the development of socialism and became part of the unified state ownership.[12] Two types of cooperatives can be distinguished: initially, there were producer cooperatives, and then, with the emergence of the new economic mechanism, general consumption and sales cooperatives. The primary aim of the creation of producer cooperatives was collectivization, whereby the private property of agricultural workers was taken away and centralized in a cooperative, even utilizing forced labour. The cooperatives fulfilled the needs of the state by the tasks imposed on them. But they tried to keep up the pretense that the members were still part-owners of the land annexed by the cooperative and had any control over its use. This was done by the periodic cooperative meetings, which were only a show and had no real benefit for the operation of the cooperative.

The term new economic mechanism has already been mentioned in the course of my study and I think it deserves an explanation of what exactly it is and why it is significant in relation to my subject. The introduction of the new economic mechanism in 1968 was necessary because the planned economy of that time was not efficient

[11] SÁRKÖZY, Tamás: A vállalatirányítás elvi kérdéseiről [On the theoretical issues of corporate governance]. *Jogtudományi Közlöny [Legal Gazette]*, Vol. 24, 1969, pp. 89–90.
[12] SÁRKÖZY, Tamás: *A szocialista vállalatok közös ismérvei a magyar adottságok között [The Common Criteria of Socialist Enterprises under Hungarian Conditions]*. Budapest, 1981, Akadémiai Kiadó, p 33.

enough, the country was in a deepening economic crisis, and in the Kádár era, it was more possible to deviate from the strict regulations dictated by the Soviets in the framework of the KGST.

It is important to distinguish, from the economic point of view of the state, between the public authority and the economic policy of the manager and owner. and management powers. While official control is essentially negative in direction, as its instrument is the system of prohibition and licensing, which must be enforceable against all sectors of the economy to function potentially. Economic governance is more policy-oriented, focusing on specific sectors, to steer economic activity in a particular direction, and the means of which are to anticipate economic advantages and draw attention to disadvantages. Later on, these features of autonomous corporate planning were made a mandatory requirement for cooperatives.[13] All in all: one of the primary aims of these management mechanisms is to reduce the state's ownership as much as possible (but not completely, it should have influence) and thus to develop an autonomous organized system of operation, which fits in perfectly with the so-called soft dictatorship of the Kádár era.[14]

It should also be mentioned here that in a hierarchical system, the interests of the state and its proprietary character are more clearly defined, while in a non-hierarchical system the functional functions of the government are more clearly defined, since in this case-control or supervision is exercised by a body independent of the state, and thus the efficient functioning of the economy is better ensured by the establishment of a balance.[15][16]

The fact that the state no longer wanted to dominate the market, but only to regulate its organized functioning, can be seen as a significant change. This gave those

[13] Act 7 of 1972.
[14] SÁRKÖZY, 1969, *op. cit.*, pp. 93–101.
[15] HALMAI, Gábor: *Az „új" gazdasági mechanizmus fejlődése – a párthatározatok és a közgazdasági irodalom tükrében [The Development of the „New" Economic Mechanism – in the Light of Resolutions and Economic Literature]*. Budapest, 1982, Akadémiai Kiadó, pp. 1–12.
[16] SÁRKÖZY, 1969, *op. cit.*, pp. 92–97.

with an economic interest the opportunity to gain some control over their property and to dispose of it as a minimum according to their wealth (of course, only in a proportion that was still compatible with the state's interests).[17]The governance model has also been transformed, with the previous strict planned economy, essentially run by a central agency (the National Planning Office), being replaced by sectoral governance. This change meant that the ministries were no longer responsible for the operation of the companies hierarchically subordinate to them, but were responsible for the management of a sector in its entirety, irrespective of the sectoral differences between the companies, to ensure that the sector functioned properly in the national economy and to ensure its continued development.[18] This type of management was known at the time as corporate supervision.[19]It was during this period of the new economic mechanism that general consumption and marketing cooperatives appeared alongside the producer cooperatives, with much greater autonomy, to which traders, producers, farmers, or landowners themselves subscribed. Here, cooperatives tended to be formed according to occupation and were rarely formed based on the location of the land. Territoriality was a factor, as a cooperative of this kind was usually formed jointly in a given village or neighboring villages, but this was not the primary consideration in terms of destination.

In my view, this socio-economic autonomy, which ensured separation from the state, gave the merchants, craftsmen, or part-owners of the company the opportunity to escape the constraints of the strictly planned economy, to have greater freedom of movement and thus to take a more active part in the work, which was also necessary to alleviate the severe economic crisis caused by the planned economy. This slight relaxation was also experienced by state-owned enterprises, which ensured the development of those that lagged in efficiency.[20] It is undeniable that the Soviet dictatorship was there in the background, which still had a large say in the functioning

[17] *Ibid.*, pp. 89–91.
[18] Government Decision No. 2027/1967.
[19] Government Decree No. 11/1967.
[20] Act 6 of 1977, Section 2.

of the economy, only perhaps it did so in a more formalized system. As we have seen from the development of history, these measures were only a temporary solution, and with the final bankruptcy of socialism, the possibility of the free market opened up and capitalist management (re)appeared in our country.

4. Nowadays' conditions

Today in Hungary, Act CLXIV of 2005 on Trade is in force, which was promulgated on 25 December 2005 and entered into force on 1 June 2006.[21] The logical structure of Act 37 of 1875 is slightly recognizable in the current Trade Act, but thanks to continuous innovation, the legislation is appropriate to the present situation and therefore differences can be detected compared to the old, more significant article. Such similarities can be seen in the fact that the primary objective of the law is still to ensure that trade is properly restricted or those prohibitive competitive situations do not arise, for example, the prohibition of cartels.[22] From my observations, the above-mentioned Act is the main regulatory instrument for trade and although there are various complementary laws, they tend to apply only to specific cases or situations and the framework for commercial activity is set out in this legislation.

The forms of business entities are currently set out in Act V of 2013 on the Civil Code. In our current law, the same five types of companies are defined, but their grouping is more distinct than in the previous article of the law referred to.[23] As it is more sharply distinguished here between the general partnership, the limited partnership, the limited liability company, the joint-stock company, and the limited liability partnership, which are included in the category of companies, and the cooperative, which is considered as a separate category. The main difference between the two categories, as I understand it, is that a cooperative focuses on self-help, on

[21] KORNAI, János: Hungary's U-turn. *Society and Economy*, Vol. 37., No. 3, 2015, pp. 279–329., https://doi.org/10.1556/204.2015.37.3.1
[22] Act CLXIV of 2005, Section 7–7/A.
[23] Act V of 2013, Title VI.

achieving or helping its members or some other socially interested purpose, whereas a business partnership in its various forms focuses on commercial as advantageously as possible, often done professionally by its members. However, it can be argued that in the 13th century, guilds, despite strict regulations, could be seen as much more subjective in their approach given their small size or scope, whereas today's firms are much more objective, profit/goal-oriented in many cases.

The advent and spread of the internet[24] is a major advantage over the past because it means that the relevant terms and conditions can be easily viewed from anywhere and the monitoring of commercial companies can be carried out much more efficiently and easily. In addition to the legislation, the Hungarian Chamber of Commerce and Industry (HCCI) is also of great importance, where all the rules/regulations on this subject can be found in one place. The operation and functions of the HCCI have, in a small part as a result of my research, developed my view of it as a guild in the 13th century in a given town, as it brings together under one hat a wide-ranging system of regulation of commercial companies. At some level, to set up a legal commercial company, compliance with the relevant rules is mandatory, and this is stated on the HCCI's website. The HCCI does not have as strong power and influence as a guild used to have, but rather only lays down the foundations and provides information, but it has a central role and a set of conditions that are extremely important. There are also separate chambers per county, subordinate to the HCCI, but not hundreds of them, as they're used to be guilds per profession and city. Although the purpose and function for which the guild was set up are different and therefore its operation can be compared to an instrument of influence over a commercial company, but because it also performs functions of protection of interests, such as the preventive protection of a modern commercial company against other companies, it can be compared to the HCCI.[25]

[24] GOSZTONYI, Gergely: Aspects of the History of Internet Regulation from Web 1.0 to Web 2.0. *Journal on European History of Law*, Vol. 13, No. 1., 2022, pp. 168-173.
[25] https://mkik.hu/ [Access on October 14 2022].

5. Summary

The title of the third section of my paper is a question that, at first glance, seems to be a contradiction in terms. After all, how would it be possible to have commercial companies under socialism? As my paper has shown, it is not at all impossible. Socialism, too, was a time of constant change and was diverse in its own way. First, there were the so-called loopholes, which allowed companies a minimum degree of autonomy, such as the various housing cooperatives, or the large companies that were extremely important for the political and social life of the country, where the forced centralization based on the plan-rule system was not fully enforced.[26]Then, the new economic mechanism was a deliberate attempt to alleviate the economic terror caused by socialism, which gave commercial companies more scope to operate again, partly independently. Eventually, with the end of socialism, such severe restrictions were finally lifted, and free, independent companies were once again free to operate in a market economy. All in all, looking at the development of trade from its beginnings to the present day, it can be concluded that the socialist period has had a rather negative impact on the development and evolution of trade and enterprise. In my opinion, if this period could be cut out of Hungarian history, there would be a less dramatic difference between th immediate pre-socialist period and the immediate post-socialist period.

[26] SÁRKÖZY, 1981, *op. cit.*, p. 39.

Jakov KURSAR: Concepts of property and agrarian reforms in Croatia during socialism

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1. Historical context

The period of most important changes in official state policy for property relations in Croatia starts at the conclusion of World War II. Nevertheless, the winning side in Croatia implemented their policies already during the war. Even before the Provisional people's assembly passed the first Agrarian Reform and Colonisation law of 1945, the People's Liberation Councils carried out confiscations of various properties belonging to ethnic Germans fleeing Croatia alongside the retreating Wehrmacht. Moreover, confiscation of personal property was a widespread punishment for civilians who took part in collaboration and aiding the occupying forces. The collaboration was, however, interpreted very liberal, so merely for example, selling food to enemy soldiers was sometimes considered as collaboration.[1]

These new property relations were formally adopted as policy when the constitutional assembly finished the Constitution of the Federal People's Republic of Yugoslavia on the 31st of January 1946. The Constitution laid the groundwork for a federal form of government. As the Cold War period started for Europe, Yugoslavia was an important ally of the USSR although it never fully came under its sphere of influence. Only in 1948 the relations between the two states deteriorated to the point that many senior officials of the Yugoslav communist party were purged under the accusation of being Stalinist sympathisers. This political antagonism between the two socialist states was one of the main factors that contributed to the formation of different socialist

[1] ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu [Croatian Legal History in the European Context]*. Zagreb, Pravni fakultet Sveučilišta u Zagrebu, 2021, p. 314.

ideas, such as the Yugoslav doctrine of workers' self-management as its unique „brand" of socialism.[2]

2. Post World War II Croatia

With the formation of new Yugoslavia, the Federal Republic of Croatia was formed as well as its integral part. Although the new communist rule was opposed to nationalism, the Communist party of Yugoslavia was well aware of the importance of Croatia in the new state. As Croatian lands were significantly more economically developed than those of Serbia and Bosnia and Herzegovina, for example. The new rule, keen on ensuring internal stability, recognised Croatian national identity, culture and traditions. Aside from the traditional Croatian coat of arms, national anthem and other symbols, the authorities adopted to some extent many traditional forms of property relations, most notably the farming communes which were widespread in Dalmatia in earlier periods.

3. Changes in property relations

In the period from 1945 to 1953 it is possible to distinguish three main forms of property: private property, state property and communal property.[3] During socialism, private property of individuals constituted of the means of personal needs, such as houses, flats, personal vehicles etc. and even some means of production, such as shops, trades and various services.[4] However, according to Marxist theory, private ownership over large means of production was banned. Concerning private ownership of agricultural land, it was expected that it could be owned by an individual, and the main

[2] ČEPO, Zlatko: : Tito nosilac borbe protiv staljinizma [Tito Leader of the Fight Against Stalinism]. *Časopis za suvremenu povijest [Magazine for Modern History]*, No. 4, 1972, pp. 65–73.
[3] MATICKA, Marijan: Zemljovlasnički odnosi u Hrvatskoj od 1945. do 1953 [Land-Ownership in Croatia from 1945 to 1953]. *Sociologija i prostor: časopis za istraživanje prostornoga i sociokulturnog razvoja [Sociology and Space: Magazine for Research of Spatial and Socio-cultural Development]*, No. 125–126, 1994, pp. 191–201.
[4] ČEPULO, *op. cit.*, p. 315.

question of this paper is how much? The state handled this issue through the process of nationalisation and the creation of state property. This process started in 1945 through confiscation of farmland owned by German nationals, wealthy landowners and the church and employing impoverished farmers to cultivate it. The envisioned goal of this process was the creation of collective farms owned by the state.

This process was continued in 1946 with the implementation of the Law of Nationalisation of Private Enterprises which brought about the nationalisation of a large part of the total economy. Industry, infrastructure and both foreign and domestic banks and other financial institutions were made property of the state. The adoption of the doctrine of worker's self-management and the concept of communal property was largely tied to the Yugoslav-USSR disputes in 1948. Yugoslav socialist theory argued that the Soviet development of socialism has degenerated into a „bureaucratic hegemony of the state which has lost touch with the working class". The alternative to the soviet model was articulated in the form of worker self-governance in which workers would directly manage the means of production. This also meant that workers would directly managethe compensations in wages instead of the state. The first factory worker councils were being formed since December 1949 and in 1950. From then on, Workers' Collectives institutionalised the practice of self-governance with the implementation of the Primary Law of Management of State Enterprises and Industrial Associations.[5]

4. Collectivisation of farmland

4.1. First Agrarian Reform

As already stated, the main issue concerning land property relations in the new socialist system was was articulated with the Agrarian Reform and Colonisation Law of 1945.[6] Initially, this reform foreshadowed practices during the war towards the the land of

[5] *Ibid.*, p. 315.
[6] *Ibid.*, p. 328.

owners that were deemed as collaborators or were marked as enemies of the state, although these measures also served as a means of securing a reliable food supply for the army on the front and not an official change in policy. As the war ended the Communist party of Yugoslavia wanted radical redistribution of farmland and they were choosing between nationalising the farmland and renting out portions to farmer or handing the land out to the farmers as private property. They decided to implement the latter option. The reasoning behind this was the serious risk of famine in the post-war times.

On the 23rd of August 1945 the law was passed and it demanded the expropriation of all farmland larger than 45 hectares or 25 to 35 hectares of land suitable for farming, effectively enforcing the land ownership cap. The law also started the process of colonisation, or the resettlement of poor farmers from unproductive regions like Dalmatinska zagora to agriculturally developed and profitable regions like Slavonia. In numbers, 12157 colonist families received a total of 47109 hectares of land. At the end of the collectivisation process, most of the privately owned lands were divided into estates between 2 to 5 hectares large.[7] As this radical land redistribution was often resisted, the authorities decided to „rebrand "this reform in 1949 from collectivisation of the farmland in Soviet style towards formation of farming communes in form of the „zadruga" or rural farming commune as a concept that was based on traditional communes present in earlier periods of Croatian history. Edvard Kardelj, the leading theorist of socialism in Yugoslavia and the founder of workers' self-management advocated for the adoption of communal farming as he saw it as a promising plan to finally eradicate capitalism in farming and to increase agricultural output as well as to modernise the methods of agricultural production.[8]

[7] MATICKA, *op. cit.*
[8] *Ibid.*

4.2. Second Agrarian Reform

The introduction of communal farming was not met with approval and a large majority of farmers refused to enter into the system as participation was voluntary. Moreover, the communes that were formed did not meet the desired production output that was hoped for when implementing the policy. With these developments, the state decided against the continuation of their previous policies that is indicative by the fact that no more than 12% of the total agricultural land was organised into communes at any point in time. After the 6th congress of the Communist party of Yugoslavia in 1956, many farming communes were disbanded and with the introduction of the Second Agrarian Reform shortly after, the maximum amount of agricultural land was raised to 10 hectares. This marked the definitive end of the efforts to collectivise the land as approximately 92.3% of the total farmland was privately owned by 1954.[9]

4.3. Comparison with the USSR and the NEP

It is possible to draw many parallels between not only the agrarian policy changes between the second Yugoslavia and the USSR but the understanding of socialist economy itself. The process of collectivisation in the Soviet Union started during the Russian civil war as a policy known as "war communism", which included mass nationalisation of land owned by the Russian ruling classes including wealthy peasants from 1918. However, as the war continued, different factions formed in the Party with different economic views. As the "left" faction advocated for the continuation of the policies adopted during the "war communism" with the goal of rapid industrialisation, the farmers were increasingly dissatisfied due to the fact that this policy prioritised the development of urban economy at the expense of the countryside. The "right" faction advocated the same goal but with opposite approach, claiming that for the "survival of the revolution" it is necessary to form a class alliance between the workers and peasants

[9] *Ibid.*

and focus on improving the material conditions of the socialist forces through trade and participating in the free market.[10]

"*The policy of war communism, in effect since 1918, had by 1921 brought the national economy to the point of total breakdown. The Kronshtadt Rebellion of March 1921 convinced the Communist Party and its leader, Vladimir Lenin, of the need to retreat from socialist policies in order to maintain the party's hold on power*."[11] This change was introduced as the "New Economic Policy". Envisioned as a temporary measure, it returned agriculture, small-scale trade and light industry into private ownership and it helped the soviet economy to recover from war. By 1928 the New Economic Policy was reversed by Stalin and collectivisation was reintroduced. On the other, in 1945 Yugoslavia followed the Example of Stalin's USSR with the introduction of collectivisation and farming communes but quickly gave up on these policies as the rural population stood in staunch opposition. The increase of the land ownership cap to 10 hectares with the 2nd agrarian reform of 1953 lead to the decline in communal farming. This process had many similarities with the NEP present 30 years earlier in the USSR.

5. Conclusion

Despite different circumstances, it is safe to conclude that changes in property relations in post World War II Yugoslavia were directly inspired by those in the USSR but were introduced and enforced less rigidly. Both countries largely followed the same ideological principles of the Marxist-Leninist doctrine while attempting to eradicate capitalism and private property. However, the two states had somewhat different reasons to reintroduce private ownership of the farmland and small scale means of industrial production. The USSR adopted the "NEP" to help the economy recover from

[10] DRUŽIĆ, Ivo: *Prosvijećeni industrijalizam [Enlightened Industrialism]*. Zagreb, 2010, Nakladno-istraživački zavod „Politička Kultura".

[11] The Editors of Encyclopaedia Britannica: *New Economic Policy. Soviet history [1921–1928]*. https://www.britannica.com/event/New-Economic-Policy-Soviet-history. [Access on October 14 2022].

war and ensure internal stability. On the other hand in Yugoslavia giving up collectivisation was result of the need to politically oppose the USSR through the adoption of a completely new doctrine of socialism known as "workers' self-governance" after 1948.

Matija MATIĆ: Transformation and privatization of property in Croatia during the 1990s

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1. Historical context of privatization

With the death of Josip Broz Tito in 1980, the phase of complete disintegration of the constitutional and political system of Yugoslavia began. Difficulties in the functioning of the system and the political crisis in Kosovo further destabilized the country, which was further provoked by a serious economic crisis caused by the collision of capitalist elements and failed components of a socialist planned economy. The growth of nationalism and the collision of two different political directions, on the one hand, Slovenia and Croatia, which advocated for decentralization and the abolishment of federal funds, and on the other hand Serbia, which sought the strengthening of political unity and centralism.

In reality, these demands were a cover for Greater Serbian ambitions.[1] In the 1990s, under the pressure of western liberal ideals and ideas of a free-market economy, the process of transition began. Croatia, like other countries of Central and Eastern Europe, began the transformation from a planned economy to a market economy, the transformation of social and state ownership into private ownership (privatization), and the overall transition from socialism to capitalism.

[1] ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu od srednjeg vijeka do suvremenog doba* [*Croatian legal history in the European context from the Middle Ages to modern times*]. Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2021, p. 369.

2. Foundations for privatization in Croatia

Privatization can be defined as the: „*transfer by the central or local government of a business and its assets from the state to private ownership*."[2] The foundation for the beginning of privatization in Croatia was marked by the Christmas Constitution, adopted on December 22, 1990. The Constitution laid the foundation of a sovereign Croatian state.[3] Article 48 of the Constitution of the Republic of Croatia states in paragraph 1 that: „*The right of ownership shall be guaranteed*."[4] This provision meant a return to the freedoms of civil constitutionalism because the restrictions on property rights that were the essence of the earlier communist regime were removed.[5] In paragraph 2 of the same article, the Constitution states: „*Ownership shall imply obligations. Holders of the right of ownership and its users shall contribute to the general welfare*."[6] Ownership, therefore, is not only the right to use one's property and to exclude all others from that usage but also the duty to contribute to the common interest in proportion to the amount of that property. This norm represents the constitutional basis for the legal regulation of tax obligations based on ownership.[7]

3. Special circumstances of privatization in Croatia

Privatization in Croatia had typical features of privatizations in other countries of the Communist bloc and the process was very connected with insecurity, unemployment, poverty, and inequality. But there were some special circumstances. The first problem is the special concept of social ownership. Namely, it was determined not as a legal, but as a socio-economic relationship, so there was no proper holder of rights to things.

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[2] VUKOVIĆ, Dijana – MAMIĆ SAČER, Ivana: The impact of privatisation process on business performance of the selected companies in the Republic of Croatia. *Ekonomski pregled [Economic review]*, Vol. 69, No. 6, 2018, p. 622., https://doi.org/10.32910/ep.69.6.1

[3] ČEPULO, *op. cit.*, p. 375.

[4] The Constitution of the Republic of Croatia.

[5] SMERDEL, Branko: *Ustavno uređenje europske Hrvatske [Constitutional arrangement of European Croatia]*. Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2020, p. 366.

[6] The Constitution of the Republic of Croatia.

[7] SMERDEL, *op.cit.*, p. 366.

The concept of rights was not absolute for anyone, so one part of ownership belonged to labor organizations (right to use, arrangement), and the other part to workers' councils (right of management, arrangement of income). Given that the councils and labor organizations included members who were politically dependent on the SKJ (League of Communists of Yugoslavia) and not experts in the economic field, this led to irresponsible business and irrational consumption. What is more, unclear property relations and property rights led to low productivity so that the system accumulated losses. Another special condition is the turbulent war and the post-war period. The war conditions inevitably resulted in great insecurities, reducing the opportunities of war-affected citizens to participate in privatization and deterring a significant part of investors.[8]

4. Privatization models

The privatization process could go in two basic directions. The first way is free distribution, while the second is a sale model. Croatia chose the second model considering that it wanted to obtain the necessary revenues for the already depleted treasury. However, the problem with the second model is that it takes a lot more time. It was difficult to value assets given that there is no relevant record of profitability to base it on and a large proportion of companies were ultimately not profitable.[9]

5. Markovic's Yugoslav privatization

Privatization in Croatia consisted of several phases that were defined by changes in legislation or institutional mechanisms that monitored the process itself. Even earlier, SFRY passed the Privatization Act, which was intended to replace the social ownership

[8] RAČIĆ, Domagoj – CVIJANOVIĆ, Vladimir: *Privatizacija u Hrvatskoj: Početni uvjeti, procesi i implikacije [Privatization in Croatia: Initial conditions, processes and implications]*. Zagreb, 2004, Ekonomski institut, Zagreb, pp. 149–151.
[9] *Ibid.*, p. 151.

of companies with mixed ownership. It encouraged employees and other citizens to buy a limited quantity of shares at a discount, but without taking 50% or more shares, which would've resulted in taking the control of a company. Given that the breakup of Yugoslavia limited the effects of this initiative, it was ultimately poorly implemented, laying even more difficult foundations for more consistent privatization by creating yet another completely new model of ownership.[10]

6. Phases of privatization

6.1. 1st phase of privatization

The first phase (1991-1992) was marked by the adoption of the Law on the Conversion of Social Enterprises. The original goal of this phase was intended to be carried out as a controlled and decentralized sale of former socialist assets (conversion of social and mixed ownership.) The act established several possibilities that companies could choose independently. If they failed to complete the process within the deadline, their shares should had been transferred to state funds. The problem with this phase was that the deadlines were too short, so most of the shares were finally transferred back to the state funds, and the privatization practically in many cases did not even begin at all. There were also other problems, such as low liquidity of shareholders and a very small number of them. Finally, 45.95% of the companies entered the state funds.[11]

6.2. 2nd phase of privatization

The practically unfinished privatization created the foundation for the second phase, which took place from 1993 to 1996. This phase of privatization included the sale of a huge part of property and assets to the so-called „*strategic investors*", who in numerous cases were entrepreneurs connected to the political elite. In this phase, a very large role

[10] *Ibid.*, p. 152.
[11] *Ibid.*, pp. 152–153.

was played by the ruling party (HDZ). HDZ managed the privatization according to its own criteria, in order to maintain political and economic power (crony capitalism). HDZ contributed majorly to weakening of legal frameworks, which was reflected in constant changes in legal provisions, a politically dependent judicial branch, arbitrariness of decisions, and a hugely politically suitable administration that lacked professional competence. The new owners who engaged in illegal manipulations were not even faced with appropriate sanctions. In line with this, even the legal regulations stipulated that there would be no trials for business/commercial offenses unless the malfeasance occurred within 5 years.[12]

6.3. 3rd phase of privatization

The third phase, called coupon privatization, was carried out in 1997 and 1998. Since the privatization was carried out during the war and post-war reconstruction, it resulted in the unfavorable treatment of citizens affected by the war. Such citizens received privatization coupons that they could exchange for shares in the offered companies. Coupon privatization involved a shift away from a general orientation of selling towards the idea of the free distribution of shares. However, even this phase was filled with numerous malpractices of the type where numerous illiquid companies that have not operated for years were offered on the one hand, and those that had some value in them were given to privileged persons who were in a close relationship with the ruling party, again, showing an example of crony capitalism.[13]

7. Positive and negative effects of privatization

Now that 30 years have passed since privatization, we are allowed to make a thorough assessment of the effects of privatization. We can conclude that it has both positive and negative effects. The main positive effect of the transformation of property is

[12] *Ibid.*, pp. 158–159.
[13] *Ibid.*, p. 155.

definitely the transition from the system of *„non-ownership"* to the system of known owners vested in private ownership. It is one of the starting points for the practical formation of a transparent capital market economy. The second effect is the beginning of the creation of an entirely new economic system based on a new level of formal-legal responsibility, and the beginnings are known to be the most difficult. Privatization carries within it the roots of transition so that in accordance with privatization, not only an economic transition was achieved, but also a political one.[14] However, this is a very small number of positive effects. The following should be singled out from the negative effects.

Privatization created new owners who bought companies for trading, not for business and development structuring. The cheap and coupon-based way of acquiring ownership in itself reduced the responsibility of any reasonable and meaningful management of companies, which has led to the irrational collapse of large business systems. Fragmentation and irrational distribution of potential led to a huge wave of job losses in the context of technological redundancy. The loss of work potential created the basis for mass emigration, the effects of which are particularly felt even today. In addition, the lack of a transparent privatization strategy resulted in illegal employment and the appearance of clientelism and corruption already at the very beginning of the sovereign Croatian state.[15] Today, the state has shares in more than 1,100 companies and majority ownership in approximately 160 companies. Most of these companies are financially doing poorly.[16]

8. Conclusion

In conclusion, it can be said that the perception of Croatian citizens was that the privatization was carried out in a relatively unfair manner. Privatization was started

[14] GREGUREK, Miroslav: Stupanj i učinci privatizacije u Hrvatskoj [Degree and effects of privatization in Croatia]. *Ekonomski pregled [Economic review]*, Vol. 52, No. 1–26, 2001, pp. 180–181.
[15] *Ibid.*, pp. 181–185.
[16] RAČIĆ – CVIJANOVIĆ, *op. cit.*, p. 157.

more out of political and budgetary necessity, and less because of the technological and managerial necessity of the companies, which would've developed their competitiveness and would've had a more positive effect on the final integration into the EU. The state today still controls a large part of the economy and subsidizes the companies it owns to a significant extent. The socially and economically sustainable system of corporate governance in Croatia is still, to put it mildly, in its beginning stages.[17]

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

Eszter Kata HORVÁTH: The Wars of the Roses as a War of Succession

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The Wars of the Roses were a series of dynastic conflicts in late medieval England between the houses of York and Lancaster. This period can be described as a near-constant political struggle between the parties, interspersed with shorter periods of armed struggles. These wars – albeit their historical significance is debated[1] – have captured the interest of scholars and novelists alike. The wars were centred around the question of the succession to the throne. The rules and realities of how the crown is inherited. Therefore, the main focus of this work is to investigate the rules concerning the succession.

1. Historical Context

The events of the Wars of the Roses took place between 1455 and 1485. The struggle culminated in the Battle of Bosworth in 1485, when the victorious Tudor-dynasty began their rule in England. Since the war-waging factions, i.e., the houses of York and Lancaster, were both descendants of Edward III (1312-1377), his reign shall be a good start in our paper. Edward III was one of the longest reigning monarchs of his time. By the end of his life, he outlived several of his children, including his eldest son and heir, Edward, the 'Black Prince.' After the king's death, his grandson, Richard of Bordeaux (Richard II), the son of the 'Black Prince' succeeded the throne, who reigned for a relatively short period, between 1377 and 1399, when he was forced to abdicate the throne for the sake of his cousin, Henry Bolingbroke (Henry IV). Henry IV ruled between

[1] HICKS, Michael: *The Wars of the Roses, 1455–1487*. Oxford, 2003, Osprey Publishing, p. 8., https://doi.org/10.4324/9780203499481

1399 and 1413 as the first Lancastrian king. For a brief period, the rule of the Lancastrian dynasty seemed sure by giving three consecutive monarchs to the throne. Namely, Henry IV was succeeded by his son, Henry V (1413-1422), who was also succeeded by his son, Henry VI (1422-1471).

The Wars of the Roses began during the reign Henry VI, who was deemed unfit to rule by his contemporaries, thus the economic and military crisis of the 1450s (the end of the Hundred Years War, with the defeat of the English) bloomed into a political crisis.[2] The nobles called for reform, with Richard, Duke of York spearheading the cause. Richard was not only the richest and most influential nobleman at the time, but he was also a prince of the blood. Henry VI refused the call for reform, and the nobles were unable to carry their will through with political or military force.

The defeat of the reform-nobles did not, however, mean that they were no longer interested in change. More political and military battles followed, which lead to the Duke of York eventually claiming the throne of England for himself, based on his descent from Edward III through his mother (Anne Mortimer), who was a descendant of the second oldest son of Edward III (Lionel). His claim rested on the fact that the Lancaster were descendants of the third son of Edward III (John of Gaunt), making the York line senior. At the same time, House York and their supporters gained political and military advantage. This was the context of the birth of the Act of Accord in 1460. The Accord ordered that after the death of Henry VI the Duke of York would succeed the throne, followed by his descendants. This was not enough to bring peace to the kingdom because the fights continued, and the Duke of York himself was killed in the battle of Wakefield in 1460. His son, Edward continued his politics, by securing victory. As Edward IV, he began the first phase of his reign in 1461.

Edward IV reigned in relative peace for the next ten years, but the tension started to resurface at the turn of 1469 and 1470. It was this year when his former ally, Richard Neville, the Earl of Warwick (the 'Kingmaker') rebelled against him, trying – and failing

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

– to place Henry VI and his heirs back on the throne of England. His rebellion ended in 1471, with the battles of Barnet and Tewkesbury in the same year, so Edward IV could reign uninterrupted until his death in 1483.

The last period of armed conflict came with the death of Edward IV. His death left his two young sons not old enough to rule. Edward's brother, Richard of Gloucester came into power, first as Lord Protector, then, after the disappearance of the sons of Edward IV, as king, reigning from 1483-1485. His short reign was riddled with trouble, and ended with the uprising of Henry Tudor, which culminated in the 1485 Battle of Bosworth, where Richard III lost his life and his crown, and Henry VII (1485-1509) started the rule of the Tudor dynasty.

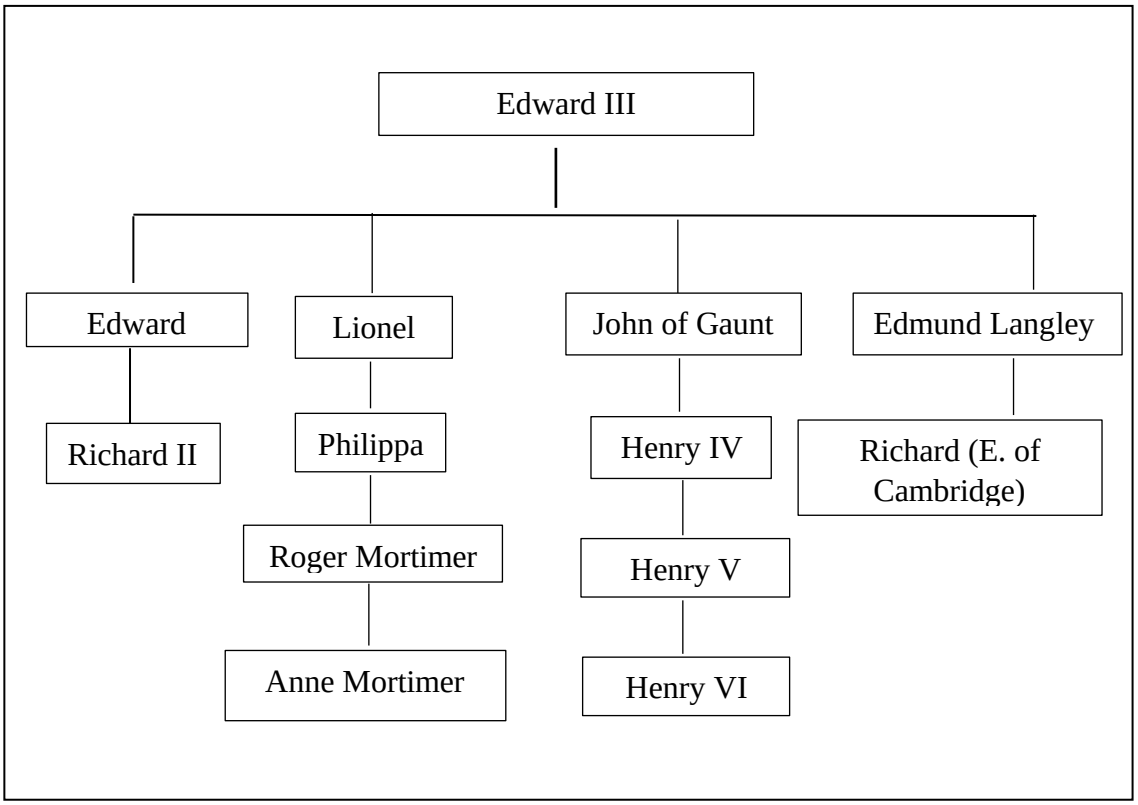

Figure 1. Edward III and his children; the Houses of York and Lancaster

2. The Ancestor of the Wars – Edward III's Reign and Entail

Edward III's entail (dated: 1376 or 1377)[3] aimed to ensure that the succession to the throne was problem-free, delineating a line of successors after the death of the king. Based on this, the line of succession was as follows. After Edward III's death the next ruler were to be his grandson, Richard of Bordeaux, and in the case of his death without leaving any heirs, Richard's uncle, John of Gaunt and his heirs were next in line to the throne. Edward III's second son, Lionel, and his heirs (his daughter, Philippa, and her son Roger Mortimer) are however rather conspicuously missing from the line of succession, posing the question: why would Edward III favour the line of his third son over the line of his second son?

This was not the first time in English history that a ruler designated his heirs on his deathbed. Examples can be found as early as the Anglo-Saxon times. One important case for this was the appointment of Harold Godwinson at the deathbed of Edward the Confessor (1042-1066) in 1066. (Though in that instance Godwinson's succession was not secure – in the end it was William the Conqueror (1066-1087), who managed to sit on the English throne.) Richard the Lionheart (1189-1199) acted similarly when he appointed his younger brother, John the Lackland (1199-1216), on his deathbed.

The entail as a legal instrument provided a more secure way of designating the heirs to the throne. Entails were used as a way to name successors outside of the frames of common law.[4] It is perhaps not surprising then, that Edward III was not the only one who used this legal device for the designation of his successors. One notable example prior to Edward III's entail was his grandfather's, Edward I's one. In that case, the order of succession was laid down as follows. After the king's death, his surviving son, and his heirs (male and female) would have followed, then the line would have continued with the king's surviving daughters and their heirs. This meant that hypothetically not

[3] BENNETT, Michael: Edward III's Entail and the Succession to the Crown, 1376-1471. *The English Historical Review,* 1998, Vol. 113, No. 452., p. 583., https://doi.org/10.1093/ehr/CXIII.452.580

[4] SPRING, Eileen: *Law, Land & Family: Aristocratic Inheritance in England, 1300 to 1800*. Chapel Hill, 1993, University of North Carolina Press, p. 28.

only sons, but daughters could inherit the throne of England. Edward's III entail in turn stated the opposite. He entailed the crown in the male line, by excluding the heirs of his second son, Lionel, duke of Clarence, from inheriting the crown.[5] There is however one common feature between the two entails. Namely, both delineated a line of successors, rather than naming a single heir.

It is not clear why Edward III chose to exclude the female line from the line of succession. One possible explanation is that he wanted to stay in line with his politics regarding aristocratic inheritance at the time, understanding that it was during his rule that restricting the inheritance of aristocratic titles to tail male became more popular.[6] This decision is even more interesting if we consider his politics regarding France, since his claims to the French throne were based on his descent through his mother. It is also important to note that at this point in English history, no specific rules excluded women from inheriting the throne. There was even previous example of a woman inheriting the crown, namely, Empress Matilda, daughter of Henry I (1100-1135), who became heir to the throne after the death of his brother after the White Ship incident. She, however, never managed to effectively rule. Due to the political and societal characteristics of that time, her cousin, Stephen of Blois ended up securing the throne. Their conflict caused a long period of anarchy and civil war. It ended with the rule of the Plantagenet-dynasty, beginning with Henry II (1154-1189). Henry inherited his claim through his mother, Matilda herself. It is perhaps also interesting to note that Stephen himself based his hereditary right on the descent through his mother, Adela of Normandy, the Conqueror's daughter.

Another interesting thing to be noted in Edward III's entail is the emergence of the principle of representation. This is one of the principles of intestate succession. It means that at the time of the death of an older brother, his sons would have inherited first, over a younger brother, so before the uncle, and the sons of that younger brother, so before the cousins. This principle became commonly accepted in England around

[5] BENNETT, *op. cit.,* p. 591.
[6] MCFARLANE, K. B.: *The Nobility of Later Medieval England*. Oxford. 1973, Clarendon Press, pp. 272–273.

this time, i.e., in the 1300s.[7] It based on this principle that after the death of Edward III, Richard of Bordeaux was next in line, ruling as Richard II from 1377 until his dethronement in 1399, when the first monarch, Henry IV from the house of Lancaster seized power.

How successful was Edward III in ensuring the line of succession based on his will? This period in history can overall be characterised by the relative weakness of the king's will. It could only prevail if the nobles agreed to it, or at least if they did not directly oppose it. Edward III was one of the most successful rulers of his time, at least for a period in his rule, which can be attributed to his military successes in the Hundred Years War (1337-1453) in France. It is important to note, however, that in order to be successful in his military ventures, he needed the financial aid provided by the nobility, which lead to the fact that it gained unprecedented influence in the governing of the land. This meant that the success of the king in his country was tied to the military successes in foreign countries, therefore the strength of kings varied by the twists and turns of the Hundred Years War.[8] These issues were out of the range of law, and yet played a key role in the succession to the throne. This illustrates one of the main takeaways of this paper. In late medieval England, even with the existence of rules concerning the succession of the crown, this question was often decided upon factors out of the spectre of the law. Another important remark is that even in the uncertain and politically unstable century following the death of Edward III, his entail was not mentioned as a relevant precedent, moreover, the emergence of the house of York to the throne was in direct opposition to it.[9]

[7] KISTELEKI, Károly – LÖVÉTEI, István, – NAGYNÉ SZEGVÁRI, Katalin, – RÁCZ, Lajos, – SCHWEITZER, Gábor, - TÓTH, Ádám (ed.: RÁCZ, Lajos): *Egyetemes állam- és jogtörténet, Ókor-feudális kor [Universal Legal History, Ancient and Feudal era]*. Budapest, 1998, HVG-ORAC Lap- és Könyvkiadó Kft., p. 249.
[8] MYERS, A. R.: *England in the Late Middle Ages*. Harmondsworth, 1971, Penguin Books, p. 27.
[9] BENNETT, *op. cit.,* p. 599.

3. The Rise of the Lancaster – The Reign and Dethronement of Richard II

Richard II's rise to the throne was relatively problem-free, especially considering the turbulent events of the following century. Edward III's entail named him as the lawful successor to the throne. It is important that by this time, the principle of representation was accepted in England. Thus, he was invested as Prince of Wales in 1376, and was declared heir apparent before the Parliament.[10] His rule (1377-1399), however, was far from problem-free. The king was only ten years old when he assumed the throne, therefore in the first few years of his reign, a council of nobles ruled in his name. The turning point occurred in 1385, since Richard reached the age of maturity, and secured his first military successes in Scotland. Thus with the great ambition of the youth, he started to reign without the influence of his councillors. At this point, an important decision was made, i.e., the naming of his successor. In case of his death without any heirs left behind, the next in line to the throne was his cousin, Roger Mortimer. This was widely accepted at the time, for example the monks of Westminster referred to the crown passing to the Mortimers by hereditary right as a matter of fact.[11] Richard II's intentions regarding Roger Mortimer's succession are however unclear. Later on, Richard didn't show any signs of special interest to the Mortimers.[12] Nevertheless, Mortimer's succession was not the probe of the circumstances, since his death in 1398 prevented the actualisation of the Mortimer claim.

The year 1399 was another great turning point for Richard's reign. By this point, the problems of the time became too great to be ignored. The war with the French dragged on, the military ventures were unsuccessful in Ireland let alone the growing threat on the Scottish border. The king needed money to finance his foreign policy, and he fulfilled this need by levying taxes. The Parliament – growing in power at the time – opposed these taxes. Throughout the 1300s, the role of the Parliament had been

[10] ORMROD, W. Mark: The DNA of Richard III: False Paternity and the Royal Succession in Later Medieval England. *Nottingham Medieval Studies,* 2016/60, p. 197., https://doi.org/10.1484/J.NMS.5.111283
[11] HECTOR, L.C. – HARVEY, B.F. (eds.): *The Westminster Chronicle, 1381–1394*. Oxford, 1982, Clarendon Press; pp. 192–195.
[12] BENNETT, *op. cit.,* p. 598.

transforming. It became a central figure in the governing of England, separately from the King and his Council, an entity that started to reduce the extent of the execution of the King's will significantly. It started to represent the will of the "nation" by offering support only to those monarchs, who respected the parliament's authority as well as ruled effectively.[13] With these circumstances in mind, the downfall of Richard II becomes painfully clear. His unsuccessful foreign policy led to domestic turmoil, which then in turn gave a chance for his opposition to gain traction. The leader of his opposition was his cousin, Henry Bolingbroke, who led his armies to victory against Richard's in 1399 and deposed him from the throne.

Henry Bolingbroke, or Henry IV (1399-1413) used several arguments to make his claim to the throne. First, since he defeated the king's armies, securing the throne with force, he invoked to the right of conquest. Second, he cited Richard's unsuccessful rule, and in turn his own capability of being an effective monarch. He also referenced his hereditary right to the throne. However, it is important to emphasize, that he did not invoke Edward III's entail, instead, he opted to allude generally to his royal descent.[14] The Parliament also played an important role, by making his rule legitimate. After Henry's military victory, Richard II's abdication, which was made in captivity, meaning that his free will was questionable at the least, was read in front of the Parliament, just as Henry's claim and titles to the throne. Finally, the Parliament accepted Henry IV as the King of England, making the starting point for the reign of the Lancaster-dynasty.[15]

This was another instance in the history of late medieval England when the fate of the throne was decided mainly on factors out of the law. Richard II lost his throne due to the opposition he faced from the nobility, much like his ancestor, Edward II (1307-1327), Edward III's father. From this angle, there is a glaring similarity between Edward III and Henry IV. They both secured their thrones by the power of the nobility

[13] HOLDSWORTH, William Searle: *A History of English Law Vol. 2.* London, 1903, Methuen & Co Ltd., p. 442.
[14] BENNETT, *op. cit.,* p. 599.
[15] MYERS*, op. cit.,* pp. 34–35.

after the partly voluntary abdication of their predecessor by citing their hereditary right.[16]

4. The Reign of the Lancaster

After Henry IV's rise to power, the rule of the Lancaster seemed secure. The reason for this lied in two main factors, namely in the fact that both Henry IV and his successor, Henry V (1413-1421) had sons, and in their military successes. The second factor was especially relevant in the case of Henry V, whose rule was one of the highest points of the Hundred Years War for the English.[17] This meant that for these two kings the incentive for delineating the line of succession was rather weak.[18] In spite of this tranquil situation, the question of the succession was not far from Henry IV's mind. In 1404, the Parliament recognised his son as heir apparent to the throne and recognised too the younger children's title including the male and female line on the rules of primogeniture. Due to the changing political circumstances, like Richard II's death, rebellions supporting the Mortimer claim, it once again became important to create an entail solely for the male line to the throne of England. In 1406, this entail was created and accepted by the Parliament. It is important to note, however, that this only excluded Henry IV's own daughters from succeeding to the throne. Indeed, hypothetically any other woman could still become the queen of England.[19] Yet, for reasons that are still unclear to this day, the regulation was revoked in short time after. The conflict with the French could perhaps offer a feasible explanation for the revocation. Since, the entailing the throne in the male line came too close to the Lex Salica, the rules governing the inheritance in France, which prohibited women from inheriting land.[20] This also goes to show that the order of succession was not simply a

[16] *Ibid.*, p. 38.
[17] *Ibid.*, p. 122.
[18] BENNETT, *op. cit.,* p. 601.
[19] ORMROD, *op. cit.,* p. 211.
[20] CORCOS, Christine: From Agnatic Succession to Absolute Primogeniture: The Shift to Equal Rights of Succession to Thrones and Titles in the Modern European Constitutional Monarchy. *Michigan State Law Review*, 2012/1587, p. 1602.

question of law, though it was heavily influenced by the leading political views and goals of the time.

The fact that the question of succession was relatively precisely decided during the reign of the first two Lancastrian kings did not mean that their rule came without their own problems. This period came with the weakening of the king's executive powers. The Lancaster-dynasty, that rose to power with the help of the nobility, was acutely aware of how easily this same power could cost them the throne. This meant that the seizing of power on the side of the nobility, resulted in losing the authority on the side of the kings proportionally. This situation, coupled with the costly military expeditions in France and elsewhere, was one of the leading causes of the beginning of the Wars of the Roses, which started during the reign of the third Lancastrian king, Henry VI (1422-1461 and 1470-71).[21]

When Henry V died, he left his 9-month-old son as his heir. This meant that England's king would not be of age for a long while, leaving the country in the hands of a council of the strongest noblemen of the land. This situation led to the nobles securing even more wealth, power, and influence. Perhaps the damage could have been reversed, had Henry VI grown up to be an energetic and strong-willed ruler, but it was not to be, as the nobility continued to assert their dominance over the king. At the same time, the tide changed in the course of the Hundred Years War. The English had less and less military success, and the costs of war placed too much burden to the society. The calls for peace became more frequent. Even though Henry VI only governed in name, i.e., the real power was in the hands of the nobility, the responsibility, thus the title was still his, as being the king.[22] This created circumstances comparable to those around the time of Richard II's deposition. However, there is one important difference between the two kings. In the case of Richard II, his absolutistic tendencies caused his downfall, whereas for Henry VI his weakness caused the biggest problems. Still, the centre of the problem remained the same. Namely, whether or not

[21] MYERS, *op. cit.,* pp. 115–118.
[22] *Ibid.*, p. 125.

the king was capable of ruling effectively. There is a sort of irony in the situation, seeing as both the rise and downfall of the Lancaster had to do with the ability (or the lack thereof) of effective ruling.

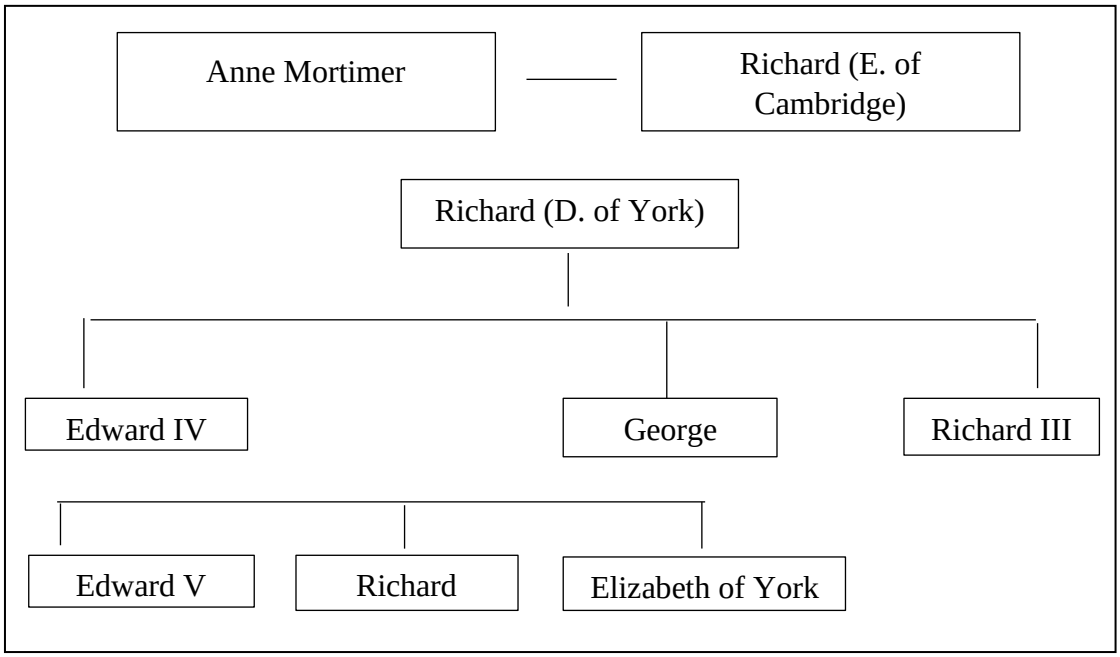

Figure 2. The House of York

5. The Wars of the Roses – The House of York

Richard, Duke of York, one of the richest and most influential noblemen of his time, began his rise to political importance during the reign of Henry VI. He could trace his lineage back to Edward III on both his maternal and paternal side. He first started to advocate for reform in the 1450's. Namely, he wanted a more efficient government, and, perhaps more importantly, wanted to weaken his political adversaries, most

notably Edmund Beaufort, Duke of Somerset, one of the chief advisors of the king.[23] After 10 years in opposition to the king and his government, he had waited enough, since his calls for reform were not answered, he committed a surprising and controversial step. He claimed the throne for himself, both with military and political force. After his military success, he arrived in London, and placed his hand on the empty throne. Afterwards, he called on the Parliament to make his claim legitimate through his descent from his mother, Anne Mortimer.

This raised several questions. At first, was the house of York the more senior line compared to the house of Lancaster? After all, they based their claim on arguments in favour of the Mortimer line, meaning on their descent from Edward III's second son, Lionel, while the Lancaster derived their title from Edward's third son, John of Gaunt. Secondly and parallel to the first question, could a woman even pass on the right to rule? At that time, the question wasn't really whether a woman could rule in her own name, rather whether it was possible to inherit the crown through her title at all. The task of deciding these questions then fell to the Parliament. If it decided to accept Richard's claim, it would implicitly answer yes to the questions above; if not, then the answer would have been a no. The Parliament however could not make this decision. They reasoned, that even though the Yorkist claim based on the rules of inheritance in common law was stronger, the Lancaster have been on the throne for the past 60 years with their rule unquestioned and essentially gained prescriptive right to the throne of England.[24] The two parties had to come to a political compromise in this stalemate situation. According to the Act of Accord of 1460, Henry VI could keep his crown until his death, but upon his death, Richard, Duke of York would succeed him. The Parliament therefore based its decision both on the realities of the time, namely, the prescriptive right of the House of Lancaster, and the legal principles concerning inheritance, namely, House of York's stronger claim to the throne. However, in effect, the Act of Accord

[23] JONES, Michael K.: Somerset, York and the Wars of the Roses. *The English Historical Review,* 1989, Vol. 104, No. 411, pp. 285–307., https://doi.org/10.1093/ehr/CIV.CCCCXI.285
[24] BENNETT, *op. cit.,* pp. 580–581.

primarily favoured the legal argument of York, rather than House Lancaster's argument rooted in practice, since after the death of Henry VI, it would be Richard, and his successors, who could claim the throne. This agreement was not without problems, for example, it proved to be unacceptable for Margaret of Anjou, Henry VI's wife, since her son from Henry was now excluded from the line of succession.[25] This meant that war broke out yet again, during which Richard himself lost his life. His cause was not forgotten however, rather it was continued by his son, Edward, who proved to be a successful military leader, eventually rising to the throne of England in 1461 as Edward IV.

The rise of the House of York to the throne was yet again a political and military affair, rather than one based solely on legal principles. Still, the question of the legality of the York rule was not forgotten. It was raised time and time again, mainly by the supporters of the Lancastrian side of the conflict. One very notable example of this is John Fortescue, one of the most prominent jurists of English legal history, who reasoned that the Yorkist kings could not be the rightful rulers of England. His argument was based on the rumours at Edward III's court. He claimed that Edward III's daughters denounced their right to the throne before the Parliament, therefore their descendants also could not have right to the throne. It is important to note however, that there exists no other source to support this statement, making its validity questionable the least.[26] One other interesting fact is that Fortescue did not even allude to Edward III's entail, which would have been a relevant precedent,[27] instead he chose to question Edward IV's claim based on the aforementioned reason and on another dubious argument, namely, that Lionel's daughter, Philippa, was actually not his daughter, making the whole York family illegitimate, therefore unable to inherit the

[25] LYON, Ann: The Place of Women in European Royal Succession in the Middle Ages. *Liverpool Law Review,* 2006/27, p. 388., https://doi.org/10.1007/s10991-006-9007-9
[26] ORMROD, *op. cit.,* p. 211.
[27] BENNETT, *op. cit.,* p. 603.

throne. This allegation had no evidence at all to support Fortescue's side in the dispute.[28]

Even though Edward IV gained the throne by force, and his rule could not be called problem-free, from 1471 onward, his rule became solid enough to become one of the most successful monarchs of his time. The reason behind this was, once again, out of the legal spectre. He strengthened his rule through acquiring the lands of the nobles revolting against him, with the help of his own lands as head of the House of York, and the fact that a good fraction of the nobility lost their lives during the armed conflict leading up to his gaining the throne. He also managed to resolve, at least for a time, the turbulent relationship between the English and the French. Through these means, he managed to raise the income of the Crown, making him the first solvent king in generations.[29] His situation seemed so stable, that had his heirs been adult at the time of his death, English history could have taken a completely different turn, perhaps beginning a transformation into the continental type of an absolute monarchy.[30] However, it was not the case, when Edward IV died, his older son, Edward V was only 12 years old, which once again led to a weaker monarchy turning the course of events again to another succession crisis.

Thus began one of the most turbulent few years in the history of the English monarchy with the events of Richard III's controversial rule, the boys disappearing in the Tower and finally the rise of Tudor. Edward V's uncle, Edward IV's younger brother, Richard, then Duke of Gloucester, became Lord Protector on the young king's side, then shortly after Edward IV's death, Richard managed to become the King of England. The basis of his coming to power was in the validity, or rather, the alleged invalidity, of Edward IV's marriage to Elizabeth Woodville. Therefore, the legitimacy of the children born in that union. These claims were validated by the Parliament with the passing of the Titulus Regius statute in 1484, which paved the road to kingship for Richard. This

[28] ORMROD, *op. cit.,* pp. 211–212.
[29] MYERS, *op. cit.,* p. 199.
[30] *Ibid.*, p. 201.

statute is important for two reasons. On the one hand, its content defines the basis of Richard III's claim to the throne, while on the other, it illustrates just how important a role the Parliament started to play in the question of succession.

So, what exactly was the often-contested basis of Richard's rule? The argument was based on the marriage between Edward IV and Elizabeth Woodville, his queen. Titulus Regius itself stated, that the marriage was invalid on the grounds of bigamy, since Edward had been precontracted to marry another woman, Lady Eleanor Talbot.[31] This would have meant that the children born of Edward IV's and Elizabeth Woodville's union were illegitimate, therefore unable to inherit the throne. Titulus Regius even went as far as to allude to the gossip surrounding the legitimacy of Edward IV himself, and as a consequence, invalidated Edward's children.[32] An interesting note is whether the invalidity of Edward's and Elizabeth's marriage even determined the legitimacy of his male heirs. The two boys were born in 1470 and 1472 respectively, by which time Eleanor Talbot had died, which effectively terminated the marital contract, while Edward and Elizabeth lived together openly as a married couple. Moreover, this fact was accepted by both the Church and the nation.[33] One person whose legitimacy could be questioned based on these grounds, however, is Elizabeth of York, Edward IV's oldest child, born in 1465, before the death of Eleanor Talbot. The reason why this could possibly be important is that the Tudor-dynasty itself based a good portion of their legitimacy on Elizabeth of York being a princess of the blood.[34] However interesting this question is, it never played a long-term role in the succession to the throne. After Henry VII had acceded to the throne, he repealed Titulus Regius, and thus making the argument irrelevant.

One noticeable trend is that questioning the legitimacy of royal offspring became more prominent in 15th century England. This was not because any change

[31] LEVINE, Mortimer: Richard III – Usurper or Lawful King? *Speculum,* 1959, Vol. 34, No. 3, p. 391., https://doi.org/10.2307/2850815
[32] *Ibid.*, p. 397.
[33] *Ibid.*, p. 391
[34] *Ibid.*, p. 392.

occurred in the field of family law, rather because of the dynastic problems of the reigning families themselves.[35] These were mainly questions for the public to ponder and speculate, yet not used as actual reasons to dethrone any ruler. The illegitimacy of a child was used, for example, to explain why a king was incapable to rule, seeing as if he was not descended from the right family, he could not have inherited the required abilities needed to effectively rule a country. Proving the illegitimacy of a child was near impossible, since very little factual evidence could be collected at this point in history. It could only happen if the husband himself stated that the child was not his. Both canon law and common law required this affirmation.[36] This explains why this argument was not explicitly used during the turbulent times of England in the 15th century.[37] The only time the illegitimacy of the children was referred to in the question of succession was Titulus Regius itself, but as elaborated above, its argument was not based on the false paternity, or on concubine relationship, much more rather on an invalid marriage. It is also important to remark, that Titulus Regius was a statute passed by Parliament, a political body, and not by a court of canon law, which had the jurisdiction to pass judgment on cases such as marriage. This means that Titulus Regius reads more as a political document, not so much as a legal one concerning the law of marriages at the time.[38]

Richard III's downfall was in part brought about by his quest to strengthen his rule. By putting Edward's sons in the Tower in custody, and after that their consequent disappearance, while finally public opinion started to turn against him. Even though it is unclear to this very day why the Princes in the Tower lost their lives, public outrage was still directed against Richard. These circumstances presented a great opportunity

[35] ORMROD, *op. cit.,* p. 215.
[36] WOOD, Charles T.: *Joan of Arc and Richard III: Sex, Saints and Government in the Middle Ages*. New York, 1988, Oxford University Press, pp. 12–28.
[37] ORMROD, *op. cit.,* p. 189.
[38] LEVINE, *op. cit.,* pp. 396–397.

for the Lancaster cause. Their supporters rallied, and with the military power at the Battle of Bosworth in 1485, Henry Tudor managed to seize the crown.[39]

6. The Rise of the House of Tudor

When Henry VII (1485-1509) secured the throne for himself and his descendants, it proved to be a great turning point in the history of England. Not only did his reign end the Wars of the Roses, the reign of the Tudor-dynasty is generally considered to be the end of medieval England, and the beginning of (early)modernity. Henry VII himself was not necessarily a modern or even early modern monarch, but some important changes began during his years on the throne. He continued and completed the natural course of medieval traditions.[40] At the same time, the old and new structures and phenomena lived in a symbiosis. This was the first time that the most important political and legal questions and problems typical of the modern era started to come to the surface in England.[41]

So, where did this extraordinary dynasty come from? Henry VII himself based his claim to the throne on various reasons, hereditary right, the right of conquest and the ability to rule effectively. His descendants also had the advantage of their mother, i.e., Henry VII's wife. She was Elizabeth of York, the oldest daughter of Edward IV, who, at the time, had the political circumstances been in favour for her, or had she pursued it, had the strongest link to the throne. This marriage obviously also helped Henry VII himself in stabilising his position.[42]

Henry traced his lineage back to John of Gaunt through his mother, Margaret Beaufort, therefore was on part of the Lancastrian side of the conflict in the Wars of the Roses. This meant that he was a member of the powerful Beaufort family. They were

[39] MYERS, *op. cit.,* pp. 202–203.
[40] *Ibid.*, pp. 202–203.
[41] GUNN, Steven: Henry VII in Context: Problems and Possibilities. *History,* 2007, Vol. 92, No. 3, pp. 301–317., https://doi.org/10.1111/j.1468-229X.2007.00397.x
[42] MYERS, *op. cit.,* p. 203.

the descendants of the union between John of Gaunt and Katherine Swynford, first illegitimate, then, after their marriage, legitimised. Richard II, who was the king at the time, affirmed their legitimacy, stressing that they could inherit land and titles as if they had been born in the bonds of matrimony. [43] During the rule of the Lancaster-dynasty, the family became more prominent, with members including Edmund Beaufort, one of the chief advisors of Henry VI, whose conflict with Richard, Duke of York was one of the key factors behind the Wars of the Roses.[44] Once Edward IV became king, however, they were forced to retire from the political ground, only re-gaining importance with the help of Margaret Beaufort, who played an undeniably key role in Henry VII's accession to the throne.[45]

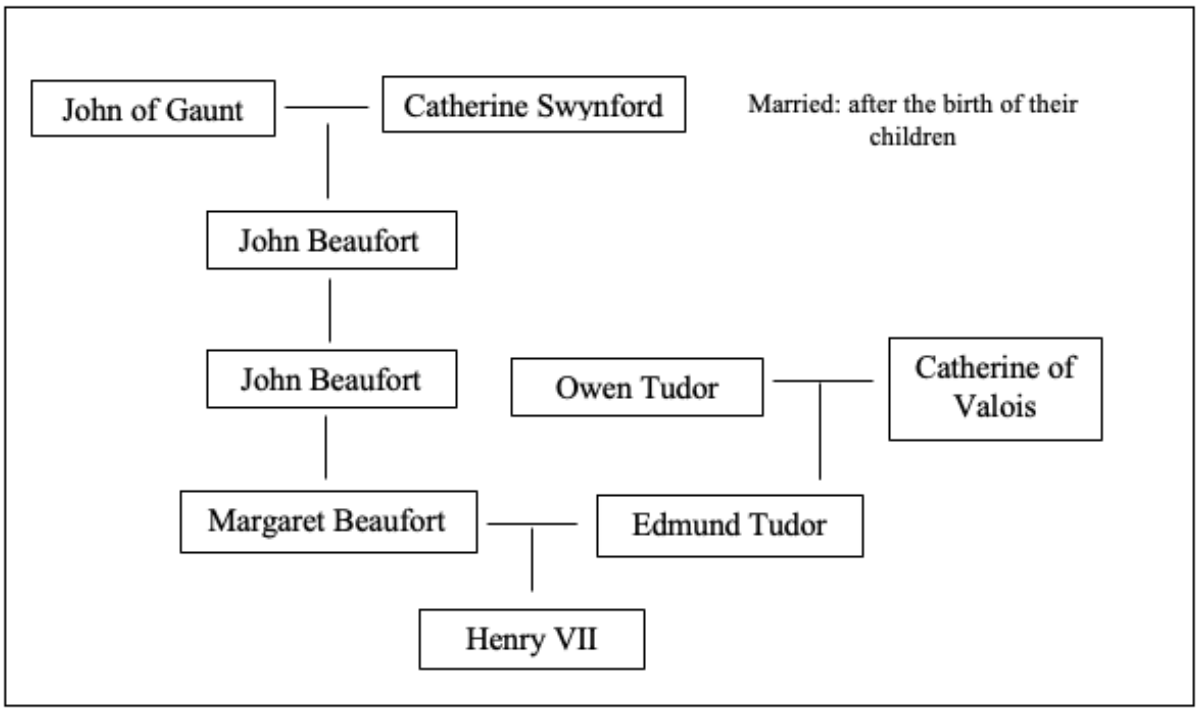

Figure 3. The descent of the Tudor-dynasty

[43] NATHEN, Amin: *The House of Beaufort: The Bastard Line that Captured the Crown*. Stroud, 2017, Amberley Publishing, p. 70.
[44] JONES, *op. cit.*, pp. 285–307.
[45] FISHER, Sally: „Margaret R": Lady Margaret Beaufort's Self-Fashioning and Female Ambition, In: FLEINER, Carey – WOODACRE, Elena (eds.): *Virtuous or Villainess? The Image of the Royal Mother from the Early Medieval to the Early Modern Era*. New York, 2016, Palgrave Macmillan, pp. 151–166., https://doi.org/10.1057/978-1-137-51315-1_8

Henry VII is often compared to William the Conqueror (1066-1087) based on the way they both gained the throne of England. Both were cases of a distant relative securing the throne with military force, and even though both had a claim to the throne, their right of conquest and their ability to hold onto to the throne were far more important in reality than any hereditary right or weak title. In the case of William I, he claimed that he was named the successor of Edward the Confessor, and Edward's subjects took an oath accepting and affirming this.[46] Henry VII claimed the throne based on his hereditary right through his mother, and the fact that there was no other possible male heir to the throne. The fact that they got the throne, did not mean in either case that everything was secure and problem-free. They both had their fair share of opposition and uprisings, conspiracies during their rule. For example, Henry VII's reign was not decisive enough in the first 15 years of his reign, it became undoubted around 1499, when the last possible York heirs to the throne were executed.[47]

7. Inheritance Law and Succession to the Throne

After examining the events of 14th and 15th century in England, it is important to look at how these fit into the frame of inheritance law. After all, succession to the throne is a sort of, if not the most important type of, inheritance.

The rulers of the Plantagenet-dynasty were not bound by common law rules concerning inheritance.[48] The comparison between inheriting land and the throne is nevertheless important, seeing as there were no concrete rules guiding succession up until the beginning of the 17th century. Note the fact that we are looking at inheriting land and not other possessions. In medieval England, just as well as in whole Europe, land played a vital role in economics, politics and in society. It was the base of a king's

[46] BAXTER, Stephen: Edward the Confessor and the Succession Question, In: MORTIMER, Richard (ed.): *Edward the Confessor, the Man and the Legend*. Suffolk, 2017, Boydell & Brewer, p. 87.
[47] MYERS, *op. cit.,* pp. 202–203.
[48] ORMROD, *op. cit.,* p. 190.

power, the key instrument in exercising his will. This crucial correlation between society and land is what highlights the reasons why there were such similar rules regarding the inheritance of land and succession to the throne. Without land, there would have been no medieval kingship, therefore it is a key factor to examine the law concerning the inheritance of land. One good example of this phenomenon is how after the Norman conquest, the rules of Norman inheritance law infiltrated into to the line of succession. Where equal partition between sons was not an option, for example in the case of the succession to the throne, the nomination of an heir was common practice, see the acts of William I, William II and Henry I, etc.[49] Yet, the partition of the land between the princes, as giving them both territorial authority and dominion was a practice until Henry II.

The rules of inheritance in common law started to take their final form around the 13th century, during Henry III's reign.[50] This meant the following basic rules: the first, and maybe most important one is that first the deceased's descendants inherited, the more distant relatives, collateral relatives, perhaps ancestors, could only come into inheritance if there were no direct descendants. The more distant relatives inherited upon the parentela system, where the order of inheritance was decided on the closeness of the relative to the decedent.[51] For example, if the decedent had no children of their own, their younger brother would inherit, in the event of the death of the younger brother, his children.[52] The order of inheritance amongst the descendants was based on five ground rules, such as a living descendant excluded their own descendants (1); a dead descendant was represented by their own descendants (2); male descendants preceded female descendants of equal degree (3); older male descendants preceded younger male descendants of equal degree (4); equal degree

[49] BAKER, John H.: *An Introduction to English Legal History, Fifth Edition*. Oxford, 2019, Oxford University Press, p. 285.
[50] POLLOCK, Frederick – MAITLAND, Frederic William: *The History of English Law Before the Time of Edward I. vol. 2*. Cambridge, 1895, Cambridge University Press, p. 260.
[51] BAKER, *op. cit.,* p. 286.
[52] SPRING, Eileen: The Heiress-at-Law: English Real Property Law from a New Point of View. *Law and History Review,* 1990, Vol. 8, No. 2, p. 275., https://doi.org/10.2307/743994

female descendants inherited together (5).[53] The principle of representation [(2)] was contested for a long time, it only became widely accepted at the beginning of the 14th century. The principle of primogeniture [(4)] was also a defining feature of the common law inheritance system at the time, which also meant that land could not be divided, only in the rarest cases, since if there was a male descendant, there was always only a single heir.[54] It is also clear to see that women were not excluded from inheriting land, but the system was clearly patriarchal, seeing as women could only inherit if there were no living male descendants.

The place of women is important both from the perspective of inheriting land and succession to the throne. In the English legal system women could also receive feudal fees.[55] From the early 12th century, if there were no male heirs, female heirs all inherited equally.[56] Female inheritance, though often overshadowed by male inheritance, played an important role. Based on the rules of common law, around 25% of all land was to be inherited by women, and around 42% of women were heiresses by common law.[57] These numbers however were only hypothetically true, reality was much different. Only around 8% of all estates were inherited by women.[58] The difference was caused by legal instruments created at least in part to make sure women did not come into their inheritance. One notable example is the practice of the so-called strict settlement. This meant that at the marriage of a common law heiress, the estate was entailed in the male line, thus reducing the father to life tenancy, and limiting the inheritance of the heiress. Later, it became more and more common to limit the inheritance of land and title to male descendants by the letter patent creating the title in the first place.[59]

[53] POLLOCK – MAITLAND, *op. cit.,* p. 260.
[54] KISTELEKI – LÖVÉTEI – NAGYNÉ SZEGVÁRI – RÁCZ – SCHWEITZER – TÓTH, *op. cit.,* p. 250.
[55] *Ibid.*, p. 149.
[56] BAKER, *op. cit.,* p. 287.
[57] SPRING, *op. cit.,* p. 276.
[58] *Ibid.*, p. 277.
[59] *Ibid.*, pp. 278–281.

How did the rules of inheritance affect the succession to the throne? First, it is important to note that women were not theoretically excluded from the line of succession, but it was the rarest of cases when a woman could inherit and keep the throne, and effectively rule England. This was because of the place of women in society at the time. The most common view was that only men could exercise proper military and political power.[60] This was closely bonded with the idea of suitability, (lat. idoneitas), accepted at the Fourth Council of Toledo, in 633. This meant that God, and in extension, the Church, only chose and anointed those people, who were suitable to take the throne.[61] Since the view at the time was that women were incapable of military leadership, which was an essential part of kingship, they, by definition, could not be suitable.

The place of women was more commonly in the background. Their knowledge and counsel were respected, even in certain cases in legal and political questions. One notable example is Empress Matilda. Even after she failed in securing the throne of England for herself, her views were respected, her counsel often sought out in questions concerning the customs and traditions of England, in short, the common law. This, however, was not common practice. The fact that Matilda herself was respected, because of her knowledge of languages, diplomacy and ruling, did not mean, that the capabilities of women were widely accepted and celebrated.[62]

Women's rule was not only contested based on their personal abilities or the lack thereof, but there were also dynastic and political reasons concerning female succession. Since daughters of monarchs often had dynastic marriages with foreign

[60] CORCOS, *op. cit.*, p. 1599.
[61] FÖLDI, András – KELEMEN, Miklós – KISTELEKI, Károly – MÁRKUS, Eszter – RIGÓ, Balázs – SIKLÓSI, Iván (ed.: FÖLDI, András): *Összehasonlító jogtörténet [Comparative Legal History]*. Budapest, 2018, ELTE Eötvös Kiadó, p. 136.
[62] VAN HOUTS, Elisabeth: The Abbess, the Empress and the 'Constitutions of Clarendon'. In: IBBETSON, David – JONES, Neil – RAMSAY, Nigel (eds.): *English Legal History and its Sources – Essays in Honour of Sir John Baker*. New York, 2019, Cambrige University Press, https://doi.org/10.1017/9781108672542.013

monarchs, there was a wide-spread fear of foreign countries gaining and exercising power over England, thus diminishing their own freedom.[63]

Despite this, there were some examples of female line succession on the British Isles in the medieval era. The most notable perhaps, is the case of Empress Matilda. Matilda became heir presumptive to the throne of England after the death of his brother in the White Ship Disaster of 1120. Her father named her heir in January of 1127, strengthening her claim with the oath of the nobility. It is important to note, that at the time, even though Norman law did not explicitly bar women from inheriting fiefs, women's inheritance was placed under their husband's disposal. It was also unheard of for women to succeed to a crown or a duchy.[64]

It is not so surprising then, that after the death of Matilda's father, Henry I, her uncle, Stephen of Blois (1135-1154) stepped up and claimed the throne of England. He claimed that on his deathbed Henry I released the nobles from their oath, no longer requiring them to uphold Matilda's succession. This meant that his reasoning did not explicitly rest on women's inability to succeed the throne.[65] This conflict between Matilda and Stephen of Blois led to civil war and anarchy, then ended with a compromise. After Stephen's death, Matilda's son, the later Henry II (1154-1189) inherited the throne.

This represents us two things. One is that the contemporaries of Matilda and Stephen did not think it impossible for women to act as a conduit through which the right to the throne passed, more so just for a woman to sit on the throne, seeing as both Stephen of Blois and Henry II based their claim on their descent through their mother.[66] Two, is that compromise was reached not because the law had an unquestionable answer to the situation at hand, but because of the need for stability and peace in the country after almost two decades of waging a civil war, meaning that,

[63] LYON, *op. cit.,* p. 365.
[64] *Ibid.*, p. 368.
[65] *Ibid.*, p. 369.
[66] *Ibid.*, p. 369.

once again, factors out of the terrain of law (extra-legal factors) also influenced the succession to the throne.[67]

The first instance of a woman being accepted as heir to the throne took place in 13th century Scotland.[68] In the 13th century in Scotland in the absence of a male heir, female succession could be permitted. This led to the acceptance of Margaret, the 'Maid of Norway' as the monarch of Scotland, without significant opposition. What makes this case so interesting is the lack of opposition from Scottish clans. This, however, can be explained by the lack of any other possible male heirs to the throne. Nevertheless, Margaret never became a proper ruler of Scotland. She died in 1290, on her way to Scotland, while still being a child.[69]

The 13th century was important for female succession in England as well. During Edward I's reign (1272-1307), after the death of his three oldest sons, he declared the rules concerning the succession. He stated that after his death his living son and his subsequent sons would inherit the throne, and in the event of his son's death, his daughters and subsequent daughters would be next in line. This meant that the rules of primogeniture would apply between both men and women. He also established, that the kingdom could only be ruled as one, it could not be divided like any other hereditary land would have been between the co-heiresses.[70]

In conclusion, female succession in medieval Europe was a rarity, which only happened under special circumstances. Even fewer and rare were the cases when women managed to stay on the throne and rule effectively. Much more commonly, their ascension was followed by civil war and uncertainty, or their husbands, sons or a council of nobles ruled the country in their place.[71] The reason for this was not necessarily a legal principle, which excluded women from the line of succession, more so the political and societal views on women at the time. Women's place in the line of

[67] *Ibid.*, p. 370.
[68] *Ibid.*, p. 376.
[69] *Ibid.*, p. 378.
[70] BENNETT, *op. cit.,* p. 591.
[71] LYON, *op. cit.,* p. 393.

royal succession is mirrored in the inheritance of land, where women were also not explicitly excluded from inheriting land. Women's succession was a last resort – it could only happen if the alternative was ending the dynasty.

8. Conclusion

In this article, I attempted to paint an overall picture of the succession question in late medieval England, with special attention on the place of women in the line of succession. Since at the time, there was no legal document governing the rules of succession to the throne, each and every king could only call upon the customs and traditions that came before them. Therefore, in the eventful centuries of late medieval England monarchs rested their claim to the throne on a wide array of reasons. The chief argument among them was the hereditary claim, though sometimes it only formed a background to the claim, rather than the main reason. An allusion to ineffective ruling was also frequent, as well as the use of force, or the alliance with an unhappy nobility.

This meant that all rulers of the time had a questionable claim to the throne. This was both due to and the reason for the wars and dynastic conflicts of the time. Overall, we can note that for the lack of a legal instrument governing succession, the fate of the throne was ultimately decided in the context of the circumstances, i.e., based on the events of real life.

The development of late medieval England, though rife with conflict, gave the basis for the rise of England during the early modern era. It was a period of great duality, thus new and old theories, legal practices, societal norms lived next to each other.[72] This is what gives this period its great significance, without it, we could not hope to understand the changes of early modern England.

[72] HOLDSWORTH, *op. cit.,* p. 413