Lectures on East Central European Legal History

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Edited by
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DESCRIPTION

The book series *Legal Studies on Central Europe* seeks to publish comparative legal scholarship on a wide variety of topics. The primary goal of the series is to present and address legal issues which arise in connection with the Central European region, taking into account the legal traditions, culture and approach of the countries therein. The series consists and will consist of titles on not only private and public law but also legal and integration history. Furthermore, it aims to encompass titles which deal with and analyse international law and EU law aspects related to the countries in the Central European region. The books published in the series are written for both academics and legal practitioners who are interested in contemporary legal problems connected to Central European countries.

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Introduction

Pál SÁRY

The present legal historical textbook was written primarily for PhD students of law. The purpose of PhD training is for the student to develop the ability to function as an independent scientific researcher. Since every legal system is a result of historical development, it is impossible to cultivate high-quality jurisprudence without adequate knowledge of legal history. No legal scholar can ignore Sir William Blackstone's (1723–1780) advice:

> *It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.*[1]

The book can, of course, also be used for the benefit of law students in undergraduate training. Lawyers with historical knowledge have a broader perspective and a better understanding of the context of the legal system, as Sir Walter Scott (1771–1832), a famous Scottish poet and novelist who studied law and originally worked as a lawyer following his father's example, already recognized. One of Scott's characters, Paulus Pleydell, an excellent Edinburgh advocate, says the following as he points to the books surrounding him in his well-proportioned study: "*These* [...] *are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect*."[2] There is much truth in this opinion.

Legal history education was severely attacked in the second half of the 20th century. During this era, the positivist view that historical and theoretical disciplines would be useless to the lawyers of the future was strengthened. Legal historians have made a number of arguments against these processes. Calvin Woodard, for example, drew attention to the following:

> *All teachers, including law professors, should endeavor to impart to their students wisdom as well as learning, in order to help them become 'complete men' aware of*

1 Blackstone, 1775, vol. II, p. 2.
2 Scott, 1917, p. 331.

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> *their duties or responsibilities to society, as well as merely skilled craftsmen and technicians.*[3]

Woodard pointed out that teaching legal history can go a long way toward achieving these noble goals. As he writes, "[…] *the ultimate justification for Legal History as a part of legal training is its 'humanizing' attributes: attributes that help transform legal technicians into wise lawgivers, groveling pettifogs into enlightened philosophers.*"[4]

David W. Raack also stressed that "*Legal education should provide students not only with skills of immediate practical application, but also with a thorough understanding of legal processes and legal institutions.*"[5] According to him, legal history studies greatly promote this understanding. As he writes, legal history

> *can effectively aid students in understanding the present legal system. There are several ways legal history can do this. One way is by illustrating the forces, interests, and traditions in our legal system, […] which are of enduring force and vitality. […] By highlighting these enduring forces, legal history helps to show which aspects of the law are transitory and which are more permanent. […] legal history can reveal the relativity or historical contingency of the present legal order. By this meant the fact that the present form of our legal system is neither inevitable nor immutable, as is sometimes supposed, but is constantly influenced by historical and cultural forces. […] Legal history can also expose the fact that although the law must change, there is a perennial tension between change and stability in the legal system. […] There are changes in society which exert pressure for change in the law, and yet at the same time there are enduring forces which exert pressure for continuity and stability in the law. Legal history can help to reveal this tension between change and stability.*[6]

Tendencies to relegate historical and theoretical legal disciplines to the background have also emerged in Europe. As Mišo Dokmanović properly states, "*This approach culminated with the Bologna process in Europe during the 1990s, a process that called for skill-based, market-ready legal education.*"[7] Practitioners of legal history clearly disapprove of these intensifying processes. It Judith von Schmädel's warning words are worth quoting:

> *A legal education that omits fundamental subjects such as legal history and legal philosophy can scarcely be called 'academic'. It lacks a solid foundation and runs the risk of giving birth to lawyers who may have learned the law, but do not grasp its deeper meaning.*[8]

3 Woodard, 1967, p. 92.
4 Woodard, 1967, p. 92. Woodard's arguments were later summarized and supplemented by Stephen M. Fuller. See Fuller, 1974, pp. 576–582.
5 Raack, 1988, p. 907.
6 Raack, 1988, pp. 908–911.
7 Dokmanović, 2016, p. 80. See also Posch, 2005, pp. 207–211.
8 Schmädel, 2009, p. 59. See also Avramović, 2010, pp. 20–39.

In an essay published in 2008, Michael Stolleis outlined European legal historians' future roles. He emphasized that European legal history must become a comparative legal history, that in addition to the history of private law, the history of public law must be addressed, and that research must be extended to the eastern parts of Europe in addition to the western regions.[9] I think we can say that the present textbook meets all these requirements: It focuses on the legal development of East Central Europe, comparing the region's different legal systems and paying attention to both private and public law issues.

Demarcating the territory of the East Central European region is not an easy task. Narrowly, the region only includes the territories of present-day Poland, the Czech Republic, Slovakia, and Hungary. Piotr S. Wandycz uses the term 'East Central Europe' in this narrower sense.[10] We found these frames to be too narrow. Other authors have written about this region in a much broader sense. Jean W. Sedlar, for example, considers the territories of present-day Romania, Bulgaria, Albania, and the former Yugoslavia to be part of East Central Europe in addition to the territories of the four countries mentioned above.[11] Joseph Rothschild further expands the frames by classifying the Baltic States as part of the region.[12] We found these frames to be too wide: We did not extend our studies to the whole of the Balkans and the whole of the Baltics, only to those areas that were historically more closely connected with the central areas of East Central Europe. Thus, our textbook does not deal with the legal history of today's Bulgaria, Albania, Latvia, and Estonia. However, the territory of present-day Austria, which belongs to Western Central Europe, could not, of course, be excluded from our investigations. One chapter also deals with the legal history of the German Democratic Republic due to its close ties with the Soviet bloc.

Our textbook covers ten topics in terms of content. In the first chapter, *Marko Petrak* highlights the fundamental role that Roman law as *ius commune* has played and continues to play in the region's legal life. Before 1848, Werbőczy's *Tripartitum* (completed in 1514 and published in 1517) was the most important law book in the Lands of the Crown of Saint Stephen. Werbőczy wanted primarily to summarize specific customary law rules that deviated from *ius commune*. Contemporary legal practice knew and applied the rules of Roman law. Issues that are not covered by the *Tripartitum* (such as, for example, the rules for the sale of movable property) were certainly decided by contemporary courts under Roman law. The rules of *ius commune* as applied by domestic courts became binding. The rules of Roman law thus became part of customary law through their judicial application. In addition, it is important to note that in 1581, the Justinianic *Digest* containing the basic Roman legal principles (D. 50,17) became part of the *Corpus Iuris Hungarici*.

9 Stolleis, 2008, p. 46.
10 Wandycz, 2001.
11 Sedlar, 1994.
12 Rothschild, 1974.

In 1812, the *Code Civil* came into force in all Croatian territories under French rule (except Slavonia). Later, the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB) came into force in all the Lands of the Crown of Saint Stephen. Whereas these civil codes were based on Roman legal foundations, the Roman legal tradition was further strengthened in the region.

In the Hungarian legal system, which was in force in 1941 in some territories of Croatia, Roman law was one of the applicable sources of law. Under a law passed in 1991, the legal rules that were in force in the present-day territory of the Republic of Croatia on April 6, 1941 are considered, with certain restrictions, to be subsidiary sources of contemporary Croatian law. It logically follows that the Roman legal rules are, in principle, still applicable in the Republic of Croatia.

The Justinianic law codes constituted the basis for the Byzantine legal system, which had a strong influence on the legal development of the Eastern and Southern Slavic states. The second chapter of our textbook, written by *Srđan Šarkić,* explores this effect of Byzantine law. The sources of Byzantine law are composed of secular laws (such as the Farmer's Law, the Soldier's Law, the Rhodian Sea Law, the *Ecloga*, the *Eisagoge,* the *Procheiron,* the *Basilika,* the *Novels* of Leo VI, and the *Hexabiblos*) and ecclesiastical law collections (such as the *Synopsis*, the *Synagoge*, the *Syntagma*, *The Nomokanon of 50 Titles, The Nomokanon of 14 Titles,* the *Alphabetical Syntagma,* and *The Epitome of Canons*).

The oldest preserved Slavonic legal text, the *Zakon Sudnyj Ljudem*, was written based on the *Ecloga*. The first Slavonic *nomokanon* was written by Saint Methodius, who translated John Scholasticus' Greek *Synagoge* into Old Church Slavonic. In Serbia, the reception of Byzantine law commenced with the *Nomokanon of St. Sabba* (around 1219), a compilation of ecclesiastical law that also contains Basil I's entire *Procheiron*. This reception culminated with Tsar Stefan Dušan's (1331–1355) codification, the greatest work of the Serbian legal tradition. Dušan's lawyers created a special *Codex Tripartitus,* codifying both Serbian and Byzantine law. The first part of the codification was an abbreviated translation of Matheas Blastares' *Syntagma*. The abbreviations had partly ideological and partly practical reasons. All the chapters in the *Syntagma* referring to Byzantium's hegemony over the Slavic states were omitted. Since the law code was designed for use in ordinary courts, most of the ecclesiastical rules were also omitted. The second part of the codification was Justinian's Law, a compilation of articles regulating agrarian relations. The majority of these articles were taken from the Farmer's Law. The third and the most important part of the codification was Dušan's Code, which borrowed about 60 articles directly from the *Basilika*.

Byzantine law influenced the legal development of the Danubian principalities (the principalities of Moldavia and Wallachia) through several channels. Initially, the Serbian legal compilations were used in these territories. The Romanian translation of the Farmer's Law was inserted in the Moldavian law book of 1646. Later, in Moldavia, the *Hexabiblos* became the official law code, and it remained so until 1817.

Byzantine public law ideas significantly influenced the Orthodox Slavs' legal and political philosophy. Like the Byzantines, the Slavs lacked a general concept of

law. They took the existence of an empire and the hierarchical order of states for granted. There was a strong conviction that the emperor's main task was to promote the common good. The Justinianic idea that there must be harmony between the state and the church was accepted among the Slavs of the Middle Ages. Later, however, this idea was pushed into the background so that the State could intervene in the church's internal affairs.

In medieval Europe, ecclesiastical courts had wide competence. The third chapter of our textbook, written by *Elemér Balogh*, deals with the different models of episcopal courts and their organization and operation. In the Czech and Polish territories, the French and German-style officials were the main ecclesiastical judges, appointed specifically for this purpose, but in the Hungarian dioceses, the Italian-style *vicarii generales* performed the task of judging.

The *officialis* was often the archdeacon. He could be deputized by the *commissarii*. The judge was assisted by an *assessor* who gave him legal advice. The litigants could be represented by *procuratores*. The minutes were kept by *notarii* who took care to meet the deadlines and also issued court documents. Summonses and other court orders were forwarded by *cursores* and *nuncii*, who could also serve as official witnesses in the lawsuits.

In addition to the clergy's private law disputes and criminal cases, ecclesiastical courts acted in matrimonial lawsuits, property cases involving women, widows, and orphans, and in matters relating to wills, religious crimes, and offenses against the sacrament of marriage (sacrilege, apostasy, blasphemy, heresy, perjury, abduction of women, adultery, bigamy, incest). Episcopal court judgments could be appealed in the archbishop's court. Secular authorities could be involved in enforcing the judgment.

Customary law dominated in every legal system's early developmental stages. Several customary law collections were compiled in the East Central European region. The best known of these law books is the *Tripartitum*, which was already mentioned above. The fourth chapter of our textbook, written by *Vojtech Vladár*, deals with this collection's historical background. It describes Werbőczy's person and aims, examines the structure, content, sources and impact of his famous work, and analyzes in detail the relationship between legal custom and law.

Stephen (Hung. István) Werbőczy, who was a royal curia judge and one of the most recognized legally educated men in the Kingdom of Hungary, primarily wanted to collect and systematize living Hungarian customary law. Customary law consisted of all the substantive and procedural rules that gained authority through judicial application, even without formal legislative sanction.

The work's prologue defines basic concepts such as justice, law, jurisprudence, judging, etc., using many Roman legal ideas. The first part deals mainly with noble private law, but the nobility's cardinal privileges are also included here. The second part contains the rules for nobles' litigation. The third part details town and serf law, as well as Transylvanians' special law.

The courts began applying the *Tripartitum*, and it became mandatory in practice, despite the fact that the king had not promulgated it as law. It was soon translated

into Hungarian and Croatian. Werbőczy's work had a decisive effect on legal life for several centuries. In Czechoslovakia, the *Tripartitum* was a source of civil substantive law until 1950, when the first Czechoslovak civil code entered into force.

In most cases, town laws were based on legal customs that German settlers had brought from abroad, which they could continue to use under royal privileges. Towns that were founded subsequently often took over older towns' laws, creating 'town law families.' In this system, the law court of the 'mother-town' became an appellate court for the 'daughter-towns.' We can get a detailed picture of legal life in medieval and early modern towns based on their law books. Some significant town law books from the East Central European region are the focus of the fifth chapter of our textbook, which was written by *Jakub Razim* and *Lenka Šmídová Malárová*.

The mid-14th-century law book of Brno (or the law book of Jan the notary) was compiled for sworn men and magistrates, who were responsible for exercising judicial authority. This Latin compilation of municipal law and practice with court decisions is systematized by subject and divided into alphabetically arranged sections. The book's author, who worked as a notary in the Brno town office between 1342 and 1358, also applied Roman law, especially where local rules were absent. Use of the Brno law book spread quickly in Moravia and Bohemia, where it was abbreviated by Jan of Gelnhausen.

The author of the Buda law book (*Ofen Stadtrechtsbuch*) was probably Johannes Siebenlindner, a juror at the Buda (Germ. Ofen) town court and later a town judge, who was obviously familiar with Magdeburg law. However, his law book, written in the early 15th century, was not only influenced by Magdeburg law, but also by the *Schwabenspiegel*. The law book describes the qualities of a just judge and outlines the town's main officials' moral duties. It contains the norms governing the relationship between the king, royal officials, and towns and the obligations of the urban population, merchants, craftsmen, and guilds. Its private and penal law rules reflect the Roman legal effect. The Buda law book served as the basis for the tavern court's jurisdiction across the seven Hungarian royal free towns.

The *Wiener Handwerksordnungsbuch* was compiled by Ulrich Hirssauer, the town scribe of Vienna, in 1430. It includes craft ordinances detailed apprentices', journeymen's, and master craftsmen's obligations. It provides much information about the urban administration and organization of marketplaces. It also contains numerous official and civic oaths.

The *Księga sądowa miasta Chełmna* is an official book, kept in Kulm (present-day Chełmno in Poland) from 1330. This town was a mother town and appellate court for Polish and Prussian towns adopting the Kulmer Recht, which was based on Magdeburg law. This town book contains rules for rental contracts, records of criminal cases decided by lay judges, and a register of outlaws, who could be caught with impunity if they failed to appear in town court voluntarily or had not reconciled with the damaged party.

Political and legal relations between the states of the East Central European region have changed many times throughout history. In the sixth chapter of our textbook,

Miroslav Lysý describes this development in international relations. The Hungarian–Croatian personal union was established with the coronation of the Hungarian King Coloman (Hung. Kálmán) as king of Croatia and Dalmatia. This union, which lasted until 1918, later became stronger and more complex. In 1301, the son of the Czech king was crowned king of Hungary and Croatia, and in 1305, he became king of the Czechs and Poles. Hungary and Poland formed a personal union between 1370 and 1382, then again between 1440 and 1444. Sigismund of Luxembourg was, among others, king of Hungary, Croatia, and Bohemia. Albert, the first Habsburg ruler of Hungary and Croatia, was also a Czech king. His son was also a Hungarian, Croatian, and Czech king. Matthias, king of the Hungarians and Croats, also became king of the Czechs. In 1490, the Czech king, the son of the king of Poland, became the Hungarian and Croatian ruler. In 1526, Hungary was divided into three parts. After 1526, most of the Habsburg rulers of Hungary and Croatia were also Czech kings. Between 1569 and 1795, the Polish–Lithuanian Commonwealth was one of the largest and most populous countries in Europe. This real union ended in 1795, when its territory was divided between Russia, Prussia, and Austria.

Hungary's situation within the Habsburg empire changed several times. The Austro-Hungarian Compromise of 1867 reorganized the Habsburg monarchy as a dualistic real union. The Croatian–Hungarian Settlement of 1868 governed Croatia's political status as a territory of Hungary. In 1908, Austria–Hungary annexed Bosnia and Herzegovina. The First World War ended with the disintegration of Austria–Hungary. The Kingdom of Hungary suffered a huge territorial loss. The kingdom of the Serbs, Croatians, and Slovenians was created, and Romania was reorganized, acquiring vast territories. The independent country of Czechoslovakia (the First Czechoslovak Republic) was formed by the unification of the Czech, Slovak, and Carpatho-Ruthenian territories. The Second Polish Republic was established. However, this situation did not last long. The region was gradually reorganized through a series of decisions taken by the great powers (e.g., the Munich Agreement, the First and Second Vienna Awards, and the Molotov–Ribbentrop Pact). After the Second World War, the political conditions and state borders changed again, and the region's countries became part of the Soviet bloc. Later, the fall of communism and the disintegration of the Soviet Union brought about another significant change in the region's political and international relations.

Most European private law systems today are codified, but there are also non-codified systems (in the common law system, for example, private law is not codified). The seventh chapter of our textbook, written by *Emőd Veress*, provides us with a history and comparative analysis of private law codifications in the East Central European region. The region's private law codes were mostly influenced by the French (Napoleonic) Civil Code of 1804, the ABGB of 1811, and the German *Bürgerliches Gesetzbuch* (BGB), which entered into force in 1900. For example, the Serbian civil code of 1844 was strongly influenced by both the Austrian and French codes, the Romanian civil code of 1864 was inspired primarily by the French code, and in the case of the Polish code of 1964, the effects of the German, Austrian, and French codes can all be demonstrated. The intensity of model following varied for each code.

Our region is generally characterized by a dualistic solution, i.e., civil law in the narrower sense and commercial law are regulated by separate codes. However, there are also examples of the application of the monistic principle; the new Romanian civil code (Act 287 of 2009) and the new Hungarian civil code (Act V of 2013) switched to monistic regulation, breaking with the dualistic system (the latter code discusses the substantive rules of commercial companies among legal persons).

The codes followed political, social, and economic changes on the one hand and provided an appropriate legal basis for consolidating such changes on the other. The socialist era's private law codes were characterized by ideological content (especially in the field of property law). One of the features of socialist legislation was the separation of civil law and family law. For example, separate family law acts were passed in Poland, Romania, and Hungary. (The new Romanian and Hungarian civil codes include family law.)

Some countries followed the model of separate acts for different civil law segments instead of adopting a unitary civil code. In Croatia, for example, between 1997 and 2006, separate laws were enacted in the areas of property, family, inheritance, and contract law.

After the Second World War, the countries comprising our region came under the political influence of the Soviet Union, based on the great powers' decisions. The communists, after taking power through electoral fraud and violence, immediately began to build dictatorships upon instructions from Moscow. The eighth chapter of our textbook, written by *Ewa Kozerska* and *Tomasz Scheffler,* presents the radical changes that took place in the fields of state and criminal law in the East Central European communist dictatorships. In addition to the socialist legal systems of Czechoslovakia, Romania, Hungary, and Poland, the chapter also analyzes the German Democratic Republic's state and criminal law due to the significant similarities that prevailed throughout the Soviet bloc.

During the drafting of the socialist constitutions, the 1936 Constitution of the Soviet Union was considered to be a model. They introduced the one-party system and, emphasizing the Communist Party's leading role, declared that state power belonged to the working people. A centralized, hierarchically structured state organization was established, in which the bodies of the only political party were closely intertwined with the state bodies. After the nationalization of the means of production, a centrally planned economic system was introduced. They developed the personal cult of the party's top leader.

Civil rights were declared, but there was no legal guarantee to enforce these rights. Freedom of speech and of the press did not exist, and freedom of assembly and of religion were severely restricted. The Communist Party ruled society through violence and intimidation. The people were constantly monitored by state police and the whistleblower network.

State power was not really divided. Parliaments only functioned formally, but they did not control the government or the state budget. Significant issues were regulated by lower-level legal norms based on party decisions. Local governments were liquidated.

In the dictatorial system, the courts were not independent either. Criminal judiciary and prosecutorial academies were set up, where new judicial cadres were trained in a short time. Criminal law was considered as a means of class struggle. Danger to society became a conceptual element of crime, and all behavior that threatened the political system was considered dangerous to society. In judicial practice, guilt and political unreliability became synonymous. Conceptual lawsuits were launched to intimidate society. Detainees were brutally abused, and confessions were often forcibly elicited. Although this cruelty was greatly alleviated over time, decisive changes were only brought about in the bloc countries due to the Soviet Union's economic crisis and the weakening of its political power.

In the East Central European countries forced to follow the Soviet political and economic model after the Second World War, ownership relations were radically changed. Another significant change in these relations was brought about by the fall of the communist dictatorships. The ninth chapter of our textbook, written by *Emőd Veress*, provides an in-depth analysis of these legal processes, with particular reference to the history of Romanian legislation.

In Soviet-type political systems, private property was seen as a means of exploitation, and therefore, efforts were made to eliminate or at least severely restrict it. The means of production, factories, commercial companies, and banks were taken into state ownership. This Soviet-type nationalization took place in a completely different way from that typical of capitalist systems (e.g., nationalization was based on administrative decisions without parliamentary authority and judicial scrutiny; it was universal, affecting the economy as a whole; and there was generally no compensation for the nationalized goods).

In the case of agricultural land, collectivization took place instead of nationalization. Collectivization was theoretically based on the voluntary accession of peasants, but in practice, it took place by force; those who refused to join collective farms were persecuted and severely punished. Cooperative land ownership was a form of 'socialist property.' Members of the agricultural production cooperatives had a theoretical right to dispose of the collective property, but in reality, such a right of disposal did not exist.

Marxist civil law, instead of using the notion of private property, introduced the notion of personal property. The objects of personal property could be consumer goods; personal property rights over immovables were severely restricted. The transformation of private property into the mystical property of the whole people has largely contributed to the bankruptcy of the socialist economic model.

The possibility of reprivatization (that is, the return of nationalized property to its previous owner or their successor) was debated during the period of regime change. In Romania, the restitution of agricultural lands took place gradually. In most countries, limited and complicated compensation has been chosen instead of reprivatization (justified by public debt and the anti-investment nature of reprivatization). State-owned enterprises were privatized. As the population did not have adequate capital, various methods were used to facilitate privatization (e.g., employees and former

management were given discounts on purchases, and in several countries, the population received coupons that could be sold or acquired for shares in the company). Many abuses took place during privatization, and many valuable state assets were squandered.

As the population of the states of East Central Europe has never been ethnically homogeneous, the regulation of minorities' position has a long history. The last chapter of our textbook, written by *Iván Halász*, presents the history of the legal protection of national and ethnic minorities. The protection of religious minorities first appeared in Europe. In the first half of the 19th century, national and ethnic minorities were granted territorial autonomy in some states. The Austrian December Constitution of 1867 declared the complete equality of nations in the monarchy. The Croatian–Hungarian Settlement of 1868 guaranteed territorial and limited legislative autonomy for Croats. However, the dualistic state structure did not correspond to the monarchy's ethnic composition. The Hungarian Nationality Law of 1868 declared the rights of minorities but failed to recognize several nationalities' political identity, and in practice, the Hungarian government sought to assimilate non-Hungarians. Therefore, it was no wonder that the national minorities sought to disintegrate the Austro-Hungarian monarchy.

After the First World War, efforts were made to regulate national and ethnic minorities' position at the international level. The rights of minorities were enshrined in peace treaties, and in case of violation of the rules contained in the treaties, it was possible to file a complaint with the Council of the League of Nations. Minority rights were regulated at the national level in several countries. However, the minority protection system the League of Nations controlled was not effective in practice.

After the Second World War, attempts were made to establish ethnic homogeneity in several countries through population exchange, displacement, and the application of national discrimination. Ethnic purges took place in some areas, and many people were forced to relinquish their national identities. The communist takeover resulted in a significant improvement in minorities' situation. Following the Soviet model, the constitutions of the Soviet bloc countries banned national and ethnic discrimination. Operation of minority institutions (schools, cultural organizations) was allowed, and proportional representation of minorities in state, political, and administrative bodies was ensured. In Romania, a Hungarian autonomous province existed between 1952 and 1968. However, with the decline of Soviet influence in the 1970s and 1980s, during Nicolae Ceauşescu's dictatorship, Hungarians' position in Romania became much worse. Czechoslovakia was reorganized as a federation in 1968, when the rights of minorities were significantly expanded. Socialist Yugoslavia also functioned as a federal state; the Yugoslav constitution of 1974 granted Kosovo and Voivodina broad autonomy.

This textbook is the fruit of successful international cooperation. The creator and director of this joint work was my dear colleague, head of the Ferenc Mádl Institute of Comparative Law, János Ede Szilágyi, to whom I am very grateful for his principled guidance. I received useful advice from Emőd Veress in defining specific topics, for

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Historical maps are very important for studying legal history. The fourteen maps in our textbook are the work of Zsombor Bartos-Elekes, who, as a cartographer, also commented on the maps and compiled a list of the names of the cities on them. Special thanks to him for his precise work.

We hope that our textbook will enrich many students with knowledge. It is our sincere hope that by studying the history of law, our readers become better suited to practice their chosen profession.

Bibliography

Avramović, S. (2010) 'From general legal history towards comparative legal traditions', *Anali Pravnog fakulteta u Beogradu*, 58(3), pp. 20–39.

Blackstone, W. (1775) *Commentaries on the Laws of England.* Vols. I–IV. 7th Oxford: Clarendon Press.

Dokmanović, M. (2016) 'Rediscovering the Relationship Between Law And History: How to Teach Legal History in the 21st Century' in Abushouk, A. I., Zweiri, M. (eds.) *Interdisciplinarity in History: Continuity and Change*. Newcastle: Cambridge Scholar Publishing, pp. 76–91.

Fuller, S. M. (1974) 'Some Contemporary Approaches to the Study of Legal History and Jurisprudence', *Tulsa Law Review,* 10(4), pp. 576–582.

Posch, W. (2005) 'The Austrian View of the Bologna Process in Legal Education', *Slovenian Law Review,* 2(1–2), pp. 207–211.

Raack, D. W. (1988) 'Some Reflections on the Role of Legal History in Legal Education', *Duquesne Law Review,* 26(4), pp. 893–924.

Rothschild, J. (1974) *East Central Europe between the Two World Wars*. Seattle and London: University of Washington Press.

Schmädel, J. von (2009) 'Legal Education in Austria and Germany and the Importance of the Study of Legal History', *Hitotsubashi Journal of Law and Politics*, 37, pp. 49–59.

Scott, W. (1917) *Guy Mannering*. London and Glasgow: Collins' Clear-Type Press.

Woodard, C. (1967) 'History, Legal History and Legal Education', *Virginia Law Review,* 53(1), 1967, pp. 89–121.

Sedlar, J. W. (1994) *East Central Europe in the Middle Ages, 1000–1500*. Seattle and London: University of Washington Press.

Stolleis, M. (2008) *Rechtsgeschichte Schreiben. Rekonstruktion, Erzählung, Fiktion?* Basel: Schwabe Verlag.

Wandycz, P. S. (2001) *The Price of Freedom. A History of East Central Europe from the Middle Ages to the Present*. 2nd London and New York: Routledge.

| Chapter 1 |

Roman Law as *Ius Commune* in East Central Europe: the Example of the Lands of the Crown of Saint Stephen

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ABSTRACT

The aim of the chapter is to analyze the significance and role of Roman law as *ius commune* in East Central Europe (*Ostmitteleuropa*) from the Middle Ages up until today. The notion of East Central Europe will be pragmatically exemplified for the purposes of this contribution within the context of the Lands of the Crown of Saint Stephen. This territory was and is 'the very heart' of East Central Europe, as it comprises, in their entirety or partly, the following present-day states: Hungary, Croatia, Slovakia, Austria, Poland, Romania, Serbia, Slovenia, and Ukraine. The centrality and importance of the Lands of the Crown of Saint Stephen within East Central Europe also guarantee that the experience of Roman law as *ius commune* in these territories is not unimportant and has a certain level of paradigmaticity. The most important source of traditional pre-1848 law in the Lands of the Crown of Saint Stephen was undoubtedly the *Tripartitum* (1514), which represents one of the milestones of East Central Europe's legal tradition and culture. Despite the explicit declaration that Roman law and canon law are the very basis of the law of *Archiregnum Hungaricum* (*omnia fere iura regni huius originaliter ex pontificiis caesareique iuris fontibus progressum habeant*), this legal collection was, in reality, a compilation of customary law and a powerful legal practice forming work that hindered any major legal transfer. Regardless of the fact that European *ius commune* was not a direct source of law in the pre-1848 period, there were definitely some 'channels' through which Roman legal tradition exerted a considerable influence and impact in the Lands of the Crown of Saint Stephen (e.g., procedural law manuals like Kitonich's *Directio Methodica* and the inclusion of *Digesta 50, 17* in *Corpus Iuris Hungarici*), creating the phenomenon called *tacita receptio*. Only since the second half of the 19th century onward has Hungarian judicial practice and doctrine – due to the withering away of feudal relations and consecutive failed attempts to pass a modern national civil code – gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. The last part of the contribution deals with the role and significance of Roman law as *ius commune* in the former Lands of the Crown of Saint Stephen in the last hundred years, emphasizing that a possible wider scope of the application of the *ius commune* rules in the national judicial practice, especially in the form of *regulae iuris*, would not just represent a nostalgic quest for the hidden treasure of the European legal tradition but rather a part of a long-term creative effort toward the non-legislative Europeanization of the contemporary legal orders on the firm foundations of the common legal culture.

KEYWORDS

Roman law, *ius commune*, East Central Europe, Lands of the Crown of Saint Stephen, *Tripartitum*, *Corpus Iuris Civilis*, *Corpus Iuris Hungarici*, legal tradition, legal maxims.

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1. Introductory remarks

As it is generally known, the term *ius commune* denotes the legal order that was the source of law across almost all of Europe in the medieval and early modern times. That legal order was formed through the reception of Roman law, i.e., the process of gradual acceptance of the rules of Roman law contained in the Justinian codification (*Corpus Iuris Civilis*) as law in force and their integration with certain aspects of canon law and customary laws, with the adjustment of these rules to the needs of life and legal practice in the aforementioned periods.[1] Although *ius commune*, after centuries of continuous validity as *ius in subsidio*, ceased to be a formal source of law in most European countries due to the adoption of modern civil codes in the 19th and 20th centuries, the very essence of the aforementioned codes actually represented different codifications of Roman law, i.e., national variations of the common European legacy. Thus, in these codified forms, the tradition of Roman law as *ius commune*, with all the principles, institutes, and solutions belonging to it, continued to exert a crucial impact on overall European legal development to the present day.[2] Moreover, it should be emphasized that the tradition of *ius commune* experienced its ultimate culmination during the period in which the idea of codification dominated, owing to the German Pandectist school, the doctrines of which significantly influenced the legislation, science, and practice of private law in practically all European countries in the second half of the 19th century and in the 20th century. These doctrines still form the basis of the common European private law dogmatics.[3] In addition to that, in the most recent times, the process of European integration and of rendering uniform the European legal system largely renewed interest in *ius commune* as a predecessor of this process in itself, whereby Roman legal tradition, as a common denominator of the European legal culture, became an important factor in the formation of contemporary European identity.[4]

As the title makes apparent, this contribution is focused on Roman law as *ius commune* in East Central Europe. In order to avoid entering into a discussion about *vexata quaestio* in relation to East Central Europe (*Ostmitteleuropa*) and its precise borders, that notion will be pragmatically exemplified for the purposes of this contribution within the context of the Lands of the Crown of Saint Stephen. This territory was and is 'the very heart' of East Central Europe, as it comprises, in their entirety or partly, the following present-day states: Hungary, Croatia, Slovakia,

1 For general information about *ius commune* as a legal system, see, e.g., Calasso, 1970; Coing, 1968; id., 1986; Bellomo, 1998; Van Caenegem, 2002, pp. 13 sqq.

2 See, e.g., Stein, pp. 104 sqq.; Zimmermann, 1997, pp. 259 sqq.

3 For general information about the German pandectistic doctrine in the second half of the 19th century and the creation of the Pandect law system see, e.g., Wieacker, 1996, pp. 430 sqq., with references to numerous further reading.

4 For general information about Roman law tradition as a 'common denominator' of European (private) law systems in the context of the creation of the European civil law legislation see, e.g., Sturm, 1994, pp. 147 sqq.; Knütel, 1994, pp. 185 sqq.; Zimmermann, 2001.

Austria (Burgenland), Romania (Transylvania), Serbia (Vojvodina/Délvidék), Slovenia (Prekmurje/Muravidék), Ukraine (Carpathian Ruthenia), and even Poland (Orawa/Árva and Spisz/Szepes counties).[5] It has to be emphasized that every part of East Central Europe has its own story regarding the significance of Roman law as *ius commune*, and thus, the Lands of the Crown of Saint Stephen surely cannot be treated as *pars pro toto* in that context. Nevertheless, the centrality and importance of the Lands of the Crown of Saint Stephen within East Central Europe also guarantee that the experience of Roman law as *ius commune* in these territories is not unimportant and has a certain level of paradigmaticity.

2. Roman law as *ius commune* in the Lands of the Crown of Saint Stephen

Starting with our previous research, which was conducted together with Hungarian colleagues, it must be pointed out that traditional, in other words, pre-1848 law in the Lands of the Crown of Saint Stephen "...was not free from the influence of Roman law. The formation of the Christian kingdom was connected with the organization of the Latin Church. Consequently, the Latin terminology was used for legal institutions in these Lands regardless of whether they appeared in statutory legal rules or their individual elements were referred to and expounded as customary law. However, this did not lead to the prevalence of Canon law and, through it, Roman law. It is possible to show some influences of or correspondences with Canon law and Roman law, but they did not have a crucial impact on the basic institutions that had developed..." in these territories within East Central Europe.[6] The examples of these medieval influences of Roman law (11th–16th C.) on the legal order(s) within the Lands of the Crown of Saint Stephen in nearly all fields of law were thoroughly researched and presented by György Bónis in his book *Einflüsse des römischen Rechts in Ungarn* (1964), which remained the most important and influential study of its kind.[7]

The most important source of traditional pre-1848 law in the Lands of the Crown of Saint Stephen was undoubtedly the *Tripartitum* (*Opus tripartitum juris consuetudinarii*), compiled by Stephen (István) Werbőczy and finished in 1514. This collection represents one of the milestones in East Central Europe's legal tradition and culture. Despite Werbőczy's explicit declaration that Roman and canon law are the very basis of the law of *Archiregnum Hungaricum* (Trip. II, 6, pr.: *Omnia fere iura regni huius originaliter ex pontificiis caesareique iuris fontibus progressum habeant*), this legal collection is, in reality, a compilation of the customary law of the Lands of the Crown of Saint

5 On the Lands of the Crown of Saint Stephen and their dismantling after First World War, see, e.g., Macartney, 1937; cf. also Romsics, 2002.
6 Cit. Béli, Petrak, Žiha, 2012, p. 65.
7 Bónis, 1964, pp. 1 sqq.

Stephen, especially nobiliary law.[8] Of course, there are some Roman law segments (e.g., in the prologue)[9] and institutes (e.g., guardianship)[10] in *Tripartitum*, but it should be emphasized that this famous customary law collection "was a powerful legal practice forming work that hindered any major legal transfer."[11]

Regardless of the fact that European *ius commune* was not a direct source of law in the Lands of the Crown of Saint Stephen in the pre-1848 period, there were definitely some 'channels' through which Roman legal tradition exerted a considerable influence and impact, paving the way for the phenomenon that János Zlinszky, a great Hungarian legal scholar from the last century, more than adequately called *tacita receptio*.[12]

For example, procedural law manuals – such as Ioannes Kitonich's prominent 1619 work *Directio methodica processus iudiciarii iuris consuetudinarii inclyti regni Hungariae* – point to the fact that some important elements of procedural *ius commune* were undoubtedly present in the 'law in action' of the time.[13]

Furthermore, it is very important to note that *Corpus Iuris Hungarici* contained the final title of the last book of Justinian's *Digesta* (D. 50, 17), which is entitled *De diversis regulis iuris antiqui*. This title, undoubtedly one of the most significant parts of the Justinian codification (*Corpus Iuris Civilis*), contains 211 short fragments by Roman lawyers, summarizing in the form of *regulae* those basic Roman legal principles on which subsequent European legal culture and the European private law systems were based to a significant extent.[14] The aforementioned *Digesta* was included in the 1581 edition of *Corpus Iuris Hungarici* on the volition of its editor, Hungarian humanist Iohannes Sambucus (János Sámboky),[15] and thus, the legal rules contained in it exerted a relevant impact by becoming a source of law in the Lands of the Crown of Saint Stephen.

The first wave of the great civil codifications in Europe at the beginning of 19th century (*Code Civil*, ABGB) as codified forms of *ius commune* exerted a certain impact in the Lands of the Crown of Saint Stephen, especially in the Croatian territories.

Regarding the *Code Civil*, it should be pointed out that Napoleon formed the Illyrian provinces on October 14, 1809, after the Peace Treaty of Schönbrunn, which ended yet

8 On Werbőczy's *Tripartitum*, see, e.g., Kadlec, 1902, pp. 17 sqq.; Lanović, 1929, pp. 85 sqq.; Hamza, 1998–1999, pp. 19 sqq.; Rady, 2003. See also the fourth chapter of the present textbook, written by Vladár.

9 See, e.g., Rady, 2006, pp. 103 sqq., with further references.

10 See, e.g., Béli, Petrak, Žiha, 2012, pp. 73 sq., with further references; generally on the relationship between Roman law tradition and *Tripartitum*, see Bónis, 1964, pp. 68 sqq.; Zajtay, 1954, pp. 197 sqq.; Szabó, 2002, pp. 769 sqq., with further references.

11 Cit. Béli, Petrak, Žiha, 2012, p. 65.

12 Cf. Szabó, 2002, p. 777.

13 On the influence of *ius commune* on Kitonich's *Directio methodica* see, e.g., Damaška, 2004, pp. I sqq.; Szabó, 2002, pp. 773 sqq., with further references.

14 On *De diversis regulis antiqui*, specifically its structure, contents, and significance in the European legal tradition, see, e.g., Stein, 1962, pp. 1 sqq., with further references.

15 See Mora, 1964, p. 413; Hamza, 2002, p. 133.

1.1. The Illyrian Provinces (1814)

another war between Austria and France. Austria lost that war and had to cede to the French the remaining part of Istria (so-called Habsburg Istria) and all the parts on the right bank of Sava river up to the confluence of the Una river. The Illyrian provinces consisted of seven parts: Carinthia, Carniola, Istria with Gorizza, Gradiska and Trieste, Civil Croatia and the Croatian Military Frontier, and Dalmatia and Dubrovnik.[16] With the imperial decree regarding the organization of Illyria (*Décret imperial sur l'organisation de l'Illyrie*) on April 15, 1811, which came into force on January 1, 1812,[17] among other things, Napoleon prescribed the enactment of the French legal system – led by the *Code Civil* and his codifications of other fundamental branches of law (*Code de procédure civile, Code de commerce, Code pénal, Code d'instruction criminelle*) – to all territories belonging to the Illyrian provinces, with the aim of ending legal particularism.[18] Therefore on January 1, 1812, the *Code Civil* formally came into force in all Croatian territories under French rule (Istria, Civil Croatia and the Croatian Military Frontier, and Dalmatia and Dubrovnik), except Slavonia. Some of these territories (Civil Croatia, the Croatian Military Frontier, as well as – as historically seen – Dalmatia and Dubrovnik) were parts of the Lands of the Crown of Saint Stephen. Therefore it can be concluded that *Code Civil*, the most important and influential private law codification *bis dato*, also exerted a relevant influence within some of these lands.

Starting with the basic characteristics of this private law codification,[19] it should primarily be noted that the mere enforcement of the *Code Civil* marked a complete unification of civil law sources for the first time across the entire Croatian territory (except Slavonia) in an attempt to overcome former private law particularism.[20] Consequently, since most *Code Civil* provisions were adopted from *ius commune*, Roman legal tradition, with its legal principles, institutes, and individual provisions, became, for the first time, the dominant private law paradigm in the mentioned parts of the

16 See Maštrović, 1959, pp. 57 sqq.; Čulinović, 1961, pp. 209 sqq. and especially Ćosić, 2000, pp. 104 sqq., with further references; cf. also Bundy, 1987.
17 *Recueil de lois, décrets et réglements à l'usage des provinces Illyriennes de l'Empire*, vol. V, pp. 8 sqq.
18 See Maštrović, 1959, p. 58; Ćosić, 2000, pp. 119 sqq.
19 About the crucial importance of the *Code Civil* for the French legal system as well as the origins, contents and influence of that codification on further development of civil law worldwide, see, e.g., Rehm, 2012, pp. 200 sqq., with further references.
20 Cf. Coing, 1989, pp. 12 sqq.; Rehm, 2012, p. 201.

Lands of the Crown of Saint Stephen, overcoming a wide range of local and customary legal traditions that were in force until that time.[21] In the context of the Roman foundations of the *Code Civil*, it must be emphasized that the general structure of Napoleonic codification was built on the Roman institutional system as the tripartition of basic legal categories (*personae*, *res*, *actiones*).[22] Finally, the provisions of the *Code Civil* are heavily imbued with the idea of citizens' rights and freedoms – in the sphere of private law primarily based on the Romanistic principles of private ownership, freedom of contract, and freedom of testation[23] – which means that their application in legal practice inevitably resulted in the certain social individualism and modernization of the entirety private law life as opposed to the various collectivist and traditional legal structures that had been present until that time. Therefore, thanks to the *Code Civil*, with its individualist anthropology based on the described Romanistic principles, the first considerable step toward the modernization of private law life was also made in some parts of the Lands of the Crown of Saint Stephen.

The *Code Civil* was formally in force in these territories for only few years. After the fall of Napoleon's empire, the Illyrian provinces were returned to the Habsburg empire via the Treaty of Paris and the Vienna Congress (1814–1815). Within several years, the *Code Civil* was replaced by another famous European codification, the Austrian ABGB. Thus, in the period from 1814 until 1820, the ABGB came into force in the Croatian Military Frontier (1814), Istria and Rijeka (1815), Dalmatia and Dubrovnik (1816), and finally in the part of Karlovac county that belonged to the Illyrian provinces (1820). At the beginning of the so-called period of Bach's absolutism (1853), the ABGB came into force via the emperor's patent in all the Lands of Crown of Saint Stephen: the Kingdoms of Hungary, Croatia, and Slavonia, the Serbian Voivodeship, and the Banate of Temes.[24] From that time up until today, the Croatian private law system has been under the dominant influence of the Austrian civil law tradition (i.e., the legal norms of the ABGB),[25] while the end of Bach's absolutism led, in 1861, to the removal of the ABGB from Hungary and the return to the *Tripartitum* and other legal sources contained in the *Corpus Iuris Hungarici*.[26]

21 On *ius commune* and its doctrine in France (e.g., Domat, Pothier) as the most important foundation of the *Code Civil*, see an excellent contribution from Gordley, 1994, pp. 459 sqq.

22 The institutional system stems from classical Roman jurist Gaius; cf. Gai. Inst. 1.8: *Omne autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones*; on the institutional system and its philosophical and historical roots see, e.g., Wieacker, 1953, pp. 93 sqq., with further references; on the institutional system's influence on the structure of the *Code Civil*, see, in brief, Coing, 1989, pp. 12 sqq.

23 On the mentioned principles as basic characteristics of the *Code Civil*, see, e.g., Coing, 1989, pp. 12 sqq.; Rehm, 2012, pp. 202 sqq.

24 Regarding the exact dates of the enactment of the ABGB in these territories, see Gavella, 1993, pp. 336 sqq.

25 Regarding the role of the ABGB in Croatian civil law tradition, see, in detail, Gavella, 1993, pp. 335 sqq., with further references; cf. also Maurović, 1911, pp. 685 sqq.; Gavella, 1994a, pp. 603 sqq.; Josipović, 2011, pp. 157 sqq.

26 On the removal of the ABGB from Hungary and the return to the *Tripartitum*, see e.g., Péter, 2005., p. xx.

However, it could be concluded that the short-term application of the *Code Civil* – in an unpredictable historical dialectic – unquestionably paved the way for a considerably easier subsequent application of the ABGB in some parts of the Lands of the Crown of Saint Stephen, since the Austrian codification analogously implemented the unification, Romanization, and modernization of legal life.[27] Therefore, the tradition of Roman law as *ius commune*, with all the principles, institutes, and solutions belonging to it, has continued to live in these and other more modern codified forms (including the new Hungarian Civil Code of 2014) and has exerted a crucial impact on overall legal development up until today.

Although the Kingdom of Hungary, as it was seen, resisted the more profound reception of Roman law for several centuries, as well as removed the ABGB in 1861 and returned to the *Tripartitum* and the other legal sources contained in the *Corpus Iuris Hungarici*, the Hungarian judicial practice and doctrine has, since the second half of the 19th century onward – due to the withering away of feudal relations and consecutive failed attempts to pass a modern national civil code[28] – gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law.[29]

It was mentioned above that *Digesta 50, 17,* with its fundamental Roman legal principles and rules, represented the primary source of law in the Hungarian legal system from the time of Iohannes Sambucus' (János Sámboky's) publication of the *Corpus Iuris Hungarici* in 1581. However, as was just seen, since the second half of the 19th century onward, the applicability of Roman law in the form of *ius commune* within the Hungarian legal system was not limited to rules from the *Digesta 50, 17*; the rules of *Corpus Iuris Civilis* could be applied as *ius in subsidio* to a much wider extent. As *Corpus Iuris Hungarici*, after the Treaty of Trianon (1920), remained the law in force between two world wars, not only in Hungary, but also in Slovakia,[30] parts of Yugoslavia (the so-called 'former Hungarian legal area,' which included Vojvodina/Délvidék, Međimurje/Muraköz, Baranja/Baranya, and Prekmurje/Muravidék),[31] and even in the two abovementioned Polish counties (Orawa/Árva and Spisz/Szepes),[32] it should be pointed out that the situation with regard to *ius commune* as the subsidiary source of law did not change until the end of that period in these former Lands of the Crown of Saint Stephen. The understanding that *ius commune* is a subsidiary source of private law in the abovementioned territories is strongly supported by legal doctrine between the two world wars. Thus, for example, Ivo Milić (1881–1957), professor of

27 On the general characteristics of the ABGB, see, in more detail, e.g., Doralt, 2012, pp. 45 sqq., with further references; especially on the Roman foundations of the ABGB, see Koschembahr-Lyskowski, 1911, pp. 211 sqq.; Steinwenter, 1954, pp. 405 sqq.; Ogris, 1974, pp. 153 sqq.

28 On various attempts at as well as proposals and drafts of the codification of civil law in Hungary in the 19th century and the first half of the 20th century, see, e.g., Zlinszky, 1985, pp. 433 sqq; cf. Heymann, 1917, pp. 9 sqq; Hamza, 2002, pp. 135 sqq.

29 On the gradual acceptance of *ius commune* as subsidiary law in the Hungarian private law system, see, e.g., Hamza, 2001, pp. 357 sqq; cf. Heymann, 1917, pp. 12 sqq.; Földi, 1988, pp. 366 sq.

30 See, e.g., Singer, J., 1924.

31 See, e.g., Milić, 1921; cf. Nikolić, 2011, pp. 525 sqq.

32 See Pęksa, 2010, pp. 91 sqq.

1.2. The Lands of the Crown of Saint Stephen (1914) and the Treaty of Trianon (1920)

Roman law, private international law, and civil procedural law at the Faculty of Law in Subotica and Zagreb, resolutely emphasizes in the very beginning of his work *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code] that where "[...] *there are no positive regulations, the principles of ius commune, i.e. pandect law should be applied without hesitation, as they formed the basis of the Austrian civil code and* [...] *Hungarian private law.*"[33]

The private law regulations contained in *Corpus Iuris Hungarici* were derogated in Hungary, Slovakia, and Poland in the civil codes passed after World War II,[34] together with the possibility of the application of *ius commune* as the subsidiary source of law. Only in socialist Yugoslavia – due to the failed attempt to pass a civil code and owing to the acceptance of the legal–political principle of 'the unity of law'[35] – could individual segments of *Corpus Iuris Hungarici* be applied as subsidiary law across the entire state territory until its dissolution in 1991.

33 Cit. Milić, 1921, p. 1; cf. Nikolić, 2007, p. 100; on the life and work of Prof. Ivo Milić, see Apostolova Maršavelski, 1996, p. 237.
34 Civil code was passed in Hungary in 1959, in Czechoslovakia in 1950, and in Poland in 1964; cf. Hamza, 2002, pp. 139 sqq, 151 sq., and 184.
35 On the principle of 'the unity of law', see N. Gavella, 1993, pp. 358 sq.

3. *Usus hodiernus* of Roman law as *ius commune* in the former Lands of the Crown of Saint Stephen: the case of the Republic of Croatia

To our knowledge, the only successor state of Yugoslavia where judicial practice continued to apply certain rules from *Corpus Iuris Hungarici* as the subsidiary law after 1991 is the Republic of Croatia.[36] Therefore this case would merit a deeper analysis that is undoubtedly connected to the question of the contemporary application of Roman law as *ius commune*.

The legal basis for the contemporary judicial use of the rules of *Corpus iuris Hungarici* in Croatia is the Law on the Application of Legal Rules passed before April 6, 1941 (Zakon o načinu primjene pravnih propisa donesenih prije 6. Travnja 1941. Godine) (hereinafter: ZNPP), which came into force on December 31, 1991. According to the provisions of the ZNPP, legal regulations that were in force on April 6, 1941 (i.e., the day when the Second World War started in the territory of Croatia, causing legal discontinuity in the occupied territories) are to be applied in the Republic of Croatia as legal rules to those relations that are not regulated by the positive legal order of the Republic of Croatia, provided that they are in conformity with the Croatian constitution. The basic purpose of the ZNPP is to fill in the legal gaps that exist in the legal system of the Republic of Croatia (e.g., no civil code has been passed) through the application of legal rules that were in force in the present-day territory of the Republic of Croatia on April 6, 1941.[37]

As seen, *Digesta 50, 17* continued to be an integral part of the *Corpus iuris Hungarici*,[38] and thus, it was also a primary source of law until the Second World War in the Croatian territories belonging to the 'former Hungarian legal area' (Međimurje/Muraköz, Baranja/Baranya). Therefore, we assert that they should still be treated – taking into consideration the aforementioned principle of 'the unity of law' – as potential subsidiary law in the Republic of Croatia in the sense of the norms of the ZNPP.

In that context, it is particularly interesting to note that the Supreme Court of the Republic of Croatia – after Croatian independence – in their reasons for judgments explicitly referred to certain *regulae* contained in the aforementioned Justinian's *Digesta*, e.g., *quod ab initio vitiosum est, non potest tractu temporis convalescere* (D. 50, 17, 29),[39] *nemo plus iuris ad alium transferre potest, quam ipse haberet* (D. 50, 17, 54)[40] or *res iudicata pro veritate accipitur* (D. 50, 17, 207),[41] which undoubtedly proves that the legal rules in question have been accepted as relevant normative content in the Croatian judicial practice. However, the aim of the analysis of the *Digesta 50, 17* conducted

36 For example, in the land registry law, the Hungarian Act XXIX of 1886 was applied; see Gavella, 1994, p. 130, n. 354.
37 On the ZNPP, see Gavella et al., 1994, pp. 170 sq.
38 Cf. Lanović, 1929, p. 96.
39 I Kž 545/1991-3; on the rule in question, see Petrak, 2010, p. 116.
40 II Rev 26/1993-2; Rev 2749/1993-2; Rev 1822/1993-2; cf. U-III-1107/1994; see, Petrak, 2010, p. 90.
41 Rev 1396/1993-2; Revt-80/02-2; see, Petrak, 2010, p. 120.

here is to point to the fact that Croatian judicial practice could certainly take a step further, meaning that the legal rules contained in the aforementioned title should not be applied as a mere argument in the explanation of judicial decisions, but that this part of Justinian's *Corpus Iuris Civilis* can – via *Corpus Iuris Hungarici* and under the conditions determined by the ZNPP – be applied as a source of positive law in the Republic of Croatia.

According to the authors' opinion, the applicability of Roman private law in the form of *ius commune* within the contemporary Croatian legal system – owing to the fact that the Hungarian private law system was in force in the Croatian territories on April 6, 1941 and that it therefore still represents a potential source of subsidiary law – is not limited to the rules from the *Digesta 50, 17,* as the rules of *Corpus Iuris Civilis* could be applied to a much wider extent. As has been demonstrated, the *Digesta 50, 17* represented the primary source of law, as it was directly contained in the *Corpus Iuris Hungarici*. It was also mentioned above that Hungarian judicial practice and doctrine have, since the second half of the 19th century onward, gradually elevated Roman private law in the form of *ius commune* to the level of a subsidiary source of law. Moreover, it was already pointed out that legal doctrine between the two world wars also supported the understanding that *ius commune* is a subsidiary source in the 'former Hungarian legal area,' and this fact should be emphasized in the context of determining the scope of the possible application of the rules of *Corpus Iuris Civilis* in the Republic of Croatia today. Such a situation with regard to the legal sources in the 'former Hungarian legal area' did not change until April 6, 1941, the day when the Second World War started in the territory of Croatia.

Based on the previously conducted analysis, it can be emphasized that the rules of *ius commune* – via the *Corpus Iuris Hungarici* and under the conditions determined by the ZNPP – could be applied as a source of contemporary law in the Republic of Croatia through two different 'channels.' Firstly, owing to the fact that the *Digesta 50, 17* was a primary source of law on April 6, 1941 in the Croatian territories belonging to the 'former Hungarian legal area,' the principles contained in the aforementioned *Digesta* are still applicable in the Republic of Croatia – in the sense of the provisions of the ZNPP – and this was confirmed by the judicature of the Supreme Court. Secondly, since the ZNPP does not distinguish between the primary and secondary sources of the law on April 6, 1941 and proceeding from the fact that Roman private law in the form of *ius commune* was a subsidiary source of private law in the 'former Hungarian legal area of Croatia,' it should be concluded that the entire corpus of *ius commune* can represent a potential source of contemporary Croatian law. As the second 'channel' is much more extensive than the first one and given that it absorbs it in its entirety, it is necessary to finally conclude that all the *ius commune* rules – and not just the legal rules contained in the *Digesta 50, 17* – can have the status of the source of Croatian law under the conditions defined by the ZNPP.

Based on the analysis conducted, it seems that sufficient arguments were offered to support the statement that the *ius commune* rules, according to the provisions of the ZNPP, can have the status of a source of contemporary Croatian private law. Their

application is possible, as has been demonstrated, primarily owing to the fact that *ius commune* was a legal source on April 6, 1941 as a subsidiary law in the territory of Croatia in the territories belonging to the 'former Hungarian legal area.' Although the *ius commune* rules only formally have the status of a subsidiary source of law, in terms of content, they can be regarded as being of fundamental importance for the contemporary legal system, as a series of these rules contain in themselves the basic legal principles upon which a range of the most important legal institutes are founded.[42] Therefore, the reception of the *ius commune* rules as subsidiary law by judicial practice and legal doctrine could to a relevant extent contribute to the correct interpretation and application of contemporary legal regulations, and legal practice could directly apply the legal principles contained in these rules to a much larger and more precisely defined extent than it has been the case so far, especially as it pertains to legal gaps.[43]

From the comparative law perspective, it should be pointed out that such *usus hodiernus* of the *ius commune* rules should by no means represent a *unicum* in the European or global context. Indeed, Roman law as *ius commune* today represents a subsidiary source of positive private law in a dozen European and non-European countries, and the decisions of those countries' judicial practice are often based directly on the sources of that law, starting with the Justinian codification.[44] Additionally, in countries in which *ius commune* no longer represents a source of positive law, judicial practice frequently refers to the numerous *ius commune* rules, particularly regarding the meaning of legal principles.[45] In the aforementioned context, it is particularly interesting to point out that the judicial bodies of the European Union (EU), as well as the international courts, directly refer to the legal principles of *ius commune* in a

42 Thus, for example, the *superficies solo credit* rule as a fundamental principle of the contemporary Croatian law of real property is relevant for the legal regulation of almost all institutes of the law of real property today, including those that did not originate under the Roman legal tradition (e.g., *condominium*, land-registry books, etc.).

43 Generally on the significance of the *ius commune* rules that incorporate the general principles of law, see, e.g., Wacke, 1999, pp. 174 sqq; Kranjc, 1998, pp. 5 sqq.; Petrak, 2010, pp. 1 sqq.

44 Thus, with regard to the European countries, *ius commune* is a subsidiary source of positive private law in individual parts of the United Kingdom (Scotland, Channel Islands), Malta, San Marino, Andorra, and in a strictly limited scope, in Spain and Germany. With regard to non-European countries, *ius commune* is *in subsidio* applied in the entire area of South Africa (South African Republic, Zimbabwe, Botswana, Lesotho, Swaziland, Namibia), as well as in Sri Lanka and Guiana; on *ius commune* as a contemporary positive law in the form of a survey according to individual countries of the world, see Chorus, 1974, pp. 139 sqq.; v. i Evans-Jones (ed.), 1995 (for Scotland); Zwalve, 2002, pp. 379 sqq. (for Channel Islands); Reinkenhof, 1997 (for San Marino); Reinoso Barbero, 1986, pp. 310 sqq. (for Spain); Kaser/Knütel, 2003, pp. 14 sqq. (for Germany); Zimmermann, 1983 (for South Africa); Van den Horst, 1985 (for Sri Lanka); Smits, 2002, p. 139 (for Guiana).

45 See, e.g., Carbonnier, 1982, pp. 107 sqq. (for France); Micali, 1993, pp. 489 sqq. (for Italy); Wolodkiewicz, 2003 (for Poland); cf. Astorino, 2001–2002, pp. 627 sqq. (for the United States).

relevant number of their cases.[46] Therefore, it is indisputable that the national legal practice, as is the case, can creatively apply the *ius commune* rules in concrete cases, especially those rules that contain general legal principles.

4. Concluding remarks

Proceeding from the fact that the *ius commune* rules formulated as Latin legal maxims represent a traditional concise expression of the very essence of the European legal tradition and culture, a final question arises: To what extent could their more extensive application contribute to the further Europeanization of national legal systems? In recent detailed analyses of the application of the *ius commune* rules by the judicial bodies of the EU, both in cases of the existence of legal gaps in the European legal order as well as with the aim of providing a more precise interpretation of its existing legal norms, it is particularly emphasized that a systematic application of those rules as general legal principles common to all national European legal systems that belong to the *ius commune* tradition represents, together with the different types of legislative acts, one of the ways to achieve further harmonization and/or unification of the European legal area.[47] Moreover, it should be mentioned that certain authors of the already famous *Principles of European Contract Law*, one of the most significant recent projects directed toward the Europeanization of private law, determined in their detailed analyses that the principles in question are, in essence, a modern reformulation of the traditional *ius commune* rules.[48] Considering all the aforementioned facts, a possibly wider scope of the application of the *ius commune* rules in the national judicial practice, as has been done for a long time in the former Lands of Crown of Saint Stephen, would not just represent a nostalgic quest for the hidden treasure of the European legal tradition, but also a part of a long-term creative effort for the Europeanization of the contemporary legal orders of these territories on the firm foundations of the common legal culture: *Corpus Iuris Civilis* and *Corpus Iuris Hungarici*.[49]

46 On the application of the Roman legal rules or *ius commune* rules and the legal principles contained in them by the judicial bodies of the European Union (EU), see amplius Knütel, 1996, pp. 768 sqq.; Rainer, 2002, pp. 45 sqq.; Andrés Santos, 2004, pp. 347 sqq.; on the application of these rules by international courts, see, e.g., Lesaffer, 2005, pp. 25 sqq.; cf. Baldus, 2000.

47 Thus, for example, the following rules were applied: *alterum non laedere*; *audiatur et altera pars*; *dolo petit qui petit quod statim redditurum est*; *ne bis in idem*; *nemo auditur propriam turpitudinem allegans*; *nemo censetur ignorare legem*; *non contra factum proprium*; *nulla poena sine culpa*; *nulla poena sine lege*; *nullum crimen sine lege*; *pacta sunt servanda*; *patere legem quam fecisti*; *venire contra factum proprium*; *vim vi repellere licet*; see Knütel, 1996, pp. 768 sqq.; Rainer, 2002, pp. 45 sqq.; Andrés Santos, 2004, pp. 347 sqq., as these papers provide further analyses of the individual cases in which the *ius commune* rules were applied in the judicial practice of the EU; cf. also Wacke, 199, pp. 174 sqq., who particularly emphasizes the role of Latin legal maxims and the legal principles contained in them in the process of the Europeanization of private law.

48 See R. Zimmermann, 2006, pp. 1 sqq.

49 Cf. Zlinszky, 1994, pp. 61 sqq.

Bibliography

Andrés Santos, F. J. (2004) 'Epistemological Value of Roman Legal Rules in European and Comparative Law', *European Review of Private Law*, 12, pp. 347–357.

Apostolova Maršavelski, M. (1996) 'Rimsko I pandektno pravo na Pravnom fakultetu u Zagrebu [Roman and Pandect Law at the Law Faculty in Zagreb]', in Pavić, Ž. (ed.), *Pravni fakultet u Zagrebu II (Law Faculty in Zagreb II)*. Zagreb: Pravni fakultet, pp. 209–240.

Astorino, S. J. (2001–2002) 'Roman Law in American Law: Twentieth Century Cases of the Supreme Court', *Duquesne Law Review*, 40, pp. 627–654.

Baldus, C. (2000) *Regelhafte Vertragsauslegung nach Parteirollen im klassischen römischen Recht und in der modernen Völkerrechtswissenschaft: Zur Rezeptionsfähigkeit römischen Denkens*. Frankfurt am Main: Peter Lang.

Béli, G., Petrak, M., Žiha, N. (2012) '*Corpus Iuris Civilis* and *Corpus Iuris Hungarici* – The influence of Roman legal tradition on the Hungarian and Croatian law' in Drinóczi, T., Župan, M., Ercsey, Zs., Vinković, M. (eds.) *Contemporary Legal Challenges: EU – Hungary – Croatia*. Pécs – Osijek: Faculty of Law, University of Pécs – Faculty of Law, J. J. Strossmayer University of Osijek, pp. 65–84.

Bellomo, M. (1998) *L'Europa del diritto comune.* Roma: Il cigno Galileo Galilei.

Bónis, Gy. (1964) *Einflüsse des römischen Rechts in Ungarn* (Ius Romanum medii aevi, Pars V, 10). Mediolani: Giuffrè.

Bundy, F. J. (1987) *The Administration of the Illyrian Provinces of the French Empire, 1809–1813*. New York – London: Garland.

Calasso, F. (1970) *Introduzione al diritto commune*. Milano: Giuffrè.

Carbonnier, J. (1982) 'Usus hodiernus Pandectarum' in Graveson, R., Kreuzer, K., Tunc, A. & Zweigert, K., (eds.) *Festschrift für Imre Zajtay*. Tübingen: Mohr Siebeck, pp. 107–116.

Chorus, J. M. J. (1974) 'Romeins Recht op de Zuidpool en Elders' in Spruit, J. E (ed.), *Coniectanea Neerlandica Iuris Romani. Inleidende Opstellen over Romeins Recht*. Zwolle: W. E. J. Tjeenk Willink, pp. 139–149.

Coing, H. (1968) *Die ursprüngliche Einheit der europäischen Rechtswissenschaft*. Wiesbaden: Steiner.

Coing, H. (1986) *Europäische Grundlagen des modernen Privatrechts*. Opladen: Westdeutscher Verlag.

Coing, H. (1989) *Europäisches Privatrecht. Band II: 19. Jahrhundert. Überblick über die Entwicklung des Privatrechts in den ehemals gemeinrechtlichen Ländern*. München: Verlag C. H. Beck.

Čulinović, F. (1961) *Državnopravna historija jugoslavenskih zemalja* [State and legal history of Yugoslav lands]. Vol. I. Zagreb: Školska knjiga.

Ćosić, S. (2000) 'Dubrovnik under French rule (1810–1814)', *Dubrovnik Annals*, 4, pp. 103–142.

Damaška, M. (2004) 'Ivan Kitonić i njegova *Directio methodica*' [Ivan Kitonić and his *Directio methodica*] in Kitonić, I., *Directio methodica processus iudiciarii iuris consuetudinarii, inclyti regni Hungariae*. Zagreb: Pravni fakultet Sveučilišta u Zagrebu, pp. I–XXXI.

Doralt, W. (2012) 'Allgemeines Bürgerliches Gesetzbuch (ABGB)' in Basedow J., Hopt, K. J., Zimmermann, R., Stier, A. (eds.), *Max Planck Encyclopedia of European Private Law*. Oxford: Oxford University Press, pp. 45–51.

Evans-Jones, R. (ed.) (1995) *The Civil Law Tradition in Scotland*. Edinburgh: The Stair Society.

Földi, A. (1988) 'Living Institutions of Roman Law in Hungarian Civil Law', *Helikon*, 28, pp. 363–380.

Gavella, N. (1993) 'Građansko pravo u Hrvatskoj i kontinentalnoeuropski pravni krug – u povodu 140. godišnjice stupanja na snagu OGZ u Hrvatskoj' [Civil law in Croatia and continental European legal family – on the occasion of the 140th anniversary of the enactment of *ABGB* in Croatia], *Zbornik Pravnog fakulteta u Zagrebu*, 43, pp. 335–375.

Gavella, N. (1994a) 'Die Rolle des ABGB in der Rechtsordnung Kroatiens. Zum 140. Jahrestag siner Einführung in Kroatien', *Zeitschrift für Europäisches Privatrecht*, 2, pp. 603–623.

Gavella, N. (ed.) (1994) *Hrvatsko građanskopravno uređenje i kontinentalnoeuropski pravni krug* [Croatian civil law regulation and continental European legal circle]. Zagreb: Pravni fakultet u Zagrebu.

Gordley, J. (1994) 'Myths of the French Civil Code', *The American Journal of Comparative Law*, 42, pp. 459–505.

Hamza, G. (1998–1999) 'Das *Tripartitum* von István Werbőczy als Rechtsquelle. Ein Beitrag zur Rechtsquellenlehre in der europäischen Rechtsgeschichte', *Ungarn-Jahrbuch. Zeitschrift für die Kunde Ungarns und verwandte Gebiete*, 24, pp. 19–30.

Hamza, G. (2001) 'Sviluppo del diritto privato ungherese e il diritto romano' in *Ivris vincvla. Studi in onore di Mario Talamanca*. Napoli: Jovene, pp. 353–364.

Hamza, G. (2002) *Die Entwicklung des Privatrechts auf römischrechtlicher Grundlage unter besonderer Berücksichtigung der Rechtsentwicklung in Deutschland, Österreich, der Schweiz und Ungarn*. Budapest: Andrássy Gyula Deutschsprachige Universität.

Heymann, E. (1917) *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*. Tübingen: Mohr.

Josipović, T. (2011) '200 Jahre der ABGB-Anwendung in Kroatien – 135 Jahre als Gesetz und 65 Jahre als' Rechtsregeln' in Fischer-Czermak, C., Hopf, G., Kathrein, G., Schauer, M. (eds.), *Festschrift 200 Jahre ABGB*. Wien: Manz Verlag, pp. 157–174.

Kadlec, K. (1902) *Verböczyovo Tripartitum. Soukromé pravo Uherské I Chorvatské šlechty v něm obsažené* [Werbőczy's Tripartitum. The Private Law of Hungarian and Croatian Nobility Contained in It]. Praha: Nákladem české Akademie.

Kaser, M., Knütel, R. (2003) *Römisches Privatrecht*. München: Verlag C.H. Beck.

Knütel, R (1994) 'Römisches Recht und Europa' in *Droit romain et identité européene. Revue internationale des droit de antiquité'*. Supplément au tome XLI, pp. 185–223.

Knütel, R. (1996) '*Ius commune* und Römisches Recht vor Gerichten der Europäischen Union', *Juristische Schulung*, 36, pp. 768–778.

Koschembahr-Lyskowski, I. von (1911) 'Zur Stellung des römischen Rechts im ABGB' in *Festschrift zur Jahrhundertfeier des ABGB*. Bd. 1. Wien: Manz, pp. 211–294.

Kranjc, J. (1998) *Latinski pravni reki* [Latin Legal Proverbs]. Ljubljana: Cankarjeva založba.

Lanović, M. (1929) *Privatno Tripartita* [Private Law of Tripartitum]. Zagreb: Tipografija.

Lesaffer, R. (2005) 'Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription', *European Journal of International Law*, 16, pp. 25–38.

Maštrović, V. (1959) *Razvoj sudstva u Dalmaciji u XIX. stoljeću* [Development of the Judiciary in Dalmatia in the 19th century]. Zagreb: Jugoslavenska akademija znanosti i umjetnosti.

Macartney, C. A. (1937) *Hungary and Her Successors: The Treaty of Trianon and Its Consequences 1919–1937*. Oxford: Humphrey Milford, for the Royal Institute of International Affairs.

Maurović, I. (1911) 'Das österreichische allgemeine bürgerliche Gesetzbuch in Kroatien' in *Festschrift zur Jahrhundertfeier des ABGB*. Bd. 1. Wien: Manz, pp. 685–699.

Micali, G. (1993) 'Il diritto romano nella giurisprudenza della Corte Suprema di Cassazione', *Giurisprudenza italiana*, Parte IV, 145, pp. 498–509.

Milić, I. (1921) *Pregled madžarskog privatnog prava u poredjenju sa austrijskim građanskim zakonikom* [A Survey of Hungarian Private Law in Comparison with the Austrian Civil Code]. Subotica: Naklada autorova.

Mora, M. (1964) 'Über den Unterricht des römischen Rechtes in Ungarn in den letzten hundert Jahren', *Revue internationale des droit de antiquité*, 11, pp. 409–432.

Nikolić, D. (2007) *Uvod u sistem građanskog prava* [An Introduction to the System of Civil Law]. Novi Sad: Pravni fakultet Univerziteta u Novom Sadu.

Nikolić, D. (2011) 'Private Law in Vojvodina in the First Half of the 20th Century: A Functional Model of a Mixed Legal System', in Borić T. et al. (eds.) *Öffnung und Wandel – Die internationale Dimension des Rechts (Festschrift für Willibald Posch)*. Bd. II. Wien: LexisNexis, pp. 525–533.

Ogris, W. (1974) 'Die Wissenschaft des gemeinen römischen Rechts und das österreichische allgemeine bürgerliche Gesetzbuch', in Coing, H., Wilhelm, W. (eds.) *Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert*. Bd. I. Frankfurt am Main: Vittorio Klostermann, pp. 153–172.

Pęksa, W. (2010) 'The Hungarian Feudal Institutions as Found in the Legal System of the Second Polish Republic. The Relationships between the Estate Manor and the Village in the Polish Spisz (Szepes) and Polish Orawa (Arva)' in Baran, K. (ed.), *Constitutional Developments of the Habsburg Empire in the Last Decades before its Fall. The Materials of Polish-Hungarian Conference*. Kraków: Jagiellonian University Press, pp. 91–95.

Péter, L. (2005) 'The Irrepressible Authority of the Tripartitum' in Bak, J. M., Banyó, P., Rady, M. (eds. and trans.) *Stephen Werbőczy, The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts. (The Tripartitum).* (Decreta regni mediaevalis Hungariae 5.) Idyllwild–Budapest: Central European University, pp. XIII–XXVI.

Petrak, M. (2010) *Traditio iuridica*. Vol. I. Zagreb: Novi informator.

Rady, M. (ed.) (2003) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, Faculty of Law, University of Cambridge.

Rady, M. (2006) 'The Prologue to Werbőczy's *Tripartitum* and its Sources', *English Historical Review*, 121, pp. 103–145.

Rainer, J. M. (2002) 'Il Diritto romano nelle sentenze delle Corti europee', in Castellano, D. (ed.), *L'anima europea dell Europa*. Napoli: Edizioni scientifiche italiane, pp. 45–50.

Rehm, G. (2012) 'Code Civil' in Basedow J., Hopt, K. J., Zimmermann, R., Stier, A. (eds.), *Max Planck Encyclopedia of European Private Law*. Oxford: Oxford University Press, pp. 200–205.

Reinkenhof, M. (1997) *Die Anwendung von ius commune in der Republik San Marino. Einführung in die Grundlagen und Erbrecht*. Berlin: Duncker & Humblot.

Reinoso Barbero, F. (1986) 'España y el derecho romano actual', *Labeo. Rassegna di diritto romano*, 32, pp. 310–317.

Reinoso Barbero, F. (1997) 'El derecho romano como desideratum del derecho del tercer milenio: los principos del derecho', *Roma e America. Diritto romano comune. Rivista di diritto dell integrazione e unificazione del diritto in Europa e in America Latina*, 3, pp. 23–90.

Romsics, I. (2002) *The Dismantling of Historic Hungary: The Peace Treaty of Trianon, 1920*. New York: Columbia University Press.

Singer, J. (1924) *Das in der Slowakei geltende Recht. II. Teil: Privatrecht*. Praha: Heinrich Mercy.

Smits, J. M. (2002) *The Making of European Private Law. Towards a Ius Commune Europaeum as a Mixed Legal System*. Antwerpen: Intersentia.

Steinwenter, A. (1954) 'Der Einfluss des römischen Rechtes auf die Kodifikation des bürgerlichen Rechtes im Österreich' in *Europa e il diritto romano. Studi in memoria di Paolo Koschaker*. Vol. I. Milano: Giuffrè, pp. 405–426.

Stein, P. (1962) 'The Digest Title, De diversis regulis iuris antiqui and the General Principles of Law', in Newman, R. A. (ed.) *Essays in Jurisprudence in Honor of Roscoe Pound*. Indianapolis: The Bobbs-Merrill Co. Inc., pp. 1–20.

Stein, P. (1999) *Roman Law in European History*. Cambridge: Cambridge University Press.

Sturm, F. (1994) 'Droit romain et identité européenne' in *Droit romain et identité européene. Revue internationale des droit de ''antiquité*. Supplément au tome XLI, pp. 147–162.

Szabó, B. (2002) 'Die Rolle des europäischen *ius commune* in der ungarischen Privatrechtsentwicklung der frühen Neuzeit. Das Zeugnis der Rechtswissenschaft' in Schermaier, M. J. et al. (eds.) *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*. Köln – Weimar – Wien: Böhlau, pp. 765–777.

Van Caenegem, R. (2002) *European Law in the Past and the Future*. Cambridge: Cambridge University Press.

Van den Horst, M. H. J. (1985) *The Roman-Dutch Law in Sri Lanka*. Amsterdam: Free University Press.

Wacke, A. (1999) 'Sprichwörtliche Prinzipien und europäische Rechtsangleichung', *Orbis Iuris Romani*, 5, pp. 174–213.

Wieacker, F. (1953) 'Griechische Wurzeln des Institutionensystems', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung*, 70, pp. 93–126.

Wieacker, F. (1996) *Privatrechtsgeschichte der Neuzeit*. Göttingen: Vandenhoeck & Ruprecht.

Wolodkiewicz, W. (2003) *Czy prawo rzymskie przestało istnieć?* Kraków: Zakamycze.

Zajtay, I. (1954) 'Sur le role du droit romain dans l'évolution du droit hongrois' in *Europa e il diritto romano. Studi in memoria di Paolo Koschaker*. Vol. II. Milano: Giuffrè, pp. 181–211.

Zimmermann, R. (1983) *Das römisch-holländische Recht in Südafrika. Einführung in die Grundlagen und usus hodiernus*. Darmstadt: Wissenschaftliche Buchgesellschaft.

Zimmermann, R. (1997) 'The Civil Law in European Codes' in Carey Miller, D. L., Zimmermann, R. (eds.) *The Civilian Tradition and Scots Law: Aberdeen Quincentenary Essays*. Berlin: Duncker & Humblot, pp. 259–294.

Zimmermann, R. (2001), *Roman Law, Contemporary Law, European Law. The Civilian Tradition Today*. Oxford: Oxford University Press.

Zimmermann, R. (2006) '*Ius Commune* and the Principles of European Contract Law: Contemporary Renewal of an Old Idea' in MacQueen, H. L., Zimmermann, R. (eds.), *European Contract Law: Scots and South African Perspectives*. Edinburgh: Edinburgh University Press, pp. 1–42.

Zlinszky, J. (1985) 'Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert' in *Studia in honorem Velimirii Pólay septuagenarii. Acta Universitatis Szegediensis. Acta Juridica et Politica*, 33, pp. 433–446.

Zlinszky, J. (1994) 'Das Recht, erhalten und neu belebt durch römisches Recht. Ungarns Verhältnis zum römischen Recht in der Vergangenheit und in der Gegenwart', *Tijdschrift voor Rechtsgeschiedenis*, 62, pp. 61–70.

Zwalve, W. (2002) 'Snell v. Beadle. The Privy Council on Roman law, Norman customary law and the ius commune' in de Ligt, L. (ed.), *Viva vox iuris romani. Essays in honour of Johannes Emil Spruit*. Amsterdam: J. C. Gieben, pp. 379–386.

| Chapter 2 |

The Influence of Byzantine Law in East Central Europe

Srđan ŠARKIĆ

ABSTRACT

The first part of the chapter is dedicated to the sources of Byzantine law, that is, secular and ecclesiastical. The most important secular laws are: 1) the Farmer's Law from the 7th or 8th century, concerning the peasantry and the villages; 2) the *Ecloga* (726 or 741) issued by Emperor Leo III and his son Constantine V; 3) *Legislation of the Macedonian dynasty* or the so-called 'Re-cleansing of the Ancient Laws,' including *Epanagoge, Procheiron, Basilika*, and the *Novels* of Leo VI; and 4) *Hexabiblos* (*Six Books*), which is a private codification compiled by Constantine Harmenopoulos, judge of Thessalonica. The most important ecclesiastical laws are: 1) *Synopsis Canonum*, a summary of abridged canons arranged in alphabetical or chronological order; 2) 'Systematic collections', *Synagoge*, and *Syntagma Canonum*, organized by topic; 3) *Nomokanons*, compilations of secular laws and canons; and 4) Matheas Blastares' *Syntagma* and Constantine Harmenopoulos' *The Epitome of the Holy and Divine Canons*.

The second part of the text treats the reception of Byzantine law in Slavonic countries: 1) the Slavonic *Ecloga* and the oldest preserved Slavonic legal text *Zakon Sudnyj Ljudem* (*Law for Judging the People* or *Court Law for the People*); 2) the Slavonic *Nomokanons* or *Kormchaia kniga*; and 3) the Stefan Dušan's codification, consisting of the Serbian translation of Matheas Blastares' *Syntagma*, Justinian's Law (a short compilation of 33 articles regulating agrarian relations), and Dušan's law code in the narrow sense.

The third part of the chapter refers to the reception of Byzantine law in the Danubian principalities (Wallachia and Moldavia) transmitted through the Serbs and the Bulgars and their processed Slavic legal works received through Byzantine officials and through the church.

The last part of the text is dedicated to the Byzantine public law's ideas in East Central Europe. The most important and common ideas espoused in the work are: 1) the Roman, Byzantine, and Slavonic concepts of law, 2) the idea of Rome and a hierarchical world order, 3) the emperor's task, and 4) concordance or 'symphonia' between the church and the state.

KEYWORDS

Farmer's Law, *Ecloga*, *Epanagoge*, *Procheiron*, *Basilika*, *Novels* of Leo VI, *Hexabiblos*, 'Systematic collections', *Nomokanons*, *Syntagma*, *Zakon Sudnyj Ljudem*, *Kormchaia kniga*, Stefan Dušan's codification, Danubian principalities, concept of law, hierarchical world order, the emperor's task, symphonia.

1. Sources of Byzantine law

Byzantium inherited its main political, cultural, and social institutions from Rome. Hence, the Byzantines called themselves 'Romans' (οι Ῥωμαίοι), their empire Βασιλεία Ῥωμαίων (*Imperium Romanorum*), and their princes 'emperors of the Romans' (Βασιλεὺς

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τῶν Ῥωμαίων) until the fall of their empire in 1453. Similarly, Roman law constituted the basis for the Byzantine legal system. For many centuries, the great Justinian codification was the cornerstone of Byzantine legislation. Of course, over the years, these Roman codes were adjusted to suit the current circumstances and then replaced by new codifications written in Greek. However, the influence of Roman law persisted, and it is obvious in post-Justinian laws. The most important Byzantine laws, secular and ecclesiastical, are:[1]

1.1. Secular laws

1) The Farmer's Law (Greek Νόμος Γεωργικός, Latin *Leges Rusticae*) legal code promulgated either at the end of the 7th or at the beginning of the 8th century, probably during the reign of Emperor Justinian II (685–695 and 705–711), focused largely on matters concerning the peasantry and the villages in which they lived. It protected farmers' property and established penalties for villagers' misdemeanors. It was designed for a growing class of free peasantry, supplemented by the influx of Slavic peoples into the empire, that became a dominant social class in later centuries. Its provisions concerned property damage, various kinds of theft, and taxation. The village was regarded as a fiscal unit, and payment of communal tax was required of all members of the community. Delinquent farmers' land and crops could be appropriated by anyone willing to pay the tax.

The significance of the Farmer's Law lay in its axiom that the landowner was also a taxpayer. Its influence was widespread, having an impact on legal development among the south and east Slavs, particularly in Serbia.[2]

Around that time, two other laws were promulgated: a) the Soldier's Law (Greek Νόμος Στρατιωτικός, Latin *Leges militares*), a collection of approximately 55 regulations, mainly penal and disciplinary, for soldiers,[3] and b) the Rhodian Sea Law (Νόμος Ῥοδίων ναυτικός), a three-part collection of regulations involving maritime law.[4]

2) *Ecloga* (from Greek Ἐκλογὴ τῶν νόμων, literally 'Selection of the Laws'), an 18-chapter compilation of Byzantine law, issued in 726, or more likely 741, by Emperor Leo III Isaurian in his name and that of his son Constantine V. Leo issued the law code in Greek instead of the traditional Latin so that more people could understand it and judges could use it as a practical legal manual. Though the *Ecloga* continued to be based on Roman law (editors took the provisions from Justinian's *Institutions*, *Digest*, *Codex*, and *Novels*), Leo revised it with a 'correction toward greater humanity' (ἐπιδιόρθωσις εἰς τὸ φιλανθρωπότερον) and on the basis of Christian principles.

1 On the sources of Byzantine law see Pieler, 1978, pp. 341–480; Van der Wal and Lokin, 1985; Troianos, 2011; id., 2015; id., 2017.
2 Best edition of the text with English translation: Ashburner, 1910, pp. 85–108; id., 1912, pp. 68–95.
3 Editions: Ashburner, 1926, pp. 80–109; Korzenszky, 1931, pp. 155–163.
4 Editions: Ashburner, 1909 (repr. 1976); Letsioos, 1996.

In civil law, the rights of women and children were enhanced at the expense of those of the father, whose power was sharply curtailed. In criminal law, the application of capital punishment was restricted to cases involving treason, desertation from the military, and certain types of homicide, heresy, and slander. The code eliminated the death penalty for many crimes previously considered capital offenses, often substituting mutilation. Equal punishment was prescribed for individuals of all social classes. In an attempt to eliminate bribery and favoritism, the code provided salaries for officials and judicial service and forbade the acceptance of gifts.

Although the work of an iconoclast emperor, the *Ecloga* had a strong influence on later Byzantine legislation as well as on the development of law in the Slavic countries beyond the Byzantine frontiers.[5]

3) The 'Recleansing of the Ancient Laws' (Ἀνακάθαρσις τῶν παλαιῶν νόμων) under Basil I and Leo VI. The first two emperors of the Macedonian dynasty, Basil I (867–886) and his son Leo VI (886–912), chose to undertake a legal reform called the 'Recleansing of Ancient Laws.' During their reign, much codified law was issued, and this flurry of legislative activity was the most extensive of any emperor after Justinian. The most important codes were:

a) *Epanagoge* (Greek Ἐπαναγογὲ, 'Return to the Point'), more correctly *Eisagoge* (Greek Εἰσαγωγὴ τοῦ νόμου, 'Introduction to the Law'), a law book promulgated in 886. Begun under Basil I, it was completed under his son and successor, Leo VI the Wise. As its name suggests, it was meant to be an introduction to the legislation of the *Basilika*, which was published later during Leo's reign.

The work, organized in 40 volumes, covers almost all spheres of law, and was explicitly meant to replace the earlier *Ecloga*, dating to the iconoclast Isaurian dynasty. Nevertheless, it draws some inspiration from the *Ecloga*. Its main source, however, is Justinian I's *Corpus Iuris Civilis*, albeit often heavily altered. Patriarch Photius (Φώτιος) of Constantinople worked on its compilation and wrote the preface as well as two sections addressing the position and power of the Byzantine emperor and patriarch; notably, the powers of the patriarch appear broader than in Justinian's legislation, both with regard to the emperor and toward the other patriarchates of the pentarchy (Πενταρχία).[6]

The *Epanagoge* was withdrawn from official use soon after its publication and replaced by the *Procheiron* (which was previously considered to be an antecessor of the *Epanagoge*) 20 years later, but it served as the basis for several private law books, such as the *Epanagoge Aucta* and the *Syntagma Canonum*. Through its translation into Slavonic, the *Epanagoge* found its way into Russian canon law, including the 13th-century

5 Best edition: Burgmann, 1983.

6 From Greek πέντε = five, and ἄρχειν = to rule. Pentarchy is a model of Church organization, formulated in the laws of Emperor Justinian I. In this model, the Christian Church is governed by Patriarchs of the five major episcopal sees of the Roman Empire: Rome, Constantinople, Alexandria, Antioch and Jerusalem.

Kormchaya Kniga. Its provisions on the patriarch's and church's positions vis-a-vis the temporal ruler played a great role in the controversy around Patriarch Nikon in the 17th century.[7]

b) *Procheiron* (Greek Πρόχειρος Νόμος, 'Handbook', or 'The Law Ready at Hand'). According to the traditional dating schema, the first text published as part of the Macedonian codification efforts was the *Procheiron*, which used to be dated to 870–879 (more precisely, 872) but must be regarded as a revision of the *Epanagoge* ordered by Leo VI in 907. Divided into 40 titles, *Procheiron* was the codification of certain fundamental statutes of Byzantine civil, criminal, and partly judicial and church law. As its main source, *Procheiron* uses Justinian's *Institutions*, but the Greek translations and comments rather than the original Latin text.

Regarding *Procheiron*, the intention was the same as the purpose of Ecloga: to create a compulsory guide for judges. However, the *Procheiron* presents itself as a connection to earlier times, before the iconoclastic period, lending the Macedonian dynasty a sense of religious legitimacy. Although the *Procheiron* invalidates parts of *Ecloga* and restores Justinian's Law, many provisions were taken directly from *Ecloga*.

In addition to the Farmer's Law and *Ecloga*, *Procheiron* had a strong influence on law in the Slavic countries, particularly in Serbia.[8]

c) *Basilika* (Greek τὰ Βασιλικὰ, 'Imperial Laws') was a collection of laws completed c. 892 in Constantinople by order of Emperor Leo VI. This was a continuation of the efforts of his father, Basil I, to simplify and adapt (chiefly regarding the change in language from Latin to Greek) Emperor Justinian's *Corpus Iuris Civilis*. The commission in charge of the compilation was headed by *protospatharios* (πρωτοσπαθάριος)[9] Symbatios (Συμβάτιος).

The 60 books comprising the *Basilika* have had a profound impact on the Byzantine empire's scholarship because they preserved many legal documents. Within the 60 books, in addition to the preservation of Justinian's *Codex,* new legal customs that evolved over the centuries were also included. It also included legal works initiated by Basil I, including *Procheiron* and *Epanagoge*. However, the *Basilika* still followed the tradition of the *Corpus Iuris Civilis,* beginning with ecclesiastical law, sources of law, procedure, private law, administrative law, and criminal law.

It greatly differed in its use of commentaries (*scholia,* σχόλια, singular σχόλιον), which were pieces of juristic works from the 6th and 7th centuries as well as the 12th and 13th centuries. Previously, Justinian I had outlawed commentary on his set of laws, making the *scholia* on the *Basilika* unique.

7 Edition: Zepos and Zepos, 1931 (repr. 1962), vol. II, pp. 229–368.

8 Edition: Zepos and Zepos, 1931 (1962), vol. II, pp. 107–227.

9 Protospatharios was one of the highest court dignities in the middle Byzantine period (8th–12th century). The designation was awarded to senior generals and provincial governors, as well as to foreign princes.

The *Basilika*'s influence was limited to the eastern empire. This included having a lasting impact on Greece's modern law code. Following the Greek War of Independence against Turkey in 1821, the *Basilika* was adopted until the introduction of the present Civil Code of Greece (which came into a force on February 23, 1946).[10]

d) *Novels* of Leo VI (Greek νεαρὰ, Latin *novella,* literally a 'new [laws]', the term for an imperial edict) promulgated in a collection (113 novels) most likely on Christmas Day 888 AD. Addressed for the most part to Leo's trusted advisor and father-in-law Stylianos Zaoutzes (Στυλιανὸς Ζαούτζης), Leo VI's *Novels* are, in fact, a heterogeneous collection of his legislation composed at different points during his reign.

The 'new laws' were codes that dealt with current problems and issues, such as the prohibition of fourth marriages. Novels addressed canon as well as secular law. Most importantly, from a historical perspective, they finally did away with much of the remaining legal and constitutional architecture that the Byzantine empire had inherited from the Roman empire, and even from the days of the Roman Republic. Obsolete institutions such as the Curiae, the Roman Senate, and even the Consulate, were finally removed, from a legal perspective, even though they still continued in a lesser, decorative form.[11]

4) *Hexabiblos* (Πρόχειρος Νόμος or Ἑξάβιβλος, 'Handbook' or 'Six Books'), a private codification of Byzantine law compiled in 1345 by Constantine Harmenopoulos (Κωνσταντίνος Ἁρμενόπουλος, 1320–c. 1385), a Byzantine jurist from Greece who held the post of 'universal judge'[12] of Thessalonica. The *Hexabiblos* was the last important monument of Byzantine law. It drew on previous codifications, such as the *Digest* and *Nomokanons.* It was divided into six books, each of which dealt with a given topic: legal procedure, real law, liability, inheritance, laws relating to marriage, and criminal law.

Harmenopoulos' *Hexabiblos* was widely used in Greece during the period of Turkish supremacy (since Greeks retained special jurisdiction) and after the country's liberation. The codification was also widely used in Bessarabia.[13]

1.2. Ecclesiastical (canon) law collections

It is typical to organize the canonical material underlying Byzantine canon law into four groups: 1) canons of the apostles; 2) canons of ecumenical synods; 3) canons of local synods; and 4) canons of the fathers. This organization was first found in Canon 1 of the Seventh Ecumenical Council (787), and it has generally been followed in the

10 Modern edition: Scheltema, Van der Wal and Holwerda, 1953–1988.
11 Editions: Noailles and Dain, 1944; Troianos, 2007.
12 The ‚universal judges of the Romans' (οἱ κριταὶ καθολικοὶ τῶν Ῥωμαίων) were a supreme court in Constantinople, Thessalonica, Serres, and some other parts of the state during the late Byzantine Empire.
13 Edition: Heimbach, 1851 (repr. 1969).

Orthodox Church. There are three types of collections revealing the material upon which Byzantine canon law was founded.[14] The most important are:

1) *Synopsis Canonum* (Greek Σύνοψις κανόνων) was a brief summary of the major points pertaining to a subject, i.e., abridged canons arranged in alphabetical or chronological order. The first synopsis was composed at the beginning of the 6th century by Stephen, Bishop of Ephesus (Στέφανος ο Εφέσιος). The collection contains, in chronological order, exposed canons of Saint Apostles, canons of the first three ecumenical councils, and those from the first five local synods.[15] As *Synopsis* was not always clear and understandable, Alexios Aristenos (Ἀλέξιος Ἀριστηνός), a 12th-century canonist who held a senior ecclesiastical and secular position during the reigns of John II Comnenus (118–1143) and Manuel I Comnenus (1143–1180), wrote interpretations and additions to Stephen of Ephesus' canonical collection.[16]

A later revision of *Synopsis* is attributed to 10th-century scholar Symeon (Συμεών), who held the high official posts of *magister* (μάγιστρος) and *logothetes* (λογοθέτης) and is usually identified with Symeon the Metaphrast (Μεταφραστής, 'Compiler'), author of *Menologion* (Μηνολόγιον), a collection of saints' lives, and *Chronicle* (Χρονογραφία). In this form, *Synopsis* contains epitomes of the following canons in the following order: of the Apostles, Nicaea (Iznik), Constantinople (381), Ephesus, Chalcedon (modern Kadiköy, a district of Istanbul in Asia Minor), Ankyra (Ankara), Neokesareia (Niksar in Turkey), Serdica (Sofia), Gangra (Çankiri in Turkey), Antioch, Laodikeia, Carthage, Saint Basil, and the Quinisext Synod. It is obvious that the above arrangement was based on criteria of importance: the canons of the Apostles come first, followed by those of the ecumenical councils (Nicaea, Constantinople, Ephesus, and Chalcedon), those of the local councils in chronological order (Ankyra, Neokesareia, Serdica, Gangra, Antioch, Laodikeia, and Carthage), and then those of the Church Fathers (Basil the Great). The canons of the Quinisext Synod are found at the end because they were appended after the material had already been arranged. Such an order was accepted by the famous 12th-century canonists John Zonaras (Ἰωάννης Ζωναράς) and Theodore Balsamom (Θεόδωρος Βαλσαμῶν), and it is applicable even today.[17]

2) 'Systematic collections': *Synagoge* (Greek Συναγογὴ) and *Syntagma Canonum* (Greek Σύνταγμα κανόνων).[18] *Corpus Canonum* was not systematic and was not arranged by topic. In all of its versions, the canons were arranged according to councils, and these, in turn, had a chronological order, with the exception of the Council of Nicaea. The

14 On Byzantine canon law, see Troianos, 2012, pp. 115–169, 170–214.
15 Editions: Krasnožen, 1894, pp. 207–221; id., 1910, pp. 225–246; id., 1911, pp. III–XVIII.
16 Latest edition: Papagianni et al., 2019.
17 Editions of the text: Voel and Justel, 1661, vol. II, pp. 710–714; Migne, 1857–1866, vol. 114, col. 236–292.
18 *Syntagma* is a term used in patristic literature to designate any treatise or book, especially those that were scriptural, exegetic, or polemical in content. The term was extended to characterize some collections of canon law.

2. The Byzantine Empire in SE-Europe (565); Serbia and the Danubian Principalities (1355)

first attempt at preparing a systematic collection (i.e., one organized by topic with corresponding canons) was made in the 6th century. The need for such a collection was dictated by the increase in the number of canons, which made the general monitoring of this material as a whole extremely difficult.

The product of this attempt, *The Collection of Sixty Titles*, did not survive. The only mention of its existence is in the prologue of a similar, later work based on the first collection titled *The Compilation* (*Synagoge*) *of Ecclesiastical Canons Divided into 50 Titles* (Συναγωγὴ κανόνων ἐκκλησιαστικῶν εἴς ν' τίτλος διηρημένη), which is a 'systematic' collection of canons organized according to content. The work was authored by John Scholasticus (Ἰωάννης Σχολαστικός), attorney-at-law (*scholasticus*) and presbyter (πρεσβύτερος, 'elder') of Antioch and later patriarch of Constantinople (565–577). The collection reproduces the apostolic canons and the canons of Nicaea, Ankyra, Neokesareia, Serdica, Gangra, Antioch, Laodikeia of Phrygia, Constantinople, Ephesus and Chalcedone, as well as the canonical letters of Basil the Great.[19]

Probably c. 580, a new systematic collection was formed, called *The Syntagma of Canons of 14 Titles* (Σύνταγμα κανόνων εἰς 14 τίτλους). According to one unconfirmed hypothesis, this collection was created by the patriarchs of Constantinople Eutychios (Εὐτύχιος, 'Fortunate,' 552–565 and 577–582) and John IV Nesteutes (Νηστευτής, 'Faster,' 582–595). Although it did not survive in its complete state, its text has been handed down to us indirectly through *The Nomokanon of 14 Titles* (Νομοκάνονος εἰς 14 τίτλους), which was based on it.[20]

The *Syntagma* differed substantially from John Scholasticus' *Synagoge*. First, it was much richer in content. Second, *Syntagma* was organized differently. It was divided into 14 titles, and every title was subdivided into chapters. In every chapter, related canons were mentioned with reference to their number according to the synod; however, this was done without the inclusion of their text at the place of mention. The texts, listed according to their source (apostolic canons, canons of synods, canons of

19 Critical edition: Benešević, 1937.

20 Due to this relationship, the editions of *The Nomokanon of 14 Titles* also cover *The Syntagma*. See the next title.

fathers) were gathered in a special collection. Constantinople must be regarded as the place where the *Syntagma* was edited.

3) *Nomokanons* (Greek νομοκανόνες) are compilations of secular laws (νόμοι, singular = νόμος) and ecclesiastical regulations (κανόνες, canons). The most important Byzantine nomokanons are *The Nomokanon of 50 Titles* and *The Nomokanon of 14 Titles.*

The Nomokanon of 50 Titles was put together by an unknown compiler, probably in Antioch, during the reign of Justin II (565–578) or Maurice (582–602).[21] John Scholasticus' *The Synagoge of 50 Titles* constituted a basis for this work. After every title under the heading τὰ συνάδοντα νόμιμα, 'The Legal Precepts,' Justinian provisions (mostly from *Novels*) were added to this work, taken primarily from *Collectio LXXXVII Capitulorum.* This collection is also attributed to John Scholasticus, and it is one of the collections of ecclesiastical law of civil origin.[22]

The original *Nomokanon of 14 Titles,* which was composed between the years 612 and 629 and is among the most important sources of the law of the Eastern Church, was the result of the incorporation into *The Syntagma of Canons of 14 Titles* of the provisions from Justinian legislation that dealt with the church.[23] These provisions were essentially drawn from *Collectio tripartita* or *Collectio constitutionum ecclesiasticarum.* It was a supplement, in the form of an appendix, to *The Syntagma of Canons of 14 Titles,* containing texts that were originally civil laws pertaining to the church. The name, *Collectio tripartita* ('Tripartite Collection'), reflects the fact it is made up of three parts. The first part includes provisions from Book I of Justinian's *Codex* (Titles 1-13), which came from an interpretive revision also containing subtitles (παράτιτλα). The second part contains provisions relating to *ius sacrum* from the *Digest* and Institutes. The third part contains all Justinian's and Justin II's novellas with ecclesiastical content.[24]

For centuries, it was believed that this nomokanon was the work of Patriarch Photios, who died in 893. When it was realized that it was originally composed in the 7th century, this opinion collapsed. This is why the characterization '*Nomokanon of Pseudo-Photios*' is sometimes used in bibliographies.

4) 14th-century collections. The most important of the collections from the late Byzantine period are the *Syntagma kata Stoicheion* (Σύνταγμα κατὰ στοιχείον) or *Alphabetical Syntagma* (nomokanonic miscellany put together in 24 titles, where each title has a sign of one of the letters from the Greek alphabet) by Matheas Blastares, a monk from Thessalonica, and Judge Constantine Harmenopoulos' *The Epitome of Canons* (Επιτομή κανόνων).

Matheas Blastares' collection was created in 1335. From the ecclesiastical side, he used *The Nomokanon of 14 Titles* and the commentaries of John Zonaras and Theodore

21 Edition: Voel and Justel, 1611, vol. II, pp. 603–660.
22 Editions: Heimbach, 1838–1840 (repr. 1969), vol. II, pp. 202–237; Pitra, 1864–1868 (repr. 1963), vol. II, pp. 385–405.
23 Best edition: Pitra, 1864–1868 (repr. 1963), vol. II, pp. 445–640.
24 Modern critical edition: Van der Wal and Stolte, 1994.

Balsamon. From the civil side, he used *Ecloga*, *Epanagoge/Eisagoge*, *Procheiron*, The *Novels* of Leo VI, and *Basilika*.[25] Thanks to its rich content, coupled with the practical, useful manner in which its material is arranged, the *Syntagma* enjoyed wide circulation, as its rich manuscript tradition indicates. Shortly after its composition, it was translated into Old Serbian. It was also translated into Bulgarian in the 16th century and into Russian in the 17th century.

Alongside the *Hexabiblos*, which contained only civil law, Constantine Harmenopoulos created a second collection titled *The Epitome of the Holy and Divine Canons* (Επιτομή τῶν ιερών καὶ θείων κανόνων) in 1346. *Epitome* is divided into six sections, which are further defined by inscriptions instead of titles. The six sections are: 1) Concerning bishops; 2) Concerning presbyters, deacons, and subdeacons; 3) Concerning the clergy; 4) Concerning monks and monasteries; 5) Concerning the laity, and 6) Concerning women.[26]

2. Reception of Byzantine law in Slavonic countries

2.1. Slavonic Ecloga *and* Zakon Sudnyj Ljudem

In the Slavonic world, law of Byzantine origin, mostly from *Ecloga,* had already been introduced through legislative work associated with Cyril and Methodius' mission and by the *Zakon Sudnij Ljudem*.

A Slavonic translation of *Ecloga* was preserved in a Russian manuscript from the 14th century. The translation was not particularly good, and it is impossible to understand a number of its provisions. The translation's place of origin and date are still unknown.[27]

The oldest preserved Slavonic legal text is the *Zakon Sudnyj Ljudem* ('Law for Judging the People' or 'Court Law for the People'). Its source was the *Ecloga*, and it was written in Old Church Slavonic in the late 9th or early 10th century. The oldest (short) version contains 33 articles primarily on penal law adapted from the *Ecloga* (Chapter XVIII, entitled Ποινάλιος τῶν ἐγκληματικῶν κεφαλαίων, 'Penalties and Crimes'). Other provisions were taken from Chapters VIII (Περὶ ἐλευθεριῶν καὶ ἀναδουλώσεον, 'On Manumission and Enslavement'), XIV (Περὶ μαρτύρων πιστῶν καὶ ἀπροσδέκτων, 'On Believable and Unreliable Witnesses'), and XVIII (Περὶ διαμερισμοῦ σκύλων, 'On Distribution of Booty'). Parts of this version (24 arts.) are verbatim translations of the source, while the remaining chapters are adaptations with some changes.

Later Russian annals and the legal collection compiled at the end of 13th or the beginning of the 14th century called *Merilo Pravednoye* ('Just Measure' or 'Measure of

25 Edition: Ralles and Potles, 1859 (repr. 1966), vols. I–VI. Matheas Blastares' *Syntagma* (Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων) is Volume VI of this edition of all sources of the canon law of the Eastern Church.

26 Editions: Leunclavius, 1596, vol. I, pp. 1–71; Perentidis 1980–1981.

27 Edition: Ščapov and Burgmann, 2011.

Righteousness')[28] contain a widespread edition of the *Zakon Sudnyj Ljudem*, consisting of 77 or 83 articles (depending on the numeration) under the name Sudebnik cara Konstantina (Судебник царя Константина, 'Code of Laws of Tsar Constantine,' that is, Constantine the Great). The text is of Russian origin.

The place of origin of the *Zakon Sudnyj Ljudem* is a controversial topic. The oldest theory is Great Moravian provenance and a date around 870–880, with authorship by the Slavonic apostle Methodius. The 'Bulgarian' theory places the origin of the text in 866–868 and relates it to Prince Boris' (852–889) need for Christian legislation. However, some Bulgarian scholars believe that the law was promulgated immediately after the Council of Preslav (893), when Bulgarian Prince Vladimir (889–893), mainly remembered for his attempt to eliminate Christianity in Bulgaria and the reinstitution of paganism, was dethroned and replaced by his younger brother Simeon (893–927). On the basis of Frankish and Bavarian legal patterns in the text, some Slovenian scholars have suggested the late 9th century principality of Lower Pannonia (the Balaton principality) as a likely place of origin, as it was part of the state-building process initiated by Prince Kocelj (861–876). Finally, the 'Macedonian' theory considers the Byzantine region of Strymon (Στρυμών), in actual North Macedonia and Bulgaria, to be the place of origin, dating it around 830. Despite its origins, all surviving manuscripts come from Russia. The text itself seems to have reached Russia before the end of the 10th century.[29]

2.2. Slavonic nomokanons *or* Kormchaia Kniga

The first Slavonic nomokanon was written by Methodius (c. 868), upon the initiative of Moravian Prince Rastislav (846–870), in the era of the Slavs' conversion to Christianity. Methodius translated John Scholasticus' *Synagoge of 50 Titles* from Greek into Old Church Slavonic and added some secular law provisions, mostly taken from the *Ecloga*. Methodius' so-called nomokanon was preserved in Russian manuscripts from the 13th to the 17th century.[30] Slavonic nomokanons in Russian were known as *Kormchaia Kniga* (Russian Кормчая книга, lit. The Pilot's Book from Church Slavonic and Greek κυβερνήτης = helmsman, pilot of ship) or Pidalion (Russian Пидалион, from Greek Πιδάλιον = stern, oar, helm, handle of helm, rudder), which were guidebooks for the management of the church and for the church court in Orthodox Slavic countries and are a transmission of several old texts.

The first Byzantine legal collection that penetrated Serbia, around 1219, was the *Nomokanon* or *Zakonopravilo* of Saint Sabba (Serbian *Sava*), later called *Krmčija*. On his way back from Nicaea, where the Serbian Church got its autocephalous, Sabba stopped in Thessalonica, where he probably composed the famous nomokanon.

28 The name is given in modern literature. It was taken from the first words of this text: "*This book is just measure, true weighing…*" *Merilo pravednoye* was to serve both as a moral precept and a legal guidebook for judges and as a transmission of several old texts. Edition: Tichomirov, 1961.
29 Editions: Tihomirov and Milov, 1961; Vašica, 1971, vol. IV, pp. 178–198; Dewey and Kleimola, 1977 (contains an English translation).
30 Edition: Vašica, vol. IV, pp. 205–263.

The ecclesiastical rules of the *Zakonopravilo* were taken from two Byzantine canonical collections, with canonists' glosses: Stephen of Ephesos' *Synopsis*, with interpretations from Alexios Aristenos, and the *Syntagma of XIV Titles,* with interpretations from John Zonaras. Among the Roman (Byzantine) laws (νόμοι), Saint Sabba's nomokanon contains the whole *Procheiron*, the *Zakon gradskii* in Serbian translation, and a translation of *Collectio octoginta septem capitulorum*.

Saint Sabba's nomokanon has no prototype in any Byzantine or Slavonic codex, and it retained its place within the Serbian legal system, having been neither challenged nor abrogated.[31] As early as 1226, a copy was sent to Bulgaria, where it was accepted as the official collection. From Bulgaria, Saint Sabba's nomokanon arrived in Russia. The Russian Metropolitan of Kiev Kirill II proposed it as a guideline for the management of the Russian Church in 1274 at the Church Council in Vladimir.

In the late 15th and early 16th centuries, the *Kormchiye Books* were revised due to the large number of variant readings. In 1650, the *Joseph Kormchaia* (Иосифовская Кормчая by Patriarch Joseph), which was based on Saint Sabba's *Zakonopravilo*, was prepared for printing. After some amendments in 1653, the *Nikon Kormchaia* (Никоновская Кормчая by Patriarch Nikon) became the first printed version of any Slavonic nomokanon. It was disseminated in all Orthodox Slavonic countries, where it became an official source of canon law and displaced all other Kormchaia manuscripts.

The impressed *Kormchaia* is divided into four parts: the first part contains an article about church schism as well as on the autocephalous Russian, Bulgarian, and Serbian church, an article on the conversion of Russians to Christianity and on the foundation of the Moscovite Patriarchate, a part concerning the importance of Matheas Blastares' *Syntagma*, a description of Ecumenical and local synods, and two prefaces to the *Nomokanon of 14 Titles.*

The second part contains 41 chapters from which 36 chapters are a translation of Stephen of Ephesus' *Synopsis*, with Alexios Aristenos' interpretations.

The most important sources for the third part are *Collectio octoginta septem capitulorum,* part of the *Nomokanon of 14 Titles,* and *Ecloga* and *Procheiron* in their entirety.

The fourth part contains the *Donation of Constantine* (*Donatio Constantini*), a forged imperial decree (diplom), probably composed in the 8th century, by which Roman Emperor Constantine the Great supposedly transferred authority over Rome and the western part of the Roman empire to Pope Silvester.

2.3. Stefan Dušan's codification

The reception of Byzantine law in any Slavonic country culminated with the greatest work in the Serbian legal tradition, Emperor (Tsar) Stefan Dušan's (1331–1355) codification. This was realized in 1346, when King Dušan proclaimed himself to be the true-believing tsar and autocrat of the Serbs and the Greeks. Educated as a young man

31 Petrović, 1991. It is really strange that up to the present, there is no critical edition of *Zakonopravilo.*

in Constantinople, Dušan understood very well that if his state proclaimed itself to be an empire, it should have, inter alia, its own independent legislation. Accordingly, he began preparations for his own law code immediately after the establishment of the empire, following the examples of his models, the great Byzantine emperors and legislators Justinian I, Basil I, and Leo VI. In a 1346 charter, in which he announced his legislative program, he said that the emperor's task was to make the laws that one should have. These laws are undoubtedly similar to those of the Byzantine emperors, that is, general legislation for the entire state territory. Under the social and political circumstances, the Serbian tsar had to accept existing Byzantine law, though it was modified in accordance with Serbian custom. A completely independent codification of Serbian law, without any Byzantine law, could not be produced, and therefore, Serbian lawyers created a special *Codex Tripartitus*, codifying both Serbian and Byzantine law. In the old manuscripts, Dušan's Code is always accompanied by two compilations of Byzantine law: Matheas Blastares' abbreviated (*Epitome*, Ἐπιτομή) *Syntagma* and Justinian's Law. Dušan's law code, in the narrow sense, is the third part in a larger Serbo-Byzantine codification.

Matheas Blastares' *Syntagma* came to be known in Serbia in two translations, a full and an abridged one.[32] The compilers of Dušan's codification radically abridged the earlier translation of the entire *Syntagma* from the original 303 chapters to 94. They had two reasons for abbreviating the earlier text. The first was entirely ideological, as Matheas Blastares' *Syntagma* expresses the Byzantine empire's political hegemony on ecclesiastical as well as constitutional terms. Accepting Theodore Balsamon's commentaries, Matheas Blastares reflects the Byzantine emperor's omnipotence through his spiritual and political *dominium*. He actually restricts the independence of the autocephalous churches, whilst emphasizing Byzantine hegemony over the Slavic states that were, at the time, threatening Byzantine interests in the Balkans. The independence of the Bulgarian and Serbian churches was denied (although both were autocephalous), as was other nations' right to proclaim themselves empires. Following the appearance of the full translation in 1347–1348, work on the abbreviated *Syntagma* began. It should be noted that there is no Greek original of the abbreviated version, in which all the chapters referring to Byzantium's hegemony are omitted.

The second reason for undertaking the abbreviation was more practical. The abridged *Syntagma*, as a part of Dušan's Code, was designed for use in ordinary courts. For this reason, most of the ecclesiastical rules were omitted, and only those with secular application were retained.

Justinian's Law, a short compilation of 33 articles regulating agrarian relations, formed the second part of this *Codex Tripartitus.* The majority of these articles were taken from the famous Farmer's Law, which had been completely translated into the Old Serbian language. Further articles were culled from *Ecloga*, *Procheiron*, and

32 Novaković, 1907.

Basilika. This collection also does not exist in a Greek version and so represents an original work produced by Serbian lawyers.[33]

At the end of the 16th or at the beginning of the 17th century, a widespread edition of Justinian's Law, consisting of 87 articles, was composed (probably in Bulgaria), and it is known under the name Sudatz ('Court Law').[34]

Dušan's law code, in the narrow sense, which is the third and the most important part of the codification, was issued at councils held in Skoplje (Скопје) on 21 May 1349 (the first 135 arts.) and in Serres (Σὲρρες) 5 years later (Arts. 136–201). Although Dušan's law code represents an original work produced by Serbian legislation, many of its provisions were undertaken based on Byzantine law, especially the *Basilika* (around 60 arts.).[35]

3. Reception of Byzantine law in the Danubian principalities

The Byzantine influence on the institutions and law of the Danubian principalities (Wallachia and Moldavia) was very strong, and it was initially transmitted, along with other elements of Byzantine culture, through three channels of communication: through the Serbs and the Bulgars and their processed Slavic legal works, through Byzantine officials and economic factors, and through the church.

Byzantine legal texts were in use in the Danubian principalities as early as the foundation of their states. In particular, extracts from the Serbian version of the *Procheiros Nomos* (*Zakon gradski*) were imported into the country in the mid-14th century. This text spread widely in Wallachia and Moldavia until the end of the 16th century. The same occurred with the Serbian compilation of Justinian's Law. The Romanian translation of the text, entitled *Cartea judecăţii împăratului Constantin Justinian* ('Law Court of Emperors Constantine and Justinian') was preserved in a manuscript from the 15th century. Though certain clauses of the Farmer's Law were used in Wallachia since the beginning of the 15th century, the full text in Romanian translation was published in 1646 as a part of the Moldavian law book, compiled upon the order of Voevod ('Duke') Vasile Lupu (Pravilele lui Vasile Lupul voevod). Matheas Blastares' *Syntagma* was known in the Danubian principalities as early as the 15th century, either in its original form in Greek or through Slavic translations and in the Serbian *Epitome*. Two copies of the Serbian *Syntagma* were prepared in 1461 and 1495 for the Wallachian Princes Ioann Vladislav and Ioann Stefan. In addition, in Moldavia, upon the command and with the support of Prince Stefan the Great, the *Syntagma* was published three consecutive times in 20 years – in 1472, 1474, and 1495 – which indicates its persistent use and broad acceptance.

33 Marković, 2007.
34 Edition: Andreev and Cront, 1971.
35 Editions: Novaković, 1898 (repr. 2004); Radojčić, 1960; Bubalo, 2010. The Serbian Academy for Science and Art has edited all manuscripts of *Dušan's Law Code* in four volumes: Begović, 1975; id., 1981; Pešikan, Grickat-Radulović and Jovičić, 1997, Čavoški and Bubalo, 2015.

Apart from these collections, the influence of Byzantine law, adjusted to suit local administrative and social needs, is generally apparent in Romanian rulers' political practice, in state ideology, in the institutions, and mostly in the structure of the church. In the legal collections written in the Romanian language and composed in the epoch spanning the 17th to 19th centuries, the expression 'imperial laws' denoted extracts from Byzantine legal miscellanies, such as the *Basilika* and *Hexabiblos.* The influence of Byzantine law was maintained until the 19th century. In Moldavia, for example, until 1817, *Hexabiblos*, in its original Greek form, was the official law code. Some writers have claimed that the *Basilika* was the main source for the Moldavian Civil Code (*Codex Callimachus*), promulgated in 1817 by Prince Scarlat Callimachi. However, it is more probable that the code was composed according to the model of the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch*).[36]

4. Byzantine public law ideas in East Central Europe

Byzantine law and the Byzantine empire's concept of law had a great effect on the formation of law in and the ideology of the mediaeval Balkan states and Russia, and at the same time, it constituted the basic foundation of their political organization. We shall expose some of the most important and common ideas that were undertaken from Byzantine public law.

4.1. Concept of law

1) *Roman and Byzantine concepts*. Although the Byzantines based their entire legal and political tradition on Roman law, their concept of law (in the sense of *ius*) was essentially different from that held by the Romans. In fact, the Byzantines had no general concept of law. The conception of *ius* as a body of legal rules forming the law (*droit, diritto, derecho, Recht*), inherited from the classical Roman tradition, had already been rejected in Justinian's time. Justinianic professors translate the term *ius* into the Greek δίκαιον (*dikaion*), but this translation has no practical significance. When a Byzantine lawyer says or writes νόμος καὶ δίκαιον (*nomos kai dikaion*), he means law (*lex*) and justice, not statute (*lex*) and law (*ius*). The most important and central legal concept is that of *nomos,* which means law in the sense of *lex,* behind which the imperial legislator (νομοθέτης) is always present.

It is obvious from the way in which they translate their predecessors' texts that Byzantine lawyers were not acquainted with the general ideas of law. Take for example, Ulpian's thought that law (*ius*) was derived from justice, since law (*ius*) is the art of good and equality (*ius est autem a iustitia appelatum; nam ut eleganter Celsus*

36 On the reception of Byzantine law in the Danubian principalities, see Georgesco, 1959, pp. 373–391. On the influence of Byzantine law on the East European nations, see Solovjev, 1955, pp. 599–650; German version: id., 1959, pp. 432–479.

definit, ius est ars boni et aequi).[37] The editors of *Basilika* translated this as follows: ὁ νόμος ἀπὸ τῆς δικαιοσύνης ὠνόμασται; ἔστι γὰρ νόμος τέχνη τοῦ καλοῦ καὶ ἴσου.[38] Thus, *ius* is replaced by *nomos* (*lex*), with the result that Ulpian's play on *ius – iustitia* is lost (The text of *Basilika* says *nomos – dikaiosenes*). In Byzantium, the principle of *nomos,* which denotes both the Roman terms *ius* and *lex,* always took precedence over other legal rules. Until the fall of the Byzantine empire, Byzantine lawyers referenced 'the law' (*nomos*), even in the absence of a specific statutory provision. There are also many provisions in legal documents indicating that everything should be done in accordance with statute (κατὰ νόμον). These formulations have led modern scholars to try to identify the statutes to which reference is being made, but in all these instances, Byzantine lawyers and notaries had in mind what would be called 'legality' or 'the rule of law' rather than any particular legal provision.

2) *The Slavonic concept*. As in Byzantium, the general concept of law in Slavonic countries was not taken to be the Roman *ius.* Rather, the general legal concept was *zakon,* a term that in modern Slavonic languages indicates the ultimate act of state power; it can be translated as νόμος in Greek, *lex* in Latin, 'act' or 'statute' in English, *la loi* in French, *la legge* in Italian, *la ley* in Spanish, *das Gesetz* in German, *törvény* in Hungarian, and so on in other languages, whilst in the Slavonic languages, it is virtually the same word. The term is of ancient derivation, having first been mentioned in documents from the end of the 9th century. During the following centuries, it can be found in numerous legal sources with one of two basic meanings, firstly as a legal rule in general (*regula iuris*) and secondly as the translation of the Greek *nomos,* a law-making act performed by the Byzantine emperor, meaning either *ius* or *lex.* In its first meaning, it occurs in legal documents of Slavonic origin, whereas in its second, it can be found in Byzantine legal compilations translated and adapted for mediaeval Slavonic states. For example, the Serbian translation of Matheas Blastares' *Syntagma* contains Chapter H under the title 'On the Law,' with a Roman lawyer's definitions of 'law' translated from Byzantine legal compilations rather than from the Latin original.

4.2. The idea of Rome and a hierarchical world order

During the Middle Ages, the idea of Rome as the center of a universal and ecumenical empire as well as the whole Christian Church was present in all European nations. Naturally, the eastern Roman empire (Byzantium) considered itself to be the Roman empire's only successor and, according to that ideology, only their monarchs could carry the title 'emperor of the Romans,' hence the new imperial capital on the European coast of the Bosphorus strait was called the 'New Rome' (Νέα Ῥώμη). However, the idea of Rome as an eternal, universal empire became attractive to the German and Slavonic rulers. Charlemagne in the west (800) and Simon of Bulgaria in the east (913) started to call themselves 'emperors.' The Byzantines protested and sought political

37 D. 1,1,1.
38 Bas. 2,1,1.

and legal arguments that would contest the existence of other 'empires,' but they eventually had to accept the reality. Hence, the number of emperors increased, and this meant the decay of the one and only universal Christian empire. Nevertheless, this did not lead to the negation or obliteration of the century-old idea.

Byzantine constitutional ideology was expressed as a hierarchical world order. According to this model, not all states were equal; rather, a strict order existed among them, reflecting the importance of each. At the head of this hierarchy was Byzantium, the legitimate holder of the idea of the universal empire; only its monarchs could bear the title of 'emperor.' All other mediaeval states had a higher or lower rank, depending upon their political importance, which might vary.[39] The heads of these states, pursuing this construct, formed a so-called 'family of monarchs' associated in a fictive parentage. At the head of the family, as the *pater familias,* stood the emperor of Byzantium, whilst different degrees of relationships were conferred on other monarchs depending upon their political importance. Charlemagne, for example, became the emperor's brother (ἀδελφός) and his German, French, and Italian successors were proud of this *adelphos* distinction. English kings were merely the emperor's 'friends' (φίλοι), whilst at the bottom of the scale came those insignificant monarchs who Byzantium considered to be part of the household property rather than a part of the family.[40]

The influence within Serbia of the Byzantine ideology of the hierarchical world order is obvious in the text of a charter presented to the monastery of Hilandar (on the Holy Mountain) in 1198 by the founder of the Serbian dynasty, Stefan Nemanja (1166–1196). It begins as follows:

> *In the beginning God created the heavens and the earth and human beings on it, he blessed them and gave them a power over the whole of his creation. And some of them he made emperors, other princes, other lords and provided all of them with herds to be grazed and protected from every harm. So, brothers, the merciful Lord established the Greeks as emperors and the Hungarians as kings and he classed all men and gave the law... According to all his infinite grace and mercy He endowed our ancestors and our forefathers to rule this Serbian land... and appointed me, christened in holy baptism Stefan Nemanja, the Great Župan.*[41]

Hence, for Stefan Nemanja, only the Greeks (the Byzantines) could be emperors, while the Hungarians could only be kings, but by emphasizing the fact that his monarchical power was derived from God, he indicated his independence from the Byzantine emperor. Consequently, by the end of the 12th century, Serbia had become an independent state within the Byzantine system of the hierarchical world order.

39 Ostrogorski, 1956, pp. 1–14.
40 Dölger, 1964, pp. 43 ff. and p. 38, n. 8.
41 Mošin, Ćirković and Sindik, 2011, p. 68.

The triumph of the idea of Rome came in Serbia after King Dušan's proclamation of the empire, and it was expressed in the charter from about 1346, announcing his legislation. Inter alia, Serbian rulers declared:

> *And [God] appointed me to be lord and ruler of all of my fatherland and I ruled sixteen years and then I was strengthened with greater honour by the right hand of Almighty Lord as the most magnificent Joseph was strengthened with wisdom and appointed to be ruler of many peoples and of all of the Pharaoh's land and the whole Egypt. In the same manner by His grace I was translated from the Kingdom to the Orthodox Empire. And he gave me in my hands as to the Great Emperor Constantine lands and countries and coasts and large towns of the Greek Empire.*[42]

The charter clearly shows the Byzantine constitutional ideology that was adopted in Serbia: By proclaiming his state as an empire, Dušan achieved his supreme goal. Serbia reached the highest rank in the hierarchical world order, and the whole procedure was done according to the Byzantine model. However, Dušan was conscious that he could not consider himself absolutely equal to the emperor of Constantinople. In order to emphasize the difference between his status and that of the ecumenical emperor in Constantinople, Dušan signed his charters written in Greek as follows: ΣΤΕΦΑΝΟΣ ΕΝ ΗΡΙΣΤΩ ΤΟ ΘΕΟ ΠΙΣΤΟΣ ΒΑΣΙΛΕΥΣ ΚΑΙ ΑΥΤΟΚΡΑΤΩΡ ΣΕΡΒΙΑΣ ΚΑΙ ΡΩΜΑΝΙΑΣ ('*Stefan in Christ the God the True-believing Emperor and Autokrat of Serbia and Romania*'). As we can see, the expression 'emperor of the Romans' (βασιλεὺς τῶν Ῥωμαίων) was replaced by 'emperor of Serbia and Romania.' Although this difference seems to be insignificant, the fact is that no one Byzantine emperor ever used the title 'emperor of Romania' (βασιλεὺς Ῥωμανίας). Although Dušan desired it, he could not pretend to be the 'emperor of the Romans' because the legitimate Emperor John V was still alive and holding power in Constantinople, and Dušan never contested his imperial rights. For this reason, in the charters written in Greek (one of the major world languages of the epoch), he replaced the ethnic elements with geographical ones. In so doing, he limited his power to the 'Roman territories,' and via a tacit agreement, he recognized the Byzantine hierarchical world order in which only one sovereign had the right to the supreme title.

Within decades of the capture of Constantinople by Mehmed II of the Ottoman empire on 29 May 1453, some Eastern Orthodox people nominated Moscow as the 'Third Rome' (Russian 'Третий Рим'). In 1472, Ivan (Иван) III, the Grand Prince of Moscow, married Zoe Palaiologina (Ζωή Παλαιολογίνα), who later changed her name to Sophia (София), a niece of the last Byzantine Emperor Constantine XI, and styled himself tsar (Царь, 'Caesar') or emperor. In 1547, Ivan IV the Terrible (Грозный) cemented the title 'tsar of all Rus' ('Царь Всея Руси'). In 1589, the patriarch of Constantinople granted autocephaly to the metropolitanate of Moscow, which thus

42 Pešikan, Grickat-Radulović and Jovičić, 1997, p. 428. The charter was preserved only in a late Rakovac manuscript from the year 1700.

became the patriarchate of Moscow, thanks to Boris Godunov (Борис Годунов). This sequence of events supported the narrative, encouraged by successive rulers, that Muscovy was Byzantium's rightful successor as the 'Third Rome' based on a mix of religious (Orthodox), ethno-linguistic (East Slavic), and political ideas (the tsar's autocracy). Supporters of that view also asserted that the topography of the seven hills of Moscow offered parallels to the seven hills of Rome and the seven hills of Constantinople.

In 1492, Zosimus the Bearded (Russian Зосима Брадатый), metropolitan of Moscow, in the foreword to his *Paschalion* (Изложение пасхалии), referred to Ivan III as 'the New Tsar Constantine of the New City of Constantine – Moscow.' In a panegyric to the Grand Prince Vasili (Василий) III, composed between 1514 and 1521, Russian monk Philotheus (Филофей) from the Yelizarov monastery (Елеасаров монастырь) near Pskov proclaimed: "*Two Romes have fallen. The Third stands, and there will be no fourth. No one shall replace your Christian Tsardom!*"

4.3. The emperor's task

Slavonic legal documents took several texts from Byzantine legal sources, which were part of the Byzantine constitutional ideology. Among others, the Byzantine teaching on the emperor's task was translated from Matheas Blastares' *Epanagoge/Eisagoge* and *Syntagma*, and Blastares incorporated the entire text of *Epanagoge* in his nomokanonic miscellany:

> *The Tsar is a lawful ruler, the common good of all subjects (*Βασιλεὺς ἐστιν ἔννομος ἐπιστασία, κοινὸν ἀγαθὸν πᾶσι τοῖς ὑπηκόοις*); he does not do good out of partiality, nor does he punish out of antipathy, but according to the virtues of the subjects, and like a judge at the trial, gives the awords equally, and does not give the benefit to any one to the detriment of others. The Tsar's goal is to preserve and foster existing values, and to re-establish with care those lost, and to acquire by wisdom and rightheous means and enterprises those which are missing. The task of the Tsar is to do good, for which he is called benefactor; when he stops doing good, then, according to the opinion of the ancients, it is considered that he has perverted the Tsar's mission. The Tsar must distinguish himself in Orthodoxy and piousness and be renowned in his favour before the God (*Τέλος τῷ βασιλεῖ τὸ εὐεργετεῖν, διὸ καὶ εὐεργέτης λέγεται, καὶ ἠνίκα τῆς εὐεργεσίας ἐξατονήση, δοκεῖ κιβδηλεύειν κατὰ τοὺς παλαιοὺς τὸν βασιλικὸν χαρακτῆρα. Ἐπισημότατος ἐν ὀρθοδοξίᾳ καὶ εὐσεβείᾳ ὀφείλει εἶναι ὁ βασιλεύς, καὶ ἐν ζήλῳ θείῳ διαβόητος*). The Emperor must interpret the laws, laid down by the men of old; and must in like manner decide the issues on which there is no law. In his interpretation of the laws he must pay attention to the custom of the State. What is proposed contrary to the canons is not admitted as a pattern.*

The Emperor must interpret the laws benevolently. For in case of double we allow a generous interpretation.[43]

Such solemn ideas about the emperor's rule could be found in some of Dušan's charters written in Greek. The idea of benefaction (εὐεργεσία), for example, is present in the first chrysobull to the Iberian (Georgian) monastery of Iviron (Ιβήρον) on the Holy Mountain (January 1346), which begins as follows: "*Like it is normal to breathe, the same way it is normal for the Emperor to do good*" (Ὥσπερ τὸ ἀναπνεῖν οἰκεῖον καὶ κατὰ φύσιν, οὕτω καὶ τὸ εὐεργετεῖν τοῖς βασιλεῦσιν ἐστιν). Dušan's chrysobull to the monastery Xenophontos (Ξενοφῶντος) on the Holy Mountain in June 1352 expresses the idea of the emperor imitating God (μίμησις Θεοῦ): "*It is necessary to me the Emperor, if it is possible, to become similar to God, and the most philantropic to take care of those who are under His power*" (Καὶ τῇ βασιλείᾳ μου δέον κατὰ τὸ δυνατὸν ἐξομοιοῦσθαι Θεῷ, καὶ φιλανθρώπως ἄγαν τοὺς ὑπὸ χεῖρα αὐτῆς οἰκονομεῖν).[44]

4.4. Concordance or symphonia (Συμφονία) *between the church and the state*

Regulation of church–state relations stems from biblical and Byzantine ideas about the origin of authority. From Constantine to Justinian, there was little difference between *imperium* (imperial authority) and *sacerdotium* (Christian priesthood): The emperor was regarded as a bishop and saluted as *sacerdos* and *archiereus.* It was Justinian who accepted the Christian teaching, according to which God is the source of the emperor's spiritual authority; both the emperor and the patriarch must obey His will when serving the people. The *symphonia* system was established and evolved (συμφονία) on these foundations, emphasizing concord, harmony, and mutuality, as formulated in the introduction to Emperor Justinian's *Novella VI* in 535. From there, John Scholasticus took over, teaching about *symphonia*, which he introduced in his *Collectio octoginta septem capitulorum* and which Saint Sabba subsequently used in his work on the Serbian *nomokanon – Zakonopravilo.* By virtue of this, the Serbs, and later the Bulgarians and Russians, had a literal translation of the text dealing with the theory of *symphonia* between the state and the church.

The text of Justinian's *Novella VI* begins as follows:

The greatest gifts of God among men, bestowed by philanthropy from above, are clergy and empire (ἱερωσύνη καὶ βασιλεία, sacerdotium et imperium). First to serve to what is divine, and second, to govern and take care of what is human. Both, coming from the same principle – adorn the human life; because, nothing can be so important to the Emperors like the honour of clergy who always pray the God even to themselves. If the first ones are irreproachable in every matter and if they would have courage in front of God, and the second ones start decorating the cities and

43 Epanagoge 2,1–3.5–8; see Zepos and Zepos, 1931 (repr. 1962), vol. II, pp. 240–241; Syntagma B, 5; see Novaković, 1907, pp. 127–128.
44 Solovjev and Mošin, 1936 (repr. 1978), pp. 141, 186.

> *those who are under them, regularly and fittingly, it will become the pleasant concordance (συμφονία, consonantia) which gives everything good to human life. And it will happen, we believe, if the supervising of ecclesiastical rules (τῶν ἱερῶν κανονῶν, sacrarum regularum) would be kept, which the Apostles – righteously praised and glorified as the eye-witnesses of the Word of God (θεοῦ λόγου, dei verbi) – have conferred and the Saint Fathers have kept and told.*[45]

As we can see, the essence of this theory lies in the idea that both institutions equally respect divine law. Such a solution makes it theoretically impossible to establish the supremacy of one over the other; that is, it excludes the possibility of the appearance of *caesaropapism* or *papocaesarism*.

This teaching about *symphonia* was completely acceptable to the Orthodox Slavs of the Middle Ages. The church and the state help each other in that the representatives of the spiritual and secular authorities do not transgress their own limits; they do not interfere in each other's spheres. On the contrary, they support one another in their common interest, which brings the people both material and spiritual progress.

However, when Matheas Blastares' *Syntagma* was translated into Serbian, distinguished canonists Theodore Balsamon's and Demetrios Chomatianos' (Δημήτριος Χωματηανός or Χοματηνός) interpretations were revealed to the Serbs, and they were not in harmony with the teaching about *symphonia* as espoused in Justinian's *Novella VI*. Under their influence, Matheas Blastares omitted the following chapter from the *Epanagoge* (which contains two sections dealing with the position and power of the Byzantine emperor and patriarch): "*The Emperor is presumed to enforce and maintain, first and foremost all that is set out in the divine scriptures; then the doctrines laid down by the seven Ecumenical Councils; and further, and in addition, the received Romaic laws.*"[46]

That fact created the opportunity for the emperor to interfere in some ecclesiastical matters, such as the election of bishops, the changing of the patriarch, the determination of a church district's rank, etc.

45 Iust. Nov. 6, praefatio.
46 Epanagoge 2,4; see Zepos and Zepos, 1931 (repr. 1962), vol. II, p. 240.

Bibliography

Andreev, M., Cront, G. (1971) *Loi de jugement: compilation attribuée aux empereurs Constantin et Justinien, versions slave et roumaine.* Bucarest: Association Internationale D'études du Sud-Est Européen.

Ashburner, W. (1909) *The Rhodian See Law.* Oxford: Clarendon Press (repr. Aalen: Scientia Verlag, 1976).

Ashburner, W. (1910) 'The Farmer's Law', *The Journal of Hellenic Studies,* 30, pp. 85–108.

Ashburner, W. (1912) 'The Farmer's Law (Continued)', *The Journal of Hellenic Studies,* 32, pp. 68–95.

Ashburner, W. (1926) 'The Byzantine Mutiny Act', *The Journal of Hellenic Studies,* 46, pp. 80–109.

Begović, M. (1975) *Zakonik cara Stefana Dušana. Knjiga I: Struški i Atonski rukopis.* Belgrade: Srpska akademija nauka i umetnosti.

Begović, M. (1981) *Zakonik cara Stefana Dušana. Knjiga II: Studenički, Hilandarski, Hodoški i Bistrički rukopis.* Belgrade: Srpska akademija nauka i umetnosti.

Beneševič, V. (1937) *Ioannis Scholastici Synagoga L titulorum ceteraque eiusdem opera iuridica.* (Abhandlungen der Bayerischen Akademie der Wissenschaften, Philosophisch-Historische Abteilung, Bd. 14.) München: Beck.

Bubalo, Đ. (2010) *Dušanov zakonik.* Belgrade: Zavod za udžbenike – Službeni glasnik.

Burgmann, L. (1983) *Ecloga. Das Gesetzbuch Leons III. und Konstantinos' V.* (Forchungen zur byzantinishen Rechtsgeschichte, Bd. 10.) Frankfurt am Main: Lowenklau-Gesellschaft.

Čavoški, K., Bubalo, Đ. (2015) *Zakonik cara Stefana Dušana. Knjiga IV: Patrijaršijski, Borđoških, Popinački, Tekelijin, Sandićev, Koviljski, Beogradski, Reževićki, Karlovački, Vršački, Grbaljski, Bogišićev i Jagićev rukopis, urednici.* Belgrade: Srpska akademija nauka i umetnosti.

Dewey, H. W., Kleimola, A. M. (1977) *Zakon Sudnyj Ljudem (Court Law for the People).* (Michigen Slavic Materials, no. 14.) Ann Arbor: Department of Slavic Languages and Literatures.

Dölger, F. (1964) 'Die Familie der Könige im Mittelalter' in *Byzanz und die europäische Staatenwelt.* Darmstadt: Wissenschaftliche Buchgesellschaft, pp. 34–69.

Georgescu, V. A. (1959) 'La réception du droit romano-byzantin dans les Principautés roumaines (Moldavie et Valachie)' in *Droits de l'Antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl.* Paris: Syrei, pp. 373–392.

Hartmann, W., Pennington, K. (2012) *The History of Byzantine and Eastern Canon Law to 1500.* Washington D.C.: The Catholic University of America Press.

Heimbach, G. E. (1838–1840) *Ανέκδοτα.* Leipzig: Barth (repr. Aalen: Scientia Verlag, 1969).

Heimbach, G. E. (1851) *Manuale legum sive Hexabiblos cum appendicibus et Legibus agraris.* Leipzig: Weigel (repr. Aalen: Scientia Verlag, 1969).

Korzenszky, E. (1931) 'Leges poenales militares e codice Laurentiano LXXV, 6', *Egyetemes Philologiai Közlöny*, 54, pp. 155–163.
Krasnožen, M. (1894) *Tolkovateli kaniničeskago kodeksa vostočnoj cerkvi: Aristin, Zonara i Valsamon*. (Učenija Zapiski Imperat. Moskovskago Universiteta, Fasc. 8.) Moskva.
Krasnožen, M. (1910) 'Sinopsis cerkovnich pravil i istorija ego obrazovanija', *Vizantiyskiy Vremennik*, 17, pp. 225–246.
Krasnožen, M. (1911) 'Acta et commendationes Imperat', *Universitatis Jurievensis*, 19, No. 12, pp. III–XVIII.
Letsios, D. G. (1996) *Das Seegesetz der Rhodier* (Νόμος Ῥοδίων ναυτικός). Rhodos: Institouto Aigaiou tou Dikaiou tēs Thalassas kai tou Nautikou Dikaiou.
Leunclavius, J. (1596) *Iuris Graeco Romani tam canonici quam civilis tomi duo.* Francofurti: Fischer (repr. Farnborough: Gregg, 1971).
Marković, B. (2007) *Justinijanov zakon: Srednjovekovna vizantijsko-srpska pravna kompilacija*. Beograd: Srpska akademija nauka i umetnosti.
Migne, J. P. (1857–1866) *Patrologiae Cursus Completus. Series Graeca.* Paris: Garnier.
Mošin, V., Ćirković, S., Sindik, D. (2011) *Zbornik srednjovekovnih ćiriličkih povelja i pisama Srbije, Bosne i Dubrovnika, Knjiga I, 1186–1321.* Belgrade: Istorijski Institut.
Noailles, P., Dain, A. (1944) *Les Novelles de Léon le Sage.* Paris: Les Belles Letres.
Novaković, S. (1898) *Zakonik Stefana Dušana, cara srpskog.* Belgrade: Državna štamp (repr. Belgrade: Lirika, 2004).
Novaković, S. (1907) *Matije Vlastara Sintagmat*. Belgrade: Štampano u državnoj.
Ostrogorski, G. (1956) 'The Byzantine Emperor and the Hierarchical World Order', *The Slavonic and East Europian Review*, No. 84, pp. 1–14.
Papagianni, E. S., Troianos, Sp. N., Burgmann, L., Maksimovič, K. (2019) *Alexios Aristenos: Kommentar zur 'Synopsis canonum'.* (Forschungen zur byzantinischen Rechtsgeschichte, Neu Folge I.) Berlin–Boston: De Gruyter.
Pérentidis, S. (1980–1981) *Édition critique et commentaire de l'Épitomè des Saints canons de Constantin Harménopoulos*. (Thèse de doctorat de Paris l'université Paris-Sorbonne). Paris.
Pešikan, M., Grickat-Radulović, I., Jovičić, M. (1997) *Zakonik cara Stefana Dušana. Knjiga III: Baranjski, Prizrenski, Šišatovački, Rakovački, Ravanički i Sofijski rukopis.* Belgrade: Srpska akademija nauka i umetnosti.
Petrović, M. (1991) *Zakonopravilo ili Nomokanon Svetoga Save: Ilovički prepis 1262. godina: Fototipija.* Gornji Milanovac: Dečjne novine.
Pieler, P. E. (1978) 'Byzantinische Rechtsliteratur' in Hunger, H. (ed.) *Die hochsprachliche profane Literatur der Byzantiner.* (Handbuch der Altertumswissenshaft, XII, 5, 2 = Byzantinisches Handbuch 5,2.) München: Beck, vol. II, pp. 341–480.
Pitra, J. B. (1864–1868) *Iuris ecclesiastici Graecorum historia et monumenta.* Romae: Typis Collegii Urbani (repr. Roma: Bardi Editore, 1963).
Radojčić, N. (1960) *Zakonik cara Stefana Dušana 1349 i 1354.* Belgrade: Nauč. Delo.
Ralles, G. A., Potles, M. (1852–1859) Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων. Vols. I–VI. Athens (repr. Athens, 1966).

Scheltema, H. J., Van der Wal, N., Holwerda, D. (1953–1988) *Basilicorum Libri LX.* Groningen: J.B. Wolters.

Solovjev, A. V. (1955) 'L'influence du droit byzantin dans les pays orthodoxes' in *Relazioni del X Congresso internazionale del scienze storiche.* Vol. VI, Firenze: G. C. Sansoni, pp. 599–650.

Solovjev, A. V. (1959) 'Der Einfluß des byzantinischen Rechts auf die Völker Osteuropas', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung,* 76, pp. 432–479.

Solovjev, A. V., Mošin, V. A. (1936) *Grčke povelje srpskih vladara* (*Diplomata graeca regum et imperatorum Serviae*). Belgrade: Serbian Academy of Sciences (repr. London: Variorum Reprints, 1974).

Ščapov, J. N., Burgmann, L., Behrends, O. (2011) *Die slavische Ecloga.* (Forschungen zur byzantinischen Rechtsgeschichte, Bd. 23.) Frankfurt am Main: Lövenklau-Gesellschaft.

Tikhomirov, M. N. (1961) *'Merilo pravednoe' po rukopisi XIV veka.* Moskva: Izdvo Akademij Nauk SSSR.

Tikhomirov, M. N., Milov, L. V. (1961) *Zakon Sudnij Ljudem*. (Vol. I: Kratkoj redakcii. Vol. II: Prostranoj i svodnoj redakcii.) Moskva: Izdvo Akademij Nauk SSSR.

Troianos, Sp. N. (2007) Οι Νεαρὲς Λέοντος τοῦ Σοφοὺ. Athens.

Troianos, Sp. N. (2011) Οι πιγές του Βυζαντινού δικαίου. 3rd edn. Athens–Komotini: Sakkoulas.

Troianos, Sp. N. (2012) 'Byzantine Canon Law to 1100 and Byzantine Canon Law from the Twelfth to the Fifteenth Centuries' in Hartmann, W., Pennington, K. (eds.) *The History of Byzantine and Eastern Canon Law to 1500.* Washington D.C.: The Catholic University of America Press, pp. 115–169, 170–214.

Troianos, Sp. N. (2015) *Le fonti del diritto bizantino.* Torino: Giappichelli.

Troianos, Sp. N. (2017) *Die Quellen des byzantinischen Rechts.* Berlin–Boston: De Gruyter.

Van der Wal, N., Lokin, J. H. A. (1985) *Historiae iuris graeco-romani delineatio. Les sources du droit byzantin de 300 à1453.* Groningen: E. Forsten.

Van der Wal, N., Stolte, B. H. (1994) *Collectio tripartita: Justinian on Religious and Ecclesiastical Affairs.* Groningen: E. Forsten.

Vašica, J. (1971) 'Zakon sudnyi ljudem – Soudni zákonik pro lid' in *Magnae Moraviae Fontes Historici.* Brno: Univerzita Jana Evangelisty Purkyně. Vol. IV, pp. 178–198.

Voel, G., Justel, H. (1611) *Bibliotheca iuris canonici veteris in duos tomos distributa, opera et studio G. Voelli et H. Justelli.* Paris: Billaine.

Zepos, J., Zepos, P. (1931) *Ius Graecoromanum.* Vols. I–VIII. Athens: G. Fexis (repr. Aalen: Scientia Verlag, 1962).

| Chapter 3 |

Ecclesiastical Jurisdiction in Medieval East Central Europe

Elemér BALOGH

ABSTRACT

To interpret the legal–geographical dimension of the subject indicated in the title, it is necessary to know that medieval Europe was divided into north–south, roughly as the countries north and south of the Alps. The term 'Central and Eastern Europe' is a modern concept that cannot simply be projected back to the Middle Ages. The legal institutions discussed in this chapter have affected the territories of present-day Bavaria, Austria, Slovakia, Slovenia, Croatia, Serbia, and Poland, to a greater or lesser extent. In terms of the medieval ecclesiastical judiciary, this area encompassed both European legal regions, as in the German and Polish territories, the northern type of official judiciary prevailed, while the procedure utilized in the Kingdom of Hungary's ecclesiastical court can be classified as the southern vicarian judiciary. It is important to emphasize, however, that a number of combined elements from the two judging models can also be detected, and I will elaborate on these features in detail in this chapter.

The ecclesiastical judiciary focused on the dioceses, so organizational and jurisdictional rules are included in its main elements in the study. The more detailed section of the Bavarian judiciary presents all important litigants. When discussing institutions in Poland and Hungary, I also tried to highlight the parallels and differences that can be related to each other, and thus, the chapter engages in a comparative discussion of the institutions of ecclesiastical justice in Central and Eastern Europe, as promised in the title.

KEYWORDS

Bavaria, Poland, Hungary, bishop, archbishop, *consistorium*, *officialis*, *vicarius*, canon law, Roman law, customary law, *Tripartitum*, *iudex delegatus*, *iurisperiti*, *assessores*, *procuratores*, notaries, *privilegium fori*, *Regestrum Varadinense*, *doctores decretorum*, *mandatum transmissionale*.

Introduction

To understand the chapter's title accurately, it is necessary to know that medieval Europe was neither legally nor politically divided into east–west; rather, it was divided into northern and southern regions. Contemporary vocabulary most often defined it by referencing positions south and north of the Alps. Clearly, this was an expression of a lasting attitude toward the ancient Roman empire and its legal culture. So-called 'Latin Europe,' i.e., the territories that were also organizationally dominated by the Roman Church, was bordered on the north by the Scandinavian countries, on the

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south by Sicily, on the west by the Irish islands, and on the east by the Hungarian and Polish kingdoms. Within this, moving from west to east, of course, the general conditions of development were visible, but it is the judicial mechanism of the church's organization that is the best evidence that categorical and significant differences did not develop between the eastern and western countries of Europe. Here, in the east central segment of this region, we also find general European institutions, with many local specialties, of course.

The north–south division is best captured in the difference in the status of the officer in charge of the diocesan court. While in the north, it is the *officialis*, in the south, the *vicarius* led the diocesan forum.[1] This discrepancy was, of course, not just a matter of terminology; behind the different names, we can also find slightly different competencies. The countries presented in this chapter provide examples of models for both regions: While the Bavarian and Polish dioceses were under the jurisdiction of the *officialis*, Hungary was part of southern Europe's vicarious courts. However, similarities can also be detected between the different models.[2]

> *It turned out, for example, that the Hungarian vicariates and Polish officials developed into a very similar institution by the end of the Middle Ages. Both were headed – regardless of their different names – by a person who was both the bishop's general deputy for ecclesiastical administration and a permanent judge*[3] *acting on behalf of the bishop.*

Add to this the fact that the judge of the archbishop's chair in Salzburg, the *officialis*, was also the archbishop's general deputy, and it can be seen that the northern and southern models show a very colorful picture in reality.

1. The focus of judgment in the ecclesiastical court: the diocese

Following the provisions of the Fourth Council of Lateran (1215), the legal practice that the court of general jurisdiction and most often the court of first instance is the episcopal sacrament has been consolidated. The bishops' weight of in the organization of the church, given that they possessed the most spiritual power and were the descendants of the apostles, increased considerably in the Gregorian age. It is natural, therefore, that they played a prominent role in both ecclesiastical legislature and jurisdiction. The episcopal chair was the custodian of the judiciary in the ecclesiastical court; from here, the lower forums gained their procedural jurisdiction. The only higher forum with the possibility of appeal was essentially the Roman *curia*, the

1 According to the literature, Spain and Portugal can also be included here. Cf. Garçia y Garçia, 1988.
2 For the characteristics of the ecclesiastical judiciary of the period and of the region, see Erdő 2016.
3 Cf. Erdő, 1994.

Sacra Rota Romana, the reason for which, in light of the Catholic Church's hierarchical system, need not be explained in more detail.[4]

At time of the formation of the office of bishop (*officialatus*), the bishop judged personally, and only from the 10th century onward was this task taken over by the archdeacon as his deputy (*vicarius episcopi*). This activity is described as *Sendgerichtsbarkeit* in the German language. The activity of this chair, growing out of its originally substitute function, became independent (*iurisdictio propria et ordinaria*). The rapidly strengthening ecclesiastical judiciary in the 12th century created the need for the bishop to appoint a person who had been specifically educated and was deemed to be fit for the exclusive purpose of judging (*Offizial*).

These individuals came from among clerics who initially played an important role not only in the judiciary but also in the episcopal administration, hence the name *officialis.* However, this church official who quickly acquired a great career in the 12th century was not yet the bishop's other self (*alter ego*). Such people who were experienced in law were favored not only by the bishop but also by the larger monasteries and other ecclesiastical institutions (*Stiftskirchen*). They were also well known to secular princes and authorities. The term *officialis* has become a collective term for all those who have acted officially as professional representatives on behalf of the church. Initially, there was no question of being limited to adjudication.

It is generally believed that the first permanent ecclesiastical judges began their work in the last decades of the 12th century in France (Reims).[5] In fact, it was a further development of the institution of papal sentenced judges (*iudices delegati*); furthermore, the archbishop of Reims was the papal *legatus*, and, at the same time, the papal *iudex delegatus*. From the second half of the 12th century, the activity of delegated judges, who were increasingly likely to be chosen from among legal experts (*iurisperiti*),[6] was significantly strengthened. The office of sent judges was institutionalized by the 13th century, but this usually meant single judges. The term *iudices*, then, essentially referred to the office itself, the institution of the court. In larger dioceses, it can be observed that the institution of sent judges was not relegated to the background after the establishment of the permanent sacraments, but a certain, partly territorial, partly partisan division of responsibilities took place between the two ecclesiastical courts.

Before introducing the organization of the episcopal judiciary in Central and Eastern Europe, it is worth taking a look at contemporary Europe because although

4 Cf. Szuromi, 2011.

5 This view is also represented by Georg May, who, in his monograph on the ecclesiastical court of Erfurt, measures the jurisdiction of judges against French patterns: "*Sie waren ordentliche Richter mit stellvertretender Jurisdiction. Ihre Gerichtsbarkeit kam ihnen zu auf Grund ihres Amtes, mit dem sie bleibend verbunden war. Ihr Amt war ihnen nicht für ständig, sondern auf Widerruf übertragen. Jeder von ihnen hatte die volle Ausrüstung des französischen Einzeloffizials*." Peter Aspelt, archbishop of Mainz, founder of the *Generalgericht* of Erfurt, modeled the office model from Cologne. Cf. Michel, 1953, p. 24.

6 In Hungarian: 'jogtudók' (word made up by György Bónis).

medieval Europe has shown impressively uniform features in the ecclesiastical context, the differences are all the more instructive. The mention of Reims above already suggests that France was at the forefront of development. From the beginning of the 13th century, the *officialis* was mentioned in a number of French dioceses: starting with the earliest, Paris (1205), Arras (1210), Cambrai (1212), Poitiers (1246), Arles (1251), Cavaillon (1255), Marseille (1260), Orange (1269), and Toulon (1277); however, it is difficult to decide whether, in these cases, the *officialis* was already an office or only an *iudex delegatus*.[7]

The beginnings of formal episcopal judging can be traced to a similar time on the eastern outskirts of Germany. In Olmütz, the office of *officialis* is first mentioned in 1267. In Prague, we have data from 1265 indicating a lawsuit led by two judges who were not mentioned as sent judges in the diploma. A year later, the name of the institution appears: *officialis Pragensis*.

Similar developments have taken place in the northern countries of Europe, but in the south, the picture is radically different. In Italy, perhaps because of the dioceses' small size, the institution of *officialatus* has not developed at all. There, in addition to the bishops, the general deputies conducted the judging. The picture is exactly the same in medieval Hungary, where the French–German-style *officialatus* never developed, and the general deputies of bishops and archbishops (*vicarious generalis*) performed the function of judging.[8] The reasons for the discrepancy and the detailed circumstances are still to be explored, but it is probable that the Hungarian church's fidelity to traditional Rome played a key role in this developmental direction; hence, it is understandable to follow the Italian patterns and, in parallel, the need to consciously distance oneself from the vast western neighbor, Germany.

Different views have emerged on the formation of the institution of the *officialatus*. The most common perception is that bishops elevated deputies or officers over their rival archdeacons to stabilize their own authority. This perception was embraced, among other things, by the famous French medievalist Paul Fournier;[9] however, it can no longer be sustained in the light of recent research. It is a fact that archdeacons' power grew in the 11th and 12th centuries in such a way that the bishops in many dioceses simply lost direct control and administration. It was also common for litigants not to turn from the chair of the archdeacon to the episcopal chair, which was the ordinary forum for appeals, but rather to the metropolitan or directly to the pope (*appellatio per saltum*). However, even if ecclesiastical law – and the claimants themselves – accepted the chief defendants as *iudices ordinarii*, canon law and papal legislation that had just begun to develop enormously drew a sharp line here, clearly emphasizing the bishop's judicial jurisdiction in his diocese. Thus, the *archidiaconus*,

7 Cf. Fournier 1880, p. 309.

8 Thanks to the work of György Bónis, today, we not only know a lot about medieval Hungarian ecclesiastical jurisdiction, but the diligence of his life is also praised in the thematic source publication, similarity to which has not been achieved even by German medieval studies so far. See Bónis, 1997.

9 Cf. Fournier, 1880, p. 8.

whose rights the pope also vigorously defended, seemingly never became a rival to the bishop.[10] It should also be noted that archdeacons, who became independent at the same time, came from among the deputies in most places. For that reason alone, the bishops had to look for new professional help.

The main driver of development was certainly the pursuit of the needs of a Rome-inspired professional judiciary. Papal intentions, which were strongly influenced by Roman law and rapidly strengthening, no longer made it possible to resolve increasingly complex legal disputes and cases merely *ex aequo et bono*. Educated lawyers were needed in the judiciary. Just as the *auditores* in the proceedings in Rome were bound by the order of the proceedings, the same was required of papal delegates.

2. Bavaria

The German roots of episcopal justice go back to the Frankish era. The bishops of the dioceses formed in the territory of the Frankish empire regularly visited their provinces (*visitatio*) according to the customs and regulations of the age because the chief shepherds, though small in number, had vast territories.[11]

The visits, which were usually held annually, had a dual purpose: On the one hand, the bishops controlled the activities of the lower priesthood (this was the purpose of the *visitatio* in the strict sense), and on the other hand, they also took action against worldly villains in the area by imposing church punishments. The bishop did not travel the diocese alone; he was accompanied by his most important helpers (archdeacons, *archipresbiter*, and many others), and from this nomadic judging, the institution of the *Sendgericht*, which was unique to German legal development, developed.

On the subject of ecclesiastical jurisprudence in medieval Bavaria, the interpretation of the adjective 'Bavarian' cannot be circumvented. The term is not accurate, especially not in today's context. Medieval Bavaria was not the same as it is now, neither politically nor ecclesiastically. In terms of ecclesiastical organization, bishoprics are organized in the Bavarian tribal areas within the archbishopric of Salzburg, and they remained there throughout the Middle Ages. The Diocese of Vienna was only established in 1469, and even then, it had jurisdiction solely over the city. Thus, although Salzburg grew increasingly distant from the ancient Bavarian political organizational systems from the beginning of the 14th century and became the

10 Pope Urban IV emphasized in the case of the *officialatus* to be set up in Poland that the new judicial office could not function otherwise than "*salvo iure archidiaconorum, qui in suis archidiaconatibus censuram ecclesiasticam exercere.*" Cf. Trusen, 1973, p. 471.

11 The inequalities in the late Roman Empire's settlement structure can be seen in action here. At the time of the vandal conquest, for example, there were about 500 bishops in North Africa and a similar number in Italy, while there are about 400 bishops in present-day France (excluding Alsace), and there were up to eight in the eastern part of the Frankish empire before the arrival of Anglo-Saxon missionaries. Cf. Werminghoff, 1913, p. 9; Kirn, p. 167.

archdiocese of fast-growing Austria,[12] it remained the seat of the province uniting the original Bavarian dioceses. As a result, the use of the adjective 'Bavarian' seems justified because, in the ecclesiastical approach, the archbishop of Salzburg was the metropolitan of this area throughout the period, which was fully consistent with the ecclesiastical court's system of judgments.

2.1. The dioceses

The ecclesiastical organization, which was formed in the southeastern part of the Frankish and later German–Roman empires, definitely united the German-speaking population and may also have united others. The territory and interrelationships between the dioceses formed on Bavarian land in the early Middle Ages[13] have changed considerably over the centuries and are by no means identifiable with present-day Bavaria's territorial and ecclesiastical status, although it is evident that most of the historical dioceses are still here. Two major exceptions should be mentioned. Throughout the Middle Ages, Würzburg did not belong to the Bavarian dioceses, and the diocese of Augsburg was only minimally associated with the duchy and never participated at its provincial assemblies (*Landtag*). Mention should be made of a church founded in 741 along the Danube at the center of Neuburg, with Prince Odilo's support; however, this church quickly disappeared from the map of Bavarian church history.[14]

2.1.1. Salzburg

We must first talk about the archdiocese of Salzburg, which was established at the seat of the church province. Around 746/747, the Bavarian Prince Odilo invited Virgil, the Irish missionary abbot, to be the bishop of Salzburg, although the priest from the Irish royal family, who bravely opposed the almighty Boniface several times, had not yet been ordained as a bishop. The new priest, blessed with great organizational talent and knowledge of the natural sciences, built the Salzburg Cathedral, which became a match for the Franks' sacred center (Saint Denis). Tassilo III, Duke of Bavaria, probably also supported the construction because he visualized the coronation church of a future Bavarian kingdom. At the consecration of the cathedral (774), the earthly remains of Saint Rupert, transported from Worms to Salzburg, were buried here as his final resting place. In addition to successful conversion work and authoritative construction, ecclesiastical art and culture were also revered at the center of Salzburg

12 "*Most of the territory of modern Austria was in the medieval ecclesiastical province of Salzburg.*" Cf. Hageneder et al., 1989, p. 33.

13 Below, I pay close attention to the history of the Bavarian dioceses because these formations played a major role in the judiciary. Monastic orders that are otherwise indispensable from the point of view of ecclesiastical history will be discussed only tangentially, since in the jurisdiction, they were largely included as litigants, with the exception of abbots acting as sent judges, who are mentioned extensively in the following chapters. Cf. Prinz, 1981, p. 462.

14 Cf. Prinz, 1981, p. 450.

3. The dioceses of Bavaria, Poland and Hungary (around 1500)

when Arngil's successor, Arn, a faithful believer in Charlemagne, occupied the episcopal seat (785).

The Bavarian ecclesiastical organization created by the papal *legatus* of Saint Boniface reached the fall of the Agilolfinger dynasty and the beginning of the Carolingian era without major shocks, thanks in no small part to the talented and very ambitious high priest of Salzburg. At the end of the 8th century, Charlemagne carried out significant church organizational reform: Embracing the wishes of the Bavarian high priesthood, he placed the Bavarian dioceses under unified control by elevating the highly prestigious and wealthy, though not the most prestigious, Diocese of Salzburg to the rank of archbishopric. With the revival of the Archdiocese of Salzburg (798), the first archbishop's center was established not only in Bavaria but in the

entire German-speaking area.[15] It is certainly not known why Salzburg was chosen.[16] However, the address contained in the diploma Pope Leo III issued to the rank of the archbishop of Salzburg reveals something: "*Leo episcopus servus servorum Dei reverentissimo et sanctissimo fratri Arnoni archiepiscopo ecclesie Iuvauensum, que et Petena nuncupatur, provinciae Baiovuariorum*."[17] Although the origin of the name '*ecclesia Petena*' is not entirely clear, it is likely that it was intended to be a reference to a late antiquity bishopric (perhaps Poetovio-Pettau, today Ptuj in Slovenia), which also serves as an explanation right next to the Salzburg election. With this reference to an upscale ecclesiastical origin, a reference to continuity, it was possible to somewhat offset Salzburg's disadvantage, especially with Regensburg, the then-capital of Bavaria.

Arn, from the West Bavarian nobility, was placed in the archbishopric, and the pope elevated him above the other bishops as a metropolitan, with the consent of the imperial ruler, Charlemagne.[18] At the same time as his appointment as archbishop (April 20, 798), Pope Leo III notified Charlemagne himself and the bishops of the Bavarian diocese of the transfer of the *pallium*.[19] Arn soon convened a provincial council (800) in Reisbach bei Dingolfing (Niederbayern) – not long after, probably even in the same year in Freising and Salzburg – in conjunction with the orders of similar imperial Frankish synods inspired by Charlemagne that ruled, inter alia, that no bishop or abbot could claim royal property or consecrate the king's church (*Eigenkirche*) unless the king gave permission. The above Bavarian councils, even without specific instructions from Rome or Aachen, adopted the notion that the church's aims should serve society's interests, but that the royal (soon imperial) throne was the center of power.[20]

15 Mainz and Trier lost their archbishop rank for a time, and the bishop of Cologne received the *pallium* a little later (800).

16 Obviously, several factors played an important role, such as Arn's personal court relations, Salzburg's material wealth, and his missionary responsibilities: "*Die Frage, warum gerade Salzburg zu dieser Würde erhoben wurde, ist bis heute nicht befriedigend beantwortet worden. Es konnte nicht auf ein höheres kanonisches Alter hinweisen, und an weltlicher Bedeutung stand es der Hauptstadt Regensburg oder sogar Freising bei weitem nach. Wenn man nicht annehmen will, dass die persönlichen Beziehungen Arns zum Franken herrscher eine Rolle spielten, so kann man nur vermuten, dass die Bedürfnisse der Mission im Osten, die insbesondere von Salzburg aus in Angriff genommen wurde, dabei den Ausschlag gaben*." Reindel, 1981, p. 233.

17 Cf. Dopsch, 1998a, p. 17.

18 Arn had long been a well-known, reliable, Frank-friendly nobleman, whom Pope Leo III had elevated to a metropolitan without any objection, but the strengthening of Frank–Bavarian relations did not end in his person. Significant Bavarian monasteries, such as Chiemsee and Staffelsee, fell into the hands of Frankish dioceses, and vice versa: Bavarian dignitaries gained prominent imperial positions, such as Leidrad (archbishop of Lyon) or 9th-century Bavarian bishops in Auxerre.

19 The main pastors to be addressed were Alim (Säben), Atto (Freising), Adalvin (Regensburg), Waltrich (Passau), and Sintpert (Neuburg).

20 According to Werminghoff, "*Staatliches und kirchliches Regiment schließen einander nicht aus, sondern ergänzen einander, weil beider Ziel dasselbe ist. Der Wohlfahrt des christlichen Volkes, der Festigkeit der katholischen Kirche hofften auch die bayrischen Bischöfe zu dienen, eines Sinnes mit ihrem König Karl, der das Volk durch die Kirche, die Kirche aber für sein Volk zu fördern gedachte*." Werminghoff, 1910, p. 55.

An important chapter in the eastward expansion of the Salzburg-based Bavarian Church is related to the decline of the Avars. After his victory over the Avars (743), the Bavarian Prince Odilo subjugated the Carantanian Slavs. As a result of the powerful mission, several new churches were founded, but the renewed pagan rebellions necessitated another campaign (772). Due to ongoing conversion, not only were the Christian faith and the church consolidated, but also the originally Slavic population.[21] The Salzburg Church's missionary activity ranged from 796 in the north to the Vienna Basin – Vienna's oldest church (Ruprechtskirche) is also reminiscent of the Salzburg mission. Another defeat of the Avars (798) gave further impetus to the expansion, so a bishop (*Chorbischof*) was sent to Pannonia. Here, however, jurisdictional disputes arose between the mission in Passau and Aquilea, forcing Charlemagne to take action. He ordered (811) Salzburg and Aquileia to share over Quarantine and to include Lower Pannonia, which had been effectively supervised since 796, while Passau received the two banks of the Danube to Moravia (Tulln and Vienna), including Upper Pannonia. Under Archbishop Liupram (836–859), the expansion in Salzburg was particularly successful, and the activities had an impact in the east, all the way to the Balaton Uplands.[22]

However, the mission in Salzburg conflicted with the Byzantine missionaries (Cyril and Methodius) who were successfully operating there in Pannonia and were already offering mass in Slavic at that time. When Pope Hadrian II exalted Methodius, the Slavic apostle, as archbishop of Pannonia, the metropolitan of Salzburg was forced to support this eastern mission. However, there was no question of friendship or real cooperation. Saint Methodius – regardless of her archbishopric – was sentenced to 3 years' imprisonment by the Regensburg Provincial Council (870), chaired by Archbishop Adalvin of Salzburg. A few decades later, with the appearance of the Hungarians, the Salzburg mission was permanently and completely pushed out of the Carpathian Basin, especially after the fall of Archbishop Theotmar of Salzburg and Bishop Zacharius Säben in the catastrophic defeat at Bratislava (907). Overall, the Eastern Compensation was quite successful: The Salzburg mission undoubtedly played a lion's share role in creating the Latin ecclesiastical culture of the eastern Alps.[23]

After the Archdiocese of Mainz, the Diocese of Salzburg was the largest in Germany. Moreover, Archbishop Gebhard unusually established his own bishopric (1072) at the center of Gurk.[24] The bishop of Gurk was able to regard Bishop Modestus, who was appointed to Karantania in the 8th century, as his forerunner, and thus, he

21 *"Daß aus dem slawischen Karantanien in den folgenden Jahrhunderten ein überwiegend deutschbesiedeltes Land Kärnten wurde, ist vor allem der Arbeit der Salzburger Missionare zu danken*." Dopsch, 1998b, pp. 30–31.

22 The excavations in Zalavár show that Liupram had already built a church dedicated to St. Hadrian with his own Salzburg masters before Pribina. Cf. Bogyay, 1993, p. 261, n. 89.

23 *"Daß bis heute Böhmen, Mähren und die Slowakei, Slowenien, Dalmatien und Kroatien zur römisch-katholischen Kirche und zum abendländischen Kulturkreis mit seiner lateinischen Schrift gehören, ist vor allem ein Verdienstjener Missionsarbeit, die vor mehr als elf Jahrhunderten von Salzburger und bayerischen Glaubensboten geleistet wurde*." Dopsch, 1998b, p. 32.

24 The seat is Klagenfurt from 1787.

interpreted himself not as an ordinary bishop but as a deputy to the archbishop of Salzburg. Archbishop Gebhard handed over the vast property of the Gurk convent to the new bishopric, thus averting the papal and imperial assistance normally involved in its establishment, as a result of which the consecration and ordination of the bishops of Gurk became the exclusive prerogative of the archbishop of Salzburg.[25] To prevent the bishops of Gurk from seeking independence, Archbishop Eberhard II (1200–1246) established three additional dioceses (*Eigenbistümer*): on the island of Herrenchiemsee in Bavaria, in Seckau in Styria, and in Lavant.[26] The four Eigenbistümer,[27] completely unique in the Catholic ecclesiastical organization, surprisingly survived until the 19th century. These special dioceses had extensive pastoral care, ecclesiastical administration, and judiciary but continued to experience serious conflicts with the provincial dioceses established by the dukes of Carinthia and Styria. An exception was the bishop of Chiemsee, based in Salzburg, who, as the archbishop's auxiliary bishop, was in possession of a relatively calm seat in the sanctuary (*stallum*).

In the midst of the conflict in the middle of the 12th century, Archbishop Eberhard (1147–1164), according to tradition, once again sided with the pope, although the high priest, who was already known for his holiness in his life, was also honored and called prince (*princeps*) by Emperor Frederick Barbarossa. It was due to his immense authority that the emperor did not march against him with an army. However, after the high priest's death, 'hell broke loose': The emperor struck the city with an imperial curse (1166), and imperial party followers set the city on fire in the following year. The unfortunate state ceased only after the Peace of Venice (1177) between the emperor and Pope Alexander III.

A characteristic feature of the organization of the diocese of Salzburg is that the rural ecclesiastical administration was in the hands of a single archdeacon—after 1139, the provost of the cathedral. As a result of the centralization that began under Archbishop Konrad I (1106–1147), the western half of the diocese was divided into four archbishopric districts: Salzburg, Baumburg, Gars, and Chiemsee, placing them under the control of the provosts there. At the same time, there appeared new orders of monks next to the Benedictine monasteries; particular mention should be made of the reformed Augustinians, who quickly established centers: Domstift (1122), St. Zeno/Reichenhall (1136), Gurk, Höglwörth, Herrenwörth/Chiemsee, Weyarn, Au, Gars, Baumburg, Berchtesgaden, Maria Saal, and Suben. The energetic archbishop even settled Cistercians next to Rein, Viktring, and Raitenhaslach.

25 Cf. Heinemeyer, 1974.

26 The seat of the diocese of Seckau was abolished in 1786 in Graz, in the Levant in 1859 when it was moved to Marburg, and in Chiemsee in 1808. Emperor Frederick III founded two more dioceses: Vienna (first known bishop: Leo von Spaur) and Wiener Neustadt (both in 1469), but their relationship to the Salzburg diocese was disputed throughout the Middle Ages: "*Wien became a see before the council of Trent and was exempt from metropolitical jurisdiction*." Hageneder et al., 1989, p. 33.

27 "*Tangl's Provinciale offers the following for this province: Salzburg (Passau, Regensburg, Freising), Gurk (Brixen), Seckau (Chiemsee), Lavant*." Hageneder et al., 1989, p. 33.

2.1.2. Regensburg

The diocese of Regensburg was ecclesiastically subordinated to Salzburg, but its authority was no less: It was and remains an important administrative seat in the Carolingian era and, through St. Emmeram, an outstanding center of spirituality. However, with the decline of power and territory from the 10th century, the diocese gradually weakened, and the separation of St. Emmeram (972) was particularly painful.[28]

The mission to Regensburg toward the east became especially significant to the Czech Republic after King Louis of Germany, accompanied by fourteen Czech tribal princes (845), was baptized. The signs of the mission operating in the Czech–Moravian empire and the memories of the cultural influence are obvious in Prague, but they are also probable in the bishopric of Nitra.[29] The formation of the diocese of Prague (973) and its accession to the metropolitan province of the archbishop of Mainz weakened the bishopric's influence in this area, but it remained significant as the borders of the diocese of Regensburg stayed within the framework of the emerging Czech state.[30] An important result of the Regensburg expansion was the establishment of many monasteries.

2.1.3. Freising

The most dynamic era for the bishopric of Freising dates back to the 9th century. His estates acquired at that time lay mostly in Bavaria, (later) Austria, and Tyrol, which he succeeded in enriching to a greater extent in the late 10th century. It has been the center for the Bavarian nobility of Frankish origin from the beginning. In addition to the bishopric's central monastery, the cathedral chapter was established in the 9th century. The sources mention the first canonists in 842, and the whole diocese was gradually brought under its influence. In addition to Freising, the bishopric also had other important monasteries: Scharnitz-Schlehdorf, Benediktbeuern, Tegernsee, Schäftlarn, Moosburg, and Rottenbuch. During Bishop Waldo's reign (883–906), the bishopric received Oberfohring from the German king, together with the Isar Bridge salt duties, to support the reconstruction of the cathedral, which had been destroyed in the fire.

28 The bishopric received only a significant estate donation from King Conrad I: the forest of Sulzbach. Other estates include Steinakirchen and Wieselberg, Pöchlarn, Mondsee, Aist and Naarn, as well as the Veiden area. The significance of St. Emmeram is demonstrated by the fact that his fidelity lord was King Louis of Germany himself. Bosl found that it was 'St. Denis Bayerns.' Of course, the ashes of the great patron saint St. Emmeram rested here. There is a surviving urbarium (1031) that provides an insight into the monastic estate: 1000 Mansen was located in about a hundred localities in Lower and Upper Bavaria, Upper Palatinate, and Austria. The largest contiguous estate was in Vogtareuth/Rosenheim (130 Hufen). Cf. Prinz, 1981, p. 446.

29 Hermann, 1961.

30 During the reign of Emperor Henry II, the Count of Günther von Schwarzburg († 1045) of Thuringia, who was buried in the Břevnov Monastery in Prague, carried out missionary and political mediation on this Bavarian-Czech border.

During the Investiture Controversy, the bishops of Freising, unlike those of Salzburg and the Passover, took the emperor's side. The most famous high priest in the diocese was Otto I (1138–1158), who took great care to oversee organizational reforms and the schooling of his priesthood. Furthermore, given his relation to the imperial house, he also carried out significant political and historical work.[31] Like other Bavarian churches, the Freisingians gained feudal rights during the 12th century, so that by the beginning of the 13th century, the central areas of the diocese (with the addition of some more important places like Ismaning, Isen, and Werdenfels) were given independent imperial status.

2.1.4. Passau

Although it had favorable conditions in terms of its location, the eastward expansion and mission of the bishopric of Passau was by no means as significant and successful as that of Salzburg. The diocese was oppressed by its status under Salzburg, and in the 10th century, Bishop Pilgrim even resorted to diploma forgery to improve the diocesan positions, albeit without lasting results. The chapter, which was formed at the seat of the bishopric, had its own estates and gained property independence by the beginning of the 9th century. The borders of the diocese already extended to Rába in the Carolingian period, and with the decline of the Hungarian expansion, at beginning of the 11th century, they stretched all the way to the line of the river Lajta.

Converters carried out significant missionary activity in Passau in the Moravian empire, but the independent Moravian Church established by Rome in 867 stunted the possibility of further expansion: The Bishop of Nitra, Wiching, was forced to leave his job, and against the will of the Bavarian bishops and with the support of Emperor Arnulf, he received the crosier from Passau in 899. Bishop Ermenrich's (866–874) large-scale mission, commissioned by Lajos Német with the aim of establishing a Western Franco-Bavarian-style church organization among the Danube Bulgarians, failed. Bishop Pilgrim, who failed in his resistance to Rome, also planned to make Passau the archbishop's seat of a diocese along the Danube, to which the Moravian and Hungarian dioceses would have been subordinated. In 999, his successor, Bishop Christian, received judicial and administrative jurisdiction over Passau under Emperor Otto III, with the exception of the abbey of Niedernburg, which Emperor Henry II soon (1010) elevated to the rank of imperial abbey. However, they did not settle for this: With the help of the powerful ruler Bishop Konrád I (1148–1164, one of Emperor Frederick Barbarossa's uncles) the abbey, together with all its estates, was returned to the bishopric – at the cost of a protracted strife, a matter which would only be concluded in the time of Bishop Wolfger (1193). The diocese along the Danube acquired other significant estates in the 12th century, such as St. Pölten, Herzogenburg, Krems, and Tulln, and claimed its own monasteries: Kremsmünster, Mattsee, St. Florian, Niedernburg, St. Nikola/

31 The bishop's scholarly writings during the Crusades in Hungry in 1147 occupy a prominent place among contemporary Hungarian-related historical sources. Cf. Szamota, 1891, pp. 16–18.

Passau, Göttweig, St. Georgen, St. Andrä, Seitenstetten, Erlakloster, Waldhausen, Altenburg, Geras, and Pernegg.

The diocese of Passau, which stretched in an east–west direction, was one of the largest dioceses of the German–Roman empire. Until the separation of the Austrian parts (1783/85), in addition to the present-day area, he could still claim the terrains of the dioceses of Linz, Pölten, and Vienna.[32]

2.1.5. Säben–Brixen

Although the bishopric's territorial location would not have justified this (it was centered in Säben until about 990 and then in Brixen), after the establishment of the archdiocese of Salzburg, it did its best to move away from the Bavarian duchy. According to sources, the pastors of the diocese were not invited to the ducal court council, and the 10th–12th century local sources also show that it is a province independent of Bavaria.

Neither the bishopric of Brixen nor that of Trient counted Säben-Brixento among the Bavarian tribal territories. The bishop of Trient, who belonged to Bavaria until 976 and then to Carinthia until 1027, regarded himself (1113) as *dux, marchio et comes*. Emperor Conrad II donated the county in the area of Eisack and Oberinntal (1027) to the bishopric, and Emperor Henry IV gave another (1091) beside Pustertal. Emperor Barbarossa elevated the bishopric of Brixen to imperial rank (1179), but from the 13th century, its powers passed to the counts of Tyrol and Graz. The most prominent bishops, such as Poppo (later Pope Damasus II), Altwin († 1097), and Hugo, stood on the emperor's side in the Investiture Controversy. Under the high priests who spoke in the following times – Reginbert († 1140) and Hartmann († 1164) – significant reform unfolded.[33]

2.1.6. Eichstätt

An alleged distant relative of Saint Boniface (the founder of the dioceses of Bavaria), Willibald, also of Anglo-Saxon descent (according to legend, he was an English prince), founded the bishopric of Eichstätt. Boniface ordained Willibald as a priest in 740 and as bishop the following year. He would have originally been the pastor of Erfurt, but this was not established for a long time, so he returned to 'Eihstat.' For a time, his rank was not bishop of Eichstätt, but rather bishop of the Eichstätt monastery (in

32 Rising to the rank of an independent city–bishopric from 1469, Vienna gained access to the Vienna Woods after the acquisition of the archdiocese (1722). Cf. Zinnhobler, 1969, p. 152.

33 The work of Bishop Hartmann, who was born in Passau and studied at the St. Nikola/Passau school, was particularly outstanding. In his early career, Archbishop Konrad I first appointed him as the deacon of the cathedral of Salzburg, and in this capacity, he began to implement monastic reform, during which he organized the monastic life of the cathedral chapter and then reorganized the Herrenchiemsee monastery in Salzburg into an Augustinian abbey. The archbishop of Salzburg first appointed him the founding provost of Klosterneuburg (he held this position between 1133 and 1140) and then made him bishop of Brixen. His name is associated with the creation of the Augustinian abbey in Neustift in Brixen.

this capacity, he attended the Frankish Imperial Synod in 742). The exact date and circumstances of the founding of the bishopric are still uncertain.

When Charles Martell died in 741, Bavarian Prince Odilo saw that the time had come to weaken the Frankish influence. He was wrong: In 743, he was severely defeated by the Frankish armies led by Karlmann and Pippin III, and after his failure, Nordgau also became Frankish. At the victors' urging, Boniface founded the diocese of Eichstätt around 743/745. The diocese was organized in semi-Bavarian (Regensburg), semi-Franconian (Augsburg, Würzburg) territories and belonged to the metropolitan province of the archbishop of Mainz from the end of the 8th century, but its representatives always attended Bavarian provincial councils from 916 to 932, and their presence can be traced back to the 13th century. The bishopric had sufficient possessions so that its sovereignty would not be jeopardized. The political purposefulness of the founding (the Franks intended it as a 'buffer zone' against the Bavarians) is justified by the fact that the general papal expectation that the episcopal seat should also be a cultural center was not met here.

The institution of *Vogtei* served to protect medieval German churches. The Church was in dire need of the support of the great secular lords of this office, at first. The *brachium saeculare* the *Vogt* provided was indispensable in the execution of the ecclesiastical court's judgments, but from the Gregorian age, it became more burdensome to the increasingly self-conscious church, a competing factor of power from which it sought to free itself. The first mention of a *Vogt* from Eichstätt, Count Hartwig, is from 1068. The Concordat of Worms (1122), which concluded the Investiture Controversy, confirmed the bishops' jurisdiction and further recorded that the chapter would choose the bishop, who the king would then endow with the necessary feudal rights, followed by a solemn consecration. The growing episcopal power increasingly conflicted with the interests of the *Vogt*, against whom imperial privileges could also be exercised.

2.1.7. Bamberg

The bishopric of Bamberg has a special history of origin. While the dioceses discussed so far were usually established during Boniface's time, this bishopric was founded in 1007 as an imperial bishopric, that is, with great splendor and amidst solemn appearances, by a similarly sacred brother of King Saint Stephen of Hungary, Emperor Henry II. The final impetus came from the action of one of the members of the Babenberger dynasty, Heinrich von Schweinfurt, against the emperor. Despite all his possessions and offices, he failed, and the emperor was determined to establish a strong diocese on the border of the empire Slavic peoples inhabited in the southeast (*terra Slavorum*).

The new bishopric harmed the interests of two other old dioceses in particular: Würzburg had to give up the possibility of eastward expansion (compensated by the surrender of the Meiningen region), and Eichstätt became poorer with respect to the area between Pegnitz and Erlangen-Schwabach. Establishing and securing the tenure of the diocese of Bamberg took decades of effort. A close relationship with the German

king throughout its founding explains why the bishopric of Bamberg did not enjoy the privilege of *immunitas*. Another disadvantage was the military obligation imposed on the diocese (*Heerfahrtspflicht*). During the Investiture Controversy, Bamberg – unlike Salzburg and Passau – proved to be the emperor's reliable ally.

The clergy of the court chancellery studied at the school of the Bamberg Cathedral from the 12th century, but in a more general sense, it also grew into an intellectual center. Imperial and court rallies were held several times in Bamberg (the most prominent were in 1035, 1080, 1122, and 1135). Bishop Eberhard (1007–1040) was not only the chancellor of the German part of the empire, he also belonged to Italy from 1013, and from his time, the bishopric of Bamberg exerted a great influence on the filling of the Italian episcopal chairs within the empire. Under Emperor Henry III, Bishop Suitger of Bamberg came to the papal throne under the name of Clement II. Another outstanding figure was the missionary to the Pomeranians, Bishop Otto I of the Swabian noble family (1102–1139), who became loyal to the emperor in the struggle between the papacy and the empire (giving up his initial neutrality). The generous donations he received from the emperor were largely used to renovate monasteries and abbeys and establish new ones.[34]

2.2. The organization of justice in Salzburg

I present the organization of the diocesan judiciary using the example of the provincial center of Salzburg. In the ecclesiastical jurisdiction system, the archbishop's chair was considered a forum of appeals by the bishoprics subordinate to him in a given diocese but a forum of first instance in his own diocese (not considering the possibility that the lawsuit could have started before the *archidiaconus*). The early jurisprudence of the bishopric of Salzburg, which rose to the rank of archbishop in 798, covered not only ecclesiastical but also many secular matters as a result of the strong Frankish influence. According to Charlemagne's empire-building concept, the ecclesiastical offices also performed state tasks. The most characteristic institution of mixed judging was the *missi dominici*, in which the bishop/archbishop of Salzburg, Arn, often judged in person, together with other clerical and lay judges.[35]

Following Frankish patterns, Archbishop Arn naturalized the judging of the synods. At the diocesan synods, which also served the purposes of ecclesiastical administration, it was the duty of the *archipresbyter* to guard the rule of law and inform

34 The reformed or newly founded monasteries were also home to new orders of monks: Cistercians, Augustinians, Premontreys, and monks from Hirsau. The ecclesiastical significance of the monastery (*monasterium Hirsaugiense*), founded in 1059, reached its heyday during the time of Father William (1069–1091), referred to as the Cluny of Germany.

35 The lawsuits before the *missi dominici* covered a very wide range of cases (church disputes, property disputes, inheritance cases, criminal lawsuits, etc.); their characteristic was *inquisitio*, in which testimony was given an important role. Several cases have been settled. Except in cases of urgency, they usually met four times, during which time they discussed continuously. After Charlemagne's death, this court began to decline strongly, and since Louis the Pious, there has been little record of it in the Salzburg diocese. Cf. Krause, 1890, p. 193; Eckhardt, 1978, pp. 1025–1026.

the archbishop. All clerics of high prestige in the diocese, and even some lay people, attended the synod.[36] Such a system of episcopal councils lasted until the 13th century, although the archbishop, and even more so, the diocesan *officialatus* assumed the lion's share of responsibilities in the field of justice. The archbishop's chair retained the right to judge heresy and the most serious of the clerics' transgressions.

With the spread of canon law, it did not take long for a professional court to appear in Salzburg. Moreover, there was some impatience in this area because unknown individuals who achieved the desired goal as soon as possible were not deterred from forging diplomas. According to the first such document (1139), the cathedral chapter is entitled to deal with all appeals to the archbishop of Salzburg; the forgery referred to the alleged order of Archbishop Konrád I (1106–1147), which essentially delegated full jurisdiction of the appellate court to this body. In fact, the superior of the chapter, the dean of the cathedral, has been increasingly involved in the administration of justice since the beginning of the 14th century. The diplomas refer to him as *iudex a reverendissimo archiepiscopo Salczburgensi deputatus*. Data on the use of his own court seal is available beginning in 1292. The formation of the independent *officialatus* of the diocese and archbishop dates back to the first decades of the 13th century. The judges are referred to as: *officialis curie et vicarius in spiritualibus generalis ecclesie Salczburgensis*.

The heyday of archbishopric jurisdiction in Salzburg fell to the late Middle Ages, but signs of decline also began to show at that time. The most frequently mentioned complaint, secular use of church punishments, has taken on enormous proportions. *Excommunicatio* appeared in almost every court file in some context, leading to the complete devaluation of this sanction. This was, of course, a fairly common phenomenon in Europe, but it is a fact that Salzburg was no exception. It was common to impose fines and exclusion, together or in an alternative perspective.

Although the decline in the judiciary's authority has been striking, no serious reform efforts have been made. A notable document containing criticism aimed at improving the situation in the early 16th century was the analysis put forth by Jakob Haushaimer, Salzburg official and deputy general (1519), which saw the main cause of the troubles as a lack of separation between the ecclesiastical judiciary and ecclesiastical administration; in addition, they were in a significantly more favorable financial situation. He also urged the reconvening of diocesan councils because they had not been held within 'human memory.'[37]

The organization of an ordinary and permanent diocesan (here, archbishop's) court in Salzburg was motivated by reasons similar to those of the German bishops: a huge expansion in the office of the archbishop, the need for legal expertise, and changes in office and procedural law.[38] The name for the first member of the diocesan

36 The 11th century Ordo synodalia of St. Peter's Archabbey has remained. In this, clerics and laymen were already sharply separated for each of the cases to be heard. Cf. Paarhammer, 1998, pp. 188–189.
37 Paarhammer, 1998, pp. 196–197.
38 Paarhammer, 1977, pp. 5–9.

court, *officialis*, appeared in Salzburg quite early, in the late 12th century, and was applied to secular officials. However, the oldest mention where it means a church judge is from the early 14th century: Ulrich, the dean of the cathedral of Salzburg, was one of the witnesses at the epistle of Petrus Duranti's papal *nuncius* (1314), and he refers to himself as *officialis et vicarius in spiritualibus*.

The term *consistorium* was also commonly used to denote the archbishop's court in Salzburg, thus serving as a synonym for *officialatus*.[39] Use of the term, originally in a broader sense, in relation to the ecclesiastical court, has been strengthened since Pope Innocent III, who personally chaired the judgments of the solemn papal *consistorium*, held three times per week, and rendered judgments.

The *consistorium* was initially a one-person institution that received help from the *officialis* and consisted of a clerk in charge of written tasks. However, the apparatus slowly developed: The task increased in inverse proportion as the papal and episcopal sent judges' activity decreased. However, due to the scarcity of resources, an approximate picture of the consistory's structure and operation can only be given from 1450.[40]

The trial venue may have initially been the residence of the dean of the cathedral (*Domkloster*), although sources were silent on this in the early days. If the archbishop himself judged, the seat was, of course, the high priestly residence (*camera*). Johannes Brennberger sat in his chair as *officialis in domo habitacionis*. Even in court summonses, this was usually only '*in iudicio*' or simply '*in loco nostro solito*.' Since there was certainly no court building dedicated to this purpose, it is probable based on the simple references in the diplomas that the seat of the jurisdiction could, as a rule, have been the official (residence) of the dean of the cathedral. This is also indicated by the fact that when the *commissarius* acted instead of the *officialis*, specific reference was made to the house where the dean of the cathedral resided: *in domo decanatus ecclesie metropolitice*. There is evidence from about 1470 that *Domkustorei* may have been the site of the *consistorium*. At the time of Ludwig von Ebm *officialis*, the court was meeting in the countryside (Chiemseehof). As a general rule, the place of jurisdiction has always been the acting judge's place of residence (that of the archbishop, *officialis*, or *commissarius*) – that is, the residence and office were not separated.

The order of the court sitting in the 14th century cannot be determined with certainty, but the sources from the 15th century are more eloquent. According to these, the ecclesiastical court usually judged three days per week: Monday, Wednesday, and Friday. Negotiations took place in the 15th and 16th centuries as *hora vesperorum et causarum consueta*, which had not been established before: The two most common

39 The German historical literature also expresses a view that in northern Germany, the term '*consistorium*' was used to refer to the church's judicial body, while in the south, it was understood to mean the center of church administration. Cf. Hinschius, 1959, p. 244; Plöchl, 1955, p. 325; Szentirmai, 1962, p. 164.

40 The oldest protocol left to us, for example, is from 1505, and the court order has not survived at all. Cf. Paarhammer, 1977, p. 21.

appellations were *hora tertiarum, hora nona vel quasi,* or *hora completorii diei eiusdem.* In subpoenas, *hora prima post meridiem* can sometimes be read.

The jurisdiction had an annual rhythm. The judicial year began on the first working day after the Epiphany (January 7), or, if it was a holiday, on the 8th. There was a week's break during the carnival, the week before the first Sunday of the carnival. Jurisdiction was also ceased during Holy Week and Easter week, as was also the case during Pentecost. The great summer vacation (*feriemessum*) began in the second week of July and lasted until St. Bartholomew's Day (Aug. 24). There was no jurisdiction on St. Rupert's Day either (Sept. 24). The Christmas holiday began on December 20 and ended with Epiphany Eve. In addition to all this, Sundays and other holidays also marked a judicial break, such as the various feasts of the Savior and Our Lady, the apostles and evangelists, and certain saints.

In what follows, I will list the most important officials of the ecclesiastical court in Salzburg.

2.2.1. Officialis

The Salzburg *officialis* was special in the German ecclesiastical jurisdiction in two respects. With few exceptions, the dean of the cathedral has always been appointed to this office and has usually held the position of general deputy.[41] The personal union of the diocesan judge and the dean of the cathedral was also exemplified in Bamberg, but the *vicarius generalis in spiritualibus* was always a different person there, and in addition to the dean, there was also an express *officialis*. The personal coincidence of the *officialis* and the general deputy in Salzburg unequivocally suggests that the development of the judiciary's organizational system here was greatly influenced by the Italian model and, more generally, the southern European model.[42]

It was no accident that the dean of Salzburg was appointed to this important office; he was already the most employed papal and archbishop's (or commissioned by the chapter) delegate in the days before the organization of the *officialatus*, so it is unsurprising that he also became the first permanent judge to replace the contingent one. The dean judged as an independent judge as early as the end of the 13th century, but the initial diplomas still lacked an explicit indication of judicial quality and only featured independent seal usage (*sigillum causarum Salczburgensis ecclesie*).

41 Accordingly, it conferred governmental and judicial power over the entire province under Archbishop Pilgrim II to the canon Gregor Schenk: "[...] *ut ecclesie nostre gubernacio ac regimen gregis nobis crediti non negligatur, sed fiat cum diligenda studiosa. Ne igitur propter absenciam nostram et alia radon edicte ecclesie nostre quod multiplicia et ardua negocia nobis incumbenda eadem nostra ecclesia et grex nobis commissus in spiritualibus lesionem aliquam vel dispendium paciantur* [...] *facimus, constituimus et ordinamus nostrum officialem et vicarium in spiritualibus generalem dantes tibi tenore presencium plenam et liberam potestatem in civitate diocesi et provincia nostra Salczburgensi* [etc.]" Paarhammer, 1977, p. 7. For the persons who were also deacons of cathedrals and general deputies in one person, see Hageneder, 1967, pp. 265–268.

42 The essence of the southern European organizational model was precisely that the general deputy performed the duties of the diocesan judiciary, and interconnection became the rule, for example, in Poland (besides Hungary). Cf. Erdő, 1993, p. 142.

The somewhat later name *decanus et iudex* was already unambiguous and was later replaced by the appellation *vicarius et officialis*.[43] Future archbishops explicitly confirmed the hegemony of the deans of Salzburg in the election capitulations at the end of the era by promising to continue the nomination procedure. At the same time, a noticeable increase in the chapter's influence is observable. The identities of the *officialis* and the deputy were so converged that when the archbishop's seat became vacant, both offices ceased to exist; the new archbishop then either confirmed the previous one or appointed a new one.

The archbishop has always determined the extent of rights and obligations. The *officialis* acted on behalf of the archbishop, though (apart from some specific assignments) not as *potestas delegata*, but rather as *potestas ordinaria vicaria.* In legal terms, he was the impersonator of the archbishop, as evidenced by the fact that the *officialis*' judgment could not be challenged before the archbishop; in other words, the *officialis* and the archbishop formed one and the same forum (*unum et idem auditorium*). The Salzburg specialty was that the *officialatus* and the *vicariatus* coincided according to the rule, so that (in modern parlance) the branches of power were intertwined, with governmental and judicial power resting completely in one hand. This situation was undoubtedly extremely effective, but by the end of the era, it had become the subject of criticism.

2.2.2. Commissarius

Being a very busy person due to the parallel office of the *officialis,* he often had to look for a deputy. This deputy of the diocese's ordinary judge was the *commissarius*, several of whom were sometimes active at the same time. Two forms have emerged in the Salzburg practice: the *commissarius generalis* and the *commissarius surrogatus*. The functions behind the two designations are often not sharply separable, just as it is unclear from the sources whether the appointment of the *commissarius* was the right of the archbishop or the *officialis*.

The persons referred to as *commissarius generalis* functioned in the 15th century and can be considered the general deputies of the *officialis* in the *consistorium*. The first documented mention of this office dates from 1428, and it was Johann Elser who authenticated a transcript of the diploma on the orders of the *officialis*. The next person, the canonist Johann Hesse of Regensburg, referred to himself as *commissarius vicariatus et officialatus curie Salczburgensis,* so he also held the office of deputy. In the 70s in the 15th century, five *commissarius generalis* were active. It is probable that when the diplomas remaining from the aforementioned period are silent on the existence of any *officialis,* the full-time commissaries were appointed by the archbishop; in this case, they exercised the same power as the *officialis,* with the difference that the judicial power they held was merely delegated in nature.

43 The full title was *vicarius in spiritualibus generalis ecclesie et officialis curie Salczburgensis.* Diplomas usually also included the academic degree of the person in question, for example, *in decretis licentiatus or decretorum doctor.* Cf. Paarhammer, 1977, p. 28; Wagner and Klein, 1952, p. 30.

It was also possible for the *officialis* to appoint, on an occasional or fixed-term basis, one or more deputies to preside over the court on his behalf (*in vicem et locum suum*); these are called *commissarius surrogatus*. The court files show that these officials appeared from the second half of the 15th century; thus, they differed significantly from the former category in that their procedural rights were definitely ad hoc.

The *commissarius* had to be a person proficient in canon law and court practice, so he was most often one of the *assessores*. The *surrogatio* was always recorded in the clerk's minutes, so there was always a record of whether the trial was conducted by someone other than the *officialis* (e.g., '[...] *assessor presedit*').

*2.2.3. Jurisprudents (*assessores*)*

Although the Salzburg *officiales* mostly attended university, they were scientifically well-trained lawyers, but in more complex cases, they could not do without the support of their scientific colleagues. According to a fairly general practice in Germany, such an adviser was also called an *assessor* because he sat with the judge during the proceedings and assisted him with the dispensation of his advice.[44] However, they cannot be considered real fellow judges because there is no question of their inclusion on a panel of judges; these legal advisers could not participate in the judgment themselves, and they did not have their own judicial jurisdiction. However, if the *officialis* left the meeting, he was usually replaced by the assessor present, and if a judgment was given in such a situation, it was always taken as a *commissarius surrogatus*, never as an *assessor*.

The presence of Salzburg jurisprudents in the work of the *consistorium* can be proved from the middle of the 15th century; their role was, in accordance with general practice, limited only to consulting. The high professional standard associated with the jurisdiction of the ecclesiastical court in Salzburg is evidenced by the fact that only persons with an academic degree could apply for the office of *assessor*.

*2.2.4. Prosecutors (*procuratores*)*

Inexperienced and even generally illiterate clients could not act without legal representation, especially in more complex cases. *Procuratores* were available for this purpose. They were not only experienced in Latin but also well versed in canon law. Seekers could choose from prosecutors working alongside the *consistorium* (*causarum consistorii procuratores generales*). The mandate was contained in the *instrumentum constitutionis procuratoris* (abbreviated: *procuratorium*) prepared by the ecclesiastical court's notary, and it had to be presented before the *officialis*. The only and most important feature of the power of representation was that it was all-encompassing; it was so general that the prosecutor in charge of the administration could even take the necessary oaths in his own name and on behalf of his client, and his mandate

44 The correlation between the phrasing *consistorium* and *assessor* is striking, but the coincidence was not exceptional in other dioceses either. Cf. Straub, 1957, p. 199; Paarhammer, 1977, p. 44.

was not only for the main part of the proceedings but was sometimes decided on his own appeal.

Another function of the *procuratores* was to act as official witnesses when needed. Such need often arose because, in the course of the work of the *consistorium*, a whole host of diplomas were drawn up, the authenticity of which required witnesses: This function in Salzburg was mostly performed by 'on hand' prosecutors. The prevalence and popular application of such testimony is evidenced by the fact that, from the 15th century onward, at the end of the diplomas, right next to the date, there was a formulaic prosecutor's clause, as a sign of the authentication that had taken place.[45]

While in other bishoprics[46] even lawyers (*advocati*) performed in the ecclesiastical court, there is no trace of this in Salzburg. The scarcity and contingency of resources can explain many things, but in this case, it may be different. This surprising actuality may be explained by the fact that, without exception, the university prosecutors in Salzburg, who had completed a university degree, satisfactorily provided all forms of legal aid, so there was no need to include lawyers entrusted with specific tasks.[47]

2.2.5. Notaries

According to the provision of the Synod of Lateran IV, which is also included in the papal decree law, all official sacramental acts must be recorded in writing by a suitable person. This work was carried out by notaries, but only those (*notarius publicus*) in possession of papal and/or imperial authority. Depending on the nature of the authorization, such a person could be imperial (*publicus imperiali auctoritate notarius*), papal (*publicus apostolica auctoritate notarius*), or both (*publicus imperiali et apostolica auctoritatibus notarius*). There may have been a lot of abuse of the notary's office because it was stated at the Salzburg Provincial Council in 1490 – reaffirming an earlier decision that was also taken at a provincial council in Salzburg (1386)[48] – that only such a person could be considered a notary and could engage in judicial and public service in this capacity, with confirmation from the archbishop or his deputy.[49]

The first notaries appeared in Salzburg from the 14th century. Interestingly, the first notary is mentioned in a diploma from the same year (1314) when the *officialis* also appears. This, of course, could not be the work of chance, since the canonical procedure would not have lacked literacy.[50] Notaries initially performed their judicial

45 For example, "*Presentibus ibidem magistris Johanne Kirchmair, Georgio Gaisler et Johanne de Hersfeldin, decretorum licentiatis, causarum consistorii curie Salczburgensis procuratoribus, testibus.*" Paarhammer, 1977, p. 51.

46 Straub, 1957, p. 196.

47 There are only a few indications that the person in charge of the procedure was given a collective name: Master Leonhard Angerer, as *annwald und procurator,* received the authorization of attorney/lawyer. Cf. Paarhammer, 1977, p. 51.

48 See Dalham, 1788, p. 165.

49 On the status of notaries and abuses, see Bader, 1967, pp. 6–7.

50 For more details about the relationship between the *officialatus* and notaries, see Luschek, 1940, p. 133.

and credential activities without any particular division of duties, but by the 15th century, the functions had already crystallized. The *consistorium* employed its own notary, who was first mentioned in the diplomas as the *consistorii curie Salczburgensis notarius iuratus* and from the second half of the 15th century was referred to more broadly as the *publicus imperiali auctoritate notarius causarumque consistorii curie Salczburgensis scriba juratus*. Notaries were usually clerics, not only from the diocese of Salzburg, but also from Passau and Regensburg, for example.

The notaries of the ecclesiastical court were primarily responsible for keeping court records and court books. The former had to be marked with the date to indicate each of the cases (*causas*) heard by the court, as well as deadlines, *surrogationes*, prosecutorial orders, etc., while the latter recorded the exact course of the court proceedings. Relying on these two types of records, the notaries then issued the necessary court documents (e.g., court orders and judgments). It was not an infrequent occurrence for notaries to participate actively in litigation, such as by taking witnesses and oaths on behalf of an *officialis*.

As a Salzburg specialty, it was the notary's task to preserve and manage the seal of the *officialatus*. In most other German dioceses, a special office was established for this purpose, that of the sealer (*Siegler*), but here, there was no need for this duality. Therefore, in addition to his own seal, the notary used the ecclesiastical court's ordinary seal. From the very first mention of the *officialatus* (1292), there has been a *sigillum causarum*; however, whether this was the court's official seal is in question. It is certain that such a seal existed from the 15th century under the name *sigillum maius officialatus curie Salczeburgensis*; it features a picture of Saint Rupert at the center, and it is oval in shape and imprinted in red wax. There was also a small seal used on documents issued by the notary (on the official order) to record certain procedural acts (orders, letters of command, exhortations, exclusions, etc.). On this seal, the following can be read: *secretum officialatus curie Salczeburgensis*. It was printed as a stamp on the back of the diploma and covered with a piece of paper. This seal was round in shape, with the image of a bishop in the middle, at whose feet appeared these words: *Sanctus Virgilius*.

The use of seals was an indispensable accessory during diploma exhibition because it informed the clerk that he was not merely a chancellor's clerk but a true *notarius publicus*. Each Salzburg notary had his own artistically engraved seal. The notaries always undertook sealing personally, and once used, the seal could not be replaced by another (i.e., with a different design) – the seal was inseparable from the signature and was permanent, and the combination of the two proved the diploma's authenticity.[51] Finally, it should be noted that as the number of notaries in the ecclesiastical court in Salzburg was much higher than the number of their colleagues in the other dioceses, they also employed purely clerical staff (*substituti*), several of whom rose to the rank of ordinary notary.

51 "*Signo et nomine meis solitis et consuetis consignavi*." Luschek, 1940, p. 72.

2.2.6. Judicial auxiliaries

The delivery of various court notices and orders in Salzburg was the responsibility of the *cursores* and *nuncii*,[52] who were ordinary court employees. They had to take an oath of office, so they are often mentioned in diplomas as *cursores iurati*. They were also considered officials, so they often witnessed legal acts.

In Salzburg, they did not belong to the regular staff of the *officialatus*. External persons (always clergy: provosts, parishioners) performed an important task; being pastors in the area concerned, they possessed the knowledge and authority to aid the ecclesiastical court of Salzburg. They were used mainly during witness hearings and the service of judicial orders and pronouncements (and explanations) of judgments.

3. Poland

Regarding the beginnings of the history of the Polish church, it can be stated that until the beginning of the 13th century, it operated while strongly subordinated to state power. Although the Investiture of the Profane of the apostolic ecclesiastical court was relatively quickly abolished and the canonical bishop election implemented, the church only attained religion privileges (*privilegium fori*) later on. Therefore, in the beginning, there were only a few opportunities for the development of ecclesiastical judgment. The first traces of the Polish clergy's economic and judicial immunity appeared in the 12th century. From the end of this century, the archdeacons were already at work. The immunity of ecclesiastical judgment was enforced in the time of Henryk Kierticz (1199–1219), the archbishop of Gniezno, during different synods – mostly in 1215 in Wolborz.[53]

In Poland, the first mention of *officialis* can be read in the statutes of legacy Pope Urban IV issued in the provincial synod held in Breslau (1248). According to the 10th canon (which was unmistakably conceived in the spirit of Pope Innocent IV's constitution *Romana Ecclesia*), each bishop was obliged to appoint a person to be in charge of the tasks *virum utique literatum, providum et discretum officialis*; in addition, apart from the bishop's disappearing cases, he judged and occasionally imposed the necessary penalties.[54] He had the right to use the seal independently. The designation of the appellate forums also followed the intentions of the papal bull. However, this provision was not very successful because later (1267), another papal legate, Cardinal Guido, again called on the archbishop of Gniezno at the synod, again in Breslau, to arrange the fulfilment of the *officialatus* in the diocese. There has been a verifiable

52 Paarhammer, 1977, p. 61.
53 For medieval ecclesiastical jurisdictions in Poland and Hungary, see Erdő, 1993; id., 1994; id., 1995; id., 2016.
54 Cf. Erdő, 1993, p. 136.

ecclesiastical court in Krakow since 1285,[55] and after 1267, the work of professional ecclesiastical judges gradually commenced in the other dioceses.

In Poland, there is a close correlation between the establishment of the diocesan courts and the acquisition of the judgment privilege. Following the renowned year 1267, the *officialis* rather rapidly became a permanent officer at the head of the ecclesiastical court. In the competition between bishops and archdeacons, the introduction of *officialatus* did not play a role (this was typically the case in the German dioceses). Perhaps, part of this was the fact that the papal legates, James and Guido, who worked forcefully to establish the ecclesiastical courts in Poland, were also French, so the French patterns were conveyed. One proof of this may be the similarity of the jurisdictions, the order in which files were kept, the use of seals, the establishment of an order of appeal, and perhaps even the practice of winning an ecclesiastical court office for only one year, requiring the annual renewal of the oath.[56]

3.1. The judicial organization

In Poland – following perhaps German, and in this case non-French, models – there was initially only one *officialis* for each bishop (*iuxta ecclesiam cathedralem*). Within the diocese, lower-level court forums developed during the 15th and 16th centuries, essentially at the level of the archdeacon districts, and in these districts, the *officialis* was most often the archdeacon himself. The naming of judges has been uncertain for centuries; only since the early 16th century have they been called *officiales foranei*.[57] The judges of the archdeacon districts were most often simply referred to as *officiales*, which was added to the name of the place where they had their seat (this was the most common). The chief official next to the bishop was called the *officialis generalis* in the diplomas.[58] However, political rank sometimes justified the holding of this title in the case of district and rural authorities as well. For example, the Pomeranian judge called himself: "*in spiritualibus et temporalibus vicarius, officialis per terram Pomeraniae generalis*."[59] Similarly, the Warsaw *officialis* has reportedly used the following address since 1452: "*archidiaconus Varschoviensis vicariusque* [...] *in spiritualibus et officialis in ducatibus Mazoviaegeneralis*."[60]

It is probable that the term *officialis generalis* may have originated in connection with the use of the title *vicarius generalis* because this title was mainly used by those *officiales* who also held the position of general deputy. It can be stated that from the second half of the 15th century, the *officialis* working alongside the bishop was also a

55 The oldest known diploma issued by the Polish official dates from 1286. Cf. Vetulani, 1934, p. 306.
56 Vetulani, 1934, pp. 293–295.
57 Vetulani, 1934, p. 321, n. 200.
58 Vetulani, 1938, p. 481.
59 Fijalek, 1899, pp. 170–172.
60 Ulanowski, 1926.

deputy general (*vicarius in spiritualibus*).[61] This personal union is evident elsewhere, such as in the case of a diocesan judge attached to the archbishop of Salzburg.[62]

The seat of the judge next to the bishop (*officialis generalis*) and the bishop's court (*idem auditorium*) were the same, and the same episcopal jurisdiction extended to the rural *officiales*, as evidenced by the fact that no appeal could have been made to the bishop's judge from there.

In addition to judges, there were also ecclesiastical fiscal lawyers (*instigatores*)[63] at the Polish ecclesiastical courts, who were most often referred to as *procuratores* in German practice. They primarily represented the church itself in lawsuits, but they could also undertake to represent individuals in church lawsuits.

The judge's officials and the organization of courts were experts in canon law. In addition to the various references to judges in the diplomas, the title *magister* or *doctor decretorum* is often used, which also refers to the continuation of university studies. The ecclesiastical courts in both the episcopal office and the centers of the archdeacon districts applied the principles of Roman canon law with sufficient expertise.

3.2. Competence and jurisdiction

The jurisdiction of the ecclesiastical courts in Poland was first articulated in the legate synods (1267, 1279) where the main issue was the recognition of the *privilegium fori*. Under these provisions, clerics could not be summoned to secular courts in either private or criminal cases. This privilege was later extended to counterclaims. It is important to note that in Poland, due to the nobility's massive resistance, ecclesiastical courts could not judge estate lawsuits. Casimir the Great (14th century) expressly reserved the right to adjudicate matters affecting the interests of the king and the state, and even established the jurisdiction of secular forums in tithes.

There were serious conflicts between the nobility and the clergy over matters of jurisdiction, especially over land, wills, tithes, and other services. At such times, the kings also intervened directly in the ecclesiastical courts' ongoing trials.[64] In the opinion of the royal court, in cases of non-ecclesiastical competence, regular injunctions (*litterae inhibitoriae*) were issued and even interrupted ongoing proceedings. Following the royal transmission order (*mandatum transmissionale*), such lawsuits were brought to the court – as in Hungary – where they continued and ended.

Rural *officiales* usually received general authority from their bishops to adjudicate all matrimonial matters. This is an important circumstance because, as was typical in Europe, most cases here were related to marriage. They could also act in matters

61 Pawluk, 1985, p. 165; Nowacki, 1964, p. 202.
62 Trusen, 1973, pp. 475, 482. Ulrich is among the witnesses in the epistle of Petrus Duranti's papal *nuncius* (1314) at the Salzburg Cathedral, and he refers to himself as *officialis et vicarius in spiritualibus*. Cf. Balogh, 2020, pp. 69–70.
63 Wójcik, 1959, p. 359; Vetulani, 1938, p. 484.
64 Wójcik, 1967, pp. 95–99, 104.

concerning rights in rem, but here, their jurisdiction was limited by the threshold value (*ratione valoris*).[65]

Enforcement of ecclesiastical court judgments in Poland has also been difficult from the outset. The church constantly demanded the use of the secular arm (*brachium saeculare*), and from 1433, the Polish kings pledged assistance. Royal interventions only ceased at the end of the Middle Ages, in 1565, when the secular execution of ecclesiastical judgments ceased.

4. Hungary

The beginnings of ecclesiastical judging in Hungary date back to the time of Saint Stephen I, the founder of the state and of the foundations of the Hungarian ecclesiastical organization. The kingdom was divided into two dioceses, with the headquarters of Esztergom and Kalocsa, but Esztergom was the first in rank, headed by the primate archbishop, who was the country's first ensign (only he could validly crown the new king). Canon lawsuits could even be appealed from the archbishopric of Kalocsa. The seats of the dioceses assigned to the archbishops of Esztergom were in these cities: Eger, Győr, Nitra, Pécs, and Veszprém; the archbishop of Kalocsa was in charge of the following dioceses: Argeş, Csanád, Gyulafehérvár, Sremska Mitrovica, Várad, and Zagreb. Today – in addition to Hungary – these cities and their former territories can be found in several foreign countries (Austria, Croatia, Romania, Serbia, Slovakia, Slovenia, and Ukraine).[66]

The provisions of the first royal decrees and the diplomatic sources all show close co-operation between the royal power and the church in Hungary. The ruler guaranteed observance of the Christian Church's commandments (Mass, confession, fasting, tithing, etc.), and in return, he enjoyed keen support from the clergy.[67] In Hungary, members of the church receive their mandates from the legislature, but they exercise them according to the *canonum institutiones* (or *mandata*). Saint Stephen I's first law (13th caput) sheds light on the relationship between the secular (royal) and ecclesiastical judiciary. Proceedings against violators of ecclesiastical orders appear before the episcopal office. In cases of ineffectiveness, the offender is brought before the royal court *per disciplinas canonum*. The procedure is similar for witches (*striga*), where the sinner is first accountable to the parish priest, but the converted person is eventually handed over to the secular judges. The early state of Hungary's canon law evokes the relations of the time before Gratian and bears many similarities to contemporary Anglo-Saxon laws, the content of which

65 Sources most often indicated the upper level of litigation in 12 marks. Cf. Vetulani, 1934, p. 484.

66 Cf. Erdő, 1989, pp. 123–158.

67 György Bónis gives a systematic summary of the ecclesiastical jurisdiction in prehistoric Hungary, see Bónis, 1963. Péter Erdő's comparative studies stand out from the recent literature: Erdő 1993; id. 2016.

was strongly connected with the penance books that were widespread in Europe at that time.[68]

Early memories of the church's *privilegium fori* can be found in the laws of our first king, Saint Stephen I. Regarding content, the decisions of the Council of Mainz (847, can. 6–7)[69] are repeated, according to which secular judges follow only the ecclesiastical *ad iustitias faciendas iuxta praecepta legis divine* (I, 2). In the second half of the 11th century, the laws of Saint Ladislaus punished violators of private property with draconian vigor, including clerical perpetrators. The ecclesiastical perpetrator of a theft (hen, goose, fruit) committed to a lower value should be punished by his superior, but the perpetrator of a more serious act must be degraded and then passed on to secular judges. Thus, the king's judiciary was also manifested toward churchmen, but the church's internal judging was given priority in the procedure (especially in minor matters). The synod of Szabolcs (1092), chaired by the king, also dealt with issues of celibacy. According to the decisions, the priests could remain in their first and 'legal' marriages, but they had to dismiss their second or further wives, as well as any widow or divorced woman. If such *bigami* stubbornly clung to their wives, they had to be excluded from the Church, *secundum instituta canonum.* Furthermore, if a priest living in such a forbidden marriage continues to work, he must be convicted *iudicio voluntario episcopi*, and if a bishop or an archbishop endures a sinful priest judged in accordance with the above in holy service, then the king judges over them, with his bishop counselors. Thus, the king's supreme jurisdiction prevailed strongly in Hungary in the 11th century. By the 12th century, we know very little about the practice of ecclesiastical jurisdiction in Hungary. The first diploma from an ecclesiastical authority (1134) is a court letter from Archbishop Félix pertaining to a church estate dispute in Esztergom. The trial was probably oral, given the low level of written culture, and it may have been common for high-ranking churches' arbitrary court judgments to close disputes.[70]

The Gregorian age also saw the widespread strengthening of ecclesiastical justice in Hungary. In matters between ecclesiastical and lay people, a secular judge can no longer, in principle, summon a cleric: "*Nullus praesumat secularis iudex sigillum clerico dare*."[71] Moreover, in the case of simpler homicides, abductions, and adultery, bishops' and archbishops' jurisdiction prevailed. Centuries before his age, King Coloman forbade taking action against witches on irrational charges (e.g., night flight) in his famous law: "*De strigisvero, que non sunt, nulla quaestio fiat*."[72] The Hungarian kings sided with the papacy in the Investiture Controversy, which did not, of course, prevent the unhindered enforcement of the papal laws (*decretales*) issued in 1180 in the direction of the Hungarian archbishops. The strong papal influence in Hungary

68 Cf. Oakley, 1923, p. 142; Frantzen, 1983, pp. 23–56.
69 Cf. Schiller, 1910, pp. 389–391.
70 See, e.g., the trial of Archbishop Seraphin of Esztergom with fellow bishops (1103). Cf. Knauz and Dedek, 1874–1924, vol. I, p. 71.
71 Decreta Colomanni I. 14.
72 Decreta Colomanni I. 57.

was further enhanced by the fact that papal power culminated with Pope Innocent III and Honorius III, as weak and even light-hearted kings ascended the throne in Hungary.[73]

It is characteristic of canon law's domestic validity that King Bela IV (1235–1270) expressed his wish in the same diploma in which he complains about the papal legate Jacob's excessive use of excommunication: "*ut nos et regnum nostrum iure communi et sanctorum partum institutionibus regamur*."[74] During the reign of his grandson, Ladislaus IV (1272–1290), there was an open breaking of bread between Rome and Hungary. As the young king based his power on the Cumans who had settled in the country shortly before but still lived according to pagan customs (and caused severe damage to the people of the country and the church), a papal legate was again ordered to restore the Church's rights. Bishop Philip of Fermo held a synod in Buda (1279), the provisions of which were not fulfilled in many respects. In response, the legate sentenced the king to ecclesiastical punishment and subjugated the country. The accepted validity of canon law thus prevailed in full force, so the same Hungarian king was forced to accept it on the issue of Bosnian heretics – as "*omnia statuta, constitutiones, leges et iura atque decreta* [...] *per sedem apostolica medita*."[75]

4.1. Development of the judiciary

The ecclesiastical judiciary and its organizational development also gained great momentum in Hungary in the 13th century. The first half of the century reveals the picture of rudimentary practice (and the times before the Fourth Council of the Lateran). The *Regestrum Varadinense*,[76] a surviving source of European significance from this age, has preserved the memory of the judiciary's supremacy in Hungary. Thus, they brought under their jurisdiction a number of criminal cases, such as *veneficium, maleficium*, *furtum*, *latrocinium*, *occasio*, and *raptus* (*mulieris*), as well as the clergy's private law cases.

Legate Jacob was expected to renew ecclesiastical jurisdiction in Hungary. After 1279, the Hungarian ecclesiastical courts were strengthened internally, and their organization was transformed in accordance with the rules of the *curia*. From the end of the 13th century, the episcopal and archbishopric chairs' appeal role was abundant: Litigants often approached the archdeacons here. The disputes' substantive legal basis, according to the doctrine established by numerous sources, was already, obviously, canon law norms, especially the papal decrees.

The archbishops, bishops, some provosts, and abbots, in the possession of the *immunitas*, gained the right to judge their subjects. The organization of these high priest courts was modeled on that of the royal *curia*, and although such provincial fragmentation (as in Germany) never developed in Hungary, the high priest (of the

73 Cf. Bónis, 1963, p. 188.
74 Cf. Theiner, vol. I, p. 170.
75 Cf. Theiner, vol. I, p. 348.
76 Cf. Karácsony and Borovszky, 1903.

bishops) of the Hungarian Church ruled over the population of the archbishop of Esztergom (1262) as *palatinus suus vel iudex curiae sue aut terrestris comes.*[77]

At the beginning of the 14th century, the activities of the papal legate Gentilis laid the foundation for the organizational development of the Hungarian ecclesiastical judiciary. The most excellent – foreign – specialists of canon law were active in lawsuits between 1308 and 1311 in Hungary.[78] Diocesan courts were typically headed by bishops, who most often sought the help of jurists who were truly knowledgeable in canon law. Arduous tasks requiring legal expertise were very often delegated to other officials (*viceiudex et cancellarius, vicesgerens, yconomus*).

In Hungary, in the 14th century, it became common for the office of the diocesan judge to be filled by the vicar of the bishop, the *vicarius,* and this remained firm throughout the Middle Ages. In our case, the *officialis* nominated the property director of the secular estates, and only papal letters made formal application to the ecclesiastical court judge. It can be stated that Hungary thus clearly joined the model of medieval ecclesiastical judiciary in Southern Europe, i.e., the vicar judiciary. This system resulted in the appointment of a cleric who was always proficient in canon law as the bishop's general deputy. In Esztergom, in the 14th century, a canon was most often appointed, and an archbishop was usually appointed in addition to the episcopal chairs. In the 15th century, this judge was referred to as *vicarius in spiritualibus* and sometimes even *vicarius in spiritualibus et causarum auditor generalis*.[79]

It is exceptional that the bishop of Transylvania had a geographically 'outsourced' deputy judge (*vicarius de extra Mezes*), an officer who became permanent, and this function was usually performed by the parish priest of Satu Mare or Tasnád. It is important to note that, in contrast to the development of Western Europe, there has never been rivalry between the archbishop's and bishop's judgments in Hungary.

The court (*consistorium*) has always acted in a council (*cum fratribus nostris de capitulo*), most often with the parishioners of the area. At the same time, it is known that since the affairs of the Hungarian ecclesiastical courts included the adjudication of a number of secular cases, in addition to the clerics, jurists familiar with secular customary law were also involved in the deliberations.[80] The mixed court chair had a long tradition in Hungary; in the second half of the 14th century in particular, lawsuits in which the ecclesiastical courts, seemingly aside from canon law, applied purely the substantive and procedural rules of domestic law were frequent.[81] In Hungary, therefore, we can state that there was a strong mix of canon and domestic law, which was an important factor in the spread of Roman canonical norms.

77 Cf. Knauz and Dedek, 1874–1924, vol. I, p. 473.

78 In the judgment seat: Philippus de Sardinia, Vannes de Aretio *auditores,* Boninsegna de Perusio, all of whom were *doctores decretorum*. Papal notaries arrived in Hungary as well: Angelus de S. Victoria, Philippus de Cingulo, and Vagnolus de Mevania. See Bónis 1963, p. 202.

79 Cf. Erdő, 1993, pp. 139–140.

80 In 1383, the deputy of Spiš judged nobles, citizens, and serfs.

81 By the judgment of the Eger deputy (1389), one of the litigants was convicted of blood premiums (*in emenda homagii*) for denying kinship (*proditio fraternis*).

The number one official of the ecclesiastical court in Hungary is therefore the deputy general of the bishop, whose office (*officium vicariatus*) also had an authentic seal. The deputy chair's increasing autonomy and importance required persons skilled in canon law. From the end of the 14th century, they sit almost without exception at the country's ecclesiastical center, Esztergom, as *doctores decretorum.* Among them are several lawyers from Italy: Leonardus de Pensauro, Antonius de Ponto, marketer Matheus de Vicedominis for a quarter of a century during King Sigismund's reign, Simon di Treviso (archbishop of Antivari), Ludovicus Borsi (bishop of Aquileia), and many others. There may have been a great deal of national outrage against scholars who came from abroad and applied only canon law because Law XXXII of 1495 banned them and all foreigners from the sacraments and declared their judgments null and void. We have no data on the enforcement of these legal provisions, but it is certain that the validity of canon law has not been shaken in Hungary; however, at the same time, they have pointed out strong adherence to domestic law.

4.2. Jurisdiction

The Hungarian ecclesiastical courts' rules of competence and jurisdiction were largely in line with European practice, but there are peculiarities. In the 14th century, the ecclesiastical courts' jurisdiction and the rules of jurisdiction had not yet been established, and a kind of dynamic co-operation could be established between the royal court and the episcopal courts. In the first half of the 14th century, the royal court judges referred not only the affairs of widows, dowry, and daughter quarters, but also cases of clerical domination (*actus maioris potentiae*) to the episcopal chairs' jurisdiction. The opposite was true as well: In particular, cases of women's special rights to be decided on the basis of domestic law were sent to the royal court with preference, and in such cases, the *mandatum transmissionale* was regularly obeyed.

From the middle of the 14th century onward, the clientele with regard to whom the ecclesiastical courts acted in Hungary developed. These included judgments on heresy, matrimonial matters, special women's rights (*paraphernum*, *quarta puellaris*, *ius viduale, dos*), abuse of church and women, sexual offenses against virgins and women, adultery (*civiliter*), and wills. Property disputes were particularly problematic because the nobility's property rights also included the king's right, *ius regium*, so secular law generally prohibited the ecclesiastical court's jurisdiction in such matters, but with regard to women's special rights, the performance of many legal acts was accepted as lawful under Hungarian law.

From the beginning of the 15th century, we find provisions at the legal level on the jurisdiction of ecclesiastical courts. Jurisdiction disputes, which often occur between secular and ecclesiastical courts, were always decided by the royal court. This meant that although the church had an autonomous system of justice and was even part of a vast transboundary structure connected with Rome, within the country's borders, royal courts always settled sharp jurisdiction conflicts, thus effectively encircling the sacraments in the national court.

Several laws[82] listed the scope of matters within the competence of the ecclesiastical court; these were sometimes supplemented by the clause '*que profane non essent*.' The jurisdiction of the ecclesiastical court was developed in the 15th century: sacramental matters, the purity of the Christian faith (heresy), wills, matrimonial matters in the broadest sense (thus, in addition to bond trials, women's special rights were included), tithes, usury, matters of widows and orphans, perjury (*periurium*), and all other matters where the church's penitentiary power prevails.

The famous Hungarian legal book, *Tripartitum*, written at the beginning of the 16th century – whose actual legal authority exceeded its laws – does not cover the definition of the competence of ecclesiastical courts; it only sets out the position of national law on the most important issue.[83] This, in turn, applied to aristocratic land disputes, where it enshrines the ancient legal principle that such cases cannot be judged by ecclesiastical courts (III. 25.), meaning that their diplomas issued in such cases have no legal effect.

82 Laws: IX of 1458; L of 1458; III of 1462; XVII of 1464; XLVI of 1492.
83 Tripartitum I. 78. § 6: "[…] *quia non est mei institute aliquid de ecclesiastico foro disserere* […]"

Bibliography

Bader, K. S. (1967) 'Klerikernotare des Spätmittelalters in Gebieten nördlich der Alpen' in Lentze, H. (ed.) *Speculum iuris et ecclesiarum. Festschrift für Willibald M. Plöchl zum 60. Geburtstag*, Wien: Herder, pp. 1–15.

Balogh, E. (2020) *Középkori bajor egyházi bíráskodás*. 2nd Budapest: Szent István Társulat.

Bogyay, T. (1993) *Magyarország története távlatból*. Bécs–Budapest–München: Mérleg.

Bónis, Gy. (1963) 'Die Entwicklung der geistlichen Gerichtsbarkeit in Ungarn vor 1526', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 49, pp. 174–235.

Bónis, Gy. (1997) *Szentszéki regeszták. Iratok az egyházi bíráskodás történetéhez a középkori Magyarországon* (ed. E. Balogh). Budapest: Püski.

Dalham, F. (1788) *Concilia Salisburgensia provincialia et dioecesana*. Augsburg: Rieger.

Dopsch, H. (1998a) 'Papst Leo III. verleiht Arn, dem Erzbischof und Metropoliten der bayerischen Kirchenprovinz, das Pallium (798 April 20)' in Domkapitel zu Salzburg (ed.) *1200 Jahre Erzbistum Salzburg. Dom und Geschichte*. Salzburg: Gesellschaft für Salzburger Landeskunde, pp. 17–22.

Dopsch, H. (1998b) 'Anfang und Aufstieg – vom bayerischen Erzbistum zum Land Salzburg' in Domkapitel zu Salzburg (ed.) *1200 Jahre Erzbistum Salzburg. Dom und Geschichte*. Salzburg: Gesellschaft für Salzburger Landeskunde, pp. 27–43.

Eckhardt W. A. (1978) 'Königsbote' in Erler, A., Kaufmann, E. (eds.) *Handwörterbuch zur deutschen Rechtsgeschichte*. Berlin: Erich Schmidt Verlag, vol. 2, pp. 1025–1026.

Erdő, P. (1989) 'Ungarn (Kirchenprovinzen von Esztergom und Kalocsa)' in Donahue, C. Jr. (ed.) *The Records of the Medieval Ecclesiastical Courts: The Continent* (Comparative Studies in Continental and Anglo-American Legal History, 6). Berlin: Duncker & Humblot, pp. 123–158.

Erdő, P. (1993) 'Középkori egyházi bíróságok Lengyelországban és Magyarországon', *Jogtudományi Közlöny*, 48(4) pp. 133–142.

Erdő, P. (1994) 'A középkori officiálisi bíráskodás írott emlékei Lengyelországban és Magyarországon', *Magyar Könyvszemle*, 110(2), pp. 117–129.

Erdő, P. (1995) 'Tribunali ecclesiastici medievali in Polonia e in Ungheria', *Studi Medievali*, 36, pp. 323–343.

Erdő, P. (2016) 'Ecclesiastical Procedure in Eastern Central Europe' in Hartmann, W., Pennington, K. (eds.), *The History of Courts and Procedure in Medieval Canon Law*. Washington, D.C.: The Catholic University of America Press, pp. 426–462.

Fijałek, J. (1899) 'O archidiakonach pomorskich i urzednikach biskupich w archidiaconacie pomorskim diecezji włocławskiej w XI–XIV wieku', *Roczniki Towarzystwa Naukowego w Toruniu*, 6, pp. 125–172.

Fournier, P. (1880) *Les Officialités au moyen âge. Étude sur l'organisation, la compétence et la procédure des tribunaux ecclésiastiques ordinaires en France de 1180 à 1328*. Paris: E. Plon.

Frantzen, A. J. (1982) 'The tradition of penitentials in Anglo-Saxon England', *Anglo-Saxon England*, 11(December), pp. 23–56; https://doi.org/10.1017/S0263675100002556.

Garçía y Garçía, A. (1988) 'Las constituciones del concilio legatino de Valladolid (1322)' in Brandmüller, W., Immenkötter, H., Iserloh, E. (eds.) *Ecclesia Militans. Studien zur Konzilien- und Reformationsgeschichte. Remigius Bäumer zum 70. Geburtstag gewidmet*. Paderborn: F. Schöningh, vol. I, pp. 111–127.

Hageneder, O. (1967) *Die geistliche Gerichtsbarkeit in Ober- und Niederösterreich. Von den Anfängen bis zum Beginn des 15. Jahrhunderts* (Forschungen zur Geschichte Oberösterreichs, 10), Graz–Wien–Köln: Hermann Böhlau Nachf.

Hageneder, O., Haidacher, C., Lindner, K., Weigl, H. (1989) 'Österreich (Kirchenprovinz Salzburg)' in Donahue, C. Jr. (ed.) *The Records of the Medieval Ecclesiastical Courts: The Continent* (Comparative Studies in Continental and Anglo-American Legal History, 6). Berlin: Duncker & Humblot, pp. 33–49.

Heinemeyer, W. (1974) 'Zur Gründung des Bistums Gurk in Kärnten' in Beumann, H. (ed.) *Historische Forschungen für Walter Schlesinger*. Köln–Wien: Böhlau Verlag, pp. 495–513.

Hermann, E. (1961) 'Zur frühmittelalterlichen Regensburger Mission in Böhmen', *Verhandlungen des Historischen Vereins von Oberpfalz und Regensburg*, 101, pp. 175–187.

Hinschius, P. (1959) *Das Kirchenrecht der Katholiken und Protestanten in Deutschland. Bd. II. System des katholischen Kirchenrechts mit besonderer Rücksicht auf Deutschland.* Repr. Graz: Akademische Druck- und Verlagsanstalt.

Karácsony, J., Borovszky, S. (eds.) (1903) *Az időrendbe szedett váradi tüzesvaspróbalajstrom az 1550-iki kiadás hű másával együtt (Regestrum Varadiense examinum ferri candentis ordine chronologico digestum, descripta effigie editionis a. 1550 illustratum).* Budapest: Váradi Káptalan.

Kirn, P. (1926) 'Der mittelalterliche Staat und das geistliche Gericht', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 15, pp. 162–199.

Knauz, F., Dedek, L., C. (disp.) (1874–1924) *Monumenta ecclesiae Strigoniensis 1079–1349*. Esztergom.

Krause, V. (1890) 'Geschichte des Instituts der missi dominici', *Mitteilungen des Instituts für Österreichische Geschichtsforschung*, 11, pp. 193–300.

Luschek, F. (1940) *Notariatsurkunde und Notariat in Schlesien von den Anfängen (1282) bis zum Ende des 16. Jahrhunderts* (Historisch-Diplomatische Forschungen, 5). Weimar: Böhlau Verlag.

Michel, F. (1953) *Zur Geschichte der geistlichen Gerichtsbarkeit und Verwaltung der Trierer Erzbischöfe im Mittelalter* (Veröffentlichungen des Bistumsarchivs Trier, 3). Trier: Kommissionsverlag des Bistumsarchivs Trier.

Nowacki, J. (1964) *Archidiecezja Poznańska w granicach historycznych i jej ustrój*. Poznań: Księgarnia Św. Wojciecha.

Oakley, T. P. (1923) *English Penitential Discipline and Anglo-Saxon Law in their Joint Influence*. New York: Columbia University Press.

Paarhammer, H. (1977) *Rechtsprechung und Verwaltung des Salzburger Offizialates (1300–1569)* (Dissertationen der Universität Salzburg, 8). Wien: Verband der wissenschaftlichen Gesellschaften Österreichs.

Paarhammer, H. (1998) 'Die Salzburger Erzbischöfe als Appellationsinstanz. Anmerkungen zur geistlichen Gerichtsbarkeit in der Kirchenprovinz Salzburg im Mittelalter' in Domkapitel zu Salzburg (ed.) *1200 Jahre Erzbistum Salzburg. Dom und Geschichte*. Salzburg: Gesellschaft für Salzburger Landeskunde, pp. 185–200.

Pawluk, T. (1985) *Prawo kanoniczne według Kodeksu Jana Pawła II. Vol. I. Zagadnienia wstępne i normy ogólne*. 2nd Olsztyn: Warmińskie Wydawnictwo Diecezjalne.

Plöchl, W. M. (1955) 'Zur Rechtsgeschichte der Wiener geistlichen Konsistorien', *Mitteilungen des Instituts für Österreichische Geschichtsforschung*, 63, pp. 323–337.

Prinz, F. (1981) 'Die innere Entwicklung: Staat, Gesellschaft, Kirche, Wirtschaft. Die Bistümer' in Spindler, M. (ed.) *Handbuch der bayerischen Geschichte I*. München: C.H. Beck, pp. 440–462.

Reindel, K. (1981) 'Christentum und Kirche. Die Errichtungeinerneuen Bistumsorganisation' in Spindler, M. (ed.) *Handbuch der bayerischen Geschichte I*. München: C.H. Beck, pp. 226–233.

Schiller, F. (1910) 'Das erste ungarische Gesetzbuch und das deutsche Recht' in *Festschrift Heinrich Brunner zum siebzigsten Geburtstag dargebracht von Schülern und Verehrern*. Weimar: H. Böhlaus Nachfolger, pp. 379–404.

Straub, H. (1957) *Die geistliche Gerichtsbarkeit des Domdekans im alten Bistum Bamberg von den Anfängen bis zum Ende des 16. Jahrhunderts* (Münchener Theologische Studien, III/9). München: Karl Zink.

Szamota, I. (1891) *Régi utazások Magyarországon és a Balkán-félszigeten (1054–1717)*. Budapest: Franklin Társulat.

Szentirmai, A. (1962) 'Die ungarische Diözesankurie im Spätmittelalter', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 48, pp. 164–221.

Szuromi, Sz. A. (2011) 'An Outline of the Ecclesiastical Administration of Justice and Judicial Organization in the High Middle Ages', *Rivista internazionale di diritto comune*, 22, pp. 279–292.

Theiner, A. (1859–1863) *Vetera monumanta historica Hungariam sacram illustrantia I–II.* Romae: Typis Vaticanis.

Trusen, W. (1973) 'Die gelehrte Gerichtsbarkeit der Kirche' in Coing, H. (ed.) *Handbuch der Quellen und Literatur der Privatrechtsgeschichte I.* München: C.H. Beck, pp. 467–504.

Ulanowski, B. (ed.) (1897–1926) 'Acta ecclesiae collegiatae Varsoviensis', *Archiwum Komisji Prawniczej*, 6, Nr. 66.

Vetulani, A. (1934) 'Die Einführung der Offizialate in Polen. Ein Beitrag zur Verbreitungsgeschichte des bischöflichen Offizialats im Mittelalter', *Collectanea Theologica*, 15(3), pp. 277–322.

Vetulani, A. (1938) 'Prawne stanowisko oficjałów biskupich w Polsce w XV stuleciu' in Adamus, J. (ed.) *Studia historyczne ku czci Stanisława Kutrzeby*. Kraków: Nakładem Komitetu, vol. I, pp. 471–491.

Wagner, H., Klein, H. (1952) 'Salzburgs Domherren von 1300–1514', *Mitteilungen der Gesellschaft für Salzburger Landeskunde*, 92, pp. 1–81.

Werminghoff, A. (1910) 'Zu den bayrischen Synoden am Ausgang des achten Jahrhunderts' in *Festschrift Heinrich Brunner zum siebzigsten Geburtstag dargebracht von Schülern und Verehrern*. Weimar: H. Böhlaus Nachfolger, pp. 39–56.

Werminghoff, A. (1913) *Verfassungsgeschichte der deutschen Kirche im Mittelalter*. Leipzig–Berlin: Teubner.

Wójcik, W. (1959) 'Instygator w oficjalacie okręgowym w Sandomierzu', *Prawo Kanoniczne* 2(1–2), pp. 331–383.

Wójcik, W. (1967) 'Interwencje monarsze u sędziów koscielnych w Polsce XV–XVI wieku', *Czasopismo Prawno-Historyczne* 19(2), pp. 89–105.

Zinnhobler, R. (1969) 'Geistliche Gerichtsbarkeit und organisatorischer Aufbau im ehemaligen Großbistum Passau', *Theologisch-praktische Quartalschrift*, 117, pp. 152–155.

| Chapter 4 |

Collections of Customary Law in East Central Europe Using the Example of *Opus Tripartitum*

Vojtech VLADÁR

ABSTRACT

Customary law dominated at the beginning of the development of all legal systems, and this status persisted until the times when they were equaled by laws of the authorities disposing of necessary state power. However, even then, customs were not instantly sidelined, and these two sources were engaged in competition for centuries. Mention was topical, with certain exceptions and individualities, even regarding the legal systems of Central and Eastern Europe. The most widely known compilation of this provenance was Stephen Werbőczy's collection of customary law from the second decade of the 16th century that became famous under the name *Opus Tripartitum*. Using it as an example, we can demonstrate typical legal development in this period, not only for the Kingdom of Hungary but also for several neighboring countries. The main goal of this article is to point out the historical development of its origin, identify the authorial spirit in which it was written, and clarify the conflict between customary and written law, which was resolved determinatively by reason of this compilation in favor of the first for the next centuries.

KEYWORDS

codification efforts, Stephen Werbőczy, *Opus Tripartitum*, structure of the compilation, legal custom, law, reasons for non-promulgation, obligatory force, dominance and weakening of the achieved positions, other countries of Central and Eastern Europe.

Introduction

Practically all contemporary legal systems were initially constructed on the legal customs that dominated as the sources of law until the times when they were equaled by the laws promulgated by the authorities with power over given territories and the communities residing there. Their task was not immediately accomplished; on the contrary, customary law often remained in effect for entire centuries alongside other sources of law, often acting as contemporary rules of constitutional laws expressing the normative principles to which all other rules, not omitting written laws, must conform. This status was reflected in almost all legal systems, and the countries of Central and Eastern Europe in the Late Middle Ages and the early modern history period were not exceptions in this sense. Since the Middle Ages lasted longer in the Kingdom of Hungary than elsewhere, legal custom dominated there for much longer,

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until the middle of 19th century, in contrast to Austria, for example. In spite of the gradual strengthening of the position of other sources of law, legal custom retained more vitality and a greater ability to meet social needs, in comparison with the royal decree (*decretum*) issued by the king with the approval of the estates convened at the diet, royal privilege, and court decisions.[1] Credit for this development is mainly attributed to the protonotary of the High Court, Stephen Werbőczy († 1541), who held this position from the beginning of the 16th century. He presented a magnificent work entitled *Tripartitum opus iuris consuetudinarii inclyti Regni Hungariae* to the diet of Hungary in 1514. It contained Hungarian customary law enriched with certain authorial changes and conclusions that favored the lower class nobility over the upper class nobility. Although this compilation did not receive the royal great seal, it nevertheless acquired immediate authority and shaped Hungarian law up to 1848 at the latest in the areas of substantial as well as procedural law.[2] This is evidenced by the fact that practically all court manuals and other handbooks related to customary practice published in those times were summaries of or commentaries on the text of *Opus Tripartitum*. Moreover, the work has been edited and issued more than 50 times to date.[3]

1. Historical background

Although the Hungarian rulers promulgated several laws under the rule of the Árpád dynasty, legal customs remained the most important source. In this period, we may divide these into customs with effect at the national level (common law) and particular customs. As a matter of interest, we may mention that whereas Western Europe was dominated by local laws and had only complementary national laws, the opposite situation prevailed in the Kingdom of Hungary. The ascendancy of legal custom endured even during the reign of the first Hungarian king Stephen I (997/1000–1038) that issued his own law code, markedly influenced by Frankish Carolingian law and pervaded by a Christian spirit.[4] Alongside royal laws and customs, of which the most important guaranteed the nobility's privileges, other sources of law started to emerge as early as

1 Cf. Péter, 2003, p. 101.

2 As an example, we may mention generally accepted provisions guaranteeing the Hungarian nobility possession of land and individual privileges, as well as procedural directives that royal courts followed without reservation. This collection did not lose influence, even in 1848 with the formal abrogation of noble-hood and traditional forms of land possession and later was used to support the Hungarian demands on statehood in the Habsburg monarchy. One of the fragments found its way to the socialist Civil Code of 1959. See also Eörsi, 1966, p. 137.

3 Cf. Gönczi, 2003, p. 98.

4 This work was partially influenced by Justinian's Roman law, albeit indirectly. The researchers typically reflect within this context on the *Codex Iustinianus* and parts of *Novellae constitutiones*. Cf. Hamza, 2014, p. 383. Christian elements were evident especially in the rules of criminal law that assessed criminal offenses not only as breaches of the law, but also as sins. Church sanctions were thus usually attached to secular punishments. Cf. Múcska, 2004, p. 40–41.

these times, for example, the rules of municipal law.[5] Courts were later strengthened in terms of putting their own legal customs and style into practice; they even acquired a role in law making.[6] Nevertheless, the Hungarian legal system was characterized by customs' special status and superiority, and this endured to the half of the 19th century. This is especially evident from acceptance of the fact that royal laws had to be legitimized by legal customs. This source of law encircled the legal system to the influence of Roman-canon law (*ius commune*) and by scrupulously protecting the nobility's rights also contributed considerably to political particularism.[7] Concerning its character, it had from the beginning all the characteristics of traditional theory as well as historical definitions as non-written source of law derived from community whose members consider it to be generally binding and sanction its violation.[8]

Although the Angevin dynasty made several attempts, the most significant efforts came from the representatives of central legislative power who sought to interfere with the regulations on social relationships by means of their own laws in an attempt to suppress customary law from the times of Sigismund of Luxembourg (1387/1410–1437).[9] After his death, the diet of Hungary assumed an important position as a body representing the kingdoms' estates, and from those times, it was accepted that laws may be passed by a properly convened diet after adjustment by the king, his signing, and the impressing of his seal. King Matthias Corvinus (1458–1490) adopted a similar attitude, somewhat inspired by Justinian's Roman law; he tried to codify Hungarian law, issuing his laws in so-called *Decretum maius*, in an effort to restrain the influence of customary law.[10] His goal was also to enforce the radical centralization of the country's administration to suppress the upper class nobility's determining influence on the motion of the state and their guaranteed untouchability.[11] However, his weak, hesitant successor Vladislaus II of Hungary (1490–1516) succumbed to their pressure and restored all of their original privileges, even abrogating the mentioned

5 The most developed cities in the Kingdom of Hungary rid themselves of their dependence on local feudalists and became directly subordinated to the king. As an example, we may mention that in the 15th century, about 30 cities achieved this goal. From the legal point of view, independence was manifested especially in the existence of independent municipal courts, where the representatives of the city gradually replaced the nobility. The individual municipal laws that developed, influenced from the beginning by Roman law, enabled the expansion of business activities. Cf. Gergely and Máthé (eds.), 2000, p. 131, and pp. 134–135.

6 Cf. Rady, 2012, pp. 450–481.

7 See also Bónis, 1972.

8 Cf. Schelle and Tauchen (eds.), 2016, pp. 718–720.

9 The expression of his centralistic politics strengthened royal claims toward the church that manifested, for example, in the nobility being excepted from paying church tithes (1415), but also in the decree of the Council of Constance (1414–1418) on 'the highest right of patronage of the king' (1417), which Sigismund negotiated with the College of Cardinals. In 1404, he put into practice, with effect for the whole of Hungary, the so-called royal placet (*placetum regium*), according to which any papal document could be published in the kingdom without his approbation. Cf. Kumor, 2002, p. 112.

10 Cf. Pekarik, 2011, p. 24; Hamza, 2014, p. 384; Schelle et al., 2007, p. 825 and Kindl, 2004, p. 627.

11 Cf. Article No. 21/1486.

source of law.[12] The sovereign found a way to improve the legal system by drawing up the country's customary law and declaring this intention in Articles No. 6/1498 and 10/1500.[13] The struggle to synthesize the national law was especially connected with the need to elucidate the legal system and the courts' application practice, since the parties before the courts commonly referred to different rules that directly or indirectly contradicted each other.[14] After an unsuccessful attempt to entrust the task of collecting valid customs to the protonotary Adam Liszkai, King Vladislaus II finally extended his request to include all *decreta* published in the kingdom and asked the protonotary Stephen Werbőczy to execute this mission.[15]

2. Authoring and working on the collection

According to the majority of scientists, the individuality of elaboration in *Opus Tripartitum* reflects not only the then legal-political situation in the Kingdom of Hungary but also, in several aspects, reflects the author's personality as well as his education, legal thinking, and goals. Since the final form (especially the prologue) of his work partly evokes at least fundamental knowledge of the institutions of Roman law, most polemics in the scientific community were related to the site of his university studies. Nevertheless, it is generally accepted that he spent only few months at the university in Kraków.[16] Although such an attitude was unextraordinary, the length of the studies naturally depended entirely on the student's will and the sufficiency of his resources and did not in any way disqualify him from future legal practice.[17] Stephen Werbőczy developed his skills by learning about Hungarian legal practice, as reflected in his activities as a politician, officer, judge, diplomatist, and juridical scholar – and finally as the author of *Opus Tripartitum*.[18] Concerning his political orientation, during his career, he advocated for the rights of the lower class nobility and endeavored on a long-term basis to strengthen their influence in the royal curia and attain for them the same position in the royal council and in terms of holding the highest state offices as members of the upper class nobility.[19]

12 Cf. Hubenák, 2001, p. 9; Kuklík and Skřejpková, 2008, p. 79.
13 Cf. Štenpien, 2009, p. 98.
14 Cf. Rady, 2005, p. XXXII. The strengthening codification efforts were, in general, oriented in three ways: collecting and systemizing Hungarian laws for the sake of compiling the collection of laws (*collectio decretorum*), recording customary law, and collecting court decisions. Cf. Švecová and Laclavíková, 2018, p. 468.
15 Since Articles No. 31/1504 and 20/1507 specifically addressed the necessity to record decrees, everything implies that the codification of customary law had already started. Cf. Csiky, 1899, p. 28.
16 Cf. Kubinyi, 1999, p. 559. It is principally not accepted that he studied in Buda, Bratislava, Padova, Vienna, or even Bologna and spoke Greek or Italian. Cf. Rady, 2006, p. 107.
17 See also Brundage, 2008, p. 219, n.
18 He learned about Hungarian legal practice while working as a royal archivist, where he became acquainted with a quantity of legal documents. Cf. Pekarik, 2011, p. 23.
19 Cf. Luby, 2002, p. 55.

As the peak of his career, we may designate the short-term position he held as the palatine (*Regni Hungariae palatinus et servus*), which was the second most important office after the royal one.[20] Regarding the assessment of his personality, as was typical for important official authorities, it was ambiguous. On the one hand, he is often described as a bad, self-serving politician that sold his language and country and indirectly caused the catastrophe of Mohács; on the other hand, the fact that he was a good lawyer is fully accepted and was proven when Hungary confronted the absolutism of the Habsburg dynasty.[21] Since that time, he has often been compared to the most famous personalities in the legal sciences, including Aurelius Hermogenianus, Henry de Bracton, Tribonianus, and Ulpianus.[22] As is usual in such cases, the truth is apparently somewhere in the middle. Nevertheless, his position in the history of the Central European legal science is unshakable.

As pointed out, Stephen Werbőczy was entrusted with recording customary law and other relevant rules, as he was one of the most recognized legally educated men in the Kingdom of Hungary and had worked as a protonotary of the High Court, coupled with his role as a prominent politician and a representative of the interests of the lower class nobility.[23] His task was to logically and systematically organize valid laws, legal customs, and other generally binding or individual legal acts, among which we may mention the charters of privileges and legal material accumulated by court practice.[24] Under the term 'customary law,' Werbőczy imagined practically all substantive and procedural rules that exercised authority in the kingdom through the courts, even without formal approbation.[25] Therefore, a vast amount of material had to be gathered relating to the real causes. These were then excerpted, indexed, and collected to compile a final text consisting of 700 manuscript pages.[26] Concerning the beginning of the works, legal historians usually agree on the year 1505, when the king commanded the collection of the kingdom's customs for the third time. On the other hand, they argue that the final product reveals several signs of haste; specifically, the text contains a number of contradictions and deficiencies implying limited time.[27] Although Stephen Werbőczy declared many times that it was his intention to replicate the traditional Hungarian customs, several excerpts prove that he imprinted his own interpretation of many

20 Cf. Rady, 2005, pp. XLII and XLIV.
21 Cf. Luby, 2002, p. 82.
22 Cf. Wallaszky, 1768, p. 15.
23 In the times of the presentation of *Opus Tripartitum*, he worked in the royal chancery for more than two decades and held the position of chief judge for 12 years. Cf. Rady, 2005, p. XXXIV.
24 Cf. Gergely and Máthé (eds.), 2000, p. 143.
25 Cf. Rady, 2006, p. 104.
26 Cf. Štenpien, 2009, p. 98. The last edition in Latin text had more than 200 dense pages. Cf. Bak, 2003, p. 5. Considering the language, *Opus Tripartitum* is written in barbarized Latin, interlaced with a number of foreign terms of Slovak, Hungarian, and other origin. This is also evident from the author's stylistics. Cf. Luby, 2002, p. 83.
27 This conclusion is accepted in spite of the older legal historians' statements that the collection resulted from time-consuming work. Cf. Bónis, 1941, p. 4.

sources in an effort to reflect the contemporary (typically political) views, remove the inconsistencies, or improve the original text.[28] Some parts of the collection indicate that the compiler adjusted them not only in the sense of *de lege lata* but also *de lege ferenda*, and for this reason, we may discuss individual revision and legal modernization.[29]

Stephen Werbőczy finished his codification in 1514, and in the form of a solemn royal bill, proposed it under the title *Opus Tripartitum iuris consuetudinarii inclyti regni Hungariae* or 'The Customary Law of the Renowned Kingdom of Hungary in Three Parts' to the national diet that congregated on 18 October, 1514. The diet's members subsequently created a 10-man committee to investigate the work for objective correctness as well as content.[30] When they concluded that the law code corresponded in every sense with Hungarian traditions, the work was presented to a general meeting of the diet, which approved it unanimously by acclamation.[31] The decree the diet issued included a plea to the king to promulgate the code, confirm and seal it, and then disseminate it to all the districts in the kingdom.[32] The diet's delegates put this request before the king. The king did not consider it necessary to examine the work more closely, and he approved it on 19 November via a solemn bill.[33] In addition, he promised to send copies of *Opus Tripartitum* to the country's districts.[34] However, the sovereign did not keep his promise. He neither appended the seal to the solemn bill containing the collection's text nor did he promulgate it by distributing it through the royal chancery.[35] The collection therefore did not meet the requirements for validation and on that basis could not formally come into effect and have obligatory legal force.[36] Stephen Werbőczy was not discouraged by the king's attitude; he found an alternative. First, he made moderate changes to *Opus Tripartitum*, including the addition of a salutation to the reader (*salutatio*) and a dedication to the ruler. In 1517, he printed the work at his own expense at printer Johannes Singrenius' Viennese letterpress and disseminated it in the districts and country courts.[37]

28 Cf. Bak, 2003, p. 6.
29 Cf. Rady, 2002, p. 33.
30 Cf. Luby, 2002, p. 82.
31 Cf. Fraknói, 1899, p. 68.
32 Cf. Article No. 63/1514.
33 Cf. Švecová and Laclavíková, 2018, p. 469.
34 Cf. Schelle et al., 2007, p. 783.
35 Cf. Gergely and Máthé (eds.), 2000, p. 143.
36 Cf. Pekarik, 2011, p. 85.
37 The original version of the manuscript was not preserved, but the facsimile edition of the Viennese exemplary was published by Armin Wolf in Frankfurt in 1969. See also Rady, 2006, p. 104.

3. *Opus Tripartitum*

3.1. Structure and content

Concerning structure, Stephen Werbőczy chose a three-part division, which was typical for those times considering the number's association with perfection (with reference to the Holy Trinity). He might also make the original choice to proceed in accordance with Roman lawyer Gaius' classical textbook *Institutiones*. A prologue (*prologus*) with 16 titles preceded the individual parts of the work. This is usually described as a theoretical-legal introduction to the collection.[38] Whereas individual parts may be characterized as the outcomes of Hungarian legal practice or the author's personal contributions, the prologue represents a low quality compilation of the older works with which he was directly familiar or had at his disposal.[39] Stephen Werbőczy addressed truth, law, sources of law and justice, and generally accepted legal and theological principles. The prologue is recognized as more theoretical than legal.[40] In the first part (*pars prima*), divided into 134 titles, he dealt with almost the entire area of substantial law, including personal, donative, pledge, hereditary, and partly also contractual law, concentrating almost exclusively on the nobility.[41] Herein, he addressed, for example, the principles and fundamentals of the nobility's possession of land and possibilities of its deprivation on the king's behalf after the commission of certain delinquencies (especially 'contagion of infidelity'or feudal infidelity). The second part (*pars secunda*), consisting of 86 titles, was mostly oriented to the sources of law and procedural law. Here, after the presentation of basic types of law sources, he explained individual trials and the typically applied legal remedies.[42] In the third part (*pars tertia*), structured into 36 titles, he dealt with special particular laws, especially municipal, Transylvanian, Croatian, Slavonic, and rules regulating the status

38 The collection was originally divided into parts and titles. The generally accepted division of the titles into principia and paragraphs is the work of lawyer Joannes Szegedi who taught in the first half of the 18th century at the Faculty of Law of the Trnava University in Trnava. Cf. Kadlec, 1902, p. 92.

39 The author explained that he would like to negotiate herein on 'certain remarkable matters' (*quaedam notabilia*) relating to the text as a whole. Within its frame he discussed the nature of law; its division, origin and goals; the relationships between *ius*, *lex*, and *consuetudo*; and the duties of a good judge. In this part, he proceeded in accordance with scholastic methods and individual *quaestiones* then structured into *distinctiones*. Cf. Rady, 2006, p. 106.

40 Cf. Cieger, 2016, p. 133.

41 Cf. Hamza, 2014, p. 387.

42 Although the majority of procedures corresponded to the older patterns of generally accepted Roman-canon procedure, they suggest various peculiar procedural law institutions unknown to the Western jurisprudence built on *ius commune*. Cf. Hunyadi, 2003, pp. 25–35. Of them, we may mention so-called *repulsio*, when a nobleman could draw sword and defend himself against a bailiff executing a judicial decision, and *reoccupatio*, which allowed a dispossessed nobleman to take possession of his property by force within 1 year from expulsion. In a certain aspect, the second remedy evokes some Roman-law interdicts, or the procedure to protect possession presupposed by canon law through *remedia spolii* (*exceptio spolii* and *actio spolii*). I addressed this problem in the monograph Vladár, 2014.

of bondsmen. The majority of researchers agree that from a systematic point of view, this had to be integrated in previous parts; they have even pointed out its considerably chaotic nature.[43] In the conclusion (*operis conclusio*), Stephen Werbőczy explained his language and chosen terminology in more detail.[44]

3.2. Sources

Although Stephen Werbőczy asserted elaboration of his work in accordance with the Hungarian customs, and we may more or less agree with such a statement, most scientific polemics were related to the sources used while compiling the prologue. As a non-expert in Roman law, he declared his interpretation of the Kingdom of Hungary's customary law in accordance with the Roman-law principles, following the divisions accepted by classical Roman law, which were then *personae*, *res*, and *actiones*.[45] As evident from the antecedent chapter, this resolution failed because of several peculiarities of the Hungarian legal system.[46] On that account, the first and longest part of the *Opus Tripartitum* actually combines *personae* and *res*, since the author himself admitted the impossibility of separating one from the other. The second part contains mostly *actiones*.[47] In spite of this, the abovementioned indicates that at least the prologue was elaborated using several Romanist ideas and bases.[48] Insufficient knowledge coupled with the individual character of Hungarian law meant that *Opus Tripartitum* did not become the mediator of Roman law in the Kingdom of Hungary, and the largest traces of Roman-law erudition could be found in municipal law.[49] As the majority of researchers have proven, Stephen Werbőczy made indirect references to Roman law in his work through other private-law compilations, among which we may make particular mention of *Summa legum*, which was written in the 14th century by the Italian lawyer Raymundus Parthenopeus and published in 1506 also in Kraków.[50] That moved the author to indirectly incorporate Justinian's *Digest* and mention Gaius' *Institutiones*; the author even referenced the works of famous glossators Accursius († 1263), Azo († 1230), Bartolus de Saxoferrato († 1357), and Albericus

43 Within this context, we may speak about the institutions of *homagium*, legal self-defense, the delinquency of the theft of horses, etc. Inclusion of particular rights is explained by the author's intention to interconnect the causes tried in individual parts of the kingdom with the jurisdiction of the central royal courts by means of appeal, bill of reviver, or transferring the case to the royal court for the sake of 'more considered verdict.' Cf. 3,3,3; 3,3,6 and Rady, 2005, p. XXXVII.

44 Cf. Luby, 2002, p. 84.

45 Insufficient knowledge and misunderstanding of several institutions of Roman law are evident, for example, from the fact that he often borrowed civilian terminology to describe the matters in a manner completely distinct from their original sense. Cf. Bak, 2003, p. 7.

46 Cf. Rady, 2003, p. 47.

47 Cf. Rady, 2006, p. 105.

48 Cf. Ibbetson, 2003, pp. 16–20; Hamza, 2014, p. 386.

49 Cf. Gergely and Máthé (eds.), 2000, p. 135. On the other hand, in the Kingdom of Hungary, Roman law had direct influence in the time of the glossators, when students frequently studied at the university in Bologna, where even the individual 'Hungarian nation' (*natio Hungarica*) existed. Cf. Hamza, 2014, p. 384.

50 Cf. Rady, 2006, p. 108, n. 22; Bónis, 1965, pp. 373–409; Seckel, 1898.

de Rosate († c. 1354). Although the majority of researchers agree that the prologue had to present the compiler's erudition, contemporary researchers have proven the contrary. On the other hand, several indications of haste and a vague attitude to the compilation inspire the question of whether the prologues of such works were read at all.[51] Similarly, we may examine the texts of the classical antique writings generally used in the works of that time that appeared indirectly in *Opus Tripartitum* through the medium of humanists.

Although the majority of researchers agree that Stephen Werbőczy had the same attitude while working with church texts, several indications point to his basic knowledge of theology and canon law.[52] The latter eventually completely dominated the Roman-canon procedure that he had to master as a judge.[53] In the prologue, we find several extensive passages taken verbatim from the works of famous theologians and canonists. Of them, we may mention, first and foremost, the canonist Gratian, since preliminary distinctions of his *Concordia discordantium canonum* (*Decretum Gratiani*) provided the author of *Opus Tripartitum* with an enormous amount of material, specifically pertaining to the elaboration of the theoretical-legal fundamentals of such important topics as legal custom.[54] He also derived several characteristics of the law from Thomas Aquinas' († 1274) classical *Summa theologica*, as is also evident in other parts of his work. Stephen Werbőczy even included references to other canonistic works, including, for example, Hostiensis' († 1271) *Summa aurea*. On the other hand, we may mention that although he accepted canon law, he only respected it in its sphere of competence.[55] The collection includes several quotations from the Church fathers; the majority of researchers agree that they were incorporated into *Opus Tripartitum* mediately.[56] As a matter of interest, we may note that in the prologue, Stephen Werbőczy did not hesitate to use such individual church sources as rhetorical and predicatory treatises, for example, the work of Pelbartus Ladislaus of Temesvár († 1504).[57] Even though some authors point out the adequate representation of the original texts in the prologue, others correctly call attention to the fact that even these passages may not automatically be considered original. These could also be arranged

51 Cf. Rady, 2005, p. XXXIV.
52 This is evident, for example, in his attitude to the institution of the derogation of law. Cf. Bušek, 1946, p. 95.
53 Cf. Hubenák, 2001, pp. 110–111.
54 Cf. D. 1, c. 4–5.
55 In addition, he expressly accepted papal jurisdiction in the territory of Hungary. On the other hand, he pointed out several distinctions between secular and church-law rules that manifested, for example, in his treatise on marriage impediments. The author of *Opus Tripartitum* excluded church courts from decision making in certain matters of major importance, for example, possessory causes. Canon law maintained its dominance in the areas of marriage and family and personal law (definitions of age or blood relations) and determined several aspects of hereditary and criminal law (especially in procedures related to morality and honesty). Concerning the next development, in the 17th century, the competence of church courts was reduced to testamentary causes, marriage matters, and perjury. Cf. Gergely and Máthé (eds.), 2000, pp. 143, 147, and 166.
56 Cf. Rady, 2006, p. 110.
57 Cf. Švecová and Laclavíková, 2018, p. 469.

using the same method for taking over sources that are either unknown or completely lost at present.[58]

3.3. Legal custom and its relationship to the law

As is evident from the whole conception of the *Opus Tripartitum*, it practically constructed Hungarian law on centuries of customary law foundations, and the collection derives its obligatory force from this.[59] To justify this attitude, Stephen Werbőczy had to delineate the conception of law, in accordance with these premises. *Ius*, in his interpretation, consisted of approved community customs and usages, and the task of statutes was to record and promulgate customary law that had already been considered binding.[60]Although he admitted that *ius* is changeable in cases of necessity and such change should be natural and originate in the society. The author of *Opus Tripartitum* indirectly asserted that law ought not to be created by the sovereign and not even by courts, since their practice is proof rather than reason generating *ius*.[61] The authority of *ius non scriptum* was then *tacitus consensus populi*, meaning that the lawgiver had to reveal and express and judge had to apply. In accordance with Stephen Werbőczy's conviction, all customary law in the Kingdom of Hungary was preserved in his compilation.[62] It is all the more interesting that *Opus Tripartitum* almost never refers to legal customs, and its rules are, from the formal point of view, presented as quasi-written laws. In the prologue, the author expressly mentions his resolution to describe the laws and customs that received approval from the Hungarian kings (*leges et consuetudines approbatas*).[63] Although the majority of researchers admit that the treatise on the custom is derived from the work of the famous Romanist Bartolus de Saxoferrato, closer analysis indicates that his doctrine was almost entirely taken from

58 Cf. Félegyházi, 1945, p. 109.

59 Cf. Péter, 2003, p. 101.

60 In the Kingdom of Hungary, even public law was regulated by legal customs. Within this context, we may mention institutions such as succession in the royal office, coronation, royal oath, inaugural bill, constitution, or the Hungarian diet's sphere of authority. Cf. Péter, 2005, pp. XIV–XV.

61 Cf. Eckhart, 1931, pp. 279 and 283. Although the majority of scientists agree that judiciary practice was only one of the external forms of customary law, these legal principles contained in court decisions were then applied in the same court even in subsequent cases in the sense of precedents. Cf. Gergely and Máthé (eds.), 2000, p. 142.

62 Cf. Bak, 2003, p. 9.

63 Cf. Trip., Prol. 10. On custom, he in the concrete treatises in three articles entitled as follows: *Quid sit consuetudo*: *et quae sunt necessaria ad consuetudinem firmandam?*; *Quomodo differt lex a consuetudine*: *et de triplici virtute consuetudinis* and *De lege et statuto*: *ac consuetudine contraria quid sit sentiendum*. Cf. Trip., Prol. 10–12. Distinctively, we may also mention the sixth article from the second part, with the title *Unde traxit originem consuetudo nostra in iudiciis observanda*. Cf. Trip. 2,6.

the classical canonists.[64] Even its definition and introductory theoretical treatise Stephen Werbőczy borrowed from Gratian's *Decretum*.[65]

Although, from the definition that a legal custom is a law constituted under the authority of usages recognized by law, when the law is missing, is not possible to deduce it, the author of the *Opus Tripartitum* defined its canon-law and some Roman-law fundamentals elsewhere with three conceptual attributes, namely rationality (*ratio*), prescription (*praescriptio*), and repetition of actions (*frequentia actuum*).[66] Regarding rationality, Stephen Werbőczy referred to its tendency to support the real goal of *ius*. If the rightful goal of human law is the common good, legal custom following it has to share the same rationality.[67] It was typically accepted as rational when it did not contravene *ius naturale, ius gentium*, or *ius positivum*.[68] Regarding prescription, a lapse of at least 10 years from the first time the action was performed was requested.[69] The author argued that legal custom could not be introduced immediately but had to be put into practice gradually.[70] It ultimately acquired the strength of law through prescription, the institution traditionally applied to *iura in re*.[71] Of course, the request proved the existence of the people's longstanding silent consent, which was necessary for its recognition and performance in terms of the adequate repetition of actions.[72] As a matter of interest, we may mention that whereas the prologue generally refers to customary Hungarian law originating in usages, the text commonly refers to the national law of the individual parts of the Kingdom of Hungary (Hungarian, Dalmatian, Croatian, Slavonic, or Transylvanian law, etc.).[73] The majority of these *iura* originated in the authoritative decisions of the authorities of that place and not in the people's usage.[74]

As mentioned, in the *Opus Tripartitum,* the term *consuetudo* often subsumed even other sources of law, since the king's aim was to combine the kingdom's statutes, decrees, laws, and customs in one compact compilation.[75] Stephen Werbőczy asserted

64 We may illustrate using the sentence *Consuetudo est ius quoddam moribus institutum, quod pro lege suscipitur, cum deficit lex*, which was incorrectly ascribed to Bartolus. This definition was put into legal practice by Gratian, who referred in his collection to the older work of the church father Isidore of Seville († 636). Cf. Dec. Grat. D. 1, c. 5 and Etym. 2,3,10. Within this context, it is appropriate to remind readers that Gratian's work obtained the nature of law through legal custom as a private collection. I already addressed these questions in the textbook Vladár, 2017, p. 273, n.

65 Cf. Rady, 2006, p. 134.

66 Cf. Kuklík and Skřejpková, 2008, p. 69.

67 Cf. Kovács, 2016, p. 51.

68 Cf. Inst. Iust. 1,2,1.

69 Cf. Bartolus, Rep. ad D. 1,3,31.

70 Cf. Trip., Prol. 11.

71 Cf. Gergely and Máthé (eds.), 2000, p. 133.

72 The author of *Opus Tripartitum* expressly declared that the repetition frequency is not needed if it is possible to prove the community's silent consent and the application of custom for a sufficiently long time. Cf. Trip., Prol. 10,7.

73 Cf. Kovács, 2016, p. 50.

74 Cf. Bak, 2003, p. 23.

75 Cf. Bónis, 1941, p. 4.

that he extensively reflected *decreta*, especially those promulgated under King Vladislaus. Several researchers agree that the majority of the material elaborated in his work reflects the principles and procedures recorded in charters, procedural formularies, and other similar sources.[76] The biggest controversies in the scientific literature are related to Stephen Werbőczy's conception concerning the relationship between customs and laws. As is evident, the logic underlying his methodological and mostly politically motivated attitude forced him to give *constuetudo* a prominent place among his sources, regardless of whether these competed with royal edicts, charters of privileges, court decisions, or *decreta regni*.[77] In his opinion, not even the law itself is legislated, created, or presenting the community's will because it represents *ius*, which already exists in the given society's frame of approved customs.[78] Moreover, statutes only record and declare customary laws previously recognized as binding. Even in this respect, we find some inconsistencies between the scholarly treatise in the prologue to the collection and the normative text itself.[79] In the prologue, which was influenced by canon-law and Bartolistic attitudes, Stephen Werbőczy initially asserted that *consuetudo* and *decretum* are sources with the same legal force.[80] On that account, if statutory law follows custom against law, statute has to prevail. On the other hand, if statute precedes established custom, latter must dominate. At the same time, he noted that generally accepted custom abrogates statutes that are valid throughout the Kingdom of Hungary, whereas local custom prevails only in the given territory.[81]

In addition to the derogatory and abrogatory functions, the custom could also interpret and complement law. From the interpretation point of view, it was, for example, possible to interpret problematic provisions of the law through legal

76 Cf. Rady, 2005, p. XXXIII.

77 Cf. Trip. 2,6. To more closely examine the detailed characteristics of the individual sources of law, see Gergely and Máthé (eds.), 2000, p. 136, n. It is also evident that the author of *Opus Tripartitum* perceived the legal system as a whole as falling under the term *consuetudo*. It was not only laws that he subjected to the criterion of custom; he also ranked royal privileges that the community had recognized for a sufficiently long time, as well as the decisions of the royal courts that could establish new customs, in this system. Cf. Trip. 2,6,10–11.

78 Cf. Péter, 2003, p. 102.

79 Cf. Ibbetson, 2003, pp. 20–22.

80 Cf. Péter, 2005, p. XIV. Whereas according to Bartolus de Saxoferrato, the strength of *lex* and *consuetudo* originated in people's approval whether expressed or silent, the rules of canon law requested correspondence to the Divine law and consistency with rationality and faith. Cf. Dec. Grat. D. 1, c. 1 and 5. Bartolus de Saxoferrato's opinion on this should be perceived primarily within the context of efforts to confirm Italians cities' right to constitute their own law in opposition to the imperial laws. After all, other Romanists postulated in the spirit of classical Roman law the priority of written law ahead of customary law. Cf. Ryan, 2000, pp. 65–89; Ullmann, 1940, pp. 265–283; Bónis, 1971, p. 334. Later commentators also emphasized that legal custom must not oppose the Divine natural law and the rights of third parties. Cf. Švecová and Laclavíková, 2018, p. 476.

81 Cf. Trip., Prol. 12. See also Luby, 2002, p. 61.

custom.[82] The complementary function manifested in the process of filling up the existing *lacunae iuris* within the frame of appreciating the legal conditions *per analogiam*.[83] It is therefore evident that in the normative text, the author of *Opus Tripartitum* abandoned the opinions expressed in the prologue and started to perceive *lex* and *consuetudo* as two individual sources of *ius*; he accepted them rather as two elements constituting one organic unit capable of mutually complementing and influencing. This is also apparent based on his statement that the oldest laws in the Kingdom of Hungary were gradually transformed into legal customs.[84] Stephen Werbőczy understood the procedural innovations of Hungarian law constructed in the 14th century in the same way on the basis of Roman-canon procedure that accordingly acquired the character of custom and became a firm part of the Hungarian legal system.[85] On that account, legal custom could, for example, sanction written laws and even abrogate them indirectly in cases when *decretum* was surmounted by practice.[86] It is therefore evident that the full legal character could only be associated with law that proceeded into usage, gradually meeting the conditions set by legal custom, and on that account, indirectly acquired the attributes of a legal custom and became one. In conflict with the prologue, the author of *Opus Tripartitum* finally asserts that only the latest law could unconditionally abrogate older custom at all events, since it is not possible to determine whether it was issued for the good of society and therefore bears the sanction of custom.[87]

Of course, this attitude and delimitation of the relationship between law and custom had repercussions on the overall conception of power in the Kingdom of Hungary, especially with reference to the relations between the nobility and Crown.[88] Stephen Werbőczy thus initially recognized the unmediated relations between the ruler and his noble subordinates. He similarly accepted that the sovereign *de facto* created the nobility, since only he could grant land, which is the only mark of real nobility. It follows from this fact that only the king could take away the soil in the case of the extinction of the noble line or defrauding by presence of the mark of infidelity.[89] In turn, he asserted that even the king is created by the nobility, since the Hungarian nobility's traditional right to elect the king is indubitable and has lasted for centuries. The venerable feudal bonds based on reciprocity in the Kingdom of

82 Cf. Švecová and Laclavíková, 2018, p. 472. Therefore, if the meaning of the law remained obscure, it was necessary to turn to the custom as for the best interpretation. Cf. Paul. D. 1,3,37. See also Bak, 2003, p. 19. In the absence of law, legal custom may be perceived in the sense of *imitatio legis*, since it performs the same functions as law. Cf. Trip., Prol. 11,5 and Bartolus, Rep. ad D. 1,3,31.
83 Cf. Trip., Prol. 11,4.
84 Cf. Trip. 2,6,9.
85 Cf. Trip. 2,6,12–13. See also Bak, 2003, p. 8.
86 Cf. Trip. 2,2,9.
87 Cf. Trip. 2,2,10.
88 Cf. Hubenák, 2001, p. 111.
89 Cf. Rady, 2005, pp. XXXVII–XXXVIII.

Hungary reflected the principles of fidelity, duties, favor, and freedom.[90] The conceptual attitude and specification of the sources of law also prepared a starting point for Stephen Werbőczy for the important statement that if all noblemen enjoy the same freedoms, they must be equal to each other (*una et eadem nobilitas*). It is this statement that most likely caused the king's non-promulgation of the *Opus Tripartitum*.[91] Although it follows from the aforesaid that the nobility should not dispose of the right to participate in lawmaking and limit royal *plenitudo potestatis*, the author presented a dualistic construction, according to which the acceptance of law required the approval of the sovereign as well as that of people.[92] Finally, he laid out two methods of making law: The king either convenes the nobility ('the people') to examine the submitted draft law, or the nobility itself presents the proposals considered to be useful for the common good to the king for his approval, and these become law after his approbation.[93]

3.4. Procedural law

In the area of procedural law, several traditional institutions were established in the Kingdom of Hungary that typically corresponded to the legal development of the states of Western Europe. Except for the acceptance of Roman-German law, it is necessary to examine mentions of Roman-canon procedure adopted in the 12th and 13th centuries to satisfy the needs of *ius commune* as a whole and set the standards for modern procedural law.[94] In medieval society, it became the significant factor that surmounted older court customs of national laws and by virtue of its perfection and preciseness considerably influenced the shape of procedural law in almost all continental legal systems (including Anglo-American).[95] In spite of this, particularism endured in Hungarian procedural law, since courts of various types and levels

90 Cf. Trip. 1,3,7.

91 Cf. Luby, 2002, p. 83. Under the term 'nobility,' Stephen Werbőczy referred to the whole Hungarian governmental category, that is, secular as well as ecclesiastical. This doctrine was also applied in Poland, where it became the basis for the nobility's collective land privileges. It is indeed evident that in this respect, the author of the *Opus Tripartitum* completely failed to notice the lower class nobility's dependence on the representatives of the upper class nobility. Cf. Bak, 2003, p. 10; Hubená, 2001, p. 182.

92 Cf. Trip. 2,5 and 2,2,1.

93 Cf. Gergely and Máthé (eds.), 2000, p. 137.

94 It originated in the church courts' extensive use of Roman law and was the product of the synthesis of Roman-law (partly even German law, especially Langobard) and canon-law elements. Cf. Kantorowicz, 1938, p. 123; Evans, 2002, p. 93. For more detailed information about the Roman-canon procedure and its influences on medieval and modern legal culture, see Nörr, 2012; Litewski, 1999.

95 Cf. Brundage, 2008, p. 156. From the Kingdom of Hungary's point of view, we may mention that the majority of researchers credit canon law, especially regarding the division of delinquencies into public and private during the 14th century. Even the concept of delinquency was based on public-law principles (*quia peccatum est*) with the aim of preventing other members of society from doing wrong (*ne peccatur*). I addressed this problem in the scientific article Vladár, 2020, pp. 185–223.

accepted and applied various kinds of procedural rules.[96] These insufficiencies were usually balanced by customary rules in official practice, specifically by sporadic royal impacts through miscellaneous mandates or instructions that exerted a real impact on the development of the given courts' *stylus curiae*.[97] In the older procedural law, non-differentiation between civil and criminal procedure was also typical.[98] This status was more or less conserved even in the *Opus Tripartitum*, which did not provide more detail while specifying the procedural directives.[99] Essentials of the summons (*libelli*), rules regulating the beginning of a trial including the stages allowing the application of *exceptiones* or *allegationes* and interlocutory, as well as final judgment, are thus only insinuated in this work. Only in the second half of the 16th century were procedural principles (minimally in the area of private civil procedure) generally accepted on the basis of *Opus Tripartitum*, which developed and remained unmodified in the Kingdom of Hungary until 1848.[100]

4. The reasons for non-promulgation, authority, and obligatory force

As mentioned, despite Stephen Werbőczy's efforts, the sovereign did not sanction *Opus Tripartitum* in the form prescribed for law. The reasons for this decision are still scientifically disputed. The majority of researchers point, within this context, to the upper class nobility's resistance to recognizing, through acceptance of the principle *una et eadem nobilitas*, their equality with the lower class nobility, which would endanger the unlimited power they enjoyed freely until that time.[101] The matter of interest is that in the salutation to the reader, the author himself explained the situation in which the king was impeded from sanctioning and promulgating the work properly because of other political duties and his worsening health condition.[102] Although some sources indicate that the work met only with critical acclaim, others assert that it achieved appropriate authority and the title *Decretum* even in advance of its private promulgation in Vienna.[103] There is no need to omit the fact that the diet confirmed its

96 Among them, we may mention, for example, curial courts, provincial *sedriae*, haligemots, municipal courts, and church courts. Cf. Gergely and Máthé (eds.), 2000, p. 155.
97 Cf. Péter, 2005, p. XI. The royal impacts are typically recognized as the most important in the process of adapting the procedural rules to the Western standards. This may be illustrated in the recognition of the inquisitorial procedure according to Western examples in the times of Matthias Corvinus. As a matter of interest, we may even mention that the later code Ferdinand III (1637–1657) published in 1656 under the title *Forma processus iudicii seu Praxi Criminalis* for the Austrian countries was *de facto* built on customary law. See also Gergely and Máthé (eds.), 2000, pp. 156 and 162.
98 Cf. Hubenák, 2001, p. 111.
99 Cf. Rady, 2005, p. XXXV.
100 Cf. Gergely and Máthé (eds.), 2000, p. 156.
101 Cf. Kuklík and Skřejpková, 2008, p. 69; Luby, 2002, p. 82; Rady, 2005, p. XXXIX.
102 Cf. Trip., Lectoribus salutem.
103 The publishing procedure lasted a record-breaking 40 days and cost a few hundred guldens. See also Hirsch, 1974, pp. 36–40.

content as law and instructed the kingdom's courts to judge according to its principles and procedures.[104] Overall, Stephen Werbőczy's actions after failing to obtain royal approval are unsurprising. He elaborated his compilation on the principle that the authority of law comes primarily from its application and actual usage.[105] The authority of *Opus Tripartitum* increased especially because of the fact that it had almost no competition, as evidenced by its prominence in the decisions taken by the kingdom's courts.[106] Above all, it was especially notable that court practice requested the inclusion of Stephen Werbőczy's work in the system of generally recognized sources of law. Similarly, jurisprudence explained the rules in the form of questions and answers, with specific reference to the rules contained in the *Opus Tripartitum*.[107]

Although efforts to collect a given kingdom's laws were typical in the Late Middle Ages, and several works similar to Stephen Werbőczy's collection were compiled, those works only sporadically retained the authority of law. *Opus Tripartitum* enjoyed lasting success and influenced Hungarian law and legal practice for centuries, despite never having been promulgated as law and failing to receive the royal seal. We may also illustrate this by pointing to the fact that casuistry after 1588 refers expressively to legal action founded on no less authority than *Decreti Tripartiti partem secundum titulum quiquagesimum*.[108] Its success is also proven by the existence of several editions, as well as its inclusion in the Hungarian compilation of laws *Corpus iuris Hungarici*, of which it became an integral and permanent part after 1626.[109] Lastly, this work enjoyed excellent authority not only within the Kingdom of Hungary, where, after the Battle of Mohács (1526), it consolidated not only the legal but also the social system, but extended its influence to other countries. Of them, we may refer to the northern part of Croatia, or Transylvania, where Emperor Leopold I (1658–1705) recognized it as a source of law in 1691 in his *Diploma Leopoldinum*.[110] A similar situation existed in Poland, where *Opus Tripartitum* became a public statute (*statutum*).[111] The Hungarian nobility defended their privileges against the representatives of the Habsburg monarchy using arguments derived from *Opus Tripatitum*. Stephen Werbőczy then became the defender of the Hungarian *avita constitutio*, the political and legal structure of the social order applied in the Kingdom of Hungary regardless of its longstanding obsoleteness. This work lost its special position as late as the 19th century, when it did not mesh with the liberal program underlying the creation of Hungarian civil society,

104 Cf. Rady, 2005, p. XL.
105 Cf. Trip. 2,2,9.
106 See also Rady, 2015.
107 Cf. Štenpien, 2009, p. 99; Gönczi, 2003, p. 89.
108 See also Rady, 2005, p. XLI.
109 Cf. Malý and Sivák, 1992, p. 234. The work's popularity may be illustrated by the fact that in the Kingdom of Hungary, it became the second most frequently printed book after the Bible. Cf. Štenpien, 2009, p. 99.
110 On that account, *Opus Tripartitum* was in 1698 included in the main collection of Transylvanian laws, known as *Approbatae et compilatae constitutiones*. Cf. Gergely and Máthé (eds.), 2000, p. 143.
111 Cf. Hamza, 2014, p. 385.

which required the transformation of the old constitution and the end of the medieval system of privileges.[112] However, the legal customs in *Opus Tripartitum* retained authority even in the 20th century, since some lawyers granted it not only the power to interpret but even to supply or abrogate written law.[113]

Regarding the reasons for *Opus Tripartitum*'s obligatory force, we may primarily mention that after its dissemination to individual courts, they started to apply it directly and unconditionally in their decision making.[114] In addition to Stephen Werbőczy's authority, it was also helpful that the Hungarian diet's 1517 decree instructed every district to judge according to the country's written law that had recently been sent to them.[115] Later legislation was similarly accepted, as may be illustrated by an article from the same year requesting that the kingdom apply *iura regni scripta*.[116] The following theories constituted, in part, the reasoning behind this compilation's obligatory force. First, it was concretely asserted that *Opus Tripartitum*'s obligatory force derived from the fact that it consisted of legal customs that were already binding prior to their presentation in written form.[117] The mentioned arguments may be rejected because court practice applied the objective compilation as a whole, without referring to the original sources.[118] Another claims that it obtained the validity of law through the people's consent (*consensus populi*), relating to the original customary law before its inclusion in the *Opus Tripartitum*. Another theory points out the existence of subsequent laws that recognized this compilation as generally binding without any reservations.[119] Although several of them may be rebuffed by a number of arguments, we may, in all conscience, agree that *Opus Tripartitum* was appreciated in court practice, later legislation, and jurisprudence, thus acquiring the status of a generally accepted source of law, status analogous to few times mentioned

112 Within this context, the majority of researchers argue that several civil rights, legal regulations on police and public employers, and also a part of criminal law were, even after 1867, regulated by custom law. Cf. Péter, 2005, pp. XX–XXI and XXV.

113 See also Kérészy, 1935.

114 Cf. Luby, 2002, p. 84.

115 Cf. Article No. 41/1518, § 5.

116 An analogous attitude was also preferred in Articles No. 21/1548, 24/1588, 15/1608, 2/1622, 18/1635, 1/1638, 16/1647, 25/1715, 6/1723, 48/1725, 40/1729 etc. Other suggested its revision, for example, No. 21/1548. These endeavors' imperfect outcome was, after all, the compilation *Quadripartitum opus iuris consuetudinarii Regni Hungariae* of 1553. The matters of interest are that the organization system for the matter of the *Opus Tripartitum* turned the scale, even in this work, with one difference: the division of the first part into two parts and the placement of personal rights at the beginning of the compilation. In addition, this work, despite certain enhancements and the introduction of some Roman-law institutions, was *de facto* considered to be the only revised edition of Stephen Werbőczy's compilation. See also Hamza, 2001, p. 54; Kuklík and Skřejpková, 2008, p. 68; Gergely and Máthé (eds.), 2000, pp. 145–146. Low originality manifesting only in partial and more or less marginal modernization of the *Opus Tripartitum* thus did not diminish the exclusivity and importance of this compilation for the Hungarian modern legal system. Cf. Švecová and Laclavíková, 2018, p. 470; Luby, 2002, p. 55.

117 Cf. Szlemenics, 1817, p. 41.

118 See also Zlinszky, 1983, pp. 49–68.

119 Cf. Luby, 2002, p. 85.

Gratian's *Decretum* in canon law.[120] This may be especially demonstrated by the fact that the courts decided in accordance with the *Opus Tripartitum*, considering it to be the normative text and the legal not merely factual foundation of every delivered judgment. Similarly, jurisprudence acceded to it, refusing to accept it only as result of the opinions of private jurist.[121]

5. Compilations of customary law in other countries in Eastern and Central Europe

As indicated, *Opus Tripartitum* was the result of codification efforts that started to appear across Europe in the Late Middle Ages. From the validity point of view, we mentioned that it acquired the status of a source of law in several countries, not only in those attached to the Kingdom of Hungary. In summary, we may refer to Transylvania, northern Croatia, the northern part of Serbia (especially Vojvodina), and also Poland.[122] Of course, in these countries, it was not the dominant source of law and only supplemented the rules applied there. Distinctively, we may mention Croatia within this context, where from the 13th century to midway through the 15th century, several customary-law codes were compiled, some of which could have influenced Stephen Werbőczy in terms of content and formality.[123] As indicated, the content of *Opus Tripartitum* is very similar to other medieval codes containing various types of secular-law sources. We may refer especially to the German Sachsenspiegel and Schwabenspiegel, the English compilations of Henry de Bracton and Ranulf de Glanville, the French Philippe de Beaumanoir's code, two similar works of Czech–Moravian provenance, and a Polish one.[124] Several researchers agree that Stephen Werbőczy's work may

120 I addressed this problem in the monograph Vladár, 2009, p. 128, n.

121 For a close examination of the individual theories and arguments in the high-class treatise, see Pekarik, 2011, p. 89, n.

122 Cf. Bak, 2003, p. 6; Kovács, 2016, p. 50.

123 Croatian and Hungarian laws were, with reference to property and family law, almost identical. The authors of Croatian compilations typically made provisions for the recognized sources of *ius commune*, like Justinian's *Digesta*, decrees of the ecumenical councils, Gratian's *Decretum*, and other canon-law compilations. It is therefore worth considering whether Stephen Werbőczy, engaged in lengthy preparation for the task of codifying Hungarian customary law, was not inspired by the mentioned Croatian law codes. Several researchers have compared *Opus Tripartitum* especially to the law code of Poljica, which remained valid in the south-east of Croatia until the fall of the Republic of Venice in 1797. Cf. Karbić, 2003, pp. 38, 41, and 44.

124 From the Czech territory, we may mention the so-called Knihy devatery from the turn of the 15th and 16th centuries, compiled by Viktorin Kornel of Všehrd, and from Poland the 1532 compilation 'Korektura Taszyckiego'. Cf. Luby, 2002, p. 83; Bílý, 2003, p. 170; Veselý, 1934; Štenpien, 2009, p. 99; Schiller, 1902, p. 56, n.; Gönczi and Wieland, 2013, pp. 16–19; Kuklík and Skřejpková, 2008, p. 58. Concerning Poland, this country preferred the collections of the decrees of the diet. Regarding the status of legal custom in Poland in the period from the 16th to the 18th century, see Kowalski, 2013; Płaza, 2002. *Opus Tripartitum* may be compared from a contentual point of view with the so-called Księga elbląska from the second half of the 13th century, as it contains the customary law of northern Poland, specializing in the areas of substantial and procedural

be called an 'official compilation of customary law' ('recueil officiel de coutumes'), a category that was widely expanded in the 15th and 16th centuries in France, Germany, and the Netherlands.[125] Several scientists even assert that overall, the 16th-century Statutes of Lithuania cannot be equated with *Opus Tripartitum*. Similarly, we may look upon the Serbian Dušan's Code of 1349 that collected Serbia's customary rules and combined them with generally recognized sources of Byzantine law.[126] Despite the numerous insufficiencies, we may thus consider Stephen Werbőczy's compilation to be the most important medieval as well as modern source of law from Middle and Eastern Europe.

6. Conclusion

As indicated, the Late Middle Ages and early modern times may be described as a stage of legal stabilization from which even the area of Central and Eastern Europe was not excepted in this context. Whereas other countries built their legal systems upon the premises of *ius commune* and transformed their own legal customs in its spirit, in the Kingdom of Hungary, this source of law dominated from the second decade of the 16th century in the form expressed in Stephen Werbőczy's work. Although written law was gradually advanced in Western Europe, Hungarian law remained in the customary form.[127] Although several representatives of jurisprudence were conscious of the fact that legal custom may be evaluated, first and foremost, as a relic of the Middle Ages, at the same time, they adjudicated it the value of heritage from ascendants and also in several aspects of national identity.[128] The change did not happen even when the sovereigns of the Habsburg dynasty acquired the Hungarian throne in 1526, although written law gained bigger authority.[129] Customary law prevailed even though *Opus Tripartitum* was commonly published (in later editions) along with *decreta* and other

criminal law. Similar to the task that compilation of Stephen Werbőczy performed in the Kingdom of Hungary, performed the so-called Statuta Vislica of 1347 in the Greater Poland and Lesser Poland Province. This made provisions for the old customary law and primarily contained the rules of state administration and criminal law. Its main objective was to unify the rules of the Polish crown. Cf. Schelle et al., 2007, p. 783.

125 See also Hamza, 2001, p. 54.

126 From the contentual point of view, it included public, state, and criminal law in particular. See also Burr, 1949, pp. 198–217; Adamová, 2006, p. 41.

127 Cf. Schelle et al., 2007, p. 826.

128 Cf. Gönczi, 2003, p. 89; Cieger, 2016, pp. 123–150. As an example, we may mention that in the law valid in Slovakia and Carpathian Ruthenia, custom was maintained as a source of substantial civil law, thanks in part to *Opus Tripartitum*, until 1 January 1950. See also Prusák, 2001, p. 198.

129 For example, Emperor Leopold II (1790–1792) expressly conceded that Hungary should be 'governed and administered' by its king following *propriis legibus et consuetudinibus*. Cf. Article No. 10/1790. The immutability of these rights was also confirmed by Article No. 3/1827 and by Emperor Ferdinand I's (1830/1835–1848) 1830 diploma. In like manner, Franz Joseph I (1848–1916) promised in his coronation oath to observe '…exceptions, privileges and legal customs' in Hungary. Cf. Article No. 2/1867. See also Péter, 2003, pp. 105–106.

various supplemental materials that also reflected the compilation's provisions.[130] The majority of scientists did not hesitate to admit that thanks to this *status quo*, a number of obsolete and archaic institutions remained in force, and the modernization of Hungarian law was practically impossible.[131] Although Stephen Werbőczy endeavored to meet the time constraints and consolidate and renew the law, he ultimately contributed to its backwardness and also to the fact that the Middle Ages lasted until the 19th century in this field in the Kingdom of Hungary.[132] In addition, the special conception of legal custom in *Opus Tripartitum* in the sense of reflecting social reality not only hampered legal practice, it also led to legal insecurity and several abuses of law.[133] Even so, this compilation managed to exert continual influence not only on legal practice itself, but also on Hungarian political thinking and the development of legal conscience.[134] Although *Opus Tripartitum* did not become law, it represents the main work of Hungarian medieval law, with several overlaps with neighboring countries.[135] The most interesting polemics about the character of Hungarian law appeared in the scientific literature in the 19th century addressing the background of the influences of the then German lawyers. The understanding of the term '*Volksgeist*' in several aspects especially evoked Werbőczy's attitude to law and indicates the reflection of the functioning of the Hungarian legal system during the creation of this term.[136] However, several Hungarian legal historians glorified the particularity of Hungarian customary law as a personification of the national character and spirit ('*Volk*'), and the majority rejected these opinions. With reference to later development, it would be worthwhile to repeatedly revalue them, specifically through the prism of the development of Hungarian law and its continuity in the 20th century.[137]

130 Cf. Péter, 2005, pp. XV and XVI, n. 12. The next development proved that science *de facto* accommodated Werbőczy's doctrine, even though it classed legal custom after law in some commentaries. See also Švecová and Laclavíková, 2018, pp. 473–477.

131 This may also be demonstrated by the fact that although courts frequently modernized law through their decision making, judicial practice could not essentially oppose *Opus Tripartitum*. Cf. Gergely and Máthé (eds.), 2000, p. 161.

132 Cf. Péter, 2005, p. XIII.

133 Cf. Ibbetson, 2003, p. 13; Hubenák, 2001, p. 112.

134 Cf. Gergely and Máthé (eds.), 2000, p. 143.

135 Cf. Švecová and Laclavíková, 2018, pp. 469–470.

136 The representatives of the German historical school of jurisprudence confirmed that even legislation may be designated, in relation to a given country's legal customs, only as a secondary phenomenon. Cf. Péter, 2005, p. XII; Pinz, 2014, p. 143; Hattenhauer, 1998, p. 487; Falada, 2016, pp. 141–142; Sommer, 1934, pp. 459–467.

137 Cf. Péter, 2003, p. 110.

Bibliography

Adamová, K. (2006) *Světla a stíny středověkého práva*. Praha: Havlíček Brain Team.

Bak, J. M. (2003) 'Introduction' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 1–12.

Bílý, J. L. (2003) *Právní dějiny na území České republiky*. Praha: Linde.

Bónis, Gy. (1941) 'Törvény és szokás a Hármaskönyvben' in *Werbőczy István*. Kolozsvár: Nagy-nyomda, pp. 121–140.

Bónis Gy. (1965) 'Der Zusammenhang der *Summa Legum* mit dem *Tripartitum*', *Studia Slavica Academiae Scientiarum Hungaricae*, 11, pp. 373–409.

Bónis, Gy. (1971) *A jogtudó értelmiség a Mohács előtti Magyarországon*. Budapest: Akadémiai Kiadó.

Bónis, Gy. (1972) *Középkori jogunk elemei. Római jog, kánonjog, szokásjog*. Budapest: Közgazdasági és Jogi Könyvkiadó.

Brundage, J. A. (2008) *The Medieval Origins of the Legal Profession. Canonists, Civilists, and Courts*. Chicago – London: The University of Chicago Press.

Burr, M. (1949) 'The Code of Stephan Dušan: Tsar and Autocrat of the Serbs and Greeks', *The Slavonic and East European Review*, 28(70), pp. 198–217.

Bušek, V. (1946) *Učebnice dějin práva církevního I*. Praha: Všehrd.

Cieger, A. (2016) 'National Identity and Constitutional Patriotism in the Context of Modern Hungarian History', *Hungarian Historical Review*, 5(1), pp. 123–150.

Csiky, K. (1899) *Werbőczy István és Hármaskönyve*. Budapest: Franklin Társulat.

Eckhart, F. (1931) 'Jog- és alkotmánytörténet' in Hóman B. (ed.) *A magyar történetírás új útjai*. Budapest: Franklin Társulat, pp. 267–320.

Eörsi, Gy. (1966) 'Richterrecht und Gesetzesrecht in Ungarn. Zum Problem der Originalität eines Zivilrechts', *Radels Zeitschrift für ausländisches und internationales Privatrecht*, 30, pp. 7–40.

Evans, G. R. (2002) *Law and Theology in the Middle Ages*. London: Taylor and Francis.

Falada, D. (2016) *Recepce římského práva*. Plzeň: Aleš Čeněk.

Félegyházi, J. (1945) *Werbőczy Hármaskönyve és a kánonjog*. Budapest: Kapisztrán Nyomda.

Fraknói, V. (1899) *Werbőczi István. Magyar történeti életrajzok*. Budapest: Magyar Történelmi Társulat.

Gergely, A., Máthé, G. (eds.) (2000) *The Hungarian State. Thousand Years in Europe*. Budapest: Korona Publishing House.

Gönczi, K. (2003) 'Werbőczy's Reception in Hungarian Legal Culture' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 87–100.

Gönczi, K., Wieland, C. (2013) *Sächsisch-magdeburgisches Recht in Ungarn und Rumänien. Autonomie und Rechtstransfer im Donau- und Karpatenraum*. Berlin: De Gruyter.

Hamza, G. (2001) 'Das *Tripartitum* von István Werbőczy als Rechtsquelle. Bemerkungen zur Rechtsquellenlehre in der europäischen Rechtsgeschichte' in Hamza, G., Boóc, Á., Buzády, Cs. (eds.) *Tanulmányok Werbőczy Istvánról. Studien über István Werbőczy*. Budapest: Professzorok Háza, pp. 49–63.

Hamza, G. (2014) 'Roman Law and the Development of Hungarian Private Law Before the Promulgation of the Civil Code of 1959', *Fundamina*, 20(1), pp. 383–393.

Hattenhauer, H. (1998) *Evropské dějiny práva*. Praha: C. H. Beck.

Hirsch, R. (1974) *Printing, Selling and Reading, 1450–1550*. Wiesbaden: Harrassowitz.

Hubenák, L. (2001) *Právne dejiny Slovenska do roku 1945. I. diel*. Banská Bystrica: Univerzita Mateja Bela, Právnická fakulta.

Hunyadi, Zs. (2003) 'Administering the Law: Hungary's *Loca Credibilia*' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 25–35.

Ibbetson, D. (2003) 'Custom in the *Tripartitum*' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 13–24.

Kadlec, K. (1902) *Verböczyovo Tripartitum a soukromé právo uherské i chorvatské šlechty v něm obsažené*. Praha: Nákladem České akademie císaře Františka Josefa pro vědy, slovesnost a umění.

Kantorowicz, H. (1938) *Studies in the Glossators of the Roman Law*. Cambridge: Cambridge University Press.

Karbić, D. (2003) 'Hungarian and Croatian Customary Law: Some Contrasts and Comparisons' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 37–46.

Kérészy, Z. (1935) *A jogszokás derogatórius erejének kérdése a magyar jogi irodalomban*. Szeged: Városi Nyomda.

Kindl, V. (2004) 'Uherské právní dějiny' in Adamová, K., Bělovský, P., Císař, J., Falada, D., Horák, Z., Kindl, V., Pelikán, D., Seltenreich, R., Skřejpek, M., Tretera, J. R., *Dějiny evropského kontinentálního práva*. Praha: Linde, pp. 631–684.

Kovács, Á. (2016) 'Continuity and Discontinuity in Transylvanian Romanian Thought. An Analysis of Four Bishopric Pleas from the Period between 1791 and 1843', *Hungarian Historical Review*, 5(1), pp. 46–72.

Kubinyi, A. (1999) 'István Werbőczy als Politiker in der Zeit vor Mohács (1526)' in Nagy, B., Sebők, M. (eds.) *...The Man of Many Devices, Who Wandered Full Many Ways... Festschrift in Honor of János M. Bak*. Budapest: Central European University Press, pp. 558–582.

Kuklík, J., Skřejpková, P. (2008) *Kořeny a inspirace velkých kodifikací*. Praha: Havlíček Brain Team.

Kumor, B. (2002) *Cirkevné dejiny 4. Jeseň cirkevného stredoveku*. Levoča: Polypress.

Kowalski, G. M. (2013) *Zwyczaj i prawo zwyczajowe w doktrynie prawa i praktyce sądów miejskich karnych w Polsce* (*XVI–XVIII* w.). Krakow: Wydawnictvo Universytetu Jagiellońskiego.

Litewski, W. (1999) *Der römisch-kanonische Zivilprozeß nach den älteren ordines iudiciarii*. Kraków: Wydawnictvo Uniwersytetu Jagiellońskiego.

Luby, Š. (2002) *Dejiny súkromného práva na Slovensku*. Bratislava: Iura edition.
Malý, K., Sivák, F. (1992) *Dejiny štátu a práva v Česko-Slovensku do roku 1918*. Bratislava: Obzor.
Múcska, V. (2004) *Uhorsko a cirkevné reformy 10. a 11. storočia*. Bratislava: Univerzita Komenského v Bratislave, Filozofická fakulta.
Nörr, K. W. (2012) *Romanisch-kanonischesProzessrecht. Erkenntnisverfahren erster Instanz in civilibus*. (Enzyklopädie der Rechts- und Staatswissenschaft. Abteilung Rechtswissenschaft.) Berlin – Heidelberg: Springer.
Pekarik, M. (2011) *Vlastnícke právo v Opus Tripartitum a v rímskom práve. Komparatívny pohľad*. Dizertačná práca. Trnava: Právnická fakulta Trnavskej univerzity v Trnave.
Péter, L. (2003) 'The Primacy of *Consuetudo* in Hungarian Law' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 101–111.
Péter, L. (2005) 'The Irrepressible Authority of the Tripartitum' in Bak, J. M., Banyó, P., Rady, M. (eds. and trans.) *Stephen Werbőczy, The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts. (The Tripartitum).* (Decreta regni mediaevalis Hungariae 5.) Idyllwild – Budapest: Central European University, pp. XIII–XXVI.
Pinz, J. (2014) 'Recepce římského práva a historická právní škola', *Acta Iuridica Olomucensia*, 9(3), pp. 139–144.
Płaza, S. (2002) *Historia prawa w Polsce na tle porównawczym. Część I*. Kraków: Księgarnia Akademicka.
Prusák, J. (2001) *Teória práva*. Bratislava: Vydavateľské oddelenie Právnickej fakulty Univerzity Komenského v Bratislave.
Rady, M. (2002) 'Warranty and Surety in Medieval Hungarian Land Law', *The Journal of Legal History*, 23(1), pp. 23–36; https://doi.org/10.1080/01440362308539639.
Rady, M. (2003) 'Hungarian Procedural Law and Part Two of the *Tripartitum*' in Rady, M. (ed.) *Custom and Law in Central Europe*. Cambridge: Centre for European Legal Studies, pp. 47–70.
Rady, M. (2005) 'Stephen Werbőczy and his *Tripartitum*' in Bak, J. M., Banyó, P., Rady, M. (eds. and trans.) *Stephen Werbőczy, The Customary Law of the Renowned Kingdom of Hungary: A Work in Three Parts. (The Tripartitum).* (Decreta regni mediaevalis Hungariae 5.) Idyllwild – Budapest: Central European University, pp. XXVII–XLIV.
Rady, M. (2006) 'The Prologue to Werbőczy's *Tripartitum* and Its Sources', *The English Historical Review*, 121(490), pp. 104–145.
Rady, M. (2012) 'Judicial Organization and Decision Making in Old Hungary', *The Slavonic and East European Review*, 90(3), pp. 450–481; https://doi.org/10.5699/slaveasteurorev2.90.3.0450.
Rady, M. (2015) *Customary Law in Hungary. Courts, Texts, and the Tripartitum*. Oxford: Oxford University Press.
Ryan, M. (2000) 'Bartolus of Sassoferrato and Free Cities', *Transactions of the Royal Historical Society*, 10, pp. 65–89.

Seckel, E. (1898) *Über die Summa legum' des Raymund von Wiener Neustadt. Beiträge zur Geschichte beider Rechte im Mittelalter.* Vol. 1. Tübingen: Verlag der H. Laupp'schen Buchhaldlung.

Schelle, K., Kadlecová, M., Veselá, R., Vlček, E., Židlická, M., Vojáček, L., Schelleová, I. (2007) *Právní dějiny.* Plzeň: Aleš Čeněk.

Schelle, K., Tauchen, J. (eds.) (2016) *Encyklopedie českých právních dějin. V. svazek. Pa-Právni*. Plzeň: Aleš Čeněk.

Schiller, B. (1902) *A Hármaskönyv jogforrástana*. Budapest: Franklin Társulat.

Szlemenics, P. (1817) *Elementa juris civilis Hungarici*. Tomus I. Posonium: Typis haeredum Belnayanorum.

Sommer, O. (1934) 'Randa a historickoprávní škola' in *Randův jubilejní památník*. Praha: Bursík a Kohout, pp. 459–467.

Štenpien, E. (2008) *Tripartitum*. Žilina: Euro Kódex.

Štenpien, E. (2009) 'Trestné právo Werbőczyho Tripartita' in Fico, M., Soliar, L. (eds.) *Právna úprava protiprávnych činov od rímskeho práva až po súčasnosť. (Zborník príspevkov z vedeckého sympózia, konaného v dňoch 18.–19.9. 2009 na Právnickej fakulte UPJŠ v Košiciach.)* Košice: Univerzita Pavla Jozefa Šafárika v Košiciach, Právnická fakulta, pp. 97–106.

Švecová, A., Laclavíková, M. (2018) 'The *Opus Tripartitum* as an Original Source of Law as well as a Source of Knowledge about Custom in Light of Late Modern Age Hungarian Jurisprudence', *Krakowskie Studia z Historii Państwa i Prawa,* 11(4), pp. 467–479; https://doi.org/10.4467/20844131KS.18.039.9481.

Ullmann, W. (1940) 'Bartolus and Customary Law', *Juridical Review,* 52(4), pp. 265–283.

Veselý, J. (1934) *Příspěvky ke kritice právních pramenů šestnáctého století. I. Všehrd a desky zemské*. Praha: Všehrd.

Vladár, V. (2009) *Pramene práva Katolíckej cirkvi v historickom vývoji*. Plzeň: Aleš Čeněk.

Vladár, V. (2014) *Remedia spolii v stredovekom kánonickom práve*. Praha: Leges.

Vladár, V. (2017) *Dejiny cirkevného práva*. Praha: Leges.

Vladár, V. (2020) 'Prínos kánonického práva k rozvoju moderného trestného práva' in Vladár, V. (ed.) *Rímsko-kánonické východiská slovenského a európskeho verejného práva. Zborník z konferencie Katedry rímskeho a cirkevného práva uskutočnenej 25. septembra 2020 na Právnickej fakulte Trnavskej univerzity v Trnave v rámci medzinárodného vedeckého kongresu Trnavské právnické dni*. Praha: Leges, pp. 185–223.

Wallaszky, P. (1768) *De Stephano Verbőczio icto Hungariae celeberrimo: Dissertatio historico epistolica*. Lipsiae: Langenhemia.

Zlinszky, J. (1983) 'Die Rolle der Gerichtsbarkeit in der Gestaltung des ungarischen Privatrechts vom 16. bis zum 20. Jahrhundert', *Ius Commune* (*Zeitschrift für Europäische Rechtsgeschichte*), 10, pp. 49–68.

| Chapter 5 |

Town Law Books in East Central Europe

Jakub RAZIM – Lenka ŠMÍDOVÁ MALÁROVÁ

ABSTRACT

This chapter focuses on the town law books written in the historical territory of Central and Eastern Europe. Town law books, in a broader sense, consist of a wide range of manuscripts. They are a result of cities' literary production and include a considerable number of codes that served the municipal administration and jurisdiction. Using the example of the Czech lands, Slovakia, Hungary, Austria, and Poland, the authors seek to point out the role this crucial legal source plays, which mirrors the quality of legal culture and life in medieval and early modern cities. Our chapter contains several subchapters dedicated to each of the abovementioned countries. These subchapters begin with an explanation of the origins of towns in a particular region, followed by discussion about the municipal administration, the judiciary, and the nature of local municipal law and municipal documents. At the end of every subchapter, there is also a more detailed explanation of the selected legal source.

KEYWORDS

town law books, municipal law, Magdeburg Law, municipal administration, Swabian Law, sources of municipal law, East Central Europe.

Introduction

In legal history, the term 'town' usually referred to a privileged settlement with local self-government and judiciary but also an autonomous legal order. Towns attracted mainly craftsmen and merchants, who gained civil liberties upon their arrival. In the legal sense, towns founded in the countries of Central and Eastern Europe as early as the first half of the 13th century had their own or granted municipal law. This law, with roots in the legal environment of today's Germany, represents a set of rights and obligations regulating the external and internal relations of medieval and early modern towns. In other words, these rules regulated relations between towns and the ruler and also affected burghers and persons subject to municipal jurisdiction. In general, the source base of municipal law consists of normative sources, i.e., those issued *ex officio* that are thus legally binding. The sources include royal privileges granting towns various personal, legal, administrative, and economic privileges. Other sources were town statutes intended for craftsmen and merchants and national or religious minorities such as Jews. Finally, there were codifications of municipal law as the highest stage of legal development in particular regions, representing a legal

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predecessor to modern civil codifications. Another significant source of municipal law, apart from normative sources, is law books (town law books in the narrower sense), i.e., mostly private compilations of legal regulations, which were legally non-binding. Law books were written as manuscripts, and their content and structure did not differ much from later codifications. Their production was initiated either by the authors (or compilers) themselves, or they were produced at the request of a magistrate or town council, i.e., officials holding crucial posts in municipal offices. Those compilations were often of high quality and provided an adequate alternative to legal literature, which was not easily accessible at that time. It is also clear that the preserved law books reflect to some extent the period's legal environment, not only in terms of the content of regulations in force (especially the abovementioned privileges and town statutes), but also frequently court verdicts and legal instructions. On the other hand, law books were sources of a non-normative nature, and as such, were legally non-binding and had a more advisory role.

What the abovementioned sources have in common (except for codifications) is that they were copied (mainly privileges) or recorded directly in town books. Town books were established as the result of the gradual development of municipal self-government in the 14th century. In that period, charters were to some extent being replaced by codes, which provided a better arrangement of the growing amount of written material produced in municipal administration. Town books were created for various purposes. In terms of content, there were books of municipal administration, memorial books, commercial books, court books, books of municipal legislation, and guild books (town law books in a broader sense).

The following chapter dealing with town law books offers insight into the urban environment of countries in Central and Eastern Europe and presents selected sources. Since the aim of this work is not a comprehensive presentation (which would be a mere list of preserved town books), the following concept was chosen. Each subchapter addresses one country[1] and starts with an explanation of the origins of the towns in a particular region and the municipal administration, including the judiciary. Subsequently, the issue of municipal law and municipal documents is addressed. Finally, there is a separate section dealing with preserved legal sources.

1. The Czech lands

1.1. Towns and their origins[2]

The first 'towns,' in the legal sense of the term, were founded in the historical Czech lands in the first half of the 13th century. According to the preserved sources, the oldest institutional town is Bruntál (Ger. Freudenthal), which was established before 1213,

1 Except the countries located in the former territory of historical Hungary, which will be dealt with concisely in a subchapter called 'Present-Day Slovakia and Hungary.'
2 Among others, see Hoffmann, 2009.

5. The towns of the Czech lands, Austria, Hungary and Poland (around 1500)

followed by Uničov (Ger. Mährisch-Neustadt, 1223), Opava (Ger. Troppau, Pol. Opawa, 1224), and Hlubčice (Ger. Loebschütz), now located in Poland (Pol. Głubczyce). Historian František Hoffmann links the origins of the first towns in the regions of North Moravia and Silesia with the mining of precious metals, since the region provided ideal conditions for economic development and brought considerable capital to the country. In the south of Moravia and in Bohemia, the process was more gradual. First, there were larger settlements and fortifications, which were gradually transformed into urban locations with urban characteristics in the legal sense. Cities located on significant commercial arterial roads were an exception. This was the case for Brno (Ger. Brünn) in South Moravia, which became an institutional town under the privilege of the Czech King Wenceslas I at the beginning of 1243. This privilege, called *iura*

originalia, granted Brno, which had, until then, been governed by the statutes of Ota Konrad, the status of a royal town with numerous legal and economic privileges. Apart from royal towns, the development of which ended by the 1280s, serf towns were also being founded in the Czech lands. They were subordinated either to the church or to manorial lords, and it is documented that a tenth of the domestic population resided there at the beginning of the 15th century. While the development of royal towns stagnated after the end of the Hussite wars and during the pre-White Mountain period, serf towns were experiencing their heyday, as they became new centers of commerce and small trade. From an economic point of view, only mining towns profiting from mineral resources could compete with serf towns. This classification of towns, which had mainly a legal and administrative purpose, was definitively replaced in the mid-19th century as the result of Stadion's reforms.

1.2. Municipal government and judiciary

Municipal administration in the Czech lands was carried out by magistrates (*iudex*, *Richter*) or advocates (*advocatus*, *Vogt*) appointed by the town lord (the ruler or manorial lord in the case of serf towns). The term '*iudex*' first appeared in sources in the charter for Uničov from 1234, in which the town was granted mining and mile privileges. It is clear that this concept was relatively new in this context, as the magistrate of Uničov was still referred to as '*advocatus*' in 1223. Two main magisterial roles were to represent the town, both internally and externally, and to preside over the municipal court. The office of magistrate was highly prestigious and was acquired on the grounds of renting the magistrate's house for a particular length of time, sometimes for life. However, this was not a standard practice, as seen in several cases from the royal city of Brno. In the second half of the 13th century, the office of the magistrate of Brno was still considered to be a somewhat unstable and short-term post. Miroslav Flodr argues that the king, who appointed magistrates, could stipulate the right to withdraw from the contract at any time. The office of the magistrate of Brno was finally consolidated at the turn of the 13th and 14th centuries, when the idea of hereditary tenancy came to the fore, following the example of other royal towns in the country. Apart from magistrates, there were also sworn men (*iurati*) sitting at municipal courts. The post of a sworn man was rather unstable, as it was split between the court and the council. However, the key role of sworn men at courts was to issue findings and instructions. This role is recorded in the extensive collection of legal instructions preserved mainly for the East Moravian town of Uherské Hradiště (Ger. Ungarisch Hradisch) in two town books, namely *Liber negotiorum civitatis Hradisch*[3] from the second half of the 14th century and *Liber informationum et sententiarum*[4] from the 15th century. Both volumes document the legal environment in the region in late medieval Moravia and contain over 300 cases, for which legal instructions, i.e., qualified advice from sworn men, were issued. As stated earlier, magistrates played a crucial role in towns. This was

3 Available in the edition by Miroslav Flodr, see Flodr (ed.), 2007.
4 Published by Ignác Tkáč, see Tkáč (ed.), 1882.

true in the 13th and 14th centuries. However, in the period of the Hussite wars, the office of magistrate was significantly overshadowed by the town council. This is also underlined by the fact that the municipal judiciary, which was, until then, in the competence of magistrates, was taken over by councils. The rehabilitation of the office of magistrate did not take place until the mid-16th century, during Ferdinand I's reign. A hundred years later, an instruction was issued consolidating magistrates' powers in particular towns in Bohemia and Moravia. This situation, with minor changes, lasted until the early 18th century, when most magisterial powers were delegated to hetmans. The office of magistrate was abolished in 1783 as part of the Josephine reforms.

1.3. Municipal law[5]

From the perspective of medieval municipal law, the territory of historical Czech lands can be divided into two main areas, namely the North German (Saxon) legal circle and the South German (Swabian) legal circle. In the literature, this is inaccurately referred to as 'the Nuremberg legal circle.' As in other countries of Central and Middle Eastern Europe, the circle to which Bohemian and Moravian towns belonged had not only a legal but also an administrative purpose. Towns belonging to the North German legal circle were based on Magdeburg Law embodied in the *Old Saxon Mirror* (*Sachsenspiegel)*, copies of which were widely distributed there. For a long time, the court of appeal for these towns was in Magdeburg; however, in Bohemia, the court of appeal was in Litoměřice (Ger. Leitmeritz), and Moravian towns appealed to Olomouc (Ger. Olmütz). Magdeburg Law is considered relatively obsolete in comparison with Swabian Law, also because it did not accept Roman law. However, most Bohemian and Moravian towns adopted the legal regulations of Roman law and made amendments and modifications when the need arose. In the territory of the Czech lands, the Saxon legal circle was in the region of northern and eastern Bohemia (mainly in and around Litoměřice, Louny, Ústí nad Labem [Ger. Aussig an der Elbe], and Děčín [Ger. Tetschen], and in the north of Moravia (Olomouc and its region, Šumperk [Mährisch Schönberg] and Litovel [Ger. Littau]). The area of the Swabian legal circle was in Central and Western Bohemia (mainly in the regions of Kutná Hora [Ger. Kuttenberg] and Cheb [Ger. Eger] and in the Old Town of Prague) and in South Moravia (Brno). Both the North and South German legal circles were divided into regional circles formed around bigger cities. In South Moravia, it was Brno and the derived circle of Brno municipal law, which spread throughout almost all its territory. The only exceptions were Hodonín (Hung. Hodolin), which was subject to Hungarian law, and Jevíčko (Germ. Gewitsch), which belonged to Magdeburg Law. The legislation of individual areas or regional circles was reflected mainly in law books created to meet the needs of the municipal administration and the judiciary. While the North German legal circle was still using copies of German Weichbild books, the South German legal circle applied a more dynamic approach. This is evident mainly in manuscripts from Brno and Jihlava (Ger. Iglau), which are interconnected. This is supported, for example, by the existence of

5 See Bily et al., 2020.

the law book by Jan the notary, which is addressed in a separate section at the end of this subchapter. This legal document was created in medieval Brno, purely for practical purposes. It is evident that this law book was not only partly based on Jihlava Law, it also influenced its further structure and direction.[6] Although some legal circles' sources overlap, municipal legislation was considerably fragmented until the end of the 16th century. The above-described legal particularism lasted until the publication of Koldín's code (*Municipal Rights of the Czech Kingdom* by Pavel Kristián of Koldín) in 1579. First, he unified municipal law in Bohemia (except for Litoměřice, where the code came into force in 1610), and later in Moravia (in 1697).

1.4. Municipal documents

The charter as a basic written document pertaining to medieval towns first appeared in the Czech lands in the first half of the 13th century. Initially, charters dealt with towns' general legal issues. Burghers, as specified recipients, appeared in charters only sporadically. Burghers' efforts to record legal proceedings were common in bigger cities (Prague, Brno, Olomouc) and towns associated with mineral extraction (Jihlava, Kutná Hora). Charters confirming transactions affecting property rights represented important evidence. Therefore, it makes sense that the first towns interested in producing this type of document were economically prosperous centers; later, this expanded to include other towns. Charters issued for municipal administration and private persons were drawn by appointed scribes, one of whom was Master Jindřich, who probably worked in Prague from 1282. While smaller towns had only one scribe in the 14th century, large cities (such as Prague and Brno) had several scribes. They worked at town offices, headed by notaries. It was the notary who initiated the production of town books that helped to organize the constantly growing production of charters and notes and thus simplify the existing administration. The oldest preserved town book in the Czech lands is considered to be the so-called *liber vetustissimus* of the Old Town of Prague (*Liber vetustissimus Antiquae Civitatis Pragensis*) from 1310.[7] The book was used for commercial records (the so-called town accounts), administrative records (town council registers, records of receiving citizens), and legal records (copies of privileges and town or guild statutes). The last record is from 1518. Compared to Prague, the first town book of Brno was created rather late (in 1343). Despite this fact, the collection of Brno manuscripts now stored in the Brno City Archive represents a unique source on a national level. In addition to two consecutive memorial books spanning 1343 to 1379 and 1391 to 1515, which are available in modern critical editions,[8] there are also books on financial administration available for publication in Brno. These are the so-called book of accounts from the years 1343–1365 and the Brno tax collections from the turn of the 14th and 15th centuries.[9] However, numerous

6 More on that can be found in Štěpán, 1989, pp. 27–42.
7 Available in the edition by Hana Pátková, see Pátková (ed.), 2011.
8 See Flodr (ed.) 2005; id. (ed.), 2010.
9 See Mendl (ed.), 1935; Urbánková and Wihodová (eds.), 2008.

documents from the municipal administration of Brno are not yet available for publication, for example, three manuscript volumes containing legal instructions, which were produced in Brno between the years 1471 and 1616 at the request of towns located in their legal circle.[10]

1.5. Law book by Jan the notary[11]

The law book by Jan the notary, which was compiled in the late 1350s, is a significant example of Brno municipal law. The compilation was initiated by the author himself, who worked in the Brno town office between 1342 and 1358. When Jan took up the post of notary, Brno's legislation was rather incoherent. Its source base consisted of royal privileges and city council statutes, i.e., normative regulations. There was also a relatively brief private compilation of Brno municipal law, compiled around the early 1330s by Jan's predecessor, the notary Jindřich (Henry). It was the absence of a practical law book reflecting Brno's existing legislation that led Jan to compile a comprehensive collection of legal rules addressing individual areas of private law and municipal administration. However, the law book was not purely theoretical; it was intended to be used in legal practice at that time. Hence, the book was designed primarily to meet the needs of sworn men and magistrates, who were responsible for exercising judicial authority in towns. Since officials often lacked proper legal education, the book was compiled as a practical manual, based on standards and regulations in force, including the existing judicature and various Roman law regulations. The law book was written in Latin, except for a few regulations written in German. The original manuscript is now stored in the city of Brno's archives (ms. no. 2 AMB). The volume consists of several relatively independent sections that form a systematically arranged volume. The introduction contains text recording the privilege of the Czech King Wenceslas I from 1243 (*Iura originalia*). The main part of the law book of Brno consists of 716 provisions, divided into alphabetically arranged sections. The final part of the manuscript includes several other privileges received by 1357. The law book's rich content can be divided into several sections, including personal law, matrimonial law, inheritance law, law of obligations, property rights, procedural law, administrative law, and criminal law in the sense of the legal regulation of private delicts. As Jan was aware of his work's practical purpose, he amended most of the provisions with legal instructions, which he compiled in the unpreserved *Book of Sentences* during his activities in Brno. For the sake of clear arrangement and easier orientation in the text, he added a brief section to each of the provisions. When compiling his law book, Jan reflected the existing legal regulations and based his work mainly on text from royal privileges, town statutes, and Brno's oldest municipal law. He also applied Roman law, especially where local rules were absent or insufficiently formulated. Therefore,

10 For further information, see Sulitková, 2004.

11 *Law Book* is available in the following editions: Flodr (ed.), 1990–1993; Roessler (ed.), 1852. On this issue, see also these works: Schubart-Fikentscher, 1947, pp. 86–176; Flodr, 2001; Fiedlerová and Šmídová Malárová, 2017, pp. 263–287.

some literal or modified quotations from the Justinianic *Institutions*, *Digest*, and *Codex* became an integral part of various provisions, aptly amending the local regulations. The law book's qualities and its popularity at that time are documented by several factors. First, the text soon spread beyond the borders of Brno's municipal law circles (as copies were made in Prague, Jihlava, and Kutná Hora). Secondly, several other legal documents were based on Jan's work, namely the *Handbook of Municipal Law*[12] from the 1380s, which is a shorter version of the law book of Brno, amended by a further several hundred provisions from the sixteenth and seventeenth titles of the fiftieth book of the *Digest*.

2. Present-day Slovakia and Hungary

2.1. Towns and their origins[13]

The oldest 'towns' (in the legal sense of the term) in the territory of former Hungary were documented in the first half of the 13th century. In 1237, Székesfehérvár received the first town privilege, followed by Trnava (Ger. Tyrnau, Hung. Nagyszombat) in 1238. In the period before the Mongol invasion of Hungary (1241), other significant Slovak settlements, such as Starý Tekov (Ger. Alt Berschenburg, Hung. Óbars), Krupina (Ger. Karpfen, Hung. Korpona), and Zvolen (Ger. Altsohl, Hung. Zólyom), were granted privileges. In Lower Hungary, it was Esztergom, followed by Buda and Pest, which were granted privileges after the Mongol army's withdrawal from Europe (1242). Mining towns, which played a vital role in Hungary, were founded, especially in the region of today's Banská Bystrica (Ger. Neusohl, Hung. Besztercebánya). This area, which is associated with the mining of precious metals, mainly gold and silver, as well as other mineral resources (iron), represented an economically important region. The ruler was highly interested in establishing mining towns because he was profiting from the revenue. While there were dozens of privileged towns in Hungary at the end of the 13th century, the urbanization process culminated in the 14th century, when a well-known union of 24 Spiš (Ger. Zips, Hung. Szepes) towns was established. It developed from the original association of the Spiš Saxons, who were granted the so-called collective privilege in 1271. In the first half of the 16th century, the following three categories of towns existed in Hungary, varying according to the number of granted legal and administrative privileges: royal tavern towns, royal private towns, and free mining towns.

2.2. Municipal administration and judiciary[14]

In the 13th century, towns were represented by a *vilicus*, who was replaced by a magistrate (referred to in the sources as *Richter* or *iudex*) in the 14th century. In the Czech lands and in Poland, the office of magistrate was hereditary on principle, while in

12 I.e. *Manipulus vel directorium iuris civilis* by Jan Gelnhausen.
13 For further information see Rábik, Labanc, and Tibenský, 2013. See also Gerevich, 1990.
14 See, e.g., Marsina (ed.), 1984; Rady, 1985.

Hungary, burghers elected the town's representative (magistrate). Historian Ferdinand Uličný argues that this form of municipal administration was convenient both for the ruler, who was profiting financially from the election of a magistrate, and burghers, who enjoyed higher autonomy and thus a better life. However, in Trnava, for example, the situation was different. Municipal sources for Trnava include a clause regarding the ruler's approval of the magistrate the burghers elected. Formally, the elected magistrate held the office for only one year. However, there are records proving that one person held the office for several consecutive years or for life (e.g., Banská Bystrica, Žilina). The magistrate was the head of the town council and the town court. Regarding municipal jurisdiction, magistrates had the power to decide mainly private law disputes. Verdicts in cases involving particularly serious crimes fell almost exclusively into the ruler's competence. In larger towns, the magistrate would consult a 12-member bench of sworn men (*iurati*) who oversaw trials and issued legal instructions. At the end of the 13th century, sworn men were still an exception in municipal self-government, and the jurisdiction fell exclusively into the magistrate's competence (except for the abovementioned cases decided by the ruler). Although it is evident that at the turn of the 14th and 15th centuries, most municipal competencies belonged to the magistrate, in the first decades of the 15th century, there was a tendency to delegate municipal administration to the burgomaster (*Bürgermeister*). This form of municipal administration in Hungary remained almost unchanged until the end of the early modern period. A more significant reorganization took place in the period of enlightened absolutism and the Theresian and Josephine reforms.

2.3. Municipal law[15]

It is not surprising that the predominant legal order in the territory of historic Hungary was Magdeburg Law, brought by German colonists. The first town that received Magdeburg Law, specifically Saxon–Magdeburg law, was the abovementioned Székesfehérvár. It later spread to the regions of Upper Hungary (Trnava, Nitra [Germ. Neutra, Hung. Nyitra]) and Transdanubia (Győr [Germ. Raab]). The literature points out that the reception of Magdeburg Law brought indisputable economic benefits to towns, such as the toll exemption, which represented significant financial relief for both the town and individual persons (traveling traders, etc.). Therefore, it is not surprising that Magdeburg Law gradually replaced the existing legislation of some Hungarian towns belonging to the South German legal circle. An example of this is the royal town of Buda, which housed the supreme court of appeal for the relevant legal circle in Lower Hungary. Buda municipal law was based primarily on the *Swabian Mirror* (*Schwabbenspiegel*), which arrived with immigrants from Austria and Bavaria. However, as seen in the text of the Buda law book, written in the first half of the 15th century, Magdeburg Law gradually replaced the original legislation. Legal

15 Regarding the development of and changes in municipal law in the territory of today's Slovakia and Hungary, see Bily et al., 2020; Gönczi, Carls, and Bily, 2013. Cf. Lehotská, 1959, pp. 65–111; Kluknavská and Gábriš, 2013, pp. 208–278.

historian Katalin Gönczi argues that Magdeburg Law probably arrived in Buda from Silesia or Vienna. Although Magdeburg Law was predominant in Hungary at the turn of the 14th and 15th centuries, municipal legislation was still significantly fragmented. The first attempts to unify town rights were made at the beginning of the 15th century, for example, in the *Decretum maius*. This 1405 charter from Sigismund of Luxembourg unified the general features of some royal towns' municipal legislation. Fifty years later, the procedural legislation of Hungarian tavern towns was unified in the code *Articuli iuris tavernicalis*. It received a sanction in 1602 and became the basic standard used by tavern courts.[16]

2.4. Municipal documents[17]

Some Hungarian towns received first privileges as early as in the first half of the 13th century. However, diplomatic production developed gradually. In one of his studies, historian and paleographer Juraj Šedivý presented a specific model illustrating the beginnings of the production of municipal documents in the Slovak part of Hungary. The first condition for issuing pragmatic documents was establishing municipal self-government, followed by acquiring a seal and hiring an external notary. For example, this was the case in the medieval towns of Sopron (Ger. Ödenburg) and Bratislava (Ger. Pressburg, Hung. Pozsony), which used the services of local church institutions for this purpose. According to Šedivý, the Bratislava Chapter also serviced Trnava, which maintained numerous contacts with Esztergom. Trnava represents a clear example of the development of written municipal documents. In this context, Šedivý draws attention to the fact that there were long gaps between the stages, i.e., receiving the privilege (1238), acquiring the seal (last quarter of the 13th century), and the beginnings of the production of municipal documents (early 14th century). Paleographic analysis shows that the first charters, of which the oldest one is from 1309, were not produced at the Trnava town office, but rather in Esztergom.[18] Along with the development of written production, the first town books were created in the 14th century. Of the preserved ones, the town books of Bratislava and Banská Štiavnica are considered to be the oldest. Both were created in the early 1360s and contain administrative and judicial records. Žilina (Ger. Sillein, Hung. Zsolna) created its town book less than 20 years later. The *Žilina Law Book*[19] of 1378 represents not only an important administrative but mainly legal source, as it presents a probable form of legislation in the circle of Žilina municipal law. This area, until then governed by Flemish law and subject

16 On this topic, see Mertanová, 1985.

17 Among others, see Švecová, 2016, pp. 327–343; Bartl, 2003, pp. 225–239.

18 Šedivý, 2018, pp. 87 ff.

19 The *Žilina Law Book* is available in several editions. The original German version was published by Ilpo Tapani Piirainen, see Piirainen (ed.), 1972. An earlier translation of the *Law Book* in the Slovak-Czech version from the 70s in the 14th century was edited by Václav Chaloupecký: Chaloupecký (ed.), 1934 (the chapter with a legal-historical commentary on Magdeburg Law was written by Rudolf Rauscher); and lastly, also Kuchár (ed.), 2009. On the *Žilina Law Book*, see, e.g., Papsonová and Gajek, 2003.

to the Silesian town Cieszyn (Ger. Teschen), is one of the localities belonging to the broader circle of North German law. Žilina was subordinate to Cieszyn until 1369, when Hungarian King Louis I's charter was issued. This significantly affected the expansion of the existing Žilina legal circle, which can be observed as early as at the end of the 14th century. In the mid-15th century, the famous Buda law book was created in the territory of today's Hungary, the focus of which is described below.

2.5. The Buda law book[20]

The manuscript of the Buda law book, also known as *Ofen Stadtrechtsbuch*, was created between 1403 and 1439. Its authorship is traditionally attributed to Johannes Siebenlindner, who worked at the Buda (Ger. Ofen) town court, first as a sworn man and later as a town judge.[21] He was obviously well acquainted with Magdeburg Law. This fact, supported by the literature, explains the presence of related passages (the author's area of origin was subject to the North German legal circle).[22] The Buda law book contains a total of 445 provisions. The introduction consists of a preface and a register, followed by legislation consisting mainly of the rules of private law, while a fraction of the rules are related to offenses. The law book's content is based on the Swabian and Saxon *Mirrors*, while some passages correspond to the texts of canonical and Roman law. In addition to these sources, the legal regulations contained in the Buda law book reflect the content of some royal privileges. Apart from Béla IV's 1244 Golden Bull, it was mainly King Ladislaus IV's privilege, which the city received in 1276, and that of Sigismund of Luxembourg from 1403. The law book's source base clearly shows that the author aimed to create a work that would reflect not only the existing legislation, but also the findings of the legal science of that time, as evidenced by the presence of passages from legistical and canonical manuals. The result was extensive legislation that was used within and outside the area of the circle of Buda municipal law. This is supported by the fact that the Buda law book became a key source for Hungarian tavern towns and, as such, was applied by the tavern court.

3. Austria

3.1. Towns and their origins[23]

The gradual development of 'towns' (in the legal sense of the term) in today's Austria began in the 12th century. It is estimated that there were about 70 agglomerations with characteristic urban features in the Austrian lands in the 13th century. At that time, fortifications were already seen as a specific architectural and historical feature, distinguishing towns from market settlements. The majority of Austrian towns were

20 Edition by Karl Mollay: Mollay (ed.), 1959. From the literature on that, see Szende, 2004, pp. 39–48.
21 Lück, 2018, pp. 500–501.
22 Lück, 2018, pp. 500–501.
23 Selected literature: Opll, 1991, pp. 17–34; Weigl, 1993, pp. 123–134; Zöllner, E. (ed.), 1985.

small settlements without imperial immediacy. It was typical that throughout the Middle Ages, such settlements did not exceed an area of 15 hectares, and their population remained well below 1 000 inhabitants. Vienna as a European urban center with a population of 20 000 around the year 1500 was an exception. Some towns were directly subordinate to the landlord (the so-called *landesfürstliche Städte*), while others were indirectly owned by secular or ecclesiastical nobility recognizing the ruler's supreme authority (the so-called *patrimoniale Städte*).

3.2. Municipal government and judiciary[24]

The administration of Austrian towns combined manorial and self-governing elements. The situation in royal towns, particularly in Vienna, was as follows: The town lord was represented by an appointed town magistrate (*Stadtrichter*), who was responsible for both municipal government and the judiciary. This was first documented in Vienna in 1137. The self-governing element was represented by burghers meeting at the General Assembly (*Genossenversammlung*) to defend collective interests and decide on their affairs. There was also a smaller self-governing committee consisting of prominent burghers. It was gradually institutionalized into a town council (*Stadtrat*). The council held meetings at a town hall (*Rathaus*), which also represented municipal autonomy externally. The board was chaired by the burgermaster (*Bürgermeister*), who was also the leading representative of a given town community. In Vienna, this is documented from the last quarter of the 13th century. In areas of lesser importance, the council was chaired by the magistrate, who represented the town. The burgermaster was elected by burghers, and the election was approved by the landlord. On the contrary, magistrates were appointed directly by the land government. Two tendencies can be observed in the early modern development of towns. First, there were fewer periodic personnel changes, and some areas even recognized the principle of inheritance. As a result, the municipal government became rigid and was controlled by a small elite circle. Secondly, municipal autonomy was becoming increasingly limited, culminating in Joseph II's Enlightenment reforms. One of the reasons for state interventions was the crisis of the towns' financial management and the inability to meet the tax obligations the Habsburg government had imposed on town. In the 16th century, manorial lords reinforced their control over municipal elections and established a special category of officials (*Stadtanwalt*), who were supposed to defend royal interests at town council meetings. Emperor Joseph II ultimately abolished municipal self-government by gradually replacing the existing municipal authorities with the bureaucratic municipal council (*Magistrat*). The newly established town offices were internally divided into three senates. One senate dealt with political and economic administration, the second with the civil judiciary, and the third with the criminal judiciary. The staff consisted of town councilmen, headed by the mayor (*Bürgermeister*). This municipal government remained without major

24 For a standard textbook with a bibliography, see Hellbling, 1956. Details also in: Brunner, 1955, pp. 221–249.

changes until the revolutionary year of 1848, which saw the 'rebirth' of municipal self-government.

3.3. Municipal law[25]

It is assumed that by the end of the 15th century, most Austrian towns had a written compilation of municipal law, which was used in the local environment. Thanks to an advanced legal culture, some bigger centers became models for other localities. This resulted in the gradual establishment of 'families' of municipal law, such as the legal circle established around Vienna. Although the Vienna Council, as the supreme court (*Oberhof*) for municipal courts, decided within its legal family in the most serious cases, Vienna clearly affected the legal life of both local burghers and those outside the family. The towns that received Vienna law adapted the wording to suit local conditions and needs. There is evidence that some localities were only inspired by Vienna law (Laa, Klosterneuburg), while others adopted it fully (Eggenburg, Wiener Neustadt). Hans Planitz argues that Vienna did not have a mother city. However, it is evident that Vienna's town privileges drew on similar foundations as those privileges granted to other towns in Europe (municipal law, merchant law, law of the urban communities based on oaths, etc.). Most Austrian municipal sources preserved from the Middle Ages contain economic and criminal law rules and regulations. Despite the predominance of domestic law, Roman law influences were also present to a small extent, especially in the fields of inheritance law, mortgage law, and litigation.

3.4. Municipal documents[26]

In the first third of the 13th century, charters were still a rare phenomenon in the urban environment. If the need arose to record some legally relevant facts, burghers turned to scribes employed by landlords or church institutions, which had traditionally supported written culture. Therefore, it is not surprising that the oldest municipal document on a town's autonomous legal activities (written in Vienna in the 1270s) was found in the archives of the Benedictine monastery Michaelbeuern. It was not until the 13th century that some changes occurred. One of them was the establishment of the first town councils, which carried out municipal self-government and used seals as an external symbol of their autonomous position. The first seal was documented in Vienna in the 1220s. Secondly, basic municipal rights were codified (in 1212 for Enns and in 1221 for Vienna). The pressure to introduce written production and to more precisely define the competencies of municipal self-government increased after 1276 with the arrival of the Habsburgs, who brought a more advanced administrative culture from Swabia to the Austrian lands. Town scribes (*Stadtschreiber*), in modern times also called 'syndics,' are first mentioned in the sources from the 13th century.

25 For a general survey, see Baltl, 1982. For details, see Hasenöhrl, 1905, pp. 249–350; id., 1909, pp. 1–160. With a focus on Roman law influence: Baltl, 1962. Concerning the legal family of Vienna, see Fischer, 1948, pp. 52–77; Geyer, 1950, pp. 589–613; Planitz, 1948, pp. 287–327.

26 The fundamental text here is Csendes, 2000, pp. 93–99. See also Weigl and Scheutz, 2004, pp. 590–610; Pauser and Scheutz, 2008, pp. 515–563.

The first scribe was recorded in Villach in 1227. It is assumed that in most medieval towns within the borders of today's Austria, a permanent post of scribe did not exist. This work was occasionally done by a local teacher (e.g., in Graz this was still the case in the mid-16th century). Actual town offices with a larger staff base and stronger organization were established in several bigger towns during Rudolf IV's reign in the second half of the 14th century. However, there is a lack of information about these offices' administrative activities until the beginning of the modern age. On one hand, the conditions for executing clerical work included the general requirements of marital origin, physical condition, good reputation, and professional training. As part of their versatile job, town scribes were also involved in municipal administration and the judiciary. In addition to preparing and archiving documents, they were responsible for keeping town books (*Stadtbücher*). The use of hardcover records intended for official use began in Austrian towns in the 14th century. One of the oldest and most important preserved examples is the Viennese manuscript titled *Eisenbuch* (named after the decorative iron fittings on the cover), which was probably created around 1320. While at the end of the 15th century most of the town books contained mixed content, from the 16th century, they were gradually replaced by documents with a specific orientation. At that time, proceedings from town council meetings first appeared among official documents and were recorded in special books (*Ratsprotokollbuch*).

3.5. The Wiener Handwerksordnungsbuch[27]

The oldest preserved town books from Vienna are from the beginning of the 14th century. Over time, their number and specialization increased as councils' competencies and the number of written documents grew. An example from the preserved sources is the *Wiener Handwerksordnungsbuch* created in 1430. Editor Markus Gneiß ranks the book among the most important works of the late medieval municipal administration of Vienna. The author of the code, which was written mostly on paper, is the town scribe Ulrich Hirssauer, who is credited with improving official practices in the Vienna town office. As the name suggests, it is the town book regulating the activities of professional authorities (guilds) with which Viennese craftsmen were associated from the Middle Ages. The 1364 guild statutes are the main content of the *Handwerksordnungsbuch*. The focus of its legal content lies in the regulation of the three most important groups within the urban population involved in trade: apprentices, journeymen, and masters. Apprentices, who were training to carry out independent professional work, were at the bottom of the professional hierarchy. The *Handwerksordnungsbuch* states the length of apprenticeship and the maximum number of apprentices per master. The second group consisted of journeymen, who had already passed guild examinations and were employed by masters as wage laborers. Masters, who ran workshops, held the highest position. The legal regulation of the *Handwerksordnungsbuch* states the conditions of employment at workshops (working hours, etc.), and regulates journeymen's public behavior and their active

27 Edition with commentary: Gneiss (ed.), 2017.

service in the defense of a town. Some regulations are also related to masters, such as conditions for becoming a master and a list of competencies and responsibilities within the guild.

4. Poland

4.1. Towns and their origins[28]

The first more advanced urban settlements were established in Poland in the 13th century, with the contribution of colonists from the West. The settlers came as part of the so-called German colonization and brought with them legal innovations in the form of unwritten customs. New urban locations had to adapt to the prevailing conditions at the place of establishment; however, their internal organization generally did not differ. The universal administrative model, with either a simple or more complex structure depending on circumstances, remained unchanged until the division and extinction of Poland in the 18th century. The founder and lord of the town could be either the ruler or the landlord; therefore, towns were divided into princely, specifically royal (*miasta książęce, królewskie*), and private (*miasta prywatne*). For the sake of more clarity, the literature sometimes uses the classification of towns according to their size and economic potential, based on tax sources from that time. There were four categories of urban centers in Poland: the largest, medium, smaller, and the smallest. It is also estimated that there were almost 700 towns in Poland around 1500 and that more than half belonged to the last category. Although the percentage of the smallest towns was decreasing over time, it can be observed that until the late modern era, the urban landscape of Poland was characterized by small towns.

4.2. Municipal administration and judiciary

From the 13th century onward, the most important post in the internal organization of towns was an official who represented the landlord and was called *Vogt* (*wójt*) or *Schultheiss* (*sołtys*). In addition to municipal administration and the judiciary, his task was to represent the town externally. However, his initial superior position soon weakened as a result of the 'communalization' of municipal administration. This process had already been initiated in the 13th century by burghers, who were uniting to defend their interests. They were forming larger assemblies (*pospólstwo*), overseeing municipal finances, and participating in key decisions in municipal policy, as well as forming smaller councils (*rady miejskie*). The councils, consisting mainly of the wealthiest burghers, gradually took over control of municipal administration and the office of the *vogt*, which was purchased from landlords. The degree of municipal self-government depended not only on the size of a town, but also on its economic and social status. In more developed centers, the acting council (*rada urzędująca*) and the

28 A widely acknowledged book on this topic (incl. administration and judiciary) is Bogucka and Samsonowicz, 1986. On the beginnings of urbanization, see also Mühle (ed.), 2011.

council of aldermen (*rada starszych*) were established in the 14th century, both councils usually consisting of 12 members and on some occasions forming a large council (*rada ogólna*). Council management and the organization of meetings were entrusted to one or more burgomasters (*burmistrz*). While in towns established under Lübeck Law, councilors also participated in the judiciary, in towns that received Magdeburg Law, a special judicial authority was constituted. It was called the bench of lay judges and usually consisted of seven members (*ława sądowa*). Trials were always presided over by the *Vogt* or *Schultheiss*, who was appointed by the landlord or the council, depending on the area. As for sworn men, who participated in the decision-making process, full attendance was not necessary for the tribunal to decide a case. Regarding the type of case and the parties' positions, ordinary (*sądy zwyczajne, obywatelskie*) and extraordinary (*sądy nadzwyczajne, potrzebne, potoczne*) courts were distinguished. The former took place on fixed dates, and burghers could turn to them in disputed and undisputed matters. The latter were convened as needed and provided legal protection to foreigners or burghers who were in danger of suffering damage of delay.

4.3. Municipal law[29]

Most towns in Poland were granted Magdeburg Law and its daughter laws, such as Chełmno (Ger. Kulm) and Środa Śląska (Ger. Neumarkt in Schlesien) Law, immediately following their establishment. Chełmno Law was widely used in Eastern Pomerania and Mazovia, while Środa Śląska Law prevailed in Greater Poland. Only a fraction of towns received Lübeck Law, which was used in some towns in the historical territory of Prussia. Due to its origin, municipal law in Poland was generally referred to as 'German' (*ius Teutonicum*); however, in the process of legal transfer, it did not remain as the same body of law. As Maciej Mikula recently pointed out, sources of municipal law underwent complex development and were adapted to suit recipients' needs. The implementation of changes in the local environment was facilitated both by editorial changes made in normative texts adopted from other sources and through the provision of selective and creative translations of Magdeburg Law to Latin and Polish. Compared to the more homogeneous Lübeck legal circle, Magdeburg Law was strongly differentiated in Poland. Along with the rights and regulations of Magdeburg Law, other related sources of 'German law,' such as the *Saxon Mirror* or the Meissen law book, were spreading to the East. The authority of Magdeburg Law was based on the privileges obtained from the lord of the town (the oldest preserved privilege is that of Silesian Złotoryja [Ger. Goldberg] from 1211) and on legal regulations provided by towns with royal upper courts. Daughter towns were turning to their mother towns with more complex legal issues, the solutions for which subsequently led to the written recording and stabilization of burghers' customary law (the oldest known regulation of Magdeburg Law is that of Wrocław [Ger. Breslau] from 1261). From the

29 For a textbook review, see Bardach, Leśnodorski, and Pietrzak, 1987. More details can be found in Kutrzeba, 1926; Schubart-Fikentscher, 1942. On the issue of Magdeburg Law, see Mikuła, 2018 (a revised edition in English will appear in 2021); Bily, Carls, and Gönczi, 2011.

16th century onward, knowledge of Magdeburg Law also deepened as a result of its scientific elaboration by trained jurists (e.g., Jan Łaski, Mikołaj Jaskier). Municipal law based on Magdeburg Law remained in force until the end of independent Poland in the 18th century, when it was replaced by Enlightenment codifications and reforms.

4.4. Municipal documents[30]

The history of town offices is closely related to towns' cultural environments. Since the clergy's monopoly on literacy ceased in the second half of the 13th century, written communication penetrated burghers' lives in both private and official communication. As the literacy level increased, the way in which important regulations were issued changed accordingly. At first, they were announced and read at gatherings of residents at town halls and churches, while from the second half of the 15th century, posting written copies at town halls or on church doors proved to be more effective. Contrary to an earlier opinion, due to the absence of more detailed source evidence, it is now generally accepted that, with a few exceptions (e.g., Wroclaw), town offices were not established immediately after the formation of municipal self-government authorities. Rather, it is assumed that initially, clerks were hired ad hoc or smaller scriptoriums with little workload, financed by the council, were established in most areas. According to this opinion, offices became pillars of municipal administration from the 14th century, when the growth of the municipal economy and the consolidation of municipal self-government could be observed. The activities of scribes in Polish towns were first recorded in Kalisz (Ger. Kalish) and Kraków in the last decades of the 13th century. Initially, clergymen predominated among scribes. Permanent scribes were hired by bigger towns, in which the growth of clerical work resulted in an increase in the number of officials and the deepening of their specialization. At the same time, there was a trend of unification of the forms and methods of clerical work. The post of scribe was generally held for life; however, in some towns, scribes had to repeatedly apply for the renewal of their post. The requirements for the post of scribe were not only language competences, familiarity with the legislation, mastery of clerical art, and knowledge of arithmetic, but also the ability to keep a secret. The high intellectual level of at least some scribes can be seen in the preserved sources, which also include compilations of municipal rights and regulations (Konrád of Opole). Among the rich variety of documents produced in town offices, charters are among the earliest. Initially, only documents addressed to towns were kept in town archives. It was not until the turn of the 13th and 14th centuries that towns issued copies and extracts of documents to other recipients. In Poland, scribes produced not only charters, but from the end of the 13th century, also official books. In larger and medium-sized towns, various specialized books were produced, and these were still used in the modern age. On the contrary, the frequency of records in smaller towns was lower, and therefore, mixed manuscripts were sufficient. The content of town

30 Bielińska, 1971, pp. 316–346; Nawrocki, 1998; Tandecki, 2015, pp. 407–446. For a broader context, see Bartoszewicz, 2012.

books in Poland can be seen in the typology of Janusz Tandecki, who distinguishes the following categories: (1) general council books, (2) administrative–financial books, and (3) court books. Documents collected in town offices also included sources of municipal law. This is evidenced by preserved legal codes, i.e., manuals used by town officials and scribes, in which legal norms, court regulations, and town privileges were recorded. Town scribes also recorded and kept town council statutes (*wilkierze*).

4.5. Księga sądowa miasta Chełmna[31]

The *Księga sądowa miasta Chełmna*, which survived the Second World War thanks to a lucky coincidence, is an important document containing a variety of information about everyday life in a medieval town. It is a paper code that was kept in Chełmno from 1330. Chełmno is the second oldest city in the Prussian territory of the Teutonic Knights, which was not only the court of appeal but also a model for other towns using Chełmno Law. Over more than a hundred years of use, this official book passed through the hands of about 20 scribes and other town officials. The records do not cover the entirety of the manuscript sheets. They were not written systematically, and the individual records were not consistently arranged in chronological order. The essential legal content of the Chełmno 'court book' is divided into two units. The first part contains less than 200 records about the purchase of rent and rental payments, approval of which fell within the council's competence. The second part, which is perhaps even more interesting, occupies almost half of the code. It consists of approximately 1 500 records of criminal cases decided by the bench of lay judges, chaired by the magistrate. It includes a register of outlaws who could be caught with impunity and arrested if they failed to appear in town court voluntarily or had not reconciled with the damaged party. The offenses for which outlaws were blamed included murder, which is the most frequent offense, or homicide (4–5 registered cases per year), rape, personal injury, robbery, theft, damage to another's property, forcible entry into a house, breach of peace, and insult. Most of the offenses were serious crimes, which meant that special outlaw proceedings were under consideration. Imposed sanctions ranged from a fine to the death penalty. When the record was crossed out, it can be assumed that the sentence had been served or the offender had been reintegrated into society.

31 Edition with commentary: Lückerath and Benninghoven (eds.), 1999. Cf. the register of outlaws (among others) Jeziorski, 2017; Willoweit, 2016, pp. 488–498.

Bibliography

Baltl, H. (1962) *Einflüsse des römischen Rechts in Österreich*. 1st Mediolani: Giuffrè.

Baltl, H. (1982) *Österreichische Rechtsgeschichte*. 5th Graz: Leykam.

Bardach, J., Leśnodorski, B., Pietrzak, M. (1987) *Historia państwa i prawa polskiego.* 5th Warszawa: PWN.

Bartl, J. (2003) 'Mestské knihy na Slovensku a problémy ich štúdia', *Studia historica Tyrnaviensia III. K životnému jubileu prof. R. Marsinu*. 1st Trnava: Katedra histórie Fakulty humanistiky Trnavskej univerzity, pp. 225–239.

Bartoszewicz, A. (2012) *Piśmienność mieszczańska w późnośreniowiecznej Polsce*. 1st Warszawa: Wydawn. Uniwersytetu Warszawskiego.

Bielińska, M., (1971) 'Kancelarie miejskie' in Bielińska, M., Gąsiorowski, A., Maleczyński, K. *Dyplomatyka wieków średnich*. 1st Warszawa: PWN, pp. 316–346.

Bily, I., Carls, W., Gönczi, K. (2011) *Sächsisch-magdeburgisches Recht in Polen: Untersuchungen zur Geschichte des Rechts und seiner Sprache*. 1st Berlin: De Gruyter.

Bily, I., Carsl, W., Gönczi, K., Lazar, M. (2020) *Sächsisch-Magdeburgisches Recht in Tschechien und in der Slowakei: Untersuchungen Zur Geschichte des Rechts und Seiner Sprache*. 1st Berlin: De Gruyter.

Bogucka, M., Samsonowicz, H. (1986) *Dzieje miast i mieszczaństwa w Polsce przedrozbiorowej*. 1st Wrocław: Ossolineum.

Brunner, O. (1955) 'Städtische Selbstregierung und neuzeitlicher Verwaltungsstaat in Österreich', *Österreichische Zeitschrift für öffentliches Recht NF,* 6, pp. 221–249.

Chaloupecký, V. (ed.) (1934) *Kniha Žilinská*. 1st Praha: Učená společnost Šafaříkova.

Csendes, P. (2000) 'Die Anfänge des städtischen Urkundenwesens in Österreich' in de Hemptinne, T., Prevenier, W. (eds.) *La diplomatique urbaine en Europe au Moyen Âge*. 1st Louvain: Garant. pp. 93–99.

Fiedlerová, N., Šmídová Malárová, L. (2017) 'The Earliest Law Books of the City of Brno and Their Relation to the Contemporary Legal Practice', *Krakowskie Studia z Historii Państwa i Prawa*, 10, pp. 263–287.

Fischer, H. (1948) 'Die Wiener Stadtrechtsfamilie', *Jahrbuch des Vereins für Geschichte der Stadt Wien*, 7, pp. 52–77.

Flodr, M (ed.) (1990–1993) *Právní kniha města Brna z poloviny 14. století*. Díl I.–III. 1st Brno: Blok.

Flodr, M. (2001). *Brněnské městské právo. Zakladatelské období (–1359)*. 1st Brno: Matice moravská.

Flodr, M. (ed.) (2005) *Pamětní kniha města Brna z let 1343–1376 (1379)*. 1st Brno: Matice moravská, 2005.

Flodr, M. (ed.) (2007) *Nálezy brněnského městského práva. Svazek I. (–1389)*. 1st Brno: Archiv města Brna.

Flodr, M. (ed.) (2010) *Pamětní kniha města Brna z let 1391–1515*. 1st Brno: Matice moravská.

Gerevich, L. (1990) *Towns in Medieval Hungary*. 1st Boulder: Social Science Monographs.

Geyer, R. (1950) 'Die mittelalterlichen Stadtrechte Wiens', *Mitteilungen des Instituts für österreichische Geschichtsforschung*, 58, pp. 589–613.

Gneiss, M. (ed.) (2017) *Das Wiener Handwerksordnungsbuch (1364–1555). Edition und Kommentar.* 1st Wien: Böhlau.

Gönczi, K. (2008) *Die europäischen Fundamente der ungarischen Rechtskultur Juristischer Wissenstransfer in Ungarn zur Zeit der Aufklärung und im Vormärz.* 1st Frankfurt am Main: Klostermann, 2008.

Gönczi, K., Carls, W., Bily, I. (2013) *Sächsisch-magdeburgisches Recht in Ungarn und Rumänien: autonomie und Rechtstransfer im Donau- und Karpatenraum*. 1st Berlin: De Gruyter.

Hasenöhrl, V. (1905) 'Beiträge zur Geschichte der Rechtsbildung und der Rechtsquellen in den österreichischen Alpenländern', *Archiv für österreichische Geschichte*, 93, pp. 249–350.

Hasenöhrl, V. (1909) 'Beiträge zur Geschichte der Rechtsbildung und der Rechtsquellen in den österreichischen Alpenländern', *Archiv für österreichische Geschichte*, 97, pp. 1–160.

Hellbling, E. C. (1956) *Österreichische Verfassungs- und Verwaltungsgeschichte, ein Lehrbuch für Studierende*. 1st Wien: Springer-Verlag.

Hoffmann, F. (2009) *Středověké město v Čechách a na Moravě*. 2nd Praha: Lidové noviny.

Jeziorski, P. A. (2017) *Proskrypcja i banicja w miastach pruskich późnego średniowiecza*. 1st Warszawa: Instytut Historii PAN.

Johanek, P. (2004) 'Stadtrechtsbücher' in Stammler, W., Langosch, K. (eds.) *Die deutsche Literatur des Mittelalters. Verfasserlexikon*. Vol. 11. 2nd Berlin: Kurt Ruh, pp. 1454–1455.

Kluknavská, A., Gábriš, T. (2013) 'Mestské právo ako dynamický prvok vývoja práva v Uhorsku' in Malý, K., Šouša, J. (eds.) *Městské právo ve střední Evropě. Sborník příspěvků z mezinárodní právnické konference "Práva městská Království českého" z 19.–21. září 2011*. 1st Praha: Karolinum, pp. 208–278.

Kuchár, R. (ed.) (2009) *Žilinská právna kniha. Preklad magdeburského práva, zápisy právnych úkonov žilinských mešťanov*. 1st Bratislava: Veda.

Kutrzeba, S. (1926). *Historja źródeł dawnego prawa polskiego 2*. 1st Lwów: Wydawn. Zakł. Narodowego im. Ossolińskich.

Lehotská, D. (1959) 'Vývoj mestského práva na Slovensku', *Sborník Filozofickej fakulty Univerzity Komenského – Historica,* 10, pp. 65–111.

Lück, H. (2018) 'Urban law. The law of Saxony and Magdeburg' in Pihlajamäki, H., Dubber, M. D., Godfrey, M. (eds.) *The Oxford Handbook of European Legal History.* 1st Oxford: Oxford University Press, pp. 474–508.

Lückerath, C. A., Benninghoven, F. (eds.) (1999) *Das Kulmer Gerichtsbuch 1330–1430: Liber memoriarum Colmensis civitatis*. 1st Köln: Böhlau.

Marsina, R. (ed.) (1984) *Vývoj správy miest na Slovensku*. 1st Martin: Gemerská vlastivedná spoločnosť v Rimavskej Sobote.

Mendl, B. (ed.) (1935) *Knihy počtů města Brna z let 1343–1365*. 1st Brno: Československý státní ústav historický.

Mertanová, Š. (1985) *Ius tavernicale. Štúdie o procese formovania práva tavernických miest v etapách vývoja tavernického súdu v Uhorsku (15.–17. stor.)*. 1st Bratislava: Veda.

Mikuła, M. (2018) *Prawo miejskie magdeburskie (Ius municipale Magdeburgense) w Polsce XIV-pocz. XVI w. Studium o ewolucji i adaptacji prawa*. 2nd Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Mollay, K. (ed.) (1959) *Das Ofner Stadtrecht. Eine deutschsprachige Rechtssammlung des 15. Jh. aus Ungarn*. 1st Budapest: Akadémiai Kiadó.

Mühle, E. (ed.) (2011). *Rechtsstadtgründungen im mittelalterlichen Polen*. 1st Köln: Böhlau Verlag.

Nawrocki, S. (1998) *Rozwój form kancelaryjnych na ziemiach polskich od średniowiecza do końca XX wieku*. 1st Poznań: Wydawn. naukowe UAM.

Opll, F. (1991) 'Das österreichische Städtewesen vom Mittelalter bis zum Beginn des 17. Jahrhunderts', *Pro Civitate Austriae*, 13, pp. 17–34.

Papsonová, M. (2014) *Sasko-magdeburské právo na Slovensku. Krajinské právo v Žilinskej knihe*. 1st Bratislava: Eurokódex.

Papsonová, M., Gajek, B. (2003) *Das Magdeburger Recht und das Silleiner Rechtsbuch. Wörterbuch zur deutschsprachigen Vorlage des Landrecht (1378) und zu ihrer Übersetzung (1473)*. 1st Frankfurt am Main: Verlag Peter Lang.

Pauser, J., Scheutz, M. (2008) 'Frühneuzeitliche Stadt- und Marktschreiber in Österreich – ein Aufriss' in Griesebener, A., Weigl, H., Scheutz, M., (eds.) *Stadt, Macht, Rat 1607: Die Ratsprotokolle von Perchtoldsdorf, Retz, Waidhofen an der Ybbs und Zwettl im Kontext*. 1st St. Pölten: Verein für Landeskunde von Niederösterreich, pp. 515–563.

Petrovics, I. (2011) 'The Cities and Towns of Medieval Hungary as Economic and Cultural Centres and Places of Coexistence. The Case of Pécs', *Colloquia*, XVIII, pp. 5–26.

Pátková, H. (ed.) (2011) *Liber vetustissimus Antiquae Civitatis Pragensis 1310–1518. Edice*. 1st Dolní Břežany: Scriptorium.

Piirainen, I. T. (2010) 'Městské knihy, právní knihy a soudní knihy. Rukopisy ve slovenských archivech' in Sulitková, L. (ed.) *Stav a perspektivy zpřístupňování středověkých a raně novověkých městských knih*. 1st Ústí nad Labem: Filozofická fakulta Univerzity Jana Evangelisty Purkyně v Ústí nad Labem, 2010, pp. 125–135.

Piirainen, I. T. (ed.) (1972) *Das Stadtrechtsbuch von Sillein*. 1st Berlin: Walter de Gruyter.

Planitz, H. (1948) 'Das Wiener Stadtrecht und seine Quellen', *Mitteilungen des Instituts für österreichische Geschichtsforschung*, 56, pp. 287–327.

Rábik, V., Labanc, P., Tibenský, M. (2013) *Vývoj stredovekých miest na Slovensku. I. a II.* 1st Trnava: Filozofická fakulta Trnavskej univerzity v Trnavě.

Rady, M. C. (1985) *Medieval Buda. A study of municipal government and jurisdiction in the kingdom of Hungary*. 1st Boulder: East European Monographs.

Roessler, E. F. (ed.) (1852) *Deutsche Rechtsdenkmäler aus Böhmen und Mähren. Eine Sammlung von Rechtsbüchern, Urkunden und alten Aufzeichnungen zur Geschichte des deutschen Rechtes. II. Band, Die Stadtrechte von Brünn aus dem XIII. u. XIV. Jahrhundert. Nach bisher ungedruckten Handschriften*. 1st Prag: J.G. Calve'sche Buchhandlung.

Schubart-Fikentscher, G. (1947) 'Römisches Recht im Brünner Schöffenbuch. Ein Beitrag zur Rezeptionsgeschichte', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, 65, pp. 86–176.

Schubart-Fikentscher, G. (1942) *Die Verbreitung der deutschen Stadtrechte in Osteuropa*. 1st Weimar: H. Böhlaus Nachf.

Šedivý, J. (2018) 'Stredoveké mestá na Slovensku a ich pragmatická (diplomatická) písomná kultúra' in Hrdina, J., Jíšová, K. (eds.) *Úřední písemná kultura v českých a moravských městech ve středověku a raném novověku*. 1st Praha: Archiv hlavního města Prahy; Dolní Břežany: Scriptorium, pp. 79–127.

Štěpán, J. (1989) 'Ke vzájemným vztahům brněnské a jihlavské knihy sentencí městského práva', *Právněhistorické studie*, 29, 1989, pp. 27–42.

Sulitková, L. (2004) *Vývoj městských knih v Brně ve středověku v kontextu vývoje městských knih v českých zemích*. 1st Praha: Archiv Akademie věd ČR.

Švecová, A. (2016) 'Die Stadtrechtsbücher in der mittelalterlichen Slowakei und Ungarn als Beispiel des eigenen Selbstbewusstseins im Rahmen der europäischen Rechtskultur', *Krakowskie Studia z Historii Państwa i Prawa*, 9, pp. 327–343.

Szende, K. (2004) 'Das Ofner Stadtrecht' in Hambuch, W. (ed.) *Deutsche im Ersten Stadtbezirk von Ofen*, 1st Budapest: Deutscher Kulturverein, pp. 39–48.

Tandecki, J. (2015) 'Dokumenty i kancelarie miejskie' in Jurek, T. (ed.) *Dyplomatyka staropolska*. 1st Warszawa: DiG, pp. 407–446.

Tkáč, I. (ed.) (1882) *Liber informationum et sententiarum, čili, Naučení Brněnská Hradišťské městské radě dávaná od r. 1447 až do r. 1509 s dodatky do roku 1540*. 1st Uherské Hradiště: Nákladem Historicko-statistického odboru a.t.d. v Brně.

Urbánková, K., Wihodová, V. (eds.) (2008) *Brněnské berní rejstříky z přelomu 14. a 15. století*. 1st Brno: Matice moravská ve spolupráci s Archaia Brno.

Weigl, H. (1993) 'Österreichische Städte, Stadtherren und Landesfürst im späten Mittelalter und in der frühen Neuzeit' in Janák, J. (ed.) *Ústřední moc a regionální samospráva*. 1st Břeclav–Brno: SOA Břeclav, pp. 123–134.

Weigl, H., Scheutz, M. (2004) 'Ratsprotokolle österreichischer Städte' in Pauser, J., Scheutz, M., Winkelbauer, T. (eds.) *Quellenkunde der Habsburgermonarchie 16–18. Jahrhundert: ein exemplarisches Handbuch*. 1st Wien: Oldenbourg, pp. 590–610.

Willoweit, D. (2016) 'Verbrechen und Verfestung im Spiegel der Kulmer Gerichtsbücher', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*, 133, pp. 488–498.

Zöllner, E. (ed.) (1985) *Österreichs Städte und Märkte in ihrer Geschichte*. 1st Wien: Österreichischer Bundesverlag.

| Chapter 6 |

The History of International Cooperation and Integrations in East Central Europe

Miroslav LYSÝ

ABSTRACT

This chapter is concerned with the development of international relations, international cooperation, and international law in Central Europe from the beginning of the Middle Ages up until present times. The topic encompasses the relationship between international and constitutional law. While the first centuries of the Middle Ages can be characterized as a struggle between imperial universalism (the Frankish empire and the German–Roman empire), beginning in the 12th century, it was the particularism of Central European countries like Poland and Hungary (and particularism within the German–Roman empire) that set the pace. Various particular units, however, often integrated into larger unions, united as personal or (later) real unions. In the case of Hungary and the Czech lands, the idea of Crown lands was created in order to express unity among various countries with different levels of integration. Among many unions, the Habsburg empire proved to be very successful and viable and led many unification attempts toward the Austrian–Hungarian Compromise of 1867. Dualistic statehood lasted for half a century, and after the First World War, it was replaced by a newly organized Central Europe, with new states, new borders, and a new system of international security. Versailles peace, however, resulted in new controversies and new hostile relations in the late 1930s. After Anschluß of Austria and especially the Munich Treaty (1938), the Versailles system in Central Europe was definitively gone. A new order was set after the end of the Second World War, when Central Europe became part of the Soviet bloc. This lasted until 1989, when the Soviet-controlled regimes in Central Europe ceased to exist and Central Europe started to integrate with structures of the European Union and the North Atlantic Treaty Organization.

KEYWORDS

history of Central Europe, integration, personal union, real union, dynasty policy, peace treaties, Versailles peace system, Munich Treaty.

Since the early Middle Ages, international relations were not governed on the basis of equality. The Roman empire adopted the idea of superiority accomplished through immense military achievements during the break of the millennia in particular. This resulted in the creation of a unit that could, at least in theory, grow territorially. Rome's imperial universality was then taken over by numerous other empires known in the Middle Ages and in the early modern age, although none of these units was able to retain such long-lasting supremacy over the European continent as was the case with Rome. Thus, Rome became an unattainable symbol that many other empires to

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follow tried to imitate (*imitatio imperii*). Central Europe experienced Rome's practices and imperial policies, too, where the local Teutons' political units arose, as initiated by the empire.

The relationships between the Roman empire and its Barbarian neighbors were, at least at their beginnings, governed by the subordination principle, where the empire expected to receive help from the Teutonic tribes, often against other Teutonic tribes. In the 4th century, Romans were often forced to demand alliance with Teutons through paying tributes. In the late 4th century, the final phase of the ancient era saw the migration of peoples, in which the territory of Central Europe played an important role. The Barbarian invasions accelerated the fall of the Roman empire in the West.[1]

The power vacuum after the fall of the west Roman empire was filled by the Kingdom of the Franks. The first Slavs had appeared in Central Europe, including in the territory of Slovakia, in the 6th century. In the year 623, they created a defense union against the Turkic Avars living in the territory of contemporary Hungary. The defense union leader was Frankish merchant Samo, hence the name Samo's empire ('*regnum Samoni*') was used in Central European history. Although Samo's Slavs were emancipated from their dependence on the Avars, they became of interest to the Franks, whose attempt to subdue Samo's empire failed; however, written sources state that the Elbe Serbs were deemed as having submitted in the view of the Kingdom of the Franks, and a similar fate was to befall the Danube Slavs.[2]

A revitalized interest in Central Europe came during the reign of the Frankish king and Emperor Charlemagne (768–814). While the Roman empire systematically built its own administration in the conquered territories (provinces), the monarchs of the Kingdom of the Franks tried to develop their influence in such territories, especially through relationships with the local rulers. Danube Slavs, Avars, Moravians, Bohemians, and Elbe Slavs came into closer contact with the Kingdom of the Franks at the break of the 8th and 9th centuries. It resulted in payment of tribute or attendance of their representatives at the assemblies of the Kingdom of the Franks. A typical example is the assembly in Frankfurt in the year 822, which was attended by representatives of the Obodrites, Serbs, Velets, Bohemians, Moravians, Praedecents, and Avars.[3]

Bohemians, Moravians, and several tribes of Elbe Slavs entered into a relationship with the Kingdom of the Franks assuming several obligations. One of these obligations was typically the duty to pay tributes concluded between the tribe (e.g., Bohemians, Moravians) on one hand and the Kingdom of Franks (or part thereof) on the other. Tributes were due annually and were paid long term. Solemn oaths of fidelity were a special type of obligation that, unlike the tributes, constituted personal obligations. This was how the monarchs of the Kingdom of the Franks bound the rulers and other top representatives of Central European political units. Examples of

1 Scholl, 2017, pp. 19–39.
2 Steinhübel, 2021, pp. 41–48; Lysý, 2014, pp. 152–153.
3 With attention to Bohemian relations, Hoffmann, 1969, pp. 9–11.

figures who took such oaths of fidelity were the Moravian rulers Rastislav (864) and Svatopluk (874 and 884), along with their second degree princes, as well as Bohemian princes (Spytihněv and Vratislav in 895, Wenceslaus in the 929). The adoption of the Christian faith formed part of these relationships. Many obligations and subordination relations were reasoned by the adoption of Christianity from Bavaria, followed by the creation of relationships between the papacy or Constantinople (as was done in the case of Cyril and Method's mission) and Central European political units.[4]

The Hungarian kingdom entered into similar relations in its first century as the Moravians had done. King Peter Orseolo (1038–1041, 1044–1046) also took a solemn oath of fidelity to the king of the Roman–German empire (the successor of the eastern Frankish empire), and his successor Andrew I (1046–1060) offered to do the same. Such oaths can also be found in the case of the Polish Prince Kazimierz I the Restorer (1034–1058); these relations were of a more permanent nature in the case of the Bohemian Premysls.[5]

Compared to the Moravian Mojmirs or Bohemian Premysls, Hungary was able to resist the strong pressure from the empire. The Roman–German empire, the successor of the Eastern Kingdom of the Franks, gradually closed into itself as a result of inner crises that rendered it unable to execute an active power policy toward its neighbors. The Roman–German empire thus turned into a set of states, and their rulers had to resign to more substantial power state ambitions. Unlike Hungary, Bohemia (and Moravia) became part of the union of the Roman–German empire through their obligations.[6]

As of the 11th century, centralization trends can be observed in Central European space, leading to the creation of compound states. Several countries established a common tie with Hungary. The majority of such ties were of a temporal nature; however, some lasted longer. Thus, (1) associated or affiliated countries (Croatia, Dalmatia, Slavonia) and (2) vassal countries (e.g., Duchy of Galicia) appeared.[7]

The difference was that in associate countries, the head of the state was one in the same as the Hungarian king, while in vassal countries, a personal union existed between the Hungarian king and the local ruler. This personal union impacted both countries' relations. Hungarian kings adopted the habit from the Roman–German empire. Eventually, unions in the form of associate countries became more permanent. The first was the Croatian–Hungarian union.

In 1097, Hungarian King Coloman (Hung. Kálmán) was crowned the Croatian king after a victorious war. This gave rise to the Hungarian–Croatian union, which was originally linked solely to the person of the monarch (thus having the form of a personal union) and lasted until 1918. The countries' union had to be renewed in 1102. According to the later tradition, a treaty (*pacta conventa*) between Hungarian King

4 Razim, 2017, pp. 41–90.
5 Lysý, 2004, pp. 451–468.
6 Boshof, 1979, pp. 265–287; Žemlička, 2014, pp. 16–46.
7 For a more complex description of Hungarian countries' constitutional relations, Kadlec, 1907, pp. 2–3.

Coloman and the top Croatian nobility established a voluntary union between both countries. This interpretation is supported by the enduring union charter.[8]

The Croatian–Hungarian union was not of a personal nature during its entire existence. Although Croatia and Slavonia maintained their own institutions (assemblies, ban, later vicegerency board), they also sent representatives to the Hungarian diet. The resolutions of this common diet were binding for Croatia only after their separate approval by the Croatian assembly. Therefore, majorization (outvoting due to a minority in the number of voters) could not occur. The Croats relinquished this autonomy at the assembly in the years 1790–1791, following Joseph II's death. In 1868, the Hungarian–Croatian Compromise was established, under which the territory of Croatia–Slavonia obtained a special status within the Kingdom of Hungary.[9]

Personal union between Poland and Hungary arose twice. The first time was after the extinction of the Piast dynasty with Kazimierz III's death in 1370. With the approval of the Polish nobility, Hungarian King Louis I Anjou became the new Polish king, and this union lasted until Louis I's death in 1382. The countries were independent and linked only by the person of the monarch, who ruled independently in both countries under the law of each respective country. The second personal union arose in 1440 with the election of Vladislav III Jagiellon as the Hungarian king (he ruled as Vladislav I in Hungary). However, only a part of the country supported him. The Polish–Hungarian union only lasted for a short time, as Vladislav I died in 1444 after the battle of Varna against the Turks.[10]

From the viewpoint of Hungarian history, the unions with the Bohemians involved more perspective and were longer lasting. Technically, Bohemia was not a single state because it had been a union of two countries, namely Bohemia and Moravia, since the 10th century. The Bohemian princes' (kings, since the end of the 13th century) rule over the two countries was gradually extended to other territories like Silesia and the Austrian countries, Lusatia, Luxembourg, and Brandenburg. Thus, the union of the Czech Crown Lands arose. Even though Hungary also joined the common union with the Czech Crown Lands, a union where Hungary would become part of Czech Crown Lands or the opposite, or where Bohemia would be a part of the union of the Hungarian Crown, never occurred.[11]

The first personal link between the two countries arose after the Arpads' extinction on the Hungarian throne in 1301, when Wenceslaus III, supported by only a part of the Hungarian nobility, became the new Hungarian king (he ruled as Ladislav V in Hungary). Personal union did not occur, as Ladislav's father, Wenceslaus II, remained as ruler of Bohemia. Eventually, Wenceslaus III had to retreat from Hungary, and the members of the Anjou dynasty became the Hungarian rulers. A similar situation occurred after their extinction, as Sigismund Luxembourg, brother of Czech and

8 Kristó, 2007, pp. 138–139.
9 Macůrek, 1934, pp. 46–50.
10 Kónya, 2013, pp. 103, 128–130.
11 For the structure of the Czech Crown Lands in late Middle Ages, see, e.g., Šmahel, 1995a, pp. 189–200; Kavka, 1993a; Kavka, 1993b.

German King Wenceslaus IV, ruled in Hungary since the year 1387. Personal union came only after Wenceslaus IV's death in 1419. Sigismund was his successor, and thus, a personal union including Hungarian lands, Bohemian lands, and the Holy Roman Empire arose. Its existence did not, however, lead to closer integration among these units, as the countries retained separate constitutional institutions and institutes. Sigismund Luxembourg decided to preserve this Central European unit after his death, too. Having no legitimate successor, he decided to support the interests of his son-in-law, the Austrian Duke Albrecht Habsburg. After Sigismund's death (1437), he took over rule in Hungary and Bohemia (with much more difficulties). However, in 1439, he died unexpectedly, and the arduously created personal union in Central Europe ceased to exist along with him.[12]

This mode of creating unions continued until the conclusion of the 15th century. Czech King Vladislaus Jagiellon ascended to the Hungarian throne after Matthias Corvinus' death in 1490. The Jagiellons' weak rule posed no risk that the personal union of Bohemian and Hungarian lands could create a stronger common union. However, a personal union was created in 1490 that persevered until the year 1918. Bohemian and Hungarian kings have been one in the same persons ever since; by 1526, these were the Jagiellon dynasty rulers, and after 1526, they were the Habsburg dynasty rulers and the Habsburg-Lorraine dynasty as of the year 1780.[13]

The abovementioned personal unions (except the Croatian–Hungarian union) had one particular aspect in common: no joining of institutions occurred. The unions only had rulers (heads of states) in common, who reigned in accordance with special regulations in the particular countries while respecting these countries' different laws. Their basis consisted of dynastic relations and European dynasties' family (or nuptial) policies like those of the Luxembourgs, Jagiellons, or Habsburgs. These were of a temporal nature only.

All that was to change after the year 1526 with the creation of the Habsburg monarchy, which proved to be long-lasting and vigorous.

The aggregate of the Habsburg monarchy countries, sometimes denoted as the 'Danube monarchy' or less accurately 'Austria,' was a continuation of the original Czech–Hungarian union. It arose on the basis of dynastic agreements between the Jagiellons and the Habsburgs on mutual succession. These were completed after the unfortunate Battle of Mohacs on 29 August 1526, when Czech and Hungarian King Louis II died while fleeing. Although no one realized its consequences at that time, it resulted, after the subsequent fights for the throne in Hungary, in the creation of the Habsburg monarchy, i.e., the union of Central European countries headed by members of the Habsburg (and as of 1780, the Habsburg–Lorraine) house.[14]

12 For the Czech king's Hungarian 'adventure,' see Žemlička, 2017, pp. 350–369. Sigismund's path to the Hungarian throne is described in Dvořáková, 2003, pp. 36-46. Regarding his struggle over the Czech lands, see Šmahel, 1995b, pp. 7–64.

13 Marsina (ed.), 1986, pp. 418–425.

14 See Kann, 1975, pp. 1–56.

The Habsburg monarchy rulers proudly bore a long list of ruler titles; they were emperors, kings, grand dukes, dukes, and markgrafs. The core of the Habsburg monarchy consisted of Austrian lands, the original feudum of the Holy Roman Empire. Based on dynastic agreements, the Bohemian Crown Lands and the Hungarian Crown Lands were added to it in 1526. Moreover, the Habsburgs also bore the imperial title (of the Holy Roman Empire of the German Nation). Until the adoption of the Pragmatic Sanction in 1713 and its approval, the individual lands did not have identical succession rules, and thus, succession principles varied from one country to another.

Therefore, the Habsburg monarchy was originally only united by its monarch. This union had no common name at first, and designations like hereditary lands or other informal names were sometimes used. In the 19th century, the designation 'Austrian empire' came into use (Habsburg monarchy rulers were Austrian emperors since 1804, although this title was not officially used in Hungary), and following the year 1867, the name 'Austria–Hungary' was adopted. In addition to the monarch, other institutions joined the Habsburg Crown Lands like the Privy Council, the Office of the Imperial Court, the Economic Council, the Military Council of the Imperial Court, and the Ministry of the Police.[15]

The union of the Kingdom of Hungary with other countries of the Habsburg monarchy enhanced some rulers' absolutist trends. These were linked in particular with the rule of Leopold I (he ruled as the Hungarian king in the years 1657–1705). His predecessors also had to face the uprisings of the estates in the Kingdom of Hungary and the principality of Transylvania. In relation to those, the Vienna imperial court devised the loss of sovereignty theory (*Verwirkungstheorie*), according to which Hungary was no longer entitled to the discretion to govern its lands as a result of the uprising against its legitimate ruler. Following the Thököly uprising, the monarch supplemented *Verwirkungstheorie* with the concept of original acquisition of the country, according to which the monarch conquered Hungary from the Turks thus acquiring an ownership title to it; therefore, he was no longer bound by the old laws.[16]

When Hungarian King Charles II (he ruled as Roman German Emperor Charles IV) decided to issue the Pragmatic Sanction in 1713, the intention was to create a unifying regulation securing the indivisibility of the Habsburg monarchy lands.[17] The Pragmatic Sanction had to be approved individually in all the monarchy's constituent lands. This process occurred in the years 1720–1724. On one hand, the adoption of the Pragmatic Sanction in the various countries occurred pursuant to each country's individual legislative procedure; on the other, its adoption solidified the unity of the Habsburg compound state. Along with this, the Pragmatic Sanction became

15 Regarding the central administration in Vienna, see: Sokolovský, 1995, pp. 6–10.
16 Gábriš, 2013, p. 15.
17 The Pragmatic Sanction established a unified succession rule in all Habsburg monarchy lands, including a female line succession right.

the constitutional basis for the entire monarchy, which proved to be of a special significance in the 19th century. Although classical political government science only deemed Austria–Hungary to be a real union after the year 1867, its foundations were set in the aftermath of 1526 due to the creation of the common governmental bodies effective in all monarchy lands and also by the Pragmatic Sanction of 1713.[18]

In order to fully comprehend the essence of the union of the Habsburg lands, it is crucial to note the existence of central institutions in Vienna with decision-making powers in the area of military and foreign relations. Unlike earlier personal unions, vis-à-vis the Turkish threat, it was vital for the Habsburg monarchy to coordinate military and foreign relations within a single center.

Hungary obtained a special position within the monarchy. In Habsburgs' view, two categories of countries within the monarchy arose as a result of the Hungarian estates' uprisings and their compromising termination by the Szatmár Peace of 1711. The Bohemian (after the year 1627) and Austrian lands were linked by a stronger bond through absolutist rule, while the bonds with the Hungarian Crown Lands were looser. This difference broadened in the 19th century and led the monarchy to dualism after the year 1867.

A special integration was attempted during the reign of Joseph II (1780–1790), who did not allow himself to be coronated as the Hungarian or Bohemian king and tried to rule directly through imperial directives. This manner of rule met with deep resistance, hence this attempt to centralize the monarchy failed.

The revolutionary events of the years 1848/49 created new relations within the monarchy. Within the framework of reform attempts, the Hungarian Diet adopted a series of articles of law that became known as the April (or March) Laws. Inter alia, they created a Hungarian government and contained a special provision that the monarch exercises his executive powers through the relevant ministry. Hungarian King and Austrian Emperor Ferdinand was rather reluctant to approve these laws on 11 April 1848. In the view of Hungarian politicians, the Kingdom of Hungary became an independent state linked with other hereditary Habsburg lands through personal union only. Hungary began to issue its own money and build its own army, which was contrary to the Pragmatic Sanction in the view of Vienna.[19]

Executive power in Hungary was taken over by the very promptly established Land Committee of Homeland Protection, and when King and Emperor Ferdinand was forced to abdicate in December and was replaced by the young Franz Joseph, the Hungarian Diet did not acknowledge this change, deeming Ferdinand to be the king.

It should be noted that the Hungarian government and the Land Committee of Homeland Protection attempted to enter into relations with foreign countries in accordance with the concepts of Hungarian politicians regarding the country's independence. Although some western European countries were very sympathetic toward Hungary, the most important powers (France and Great Britain) were unwilling to

18 Real unions and the example of Austria–Hungary are analyzed in Jellinek, 1914, pp. 754–761.
19 Brauneder and Lachmayer, 1987, pp. 179–181.

acknowledge Hungary as a country outside the Austrian empire's borders. The only exception was the position of the Kingdom of Piemonte–Sardinia, although its favorable stance toward independent Hungary was only of a temporal nature.

On 7 March, 1849, Emperor Franz Joseph issued the imposed Stadion's Constitution, which considered the Habsburg monarchy lands as mere provinces. This step elicited a strong reaction from Hungary, which had declared independence. Responses from foreign states were rather reserved, and only the Republic of Venetia concluded a treaty with independent Hungary. Finally, Hungarian troops were forced to surrender, and as a result of the repeated application of the loss of sovereignty thesis (*Verwirkungstheorie*), the entire country was strongly embedded in a centralist and absolutist Habsburg monarchy.[20]

The issuance of the October Diploma (20 October 1860) was a return to a partially constitutional state of affairs, promising the restoration of constitutionality in the entire monarchy and a federation to a certain extent. This trend was supported by the new all-empire constitution called the February Patent (16 February 1861), which outlined trends to federalize the monarchy. As Hungarian politicians rejected this text and the newly elected Hungarian Diet supported the notion of an independent Hungary, the emperor dissolved the diet, and a new provisional arrangement was introduced. In 1865, a compromise began to arise between Vienna and Hungary. Negotiations were hastened as a result of military defeat in the war against Prussia in 1866, which definitively extinguished any Austrian hopes of hegemony among the German states (long-term power struggles between Prussia and Austria) as well as in Northern Italy. The defeat was the reason underlying the need to create more permanent relations between Vienna and Pest-Buda. The negotiations between Vienna and Hungarian politicians (Gyula Andrássy, József Eötvös, Menyhért Lónyay) resulted in an agreement on the basic compromise parameters. The Hungarian Diet summoned in the first half of the year adopted several important laws related to the compromise. The monarch also appointed Gyula Andrássy as prime minister, alongside a further eight ministers of the Hungarian government. Hungary finally had its cabinet for the first time after the year 1849. Hungary and Austria thus stood on the threshold of the Austro–Hungarian Compromise.[21]

From among the laws the Hungarian Diet adopted in 1867, one of the more significant was Article of Law No. XII/1867 on the relations of common interest between the Hungarian Crown Lands and other lands under the rule of His Majesty and the manner of their settlement.[22] The settlement eventually became part of the Austrian laws and was incorporated into Act No. 146/1867 r.z. on the common matters of all Austrian lands. It was part of a series of laws (141–147/1867 A.C.) collectively known as the December Constitution that arranged relations in the Austrian part of the monarchy

20 Kónya, 2013, pp. 577–580; Adamová et al., 2015, pp. 223–233.

21 Adamová et al., 2015, pp. 254–280.

22 In Hung. orig. "1867. évi XII. törvénycikk a magyar korona országai és az Ő Felsége uralkodása alatt álló többi országok között fennforgó közös érdekű viszonyokról, s ezek elintézésének módjáról."

until its final dissolution in the year 1918. Under the terms of the compromise, the Habsburg monarchy was transformed into the Austrian–Hungarian empire comprising two subjects informally denoted as Transleithania and Cisleithania (according to the border river Leitha, dividing Austria and Hungary). Although the compromise was entered into between nominally two subjects, in fact, both subjects comprised further subjects.

Concessions on both sides occurred upon the adoption of the Austro–Hungarian Compromise. Vienna accepted the April Laws as effective (although in a form modified by Article of Law No. XII/1867) and also accepted the sovereignty of Hungary and its administration. On the other hand, Hungary accepted the idea of common matters, i.e., the transfer of the administration of matters of foreign affairs and finance upon central Austro-Hungarian institutions in which Hungarian politicians enforced their respective right to participate.

The Pragmatic Sanction became the basis for the relations between Austria and Hungary, expressing unity across the empire represented by a common ruler. As a part of the compromise, Franz Joseph allowed himself to be coronated as the Hungarian king after 19 years of his rule. The coronation ceremony was held in Buda on 8 June, 1867. Thus, Franz Joseph ruled as king in Hungary and as king and emperor in the Austrian part. Therefore, Hungarian institutions were denoted by the attribute 'royal,' while Austrian and Austrian–Hungarian institutions were denoted as 'imperial and royal' (*k. und k.* in German).[23]

Apart from the imperial and royal 'Apostolic Majesty,' the common bodies of the entire monarchy were the following: (1) The Ministry of Foreign Affairs (the minister was the chairman of the Austrian–Hungarian ministerial board), the Ministry of War, and the Ministry of Finance as executive bodies; (2) delegations of parliamentary representatives of the Austrian Imperial Council and the Hungarian Lands Assembly; and (3) the Austro-Hungarian Bank (bank of issue).

The existence of these Austro-Hungarian bodies meant that Austria–Hungary had a common army, although in practice, separate military bodies existed (*Landwehr, hondvédség*) for Transleithanien and Cisleithanien. A common currency also existed (with different bank notes), as did a common customs area.

Delegations were an important part of the compromise arrangements. As Hungarian politicians consistently declined to participate in the activities of the Austrian Imperial Council and refrained from sending their representatives there, the reason for establishing delegations was that no common sessions could occur. Austrian and Hungarian delegations thus communicated through correspondence as a rule. Therefore, the nature of this form is not quite clear. As they did not pass laws, they did not become a uniform legislative body. Their role was to approve the empire's budgets and final accounts. Part of the compromise was also agreement on a method for determining the extent of contributions to finance the common matters and the setting of customs rates. Both parts of the monarchy collected customs duties individually, but

23 Brauneder and Lachmayer, 1987, pp. 181–186.

customs policy had to be resolved in conformity. These negotiations were far from simple due to the different economic structures of Transleithania and Cisleithania.[24]

The nature of the union of Transleithania and Cisleithania was really of interest. Austria–Hungary did not have a common parliament (leaving out the issue of delegations) nor did it have a common legislative body or a common system of law or constitution. Although it acted as a single unit in international relations (it had only one Ministry of Foreign Affairs and one set of embassies), from the internal perspective, relations between Transleithania and Cisleithania were established on the basis of agreements that were individually embodied into separate pieces of legislation in both parts.

This was why some saw Austria–Hungary as a real union, since it had some common bodies in addition to the common head of state. In the Hungarian environment, the notion of a personal union with the elements of the real one was more popular.

Internationally, the Austrian empire was perceived as a single unit as of the adoption of the Pragmatic Sanction at latest. Hungarian politicians' attempts to bring the Hungarian issue to the international field failed in 1848/49 and later during further international crises involving the Habsburg monarchy (1859, 1866). Austria–Hungary became a regional power after a series of defeats, respecting Prussia's dominance after the year 1866 (or unified Germany after 1871). The tense relations between Austria–Hungary and Germany were eased as a result of the outcomes of the Berlin Congress. It resolved the issue of western states' interests in the Balkan peninsula following the Russian victory in the Russian–Turkish war (1877–1878). Thanks to the Berlin congress, Austria–Hungary obtained the opportunity to annex Bosnia and Hercegovina (which happened in the year 1908). It may seem interesting from the view of internal arrangements within Austria–Hungary that Bosnia did not become part of Transleithania or Cisleithania but was governed by the common Austria–Hungarian Ministry of Finance.

As a subject of international law, Austria–Hungary's acts were performed in practice by the monarch in cooperation with the common Austro-Hungarian government, especially with its Ministry of Foreign Affairs. Therefore, Austria–Hungary was entering into international relations in a manner similar to other powers. From the view of foreign orientation, it is important to note that following the consolidation of relations with the German empire based on international treaties, it became part of the so-called Dual Alliance (1879) and Triple Alliance. These treaties were ratified in both parliaments.[25]

International obligations entered into with Germany brought Austria–Hungary into the First World War and thus indirectly contributed to its demise. National movements in both Transleithania and Cisleithania decided to use the opportunity afforded by the weakening of the monarchy to realize their own programs and create

24 One hundred years of the Austrian–Hungarian Compromise became an opportunity for such reflections as Vantuch and Holotík, 1971. See also Barany, 1975, pp. 379–409; Sarlós, 1975, pp. 499–522.
25 For example, the Berlin Congress conclusions were resolved by Article of Law No. VIII/1879 on Berlin Treaty ratification (in Hung. orig. "1879. évi VIII. törvénycikk a berlini szerződés becikkelyezéséről").

nation-states on its ruins. In October 1918, the Hungarian government renounced the union with Austria, and on November 11, Emperor Charles (1916–1918) abdicated. Austria–Hungary ceased to exist.[26]

The principal outcome of the First World War was the territorial disintegration of the Russian, German, and Austro-Hungarian empires and the creation of new states. Thus, after over a century, Poland's existence was restored, the Kingdom of Serbs, Croatians, and Slovenians was created, and a substantial territorial reconstruction of Romania occurred (at the expense of the Austro-Hungarian territory). The newly created Czechoslovak state arose as a combination of the historical Bohemian right (referring to the existence of the Bohemian Crown Lands) and the natural right of self-determination with respect to the territory of Slovakia and Carpathian Ruthenia. The Czechoslovak example was of interest due to the reference to the existence of Czechoslovak (and not the Czech and Slovak) nation. However, the fiction of a uniform Czechoslovak nation became a problem in political practice, dividing the political spectrum.[27]

Like every huge conflict on the European continent, the First World War was also supposed to be definitely terminated by peace treaties between the victorious Allied Powers and the defeated Central Powers. Conference negotiations began on 18 January 1919, in which the great powers of the Entente, notably Great Britain, France, the United States of America, Italy, and Japan, played the most significant role, both formally and factually. Unlike the powers, other Entente states participated in the negotiations only with regard to matters that directly concerned them. On the other hand, the defeated states could not take part in key negotiations and were hardly able to influence the final wording of the peace treaties. Peace treaties were eventually signed in various Paris suburbs, which gave the treaties unofficial titles.

From the internal Central European perspective, the most important treaties proved to be those with Germany (Versailles Peace Treaty), Austria (Saint Germain Peace Treaty), and Hungary (Trianon Peace Treaty); the Sevres Treaty also had an impact on the Czechoslovak border. Formally, these treaties were entered into by the Entente states on one hand and an individual defeated state on the other. The provisions of the treaty comprised the recognition of the new power and the political status quo following the war, in particular of the new states arising from what was once Austria–Hungary. They also contained reparation provisions that were, due to the length and intensity of the war conflict, sky-high, and Germany, designated as the state with the highest responsibility for the outbreak of war, was practically unable to meet them. The obligations arising from the sky-high reparations burdened mutual relations between Germany and France and were subject to further expert economic negotiations in the following decade.[28]

26 Opočenský, 1928, pp. 443–768.
27 The disintegration of Austria–Hungary is described in the comparative monography Rychlík, 2018, pp. 209–253.
28 For the Hungarian perspective, see Romsics, 2006, pp. 105–218.

The implication of these treaties in the particular cases varied. As for Czechoslovakia, the Versailles Peace Treaty signed with Germany on 28 June 1919, stipulated that the border between Germany and Czechoslovakia shall be set based on the historical border of Bohemia and Moravia (they are denoted as the Austrian empire border in the treaty text), awarding Czechoslovakia a smaller part of Prussian Silesia known as the Hlučín region. Other Czechoslovak territorial claims were not recognized. The Saint Germain Peace Treaty with Austria signed on 10 September, 1919 was of similar significance, based on which the borders with Czechoslovakia were set according to the old land border between Austria and Hungary starting from Kopčany/Köpcsény (today part of Bratislava–Petržalka) along the Morava river, following the old land border between Lower Austria and Moravia, Lower Austria and Bohemia, and Upper Austria and Bohemia. Similarly, as in the case with Germany, a deviation from historical borders appeared here in favor of Czechoslovakia. It was the territory of the Valtice and Vitoraz regions, which were attached to the Czechoslovak state. On the other hand, the Trianon Peace Treaty signed between the victorious states and Hungary as late as 4 June 1920 set the state borders in a more complex way. The reason was that no administrative borders had existed within Hungary that the victorious Entente states were willing to apply (Hungarian administrative districts did not respect any natural or ethnic borders). Therefore, the Trianon Peace Treaty set only a framework for borders between Hungary and the neighboring states. A more thorough demarcation of borders occurred directly on site.

Although the positions of Czechoslovakia, Hungary, and Austria differed considerably, in the view of international law, they were all succession states of Austria–Hungary. This was due to the incorporation of a part of the former Austro-Hungarian territory and population into the Czechoslovak state as well the taking over of a part of Austria–Hungary's pre-war state debt. The succession states also differed considerably in respect of law. While Czechoslovakia, after its creation, belonged to the victorious bloc of states, Hungary and Austria were defeated states, and it was necessary to conclude a formal peace treaty with them (the state of war was initiated by the now non-existent Austria–Hungary). Hungary and Austria were not identical to Austria–Hungary in the view of international law. It can be said that the disintegration of Austria–Hungary was not a mere breakdown of the dualist compound state but also a breakdown of its subjects, i.e., the Austrian empire and the Kingdom of Hungary.

The enormous extent of the war conflict started by Germany and Austria–Hungary's aggression in 1914 reinvigorated the idea of an international organization that should resolve future conflicts peacefully. The organization was named the League of Nations, and its rise was embedded in Paris peace treaties. Although American president Woodrow Wilson was one of the biggest supporters of the idea of a global organization, the United States eventually backed out of this organization, as well as from Europe, as such, between the wars.

It should be noted that the hopes placed into this organization did not materialize. For Central European states, the bilateral treaties and multilateral agreements made during this period were of much greater importance. Taking Czechoslovakia as an example, the highest peace guarantee was supposed to be the peace treaty with

France of 25 January 1925. Czechoslovakia's security against the threat of Hungary's revision of treaties was to be guaranteed by further treaties with Yugoslavia (1920) and Romania (1921). Thus, sets of bilateral treaties were at the core of the security framework during the interwar period.[29]

An attempt to implement a more permanent solution to remove war conflict as a legitimate form of conflict resolution in international law was also presented by the so-called Kellog–Briand Pact of 27 August 1928. The pact was signed in Paris by 15 signatories including Czechoslovakia. Many other states acceded to it at a later point. The treaty declared war to be an illegal instrument for resolving conflicts and only allowed for the waging of wars in defense. However, it did not contain any sanction provisions; therefore, it proved to be ineffective in practice. However, it was an important step in the further development of international law.

After Hitler's rise to power in January 1933, Germany gradually renounced its obligations under the Versailles Peace Treaty, which was not only the Nazis but also a great part of the German public despised. The immediate threat to Czechoslovakia came mainly after Anschluβ, the annexation of Austria to Germany in March 1938, although peace treaties explicitly banned such unification of Austria and Germany after the First World War. Thus, the border between Czechoslovakia and Germany was, in practice, extended, in addition to the border line of northern Moravia and Bohemia extending south as far as Bratislava.

After annexing Austria to Germany, Adolf Hitler was able to concentrate on a new goal, Czechoslovakia, which he viewed as an 'artificial' unit. Hitler's aim was to erase Czechoslovakia from the map of Europe. The attacks against numerous members of the German minority in Czechoslovakia, as repeatedly proclaimed in Nazi propaganda, served as an excuse for actions taken against Czechoslovakia. In cooperation with political representatives of the German minority in Czechoslovakia, Hitler demanded the annexation of the border regions of Czechoslovakia (Sudetes) to Germany, and the issue posed a real war threat between the two states. At first, Czechoslovakia relied on its treaties with its allies, but neither France nor Great Britain, with which France coordinated its policy toward Central Europe, had any intention to help Czechoslovakia as a result of the appeasement policy. Czechoslovakia thus found itself abandoned in its attempt to retain the integrity and sovereignty of its state territory. Great Britain and France forced Czechoslovakia through their diplomatic notes in September 1938 to agree to cede the territories in question.[30]

On the initiative of British Prime Minister Neville Chamberlain, who attempted to satisfy German territorial demands through negotiations in the spirit of appeasement, a meeting of four powers occurred: Germany (represented by Chancellor and Reich leader Adolf Hitler), Italy (Prime Minister Benito Mussolini), Great Britain (Prime Minister Neville Chamberlain), and France (Prime Minister Édouard Daladier). It was held in the Munich Nazi Party headquarters (NSDAP) on the night of

29 Adamová et al., 2015, pp. 360–362.
30 Rychlík, 1997, pp. 141–143.

29–30 September 1938. The outcome of the negotiations was an agreement between Germany, Great Britain, France, and Italy, which entered history under the name the Munich Agreement or Munich Dictate. The agreement contained provisions, under which: (1) Czechoslovakia was to cede to Germany the border territories with over 50 per cent of the German population; (2) Czechoslovakia was to vacate this territory by October 1 without causing any damages to the installations there; (3) Czechoslovakia was to release all Sudeten German citizens from detention or imprisonment for political crimes; (4) an addendum to the agreement imposed on Czechoslovakia the obligation to agree to the demands of Hungary and Poland, too.

The Czechoslovak Republic, which did not participate in the negotiations and whose representative did not sign the agreement, accepted the Munich Agreement on 20 September 1938 via a governmental decree.

Both the governmental decree upon which the Munich Agreement relied as well as the Munich Agreement itself are deemed to be legally invalid. The governmental decree was contrary to the Czechoslovak Constitutional Charter and therefore unconstitutional as the government alone could not agree to cessation of the state territory. The consent of a three-fifths majority of the National Assembly chamber was required to change state borders. Moreover, the government accepted Great Britain's and France's proposals only under the condition that Czechoslovakia would be provided guarantees in case of further German demands; however, the powers did not meet this condition. For these reasons, the Munich Agreement was invalid from the perspective of the domestic law in force in Czechoslovakia.

From the perspective of international law, the Munich Agreement was contrary to the League of Nations Pact, the Locarno Agreement of 1925 (the duty of peaceful dispute resolution), and the Kellogg–Briand Pact of 1928 (prohibition on resolving disputes through the use of armed force). On the contrary, consent to cede territories to Germany was obtained only under the threat of force and such legal act was invalid under the international law in force at that time. The reasons for the invalidity of the Munich Agreement may be further supplemented by the following: (1) It was a *res inter alios acta*; the agreement entered into by four international law subjects was made against the interests of another state that did not participate in negotiations nor was a signatory of the agreement; (2) there was an immediate threat of violence from Germany, as Nazi Germany threatened to declare war unless its territorial demands were met; (3) it was fraud on the part of Germany, as Nazi Germany did not intend to be satisfied with the ceded territories only; rather, its genuine interest was the destruction of Czechoslovakia. For this reason, Germany's manifestation of will (that it would be satisfied by obtaining the border territories of Czechoslovakia) was contrary to its real will (to destroy Czechoslovakia as a state). Soon after the Munich Agreement, Adolf Hitler decided to dissolve what remained of Czechoslovakia.[31]

Based on the addendum to the Munich Agreement, Czechoslovakia was forced to hold negotiations regarding satisfying Poland's and Hungary's demands. In the

31 There are many analyses on the validity of the Munich Treaty. See, e.g., Ort, 1967, pp. 43–51.

case of Poland, further territories were ceded in Spiš, Orava, Kysuce, and in the area of Tešín. As the Czechoslovak government agreed to these territorial demands from Poland, the matter came – at least temporarily – to a conclusion. Hungary's attitude was more complicated, as it preferred arbitration by powers more than it desired to reach a mutual agreement with the Czechoslovak government. Therefore, following the failure of mutual negotiations, an arbitration undertaken by the German and Italian ministers of foreign affairs (Joachim von Ribbentrop and Gian Galeazzo Ciano) took place on 2 November, 1938 and became known as the First Vienna Arbitration. The Hungarian demands related to the territories of Southern Slovakia and Southern Carpathian Ruthenia were accepted, with the exception of Bratislava.

The new Czechoslovak borders did not last long, as under the impact of both domestic and foreign pressure, Czechoslovakia disintegrated on 14–15 March 1939. The Slovak state was declared in what remained of Slovakia (March 14), and the so-called Protectorate of Bohemia and Moravia was declared in the remaining territories on 16 March 1939, after the Wehrmacht troops began their occupation.[32]

The stability of the new political situation and changed borders was dependent on the military outcomes of the Second World War. For example, since the Slovak state earned rather broad recognition from foreign states, it should be noted that the most favorable period was the first year of its existence. Apart from the neighboring states (Poland, Hungary, Germany), the Slovak state was also recognized by the Soviet Union, Italy, the Vatican, and de facto by France and Great Britain. However, the states' attitudes changed, for example, as a result of Slovakia joining the war against Poland (1 September 1939). This later resulted in the post-war arrangements in Central Europe disregarding the changes produced by the foreign policy of the Third Reich (Munich Agreement, Vienna Arbitration 1 and 2); however, those that resulted from the will of the Soviet Union as a victorious belligerent (Poland's new borders, annexation of Carpathian Ruthenia to the Union of Soviet Socialist Republics [USSR]) were retained.[33]

One of the key principles of the post-war arrangements was the thesis of the Czechoslovak state's legal continuity. During the Second World War, it existed only in the form of a government-in-exile based in London (represented by President Edvard Beneš and the government). The Munich Agreement was voided during the war by its signatories (France, Great Britain, and Italy), followed by the Federal Republic of Germany in 1973.

The relational arrangements in post-war Europe were to be ensured by a global organization, the role of which would be to prevent conflicts. The United Nations (UN) was established with this goal on 24 October 1935. However, the key status within the UN was granted to the Security Council members with veto power. These were China,

32 Adamová et al., 2015, pp. 425–449.

33 Let us recall that the Slovak state was the Third Reich's first war ally during the attack against Poland in September 1939. The question of *restauratio statu quo ante* after the world war was, however, under different perspectives in the East and West. See Rychlík, 1997, pp. 212–226.

the Soviet Union, the United Kingdom of Great Britain and Northern Ireland, France, and the United States of America.

Following the end of the Second World War, Central European states immediately became part of the Soviet sphere of influence, even though communist regimes were not established at the same time in these countries. These states' different statuses were attributed to their classification as victorious or defeated. In the light of international law, Czechoslovakia was deemed to be a victorious state in respect of the war, disregarding the fact that the Slovak state was actually Adolf Hitler's first direct ally in his march against Poland. Post-war relations in Europe were to be resolved repeatedly through a grand peace conference. As was the case almost 30 years prior, it was held in Paris, with the negotiations launched on 29 July 1946. Unlike the first one, no peace treaty was made with Germany, only with its key allies (Bulgaria, Finland, Hungary, Romania, and Italy, which had the status of defeated states). Regarding the USSR's territorial requirements, a considerable shift of borders occurred in its favor, not only at the expense of the defeated states (Germany, Finland, Romania), but also at the expense of the victorious states Poland and Czechoslovakia.[34]

A special issue of mutual relations determined the status of German and Hungarian minorities in Eastern European countries. As for the German minority members, based on the final Potsdam Conference protocol,[35] the decision was taken to displace them to the German occupation zones. The displacing of Germans involved Poland in particular within its new post-war borders, but also Czechoslovakia and Hungary. A similar fate was prepared for the Hungarian minority members in Czechoslovakia; however, unlike the German minority, the powers in Potsdam did not agree to displace them. Therefore, Czechoslovakia initiated separate negotiations with Hungary, resulting in a population exchange agreement on 27 February 1946.[36] It provided the basis for the mutual exchange of Hungarian inhabitants of Slovak nationality for Czechoslovak inhabitants of Hungarian nationality. In the course of its execution, around 70 000 Slovaks from Hungary and up to 90 000 Hungarians from Slovakia were voluntarily or forcefully displaced. The remaining Hungarians were eventually granted Czechoslovak citizenship anew as late as in 1948.[37]

34 Rychlík, 2020, pp. 43–45.

35 It was held from July 17 to August 2, 1945 and attended by the 'Grand Three', Josif Visarionovič Stalin (USSR), Harry Truman (USA), and Winston Churchill (United Kingdom), who was replaced in the course of the conference by election winner Clement Atlee.

36 It was published under no. 145/1946 Sb. Dohoda medzi Československom an Maďarskom o výmene obyvateľstva (Agreement between Czechoslovakia and Hungary on population exchange).

37 The acts against the German and Hungarian minority members were facilitated by the fact that in the period of the Second World War, these population groups adopted citizenship of the German Reich and the Kingdom of Hungary. Therefore, they were viewed as foreign nationals by the Czechoslovak state. It should be stated that the persons of Slovak or Czech nationality living in the territories of Germany and Hungary who also adopted these foreign citizenships were not viewed in the same way. For a basic overview, see Brandes, Ivančíková and Pešek, 1999. The Hungarian perspective is analyzed, for example, in Vadkerty, 2002, pp. 251–367.

Although the relations among some neighboring states of the newly established Eastern Bloc were rather tense, it was in the USSR's interest as the new hegemon to improve them. The mutual relationships were, at first, governed by various bilateral agreements of mutual friendship and cooperation. However, when a military organization, the North Atlantic Treaty Organization (NATO) was established by the Washington Treaty in 1949 and the Federal Republic of Germany was later allowed to join it, the Soviet bloc responded by creating a military organization of its own via the Warsaw Pact of 1955.[38] It presented itself as a defense pact for socialist countries with common command and control (headquartered in Moscow).

In the course of the existence of the communist bloc in Central Europe, several attempts to manifest disagreements with the regime occurred. The resistance manifestations were violently suppressed in Polish Poznań in 1956, especially the revolution in Budapest in the same year, which led to Warsaw Treaty troops' direct occupation of the country. In 1968, Warsaw Treaty military troops intervened in internal development in Czechoslovakia: the so-called Prague spring. This was the first (and also the last) military action this military bloc undertook. Soviet troops left Czechoslovakia as late as after 1989.[39]

New impulses for the integration of Central Europe came after the fall of the communist regimes in 1989. These processes resulted in the accession of the Central European countries to the Council of Europe structures (from 1990), the North Atlantic Alliance (from 1999), and the EU (after 2004). The degree of mutual links between these states and the experience obtained so far demonstrate the permanent presence of both centripetal and centrifugal forces. It remains to be seen to what extent the integration of European states will prove to be optimal in the European compound state.

38 The foundation members were Albania, Bulgaria, Hungary, German Democratic Republic, Poland, Romania, Soviet Union, and Czechoslovakia. Yugoslavia, as an eastern bloc country, was missing here due to the conflict that was ongoing at that time.

39 Military intervention and decision cross points are described in Valenta, 1991. See also Štefanský, 2009, pp. 265–276.

Bibliography

Adamová, K., Lojek, A., Schelle, K., Tauchen, J. (2015) *Velké dějiny zemí Koruny české. Tematická řada. Stát.* Praha: Litomyšl.

Barany, G. (1975) 'Ungarns Verwaltung' in Wandruszka, A., Urbanitsch, P. (eds.) *Die Habsburgermonarchie 1848–1918. Band II. Verwaltung und Rechtswesen*. Wien: Verlag der Österreichischen Akademie der Wissenschaften, pp. 306–468; https://doi.org/10.18447/BoZ-1977–1174.

Boshof, E. (1979) 'Das Reich in der Krise. Überlegungen zum Regierungsausgang Heinrichs III.', *Historische Zeitschrift*, 228, pp. 265–287; https://doi.org/10.1524/hzhz.1979.228.jg.265.

Brandes, D., Ivančíková, E., Pešek, J. (eds.) (1999) *Vynútený rozchod. Vyhnanie a vysídlenie z Československa 1938–1947 v porovnaní s Poľskom, Maďarskom a Juhosláviou*. Bratislava: Veda.

Brauneder, W., Lachmayer, F. (1987) *Österreichische Verfassungsgeschichte*. Wien: Manzsche Verlags- und Universitätsbuchhandlung.

Dvořáková, D. (2003) *Rytier a jeho kráľ. Stibor zo Stiboríc a Žigmund Luxemburský. Sonda do života stredovekého uhorského šľachtica s osobitným zreteľom na územie Slovenska*. Budmerice: Rak.

Gábriš, T. (2013) 'Dočasné súdne pravidlá a kontinuita práva', *Historia et theoria iuris*, 5(1), pp. 8–22.

Hoffmann, H. (1969) 'Böhmen und das Deutsche Reich im hohen Mittelalter', *Jahrbuch für die Gechichte Mittel- und Ostdeutschlands*, 18, pp. 1–61.

Jellinek, G. (1914) *Allgemeine Staatslehre*. Berlin: Verlag von O. Häring.

Kadlec, K. (1907) *Uherské ústavní dějiny do Ottova slovníku naučného*. Praha: Nákladem J. Otty.

Kann, R. A. (1975) 'Die Habsburgermonarchie und das Problem des übernationalen Staates' in Wandruszka, A., Urbanitsch, P. (eds.) *Die Habsburgermonarchie 1848–1918. Band II. Verwaltung und Rechtswesen*. Wien: Verlag der Österreichischen Akademie der Wissenschaften, pp. 1–56; https://doi.org/10.18447/BoZ-1977–1174.

Kavka, F. (1993a) *Vláda Karla IV. za jeho císařství (1355–1378). (Země České koruny, rodová, říšská a evropská politika) I. díl (1355–1364)*. Praha: Univerzita Karlova Praha.

Kavka, F. (1993b) *Vláda Karla IV. za jeho císařství (1355–1378). (Země České koruny, rodová, říšská a evropská politika) II. díl (1364–1378)*. Praha: Univerzita Karlova Praha.

Kónya, P. (ed.) (2013) *Dejiny Uhorska (1000–1918)*. Prešov: Vydavateľstvo Prešovskej univerzity v Prešove.

Kristó, Gy. (2007) *Magyarország története 895–1301*. Budapest: Osiris Kiadó.

Lysý, M. (2004) 'Politika českého kniežaťa Břetislava I. (1035–1055) voči Uhorsku', *Historický časopis*, 52(3), pp. 451–468.

Lysý, M. (2014) *Moravania, Mojmírovci a Franská ríša. Štúdie k etnogenéze, politickým inštitúciám a ústavnému zriadeniu na území Slovenska vo včasnom stredoveku*. Bratislava: Atticum.

Macůrek, J. (1934) *Dějiny Maďarů a uherského státu*. Praha: Melantrich.
Marsina, R. (ed.) (1986) *Dejiny Slovenska I*. Bratislava: Veda.
Opočenský, J. (1928) *Konec monarchie Rakoskou-Uherské.* (Publikací Archivu Ministerstva zahraničních věcí ČSR řada první, číslo 5). Praha: Orbis a Čin.
Ort, A. (1967) 'O neplatnosti mnichovského diktátu', *Mezinárodní vztahy*, 2(3), pp. 43–51.
Razim, J. (2017) *Věrní Přemyslovci a barbarští Čechové. Česko-římské vztahy v raném a vrcholném středověku*. Praha: Leges.
Romsics, I. (2006) *Trianonská mierová zmluva*. Bratislava: Kalligram.
Rychlík, J. (1997) *Češi a Slováci ve 20. století. Česko-slovenské vztahy 1914–1945*. Bratislava: AEP a Ústav T. G. Masaryka.
Rychlík, J. (2018) *Rozpad Rakousko-Uherska a vznik Československa*. Praha: Vyšehrad.
Rychlík, J. (2020) *Československo v období socialismu 1945–1989*. Praha: Vyšehrad.
Sarlós, B. (1975) 'Das Rechtswesen in Ungarn' in Wandruszka, A., Urbanitsch, P. (eds.) *Die Habsburgermonarchie 1848–1918. Band II. Verwaltung und Rechtswesen*. Wien: Verlag der Österreichischen Akademie der Wissenschaften, pp. 499–535; https://doi.org/10.18447/BoZ-1977–1174.
Scholl, C. (2017) 'Imitatio Imperii? Elements of Imperial Rule in the Barbarian Successor States of the Roman West' in Scholl, C., Gebhardt, T. R., Clauß, J. (eds.) *Transcultural Approaches to the Concept of Imperial Rule in Middle Ages*. Frankfurt am Main, Bern, Bruxelles, New York, Oxford, Warszawa, Wien: Peter Lang, pp. 19–39; https://doi.org/10.3726/978-3-653-05232-9.
Sokolovský, L. (1995) *Prehľad dejín verejnej správy na území Slovenska. II. časť (Od roku 1526 do roku 1848)*. Bratislava: Metodické centrum mesta Bratislavy.
Steinhübel, J. (2021) *The Nitrian Principality. The Beginnings of Medieval Slovakia*. (East Central and Eastern Europe in the Middle Ages, 450–1450, Volume 68). Leiden, Boston: Brill; https://doi.org/10.1163/9789004438637.
Šmahel, F. (1995a) *Husitská revoluce 1. Doba vymknutá z kloubů*. Praha: Karolinum.
Šmahel, F. (1995b) *Husitská revoluce 3. Kronika válečných let*. Praha: Karolinum.
Štefanský, M. (2009) 'Moskovský protokol a rokovania o rozmiestnení sovietskych vojsk' in Londák, M., Sikora, S. (eds.) *Rok 1968 a jeho miesto v našich dejinách*. Bratislava: Veda, pp. 265–276.
Vadkerty, K. (2002) *Maďarská otázka v Československu. Trilógia o dejinách maďarskej menšiny*. Bratislava: Kalligram.
Valenta, J. (1991) *Sovětská intervence v Československu 1968. Anatomie rozhodnutí*. Praha: Svoboda.
Vantuch, A., Holotík, Ľ. (eds.) (1971) *Der österreichisch-ungarische Ausgleich 1867: Materialien (Referate und Diskussion) der internationalen Konferenz in Bratislava 28. 8. – 1. 9. 1967*. Bratislava: Verlag der Slowakischen Akademie der Wissenschaften.
Žemlička, J. (2014) 'Království Přemysla Otakara I. v optice Zlaté buly sicilské', in Wihoda, M., Žemlička, J. (eds.). *Zlatá bula sicilská. Mezi mýtem a realitou*. Praha: Nakladatelství Lidové noviny, pp. 16-46.
Žemlička, J. (2017) *Do tří korun. Poslední rozmach Přemyslovců (1278–1301)*. Praha: Nakladatelství Lidové noviny.

| Chapter 7 |

Private Law Codifications in East Central Europe

Emőd VERESS

ABSTRACT

The codification of civil law implies the creation of a fundamental law in a private context. The process itself is fascinating: the social and political context that shaped East Central Europe's civil codes. What models were used in the codification process and who were the key players? English-language legal history works generally speak very briefly of East Central Europe as a region of the model being followed and may dedicate a few lines to mentioning which civil code is a translation or adoption of which Western model. In fact, this story is much more complex. Adaptation included innovative elements, and the way in which the courts applied these codes revealed the region's specificities. Most civil codes of East Central Europe cannot be considered transplants and are as original as the important codes in different world regions. This chapter firstly analyzes the two 19th-century waves of codification. Secondly, the chapter examines the other three waves of codification in the 20th century. The emphasis is on the specificities of East Central Europe and on the comparative legal method.

KEYWORDS

codification, civil codes, East Central Europe, Croatia, Czechia, Hungary, Poland, Romania, Serbia, Slovakia, Slovenia.

1. Codification: origins and purposes

A code, i.e., a 'codex' or a 'book,' is a symbol of a written, organized, logical, coherent legal text. The creation of codes is codification: high-order legislation of great cultural significance.[1] The process of major civil law codification dates back to the 19th century. It started as a result of bourgeoisie revolutions aimed at overthrowing feudalism. Thus, the name 'civil' = 'bourgeois' code also indicates these revolutions' achievements: These codes implement a system of ideas based on private property, which removes feudal ties and puts the citizen at the center of society. Codification "*was based on principles of the equality of all citizens, the inviolability of private property and contractual freedom*."[2] For example, the abolition of the firstborn male heir's privileged legal inheritance status and the introduction of equal inheritance for children

1 Nizsalovszky, 1984, p. 103.
2 Stanković, 2014, p. 882.

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were an essential means of consciously demolishing large estates.[3] Gustave Flaubert (1821–1880), a French writer (who also studied law), writes the following in one of his important novels, demonstrating the effects of codification:

> *But simple-minded people get enraptured about the Civil Code, a work fabricated – let them say what they like – in a mean and tyrannical spirit, for the legislator, in place of doing his duty to the State, which simply means to observe customs in a regular fashion, claims to model society like another Lycurgus.*

In reality, civil codes are meant to endure over a long period, and they have a conservative nature. This is true even in the case of the French codification:

> *The revolutionary upheaval in the legal and economic status of the individual, equality before the law, civil liberties, the abolition of class privileges, the radical reform in the tenure of real property, in the order of inheritance, in the system of mortgages, the introduction of civil marriages and civil divorces – all these fundamental measures amounting to the abolition of the feudal system were already affected by a number of statutes enacted by the National Assembly and the Convention starting in 1789.*[4]

Therefore, Code Napoléon consolidated, not introduced, the revolutionary ideology; hence, the term 'post-revolutionary' legislation is accurate.[5] The conservative nature of German and Swiss codification is evident. This does not mean that the civil codes cannot be instruments of reform, but these reforms are generally minor corrections and not fundamental changes.

Revolutions in private law necessitate transitory legislation, and these norms, in general, are exterior to the civil codes. In East Central Europe, several such transitions took place. First, a transition occurred from a 'feudal' legal order to a capitalist, bourgeoisie legal order (the first and second waves of codification in the 19th century). In Western Europe, this legal order has evolved organically since this transformation. This evolution was limited in East Central Europe, as a detour prevented organic development. After the Second World War, the property regime underwent forced transformation, and a Soviet-type economy was introduced, based on the dominance of state ownership and planned economy. This reform was also realized outside the civil codes, through transitory norms. Finally, there was a return to the capitalist legal order, based on private property and market economy, necessitating the third set of transitory, 'revolutionary' norms. In this context, civil codes are conservative, and these norms are meant to represent permanence. Dynamism is realized through means other than the civil codes.

Codification in private law from this perspective ends an era of change (the transition), fixes the novel system of norms for a new epoch and for a longer period of time,

3 Vékás, 2017, pp. 220–221.
4 Rudzinski, 1965, p. 34.
5 Rudzinski, 1965, p. 35.

and demands the systematization of the previous transformations. The requirement of legal certainty is served more effectively by a well-crafted code than by the daily zeal of the legislature and an untraceable flood of legislation.[6] In general, codification cannot lead to a fully comprehensive or complete code, as such a creation is utopian. On the other hand, "*Codification can be successfully applied to summarize the interlinked parts of the legal system, in particular, a given field of law or part of a field of law.*"[7] However, after acknowledging that not even the French code is in itself revolutionary, we can find truly revolutionary codes in East Central Europe, such as those used to foster the bourgeoisie transformation of a 'feudal' society. This is the case in Romania, where the adoption of a civil code in 1864 was not preceded by the formation of a new economic order; rather, the code itself was a tool in these transformations.

The main reasons for codification are:

- ensuring general knowledge of legislation;
- where appropriate, standardization and systematization of legislation;
- servicing legal certainty as a precondition for stability and economic development;
- strengthening citizens' political identity;
- expressing value choices;
- in some cases, codification is an instrument of reform and modernization.

Codification in East Central Europe was deeply rooted in common European trends, but it also had its specificities. In order to proceed with a comparative analysis of the legal history of codification, several factors can be taken into consideration: (1) Is there a unitary code or are several distinct acts used to regulate private law? (2) Is there a dualist system (that is, a specific commercial code besides the civil code) or a single code that also serves the needs of private persons and businesses (monist system)? (3) Differentiation is possible based on the models used for codification (Austrian, French, German, Swiss regulation). (4) Important criteria can determine the intensity of model-following: There are cases of direct introduction of a civil code, of an almost complete adoption and translation of a civil code, of medium-intensity model tracking (e.g., the use of multiple models), and finally, low-intensity model tracking, where the act presents original solutions. These questions are answered in the final compendium at the end of the present chapter.

2. Codification: models

For the purposes of the historical analysis, we have to consider the main different models that served as a guiding point for codification in East Central Europe. As a general trend, it was noted that "*The countries concerned* [...] *are traditionally accustomed*

6 Vékás, 2017, pp. 216–219.
7 Varga, 2002, p. 377.

not to look at the solutions devised by the others among them, preferring instead to shop for solutions in vogue in Western countries."[8]

Practically, the Austrian empire was the home of the first modern codification of private law: After the 1786 project, an experimental version of the Austrian civil code entered into force in 1797 in the province of Galicia (at present, this historical region is divided between Poland and Ukraine).[9] These were the modernization efforts of enlightened absolutism. The 'final' version of the Austrian civil code (*Allgemeines Bürgerliches Gesetzbuch* [ABGB])[10] "*was enacted in 1812 for the non-Hungarian part of the Austrian monarchy*."[11] Therefore, the Austrian civil code served as a starting point for modern codification in several states within the region. From the beginning, it was a codification for different nationalities: "*Immediately after the enactment of the ABGB, official translations were published. All in all, translations existed in all languages spoken in the Habsburg Empire so each nationality could hold the ABGB for a law of its own*."[12] The Austrian civil code was applied by courts and commented on in different languages in the region. It was stated that:

> *Contrary to France, where in the effort to apply even more radical idea of equality of all men with consciously abandoning the historical regions and, more importantly, merging the concept of a French citizen with that of a member of a French nation, citizenship in the Austrian Empire was never merged with a unitary concept of nationality. Alongside the historical regions, the constitution recognized the fact of the existence of different nationalities (Stäme) and conferred upon them certain important rights, as well. It goes without saying that one was faced here with an inherently dualistic communal identity (or better, pluralistic one: apart from national, also that of pertaining to a historical province on one hand and being a citizen of the Austrian Empire on the other.*[13]

Another possible model was the French civil code (*Code Civil*) adopted in 1804.[14] The French code's main merit is that its definitions are clear and easy to understand, which allows lay people to understand the code (as opposed to the German code). Its main flaw, on the other hand, is superficiality.[15]

The French and the Austrian codes

8 Izdebski, 1996, p. 6.
9 Brauneder, 2013, pp. 1019–1020; Veress, 2020a, p. 42. The 1794 *Allgemeines Landrecht* of Prussia was not a civil code but rather a general set of rules intended to cover the whole legal order.
10 Van Caenegem, 2004, pp. 124–125.
11 Brauneder, 2013, p. 1019.
12 Brauneder, 2013, p. 1025.
13 Škrubej, 2013, p. 1076.
14 Van Caenegem, 2004, pp. 147–151.
15 Szászy, 1947, p. 34.

> *differed fundamentally in the question of whose will it was that the two nominally represented, the first the so called general will of the people whereas the latter, the will of the monarch (although expertly couched into the principles of the rationalistic natural law theory).*[16]

The third codification that influenced this region was the German code. The antecedent of German codification was the Prussian *Allgemeines Landrecht* (1794).[17] This legislation contained 17 000 paragraphs in a manner that was too casual, overshadowing general rules and abstraction. It covered all fields of law, not just civil law, and its content was influenced by the school of natural law. However, after the Landrecht, the momentum for codification in the German territories slowed because the school of natural law was replaced by the historical school of law, the main tenet of which was that law appears not as a free creation of the wisdom of the legislature but as a result of organic historical development. That is, the correct way to legislate in this view is not codification but rather the development of customary law. According to Friedrich Carl von Savigny (1779–1861), the leading scholar of the historical school, German jurisprudence was not yet ready for the task of codification. Moreover, codification was not absolutely necessary, as the tools for legal development were included in the *Volksgeist* ('national spirit'). The *Volksgeist*, a carrier of Roman and Germanic legal thought, is the appropriate bearer and developer of customary law.

The task of the legislature and the science of law is not codification in its sense as an instrument of social transformation but rather the ascertainment of the law developed organically by the people's soul. In the long run, however, the opposing position, the pro-codification views of Anton Friedrich Justus Thibaut (1772–1840), a law teacher in Heidelberg, prevailed.

Thus, the German civil code (*Bürgerliches Gesetzbuch*, BGB)[18] was not adopted until 1896, and it came into force in 1900. Regarding the German civil code:

> *This vast work excels with its logical and consistent system, precise conceptualization, and regulation of all major issues of private law. These advantages are counteracted by its excessive abstractness and complexity of structure, which is accompanied by a lack of comprehensibility.*[19]

In Switzerland, several separate laws cover the classic areas of the regulation of civil codes: the Obligations Act (*Obligationenrecht*), which was passed in 1881 and came into force in 1883, and the regulations for persons, family, succession, and property (*Schweizerisches Zivilgesetzbuch*), which were adopted in 1907 and entered into force in 1912.

16 Škrubej, 2013, pp. 1068–1069.
17 Van Caenegem, 2004, pp. 123–124.
18 Van Caenegem, 2004, pp. 155–159.
19 Villányi, 1941, p. 5.

> *It is worded in vernacular language, it is easy to understand even for a non-lawyer… It consists of few sections, is short… Allows the judge wide freedom. In addition to the Austrian Civil Code, the Code Civil and the BGB, it is the best code in the world.*[20]

The German and the Swiss codes, born after decades of social and political stability, "*fulfilled only one function in common with such revolutionary codes as the French code. They unified the civil law which was diverse in the different parts of Germany and the Swiss cantons as it was in pre-revolutionary France*."[21]

In Italy, the first civil code was adopted in 1865 and repealed by the 1942 *Codice civile*. The date of its adoption is debatable: The code was developed and enacted during Mussolini's fascist dictatorship and was described as an excellent achievement of the new Mussolini civilization. However, "*fascist ideology did not leave a significant mark on the code… Thus, after the fall of fascism, it was enough to stylistically amend the Italian Civil Code and remove some specific institutions from it*."[22] Traces of the idea of corporatism can indeed be found in the *Codice civile*.

All the abovementioned codes are still in force, with some reforms and amendments. We will undoubtedly see that these codes exerted a great influence on codification in East Central Europe. Codes were used as tools of reform and modernization. In some cases, they were implemented as strange bodies into the organism of agrarian society, but they ultimately served as the engines of deep transformation.

Even in cases where model-tracking was intense, these codes, when implemented and adapted to suit a certain milieu, also created something beyond the model. A civil code, applied by the courts, became a living text that was adapted to suit local realities, became part of the culture, and in certain cases was even altered by local specificities. East Central Europe was also a terrain of legal innovation. This was not a 'copy and paste' zone for Western codification. The codes became organic parts of the legislation and culture; their adoption was also possible only because they also represented the legal ethos and values of this geographical area. Identical legal texts came to exist independently, raising original interpretations in a specific context. Several codes within the region can be considered truly original. This development shows that there is a common East Central European legal tradition.[23]

As a structural model, in connection with the systemic approach to private law, two solutions are possible. On the one hand, there is the traditional model, the dualistic regulation of private law. In this system, private law can be subdivided or subclassified into two basic subsystems: civil law itself and commercial law. Thus, trade, more precisely, economic life, has its own partial private law differentiated from the general rules of common private law. The main argument that can be invoked in support of maintaining the dualistic system is that trade and business

20 Szászy, 1947, p. 37.
21 Rudzinski, 1965, p. 35.
22 Kecskés, 2004, pp. 260–261.
23 Izdebski, 1996, p. 3.

must be conducted in conditions of speed, flexibility, transparency, and maximum predictability, with ample protection offered to creditors, which cannot be achieved through civil law because this branch of private law seeks to defend the public interest and the balance between the interests of the creditor and those of the debtor and is therefore unable to ensure the conditions of efficient trade. The dualistic system, in fact, finds its origin in customary commercial law (*lex mercatoria*), which developed concurrently with but separate from the rigid system of private feudal law, which different states subsequently codified. According to Ödön Kuncz, commercial law is 'a lace-like refinement of private law' that differs from private law in the same way as "*intense and planned trade is different compared to relations of private* [*economic*] *life*."[24] Manifestations of the dualistic principle are constituted, for example, by the French norms pertaining to land and maritime trade (the *Ordonnance de commerce* of 1673 and the *Ordonnance de la marine* of 1681) and the commercial code of France (1807), the commercial code of Spain (1829), the common commercial code of the German States (1861), the commercial code of Germany (the *Handelsgesetzbuch* of 1897), and the Italian Code of Commerce (1861, 1883). It follows from the data that the principle of the dualistic concept was most prevalent in the 19th century. In East Central Europe, similar legislation was enacted, such as the Romanian commercial code (1887), based mainly on the Italian model, and the Trade Act in Hungary (Act XXXVII of 1875), based on the model of the *Handelsgesetzbuch* of 1861.

The alternative is the monistic concept of private law. There is no separate commercial law in this system, as civil legal relations and those born in the course of commercial activities are subject to and determined in accordance with an identical set of rules. Even in the age that was the apogee of the dualistic concept, that is, in the 19th century, the conclusion was already drawn according to which the differentiation of civil law from commercial law is due to extrinsic, relative reasons of historical origin, and this separation jeopardizes the unitary character of positive substantive law and legal security. In the 20th century, the monistic perception spread unambiguously. For example, Italy, through the civil code adopted in 1942, switched to the monistic concept. The French, German, and Austrian legal systems, however, maintained the dualistic tradition and concept of regulation. The fundamental argument that supports the introduction of the monist system is that private law, which was rigid in ancient times, accelerated and has been transformed today to such an extent that it has become apt to ensure the flexibility required for trade activities, and therefore, no need subsists for a separate and distinct trade law. General civil law has taken on the character of commercial law, assimilating itself to the latter. In this transformation, commercial law played the main role that contributed to the increase of the flexibility of civil law to the degree known today. Commercial law sculpted the face of civil law to its likeness, and through this – in the states that assumed the monistic position in place of the dualist one, making the transition to the first regulatory model – it finally liquidated itself. In East Central Europe, both the dualistic and monist systems are present.

24 Kuncz, 1946, p. 79.

3. The first wave of modern codification in East Central Europe – the first half of the 19th century

3.1. Overview

The territory that forms the subject of analysis at the beginning of the 19th century was not the present-day variety of states. Practically, East Central Europe was ruled in 1815 by the Kingdom of Prussia, the Empire of Austria, the Russian Empire, and the Ottoman Empire. The period was characterized by the emergence of national movements and a call for modernization, both – in most cases – a source of conflict and crisis within the ruling empires.

3.2. Wallachia and Moldova

The two principalities were a collision zone of Russo-Turkish antagonisms. In the Russo-Turkish War of 1806–1812, Turkey sought to regain its former position in the Black Sea. Kutuzov defeated the Turkish forces in 1811, and the Peace of Bucharest was concluded in 1812. Eastern Moldavia (Bessarabia) was annexed to Russia. When the Russian troops withdrew from the two Romanian principalities, the Turkish Porte appointed Ioan Caragea as prince of Wallachia for 7 years and Scarlat Calimach as prince of Moldavia.

For Greek officials who held high positions in the Turkish administration (dragoman or interpreter), becoming a prince of the Wallachian or Moldavian principality was a career highlight. Since the Greeks originated from the Fener district of Istanbul, this period in the two principalities' history is known as the Fanariot period (from the early 18th century to 1821). This period was generally characterized by a rapid turnover of princes and a high degree of corruption. The same prince could rule in one principality at one time, in another at other times, and several times in the same principality. These princes were educated men, speaking several languages, who were familiar with Western culture as well as Eastern culture. The reigns of Caragea and Calimach mark the very end of the Fanariot period.

Calimach introduced economic and educational reforms in Moldova. In 1817, he promulgated the *Codul Calimach* or *Codica Țivilă a Moldovei*, a civil code in Greek. In 1819, he was deposed by the sultan. However, his code survived the unification of the two principalities and remained in force until 1864, when the civil code came into force. The Calimach Code was translated into Romanian in 1833. The code followed Byzantine traditions, but the direct influence of the 1811 Austrian civil code and the 1804 French civil code was also evident. The strong Austrian influence can be explained by the fact that Christian Flechtenmacher (1785–1843), a Saxon from Brasov who had studied in Vienna, played a major role in drafting the code, alongside Anania Cuzanos and Andronache Donici. In his work, Flechtenmacher often referred to the works of Franz von Zeiler, a leading figure in Austrian codification. Prince Calimach invited Flechtenmacher to become a lawyer, and he remained in Moldavia for the rest of his life, later receiving the rank of boyar. He departed from the Byzantine

tradition and marked a rapprochement with the West. This code did not aim at a universal synthesis of laws; rather, it concentrated exclusively on one branch of law, civil law.[25] It was structured in three parts: rules on persons, rules on things, and rules on both persons and things. The French code's impact is evidenced by the rules on guardianship, succession, and contracts including marriage contracts concluded in a foreign state.

In 1818, a code was adopted in Wallachia on Caragea's initiative: *Condica lui Caragea*. Caragea was condemned for his excessive profiteering (selling off provincial offices, elevation to the rank of boyar for money, excessive tax increases). During his 6 years as a prince, he amassed considerable wealth, and when he felt he was losing the sultan's support, he fled. His legislation remained in force until 1864. This code was published in Greek and printed in Vienna, and a Romanian translation emerged later. The law was

> *deposited with the Metropolitan Bishop, by order of the Prince, who was also responsible for checking that the new law remained in accordance with the imperial laws and ancient, canonized customs of the Byzantine Empire, which had more permanent links with the Byzantine and Balkan worlds, and also placed greater emphasis on its legal traditions.* [26]

As a reason for codification, Caragea stated that the

> *old, sanctioned collections of rules, unclear, unwritten customs, and the few codes that had not been developed, written laws, were not fit to do justice to anyone, and it became necessary to resort to the laws of the Roman emperors. Thus three groups of sources of law were formed, which often contradicted each other, and the dangerous situation arose whereby the law which was dictated by the pleasure of the strongest, the shrewdest, and the most learned was applied.*[27]

The aim of codification was, in fact, to strengthen legal certainty by unifying old rules and creating new ones. The *Condica lui Caragea* contained civil law, criminal law, and procedural law, i.e., it can be considered a traditional general code, without specialization. Its drafting was mainly the work of the logothete (chancellor-general) Nestor and Atanasie Hristopol, who produced a Greek text of literary quality, but the Romanian translation was not of the highest quality due to the immaturity of the Romanian legal language.

25 Demeter, 1985, p. 209.
26 Demeter, 1985, p. 209.
27 Demeter, 1985, p. 209.

3.3. Hungary

Hungary had a very strong legal culture deeply rooted in medieval customary law.[28] In 1840, company law and bills of exchange were regulated in a modern manner. Act XV, adopted in the context of the revolution of 1848–1849, provided for the drafting of a civil code on the basis of the abolition of the *aviticitas* (the bound succession and circulation regime of the noble estate). The proposal was submitted in the next parliamentary session. The codification would have been led by a truly competent jurist, László Szalay. However, this could not take place due to the fall of the revolution; therefore, in general, the old customary private law was in force until 1853, when the Austrian civil code was introduced for a short period (1853–1861).

3.4. The territory of Poland

At the end of the 18th century, Poland was partitioned between Prussia, Russia, and Austria, and it lost its independence, which resulted in the fading of the Polish legal system and tradition.[29] Practically, this meant that in the territory of Poland, several legal systems were in force: German, Austrian, French, Russian, and Hungarian.

3.5. Serbia

Serbia gained its independence and statehood gradually from under Ottoman rule. After the first (1804–1813) and the second revolution (1815–1830), the Ottoman empire was obliged to recognize Serbia's autonomy, with Miloš Obrenović recognized as the prince. Serbia even adopted a constitution in 1835. In 1837, Miloš Obrenović commissioned a civil code from the lawyer (and poet) Jovan Hadžić. Hadžić studied law in Pest and Vienna, obtaining his doctorate in law in Pest in 1826.[30] He presented the code's text, influenced mainly by the Austrian civil code.[31] The code was adopted in 1844, under the rule of Aleksandar Karađorđević. This work is also important as the source of modern legal language. The code consisted of 950 paragraphs and was practically an abbreviated version of the Austrian civil code (1 502 paragraphs).[32] The reception of the Austrian regulation was favorable for commercial relations with the Habsburg monarchy.[33] However, regulations on family and inheritance were adapted to local realities, as Hadžić was forced to "*give preference to the significantly more conservative Serbian customary law. At that time in Serbia, the position of men in society was better than that of women, and male children had advantages over female children in matters of succession*."[34] Practically, in the *zadruga*—a family cooperative, a self-sufficient

28 Van Caenegem, 2004, p. 178.
29 Zoll, 2014, p. 126.
30 Hadžić is also the founder of the Matica Srpska, an important cultural–scientific institution that is still active today.
31 Horváth, 1979, pp. 254–255.
32 It is stated to be the 'fourth' modern codification in Europe (see Stanković, 2014, p. 881). This does not seem to be precise. For example, the Austrian civil code was implemented in Liechtenstein in 1811 or in a specific version in Moldova in 1817.
33 Horváth, 1979, p. 255; Dudás, 2013, p. 10.
34 Stanković, 2014, p. 887.

organization, and an association of life, work, and property—the possessions were family-owned and the right to inherit was reserved for male descendants.[35]

> *They remain in the family, and the property they inherit remains within the community because they do not depart from it. Female descendants generally marry and join other families (unions), so that what they inherit goes to a different community. In this situation, traditions prevailed and the exclusion of female children from succession became the norm.*[36]

This was criticized, since this family model was not the only one that existed in Serbia, and in more urban areas, the rule was a retrograde norm. Owing to the norms that made the dissolution of or separation from a *zadruga* possible, Hadžić was considered the destroyer of this traditional social unit. The realities were more complex. The norms may have facilitated these changes, but other changes were more important: these structures' economic self-sufficiency was threatened by the growing number of members; coexistence in the context of modernization was no longer smooth, and personal (intergenerational) conflicts were frequent; individualism overtook large-family collectivism under the changed social circumstances; new fiscal policies considered the individual as the subject of taxation, etc.[37] The dawn of the *zadruga* began decades before the Serbian civil code. The idea of the *zadruga* as an ideal way of life sometimes reoccurred thereafter in idealist movements of thought.

However, the code was a tool for modernization as well, and it consisted of many positive institutions.

> *One of the most important aspects of the codification was that it clarified property law in Serbia. No less relevant was the establishment of a framework for the development of capitalist commerce and financial relations… The dream of a connection to Western Europe also became a reality.*[38]

Paragraph 211 of the code stated "*that every Serb is the total master of his possessions, so that he is entitled to enjoy them and dispose of them at will, to the exclusion of all others, within the limits of the law.*" This definition was a revolutionary change compared to the many limits of the exercise of property rights in the context of Serbian customary law.

Serbia gained its de facto independence in 1867–1868 and was internationally recognized in 1878. In 1882, the principality was transformed into a kingdom.

In the first phase of the code's application, there was a problem with the human resources needed to properly understand and apply the new legislation, but in a

35 Bíró, 2000, pp. 51–52; Stanković, 2014, pp. 887–888.
36 Stanković, 2014, p. 888.
37 Bíró, 2000, pp. 57–58.
38 Stanković, 2014, pp. 886–887.

decade, this problem started to be solved, and reform of the inefficient civil procedure was requested.[39] The 1844 civil code was in force until the Soviet-type dictatorship emerged.

3.6. The territories of Croatia and Slovenia

Present-day Croatia, Slovenia, and Czechia were parts of the Habsburg empire, so the Austrian civil code was intended to enter into force in these territories in 1812.

However, parts of Croatia and Slovenia were occupied by the French, who organized the French Illyrian provinces (1809–1814).[40] Here, for this period, the first French governor, Auguste de Marmont introduced the French civil code.

In general, in these territories, the Austrian civil code was in force from 1812, and it remained in force in the succeeding territories until 1946 (Croatia and Slovenia) and 1950 (Czechia).

4. The second wave of codification in East Central Europe – the second half of the 19th century

4.1. Wallachia and Moldova; Romania

In 1859, Wallachia and Moldova integrated under the name of the United Principalities, and in 1862, the new state took the name Romania. It gained independence from the Turks in 1877. A modernization process was set in motion, characterized by a move away from Byzantine traditions and Turkish influences and the adoption of Western models.

A unified civil code had already been adopted in united Romania: the *Codul civil*, which repealed the two principalities' previous codes, the Calimach and Caragea codes. The civil code entered into force on 1 May 1865. This code is essentially a transposition—in practice, a translation—of the French code of 1804. The Belgian Mortgage Act of 1851 served as a model for mortgage regulation, and to a lesser extent, Italian influence can be detected. "*The source of law for the very specific Romanian situation remained customary law.*"[41]

4.2. Hungary

In 1853, the Austrian civil code was introduced as a forced measure of imperial unification initiated by the Habsburgs. The application of the AGBG lasted only until 1861. The reason for resentment toward the AGBG was that after the defeat in the war of independence in 1848-49, the code was artificially forced (octrooted) on the country by the means of absolute power, and the issue of the preservation of old Hungarian

39 Hadrovics, 1944, pp. 61–63. The Code of Civil Procedure of 1853, fundamentally modified in 1865, also took l the similar Austrian regulation as a model.
40 Škrubej, 2013, p. 1067. For details, see Petrak, 2019, pp. 344–349.
41 Demeter, 1985, p. 210.

law as an outstanding cultural achievement was also raised. Thus, from 1861, the old Hungarian law became applicable again, but the issue of codification also came gradually to the fore.[42]

As for Transylvania, in 1861, Elek Dósa (1803–1867), a law professor at the Reformed College in Marosvásárhely (presently Târgu Mures), published an extremely interesting summary of Transylvanian Hungarian private law, which had developed over centuries based on customary law and had only been partially codified. The second volume of his great work, *Transylvanian Jurisprudence* (*Erdélyhoni Jogtudomány*), deals with private law. Dósa's work is the last, very interesting snapshot of Transylvanian law, which had been developing continuously since the Middle Ages and which was a special branch of Hungarian law. Modernization was partly forced. In historical Transylvania, the Austrian civil code was enacted in 1853 during the absolutist Habsburg rule, as in Hungary. However, in Transylvania, unlike in Hungary, the AGBG remained in force after 1861, despite the fact that in 1867, the Transylvanian Great Principality was reunited with Hungary, both under Habsburg rule (from which it had detached in the 16th century following the Turkish invasion and occupation). Practically, in Transylvania, the ABGB remained in force until the end of the Second World War.[43]

The last decades of the 19th century were characterized by an intellectual struggle between the defenders of customary law and the adepts of codification. A commercial code (Act XXXVII of 1875) was adopted, which modernized company law and commercial obligations. The source of inspiration was the common commercial code of the German States (*Allgemeine Deutsche Handelsgesetzbuch* [ADHGB] of 1861).

Several partial projects toward a civil code were also presented starting in 1871.[44] In 1900, a complete version was ready, but intense intellectual work continued in the first decades of the 20th century in order to finalize the text.

4.3. Serbia

In the second wave of codifications, Serbia, in 1860, adopted a commercial code that was a transplant of the French commercial code and the German rules on bills of exchange.

The General Property Code (*Opšti imovinski zakonik za Knjaževinu Crnu Goru*) was an exciting original piece of legislation adopted in the principality of Montenegro in 1888. The code was drafted by Valtazar Bogišić, who was, at that time, a professor of law in Odessa and a proponent of the historical school who believed that the transposition of a foreign code as a method of codification was far from ideal. Instead, he studied local customary law and based the code's text on it. The work is original in both content and structure. In terms of content, it regulates the law of persons, real rights, and the law of obligations because Bogišić believed that the area of family law,

42 Vékás, 2011, pp. 262–266.
43 Veress, 2020b, pp. 287–304.
44 Nizsalovszky, 1984, p. 111.

particularly the law of succession, had not yet reached a level of coherence that would require codification and that customary law could settle these issues.[45]

In Serbia, the law professor Dragoljub Aranđelović criticized the civil code of 1844 and called for the adoption of a new law. He drafted a project toward this purpose based on the BGB, with a structure reflecting the Montenegrin codex (the draft was finalized in 1914). However, as a consequence of the war and the enormous changes that followed the war, the draft was not adopted.

5. The third wave of codification in East Central Europe – the first half of the 20th century

5.1. Poland

Poland regained its independence in 1918. As previously mentioned, Poland inherited a fragmented legal system. To unify the legislation, the Codification Commission was founded; It operated until 1939 and even continued to function underground during German occupation.[46]

In the context of civil law, the commission's major achievement was the adoption of a new law on obligations in 1933. As stated, every rule was a result of broad comparative analysis that merged different European traditions and aimed to create the best rules.[47] In 1934, a commercial code was adopted alongside the Bankruptcy Act and a different Act on Composition Agreement Proceedings.[48] In general, the codification efforts were substantial, and the work was thorough and of outstanding quality.

Other parts of the proposed codification acquired a different status in 1939 when the Second World War interrupted progress. The matrimonial bill (the Lutostański Draft) was perceived to be too progressive and was rejected. Property law reached the first draft phase; regarding succession law, only theses were formulated.

The work continued after the war. In 1946, proposals were ready, and through different decrees, the different domains of civil law came into force (property law, succession law, matrimonial law). Parallel to these developments, the Soviet-type dictatorship took over all aspects of life in Poland, and the original context of this legislation changed totally: A totalitarian dictatorship seized power, and through the courts, these rules were interpreted according to the new regime's goals.

5.2. Hungary

In Hungary, this was a fervent period of codification, at least from the point of view of the creation of high-quality official projects. The main result was a perfected version

45 Dudás, 2013, pp. 10–11.
46 Zoll, 2014, p. 127.
47 Zoll, 2014, p. 128.
48 Izdebski, 1996, p. 5.

of the 1900 project: the 1928 Private Law Bill—a complete, complex civil code.[49] However, this project was not adopted either.

There are several reasons the Private Law Bill of 1928 was not adopted. The Great Depression, a global economic crisis (1929–1933), can be mentioned in particular. Secondly, the strength of the defense of the old customary law could not be underestimated either. Károly Szladits (1871–1956), one of the most renowned civil lawyers of the age, argued for the need for codification, but he basically blamed those protecting customary law for the failure of the Private Law Bill. The third reason is "*the idea that a civil code should not disrupt the unity of private law that still exists in part with the former territories of the country transferred to other states as a result of the Treaty of Trianon*." Bálint Kolosváry also argued the same: Hungarian private law, which is still in force in the annexed territories,

> *surrounds the Hungarian nation here and beyond as an invisible spiritual wall. Although it is ready for codification, this codification would also be an irreparable loss… The private law of the new code would be pushed back into the narrowed geographical area of the truncated country, triggering (unfortunately, among many other things) a slow process of alienation, which would lead to the formation of more harmful spiritual barriers.*

As a counter-argument, in favor of codification, it has been argued that the Private Law Bill is, in fact, a codification of customary law, and if this customary law becomes a codified law, it "*should not stand in the way of continuing to be applied in the former Hungarian territories as a customary law; it does not detract from the customary nature of the law if here is included into an act*."

The fourth reason codification failed is perhaps the early death of Béla Szászy (at age 65), who was responsible for codification, as he had to contribute to the finalization process, accurately assess the impact of possible amendments on the entire text, and manage and carry out coordination work. Perhaps it is worth quoting from his obituary, written by the Reformed Bishop László Ravasz, highlighting Szászy's codifying and personal qualities:

> *Legislation is the highest intellectual work… Codification requires a virtuoso technique. Nowhere is maturity, clarity, objectivity and punctuality desired in the wording of the law… Should I add to this that he was one of the kindest, most humble and best people? He could love deeply, served with mortal fidelity, never noticing his own greatness, augmenting everyone he met.*

Nevertheless, the draft text of this code was taken up by judicial practice and applied in many cases as a text fixing the content of customary law.

49 Veress, 2019, pp. 17–32.

5.3. Czechoslovakia

After the First World War, Czechoslovakia was created, incorporating the historical Czech territories (Bohemia, Moravia) and those territories obtained from Hungary (Slovakia, Subcarpathian Ruthenia). From the point of view of private law, the ABGB was in force in the Czech parts, while in the Slovakian parts, Hungarian law prevailed,[50] with its partially customary character. One of the first measures of the new state was to create a basis for provisionally maintaining the previous legislation. In 1918, it was regulated that "*all current land and imperial laws and regulations remain valid, for the time being*."[51] However, the unification of private law in the interwar period did not succeed, despite genuine effort to prepare a civil code. The efforts started in 1919, under the supervision of Jan Krčmář (1877–1950) and Emil Svoboda (1878–1948). The first draft was published in 1923. The project was also translated into German. The discussions continued in revision committees, with the final draft being submitted to the government in 1936, which initiated the legislative procedure in parliament in 1937.[52]

As the sources of inspiration,

> *some of the invited experts advocated the German BGB of 1896 as the model for the new Czechoslovak Civil Code. Czech legislators, however, considered this a step supporting German political aspirations to dominate Central Europe. They preferred that the draft Czechoslovak Civil Code should follow more closely the legislative pattern of the Austrian ABGB of 1811.*[53]

The parliamentary codification committees' last sessions took place in the summer of 1938.

After the Munich Agreement (1938), which forced Czechoslovakia to cede territories to Germany, the state was dismembered: In 1939, the Protectorate of Bohemia and Moravia became part of the German Reich,[54] and Slovakia formally converted to an independent territory but was, in reality, a puppet state of Nazi Germany. Codification was impossible under these circumstances.[55] After 1945, when Czechoslovakia was reestablished, codification was possible only in the context of a Soviet-type dictatorship.

50 Hungarian private law was applicable until 1950, when the Czechoslovak civil code entered into force.
51 Falada, 2009, p. 53.
52 Falada, 2009, p. 54.
53 Falada, 2009, p. 55.
54 In the territories ceded to Germany under the Munich Agreement, the *BGB* was applicable. In the Protectorate, the *ABGB* remained in force, but for ethnic Germans living there who became German citizens, the *BGB* was applicable. See Falada, 2009, p. 57.
55 Glos, 1985, p. 223.

5.4. Kingdom of the Serbs, Croats, and Slovenes (Kingdom of Yugoslavia)

The Kingdom of Serbia, Croatia, and Slovenia (from 1929, the Kingdom of Yugoslavia) was a new state formation created after the First World War. It was formed by the merging of Serbia, which had been independent since 1878, with the territories formerly belonging to the Austro-Hungarian monarchy (Croatia, Slovenia) and Montenegro. This period was characterized by legal particularism, with several parallel legal regimes: the 1844 civil code in the former Kingdom of Serbia, the Austrian civil code in Slovenia and Croatia, and the General Property Code of 1888 and local customary law in Montenegro. In Bosnia and Herzegovina, the Austrian civil code was also in force. At the same time, in the area of family law, especially inheritance law, Sharia law applied to Muslim citizens, while canon law applied to Christians.[56] In the territories annexed to the former Kingdom of Hungary, Hungarian customary law was in force.[57]

The political aim was to eliminate legal particularism. In the field of civil law, a codification committee was set up in 1930, which, by 1934, had drawn up a preliminary draft based on the ABGB. The reason for this was that Austrian law was the closest to the existing law, and organic development was possible on the basis of it. Critics, however, argued that there were more modern codes (Germany, Switzerland) and that the choice of model was therefore incorrect. The political situation did not allow this codification work to continue.[58]

5.5. Romania

In Greater Romania, substantially enlarged in the territory after the First World War, six different private law regimes coexisted, each with its own particularities. On the territory of the Old Kingdom of Romania (also called the Regat or 'Kingdom' using the traditional term), the Romanian civil code – developed based on the Napoleonic Code – remained in force. In Dobrogea and in the so-called Cadrilater (a territory acquired from Bulgaria), the law of the Old Kingdom of Romania was in force for the most part, but with significant derogations applicable to Muslims. In Bessarabia, in addition to Russian law, the *Hexabiblos* of Constantine Harmenopoulos (1345) was still in force, but since 1921, apart from negligible matters, the transition to the law of the Old Kingdom had been gradually taking place. In Bucovina, the Austrian civil code of 1811 (the ABGB) and its various amendments up to November 1918 were preserved in force. This code was also in force on the territory of Transylvania, but with the amendments put in place by Hungarian laws since 1867. Finally, in the regions of Banat and Crişana, the rules of Hungarian private law adopted before 1 December 1918 were in force, as was the case also in Maramureş. Due to the difficulties encountered in applying the law that arose due to the parallel existence of several legal

56 Šarkić, 2020, p. 176.
57 For a detailed analysis of the Hungarian private law applicable in the Kingdom of Yugoslavia, see Šarkić, 2020, pp. 176–205.
58 Dudás, 2013, p. 12.

systems, each with its own peculiarities and resulting from the political purpose of unification of the law, an ample process of legal integration was initiated following the formation of Greater Romania. Legal unification could only be accomplished by unifying the whole country as a territory, subject to a single normative regime. This solution could be implemented with any measure of speed only by extending the laws of the Old Kingdom over the entire state. This was the proposal of Minister of Justice Constantin Hamangiu (1869–1932). He, as of 1 January 1932, would have wanted to see the law of the Old Kingdom in force in the whole of Romania, except for a few areas where the implementation of Romanian law would have meant a significant regression in the evolution of regulation (especially in what concerned the age of adulthood for women, matrimonial law, guardianship, the land books, or the inheritance rights of the surviving spouse). The proposed solution resulted in vehement protests. For example, the Bar Association of Cluj considered the extension of the laws of the Old Kingdom over Transylvania to be no less than catastrophic and called on fellow bar associations to formulate positions in similar wording. Because of this reluctance and the death of Minister Hamangiu, this plan was doomed to failure. Another way of the complete unification of law was the development of new normative acts and new codes with valences in private law. This process began after the territorial unification but was the longest-running solution for unifying the law.

The unification of the law was initiated by adopting acts governing a narrower circle of social relations (for example, an act on literary and artistic property was adopted in 1923). Considering the failure to extend the civil law of the Old Kingdom to Greater Romania, unification of private law was deemed possible by developing new codes. Therefore, the elaboration of the bills of the two codes of private law (the civil code and the commercial code) was initiated. The drafts were adopted during the dictatorship of King Carol II of Romania and were considered to be works of great significance of Romanian legal thinking.

The new civil code was published in the Official Gazette on 8 November 1939. The entry into force was expected to take place on 1 March 1940. The then Minister of Justice declared that he had to express the greatest gratitude and reverence to His Majesty King Carol II, at whose high instructions and initiative – concerned exclusively with the homeland's prosperity – this work of truly extraordinary scale had been achieved. The commercial code was adopted in 1938 and amended in 1940, and the rules on general meetings of joint-stock companies entered into force as early as 7 October 1939. The full entry into force of the two codes was set for 15 September 1940, subsequently postponed to 1 January 1941, but, finally, on 31 December 1940, the date of their entry into force was again postponed, this time indefinitely. The reason was constituted, among others, by the territorial losses suffered by Greater Romania: Bessarabia was to be ceded to the Soviet Union (in June of 1940), and in the sense of the Second Vienna Award, the north of Transylvania had to be ceded back to Hungary (on 30 August 1940). These territorial losses of Romania, and the abdication and forced exile of King Carol II, the events of the Second World War, and the rise of the

Soviet-style dictatorship after the war prevented the entry into force of the two codes, and thus the unification of private law by new codification could not be achieved.

The Romanian legislator finally accomplished the project of Hamangiu: extended Romanian private law to Southern Transylvania as early as 1943 and following the 1945 restitution (by Act 260 of 1945) of Northern Transylvania – in this case, with lightning speed – , overwriting the substantiated scientific plan for the unification of private law, which characterized the period before the Second World War.

6. The fourth wave of codification in East Central Europe – the second half of the 20th century

6.1. Overview

The fourth wave of codification corresponds to the period of Soviet-type dictatorship in the region. Initially, communist theory predicted the disappearance of civil law or law in general. Soviet practice rejected this theory, and as the great thinkers of communism were infallible, the communists did not openly deny the disappearance of law, they just relegated it to the distant future. The reality was compatibility between the existence of law and socialism.[59] The works of A. V. Venediktov had a great influence on civil law codification in the region.[60]

The civil law of this period was characterized by the following:

a) A break with legal tradition because the new political, economic, and legal system in which civil law had to perform was imposed from outside: As a great power, the Soviet Union and the local servants of Soviet policy reshaped the states of the region as much as possible to confirm with its own image.

b) In some states a new civil code was adopted, while in others, the old codes remained in force, but in all cases, the role of classical civil law was reduced: Private property was primarily replaced by state and cooperative property, and personal and private property played only a limited secondary role. This period was known as one of 'private law without private property.'[61] Special rules on state-owned enterprises formed the core legislation. Separate legislation dealt with their role in the planned economy, their control, the contracts they concluded, their investments, dispute resolution through state arbitration, public agricultural enterprises, and cooperatives. As stated, "*the classical (capitalist) form of civil law regulation assumes market equilibrium and has traditionally developed a corresponding institutional system. The market is marginalized by the socialist planned economy and this intersects with the pure solutions of civil law.*"[62]

59 Rudzinski, 1965, p. 36.
60 Kuklík and Skřejpková, 2019, p. 13.
61 Vékás, 2013, p. 226.
62 Sajó, 1986, p. 102.

c) Therefore, civil codes and civil legislation declined, but they existed. Civil codes' limited survival facilitated the possibility of subsequent regime change: The main corpus (on state property called and disguised as socialist property, controlled by the *nomenklatura*) had to be abolished, and the dominance of the existing subsidiary corpus (on private property) had to be re-established.

d) Family law, in the spirit of socialist morality, was regulated in a separate code and became a separate branch of law.

e) The quality of legal science and the totalitarian regime were not necessarily mutually exclusive. It was noted as a parallel that the classical Roman jurists and Justinian's excellent jurists worked in an autocratic empire.[63]

6.2. Czechoslovakia

In Czechoslovakia, the radical legislation change came into the center right after the Communist Party seized power. In 1948, a 2-year legal codification plan was adopted, and work on a new civil code started immediately. The new code was conceived as expressing the will of the working class and standing as a fundament for social transformation, especially through the liquidation of bourgeoisie property relations, the creation of socialist ownership, and the subservience of contract law to the requirements of the planned economy. In addition to being a tool for promoting Soviet-type ideologies, the code was intended to unify the legislation of Czechia and Slovakia

> *which was something that the whole interwar period tried to achieve but did not succeed. Various outcomes of codification drafts from the interwar period were used to speed up the preparation. Communists took advantage of these drafts and presented them as another example of the effectiveness of People's Democracy, in comparison with the unsuccessful twenty years of bourgeois interwar democracy.*[64]

The codification commission was subordinated to a political commission and also to the Central Committee of the Communist Party, which assured that the code aligned with party expectations. As a principle for the interpretation of the entire legal text, a clause was included stipulating the predominance of the common social interest over individual interests.[65] The code, adopted in 1950 (Act 141 of 1950), was shorter (570 articles) than its Austrian predecessor (of 1 502 articles).[66] Furthermore, the code had a provisional character because it incorporated social relationships that the Communist Party could not immediately abolish, but these became relatively rapidly obsolete because the conditions changed as the

63 Földi, 2020, p. 27.
64 Kuklík and Skřejpková, 2019, p. 14.
65 Art. 3 of the code stated that "*Nobody may abuse his civil rights to the detriment of the entire society.*"
66 Falada, 2009, p. 59; Kuklík and Skřejpková, 2019, p. 16.

transformation of Czechoslovak society travelled further along the path of the Soviet model.[67]

In Czechoslovakia, a new civil code was adopted in 1964 (Act 40 of 1964). This code declared that civil law could be applied in the context of the socialist order. The development and protection of socialist ownership were everyone's duty. In civil law relationships, the code declared, there are obligations not only between the participants (e.g., the contracting parties), but the same relationship gives birth to obligations toward society. This piece of legislation was in force during the Soviet-type dictatorship. Before 1989, it was only amended four times.[68] Consisting of 510 articles, this code was comparatively short.[69] As Article 130 stated, "*Things accumulated contrary to the social interest in excess of the personal needs of the owner, his family and his household do not enjoy the protection of personal property.*" Relations between socialist organizations and individuals were not governed by contractual freedom and were not even perceived as contracts but rather as services. Article 224 provided that "*If the duties of an organization include the provision of a service, the organization shall have the duty to provide it at the request of an individual unless it is precluded by the scope of its operational possibilities.*"

In addition to the civil code, an economic code was enacted in 1964 (Act 109 of 1964). As a specificity, this could be interpreted as a rejection of the Soviet principle of the unity of civil law.[70] "*This demonstrates that the same type of economy is not mechanically reflected in the legal superstructure of the communist countries but dearly leaves a choice between different solutions to the communist legislators.*"[71]

The Czechoslovak civil codes of 1950 and 1964 implemented important changes and created the first socialist codes in East Central Europe. As it was perceived,

> *they introduce a new spirit, a new application of the law. They have profound political eloquence and importance as well. To put it crudely in Marxist terms: the superstructure has changed. There is no longer the same legal form borrowed from the capitalist world but covering a different socialist content. Now there is a new socialist form as well."*[72]

Compared to the Czechoslovak codes, the Hungarian and Polish codes had a more moderate spirit, as if some of the drafters had attempted to rescue the bourgeoisie past in places.[73]

67 Glos, 1985, pp. 238–239.
68 Dulaková Jakúbeková, 2021, p. 84.
69 Rudzinski, 1965, p. 37.
70 Izdebski, 1996, p. 5.
71 Rudzinski, 1965, p. 38. The case was similar in East Germany.
72 Rudzinski, 1965, p. 46.
73 "*In a crass contradiction to the Czechoslovak code, a strong effort is evident* [...] *to preserve and maintain the integrity and unity of civil law inside its new confines (after family law has been left out), not merely in the purely scholarly sense, as an academic teaching subject or in juridical textbooks, but as a branch of legislation as well.*" Rudzinski, 1965, p. 48.

6.3. Hungary

The codification works started in 1953 in the context of a certain relaxation of the dictatorship under Prime Minister Imre Nagy. However, there was an interruption due to the 1956 revolution.[74] The first Hungarian civil code was adopted during the Soviet-type dictatorship (Act IV of 1959), when

> *the ruling dictatorial political power and the nationalizations that took place almost completely eliminated the natural social conditions for the development of private property and human personality, including private property. In the given economic, social, and political circumstances, we must especially appreciate the establishment of the Code… Due to the outstanding professional standard, the Hungarian Code of 1959 survived for decades the profound economic and social transformation that began in the second half of the 1980… It is understandable, however, that these changes, as a result of which a market economy based on private property was re-established in Hungary, had to be followed by the legislator with frequent amendments.*[75]

The principal authors of the draft were Miklós Világhy, Gyula Eörsi, Endre Nizsalovszky, Elemér Pólay, and Béla Kemenes. This code, as mentioned before, unlike the Czech code, did not radically break with the past and also served to preserve the traditional values of civil law. The involvement of the non-communist Nizsalovszky is remarkable.[76] The code was criticized for using concepts and solutions that were linked to a bygone stage of legal development: It was described as a late flowering of civil law following the liberal–capitalist small commodity model. Thus, the legal solutions included in the code would have strengthened the position of obsolete economic interest groups.[77] The communists who were convinced of this at that time, Eörsi and Világhy, could, as exceptionally talented and highly qualified lawyers who also wielded strong political influence, "*successfully insist that a number of classical traditions of private law be preserved*."[78] The code represented a radical change for lawyers compared to the past: Hungarian private law, based on customary law, was replaced by a much narrower law. Judges had to switch from an inductive to a deductive method of interpretation.[79] Only the Soviet-style dictatorship was able to overcome the common law-based private law.

The code entered into force on 1 May 1960, and it was reformed in 1967 and 1977.

6.4. Poland

The Soviet-type dictatorship practically inherited the different pieces of civil law legislation prepared by the interwar Codification Commission, which were adopted either before the Second World War (the Law of Obligations in 1933) or after the war,

74 Nizsalovszky, 1984, p. 114.
75 Vékás, 2014, p. 82.
76 Földi, 2020, p. 27.
77 Sajó, 1986, pp. 99–101.
78 Földi, 2020, p. 27.
79 Eörsi, 1960, p. 312.

all reflecting the past ideology of freedom and private property. First, the General Provisions of Civil Law were adopted separately. This was a piece of legislation reflecting Marxist views, and it formed the ideological base for the interpretation of other civil law legislation. However, this was insufficient. The party wanted a new civil code reflecting the ideology of the new times. An ideologically burdened draft was hastily prepared but never adopted.

> *It was so strongly criticized by the legal doctrine, which despite of the lack of the academic freedom, limiting the possibility of running the necessary discussions, managed to present the flaws of this draft in such a very clear way, that even the communist government has not decided to adopt this draft.*[80]

Practically, after Stalin's death (1953), pressure to adopt a legal text that could erase the previous codification achievements eased.

A new Codification Committee was set up, consisting of members with personal links to the former commission, including those whose academic mentors were participants on the former commission.[81] This committee intended to preserve the pre-World War II achievements (which are perceived even today as important legislative and cultural achievements), but they accepted the price of surrendering to the regime. From a political point of view, this period was a strict epoch of the political system: After limited relaxation after 1956, the regime returned to a more severe version. Even so, compared to Stalinist politics, the very narrow easing that occurred was enough to facilitate the Codification Committee's work.[82]

The committee rejoined the distinct pieces of civil law legislation to form a unitary code. They attempted to include family law as a book in the code, but this deviated from the Soviet model, and a separate family law code was adopted in 1952, as a result of the joint effort of a Polish and Czechoslovakian commission.[83]

> *Because this law was an effect of the consent in this international working group, all issues on which the parties could not agree upon were left out and therefore the short code was full of gaps. The case-law of both countries was quite different and the Polish-Czech family code was not treated as a successful example of transnational unification of the law.*[84]

80 Zoll, 2014, p. 129.
81 "*It does not mean that all of the members of the Commission from the year 1964 were rebels against the communist regime. Some of them were quite closely associated with this political direction, but they were also excellent jurists and they perceived themselves as a part of the tradition of this deep comparative discussion between the wars. Therefore the Polish civil law tradition has not been broken.*" Zoll, 2014, p. 133.
82 Zoll, 2014, p. 126.
83 Zoll, 2014, p. 132.
84 Zoll, 2014, p. 132.

The civil code was adopted in 1964 and had 1 088 articles.[85] This code could be regarded as the completion of the work of the pre-war Codification Commission. Almost all essential legal concepts and institutions were taken over from the Law of Obligations from the year 1933 and the post-war decrees.[86]

However, it was more abstract, as the political regime required legal notions that could be interpreted on an ideological basis. As it was stated,

> *this more abstract technical approach was not ideologically neutral. It is easier to fill the rules by contents harvested from the intrusive political ideology, if they are more abstract and by this way more flexible and can be easier bended by the means of interpretation.*[87]

The code includes general provisions, property law, the law of obligations, and succession law. The text stated that it has to be interpreted in accordance with the official ideology. Several norms reflected the ideology of those times (stronger protection of state property, regulation on contracts between state-owned enterprises as tools of the planned economy, etc.). The justification of the legal text stated that:

> *In legal systems based upon private ownership of the means of production, civil law is a branch of law that regulates first and foremost the private sphere of individuals... In a socialist system, the vast majority of ownership relationships are outside the realm of private ownership by individuals.*[88]

In 1964, the 1934 commercial code was partially repealed, except for the rules on general partnerships, limited liability companies, and joint-stock companies.[89]

6.5. Yugoslavia

During the first phase of the socialist dictatorship, in 1946, the Act on the Invalidity of Regulations Adopted Prior to 6 April 1941 and During the Occupation (1946) was adopted. This act practically abrogated all previous legislation, such as the 1844 Serbian civil code and the Austrian civil code that had been in force in Croatia since 1812, as a manifestation of legal nihilism. A new legal system was intended to be introduced. However, the old legislation (*stara pravna pravila*) was still practically applicable in all fields where the envisaged new set of rules had not been introduced and the old norms were coherent with the new social realities.[90] Civil law was a prominent domain in which the former legislation survived. For example, in the socialist Republic of Croatia, the Austrian civil code was still applied to segments

85 Rudzinski, 1965, p. 48.
86 Zoll, 2014, p. 130.
87 Zoll, 2014, p. 130.
88 Radwański, 2009, pp. 136–137.
89 Izdebski, 1996, p. 9.
90 Dudás, 2013, p. 13.

of family law, inheritance law, real property, and obligations, not as positive law but rather as simple rules to theoretically fill the gaps in the new legislation.[91] The case of Serbia was similar with regard to the 1844 civil code.[92] This continuation of the old law was considered a temporary solution intended to be maintained until the new law was enacted. This is why different segments of private law were regulated progressively through new pieces of legislation. The need to abolish the old law resulted in new partial regulations of particular social relations. Creating fragmented norms included in different acts was significantly faster than the time-consuming process of drafting a unitary civil code. Therefore, instead of a new, unitary code, in Yugoslavia, the subdivisions of civil law were regulated through different acts, such as the Marriage Act (1946), the Inheritance Act (1955), the Obligations Act (1978), and the Act on Basic Ownership Relations (1980).[93] The results of this legislation were outstanding in terms of quality, for example, the Obligations Act, having mainly utilized a Swiss model, was said to be "*one of the most outstanding products of the liberal socialist legislation of the time, which has shown its merits in the course of its almost forty years of application*."[94] However, because these new rules did not cover all the fields of a civil code, in the case of Croatia, it was stated that the provisions of the Austrian civil code would continue to be applied to donation contracts, neighborhood law, and private easements.[95] We can observe that despite the tradition of a unitary code in Serbia and Croatia, regulation via separate pieces of legislation was chosen. Nevertheless, the ultimate, though yet unrealized, goal was to create a unitary code at the end of this decades-long transitory period. Professor Mihailo Konstantinović, who completed university and doctoral studies in France, played a leading role in the creation of the new legislation. For instance, the Obligations Act was compatible with the capitalist order and was kept in force in the former Yugoslav states even after the regime change (e.g., in Croatia until 2006; in Serbia, it is still in force).

6.6. States without new codes in the fourth wave of codification

In Romania, the 1864 civil code was in force during this period, playing a secondary role in the context of the serious limitation of private property. Some efforts were made to create a socialist civil code, but these processes did not succeed.

91 Josipović, 2014, p. 111.
92 Dudás, 2013, p. 13.
93 Josipović, 2014, p. 112.
94 Dudás, 2015, p. 79.
95 Josipović, 2014, p. 112.

7. The fifth wave of codification in East Central Europe – after the collapse of the Soviet-type dictatorship

7.1. Overview

Some states had pre-World War II civil codes that could naturally be maintained after the collapse of the communist regimes.

The civil codes adopted under the Soviet-type dictatorship were maintained even after the collapse of these political regimes. The reasons are, in relation to Poland, for example, as follows:

> *The core of the civil code was however not strongly affected by the time of its origin. […] After the events of 1989 and the great political and economic transition the code could be maintained without too far-reaching economic legislative intervention. The code was drafted in a way that the parts clearly affected by the communist ideology or the adjusted to the communist economic legal system were very easy to delete from the text without infringing the structure of the code. They have formed simply the alien component in the body of the code.*[96]

The change was informal: Civil codes have risen from the relative shadow in which they were placed under Soviet-type dictatorships, with separate regulations pertaining to the planned economy now disappearing. In addition to democratic constitutions, civil codes assumed their well-deserved place as basic laws governing private property and contractual freedom.

During the transition period, the reform of the civil codes was not of utmost importance; after a regime change, "*civil codes are not the first pieces of legislation to be amended or drafted*."[97] The explanation is simple: The civil code expresses the status of normality. Instead, it was necessary to create a transition from the Soviet-type property regime to a system based on private property. This required a special set of norms in order to create this shift from a planned economy to a market economy. Once this change is realized, the question of reform of the existing or implementation of a new civil code could be raised.

Some changes were introduced in the civil codes in order to abolish the special status of state ownership and level the field regarding private property. The fifth wave of codification is a characteristic of the 21st century, decades after the collapse of communism in the region. Croatia and Slovenia adopted new acts to regulate the traditional domains of civil law. Czechia, Hungary, and Romania adopted new civil codes. Other states (Poland, Serbia, and Slovakia) are working on a new code: The fifth wave of codification is still ongoing in the region.

96 Zoll, 2014, p. 132.

97 Izdebski, 1996, p. 4. In general, minor changes were sufficient to make those codes, especially the pre-World War II texts, fully applicable under the new conditions.

7.2. States with new civil codes

7.2.1. Czechia

After the regime change, in 1990 and 1991, a set of modifications were introduced into the 1964 civil code. This was done under socialism and "*overtly neglected many traditional rules concerning ownership and other real rights or obligations*."[98] These changes were necessary in order to make the code functional within the altered context. This modernization was perceived as insufficient in the movement toward modern civil law, since the codes' socialist origins and structure, despite reform, were inconsistent and inadequate in the changing environment.[99] Therefore, efforts to prepare a new code commenced immediately after the regime change (Viktor Knapp), and by 1996, another draft was ready (František Zoulík). However, these projects were abandoned, and in 2000, the Ministry of Justice commenced a new project. The drafting was led by Karel Eliáš. Integral drafts were presented in 2007 and 2008 for public discussion.

Czechia finally adopted the new civil code in 2012, and it came into force starting in 2014.[100]

Regarding commercial law, a dualist approach continued with the adoption of the 1991 commercial code, which repealed the 1964 economic code, an original piece of codification.[101]

7.2.2. Hungary

Hungary adopted a new civil code decades after the regime change. In place of the 1959 code, Hungary adopted Act V of 2013, which entered into force on 15 March 2014. It is an original piece of legislation that has built on previous drafts and aims to ensure continuity. It is 'supermonist' in nature, as it often regulates legal relations between private individuals (consumers) in a business-like spirit and also includes company law.

During the drafting of the code, the following problem was raised: In the 21st century is codification still actual? Some founding principles of the classical civil codes, such as the unencumbered ownership of property and the freedom of the parties to form contracts became relative. The pace of social change is accelerating, and the direction such variations will take is unpredictable. Under these conditions, legislators become hyperactive: More and more specialized legal rules are being created, abstraction is difficult, and private law norms outside the civil codes proliferate. In the EU, directives must be constantly integrated into national laws in fields like company law, consumer protection, and intellectual property. The president of the codification committee, Professor Lajos Vékás concluded:

98 Izdebski, 1996, p. 9.
99 Falada, 2009, pp. 63–64.
100 For some elements of the new code, see Tichý, 2014, pp. 9–29; Balarin, 2014, pp. 31–39; Hrádek, 2014, pp. 223–232.
101 Izdebski, 1996, p. 12.

One of the classic arguments in favor of codification, namely the need for a systematization of law, has survived the glory days of codification. Sufficiently abstracted, systematised, and codified rules are necessarily better suited to enabling the judicial practice to keep pace with the rapid changes in the circumstances of life than an unclear mass of individual and ad hoc laws, which are chasing each other at speed and getting lost in detail. This is why we have put forward as a further argument in favor of codification the need to give the judge the opportunity to develop the law, to fill the inevitable gaps in the written rules, and a code provides a more solid framework for this than the daily efforts of the legislator to grasp the detailed problems at all costs and to react nervously.[102]

7.2.3. Romania

At the time of the regime change, Romania still had two 19th-century codes in force: the civil code and the commercial code (the latter having been dormant during the Soviet-type dictatorship).[103] Romania was perceived, thanks to its tradition of formally preserving these pieces of legislation, as having "*at its disposal a civil law infrastructure better adapted to market conditions than that of many states which attempted completely to modernize their law under real socialism*."[104] Paradoxically, as stated above, civil codes are the norms representing normality; hence, Romania missed an opportunity to quickly convert to a market economy. A normality regulation was useless if the return to regularity from the Soviet-type system was not properly paced due to ideological barriers.

The arguments in favor of adopting the French model were the masterly drafting technique; the clear, simple, and comprehensible provisions; and the avoidance of unnecessary theoretical generalizations and abstractions. Obviously, societal and legal development in the 20th century surpassed the original French code in many respects, so the Romanian adaptation (translation) has lost much of its relevance. The modernization of the French code has been and is still being carried out, together with amendments, judicial practice, and legal doctrine, maintaining continuity with the original Napoleonic Code.

Romania, on the other hand, having abandoned its historical traditions, has opted to adopt a new code. A new civil code was already drafted before the Second World War, but its entry into force was prevented by the outbreak of the conflict, the

102 Vékás, 2021, p. 102.

103 The code lost the object of its regulation due to the abolition of private property. Sipos, 2003, pp. 41–43. Following the regime change, the code was applied again. The fate of the Romanian commercial code is also interesting for this reason: It would go on to survive its own model (Italy's commercial code was repealed during the Second World War, and Italian private law – which was used as the initial model – transitioned to a monist regulation of civil law through the civil code of 1942). The Romanian commercial code survived totalitarianism and revived itself after 1989, along with its natural environment, capitalism.

104 Izdebski, 1996, p. 5.

territorial losses the country suffered, and, later, the establishment of a Soviet-type dictatorship.

The issue of codification came back into focus after the regime change, and thus, Act 287 of 2009, the new Romanian civil code, was adopted. The code entered into force on 1 October 2011. Apart from abandoning historical continuity, another criticism can be levelled regarding the abandonment of the old legislation. Previously, following the French model and complying with the French code undoubtedly had its advantages: The direct use of French legal literature and the richness of the French case has raised the standard of Romanian civil law scholarship significantly. Obviously, the French model of regulation was prone to criticism because it did not reflect the specific Romanian legal culture.

The sources on which the new Romanian civil code are based are complex: The legislator departed somewhat from the classical French model but also draws heavily on the modern French-language civil code of the Canadian province of Quebec (*Code civil du Québec*), which was adopted in 1991 and entered into force on 1 January 1994, and which can be interpreted as a strong modernization of the original French code. However, the Italian civil code and the Draft Common Frame of Reference (DCFR) have been used as a model. The extent to which this new legislation is a product of Romanian legal culture, compared to the previous civil code translated from French, remains a matter for debate. One change is that the single-model code has been replaced by a multi-model code.

The reform ended the dualism between civil and commercial law, thereby achieving, at least in principle, the transition from the dualistic system of the regulation of civil law to the monistic model. Nevertheless, to some measure, the differentiation of business law within the civil code was preserved because in the matter of relations between professionals, both this new code and other special rules continued to provide for derogations from the general norms.[105]

The new civil code again included and integrated into a unitary whole from a systematic point of view the numerous norms of private law enacted during the Soviet-type dictatorship outside the civil code framework, for example, Decree No. 31/1954 Concerning Natural and Legal Persons, Decree No. 167/1958 Regarding the Statute of Limitations, and the Family Code; the legislator even merged the rules applicable to private international law into this new norm.

However, the changes were not purely formal or structural; they were also of substance. The new civil code reformed private law in several areas: personality rights, matrimonial law, real property rights, the general rules on obligations, those on certain special contracts, the debt guarantee system, and in particular, mortgages on movable property. These measures – although they could certainly have been achieved by reforming the 'old' civil code – have significantly contributed to effective application in the practice of Romanian private law, including in the context of the 21st century.

105 Veress, 2017, pp. 27–34; Fegyveresi, 2017, pp. 35–42.

7.2.4. Croatia

Croatia gained its independence in 1991. It inherited the civil law of the former Yugoslavia and also tried to re-establish the broken link with the former legislation in force, including some provisions of the Austrian civil code not covered by Yugoslav civil law, through the Act on the Application of Regulations Adopted Prior to 6 April 1941 (1991).[106]

New civil law, based on a modernized concept of the former Yugoslav legislation, was adopted: the Act on the Ownership and Other Real Property Rights (1997), the Family Act (1998, 2003), the Inheritance Act (2003), and the Obligations Act (2006). As the Austrian civil code became to a certain extent part of Croatian legal culture, it influenced the new legislation[107] and also granted a certain continuity of regulation. We can observe that Croatia followed the model of separate acts for different civil law segments instead of adopting a unitary civil code.

> *An integral concept of codification of individual private law segments has not been adopted… [T]he contents of individual pieces of legislation either overlap or are mutually conflicting. Different terminology is used. This all leads to the question about whether it would be better to synthesize various individual regulations into an integral civil code or keep this segmented approach to the development of the Croatian private law system.*[108]

7.2.5. Slovenia

After gaining its independence, Slovenia gradually reformed its legislation. In 2001 and 2002, the Obligations Act and the Property Act were adopted, respectively. The classical domains of civil law are regulated through separate pieces of legislation, as in Slovenia, there is no unitary civil code. The Inheritance Act was taken from Yugoslavia (1976) and modified slightly.

7.3. States with former codes still in force and the reasons for maintaining the legislation

7.3.1. Slovakia

In Slovakia, which gained its independence in 1993, former Czechoslovakia's 1964 civil code remained and is still in force. However, this act was modified several times, the most fundamental revision being Act 509 of 1991, which changed or amended approximately 80% of the original text.[109] The reform of private law was completed with the adoption of a commercial code (Act 513 of 1991). Both of the abovementioned acts were adopted before the creation of independent Slovakia.

106 Josipović, 2014, p. 113.
107 Josipović, 2014, pp. 114–115.
108 Josipović, 2014, p. 122.
109 Dulaková Jakúbeková, 2021, pp. 84–85.

The civil code was modified frequently in independent Slovakia, and compared to the Czech version (in force until 2014), the two texts have drifted apart in some respects.

Recodification efforts started in 1996. A commission led by Professor Karol Plank had the unrealistically short timeframe of less than a year in which to propose a draft. A first draft was delivered in 1997. Coordination of the commission was entrusted to Professor Ján Lazar after Professor Plank's death in 1998, and a second draft was presented.

> *Despite the fact that this draft had also not been subjected to a wider expert discussion, it was approved by the Government of the Slovak Republic that same year. The expert public raised serious objections against the draft, which, combined with political and personal changes at the corresponding ministries, resulted in the draft not being picked up again, and it was withdrawn from the legislative process.*[110]

In 1999, recodification efforts restarted under the leadership of Professor Peter Vojčík, and a directional document was prepared, but the commission's mandate ended in 2002.

The year 2006 represented a new beginning, and Professor Ján Lazar led a new commission. Another directional document followed and was adopted by the government in 2009. Another latent 2-year period followed the 2010 elections. In 2013, Professor Ján Lazar, who was born in 1934, proposed Anton Dulak as his replacement. The new deadline to deliver a first working draft was set to 2015. The first unified working version of the new civil code, consisting of 1 756 paragraphs, was delivered on time in 2015. Later that year, due to political reasons, a new commission was nominated under the leadership of General Director of the Civil Law Section in the Ministry of Justice Marek Števček.

In 2018, the Ministry of Justice took a novel approach: recodifying private law *per partes* (i.e., to change the existing code), beginning with the law of obligations.[111] The new 2020 government seems to have embraced the former recodification approach. In this context, it was stated that:

> *Despite many attempts and specific activities within the Slovak Republic, and in contrast with the Czech Republic as well as with Hungary, Romania, Estonia, and Russia, this recodification process has not yet been completed. The Slovak Republic thus remains one of the last countries to adopt recodification of private law out of all the previously socialist states of Eastern Europe.*[112]

There exists a first draft text representing further efforts, but faith in a Slovakian civil code is uncertain at this time.

110 Dulaková Jakúbeková, 2021, p. 86.
111 Dulaková Jakúbeková, 2021, p. 89.
112 Dulaková Jakúbeková, 2021, p. 84.

7.3.2. Poland

In Poland, the 1964 civil code is still in force, with some adjustments. The 1964 text, based on the work of the pre-World War II Codification Commission, is of high quality and proved to be fit as a basis for the transition and the market economy, hence there was no need for its immediate replacement. In 1990, the code was amended, but compared to the Czechoslovak code, the Polish regulation was "*much closer to the continental tradition of civil codes*"[113] and could therefore be maintained in force.

A new Codification Commission began work on a new text in 2002, headed until 2010 by Zbigniew Radwański, with Tadeusz Ereciński assuming leadership after his resignation. In 2015, the commission's mandate ended without the completion of the task. It is true

> *that there is a space for innovation. In the world dominated by the technology, in the world, where services become more important than sales and in the world where the function of property also has to be redefined, in the world of essential changes of the structure of family, the law rooted in the pre-war time loses its capability to solve the contemporary problems. Hence it is inevitable to start the work on the new codification.*[114]

As an impediment to codification, it was stated that "*Polish lawyers are generally conservative and, when accustomed to a text, they do not think about a new one*."[115]

However, Poland modernized its company law, adopting a new commercial companies code (Kodeks Spółek Handlowych) in 2000. This regulation does not break with the monistic nature of civil law, as it regulates companies as civil law entities but does not create a separate commercial law. As stated, the name 'code' was given to it in an attempt to neutralize resistance from the supporters of the old commercial code of 1934.[116]

Finally, Poland maintains a monist system of private law, in the absence of a specific commercial law of obligation. This is perceived as a socialist law inheritance, that is, the principle of the unity of civil law, "*which bars the reintroduction of classical commercial codes*."[117]

7.3.3. Serbia

After the collapse of the communist regimes and the former Yugoslavia, private law reform in Serbia manifested in the adoption of the new Inheritance Act (1995) and the Family Act (2005). Codification works to create a new unitary civil code started in 2006. A draft version of the code was prepared in segments under the leadership of Slobodan Perović. In 2015, the full bill was presented for public debate, proposing, in some cases, alternative legislative solutions. The final draft was prepared in 2019. After the death of Slobodan Perović in 2019, the codification work was completed under the leadership

113 Izdebski, 1996, p. 9.
114 Zoll, 2014, p. 134.
115 Izdebski, 1996, p. 10.
116 Radwański, 2009, p. 137.
117 Izdebski, 1996, p. 14.

of Miodrag Orlić and submitted in 2020 to the government for further procedures. However, in Serbia, the scope is to create a unitary code to replace the segmented acts regulating the different domains of civil law. This demonstrates a change in optics in Serbia compared to the other former Yugoslav states (Croatia, Slovenia) that have decided, at least momentarily, to maintain the segmented regulation of civil law.

Conclusions

Due to space limitations, any overview of the history of private law codification that fits in a single chapter is necessarily partial. Nevertheless, this chapter has offered an eye-opening look at the region's complex and captivating legal history. Historical analysis clearly indicates the political, ideological, economic, and legal influences that have shaped the region and the links between the models followed and the manifestations of a particular legal culture. The results of development process analysis show that each of these states adheres to its own private law culture and civil code, even though the EU member states have delegated specific issues to the supranational legislator in the interest of functioning as a single European market.[118] Therefore, a common body of private law was created, but that exceeds the scope of the present analysis. In addition to these areas delegated to the EU, private law must also reflect local cultural specificities. Its dynamics must account for these specificities, which are, at the same time, special values. The process of the unification of private law in the region must be essentially organic and based on market needs in a way that does not preclude any state from developing its private law autonomously as far as is both possible and necessary. Coordinated autonomy in the development of law will create competition to reach innovative legal solutions essential for improving legislation.

Compendium

First (early) codification wave (first half of the 19th century)				
	Code	**Purpose of codification**	**Model**	**Intensity of model tracking**
Croatia and Slovenia (as parts of the Habsburg Empire)	Austrian civil code entered into force (1812)	Unification of law, imperial integration	Austrian	Total

118 All states examined here, except Serbia, are now members of the EU.

Moldova	Codul Calimach (1817)	Clarification of legal sources	French, Austrian, Byzantine	High
Wallachia	Condica lui Caragea (1818)	Clarification of legal sources	Byzantine law, local customary law, partially French and Austrian	High
Hungary	Regulation on company law and bills of exchange (1840)	Modernization	Austrian, German	High
Serbia	Civil code (1844)	Modernization	Austrian, French	High
Second wave of codification (second half of the 19th century)				
Hungary	Austrian civil code entered in force for a short period (1853), Commercial Act (1875), first full civil code project (1900)	Imperial unification Modernization Modernization	Austrian German Austrian, German	Total Medium-high Medium-low
Serbia	Commercial code (1860)	Modernization	French, German	High
Romania	Civil code (1864), Commercial code (1887)	Modernization	French in the case of the civil code, Italian in the case of the commercial code	High High
Third wave of codification (first half of the 20th century)				
Hungary	Private law code project (1928)	Modernization	German	Low
Poland	Obligations Act (1933)	Unification of legislation, modernization	Swiss, German, French	Low
Czechoslovakia	Civil code project (1937)	Unification of legislation, modernization	Austrian	Medium
Romania	Civil code project (1940)	Unification of legislation, modernization	French, Italian	Medium

Kingdom of Serbs, Croats, and Slovenes (from 1929, known as the Kingdom of Yugoslavia)	Previous legislation in force			
Fourth wave of codification (Soviet-type dictatorships)				
Czechoslovakia	Civil code (1950) Civil code (1964)	Unification of legislation, creation of socialist civil law	Russian civil code of 1922, interwar Czechoslovak projects, 1936 Russian Constitution, Austrian	Medium-low
Yugoslavia	Marriage Act (1946), Inheritance Act (1955), Obligations Act (1978), Property Relations Act (1980)	Unification of law, creation of socialist civil law	Swiss, Austrian, German	Medium
Hungary	Civil code (1959)	Codification of civil law, creation of socialist civil law	German, previous Hungarian projects	Low
Poland	Civil code (1964)	Creation of socialist civil law	German, Austrian, French	Medium
Romania	Preparatory works			
Fifth wave of codification (after collapse of the Soviet-type dictatorships)				
Czechia	Civil code (2014) Commercial code (1991)	Modernization	German	Low
Croatia	Act on the Ownership and Other Real Property Rights (1997), Obligations Act (2006)	Satisfaction of the need to establish its own law, modernization	Former Yugoslav legislation Austrian, German	Medium
Poland	Codification efforts not finalized			

Romania	Civil code (2011)	Modernization	Multi-model (Québec, Italian, French, Draft Common Frame of Reference)	Medium-high
Hungary	Civil code (2014)	Modernization	German	Low
Serbia	Project finalized in 2020			
Slovakia	Codification efforts are ongoing			
Slovenia	Obligations Act (2001), 2002 Property Act (2002)	Satisfaction of the need to establish its own law, modernization	Former Yugoslav legislation, Austrian, German	Medium

Bibliography

Balarin, J. (2014) 'The Principle of Legitimate Expectations in the New Czech Civil Code', *ELTE Law Journal*, 2, pp. 31–39.

Bíró, L. (2000) 'A zadrugák felbomlásáról', *Világtörténet*, 22(ősz-tél), pp. 51–60.

Brauneder, W. (2013) 'The "First" European Codification of Private Law: The ABGB', *Zbornik Pravnog fakulteta u Zagrebu*, 63(5–6), pp. 1019–1026.

Demeter, J. (1985) 'A román jog kodifikálásának szakaszai és jellemzői', *Jogtudományi Közlöny*, 40(4), pp. 207–216.

Dudás, A. (2013) 'A polgári jog kodifikációjának történeti áttekintése Szerbiában', *Jogtörténeti Szemle*, 15(1), pp. 9–17.

Dudás, A. (2015) 'A kötelmi jog reformja Szerbiában a készülő polgári törvénykönyv fényében', *Magyar Jog*, 62(2), pp. 79–85.

Dulaková Jakúbeková, D. (2021) 'The Current State of Recodification Works of Slovak Private Law and Its Perspectives. A New Civil Code per partes or en block?', *Central European Journal of Comparative Law*, 2(1), pp. 83–92.

Eörsi, Gy. (1960) 'A Magyar Népköztársaság Polgári Törvénykönyvének életbelépéséhez', *Jogtudományi Közlöny*, (15)2, pp. 312–319.

Falada, D. (2009) 'Codification of private law in the Czech Republic', *Fundamina. A Journal of Legal History*, 15(1), pp. 38–68.

Fegyveresi, Zs. (2017) 'The Persistence of Some Characteristics of Commercial Law in the Monist Romanian Civil Law' in Menyhárd, A., Veress, E. (eds.) *New Civil Codes in Hungary and Romania*. Springer International Publishing, pp. 35–42; https://doi.org/10.1007/978-3-319-63327-5_4.

Földi, A. (2020) 'The transformations of some classical principles in socialist Hungarian civil law. The metamorphosis of bona fides and boni mores in the Hungarian Civil Code of 1959' in Erkkilä, V., Haferkamp, H.-P. (eds.) *Socialism and Legal History. The Histories and Historians of Law in Socialist East Central Europe*. London: Routledge, pp. 25–42.

Glos, G. E. (1985) 'The Czechoslovak Civil Code of 1964 and Its 1982 Amendment Within the Framework of Czechoslovak Civil Law', *New York Law School Journal of International and Comparative Law*, 6(2), pp. 215–273.

Hadrovics, L. (1944) *Magyar és déli szláv szellemi kapcsolatok.* Budapest: Magyar Szemle Társaság.

Horváth, P. (1979) *Bevezetés az összehasonlító jogtörténet alapelemeibe*. Budapest: Közgazdasági és Jogi Könyvkiadó.

Hrádek, J. (2014) 'Regulation of Liability for Damage in the New Czech Civil Code', *ELTE Law Journal*, 2, pp. 223–232.

Izdebski, H. (1996) 'General Survey of Developments in Eastern Europe in the Field of Civil Law' in Ginsburgs, G., Barry, D. D., Simons, W. B. (eds.) *The Revival of Private Law in Central and Eastern Europe. Essays in Honour of F.J.M. Feldbrugge.* The Hague: Martinus Nijhoff, pp. 3–14.

Josipović, T. (2014) 'Private Law Codification in the Republic of Croatia. An Example of Legal Reform in Post-Socialist Countries in South-East Europe' in Wang, W.-Y. (ed.) *Codification in International Perspective*. London: Springer International Publishing, pp. 107–123.

Kecskés, L. (2004) *A polgári jog fejlődése a kontinentális Európa nagy jogrendszereiben. Történeti vázlat*. Budapest–Pécs: Dialóg Campus.

Kuklík, J., Skřejpková, P. (2019) 'Frost Comes out of the Kremlin: Changes in Property Law and the Adoption of the Civil Code in 1950', *Právněhistorické studie*, 49(2), pp. 10–19.

Kuncz, Ö. (1946) *A jog birodalma. Bevezetés a jog- és államtudományba.* 2nd Budapest: Grill Károly Könyvkiadóvállalata.

Nizsalovszky, E. (1984) *Tanulmányok a jogról*. Budapest: Akadémiai Kiadó.

Petrak, M. (2019) 'Code Civil and Croatian Legal Culture' in Kambič, M., Škrubej, K. (eds.) *Odsev dejstev v pravu. Da mihi facta, dabo tibi ius. Liber amicorum Janez Kranjc.* Ljubljana: Pravna fakulteta, pp. 341–357.

Radwański, Z. (2009) Kodyfikacja prawa cywilnego, *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, 71(2), pp. 131–142.

Rudzinski, A. W. (1965) 'New Communist Civil Codes of Czechoslovakia and Poland: A General Appraisal', *Indiana Law Journal*, 41(1), pp. 33–68.

Šarkić, S. (2020) 'Az alkalmazásban maradt Magyar jogszabályok a Szerb-Horvát-Szlovén Királyságban (Jugoszláviában)' in Várady, T. (ed.) *Délvidéki (vajdasági) magyar jogászok. A Monarchiától a titói korszak végéig.* Újvidék: Vajdasági Magyar Jogász Egylet, pp. 171–205.

Sipos, I. (2003) 'A Kereskedelmi törvénykönyv időszerűségéről', *Romániai Magyar Jogtudományi Közlöny*, 1, pp. 41–43.

Škrubej, K. (2013) 'Austrian General Civil Code (1812) and the Slovenes: the Blinding Legacy of Legal Monism', *Zbornik Pravnog fakulteta u Zagrebu*, 63(5–6), pp. 1063–1080.

Stanković, E. (2014) 'The Serbian Civil Code – the fourth codification in Europe', *Fundamina. A Journal of Legal History*, 20(2), pp. 881–890.

Szászy, I. (1947) *A magyar magánjog általános része különös tekintettel a külföldi magánjogi rendszerekre*. Budapest: Egyetemi Nyomda.

Tichý, L. (2014) 'Ordre Public, Abuse of Rights and Other General Clauses and the New Czech Civil Code', *ELTE Law Journal*, 2, pp. 9–29.

Van Caenegem, R. C. (2004) *European Law in the Past and the Future. Unity and Diversity over Two Millennia*. Cambridge: Cambridge University Press.

Varga, Cs. (2002) *A kodifikáció, mint társadalmi-történeti jelenség.* 2nd Budapest: Akadémiai Kiadó.

Veress, E. (2017) 'The New Romanian Civil Code – Difficulties in the Transition Towards a Monist Private Law' in Menyhárd, A., Veress, E. (eds.) *New Civil Codes in Hungary and Romania*. Springer International Publishing, pp. 27–34; https://doi.org/10.1007/978-3-319-63327-5_3.

Veress, E. (2019) 'Az 1928. évi Magánjogi törvényjavaslatról' in Veress, E. (ed.) *Az 1928. évi Magánjogi törvényjavaslat*. Kolozsvár: Forum Iuris, pp. 17–32.
Veress, E. (2020a) *Román polgári jog. Általános rész.* 5th Kolozsvár: Forum Iuris.
Veress, E. (2020b) 'Neun Jahrzehnte: das österreichische Allgemeine Bürgerliche Gesetzbuch in Siebenbürgen.', *Jahrbuch für Ostrecht*, 61, pp. 287–304.
Vékás, L. (2011) 'Történeti visszapillantás a magyar magánjog kodifikációjára', *Jogtudományi Közlöny*, 66(5), pp. 261–268.
Vékás, L. (2013) 'Az új Polgári Törvénykönyvről', *Jogtudományi Közlöny*, 68(5), pp. 225–242.
Vékás, L. (2014) 'Magánjogi kodifikáció kultúrtörténeti tükörben', *Magyar Tudomány*, 175(1), pp. 80–89.
Vékás, L. (2017) 'Magánjogi kodifikáció kultúrtörténeti tükörben', *Acta Universitatis Sapientiae. Legal Studies*, 6(2), pp. 215–226.
Vékás, L. (2021) 'A Polgári Törvénykönyv első hét évéről', *Jogtudományi Közlöny*, 76(3), pp. 101–112.
Villányi, L. (1941) *A magyar magánjog rövid tankönyve.* Budapest: Grill Károly Könyvkiadó Vállalata.
Zoll, F. (2014) 'A Civil Code Outside of Reality – The Polish Codification of the year 1964. Its Origins, Development and Future' in Wang, W.-Y. (ed.) *Codification in International Perspective*. London: Springer International Publishing, pp. 125–135.

| Chapter 8 |

State and Criminal Law of the East Central European Dictatorships

Ewa KOZERSKA – Tomasz SCHEFFLER

ABSTRACT

The chapter is devoted to discussing constitutional and criminal law as it existed in selected countries of Central and Eastern Europe between 1944 and 1989 (Czechoslovakia, the German Democratic Republic, Romania, Hungary, and Poland). As a result of the great powers' decisions, these countries came under the direct supervision of the Soviet Union and adopted totalitarian political solutions from it. This meant rejecting the idea of the tripartite division of power and affirming the primacy of the community (propaganda-wise: the state pursuing the interests of the working class) over the individual. As a result, regardless of whether the state was formally unitary or federal, power was shaped hierarchically, with full power belonging to the legislative body and the body appointing other organs of the state. However, the text constantly draws attention to the radical discrepancy between the content of the normative acts and the systemic practice in the states mentioned. In reality, real power was in the hands of the communist party leaders controlling society through an extensive administrative apparatus linked to the communist party structure, an apparatus of violence (police, army, prosecution, courts, prisons, and concentration and labor camps), a media monopoly, and direct management of the centrally controlled economy. From a doctrinal point of view, the abovementioned states were totalitarian regardless of the degree of use of violence during the period in question.

Criminal law was an important tool for communist regimes' implementation of the power monopoly. In the Stalinist period, there was a tendency in criminal law to move away from the classical school's achievements. This was expressed, among other means, by emphasizing the importance of the concept of social danger and the marginalization of the idea of guilt for the construction of the concept of crime. After 1956, the classical achievements of the criminal law doctrine were gradually restored in individual countries, however – especially in special sections of the criminal codes – much emphasis was placed on penalizing acts that the communist regime a priori considered to be a threat to its existence. Thus, also in the field of criminal law, a difference was evident between the guarantees formally existing in the legislation and the criminal reality of the functioning of the state.

KEYWORDS

state law, criminal law, communist regime, East Central Europe.

1. Introduction

The decisions of the so-called Big Three, which were taken in Tehran (1943), as well as in Yalta and Potsdam (1945), led to the nearly half-century-long division of Europe into two zones, i.e., democratic and totalitarian. The states and societies of Central,

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Eastern, and South-Eastern Europe were – against the will of the majority of citizens – forced to submit to the new communist political solutions and resign from political independence. These countries were subordinated to Soviet Russia (with the consent of the United States, Great Britain, and France) and retained only illusory features of sovereignty. In these states, so-called people's democracy government departments were introduced, which were to reflect alleged support from the masses of society ('the working masses of towns and villages'). In fact, they were an example of the implementation of the Schmittian thesis about the advantage of force over law[1] that was expressed in the new political elite's successful seizure of power under the patronage of the Red Army.

At this point, we need to recall that it is quite obvious that the socialist or communist groups that took power in individual countries in the Soviet sphere of influence were completely subordinated to Moscow, and it was this factor, and not the issue of the political program, that determined their victory. Let us recall the history of Poland, in which the Polish Socialist Party, which had relatively many supporters, referring to democratic traditions, after 'purges' in its leadership bodies conducted by Moscow-dependent politicians and officials, and after separating its structures from the emigrant elites, remained absorbed by the Polish Workers' Party formed during the war on Stalin's order, i.e., a group whose strength was not so much social support but primarily control over the security apparatus and over the army (under the strict control of Soviet decision makers). The elites taking over actual power in the countries under Moscow's direct influence usually did not have the constitutional legitimacy to exercise public law functions. They substantiated their claims with a strong but questionable narrative that liberation from Nazi–German occupation was accompanied by a grassroot need for social liberation, which was additionally an implementation of historical necessity. This reference to one of the key categories of the Marxist worldview was to additionally justify actions (factual and legal) aimed at adopting the Soviet system and its legal solutions. As a result, the states of the so-called people's democracy (demoludes) acquired certain common features derived both from the USSR's 1936 constitution, which was their model, and from the real (though masked by words in the Orwellian spirit) functioning of the criminal state machine.

This ideological and institutional community includes the recognition of the so-called 'working people' as the source of state power (public), centralism (a uniform management system based on supreme and local state organs), the so-called 'proletarian internationalism' (understood in the context of the apparent internal equality of national minorities or subjects of a federation and external cooperation with socialist states), the leading role of the (generally monopolistic) communist party, an extensive system of apparatus of coercion and social surveillance, monopolization of the mass media, planned command-and-distribution national economy, Sovietization and standardization of culture, and finally, the introduction of the Russian language as the basic means of international communication (in the zone of Soviet domination).

1 Kozerska and Scheffler, 2017, pp. 53–79.

It is worth noting that the implementation of the aforementioned principles in some countries, and in certain periods, differed from the pattern carried out in the USSR. The 'evil empire' – as Ronald Reagan vividly called it – did not, as a rule, accept major deviations from the chosen path. As a result of disputes about the orthodox nature of the adopted solutions, some of the peripheral satellite states broke away from direct dependence on Moscow (Albania, Yugoslavia), and some (Hungary, Czechoslovakia) experienced the tragic consequences of armed intervention either by the Soviet Union itself or by Soviets supported by allies from the Warsaw Pact. It is worth emphasizing that, regardless of the fate of the individual countries' relations with Moscow, in each of them, criminal legislation, as well as security organs and the judiciary, became a reliable weapon for implementing and strengthening new political and economic communist regimes. The communists were convinced that the use of punitive measures and intimidation could suppress any manifestations of resistance and counteract the inefficiencies of a centrally planned economy. The implementation of ideology, and perhaps even the maintenance of power, was guided by instrumental and sometimes even disrespectful treatment of institutions and legal solutions developed in the era of the formation of the idea of a constitutional (legal) state. It should also come as no surprise that the staunch justification of far-reaching extra-normative repressiveness is that the fight against 'class' enemies (having all the qualities of the objective enemy Hannah Arendt described) became one of the foundations of the totalitarian system that prevailed in the part of Europe dominated by the USSR.

In order to present the community and the local differences acceptable from the point of view of the interests of the USSR in terms of constitutional (state law) and criminal solutions occurring in demoludes, the situation in five selected countries will be discussed: Czechoslovakia, the German Democratic Republic (East Germany), Romania, Hungary, and Poland.

2. Czechoslovakia

The pro-Soviet inclinations of the Czech state's political circles became apparent relatively early. Their roots can be mainly traced to the Communist Party of Czechoslovakia (KPCz), which was very active within the years 1921–1992. It was the only legally operating communist party in Central and Eastern Europe throughout the interwar period.[2] These connections should also be seen in foreign policy, specifically in the policies of Edvard Beneš (the minister of foreign affairs in 1918–1935, then the president of the First Czechoslovak Republic 1935–1938, subsequently the head of the government-in-exile 1940–1945, and again the leader of the country in the years 1945–1948), who before and during the war, formed alliances of cooperation and friendship with the USSR. It is hard to unequivocally evaluate to what extent

2 Bankowicz, 2003, p. 44.

the undertaken diplomatic endeavors were the result of a well-thought geopolitical strategy conducted by the Czech side and to what extent it was a genuine ideological commitment to Soviet solutions and good relations with Stalin. Nonetheless, soon before the Red Army entered Czechoslovakia, in March 1945, an agreement was concluded in Moscow between the London-based Provisional State Organization of the Czechoslovak Republic in Exile and the Communist Party of Czechoslovakia. This event bore fruit through the establishment (April 4, 1945) of the multi-party government of the National Front of the Czechs and Slovaks, based on the declaration known as the Košice Program.[3]

In spite of the fact that the signatories of this document pledged willingness to maintain state continuity with the pre-war republic, both the acceptance of the borders of Czechoslovakia, changed under the influence of the USSR's demands, and the clear attachment to the formally binding constitutional order (shaped by the Constitution of February 29, 1920) indicated the desire to create a new political entity of a socialist nature.[4] The persisting democratic rhetoric was accompanied by measures to change the system by reinforcing the local state administration (national committees), nationalizing heavy industry, banks, and joint-stock companies, and the gradual liquidation of private agricultural property (from restrictions on private land acreage to the compulsory 'socialization' of villages). Ultimately, after the so-called Czechoslovak coup d'état in Prague (February 20–25, 1948), the Communist Party of Czechoslovakia took over political domination in the National Front and actual power in the country (after purges and arrests of political opponents) with the USSR's support. In fact, its extra-parliamentary position in the system allowed for the adoption (on May 9, 1948) of the constitution, assuming – while maintaining insincere democracy in accordance with Orwellian new-speak – the 'people's' character of the state and political pluralism, as well as maintaining the names of some state institutions appearing in the old order.[5] It enabled the National Assembly nominally elected in four-point elections (a unicameral parliament managed by the Presidium of the Assembly) to become the highest state authority. The constitution, however, retained the institution of the president of the republic (elected by and accountable to parliament) and a government appointed by the president and accountable to parliament. Moreover, the National Assembly was given the authority to choose the composition of the Supreme Court, while the power to appoint and dismiss the public prosecutor general (who was accountable to parliament) was given to the president. At the level of local administration, there were national committees in counties, poviats, and communes, respectively.[6]

At the same time, in order to alleviate the Slovak population's separatist aspirations, autonomous solutions were introduced, the manifestation of which was

3 Bouček, Klimeš and Vartíková, 1975, p. 316.
4 Cholínský, 2018, p.159.
5 Bankowicz, 2003, pp. 67–68.
6 Szymczak, 1970, p. 56.

Slovakia's establishment of a regional legislative and control body called the Slovak National Council and a local government called the College of Plenipotentiaries. It has to be highlighted here that no analogous ruling entities were established in the Czech Republic, which, contrary to the proclamations on the equality of both nations, showed the actual advantage of the Czech part over the Slovak part. Both practice and subsequent constitutional regulations (with the exception of the constitutional act on Slovak national authorities of July 31, 1956) were unconducive to maintaining Slovak autonomy and systematically strengthened centralist tendencies.[7] Therefore, despite the formal existence of Czechoslovakia as a state guaranteeing Slovakia's autonomy, totalitarian thinking shaped regulations and their interpretation (or even disregard), which enabled the strictly unitary perception of the public law system.

In spite of maintaining the appearance of a democratic order, as mentioned above, Czechoslovakia's first post-war constitution introduced quite significant modifications to the political system leading to the centralization of public authority and the actual liquidation of civil liberties. The prevailing—typical of a totalitarian system—mixing of party and state structures was combined with increased repression of those whom the party and the extensive violence apparatus arbitrarily considered enemies. Over the years, transformations also took place in the socio-economic sphere, basically leading to the full nationalization of production plants, service plants, and farms. It should also be noted that from the very beginning, the post-war reorganization of the political system also influenced criminal law regulations. In Czechoslovakia, until the 1960s, Austrian and Hungarian penal regulations were in force, and these were amended and supplemented with special laws in the interwar period. Such a transformation of penal legislation continued in the post-war period.

The restrictiveness of the new governments in the Czech Republic (and partly also in Slovakia) was initially visible primarily in a series of decrees and executive acts issued by President Edvard Beneš from May to October 1945 putting a clear stamp on the anti-German and anti-Hungarian policy and a specific policy of settling accounts with people who were arbitrarily considered collaborators, traitors, or enemies of the Czech and Slovak nations.[8] It is worth emphasizing that although at the level of the normative text, these decrees (approved by the Constitutional Act 57 of March 28, 1946 by the Provisional National Assembly of the Czechoslovak Republic) did not contain any grounds for this, they still became an impulse to start the displacement of the German and Hungarian population. These actions, which were very often brutal (persecution, ethnic cleansing based on collective guilt decisions), mainly affected the economic, financial, administrative, and military spheres; however, in the context, they often referred to political struggles with circles that were not enthusiastic about the Soviet Union and communist ideology.[9]

7 Chmielewski, 2005, pp. 15–16.
8 Jonca, 2005, p. 162.
9 Cholínský, 2018, pp. 159–160.

Particularly noteworthy legal elements contained in the abovementioned decrees included the introduction of a new institution in the Czechoslovak judiciary, i.e., collective extraordinary people's courts (composed of a professional judge and four non-professional lay judges elected by local authorities), before which the proceedings lasted up to three days. The case, due to the complexity of the subject, could be referred to common courts, but the rules were so vague that it was highly discretionary. The sentences were delivered on camera, the accused could not appeal, and the death penalty (including public execution) was carried out within a few hours of the sentence. By Decree No. 138 ('on punishing certain offences against national honor'), the power to judge was granted to poviat national committees, which could reopen proceedings against persons acquitted by people's courts. Public stigma appeared among the penalties applied by poviat committees.

The first post-war years were characterized by the existence of factual and legal differences between Slovakia and the Czech Republic, and Moravia and Cieszyn Silesia. In non-Slovak territory, we could observe the zealous activity of people's courts, mass arrests, and the internment of the German and Hungarian population (as well as representatives of the Czech, Slovak, or Polish population – if they were considered hostile to the new order), acts of violence and murder committed against prisoners, and the brutal arbitrariness of the Red Army and the NKVD (the People's Commissariat for Internal Affairs). Within the period 1945–1948, the Czech part of Czechoslovakia also stood out from other European countries with a large number of sentenced and executed death penalties in connection with settlements from the time of the war. In contrast, in Slovakia, the situation was different, as the autonomous organs adopted separate legal provisions resulting from this area's specific fate during the war. They less restrictively defined the categories of persons and types of crimes falling within the forms of special justice. Even though the settlement proceedings were conducted in a similar manner before the people's courts (the composition and rules of procedure were analogous to the Czech solutions) and before the National Court (the best known example is the trial sentencing Monsignor Jozef Tiso, who was the leader of the Slovak state during the war, to the death penalty), the number of pronounced death sentences was significantly lower. Furthermore, the non-legal actions of the security authorities and the army were less brutal.

From 1948 (after the coup d'état), onward, the communist authorities, in order to strengthen and consolidate their rule, tightened the system of penal repression. The new normative acts (including Act 231 of 1948 on the protection of the Democratic People's Republic or Act 232 of 1948 on the courts) covered the entire territory of the state of Czechoslovakia. This was accompanied by purges in the justice system and the resumption of numerous additional proceedings, including political, before the National Court.[10] When shaping the provisions of criminal law and during adjudication, reference was made to the Marxist idea of the class nature of the state, in which crimes against the 'system' and the economic principles of the people's state, as well

10 Jasiński, 2014, pp. 253–282.

as alliance with the USSR, should be criminalized. The concept of the dissuasive role of severe penalties was also combined with the re-education process, which was reflected in the penal code adopted in 1950. As part of totalitarian regimes' specific hypocrisy, a special role was assigned to the 'fight for peace' (Act 165 of 1950 on the protection of peace, which, under the slogan of penalizing 'inciting and promoting war,' fictitious charges against real and imaginary political opponents were formed).[11] The powers of non-judicial bodies (committees of national councils) to impose penalties in minor cases (misdemeanors) under the administrative penal code (Act 87 of 1950 and Act 89 of 1950) were also maintained.

It should be emphasized here that the subsequent waves of repression continued until the so-called 'thaw' that occurred in 1955–1956,[12] as a result of which there were also statutory changes restoring some of the achievements of the philosophy of criminal law developed in the Enlightenment period and the era of liberalism. For instance, in the Criminal Procedure Act,[13] the basic principles of criminal procedure were referred to unequivocally, such as the presumption of innocence, the right to defense, the free assessment of evidence, recognition of the indictment as the basis for conducting proceedings before a court, legalism (the principle of binding by law), and finally, recognition that the mere admission of guilt cannot be sufficient proof of guilt and conviction. The statutory conditions for initiating and conducting criminal proceedings before investigators (the prosecutor) were also defined.

The tendencies, at least at the level of a legal text, to restore the significance of the achievements of classical penal litigation and simultaneously introduce socialist new-speak were visible in the subsequent Code of Criminal Procedure of 1961.[14] It reinforced the court's role by entrusting it, for example, with the right to make a preliminary examination of the indictment and by extending the powers of taking evidence (the principle of inquisitiveness). It emphasized that law enforcement agencies, the prosecutor's office, and the court should act in a way that guarantees constitutional rights and freedoms. Moreover, it stated that the principles of the presumption of innocence, complaints, objective truth, openness, directness, and free evaluation of evidence should be the basis for proper conduct. Nevertheless, the necessity of 'deepening' the process of 'socialist democracy' by expanding the role of 'working people' and their organizations was not neglected.

In this context, we need to signal that when analyzing normative acts created by totalitarian regimes, one should always remember the difference between what is written and the actual nature of practice. This, in particular, applies to the so-called 'people's democracy' in which the discrepancies between declarations and facts were qualitative rather than quantitative. This can be seen, for example, in the idea of including social organizations in criminal proceedings, which was to be realized not

11 Zákon na ochranu míru č. 165/1950.
12 Jasiński, 2014, p. 280.
13 Zákon o trestním řízení soudním (trestní řád) č. 64/1956.
14 Zákon o trestním řízení soudním (trestní řád).

only in the possibility of granting bail to the accused, but also in such a specific action as 'warning' law enforcement agencies about violating socialist legality, as well as in performing the function of a 'social prosecutor', i.e., an entity that expresses social indignation at the violation of the socialist rule of law. Therefore, when interpreting normative texts, one must not make the cardinal error of applying mental categories developed in the rule of law to totalitarian regimes that, in principle, are legal nihilism.

Another constitution was adopted on July 11, 1960, when Antonín Novotný (until 1968) held the office of the First Secretary of the Communist Party of the Czech Republic (KPCz) concurrently with that of the president of the state (1957). Based on its provisions, the state changed its name from the Czechoslovak Republic to the Czechoslovak Socialist Republic. Although it did not introduce any significant changes to the system of state organization, it led to the further depreciation of the Slovak authorities, while maintaining the formal appearance of autonomy. Novotny's rule was characterized by centralism, and it maintained numerous Stalinist remnants (e.g., the so-called 'cult of personality'); however, at the same time, the most drastic and brutal methods of the security services' operation were abandoned. A manifestation of the slight easing of repression was the adoption of a new penal code (1961) in that period.

The weakness of the Czech 'thaw' contributed to the strong social reaction expressed during the Prague Spring (5 January – 21 August 1968) due to the next first party secretary, Alexander Dubček. His rule resulted in the introduction of the so-called 'open door' program aimed at numerous political and socio-economic reforms (including the rehabilitation of victims and persecuted people during the Stalinist era). This systemic experiment, known as 'socialism with a human face,' was brutally ceased by the military intervention of five Warsaw Pact countries (August 20–21, 1968) and the arrest and deportation of the party elite – led by A. Dubček – to Moscow. As a consequence of a serious political impasse, a law was passed on October 27, 1968, i.e., the Constitutional Act on the Czechoslovak Federation (it entered into force on January 1, 1969). Under Soviet pressure, the initiated reforms were withdrawn (accompanied by social protests that were brutally suppressed), and changes were made in the party and the government's top representatives. In April 1969, Gustàv Husák became the new leader of the Communist Party of the Czech Republic (KPCz), and in 1975, he assumed the office of the president (which he held until 1989).[15] Within the framework of introduced systemic changes, the legislative function was entrusted to the Federal Assembly consisting of two equal chambers – the People's Chamber (200 members representing all citizens) and the House of Nations (the Czech Republic and Slovakia had 75 equal representatives delegated by national councils, i.e., the parliaments of both republics). The debates of each house were held separately, in a session system (spring and autumn), except for the election of the president of Czechoslovakia and common matters such as the election of the president of the Federal Assembly. In both chambers, majorization was prohibited (the rules of a blocking minority) in

15 Bankowicz, 2003, pp. 71–84.

certain decisions, which essentially concerned the preservation of autonomy. Legislative initiative was granted to members, parliamentary committees, the president, the government, and national parliaments. To pass a law, the consent of both chambers and the non-violation of the prohibition of majorization were required. In the period between sessions, some of the competences of the Federal Assembly (except for the election of the president, the passing of laws and the budget, a vote of no confidence in the government, and declaration of war) were taken over by the 40-person presidium elected and dismissed by both houses (each with 20 members). Additionally, the Presidium could pass statutory regulations (*zákonné opatřeni*), which had to be approved at the next session by the houses of the Federal Assembly.

The president of Czechoslovakia – as mentioned above – was elected by the Federal Assembly for a period of 5 years by at least three-fifths of all members. He was bound by the *incompatibilitas* rule. Due to the function that he performed, he also could not be judicially held accountable, and he was solely politically accountable to the Federal Assembly. His powers were mainly formal (e.g., convening and dissolving the Federal Assembly, signing bills with a countersignature), but his position in the political system was rather strong in that he was also the secretary general of the Communist Party of the Czechoslovakia.

The highest central executive organ was the government, whose chairman, vice-chairman, and ministers were appointed and dismissed by the president. After delivering an *exposé*, the government still had to garner the Federal Assembly's support. The government's main task was administering the state (conducting internal and foreign policy), which was supported by legislative initiative or the power to issue executive regulations. Finally, it is worth adding that in the Czech Republic and Slovakia, respectively, unicameral national councils, their presidencies, governments, supreme courts, prosecutors general, and local administrations were established, as well as national committees at the level of counties, poviats, and municipalities.

The judiciary and the prosecutor's office were regulated by the law of December 17, 1969, which stated that the constitutional duty of the courts and the prosecutor's office was to educate citizens in the spirit of fidelity to the Fatherland and the cause of socialism, observance of the law, and fulfilment of obligations to the state. The judiciary system was based on the existence of the Supreme Court of the Czechoslovak Socialist Republic (CSRS) – its judges were elected and dismissed by the Federal Assembly – the Supreme Court of the Czech RS, and the Supreme Court of the Slovak RS, as well as national and district courts (judges were appointed and dismissed by the relevant national councils for a period of 10 years). The military judiciary formed a separate structure. It is worth noting that apart from formally independent professional judges, the national and district people's lay judges (elected and dismissed by national committees for 4 years) took part in the hearings. The constitution also provided for the existence of the Constitutional Court, but due to the failure to issue the relevant act, this body was not established until 1991 (the Act of November 17, 1991). Until then, issues related to normative acts' conformity with the constitution were resolved by the Federal Assembly. The prosecution system was based on the

principle of centralism and hierarchy. Organizationally, the prosecutor's office was built in a similar way to the judiciary.[16] When considering the system of courts or prosecutorial offices in communist countries, it is absolutely necessary to remember that their staffing and functioning were fully subordinated to the community party's decisions.

Finally, we would like to emphasize that although the constitution of 1968 established the Czech–Slovak federation and sanctioned the equality of 'fraternal nations,' the amendments of 1971 and 1975 pointed to the insincerity of the idea of federalism and the return to centralist state management by the communist regime. It is also worth highlighting that the era of Husák's rule was distinguished by the maintenance of the Marxist and Leninist course in the post-Stalinist spirit. This period was marked by constant confrontation with small anti-communist opposition focused mainly on Charter 77 (closely cooperating with other movements of this type, such as the Workers' Defence Committee (KOR) or Solidarity in Poland) and growing social dissatisfaction. This process manifested itself on November 17, 1989, starting the 12-day festival of freedom known as the Velvet Revolution. Daily demonstrations involving several thousand people compelled the rulers to recognize that the society no longer agreed to further propositions of 'rebuilding socialism.' The scale of the protests also ultimately prompted the regime to withdraw from solutions through force.[17] It is possible that the resolutions of the decision makers within the Communist Party of the Czech Republic were influenced by the orders Moscow issued and the political changes taking place in Poland.

3. German Democratic Republic

Unconditional surrender made the areas of the former German state fully dependent on the anti-Nazi coalition's decisions. It was considered necessary to divide its territory into four occupation zones, and this took place on June 5, 1945. One part of Germany came under the direct administration of the USSR authorities through the Soviet Military Administration (RWA), which put in place a program of denazification, nationalization of natural resources, industry and services, and the parceling of land goods. The legal basis for these actions were the normative acts issued by the Allied Control Council (a body established by France, the United States, Great Britain, and the USSR), but also outside the normative orders and instructions of the Soviet Military Administration commander. After the exacerbation of the conflict between the USSR and the United States, and the western countries' commencement of the formation (in the remaining occupied zones) of the Federal Republic of Germany, Moscow decided to create a separate socialist-style state entity called the German Democratic Republic

16 Szymczak, 1988, pp. 428–450; Chmielewski, 2005, pp. 16–17.
17 Bankowicz, 2003, pp. 88–94.

(GDR).[18] It is worth indicating, however, that this was preceded by the appointment, in 1947, in the Soviet occupation zone, of an advisory body named the German Economic Commission, which, until 1949, was the central German administrative body with legislative and administrative powers. Its effective management and planning policy, mainly in the economic sphere, favored the centralization of the territories subordinated to the USSR even before the formal establishment of the GDR, i.e., a state which, in the propaganda and formal and legal narrative, was to be the only legitimate political entity representing the interests of the entire German 'people.' As a side note, it can be added that the exclusivity thesis, due to the progressive normalization of relations between Bonn and Moscow, did not begin to be withdrawn until the end of the 1960s, and wording about the existence of a socialist 'GDR nation' was introduced into the official nomenclature (amendment to the constitution of 1974).[19]

The GDR's first constitution (May 30, 1949) was modelled on the Weimar constitution of 1919 and proclaimed the new state as a federal republic. On its basis, a temporary bicameral parliament and a provisional government were established. In an unusual move for socialist countries, the bicameral parliament (the *Volkskammer* chamber coming from general election and the *Länderkammer* chamber being appointed by the federal states' parliaments; this model survived until 1958) on October 11, at a joint session, elected communist Wilhelm Pieck (1949–1960) for the office of president of the GDR. It should be noted, however, that although the Soviet occupation forces seemingly handed legislative and administrative power to the new constitutional organs, the state was still under Soviet control – this time through the newly created body of the Soviet Control Commission (SMAD – Soviet Control Commission in Germany).[20]

From the very beginning of its formation, the Socialist Unity Party of Germany (SED), established in 1946 (through the forced merger of the Communist Party of Germany and the German Social Democratic Party in the Soviet occupation zone), imposed political hegemony. Under the leadership of the SED's first secretary (1950–1971, and, at the same time, 1960–1973; the chairman of the State Council of the GDR), Walter Ulbrich, together with the other puppet parties, formed the so-called National Front.[21] The falsehood of the omnipotent democratic rhetoric and the illusory people's power in the GDR (allegedly expressed through support for the Socialist Unity Party of Germany and allied parties within the National Front) were exposed through such events as the bloody suppressed workers' revolt in 1953 and East Germans' attempts to enter West Germany and West Berlin. As a result, the communist authorities decided to build the infamous Berlin Wall and a system of barriers on the German–German border; they also issued a barbaric order to shoot unarmed refugees.

18 Turski, 1972, pp. 288–304.
19 Szymczak, 1988, p. 162.
20 Szymczak, 1988, p. 158.
21 Turski, 1972, pp. 275–286.

From the dawn of the new rule, legislation (especially criminal legislation) became the key instrument for the communists' seizure and consolidation of power. Its politicized and repressive nature was initially manifested not so much in its content as in the practical application of the Soviet occupation authorities and the German local structures subordinated to it. Not only was the Allied Commission's special legislation willingly used as a tool to counter potential political opponents (such as Act 10 of 1945 and Implementing Ordinances No. 24 and 38 on the punishment of war crimes, crimes against peace and against humanity, or the acts establishing the economic criminal proceedings of 1948 in cases of sabotage, diversion, and other economic crimes), but, most of all, the Penal Code of 1871 that was still in force,[22] was utilized. This began to be widely interpreted, especially in view of Article 6 of the constitution of 1949, which broadly covered the protection of the state and (democratic) power.[23]

The tendency to apply an instrumental treatment of criminal provisions was confirmed by the amendments to the penal procedure of 1952 and to the penal code of 1957. These acts were intended to facilitate the process of 'cleansing' social life from the Nazi past, but they were, in fact, frequently used to eliminate all manifestations of political and economic resistance (generally under the pretext of countering incitement to war or to expose and undermine the actions of the enemies of the workers and peasants) and consequently to intimidate the public. Various restrictions were applied, such as imprisonment in labor camps or prisons with a strict regime, expropriation or forfeiture of property, deprivation of certain civil rights (the right to vote, the right to work or to perform functions in public services), as well as new types of punishment such as conditional conviction and public condemnation, or educational punishments (for acts of the so-called 'low social harm offense').

Penal regulations were enforced by the police and by the Ministry of Public Security established in 1950 (MfS, known as Stasi) as a political, economic, and military investigative body closely cooperating with district prosecutors' offices, as well as by the reorganized (structural and personnel) judiciary that was wholly dependent on ruling party's political will in its judgements. Their repressive activity was often in blatant contradiction to the declared rule of law (classified investigations, unfounded arrests, use of illegal measures in the investigation, brutal interrogation methods, simplified procedure, forcing a suspect to plead guilty, denial of the right to defense).[24]

In order to adjust the normative content to suit the actual prevailing ideology, in the GDR, a new constitution was adopted on April 6, 1968, this time modelled on the Soviet solutions originating in 1936. Its content included a declaration that state power was exercised by the working people of towns and villages under the leadership of the Marxist–Leninist party (Art. 1–2), and it referred to unitarism and democratic centralism (Art. 47), as well as to the principles of proletarian socialist internationalism with

22 Arnold, 2006, pp. 423–425.
23 A. 6 Verfassung der Deutschen Demokratischen Republik vom 7. Oktober 1949.
24 Herz, 2008, pp. 15–19.

distinction. Fraternal ties with the Soviet Union (Art. 6) were also emphasized. It was also stated that the economy should be based on socialist ownership of the means of production and on central control through plant complexes, production cooperatives, and labor cooperatives bringing together small producers and craftsmen (Art. 9).

The limitation in relation to the regulations of 1949 was significant. The catalogue of civil rights (Art. 19–40) was notably closely related to the corresponding duties (in accordance with the principles 'co-operate, co-plan, co-ordinate').[25] The new constitution also rebuilt the system of supreme state organs, removing the appearances of federalism. The People's Chamber became the highest organ of public authority, equipped with a legislative and creative function in the form of authorizing the election and dismissing the president of the State Council and the election and dismissal of members of other state authorities: the Council of Ministers, the National Defense Council, the Supreme Court, and the General Prosecutor's Office. In addition, people's representative offices were established in the districts, poviats, district cities, and communes (Art. 48–65).[26]

As mentioned above, the structure of the supreme bodies followed a centralist model of management and subordination. Its peculiarity was the combination of the position of the first secretary of the party with the function of the chairman (having the powers of the head of state) of the council,[27] as it emphasized the identification of the state with the party and strengthened the political position of this state function.

Let us remember that such a combination of party and state functions was a typical feature of totalitarian states, including the Third Reich. The application of this scheme was accompanied by a tendency to limit (from 1960) the powers of the State Council as a collegial body (e.g., depriving it of the right to issue a binding interpretation of the constitution and other normative acts), to reduce it to a representative role and, at the same time, to strengthen the competences in the internal and external policy of the foreign Council of Ministers. A noteworthy systemic solution in the GDR was also the creation of a body under the name of the National Defense Council (chaired by the First Secretary of the Socialist Unity Party of Germany), which, in the event of martial law, had exclusive legislative and executive powers.

In the DDR, justice was administered by the Supreme Court and the district, poviat, and social courts (e.g., in workplaces or housing estates). The military courts formed a separate structure. All judges (except in the military), lay judges, and members of social courts were elected by people's representatives or directly by citizens (Art. 92–96). The public prosecutor general (appointed, as mentioned above, by the People's Chamber and responsible to this body) was subject to hierarchical subordination of the public prosecutors from districts and poviats and the military prosecutors (Art. 97–98), who were appointed, dismissed, and responsible to the

25 Szymczak, 1988, pp. 160–175.
26 Mizerski, 1992, pp. 29–93; Verfassung der Deutschen Demokratischen Republik von 6 April 1968 in der Fassung des Gesetzes zur Ergänzung und Änderung der Deutschen Demokratischen Republik von 7 Oktober 1974, 1975, p. 79.
27 Działocha, 1974, p. 104.

public prosecutor general (Art. 97–98). The constitution also guaranteed the right to a fair trial and a typical defense throughout the entire criminal procedure and sanctioned the basic criminal law guarantees, including the principles of *lex retro non agit*, *nullum crimen sine lege*, *nulla poena sine lege*, and *nullum crimen sine culpa*. It also stated that the rights of a citizen in criminal proceedings may be limited only to the extent specified by law and that the decision to apply pre-trial detention constitutes a judge's exclusive right.

It can be added here that many of the aforementioned constitutional guarantees were previously expressed in the penal code adopted on January 12, 1968. This code, despite the appearance of referring to the principles developed by the classical school of criminal law, was, in fact, mainly focused on protecting the socialist regime, which was perfectly illustrated by the accumulation of ideologically marked offenses in the following chapters: 1 – crimes against the sovereignty of the GDR, peace, humanity and human rights (sic!), 2 – crimes against the GDR, and 8 – crimes against the state order. It also manifested itself in describing crime in a typically totalitarian manner in terms of a culpable anti-social or socially dangerous activity, being an echo or relic of capitalism.

This conviction that crime is the result of the previous system's influence was also reflected in the categorization of criminals and punishments. Educational penalties (including freedom sentences) were provided for citizens who were class-devoted to socialism and who committed misdemeanors and offenses that did not affect the foundations of the functioning of the state and the system. For the enemies of the people and the system who committed crimes, penalties were foreseen primarily as a deterrent.[28] Acts of low social harm or fault could be treated as misdemeanors, administrative offenses, or disciplinary offenses, or could be prosecuted in accordance with the provisions on material liability. These issues were regulated by the Act on Combating Misdemeanors of 1968, which – let us mention it as a curiosity – introduced such specific penalties as an entry in employees' files containing an annotation about the violation of legal obligations or an order of work commonly useful during time off work.[29]

In relation to Erich Honecker's 1971 takeover of the position of secretary general of the Socialist Unity Party of Germany (which he held for the period 1971–1989; from 1976, he was also the chairman of the State Council), the 'consumer socialism' program began to be implemented, and international relations were normalized (also with the Federal Republic of Germany, accession to the United Nations in 1972). An expression of this new approach was the 1974 amendment to the constitution, which adopted the idea of building a separate identity for the GDR. At the same time, the hegemonic power exercised by the Socialist Unity Party of Germany and the friendship with the USSR were consolidated, and the preamble stressed the need to "*follow a developed socialist society along the path of socialism and communism*." Despite the

28 Arnold, 2006, pp. 430–433.
29 Łysko, 2017, pp. 194–195.

apparent success of the idea of 'consumer socialism' in the autumn of 1989, in the GDR, there were mass popular protests that resulted in the spectacular fall of the Berlin Wall. Subsequent significant changes in constitutional regulations aimed at deconstructing the state's communist character[30] did not prevent the country from being absorbed by the Federal Republic of Germany.

4. Romania

Romania was a constitutional monarchy in the years 1866–1947. During the Second World War, however, its vulnerability – first to the influence of the Third Reich (the pact with the Axis powers, the infamous dictatorship of Conducător Ion Antonescu), and then – to the Soviet Union led to significant changes in the state's political structure. In August 1944, there was a coup d'état controlled by King Michael I (with great public support), siding with the allies. The monarch also agreed to the USSR's liberation and actual control of the state (Soviet troops were stationed in Romania until 1958) and to make territorial concessions to the USSR and Bulgaria. The adopted course of action, with the consent of the rest of the Big Three, resulted in an increase in the communists' importance, the forced abdication of the king, and the overthrow of the monarchy.[31]

As a result, on December 30, 1947, a proclamation of the Romanian People's Republic was delivered, in which the then-prime minister Petru Groza (the head of the Ploughmen's Front, a satellite party towards the communists) continued to ingloriously play the role of creator of brutal systemic changes, along with the communist Georghe Georghiu-Dej (first secretary of the Romanian Workers' Party in the periods 1944–1954 and 1955–1965, prime minister in the period 1952–1955, and chairman of the State Council in the period 1961–1965). For the sake of clarity, it should be recalled that the communists' domination, legalized in a typical manner for the so-called 'demoludes' through the rigged elections in 1946, resulted not only from the exercise of control over the power-wielding departments and administration but also from the Soviet authorities' direct and constant interference. The construction of the totalitarian system, preceded by the liquidation (after trials that were conducted for show) of all formal political opposition, the forced merger of the communist and social democratic parties, and the creation of a cross-party bloc called the People's Democracy Front (from 1974, constitutionally legalized as the Socialist Unity Front), was sealed in March 1948 by means of fictitious elections to the Great National Assembly and the adoption of a new constitution on April 6, 1948.

In this case, we can note a clear departure from Montesquieu's idea of the division and inhibition of powers in favor of Marxist–Leninist 'democratic centralism.'[32]

30 Mizerski, 1992, pp. 25–28.
31 Hasenbichler, 2020, pp. 2–3; Tismaneanu, 1989, pp. 34–39.
32 Bielakow et al., 1964, p. 714.

The supreme organ of state power, representing the working people and having a monopoly on legislation, was the unicameral Great National Assembly (GNZ) headed by the Presidium. The executive body was a government headed by the prime minister (who was accountable to parliament). In the field, power rested in the hands of collective national councils subordinated to central administration bodies, which meant no dualism in public administration. Bills were prepared and control over the constitutionality of the laws was exercised by a body specific to Romania (a similar one was established in the GDR) called the 'constitutional and legal committee' (from 1975 – the 'constitutional committee'). The committee was elected for a given parliamentary term from among members and specialists from outside parliament. As part of the justice system, lay judges were appointed to resolve disputes, alongside professional judges, with an equal decision-making vote.

The systemic changes also affected the socio-economic structure. An often brutal, forceful process of nationalization of almost all branches of the economy was initiated, and a central model of its management was implemented (the first plan, however, was put into effect only in the years 1951–1955, i.e., slightly later than in other socialist countries). Due to the peasantry's mood, collectivization was extended in time and completed at the beginning of the 1960s.[33] It is also worth underlining that for all manifestations of contestation of the new Romanian rule, one could face particularly brutal restrictions, including imprisonment in labor camps and colonies without a sentence – that is, solely by the decision of the Ministry of the Interior. In these, the authorities applied an inhumane, 'experimental' method of re-education, which consisted of rewarding convicts who expressed communist views by shortening their stay in a cell or prison in exchange for torturing other prisoners.[34] As we can see, the 'experiment' carried out in the Piteşti prison was earlier and far more brutal than that in the famous Stanford prison[35] or Milgram's experiment.[36]

Due to continued pro-Russian subordination, the character of the constitution of March 27, 1952 was established through consultation with Joseph Stalin and the leading Soviet lawyer, Andrej Wyszyński. Thus, a system based on the state's class character and its friendship and alliance with the Soviet Union and socialist internationalism was consolidated in Romania. Moreover, it highlighted the superior role of the Supreme Court over other judicial authorities and the prosecutor's supervision of central and local administration bodies, as well as these bodies' terms of office at all levels. Another noteworthy fact is that by virtue of the constitution of 1952, as part of the reorganization of state administrative units, the Magyar Autonomous Region (Regiunea Autonomă Maghiară), which was inhabited by Hungarian-speaking Seklers, was established. This gesture was meant to communicate the regime's sensitivity to national minorities' affairs, but in reality, under the pretext of population and

33 Szymczak, 1988, pp. 199–206.
34 Wolsza, 2016, pp. 105–106.
35 Zimbardo et al., 1972, p. 26.
36 Milgram, 1963, pp. 371–378.

territorial changes, this only seemingly independent entity was liquidated in 1968. An important constitutional amendment in 1961 transformed the GNZ Presidium into the Council of State (which, among others, was composed of the chairman of parliament and the prime minister), expanding its scope of powers, increasing its independence from parliament, and giving it authority over the government.[37] Thus, it became the main authority in the state.

Nicolae Ceauşescu's (secretary general of the Romanian Communist Party in the period 1965–1989, chairman of the State Council, and later president in the period 1967–1989) dictatorship marked a vital and painful period in the history of the communist state regime. His rule evolved from the political 'thaw' (*dezghet*) period (continuation of de-Stalinization, G. Georghiu-Dej's rehabilitation of the victims of terror, refusal to agree to the invasion of Czechoslovakia, cooperation with the West) and cultural and economic liberalization to the 'freezing' (*înghet*) period. Staunch protest against foreign states' interference, especially the Soviets, in the country's internal affairs was accompanied by a shift toward the legitimacy of communist nationalism known as Ceausism (the Romanian version of Stalinism).[38] The legal basis for strengthening Ceauşescu's personal rule was the third constitution in the regime's history, which was passed on August 21, 1965 (symbolically referring to the anniversary of the 1944 coup d'état) and then amended ten times within the years 1968–1986.

From the viewpoint of the systemic regulations validated in this act, the following are noteworthy: the change of the state's name to the Socialist Republic of Romania and the replacement of the fraternal alliance with the Soviet Union on the principle of basing international relations on respect for national sovereignty and independence and not interfering in internal affairs. Moreover, its content was enriched with an ideological layer emphasizing the Romanian working class aspiration to achieve communism and recognizing the Romanian Communist Party (RCP) as the leading political force in society and the highest organizational form of the working class. The issue of founding the national economy on socialist ownership of the production means (state or cooperative) and a foreign trade monopoly was also accentuated.

From the time of the delivery of the so-called July Theses in 1971, there was a clear regression in Ceauşescu's policy; the personal dictatorship and cult of the individual expressed, through strong control and administrative and police restrictions on society, a high degree of state centralization (the highest, not considering Albania), economic statism, and justified nepotism. It is also worth mentioning the significant amendments to the constitution, which, among others, sanctioned the principle of combining the position of the chairman of the State Council (from 1975, equivalent to the president of the republic) with the function of the secretary general of the RCP (1967) and granted the right to nominate only candidates for parliament to the Socialist Unity Front (1974). In terms of constitutional and statutory regulations concerning local state authorities (national councils), the tendency indicated a formal extension

37 Sokolewicz et Zakrzewska, 1976, pp. 7–9, 15–16, 27–32.
38 Zavatti, 2016, pp. 194–197; Brzostek, 2009, pp. 47–69.

of the scope of their competences (e.g., militia bodies were subordinated to them at all levels; at the district level they selected judges, lay judges, and prosecutors at the request of the minister of justice, respectively, and the public prosecutor general), but with a strong position in these councils' executive committees.

Analogically to the constitutional regulations, the principle of combining positions in the party and in national councils had already been introduced by way of non-statutory (political) means.[39] It is worth noting that in Romania, as in the case of other so-called 'democracies,' the practice of combining party and state functions and the state's actual absorption by the communist party could be observed. In other words, on the factual and normative level, the party organization absorbed the state, and it took a secondary position in relation to the party. The issue that distinguished Romania in terms of the system, and in fact from other socialist countries, was the restoration of the cult of the individual and specific leadership in the state's organizational structure during Ceauşescu's rule. The most palpable symptom of this was the introduction into public circulation (infamous with respect to Antonescu's heritage) of the term *conducător* (chief).

As far as criminal law in Romania is concerned, quite similar to in Poland, the codes developed before the communist coup were used for a long time (the Romanian penal code and the code of criminal procedure, adopted in 1936 and entered into force in 1937).[40] It was assumed that the 'old' regulations could be filled with new, socialist content and adapted to the formation of a new society through systematic amendments (actually, they were amended annually). In the case of Romania, the technically modern nature of criminal codifications was aptly emphasized; nonetheless, this did not prevent them from being replaced by new regulations in 1968.

The new penal code adopted the assumption, which was typical for socialist countries, that a crime is a socially dangerous act (in the 1936 code, this idea was introduced by the 1949 amendment). In its content, the division into crimes, misdemeanors, and offenses (*crima*, *delict*, *contraventie*) that existed in the 1936 code was abolished. It was also established, as was the case in the criminal code of the German Democratic Republic, unprecedentedly so in the context of other USSR-dominated regions, that attempt and preparation were punishable only if they were expressly provided for in the criminal law.

Among the more interesting elements of Romanian criminal law, it is also worth indicating that, apart from typical justifications, such as necessary self-defense or a state of necessity, it introduced (similarly to the Hungarian regulations) the abolition of criminal liability for acts committed as a result of physical or mental coercion. The Romanian penal code also differed from other socialist regulations by assuming that unintentional offenses consisting of acting were only liable if provided for by law, and in the case of offenses of negligence, it assumed that they could be committed either

39 Sokolewicz and Zakrzewska, 1976, pp. 39–57; Constitution of the Socialist Republic of Romania of 21 August 1965, 1976, pp. 69–101.
40 Negru, 2014, p. 155.

intentionally or unintentionally – without a separate indication of this in the act.[41] Nevertheless, one should not fail to mention that regardless of the level of legislative technique expressed in the structure of particular provisions or, more broadly, the institution of substantive and procedural criminal law, in Romania, as in other countries of the so-called 'people's democracy,' the level of formal, normative means of security, such as the right to a fair trial, the principles of non-retroactivity, the right to choose a defense counsel, the presumption of innocence or *nullum crimen, nulla pena sine lege*, was only as high as the politicized ruling structures, especially the staff officials' mentality and ordinary decency, allowed.

5. Hungary

During the Second World War, the Kingdom of Hungary cooperated with the Nazi–German regime. Nevertheless, it is worth indicating here that (unlike in the Romanian case) no anti-Semitic policy was implemented in Hungary under Kormányzó Miklós Horthy. After the entry of Wehrmacht troops into the country in March 1944 and then Ferenc Szálasi's (the leader of Arrow Cross) takeover of full power, however, the Jewish population's situation became as tragic as in other areas under the Third Reich's rule. At the end of 1944, in response to the occupation and the Arrow Cross Party's rule, an independent multi-party Hungarian National Independence Front was formed in the country, the common target of which was to side with the Allies and democratize the country.

Following the war's conclusion, by the decision of the Big Three, this country fell into the USSR's sphere of influence. During the time of initial occupation, the invading Soviet troops took full advantage of the Hungarian defeat and the breakdown of law and order and committed numerous acts of rape and murder against the civilian population in addition to plundering private and public property. Additionally, significant large material burdens related to the implementation of the provisions of the Paris peace treaty (February 10, 1947) were heaped upon the defeated nation. These resulted in the reinstatement of Hungary's pre-1938 borders, compulsory war reparations to the USSR, Yugoslavia, and Czechoslovakia, and the obligation to the further stationing of Soviet troops. The last element in particular (as in the case of Romania and Poland) ensured the state's political fate.

Despite the fact that the first free elections in November 1945 gave the non-communist agrarian party a political advantage, the Soviets' constant, forceful support for the left-wing parties participating in the government led to their gradual takeover of control of the state.[42] The decisive importance of the stationing of Soviet troops in a given country needs to be highlighted in relation to the loss of that country's

41 Andrejew, 1975, pp. 44–103.
42 Kubas, 2012, pp. 200–201.

sovereignty. This is exemplified by the different fates of Albania, Yugoslavia, and Finland in relation to that of Hungary or Poland.

The first vital step in transforming the Hungarian state into a country with a so-called people's democracy was the adoption, on January 31, 1946, of the so-called Small Constitution, by virtue of which the monarchy was abolished and the Second Hungarian Republic was proclaimed (however, temporarily, as it turned out, since it only survived until 1949). In accordance with its provisions, a unicameral legislative body called the National Assembly was established, the composition of which was selected in universal, direct, equal, and secret elections. Moreover, executive power was entrusted to the president elected by the National Assembly, who was responsible to it (his acts required the relevant minister's countersignature), and the interim government (responsible to the parliament). The Small Constitution did not regulate other state organs' systemic position, although it referenced the idea of the tripartite division of powers.[43]

The communists' ongoing political offensive, marked by electoral fraud and political murders, made it possible, in 1947, for the Left Bloc to take full power in the state. In practice, this ensured the Hungarian Communist Party's (from 1948, after the forced merger with the Social Democratic Party – the Hungarian Workers' Party) political domination under the leadership of 'Stalin's best Hungarian disciple,' Mátyás Rákosi (appointed, based on the generalissimo military ranking, secretary general of the Party in 1946–1956).

His infamous reign, known for the use of 'salami tactics' (the tactic of eliminating political opponents and gaining control of the state apparatus piece by piece), was marked (especially from 1947) by widespread terror and mass repression by the security services (Államvédelmi Osztály), as well as fake trials that were essentially formalities[44] and deportations (often without sentences) to forced labor camps (modelled on the Soviet Gulags).[45] The regime's elites also attacked Hungary's Christian denominations. This practice is best symbolized by the 1948 imprisonment of the Lutheran bishop Lajos Ordass and the 1949 sentencing of József Mindszenty, the Catholic Primate of Hungary, to life imprisonment (both were subsequently exiled in 1956).[46] At the same time, the communist authorities began to undertake systemic transformations in the socioeconomic sphere, expressed, inter alia, in agrarian reform (e.g., expropriation of largescale agricultural estates, and, over time, the brutal collectivization of agriculture) and currency reform (*pengő* replaced with *forint*), as well as the nationalization of industries and banks. Following the Stalinist pattern, 5-year economic planning (from 1947) was put into practice. These were allegedly conducive to pro-quality changes, but in reality, in the following years, they deepened the material collapse of the state and the pauperization of the population.[47]

43 Kubas, 2012, pp. 200–201.
44 Horváth, 2003, pp. 238–244.
45 Rieber, 2013, pp. 29 et seq.; Wolsza, 2016, pp. 104–105.
46 For more on the cardinal's stance, see Grajewski, 2017, pp. 139–145.
47 Szymczak, 1988, pp. 242–246.

Another major change in the political system occurred with regard to the adoption, on August 18, 1949, of a new constitution after the Hungarian Workers' Party took full control of the country (A Magyar Népköztársaság Alkotmánya; this constitution, as amended, was in force until the end of 2011). The state, now renamed the Hungarian People's Republic, was to be a 'country of workers and working peasants.' The adopted direction of transformations was signaled in the preamble to the act, which focused on recognition of the Soviet armed forces' contribution to the liberation of the country, as well as on the 'generous' assistance the USSR provided in its post-war reconstruction. It should be emphasized here that the document's content was an exceptionally accurate (even compared to other countries in the so-called people's democracy) carbon copy of common Soviet constitutional practices.

Among the elementary system principles contained in the 1949 constitution, it is worth noting the following: the assumption that state power comes from working people; recognition of a socialized economy and central planning as the basis of the state's economic existence; the assumption that the implementation of economic targets should be carried out in accordance with the socialist principle 'from everyone according to ability, to everyone according to work'; recognition of the principle of the uniformity of state authority as the basic rule shaping the political system; guarantee of the rights and civic obligations of the 'working people' (and therefore not all) but without the legal tools to protect (enforce) these rights; and the introduction of 'separation' between the state and the church, which (in reality) entails the state's domination over religious organizations.

Pursuant to the 1949 constitution, the National Assembly exercised supreme authority on behalf of the 'working people.' Its basic competences included passing bills, appointing and dismissing the Council of Ministers (the supreme organ of state administration), deciding on matters related to war and peace, as well as wielding constitutional control and derogation from sub-statutory normative acts. The assembly held sessions biannually (in exceptional cases, extraordinary sessions could be convened). The function of the head of state (elected by the assembly) was performed by a collegiate body (20 people) called the Presidential Council. Its duties included ordering parliamentary elections, convening National Assembly sessions, initiating legislation, managing nationwide referenda, ratifying international agreements, establishing the right to grace, and electing professional judges – and from 1972, holding constitutional supervision over territorial representative bodies.[48]

In the Hungarian People's Republic, people 18 years of age and older were entitled to passive and active suffrage. Moreover, from 1966, a rule was introduced that the deputy represented the constituency from which he was elected and that he was formally accountable to voters. It was also made possible for the number of parliamentary candidates to exceed the number of seats. In the 1980s, the electoral system was modified in such a way that some deputies from the national list (1983)

48 Constitution of the People's Republic of Hungary of 20 August 1949, pp. 659–671.

were directly elected, and the obligation to nominate at least two candidates for one deputy's mandate (1985) was introduced.[49]

The Hungarian judiciary consisted of district and regional courts and the Supreme Court (special courts could also be established by law in the event of a state of emergency). The Supreme Court, which supervised the activities of all other courts, was headed by a president elected by the assembly for the duration of the parliamentary term. Courts adjudicated (also in administrative cases) in panels composed of professional and lay judges. Professional judges were formally independent and subject only to the law; they were appointed by the Presidential Council (which also had the power to remove judges). The prosecutor general of the Hungarian People's Republic was in charge of the prosecutor's office. This body was also appointed by the parliament for the term of the assembly. The public prosecutor's major duties included overseeing the legal order and prosecuting crimes with the assistance of hierarchically subordinate public prosecutors whom he appointed (in accordance with the current administrative structure).[50] It goes without saying that the prosecution service was politicized and that the task of protecting the legal order, as in all other demoludes, was primarily related to securing the existence of the communist regime.

In order to build and consolidate the power of elites dependent on the Soviet Union, the prosecutor's office and the Hungarian judiciary used criminal law (again, analogously to the situation in other satellite countries) to target opposing individuals. Immediately after Szálasi's overthrow, regulations concerning war crimes and enemies of the nation, as well as rules for establishing people's courts were introduced. In 1946, laws on the protection of the democratic order of the state and the democratic republic were brought into play. These acts, which the communists ruthlessly used to destroy political opposition, became the basis for the fragmentation of the penal law typical of demoludes into those that the communists considered important for gaining and maintaining power (hence, the particular severity) and those related to common crimes (the less severe criminal policy). This phenomenon was perpetuated by the amendments to the 1878 penal code: first in 1948, and then a significant amendment in 1950, which introduced a new general part of the code, based on Soviet solutions.

In the Hungarian People's Republic, countering political opposition was made easier due to the application of solutions incompatible with the principles of the rule of law, for example, introducing responsibility for belonging to an organization recognized as criminal or for work in state authority offices during Szálasi's rule (retroactive effect of criminal law, presumption of guilt). The amendment to the general part of the 1950 penal code also facilitated the manipulation of the notion of a crime by introducing the category of the social harmfulness of an act into its definition and by equating the responsibility of perpetration with attempt, incitement, and aiding.[51]

49 Kubas, 2012, pp. 202–203.
50 Szymczak, 1988, pp. 262–263.
51 Horváth, 2006, pp. 6–8.

It is worth noting here, however, that the very same equation does not pose a threat to the rule of law as long as judges are actually independent and the courts are independent of other state authorities. The aforementioned amendment also excluded the notion of offenses from crime (in the People's Republic, there was a division into felonies and misdemeanors), stating that "*criminal courts* [...] *must have laws that do not cause unnecessary legal complications and avoid unnecessary legal pettiness*."[52] It also has to be highlighted at this point that Hungarian criminal law, as in the case for the vast majority of the so-called people's democracies (with the exception of Poland), agreed to derogate from the principles of *nullum crimen sine lege* and *nulla poena sine lege* (even though Hungarian criminal law, like Polish, Czechoslovak, and East German law, did not legalize the Soviet rule of analogy).[53] It also inculcated different treatment of perpetrators due to the guild assigned to it: Persons recognized as class enemies were, by definition, found guilty of any alleged offense, and the evidence proceedings, if pending, could, at most prove, innocence. It also recognized, as mentioned above, the principle of collective responsibility.[54]

In 1961, a new penal code was passed which, while still significantly influenced by Soviet concepts of penal law, re-adopted some of the classical school's achievements. This was visible, for instance, in the modified approach to crime, which, on the one hand, included the concept of the social danger of an act,[55] and on the other hand, restored, as its condition, the proof of guilt or the recognition that negligence may be punished only if the law expressly provides for it. The tendency to return to the classical school's achievements was even more clearly marked in the 1978 penal code, which is in force to this day, though with amendments. As the literature emphasizes, its systematics and language are impeccable; nevertheless, it also retains the Soviet approach to social danger: 75 political crimes were penalized, and in many cases, the punishments were made more severe.[56]

Analogically, as in the case of other countries where so-called 'real socialism' was in effect and also in Hungary, regardless of formal normative regulations (on the level of the constitution or ordinary laws), the real monopoly of power in the state was enjoyed by the communist elite gathered in the Hungarian Workers' Party (in the years 1956–1989, this group was called the Hungarian Socialist Workers' Party – Magyar Szocialista Munkáspárt). However, after Stalin's death, the post of prime minister of Hungary was entrusted (with the USSR's support) to the communist politician Imre Nagy, whose reforms, known as the 'new stage,' clearly brought about changes in freedom in the political, social, and economic spheres. Nagy's government restored the multi-party system, abolished the political police, released political prisoners, and announced the introduction of free elections.

52 Horváth, 2006, p. 9.
53 Andrejew, 1975, p. 73.
54 Horváth, 2006, pp. 12–20.
55 Andrejew, 1975, p. 63.
56 Horváth, 2006, pp. 8–9.

In 1956, he was forced out of government and became the leader of the Hungarian revolution as well as a symbol of resistance to the intervention of the armed forces of the Warsaw Pact in Hungary (which was reflected in the declaration of Hungary's neutrality and its withdrawal from the Warsaw Pact).[57] After the Soviet army's intervention and the bloody suppression of the uprising, Nagy, following a secret trial, was hanged and buried in an anonymous tomb (attempting to obscure their memory and ensure complete disrespect for people considered enemies, even after their death, was another hallmark of the communist regimes). Moscow subsequently positioned János Kádár (in the years 1956–1988 secretary general of Magyar Szocialista Munkáspárt; prime minister in the years 1956–1958 and 1961–1965) as the head of the party and the government.

The new regime legalized the deployment of Soviet troops in the country's territory, restored (with the participation of the Soviet security services) the political police by establishing the so-called communist party 'order forces' (karhatalom), and established political investigation departments at police stations (subordinated to the 2nd Main Department of the Ministry of Internal Affairs). Purges were also carried out in the party and public institutions, as well as staff rotation in the judiciary and the prosecutor's office (the vast majority of new employees at these institutions had no education or professional qualifications, and professional judges or prosecutors, often with basic general education, acquired legal knowledge during short training courses at the Judges and Public Prosecutors' Academy).

Moreover, in December 1956, at the meeting of the Central Committee of the WSPP, a resolution was adopted on the ideological foundations and methods of conducting the official repressive policy, which constituted legally binding guidelines for the operation of public security and legal protection bodies. In the period 1956–1957, ordinances were issued introducing special laws and extraordinary courts (including the network of people's courts). Their justification was the introduced state of emergency, and the assumption was to intimidate and repress society, mainly the participants in the revolution and leading opposition intellectuals and artists. As part of the so-called ad hoc justice system, an expedited prosecution procedure was introduced, i.e., the accused had limited access to defense, the charges were often presented to them only at court sessions, and the catalogue of crimes ranged from murders through illegal possession of weapons and ammunition and recognition as a class enemy to strikes and refusal to work. The convictions were harsh (ranging from 10 years in prison to the death penalty) and carried out swiftly. In total, the extraordinary civil and military courts issued over 8 000 convictions.[58] Another form of repression was the internment for at least 6 months of anyone suspected of violating public order. The new government did not hesitate to use such inhumane methods of fighting civilians as shooting at assemblies with live ammunition or

57 Rainer, 1997, pp. 263–277; Tischler, 2006, allowance.
58 Kopyś, 2017, p. 184.

beating up random citizens. All of the above were treated as a form of retaliation for October 1956.[59]

Kádár's brutal and restrictive rule was alleviated by gradual amnesties from 1957 until the great amnesty in 1963. This trend, in the years 1963–1968, took the form of so-called goulash communism, otherwise known as Cadarism, and demonstrated a massive, by real socialist countries' standards, liberalization of the economy (as part of the '*új gazdasági mechanizmus*' program), culture, and later also the sphere of politics (the principle of the mono-party system, which was restored in 1957, however, was not violated). Nonetheless, it should be borne in mind that the thaw and the relative stabilization of public life were constantly accompanied by the shadow presence of a dictatorship[60] that had no qualms about the forcible destruction of people who were considered a priori as the enemies of the system. A symbolic reminder of the Kádár regime's nature was the adoption, on April 4, 1972, of the amendment to the constitution that recognized Hungary as a socialist state.[61] It was apparent, however, that within the years 1963–1989, the number of political trials (which involved, as indicated in the subject literature, actual opponents of the political system) decreased and that death sentences were abandoned. This was an expression of the regime's new political tactics, which were manifested in the change of the motto from "*those who are not for us, are against us*" to "*those who are not against us, are for us*."[62]

The opportunity to introduce systemic changes appeared in Hungary, as in other real socialist countries, only with the emergence of a new balance of power among Soviet decision makers (Mikhail Gorbachev) in the mid-1980s. This enabled an initiation of talks between the Hungarian communists and the Hungarian opposition. Consequently, Kádár was replaced by Miklós Németh, and the systemic reforms approved during the Hungarian Round Table Talks in the agreement between the government and the opposition commenced.[63]

6. Poland

The last of the states discussed in the chapter, which, after 1945, was under the direct control of the USSR, is Poland. Although after the invasion of the German and USSR troops, the continuity of the government-in-exile was maintained (first, in France, and from 1940, in London),[64] on behalf of which the structures of the Polish Underground State operated in the occupied territories, after the re-entry of

59 Kiss, 2016, pp. 373–394.
60 Szerencsés, 2012, pp. 29–52.
61 Kubas, 2012, p. 203.
62 Horváth, 2006, p. 6.
63 Szigeti, 2008, pp. 3–15.
64 The Polish government-in-exile ended its activities after the handover of the insignia of power in 1990 to a freely elected individual – President Lech Wałęsa. Cf. Kozerska and Scheffler, 2017, pp. 56–60.

the Red Army into Polish territory, all manifestations of the Polish legal authorities' operations were systematically eradicated. The Soviet administration was created in the lands to the east of the Bug line, while to the west, structures dependent on the State National Council (KRN) were established at the turn of 1943/1944 under the aegis of Stalin and controlled by the USSR. The KRN soon set up an executive body called the Polish Committee of National Liberation (PKWN), which, on July 22, 1944, announced an act called the manifesto. Pursuant to this act (despite the fact that it was not formally a normative act), the new usurping power unjustifiably banned the legal and systemic order of the Second Polish Republic and arbitrarily recognized the KRN as the only legal source of power in the country, in addition to announcing the introduction of socioeconomic reforms. With initially quiet and then open approval from Great Britain and the United States (in June 1945, the United States and Britain withdrew diplomatic recognition of the Polish government-in-exile) coupled with the Soviets' direct influence, the communists began to forcibly form an administrative party structure at all state levels, gradually started to nationalize industries, and, as part of land reform, introduce expropriations.[65] Numerous acts introducing penal provisions in the social, economic, and political spheres were to reinforce the volatile legality of the communist regime. Legislative activity in this area within the years 1944–1954 was expressed in the issuance of over 100 legal and criminal acts that not only undermined or repealed the existing legal order but also questioned the principles of European legal culture. Among these, the following are worth mentioning: the Sierpniówka (August Decree of 1944) and the decree on the so-called fascization of the country (1946), penalizing actions from before and during the war (also applied to the Polish underground) on the basis of *lex retro agit*, the Decree on the Protection of the State (1944), the decree on emergency proceedings (1945), the Small Penal Code (1946), the decree on the protection of freedom and conscience (1949), the March decrees (1953), and the acts of 1958 and 1959 concerning the protection of social property. The provisions they contained extended the objective and subjective scopes of being held accountable and allowed for the courts' freedom of interpretation. They also made the restrictiveness more stringent by frequently allowing the employment of the death penalty, life imprisonment, or forfeiture of property in relation to acts of a political and economic nature.[66] It should also be noted here that the communist regime's criminal activities (typical for people's democracies) often took place without specific normative foundations (murdering political opponents, torturing prisoners, labor camps,[67] deportation to camps in the USSR), as well as that where reference was made to the new regulations, their application was very often the responsibility of people without traditional legal education.[68]

65 Kersten, 1984, pp. 131–263; Kozerska and Dziewulska, 2021, pp. 122–123.
66 Lityński, 2010, pp. 110–122.
67 Kozerska and Stec, 2017, pp. 1115–1134.
68 Olszewski, 2017, pp. 37–51.

After taking power, the communists upheld the 1932 penal code. This was owing to both the high quality of its legislative technique and to the assumption that the 'bourgeois' form of the code could be filled with socialist content resulting from class-conscious judges' and prosecutors' interpretations. In spite of it, in 1969, a new code was enacted, which was to correspond to the socialist sense of justice, while retaining some of the solutions contained in the code of 1932. It adopted the Soviet concept of the so-called material approach to the crime by recognizing that the crime is a 'socially dangerous' act, and at the same time, it was also confirmed to be bound by the classical principle of *nullum crimen sine culpa*. It was also established that guilt may be intentional or unintentional or, due to the object and effects of the action, may combine intentional with unintentional elements. The validity of the *nullum crimen* / *nulla poena sine lege* principles was recognized, and the possibility of applying an analogy and extensive interpretation in criminal law was excluded. In terms of responsibility, the following were equalized: attempt, incitement, aiding, accomplicity, and the so-called directing the commission of a felony (when the perpetrator performs prohibited acts with the assistance of other subordinated persons). The punishability of preparation was limited to cases expressly specified in criminal law. Felonies, due to the severity of the potential punishment, were divided into crimes and offenses. Misdemeanors were included in a separate code and were not subject to court judgements but rather to those of special bodies called magistrate courts. The special part of the code contained relatively numerous cases of felonies against the state and public order, which were assumed to have a strong political load. The death penalty was kept among the penalties; however, the life sentence was abolished.

The kidnapping and then carrying out a show trial of 16 leaders of the Polish Underground State (the so-called Moscow trial) before the Supreme Court of the USSR was a clear demonstration of force and a brutal act of lawlessness.[69] The communists' brutal struggle against the Catholic Church should also be mentioned: Atheism and secularism were promoted, and clergymen were surveilled, murdered, and imprisoned. The communists, in the years 1953–1956, even had the courage to intern Stefan Wyszyński, the then primate of Poland.[70] The communist regime also falsified the results of the first post-war referendum (June 1946), which was to legalize the direction of political changes, as well as the first parliamentary elections (January 1947). These actions paved the way for the liquidation of the legal political opposition and the enactment, on February 19, 1947, of the so-called Small Constitution.[71] Its content was limited to regulating the highest organs' systemic position and scope of operation. Based on the provisions of this act, which was in force within 1947–1952, the state's official name was maintained as the Republic of Poland; however, the state management system that was actually introduced assumed the character of an apparent people's rule. Supreme legislative power was entrusted to the unicameral

69 Davies, 2004, pp. 611–618.
70 Żaryn, 2010, pp. 35–122.
71 Roszkowski, 2017, pp. 183–189.

Legislative Sejm, which was elected by universal suffrage. Executive power was assigned to the Council of State appointed by the Sejm (consisting of the president, the marshal, and three deputy speakers of the Sejm, the president of the Supreme Chamber of Control, and the supreme commander of the armed forces during the war), the president appointed by the Sejm (who was also the head of the armed forces, the chairman of the Council of Ministers, and the Council State), and the Government of the Republic appointed by the president. Judiciary power, on the other hand, was entrusted, according to the Small Constitution, to formally independent judges who were subject to the law.[72] Three 1949 acts supplemented the residual constitutional regulations in this respect, i.e., the Act on the System of Common Courts, the Act on Amending the Provisions of the Code of Criminal Procedure, and the Decree on Emergency Proceedings. On their basis, inter alia, the institution of investigative judges was abolished, lay judges in criminal cases were introduced, the Supreme Court was empowered to establish guidelines for the administration of justice, in criminal proceedings, two-instance (instead of three-instance) procedures were introduced, and following the Soviet (and military) approach, the institution of extraordinary appeal was introduced as a remedy. The changes legalized the direct influence of political factors on the judiciary.[73]

Another significant system modification took place in connection with the adoption, on the anniversary of the July manifesto (22 July 1952), of a new constitution, which referred to the Soviet models. Essentially, as in the case of other people's democracies' constitutions, it was primarily propaganda and a declaratory act. In accordance with its regulations, the Polish People's Republic (since it gave the state the name that was in force until 1989) was to be a state with a people's democracy in which sovereignty belonged to the 'working people of towns and villages.' On behalf of the working people, according to the sanctioned principle of the uniformity of state power, power was entrusted to the unicameral Sejm and the local people's councils. Executive power was exercised by the supreme organ of state authority called the Council of State and the supreme organ of state administration in the form of the Council of Ministers. Both of these entities were appointed by the Sejm. The judiciary was entrusted to the Supreme Court (which supervised all courts), poviat courts (later renamed district courts), voivodeship courts (as the first instance in certain cases and on appeal against poviat court judgements), and special courts (military, and, from 1980, administrative courts). People's judges and lay judges were appointed by the State Council. In the 1980s, two more specific judicial organs were established: the Tribunal of State in 1982 (a body established to hold the highest state officials accountable for violations of the law in connection with the performed function; it did not sit during the communist period), and, in 1986, the Constitutional Tribunal (a judicial body examining the constitutionality of legal provisions and determining the interpretation of acts with universally binding force). The prosecutor's office consisted of

72 Dz.U. 1947, No. 18, item 71, as amended.
73 Lityński, 2010, pp. 33–34.

the public prosecutor general appointed by the State Council and lower-level prosecutors who were appointed and subordinated to the office. The state's economic basis was the socialized national economy, central planning, and the state's monopoly on foreign trade.[74] It is worth adding that the ownership policy assumed a state monopoly on industries and strategic services (e.g., banks, transport) from the beginning of the regime's rule. The nationalization process (completed until 1950) survived only small service entities (e.g., hairdresser, shoemaker, tailor) under the state-controlled system of craft guilds. During the so-called battles for trade (1947–1949), the number of private shops replaced by state and cooperative entities was radically reduced. Until 1956, efforts were also made to impose the full collectivization of agriculture. However, this process ended in a partial fiasco, and until 1989, the agricultural economy in Poland (unlike in other demoludes) was based both on largescale state and cooperative farms as well as on individual peasant farms. When returning to the provisions of the 1952 constitution, it should also be mentioned that it established a fairly extensive catalogue of civic rights and obligations, the respect and protection of which were, in practice, associated with numerous abuses.[75] The 1952 constitution was amended 24 times. It is especially worth paying attention to the change made on 10 February 1976, which defined the People's Republic of Poland as a socialist state and decreed both the Polish United Workers' Party's leading role in the state and the state's 'friendship' with the USSR. It should also be highlighted that this change met with social dissatisfaction[76] and contributed to the emergence of organized forms of opposition activity, which, combined with the collapse of the centrally planned economy and the Catholic Church's increased influence after Karol Wojtyła was elected pope in 1978, led to the social revolt embodied by the solidarity movement (1980–1981). The amendment, which was supposed to consolidate the communists' omnipotence on the legal level, actually initiated the process that would result in their subsequent collapse.

When evaluating the Polish system in the communist era, one must constantly bear in mind that although there were no appropriate provisions in the constitution, the Polish United Workers' Party did wield regular domination over all state structures. The state organs could not make any vital decisions without the consent of the relevant party cell. The communists' power monopoly was not even slightly disturbed by the existence of two other political parties, which, however, like other licensed social organizations, did not have real independence. It is also worth emphasizing that in order to exercise power, individual party leaders had to obtain the approval of their superiors in Moscow on every significant occasion. The communists' manner of exercising power, the system's structural inefficiency, and the social attachment to the Catholic Church led to more frequent social rebellions than in other countries with people's democracies. They manifested themselves not only in national protests

74 Burda, 1969, pp. 169–352.
75 Kozerska, 2015, pp. 13–39;
76 Dz.U. 1976, No. 5, item 29.

(June and October 1956, 1968, 1970, 1976, 1980–1981) but also in relatively numerous local revolts organized mainly in defense of local churches or places of worship, which the communists tried to violate. All signs of resistance were always brutally suppressed. During the struggle to maintain power, the regime allowed actions that were inconsistent even with the normative order they had established, i.e., they did not hesitate to issue orders to shoot protesters with live ammunition, to use torture (e.g., the so-called health paths: a prisoner runs in front of a line of militiamen hitting him with batons), to commit assassinations organized by the security services (within the period 1981–1989, at least 88 opposition activists were killed in this way),[77] and even to lead a military coup d'etat (illegally introduced by General Wojciech Jaruzelski on December 13, 1981 to liquidate the solidarity movement).[78]

In spite of the 1988 repressions, another wave of strikes passed through Poland. As a result, the communists proposed talks related to political transformation with part of the opposition connected to Lech Wałęsa. The 'round table' sessions, officially launched on February 6, 1989, led to partially free parliamentary elections (June 4, 1989) and, in the following years, the gradual transformation of the state system toward liberal democracy; nonetheless, it was still influenced by the party nomenclature from the communist era.[79]

77 Lasota, 2003, p. 28.
78 Scheffler, 2003, pp. 383–403.
79 Roszkowski, 2017, pp. 225–460; Kozerska and Scheffler, 2017, pp. 78–79.

Bibliography

Andrejew, I. (1975) *Zarys prawa karnego państw socjalistycznych*. Warszawa: Państwowe Wydawnictwo Naukowe.

Arnold, J. (2006) 'Einige normative Aspekte der Entwicklung des StGB der DDR' in Vormbaum, T., Welp, J. (eds.) *Das Strafgesetzbuch. Sammlung der Änderungsgesetze und Neubekanntmachungen. Supplementband II: Das Strafgesetzbuch der DDR*. Berlin: Berliner Wissenschafts-Verlag, pp. 381–455.

Bankowicz, M. (2003) *Zlikwidowane państwo. Ze studiów nad polityką Czechosłowacji*. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego.

Bielakow, A., Burłacki, F., Melwil, J., Milejkowski, A., Wygodzki, S. (1964) *Podstawy marksizmu-leninizmu*. Warszawa: Książka i Wiedza.

Bouček, M., Klimeš, M., Vartíková, M. (1975) *Program revoluce. Ke vzniku Košického vládního programu*. Praha: Svoboda.

Brzostek, B. (2009) 'Rumuński rok 1968', *Przegląd Historyczny*, 100(1), pp. 47–69.

Burda, A. (1969) *Polskie prawo państwowe*. Warszawa: PWN.

Chmielewski, G. (2005) 'Geneza państwa i naczelnych instytucji państwowych Republiki Słowackiej', *Studenckie Prace Prawnicze. Administratywistyczne i Ekonomiczne*, 3, pp. 9–21.

Cholínský, J. (2018) 'Klucz do sowietyzacji Czechosłowacji. Polityka i propaganda Edvarda Beneša w okresie II wojny światowej oraz publikacja ministra rządu emigracyjnego Huberta Ripki o sojusze ze Związkiem Sowieckim', *Pamięć i Sprawiedliwość*, 2(32), pp. 157–185.

Davies, N. (2004) *Powstanie 44*. Kraków: Znak.

Działocha, K. (1974) *Ewolucja prawne organów prezydialnych w państwach socjalistycznych*. Wrocław: Państwowe Wydawnictwo Naukowe.

Grajewski, A. (2017) 'Niepokorny. Kardynał József Mindszenty', *Biuletyn Instytutu Pamięci Narodowej*, 6(139), pp. 139–145.

Hasenbichler, M. (ed.) (2020) *Romania's political system from communism to democracy. Seminar paper*. Klagenfurt: Alpen-Adria Universität.

Herz, A. (ed.) (2008) *Quellen zur Geschichte Türinges. Nicht – im Namen des Volkes. Politisches Strafrecht in der DDR 1949–1961*. Erfurt: Landeszentrale für politische Bildung Thüringen.

Horváth, A. (2003) 'Konzeptionsprozesse in den Diktaturen des Sowjetsystems' in Mezey, B. (ed.) *Strafrechtsgeschichte an der Grenze des nächsten Jahrtausendes*. Budapest: Gondolat Kiadó.

Horváth, A. (2006) *Geschichte des Strafrechts in Ungarn während des sowjetisch geprägten Sozialismus, mit besonderem Hinblick auf die Schauprozesse*. (Rechtsgeschichtliche Vorträge 44.) Budapest: Rechtsgeschichtliche Forschungsgruppe der Ungarischen Akademie für Wissenschaften an dem Lehrstuhl für Ungarische Rechtsgeschichte Eötvös Loránd Universität.

Jasiński, Ł. (2014) 'Powojenne rozliczenia w Czechosłowacji 1945–1948: proces prawny i tło polityczne', *Pamięć i Sprawiedliwość*, 13/2(24), pp. 253–282.

Jonca, K. (2005) *Dekrety prezydenta Edvarda Beneša. Niemcy w czechosłowackiej doktrynie politycznej i prawnej z lat 1920–1945*. Wrocław: Wydawnictwo Uniwersytetu Wrocławskiego.

Kersten, K. (1984) *Narodziny systemu władzy. Polska 1943–1948*. Warszawa: Krag.

Kiss, R. (2016) '1956 – instytucje i dynamika represji porewolucyjnych', *Pamięć i Sprawiedliwość*, 15/2(28), pp. 373–394.

Konstytucja Socjalistycznej Republiki Rumunii of 21 August 1965 (1976). Wrocław: Ossolineum.

Kopyś, T. (2017) 'Stany wyjątkowe w węgierskim systemie prawno-konstytucyjnym', *Studia Bezpieczeństwa Narodowego*, 11, pp. 179–199.

Kozerska, E. (2015) 'Status prawny obywatela PRL' in Duszka-Jakimko, H., Kozerska, E. (eds.) *25 lat doświadczeń ustrojowo-prawnych III Rzeczpospolitej*. Warszawa: Wolters Kluver.

Kozerska, E., Dziewulska, K. (2021) 'The State National Council and the Polish Committee of National Liberation in a State Governed by the Rule of Law: Positions of Legal Scholarly Opinion', *Studia Iuridica Lublinensia*, 30(1), pp. 121–144; https://doi.org/10.17951/sil.2021.30.1.121-144.

Kozerska, E., Scheffler, T. (2017) 'Retoryka ciągłości: o dziedzictwie prawnym II Rzeczypospolitej i rządów komunistycznych', *Studia nad Autorytaryzmem i Totalitaryzmem*, 39(2), pp. 53–79; https://doi.org/10.19195/2300–7249.39.2.4.

Kozerska, E., Stec, P. (2017) 'Dignity Takings in Communist Poland: Collectivization and Slave Soldiers', *Chicago-Kent Law Review*, 92(3), pp. 1115–1134.

Kubas, S. (2012) 'Węgierski parlamentaryzm: od narodzin do stanu obecnego z uwzględnieniem konstytucji z 2011r.', *Przegląd Sejmowy*, 5(112), pp. 194–214.

Lasota, M. (2003) 'O raporcie sejmowej komisji poświęconym samodzielnej grupie 'D'', *Biuletyn Instytutu Pamięci Narodowej*, 1(24), pp. 27–36.

Lityński, A. (2010) *Historia prawa Polski Ludowej*. Warszawa: LexisNexis.

Łysko, M. (2017) 'System sankcji w prawie wykroczeń europejskich państw socjalistycznych', *Miscellanea Historico-Iuridica*, 16(1), pp. 191–207; https://doi.org/10.15290/mhi.2017.16.01.10.

Milgram, S. (1963) 'Behavioral study of obedience', *Journal of Abnormal and Social Psychology*, 67, pp. 371–378; https://doi.org/10.1037/h0040525.

Mizerski, E. (1992) *Konstytucyjne podstawy organów władzy państwowej w Niemieckiej Republice Demokratycznej (1968–1990)*. Toruń: Zakłady Papiernicze UMK.

Negru, I. (2014) *Istoria dreptului românesc*. Lugoj: Nagard.

Olszewski, H. (2017) 'Kilka uwag o prawniczych studiach II stopnia w latach 1952–1954', *Studia nad Autorytaryzmem i Totalitaryzmem*, 39(2), pp. 37–51; https://doi.org/10.19195/2300–7249.2.3.

Rainer, J. M. (1997) 'The Development of Imre Nagy as a Politician and a Thinker', *Contemporary European History*, 6(3), pp. 263–277.

Rieber, A. J. (2013) *Salami Tactics Revisited. Hungarian Communists on the Road to Power*. Trondheim: Trondheim Studies on East European Cultures & Societies.

Roszkowski, W. (2017) *Historia Polski 1914–2015*. Warszawa: PWN.

Scheffler, T. (2003) 'Prawne aspekty wprowadzenia stanu wojennego w Polsce w dniu 13 grudnia 1981 r.' in Dubel, L. (ed.) *Idee jako źródło instytucji politycznych i prawnych*. Lublin: Wydawnictwo UMCS, pp. 383–403.

Sokolewicz, W., Zakrzewska, J. (1976) *Wstęp in Konstytucja Socjalistycznej Republiki Rumunii*. Wrocław: Ossolineum.

Szerencsés, K. (2012) 'Belle époque? Lata siedemdziesiąte XX w. na Węgrzech', *Pamięć i Sprawiedliwość*, 20(2), pp. 29–52.

Szigeti, M. (2008) *Die verfassungsrechtlichen Änderungen der politischen Wende in Ungarn*. (Rechtsgeschichtliche Vorträge 57.) Budapest: Rechtsgeschichtliche Forschungsgruppe der Ungarischen Akademie für Wissenschaften an dem Lehrstuhl für Ungarische Rechtsgeschichte Eötvös Loránd Universität.

Szymczak T. (1988) *Ustrój europejskich państw socjalistycznych*. Warszawa: Państwowe Wydawnictwo Naukowe.

Szymczak, T. (1970) *Organy władzy i administracji europejskich państw socjalistycznych*. Warszawa: Książka i Wiedza.

Tischler, J. (2006) 'Skazani na klęskę', *Tygodnik Powszechny*, 44 (29 October), pp. 18–19.

Tismaneanu, V. (1989) *The Tragicomedy of Romanian Communism*. Foreign Policy Research Institute. Available at: https://www.ucis.pitt.edu/nceeer/1989-903-04-2-Tismaneanu.pdf (Accessed 30 March 2021).

Turski, M. (1972) 'Niemiecka Republika Demokratyczna' in *Europejskie kraje demokracji ludowej 1944–1948*. Warszawa: Książka i Wiedza.

Wolsza, T. (2016) 'Od Sillamäe do Goli Otok. Obozy pracy przymusowej i NKWD w krajach nadbałtyckich, Europie Środkowo-Wschodniej i na Bałkanach po drugiej wojnie światowej. Skala zjawiska i codzienność', *Dzieje Najnowsze*, 48(2), pp. 93–114; https://doi.org/10.12775/DN.2016.2.05.

Zavatti, F. (2016) *Writing History in a propaganda Institute. Political power and network dynamics in communist Romania*. Stockholm: Elanders.

Zimbardo, F., Haney, C., Curtis Banks, W., Jaffe, D. (1972) *The Stanford prison experiment: A simulation study of the psychology of imprisonment*. Available at: http://web.stanford.edu/dept/spec_coll/uarch/exhibits/Narration.pdf (Accessed 20 March 2021).

Żaryn, J. (2010) 'Państwo – kościół katolicki w Polsce 1956–1989 (wybrane zagadnienia)' in Persaka, K., Machcewicza, P. (eds.) *Polski wiek XX*, vol. 4 (PRL od grudnia 70 do czerwca 89). Warszawa: Bellona i Muzeum Historii Polski, pp. 35–122.

| Chapter 9 |

Nationalization, Collectivization, Reprivatization, and Privatization in East Central Europe: Arguments for a General Theory

Emőd VERESS

ABSTRACT

Following the Second World War, a significant transformation occurred in private law under the Soviet-type dictatorial regime. Suppression – akin to abolition – of private property, wide-scale nationalization, and collectivization are presented in this chapter through the legal norms by which the socialist transfiguration of the national economy was meant to be achieved. Following the regime changes, a reversion to historical patterns of regulation and then the gradual evolution of civil law took place. We examine the legislative measures for achieving the transition to a market economy. We present in detail the private law implications of the (incomplete and imperfect) restitution of nationalized property and privatization. The chapter presents the general East Central European trends and, to provide specific details, uses Romania's historical and legal evolutions as a case study.

KEYWORDS

civil law, communism, state property, nationalization, collectivization, reprivatization, privatization, East Central Europe, Romania.

1. Context

The aim of the current chapter is to present a framework for the analysis of nationalization, reprivatization, and privatization in East Central Europe. For this purpose, it uses Romania as a case study, but the theoretical background is universal for this region, although every state also has its specificities. Therefore, the chapter provides a context for a general interpretation of the indicated legal phenomena. The content of the chapter is based on the results of the author's ongoing research project, which aims to analyze the legal history of nationalization and reprivatization in East Central Europe in a comparative legal monograph in the following years. We can see property as a cultural system, an organization of power, and sets of social relations, statically and dynamically.[1] This approach is suitable to analyze property regimes in the Soviet-type dictatorships of East Central Europe.

1 Verdery, 2003, p. 48.

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2. Nationalization

East Central Europe fell into the Soviet sphere of influence after the Second World War. A radical social experiment began. Its fundamental component was the elimination or at the very least severe limitation of private property. The Soviet-type legal and economic regime constituted an isolated system until the end of the Second World War; however, in the post-war period, the Soviet Union extended its policies of forced industrialization, collectivization, megalomaniacal public works, and the institution of centralized economic planning to the states in its sphere of influence.[2]

> *The state under single-party rule, in addition to direct control of the political, administrative, and military apparatus, also became the master of the economy. The imposition of this system meant at the same time the establishment of an economy dominated by the state.*[3]

After the Second World War, most of the companies and certainly every middle-sized and significant company experienced the radical transformation of the economic order, based generically on Karl Marx's theories but more directly on the Soviet practice. This economic transformation was achieved with different means and arrangements, nationalization being one of the most essential methods. Nationalization also encompassed urban buildings in private property as well as movable property.[4] Nationalization and collectivization have been described as the greatest theft in history.[5]

A legal theory of nationalization was constructed, but this theory had a convenient and limited purpose: to legitimize nationalization. As it was specified, the attitudes of communist legal theorists were

> *so much imbued by their belief in the correctness of Communist doctrine that they not only completely fail to conceive that possibly other points of view could also be held outside the Communist fold, but they even fail to accept facts as facts.*[6]

Therefore, we need to re-evaluate this legal theory in order to understand the fundamental nature of nationalization and also its present consequences.

To understand the logic behind nationalization, we must start with the notions of capitalism and the economic foundation of capitalism, namely the market economy. In Marxism, private property is the basis of class exploitation; therefore, private property must be eliminated or severely limited. Private property with respect to

2 Berend, 2008, p. 152.
3 Berend, 1999, p. 104.
4 For a general overview regarding nationalization, see Katzarov, 1964.
5 Verdery, 2003, p. 40.
6 Seidl-Hohenveldern, 1958, p. 541.

value-producing assets in the Marxist view is an anathema: If these assets are owned by a class who engrosses them, namely the bourgeoisie, the automatic conclusion is that this class exploits the masses of workers for their own interests.

Workers' interests are antagonistic toward those of the bourgeoisie. The workers' purpose must be to eliminate private property over the means of production and therefore eliminate the bourgeoisie, which is supposedly a revolutionary act that will lead to a much fairer society. On the other hand, this is also a historical necessity, the inevitable course of history. I do not want to endeavor to criticize Marxist theory; the goal is just to analyze its effects on private property.

Marx and Engels stated in the Communist Manifesto (*Das Kommunistische Manifest*, 1848):

> *In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.*
> *We Communists have been reproached with the desire of abolishing the right of personally acquiring property as the fruit of a man's own labor, which property is alleged to be the groundwork of all personal freedom, activity and independence.*
> *Hard-won, self-acquired, self-earned property! Do you mean the property of petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily.*
> *Or do you mean the modern bourgeois private property?*
> *However, does wage labor create any property for the laborer? Not a bit. It creates capital, i.e., that kind of property which exploits wage labor, and which cannot increase except upon conditions of begetting a new supply of wage labor for fresh exploitation. Property, in its present form, is based on the antagonism of capital and wage labor. Let us examine both sides of this antagonism.*
> *To be a capitalist, is to have not only a purely personal, but a social status in production. Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society, can it be set in motion.*
> *Capital is, therefore, not only personal; it is a social power.*
> *When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class character.*[7]

The abolition of the 'dominant' bourgeoisie class – in addition to the physical elimination of actual or potential opponents – included the economic eradication of people perceived as bourgeois, and this policy's primary tool was nationalization. According to Marxist theory and Soviet-type practice, the working class, or more precisely the

7 Elster, 1986, p. 260.

revolutionary vanguard of this class, takes over political power. It is a revolutionary act to rush and enforce something already determined by historical necessity. The takeover and concentration of political power is just a first step because the exploiting social class in the Marxist–Leninist view still keeps hold of important economic, industrial, commercial, and agricultural positions (in Lenin's own words the 'commanding heights in the sphere of means of production'). These positions must be overrun in order to create the desired ideal society, and nationalization is the principal means for achieving this objective. State ownership must replace private ownership of companies through a takeover called nationalization.

3. Constitutional and legal basis for nationalization in Romania

Preparation for nationalization started in 1947. Between October 15 and 24, 1947, a confidential inventory of industrial, commercial, and financial enterprises was compiled. This inventory contained 56 315 enterprises, of which 47 479 were private and 6 836 were state-owned.

The labor force was comprised of 976 171 persons, 649 188 employed in the private sector and 326 983 persons working at state-owned enterprises. This means an average of 47 persons per state-owned enterprise and 16 persons per private enterprise.[8]

At the end of December 1947, King Michael I abdicated, and the republic was proclaimed. The communists gained full political power. In the opening months of 1948, the first Soviet-type constitution of Romania was adopted.

According to its provisions, the Romanian People's Republic was founded by the people's struggle, led by the working class against fascism, reaction, and imperialism.[9] This marked a totally new era compared to all previous periods of history, and the constitution points to these changes. Here, we are interested in the economic transformations this fundamental law predicted.

This fundamental law provided the legal basis for nationalization. Article 11 of the new constitution specifies that "*when the general interest requires, means of production, banks and insurance companies that are owned by private individuals or legal entities may become State property, namely property of the people, subject to the conditions provided by law.*"

What can we observe from analyzing the text of this constitution? There are some mentions of private property, but the legal text has a prognostic value regarding state ownership. The constitutional text signals the basic change in optics, and we have to underline the essential auguring elements.

a) Instead of a market economy, a planned economy (or command economy) is envisaged. In concordance with the basic law, the state directs and plans the national economy to develop the country's economic strength, ensure a good status for the

8 Giurescu, 2013, p. 56.
9 Article 2 of the 1948 constitution.

people, and guarantee national independence.[10] Annual plans were drawn up for 1949 and 1950,[11] and then, beginning in 1951, 5-year plans were implemented. The goal was to transplant the Soviet model: a forced march toward industrialization. Propaganda reported tremendous success: It glorified competition in socialist work and the overachievement of planned production targets. This economic organization led to development and certain advantages in the short term, but it proved to be dysfunctional in the long run. Regarding the plan for 1949, the following was written:

> *In the middle of enthusiastic work, under the leadership of the Romanian Workers' Party and with multilateral assistance received from the Soviet Union, the workers of our country have completed the plan in a proportion of 108% and 20 days before the closing of the year.*[12]

By highlighting the latest achievements on a daily basis, propaganda became part of everyday life under the Soviet-type dictatorship.[13]

b) Private property is mentioned several times, but the forthcoming importance of state ownership ('property of the whole people') is anticipated. As the basic law states, in the People's Republic of Romania, the means of production belong to the state as the property of the whole people, or to cooperative organizations, or to particular individuals and companies.[14] The people's common goods render the material foundation of economic prosperity and the national independence of the People's Republic of Romania.[15]

Any kind of mineral resources, mining facilities, forests, waters, natural energy sources, means of rail, road, water, and air transport, the postal services, telegraph, telephone, and radio belong to the state, as the common property of the people.[16] A law will determine how to pass into state ownership the goods listed here that were in private hands at the moment at which the constitution entered into force.

The previously mentioned Article 11 can also be included here because it provides the basis for the nationalization of any means of production not included on the constitutionally itemized list.

c) According to the 1948 constitution, work is the underlying factor of the state's economic life[17] (in contrast with capital or with property in general). Work is the duty of every citizen. The state supports all those who work to protect them from exploitation and raise their living standards.

10 Art. 15 of the 1948 constitution.
11 Zoltán Hajdu (1924–1982), a Hungarian poet from Transylvania (part of Romania since 1920), in its poem dated 1949, wrote: "*The plan is only for one year, / but a decade it prepares… / The plan is just a plan, if we dream, / if we realize it, it is life! / Comrades – life is now going / according to the plan!*"
12 Roller, 1952, p. 811.
13 For further details about state economic planning, see Katzarov, 1964, pp. 246–282.
14 Art. 5 of the 1948 constitution.
15 Art. 7 of the 1948 constitution.
16 Art. 6 of the 1948 constitution. Television programs started in Romania in 1955. On 31 December 1956, Romanian Television was founded.
17 Art. 12 of the 1948 constitution.

d) Furthermore, as the fundamental law outlined, internal and external trade is regulated and controlled by the state and is exercised by state-owned, private, and cooperative trading enterprises.[18] The focus is again on the state-owned trading enterprise, first in this enumeration.

The 1948 constitution marks the starting point of a mandatory economic transformation. The Communist Party's principal goal before 1948 was the acquisition of power. Nevertheless, once power was fully seized, they started to implement their program in practice.

The constitutional basis for nationalization was established. Nationalization itself is a propagandistic term, meaning seizure and confiscation.

The law of nationalization was passed at the velocity of light. In the course of just one morning, on June 11, 1948, this law was adopted by the Central Comity, the government, and the Grand National Assembly. This is Act 119 of 1948 for the nationalization of industrial, banking, insurance, mining, and transport enterprises. The official newspaper, *Scânteia* (*The Spark*) indicated that "*the nationalized enterprises belong to the state, the state belongs to the working people, therefore the factories belong to the working people*."[19]

As a result of the act, 8 894 enterprises, among which 3 600 were of local interest, were immediately nationalized. After nationalization, a new inventory was conducted. In 1948, there were 18 569 state-owned companies, of which 193 were so-called Sovroms,[20] with 911 071 employees, an average of 50 employees per enterprise. The private sector was seriously reduced: 110 036 private entities, with 161 222 people employed in their labor force, an average of just 1.46 persons per entity.[21]

On July 2, 1948, the State Commission of Planning (*Comisiunea de Stat a Planificării*) was created. It operated until December 1989, when the communist regime was overthrown. As shown before, 1-year plans were adopted for 1949 and 1950, and starting from 1951 and continuing until 1989, the foundations of the economic cycles were determined by 5-year plans.

Act 119 of 1948 was just the first step, followed by other legal instruments on nationalization. The most important are the following:

- Decree No. 197/August 13, 1948 – nationalization of banking and credit enterprises;
- Decree No. 232/September 9, 1948 – nationalization of nine railway companies;
- Decree No. 302/November 3, 1948 – nationalization of private sanitary institutions;
- Decree No. 303/November 3, 1948 – nationalization of the entire film industry, including 409 cinemas, 37 film studios, and 7 film laboratories;
- Decree No. 61/February 18, 1948 – abolition of the Stock Exchange;
- a new wave of nationalization in February 1949 – 1 858 business entities that were not nationalized under the Act 119 of 1948 were taken over by the state;

18 Art. 14 of the 1948 constitution.
19 *Scânteia*, 19th June 1948, No. 1149.
20 Joint Romanian–Soviet ventures, technically serving Soviet interests in exploiting natural resources.
21 Giurescu, 2013, p. 57.

- Decree No. 134/April 2, 1949 – nationalization of 1 615 pharmacies, 121 medical drugstores, 198 laboratories, and 95 medicines storage facilities;
- Decree No. 92/April 20, 1950 – nationalization of immovable goods of other exploiters, including hotels;
- Decree No. 418/May 16, 1953 – nationalization of private pharmacies.

The Stock Exchange (*Bursa de Valori*) was no longer necessary because there were no more joint-stock companies (*societăți pe acțiuni*) remaining.[22]

The period of nationalization of companies ended in 1953, when all the remaining productive entities were nationalized.[23] The process was quite similar in other East Central European countries under Soviet influence.

4. A realist theory of nationalization

A comparative approach is needed to elaborate a realistic (not ideologically limited) theory of these nationalizations.

Nationalization is not simply a measure for transforming the economic order; it is a legal institution as well. As a legal institution, nationalization is very different compared to two similar legal techniques: nationalization in capitalist market economies, where it is an extraordinary and exceptional measure, and expropriation by reason of public utility (also called the eminent domain in some jurisdictions). Their common denominator is that a particular asset is transferred from private property into state property, without the genuine consent of the (former) owner. However, the differences are essential, and it is necessary to discuss these contrasts.[24]

The nationalization that constitutes our focus differs from property acquisition methods by means of private law, for example, through a contract of sale, an exchange contract, or even a donation. A contractual relationship is based on the principle of equality between the contracting parties, so any transfer of property is not possible without mutual consent, for example, of the seller and the buyer. The consent of the (former) owner is indispensable for the valid formation of such a contract. These means of private law had only a very subsidiary and limited role in creating the new social order based on state ownership. There are some cases where state property was acquired by way of donation, but the grantor's free will remains more than questionable in these cases.

We have to differentiate nationalization from agricultural cooperativization as well. In the case of agricultural property, the basic aim – to be achieved by employing the specific means available to an oppressive dictatorship – is the setting up of

22 *Aktiengesellschaft* in Germany, *société anonyme* in France, *società per azioni* in Italy. In common law terminology, there is no perfect match for these types of companies.
23 Bucur, 1994, pp. 313–321.
24 For details regarding the distinction between nationalization and expropriation, see Katzarov, 1964, 142–147.

agricultural cooperatives. This was ostensibly done based on the peasantry's apparently free will to associate, due to their steadfast belief in the superiority of this form of agriculture, which motivated them to transfer their private property willingly into common, cooperative property. In reality, the agricultural transformation was made based on oppression and on the use of (para)military force,[25] as well as punitive measures against the '*kulaks*' (relatively well-off smallholder farmers)[26] and crushed peasant uprisings. A definite legal basis for collectivization was not necessary because the dictatorship possessed all the means to openly say that the peasants wanted and requested a transformation, and in parallel, to impose these goals by force. We need not forget that there was no longer any rule of law. In the words of Gheorghe Gheorghiu-Dej:

> *Marxism-Leninism teaches that the peasantry has no other way to escape exploitation, need, and privation than the union of smaller households into the cooperative. The only way to train small and medium households on track of socialism is the belief. Marxism-Leninism condemns any attempt to use violence against smallholders. Conducting a wider persuasive activity in relations with peasants regarding the superiority of socialist agriculture, we will strengthen the idea of collective agriculture.*[27]

Cooperativization is a different process in scope, methods, and outcomes when compared to nationalization. Cooperativization also reveals one of the fundamental differences between the states that came under Soviet control after the Second World War: Poland and Yugoslavia practically abandoned the collectivization of agriculture early.[28]

A legal analysis of nationalization must concentrate on several elements. Perhaps we can define the main characteristics of nationalization in the Central and Eastern European context and especially in Romania through six questions and answers:

25 Communist activist bands, organized as paramilitaries, were sometimes involved in coercing peasants to join the cooperative.

26 As Katherine Verdery documented, kulaks were persecuted even before the courts or sometimes just lynched: "[*L*]*ocal authorities sought to compel villagers to* donate *their land by arresting, beating, or even killing them; by deporting people from their homes to some distant place, often for no clear reason; by huge requisitions and taxes beyond people's ability to pay; by confiscating some land to smooth the way for further donations; and by repeated harassing and fines. Villagers bearing old grudges denounced others, bringing them hardship and ruin; authorities used kin to apply pressure, threatening to throw one's child out of school or factory work if one did not join. Especially vulnerable to humiliation were the most influential villagers, those tied in to wide networks of kin or those whose wealth or occupation made them employ others' labor. Labeled* chiaburi*, or exploiters (the kulaks of Soviet collectivization), they were assigned impossible quotas or tasks – to plow their entire ten hectares in a single day, for instance – being imprisoned if they failed*." Verdery, 2003, p. 44. For further details, see Kligman and Verdery, 2011.

27 Gheorghe Gheorghiu-Dej was the leader of communist Romania between 1947 and his death in 1965. His successor was Nicolae Ceaușescu (1918–1989).

28 Verdery, 2003, p. 43.

a) What were the legal means of nationalization? Any legal instrument requires a manifestation of will. In the case of nationalization – as shown before – the private owner's consent is not required, but the will of the state must be expressed in a particular form to produce legal effects.

These instruments in Romania were the laws and the decrees of the Presidium of the Grand National Assembly, approved later—and by virtue of that, transformed into law—by the Grand National Assembly. Nevertheless, if we analyze these acts, we can identify a wide variety.

In some cases, these means of nationalization determine their scope only in an abstract manner. They do not name certain enterprises but define general categories. In other cases, there are no categories but an actual listing of the nationalized enterprises. The law in those cases acts through individual provisions.

There are also mixed solutions, as is the case of Act 119 of 1948, where there existed general categories defined by the law (e.g., all private slaughterhouses with a daily cutting capacity of at least 100 heads of cattle or 150 pigs), but there are also enterprises listed for nationalization.

At first sight, there is another version of the mixed type, but in reality, we are in the presence of the second category when there are general conditions set, although there follows a complete enumeration of the companies determined on the basis of the general categories. In practice, such listings were conceived just exemplifying the general categories, and by individual administrative acts, these lists were subsequently extended.

In the situation in which only general categories are determined, nationalization became effective through individual acts issued by the state administration.

When compared to nationalization in a capitalist context, these measures are vastly different. In Western Europe, in general, the nationalization act is a law enacted by parliament, and that law makes an individual determination regarding which enterprise is nationalized. The administrative authorities have no power of decision regarding the formal initiative (we do not mean the legislative initiative here, but rather the initiative to determine which specific company is to be nationalized based on a set of rules given by the law).[29]

Another difference compared to 'capitalist nationalizations' is that there is no judicial remedy against nationalization. In Romania, the Supreme Tribunal decided that an appeal against an administrative act exists only in cases where the law establishes such means. If there is a supervising administrative authority, one can complain to that authority but not to the courts.[30] Hence, if a particular company was nationalized by an administrative act, but that company did not meet the conditions set forth by the law, the courts had no authority to review the nationalization.

29 Duez and Debeyre, 1952, p. 883. An exception was the act of August 11, 1936, which made the government's nationalization of war industries possible.

30 Decision No. 2215 from October 31, 1955 of the Supreme Tribunal of the People's Republic of Romania. Published in *Legalitatea Populară,* 1/1956, pp. 111–113.

b) What were the objects of nationalization? We have a general scope determined by the 1948 constitution: means of production. It is based on Marxist terminology, and it refers to productive (value-producing) assets.

The text of this fundamental law envisaged all immovable or movable property used directly or indirectly in production. A commission subordinate to the Council of Ministers interpreted the notion as follows: The means of production also include the offices, warehouses, retail stores, canteens, worker homes, and union halls, not just the immovable or movable property directly used in production, because these all serve the enterprise. The title under which a means of production served economic purposes was itself insignificant. For example, if an enterprise only rented a certain building, it was the object of nationalization because it served the enterprise's activity.

In conclusion, the object of nationalization is the *organized totality of the means of production*, namely the enterprise as a legal entity and all of its assets.

In a capitalist context, nationalization generally envisaged the shares of a company and not the means of production. Another primary difference is an issue of scale because in a capitalist context, nationalization is a relatively isolated act. On the contrary, as a Soviet-type policy, nationalization was universal and inclusive, affecting the economy as a whole, not just specific and limited sectors of it. Nationalization in East Central Europe was a social engineering tool that extended beyond certain strategic assets and also affected, for example, local cinemas or pharmacies.

c) What were the effects of nationalization? The effect of nationalization is the transfer of property from the private owner to the state.

In Central and Eastern Europe, the transfer took place free of any encumbrance. For example, if a mortgage guaranteed a bank loan, the transfer erased the mortgage. According to Act 119 of 1948, the transfer operates regarding company shares and stock as well. Nevertheless, the consequence will be not a commercial company owned by a new sole shareholder, the state, but rather a new type of economic and also political and administrative organization: the state-owned enterprise. Consequently, there was not just a simple transfer of ownership but also a transformation of the legal entity into a new organizational form. A certain legal institution "*formerly regarded without question as coming under private law, they became institutions of a mixed or doubtful nature*…"[31] The nationalization of housing meant that former owners could, if they were lucky, stay on as tenants in part of the flat, sharing their former property with other tenants. Public housing stock and regulated rent led to a nation of tenants.

Nationalization in the capitalist context is very different. Nationalization is not a transfer of property in all cases; it can just be public management of the company or the limiting of profits or of activity in general. Another difference is that in a capitalist context, nationalization also transfers the company's liabilities.[32] In a capitalist context, only shares or stock are nationalized, not the means of production, and not necessarily totally: The state may act simply as one of the shareholders or as a

31 Katzarov, 1964, pp. 95–96.
32 Duez and Debeyre, 1952, p. 885.

majority shareholder.[33] Nationalization in a capitalist context can also take the form of nationalization of certain assets without nationalizing the shares or the company, which remain in private hands.

d) Who was the beneficiary of nationalization? It was stated that property belongs to the whole people. This was a new kind of owner created by ideology. The effective beneficiary was the state. All means of production belong to the state, so the state-owned enterprise only has a right of use regarding such means of production.[34] In a capitalist context, the beneficiary can be another public entity or another state-controlled company as well. In the Marxist concept, the indirect beneficiary, of course, is the people.

e) What was the purpose of nationalization? This question leads us back to the ideological backgrounds of nationalization. As Katzarov wrote, "*nationalisation is reflected not only in the conversion of given property into State property, but also in the conversion of a private economic activity into a social and collective activity.*"[35] The purpose of nationalization is to achieve a socialist economic order, the abolition of exploitation, and the abolition of the exploiting classes. In the case of nationalization in the Soviet context, this unique purpose exists. In a capitalist context, creating a new economic order is, of course, not within the scope of nationalization.

For example, the Renault company in France was nationalized punitively because Louis Renault collaborated with the Nazis during the Second World War.[36] Other reasons can be military or even social imperatives. Moreover, in de Gaulle's own words, there is no reason why Renault should remain nationalized forever, once Louis Renault is dead.[37] Finally, a new undertaking conducted the same activity.[38] Soviet-type nationalization was intended to last forever, being a revolutionary activity, with the aim to fundamentally transform the social and economic.

f) Was there any compensation? Article 10 of the 1948 Romanian Constitution envisages just compensation in the case of expropriation by reason of public utility. Article 11 on nationalization does not impose such a rule. There was no constitutional requirement to give compensation, and regarding compensation, the nationalization act is decisive. (The necessity of compensation is one of the distinctive characteristics of expropriation in comparison to nationalization). As it was stated, "*nationalisation results in the conversion of private property into collective property with a view to its utilisation in the general interest. Expropriation makes it possible to correct the effects of the absolute character of private property.*"[39]

33 For example, the French aircraft manufacturer *Gnome et Rhône* was nationalized in 1949.
34 It is interesting that the legislation regarding nationalization made it possible for a foreign state, according to the Peace Treaty or based on compensations, to keep their shares in a Romanian company. Hence, there was the possibility of having joint ownership of a company with the Romanian state and especially the Soviet Union.
35 Katzarov, 1964, p. 141.
36 Ordinance of January 16, 1945.
37 Jacquillat, 1988, p. 16.
38 Katzarov, 1964, p. 181.
39 Katzarov, 1964, p. 147.

A set of nationalization acts contain a general rule that the state will provide compensation, but no further rules were established. In 1948, a mechanism was designed but never put into practice. According to this mechanism, the Nationalized Industry Fund was created, organized through a decision of the Council of Ministers in the form of an autonomous fund.[40] Theoretically, this structure was to issue bonds, which could subsequently be redeemed and paid out from a share of the benefits of nationalized enterprises.

At this point in the research, we do not yet have sufficient data on whether this mechanism was only meant for signaling to the former owners that they would be compensated, without any genuine desire to give compensation, or if there existed at the outset a genuine intention to give a certain amount of compensation. In practice, generally, compensation was not given. The rules on compensation had only a declarative effect, not a normative one, and we can see them today as very easily being just a premeditated policy to create a reassuring but misleading appearance in the form of law. Law itself can be a method of manipulation in a dictatorship to ease the nationalization process.

The law excludes some categories of persons from the benefit of (nonexistent) compensation, for example, those who left the country clandestinely or fraudulently or who failed to return to the country before the expiry of travel documents issued by the Romanian authorities.

The explanation of this approach toward compensation is simple: Just compensation is a measure that would lead to a return to capitalism, essentially a revival of capitalism. Compensation has the effect of preserving the exploiting class. For this reason, real compensation is not possible.[41]

Another set of nationalization acts provide that nationalization should take place without any compensation (e.g., Decree No. 92/1952).

In a capitalist context, nationalization is generally based on compensatory mechanisms, based on the principle of protection of private property. For example, in the case of the Renault nationalization, all shareholders were compensated, except those who collaborated with Nazi Germany.

5. Collectivization (cooperativization)

According to the communist ideology, in addition to state-owned enterprises active in agriculture (called *sovkhoz* in the Soviet Union), collective-owned farms based on the Soviet *kolkhoz* model also had to be set up and operated under the name of 'collective farms' (later renamed agricultural production cooperatives).[42] As Stalin stated,

40 Decision No. 1421/1948. Published in *Monitorul Oficial* of October 14, 1948.
41 For a debate on whether compensation is necessary for foreigners under international law, see Seidl-Hohenveldern, 1958, pp. 543–552, and Katzarov, 1964, pp. 283–368.
42 Veress, 2020, pp. 368–371.

> *The agricultural commune of the future will be realized when in the farms of the production cooperative plenty of seeds for planting, animals, fowl, fruits, and any other produce will be found; when production cooperatives will arrange and operate mechanized laundries, canteen kitchens, modern bread factories; when the member of the kolkhoz will see that for him it is more advantageous if he receives meat and milk from the farm than to raise farm animals and breed cattle; when the female members of the kolkhoz will see that it is much more to their advantage to have lunch in the kolkhoz canteen and to buy bread from the bread factory and to receive laundry washed from the common laundry than to toil with such things. In this way, members of the agricultural communes of the future will no longer develop auxiliary private labor, but not because the law would prohibit this; instead because, as was the situation in previous communes, it will no longer be necessary to do so.*[43]

The basis of the agricultural production cooperative is, in theory, a voluntary association, a collective socialist farm established and run by the working peasants. In reality, however, collectivization was state policy, and for this reason, the state carried out extensive propaganda activities in favor of the transfer of private property to collective farms. Those who refused to join the collective were qualified as *kulaks* (large-holders) and persecuted (through violence, hostage-taking, and executions, and those who manifested in any way against collectivization were often condemned to prison).[44] 'Voluntary accession' was, in fact, extorted by state violence.

The realization of collectivization took place between 1949 and 1962[45] and presumed the transfer of privately-owned lots of agricultural land to the collective farm, thus affecting the population of rural Romania in its entirety (at that time, 12 000 000 people out of the total population of about 16 000 000 lived in the countryside).[46] In agricultural production cooperatives, one of the conditions for acquiring membership was to transfer ownership of all agricultural land to the collective farm.[47] These provisions were interpreted as follows:

> *The obligation exists to transfer ownership of lands extended over all lots of land owned by the prospective member of the cooperative as well as those in the property of all family members living in the same household with him, regardless of the destination of the land in question. This interpretation of the subjective side of the assignment obligation of land ownership was necessary because only this interpretation is found to be consistent with the intended goal of the socialist transformation of*

43 See Farkas, 1950, p. 463.
44 For details regarding persecutions during collectivization, see Kligman and Verdery, 2011.
45 For details, see Gheorghiu-Dej, 1962; Dobrincu and Iordachi, 2005; Oláh, 2001; Kligman and Verdery, 2011.
46 Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România, 2007, p. 238.
47 Lupán, 1972, p. 445.

> *agriculture, its significance being the abolition of small farms and the creation of the foundations of socialist agro-industrial production cooperatives. Hence the interpretation of legal norms in the sense that whichever spouse adheres to the cooperative all lands owned by the family had to be ceded to the CAP [the cooperative] because of the awkward situation in which one of the spouses was a member of the CAP and the rest of the family members who lived in the same household would carry out agricultural activities in the conditions of the small peasant household was inconceivable.*[48]

A strong reason in favor of collectivization was small farms' inefficiency. However, ideological rather than economic reasons proved to be decisive: As long as private property constantly regenerates capitalism – a system that it was desirable to overcome – collective management was the proper form for agriculture. According to Gheorghiu-Dej, socialism can be built only if all the essential means of production in cities and villages alike are transferred to public ownership, that is, state-owned or cooperative.[49]

Decree No. 83/1949 expropriated estates with an area larger than 50 hectares. Opposition to expropriation was punished with between 5 and 15 years of forced labor and confiscation of property (Art. 4). Previous owners were often forcibly relocated or required to reside at a domicile chosen by the authorities.

The implementation of the cooperative agrarian policy was achieved through the State Council's Decree No. 133/1949.[50] This norm provided the general framework for organizing various forms of cooperatives in the agricultural sector.[51] In 1949, the first model statute of collective farms was elaborated and later replaced a new statute adopted by peasant delegations in 1953 (the latter being adopted by the Joint Decision of the Central Committee and the Cabinet No. 1650/1953), followed by the adoption of another statute in 1966. Agricultural production cooperatives established during the Soviet-type dictatorship cannot be considered civil law companies or associations as the cooperatives existing in the capitalist environment, the former being specifically socialist organizations with a distinct socioeconomic nature. Subsequently, multiple special legal rules were adopted in the field of cooperatives, as follows: Act 14 of 1968 on the Organization and the Functioning of the Cooperation of Craftspeople or Act 6 of 1970 on the Organization and Functioning of Consumer Cooperation (the former cooperatives for the production, purchase, and sale of goods).

The definite principle of establishing collective farms and other enterprises was free initiative and voluntary accession (Decision of the Council of Ministers No. 308/1953), but in fact, the process was characterized by forced collectivization.

Decree No. 115/1959, which had as its object of regulation

48 Lupán, 1972, p. 446.
49 Gheorghiu-Dej, 1955, p. 213.
50 See Lupán, 1971, p. 1025; Lupán, 1974, p. 563.
51 Lupán, 1987, p. 85.

> *the liquidation of the remnants of any form of exploitation of man by his fellow man in agriculture, in order to continuously raise the material standard of living and the cultural development of the working peasantry and the development of socialist construction.*

It prohibited the partial cultivation or leasing of agricultural land lots, and lots that a single family could not cultivate were nationalized. Lots of agricultural lands thus 'liberated' were handed over for the use of collective farms or other socialist organizations.

Cooperative ownership (of land) was a form of socialist property on par with public property, but it was also a form of communal property with a narrower object. Agricultural production cooperatives were considered to be collective enterprises based on the notion of socialist property. The owners of properties transferred to the cooperative were all cooperating members, and they had a theoretical right to dispose of the collective property. However, the right to dispose of the cooperative property could not infringe upon the general social interest so that any veritable right of disposal was non-existent.[52]

Cooperatives could also exploit state-owned land.

With the establishment of collective farms, small holdings and peasant agricultural production were abolished. Land ownership in favor of collective farms was acquired primarily through the process of collectivization itself, which was considered an original means of acquiring socialist property. Following collectivization, lands thus socialized were passed into the ownership of the collective farm without any encumbrances, and thus, the collective farm could no longer be required to comply with obligations that had arisen in connection with land that had been socialized in this way.[53] (Obligations arising toward the state based on contracts of acquisitions were exempted under this provision, of course.)

At the end of the collectivization process, 96% of the total area of arable land and 93.45% of the land area intended for agricultural production were transferred to state-owned enterprises or collective farms (agricultural production cooperatives). However, collectivization was not accomplished in the mountainous areas unfavorable to factory farming. In general, as it was stated:

> *What emerged from the process everywhere was that the tie between peasant households and their land was broken; kinsmen and co-villagers had been used against one another, rupturing earlier solidarities; the influential members in each village had been humiliated and dispossessed; the former poor now held political advantage; and land was no longer the main store of wealth or the means for villagers to manifest their character, skill, or diligence.*[54]

52 See Lupán, 1971, p. 1025; Lupán, 1974, p. 563.
53 Lupán, 1972, p. 446.
54 Verdery, 2003, p. 46.

Cooperative law has become an autonomous source of law in Romania and a distinct branch of law.[55]

6. Personal property under Soviet-type dictatorship

Given that in the Soviet-type dictatorship, the notion of private property elicits negative connotations, the primary forms of property consisted of state property (of the whole people) and collective property. Civil law, instead of using the notion of private property, introduced the notion of *personal property*.[56]

Decree No. 31/1954 recognized the civil rights[57] of natural persons for the purposes of satisfying their personal needs, and thus civil rights – as well as the right to personal property – were restricted to the extent necessary to meet their own (personal) needs. The sphere of state and private property was distinguished as follows:

> *According to the most spectacular interpretation of the socialist property, by its nature, its object should be a means of production, while it is the nature of the personal property that its object is a means of consumption. [Only] of their nature, because in both cases we find exceptions: most often the means of production are initially (until the completion of the process of distribution) objects of socialist property, and, on the other hand, only in some instances does (household) property constitute a non-essential means of production which is the object of personal property.*[58]

In the case of immovables, the object of personal property could be composed of the house and the lot occupied by the household. Cultivation of the lots attributed to households was mainly achieved using methods reminiscent of those used in the Middle Ages, even if these tiny plots provided staple food for many families.[59] In the case of members of agricultural production cooperatives, after the 1965 constitution recognized their right to personal land ownership, the statute of agricultural production cooperatives – adopted in 1972 – contained a particular provision: The land area occupied by the house, the outbuildings, and the yard cooperating members' property could not exceed 800 square meters. The agricultural production cooperative could sell – for the purpose of erecting houses – an area not exceeding 500 square meters to the cooperating members or to its employees. For locative purposes (houses or apartments owned as personal property):

> *Within the meaning of Art. 60 of Act 5 of 1973, the owner and his family members, may retain only residential areas that are justified by their needs in their property. When*

55 Lupán, 1980, p. 875; Lupan, 1977.
56 Veress, 2020, pp. 372–375.
57 I use the notion of civil rights in the European sense, as in the rights provided by private law norms, not in the sense attributed to this notion in the US context especially, as in political rights.
58 Lupán, 1975, p. 268.
59 Berend, 2008, p. 155.

> *establishing these needs, the following must be considered: for each family member, one room must be available, and in excess of this number at most, two other rooms for the entire family. These provisions are applicable only to dwellings in urban areas.*[60]

Incidentally, in the case of real estate rented from state enterprises that managed the national housing inventory, the standard housing area allocated to each person was 10 square meters, and if the building's structure made this impossible, only 8 square meters (Act 5 of 1973, Art. 6). Any residential building, found in personal property and located in an urban settlement, that the owner and his family members did not use, could be rented out by the state.

Act 59 of 1974 regarding land management provided that the land constitutes the property of the whole people. Thus, all lots of land located in the territory of the Socialist Republic of Romania, regardless of destination and owner, constitute the unitary national land inventory, which can be used and must be protected in accordance with the interests of the whole people. The law completely stopped any transfer of agricultural land via *inter vivos* instruments: The right of ownership over agricultural lands could be acquired exclusively through legal inheritance (Art. 44), but if constant use – for the purpose of agricultural production – was not ensured by the legal heirs, the land was taken over by the state, and if within 2 years of this takeover, the heirs did not request restitution and did not initiate agricultural production, the land was passed on to state property.

Land of any kind owned by persons who established themselves abroad would become the property of the Romanian State without any means of compensation (the rule being applied with retroactive effect, i.e., the landed property of persons who had left the country before the entry into force of the law was also nationalized). The same procedure was to be followed if the land was inherited by any persons who were Romanian citizens not domiciled in Romania (Art. 13). Ownership of dissidents' buildings (those of persons who emigrated in a manner considered illegal, including those who left the country in compliance with official formalities but did not return) was transmitted to the state by law and without any compensation, while those who emigrated in accordance with legal formalities were obliged to sell to the state any buildings they owned at a price set by law (Decree No. 223/1974 regarding Regulation of the Situation of Some Properties).

Act 58 of 1974 on the Systematization of the Territory of Urban and Rural Localities[61] stopped the legal circulation of land located in the built-up areas of localities, and following the new regulations, obtaining the property right over such lands was made possible only by legal inheritance (Art. 30). Practically,

> *Every natural person may retain the right to personal land ownership, but his right of disposal over this property is extinguished as of 1st December 1974. In the case of*

60 Lupán, 1975, p. 268.
61 For details, see Pop, 1980.

> *alienation of real estate, the land related to it becomes the state's property in exchange for adequate compensation. So, the new owner of the building will no longer be the landowner but will receive the land necessary for personal use from the state.*[62]

The law provided for the construction of blocks of flats in urban localities for housing (Art. 8), stating that:

> *In new housing estates, depending on the average height regime applicable for the buildings, the following living areas per hectare will be ensured: up to 3 levels, 4000 m²; between 3 and 5 levels, from 4500 m² to 7000 m²; between 5 and 9 levels, from 7000 m² to 10 000 m², and over nine levels will aim to achieve about 12 000 m² of living space per hectare.*

The appearance of entire neighborhoods of overcrowded blocks of flats in which no areas were provided for greenery, playgrounds, or proper parking space is the direct result of this regulation, which, to this day, contributes to the overcrowding of new urban housing developments and to problems that have appeared as a result of a low standard of living and the degradation of urban planning. In communes, plots of land between 200 and 250 square meters could be handed over for use, with an opening to the street that does not usually exceed 12 meters in length, while in urban areas, this figure was set to between 100 and 150 square meters, in both cases in exchange for an annual fee. As a result of Act 58 of 1974:

> *In principle, the circulation of land property ceased, and personal land ownership had lost its previous significance. These objects of personal land ownership gradually became state property, and the socialist state, in exchange for a small fee, gave them over for the use of individuals during the existence of the buildings erected on them. In case of the subsequent alienation of the residence or holiday home, the right to the use of the given land is transferred to the new owner of the building as a result of the conclusion of the contract of sale (or of another type).*[63]

The concept of property in accordance with Marxist principles and the transformation of private property into the mystical property of the whole people have largely contributed to the bankruptcy of the socialist economic model. The model was summarized as follows:

> *The single-party state based on Marxist ideology replaced the private owners with the entirety of society. Although members of communist society ceased to be private owners, they never became the owners of any social property. The confiscated and concentrated property right appeared floating over the heads of mortals as a mystical*

62 Lupán, 1975, p. 270.
63 Lupán, 1975, p. 271.

right, the right of state property, and as such became a mystified plaything to the interests of the bureaucratic élite and the powerful.[64]

7. Basic questions raised by the change in the concept of property as a result of nationalization and collectivization

The Soviet-type dictatorship operated on the principle (fiction) of the right of socialist property, that is, of public property: The quasi-totality of the means of production was in socialist ownership (the majority in the property of the whole people and a relatively minor part in the property of cooperatives). In this conception,

The state is just a tool in the hands of the working class and the whole people to achieve in an organized way economic and social development based on socialist property. The state exercises control; it watches over how the people's property is managed not to be wasted but amplified and developed. The subject of socialist property rights is therefore not the state but the whole working people.[65]

In reality, the state was – as far as possible – the subject of property rights, while the fiction of socialist property (of public property) played only a legitimizing role, meant only to show that the system works in the people's interest.

However, state-owned companies operated with low efficiency, extensive staff, limited productivity, contradictory objectives due to political interference, poor resource allocation resources, inflexibly, under conditions of technological backwardness (decrepit machinery, outdated methods, and products), with a severely limited capacity to innovate, with frequent theft and widespread corruption, and to the detriment of the environment due to pollution.[66] In general, it can be established that the market economy, based on competition, which operates under adequately regulated conditions (i.e., capitalism), resulted in a more efficient form of economic organization than the planned state-owned economy implemented under Soviet-type dictatorships. The latter had the stated purpose of abolishing capitalists' exploitation of the proletariat but in reality replaced capitalist exploitation with exploitation by the authoritarian state.

As a result of collectivization, private property was abolished as a motivating factor, the peasants were degraded to the status of proletarians in the agricultural sector, and economic efficiency achieved the expected results only in the pompous statements of political propaganda.[67]

64 Pécsi, 1991, p. 365.
65 Lupán, 1986, p. 172. For similar reasoning with regard to lots of lands, see Lupán, 1988a, 1988b.
66 Savas, 1993, p. 287.
67 Veress, 2020, pp. 371–372.

8. Reprivatization

After the collapse of the Soviet-type regimes in East Central Europe, a crucial question was raised: Is it possible to restitute nationalized and collectivized property to the former owners? The answers to this question varied.

Following the regime change, reparation for nationalizations accomplished during the Soviet-type dictatorship emerged as a vital issue. In the eyes of many, the ideal solution for reparation was dismantling the effects of nationalization and collectivization altogether through the return of nationalized and collectivized properties to their former owners or their heirs.[68] There were, however, many arguments brought against this position, starting with the impossibility of disregarding legal transformations (governed by *tempus regit actum*), the necessity for continuity, economic reasons, etc. Reprivatization was, at least to a certain extent, possible in the case of agricultural and locative property, and practically impossible in the case of industrial property.

The restitution of agricultural and forest lands took place gradually.[69] Act 18 of 1991 on Agricultural Lands allowed restitution of 10 hectares of land, at most, and no more than 1 hectare of forest between the years 1991 and 1997. Ideological descendants of the former Soviet-type regime wanted to create a transitional system between socialism and capitalism and would not have preferred in any form the restoration of the old, landed class, the 'Hungarian threat' being also often invoked in connection with the restitution of real property in Transylvania. These were the reasons for limiting returned areas. As a result of this measure, from the bodies (lots) of nationalized property with an area exceeding 10 hectares, the original owner (or their heirs) was entitled to the return of an area of a maximum of 10 hectares over the rest of the lot restitutions to other entitled persons also taking place. The Land Act was also meant to accomplish a minor agrarian reform,[70] for which property bodies greater than 10 hectares were utilized. Thus, the land situation described in the land

68 Veress, 2020, pp. 382–384.

69 For an overview, see Verdery, 1996, pp. 133–167.

70 Decree No. 42/1990 on Some Measures to Stimulate the Peasantry ceded to the member of the agricultural production cooperative the land adjacent to the house, which was the member's dwelling, the household annexes, the yard, and the garden. Before the regime change, the property right of the cooperating member was limited to an area of at most 250 m^2, this new norm extending the property right over the entire yard and garden up to an upper limit of 6000 m^2. The subsequent Act 18 of 1991 granted rights to: former cooperating members who had joined the cooperative without assigning land areas or assigning land areas smaller than 0.5 hectares to the cooperative upon joining; those who were not cooperating members but worked for the cooperative (at least for a period of 3 years before the entry into force of the Act) and did not own agricultural land; deportees who did not own farmland; persons who had entirely or partially lost their ability to work due to participation in the December 1989 Revolution and heirs of people killed during the Revolution as well as other people who participated in the Revolution. Upon request, these persons could be granted ownership free of charge of 10 000 m^2 of agricultural land.

books before nationalization was made irrelevant, and the application of subsequent, more permissive rules for restitution became excessively difficult. The principle according to which nationalized lands had to be returned, as far as possible, in the form of their previous lots (instead of granting other lots as compensation) could no longer be observed (there was also very little desire to do so).

The next phase of restitution was initiated by Act 169 of 1997, which extended the upper limit of the areas that could be returned to 50 hectares per family in the case of agricultural land and 30 hectares per family for forested land. Act 58 of 1998 regarding the Legal Circulation of Lands, in turn, provided that the total land area acquired *inter vivos* may not exceed 200 hectares per family. Application of this law has been hampered by the transformation of state agricultural enterprises (which coexisted with agricultural production cooperatives but were much better equipped and considered to be agro-industrial enterprises) into companies, the lands in their possession not being subject to restitution. This rule ensured, for the first time, regarding specific structures developed throughout history for the common management of lands – such as the commonages in the Szeklerland – the possibility of requesting the restitution of lands held jointly and commonly in a state of permanent indivision.

Adoption of Act 1 of 2000 constituted the third phase of restitution, which changed the upper limits set by previous rules: Each previous owner of nationalized (or collectivized) land or the heirs of each such owner acquired the right to the restitution of up to 50 hectares of agricultural land or 100 hectares of pasture located on the old lots initially nationalized (if they were still available). This act introduced the possibility of requesting compensations into the impossibility of restitution of lands in kind.

Finally, Act 247 of 2005 stated the principle of *restitutio in integrum*, although it could not be achieved due to the manner in which the rules of previous restitutions had been implemented. The closing of the restitution process of nationalized immovables was initiated by Act 165 of 2013 and subsequently by Act 168 of 2015, but this process is still ongoing.

Act 112 of 1995 started the process of the restitution of buildings located in the built-up areas of localities, especially in urban areas. This law, however, allowed only the restitution in kind of those residential buildings that were already leased to the previous owner (a Romanian citizen) or their heirs, or which were, at the time, not inhabited by other tenants (Art. 2). Nonetheless, the law allowed all tenants – not just those who were the victims of a measure of nationalization – to buy the nationalized real estate they had rented at an advantageous price (due to its effects, this process was perceived as being a measure to consolidate the benefits of nationalization by these persons, in fact, a re-nationalization in defiance of the previous owners). Clearly, the legislator was not interested in expanding the restitution process in 1995. Act 112 of 1995 prevented the full application of subsequent restitution measures, the end result being a legal quagmire similar to the result of restitution in the case of agricultural immovables. Restitution of nationalized buildings reached its peak in the form of Act 10 of 2001, which allowed a much wider scope of restitution in kind of nationalized buildings. The issue of payment of compensations owed by the state to the former

owners and their heirs for real estate that was impossible to return in kind remains unresolved to date (the state has already spent the equivalent of the price of the real estate purchased by the former tenants, and the cost of the state's behavior to prevent restitution in kind must now, as in the future, be borne by all taxpayers alike).

Resolution of the issue of the restitution of nationalized immovables in the case of churches and national minority organizations, or minority communities respectively, was regulated by special norms (e.g., Government Emergency Ordinance No. 21/1997 in the case of the Jewish Communities, Government Emergency Ordinances No. 13/1998 and No. 112/1998 adopted in the general interest of national minority organizations and churches, Government Emergency Ordinance No. 83/1999 in favor of organizations of national minorities, and Government Emergency Ordinance No. 94/2000 and Act 501 of 2002 for the modification of the latter emergency ordinance, which ordered restitution in favor of the churches). These measures were also only partially implemented. In many cases, the practice of administrative bodies and courts has hampered the application of these normative acts' generally permissive provisions.

In its entirety, restitution of immovables nationalized under different titles or without title resulted in hundreds of thousands of legal disputes, with Romania being repeatedly convicted before the European Court of Human Rights for the violation of property rights. Therefore, this liquidation of the dictatorial past is simultaneously both a success and a partial failure.

9. Privatization

In the case of companies, direct reprivatization was rare in the region. The former companies' assets were so radically transformed due to several decades of industrialization that the former company's essence disappeared. Therefore, it was not possible to restitute something totally different to what had been nationalized; eventually, a compensation mechanism was instituted. However, the economy of the Soviet-type dictatorship based on central planning, on state and collective property, had to be dismantled and transformed into a market economy based on competition and private property, organized according to the principles of a pluralistic, democratic society. The construction of political pluralism and the democratic institutional framework in itself was not easily accomplished, but the process of economic regime change and its central element, privatization, proved to be an even more complex process, with a duration now measured in decades.[71]

This process remains incomplete to this day. "*The central phenomenon of the general change of the socio-economic regime is privatization, for without the domination of private property neither the market economy nor civil society can exist.*"[72] Privatization can be

71 Veress, 2020, pp. 384–389.
72 Sárközy, 1997, p. 19.

considered an end in itself in systems theory and, in actuality, constituted the fire sale of an unimaginable amount of state-owned wealth.[73] Competition between former socialist states, oversupply of goods subject to privatization in the region, the unfavorable conjuncture prevalent in the world economy, lack of capital, legal insecurity that stopped investments, outdated technologies, and destruction of the environment all adversely affected the privatization process in Romania. Given the troubled economies of the Eastern Bloc countries, which have lost access to their markets in the east and were stricken by social problems, and in the midst of a fight against impending economic crisis, there was a tremendous and urgent need for the funds resulting from privatization.

In a more straightforward formulation, enterprises in state ownership had to be sold.

The privatization process in Romania was delayed compared to other Central and Eastern European countries, having been accomplished in several phases and under the sign of profound contradictions. The reasons for the delay can be summarized as follows:

> *The gap that can be seen by comparison with several Central European countries can be explained on the one hand by the fact that the regime change was impossible to prepare intellectually, economic reforms not having been implemented in the eighties. On the other hand, the population was less prepared for a radical regime change, and egalitarian views were still prevalent. The third reason was that the elite brought to power was not fully committed to the idea of a market economy based on private property and was too weak politically to complete such economic programs in a consistent manner.*[74]

In the summer of 1990, Act 15 of 1990 (on the Reorganization of State Economic Enterprises as Autonomous Companies) reorganized state-owned enterprises. For those to be kept in the property of the state, the form of *autonomous utility companies* (*regie autonomă* in Romanian – based on the French *régie autonome* model of companies providing public services and utilities) was provided, while those that were to be subjected to privatization were transformed into commercial companies. A proportion of about 47% of the assets of state-owned enterprises have been assigned to autonomous utilities, including the assets of strategic enterprises. In order to reorganize them, a 6-month deadline was set. Reorganization was the precondition to privatization:

> *The form of the socialist state enterprise was not suitable for the capitalization of private enterprises, this [former] being considered in essence a public law institution. The enterprise as an organization, in this way, was inalienable. Thus, socialist countries were forced to transform state-owned enterprises into joint-stock*

73 Sárközy, 1997, p. 19.
74 Hunya, 1991, p. 135.

> *companies (or companies with limited liability) in which the sole shareholder (or associate) became the state by using the technique of universal succession of rights copied from German reorganization law. This was the so-called formal privatization, privatization in the legal sense, the compatibilization of legal form with its desired marketing but without altering the property relationship [...]. Only this formal legal privatization can be followed by real privatization, carried out in the economic-social sense [...].*[75]

A proportion of 30% of the stock of joint-stock companies founded as a result of the transformation of state enterprises according to Act 15 of 1990 was scheduled to be attributed to the population.

The Companies Act, as a fundamental law of the market economy (Act 31 of 1990), only entered into force in December 1990. The law made substantial use of the chapter regarding companies in the Carol II commercial code draft. Based on the compulsory corporate form principle, it regulated five types of companies: the general partnership, the limited partnership, the partnership limited by shares, the limited liability company, and the joint-stock company. The procedure for registration, modification, and deregistration of companies and the rules regarding the Trade Register were regulated by Act 26 of 1990.

The first real privatization act was Act 58 of 1991, which regulated the privatization of companies resulting from the transformation of state-owned enterprises. After several amendments, it was repealed by Government Emergency Ordinance No. 88/1997, which introduced the rules on privatization that are still in force today. This emergency ordinance has, in turn, been changed repeatedly.

Based on Act 58 of 1991, privatization was carried out by selling a proportion of the state's stock and by awarding stock to the inhabitants. The law also allowed the direct sale or sale at auction of constituent parts of companies that were fit to function as independent units, as a particular means of privatization.

The State Property Fund was set up to organize the sale of state-owned stock. This property fund (a holding company by the proper name) took over a share of 70% of the stock packages of companies that were formerly state-owned enterprises and exercised the rights provided in favor of shareholders in the case of such state-owned enterprises accordingly. The sale of shares could take place by public subscription, open auction, or with participation based on invitation, by direct negotiation, or by the concomitant use of these means. If, following the capitalization of the shares, the State Property Fund would have lost control of the company subject to privatization, prior approval from the National Privatization Agency to complete the operation was a compulsory prerequisite. The law allowed employees and members of the former management of state-owned enterprises to acquire shares with priority over others (the so-called MEBO model, taken from the English name of the procedure: management and employee buyout). In the case of public subscription, these persons could

75 Sárközy, 1997, p. 20.

purchase, with a 10% discount on the initial offer price, a maximum amount of 10% of the share package subject to sale, being preferred in the case of sale by auction through legal provisions and being able to purchase shares with preference at a price 10% lower than the one established at auction, in this case, without any quantitative limit imposed on the number of shares that could be purchased. The law even allowed members of management, employees, and former employees whose work relationships ceased due to retirement to delay payment deadlines and possibly reschedule payment or receive preferential credit. Based on Act 77 of 1994, management and employees could even set up associations to acquire shares.

At the same time, five companies were set up, called private property funds, each established on a regional basis. A proportion of 30% of the shares issued by state-owned joint-stock companies in each geographical region was transferred to the private property funds, these becoming minority shareholders of the joint-stock companies. The contradiction between facts and reality was evident:

> *If we accept the Government's rhetoric, which is also present in the choice of the name of these private asset funds, then these organizations have been privately owned since their establishment. By the entry into force of the privatization act, all enterprises were automatically assigned in a proportion of 30% to private property. The state (through the State Property Fund) held the majority of the shares in each enterprise so that the private asset funds had very little influence over the management of the enterprise. Moreover, because the management of the private asset funds was chosen on political grounds and because shareholders were incapable in the practice of influencing the operation of the private asset funds, the private character of these businesses was questionable.*[76]

These private property funds distributed coupons called 'certificates of ownership' to the population for free; in reality, these were shares in the private property funds.

The coupons could be alienated, or they could be converted into shares of companies subject to privatization within 5 years, or, after this period had expired, they could be used as shares in the private property funds, which had transformed into financial investment companies (abbreviated as SIF in Romanian). The law forbade the alienation of these titles to foreign natural or legal persons.

In cases where investors wanted to buy 100% of the given company's shares, the negotiations were conducted by the private property fund, which had territorial jurisdiction, including in respect of the shares held by the State Property Fund.

Given that privatization did not go as smoothly as imagined, the parliament adopted Act 55 of 1995 to accelerate the privatization process. The act was also meant to conclude the free privatization program altogether. Inalienable coupons were issued in the beneficiaries' names (members of the general population), and these could be exchanged for shares, together with previously issued property

76 Earl and Telegdy, 1998, p. 481.

titles (coupons). This new set of coupons had a face value of 975 000 lei each, the coupons from the previous issue being devalued to 25 000 lei. It was estimated that each entitled citizen would receive a sum of 1 000 000 lei from the assets of state enterprises (in total, about 30% of the asset value of state-owned enterprises). In connection with the actual value of the assets of these enterprises, no accurate data were available. Mass privatization resulted in a dispersed shareholder structure that could not effectively influence the company's management. Coupons could also be deposited with the private property funds, in which case, the funds could use them regarding the subscription of shares, the coupon owner becoming a shareholder in the fund.

Pursuant to Act 133 of 1996, the five private property funds were transformed into financial investment companies (SIFs). Government Emergency Ordinance No. 30/1997 transformed some of the autonomous utilities into companies, thus extending – in theory – the scope of the companies subject to privatization.

Government Emergency Ordinance No. 88/1997 continued the series of normative acts on privatization. The Ministry of Privatization was set up, and the State Property Fund continued its activity. The new rule maintained the benefits system stipulated in favor of management and employees, keeping the possibility of setting up associations with a legal personality, with a view to the collective acquisition of shares. In the case of payment of an advance equal to at least 20% of the price of the package of shares purchased, the rule provided the association with the possibility of paying in installments within a period of 3–5 years and with an interest rate of 10%. In 2001, the State Property Fund was renamed the Authority for Privatization and Administration of State Participations. In 2002, a new act to accelerate privatization was adopted (Act 137 of 2002), which allowed the sale of shares, even below the starting price in the auction in the absence of a tender or proper direct bid, determining whether the sale was opportune, and the price that was real and serious being exempted from judicial review. Judicial review was thereby restricted in the matter of sale only to its legality. The norm also allowed privatization for a single euro in the case of companies selected by the government if the buyer had committed to making investments, keeping jobs, or creating new jobs. Since 2004, the name of the authority exercising the state's shareholder rights was again modified, this time to the Authority for Recovery of State Assets, and since 2012, it has been called the Authority for Managing State Assets. The latter name change shows that the legislator considers the privatization process closed, at least in terms of its main lines of action.

To regulate the management of the remaining companies in state property that have not been privatized or have not been intended for privatization, a special norm was adopted (Government Emergency Ordinance No. 109/2011 on the Corporate Governance of Public Enterprises).[77]

77 Veress, 2017, pp. 62–78.

10. Conclusion

From the point of view of legal theory, nationalization in Eastern Europe was a unique, distinctive institution similar only to the nationalization that took place in the Soviet Union. The aim was, on the one hand, to review the property-dispossessing measures (nationalization, collectivization) of the Soviet-type dictatorship, which marked a radical social experiment. It was a path toward a utopia that never materialized, and in reality, it was a system characterized by repression and a lack of freedom. After the fall of the dictatorship, there was a partial restoration of the past, measured by possibilities and limited by dogmas (reprivatization), and a new process, also peculiarly post-socialist: privatization. Nationalization, cooperativization, reprivatization, and privatization mark great changes in 20th-century property in East Central Europe. All these processes were politically motivated. Both were public law phenomena devoid of organic development. Reprivatization as a restitutive measure had limited power, as it was designed

> *as an act of recuperation, a return to a just order based in individual ownership that would permit more efficient economic action. Legislating the restoration of ownership rights would overturn the grand theft that had made socialist property possible. This conception failed to grasp how deeply embedded that system had been in social relations of exchange and obligation, not so easily modified by passing a few laws.*[78]

The flaws of the otherwise necessary and inevitable reprivatizations and privatizations practically served a new round of abuses and embezzlements. Dismantling a dictatorship proved to be extremely difficult from all points of view – political, economic, moral, and legal.

78 Verdery, 2003, p. 76.

Bibliography

Berend, T. I. (1999) *Terelőúton. Közép- és Kelet-Európa 1944–1990*. Budapest: Vince Kiadó.

Berend, T. I. (2008) *Európa gazdasága a 20. században*. Budapest: História – MTA Történettudományi Intézete.

Bucur, I. 1994. **'**Naționalizările din România, 1944–1953**',** *Arhivele totalitarismului*, 2(1–2), pp. 313–320.

Comisia Prezidențială pentru Analiza Dictaturii Comuniste din România (2007) *Raport final*. București: Humanitas.

Dobrincu, D., Iordachi, C. (2005) *Țărănimea și puterea. Procesul de colectivizare a agriculturii în România*. Iași: Polirom.

Duez, P., Debeyre, G. (1952) *Traité de droit administratif*. Paris: Dalloz.

Elster, J. (ed.) (1986) *Karl Marx – A Reader*, Cambridge: Cambridge University Press.

Earl, J. S., Telegdy, Á. (1998) **'**A romániai tömeges privatizációs program eredményei. Első kísérleti elemzés**',** *Közgazdasági Szemle,* 45(5), pp. 179–493.

Farkas, J. (1950) **'**A Szovjetunió kolhozjogának rövid vázlata**'**. *Jogtudományi Közlöny*, 5(15–16), pp. 463–470.

Gheorghiu-Dej, Gh. (1955) *Cikkek és beszédek*. 2nd Bukarest: Politikai Könyvkiadó.

Gheorghiu-Dej, Gh. (1962) *Raport cu privire la încheierea colectivizării și reorganizarea conducerii agriculturii prezentat la sesiunea extraordinară a Marii Adunări Naționale 27 aprilie 1962*. București: Editura Politică.

Giurescu, D. C. (ed.) (2013) *Istoria românilor. Vol. X. România în anii 1948–1989*. București: Editura Enciclopedică.

Hunya, G. (1991), 'România', in Mizsei K., Kolta M. (eds.) *Privatizáció Kelet-Európában. Alternatívák, érdekek, törvények*. Budapest: Atlantisz.

Jacquillat, B. (1988) *Nationalization and Privatization in Contemporary France*. Stanford: Hoover Institution.

Katzarov, K. (1964) *Theory of nationalisation*. The Hague: Martinus Nijhoff.

Kligman, G., Verdery, K. (2011) *Peasants under Siege. The Collectivization of Romanian Agriculture, 1949–1962*. New Jersey: Princeton University Press.

Lupán, E. (1971) **'**Szövetkezeti demokrácia**'**, *Korunk*, 30(7), pp. 1024–1029.

Lupán, E. (1972) **'**A román mezőgazdasági termelőszövetkezetek használatában levő földek jogi helyzete**'**, *Jogtudományi Közlöny*, 27(9), pp. 445–452.

Lupán, E. (1974) **'**Három évtized a szocialista mezőgazdaság útján**'**, *Korunk,* 33(4), pp. 560–565.

Lupán, E. (1975) **'**A személyi földtulajdonjog Romániában**'**, *Jogtudományi Közlöny*, 30(5), pp. 267–271.

Lupan, E. (1977) *Drept cooperatist*. București: Editura Didactică și Pedagogică.

Lupán, E. (1980) **'**A szövetkezetek jogi szabályozásának fejlődése Romániában a felszabadulástól napjainkig**'**, *Jogtudományi Közlöny*, 35(12), pp. 873–878.

Lupán, E. (1986) **'**Az RKP felfogása az össznépi tulajdonról és a tulajdonjogról**'**, *Korunk*, 45(3), pp. 170–175.

Lupán, E. (1987) 'Szövetkezeti mezőgazdaság – mezőgazdasági szövetkezeti jog (Vissza- és előretekintő elemzés)', *Korunk*, 46(2), pp. 84–89.
Lupán, E. (1988a) 'Kié a föld? I.', *Korunk*, 47(5), pp. 330–334.
Lupán, E. (1988b) 'Kié a föld? II.', *Korunk*, 47(6), pp. 417–421.
Oláh, S. (2001) *Csendes csatatér. Kollektivizálás és túlélési stratégiák a két Homoród mentén (1949–1962)*. Csíkszereda: Pro-Print Könyvkiadó.
Pécsi, F. (1991) 'Merre tart a privatizáció Romániában?', *Korunk*, 50(3), pp. 365–367.
Pop, L. (1980) *Regimul juridic al terenurilor destinate localităților*. Cluj-Napoca: Dacia.
Roller, M. (1952) (ed.) *A Román Népköztársaság története*. Bukarest: Állami Tanügyi és Pedagógiai Kiadó.
Savas, E. S. (1993) *Privatizáció: hogyan vonuljon ki az állam a gazdaságból?* Budapest: Akadémiai Kiadó.
Sárközy, T. (1997) 'A privatizáció modelljei Közép-Kelet-Európában', *História. Ezredforduló melléklet*, 1, pp. 18–24.
Seidl-Hohenveldern, I. (1958), 'Communists Theories on Confiscation and Expropriation – Critical Comments', *American Journal of Comparative Law*, 7(4), pp. 541–571.
Verdery, K. (1996) *What was Socialism and what Comes Next?* New Jersey: Princeton University Press.
Verdery, K. (2003) *The Vanishing Hectare. Property and Value in Postsocialist Transylvania*. Ithaca: Cornell University Press.
Veress, E. (2015) 'From Capitalism to Utopia. Communist Nationalization of Companies in Central and Eastern Europe', *Acta Universitatis Sapientiae. Legal Studies*, 4(1), pp. 125–137.
Veress, E. (2017) 'The State's Role as Owner of Enterprises: Mandatory Rules of Corporate Governance in Romania', *Pro Publico Bono – Public Administration. Special Edition*, 1, pp. 62–78.
Veress, E. (2020) 'Private Law in Transylvania after 1945 and to the Present Day', *Acta Universitatis Sapientiae. Legal Studies*, 9(2), pp. 125–137.

| Chapter 10 |

National and Ethnic Minorities' Legal Position in East Central Europe Between 1789 and 1989

Iván HALÁSZ

ABSTRACT

This chapter provides a short history of the legal protection of national minorities in East Central Europe. The region has a relatively long history of legal protection of national and ethnic minorities. This history is connected to the complicated ethnic and social structure across the region because parallel nation- and state-building have been typical for East Central Europe in the last two centuries. The chapter distinguishes three main periods in modern history regarding the issue of minorities. The first legal norms were created in the 19th century. The multilateral international protection of minority rights was established in the interwar period, during the existence of the League of Nations, which played an important role in the realization of this protection. Many countries realized restrictive anti-minority policies during and after the Second World War (mainly in the 1945–1948 years). The introduction of the communist minority policy inspired by the Soviet (Leninist) model in East Central Europe meant an element of stabilization in the sphere of minority issues and the legal protection of minorities. A very important specific feature of the position of East Central European minorities is the dependence on the international politics and position of the great powers. This fact sometimes moderated the minority situation in the region. Despite similar circumstances, conditions, and international challenges, the internal development of the legal protection of minorities underwent a different dynamic process. These differences mainly depended on the internal development of certain states and their societies. The post-war nationalistic repressions were, for example, the most radical in Czechoslovakia and Yugoslavia, which improved the relatively generous minority policy several years later. The post-war situation was more moderate and tolerant in Romania, which implemented a radical anti-minority policy only in the 1970s, when Romania was (relatively) the most independent from pressure from Moscow. A nation-state's greater independence in international relations (without strong international legal guarantees) was not always good news for the national and ethnic minorities in the East Central European region.

KEYWORDS

constitution, East Central Europe, international protection, minorities, state.

Introduction

The population of East Central Europe lived in three empires before the First World War: Austria–Hungary, Germany, and Russia. In parallel, the Balkan peninsula witnessed the new independent states'— established by the predominantly orthodox nations (Bulgaria, Greece, Montenegro, Romania, and Serbia) — state building and

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constitution making. Only independent Albania, which was born immediately before the First World War, had a Muslim majority population. Many Muslims also lived in Bulgaria. The Jews represented the largest minority in the old ('small') Romania. These three empires and new nation-states were not homogenous, and they knew different ethnic and religious minorities with different legal and political statuses. It was the reason for the early presence of the minority issue in East Central Europe.

We can distinguish the three main periods in the modern history of the minority issue and its legal regulation in the region. The first legal norms and parallel minority theories or concepts were born in the prewar period, during the existence of big multiethnic empires. The multilateral international protection of minority rights was born in the interwar period, during the existence of the League of Nations (1920–1940). Then followed the tragedy of the Second World War, with the Holocaust, ethnic purges, transfers and transports, etc. As a consequence of occupation, many states in the region realized a very restrictive anti-minority policy immediately after the Second World War (1945–1948). The introduction of the communist minority policy inspired by the Soviet (Leninist) model in East Central Europe meant an element of stabilization in the sphere of minority issues and legal protection of minorities.

1. The situation in the 'long' 19th century (1789–1918)

The national and ethnic minority issue was born parallel to the idea of the nation-state in Europe in the late 18th and early 19th centuries. This idea was one of the consequences of the Enlightenment, the French Revolution in 1789, and the beginning of the process of economic and social modernization. The process of modern nation-building—and later nation-state-building—was very sensitive in regions with ethnically-mixed populations. These regions represented the majority of the Central and Eastern European countries.

The logic and structure of these processes were similar, but the dynamics were very often different. The Czech Historian Miroslav Hroch distinguished three phases of the non-state national awakening (or national revival) in Central and Eastern Europe and defined three chronological stages in the creation of a modern nation. In Phase A, activists strive to lay the foundation for a new form of national identity. They research non-dominant groups' cultural, linguistic, social, and sometimes historical attributes in order to raise awareness of the common traits. This phase is more or less theoretical. The following Phase B entails intensive national agitation. During this phase, a new range of activists emerged, who sought to win over as many members of their ethnic group as possible to participate in the project of creating a future nation. During the third phase, Phase C, the new national ideology more or less became the dominant identity. The majority of the population forms a mass movement this time, and the national ideology spans the full spectrum of political life. In this phase, a full social movement comes into being and branches into conservative, liberal, democratic, or socialist wings. The first two phases are similar in terms of timing – the first

phase started at the end of 18th century, and the second phase started in the first three decades of the 19th century. The start of the third – 'mass' – phase was more problematic because it regularly required important and impressive political or social events (e.g., revolution, resistance, repression, etc.) to propel the massive identity change across society. Here, we must research the reason for the different dynamics in the process of modern nation building.[1]

Naturally, ethnicity existed prior, but its role in political life was not the same as it was later in the 19th century. For a long time, the ethnic principle was not important in state building. The dynastic, religious, and social aspects of public life were more important in the period before the French revolution and the Napoleonic era. The principle of early legal protection of ethnic minorities was similar to the principle of solidarity on a religious basis. Solidarity based on religious community and protection of religious minorities was known as early as the 17th and 18th centuries. It is enough to think about the Peace Treaty of Karlowitz, which was signed in 1699 between the Austrian emperor, the Polish king, and the Turkish sultan, and was the first international treaty to contain minority protection provisions. According to the treaty, the Austrian emperor and the Polish king became protective powers, entitled to intervene on behalf of the Roman Catholics living under Turkish rule. The other similar treaty was the Peace of Küçük Kajnarci (1774), signed between the Russian and Ottoman empires. According to the treaty, Russia undertook a certain type of protective obligation over the minority Christian population living under Ottoman authority. The international protection of minorities' human rights emerged gradually from the political protection of Christians living under Ottoman rule.

During the first half of the 19th century, the main instrument of legal protection of national and ethnic minorities was territorial autonomy, which originated in the premodern period. Territorial autonomy and the right to participation in political life on the basis of feudal privileges were principles that were compatible with the political thinking of feudal states. The Polish case is a good example of this thinking. The dual Polish–Lithuanian state (Respublica or Rzeczpospolita) was one of the largest states in Europe, but after the three partitions of the Polish territories between Austria, Prussia, and Russia (1772, 1793, 1795), this state disappeared from the map of Europe. The Polish regions had autonomy inside these states, and the Congress of Vienna (1814–1815) recognized this autonomy. After the Polish uprisings in 1830/1831 and 1863/1864, the Russian tsars, firstly, very seriously limited and later entirely terminated this autonomy. Tsarist Russia represented one of the most heterogenous empires in the 19th century. Originally, it tolerated the old feudal territorial autonomies (e.g., Congress Poland, Finland, etc.), but Russian nationalism became increasingly strong in the second half of the 19th century. Discrimination against the Jewish and Polish populations was a reality, but the government also aimed to neutralize the national revival of Belorussians and Ukrainians. The official ideology was the concept of a united and indivisible Russia with a dominant Great Russian nation, including

1 Hroch, 1996, pp. 35–37.

orthodox Belorussians and Ukrainians as well. Only Finland preserved its territorial and legal autonomy. The Grand Duchy of Finland existed between 1809 and 1917 as an autonomous part of the Russian empire. Finland's position was very privileged: The province had its own citizenship for a long time, as well as its own currency and administration. However, under Alexander III and Nichola II, the process of Russification began, sparking Finnish resistance Tensions increased after the Russification policies were enacted in 1889, which saw the introduction of restricted autonomy and the reduction of Finnish cultural expression. Generally, the huge and very diverse Russian empire did not have complex minority legislation protecting the rights of different ethnic groups and nations beyond the empire's borders. The official state ideology was nationalistic, but the administration's real practice was old-style conservative, and this fact sometimes reconciled the tensions in everyday life.

The situation – except the Polish uprising – was similar in Prussia, which had a complicated territorial structure at this time. The former Polish territories (Eastern and Western Prussia, Pomerania, Mazovia, New Silesia, etc.) represented a big and important part of the Prussian monarchy, but according to the Congress of Vienna's decisions, only the Grand Duchy of Posen had real autonomy. Originally, Polish and other Slavonic groups represented 40% of the Prussian population,[2] but later, their proportion decreased. Before 1848, the old parliament (Landrat) in Posen served as a forum for Polish politicians, but later, they only represented the Polish population as delegates of Provinz Posen in Berlin. The 'Polish circle' worked inside the Reichstag in the German empire in Berlin, but the last part of the Polish population in Prussia definitively lost its territorial autonomy. Cultural and educational Germanization began in the second half of 19th century. The Polish inhabitants had only two secondary grammar schools that used the Polish educational language,[3] and there was no Polish university at this time. The German legal order did not include legal protection for ethnic minorities. Despite these tendencies and thanks to the anti-Catholic Kulturkampf Bismarck initiated, the Polish national movement reawakened in the early 20th century.[4]

Only Austrian Galicia, with its Polish, Ukrainian, and Jewish population, preserved its territorial autonomy throughout the 'long' 19th century (1789–1918). The Austrian administration in Galicia respected the Polish population's rights and privileges, but also tolerated and limitedly supported the ambitions of the Ukrainian national movement. The economic situation in Galicia was perhaps worse than the situation in the Polish territories in Prussia/Germany and Russia, but the educational, cultural, and legal situation was better. The Austro-Hungarian monarchy represented the most interesting example in the sphere of minority issues and especially in the field of legal protection of minority rights. This protection was born within the monarchy.

2 Davies, 2006, p. 518.
3 Davies, 2006, p. 525.
4 Davies, 2006, pp. 527–533.

Before 1918, there were two different concepts of the solution to the national minority issue in the Austrian and Hungarian parts of the dual monarchy. Austrian constitutional legislation recognized the state's multinational, decentralized, and compound character. Administration was based on historically developed lands (*Länder*), most of which were originally independent countries with their own feudal traditions. Both facts were reflected in the Austrian constitutional system. Article 19 of the Basic Rights Act of 21 December 1867 declared the equality of all nations and their languages. Members of particular Austrian nations obtained the right to be educated in their language. The specific language or languages was/were to be the official one in every *Land*, for instance, the historical administrative and law-making unit. There was no official state language throughout Austria, despite the fact that German was used as the lingua franca and the internal administrative language in state offices. Generally, there were no obstacles to Czech national and cultural development before 1918.[5]

The Czechs represented the ethnic majority, at least in the Bohemian kingdom and Moravia. Austrian Silesia, as the third traditional Czech Crown lands, had a German and Polish majority. Germans represented approximately one third of the population of the Czech historic lands. Objectively, the Czech nation's situation was not bad, but it did not harmonize with the Czech society's growing economic power, social maturity, and size. Czech policy permanently attacked the Austro-Hungarian dual system (*Dualismus*) and preferred the Austro-Hungarian-Czech *Trialismus* or (at least) the federalization of the whole monarchy. The permanent struggle between the Czechs and the Germans for political, administrative, and cultural dominance characterized public life in the Czech lands. The internal administrative language was an especially sensitive issue. In 1897, the Austrian Prime Minister Kazimierz Badeni tried to introduce language equality among the public authorities in Bohemia and Moravia, but German resistance blocked this policy and caused the biggest interethnic crisis in the Austrian part of the dual monarchy. Badeni had to annul his reform and reinstate the legal norms prior to 1897.[6] Together with the unsuccessful bilateral negotiations between the Czech political representation and Vienna about the Austro-Czech settlement (compromise), this fact caused great disappointment regarding the Czech policy before the First World War. Later, it had a tragic impact on the fate of the Austro-Hungarian monarchy.

The situation was better in Moravia, where the Czechs and Germans reached a compromise in 1905. According to the so-called Moravian Settlement, the new provincial electoral law divided the regional parliamentary mandates between Czechs and Germans before voting. New legislation in this mode tried to eliminate the negative impact of ethnical tensions during the electoral campaign and voting.[7] This model represented the second tendency in the Austrian discourse on the national issues

5 Rychlík, 2006, p. 27.
6 Kořalka, 1996, pp. 166–168.
7 Kořalka, 1996, pp. 168–173.

– the problem of different ethnic groups' equal and fair participation in the legislative process. A similar solution based on the previous division of mandates among the different ethnic groups was born in Austrian Bukovina in 1909.[8]

The situation in the Hungarian Kingdom was different. The main aim of Hungarian policy in the 19th century was to transform the multiethnic country into the modern Hungarian nation-state, where all citizens, despite their language and ethnic origin, would be politically Hungarians, or rather, more precisely (at least, in the long-term perspective), where all citizens would be Magyars.[9] The Hungarian model was born immediately after the Austro-Hungarian settlement in 1867. The Austro-Hungarian Compromise restored Hungary's territorial integrity and gave it a more real internal independence than it had enjoyed since 1526; the king's powers in internal affairs were strictly limited.

The new Hungarian 'national' model mixed two aspects: tolerance of the Croats' national territorial autonomy, based on historical reasons on the one hand, and the idea of a centralized nation-state on the other hand. The Hungaro-Croatian agreement was born in 1868, and it guaranteed the Croats territorial and limited legislative autonomy in the Hungarian kingdom. The bilateral settlement left Croatia (including Slavonia) as part of the Hungarian Crown, under a ban implemented on the Hungarian prime minister's proposal. Croatia was to enjoy full internal autonomy, but certain matters were designated as common to Croatia and Hungary. When these were under discussion, Croatian deputies attended the central parliament in Budapest, where they could speak in Croatian, the sole language in internal official usage in Croatia.[10] In other parts of the Hungarian kingdom, the Hungarian language was proclaimed the dominant state and official language. After 1867, Transylvania and the Military Frontiers were reincorporated into Hungary, where a large Serbian ethnic group lived. The basic legal norm regulating the legal position of national minorities in Hungary (except Croatia and Slavonia) was Act XLIV of 1868, which is known as the Law on Nationalities of Hungary. This legal norm represented one of the first complex domestic legal norms regulating national minorities' issues in Europe. The first Hungarian minority law was born in 1849 during the struggle against Austria for independence, but this act did not impact practical life because the Hungarian revolution unsuccessfully ended in August 1849 (1.5 months after the adoption of the law).

The 1868 Hungarian Law on Nationalities had more influence on the country's realpolitical life. It was a product of the best Hungarian liberal politicians, who had been trained as lawyers (Ferenc Deák and József Eötvös). They tried to mix the principle of individual minority rights and the idea of a single Hungarian political nation in the French style. The first sentences declared and guaranteed that all citizens of Hungary, whatever their nationality, constituted politically 'a single nation,

8 Glettler, 1997, pp. 91–93.
9 Rychlík, 2006, pp. 27–28.
10 Szentgáli-Tóth and Gera, 2020, pp. 85–106.

indivisible, unitary Hungarian nation."[11] There could not be differentiation between them, except in respect of the official usage of the current languages and then only insofar as practical considerations necessitated. Hungarian was the language of the central administrative and judicial services as well as the language used at the country's only university, but there were to be adequate provisions for the use of non-Hungarian languages on lower (county and local) levels. National minorities had special linguistic rights in the territorial units, where they represented 20% of the inhabitants. The law also recognized the notion of 'nationalities' (*nemzetiségek*), but it did not define this word nor did it contain a concrete enumeration of the nationalities living in Hungary.

This liberal law had two big problems. It was born in a country where the dominant (titular) nation represented only half of the population, and at least the three largest national groups (Romanians, Slovaks, and Serbs) preferred the practical federalization of state. Their parliamentary representatives protested against this law and rejected this model of minority protection.[12] The second problem was the practical implementation of this law's concrete provisions. These rights were not fulfilled and mostly remained existent only on paper. Hungarian liberal governments' real policy preferred the gradual assimilation of all non-Hungarians (non-Magyars). The permanent centralization of public administration and reforms in education and justice also served this aim. Fear from nationalities also blocked electoral reform, and the minority movements had less representatives in parliament then their proportion within the Hungarian population as a whole warranted.[13] On the other hand, one has to observe this law in the context of 19th-century Europe. Nationalism was strengthening and was dominant everywhere; at this time, only a few countries implemented more or less correct minority policies (e.g., Switzerland and Austria).

The model of multicultural and multilinguistic Switzerland, with its strong autonomies and language rights on the local level, was popular among the representatives of minority movements in Central Europe. Switzerland has been a federal state since 1848. It is composed of 26 federated cantons and demi-cantons that have permanent constitutional status and a high degree of independence. The cantons shall exercise all rights that are not vested in the confederation. Cantons are further divided into 2 700 communes, which are granted varying degrees of autonomy. Switzerland also comprises three main linguistic and cultural regions: German, French, and Italian. These linguistic boundaries do not necessarily correspond to cantonal ones: While most cantons are unilingual, three cantons are bilingual (French and German), and one is trilingual (German, Romansh, and Italian). German, French, and Italian have been national and official languages since 1848, whereas Romansh was only recognized as a national language in 1938. The constitution was further amended in 1996 to grant Romansh the status of an official language, thus allowing Romansh-speakers

11 Szarka, 1995, pp. 16–27.
12 Ábrahám, 2020, pp. 125–140.
13 Szarka, 1995, pp. 175–190.

to communicate with the government in their language. Currently, Article 70 of the constitution states that each canton can decide its official language(s). There is thus no official bilingualism at the local level: Four cantons are French speaking (Geneva, Jura, Neuchâtel, and Vaud), three are bilingual, that is, French and German (Bern, Fribourg, and Valais), and one is Italian speaking (Ticino). Romansh is only an official language in the trilingual (German, Italian, and Romansh) canton of Graubünden.[14]

Switzerland was originally a German-speaking state that communicated with French and Italian regions in their own language. The three languages became equal co-official languages in the period of the Napoleonic Respublica Helvetica. The German language was again the dominant language in the first half of the 19th century, but the French and Italian cantons had internal autonomy. The German, French, and Italian languages finally became national and official languages in the constitution of 1848, but this multilingualism only came to represent Switzerland's state idea (or ideology) in the second half of the 19th century, in the shadow of German and Italian national state building. The confessional and political (conservative vs. liberal) differences were also very important to Swiss inhabitants during this period. This fact moderated the tensions between the Swiss nations and helped to integrate the federal state. It was very important during the problematic 20th century. The Swiss model of minority protection is quite special and pragmatic. It has combined individual minority rights with local (territorial) autonomies. The regulation of local language rights is at the cantonal level, but every citizen can use their own language to communicate with federal organs.[15] Hungarian Oszkár Jászi (1875–1957) was sympathetic to this combination of the principle of strong territorial autonomy and language rights, and he was responsible for the Hungarian minority policy during the short period of democratic revolution in 1918/1919.[16] Slovak lawyer and politician Emil Stodola (1862–1945) was also partial to this model.[17] He was the leader of the Slovak National Party and later the first representative of the Czechoslovak government in Budapest. Stodola published a book about Switzerland.[18] He recommended the combination of the principles of territorial autonomy and individual minority rights not only for the Slovaks in Czechoslovakia, but also for the other Czechoslovakian minorities.

An interesting situation emerged on the Balkan peninsula as a consequence of the Ottoman empire's retreat from these territories. This process was accompanied by international assistance embodied in the form of international congresses and conferences involving the great powers (the so-called European Concert). Contractual protection for certain ethnic and religious groups (both Muslims and non-Muslims) already existed at an international level. The 1878 Congress of Berlin

14 https://www.queensu.ca/mcp/national-minorities/evidence/switzerland
15 Altermatt, 1994, pp. 1–3.
16 Oszkár Jászi prepared the 'Eastern Switzerland' plan. For maps, see https://tti.abtk.hu/terkepek/1918-a-jaszi-oszkar-fele-keleti-svajc-tervezet
17 Vozár, 2016, pp. 11–50.
18 Stodola, 1920, p. 38

played a crucial role in this process. During this time, independent Romania, Serbia, and Montenegro were born. The European Congress prohibited discrimination on a religious basis and attempted to improve the more liberal Romanian citizenship policy toward local Jews. (From among 270 000 Jewish inhabitants, only 2000 had Romanian citizenship at this time.)[19] The nascent Bulgarian state was first bisected and then divided into the Principality of Bulgaria and Eastern Rumelia. These entities were given nominal autonomy under the control of the Ottoman empire. The Ottoman government agreed to obey the specifications contained in the Organic Law of 1868 and to guarantee the civil rights of non-Muslim subjects. Eastern Rumelia, which was dominated by a Bulgarian population but had its own large Turkish and Greek minorities, became an autonomous province under a Christian ruler. Here, it was necessary to protect Turkish Muslims.[20] However, related agreements from Berlin were not very reassuring, since only the signatory parties were concerned about their practical application, and for this reason, violations were commonplace and usually went unpunished. Everyone saw that real implementation of international obligations required new forms of organizations. This experience was important for development after 1918.

2. The interwar period (1918–1939)

A new era in the history of legal protection of ethnic and national minorities started after the First World War. This era was characterized by the internationalization of minority issues. The Paris Peace Settlement established a new international political system, and the League of Nations represented its ideals. "*Most war-weary people, embued with a spirit of liberalism, tolerance and humanism, placed their belief in the complex ideals of the League of Nations and greater international co-operation*."[21] This universal international organization with general competencies was officially established with the entry into force of the Treaty of Versailles on 10 January 1920. The League of Nations formally existed until 18 April 1946, but it ceased political and other activities as early as 1940. It played a crucial role in the implementation of a new system of minority protection. The codification of new international legal norms regulating minority protection began at the Paris Peace Conference with the drafting of standard treaty texts, and in the early 1920s, the process continued with the signing of special bilateral treaties. This regulation was necessary because 62 million Europeans (13% of the total continental population) were still living with minority status. Minorities represented approximately 30% of the Czechoslovak, Polish, and Romanian population. They also represented a high proportion of the population of the Baltic states. The Yugoslavian state was also very heterogenous. The authors of the

19 Fábián, 2018, p. 169.
20 Jelavich, 1996, pp. 322–324.
21 Zeidler, 2009, p. 86.

peace system argued that the legal mechanism of minority protection should be made available to national and ethnic minorities.[22]

The minority protection requirement imposed on the defeated states (Austria, Bulgaria, Hungary, and Turkey) was introduced in their respective peace treaties signed between 1919 and 1923. The two old (Greece, Romania) and several new states (Czechoslovakia, Poland, and the Kingdom of the Serbs, Croats, and Slovenes) in Central and Eastern Europe were viewed as winners. These countries were compelled to sign separate minority protection treaties with the great powers in 1919–1923. Legal protection for the German minorities of autonomous Upper Silesia and the Memel territory was laid in international agreements signed between Poland and Germany in 1922 and between Lithuania and Germany in 1924. Iraq in Asia undertook to protect its minorities upon gaining its independence in 1930.[23] The new independent states around the Baltic Sea (Finland, Estonia, Latvia, and Lithuania) did not sign the minority treaties. These countries, together with Albania, before they gained access to the League of Nations, only signed a declaration confirming their readiness to negotiate regarding the protection of national minorities. It was a lower standard of protection.[24]

These were the minority protection legal regulations and norms that were placed under the League of Nations' guarantee, which the League undertook to enforce. The interwar international protection of minority rights only worked in the region of Central and Eastern Europe and in Iraq. The Western war victors did not have obligations in this field. This 'double standard' characterized the entire interwar period. "[...] *the League's minority protection system served to mitigate merely the worst minority policy effects of the transfers of territory made at the expense of the defeated states*."[25]

The new provisions did guarantee the following to citizens 'who belong to racial, religious or linguistic minorities':

> *(1) Equality of all nationals of the country before the law. (2) Equality in the matter of civil and political rights, and of the admission to public posts, functions and honours. (3) Equality of treatment and security in law and fact. (4) Equality of the nationals of the country in all matter of establishing, managing and controlling charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language, and to practise their religion freely therein. (5) Equality in the matter of employment of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings.*[26]

22 Zeidler, 2006, pp. 87–88.
23 Zeidler, 2006, p. 89.
24 Petráš, 2009, pp. 46–47.
25 Zeidler, 2006, p. 89.
26 Zeidler, 2006, p. 89; Azcárate, 1945, p. 60.

The interwar system of legal protection of minorities preferred individual minority rights, but it did not exclude the several forms of territorial autonomy. The great powers did not have a problem with autonomy. The Germans living in Upper Silesia or in the Memel territory had territorial autonomy,[27] and the international norms also prescribed autonomy for Ruthenia within Czechoslovakia. The transfer of members of minorities was also not unknown at this time, for instance, in the 1920s, in Greece and Turkey, with the United Kingdom's political assistance, the population had been changed. This organized and legally regulated transfer was the sad prelude/overture to the tragic events of the Second World War as well as the post-war period. However, during the interwar period this 'instrument' of minority policy was an exception.

Many important legal norms regarding national and ethnic minorities were born on the national level too. At its most tolerant and democratic, Czechoslovakia, with one third of its citizens belonging to ethnic minorities, adopted a special law (Act 122 of 1920) concerning the use of minority languages in public life and administration. The Czechoslovak parliament in Prague adopted this norm immediately after the adoption of new a constitution in February 1920. In this way, the young republic followed 'old' Austria's traditions. The second Polish Republic regulated the legal protection of national and ethnic minorities on the constitutional level, but it did not adopt a complex minority act or a special linguistic law for minorities. In the 1930s, Poland in Geneva very radically attacked the international obligations regulating the legal position of minorities in Poland. In 1923, interwar Hungary, ruled by Admiral Miklós Horthy, adopted a government decree (No. 4800/1923) that regulated the legal position of national minorities on the basis of the Treaty of Trianon and old Hungarian law (1868) on nationalities.[28] The political regime was more nationalistic than before the world war, but interwar Hungary had only a limited number of inhabitants belonging to national minorities. Radical anti-Semitism characterized the country's public life. Anti-Semistism was a problem in the majority of countries in East Central Europe, especially in Poland and Romania. Romania was a big territorial winner in the Versailles peace system. Despite Romania's large minority population (30% of its inhabitants), it did not adopt a special minority act on the national level. It was only during the king's dictatorship that the Romanian government passed a statute on nationalities, but this document did not have much relevance.[29]

Hungarian historian Miklós Zeidler summarized the effects of the existence of the League of Nations as follows:

> *The aim of the League of Nations' minority protection system was on the one hand to correct mistakes and on the other hand to educate its members in the art of peaceful coexistence, thereby providing a framework for learning about democracy and humanity. Still, in the atmosphere of mutual distrust, the system soon became an*

27 Witkowski, 2012, pp. 353–355; Konieczny and Kruszewski, 2002, pp. 366–375.
28 Egyed, 1943, p. 146.
29 Fábián, 2018, p. 181.

instrument for rivalry acted out in full view of international public opinion. Finally, it collapsed under the baleful pressure of the impending war… It is hardly surprising that this system of minority protection received criticism from all sides. The states signatory to the international minority protection treaties were never reconciled to the infringement on their sovereignty. In some cases, they had little choice but to defend themselves against the accusations of the minorities… They considered minority complaints to be no less than expressions of disloyalty on the part of their own citizens, motivated by the propaganda and hostility of the kin states (e.g. Hungary). Meanwhile, the region's national minorities, as well as the states that were required to support their ethnic kin living in other countries, regarded the minority protection system as highly ineffective… International minority protection could not divorce itself from general international politics. After a brief period of improving international relations, the new international system, whose inception had occurred amid the division into victors and defeated, began to reflect once again antagonistic blocs of a military and political nature. This fact rendered the peaceful and reasonable administration of minority problems almost impossible.[30]

We have to note the fact that the interwar years were a period that saw nationalistic emotions in Europe. This attitude was characteristic for the states and for the members of several minorities (e.g., see the role of Germans living abroad under the policy of Hitler's Germany).

During the Second World War, an interesting situation had arisen. Radical nationalism was dominant in all states that cooperated with Nazi Germany. Parallel to radical anti-Semitism, Germans held a privileged position, and the national principle was the basic principle for fascist state building in these countries. The German minority (*Volksgruppe*) had a special position everywhere. The Slovak constitution adopted in 1939 officially declared the principle of international reciprocity toward the Hungarian minority living in the country. The 'repatriation' of the German-speaking population from South Tyrol during Hitler's era had a place in the German–Italian relationship. Nazi Germany signed agreements concerning the exchange of minorities with Romania (1940) and Bulgaria (1943).[31] These measures indirectly paved the way for a later policy of ethnic transfers and population exchanges during the postwar period.

3. The situation after 1945

The Second World War represented an important borderline in the history of minority issues in Europe. Nazi Germany and its allies' radical nationalistic policy of abusing minority issues to destabilize the existing international system before the war

30 Zeidler, 2006, pp. 113–114.
31 Fábián, 2018. p. 183.

engendered strong mistrust among the antifascist democratic great powers toward national minority rights. Paradoxically, this trend accompanied a renaissance of human rights, which characterized the first years after the Second World War and finally produced the Universal Declaration of Human Rights in 1948. Repression of minorities linked to the defeated states was very typical in the first post-war years. The reestablished nation-states deported the majority of the German minority that traditionally lived in East Central Europe from different regions (Czechoslovakia, Hungary, Poland). The great powers permitted the partial exchange of the minority population between Czechoslovakia and Hungary as well as transfers between Poland, Soviet Ukraine, and Belarus. Despite the Yugoslav partisans' internationalistic ideology, Josip Broz Tito's new communist regime very violently repressed the Germans, Hungarians, Croats, and Slovenes who had collaborated with the occupational powers. The idea of collective punishment was, at that time acceptable, for the majority of winners.

Paradoxically, only the region's total political and social Sovietization after 1948 brought better life conditions for the members of national and ethnic minorities living in East Central Europe. This strange fact is connected to the internationalistic ideology underlying the radical socialist left movement and Leninist national policy in the early years of the Soviet Union. In the 1920s, the new Soviet power realized a generous national minority policy that accepted the idea of federalization for bigger nations and different forms of territorial or cultural autonomy for smaller ethnic groups and communities. The main author of this policy was Vladimir Ilyich Lenin, together with Josif Vissarionovich Stalin, who was a commissioner for national minorities. Stalin, during the elaboration of his personal dictatorship, later used this fact (Lenin–Stalin cooperation) in the internal political struggle among the Soviet leaders, and the 'best practices of Soviet national policy' were incorporated into the Soviet ideological model. After 1948, Moscow exported this model to East Central Europe. One of the policy's main pillars was nations' right to self-determination. Soviet federalism and the worldwide process of decolonization blossomed out of this right. The second aspect was especially important for the post-war Soviet Union, which, through support for decolonization, tried to weaken the old Western powers (mainly France and the United Kingdom) on the international level. Parallel to this policy, following the Soviet pattern in East Central Europe helped to revitalize the standard minority policy based on the right to education in mother tongues and to the usage of this language in public life. These rights were not evident everywhere in the first post-war years, but parallel to the Soviet pattern's gradually declining influence after 1968, nationalism was reborn in several communist countries within Central and Eastern Europe (Romania, partly Bulgaria).

Soviet national policy preferred cultural and educational rights for national and ethnic minorities, but it also did not have a problem with formal autonomy. Naturally, under the circumstances of dictatorship, autonomy was relative, but after the previous nationalistic repressions, every positive measure was important to the inhabitants. This was especially true for the Hungarian minority in Czechoslovakia, which,

between 1945 and 1948, endured a very radical anti-minority policy that focused on Germans and Hungarians. At the same time, Yugoslavia realized its own model of socialist state building and federalization of the country, but this model is not an object of this research. The Polish state became a more or less ethnically homogenous country after the Holocaust, the transfer of Germans to Germany, and the Polish–Ukrainian and Belorussian–Polish population exchange, where the national minority problem was totally absent. Hungary was in similar position. These countries did not adopt complex minority or official language laws during the socialism period. The larger nationalities were represented in the socialist parliaments by their communities' official cultural organizations. These unions also organized cultural and social life for members of the ethnic groups they represented.

Among the countries with large minority groups living in their territories, Romania realized a more liberal and generous policy toward national and ethnic minorities. This policy was born under Soviet pressure in the first post-war months and thus did not involve internal or domestic Romanian inspiration.[32] Romania adopted the Statute on Nationalities in February 1945. This document introduced a bilingual administration and justice in the ethnically mixed regions, in addition to guaranteeing university education in the Hungarian language. The national minorities, representing at least 30% of the local or district population, had the right to use their mother tongue in public administration, self-government, and the judicial system. Civil servants from a minority background were not obligated to take special exams in Romanian. Every minority that accounted for a proportion of the population above 5% (on the national level) had the right to the translation of legislative norms to their mother tongue. The Soviet military administration stopped the atrocities the Romanian irregular guards had been accustomed to committing against the Hungarian civil population. These norms were very important in the 'wild' post-war period.[33] Later, minorities' situation became more complicated, but the national and ethnic minorities held a relatively good position in the first period of Romanian socialism (more or less before the 1970s).

A very interesting example of the Soviet-style national policy can be found in the Hungarian Autonomous Region (HAR) in Romania (1952–1968). The creation of this region, along with the Yugoslav experiment, is the only example of an integrative minority policy in post-war Central and Eastern Europe. It represented an attempt to solve a deeply rooted national question by giving Szeklerland, a predominantly ethnic Hungarian region of Transylvania,[34] administrative 'autonomy.' The ideological premises of the region, imposed on the Romanian Party by Soviet leadership in 1952, followed the Soviet Bolshevik pattern of territorial national autonomy that Lenin and Stalin elaborated in the early 1920s. Moscow and its specialists played an important role in shaping reform, just as with every other political decision in the early 1950s

32 Fábián, 2018, pp. 184–185.
33 Nagy, 2002, pp. 1–2.
34 Bottoni, 2003, p. 71.

in Romania. Even the documents inspiring the administrative reform arrived from Moscow already translated into Romanian (often with Soviet-inspired terminology). The Hungarians of Szeklerland became a 'titular nationality' and were provided with extensive cultural rights. On the other hand, the Romanian communist central power used the region as an instrument to politically and socially integrate the Hungarian minority into the communist state.[35] The HAR's position was the strongest in the 1950s, but after the Soviet influence began to decrease in socialist Romania, the Hungarian minority's position also weakened. This fact was especially evident during Nicolae Ceauşescu's leadership in the 1970s and 1980s. However, the HAR's history was also influenced earlier by changes in the Soviet concept of the nation, which occurred in the latter part of Stalin's period. *"As the ongoing ethnicization of Soviet social identity also meant reemergence of traditional, Russian dominance, the HAR could never become a strong counter-power in front of the Romanian Stalinist elite lead by Gheorghe Gheorghiu-Dej."*[36] Later, Romania became the major example of a strong nationalistic communist regime in East Central Europe. Despite its Stalinist origin, the collective memory of Hungarians living in Romania and especially in Szeklerland preserves the years following the HAR's establishment as a period of cultural development and also as climax of ideological pressure, massive political reprisals, and an extremely low standard of living.[37] However, national rights peaked during this era.

The national problem also played an important role in the history of socialist Czechoslovakia. After the post-war period (1945–1948), anti-German and anti-Hungarian repressions (e.g., the transfer of 3 million people of German ethnicity to Germany, the Czechoslovak–Hungarian exchange of minorities, deportation of one part of Hungarians to the Czech lands, etc.), the coming communist regime reconciled the situation and reestablished the citizenship of Hungarians living in Czechoslovakia. The new government no longer followed the policy of 'Slavonic Czechoslovakia.' Rather, they implemented a policy of complex economic, social, and political transformation in the Soviet style. A more moderate national policy toward minorities was a component of this gradual process. The regime restored the system of schools with minority languages not only for Polish and Ukrainian/Rusyn minorities, but also for the originally discriminated against Hungarians. (The rest of the German minority only had this opportunity later.) Each minority had a right to form one general 'umbrella' representative organization to organize cultural life and represent the minorities before the state organs and in parliament. The Czechoslovak Hungarian Workers' Cultural Association (Csemadok) represented the Hungarian minority beginning in the 1950s. It was the biggest minority organization, with local units in many towns and villages. These organizations stayed under the strict control of the communist party and regime. The leaders of Csemadok and other nationalities only received the opportunity to gain more real self-representation in the 1960s.

35 Bottoni, 2003, pp. 71–72.
36 Bottoni, 2003, p. 71.
37 Bottoni, 2003, p. 93.

Socialist Czechoslovakia's new constitution of 1960 briefly mentioned the Hungarian, Polish, and Ukrainian minorities' cultural, educational, and language rights. The most important event in the lives of members of the Czechoslovakian minorities was the 1968 reform. After lengthy negotiation, the officially unified Czechoslovak Socialist Republic (with limited autonomy for Slovakia in the form of a post-war 'asymmetric model') became a federation of two member states: the Czech Socialist Republic and the Slovak Socialist Republic. The adoption of Constitutional Law 144/1968 Coll. on the situation of minorities in the Czechoslovak Socialist Republic accompanied the process of Czecho-Slovak federalization. This law granted rights to the German, Hungarian, Polish, and Ukrainian (Rusyn) minorities. It was the first law after 1948, and it cautiously distinguished between the officially supported Ukrainians and the somewhat tolerated Rusyns.[38] As to the Roma minority, their situation was confused and complicated. In 1958, decrees were issued limiting nomadic movement and actively committing Czechoslovakia to assimilating the Roma, in part by restricting travel and establishing settlements. Although there was a short period of official recognition of the Roma as an ethnic group after the Prague Spring in 1968, by the mid 1970s, the state had essentially begun to disavow their existence, shutting down organizations that represented their interests and preventing academic research on Romani culture. At the same time, the government tried to assimilate the Roma and improve their social situation.[39]

The Czechoslovak law of 1968 recognized minority rights in education, cultural development, media, and in the field of public administration, where members of official minorities could use their mother language. This right was real mainly for the Hungarian, Polish, and Ukrainian (Rusyn) minorities who lived more or less concentratedly, whereas the members of the German minority were dispersed. The minorities also received the right to establish representative cultural and social organizations. The declaration of the right to participate in the work of representative state organs and elected bodies was very important. The realization of this right was proportional to the nominal weight of a concrete minority within the Czechoslovak society. This model harmonized with the system of informal communist 'statistical' or 'corporative' representation. After the last communist elections in 1986, the Hungarian minority had 19 mandates in the Federal Assembly and 16 mandates in the Slovak National Council. The Ukrainian (Rusyn) minority had four mandates in federal parliament and three mandates in the Slovak National Council. Three members of the Federal Assembly represented the Polish minority, and two represented the German minority. The German and Polish minorities also had one mandate in the Czech National Council.[40]

The Czechoslovak Act of 1968 declared the right to the free choice of national identity and included an antidiscrimination clause pertaining to economic, political,

38 Petráš, 2009b, pp. 116–127.
39 Pavelčíková, 2009, pp. 128–133.
40 Gronský, 2007, p. 216.

and social life. The act prohibited pressure to assimilate. Naturally, the reality of the 1970s was more complicated, because other educational and administrative laws also regulated minorities' legal position, for example, the slow reduction in minority schools started in this time. The situation was not as dramatic as in Bulgaria and Romania, but 'gradual nationalization' under the communist regime was also present in socialist Czechoslovakia.

Socialist Yugoslavia implemented the most generous minority policy beginning in the 1960s, after the post-war anti-German and anti-Hungarian repressions and atrocities started the process of federalization of the Yugoslavian state. The most liberal was the federal constitution of 1974, which placed the two autonomous territories in Serbia (Kosovo and Voivodina) in a very good position. Voivodina was multicultural. Concrete national and minority policy sometimes depended on Yugoslavian republics' regulations, for instance, socialist Slovenia and partly Croatia were more liberal toward local minorities than Serbia. However, the general standards in the fields of minority education, public administration, right to information in the mother language, etc., were relatively high in Yugoslavia.

Summary

The East Central European region has a relatively long history of legal protection of national and ethnic minorities. This history is connected to the entire region's complicated ethnic and social structure, given that nation and state building were typical in East Central Europe in the last two centuries. Unlike in Great Britain, France, and tsarist Russia, the cultural–linguistic form of national identity (the concept of a linguistic–cultural nation) was dominant here. The majority of national movements in the region were based on the language and cultural aspects. This fact naturally impacted the concrete forms of minority policies in the region. Usage of the mother tongue in public administration and the justice system, education in the mother tongue, and the right to cultural self-expression and self-government were the main and the most sensitive points of this policy. The principle of personal or territorial autonomy was also not unknown in the region (in every researched period, including the Soviet era).

A very important specific feature of minorities' position in East Central Europe is the dependence on the great powers' international politics and position. This fact sometimes moderated the minority situation in the region. For example, the Congress of Berlin's (1878) decisions improved the situation of religious minorities in the Balkan countries. After the First World War, pressure from the victorious great powers caused the establishment of an international system of minority protection, which moderated the pressure to form new nation-states towards their minorities. After the Second World War, pressure from the Soviet Union helped to stabilize the legal position of the Hungarian minority in Romania and consolidate minorities' situation in Czechoslovakia. Naturally, the socialist and communist parties' more

internationalistic and ethnically tolerant ideology also helped minorities after the strong post-war nationalistic repressions. Furthermore, pressure from the Western democratic states and the EU helped minorities after the collapse of the communist regimes in 1989/1990, which also unfortunately caused the renaissance of radical nationalism in the post-communist region.

Despite the similar circumstances, conditions, and international challenges, the internal development of legal protection of minorities had different dynamics. These differences mainly depended on the internal development of certain states and their societies. For example, the post-war nationalistic repressions were the most radical in Czechoslovakia and Yugoslavia, but several years later, improvements had been made in the form of relatively generous minority policies. The post-war situation was more moderate and tolerant in Romania, which only implemented a radical anti-minority policy in the 1970s, when Romania was the state that was the most independent (relatively) of pressure from Moscow. A nation-state's greater independence in international relations (without strong international legal guarantees) was not always good news for the national and ethnic minorities in the East Central European region.

Bibliography

Ábrahám, B. (2020) 'A nemzetiségi törvény szlovák szemmel', *Erdélyi Jogélet*, 3(2), pp. 125–140; https://doi.org/10.47745/erjog.2020.02.06.

Altermatt, U. (1994) 'Svájc – az európai modell?', *Regio*, 5(2), pp. 1–6.

Azcárate, P. de (1945) *League of Nations and national minorities: an experiment*. Washington: Carnegie Endowment for International Peace.

Bottoni, S. (2003) 'The creation of the Hungarian Autonomous Region in Romania (1952): premises and consequences', *Regio*, 6(4), pp. 71–93.

Davies, N. (2006) *Lengyelország története*. Budapest: Osiris.

Egyed, I. (1943) *A mi alkotmányunk*. Budapest: Magyar Szemle Társaság.

Fábián, Gy. (2018) 'A nemzeti kisebbségi jogok biztosításának alakulása Romániában 1918–2018, avagy "A gyulafehérvári ígéretek megtagadásától a Minority SafePack ellenzéséig – 100 év romániai kisebbségjogi történet"', *Acta Universitatis Sapientiae. Legal Studies*, 7(2), pp. 165–261.

Glettler, M. (1997) 'Habsburg-monarchia: jelenlévő múlt?' *Európai Szemle*, 8(2), pp. 87–98.

Gronský, J. (2007) *Komentované dokumenty k ústavním dějinám Československa III. (1960–1989)*. Praha: UK v Praze–Nakl. Karolinum.

Hroch, M. (1996) 'Nationalism and national movements: comparing the past and the present of Central and Eastern Europe', *Nations and Nationalism* 2(l), pp. 35–44.

Jelavich, B. (1996) *A Balkán története. I. kötet: 18. és 19. század*. Budapest: Osiris.

Konieczny, A., Kruszewski, T. (2002) *Historia administracji na ziemiach Polskich: Wybór źródeł*. Wrocław: Kolonia Limited.

Kořalka, J. (1996) *Češi v Habsburské říši a v Evropě 1815–1914*. Praha: Argo.

Kuklík, J., Petráš, R. (2018) *Minorities and law in Czechoslovakia (1918–1992)*. Praha: Karolinum.

Nagy, Cs. I. (2002) 'A romániai kisebbségi jog 1945 és 1989 közötti történetének tendenciái, különös trekintettel a romániai magyarság történetére I–II.', *Magyar Kisebbség*, 7(2).

Pavelčíková, N. (2009) 'Romové v letech 1968–1989' in Petráš, R., Petrů, H., Scheu, H. (eds.) *Menšiny a právo v České republice*. Praha: Auditorium, pp. 128–133.

Petráš, R. (2009a) *Menšiny v meziválečném Československu*. Praha: UK–Nakl. Karolinum.

Petráš, R. (2009b) 'Menšinová-národnostní otázka v letech 1968–1989' in Petráš, R., Petrů, H., Scheu, H. (eds.) *Menšiny a právo v České republice*. Praha: Auditorium, pp. 116–127.

Rychlík, J. (2009) 'The Situation of Hungarian Minority in Czechoslovakia 1918–1938', in Eiler, F., Hájková, D. (eds.) *Czech and Hungarian Minority Policy in Central Europe 1918–1938*. Prague–Budapest: MÚ–Archiv AV ČR–MTA ENKI, pp. 27–38.

Stodola, E. (1920) *O úprave užívania reči vo Švajčiarsku*. Bratislava: Karol Angermayer.

Szarka, L. (1995) *Szlovák nemzeti fejlődés – magyar nemzetiségi politika 1867–1918*. Pozsony: Kalligram.

Szentgáli-Tóth, B., Gera, A. (2020) 'Az 1868-as nemzetiségi törvény és a politikai nemzet koncepciójának utólagos értékelése', *Erdélyi Jogélet*, 3(2), pp. 85–106; https://doi.org/10.47745/erjog.2020.02.04.

Vozár, J. (2016) *Významní slovenskí právnici z Liptova*. Bratislava: Veda.

Witkowski, W. (2012) *Historia administracji w Polsce*. Warszawa: Wyd. naukowe PWN.

Zeidler, M. (2009) 'The League of Nations and Hungarian Minority Petitions' in Eiler, F., Hájková, D. (eds.) *Czech and Hungarian Minority Policy in Central Europe 1918–1938*. Prague–Budapest: MÚ–Archiv AV ČR–MTA ENKI, pp. 85–116.

Appendix of Maps

Zsombor BARTOS-ELEKES

Some of the maps of this volume are linked to a certain chapter; these represent smaller areas, mainly from the earlier periods (e.g. Middle Ages). Other maps are linked to more chapters and have been placed in the appendix as map series. These maps represent the whole East Central Europe from 1815 to the present, generally the last peaceful year of a quieter period, before major border changes.

The language of the toponyms on the maps is determined by the language of the volume and the presented period (or precisely, the year). If the topographic feature has English exonym (*Brunswick, Danube, Transylvania*), that was used. If it has not an exonym in English, the feature appears on the principal language of the country to which it belonged on that year (*Lwów* as part of Poland, *Lemberg* under Habsburg rule, *Lvov* in the Soviet Union and *Lviv* in Ukraine). The principal language means the official language for the last two centuries, before that – instead of the official Latin – it means the national language of the country. If the language has a non-Roman script, the romanized name was used (*Kyiv* instead of the Cyrillic Київ).

As the frontiers have changed many times, and so have the languages, in many cases the settlements are not written in their present-day official language. The index below contains in alphabetic order all the place names of the all maps of this volume which differs from the present-day official name. If a settlement appears on all maps only in the present-day official form, it is not listed (e.g. *Debrecen*). Just the settlements are enumerated; any other types of toponyms (e.g. hydronyms) are missing from the index. In the name index, the present-day official names are in **bold**, the other endonyms (e.g. former official names) are in regular, and the English exonyms are in *italics*. All the allonyms shown on the maps for a certain settlement are enumerated only in that line which start with its present-day official name (e.g. **Cluj-Napoca** ~ Kolozsvár ~ Klausenburg ~ Cluj).

Agram ~ **Zagreb**
Alba Iulia ~ Gyulafehérvár
Arbe ~ **Rab**
Bač ~ Bács
Bács ~ **Bač**
Banská Bystrica ~ Besztercebánya
Banská Štiavnica ~ Selmecbánya
Bardejov ~ Bártfa
Bártfa ~ **Bardejov**
Belgrade ~ **Beograd**
Beograd ~ *Belgrade*
Beszterce ~ **Bistriţa**
Besztercebánya ~ **Banská Bystrica**
Bistriţa ~ Beszterce
Bolzano ~ Bozen
Bozen ~ **Bolzano**
Brandenburg ~ **Brandenburg an der Havel**
Brandenburg an der Havel ~ Brandenburg
Braşov ~ Brassó
Brassó ~ **Braşov**

Bratislava ~ Pozsony ~ Pressburg
Braunschweig ~ *Brunswick*
Breslau ~ **Wrocław**
Bressanone ~ Brixen
Brixen ~ **Bressanone**
Brno ~ Brünn
Brünn ~ **Brno**
Brunswick ~ **Braunschweig**
Bucharest ~ **Bucureşti**
Bucureşti ~ *Bucharest*
Buda ~ **Budapest**
Budapest ~ Buda ~ Pest ~ Ofen
Celje ~ Cilli
Cenad ~ Csanád
Cernăuţi ~ **Chernivtsi**
Chernivtsi ~ Czernowitz ~ Cernăuţi
Chişinău ~ Kishineff ~ Kishinev
Cilli ~ **Celje**
Cluj ~ **Cluj-Napoca**
Cluj-Napoca ~ Kolozsvár ~ Klausenburg ~ Cluj
Constantinople ~ **İstanbul**
Czernowitz ~ **Chernivtsi**
Csanád ~ **Cenad**
Danzig ~ **Gdańsk**
Dubrovnik ~ Ragusa
Eperjes ~ **Prešov**
Fehérvár ~ **Székesfehérvár**
Firenze ~ *Florence*
Fiume ~ **Rijeka**
Florence ~ **Firenze**
Frankfurt ~ **Frankfurt am Main**
Frankfurt am Main ~ Frankfurt
Gdańsk ~ Danzig
Gyulafehérvár ~ **Alba Iulia**
Hannover ~ *Hanover*
Hanover ~ **Hannover**
Hermannstadt ~ **Sibiu**
Hradec Kralové ~ Königgrätz
Iglau ~ **Jihlava**
İstanbul ~ *Constantinople* ~ *Istanbul*
Istanbul ~ **İstanbul**
Jihlava ~ Iglau
Kaliningrad ~ Königsberg
Kamianets-Podilskyi ~ Kamieniec Podolski
Kamień Pomorski ~ Kammin
Kamieniec Podolski ~ **Kamianets-Podilskyi**
Kammin ~ **Kamień Pomorski**
Karlovac ~ Karlstadt
Karlstadt ~ **Karlovac**
Kassa ~ **Košice**
Kieff ~ **Kyiv**
Kiev ~ **Kyiv**
Kishineff ~ **Chişinău**
Kishinev ~ **Chişinău**
Klausenburg ~ **Cluj-Napoca**
Kolozsvár ~ **Cluj-Napoca**
Košice ~ Kassa
Königgrätz ~ **Hradec Kralové**
Königsberg ~ **Kaliningrad**
Körmöcbánya ~ **Kremnica**
Krakau ~ **Kraków**
Kraków ~ Krakau
Kremnica ~ Körmöcbánya
Krk ~ Veglia
Kwidzyn ~ Marienwerder
Kyiv ~ Kieff ~ Kiev
Laibach ~ **Ljubljana**
Laybach ~ **Ljubljana**
Leitomischl ~ **Litomyšl**
Lemberg ~ **Lviv**
Levoča ~ Lőcse
Litomyšl ~ Leitomischl
Ljubljana ~ Laibach ~ Laybach
Łódź ~ Lodz
Lodz ~ **Łódź**
Lőcse ~ **Levoča**
Luckas ~ **Lutsk**
Lutsk ~ Luckas
Lviv ~ Lwów ~ Lemberg ~ Lvov
Lvov ~ **Lviv**
Lwów ~ **Lviv**
Malbork ~ Marburg
Marburg ~ **Malbork**

Marienwerder ~ **Kwidzyn**
Marosvásárhely ~ **Târgu Mureş**
Mor. Ostrava ~ **Ostrava**
Munich ~ **München**
München ~ *Munich*
Nagyszeben ~ **Sibiu**
Nagyszombat ~ **Trnava**
Nagyvárad ~ **Oradea**
Naples ~ **Napoli**
Napoli ~ *Naples*
Nin ~ Nona
Nitra ~ Nyitra
Nona ~ **Nin**
Novi Sad ~ Újvidék
Nuremberg ~ **Nürnberg**
Nürnberg ~ *Nuremberg*
Nyitra ~ **Nitra**
Odesa ~ Odessa
Odessa ~ **Odesa**
Ofen ~ **Budapest**
Olmütz ~ **Olomouc**
Olomouc ~ Olmütz
Opava ~ Troppau
Oradea ~ Várad ~ Nagyvárad
Osor ~ Ossero
Ossero ~ **Osor**
Ostrava ~ Mor. Ostrava
Padova ~ *Padua*
Padua ~ **Padova**
Pest ~ **Budapest**
Pilsen ~ **Plzeň**
Plzeň ~ Pilsen
Podgorica ~ Titograd
Posen ~ **Poznań**
Poznań ~ Posen
Pozsony ~ **Bratislava**
Prague ~ **Praha**
Praha ~ *Prague*
Prešov ~ Eperjes
Pressburg ~ **Bratislava**
Prishtinë ~ *Pristina*
Pristina ~ **Prishtinë**
Rab ~ Arbe
Ragusa ~ **Dubrovnik**
Rijeka ~ Fiume
Roma ~ *Rome*
Rome ~ **Roma**
Satu Mare ~ Szatmárnémeti
Scardona ~ **Skradin**
Schweidnitz ~ **Świdnica**
Sebenico ~ **Šibenik**
Segesvár ~ **Sighişoara**
Selmecbánya ~ **Banská Štiavnica**
Senj ~ Zengg
Šibenik ~ Sebenico
Sibiu ~ Nagyszeben ~ Hermannstadt
Sighişoara ~ Segesvár
Skradin ~ Scardona
Sofia ~ **Sofiya**
Sofiya ~ *Sofia*
Spalato ~ **Split**
Split ~ Spalato
Sremska Mitrovica ~ Szávaszentdemeter
Stettin ~ **Szczecin**
Subotica ~ Szabadka
Świdnica ~ Schweidnitz
Szabadka ~ **Subotica**
Szatmárnémeti ~ **Satu Mare**
Szávaszentdemeter ~ **Sremska Mitrovica**
Szczecin ~ Stettin
Székesfehérvár ~ Fehérvár
Târgu Mureş ~ Marosvásárhely
Temesvár ~ **Timişoara**
Timişoara ~ Temesvár
Tirana ~ **Tiranë**
Tiranë ~ *Tirana*
Titograd ~ **Podgorica**
Trau ~ **Trogir**
Trento ~ Trient
Trient ~ **Trento**
Triest ~ **Trieste**
Trieste ~ Triest
Trnava ~ Nagyszombat
Trogir ~ Trau
Troppau ~ **Opava**
Újvidék ~ **Novi Sad**

Várad ~ **Oradea**
Veglia ~ **Krk**
Venezia ~ *Venice*
Venice ~ **Venezia**
Vienna ~ **Wien**
Vilna ~ **Vilnius**
Vilnius ~ Vilna ~ Wilno
Warsaw ~ **Warszawa**
Warszawa ~ *Warsaw*
Wien ~ *Vienna*
Wilno ~ **Vilnius**
Wrocław ~ Breslau
Zadar ~ Zara
Zagreb ~ Agram
Zara ~ **Zadar**
Zengg ~ **Senj**
Znaim ~ **Znojmo**
Znojmo ~ Znaim

Appendix I. East Central Europe (1830)

Appendix II. East Central Europe (1855)

Appendix III. East Central Europe (1876)

Appendix IV. East Central Europe (1884)

Appendix V. East Central Europe (1912)

Appendix VI. East Central Europe (1914)

Appendix VII. East Central Europe (1937)

Appendix VIII. East Central Europe (1989)

Appendix IX. East Central Europe (2021)

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