



FUNDAMENTAL LEGAL TRANSFORMATIONS AS A CONSEQUENCE OF THE SPRINGTIME OF NATIONS (1848)

EMŐD VERESS (ED.)



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— OF NATIONS (1848) —

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**FUNDAMENTAL LEGAL TRANSFORMATIONS AS A CONSEQUENCE
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The coloured business card photograph of a hussar on the cover of the book was probably taken in the studio of the photographer Gairoard in Naples in the fall of 1860. The Hungarian legionnaires initially wore red shirts like Garibaldi's volunteers, the hussars with red French-cut trousers, but there was a demand for a more "Hungarian" uniform. The motifs were basically modelled after the uniform of the national army of the War of Independence, with slight variations partly due to Italian influence and partly due to changes in fashion of the era. The hussars were provided with blue atillas with red cords and tight red trousers with lighter red cords and with Hungarian boots with cords and a rose motif. The green hussar's shako is adorned with a red colour shako cord and white horsehair, and with the Kossuth badge on the front. The picture also shows the shoulder belt of the cartridge box across the chest of the hussar. The photograph is in the private collection of Dr. Péter Sereg, and its description was made by Árpád Kajon.

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ARGUMENT

On April 11, 1848, the Austrian Emperor Ferdinand I and in the same time Hungarian King under the name Ferdinand V, sanctioned thirty-one Hungarian laws.

An independent government, responsible to the Parliament, was established, which exercised the executive power together with the monarch. An annual Diet was to be held in Pest, which could not be dissolved by the monarch until the final accounts of the previous year and the budget for the following year had been approved. The electoral system introduced was strongly based on the principle of popular representation. The country, which had been torn apart after the Battle of Mohács, was reunited: Transylvania and Partium (ruled separately by the Habsburgs as a Great Principality) were returned to Hungary. Public taxation, the abolition of serfdom and establishing a program to adopt a modern Civil Code were all measures of modernization. The establishment of the principles of freedom of the press, the equal rights of accepted religions and the creation of the National Guard were also part of the legislative reform.

In his report of April 10, 1848, Lajos Kossuth wrote: “This is not all that would embrace the future of the whole nation, but the basis of our future development”. This was an indication that the laws were not perfect and that corrections were necessary, but that they would be the basis for future development.

The fall of the Revolution in 1849 wiped out many of the major innovations of the April Laws, but the content and spirit of these laws were revived at the Austrian-Hungarian Reconciliation (1867), and their impact proved long-lasting. The laws sanctioned on April 11, 1848 marked the end of the reform era and the birth of modern Hungary.

As the year 2023 marks the 175th anniversary of the sanctioning of the April Laws, the Legal History Subcommittee of the Hungarian Academy of Sciences, the Legal History Research Group (Hungarian Academy of Sciences/Loránd Eötvös University) and the Ferenc Mádl Institute of

Comparative Law have initiated and organized an international academic conference on 5 April 2023.

The conference aimed to examine the international context of the Hungarian reforms: what happened in 1848 in other parts of Europe, and the antecedents and consequences of the revolutionary movements of the mid-nineteenth century. This volume contains articles based on the papers presented at the conference. They are presented in the hope that examining the development and practical application of the ideas that shaped our world today is not only a task for legal historians, but also a matter of topicality.

WHAT REMAINED OF 1848? TRENDSETTING CONSEQUENCES OF THE REVOLUTION IN AUSTRIA

Abstract

From the point of view of an Austrian Legal Historian as (ever) lasting impacts of the 1848/49 revolution in Austria we can keyword-like count²:

- (1.) Constitutions firstly promised the equality of citizens before the law and guaranteed equal rights also to churches and religious communities.³
- (2.) The progress of political development led to the extinction of the traditional estate system⁴ and
- (3.) to the abolition of subservience of peasants – with far-reaching social and economic importance.⁵
- (4.) State district courts took the place of the manorial patrimonial courts through uniformly organized local districts with authorities serving for sovereign administration, and on the field of autonomous tasks with communal authorities (*Gemeinden*) following the construction for self-organization.⁶

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2 Cf. Braunerder 2009, p. 112.

3 Apart from that, equal rights for Protestants and Jews with Catholics had not (yet) been achieved in 1848/49, but a major step in this direction had been taken.

4 Nevertheless, privileges of the nobility formally existed until 1919.

5 In exchange for compensation, they became free owners of their land.

6 Most of these reforms are still in effect today.

(6.) While the security police continued to exist in the cities, in the countryside the gendarmerie served as a separate armed security body.⁷

(7.) The decentralization of state power initiated the federalization of the state too.

(8.) Self-government served as an organization-model for single professions in chambers, first for trade and commerce.⁸

(9.) Instead of collegial organised central state authorities of the Ancien Regime modern monocratic ministries came into being – this was a prerequisite for the political responsibility of the state administration to the parliament.

(10.) For the first in the territory of today's Austria elections led to the formation of modern parliaments, the German National Assembly (*Deutsche Nationalversammlung*) and the Austrian Imperial Diet (*Österreichischer Reichstag*).

At least: What began in 1848 as a “springtime of the people” awakened nationalistic tendencies among Czechs, Poles and South Slavs and led to a far-reaching reorganization of the political map of the entire East-Central European area – not already in 1848, but in 1918 – following the dissolution of the Habsburg monarchy.

Keywords: constitutionalism, equality before the law, extinguishing of estate system, federalization, fundamental rights, nationalism, parliamentarism, self-government

1. Initial Positions before 1848 – Overview

In the Pre-March period⁹, liberal and national streams shaped the development of political systems in Europe and influenced changes in the respective constitutional situation of the states concerned increasingly.

7 Since 2005 the Gendarmerie-organization builds an integrated body of the security police.

8 From 1861 on they had an immediate share in the formation of political will in the state parliament (“*Reichsrat*”) until 1907 and in the provincial diets (“*Landtage*”) until 1918.

9 Boesch, 1995, pp. 114–119 (political reorganization by the Congress of Vienna in 1815), pp. 119–121 (reorganization of the political map of Europe after 1815), pp. 130–133 (Revolution of 1830); Brauneder, 2000b, 81–82; Langewiesche, 2007; Brauneder 2007; Ziegerhofer-Prettenthaler 2013, pp. 24–64.

1.1. Liberalism

Liberalism led to the installation of an early-constitutional charter (*charte constitutionnelle* 1814) in France, which served as a model for other states. After 1815 the king's restorative ambitions made themselves felt, against which a broad and complex opposition of different social classes arose. They aimed at more far-reaching changes in the constitutional situation and in July 1830 provoked the outbreak of a revolution, which led to an increased importance of parliament as a representative body in the constitutional structure, and vice versa to a corresponding devaluation of the importance of the monarch, now elected by a Parliament.

The French revolution of July 1830 provoked similar developments in lot of other European states. In Switzerland, most cantons enacted liberal-democratic constitutions. In reaction to this, the conservatively governed cantons organized a special Confederation (*Sonderbund*) in 1845 and sought to secede from the Suisse Confederation, whereupon the majority of the – liberal-dominated – cantons reacted militarily and was able to assert itself until 1847.

1.2. Nationalism

Nationalism led to the emergence of new states such as Greece in 1829 and Belgium 1830, and to failed attempts at national unification as in Poland in 1830 and in Italy 1831. In the German Confederation, such efforts found a containment soon following the founding of the Viennese Act about the German Confederation (*Deutsche Bundesakte*) through the promulgation of restrictive measures, beginning with the Karlsbad Resolutions of 1819. Further measures against liberal and democratic tendencies followed after 1832 as a consequence of the National Festival in Hambach. The Act about the German Confederation (combined with a supplementary Act found in Vienna 1820) obligated all individual German states to establish constitutions that upheld the principle of monarchical legitimacy. Nevertheless, this had no effectiveness in the states of southern Germany (especially in Bavaria). Here, soon after 1815 it came to the introduction of the first constitutional charters (modelled on the French *charte constitutionnelle*). Other states gradually followed. After 1830, the enactment of new constitutions with increased sovereignty of the people followed in all German territories, except for Austria and Prussia.

1.3. Democratic Streams

Democratic streams, following liberal ones, were suppressed, especially regarding the right to vote in parliaments, which mostly followed a two-chamber system, with the first chamber being set up as a chamber of estates under monarchical influence, and only the second chamber due to a limited right to vote in its composition was determined by the people.

The constitutions of individual German states provided for comprehensive catalogues of fundamental rights, but only conceived as state objectives (constructed as guidelines for handling state power). Therefore they did not bring any subjective rights for the individual citizens (constructed as claims, enforceable against the state authorities). However, the monarch had no rights to far-reaching influence on the composition of the parliaments, but also veto rights against their legislative decisions; in addition, the entire administration came to the monarch as a prerogative, therefore the judicative branch came to independent courts.

The constitutions¹⁰ were mostly unilaterally enacted (Octroy) by the monarchs, hence without the participation of the people's representatives, although there were increasing exceptions to this after 1830. Only a small part of the German states remained the old estate system, the great powers Austria and Prussia created estate parliaments in the countries or provinces of their states, which had no political participation in Austria in the Pre-March period, but there was no state representation in either of the large states. Until 1848, however, the Federal Assembly took a restrictive distance towards the increasing liberal tendencies in the German states concerned.

1.4. Economic Unification

Close to the political and legal connection of Germany in the Confederation of 1815¹¹, tendencies towards an economic unification of the German states increasingly occurred in customs unions. Through these ambitions for an expansion to a political and a state level aroused step by step up to 1834, then

10 Brauneder, 2000b, pp. 81–82; Brauneder, 2009, pp. 88–91; Brauneder, 2013; Willoweit and Schlunker, 2019, pp. 236–238.

11 Kotulla, 2008, pp. 315–326 (establishment of German Confederation), pp. 403–417 (Constitutional Status); Willoweit and Schlunker, 2019, pp. 231–232, 248.

under Prussian leadership an almost closed economic area it came to the foundation of the German Customs Union (*Deutscher Zollverein*), only Hannover and Braunschweig, Mecklenburg, and Baden and above all Austria stood abroad.

1.5. Economic and Agrarian Crisis

At the beginning of the 1840s, economic and agrarian crises caused a mass-improvement among the lower urban and rural classes, and this resulted an increasing number of politically dissatisfied people. From the point of view of foreign countries (an observer from Switzerland), the atmosphere in Germany seemed already unstable, so “that even the dumbest eye begins to see how the same (namely Germany) is approaching a major and momentous crisis on this path (namely through the reactions of the Federal Assembly). There is no mistaking it: Germany is on the eve of a revolution.”¹²

This impression was not only symptomatic of the situation in the German Confederation, but for the entire European area; when the revolution finally broke through in 1848, its impact was also Europe-wide.

2. Development of the 1848-Revolution

2.1. Causes

The causes of the revolution of 1848¹³ partly passed back to the French Revolution of 1789, because only few demands articulated at that time found a realization, even after the waves of revolution in 1830/31 had brought only few solutions, which satisfied the people. Another cause was the system of states created for Europe by the Congress of Vienna in 1815, because it disappointed political expectations, especially in Italy and Germany. In addition to this, the so-called “social question” became urgent because of the industrial

¹² „Der Beobachter aus der östlichen Schweiz” [“Observer from eastern Suisse”] wrote as follows: “Die innere Entwicklung Deutschlands nimmt allmählich einen solchen Gang, daß auch das blödeste Auge einzusehen beginnt, wie dasselbe auf diesem Wege einer großen und folgenreichen Krise entgegengeht. Es läßt sich unmöglich verkennen: Deutschland ist am Vorabend einer Revolution.“: Cited in Brauneder, 1992b, p. 48.

¹³ Boesch, 1995, pp. 145–157; Ziegerhofer-Prettenthaler, 2013, pp. 65–80.

revolution immediately before 1848. Furthermore, this raised new social problems, which contemporary politics could not solve (bulks of unemployed people living in misery). This created a new social class, the fourth estate, the workers, initially made up of a small proportion of factory workers. Within the German Confederation, this also included small-scale unskilled laborers and journeymen as well as farm workers, especially in areas with manorial system. At that time, when within the German Confederation the third estate, the urban bourgeoisie, was not until on the way to emancipation as a political factor: In most German states – except of Prussia and Austria – after 1830 people were involved in state decision-making through elected representatives and fundamental rights guaranteed by the state. The economic importance of the bourgeoisie and of the peasantry for the state due to their tax payments was obvious; the desire for political rights had become a matter of course in large circles of society. For the lower classes of society, the agricultural crises in the 1840s had an aggravating effect because they led to the impoverishment of broad sections of the population (pauperism). In France or in parts of the German Confederation, famines heated up the political mood. Finally, political concerns and social problems – above all in Italy and Germany – joined by objectives, which aimed at national unity in a common nation state.

Revolutionary moods were emerging in all European countries in varying degrees. Opposition circles were highly differentiated, existing in all social classes, sometimes they were also found in aristocratic circles, even at the monarchical courts (e.g., at the Vienna court, individual members of the imperial family¹⁴) were open to liberal reforms. This also explains the widespread effect of the revolution of 1848, which – apart from England and Russia¹⁵ – covered all major European states. There was broad agreement on how to concretize the political demands associated with it through a constitutional model that liberalism only could offer with the constitutional monarchy. The concepts of conservatism, aiming at expanding the estate systems of the *Ançien Régime*, had no prospects to be realized. The demands of the

14 Brauneder, 2000a, p. 81: For example, in 1808 Archduke Rainer proposed a project for the organization of a “State Council”, in the next year followed “ideas about reforms and improvements to be introduced in the Austrian monarchy”.

15 In the Swiss Confederation, the “*Sonderbund*”-conflict of 1845 anticipated the revolution and the subsequent enactment of the federal constitution of 1848: Cf. Kölz, 1992, pp. 543etc.

democrats for the creation of republics were at the other end of the political spectrum – they had no prospect or realization because of the memory of the excesses of the first French republic (of 1792) as a terrifying example.

2.2. Progress of the 1848-Revolution – Consequences for Austria and the Habsburg Dynasty

2.2.1. Initial Situation

After 1789 and 1830, the revolution once again began in Paris. In February 1848, this forced the monarch to abdicate, the proclamation of the second followed. The definitive constitution enacted in November 1848 provided for the parliament for the first time purely representative of the people (in one chamber) with a (state) president elected by the people who had large powers (following the North American model).¹⁶

2.2.2. Immediate Consequences

2.2.2.1. Italy and the Habsburg-Dominions in Italy

The progress of the 1848-revolution in Italy¹⁷ was of immense importance for the Habsburg dynasty. Unlike in France, the aim of the revolutionary forces was not only to help democratic principles to achieve a breakthrough, but also to achieve national unity. The revolution in Italy was also against the regents existing in the individual states, which belonged to foreign dynasties. The peoples perceived as an occupying power. Therefore, the Habsburgs in northern and central Italy were considered as foreigners. From the middle of the 18th century, they ruled not only in Lombardy-Venetia, which had belonged to the Austrian Empire since 1815, but, also in Tuscany, Parma,

¹⁶ The aims of the revolutionaries – abolition of the monarchy and realization of the democratic principle – had achieved a complete breakthrough. The new constitution provided for a republic with strong presidential powers, after the election there was a clear anti-republican majority in the National Assembly; in the subsequent presidential election, Louis Napoleon, a nephew of Emperor Napoleon, was elected with an overwhelming majority, so that the (second) republic was soon called into question: Hartmann, 2003, pp. 101–114.

¹⁷ Daum, 2014.

and Modena through secondary lines of the Habsburg dynasty. The dynasty of Bourbon, who had ruled the Kingdom of the Two Sicily's in southern Italy since the first half of the 18th century, the people considered them as foreigners. In contrary to that, the Kingdom of Sardinia-Piedmont was perceived the only "national Italian" state, although it was also ruled by a foreign dynasty, by the French House of Savoy. The "national" revolution in Italy failed because Austria intervened in northern Italy and France in the Papal States; with the suppression of the uprising in the Kingdom of the Two Sicily's in southern Italy, the uprisings had collapsed in 1849: the realization of the national unification of Italy had failed.

2.2.2.2. German Confederation and Austria as Federal Powers in Germany

For the German Confederation¹⁸, too, it was not only about helping the democratic system to break through, but also about achieving national unity. Unlike in Italy, however, the individual German states were not ruled by foreign dynasties – except of Holstein, which – in dynastic connection with Schleswig, which belonged to the Danish crown. A removal of the regents in the individual states was therefore unthinkable in Germany. Here too, however, the question was how to integrate these individual states into one overall state in the future. With the German Confederation, an institution was already available for the organizational preparation of German unity. The aim was to convert the confederation of sovereign states into a federal state. The revolution in Germany therefore took place on two levels: on the one hand on the level of the individual states, where it was about the participation of the people in state authority, and on the other hand on the level of the German Confederation, which was transformed into a state supported by the people, "nation state" should be converted.

The events at the level of the German Confederation also affected the development of the constitution in Austria because the emperor joined the German Confederation in 1815 with the former German hereditary states, which had belonged to the Holy Roman Empire until its dissolution. Efforts to reform the German Confederation took place within the

18 Cf. Kühne, 1995 and 1998; Brauner, 2000b, pp. 102–103, 116–117; Fiedler, 2002; Brauner, 2007, pp. 36–38; Kotulla, 2008, pp. 419–438; Brauner, 2009, pp. 109–111 (Pre-March), 131–133 (German National Assembly); Willoweit and Schlöcker, 2019, pp. 248–258.

framework of a national assembly, elected in the areas belonging to the Confederation, which met first on 18th May 1848 in Frankfurt am Main, the seat of the German Confederation, in the building of the secularized St. Paul's Church (*Paulskirche*).¹⁹ Their efforts culminated in March 1849 in the creation of a "Constitution for the future German Reich", with which the German Confederation (of individual states) was to be converted into a federal state.

In Austria, these elections were the first parliamentary elections. About a fifth of the 585 deputies were elected by voters in the federal areas of Austria. The German National Assembly saw itself as the bearer of the sovereignty of the future German Reich and claimed the "Provisional Central Authority for Germany". This consisted of a regent elected by her (the Austrian archduke Johann, a brother of the Austrian emperor) and of a government appointed by him, which was politically responsible to the national assembly. The Federal Assembly of the German Confederation recognized this procedure by transferring its powers to the Reich Administrator on behalf of the governments of the member states. As a result, the German Confederation – with consent of the governments of the member states – had given itself a new provisional "constitution" in an evolutionary way – with new institutions, the National Assembly as a parliament, which appointed a central government (*Reichszentralgewalt*) and a regent (*Reichsverweser*) serving as provisional head of state. This all together formed a political system based on the constitutional model.

In its primary task of drafting a "definitive" constitution, the cardinal problem for the National Assembly was how to proceed with the incorporation of all single German States into the future federal German *Reich*. This was primarily a problem for Austria, but also affected Prussia, because both monarchies included areas that did not belong to the German Confederation. The possibility that the German Confederation should continue to exist as a federal state in the previous area – including the federal areas of Austria – initially was assumed to be the "normal case". However, this so-called "larger German" solution soon turned out to be problematic in the implementation, so that during the constitutional deliberations in the National Assembly an alternative solution for

¹⁹ Cf. Kühne 1995, 1998.

the conversion of the German Confederation into a federal state without Austria crystallized – in the sense of a “smaller German” solution. With it, another problem that would have arisen when Austria was included in the federal German State (*Reich*) could be eliminated: Namely, the question, who should serve as the head of the future German State as Emperor (*Kaiser*), a position, which would naturally have offered the most politically important German regent: either the King of Prussia or the Austrian Emperor. With the withdrawal of Austria from the German Reich, this problem would have been superfluous. And with the disappearance of the Czech-populated Austrian provinces of Bohemia and Moravia the treatment of non-German minorities within the federal German State would have defused too. The “Constitution of the German Reich” that was finally created was based on the “greater German” solution. An adequate number of seats (corresponding with the number of inhabitants) was reserved for Austrian deputies in the representation of the member states (*Bundestag*). However, the Constitution of the German *Reich* stipulated that every member state that possessed territories belonging to the future German *Reich* as well as others had the obligation split its territory into separated parts with separate constitutions, so that these parts could only be connected in personal unions (para. 2).

For Austria, this would have meant that it was impossible to enact a single constitution for its federal territories (the former German hereditary territories) belonging to the German *Reich* and its other provinces, namely Lombardo-Venetia, Hungary, Galicia, and Bukovina. As a result of the enactment of the Constitution of Hungary in April 1848, Austria seemed separated in certain complexes of provinces connected in a personal union. Of course, the Austrian government had always taken the view that it fundamentally rejected the project of the transformation of the German Confederation from a confederation of states into a federal state. At the end of 1848, following the change of throne from Emperor Ferdinand to Franz Josef, Prime Minister Schwarzenberg explicitly declared that Austria would not agree to a “small German” solution. He raised the argument that Austria was still a power of the German Confederation and could not be unilaterally pushed out of it, proclaiming bluntly: “We

will not allow ourselves to be thrown out of Germany!”²⁰ A clarification of the Austrian point of view brought – already before the decision of the Frankfurt National Assembly about the Constitution of the German *Reich* (at the end of March 1849) – the octroy of a new Imperial Constitution (*Reichsverfassung*) on 7 March 1849, which included all territories of the Austrian Empire (as a unified state). The National Assembly interpreted this statement as Austria’s rejection of its participation in the coming German *Reich*.

The Prussian deputies in the National Assembly therefore immediately began to work on the realization of the “small German” solution. Following the decision about the Constitution for the German *Reich* – including the offer to Austria according to para. 2 – the Prussian king Friedrich Wilhelm IV was already offered the office of “Emperor of the Germans”. However, he rejected the appointment to this monarchic office based on a decision by the National Assembly because this process was not compatible with monarchical legitimacy (as in 1830/31 on the election of “citizen kings” in France or Belgium). The constitutional project of the Frankfurt National Assembly had thus failed. The development that had taken place on an evolutionary path – politically and legally – had not led to the end of the German Confederation either; during the revolution, it had not been lost, extinguished, or dissolved as a subject of international law. It was not replaced by a German *Reich* as a revolutionary entity, which now – when the National Assembly had failed – had in turn been replaced by a new German Confederation. In March 1848, the German Confederation had ordered the drafting of a new constitution on its own initiative. The coming federal constitution should come into being in form of a constitutional treaty between the National Assembly and the governments of the individual German states. Finally, due to an agreement reached between Prussia and Austria in Olmütz, the German Confederation returned to the organization, which he had before 1848: In the autumn of 1851, the Assembly of the German Confederation met again (in Frankfurt) for the first time since March 1848.²¹

²⁰ Cf. Koch, 2010.

²¹ The construction of the German Confederation remained in need of reform: In 1863 Austria tried to initiate a reform of the confederation at the Meeting of German Princes at Frankfurt [*Frankfurter Fürstentag*], at least this was doomed to fail, because the King of Prussia stayed absent: Brauneder, 2009, p. 153.

2.2.2.3. *In Austria Itself*²²

The revolution broke out in Vienna on March 13, 1848, triggered by the public reading of a speech by Lajos Kossuth to the revolutionary Assembly of the Hungarian estates in Preßburg in the courtyard of House of the estates of Lower Austria. A crowd of workers and students flowed in the city and threatened with violence, the order to shoot was given against the gathering first victims (some of them killed) were to be mourned. As a direct consequence of the unrest that broke out in the city and in the suburbs, a liberal ministry was set up as an immediate measure and the enactment of a constitution promised. The emperor invited delegates from the estates of all Austrian hereditary provinces to cooperate with the ministry under the leadership of the Minister of Interior Franz Pillersdorf, who worked out the draft of the constitution in cooperation with a committee of the provincial diets (Central Committee of the Estates – *Ständischer Zentralausschuss*). Not more than two weeks later the Emperor issued the constitution promised on April 25. That arrangement provided the provisionally constitutional system of March 1848. In May, a new wave of revolution in Vienna forced the government to change the constitution, worked out by the intended *Reichstag* (serving as a people's representative body). The future constitution should be enforced in cooperation between the *Reichstag* (serving as the constituent assembly of the Austrian Empire) and the monarch – in form of a constitutional treaty (by agreement between monarch and parliament), and not by way of monarchical octroy. The election of the *Reichstag*²³ was to follow principles that corresponded only partially to universal suffrage. After a change in the electoral regulations, which removed the restrictions on voting rights imposed by a tax census, the *Reichstag* first met in Vienna in July 1848. From there the *Reichstag* was evacuated to the provincial town of Kremsier, because the revolution flared up again in the October Uprising. In Vienna, the course was set for the organization of constitutional work in two committees just in summer 1848, one of which only had the task of drafting fundamental rights.

22 Brauneder, 1992a, pp. 159–194 (development in 1848/49); Brauneder, 1993, pp. 45–49 (development until 1848- Constitution), 52–55 (development until the Kremsier-Draft); Brauneder, 2000b, pp. 84–94 (development until 1848), 106–110 (development until 1849), 120–125 (development until 1851); Brauneder, 2002, pp. 107–108, 112–113, 120–121 (development in 1848/49); Brauneder, 2009, pp. 112–123 (development in 1848/49).

23 Adlgasser, 2014, pp. IX–XXIV.

Concrete deliberations in the committees and in the plenum only took place in Kremsier. Here, the *Reichstag* created the draft of a constitution based on sovereignty of the people, regarding the role of parliament as a representation of the people and considering about the effect of fundamental rights as subjective claims of the individual. The draft could not go into force, because the emperor dissolved the *Reichstag* at the beginning of March 1849 – before the *Reichstag* could put the overall draft on the agenda in the plenary session. At the same time, he imposed a new constitution. As a result, this constitution remained unimplemented, especially in regard of the intended parliaments: Neither to the *Reichstag* nor to the provincial diets (*Landtage*) elections were prepared; the Supreme Imperial Court *Reichsgericht*, which with served as a constitutional court remained on paper, the same happened to most grants of fundamental rights. In the end, the emperor already repealed the constitution at the end of 1851 (on New Year's Eve, therefore referred to as *Silvesterpatente*).

The development of the constitution in Austria during the revolutionary years of 1848/49²⁴ is primarily to characterize by the fact that the Austrian Empire was extremely heterogeneous. It was not only composed of different complexes of provinces, but also characterized by the fact that most provinces also consisted of settlement areas of different nationalities: Hungary was mostly populated by Magyars, Lombardy-Venetia exclusively by Italians, in Galicia the Poles, in Bukovina the Ruthenia's ("Little Russians"), in Bohemia and Moravia the Czechs, and in the other Austrian provinces the Germans. During the constitutional debates in the *Reichstag*, the liberal-national Germans showed understanding that Galicia, Lombardy Venetia, and Hungary should have their own constitutions. Of course, the Czechs demanded the same for Bohemia and Moravia-Silesia. The constitution of 1848, however, went in principle from a constitutionally homogeneous unitary state. It also included Galicia as well as Bohemia and Moravia-Silesia in its scope of application, but initially Lombardo-Venetia (due to war against Sardinia-Piedmont); and Hungary was excluded (because it had been granted its own constitution by the monarch – made up of 31 articles of law) before the Pillersdorf Constitution was enacted. The imperial Constitution of 1849

24 Brauneder, 2000b, pp. 94–102 (the problem of relationships between state and provinces ["*Länder*"] 1848), 110–116 (draft of the Imperial Diet of Kremsier), 125, 127–128, 129–130 (1849); Brauneder, 2009, pp. 121–122 (about representation, nationalities, federalism).

then included all areas of the Habsburg monarchies in its area of application. The government quickly put down uprisings that broke out in the Austrian Empire in 1848. However, Constitutionalism initially was pushed back but remained the orientation goal of the liberals for the future constitutional structure of the monarchy. A restorative period followed the failure of the revolution, led by efforts to restore the pre-revolutionary constitutional status. Like in 1815, a restoration of political system led to the return of the former monarchs: In northern Italy Austria was initially able to maintain its position in Lombardo Venetia and to prevent the impending loss. Hungary, due to the Constitution granted in 1848, considered itself an independent state and declared the ruling Habsburg dynasty deposed. With the help of Russian troops, the Austrian government pacified Hungary until summer of 1849. The separation of Hungary from its neighbouring territories (Transylvania, Timisoara Banat, Serbian Voivodeship, Croatia-Slavonia) followed. A new Imperial Constitution enacted in March 1849 included all parts of the Hungarian Crown in the Austrian Empire. Although Austria had received an early constitutional political system in 1849 after the failure of the *Kremsier Reichstag's* constitutional project, this remained unrealized in its essential content: In particular, neither the Reichstag nor the provincial diets (*Landtage*) convened, and the Supreme Imperial Court (*Oberstes Reichsgericht*) never was organised.

1851 and the subsequent interlude of neo-absolutism up to 1860, there was continuous recourse to the two constitutions imposed and the draft constitution of the Reichstag of the revolutionary period of 1848/1849. In 1861/62, the constitutional restauration of the status of the provinces (*Länder*) and local communities (*Gemeinden*) followed the respective laws of 1849/50, and in 1867, the cisleithanian provinces of the Habsburg Empire state were based on a new constitution²⁵, which followed the 1849-Constitution as the model.²⁶

25 Stourzh, 1989, p. 252; Brauneder, 1993, pp. 55, 60; Neschwara, 2017, pp. 24–25, 26–26, 34.

26 In 1867, both Hungary and Austria then returned to the constitutionalism of 1848/49. After the Compromise, which led to the restoration of the 31 articles of law from 1848 were restored for Hungary at the beginning of 1867 and to the announcement of six constitutional laws ("Basic State Laws" ["*Staatsgrundgesetze*"]) for the remaining territories ("*Länder*") of now so-called "Cisleithania", on the initiative of the House of Representatives, which followed the constitution of 1849 – except of the establishment of a parliament following the model of the "*Reichstag*".

3.3. *Trendsetting Consequences of 1848 in Austria*

3.3.1. *In General*

3.3.1.1. Until 1918

From the point of view of constitutional history, left of 1848 is – apart from the realization of civil equality and other political grants of fundamental rights – above all the creation of modern organizational fundaments for the institutions for handling state power in legislative, administrative, and judicative branch. The creation of district courts and district authorities at that time was a direct consequence of the abolition of manorial rule and the transfer of their functions in self-government to local communities (*Gemeinden*), which were conceived as local authorities serving for administration.²⁷ They still exist today in the forms it developed in 1848/49, with brief interruptions (1852/62 and 1938/45) and with modifications.²⁸

The concept of local government based on the principle of the self-organization of society served also as model for self-government of certain professions immediately after 1848. Initially with the creation of chambers of commerce and trade, which from 1861 until the end of the monarchy were involved in the formation of state decisions within the framework of the right to vote for the Imperial Council (*Reichsrat*)²⁹ and the provincial parliaments (*Landtage*)³⁰ – to the *Reichstag* until the introduction of universal suffrage in 1907 and to the provincial diets even until the end of the monarchy in 1918.³¹ The aristocratic property owners, who were deprived of their

²⁷ Brauner 1992a, pp. 42–52, 66.

²⁸ After 1849, other functions of the manorial estates within the framework of state contract management were transferred to state district tax offices or to the „Gendarmerie“ (created in 1850). These institutions do not exist in today's Austria.

²⁹ Brauner, 1896a, pp. 87–89, 91–97, 113–116, 116–118; Brauner, 1896b, pp. 127–129, 133–134; Adlgasser, 2014, pp. XXV–LXVII.

³⁰ Brauner, 1896a, p. 89–90; Brauner, 1986b, 125–127.

³¹ Brauner, 2000b, pp. 192–203 (reforms of the Parliament, especially the Law of Election); Brauner, 2009, pp. 158–160 (realization of sovereignty of the people) – The concept of professional self-government organized in „chambers“ was then extended to the economically independently acting judicial professions of lawyers and notaries (1849 and 1850 respectively): Brauner, 2009, pp. 94, 127, 146, 174, as well as pp. 201 and 242 (concerning the Constitution of 1934); Brauner, 2000b, pp. 229–130. – Further applications did occur until 1918 (doctors, engineers) respectively after 1945 (pharmacists, civil engineers).

sovereign rights in 1848, had mutated into large landowners (*Großgrundbesitzer*). They were initially to have the privilege of an own chamber in parliament, the Senate of the *Reichstag*, but this was amended in May 1848 with a new Election Law because of the radicalization of the revolutionary events. Since 1861, the large landowners – as well as the chambers of commerce and trade – formed their own class of voters in the provincial diets and in the House of Representatives of the *Reichsrat*. Both remained determining political factors in the constitutional system of the monarchy until the end of the 19th century.³²

The historically traditional estate system was formally abolished in 1849, but the aristocratic class had other privileges apart from the right to vote; and these privileges were only abolished in 1919, by which a demand of the *Reichstag* of 1848/49 had found a belated realization.³³ With the end of manorial rule, not only the nobility but also the Catholic Church lost its function as an intermediary bearer of sovereign power: Until then, the church owed its privileges solely to the fact that the ruling Habsburgs themselves belonged to the Roman Catholic confession. In 1848, other confessions – previously only tolerated by the state – were formally put on an equal footing with the Catholic Church – ultimately since 1868.³⁴ This would also have corresponded to the introduction of compulsory civil marriage instead of the concept of denominational differentiated marriages according to ABGB 1811, as demanded by the fundamental rights found in the subcommittee of the *Reichstag* in 1848/49. In the second half of the 19th century, there were initiatives on the part of the Liberals and the Social Democrats, but they failed, because of the veto the Catholic monarch. After 1918, the marriage law reform was back on the reform plans of the Social Democrats and Liberals, but it fell victim to the inclusion of the Greater Germans in coalitions

32 Even after the introduction of a general class of voters in 1896, a few thousand large landowners received more seats in the House of Representatives than the approximately four million eligible voters of the general class of voters: Brauneder, 2000b, pp. 200–202; Brauneder, 2009, pp. 158–160.

33 Neschwara, 1993, p. 91.

34 The concept of separation of churches and state was subsequently broken, first in the 19th century for a decade from 1855 to 1868 and then again in 1934: Brauneder, 2000b, pp. 189–190; Brauneder, 2009, pp. 157–158 (“laicization of the state”).

with the Christian Socials.³⁵ Even the Nazi regime introduced compulsory civil marriage in 1938 – what a pity!³⁶

The first enactment of constitutions in a formal sense (that is, in the form of constitutional acts) in 1848 led to the end of the monarch's absolute rule of law. In accordance with constitutionalism, popular participation restricted the absolute government through elected representatives in a Parliament. The people's right to vote was initially severely restricted by an electoral census, and this had a significant impact on the first parliamentary elections in Austria, the election to the Frankfurt National Assembly in the spring of 1848. The law for the second parliamentary elections in Austria in July 1848 to the Austrian Reichstag reduced the census to minimum requirements (own income, as day-laborers), but only a minority of people exercised the right to vote. Equality regarding active suffrage did not come about until 1907. After the interlude of curial and census suffrage for the *Reichsrat* of 1861, with the introduction of universal suffrage³⁷; but at the level of the electoral law to the provincial diet not until the end of the monarchy. In addition to the privileged classes of voters (members of the great landowners and members of the Chambers of Commerce and Trade), the mass of citizens entitled to vote (divided into urban and rural communities) found no adequate representation, and smaller peasant landowners and the workers in the cities had no politically representation all, neither in the *Reichsrat* and provincial diets nor in the local communities. It was not until 1907, with the abolition of universal suffrage to the House of Representatives, that there were noticeable improvements in terms of equality. However, only men benefited from general suffrage. Until then, active suffrage also included women, but only in the class of the large landowners – albeit only formally and not in practice. It was not until 1919 that women's suffrage became part of all institutions serving as general representations.

The constitutions enacted in 1848/49 provided parliaments with political control rights over the government³⁸, which still exist today. The now (in

35 After the coup d'état of the Christian Socialists against the parliament, Austrofascism even went back to the legal situation before 1811 based on the Concordat of 1933 regarding Catholic marriage law: Schima, 2011; Kalb, 2011.

36 The law, which is still in force today, is politically controversial, and there are currently no initiatives for a total change.

37 Simon, 2010.

38 Brauneder, 1987, p. 135.

1848) organized monocratic ministries were responsible for the legality of government acts (including those of the monarch) to parliament within the framework of the right of interpellation, resolution, and inquiry. This too – as a late consequence of 1848 – only came to fruition from 1861 with the creation of the *Reichsrat* as a parliament. However, the possibility of a vote of no confidence did not yet exist in the constitutional system until 1918. Admittedly, the constitutions of the revolutionary years provided for legal responsibilities of Ministers: A Supreme Imperial Court (*Reichsgericht*), called upon to protect fundamental rights too, should be responsible for this task.³⁹

The constitutional achievements of 1848 were initially as good as exclusively limited to the state, the provinces had only a temporary part in this development. To the extent that the *Reichstag*, elected in June as the constituent national assembly, wanted to give the provinces partially the character of states when drafting a new constitution about their involvement in the formation of state will. The Constitution indented a chamber consisting of deputies of the provincial diets, comparable to Austria's today *Bundesrat*. The concepts of federalism developed in 1848/49 envisaged the decentralization of state legislation in general state and provincial affairs and the transfer of self-government matters to the provincial parliaments. Following the period of neo-absolute government, from 1861 onwards⁴⁰, the course was again set for a significant federalization of the state, so that at the end of the 19th century the importance of the provinces increased to such an extent that a conversion of the decentralized unitary state of the Austrian Monarchy into a federal state was considered to come into being. However, this federal state intended a structure, which divided the state into the settlement areas of the nationalities and not into the previous historical provinces.

The constitutional considerations of the revolutionary years of 1848/49 – beyond the short interlude of period of neo-absolute government – remained pointing the way for the further development of the Austrian constitutional foundations. This started with the dissolution of the German Confederation through the War of 1866 and the settlement of the division of the Austrian Empire and through the emergence of a two-state monarchy: At the beginning of 1867, first in the Hungarian provinces, there was a restoration of the constitutional laws of 1848 and at the end of 1867 in the non-Hungarian,

³⁹ Heller 2010, pp. 89, 91.

⁴⁰ Simon, 2015, pp. 71–73; Symposium, 2015.

now so-called Cisleithanian territories – several basic state laws led to the modified restoration of the constitutional aera of 1848/49. A restoration of the *Reichstag* of 1848 – without revolutionary pressure like in 1848 – was not possible, because of the veto of the anti-constitutional monarch: therefore, in Cisleithania the *Reichsrat*, which had existed as a parliament since 1861, remained, and a parliament comparable to the *Reichstag* of 1848/49 was not restored. As early as in 1861, respectively in 1862, there was a return to the constitutional fundaments of 1848/49 about the position of the provinces and local communities. With the fundamental rights and the *Reichsgericht*, the content of the corresponding basic laws of 1867 was very closely, in single cases even literally, connected to the corresponding institutions of that time. The speaker in the House of Representatives who was responsible for drafting the fundamental rights in 1867 wrote succinctly on the paper of his draft that he had edited: “Everything 1849!” (“*Alles 1849!*”).⁴¹

3.3.1.2. Since 1918

The collapse of the Habsburg monarchy in the fall of 1918 awakened, the memory of the unfinished revolution of 1848: contemporaries also saw the proclamation of the republic as a late fruit of the 1848 revolution. This perspective goes back to social-democratic narratives. These stories begin with the founding of German-Austria; the *Arbeiter-Zeitung* (“Worker’s newspaper”) publish a comment on October 30, 1918, as follows:

“The spirits of the constitution of 1848 are awake again after a long, long slumber and on the historic ground in front of the country house, where seventy years ago the first great revolution in German-Austria germinated, the old battle cry of freedom sounded again in a thousand voices [...].”⁴²

Another late fruit of the revolution of 1848 is the renewed attempt to create German unity.⁴³ The accession of German-Austria to the German Republic, proclaimed on November 12, 1918, was established as a state goal, the

⁴¹ Stourzh, 1989, p. 252; Brauneder, 1994, p. 155; Brauneder, 2000a, p. 32; Neschwara, 2017; Neschwara, 2021, p. 160.

⁴² „Die Geister der Verfassung des Jahres 1848 sind nach langem, langem Schlummer wieder wach und auf dem geschichtlichen Boden vor dem Landhause, dem vor siebzig Jahren die erste große Revolution Deutscherlands entkeimte, scholl [...] wieder tausendstimmig der alte Schlachtruf der Freiheit.”

⁴³ Neschwara, 1993, p. 91; Weiß, 2018, Neschwara, 2018b, p. 152.

propagation of which as a union remained a central goal of German-Austrian foreign policy until 1933: It was initially supported by the Social Democrats and, of course, by the Liberals. The most prominent of this idea among the Social Democratic representatives was Foreign Minister Otto Bauer, also a politician of Jewish descent. After the failure of the *Anschluss*, which Bauer considered essential for the long-term prosperous existence of German-Austria (as part of the German Republic), Bauer promptly resigned as foreign minister after concrete negotiations on a state treaty with the German Reich had already started in Berlin in March 1919 were.

The aftermath of the 1848 revolution also came at the international level. The contemporaries also perceived the developments that began in 1848 as a “spring of the people”. The awakening of nationalistic tendencies among Czechs, Poles and southern Slavs in the Habsburg monarchy made a reorganization of the political map in central Europe appear feasible. But only the dissolution of the Austro-Hungarian monarchy brought forth new states⁴⁴, shortly before German Austria and Czechia-Slovakia Republic came into being as new states. Soon after that an SHS state (uniting Serbian, Croatian and Slovenian people of the Habsburg Monarchy) came into being (afterwards joined with the Kingdom of Serbia and Montenegro). Russian Poland, after the collapse of the Tsarist Empire at the end of 1917, should exist as a monarchy – but now dependent on the Habsburg dynasty, but finally formed a republic in the autumn of 1918 – including the Austrian and Prussian areas of former Poland. Hungary saw itself in state continuity with the Hungarian monarchy, it returned to the monarchical form of government in 1920 – after the experiment of the soviet republic under the mass murderer Béla Kun.

German Austria, restricted to the borders drawn by the State Treaty of St. Germain in September 1919, and Hungary, reduced to its Magyar core by the Peace Treaty of Trianon in 1920, are the only states of the post-war order of 1919/20 that have survived to present days in unchanged shape. Apart from Poland, enlarged after 1945, the other successor states of the Austro-Hungarian monarchy fell apart after the end of the socialist regimes in Central and Eastern Europe, so Czechoslovakia in 1993 and Yugoslavia since 1991. The state fragmentation of former Yugoslavia still does not seem to be

44 Brauneder, 2000b, pp. 248–250 (Poland), 250–254 (Czechoslovak Republic), 254–258 (State of Serbs, Croats, and Slovenes).

complete – think of the constitutional situation in Bosnia-Herzegovina⁴⁵ and in Kosovo.

3.3.2. *Regarding Fundamental Rights in Particular*⁴⁶

3.3.2.1. Development during the Monarchy until 1848

Let us now come back to the most important trend-setting results left of the 1848-revolution for Austria, and that was the grant of fundamental rights for individual citizens.

The intellectual roots of modern fundamental rights, embedded in natural law doctrines of the late 18th century, granted every human being to have individual “innate rights” (as already granted in introduction to the Austrian General Civil Code of 1811 – ABGB § 16). Of course, at these times state authorities did not respect individual rights as equal rights (single rights varied on reasons of social status or religion).⁴⁷

The decisive impetus⁴⁸ for granting fundamental rights came from the independence movements in the British colonies of New England, beginning with the Virginia Bill of Rights of 1776, which in turn influenced the contemporaneous Declaration of Independence of the North American Union and through this it influenced the declaration of human and civil rights in Europe after the outbreak of French Revolution in 1789. Since then, fundamental rights usually found guarantees in form of constitutional law. The idea of binding state actions to norms regulated in codifications of constitutional law also gained importance for individuals, because such norms now led to the participation of the people in exercising state powers – represented by a parliament as a political body of the people. Fundamental rights thus got the character of constitutional law

45 Europa-Ploetz, 1999, pp. 152–153 (Yugoslavia), 153–156 (Bosnia and Herzegovina); Haeblerli et al. (eds.), 1994, pp. 33–34 (since 1918), 191–94 (since 1945); Chronik-Handbuch, 1996, pp. 158–159 (Bosnia and Herzegovina). – Another state, of which parts belonged to the Austrian monarchy until 1918, Ukraine, failed to form a separate state after 1918. She was then integrated into the Soviet Union in 1919 and organized as an autonomous Soviet republic after 1945, became sovereignty following the collapse of the Soviet Union in 1992, but seems to have been on the way to state fragmentation since 2014.

46 Hofmeister, 1988; Brauneder, 1991; Schäffer, 2014; Neschwara, 2017.

47 Kleinheyer, 1975, pp. 1061–1066; Brauneder, 1991, pp. 194–195; Schäffer, 2014, pp. 4–6.

48 Kleinheyer, 1975, pp. 1066–1070; Brauneder, 1991, pp. 189–190; Schäffer, 2014, pp. 4–6.

but including only instructions and guidelines for state actions. Embedded in constitutional norms, therefore fundamental rights had a higher-ranking (even fundamental) level and – due to state grants – independent from their natural law foundations too. However, the idea of individual equality based on natural law continued to have an influence on them, because such constitutions led to the overcoming of the corporate structures of society.

In Central Europe⁴⁹, within the borders of the German Confederation of 1815, liberal circles pushed these ideas and propagated for – fundamental rights being enshrined in a state constitution, because this would open participation for people and would grant them freedom rights against state arbitrariness. Fundamental rights in this meaning first time were constitutionally – granted in Bavaria in 1808, and in few other German territories after 1815 (initially Württemberg or Baden); and in consequence of the July-Revolution of 1830 since then in all German states, except of Prussia and Austria.

3.3.2.2. Development during the Monarchy since 1848

In Austria, several fundamental rights first were granted as – a part of constitutional law immediately following the revolution, in March 1848⁵⁰: for the first-time equality of citizens was proclaimed, freedom of the press, freedom of education and learning) was granted, especially in connection with the liberation of peasants and the emancipation of Jewish citizens as well. Since then, catalogues of fundamental rights had been created in April 1848 and in March 1849⁵¹, which finally found its way into the Basic Law on the general rights of citizens of 1867 Basic State Law (*Staatsgrundgesetz*)⁵² and then this Basic Law was transferred to the provisional constitutional law of the Republic of German-Austria in 1918.⁵³

49 Kleinheyer, 1975, pp. 1070–1075; Brauneder, 1991, p. 192; Schäffer, 2014, p. 6–8.

50 Brauneder, 1991, pp. 187–263; Schäffer, 2014, pp. 9–16.

51 Partly following the model of the „*Grundrechte der Deutschen*“, drafted in German National Assembly in Frankfurt/Main (with the significant participation of members of parliament elected in Austria): Kleinheyer, 1975, pp. 1075–1082; Brauneder, 1991,

52 Stourzh, 1989; Brauneder, 1991, pp. 274–276; Neschwara, 2017, pp. 41–42.

53 Brauneder, 1991, pp. 281–283; Schäffer, 2014, pp. 17–19; Neschwara, 2021, pp. 158–159.

3.3.2.3. In the Republic until 1945

Attempts to create a new catalogue of fundamental rights with the drafting of a new constitution failed after 1918 – due to ideological differences between the political parties, so the politicians decided to incorporate the existing fundamental rights into the Federal-Constitutional Law (*Bundes-Verfassungsgesetz*, hereinafter referred to as BV-G), which came into effectiveness in November 1920.⁵⁴ The number of these fundamental rights was a little bit expanded in 1918/19 by resolutions, passed in the Provisional and the Constituent National Assemblies⁵⁵ as well as in the provisions of the Treaty of St. Germain (due to clarify the principle of equality).⁵⁶

In the parliamentary discussion of the Constituent National Assembly from July to October 1920 in connection with the drafting of the federal constitutional law, the situation in the Austrian Reichstag of 1848/49 seemed to be repeating itself. However, contemporaries themselves did not generally feel this way.⁵⁷ The members of the Constituent National Assembly did not see themselves as builders of a permanent constitution for the state of the Republic of Austria within the limits of the Treaty of St. Germain: It was therefore accepted that – due to ideological differences between the political parties – no agreement could be reached on a new catalogue of fundamental rights. Austria stayed with the existing basic rights, the core of which is the basic state law on the general rights of citizens. These fundamental rights then remained – unchanged until the end of the constitutional order of 1920, after less than 15 years of validity until 1933. Within this brief time, no initiatives led to new catalogues of fundamental rights.

Only under the regime of Austro-Fascism, established in 1933, following a coup d'état by Christian-social Party, it was possible to create a new catalogue of fundamental rights with the enactment of a new Constitution in 1934, an authoritarian constitution based on estates (recruited from social groups representing economic and cultural interests), but the content of the catalogue of fundamental rights followed the catalogue of basic rights of the B-VG of 1920.⁵⁸

54 Brauneder, 1991, pp. 322–324; Neschwara, 2017, pp. 41–42.

55 Brauneder, 1991, pp. 306–319; Schäffer, 2014, pp. 23–28.

56 Brauneder, 1991, pp. 304–306.

57 Cf. Brauneder, 1991, pp. 283, 286, 288, 291, 301; Schäffer, 2014, pp. 208–209.

58 Brauneder, 1991, pp. 327–329; Schäffer, 2014, pp. 30–31.

The interlude of Austrofascism ended with the occupation of Austria by the German Empire (*Anschluss*) in March of 1938. The Constitution of the Weimar *Reich*, which now became decisive for Austria, was even stripped off the rule of law and liberal institutions by the National Socialist regime since 1933, and therefore it was lacking fundamental rights.

3.3.2.4. In the Republic since 1945⁵⁹

After the resurrection of Austria following her Declaration of Independence at the end of April 1945 “in the spirit of the 1920 constitution”, Austria returned to her former fundamental law by transferring the federal constitutional law in the version of March 1933: At the end of these developments, Austria returned to the roots of fundamental rights, based on the ideas of the 1848-revolution!

The further development of fundamental rights in Austria since 1945 on the one hand was marked by renewed failures of attempts to create a new catalogue of fundamental rights, on the other hand, by the adoption of fundamental rights following international agreements: Concerning the first aspect, it should be noted, that only some new fundamental rights found a regulation in special constitutional laws.⁶⁰ Moreover the *Staatsgrundgesetz* of 1867/1920 itself was supplemented too.⁶¹ All these new fundamental rights were regulated in special federal constitutional laws apart from the *Staatsgrundgesetz* (being a part of “B-VG”). At least in 2003, in the course of the Austrian Convention (founded in 2000), a new codification of fundamental rights was approached with more publicity (compared to similar efforts in the past, which were carried out almost out of the public); but the project also failed like in 1920 – once more due to ideological differences.⁶² As for the second aspect⁶³, it should be noted: fundamental rights constantly were increased and expanded and partly supplemented due to legal norms from international agreements: these developments started with the end of Allied control in Austria, beginning in 1955 with the State Treaty of Vienna

59 Brauneder, 1991, pp. 337–328; Schäffer, 2014, pp. 31–33, 33–35.

60 Brauneder, 1991, pp. 347–349; Schäffer, 2014, pp. 35–36.

61 In 1974 through the “protection of telecommunications secrecy” and in 1988 “freedom of art”; in the same year “protection of freedom of the Person”.

62 Österreich-Konvent, 2005, pp. 83–109; Schäffer, 2014, pp. 46–47.

63 Brauneder, 1991, pp. 347–349; Schäffer, 2014, 35–42.

and special rights for national minorities in Austria⁶⁴; but above all with the adoption of the “European Charter of Human Rights” (“ECHR”) of 1950, which was added to the Austrian catalogue of fundamental rights in 1958 and modified their content.⁶⁵ In 1964 Austria declared that the “ECHR” has got constitutional status, and this brought it at the same level with the fundamental rights of the B-VG. In addition to that from now on the European Court of Human Rights at Strasbourg was responsible for individual complaints about violations of fundamental rights as well as this did the Austrian Constitutional Court at Vienna. Because of the problems arising from the immediate application of the “ECHR”, the Austrian government from now on international fundamental rights adopted by transformation into national laws⁶⁶. A different treatment only happened to the – UN-Convention on the Rights of the Child of 1989, a special federal constitutional law transferred it into national law. As a result of Austria’s accession to the EU, which became effective – in 1995, individual fundamental rights of Austrian constitutional law also apply to EU citizens on the ground of basic freedoms and prohibitions of discrimination under European Community law.⁶⁷

Apart from this another catalogue, consisting of fundamental rights began to cover the Austrian constitutional system since 2000⁶⁸, when the

64 Schäffer, 2014, pp. 38–39; Olechowski, 2016, pp. 259–260.

65 However, the fundamental rights laid down in the ECHR resulted from a different understanding of constitutional regulations. At these times no one realized that serious problems could arise in the application of international law, because the content of most of these rights granted in the ECHR were also embedded in the Austrian Basic Law on general rights as a part of the B-VG. Notwithstanding the problems that might be involved with it.

66 This includes regulations as follow: the European Social Charter of 1969; and the International Convention on the Elimination of all Forms of Racial Discrimination of 1972, which was fulfilled in 1973 with a special federal constitutional law, whereby the principle of equality in art. 7 B-VG was upgraded to become a human right. The next was: The Human Rights Convention of the United Nations (UN) of 1978 on economic, social, and cultural rights and on civil and political rights, which was treated more restrictively; and finally in this case it was to be prevented, that those basic social rights (rights, including claims for social benefits to the state) were given constitutional status and thus would stay under the protection of the Constitutional Court. The same happened the UN-Convention on the Rights of Persons with Disabilities of 2008, which became part of the law of the EU in 2010 (and Austria therefore committed itself to transform these provisions into national law); all these regulations were not carried out at constitutional level: Schäffer, 2014, pp. 38–39, 39–42.

67 Therefore, several articles (2, 3, 6, 18) of the “*Staatsgrundgesetz*” on fundamental Rights of the Citizens belong to EU-Citizens too: Gehler, 2018, pp. 382–384.

68 Gehler, 2018, pp. 425–428 (Fundamental Rights-Convention 1999/2000), 428–459 (European Union-Convent 2001/3), 441–445 (EU-Constitutional draft), 515 (failing of this draft).

Intergovernmental Conference of the European Union at Nice, made efforts to create a “constitution” dedicated to the European Union (EU). Despite of the fact, that this project failed, a “Charter of Fundamental Rights” was to consolidate and enshrine the broad array of rights of EU-citizens at the level of Constitutional Law. The EU-Charter of Fundamental Rights has got legally binding in Austria – since 2009 (with the Treaty of Lisbon): This allows the European Court of Justice to influence the assessment of fundamental rights issues of the EU-Charter in their application in Austria. Since 2012 the Austrian Constitutional Court treats the EU-Charter the same as the ECHR. In effect, since then in Austria three catalogues consisting of fundamental rights do exist, and in addition to that three Supreme Courts are supervising violations against fundamental rights.

4. Outlook: Remembrance of 1848 in Austria

In the past in Austria the memory of 1848 and its aftermath in every period of political development found always neglect. 175 years ago⁶⁹ the awareness of the effects of the revolution, which have continued to present days, has almost completely faded – contrarily to Hungary, where the outbreak of the 1848-revolution is celebrated as a states-holiday since 1928 (despite of the years of socialist regimes from 1948 up to 1989).⁷⁰ In the Czech Republic one can realize a remembrance of the Reichstag at Kremsier.⁷¹

The attitudes in Germany are quite different, here the Federal President and the Bundestag had issued statements to the public, which keep the memory about the 1848 alive. Beyond that, the German Federal Archives in Koblenz also started an online series on 175 years of the 1848/49-revolution. From February 2023 on until August 2024, every month they present one picture or document from the revolutionary years on the Federal Archives website. The online presence is a digital additional project in addition to a

69 Cf. after 150 years: Hye, 2003, p. 10 (the widely respected daily newspaper „Die Presse” [“The Press”] mentioned a collective loss of memory [„kollektiver Gedächtnisschwund“].

70 Cf. Gergely, 2003, p. 168.

71 Cf. Koržalka, 2003, p. 238.

permanent exhibition in the Federal Archives Memorial at Rastatt.⁷² On May 18, 2023, the first gathering of the German National-Assembly 175 years ago was commemorated in a ceremony, among other things in speeches of the Federal President as well as the President of the German “Bundestag”.⁷³

In contrary to this, in Austria none of the supreme authorities of the Republic, neither the Parliament (*Nationalrat* and *Bundesrat*) nor the Federal President respectively the Federal Government found it worth to point out on the days of the 1848-revolution in spring of 2023.⁷⁴

72 [https://www.bundesarchiv.de/DE/Content/Meldungen/2023-02-15_akte-des-monats-1848.html (26.04.2023)]: Pictures and documents from the revolutionary years 1848/49.

73 Cf. [<https://www.deutschlandfunk.de/175-jahre-deutsche-nationalversammlung-bundespraesident-haelt-festrede-100.html> (01.06.2023)].

74 At the invitation of the Third President of the National Council only the Freedom Party of Austria organized an event with scientific lectures in an adjoining building of the Parliament (Palais Epstein) on March 28, 2023 under the “175 years of the bourgeois revolution in 1848: [https://www.ots.at/presseaussendung/OTS_20230329_OTS0064/175-jahre-buergerliche-revolution-vortragsabend-ueber-geschichte-und-erbe-von-1848 (07.05.2023)]: 175 years bourgeois revolution – lecture evening about the history and heritage of 1848.

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CONSEQUENCES OF THE “SPRINGTIME OF NATIONS” IN CROATIA – FINDING A SEPARATE LEGAL SYSTEM BASED ON THE ROMAN LEGAL TRADITION THROUGH REACTION

Abstract

The events of 1848 and the political changes following the revolution in Hungary had lasting legal consequences in Croatia, more specifically in the Triune Kingdom of Dalmatia, Croatia and Slavonia. Direct results of the “Springtime of Nations” can be recognized in the abolition of serfdom, i.e. of the feudal system, and the rising self-awareness in the attempts to regulate the relationships with the Crown, Hungary and other parts of the Empire. The indirect outcome, significant both on the national level and in an individual’ life, was the introduction of ABGB and the institutionally sanctioned reception of Roman law in the Triune Kingdom, which also meant that for a longer time there was to be in force the same civil code in the majority of Croatian lands. Additionally, the continued use of ABGB after 1861 meant the legal separation of Croatia (the Triune Kingdom of Dalmatia, Croatia and Slavonia) from Hungary and an independent legal development, esp. in private law matters, after centuries of common legal tradition.

Keywords: springtime of nations, Croatia, Triune Kingdom of Dalmatia, Croatia and Slavonia, ABGB, Roman legal tradition, Roman law

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1. Introduction

The revolutionary 1848 is considered as a major threshold in the development of the idea of nation and national states in the Central and East Europe.⁷⁶ Furthermore, it marked the end of feudalism in these parts of Europe and the beginning of a move towards the modern organization of states. However, as it is known, the transition from the old system was not easy, peaceful or swift, and the repercussions of the revolutionary 1848 diverged substantially. Specific circumstances in different empires, countries or the lands resulted in diverging “national” approaches to the revolutionary idea, what it comprised, and the appreciation of its consequences as reflected in later national historiographies. Thus, a nuanced and multifaceted approach to the topic is required, taking account of different perspectives on the same events and the positions of all the actors taking part in these events. In that sense, the happenings of 1848 and the quick succession of political and legal changes in its aftermath within the Habsburg Empire represent a highly complex issue.

In the Croatian lands, the situation was further complicated by their division among those under the direct control of the House of Habsburg and those belonging to the Lands of the Crown of St. Stephen, the latter forming the (Triune) Kingdom of Croatia, Slavonia and Dalmatia (also shorter the Triune Kingdom).⁷⁷ As the Croatian Diet (*Sabor*) of the Kingdom of Croatia, Slavonia and Dalmatia was the primary representative of the Croatian lands, main bearer of the historical national rights and the center of political will of Croatian people within the Habsburg Empire⁷⁸, the focus in the elaboration of the topic is put on the Triune Kingdom and the role of the *Sabor* during the events of 1848 and in the following years. More precisely, the nature of decisions made in Croatia during this period are elaborated, as well as those imposed from above, on one side giving impetus to the formation of modern state institutions, and on the other side having long-term consequences on national level and for individuals.

76 Von Strandmann, 2002, pp. 1-8; Okey, 1986, pp. 84 ff.; Clark, 2023, pp. 93-169.

77 On the position of Croatian lands within Habsburg Empire and the name the Triune Kingdom of Croatia, Slavonia and Dalmatia and, see more in: Beuc, 1985, pp. 159-160, 320 ff.; Čepulo, 2006a, 48-50; Čepulo and Matković, 2022, pp. 93-94.

78 See more in Čepulo, 2012, pp. 84-87.

It is especially stressed the significance of these events in bringing about the late reception of Roman law in the continental part of Croatia⁷⁹, much later than in other parts of the Central Europe because of the Ottoman (Turkish) occupation and permanent border wars during the previous centuries.⁸⁰ Despite the fact that some elements of Roman law, especially title of the Digest 50, 17, were made a part of the *Corpus Iuris Hungarici*, and thus a part of the law in the Lands of the Crown of St. Stephen⁸¹, with the pertaining impact of the rules of Romano-canonical procedure⁸², the actual reception of Roman law in the continental Croatia from the beginning of Ottoman incursions was indeed slight comparing to situation in the Western Europe and in the Holy Roman Empire.⁸³ In that sense, the impact of legislation imposed in the Triune Kingdom in the aftermath of 1848 was essential for later development of Croatian legal system fully based on the reception of Roman law as the common denominator of the civil law (continental) legal systems.

2. Pre-1848 situation in the Kingdom of Croatia, Slavonia and Dalmatia

The events of 1848 in Croatia primarily unfolded in relationship and in reaction to what was happening in Hungary. Many centuries of common living within one kingdom, starting from 1102 and the *Pacta conventa*⁸⁴, and continued from 1527 under the Habsburgs⁸⁵, brought closer the Croatian and Hungarian people, creating many connections especially among the nobility and clergy.⁸⁶ As for the nobility, both Croatian and Hungarian, for example, this can be easily observed in the legal literature, noticing the

79 Cf. Petrak, 2022, pp. 24-25. On the short-lived influences of Roman law during the medieval period in Zagreb see Apostolova Maršavelski, 2015, pp. 254-261. Also, concerning the common legal development for Hungary see: Bónis, 1964, pp. 111-113. For the importance of Roman law in the statutes in Dalmatia and Istria see in general Čepulo, 2012, pp. 98-100.

80 See in general: Stein, 1999, pp. 88-92.

81 Béli, Petrak and Žiha, 2012, p. 72.

82 See more in: Erdő, 2016.

83 For the reception of Roman law in Germany see: Wieacker, 1995, pp. 93-97.

84 On the *Pacta conventa* and the relevant literature see: Majnarić, 2008, pp. 5-10.

85 See Beuc, 1985, pp. 159 ff.; Kann and David, 1984, pp. 56 ff., 86 ff.

86 See e.g. for the iconography in the frescos from 1700 in the Collegium Illyricum-Hungaricum in Bologna in Premerl, 2014.

origin of authors of commentaries on the Werbőczy's *Tripartitum* (1514) and the afterwards developing common (customary) law.⁸⁷ Nevertheless, the language difference and the care to preserve legal and feudal rights, tightly connected with the historical political identity at the level of higher strata of society, expressed in the first place through the autonomy of Croatian *Sabor*, preserved the distinctiveness of the lands and two (political) nations during this long period.⁸⁸ Decisions of the *Sabor* of 1712 (Croatian Pragmatic Sanction)⁸⁹ and 1790⁹⁰, as well as the discussions at the Hungarian Diet (or the Hungarian-Croatian Diet or Common Diet as it is called in Croatian literature based on the separate representation of the Croatian Diet and the Triune Kingdom at the Common Diet)⁹¹ in 1790⁹², confirm the awareness of Croatian historical (national) rights on the eve of period of the overall European national awakening.

The nation building processes, instigated by the ideas of the French revolution and propagated with the Napoleonic wars, swiftly spread through the Habsburg Empire during the first half of the 19th Century.⁹³ In Croatia, the national movement developed as the Illyrian renaissance movement, or the Croatian national revival, during the 1830s⁹⁴, with the first journal published in Croatian language in the Triune Kingdom and the booming activities in other areas of the cultural life.⁹⁵ Its bearers were the members of enlightened nobility, civil officials, and the emerging bourgeoisie, the latter although still rather small and weak. The political thought, centred in the *Sabor*, consequently evolved in the ranks of the nobility, tied to the existing concepts of feudal "constitutionality".

87 In general, on *Tripartitum* see: Rady, 2005; Rady, 2015, pp. 168 ff. Also see in general papers contained in Rady, 2003. For Kitonich, for example see Jureković, 2004.

88 On the institutional elements of the Croatian autonomy during the medieval period see e.g. Čepulo, 2007a, pp. 511-512.

89 Jukić, 2008, pp. 143-163.

90 Engelsfeld, 1999, pp. 61-67; Čepulo, 2012, pp. 70-72.

91 Čepulo, 2012, p. 88.

92 Heka, 2011, pp. 145.

93 See e.g. Decker, 2017, pp. 158-164. For the stance of the Habsburgs towards the South-Slavic nationalities see Suppan, 2014, pp. 226 ff.

94 Stančić stressed the difference between the terms Croatian national revival which would represent the first phase in the nation building process, while the Illyrian renaissance movement would be its form, external representation. See Stančić, 2008, p. 8. See also for the Croatian national revival and the building of Croatian identity, with further references, Despalatović, 1975; Korunić, 2006a; Sršen, 2017.

95 See Švoger, 2016, pp. 73-74.

The central notion on which the programmatic texts of the Croatian revival were centered, was the *iura municipalia* (municipal rights), the autonomous rights and privileges recognized to the Triune Kingdom as a part of the Lands of the Crown of St. Stephen, and to the Croatian Diet (*Sabor*) in relation to the competencies of the Hungarian Diet (Common Diet).⁹⁶ With the rising national movement in Hungary⁹⁷, and following the dispute of 1790 with further perceived encroachments into the autonomous prerogatives of Croatian organs, most visibly in the sphere of official language in the administration and in the schools⁹⁸, the representatives of the Croatian political elite wrote the treatises and invectives to the defence of municipal, in essence, the Croatian national rights.⁹⁹ Among them, one can single out first the work *De municipalibus iuribus et statutis regnorum Dalmatiae, Croatiae et Slavoniae* published in Latin in 1830 by Josip Kušević, protonotary to the Ban of the Triune Kingdom.¹⁰⁰ Using the legal-historical documents entrusted to him in the official capacity of the safe-keeper of official documents issued by the Croatian government bodies, he argued for the separate position of the Triune Kingdom towards the Hungary. Another one was the *Disertacija iliti razgovor, darovan gospodi poklisarom zakonskim i budućim zakonotvorcem kraljevinah naših za buduću dietu ungarsku odaslanem, držan po jednom starom domorodcu kraljevinah ovih*, written in the Croatian language, štokavian dialect, in 1832 by count Janko Drašković.¹⁰¹ By its name, it was the instruction to the Croatian representatives at the Common Diet in Požun (Pozsony, Pressburg or Bratislava) with arguments with which they would defend the national rights, but which, furthermore, comprised the recommendations concerning other issues of economic importance for the development of Croatian lands.

Prepared by the faculty trained jurists, the documents focused on the legal arguments and the foundations of Croatian autonomous rights, as the authors were very careful to stress the intention to defend the existing,

⁹⁶ Čepulo, 2012, pp. 135-136.

⁹⁷ See e.g. László, 2012, pp. 183-191.

⁹⁸ Čepulo, 2006a, p. 52; Heka, 2008, p. 160; Kolak Bošnjak, 2017, pp. 45-55. See also on the role of language in the development of two national ideas papers collected in: Almási, G., Šubarić, L. (eds.), 2015.

⁹⁹ Engelsfeld, 1999, pp. 73-76.

¹⁰⁰ Kušević, 1830.

¹⁰¹ Drašković, 1832.

age-old rights and privileges, aware of the general, political, economic and demographic position of Croatia regarding both the Imperial Court in Vienna and the Budapest, i.e. the Diet of Požun. In the following years, as the Croatian national movement progressed during the 1830s and 1840s based on the alliance between the nobility and the representatives of the urban intelligence, organized also through the newly established Illyrian (People's) political party in 1841¹⁰², this conservative element remained dominant, stressing the defense of municipal rights.

However, not everyone accepted these ideas. A significant part of the nobility remained convinced that the only possible solution for the defence of national rights and the interests of the estates, especially towards the Imperial Court in Vienna, was through the closest possible connection with Hungary.¹⁰³ Thus, the Croatian-Hungarian party was established the same year, 1841, with the opposing political programme. In the years leading to the events of 1848, nevertheless, the People's party had a majority in the *Sabor*, and within its ranks the liberal civic and national ideas gained more traction.¹⁰⁴

3. Reform through reaction – reflection of the “revolutionary” events and changes of March 1848 in Croatia

3.1. National ideas, new (type of) government and majoritarianism in the Common Diet – reaction in defence of the Croatian autonomy

Growing tensions between the Hungarian and Croatian national movements during the 1830-1840s, expressed for example in Kossuth's negation of the Croatian separate polity¹⁰⁵, came to head in 1848. The centralising and unitarist tendencies, especially represented by the radical Hungarian

102 The Illyrian name was banned in 1843 so the party was renamed from Illyrian People's party just to People's party. See more in Čepulo, 2012, pp. 137-138.

103 Heka, 2011, p. 166.

104 See Markus, 1999, pp. 101-103; Stančić, 2021, pp. 105 ff. Also, in 1847, in line with the accelerated development of, the *Sabor* enacted that the Croatian language will be the official in the Triune Kingdom. See Markus, 2009, p. 14.

105 Heka, 2011, p. 184.

opposition¹⁰⁶, focused on the transformation of the Lands of the Crown of St. Stephen into the Hungarian national state and on strengthening the position of Hungary towards the Imperial Court in Vienna, while disregarding the similar position of the Triune Kingdom towards the Hungarian Diet and the position of Croatia as a politically separate nation, as well as that of other nationalities within the lands¹⁰⁷, culminated at the Common Diet of 1847-1848 and its decisions of March 1848. The talks at the Diet, as well as the rapid exchange of events during the March 1848, the Address to the king and the revolutions in the streets of Vienna and in Buda, caused deep concerns among the representatives of the *Sabor* and in Croatia.¹⁰⁸

The March events developed as a bilateral Austro (Imperial)-Hungarian matter, without concern at the official level of the Croatian rights and interests. In that constellation of forces, in a time when the old common feudal ties between the Croatian and Hungarian nobility forming a group with similar interests represented in the Common Diet were replaced by the Hungarian national idea, the separate existence of Triune Kingdom was in danger. It was considered that the new laws, the “March (April) laws” prepared and enacted in the Common Diet¹⁰⁹, will completely suppress and curtail the Croatian autonomy, at the same time taking over the Slavonian counties from the Triune Kingdom.¹¹⁰

An immediate reaction was not to be waited for long. Under the leadership of the prominent members of the People’s Party, there was organized in Zagreb the unofficial “Great National Assembly of the Triune Kingdom of Dalmatia, Croatia and Slavonia”, which proclaimed the “Demands of the

106 On the politically diverging paths between Széchenyi and Kossuth, and Kossuth’s skilful exploitation of the momentary weakness of the Court see e.g. Molnár, 2001, p. 173 ff.

107 See e.g. Tóth, 1955, pp. 235-277; Gángó, 2001, p. 45; Molnár, 2001, pp. 172-183; László, 2012, pp. 203-204.

108 See Heka, 2011, p. 180.

109 They will be later on mentioned as April Laws, in accordance with the predominantly accepted name, and especially in this book. For the text of the “April Laws” see <https://www.verfassungen.eu/hu/gesetz1848-i.htm>.

110 Threatened by being left aside for later, in a way that was partially realized after the Austro-Hungarian Settlement of 1867, this meant that the Triune Kingdom would be dealt with as an internal Hungarian affair. As it was to be expected from the earlier, pre-1848, attempts to abrogate Croatian autonomous rights and privileges, and especially in the circumstances and with the messages echoing during the early 1848, without a recourse to the Imperial Court as before, such an outcome was deemed to be calamitous for Croatian position. The language in Art. V of the specific worry. See more in Markus, 1996a, pp. 13-14.

People” on the 25 March 1848.¹¹¹ After stating in its introduction the will of the people to remain under the Crown of St. Stephen, as it was once accepted by the free will, and under the Habsburg rule, thus reaffirming in general the adherence to the existing legal-political framework (important as they were to be presented to the King Ferdinand V), 30 points of “Demands” aimed at the establishment of Croatian state autonomy and its organs on the similar lines with the Common Diet’s Address and the Hungarian “Twelve Points”.¹¹² It is demanded of the King the convocation of the Croatian Diet, which would be established based on equal representation, a special Croatian *Ministerium*, a national bank and the fiscal independence, use of national language in the administration and in the schools, establishment of the University, abolition of serfdom, freedom of press, religion and use of language, the creation of a national guard with the local officers and the use of national language, repeal of all the customs and the freedom of commerce, equality for all the inhabitants of the Military Frontier, etc.

One should especially stress the “Demand” no. 3 for the unification of all Croatian lands – Dalmatia, Military Frontier which was under the direct control of the Court in Vienna, and all other lands annexed to Hungarian and Austrian lands, with the Triune Kingdom, followed by the no. 4 and the claim for national independence, which is to be interpreted in a sense of an independent rule by the Croatian organs – *ban*, *Ministerium* and the *Sabor*. In essence, these can be easily compared with the Hungarian demands for the unification and independence, however, the perspectives on the issues to whom the specific territories appertained and what this independence meant for the other nationalities within its territories differed, or indeed clashed, as would be seen in later developments.

The most important, the first “Demand”, made in connection with the ongoing talks from the beginning of 1848 on the nomination of a new Croatian *ban* (*banus*, viceroy and military commander)¹¹³, highest executive position and one of the principle symbols of separate Croatian rule¹¹⁴, was the request to the King for the appointment of count Josip Jelačić Bužimski, a lieutenant in command of one of the regiments in the Military Frontier, as

111 For the text see: Čepulo et al., 2010, pp. 39-46. More about their significance see in: Čepulo, 2006a, pp. 53-54. Švoger, 2016, pp. 75-76; Stančić, 2021, pp. 107-108.

112 For the ‘Twelve Points’, with further references, see the chapter in this book by G. Képes.

113 Beuc, 1985, pp. 202-211.

114 Čepulo, 2012, pp. 82-84, 140; Stančić, 2021, p. 116.

the *ban*.¹¹⁵ Unbeknownst to the organizers of the “Assembly”, however, he was already appointed by the King’s decree as a *ban* two days earlier, on the 23 March 1848. Additionally, it was also the one “Demand” to be accepted by the King, as he, albeit receiving the Croatian legation, refused the official recognition of the (condensed and modified)¹¹⁶ “Demands of the People”, as did the *Staatskonferenz* which discussed the Croatian positions on the 1-2 April 1848, considering that they were proclaimed by an unsanctioned body.¹¹⁷ Nevertheless, the appointment of count Josip Jelačić as a *ban* had far-reaching consequences.

After being officially given the authority in Vienna on the 8 April, one day after the Hungarian *Ministerium* was confirmed and three days before the King’s sanction of the “April Laws”, Jelačić returned to Croatia. Being aware of the significance of the “April Laws” for the Triune Kingdom, as the Croatian political elites were as well, he sent the proclamation on the 19 April to all the public bodies that they are not supposed to accept any orders from the Hungarian *Ministerium* until the Croatian *Sabor* will be convened, and that in the meantime the supreme power will pertain to the office of the *ban*. Furthermore, he issued a line of decrees, among them also abolishing the serfdom and the feudal relationships, the issues that were part of the “April Laws” but which were not recognized and were not to be accepted as such in the Triune Kingdom. Although it is a question whether they would have been abolished so swiftly without the revolutionary/reform events of the 1848, the transformation of the society’s legal-economical basis was thus executed by the Jelačić’s decree, which still needed to be confirmed in the *Sabor*.

3.2. Acts of the Croatian Sabor 1848 (5 June – 9 July)

Based on the new rules for the election of representatives prepared by the Ban’s Conference, which introduced general and equal representation (with the limitations characteristic for the period)¹¹⁸, the members of the *Sabor* were elected during May and it was convened on the 5 June 1848. Its activity, split in two sessions until the 9 July, was marked by a wide legislative activity.

115 Markus, 2009, p. 16; Stančić, 2021, pp. 116-117.

116 At the request of the Court Minister there was made a limitation of the 17 to 11 “Demands” and the omission of 13. See Engelsfeld, 1999, p. 83.

117 See Engelsfeld, 1999, pp. 83-84; Čepulo, 2012, p. 139.

118 For details in English see Čepulo, 2006a, p. 54.

First of all, it confirmed Jelačić's decrees, giving them the form of legislative acts.¹¹⁹

For wide number of individuals, certainly the most important was the abolishment of serfdom and the grant of ownership of household land to former serfs (Art. XXVIII:1848).¹²⁰ However, that was not the sole object of legislative efforts. While the affairs of constitutional nature and stating the principles for the regulation of relationships with other parts of the Monarchy required fast reaction without any delays, there was created a number of *Sabor's* Committees to prepare the draft acts regarding different issue of public and private law and rights of citizens. These drafts were ultimately not enacted as the *Sabor* was soon disbanded, but they laid the foundations for later reforms.¹²¹

Corresponding to the moment, the *Sabor* focused on the position of the Triune Kingdom at the "inter-national level" in the Monarchy.¹²² As the speeches reported in the newspapers witness, e.g. for the 9 June 1848¹²³, the representatives extensively discussed the future relationship towards and with the Hungary, expressing the views that the "March (April) Laws" unlawfully changed the age-old constitution of the Monarchy and refusing any recognition or acceptance of decisions by the Hungarian *Ministerium*. The main line of reasoning in these speeches followed the precepts of the French revolution – *liberté, égalité, fraternité*¹²⁴, whereby, while acknowledging the long, 800 years old community of life and legal union, its future continuation was conditioned on the equality of Croats and Hungarians, but even more, all nations – especially having in mind and endorsing the requests from Serbian Vojvodina, which was supposed to enter into close union with the Triune Kingdom.¹²⁵

119 Art. III:1848. See the text in: Kolanović (ed.), 2001, p. 540.

120 Čepulo, 2012, p. 144.

121 Markus, 1996b; Čepulo, 2012, p. 146.

122 Despite the conciliary attempts from time to time, which were usually judged as a way to keep a secure flank during the negotiations with the Court, the press reports both in Buda – Pest and in Zagreb were quite inflammatory. See Heka, 2011, pp. 187-196.

123 See Novine dalmatinsko-hrvatsko-slavonske, vol. XIV, br. 60, 13 June 1848, <http://dnc.nsk.hr/DataServices/ImageView.aspx?id=7de5291e-1aa7-4955-bed6-97f66ffc59ba>

124 It should be mentioned that the *Sabor* also issued a Manifesto of the Croato-Slavonian people as a public proclamation towards foreign nations on the principles of government and the positions of the Croatian people towards other peoples, nations in the Monarchy. The main idea behind the Manifesto, as well as most of the legislative activity in public law sphere was safeguarding the Croatian historical rights. See Stančić, 2021, p. 117.

125 The debates revolved also around the borders between the Triune Kingdom and the Serbian Vojvodina and the position of Srijem which was supposed to be donated to Vojvodina on the condition of close union with the Triune Kingdom and the sanction of the King.

At the moment, however, this did not seem so realistic, so the political shift was made in favour of Austria. This is especially recognized in Article (Act) XI:1848 "On the basis for the regulation of relationships with Hungary and with Austria".¹²⁶ Starting from the wishes to preserve the unity of Monarchy and to remain in friendly relations with the Hungarian people¹²⁷, the *Sabor* first reaffirmed the Croatian historical freedom and independence and the complete refusal of all the acts and instructions from the present Hungarian *Ministerium*, requesting from the King the establishment of a separate Croatian government under the *ban*. Furthermore, it is proposed a unified government for the whole Monarchy, with a minister for the Triune Kingdom responsible to the *Sabor* who would be required to countersign the decisions concerning the Triune Kingdom. The Article also contained the statement that the Lower Slavonia, Military Frontier¹²⁸ and the Croatian Littoral (the area of the northern Adriatic Coast which includes Rijeka) are the integral parts of the Triune Kingdom, which will be guarded and defended against everyone, as well as the request for the unification of Dalmatia with the Triune Kingdom, and the creation of closer ties of other Southern Slavic lands (Serbian Vojvodina, Lower Styria, Carniola, Carinthia, Istria and Gorizia) within the Monarchy with the Triune Kingdom. Finally, as the expression of Austro-Slavism, the term used to describe the attitude of Croatian politics during the revolutionary 1848-1849, on one side intended to bring the

On the exchange of letters between *ban* Jelačić and patriarch of the Serbian Orthodox Church Josif Rajačić, as the political leader of Serbs in the Monarchy, concerning the patriarch's attempts of pre-emptive exercise of control in Srijem, whereby *ban* Jelačić warned that the conditions for any surrender of authority were not fulfilled, as well as the borders were not defined, see Markus, 1998, pp. 589-595. See also on the support and defence of the positions and rights of Serbs within the Monarchy, viz. Hungary, by the Croatian *Sabor* and the *ban* in Heka, 2011, pp. 192-193.

¹²⁶ See Čepulo *et al.*, 2010, pp. 57 ff.

¹²⁷ This is elaborated in sec. 7 of the Article XI:1848: „Let the friendly union with the Hungarian peoples be maintained in the sense of the (Croatian, author's remark) Pragmatic sanction and on the basis of liberty, equality, and fraternity, – but, in what manner this will be realized, the people of the Triune Kingdom wishes to decide only after the King will fulfil its' wishes and when the relationship of Hungary towards the whole Austria will be more clear." Additionally, the principles of the unity of central government and the equality of all nations in the lands of the Crown of St. Stephen are set out in Art. XX:1848. See Kolanović (ed.), 2001, pp. 552-553.

¹²⁸ The position of Military Frontier was especially regulated in Art. XXVI:1848 recognizing the Military Authority controlled by the central government, while stating its political belonging to the Triune Kingdom. See Kolanović (ed.), 2001, pp. 553-570.

Triune Kingdom closer to Austria, and on the other side forging closer bonds between (South) Slavic lands which would play a more significant role in the Monarchy¹²⁹, it was decided that the *Sabor* would send three emissaries to the Austrian Diet.

The Article XI:1848 contained the provisions which could be deemed as a constitutional program on the position of the Triune Kingdom within the Monarchy, directed towards the King. Indeed, it was the only act (resolution) of this *Sabor* to be sanctioned by the King Franz Joseph, i.e. the parts which were in accordance with the new 1849 (imposed) Constitution as the sanction was granted only in 1850. This practically meant the recognition of the integrity of Triune Kingdom¹³⁰, however now as one of the lands of the Empire, and severing the ties with Hungary, while the centralized government of the Monarchy and the local (Croatian) government under the direct authority of a minister proceeded from the Constitution itself. Although it seemed that these results corresponded to the Croatian requests, with regard to the preservation of Croatian autonomy they went much farther in limiting it. Accordingly, the new Constitution was not received with much enthusiasm and was not even proclaimed immediately, but only after the break of Hungarian revolution on the 6 September 1849.

4. Reforms from above during the period of Neoabsolutism (1849-1859) – ABGB and the late reception of the Roman law

It was mentioned that the *Sabor* of 1848 constituted a number of committees to prepare drafts of acts which would regulate private law issues, in essence bringing Croatian legal framework and economy from the feudal to the capitalist

¹²⁹ For the Austro-Slavism see more in Markus, 2009, pp. 19-20.

¹³⁰ In the letter by Franz Joseph on the recognition of Art. XI:1848 it is recognized belonging of the Croatian Littoral with Rijeka (Lower Slavonia was not deemed an issue at all) to the Kingdom of Croatia and Slavonia, as a separate land independent of Hungary. The pertinence of the Military Frontier to the Triune Kingdom was not problematic, however, it was not yet surrendered to the civilian governance of the *ban* and the *Sabor*. See Engelsfeld, p. 93.

system.¹³¹ However, as it was disbanded and was not convened until 1861, i.e. during the period of false constitutionality (1848-1851) and Bach's Absolutism (1851-1859), the envisaged acts and reforms were not realized. Nevertheless, the transition to the new system was begun, but only from above.

The new, March Constitution of 1849, while maintaining and extending the prerogatives of the Monarch, confirmed (from the revolution) or introduced at the level of the whole Monarchy, many of the enlightened and liberal reforms with regard to the rights of individuals. They included, among others, the equality of all citizens, the protection of private ownership, the freedom of trade and the freedom of occupation. Equally important for their enforcement was the new organization of judiciary and administration on the modern (civic) foundations.¹³² While these changes had been already mostly accepted in the Western Europe, in the greater parts of Central East Europe, including the Triune Kingdom, economically under-developed, with stronger nobility and with the high percentage of peasantry, they were recognized as needed by the political elites in the years leading to the revolution of 1848, but were not carried out because of the conflicting interests and ideas on their implementation. In the end, thus, the Court's efforts to strengthen the economic and financial foundations of the Monarchy brought about the attainment of revolutionary ideas on economic level, especially concerning the personal liberties. The new, centralised organization of government certainly was not in conformity with the political ideas behind the reforms and revolutions of 1848, however, it was expected to be more successful in fostering new economic relationships and accelerating the transition of wider array of common people from old to the new legal, economic and the political system, catching up with the remainder of Europe.¹³³

Much greater significance than the March Constitution, which was rather quickly suspended on the 31 December 1851, had the introduction of the Austrian *Allgemeines Bürgerliches Gesetzbuch* (ABGB)¹³⁴ in all the lands

131 In general on the transition from the oligarchic society, from 1848, to the modern state, with the reforms by *ban* Ivan Mažuranić, see Markus, 1999, p. 103; Čepulo, 2003, 215-222 (summary in English language); as well as the papers collected in: Čepulo, Rogić Musa and Roksandić, 2019.

132 Čepulo, 2012, pp. 147-151.

133 Gross, 1985, pp. 11-26.

134 *Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie*, JGS 946/1811., last amended on 9 September 2021., BGBl. I 175/2021.

of the Monarchy, i.e. those that did not belong to the Austrian Hereditary Lands where it was already in use.¹³⁵ Among the Croatian lands belonging to the latter, the ABGB had become the law in force in the Military Frontier immediately (1 January 1812)¹³⁶, while in Dalmatia, Istria, Dubrovnik, and other parts of the Illyrian Provinces established by the French, in the period from 1814 to 1820.¹³⁷ Now, as decided by a decree from the 2 November 1852, the application of the ABGB was to be extended to the Triune Kingdom from the 1 May 1853.

The introduction of ABGB in the Triune Kingdom had wide and long-lasting consequences. In first place, as a codification of private law, although with the public law elements of constitutional significance¹³⁸, it was of primary relevance for individuals. It confirmed the equality of all the citizens and the entrepreneurial freedom, but not only that, codifying the general principles and so many details belonging to the Roman legal tradition, i.e. Roman law as elaborated through the reception¹³⁹, it allowed in every-day life the free development of commercial activities. At the same time, it provided the safeguards and protection of the weaker party, as envisaged already by the Roman magistrates, jurists and emperors, e.g. in the area of liability for eviction and material defects. Despite the fact that during the first several decades the individualistic character of the Roman law and the ABGB could be considered more as the legal irritant, as it was shown in a study by D. Čepulo concerning the dissolution of communal ownership (*zadruga*)¹⁴⁰, it could be said that the liberties granted by the ABG allowed for the faster transformation of society.¹⁴¹

In a broader sense, the ABGB signified a final break-up with the feudal state following the abolishment of serfdom. As the reception of Roman law during the Middle Ages and later on is associated primarily with the cities,

135 See e.g. Neschwara, 2009; Olechowski, 2012.

136 For the earlier efforts of regulation and modernization of law in the Military Frontier see Petrak and Milković Šarić, 2014, pp. 45-55.

137 See in more detail Derenčin, 1880, pp. 15-16; Gavella, 1993, p. 337; Olechowski, 2012, p. 692.

138 Brauner, 2013, pp. 1020-1023.

139 See more, e.g. in Koschimbahr-Lyskowski, 1911; Steinwenter, 1954; Meissel, 2014.

140 *Zadruga* was still rather widely used among the peasants, so the division of its property, esp. *mortis causa*, into private ownership arising from the Roman legal tradition created many problems. See Čepulo, 2007b.

141 Krešić, 2017, p. 6.

burgesses and merchants, the feudal system was based upon and developed through the customary law. In the Lands of the Crown of St. Stephen, including the Croatian lands (at least the continental part), the reception of Roman law (*ius commune*) was rather limited before the 15th Century, but this was not something exceptional.¹⁴² The Roman law moved slowly to the east, only with the establishment of greater, richer cities, rise in the number of university schooled citizens and the immigration of foreign merchants. In the tension between the customary law and *ius commune*, the former kept its force by the power of nobility, while the latter gained ground with the growth of bourgeoisie and spread of universities. However, the quickening expansion of *ius commune* in Central Europe from the 16th Century, in first place in the Holy Roman Empire, was prevented in the Croatian and Hungarian lands by the Turkish incursions, already from the mid-1400s, and later occupation of large portions of these lands. In these circumstances, despite the efforts to use the results of *ius commune* and incorporate it into the fabric of the law of the lands, the customary law maintained its primacy.

Stronger influences of the study of Roman law began to be perceptible, at least in the law in books, during the late 17th and in the 18th Century¹⁴³, e.g. in the elaboration of law of the country with the Roman legal terminology and system, but the old categories were still defining the legal system.¹⁴⁴ Thus, when speaking about the substance of law, while the received Roman law, *ius commune*, in the guise of natural law systematizations, was already being codified in the beginning of the 19th Century in France, Austria, and other countries, in the lands of the Crown of St. Stephen, including the Triune Kingdom, there was still in 1850 mainly used the customary law, centered on the *Tripartitum* and the *Corpus Iuris Hungarici*.¹⁴⁵

Unification of the civil law in the Monarchy with the ABGB was consequently not only necessary from the economic standpoint, but for the modernization of the legal system as a whole. It could be called “better late than never” attachment to the European legal mainstream, i.e. to the European legal production as it was based on the reception of the Roman law and the evolving Roman legal tradition, especially with the Pandectist school.¹⁴⁶

142 See Bónis, 1964.

143 Gönczi, 2008.

144 E.g. Huszty, 1745. See Karlović, 2013, pp. 1310-1311.

145 Rady, 2015, pp. 220-221.

146 See more in Haferkamp, 2018.

Regardless of the specific acts which would regulate singular areas, without the central, civil code, law based on the protection of absolute ownership, the freedom of contract and the testamentary freedom, there could have been hardly expected any real progress. One could even dare to say that such a late catch-up with the common European legal development may have influenced the legal culture up until these days, although, this would not depend only on the substantive, but maybe even more on the procedural law.

In any case, with the introduction of the ABGB in the Triune Kingdom, the new phase of the development of private law began in Croatia. Here, the use of the name Croatia, relating to the territories of modern-day Republic of Croatia, is justified by the fact that from 1853 there was the same basis of private law, respectively of the legal system, in the majority of Croatian lands – Triune Kingdom as well as the Military Frontier, Dalmatia (with the wider area of Dubrovnik) and Istria.¹⁴⁷ Taking into account the original particularism of the medieval law which was present in the Croatian lands, as well as elsewhere, the Venetian conquests on the eastern coast of Adriatic taken over by Austria after its demise, the independent development of Dubrovnik, the permanent occupation of Turkish Croatia and Turkish Dalmatia, separate regulation of Military Frontier, there were divergent developments of law well into the 19th Century. Thus, with the gift of hindsight, the use of one private law in different Croatian lands for a longer period¹⁴⁸, although without a specific effect at that time because of the separate systems of judiciary, can be considered as a significant step in the overall development of law in Croatia up until today. What is more, as the developments of 1861 will show, the consequences of the 1852 decree on the introduction of ABGB in the Triune Kingdom were to be even more far-reaching.

5. *Sabor* of 1861 – creation of a separate legal system

Following the October Diploma of 1860 and the February Patent of 1861, Croatian *Sabor* was convened on the 15 April 1861. It was active again for a short period time, until the 9 September 1861, during which it prepared and

¹⁴⁷ Krešić, 2017, pp. 5-6.

¹⁴⁸ Meaning, if we disregard the relatively short use of Napoleon's Code civil. See Petrak, 2022, p. 27.

enacted many new laws.¹⁴⁹ However, only the Art. XLII:1861 on the relationship with the Crown and the Kingdom of Hungary was sanctioned by the king.¹⁵⁰ According to its contents, this Act is primarily considered as a program for the new, envisaged negotiations with the Hungary.¹⁵¹ It was based on the confirmation of the decisions by the *ban* and the *Sabor* of 1848, basically repeating that all the state bonds between the Triune Kingdom and Hungary were severed in 1848, while stating that there was still the wish, based on the historical relationship, to enter the new union based on the recognition of Croatian state right and the principles on equality.¹⁵² Despite the war and everything that happened during the 1848, recent bitter experience with the absolutism, duplicitousness by the Court concerning the unification of Dalmatia with the Triune Kingdom¹⁵³, and the rejection of new constitutionality based on the representation in the Imperial Council (parliament), which would make the Croatian *Sabor* insignificant, it was thought there must be some compromise with the Hungary for the defence of Croatian state rights.¹⁵⁴

With all the work on the acts, drafts and proposals which were not sanctioned or completed, but were of great use in the legislative work during the later period, after the Croatian-Hungarian Compromise, and especially under the *ban* Ivan Mažuranić who was an important actor of this session¹⁵⁵, one of the major results of activity of the *Sabor* of 1861 concerned the use of the laws introduced during the neoabsolutism. In general, the premise was expressed in the Art. LXXX:1861 (being a conclusion, rather than an act).¹⁵⁶ More specifically, there was established the *ad-hoc* judicial committee (*Odbor za pravosudne poslove*) for the purpose of checking the new laws

149 Čepulo, 2012, pp. 162-164.

150 Kušlan and Šuhaj, 1, 1862, pp. 39-40. See Čepulo, 2006a, p. 62; Heka, 2011, p. 266.

151 Engelsfeld, 1999, p. 131; Čepulo, 2002, pp. 144-145.

152 See the speech by later *ban* Ivan Mažuranić, the author of the Art. XLII:1848, in Mažuranić, 1886. See also Heka, 2011, p. 268.

153 Engelsfeld, 1999, p. 131. For the repeated requests concerning the reintegration within the historical Triune Kingdom of Dalmatia, including Dubrovnik, Kotor and the islands of Kvarner, and the recognized intentional prolongation of this process by the Court, see Arts. X and XXVIII:1861, Kušlan and Šuhaj, 1, 1862, pp. 14, 32.

154 Čulinović, 1967, p. 81; Čepulo, 2006a, p. 61.

155 See Čepulo, 2002, pp. 141-143.

156 Although, see in the Dnevnik Sabora notices of the proposal for the abolishment of all laws introduced during the last 12 years by Jovan Živković, e.g. Dnevnik Sabora, 1862, pp. 82, 85.

and changing them¹⁵⁷, among others. The committee's final proposal was to take over the acts introduced during the absolutism, among which was also the ABGB, but which would come into force on the 1 January 1862 with the exactly proposed set of changes.¹⁵⁸ However, as the *Sabor* was prematurely disbanded, the ABGB was just continued to be used¹⁵⁹, but without the proposed changes.

Thus, contrary to the decision by the Hungarian "Conference of the Justice of the Realm" and the Parliament to return, in general, to the old (primarily) customary law¹⁶⁰, which conclusions were consulted by the members of the *Sabor's* committee¹⁶¹, the new laws introduced during the absolutism were accepted and used as a law of the Triune Kingdom. This resulted in the separation of two legal systems, Croatian and Hungarian. While for the earlier period one would speak of the common, Hungarian-Croatian customary law, especially in the matters of private law, acknowledging the Croatian autonomous rights (law) in the sphere of public law, for the period after the 1861 this was not the case anymore. Primarily taking into account the importance of the ABGB as the basis (and the greatest part) of the private law, but also other acts, e.g. the Temporary Rules of Civil Procedure for Hungary, Croatia, Slavonia, Serbian Vojvodina and Tamiški Banat¹⁶², 1861 marked the threshold from which the Triune Kingdom started with the development of an independent Croatian legal system.

157 During the 20th session, on the 15 June 1861, with the appointment of the members. See *Dnevnik Sabora*, 1862, pp. 156, 158, 161 (the public announcement of the elected members). See also Kušlan and Šuhaj, 1, 1862, p. 72. It is also said that the conclusions of the Judexcurial Conference could be consulted, which was rather mild phrasing following a dispute between the deputies on the independent work of the committee and the possibility to issue orders what the committee should take into account or not, as preserved in the minutes of the 67th session of the *Sabor* (*Dnevnik Sabora*, 1862, pp. 690-691). See also Čepulo, 2002, p. 151.

158 Kušlan and Šuhaj, 4, 1862, pp. 1-2.

159 As phrased by Čepulo, „...it was tacitly accepted as part of the Croatian legal system...” Čepulo, 2006a, p. 63; Čepulo, 2012, pp. 154, 164.

160 Essentially, as Képesy summarized the contents of the Provisional Judicial Rules which were accepted by both houses of the Parliament: “Therefore, its propositions re-introduced the old Hungarian legal norms in “most” cases... Finally, and perhaps most importantly, they acknowledged that some of the Austrian legal norms should stay in effect for the sake of legal certainty.” See; Képesy, 2019, p. 164. See also Homoki-Nagy, 2011, 140-151; Képes, G. (2016), pp. 106-107

161 Kušlan and Šuhaj, 4, 1862, p. 264; Čulinović, 1967, pp. 127-128. See *supra* fn. 81

162 Čepulo, 2006a, pp. 58-59; Krešić, 2017, p. 7.

The ABGB in use in the Triune Kingdom, and later in the legal area that corresponded to it within the Kingdom of Serbs, Croats and Slovenes (and in Kingdom of Yugoslavia), as it continued until the 1946 (and in some parts even later)¹⁶³, became in a way a separate Croatian civil code (*OGZ – Opći građanski zakonik* translated in Croatian), as it did not contain or follow later amendments enacted in the Austrian part of Monarchy, nor was it in any relation to the Hungarian law or practice with regard to the accepted rules of the ABGB.¹⁶⁴ Its interpretation was developed in the practice of the Croatian Supreme Court (*Stol sedmorice, Tabula Regia Septemviralis*, Table of the Seven)¹⁶⁵, the other direct result of the work of the *Sabor* in 1861.¹⁶⁶ Consequently, in this synergy of a codified law, which was rooted in Roman law and which made it possible to accept more easily the new concepts created on its basis during the 19th and 20th Century, and the autonomous judicial organs, a separate legal system emerged.

6. Conclusion

The “Springtime of Nations” of 1848 in Croatia (the Triune Kingdom) was materialized at first as a reaction to the reforms coming from the Common Diet in Požun, which were in essence considered as an infringement of the Croatian autonomous (later on: historical state) rights. Threats to the Croatian identity and separate political rights during the first half of the 19th Century, in first place through the attempted impositions of the Hungarian language (as the foremost element of national identity during this period of national revivals) in the public sphere, made the political elites arising from the Croatian National Revival movement and active in the Croatian *Sabor* very apprehensive of the events of the March 1848 and the ensuing laws. The reforms which were done without the consideration of the Croatian autonomous position and which would have taken away parts of Slavonia and completely undermine the specific prerogatives of the Croatian *Sabor*,

¹⁶³ Petrak, 2003.

¹⁶⁴ Derenčin, 1880, pp. 21-24.

¹⁶⁵ Although they took into account the Austrian practice and legal literature. See Derenčin, 1880. pp. 20-22; Krešić, 2017, p. 5.

¹⁶⁶ This court was established by the royal decree on the basis of the *Sabor*'s conclusion in the same year. Čepulo, 2006b, pp. 344-345.

have thus caused a strong reaction leading to the “counter-revolution¹⁶⁷ and the severance of ties between the Triune Kingdom and Hungary, laying the groundwork for later developments. Thus, apart from the abolition of serfdom and the new electoral order in 1848, the lasting consequences of the “Springtime of Nations” in the legal system would come about in Croatia only later and indirectly.

To be more specific, the reaction to the events of 1848 served more as a catalyst for later changes in the legal sphere, despite, and in one part on the basis of, externally forced legislation. This relates to the introduction of the ABGB, among other “Austrian” laws, in the Triune Kingdom in 1853, which brought about the late reception of Roman law in the continental part of Croatia. The enactment of 1853 also meant, having in mind that the ABGB was already in force in the Croatian lands under the direct control of the Imperial Court in Vienna, that there was to be in use the same civil code in the majority of Croatian lands.

Furthermore, the introduction of these laws during the period of Absolutism (1849-1859), caused another type of reaction in 1861, i.e. after the restauration of constitutionality. Specifically, the proposal of the judicial committee of *Sabor* was in favour of the continued use of these, prominently the first one in their proposal was the ABGB, although revised laws in the Triune Kingdom, resulting in their continued application, contrary to the situation in Hungary. This decision to keep up the “modern” and “foreign” legislation had as a consequence the reintegration of legal system of Triune Kingdom of Croatia, Slavonia and Dalmatia into the mainstream European line of legal development based on the Roman law. On the other side, it was of seminal importance for the independent, as opposite to the earlier common Hungarian-Croatian customary law, development of private law institutions in Croatia and the Croatian legal system as such.

167 The term is used here as the reforms were deemed illegal as they were made under duress, and especially with regard to the later Hungarian revolution.

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THE 1848 REVOLUTION: THE DAWN OF THE CZECH CONSTITUTIONALISM

Abstract

The Czech constitutional development can be divided into several relatively separate phases: pre-modern (until 1848), monarchist (1848 to 1918), republican (1918 to 1938), totalitarian (1938 to 1989), transformational (1989 to 1992) and contemporary (since 1992). The present paper intends to deal firstly with the question of pre-modern constitutionalism and the key documents of this period, i.e. the Land Ordinances, *Landfrýds*, the Czech Confederation and, finally, the General Civil Code, which, given the date of its creation, also contained constitutional material. Each document of the pre-modern era will indicate why they are not yet modern constitutions as understood by recent constitutional law theory. The developments after 1848, triggered by the revolutionary events in many parts of the monarchy, will be discussed in detail. Not only will the constitutional results (individual constitutions and their negations) be analysed, but also the projection of these constitutions into other contexts in which the achievements of the 1848 revolution were fully manifested. The key one from the Czech perspective was the Kroměříž (Kremsier) Draft, which did not come to fruition due to the monarch's decision to impose another legislative act. Still, the content of this draft foreshadowed future modern constitutional developments, where the draft included a catalogue of fundamental rights containing very progressive rights and freedoms. However, the only tangible consequence of the Kroměříž

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parliament was the abolition of serfdom. It should be remembered that until 1918 the Czech lands were part of Austria, and the Austrian arrangement influenced the modern conception of the people as the source of power, laid the foundations of modern Czech political life and, in effect, the contemporary form of the Czech judiciary.

Keywords: land ordinances; *Confoederatio Bohemica*; Czech constitutional development, Austrian constitutional development, Kremsier Draft, March Constitution, December Constitution

1. Introduction

It is a commonly held view that the Czech Republic came into being on 1 January 1993. Its creation took place already in the framework of the Czechoslovak federalisation on 1 January 1969.¹⁶⁹ However, its constitutional history began to be written before that date, when Czech constitutionalism was closely intertwined with Czechoslovak and Austrian constitutionalism (*Orbis Iuris Austriacus*¹⁷⁰).

The paper aims to analyse crucial aspects of the constitutional development of the Czech lands, in which the events of the revolutionary year 1848 are essential. At the same time, it should be noted that specific hints of constitutional adjustment can also be traced to the earlier period.

2. The first Czech Constitution

The question of the first constitution is quite widely debated in constitutional law theory. In general terms, the constitutional texts of the Union of Utrecht (1579), San Marino (1600), Sweden (1634) and England (1647-1653) are mentioned in contrast to the so-called modern constitution.¹⁷¹ These modern constitutions regulate the organisation of state power, including a human rights catalogue, providing for the individual's participative rights, and declaring

¹⁶⁹ Filip, 1999, p. 162.

¹⁷⁰ Neschwara, 2009, p. 218.

¹⁷¹ Filip, 1999, p. 79-82.

state action's objectives. The first modern constitution in this respect is the Constitution of Virginia (1776)¹⁷² and, in Europe, the constitutions of France and of Poland (1791).¹⁷³

It can be stated that if a legal document contains matters of high importance concerning the organisation of the state system, we speak of a pre-modern constitution. This approach makes it possible to talk of several legal acts as constitutions. The Czech environment is no exception, with land ordinances being the first national constitutions. The Czech lands did not form a homogeneous area, so the development differed in Bohemia and Moravia.¹⁷⁴

In Bohemia, the first attempts in this area failed due to the disinterest of the Estates (1272, 1294, and 1355).¹⁷⁵ On the other hand, from the middle of the fifteenth century, the Estates sought to adopt the land ordinance as a collection of older laws and decisions of the provincial diet. The final document, the Vladislav Land Ordinance, was published in July 1500 and represented contemporary public and private law collections. Despite the efforts, the Vladislav Land Ordinance should have been revised. The unfinished document was issued in 1530, and since 1545, there had been a preparation of a new land ordinance adopted on 1 October 1549. In 1557, however, the 1549 Land Ordinance was criticised for its internal inconsistencies and the incomprehensibility of some of its provisions. The shortcomings were then corrected by the 1561 Land Ordinance, which was approved during the reign of Ferdinand I, but printed after his death in August 1564 (during the reign of Maximilian II).¹⁷⁶

A slightly different development was typical for Moravia. At first, the so-called land peace (*Landfriede* or *Landfrýd*) appeared here, which, in addition to their earlier protective function, also began to regulate decisive issues of the country's functioning. The 1496 *Landfrýd* included general injunctions. In 1511, the Moravian Diet adopted a Land Ordinance containing, among other things, the *Landfrýd*. In 1516, the Olomouc Diet issued another Moravian Land Ordinance under the authority of King Vladislav, summarising the

172 Filip, 1999, p. 81.

173 Filip and Kroupa, 2001, p. 131.

174 For decades, Silesia had tended to belong to the German area (Kalousek, 1892, p. 56.). Silesian Land Ordinances came from 1708 and 1726, and these fundamental laws were the legal base until 1848 (Čížek, 1885a, p. 1).

175 Kalousek, 1892, p. 318-321.

176 Kalousek, 1892, p. 115-116.

old injunctions and the *Landfrýds*. Between 1518 and 1524, various general decrees were issued, which became valid even without the sanction of the monarch and were drawn up at each Diet as a land ordinance, while the ordinance no longer dealt with the Landfrýd, which was considered permanent from 1516.¹⁷⁷ The Book of Tovačovský (*Kniha Tovačovská*; 1480 to 1490; collected by Ctibor Tovačovský of Cimburk) and the Book of Drnovský (*Kniha Drnovská*, 1523 to 1543; compiled by Ctibor Drnovský of Drnovice) also influenced the development of Moravia. In 1535, during the reign of Ferdinand I, the Moravian Land Ordinance was published, based on the 1516 Ordinance and the Book of Tovačovský. Ctibor Drnovský of Drnovice participated in its preparation.¹⁷⁸ Later, the Moravian Land Ordinance was expanded and republished (1545, 1562 and 1604).¹⁷⁹

The turning point for further development was the Bohemian Revolt. The legal manifestation of these changes was the Bohemian Confederation of July 1619. The term confederation covers not only the name of the document but also a particular *sui generis* federation with confederal elements.¹⁸⁰ In this context, Professor Adamová refers to the Bohemian Confederation as the first modern written constitution. However, she puts it in the context of local ordinances, where she emphasises the question of the union of the Bohemian lands and the union of their estates.¹⁸¹ However, the Czech Confederation was not fully established in practice when it was ended by the defeat of the Estates at the White Mountain (*Bílá Hora*) in November 1620.¹⁸²

However, this defeat led to the start of work on revising the land ordinance in March 1625. The Prague Commission drafted the text of this fundamental document, but the Vienna Commission revised it. The public law part (the introductory part) was wholly changed; in the case of the private law part, it is not clear to what extent the Prague revision was used in Vienna (in Prague, continuity was assumed, and therefore the existing provincial constitution, which was revised, was used as the basis). The Renewed Land Ordinance for Bohemia was published, imposed, and promulgated in 1627 (patent of 10 May 1627). Its central thesis was that the Kingdom of Bohemia

177 Teige, 1902, p. 511.

178 Kalousek, 1892, p. 330-333.

179 Janiš, 2001, p. 126-127.

180 Adamová, 1997, p. 60.

181 Adamová, 2000, p. 62-63.

182 Lojek, 2019, p. 121-122.

had risen against the hereditary king, and therefore the opposite of what the Bohemians had defended would be accepted; the Kingdom of Bohemia thus forfeited all its rights, and the king reserved to himself the extension, modification and correction of the provincial constitution and everything related to the law. Then, the Renewed Land Ordinance introduced absolutism and destroyed Czech political life. On the other hand, private Bohemian law was left almost unchanged. At the end of May 1627, the king confirmed all its old privileges, liberties, rights, and customs to the Kingdom of Bohemia, as they were not contrary to and not abolished by the Renewed Land Ordinance. In the conditions of Moravia, modifications were made to the Bohemian Renewed Land Ordinance, especially concerning the different organisations of the authorities, and it was dated 10 May 1628 (just a year after the Bohemian one).¹⁸³

The rather harsh tone of the text was slightly softened by the Royal declarations and amendments of 1640.¹⁸⁴ After 1710, efforts were made to prepare new land ordinances, and work was still underway in the 1750s, but the intended ordinances never came into force.¹⁸⁵ This fact can be associated with the beginning of the preparations for civil codification. Thanks to the developments, however, Emperor Charles VI declared the so-called Pragmatic Sanction in the Privy Council on 19 April 1713. It was based on the fact that all hereditary lands of the House of Habsburg were never to be divided but to remain together until the House died out; the male descendants of the Archduke of Austria were to ascend the throne if there were none, then the female descendants (first the daughter of Charles IV, then Joseph I, then Leopold I and their descendants of both genders and the other lines of the House, with the priority of the male over the female being preserved). The sanction was then submitted to the Estates for accession and commitment (the Bohemian Estates on 16 October 1720, the Moravian Estates a day later and the Silesian Estates on 25 October 1720).¹⁸⁶

However, none of these documents (the land ordinances, the Czech Confederation) represented a modern constitution in a way understood by the contemporary constitutional law theory. There were no human rights

183 Kalousek, 1892, p. 422-439.

184 Ibid., p. 460.

185 Ibid., p. 475.

186 Čížek, 1885b, p. 18.

catalogues, no enshrinement of the individual's right to participation, and no declaration of the objectives of state action. In particular, the provincial constitutions were compilations of the law of the time, and just as they contain the material of the present constitutional law, they also contain, to varying degrees, components of criminal, civil or administrative fields of law.

Thus, in the middle of the eighteenth century, there was no modern constitution in the Czech lands (or in Austria), which can be compared to Poland or France. In 1792 it was explicitly stated in Austria, to which the Bohemian lands belonged, that no constitution was needed.¹⁸⁷ The development of the law in this period led to the codification of crucial branches of law, namely civil and criminal law. These trends were crowned in civil law by adopting the General Civil Code (ABGB) of 1811. As it preceded the first modern constitutions, the ABGB contained constitutional law matters, and the residues of this approach can still be seen in current civil codes.¹⁸⁸ Although there are now catalogues of fundamental rights that contemplate the rights and freedoms of the individual, the capacity to be the bearer of such rights and liberties does not derive primarily from constitutional law but just from civil law. This is because the legal capacity and legal personality were historically regulated in the ABGB, on which the constitutional texts were later built.

3. Czech-Austrian Modern Constitutionalism

The beginnings of modern constitutionalism in Czechia (and Austria) are linked to the socio-political changes that took place due to the revolution of 1848, which marked a turning point in understanding the participation of broad sections of society in political power. The revolution broke out due to growing internal political tensions stimulated by social and national divisions. It was triggered by information about events in France, where the July Monarchy was collapsing, and in the still fragmented Italy, partly controlled directly by the Habsburg monarchy (Lombardy and Veneto). The centres of the revolutionary movement became Vienna, Prague, and Pest, in addition to the Habsburg north of Italy. Crucial to the initial success of the revolution in the Habsburg monarchy was the revolutionary uprising in Vienna from

¹⁸⁷ Kalousek, 1892, p. 509.

¹⁸⁸ Filip, 2011, p. 104-106.

13 to 15 March 1848, when Metternich was forced to resign, and the Emperor promised to issue a constitution and guarantee civil liberty. The monarch declared the transition to constitutionalism in a patent of 15 March 1848.¹⁸⁹

On 17 March, he appointed a ministerial council (government), established on the model of the Western monarchies, headed by Count Franz Anton von Kolowrat-Liebsteinsky. Immediately after that, the court chancelleries were transformed into ministries based on the monocratic principle. On 18 March, the Hungarian Diet adopted a constitution, which the monarch confirmed on 11 April (the so-called “Bratislava March Constitution” or the “April Laws”).¹⁹⁰ The Habsburg monarchy became a personal union of two almost independent states united only by the person of the monarch. During these days, political life in Bohemia also came alive and demanded the necessary changes (two Prague petitions).¹⁹¹

On 25 April 1848, a constitution was issued in Vienna, named after its author Pillersdorf. It was valid for Austria *stricto sensu*, i.e. for the Habsburg states except for Hungary, Croatia and Lombardy-Venetia. The Minister of the Interior, Franz von Pillersdorf, made no secret that the hastily drawn-up constitution with its 59 provisions, as a non-original compilation of foreign models, was intended to meet the call for a constitution and dampen public opinion. Indeed, with the general upheaval of minds, it was not much expected that the Constitution would be subjected to qualified criticism. The Pillersdorf Constitution (“April Constitution”) was based on the Belgian model and introduced rigid centralism. According to this document, the Emperor also guaranteed citizens a wide range of fundamental civil rights.¹⁹²

However, it soon became apparent that the government had underestimated the public tension. A campaign against the constitution began to intensify, culminating on 13-15 May 1848. Thus, instead of calming the situation, the Constitution had the opposite effect, creating a storm of resistance. The Viennese court was forced to flee from Vienna to Innsbruck, where the Emperor proclaimed on 16 May that a new constituent assembly would adopt the constitution. In addition to abolishing the upper house, the right to vote

189 Brauneder, 2003, p. 115.

190 Saturník, 1931, p. 50-51.

191 Tobolka, 1932, p. 37-44.

192 Schelle and Tauchen, 2013, p. 18.

was extended. The elections were held in Bohemia in the stifling atmosphere of the already suppressed Prague Uprising. The Czech national liberals came to the fore, having rid themselves of their radical democratic rivals through the failed uprising. Nevertheless, the elections were held, and on 10 July 1848, the Austrian Imperial Assembly (*Reichsversammlung*) could meet in Vienna. However, the first working session is considered to be on 22 July.¹⁹³

The Parliament, meeting in Vienna and from October 1848 in Moravian Kroměříž (Kremsier), had as its main task the drafting of a new Austrian constitution. In the initial period, liberal circles seemed dominant, but then wholly opposite forces began to gain strength. Prince Felix Schwarzenberg was put in charge of the Austrian government. Moreover, on 2 December 1848, the previous Emperor's nephew, Franz Joseph I, ascended the imperial throne after Ferdinand V's resignation. The work of the Kroměříž Assembly continued, and its deputies respected the state-law situation created by implementing the Bratislava March Constitution and prepared a constitution for only 17 Austrian provinces (later Cisleithania). The draft was based on recognising the validity of the Pragmatic Sanction and declared the Austrian Empire to be a hereditary and integral constitutional monarchy. Other initial ideas of the constitutional works were the sovereignty of the people, or the parliament representing them, and the separation of powers. Kajetan Mayer's outline was the basis for the draft. The division of the empire into historical states was to be preserved, which were to be granted limited autonomy in matters of provincial importance (science and art, supervision of pious foundations, poor and humanitarian affairs, building and fire regulations, promotion of agriculture and industry) and the right to regulate other matters (education, church affairs, police, etc.) within the limits of imperial legislation. The provincial administration was to be headed by a governor appointed by the Emperor, who presided over the local assembly. The organisation of the individual provinces was to be regulated by local constitutions. The all-Austrian parliament was to be a bicameral Reichstag, consisting of a chamber of the people, elected by direct election, and a chamber of the states, elected by the provincial assemblies. The sovereign's position was to be derived from the constitution, to which he was to swear upon ascending the throne. The Emperor was to have sole executive power and

193 Ibid., p. 18-19.

exercise it through ministers. He was to have a suspensive veto over imperial laws passed by the Reichstag. A special law was to regulate the system of independent courts, separate from the civil service. A new imperial court was to be established, the members of which were to be appointed partly by the Emperor and partly by the Land Chamber. It was to have jurisdiction over disputes of a constitutional nature, the trial of high state officials and severe attacks against the sovereign and the Diet. The supreme courts of the various countries were also to be constituted. The constitutional work went furthest with the catalogue of fundamental civil rights, also discussed by the plenum of the Constituent Assembly. The draft was based on the natural law concept. Its authors understood fundamental civil and political rights as natural, inherent, and inalienable. The Constitution's final draft was a compromise between the Federalists and the Centralists. Still, the Kroměříž Diet did not have time to approve the constitutional draft because it was dissolved on 7 March. Even before that, on 4 March 1849, a second imposed constitution was promulgated, called Stadion Constitution after its author (or "March Constitution").¹⁹⁴

For completeness, it should be added that in September 1848, the Moravian Provincial Assembly approved the Moravian Provincial Constitution. The assembly expected the sanction of the constitution by the Imperial Diet and the monarch. Still, the proposal was not subsequently examined in detail, and therefore the constitution did not manifest itself in practice (as did a large part of the Austrian constitutions from 1848 to 1867).¹⁹⁵

The Stadion Constitution was issued on 4 March 1849, and the authorities were notified of its issuance by the Ministerial Council in a circular dated 6 March 1849. Still, the Constitution did not make much of an impact on real life. Although Emperor Franz Joseph I duly published it in Olomouc with his patent, it was never put into practice, and its adoption was instead a legitimisation of the dissolution of the Constituent Assembly. The constitution was based on the unity of the whole empire, including Hungary. Some issues from the draft of Kroměříž were used for the newly imposed constitution. Unlike the April Constitution, the Stadion Constitution distinguished between imperial and provincial legislation, but the imperial decree was to be decisive. The Imperial bicameral Diet was to exercise legislative power in

¹⁹⁴ Ibid., p. 19-21.

¹⁹⁵ Dvořák, 1900, p. 86-88.

all-state matters, enumerated exhaustively. According to this constitution, individual non-Hungarian states were given land ordinances. This also happened on 30 December 1849 for Bohemia and Moravia. Still, they never came into force, so the new provincial assemblies never met, and the regional committees were never formed. At the same time as the octroy constitution, a patent was issued containing fundamental civil rights and a patent on the execution of the redemption of serfdom, which followed the framework law of 7 September 1848. This constitutional text was also supplemented by a civil rights catalogue issued as a separate patent. Its validity was limited to non-Hungarian countries, and it was not put into practice. The constitution was, therefore, fictitious and was never implemented.¹⁹⁶

On 17 May 1849, Stadion resigned due to a severe illness, and Alexander Bach temporarily took over his office until the government's reconstruction. The government was finally reconstituted on 28 July 1849, and Bach took over the Minister of the Interior seat. In his succession circular of 15 August 1849, Bach was particularly keen to stress the nature of the new government and the whole system. At the same time, the Ministry of the Interior continued to elaborate the constitution further. In January and February 1850, the land ordinances for most countries, including all three Bohemian states, were officially published. The convocation of the local assemblies was envisaged for the autumn of 1850, so the *Reichstag* could be convened in the spring of 1851. Although these statutes did not enter into force, they became the de facto basis of the land ordinances of 1861.¹⁹⁷

In April 1851, Emperor Franz Joseph I appointed the Imperial Council, to the head of which he then appointed Karl Kubeck, who paved the way for the revocation of the imposed constitution. By then, political events had already begun to move very quickly. On 20 August, the Emperor signed three decrees, namely a cabinet letter addressed to Kubeck, which changed the status of the Imperial Council from that of a personal advisory body to that of the Emperor, a cabinet letter to Schwarzenberg, in which the government was relieved of its responsibility to any other political authority and continued to be accountable to the Emperor, and a cabinet letter to Schwarzenberg, in which the government was asked to consider the possibility of implementing the 1849 Constitution. As it soon turned out, this was the penultimate

¹⁹⁶ Schelle and Tauchen, 2013, p. 21-22.

¹⁹⁷ Ibid., p. 22.

step towards liquidating constitutionalism, which had not yet had time to develop its essential features. The final action was taken after the coup d'état in France on 2 December 1851. At the end of the year, Franz Joseph I called the Imperial Council and the government together for a joint session and had three patents read out, published on 31 December 1851 as the so-called "New Year's Patents". The "neoabsolutism" was much more consistent than that of the Metternich. Under the neoabsolutism, the government imposed a rigid centralised regime persecuting every democratic and national movement. For the first time since Joseph II's efforts, it again tried to fit the Kingdom of Hungary into the ultimately unified framework of a single centralised state, in which new forms of local government were created instead of the traditional county authorities, and Austrian regulations replaced the old Hungarian law.¹⁹⁸

An essential feature of this period is the assertion of the influence of the Catholic Church, which the Concordat expressed concluded on 18 August 1855 and promulgated by the Bull of Pope Pius IX *Deus humanae salutis auctor*. It introduced the so-called coordinating principle in the relationship between the State and the Church, whereby legal life was divided under the secular and ecclesiastical jurisdiction.¹⁹⁹

The collapse of the neoabsolutist regime was brought about by foreign policy failures, the financial crisis, and rising internal political tensions in the second half of the 1850s. In the second half of the 1850s, the monarchy began to find itself in an increasingly complicated domestic and mainly foreign policy. In June 1859, Austria succumbed to French and Italian troops at the Battle of Magenta and Solferino. The Emperor then had to cede Milan to the King of Sardinia. In domestic politics, the centralist and absolutist regime was becoming increasingly untenable. The first steps, therefore, had to be taken as soon as possible. Minister Bach was dismissed from office, and on 15 July 1859, an imperial manifesto was issued announcing the first concessions from the positions of absolutism. On March 5, 1860, Patent No. 56 of the Ordinance announced that the sovereign had decided to multiply the Imperial Council with extraordinary members and would periodically convene it to consult it on important financial, legislative, and other questions. In addition to the archdukes, certain ecclesiastical dignitaries and

¹⁹⁸ Ibid., p. 23.

¹⁹⁹ Valeš, 2008, p. 114.

meritorious persons appointed by the Emperor, 39 representatives of the provincial assemblies, whom the Emperor again selected on the proposal of these assemblies, became extraordinary members of the Imperial Council. There was talk of a multiplied Imperial Council. The result of the deliberations in the Imperial Council was, among other things, the manifesto "To My Peoples" of 20 October 1860, which recalls in general terms why the previous neoabsolutist era was necessary and, at the same time, announces the publication of a law on the basic features of the new state organisation. This manifesto was the so-called October Diploma, authored by the leader of the Hungarian conservative landlords, Antal Szécsen. It was not a constitutional law but a programme restoring constitutional life in Austria. In December 1860, Baron Anton von Schmerling was appointed Prime Minister and immediately put forward his programme based on restoring constitutionalism.²⁰⁰

On 26 February 1861, the long-awaited February (Schmerling) Constitution was imposed. Nor did it abandon the centralist tendencies evident in the broad conception of the competence of the imperial parliament. In the mid-1860s, the position of the monarchy began to deteriorate significantly. The war with Prussia ended on July 3, 1866, with the defeat of Austria at Hradec Králové and the German Confederation, which had to leave Austria and give the central role to Prussia. Another sticking point was the Hungarian question, which was resolved by negotiations between the Viennese government and the representatives of the Hungarian Diet in early 1867, which resulted in a political agreement on everyday affairs and how they were to be handled. The Emperor, in the rank of King of Hungary, on 17 February 1867, by a special rescript, restored the Hungarian 1848 Constitution and appointed a Hungarian government, had himself crowned King of Hungary and the whole matter was concluded on the part of Hungary by the issue of Statutory Article 1867:XII, which entered into constitutional history as the Austro-Hungarian Compromise.²⁰¹

The monarchy soon became known as the Austro-Hungarian Empire, a personal union enriched with elements of a real union, with the monarch and the ministries of military, foreign affairs and finance and the so-called delegations in common. The share of the two parts of the monarchy in the

200 Schelle and Tauchen, 2013, p. 25.

201 Rieger, 1903, p. 13.

payment of common matters and the redemption of the national debt was also stipulated, and a customs and trade association was formed. The western part of the monarchy was called the “The Kingdoms and Lands Represented in the Imperial Council”. Cisleithania (*Zisleithanien*²⁰²) was also used, while the eastern part was officially the Lands of the Crown of Saint Stephen (or Transleithania²⁰³). The Cisleithanian constitution was adopted in December 1867; the Transleithanian constitution was the Bratislava Constitution of March 1848.

One cannot then overlook the efforts of the Czech representation for settlement, which were unsuccessful.²⁰⁴ At the end of 1867, the constitutional process culminated in issuing a set of constitutional laws that were considered the fundamental laws of the state called the December Constitution. Its core, however, was a complex of six constitutional acts that codified the status of the Cisleithanian central bodies and their relations.²⁰⁵ This series of laws was then supplemented in 1868 by the so-called May

202 Seebauer, 1988, p. 139.

203 *Ibid.*, p. 81.

204 Kadlec, 1912, p. 77-86.

205 Act No. 141/1867 RGBL. on the Imperial Council transferred the general legislative competence to the Provincial Diets; the competence of the Imperial Council was henceforth defined only exhaustively. However, the combined powers of the existing Reich Council, both broader and narrower, became the basis of its competence. In addition to its legislative competence, the Imperial Council also had a power of control by approving certain acts of the sovereign, examining the state accounts, etc. The law also maintained the curial system of 1861. The absence of changes was also noticeable in the case of the House of Lords, consisting of members appointed by lineage or rank or by special appointment by the sovereign. The number of members of the House of Lords was not fixed. Act No 142/1867 RGBL. on general civil rights contained a catalogue of the fundamental rights of citizens in Cisleithania. Act No 143/1867 RGBL. established the Reich Court of Justice with its seat in Vienna, headed by a president, a deputy president, twelve members and four alternates. The court was to rule on conflicts of competence and disputes in public law matters between the various institutions and on complaints by individual citizens about the possible curtailment of constitutionally guaranteed political rights. Act No 144/1867 RGBL. on the judiciary secured judges' independence; the proceedings' public nature introduced jury trials for certain offences and, in principle, separated the court in all institutions from the executive administrative power. Act No 145/1867 RGBL. concerned the power of government, defining the position of the Emperor as 'sacred, inviolable and unaccountable' and thus guaranteeing important dynastic prerogatives. However, the sovereign power was not explicitly derived solely from God's will. The monarch was formally bound by an oath to rule only according to the laws he had always passed. Act No. 146/1867 RGBL. on the common affairs of all the countries of the Habsburg monarchy was a balancing law of its own, analogous to the Hungarian legal article 1867:XII (Pražák, 1895, p. 21).

Laws,²⁰⁶ which abrogated the privileged position of the Catholic Church vis-à-vis other religious communities and denominations guaranteed by the Concordat. Cisleithania was a federal state consisting of 17 states and a constitutional monarchy, applying separation of powers and ensuring citizens' fundamental human rights and political freedoms.

After adopting the December Constitution (mainly Act No. 141/1867 RGBL.), the Imperial Council remained the representative body. It consisted of two chambers. The House of Lords consisted of persons designated by family or rank and persons appointed directly by the Emperor. It was intended as a conservative counterweight to the Chamber of Deputies. The provincial assemblies initially delegated the Chamber of Deputies, but only from 1873 onwards were deputies elected by the citizens in direct elections. Until 1907, MPs were divided into interest-based curia suffrage groups.²⁰⁷ The Imperial Council was to deal with everyday matters and establish common institutions cooperating with the Hungarian Diet. It was also responsible for regulating military affairs, the state's financial management, national economic issues, public health and the organisation of confessional relations, the fundamental regulation of the civil service and the judiciary, civil, criminal, exchange, and mining legislation, etc. It also exercised a controlling function over the executive. Ministers were responsible to it for the sovereign's acts and their administrative acts. The Rules of Procedure introduced the discussion of draft laws in parliamentary committees and the lengthy procedure of their triple reading. If the government requested it, the House of Commons had to act on its proposals as a matter of priority. Members of the Government could take the floor whenever they requested to do so. The closure of a session of the Chamber by the Emperor interrupted the continuity of the discussion of the individual motions, and the whole procedure had to be repeated after the reopening. All this made it possible to obstruct and direct the work of the Austrian Parliament. Obstructions by various groups of deputies were to be prevented by a low quorum.²⁰⁸

206 Act No. 47/1868 RGBL., on marriage law, No. 48/1868 RGBL., on the relationship between the school and the church, and Act No. 49/1868 RGBL., on the inter-confessional relations of citizens (Tretera, 2002, p. 30).

207 Chytilík et al., 2009, p. 266.

208 Schelle and Tauchen, 2013, p. 29-30.

The December Constitution was in force until the end of the Habsburg monarchy.²⁰⁹ During the First World War, its implementation was affected by emergency measures.

4. 1848 as a source of inspiration

The presented constitutional development, which the Czech lands had in common with Austria, indicates its crucial moment was the revolutionary year of 1848.

A relatively important indicator of the most modern constitutional trends was the Kroměříž Draft.²¹⁰ This envisaged that the source of state power was the people. This trend is still present in Czech constitutional development after 1920, albeit with a modification of the ‘working people’ from 1960 to 1992.²¹¹ The Kroměříž Draft also dealt in detail with the catalogue of fundamental rights. The deputies of the (Kroměříž) Constituent Assembly of 1848 subscribed to the natural-law definition of natural, inherent, and inalienable fundamental civil and political rights. In the constitutional draft, Czech politician František Ladislav Rieger prepared the original version in August with the words we know from the French Declaration of the Rights of Man and of the Citizen.²¹² The final text, in turn, strongly resembled the relevant passages of the Belgian Constitution of 1831. In addition to individual rights, it also guaranteed the equality of nations and the fundamental rights of municipalities as self-governing corporations. The provisions of the Kroměříž draft were then – without the most radical formulations, such as the principle that all power comes from the people or the abolition of the death penalty – taken up by the framers of the 1849 Constitution. It was not until the December 1867 constitution that a comprehensive catalogue of civil rights was put into practice.

209 On the other hand, the Catalogue of Fundamental Rights (No. 142/1867 RGL.) was in force until the adoption of the 1920 Constitutional Charter (Rouček and Sedláček, 1935, p. 293).

210 Adamová, 2007, p. 84.

211 Lakatoš, 1993, p. 45.

212 Hrubec and Bárta, 2006, p. 15.

However, the tangible result of the revolutionary year 1848 was the end of serfdom. Parliament debated the proposal in the summer of 1848 on the motion of its youngest member, Hans Kudlich, who intended the proposal (from the Czech perspective) to prolong the adoption of the Austrian constitution so as not to prevent the annexation of the Austrian lands to Germany.²¹³ The abolition of serfdom took place in September 1848.²¹⁴

The developments after 1848, however, marked a qualitative change in the development of the judiciary.²¹⁵ During the discussion of the proposal to abolish serfdom, some deputies emphasised the need to cancel the patrimonial courts and subordinate the judiciary to the state. This thesis was taken up by the 1849 Constitution, which laid down basic organisational and procedural principles and took account of the revolutionary developments of 1848, providing for a unified system of justice, the existence of a state (not patrimonial) judiciary, the principle of equality of citizens before the law, independence, separation from the administration and, in the context of proceedings, the principles of publicity, orality and, in criminal proceedings, the prosecution and the participation of a lay element. The specific rules of the organisation were then brought about by the decision of 14 June 1849 – the Foundations of the New Judicial Establishment (No. 278/1849 RGBL.), which also brought about a system of courts – district, district collegiate, provincial, superior provincial and Supreme Courts. The existence of causal courts and the subordination of members of the royal family and persons enjoying the right of extraterritoriality to the Supreme Court Marshal and military persons to military courts were envisaged. The general regulation of the Fundamentals was supplemented by special regulations for the civil (No 237/1850 RGBL.) and criminal (No 25/1850 RGBL.) spheres. Another essential regulation was the Provisional Organic Law for the Courts (No. 258/1850 RGBL.), which regulated the matter of the courts, their staffing, procedure and disciplinary rules, and the rules for dealing with the case file. In August 1850, the Supreme Court of Justice and Cassation in Vienna was established (No. 325/1850 RGBL.). In the context of the establishment of the new court system, it was necessary

213 Adámek, 1888, p. 21.

214 Some sources point out that in fact it was not Kudlich's original proposal that was adopted, but that of Lasser and associates (cf. *ibid*, p. 23.).

215 Schelle, 2008, p. 47-69.

to define the judicial districts, which was carried out by the *Gerichtseinführungskommissionen*, which were based on the principle that the new judicial districts should encompass the entire area of the former patrimonial site, the whole cadastral area, and consider the importance, population, terrain, communication possibilities and linguistic boundaries. The seats of the judicial districts were to be towns with former magistrates, patrimonial courts, or whichever was most appropriate. The system was activated during the 1850s: in the territory of the present-day Czech Republic, 310 district courts, 73 district collegiate courts, 21 provincial courts, and two supreme provincial courts were activated, the whole system being operational from 1 July 1850.²¹⁶ With modifications during the neoabsolutism, at the end of the nineteenth century, in 1948 and 1992, this court system still exists in principle.

The Revolution of 1848 also marked the awakening of modern Czech politics.²¹⁷ The suppression of the Estates' uprising was a visible shock to Czech political life, and political circles feared a confrontation with the monarch. The revolutionary events led to a certain relaxation, with Czech and German liberals articulating their demands in the First and Second Prague Petitions, which mainly aimed to achieve administrative unification of the lands of the Bohemian Crown and other reforms. The efforts were ended by the military intervention against the armed uprising in Prague; moreover, Moravia, where the Germans were in the majority, also took a hostile stance towards integration. Besides Germans, many elements were behind the Czech-Austrian settlement's failure.²¹⁸ The policy of passive resistance, which meant that Czech politicians did not participate in adopting the December constitution,²¹⁹ was also not very successful.²²⁰ Despite these partial failures, however, developments in the second half of the nineteenth century laid the foundations for modern Czech political life, fully manifesting in the era of independent Czechoslovakia.

²¹⁶ Šolle, 1968, p. 135-138.

²¹⁷ Tomášek, 1923, p. 20-21.

²¹⁸ Cibulka, 2000, p. 22.

²¹⁹ Thanks to Czech non-participation, the 1867 December constitution was considered octroi in the Czech environment. German authors then applied a similar argumentation in the context of the 1920 constitutional charter thanks to the lack of Germans in the Revolutionary National Assembly (Kolumber, 2022, p. 359).

²²⁰ Malý, 1997, p. 300.

5. Conclusion

Despite the lack of information, the revolutionary events from Hungary spread to the rest of the empire. Although there were documents regulating constitutional matters in the past (the land ordinances, *Landfrýds*, the Czech Confederation, and partly also ABGB), modern constitutionalism did not begin until after 1848, when the process towards modern constitutions began. The April, March and February constitutions were imposed, while the December constitution represented a crucial moment in Austrian (and Czech) constitutional tradition, as it was fully put into practice for a long time. It is somewhat interesting that the December Constitution served as the model for the 1920 constitutional charter. On the other hand, that one served as the model for the 1992 Constitution of the Czech Republic. This suggests that the traditions of Austrian constitutionalism and the achievements of the revolutionary year 1848 are still partially present in the contemporary Czech constitutional setting.

The 1848 revolution was a turning point in the history of Europe, Austria and Czechia. It brought about significant changes that would shape the future of constitutional development in this region. One of the revolution's most important outcomes was recognising the people's (nation's) importance in the modern constitution. The revolutionaries believed that the people should have a say in the governance of their country and that a constitution should protect their rights and freedoms.

In Austria, the revolution led to a constitutional monarchy, which granted citizens certain rights and freedoms. It also paved the way for the emergence of political parties and a more democratic system of government. This period was also instrumental in forming the Czech political nation. Czechs sought to assert their identity and gain greater autonomy within the multinational Austro-Hungarian Empire, but they had evolved during the interwar. On the other hand, some of the mistakes that can be objectively found in Vienna's policy towards the Czech nation were then repeated mainly in the Czech (Czechoslovak) attitude towards the minorities of the interwar state. The Versailles system established after the First World War then proved

unsustainable and was subverted in the late 1930s thanks to the aspirations of Nazi Germany at the time.²²¹

The 1848 revolution was crucial to establishing modern constitutional systems in Europe, Austria and Czechia. It demonstrated the power of the people to effect change and to demand greater rights and freedoms. It also highlighted the importance of self-identity in developing a modern constitution. As a result, the revolution remains an important event in the history of these regions, and its legacy continues to be felt today. The consequences of the revolution can be seen in the catalogue of fundamental rights contained in all Czechoslovak constitutions (1920, 1948, 1960, and the 1991 Charter) and the Czech Constitution (1992), in the emphasis on the people as the source of power and, last but not least, in the organisation of the Czech judiciary, the foundations of which were laid in the development following the adoption of the 1849 March Constitution.

221 Kolumber, 2022, p. 359-362.

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1848/49: FRANKFURT'S PAULSKIRCHE AS A REFERENCE SITE IN GERMAN CONSTITUTIONAL HISTORY

Abstract:

The 19th century is – not only in Germany – the century of the positivisation of fundamental rights. It began in the constitutions of the southern German states (until 1820) and ended at the end of this “long” 19th century with the Weimar Constitution of 1919 (*Weimarer Reichsverfassung*). On this path, the year 1848 marks a very decisive date for the German tradition of fundamental rights. On the one hand, the catalogue of fundamental rights adopted by the Paulskirche Assembly can be understood as a reaction to the limited validity of fundamental rights in early constitutionalism (see I.) by developing fundamental rights as subjective individual rights (see II.). On the other hand, this catalogue of fundamental rights is the reference document against which later German constitutions had to be measured and still have to be measured today (see III.): The Constitution of the German Empire of 1871 (*Bismarck Verfassung*), which did not contain a catalogue of fundamental rights, as well as the Weimar Constitution of 1919 and the Basic Law of Bonn of 1949 (*Bonner Grundgesetz*).

Keywords: German constitutional history, Weimar Constitution, Paulskirche Assembly, fundamental rights, German tradition

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1. The Constitutions of the Southern German States

After the Congress of Vienna and the reorganisation of Europe following the Napoleonic Wars, constitutions came into force in four southern German member states of the German Confederation (*Deutscher Bund*); the German model of constitutional monarchy had thus come into being. These were the Constitution for the Kingdom of Bavaria of 26 May 1818²²³ (although it should not be forgotten that this was already the second Bavarian constitution after the first constitution of 1808), the Constitution for the Grand Duchy of Baden of 22. August 1818,²²⁴ the Constitution for the Kingdom of Württemberg of 25 September 1819²²⁵ and the Constitution of the Grand Duchy of Hesse of 17 December 1820.²²⁶ What these constitutions have in common is that they contain catalogues of fundamental rights, including the Bavarian Constitution of 1818, which will be discussed below by way of example.

Title IV of this constitution, which deals with “general rights and duties”, regulates numerous civil rights, which even today should not be missing from any catalogue of fundamental rights. Title IV § 1 BayVerf 1818 links these rights to Bavarian citizenship, the acquisition and loss of which is first dealt with in the following norms. Subsequently, Title IV § 8 BayVerf 1818 regulates “The state grants every inhabitant security of his person, his property and his rights. No one may be deprived of his ordinary judge. No one may be prosecuted or arrested except in the cases determined by the laws, and in the form prescribed by law. No one may be forced to cede his private property, even for public purposes, except after a formal decision by the assembled Council of State, and after prior compensation, as such is determined in the decree of 14 August 1815.”²²⁷ Somewhat awkwardly formulated, of course, “life, liberty and property” can be recognised here from

223 Bayerisches Gesetzblatt 1818, p. 101 ff.

224 Regierungsblatt für das Großherzogthum Baden 1818, p. 101 ff.

225 Staats- und Regierungs-Blatt 1819, p. 634 ff.

226 Großherzogliches Hessisches Regierungsblatt 1820, p. 535 ff.

227 Der Staat gewährt jedem Einwohner Sicherheit seiner Person, seines Eigenthums und seiner Rechte. Niemand darf seinem ordentlichen Richter entzogen werden. Niemand darf verfolgt oder verhaftet werden, als in den durch die Gesetze bestimmten Fällen, und in der gesetzlichen Form. Niemand darf gezwungen werden, sein Privat-Eigenthum, selbst für öffentliche Zwecke abzutreten, als nach einer förmlichen Entscheidung des versammelten Staatsraths, und nach vorgängiger Entschädigung, wie solches in der Verordnung vom 14. August 1815 bestimmt ist.

John Locke's conception. The following regulation (Title IV § 9 BayVerf 1818) then concerns religion: "Every inhabitant of the kingdom is assured complete freedom of conscience; domestic prayer may therefore not be forbidden to anyone, whatever religion he may profess. The three Christian church societies existing in the kingdom enjoy equal civil and political rights. The non-Christian members of the faith have complete freedom of conscience, but they only receive a share in the civil rights to the extent that they are assured of the same in the organic edicts on their admission to the state society."²²⁸

The significance of such an early constitutional catalogue of fundamental rights, albeit a brief one, can only be accurately assessed if one considers the function of these fundamental rights in the constitutional structure. Otherwise, there is a danger of proceeding unchecked from a contemporary conception and interpreting these rights as defensive rights, rights of freedom or rights of participation vis-à-vis the state, which protected a civil sphere of freedom. The context in which these constitutions came into being is important here: they are not constitutions that were fought for through bourgeois revolutions, but products of monarchical reform.²²⁹ This means that they can be described more as "constitutional letters" (*Verfassungsbriefe*) than as constitutions, even if it is not overlooked that Württemberg, with its constitution based on the estates, is a certain exception here, as is clear from the preamble²³⁰ to this constitution, which explicitly refers to the consultations

228 Jedem Einwohner des Reichs wird vollkommene Gewissens-Freyheit gesichert; die einfache Haus-Andacht darf daher Niemanden, zu welcher Religion er sich bekennen mag, untersagt werden. Die in dem Königreiche bestehenden drey christlichen Kirchen-Gesellschaften genießen gleiche bürgerliche und politische Rechte. Die nicht christlichen Glaubens-Genossen haben zwar vollkommene Gewissens-Freyheit, sie erhalten aber an den Staatsbürgerlichen Rechten nur in dem Maaße einen Antheil, wie ihnen derselbe in den organischen Edicten über ihre Aufnahme in die Staats-Gesellschaft zugesichert ist.

229 Böckenförde 1976, p. 112 ff., p. 116.

230 Nachdem nun über den Entwurf einer den früheren vertrags- und gesetzmäßigen Rechten und Freiheiten Unseres alten Stammlandes, so wie der damit vereinigten neuen Landestheile zugleich aber auch den gegenwärtigen Verhältnissen möglichst angemessenen Grundverfassung die von der Stände-Versammlung hiezu besonders gewählten Mitglieder sich mit den von Uns ernannten Commissarien vorläufig beredet haben, und die hierüber erstatteten Berichte einerseits von Uns in Unserem Geheimen Rathe, andererseits von der vollen Stände-Versammlung vollständig und sorgfältig geprüft und erwo-gen, sodann die gesamten Wünsche Unserer getreuen Stände Uns vorgelegt worden sind, so ist endlich durch höchste Entschließung und allerunterthänigste Gegenerklärung eine vollkommene beiderseitige Vereinigung über folgende Punkte zu Stande gekommen.

with the participation of the estates. On the other hand, the aforementioned reference to John Locke already shows that the southern German monarchs appropriated the idea of innate, inalienable human rights in their constitutional letters, as it were. However, it was thus robbed of its revolutionary potential and used (or misused) as an instrument of securing power, in that the monarchs only accommodated the demand for the protection of human rights to the extent that was absolutely necessary to prevent revolutions. The monarchs of Bavaria, Baden, Württemberg and Hesse were in no need of social legitimation, but acted solely out of dynastic self-preservation interests.²³¹ It is true that freedoms were granted, but only to the extent that this was compatible with the monarchical principle.²³² The monarch remained the sovereign, the bearer of undiminished state power; again, the Bavarian constitution serves as an example, which regulates in Title II § 1 para. 1 Bay-Verf 1818: “The king is the head of the state, uniting in himself all the rights of state power [...]”.²³³ In exercising them, the monarch has merely voluntarily bound himself to certain rules. In the South German constitutions, therefore, it is precisely not the recognition of innate, inalienable human rights by the monarch that has taken place, but merely a monarchical grant (“the state grants”, Title IV § 8 BayBerf 1818) of certain freedoms.²³⁴

Nevertheless, even if only granted by the monarch, these fundamental rights already mark a sphere that should be withdrawn from monarchical rule. These fundamental rights therefore already served to moderate and limit this power, even if only to a comparatively small extent. Thus, the classic defensive function of fundamental rights already appears in them. Defensive rights, however, that not every individual citizen could assert. A corresponding constitutional jurisdiction did not yet exist and would hardly have been compatible with the monarchs’ claim to power. The fundamental rights thus functioned first and foremost as programme sentences (*Programmsätze*). They only came into being at all through the concretisation in private law,²³⁵ thus required, as it were, the activation by the legislature. It was only through this that the citizen’s sphere of freedom was actually established. The defensive function of fundamental rights was exhausted in

231 Grimm 1987, p. 308 ff., p. 311 f.

232 Hilker 2005, p. 314.

233 Der König ist das Oberhaupt des Staats, vereinigt in sich alle Rechte der Staatsgewalt [...].

234 Grimm 1987, p. 308 ff, p. 312.

235 Grimm 1988, p. 133.

this objective dimension, this function of an objective limit to state power, an objective guideline for legislation.²³⁶

Accordingly, there can be no question of subjective individual rights in the German constitutional legislation of the early 19th century. Only this view corresponds to the character of these early constitutional constitutions, which were not based on the model of treaty (which admittedly prevailed in contemporary constitutional law doctrine²³⁷), with which the individual citizens would have transferred their rights (and not certain inalienable rights, which the state consequently had to respect). Rather, the monarchical principle with the granting of fundamental rights by the monarch as the born sole holder of state power. Subjective rights that the individual could assert against the state and thus against the monarch are not compatible with such a system. Although some formulations of the Bavarian constitution are reminiscent of Locke's model, it is based on a completely different concept.

However, research on constitutional history shows that in constitutional reality, fundamental rights nevertheless took on a life of their own, as it were, because these fundamental rights awakened a need for citizens' active participation.²³⁸ In the literature on constitutional history, the constitutional monarchy is generally regarded as a transitional form that had to lead to a further development towards popular sovereignty and parliamentary democracy. The constitutional monarchy was, as it were, a compromise between the monarchical principle and popular sovereignty, which developed tensions that had to be resolved in the long run.²³⁹ This thesis is confirmed by an examination of the early constitutional fundamental rights.²⁴⁰ For these, too, were designed for expansion and further development. These fundamental rights were thus, as it were, the oil that could fuel the tensions between the monarchical principle and the democratic principle. In the end, according to Hilker, it was the fundamental rights that sharpened the question of legitimacy.²⁴¹ For the monarch had not made a binding commitment, but he had stirred up expectations, made a promise. And as long as this

²³⁶ Hilker 2005, p. 327 ff.

²³⁷ Grimm 1987, p. 308 ff, p. 312.

²³⁸ Hilker 2005, p. 347.

²³⁹ Böckenförde 1976, p. 112 ff.

²⁴⁰ Hilker 2005, p. 348.

²⁴¹ Hilker Berlin 2005, p. 343.

promise is not completely fulfilled, the legitimacy of the monarch becomes more and more questionable.

2. Subjectivisation of fundamental rights in the Paulskirche

In other words, the path towards subjectification (*Subjektivierung*²⁴²) of fundamental rights had long since begun in the 1840s, when the National Assembly, elected after the March Revolution of 1848, met for the first time in the Paulskirche in Frankfurt on 18 May 1848 and from the very beginning claimed for itself the sole competence for constitution-making in the German nation state that was now to be established.²⁴³ This assembly thus saw itself, as it were, as the parliament of a German state in the process of being established, and in this function also swiftly set up a provisional central government.²⁴⁴

As early as 3 July 1848, the Assembly began its deliberations on fundamental rights at,²⁴⁵ thereby already showing the importance it attached to these rights. The safeguarding of civil liberties was to take precedence over the solution of the – ultimately unsolvable – questions of state organisation law of a German nation state (which in retrospect was to prove very unwise).²⁴⁶ Before a constitution was fully drafted, the fundamental rights were therefore already put into effect on 27 December 1848,²⁴⁷ before they were then included as the second part in the constitution of 28 March 1849 (*Paulskirchenverfassung*)²⁴⁸, which was never able to take effect²⁴⁹ and had already failed at the time of its promulgation because the Prussian King Wilhelm IV had made it clear that he would not accept the office of head of state (Emperor of the Germans) provided for in the constitution.²⁵⁰ He did

242 Gerber 1852, 33.

243 Kotulla 2006, marginal no. 275.

244 Reichsgesetzblatt 1848 page 3.

245 Kotulla 2006, marginal no. 280.

246 Kröger 1988, p. 72.

247 Reichsgesetzblatt 1848 p. 49 ff.

248 Reichsgesetzblatt 1849 p. 101 ff.

249 Kotulla 2006, para. 300 ff.

250 Prettenthaler-Ziegerhofer 2013, p. 76.

not want to be emperor by grace of a democratically elected parliament.²⁵¹ “In an effort to secure freedom before unity had yet been won, the Frankfurt National Assembly gave away freedom and unity at the same time.”²⁵²

The catalogue of fundamental rights in the constitution of 1848/49 was very extensive and detailed, not only in comparison to the state constitutions that had come into force up to that time, but also in comparison to the catalogues of fundamental rights in the German constitutions of 1919 and 1949 (§§ 130-189 PKV). These fundamental rights were not human rights, because § 130 PKV decrees as a head norm that the following rights are guaranteed to the “German people”. Accordingly, similar to the Bavarian Constitution of 1818, the constitution initially regulated in Article I of the catalogue of fundamental rights (§§ 131-136 PKV) who should belong to the German people as well as the legal positions flowing directly from citizenship, such as the right to vote or the right of settlement.

Before regulating the rights of freedom, Article II (§ 137 PKV) first standardises the principle of equality; this model will later be followed by the Weimar Constitution (Art. 109 WRV) and the Basic Law (Art. 3 GG). “Germans are equal before the law.”²⁵³ (Art. 137 para. 3 PKV). This wording could be linked to Art. 18 of the Hessian Constitution of 1820. While the provision “All Hessians are equal before the law”²⁵⁴ forms the only paragraph of this article, two paragraphs precede the general requirement of equality in the Constitution of 1848: “(I.) Before the law there shall be no distinction of estates. The nobility as a class is abolished. (II.) All privileges of class are abolished.”²⁵⁵ At the same time, however, this constitution was intended to order the continuation of the monarchy (as a constitutional monarchy) and not to establish a democratic state. Nor was a privileged position for other princes or members of estates assemblies to be excluded.²⁵⁶ Here, the tensions in the construct of the constitutional monarchy become abundantly clear.

This is followed in Article III ff. (§§ 138 ff. PKV) by the rights of freedom. § Section 138, paragraph 1 of the PKV states at the outset: “The freedom of the

²⁵¹ Zippelius 1994, p. 115.

²⁵² Huber 1988, p. 774

²⁵³ Die Deutschen sind vor dem Gesetze gleich.

²⁵⁴ Alle Hessen sind vor dem Gesetz gleich.

²⁵⁵ (I.) Vor dem Gesetze gilt kein Unterschied der Stände. Der Adel als Stand ist aufgehoben.

(II.) Alle Standesvorrechte sind abgeschafft.

²⁵⁶ Hilker 2005, p. 355.

person is inviolable.”²⁵⁷ This formulation will become legally binding with Art. 114 para. 1 sentence 1 WRV in 1919 and has been found in the Basic Law (Art. 2 para. 2 sentence 2 GG) since 1949. However, not in such a prominent place. Hilker²⁵⁸ sees in it the programmatic statement that it was “no longer just about the protection of individual rights, but about a sphere in which the state was only allowed to intervene in exceptional cases and which had been shielded by judicial rights. Part of this freedom was the “full freedom of faith and conscience” (Art. 144, Paragraph 1 PKV), a guarantee that clearly went beyond the guarantee of the Bavarian King from 1818 and was finally to become legally binding in Article 135, Sentence 1 WRV. Every confession was protected, not just the three Westphalian Christian confessions, and “in common domestic and public practice” (Art. 145, Paragraph 1 PKV). Civic rights or the ability to hold certain offices were no longer tied to membership of a particular religious community. Not only freedom, but also property as the basis for action, especially of the emerging bourgeoisie, was now to be comprehensively protected: “Property is inviolable.”²⁵⁹ (Art. 164 para. 1 PKV). This guarantee was flanked by regulations on expropriation, which was to be carried out “only for considerations of the common good, only on the basis of a law and against just compensation” (Art. 164 para. 2 PKV). Here too, therefore, we no longer encounter only individual guarantees of the monarch, but the protection of fundamental rights to safeguard the sphere of civil liberty. In order to ensure the activation of fundamental rights, Parliament provided strict deadlines for the adaptation of legislation to fundamental rights. These regulations can be found in the Introductory Act of 27 December 1848,²⁶⁰ where adjustments were ordered “within six months” or at least “as soon as possible”.

Particularly impressive, however, is the inconspicuous provision of § 126 letter g PKV: “The jurisdiction of the Reichsgericht includes [...] actions brought by German citizens for violation of the rights granted to them by the Constitution.”²⁶¹ Details were to be regulated by an Imperial Act, which, however, never came into being. This is an early form of the constitutional complaint (*Verfassungsbeschwerde*) regulated under the Basic Law in Germany (and numerous

257 Die Freiheit der Person ist unverletzlich.

258 Hilker 2005, p. 355 f.

259 Das Eigentum ist unverletzlich.

260 Imperial Law Gazette 1848 p. 49.

261 Zur Zuständigkeit des Reichsgerichts gehören [...] Klagen deutscher Staatsbürger wegen Verletzung der durch die Reichsverfassung ihnen gewährten Rechte.

other states).²⁶² It is precisely this regulation that shows that the fundamental rights provided for by the Paulskirche Constitution were rights with which every individual citizen should be able to protect himself effectively against encroachments of state power. It is therefore a question here of the protection of fundamental rights, which are no longer granted by the monarch and the constitution, but are recognised by it (in contrast to the early South German constitutions) as pre-constitutional, subjective individual rights.

3. After 1848/49

Numerous individual German states had welcomed the legal guarantee of fundamental rights and also published the law auf December 1848, but not the large states such as Prussia, Austria or Bavaria. Against the background of the new constitutional situation, this was *de jure* insignificant, but *de facto* a problem. The model of recognising pre-constitutional fundamental rights could not be implemented against these states. When the revolution was crushed and the old constitutional order of the German Confederation was restored, mainly at the instigation of Austria, the law of 27 December 1848 was formally abolished by federal decree of 23 August 1851.²⁶³ The introduction of fundamental rights was to be abolished in all member states (the German Confederation did not have its own legislative competence in this matter and was therefore dependent on the action of the legislators of the individual states).

On the other hand, the constitution of Prussia,²⁶⁴ which was revised on 31 January 1850, remained in force and now contained a catalogue of fundamental rights for the first time. However, this was again a catalogue of rights that the monarch granted his citizens (against revolutionary efforts) in voluntary self-restraint, not the recognition of pre-constitutional rights. Nor was the subjective-individual dimension of fundamental rights developed. The German Reich, which in 1871 did not emerge from a bourgeois revolution but from “blood and iron”, was based on a constitution that had the character of

²⁶² Huber 1988, p. 835; Willoweit 2005, p. 304.

²⁶³ Bundesbeschluss über Maßregeln zur Wahrung der öffentlichen Sicherheit und Ordnung im Deutschen Bund of 23 August 1851 (so-called Bundesreaktionsbeschluss), Huber 1986, no. 2. Bundesbeschluss über die Aufhebung der Grundrechte des deutschen Volkes of 23 August 1851, p. 2.

²⁶⁴ Collection of Laws 1850, p. 17 ff.

a confederation of princes, as the preamble shows.²⁶⁵ Accordingly, this constitution only contained a part on organisational law, but not a catalogue of fundamental rights. The granting of such rights in the course of voluntary self-restraint was the responsibility of the respective monarch and was to be regulated in the constitutions of the federal states (*Landesverfassungen*).

It was only after the abolition of the monarchy following Germany's defeat in the Great War in autumn 1918 that it was possible to continue along the line of development of the Paulskirche. With the Weimar Constitution,²⁶⁶ a constitution came into force in 1919 that was based on the principle of the sovereignty of the people (Art. 1 para. 2 WRV) and in which the basic rights as subjective rights (and basic duties as subjective duties) could be developed accordingly (regulated in Art. 109 ff. WRV). However, the Constitution lacks an explicit definition of this character of fundamental rights. Article 107 of the draft Constitution of 18 June 1919 had read: "Fundamental rights and duties shall be the guiding principles and limits for legislation, administration and the administration of justice in the *Reich* and in the *Länder*."²⁶⁷ The final version no longer contains such a provision.²⁶⁸ In contrast to the constitution of 1848/49, there was also no provision for a court to which every individual citizen could complain about the violation of a fundamental rights by state action. Therefore, jurisprudence was given the task of determining the legal nature of fundamental rights. It was assumed that the legal nature of each fundamental right was to be determined independently, depending on its wording.²⁶⁹ The views held ranged from the predominantly held assumption that these fundamental rights were very largely merely "programme sentences" (*Programmsätze*), i.e. guidelines for policy, to the idea that the (or at least individual) fundamental rights contained directly applicable law.²⁷⁰ The Weimar Constitution thus fell short of the standard of subjective individual rights regulated in 1848/49.

The Basic Law of 23 May 1949 is – even after the reunification (*Wiedervereinigung* 1990) – the valid German constitution. Unlike the constitutions of

265 Cf. Haardt 2019, p. 213 ff.

266 Reich Law Gazette 1919 p. 1383 ff.

267 Die Grundrechte und Grundpflichten bilden Richtschnur und Schranken für die Gesetzgebung, die Verwaltung und die Rechtspflege im Reich und in den Ländern.

268 Cf. Stern 1988, p. 123.

269 See only Anschütz 1930, p. 453 ff.

270 Gusy 1993, p. 163 ff.

1848/49 and 1919, it places the fundamental rights section before the provisions of state organisation law as the first section. This seems strange, since the state must first be constituted by means of provisions of organisational law before this state can then be assigned the function of protecting pre-constitutional fundamental rights. After the devastating events of the Nazi era, the role of fundamental rights was to be strengthened in this way. However, this alone would not necessarily have resulted in a more effective position for constitutional guarantees. In order to make fundamental rights – without exception – more than programme sentences or guidelines for politics, a corresponding norm was needed in the constitution itself. Article 1 para. 3 of the Basic Law (“The following fundamental rights shall bind the legislature, the executive and the judiciary as directly applicable law.”²⁷¹) established the catalogue of fundamental rights as directly binding law for all three branches of state power.

Moreover, if one wanted to emphasise the character of fundamental rights as subjective individual rights, the possibility had to be created that every citizen could complain about a violation of fundamental rights by state organs before a supreme court, which could initiate all necessary measures to remedy this violation of rights. The model for this was not only section 126, letter g of the PKV, but also the Bavarian Constitution of 1919 (*Bamberg Constitution*), where a constitutional complaint was regulated for the first time in an effective constitution: “Every citizen and every legal person having its seat in Bavaria shall have the right of complaint to the State Court if they believe that they have been harmed in their right by the action of an authority in violation of this Constitution.”²⁷² (Art. 93 para. 1 sentence 1 BayVerf 1919). In the Federal Republic of Germany, this task is still assigned to the Federal Constitutional Court (*Bundesverfassungsgericht*), which was founded in 1951 (§§ 90 ff. BVerfGG, since 1969 Art. 93 para. 1 no. 4a GG). Thus – more than a hundred years after the bourgeois revolution of 1848/49 – the standard of fundamental rights that the deputies of the Paulskirche had striven for was finally achieved.

271 Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

272 Jeder Staatsangehörige und jede juristische Person, die in Bayern ihren Sitz hat, haben das Recht der Beschwerden an den Staatsgerichtshof, wenn sie glauben, durch die Tätigkeit einer Behörde in ihrem Recht unter Verletzung dieser Verfassung geschädigt zu sein.

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THE APRIL LAWS OF 1848: FOUNDATIONS OF A CONSTITUTIONAL GOVERNMENT IN HUNGARY

Abstract:

The ‘April Laws’, the series of laws enacted by the last Hungarian feudal diet in March 1848, sanctioned by king Ferdinand V at the end of a due legislative process on 11 April, established a new form of government for Hungary: a constitutional monarchy patterned after the English and Belgian models. The limits of royal executive power, combined with the accountability of the newly established ministerial cabinet were declared and regulated in Act III of 1848, while the parliament itself was transformed by Acts IV-V of 1848 to a modern legislative body partially (i.e., its lower house) elected by the people, having annual sessions in order to establish the yearly budget to be respected by the cabinet. Unlike in other European countries, the Hungarian historical constitution was not replaced with a written constitution incorporated in a single document, and the transition from a feudal to a civic social and political system seemed to be smooth and peaceful. Quoting the famous words of historian István Deák: it was a ‘lawful revolution’. However, half a year later, it still turned into a war of independence, for several internal (dissatisfaction of the nationalities) and external (counter-revolutionary events in Vienna) reasons. In August 1849, the Hungarian war of independence was crushed by the military superiority of Austria and Russia, but when

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two decades later the constitutional status of Hungary was reinstated as the result of the Austro-Hungarian Compromise of 1867, it were the 'April Laws' that served as the basis, and even if none of them is formally in force any more, we still respect them as the foundation of modern Hungarian parliamentarianism.

Keywords: 1848, April laws, Hungarian constitutional history, constitutional monarchy, representative government, responsible government, parliamentarianism

1. What are the 'April Laws'?

On 11 April 2023 we celebrated the 175th anniversary of the day when the bills elaborated at the last feudal Diet of Hungary in the second half of March 1848 had been sanctioned by and promulgated in the presence of King Ferdinand V (r. 1835–1848). The term 'April Laws' refers to a series of laws, namely thirty-one so-called 'law-articles' (*törvénycikkek*) usually translated into English as 'Acts', adopted by due process by both houses of the Diet convoked by the king for November 1847. The legislative process was not generated, but undoubtedly accelerated by the revolution of 15 March 1848: the drafting of the bills began on 18 March, and the enactment thereof happened quite rapidly. However, the whole process went through in line with the constitutional rules of legislation in force.²⁷⁴

The thirty-one 'April Laws' can be divided into two groups.²⁷⁵ Those belonging to the first group continued and accomplished the program of the 'Reform Era' (1830–1848), eliminating the old 'feudal' socio-economic and legal institutions. The serfs were emancipated and the privileges of the nobles abolished ("the seigneurial nexus unravelled"),²⁷⁶ the foundations of a modern private law established.²⁷⁷ These laws would have very probably been enacted even without the events of the 'springtime of nations' in 1848, because the anti-feudal program, the transition of the Hungarian society and economy

274 Gergely, 2000, p. 191.; Hörcher, 2019, pp. 93. and 109.

275 Csizmadia, 1986, p. 7.

276 Rady, 2015, p. 222.

277 Képes, 2016, pp. 102-103. and 106.; Képes, 2021a, p. 119.

from ‘feudalism’ to a ‘bourgeois’ (capitalist) structure, was acceptable for the Liberals and Conservatives as well, and was also in line with the intentions of the royal court, even if with slightly different emphases.

However, the second group of ‘April Laws’ is indeed revolutionary. As we will see in the historical overview, these had previously been advocated only by the Liberals. Just to highlight the most important ones: Act III of 1848 introduced a new form of government, a constitutional monarchy with a cabinet responsible to the parliament; Acts IV and V established a modern parliament based on popular representation that had to be annually convoked by the king; while Acts XVIII–XX declared “some liberties”²⁷⁸ – not a complete list thereof, but those considered by the contemporaries the most important: freedom of the press that was number one among the demands of the revolutionary youth of Pest in 1848 (Act XVIII);²⁷⁹ freedom of education (Act XIX); and freedom of religion restricted to the so-called ‘received religions’ (Act XX).

As this study will hopefully prove, the diagnosis of imperial counsellor Ludwig von Rosenfeld was correct, when he indignantly observed at the meeting of 26 March 1848 of the *Staatskonferenz* in Vienna that “this is a new constitution for Hungary that is being prepared here”.²⁸⁰ The legislators in Pressburg (now Bratislava, the place of sessions of the Hungarian Diet from the mid-16th century until 1848), by adopting these laws, made such fundamental changes that the ‘April Laws’ can be considered a new constitution – without the adoption of a single constitutional charter.²⁸¹

The Hungarian “uncodified historical constitution”²⁸² was (and had already been in the 18th century)²⁸³ often compared with the English one. No constitutional charter as a uniform legal document was adopted in Hungary either, but throughout the centuries many important laws were enacted that would later be referred to as *leges fundamentales*. At this point, a Swedish parallel can also be drawn. In Sweden, the first time in 1634, the operating principles and main rules of government were regulated in a ‘basic law’

278 Csizmadia, 1986, p. 7.

279 Gosztonyi, 2021, p. 40.; Gosztonyi, 2022, p. 44.

280 See the documents of the meeting of 26 March of the *Staatskonferenz*: Károlyi, 1936, pp. 231–237. (The quote ‘Es ist eine neue Verfassung für Ungarn...’ can be read on p. 232.)

281 Gergely, 1981, p. 51.; Gergely, 2000, p. 192.; Horváth A., 2012, p. 98.; Tölgyessy, 2012, p. 258.

282 Biró, 2019.

283 Kopyś, 2022, p. 377.

(*grundlag*) called *Regeringsform* ('Form of Government'), while the organisational and operational rules for the parliament were laid down in another organic law called *Riksdagsordning* ("Ordinance for the Assembly of the Realm", first time adopted in 1617).²⁸⁴

Remaining at the Scandinavian example, we can establish that the Hungarian political elite, instead of adopting a constitutional charter as the Norwegians did in 1814 or the Danes in 1849 (*Grundlov*), decided to stay on the path of the unwritten historical constitution. In this sense, we may consider Act III of 1848 the new Hungarian *Regeringsform*, and Acts IV–V of 1848 a new *Riksdagsordning*. We agree with István Szabó, who drew the attention to the fact that the adoption of a constitutional charter was only necessary in countries where the traditional institutions of division of power between the king and the Estates had already been abolished by the absolute monarchy, and therefore the historical constitution could not serve as the basis of modern constitutionalism.²⁸⁵

2. Did Hungary have a '*Landtag*' or a '*Reichstag*'?

The theoretical basis of the Hungarian historical constitution was the doctrine of the Holy Crown (*Szent Korona-eszme*).²⁸⁶ The concept that the king and his subjects are united in the Crown is not a kind of Hungarian specialty, similar theories emerged in other limited monarchies as well. The Danish historian Knud J.V. Jespersen says about the Danish concept of sovereignty emerged at the time of *adelsvælde* (the aristocratic government between 1536 and 1660), that "sovereignty was liberated from being linked exclusively to one or the other of the central institutions of power, [...] and was instead associated with an impersonal, abstract, and permanent concept, that of the Crown" (*Danmarks Krone*).²⁸⁷ Professor Jespersen could have written exactly the same about the Hungarian Holy Crown doctrine – however, not just for a century and a half as in Denmark, but at least five centuries.

284 Herlitz, 1969, pp. 28-29.

285 Szabó, 2014, p. 100.

286 Egresi, 2014, p. 10.; Kopyś, 2022, p. 369.

287 Jespersen, 2019, pp. 47-48.

The roots of this doctrine are some 200 years older, but a clear emphasis thereof can be found in Stephen Werbőczy's famous compilatory work of customary law, the *Tripartitum* (1514).²⁸⁸ From the point of view of our examinations, Werbőczy's most important statement is that the power of legislation is divided between²⁸⁹ (or, with other words, can be exercised together by) the king and 'the people' (the inhabitants of the country endowed with political rights, especially the nobles). According to Part II, Title 3 of the *Tripartitum*:

"And yet the prince cannot make constitutions *proprio motu* and by himself, particularly in matters where divine and natural law are prejudiced, or which diminish the ancient liberty of the Hungarian people as a whole. But once the people are summoned and asked whether such laws are acceptable to them or not, and they approve the laws, then such bills are henceforth to be observed as laws (keeping always divine and natural law)."²⁹⁰

The king is not allowed to make laws on his own: this was the principle the Hungarian monarchs were requested to confirm from time to time, when they had to promise in their Coronation Oaths to govern the country "in accordance with its own laws and approved customs", and this was the rule that actually prevented the Habsburg rulers of Hungary from introducing an imperial-style absolutism. As Zoltán Szente establishes, "the feudal Diet essentially remained a constitutional factor in the exercise of power throughout its existence", and even the periods when it was not summoned were "almost nothing", compared to other European countries.²⁹¹ As István M. Sziujártó observes, the position of the Hungarian Diet in 18th century Europe can only be compared to the Swedish *Riksdag* (between 1720 and 1772) the Polish *Sejm*, or the *Staten-Generaal* of the Netherlands.²⁹² Let us just add: and to the British Parliament.

The Habsburgs had been the kings of Hungary since 1526. From this moment on, Hungary had the same person as king who was at the same time the ruler of the Austrian hereditary provinces. However, the popular

288 Hollósi, 2018, pp. 83-85.; Kukorelli, 2014, p. 63. For a complete – thanks to the work of British professor of history Martyn Rady, excellent! – English translation of the *Tripartitum*, see: Bak-Banyó-Rady, 2005.

289 Biró, 2019, p. 47.; Kukorelli, 2014, pp. 63-64.

290 Bak-Banyó-Rady, 2005, p. 229.

291 Szente, 2007, p. 237.

292 Sziujártó, 2020, p. 307.

historical maps that can be found everywhere on the Internet depicting Hungary as a province of the Habsburg Empire are all wrong. Hungary was in a dynastic union with the Habsburg countries, but remained an independent state that had to be governed through its own bodies of legislation and administration, especially the Diet and the local strongholds, the noble counties (*comitatus*, *vármegye*). Central administration, especially the Chancellery and the Chamber (treasury), were more closely connected to the Viennese court, but this was mainly because the central executive power was then considered as a reserved right (*reservata*) of the kings, in line with the contemporary concept of state.²⁹³

The Habsburg rulers were indeed trying to introduce absolute monarchy in Hungary several times. Their first attempt was, when Leopold I (r. 1657–1705) applied his *Verwirkungstheorie* after the unveiling of an aristocratic conspiracy at the end of the 1660s. Based on this ‘doctrine of forfeiture’, he refused to convoke the Diet for a decade. However, because of the strong resistance, in 1681 the constitution had to be restored.²⁹⁴ The second, longer lasting absolutistic attempt began in 1765 with queen Maria Theresa (r. 1740–1780), and reached its peak with Joseph II (r. 1780–1790) who even refused to be crowned. Finally, the third similar situation came after the Napoleonic Wars, when King Francis I (r. 1792–1835) did not convoke the Diet for a 13-years period (1812–1825). All these attempts failed: “every conflict between the king and the nobility ended with a compromise”.²⁹⁵ Furthermore, all such failures of royal absolutism resulted in important additions to the laws of Hungary considered ‘fundamental’, forming the historical constitution together with the country’s ‘old customs’.

If we would like to have an overview of the ‘cardinal laws’ the kings of Hungary had to (and were repeatedly forced to) respect, we have to start with the Coronation Oaths and the *Diplomae Inaugurales* (coronation charters).²⁹⁶ When Ferdinand I was crowned in 1527, he had to take a similar Coronation

293 Péter, 2012, p. 158. For a detailed analysis of the relations of the Hungarian state organs to the court of the Habsburgs, see: Ember, 1955, pp. 85–88.

294 Rady, 2015, pp. 175–176.

295 Képesy, 2020, p. 54. See also: Szijártó, 2020, p. 18. (“In the case of Hungary, the Habsburgs felt it necessary to return to this so-called constitutional system of government even after a hiatus of five, ten, or even twenty-five years.”)

296 For a recently published, very detailed analysis of the role of these documents in Hungarian constitutional history see: Szijártó, 2020, pp. 209–223.

Oath as the previous kings. He had to swear that he would keep all ‘free inhabitants’ of the country “in their immunities and liberties, rights, privileges, and ancient and approved customs”, and to promise under oath to respect the fundament of Hungarian Estate constitutionalism, King Andrew II’s Golden Bull of 1222.²⁹⁷ Furthermore, in 1553, when a revised and supplemented version of Werbőczy’s *Tripartitum* was drafted at Ferdinand I’s request (*Quadripartitum*), the doctrine of the Holy Crown was reinforced.²⁹⁸

As László Péter establishes, “the right to rule and govern the kingdom” was transferred by the nobility to the kings “through *diaetalis coronatio*, the Oath and the Inaugural Diploma”.²⁹⁹ The indispensability of *diaetalis coronatio* was confirmed in 1687, when the dynastic order of succession of primogeniture, and again in 1723, when the *Pragmatica Sanctio* was ratified³⁰⁰ by the Hungarian Estates. Further to the election (until 1687) and coronation of a new (or future) king, there were several other occasions, too, when it was obligatory to convene the Diet, e.g., if the palatine (the highest dignity of the realm acting in the absence of the king as royal lieutenant) had to be elected, and of course, whenever the king wanted to impose tax or ask the nobles for soldiers. Taxation without the consent of the Estates would have been an infringement of the ‘ancient laws’, but Act I of 1504 prohibited to do so also explicitly.³⁰¹ In contrast to their hereditary provinces, the Habsburgs in Hungary were “not able to pass laws without the approval of the parliament”.³⁰²

In 1608, after the forced abdication of his brother Rudolph, the newly crowned Matthias II (r. 1608–1619) had to sanction a bill recently adopted by the Hungarian Estates on the composition of the Diet.³⁰³ By virtue of this, the kings were prohibited to invite anyone to the assemblies not listed in the law itself.³⁰⁴ In 1635, another law-article already sanctioned by Ferdinand II (r. 1619–1637), confirmed the principle of divided power of legislation of the *Tripartitum*: “As the power to issue laws and statutes lies in the competence of the king and the nation, [...] statutes disregarding Part II, Title 3 or Part

297 See: Széchenyi, 1864, pp. 13. and 64.

298 Hollósi, 2018, p. 85.

299 Péter, 2012, pp. 157–158.

300 Tóth, 2005, p. 303.

301 Horváth A., 2022, p. 160.

302 Szijártó, 2020, p. 16.

303 Szijártó, 2020, p. 18.

304 Szijártó, 2020, p. 20.

III, Title 2 of the *Tripartitum* should not be enforceable” (Act XVIII of 1635).³⁰⁵ Furthermore, Act XLIX of 1655 reinforced the old custom that the Diet was to be summoned at least in each third year.

As mentioned above, in spite of these clear rules, the “authentic enlightened despot”³⁰⁶ Joseph II still tried to govern Hungary as a subordinated province of his *Gesamtstaat*. He had not requested to be crowned,³⁰⁷ and he did not convoke the Hungarian Diet not even once during his one-decade reign. It is no wonder that the Hungarian Estates, similarly to the citizens of the Austrian Netherlands, were sworn enemies of his autocratic policy. Unlike in Brabant in 1789, no revolt broke out in Hungary, however, the noble counties dealing with local administration were constantly refusing to implement Joseph’s decrees.³⁰⁸ Quoting the words of the famous reformer of the 1830s and 1840s, Count Stephen Széchenyi, Joseph “realised that his system of governance had resulted in a complete failure”, and “already lying on his deathbed, withdrew all his decrees infringing the constitution of Hungary”.³⁰⁹

Széchenyi also cites Joseph II’s declaration signed on 28 January 1790: “as according to the fundamental laws of Hungary the legislative power is divided between the ruler and the Estates, we would keep this right of the Estates unharmed, and would leave this as a legacy to our successors”.³¹⁰ Immediately after his death, his younger brother and heir to the throne, Leopold II (r. 1790–1792) issued a letter to the Hungarian Estates assuming to maintain their ‘rights and liberties’, and on 29 March 1790 he convoked the Diet for 6 June. The Estates assembled again – the first time since 1765. Leopold II was crowned in November in line with the old customs, i.e., after having signed the *Diploma Inaugurale* and taken the Coronation Oath.³¹¹ As Széchenyi observed: “the upset country” was reinstated into “its constitutional and ordinary status”.³¹²

The newly summoned Estates requested the king to assure them that he would not govern Hungary by letters-patents, as his brother had did. This

305 Bódi, 2016, p. 199. (Endnote no. 25.)

306 Evans, 1989, p. 41.

307 Gergely, 2000, p. 168.

308 Szijártó, 2020, p. 279.

309 Széchenyi, 1864, p. 42.; See also: Szijártó, 2020, p. 279.

310 Széchenyi, 1864, p. 42.

311 Gergely, 2000, p. 168.

312 Széchenyi, 1864, pp. 43-44.

was the first step taken by the Diet³¹³ before adopting no less than 74 ‘law-articles’ (Acts). At least three (Acts X, XII, and XIX) of these will be later referred to as fundamental. From the point of view of the ‘constitutional status’ of the kingdom, Act X of 1791 is of the greatest significance. It declared Hungary to be a free and independent country “with a statehood and *constitutio* of its own”, and “thereby a country to be governed and administered by the king in compliance with its own laws and customs, rather than with those of other provinces”.³¹⁴

This is the first official Hungarian legal text that used the word *constitutio*. According to György Miru, this usage was the effect of Montesquieu’s *De l’esprit des lois* (1748) which enjoyed great popularity among the enlightened nobles and non-noble intellectuals across Hungary.³¹⁵ László Péter draws the attention to the fact that “an English traveller” had already seen it in Latin translation “in a bookshop in Pressburg in 1751”.³¹⁶ Furthermore, Act X of 1791 gave a clear interpretation of the *Pragmatica Sanctio*: Hungary was not a province but a constitutionally independent country in an inseparable dynastic union with the Austrian hereditary provinces. (No other correct interpretation could be given in the light of the clear wording of Act III of 1723, accepted by Charles III on 19 June 1723, together with the laws incorporating the succession rules of the *Pragmatica Sanctio* into Hungarian law.)

The other *lex fundamentalis* adopted by the Diet of 1790–91 was Act XII of 1791 ‘on the exercise of the legislative and executive powers’. Here the influence of the great French thinker is even more direct.³¹⁷ By virtue to this law “the right of enacting, rescinding and interpreting the laws” are “vested jointly in the lawfully crowned monarch and the lawfully assembled Estates³¹⁸ – as it had already been a “centuries-old constitutional convention”.³¹⁹ However, the Diet went further, and explicitly prohibited the king to issue letters-patents, restricting the king’s law-making power to decrees of executive character. Furthermore, the same law prohibited the king “to change the legally established structure of the judiciary”, and to interfere

³¹³ Rady, 2015, p. 216.

³¹⁴ Gergely, 2000, p. 168.

³¹⁵ Miru, 2015, p. 19. See also: Péter, 2012, p. 156.; Szijártó, 2020, pp. 249. and 253–254.

³¹⁶ Péter, 2012, p. 156.

³¹⁷ Horváth A., 2012, p. 50.; Péter, 2012, p. 158.; Szijártó, 2020, p. 11.

³¹⁸ Péter, 2012, p. 158. (Footnote no. 19.)

³¹⁹ Szente, 2007, p. 238. (Footnote no. 28.)

by any manner in the judicature. And it ended with the following famous words: “*executiva autem Potestas, nonnisi in sensu Legum, per Regiam Maiestatem exercebitur*”.³²⁰

If we look at Acts XIII, XIV and XIX of 1791 as well, the image will be even clearer. According to Act XIII, the king shall convoke the session of the Diet at least in every third year. Further to the negotiations of the king’s legislative proposals, the *gravamina et postulata* (grievances and petitions) of the Estates must also be discussed and “effectively remedied”. By virtue of Act XIX, the ancient right of the Estates to vote on taxes and raising soldiers was reinforced. When, after 13 years of absolutistic governance (the Hungarian constitution had been suspended by Francis I on the proposal of 10 December 1811 of Metternich),³²¹ the Diet was summoned again in 1825, a separate law (Act III of 1827) established that three of the above cited laws, i.e., Acts X, XII and XIX were to be observed as *leges fundamentales*.³²²

In line with the contemporary interpretation of Montesquieu’s doctrine, the legislative power was declared to be a joint right of the king and the parliament,³²³ while the executive power (and the central part of the judiciary) was acknowledged as a reserved royal prerogative (*reservata*),³²⁴ but any *contra legem* exercise thereof was declared illegal.³²⁵ It is important to note that another law of the same Diet, namely Act XIV of 1791 dealing with the position of the that-time highest organ of Hungarian central administration, the Lieutenancy Council³²⁶ (*Helytartótanács*), established that this “supreme *dicasterium*” of Hungary was independent of “any other” (imperial) *dicasteria*. It was a clear message that the *Staatsrat* had no right of supervision over the Lieutenancy Council, and that the competences of the noble counties on the local level also had to be kept intact. Any interference by the Viennese court thereto could be considered as “a formal infringement of the Hungarian constitution”.³²⁷

Finally, let us answer the question of a centuries-long dispute: was the Hungarian Diet a *Landtag* or rather a *Reichstag*? Arguments can be found

320 Rady, 2016, p. 8. For the original Latin text of the law see: Toldy, 1861, p. 236.

321 Fónagy, 2005, p. 338.

322 Nacsá, 2012, p. 41.

323 Szente, 2007, p. 238.

324 More precisely: *iura maiestatica reservata*. See: Péter, 2012, p. 5.; Szijártó, 2020, p. 12.

325 Péter, 2012, p. 158.

326 Evans, 1989, p. 46.

327 Ember, 1955, p. 86.

for both names. If we consider that the word *Reichstag* was used in Central Europe almost exclusively in relation to the Holy Roman Empire, “it would be misleading to use this term for another representative body”.³²⁸ However, the author of this study has a different opinion. The official (Latin) name of the Hungarian diet was *comitia regni*, in Hungarian ‘*országgyűlése*’ (assembly of the *ország*).³²⁹ The word *ország* in its ancient form *uruszág* derived from *úr* (lord), and was used as the Hungarian equivalent of *regnum*. Similarly to the Scandinavian countries (*Rigsdag* in late medieval Denmark, *Riksdag* in early modern and contemporary Sweden), the usage of the expression [*ungarischer*] *Reichstag* would be more adequate than *Landtag*. The latter would refer to a provincial assembly rather than the parliament of an independent kingdom.

3. How did the Diet of 1847–48 become more than just another ‘Reform Diet’?

After 1825, when Archduke Joseph, palatine of Hungary, a beloved member of the Habsburg family in Hungary who had a very strong sympathy for the country, had managed to convince his brother to reconvene the Diet after 13 years of interruption,³³⁰ Francis I duly respected the ‘triennial rule’. There were parliamentary sessions held in 1825–27, 1830, 1832–36, and, already during the reign of his son Ferdinand V, in 1839–40 and 1843–44 as well. We agree with the Czech historian Jiří Kořalka, who observed that “the Hungarian Diet in Pressburg had far outdistanced all other corporate representative bodies in the Habsburg Monarchy in terms of political experience, definition of aims, and determination”.³³¹

The Diets between 1825 and 1844 are referred to in Hungarian historiography as the ‘Reform Diets’, for reviving the wide modernisation and codification program commenced in 1790³³² and carrying it forward. A series of legal reforms was adopted in many fields and aspects of Hungarian society and economy. Just to name a few: in 1825 the Academy of Sciences was

328 Khavanova–Forgó, 2016, p. 241. (Footnote no. 5.)

329 See: Képes, 2019, pp. 20–21. and 24–26.

330 Evans, 1989, p. 43.

331 Kořalka, 2001, p. 149.

332 Hörcher, 2019, 101.

founded; in 1830 the Hungarian language was introduced in public administration and in the judiciary; in 1840 the first law on commercial companies was enacted. Many other important issues, as the abolishment of the nobles' tax exemption or the emancipation of the serfs, were also on the agenda, with partial success. Of course, there were tensions between the Viennese court, Conservatives and Liberals. Some initiatives of the more liberal lower chamber were rejected by the Lords of the upper house, and there were even bills the king refused to sanction (such as Ferenc Deák's famous bill on the prison system of 1843).³³³ Anyway, the socio-economic reforms were still going on – slowly but surely.³³⁴

The Diet of 1843–44 was closed in November 1844. It meant that, according to the 'triennial rule', the subsequent assembly should have been convoked for no later than November 1847. Furthermore, on 13 January 1847, the beloved palatine, Archduke Joseph died. The Liberals were already preparing for the new parliamentary session in the spring: on 17 March 1847 the Opposition Party was founded (the Conservative Party had already been established in 1846), and a detailed party program called the 'Opposition Declaration' (*Ellenzéki Nyilatkozat*) was worked out. This document, written by one of the most prestigious liberal politicians, Ferenc Deák³³⁵ and adopted in June 1847,³³⁶ already contained almost all the important points that would be reflected in the 'April Laws' of 1848, including, further to going forward with the socio-economic reforms, the formation of a cabinet responsible to the parliament, establishing popular representation, and declaring civil liberties (such as the freedom of the press and freedom of association).³³⁷

As it was expected, Ferdinand V convoked the Estates for November 1847, and, surprisingly, he held there an opening speech in Hungarian language, the first time since more than 300 years.³³⁸ In the lower chamber, where the deputies of the noble counties and other privileged communities gathered, the Opposition Party seemed to be in a favourable position,³³⁹ but still far

333 Mezey, 2001, p. 8.

334 Képesy, 2020, p. 57.

335 Dobszay, 2005, p. 380.; Nagy, 1930, p. 9.

336 Gergely, 2000, p. 190.

337 See e.g.: Deák, 1979, p. 56.; Dobszay, 2005, pp. 380–381.; Gergely, 2000, p. 190.; Miru, 2010, p. 45.; Nagy, 1930, pp. 9. and 23.; Szabad, 1998, p. 96.

338 Marczali, 1910, p. 140.

339 Marczali, 1910, p. 140.; Péter, 2012, p. 7.

from a decisive majority.³⁴⁰ In the upper chamber, where the Lords (the secular aristocrats and the high priests) were sitting, naturally, the Conservatives were dominant. When the political leader of the opposition, Louis Kossuth mentioned the necessity of a responsible, parliamentary government on 22 November 1847, few would have believed that it would soon be more than a “humble wish”.³⁴¹ Without the revolutionary events throughout Europe in early 1848, it is very probable that the Diet of 1847–48 would have been just another ‘Reform Diet’ that could have reached significant progress in breaking down the ‘feudal’ institutions, but it can hardly be imagined that the principles of the British historical and Belgian written constitutions (widely popular among the liberal deputies) could have also been implemented.

But then the revolution broke out in Palermo (Sicily), and Kossuth, hearing about this, immediately took the initiative.³⁴² The real breakthrough came on 1 March, when the news on the February revolution in Paris also arrived to Pressburg.³⁴³ Two days later Kossuth held a speech that was “the curtain-raiser on dramatic changes throughout the entire monarchy”.³⁴⁴ Kossuth was demanding “general and proportional sharing of taxation, public representation and an independent national government”, and even calling for the establishment of “a constitution for the hereditary provinces of the Habsburg Empire”.³⁴⁵ In this revolutionary mood, Kossuth’s proposal for an Address (petition) to the king with all such demands was unanimously approved by the lower chamber on 4 March 1848.³⁴⁶

In order to send this Address of the Diet to the monarch, the consent of the upper house was also needed. However, the Lords were not in session at the time, because both their chairman, the new palatine elected on 12 November 1847 (Archduke Stephen of Habsburg, the late Joseph’s son) and deputy chairman, the justice of the realm (*országbíró*)³⁴⁷ George Mailáth had

340 Hörcher, 2019, p. 102.; Kořalka, 2001, p. 149.

341 Nagy, 1930, p. 9.

342 Dobszay, 2005, p. 381.; Hermann, 2005, p. 381.; Hörcher, 2019, p. 102.

343 Hermann, 2005, p. 381.; Hörcher, 2019, p. 102.; Képešsy, 2020, p. 59.; Ruszoly, 2016, p. 553.

344 Kořalka, 2001, pp. 149–150.

345 Hermann, 2005, p. 382. See also: Deák, 1979, pp. 66–67.; Gángó, 2001, p. 41.; Gergely, 2000, p. 191.; Hörcher, 2019, p. 103.; Képešsy, 2020, p. 59.; Szabad, 1998, p. 96.

346 Deák, 1979, pp. 66–67.; Gergely, 2000, p. 191.; Hörcher, 2019, p. 103.; Képešsy, 2020, p. 59.; Nagy, 1930, p. 9.

347 In Martyn Rady’s translation ‘Judge Royal’, see: Rady, 2016, p. 8.

been “cautiously ordered to Vienna”.³⁴⁸ In their absence there was no one who could legally call together the members of the upper house.³⁴⁹ In the meantime, Kossuth’s speech was translated into German, printed as a pamphlet, and circulated on the streets of Vienna. On 13 March, on the occasion of the opening session of the provincial assembly of Lower Austria, the Viennese revolution broke out.³⁵⁰ In contrast to its Hungarian counterpart, this was not a bloodless revolution.³⁵¹ As the result of the heated events, Prince Metternich resigned and left Vienna still at the same night.³⁵²

Early in the next morning, palatine Stephen travelled to Pressburg in order to convoke the meeting of the upper house of the Hungarian Diet.³⁵³ Unsurprisingly, the promptly assembled *Barones et Magnates* accepted Kossuth’s draft petition still on the same day.³⁵⁴ By this decision, the Address could be officially presented to the king. The Diet appointed a delegation of 100 members from both houses,³⁵⁵ who boarded two steamers for Vienna, and arrived at about 2 p.m. to the imperial capital where they were celebrated as heroes by a large number of Viennese citizens.³⁵⁶ At the same time, without any knowledge about the trip of the deputation, however being already aware of the uprising in Vienna of 13 March, the revolution broke out in the streets of Pest (the eastern side of the present-day Budapest on the opposite side of Danube to Buda, both separate cities at that time) as well.³⁵⁷

The young radicals (from that time on called the ‘March Youth’, in Hungarian *Márciusi Ifjak*), among others the popular poet Sándor Petőfi and the young lawyer and journalist József Irinyi, managed to organise a mass demonstration of some 20,000 people for the early afternoon.³⁵⁸ Irinyi had

348 Hörcher, 2019, p. 103.

349 Képešsy, 2020, p. 59.

350 Gergely, 2000, p. 191.; Hermann, 2005, pp. 382-383.; Hörcher, 2019, p. 104.; Rapport, 2008, p. 60.

351 Hörcher, 2019, p. 104. For a detailed presentation of the revolutionary events, see: Rapport, 2008, pp. 63-64.

352 Hermann, 2005, p. 383.; Rapport, 2008, p. 64.

353 Gergely, 2000, p. 191.; Rapport, 2008, p. 66.

354 Hermann, 2005, p. 383.; Hörcher, 2019, p. 104.; Péter, 2012, p. 206.

355 Gángó, 2001, p. 41.; Gergely, 2000, p. 191.; Hörcher, 2019, p. 105. According to other sources, the deputation actually consisted of 72 members, see e.g. Képešsy, 2020, p. 60.

356 Hörcher, 2019, p. 105.; Rapport, 2008, p. 66.

357 Gergely, 2000, p. 191.; Hörcher, 2019, p. 104.; Képešsy, 2020, p. 60.

358 Hörcher, 2019, p. 105. According to other sources, c. 10,000. See e.g.: Hermann, 2005, p. 383.; Rapport, 2008, p. 68.

already met Kossuth in Pressburg on 11 March, and a day thereafter he compiled the revolutionary demands of the ‘Young Hungarians’ in twelve points (*Tizenkét pont*),³⁵⁹ a list partially based on Kossuth’s speech of 3 March, but in many aspects going even further, demanding for example that all ‘foreign’ (i.e., Imperial) troops leave the territory of Hungary, and a (Hungarian) National Guard be set up.³⁶⁰

Irinyi’s ‘Twelve Points’, ending with the three famous words of the French revolution translated into Hungarian in a different order (‘Equality, Liberty, Fraternity’),³⁶¹ together with Petőfi’s patriotic poem ‘National Song’ (*Nemzeti dal*)³⁶² had already been printed in the morning, in the printing shop ‘Landerer & Heckenast’.³⁶³ One of the owners of this company, Lajos Landerer informed the young revolutionaries that he would not be able to print the two manuscripts without the censors’ stamp on them, but he immediately came up with a solution, too, whispering the words “Seize the press!”³⁶⁴ By this, the freedom of the press was *de facto* attained.³⁶⁵ After the demonstration held in front of the National Museum (where the ‘Twelve Points’ and *Nemzeti dal* were read aloud), the crowd crossed the Danube on a pontoon bridge (Széchenyi’s famous Chain Bridge was still under construction then), and marched up to the Lieutenancy Council in Buda Castle, where they were told that their demands were all accepted.³⁶⁶ Knud J.V. Jespersen wrote about the very similar revolutionary events of 21 March 1848 in Copenhagen that they were “peaceful – indeed, almost amiable”³⁶⁷ – another Danish observation that could have been made about Hungary as well.

A few days after the peaceful (almost amiable) revolution of the streets of Pest-Buda of 15 March 1848, an extraordinarily fast and effective work of legislation started at the Diet in Pressburg: the events of Hungarian

359 Hörcher, 2019, pp. 103-104.

360 Deák, 1979, pp. 70-71.; Hermann, 2005, p. 383. For an English translation of all the ‘Twelve Points’ see: Gángó, 2001, p. 42. Gángó indicates the source of the English translation as Deme, 1976, pp. 16-17.

361 Képešsy, 2020, p. 60.

362 The famous refrain of this poem sounds in Mike Rapport’s English translation: “We swear by the God of Hungarians, we swear, we shall not be slaves any more!”. See Rapport, 2008, p. 68.

363 Gergely, 2000, p. 191.; Gosztonyi, 2022, p. 44.; Hermann, 2005, p. 383.

364 Gosztonyi, 2022, p. 44.

365 Gángó, 2001, p. 42.; Gosztonyi, 2022, p. 44.

366 Gergely, 2000, pp. 191-192.; Hermann, 2005, p. 384.; Rapport, 2008, p. 69.

367 Jespersen, 2019, p. 70.

constitutional history referred to by historian István Deák as ‘the lawful revolution’.³⁶⁸ As the first step, on 17 March 1848 palatine Stephen, based on an alleged oral authorisation received from king Ferdinand V, appointed Count Louis Batthyány as the first-ever Prime Minister of Hungary, yet without any legal basis (again, similarly to how the appointment of the first ‘responsible cabinet’ happened almost at the same time in Copenhagen), and ignoring the preconditions set up by the *Staatskonferenz*.³⁶⁹ Of course, *de iure*, this Viennese advisory body to the Emperor had no constitutional competence of supervising the state affairs of Hungary, however, it was *de facto* acting at that time as a regency council besides the monarch, who was held incapable of running the state on his own.³⁷⁰

The delegation of the Hungarian Estates returned to Pressburg “triumphantly”,³⁷¹ and on 18 March 1848 the Diet started working on the bills that would be later known as the ‘April Laws’.³⁷² It is interesting, even if for a 21st century reader it does not seem too strange, that fake news about an uprising of ten thousands of peasants fired up and armed by Petőfi also facilitated that the conservative delegates of the lower house and the aristocrats of the upper chamber give their consent to the revolutionary legislation.³⁷³ The most important bill about the new form of government (the later Act III of 1848) was adopted by the lower house on 22 and by the Lords on 23 March. The latter even proposed some modifications, especially with regards to the military and foreign affairs, considered by them for a good reason as crucial issues, in the light of the ‘indivisibility and inseparability’ clause of the Pragmatic Sanction. Finally, the two chambers could agree on a compromise text.³⁷⁴

On the next day the bill was forwarded to the Chancellery to prepare it for royal sanction, in line with the ordinary processual rules of legislation.³⁷⁵

368 See the title of István Deák’s excellent book on the Hungarian revolution of 1848-49: Deák, 1979.

369 Deák, 1979, p. 76.; Hermann, 2005, p. 384.; Hörcher, 2019, p. 105.; Képešsy, 2020, p. 60.; Miru, 2010, pp. 39-40.; Rapport, 2008, p. 67. (Batthyány’s appointment letter is published, e.g., in: Erdődy, 1998, p. 129.)

370 Miru, 2015, p. 13.; Rapport, 2008, p. 61.

371 Gergely, 2000, p. 192.

372 Bathó, 2019, p. 106.; Gergely, 2000, p. 192.; Képešsy, 2020, p. 60..

373 Hörcher, 2019, p. 105.

374 Bathó, 2019, p. 107.; Nagy, 1930, pp. 10-11..

375 Bathó, 2019, p. 107.; Képešsy, 2020, p. 62.

While the Estates in Pressburg were already working on other important issues such as the electoral bill, the Chancellery and the *Staatskonferenz* in Vienna made serious objections against the bill on responsible cabinet. The palatine was desperately trying to mediate between the Hungarians and the Viennese court, suggesting in a confidential memorandum addressed to his cousin Ferdinand that “the only feasible solution is to co-operate with Batthyány”.³⁷⁶ However, based on the advice received from the *Staatskonferenz*, on 28 March the king issued a letter of reply (‘Rescript’) in which he expressed his dissent, requesting the Diet to uphold the Chancellery as a separate state organ, to approximate the role of the new ‘responsible *Ministerium*’ to the function of the Lieutenancy Council, and to put a stronger emphasis on the reserved rights of the king, especially in the fields of military, diplomatic and financial affairs.³⁷⁷

The Estates judged the Rescript to be a counter-attack,³⁷⁸ having received it on 29 March “with fierce opposition”.³⁷⁹ Batthyány even wanted to resign, and it was again the palatine, Archduke Stephen who promised to the Estates to do his best to convince the king to change his mind.³⁸⁰ In the meantime, the people of the streets also reactivated themselves. A copy of the Rescript was thrown on fire in Pressburg, while in a crowd of 20,000 people in Pest fuelled by Petőfi’s radical poems there could even be heard the shouting “Long live the Republic!”³⁸¹ The outcome of the repeated demonstrations was quick and effective. On 30 March, the *Staatskonferenz* acknowledged that the proposed modifications were unacceptable for the Hungarian Diet, and declared to accept the original bill in main lines, with some comments.³⁸² On 31 March, the amended Rescript of the king was read aloud at a joint session of the lower and the upper chambers, and it was now received with ovation.³⁸³

The final version of the bill was adjusted by Kossuth to the comments of the *Staatskonferenz*, and was unanimously accepted by both houses on

³⁷⁶ Deák, 1979, pp. 91-92.

³⁷⁷ Képešsy, 2020, p. 62.; Ruzsoly, 2016, p. 554. For a detailed presentation of the points of the Rescript of 28 March 1848 see: Deák, 1979, pp. 93-94.

³⁷⁸ Hörcher, 2019, p. 106.

³⁷⁹ Ruzsoly, 2016, p. 554.

³⁸⁰ Miru, 2010, p. 47.

³⁸¹ Rapport, 2008, p. 140. See also: Deák, 1979, p. 95.

³⁸² Deák, 1979, p. 95.

³⁸³ Deák, 1979, p. 96.; Nagy, 1930, p. 14.

2–3 April.³⁸⁴ By this, the whole series of the ‘April Laws’ was ready (the electoral bill had already been adopted by the upper house on 1 April). The king gave his assent to the bills, too, and on 7 April he approved the final list of ministers of the Batthyány cabinet.³⁸⁵ On 10 April, Ferdinand, accompanied by his brother Archduke Francis Charles, and the 18 years old son thereof, Archduke Francis Joseph, travelled to Pressburg.³⁸⁶ On the next day, all laws were sanctioned by him in conformity with the centuries-long constitutional traditions. The ‘April Laws’ were officially promulgated in the presence of the king and the two Archdukes, and the Diet was solemnly closed.³⁸⁷ As István Deák emphasises: “Soon thereafter the deputies went home with printed copies of the thirty-one April Laws in their luggage. It seemed to them that a miracle had happened”.³⁸⁸

4. *“Es ist eine neue Verfassung für Ungarn!”*

In the following few pages, we are going to present those three Acts that were of the greatest significance from constitutional law point of view: Acts III–V. However, it would be unjust not to mention that, from the aspect of transformation of Hungary from a ‘feudal’ to a civic society, all ‘April Laws’ were very important. Just to highlight two of them that cannot be presented here in details due to space constraints: Act XV of 1848 cancelled the entailment of noble property (*aviticitas*)³⁸⁹ “abolishing the feudal constraints of the property with one stroke”,³⁹⁰ while Act XVIII of 1848 eliminated the hated institution of the ‘preliminary inspection’ of the press (censorship).³⁹¹ Citing László Péter’s assessment: “in the outburst of reforms enacted as the April Laws in 1848” the foundations of civic society were laid.³⁹²

384 Bathó, 2019, p. 107.; Képešsy, 2020, p. 63.

385 Hörcher, 2019, p. 105.; Képešsy, 2020, p. 63.

386 Deák, 1979, p. 99.

387 Gergely, 2000, p. 192.; Hörcher, 2019, p. 105.

388 Deák, 1979, p. 99.

389 Képes, 2016, pp. 102–103. and 106.; Képes, 2021a, p. 119.

390 Zlinszky, 2000, p. 310.

391 Gosztonyi, 2021, p. 40.; Gosztonyi, 2022, pp. 44–45.

392 Péter, 2012, p. 7.

4.1. Act III of 1848

It is not just difficult but would not have any sense either to set up a ranking among the ‘April Laws’. However, from constitutional law point of view, the importance of Act III ‘on the formation of an independent Hungarian responsible *Ministerium*’ is outstanding.³⁹³ This law brought three fundamental changes in the structure and operation of the executive power in Hungary: (1) introduced the ministerial countersignature of all kinds (not just the executive) of royal acts; (2) adapted the institution of impeachment of public officers; and (3) abolished all three traditional Hungarian bodies of central administration, the Chancellery, the Chamber and the Lieutenancy Council, declaring that the newly established *Ministerium* (i.e., the cabinet) would be the legal successor of all these three organs, and would take over all their duties, departments and officials, as the future uniform central body of the executive power.

This regulation was mainly patterned after the Belgian Constitution of 1831³⁹⁴ which had a great effect on the modern constitutional development of all European countries keeping the monarchic form of state.³⁹⁵ The Belgian Constitution was, on one hand, based on the (still monarchic) French constitution of 1791, and on the other hand, as even British scholars observed, in many aspects it codified the rules of the English historical constitution into a single constitutional charter.³⁹⁶ For the Hungarian reformers, France and England had always been the examples, and these two ‘best practices’ were united in a well understandable form in the Belgian charter.³⁹⁷ There are at least eight sections of the Hungarian Act III of 1848 for which a literal adaptation of the corresponding provisions of the Belgian Constitution can be observed, and many other paragraphs reflect its norms as well.³⁹⁸

³⁹³ Hermann, 2005, p. 384.

³⁹⁴ Gergely, 1981, pp. 74-75.; Hörcher, 2019, p. 101.; Rady, 2016, p. 10.

³⁹⁵ Erdődy, 2010, p. 7.

³⁹⁶ Hörcher, 2019, p. 101. (The English scholar referred and cited by Ferenc Hörcher is A. V. Dicey.)

³⁹⁷ Kaas, 1926, p. 122.

³⁹⁸ Miklós Nagy, Kálmán Ghyczy’s biographer went through all the paragraphs of Act III of 1848 looking for Belgian or other foreign parallels in a five-pages long footnote. He has found seven sections completely corresponding to their Belgian counterparts. See: Nagy, 1930, pp. 18-22. (footnote no. 2.)

The reason of this legal transplant is logical. As we have already seen, the introduction of the principle of governmental responsibility was a new point added to the agenda of the Diet by Kossuth in his revolutionary speech of 3 March 1848. After it had been accepted by the king – in reality by palatine Stephen –, Kossuth and his followers wanted to adopt the relating law as soon as possible. Kossuth drafted seven paragraphs himself, and then, in the morning of 21 March 1848 he asked Kálmán Ghyczy to finish the preparatory works for the next day's parliamentary session.³⁹⁹ Consequently, Ghyczy had less than 24 hours to accomplish the work.⁴⁰⁰ Under such a time pressure, the best solution was not to reinvent the wheel, but to utilise the experiences of others who had already fulfilled the same task with success.

Ghyczy was chosen by Kossuth for this job not just because he (as a palatine protonotary) was generally responsible for wording the documents of Diet. Kossuth knew that he had a respectable knowledge of constitutional literature. He was familiar with the constitutions of France (1791, 1814 and 1830), the states of the German Confederation (after 1815) and, of course, Belgium. In addition, he read much about the English historical constitution, and he also knew Tocqueville's book on the United States⁴⁰¹ published in the 1840s in Gábor Fábíán's Hungarian translation (*A democratia Amerikában*).

The question of responsibility of royal officials had long been debated at the sessions of the Diet. Not talking about medieval examples concerning the punishment of the king's 'wrong counsellors', let us just refer to 1825 when the issue of the illegal behaviour of the king's officials leading to the infringement of the Hungarian constitution was first brought up;⁴⁰² to Ferenc Deák's speech of 16 June 1836 in the lower house explaining that "the person of the ruler is indeed sacrosanct, [...] but the king's person is separated from the government in all constitutional countries";⁴⁰³ or to the parliamentary debates of the bill of the criminal code in 1843–44, when Kálmán Ghyczy proposed to insert a section about 'the punishment of unfaithful counsellors' that would enter into the competence of the parliament.⁴⁰⁴ Ferenc Deák

399 Nagy, 1930, p. 9.

400 Képešsy, 2020, p. 61.

401 Hörcher, 2019, p. 100.; Nagy, 1930, pp. 9. and 17-18.

402 Szabad, 1998, p. 93.

403 Cited by Miru, 2010, p. 42.

404 Nagy, 1930, p. 7.

presented a similar proposal, too, but both were rejected by the Conservative majority.⁴⁰⁵

By virtue of § 3 of Act III of 1848, the king shall exercise the legislative power “through the legally independent and responsible Hungarian *Ministerium*”. It is a paradigmatic change: by this rule the executive power ceased to be a reserved royal prerogative.⁴⁰⁶ However, as László Péter establishes, “the imperial matters of foreign affairs, army leadership and state finance were outside the executive power and remained monarchic *reservata*”.⁴⁰⁷ According to § 4, “each member of the *Ministerium* shall be responsible for his official operation”. The processual rules of impeachment were laid down in sections 33–34: the accusation of the ministers fell into the competence of the lower house by a vote of absolute majority, while an ad-hoc court, similar to e.g., the Norwegian *Rigsret*, chosen from the members of the upper house were entitled to decide on their conviction.

As László Péter highlights, “this procedure was never used [not just in 1848 but never in Hungarian history], although there were a few attempts to initiate it”.⁴⁰⁸ Anyway, this was the legal basis of the accountability of the government officials, and the key for it was the budget right of the parliament, also established the first time in Hungarian history in Act III of 1848.⁴⁰⁹ From that moment, the cabinet could spend public money only in line with the budget accepted by the parliament. The government had to prepare a financial statement of state accounts at the end of each year, from which the legality of the public expenditures could be supervised by the parliament.⁴¹⁰ The whole system of governmental responsibility – later also including the possibility to approve a ‘motion of no confidence’ – has been based on these rules up to the present day.

4.2. Acts IV-V of 1848

Further to the introduction of the new form of government, the ‘April Laws’ brought into effect a parliamentary reform as well. On one hand, Act IV of

405 Miru, 2010, pp. 42-43.; Szabad, 1998, p. 94.

406 Péter, 2012, pp. 7. and 314.

407 Péter, 2012, p. 7.

408 Péter, 2012, p. 314.

409 Magyary, 1923, p. 24.

410 Szente, 2007, p. 242.

1848 prescribed the annual summoning of the parliament, i.e., a continuous operation of the legislative body in order to guarantee that, as we have shown above, the state budget could be accepted for each year. On the other hand, Act V transformed the lower house of the deputies of the Estates into a house of representatives of the people. Both changes can be appraised as revolutionary, even if we do not forget that, again following the English model of the House of Lords, the upper house was left intact as the assembly of personally invited dignitaries and magnates, and that the absolute veto of the king over the legislation ('sanctioning') also remained unchanged.

Concerning the relationship between the monarch and the parliament, the king's obligation to summon the national assembly on a regular basis was not just reinforced (as for example in 1790 or 1825), but it was also fortified. By virtue of Act IV of 1848, the king became obliged to convoke the parliament in each year "possibly for the winter months". By this, the "national desire" (also reflected in Irinyi's 'Twelve Points') for annual parliamentary sessions was satisfied.⁴¹¹ The king was also prohibited to close the annual session or to dissolve the parliament before the approval of the financial statement of the last, and state budget of the upcoming year. Furthermore, we have to draw the attention to the fact that the parliament could not be dissolved by the king at his own discretion, only if the relating royal letter was countersigned by a minister (see § 3 of Act III of 1848).

The other change the 'April Laws' brought to the parliamentary life of Hungary was even more important. By the adoption of Act V of 1848, popular representation was introduced. Until 1848, the lower house consisted of the deputies of the Estates (*ablegati*).⁴¹² According to historical researches, c. 4.6–4.8 per cent of the Hungarian population (c. 450,000 persons) had noble titles in contemporary Hungary, from whom c. 136,000 were *patres familias* of full legal capacity.⁴¹³ Altogether c. 200,000 nobles and other privileged persons (burghers, priests) could actually vote for deputies.⁴¹⁴ If we use the term 'parliamentary representation' as the equivalent of how the actual number of voters relates to the whole population of a country, we can say that the old Diet represented the votes of approximately 2 per cent of all Hungarians.

411 Ruszoly, 2016, pp. 554-555.

412 Szijártó, 2020, p. 22.

413 Péter, 2012, p. 307. (Footnote no. 5.)

414 Nagy, 1930, p. 26.

The extension of the political rights to commoners had already been on the agenda since the end of the 18th century. The first political thinker who had raised the issue was József Hajnóczy, influenced by the French enlightenment. After the liquidation of the ‘Hungarian Jacobin conspiracy’ and the execution of their leaders (including Hajnóczy himself) in 1795, the idea was brought up again only in the ‘Reform Era’. The political elite was aware that the replacement of the Estate privileges with popular representation would not only affect the parliament but the noble counties, too. For the 1840s, a consensus was formed among the different political factions that the introduction of popular representation was unavoidable – only the depth of the reform was still a question.⁴¹⁵

Similarly to Act III, Act V of 1848 was also Kálmán Ghyczy’s creation who here took the English regulation as a model.⁴¹⁶ Those who had earlier been entitled to vote for deputies to the Diet could retain their voting right, because “it was no intention to withdraw anyone’s political rights” (§ 1). In addition to them, the law extended the franchise to all those citizens, too, who could meet all the general requirements set up by the law, plus at least one of the specific conditions (*census*). The general requirements were met by every Hungarian male citizen of at least 20 years of age who had full capacity to run his own affairs, provided that he belonged to one of the ‘received religions’ (established churches), and he had not been convicted of any major crime.⁴¹⁷

The specific conditions were primarily property based qualifications. Everyone could vote who owned at least “the quarter of a serf’s plot” (§ 2 point a). According to Maria Theresa’s *Urbarium* of 1767, it meant 9–11 Hungarian acres, depending on the quality of the land.⁴¹⁸ Taking 10 Hungarian acres as an average, this equated to c. 43,000 sqm of landed property.⁴¹⁹ If someone did not have a landed property in the countryside, he could choose from a list of other possible electoral qualifications as well, such as the ownership of a town house; running a workshop or other business; having a permanent yearly income of 100 Silver Florins; or – as the only non-property based

⁴¹⁵ Ruzsoly, 2016, p. 552.; Nagy, 1930, pp. 22–23.

⁴¹⁶ Nagy, 1930, p. 22.

⁴¹⁷ Deák, 1979, p. 97.

⁴¹⁸ Képes, 2020, pp. 201–202.; Ruzsoly, 2002, p. 44.

⁴¹⁹ Képes, 2020, p. 202.; See: ‘Hold’ In Ortutay, 1979.

census – being a qualified intellectual (e.g., academic, surgeon, lawyer, engineer, artist, teacher, chemists or priest).⁴²⁰

Thanks to these alternatives and the relatively low voting age, the number of voters was increased by the law from the above mentioned c. 200,000 privileged persons to c. 800,000 citizens,⁴²¹ equal to 7.1 per cent of the population of Hungary of that time.⁴²² In a European comparison, it was “more progressive than the French electoral law of 1830 had been; or the British Parliamentary act of 1832 [...]; or the famous liberal Belgian constitution of 1831”.⁴²³ However, if we compare it to the electoral laws of 1848–49, the picture is less attractive: the new French electoral decree granted 24% of French citizens with suffrage,⁴²⁴ and also the new Danish constitution (1849) was closer to a universal male suffrage with its 14.5 per cent.⁴²⁵ Consequently, Act V of 1848 was far not radical but, at the time, it was indeed progressive.

5. Epilogue

As we all know, the peaceful revolution of 15 March 1848 turned into a war of independence, at the end of which Hungary ceased to exist as a country. In September 1848, the new *Ban* of Croatia, the imperial general Josip Jelačić launched a military attack on Hungary. On 22 September, palatine Stephen was ordered to Vienna, and he was forced there to resign. On 2 October, Count Batthyány resigned, too. The next day Ferdinand V dissolved the Hungarian parliament infringing the rules of Act IV of 1848.⁴²⁶ On 2 December 1848, he also was forced to resign and to hand over all powers to his nephew Francis Joseph, now breaching Act III of 1848 (as the royal letter of abdication had not been countersigned by any of the Hungarian Ministers, only by Felix zu Schwarzenberg, Prime Minister of Austria).

On the basis of the new imperial constitution issued by Francis Joseph on 4 March 1849 in Olomouc, it became clear for the Hungarian political

420 Deák, 1979, p. 97.; Képes, 2020, p. 202.

421 Nagy, 1930, p. 26.

422 Horváth R., 1953, p. 368. According to József Ruszoly, only 6.5% (see Ruszoly, 2016, p. 555.)

423 Deák, 1979, p. 98. See also: Csizmadia, 1986, p. 6. .

424 Ruszoly, 2016, p. 555. .

425 Rying, 1988, p. 278. .

426 Ruszoly, 2016, p. 555.

elite that an independent Hungarian kingdom could not be kept under the reign of a common monarch with Austria. Therefore, the dethronement of the Habsburg dynasty was declared on 14 April 1849 in the Reformed Great Church in Debrecen, and Louis Kossuth was elected as the ‘Regent-President’ of Hungary.⁴²⁷ As the new Hungarian government did not receive any assistance from any of the foreign powers, while Russian Tsar Nicholas I provided a considerable military support to Austria, after further four months of desperate struggles, the Hungarian independence movement was finally crushed.

Why can we still say that the 1848 revolution and the ‘April Laws’ were indeed not a failure? Because in 1867, when the Austro-Hungarian Compromise was concluded, “most of their institutions were restored”.⁴²⁸ After the defeat of Austria–Hungary in the First World War and its consequent dissolution, and the fall of the subsequent republican (1918) and Bolshevik (1919) governments in Hungary, the ‘April Laws’ were reinstated again, and they continued to serve as constitutional norms in the whole Interwar period of ‘kingdom without a king’,⁴²⁹ moreover, partially even until 20 August 1949 (the adoption of the Soviet-style constitution). And if we look at the present form of government of Hungary (a parliamentary republic since 1989), we may observe that, even if none of the Acts of 1848 are formally in force anymore, they still have a determinative effect on Hungarian constitutionalism.

427 Kořalka, 2001, p. 155. The expression ‘*kormányzó elnök*’ in the text of the Hungarian Declaration of Independence of 14 April 1849 can be interpreted as the Regent-President (i.e., a president who is acting on behalf of the king) and as ‘a President who governs’ as well, because the Hungarian word *kormányzó* can mean ‘gouverneur’ or ‘governing’ at the same time. According to the latter interpretation, the new state form of Hungary was republican! See: Mezey, 1998.

428 Szente, 2022, see: point §1.03. (‘From Feudalism to Civic Constitutionalism’)

429 See Képes, 2021b.

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CODES AND CODIFICATION IN LIBERAL ITALY

Abstract

The essay sets out the events of the codification process in the Italian peninsula, starting with the spread of the Code Napoléon and the ABGB, then in the pre-unification States, and along the course of the Kingdom of Italy up to the 20th-century recodification, highlighting the adherence of the codes following Italian Unification to liberal social and economic models.

Keywords: code, codification, Kingdom of Italy, liberalism

1. The Italian Codes of the Restoration

The early years of the 19th Century saw the appearance of the first Codes: the French *Code Napoléon*, of 1804, and the Austrian *Allgemeines Bürgerliche Gesetzbuch* (ABGB), of 1811⁴³¹. The Italian lands knew the French legal text early on, since the Peninsula, with the exception of the islands of Sicily and Sardinia, was occupied by French troops, between the Italic Kingdom in the north and the Kingdom of Naples in the south⁴³². With the Restoration, the Austrian Code was also extended to the Lombardy-Venetia Kingdom. The two Codes can be considered as the two fundamental elements of the Italian

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⁴³¹ On the phenomenon of codification, it is always useful to read some classics, such as Caroni, 2001; Petronio, 2002.

⁴³² On the legal experience of Napoleonic Italy see the interesting research by Solimano, 2017; Solimano, 2021.

codification trunk, although with a clear predominance of the French model: they inspired the Codes that were promulgated in the Italian Restoration States after the Congress of Vienna.

Above all, the *Code Napoléon* became a model to look up to, because of the great innovations it contained: a Code-monument, such as the one sculpted by Tronchet's admirable words, 'the Code is like the peristyle of French legislation', which reminds us of a noble and respectable neoclassical building erected in the shape of a Greek or Roman temple, a peristyle whose columns are made up of the main elements of private law, such as property and contract; which recent historiography instead looks up to as a Code-document⁴³³: numerous researches have helped to unveil the real intentions of the Napoleonic codifiers, highlighting the interests at stake⁴³⁴. These interests are well expressed in the work of Honoré de Balzac, which constitutes for us a privileged observatory for understanding the concrete dynamics of the use of the Code. Not a passive tool, but a dangerous protagonist endowed with a life of its own, as we can glimpse from the words of another great French writer, Henri Beyle, well known as Stendhal: "*Le code civil arrive rapidement à tous les millionnaires, il divise les fortunes, et force tout le monde à valoir quelque chose et à vénérer l'énergie*"⁴³⁵.

Once the Constitutions, such as that of the Kingdom of Sicily in 1812⁴³⁶, were removed from the scene, the constitutional value of the protection of individual rights was rediscovered in the Codes: the administrative Monarchy, still following the path of absolutism, maintained the guarantee of the private sphere in the codified legal texts. Revolutionary and constitutional values were replaced by a sense of the State and dedication to the crown; thus rediscovering the sense of codification within a culture based on loyalty to the monarchy: awareness of an impossible return to the system of *Ius Commune* spread, however, despite the attempts of some monarchs to eliminate the idea of the Code from their states. The sovereigns rely on the so-called amalgamation policy: the economic part of the Code Napoléon is maintained, property, contracts, consolidating the elimination of feudalism;

433 Caroni, 2001.

434 Arnaud, 2006.

435 Stendhal, 1854, pp. 297-330: Nantes, le 25 juin 1837; Pace Gravina, 2021, pp. 353 ss.

436 *Costituzione di Sicilia stabilita nel generale straordinario Parlamento del 1812. Preceduta da un discorso sulla medesima, e da diplomi relativi alla Convocazione del Parlamento, ed alla Sanzione di tutte le proposte di esso: Coll'aggiunta di un Compendio della Costituzione d'Inghilterra*, Palermo, Solli, 1813; Palmieri, 1847.

while changing the rules of personal and family law to adapt them to the postulates of the Restoration, to the embrace between Throne and Altar, eliminating divorce and civil marriage, re-establishing the power of the father and religious marriage.⁴³⁷

The first code was promulgated by King Ferdinando I of Borbone in 1819 for his new State: it was the Code for the Kingdom of the Two Sicilies, in five autonomous parts corresponding to the Napoleonic codes: the Civil Laws; the Criminal Laws; the Laws of Procedure in Civil Judgments; the Laws of Procedure in Criminal Judgments; and the Laws of Exception for Commercial Affairs⁴³⁸. In 1820, the Codes of the Duchy of Parma, Piacenza and Guastalla were promulgated, which were inspired by the Austrian model too in some respects, given that the Duchess of Parma was Maria Luisa, daughter of the Emperor of Austria and second wife of Napoleon. There are four Codes, the Civil Code, the Penal Code, the Code of Civil Procedure, the Code of Penal Procedure: the Code of Commerce is not promulgated, at the behest of the jurists of the Duchy, given the impossibility of trading by sea and the hegemony of agriculture over the economy. This codification is considered among the best of the Restoration, due to the evident role of Austrian legal technicism.⁴³⁹ In the Kingdom of Sardinia, which now includes Liguria too, King Carlo Alberto published the Albertine Civil Code in 1837, which was followed by the Criminal Code (1839), the Commercial Code (1842) and the Code of Criminal Procedure (1847).⁴⁴⁰ The Civil Procedure Code was published by his successor, King Vittorio Emanuele II in 1854, as Carlo Alberto had to go into exile in Portugal for his important role in the war against Austria in 1848-1849. Only in the Kingdom of Sardinia did the Constitution of 1848, the *Statuto Albertino*, remain in force, of basic importance because the Savoy dynasty maintained a constitutional regime, thus becoming the point of reference for the patriots and intellectuals of the Risorgimento, Statuto which later became the Constitution of the Kingdom of Italy.⁴⁴¹ The Papal States saw a somewhat different experience. The Pope did not promulgate

437 For an overview of the Italian pre-unification codes and their links with the French and Austrian codes see Ghisalberti, 1998, pp. 223 ss.; Alpa, 2000, pp. 52 ss.

438 Mastroberti, Masiello, 2020.

439 Errera, 2023.

440 Aimerito, 2008.

441 Ghisalberti, 2002; L. Lacché, 2012, pp. 294 ss.; Ferrari Zumbini, 2016; Ferrari Zumbini, 2019; Ferrari Zumbini, 2011, pp. 13 ss.

new codes, but only regulations: the word ‘code’ was banned for its revolutionary taste. A Regulation of Civil Procedure (1817) and a Provisional Regulation of Commerce (1821), inspired by the Code de Commerce, saw the light of day. The only state within which the French Codes remained in force was the Duchy of Lucca, while in the Duchy of Modena it was Francesco V who promulgated new Codes only between 1851 and 1855. In the Grand Duchy of Tuscany the role of the *Ius Commune* remained: only Leopold II succeeded in promulgating a penal code (1853), considered the best of the Restoration, advanced and with a peculiar innovative and avant-garde character, typical of Tuscan legal culture.⁴⁴² In 1859, the death penalty was abolished. In the Lombardy-Venetia Kingdom, annexed to the Austrian Empire, the ABGB was extended in 1815.

The experience of the Napoleonic code did not disappear with the Restoration: in the new pre-unification codes one finds similar characters deriving from the common French codifying matrix, considered by the *Risorgimento* intellectuals as a common legal source for the creation of Italian legal unity. The pre-unification codes also contributed to the sharing of the idea of codification as popular and not belonging only to a small group of intellectuals⁴⁴³. Giovanni Cazzetta in this regard spoke of the perception of an “imaginary code”, a model “*che assorbe l’idea stessa di diritto, travalica la storia delle codificazioni e diviene spazio libero attorno a cui aggregare identità del passato e progetti per il futuro*”.⁴⁴⁴ The *Code Napoléon* becomes a meta-historical model that overcomes the differences between the different political systems of the Peninsula in the name of a common legal tradition that even goes back to the matrix of Roman law, preparing the ground for the perception of the Code as “national”, the “gift of the foreigner”⁴⁴⁵.

As in France, the *École de l’Exégèse* method spread in Italy, with a scholarly production represented by commentaries and treatises designed to explain the codes, as well as a massive use of translations of the works of French jurists such as Marcadet, Toullier, Zachariae, Delvincourt.⁴⁴⁶ It affirms the thought of numerous jurists who develop an original method of approaching

442 Sbriccoli, 2002, pp. 191 ss.; Vinciguerra, Da Passano, 1993.

443 Ghisalberti, 1998, pp. 257 ss.;

444 Cazzetta, 2012, p. 14.

445 Cazzetta, 2012, pp. 93 ss.

446 Hespanha, 1999, pp. 206 ss.; Ferrante, 2011; Spinosa, 2017.

the study and interpretation of law that Luigi Lacchè has relatively recently identified as the “eclectic canon”.⁴⁴⁷

However, there is also a new literary genre that searches for parallels between the codes of the various Italian states, and between the French and Austrian codes, to demonstrate the existence of a single language of codification of homogenous legal institutions present in the legislation of all Italian States:⁴⁴⁸ In this context, we also look at the jurisprudence of the judgments of the French Court of Cassation, although within the limits of a context that does not consider judgments among the sources of law.

However, we should not consider the pre-unification codes as a passive copy of the French and Austrian codes: in some contexts, autonomous solutions were sought and found. This is evident, for example, in the penal sphere: the Penal Laws of the Two Sicilies of 1819 were based on the Italian criminalistic tradition in numerous points; the Tuscan penal code of 1853 proved to be much more advanced than the models indicated, due to the interest of the jurists at the University of Pisa in German legal science, documented by the use of the draft of the Baden Code, in which Karl Joseph Anton Mittermaier played an important role.⁴⁴⁹

In the civil sphere too, there were autonomous choices: a notable example is the maintenance of the emphyteusis contract, present in a traditional version in the Austrian code, and expunged from the Code Napoléon due to the aversion to constraints that conflicted with the new property asset affirmed by Art. 544. The contract was introduced in the Code of the Two Sicilies⁴⁵⁰ and in the Code of Parma⁴⁵¹, with a ‘modern’ configuration, to reaffirm an autonomous way in the definition of rights over land ownership, in certain realities where it proved appropriate to subdivide the latifundia owned by the aristocracy, ecclesiastical bodies and cities, favouring access to land by the new middle class, which considered itself more malleable than the old nobility and willing to collaborate with the crown in the mechanisms of the administrative Monarchy.

The pre-unitary Italian states also adopted military penal codes, some of which were of a good standard, such as the Military Penal Statute of the

⁴⁴⁷ Lacchè, 2010, pp. 153 ss.

⁴⁴⁸ Ghisalberti, 1998, pp. 269 ss.

⁴⁴⁹ Pace, 2000.

⁴⁵⁰ Pace Gravina, 2016; Pace Gravina, 2020, pp. 195-211; Pace Gravina, 2023a.

⁴⁵¹ Pace Gravina, 2023b, pp. 175-191.

Kingdom of the Two Sicilies: in addition to the ordinary procedure, these also provided for an abbreviated one to be used in time of war and in the theatre of war operations: this version was used by the governments to contrast the *Risorgimento* uprisings, through the use of special courts, massive use of the death penalty and hard prison, to be served in fortresses.⁴⁵²

2. The Post-Unitarian Codes

After the failure of the revolutions of 1848, most Italian patriots began to look to the Kingdom of Sardinia as the only pre-unitary state that could lead the process of national unification, as it was the only State that had maintained a liberal Constitution: the *Statuto Albertino*. After being defeated in the war against Austria, Carlo Alberto himself was forced to go into exile in Portugal: the crown passed to his nephew Vittorio Emanuele II, who maintained the constitutional regime. In 1859 the Second War of Independence broke out: the Kingdom of Sardinia allied with France and invaded Lombardy, defeating the Austrian armies at Solferino and San Martino, forcing the Empire to the armistice of Villafranca. On 11 May 1860, Giuseppe Garibaldi landed in Sicily and quickly conquered the Kingdom of the Two Sicilies. In September 1860, the troops of Vittorio Emanuele II invaded Marche and Umbria, also occupying a large part of the Papal States. Thus Italy was unified in a short time, and on 17 March 1861 the Kingdom of Italy was proclaimed, with Turin as its capital: the Papal State was reduced to Latium while Veneto was still in Austrian hands. In 1866 with the Third War of Independence the Veneto was annexed; Rome was taken later, in 1870. Only Trentino and Venezia Giulia were missing, which only became part of Italy after the First World War, when the victory over the Austrian Empire made it possible to consider the Alps as the sacred inviolable border of the Italian homeland and nation. The Italian nation had been created, but a common right for the entire population was needed. Three possible alternatives were considered: the first, preferred by the government of the Kingdom of Sardinia, was to apply the Sardinian codes to the new State, by right of conquest. A second model intended to keep the pre-unification codes in

452 For the Military Criminal Statute and its implementation Pace Gravina, 2015.

force, modifying and adapting them to the constitutional regime, for a law on a regional basis. The third way was more radical, and turned towards the promulgation of new legislation. The thesis that slowly prevailed was the third. The first draft was prepared by Minister Cassinis in 1860: it was a revision of the Code Albertino that took into account both the Code Napoléon and the experience of the ABGB and the pre-unitary codes; however, it was described as too secular, liberal and tied to the French model. There were some important innovations, one of which was the complete enjoyment of civil rights for foreigners even without reciprocity: after 1848, many exiles from the pre-unitary Italian States had taken refuge in Turin, where they had found the opportunity for freer political debate, growing up in the shadow of the Savoia dynasty. Civil marriage was instituted according to the jurisdictionalist tradition and the marital authorisation was abolished, the wife was given greater legal capacity to administer her own property and the preference of legal succession for sons was re-established, reserving it also for natural sons. After the conquest of the Southern Kingdom, Cassinis prepared a second draft that was presented after the proclamation of the Kingdom of Italy, similar to the model of the Neapolitan translation of the Code Napoléon, which was extended to the Kingdom of Naples in 1808. This project did not succeed either, and was replaced in 1862 by one prepared by the new Minister of Justice, Miglietti: this one still looked to the French model with amendments inspired by the Code of the Two Sicilies.⁴⁵³ After the new minister, Pisanelli, prepared a new draft of the Civil Code: the main idea was a codification discussed and approved by Parliament title by title, as had been the case with the 1804 Code. The Civil Code was to have as its object goods and property, while persons and family were to belong to the constitutional sphere, because they were the political basis of the Kingdom, but the Senate eliminated the parts that were too innovative compared to the pre-unification tradition. The fear of a new war against Austria induced the government to proceed with legislative delegation and not with parliamentary discussion, so on 23 November 1864 the Council of Ministers asked parliament for authorisation to proceed by decree and not by law. On 2 April 1865, the law on national unification was promulgated, the Code came into force on 1 January 1866 together with a new Code of

⁴⁵³ Solimano, 2003.

civil procedure prepared by Pisanelli himself together with two experts, the lawyers Astengo and Vaccarrone.⁴⁵⁴

An important role in the events of national unification was played by numerous lawyers, who had taken part in the revolutions of the *Risorgimento* and had suffered imprisonment and exile, and who proved ready to cooperate in the construction of the legal system of the new Kingdom.⁴⁵⁵

The Civil Code of 1865 remained in force until 1942 because it was in line with the needs of Italian society in the liberal period. The first book concerned persons; foreigners were admitted to the enjoyment of civil rights even without reciprocity. Civil marriage was reintroduced and made indissoluble, so there was no existence of divorce but only the personal separation of the spouses; furthermore, the negotiating inferiority of women was maintained with marital authorisation, and adoption was maintained and improved. The second book, concerning goods and property, focused mainly on this, following the model of Art. 544 of the 1804 Code; it also included the protection of intellectual property and copyright. The third book, on the acquisition of rights, favoured legitimate succession over testamentary succession, preferring family ties and prescribing the public deed for donations.⁴⁵⁶

Three strong criticisms were levelled at the Civil Code of 1865: the absence of an autonomous consideration of the employment contract, still framed in the Napoleonic systematics of the Romanist tradition of *locatio operis*⁴⁵⁷; the introduction of emphyteusis into the Code, which was absent in the Napoleonic model but had played a fundamental role especially in the Kingdom of the Two Sicilies for the feudal eversion and could have been a useful instrument for the division of ecclesiastical property⁴⁵⁸; the other concerned the retention of a hated institution, personal arrest for debt.⁴⁵⁹

The Civil Code was promulgated together with the Civil Procedure Code and the Commercial Code, which reproduced the text of the Kingdom of

454 On the codification of 1865 Aquarone, 1960; Cazzetta, 2012, pp. 30 ss.; Ghisalberti, 1997, pp. 29 ss.

455 Padoa Schioppa, 2009; Borsacchi, Pene Vidari, 2012; Borsacchi, Pene Vidari, 2015; Migliorino, Pace Gravina, 2013; Colao, 2006; Cappuccio, 2018; Tacchi, 2002.

456 Ghisalberti, 1997, pp. 77 ss.

457 Cazzetta, 2012, pp. 163 ss.; Cazzetta, 2002, pp. 139 ss.

458 Pace Gravina, 2014, pp. 261-276; Pace Gravina, 2016, pp. 29-46; Pace Gravina, 2023a.

459 Pace Gravina, 2004.

Sardinia. The space for laws outside the Code was still very small, and the text retained its centrality for a long time. In fact, a few laws were promulgated later, such as the law of 7 July 1866, which restored full legal and political capacity to the religious; some laws of 1866-67 suppressed religious corporations, and laws on the liquidation of the ecclesiastical real estate abolished the *manomorta*. A measure of 1877 cancelled personal arrest for debts in civil and commercial matters, allowing it to survive only in the penal sphere, while another law of the same year admitted women to testify in public and private acts. On the whole, there were few regulations that dealt with certain matters not regulated by the code and did not aim to undermine the primacy of the code: it fully embodied the founding values of the middle class, guaranteed individual rights and laid down the rules of the game between private individuals. The equation between law of the State and Civil Code was clearly visible: the Code adhered well to the society of which it was an expression, and which politically identified with the historical Right Party, which represented the landowners, who fell in the elections of 1876, which saw the Left Party, representing the new, more dynamic entrepreneurial classes, prevail.⁴⁶⁰ The New Policy was evident in the genesis of the 1882 Commercial Code, which only partially retraced the paths of the French *Code de commerce*, drawing mainly on the German General Commercial Code, the *Allgemeine Deutsche Handelsgesetzbuch*, which supported, according to Chancellor Bismarck's insights, the economic expansion of the Second *Reich*. The new commercial code became the banner of the entrepreneurial bourgeoisie, prevailing over the Civil Code, the legacy of the landowners, seeing the development of legal thinking on commercial issues, with an important simplification of the tools available to economic operators, in line with liberalist thinking⁴⁶¹: Italy was thus moving towards a process of industrialisation, concentrated mainly in the North of the Peninsula, while the South remained anchored to the agrarian economy.

A very troubled process was that of the penal code, which was promulgated in 1890, well thirty years after the Unification of Italy, and was named after the minister Giuseppe Zanardelli. It was a code that embodied the postulates of liberalism in criminal matters, in harmony with the principles of the new constitutionalism: crimes were divided into crimes and

460 On the Codes of the Left Ghisalberti, 1997, pp. 149 ss.

461 Such as the Treatise on Commercial Law by Cesare Vivante: Grossi, 2000, pp. 51 ss.

contraventions, eliminating the Napoleonic tripartition; crimes of opinion in the press were eliminated, punishments were reduced and were to aim at the offender's emendation and re-education. The death penalty was abolished, which had been the stumbling block on which all legislative projects presented by Zanardelli's predecessors had run aground. The punishment had the function of re-educating the offender, in line with the most modern trends; conditional release was introduced, attempt and recidivism were more leniently regulated. The Zanardelli code was therefore seen as fully adhering to the social values of its time. It was accompanied later, in 1913, by the Code of Criminal Procedure, which was named after the Minister of Justice Finocchiaro Aprile, which comprehensively guaranteed the defendant and protected the rights of defence, in line with liberal achievements in criminal proceedings.⁴⁶² On the Zanardelli Code developed the thought of a liberal school of criminal law⁴⁶³ that was later labelled by the jurists of penal positivism, followers of Cesare Lombroso, as the Classical School, inadequate to understand the profound innovations brought by the Turin master to the study of criminal law.⁴⁶⁴ As is well known, it is to Lombroso that the Positive School of Criminal Law dates back, which attacked the postulates of the liberal school by affirming an integrated conception of criminal law, including criminology and anthropology, based on the postulate of atavism and the determination to evil of the perpetrators of crimes, recognisable through peculiar somatic traits.⁴⁶⁵

The 1880s saw the most sensitive Italian jurists abandon the traditional exegetical method that had accompanied the interpretation of the new civil code throughout the first decades⁴⁶⁶ in favour of the systematic approach advocated by the German School, the Pandectistic, which allowed a more free interpretation and enhanced the role of the jurist⁴⁶⁷. Perhaps this change also explains the small number of special laws promulgated in the period and the long life of the Civil Code of 1865: jurists regained possession of interpretation, and the contents of the code could be expanded to include the novelties emerging from society. However, liberal ideas were not the only

462 Sbriccoli, 1974-1975a, pp. 557-642; Miletta, 2003.

463 Sbriccoli, 1990, pp. 217 ss.; Sbriccoli, 1987, pp. 105-83.

464 Sbriccoli, 1998, pp. 485 ss.; Colao, 2012, pp. 349 ss.

465 Sbriccoli, 1998; Marchetti, 2012.

466 Cazzetta, 2012, pp. 119 ss.; Solimano, 2010, pp. 244-248; Solimano, 2012.

467 Grossi, 2000, pp. 13 ss.; Cazzetta, 2012, pp. 143 ss.; Alpa, 2000, pp. 150 ss.

ones to hold the field: the social sensibility of legal socialism was energising, which also developed the law, but failed to gain a grip on Italian society, which remained profoundly bourgeois and liberal. Socialism fought against the individual owner model, against contractual autonomy, and although it remained a minority current, it managed to obtain the promulgation of some laws of a social nature, such as the 1883 law on the national insurance fund for accidents at work, or the 1886 law on the work of children; in the same year workers' societies were recognised. In 1898 in 1904 we have the law on accidents at work, in 1904 the conquest of weekly and holiday rest for workers; in 1907 that on the protection of the work of women and children.⁴⁶⁸ There is also a move towards some reforms of landed property, such as in the field of emphyteusis, as witnessed by the works of Vincenzo Simoncelli.⁴⁶⁹

In this period, constitutional law developed, abandoning the previous historicist and sociological orientations to follow the model of the great German publicists such as Gerber or Laband: the renewal was due to Vittorio Emanuele Orlando, who also looked to the Pandectistic model in the field of public law⁴⁷⁰. At the same time, on the identical postulates, the study of administrative law was deepened by Orlando himself and his school.

The fifty years without reforms ended with the First World War. It strongly affected the liberal model that saw private property as almost untouchable by the State, because in a war economy the primacy of the private sphere could be undermined by the urgency and needs typical of war. Thus, there were changes in Italian legislation that were considered temporary and exceptional in nature, but which then left lasting repercussions. The law of 22 May 1915 delegated to the government full powers and a legislative power that could be implemented through decrees. The wartime legislation was expressed with strong limits on private property: administered prices, blockade and restrictions on urban leases, compulsory food supply, requisitions, militarisation of labour, shaking the liberal edifice of codification.⁴⁷¹

With the war, plans for colonial legislation, such as the Code of the Eritrean Colony, were abandoned: Italy had already embarked on African

468 Alpa, 2000, pp. 224 ss. On the genesis of labour law in Italy, Cazzetta, 2012, pp. 163 ss.

469 Simoncelli, 1910; Pace Gravina, 2023a.

470 Fioravanti, 2001; Cianferotti1980; Lacchè, 2012, pp. 294-301; Lacchè, 2023; Pace Gravina, 2011.

471 Alpa, 2000, pp. 240 ss.; Roggero, 2020a; Roggero, 2020b.

expansion at the end of the 19th century; after the defeat at Adua, which marked a long setback, Eritrea was joined by Libya in 1911.

After the war there was a progressive return to a normality that was now impossible to achieve⁴⁷², given the social and economic upheavals that had taken place. The model of bourgeois liberalism based on the binomial Liberty and Property is shaken by the workers' question and socialist movements, conflicts between groups and interests become visible and difficult to reconcile. In 1919, the law on the abolition of marital authorisation was passed in recognition of the role played by women in the difficult wartime period.⁴⁷³

3. The New Codification

Victory in the First World War permitted the annexation of Venezia Giulia and Venezia Tridentina, to which the national codes were extended, in place of Austrian law, without consideration for the German and Slovene minorities, according to the paradigm equating State and Nation.⁴⁷⁴ In the post-war years, the government moved towards a new draft penal code. The Positivists were pressing for the replacement of the Zanardelli Code, which no longer corresponded to the new Lombrosian scientific postulates: in 1919, Minister Mortara commissioned the well-known penalist Enrico Ferri to prepare a new text.⁴⁷⁵ The Ferri project, however, stalled on the first book, the general part, as contemporary scientific dynamics had overtaken the Lombrosian postulates of the Positive School, so the Zanardelli Code remained in force.

In the meantime, the Post-War Commission had been established, which sought to standardise the rights of the Kingdom of Italy in the aftermath of the conquest of Venezia Giulia and tried to recreate a common legal substratum for all conquered lands. From the work of this commission came the idea of creating an organic reform of the codes, and in 1924 the Royal Commission was established, which was to prepare amendments to the civil code, and new codes of commerce, procedure and merchant navy. The parable of

472 D'Amelio, 1913, *ad vocem*; Costa, 2004-2005, pp. 173 e segg.; Martone, 2008; Martone, 2012.

473 Ghisalberti, 1997, p. 217.

474 Ghisalberti, 1997, pp. 215 ss.

475 Sbriccoli, 1974-75b, pp. 873 ss.; Colao, 1986, pp. 107 ss.; Messinetti, 2020.

the new codification intersects with the coming to power of Fascism, after the March on Rome on 28 October 1922, which in a short time dismantled the armour of the liberal state by establishing a dictatorship. Mussolini made it a priority to promulgate new codes that could embody the essence of the fascist revolution⁴⁷⁶. In 1927, a French-Italian project for a common legislation on bonds was prepared, which failed due to the simultaneous rise of fascism with the idea of a new codification.⁴⁷⁷

In 1930 the Criminal and Criminal Procedure Codes appeared, named after the Minister of Justice Alfredo Rocco, which marked the abandonment of the tendencies of the Positivist School and the adherence to a new technical-scientific direction⁴⁷⁸; the genesis of the Civil Code proved more complex and was only concluded during the Second World War, with its promulgation in 1942: the preliminary draft of the Royal Commission was discussed and enriched by parliamentary commissions; in 1940, moreover, the Minister Dino Grandi established that the Commercial Code was to be integrated into the Civil Code, becoming the fifth Book, of Labour, implementing what has been called the commercialisation of private law.⁴⁷⁹

In 1941, the Military Penal Code of War and that of Peace were also promulgated, which replaced the 1870 Military Penal Code at the height of the conflict.⁴⁸⁰

A complex recodification of the law, which came to fruition during the tragedy of the Second World War, nevertheless survived the fall of the fascist regime and remained in force (it largely still is today), because it was the result of technical knowledge that was still predominantly liberal in nature, a feature that is particularly evident in the Civil Code of 1942⁴⁸¹: it is precisely these codes that, in continuous confrontation with the 1948 Constitution, formed the foundations of the legal experience of democratic and republican Italy.

476 Alpa, 2000, pp. 263 ss.; Ghisalberti, 1997, pp. 213 ss.

477 Alpa, Chiodi, 2007.

478 Sbriccoli, 1999, 817 ss.

479 Alpa, 2000, pp. 304 ss.

480 On military criminal law before the new codes see Vico, 1917.

481 An example in Pace Gravina, 2023a. See the remarks of Cappellini, 1999.

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RUSSIAN GOVERNOR OF THE KINGDOM OF POLAND IVAN FIODOROVICH PASKEVICH AND HIS REACTIONS TO THE IDEAS OF THE HUNGARIAN SPRING OF NATIONS

Abstract: Paskevich had a completely unique position as governor of the Kingdom of Poland and military commander of the largest army of Russia. In 1849 he commanded the Russian forces during the suppression of the Hungarian Revolution (1848–1849). The aim of the article is to trace Paskevich's reaction to the Hungarian independence movement, known as the Hungarian Revolution. What views led him to invade Hungary. Paskevich was very reticent to express his personal beliefs and political views. However, the research leads to the conclusion that his ideology is incorporated in the slogan – autocracy, Orthodoxy, folk. Paskevich believed in autocratic, absolute and supranational rule and that the so-called the rule of law is the best solution for people. Of course, he advocated the Russian Empire, and he despised the Austrian Empire as being weak and corrupt. Nevertheless Paskevich was against the intervention on the side of Austria. He believed that Austria did not deserve Russia's help and would not show any gratitude. He had fears of an uprising in Poland that could trigger a lack of confidence in him in ruling the country. Unwavering faith in himself gave Paskevich an impulse to take further steps

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towards the abolishment of the autonomy of the Kingdom of Poland. Unification and russification reforms were introduced in education, communication, censorship and customs management. The elites of the Kingdom of Poland undertook actions similar to those of the Hungarians as early as 1831 – the war against Russia and the dethronement of the tsar. The defeat of the Hungarians accelerated changes in the political tendencies among the Poles. Already in 1848, clear ideological discrepancies can be seen, and are fully revealed in the January Uprising of 1863-1864. The Poles strongly advocated the fight for the liberation of all nations from the rule of empires.

Keywords: Hungarian Revolution of 1849, Ivan Fyodorovich Paskevich, Kingdom of Poland, Russian Empire, Austrian Empire, imperialism, nation-states

1. Introduction

Paskevich was called father-commander by the tsar and had a completely unique position as governor of the Kingdom of Poland (almost a sovereign ruler) and commander of the conscripted army – the largest army in Russia. This was due to his merits for helping Nikolay Pavlovich to the throne.

Ivan Fedorovich Paskevich served in the Guards Infantry Division with the future Emperor Nicolay I. After the death of Tsar Alexander I, Paskevich supported Nicolay and not the older pretender to the throne, Konstanty. At a crucial moment, Nikolay assigned to Paskevich a secret mission to eliminate Ermolov (Head of the civilian division and border patrol in Georgia, Astrakhan and Caucasian provinces; commander of the Separate Caucasian Corps, 1816-1827), the proconsul of the Caucasus – the almost sovereign ruler of the Caucasus and the commander of the largest competent Russian army.

Paskevich went to Georgia, where Ermolov was compromised by intrigues and insubordination. On March 27, 1827 Ermolov was dismissed. The reason behind Yermolov's dismissal was the tsar's suspicion of Yermolov's involvement in the Decembrist revolt. Paskevich was a member of the Supreme Court hearing the case of the Decembrists. From 1826 he commanded the Russian army in the Caucasus, and in March of 1827 he became governor of the Caucasus.

When the parliament of the Kingdom of Poland dethroned the tsar in 1831 and the Polish-Russian war broke out, Nicholas I ordered Paskevich to lead the war. He led the suppression of the Polish uprising of 1830-1831, after which he was appointed as governor of the Kingdom of Poland, and pursued a policy of national oppression and russification. After defeating the Polish army, the tsar granted Paskevich the title of Duke of Warsaw and appointed him governor of the Kingdom of Poland and commander of the army. It was a unique position, practically he exercised full military and civilian power on the border vis-a-vis the key powers of Europe. Paskevich brought many of his associates from the Caucasus and granted them higher positions, but he put an end to the de-Polonization of the personnel, excluding the influx of Russians not related to him and to the Kingdom. The constitution, the parliament, the Polish army were abolished and civil liberties were significantly curtailed. Paskevich was practically a sovereign ruler. He did not allow any interference with his authority from St. Petersburg. Then in 1849 he was the commander of the troops during the suppression of the Hungarian Revolution (1848–1849).⁴⁸³



Il. 1.: Ivan Fyodorovich Paskevich

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Paskevich's unique position, importance, independence and influence on the tsar makes us wonder what views motivated him to invade Hungary. Paskievich expressed his personal beliefs and political views with reticence. They fit into the slogan – autocracy, Orthodoxy, folk. In his attachment to the idea of the All Russian Nation a tendency towards nationalism can be detected. It is true that he came from the Cossacks of the Polish-Lithuanian Commonwealth, but they were completely russified and believed in Moscow's political mission to rule the the stern, as well as western and southern Slavs. To some extent, he was influenced by the Eastern plan of Catherine II – the capture of Constantinople by Russia and the takeover of the idea of the Eastern Roman Empire.

Perhaps his origins and beliefs made him despise non-Slavic nations, especially Germans and Austrians. He repeatedly expressed his dislike and even contempt and distrust towards Austria. It did not mean sympathy towards the Hungarians. It seems that he would have been more willing to join the Slavic countries of the Habsburg Monarchy with Russia if Austria had not been considered a convenient buffer for Russia, holding the nations of the Carpathians and the Balkans under control.

Paskevich recommended waiting. He changed his mind in the spring of 1849 when Hungary took over the initiative in the war.⁴⁸⁴

One of the secondary reasons behind the Russian intervention was the mass participation of the Poles in the fighting in Hungary. Tsar Nicholas I was concerned that their participation in these events would lead to another Polish uprising, which would affect the territories of all partitions.⁴⁸⁵ Tsar Nicholas I decided to provide armed support to Franz Joseph I as part of the commitments of the Holy Alliance. In the proclamation issued on May 8, 1849, the Russian emperor justified his decision to support Austria:

“With our manifesto of March 26, 1848, we informed our faithful subjects of the misfortune that befell the western part of Europe, and at the same time we declared that we were ready to face our enemies [...]. The riots and revolts in the west have not yet ended [...], on the contrary, the revolt there has strengthened with the bands of our Polish traitors from 1831 and other fugitives, exiles, vagabonds and

484 Felczak 1983; Roberts 1991

485 Pomarański 1929, p. 7

adventurers of various nations, and has taken on dangerous proportions [...], and Russia will fulfil its holy calling”.⁴⁸⁶

At the beginning of May 1849, the Russian army crossed the borders of the Habsburg Monarchy, entered Galicia and, after short preparations, began to march toward Hungary. The intervention troops were headed by Field Marshal Ivan Fiodorowicz Paskevich. In early June, a Russian division commanded by General Fyodor Sergeyevich Paniutin crossed the Hungarian border at Pozsony and compelled the Austrian forces commanded by General Julius Jacob von Haynau, to attack from the west from the direction of Vienna. In the middle of that month, however, the main forces of Paskevich's army (about 70,000) through the Dukla Pass attacked the Hungarian army from the north from the direction of Prešov, Košice and Banská Bystrica. In addition, with approximately 30,000 soldiers the corps of General Alexander Nikolayevich von Lüders entered Transylvania. This was a huge support for Austria, as the intervention Russian forces totalled about 114,000 infantry, about 15,000 cavalry and 462 cannons.⁴⁸⁷

In the proclamation of Tsar Nicholas I, there was a reference to Polish emigrants, called “bands of Polish traitors”, who participated in the events of the Spring of Nations. The participation of the Poles on the side of the Hungarians has been described in detail by both Polish and Hungarian historians.⁴⁸⁸ According to the findings of the best researcher of this problem, István Kovács, there were over 5,000 Poles fighting alongside the Hungarians, including about 3,000 concentrated in the Polish Legion commanded by General Józef Wysocki.⁴⁸⁹ These events were also reflected in the memories of Polish participants in the Hungarian Uprising of 1848–1849.⁴⁹⁰ We can learn from various sources, that the Russian corps sent to intervene in Hungary included a group of Polish officers and soldiers serving in the tsarist army (including such famous ones as the future dictator of the January Uprising, Romuald Traugutt, in 1849 an officer (ensign) in a sapper battalion in I. Paskevich's intervention army).

⁴⁸⁶ „Czas” 1849, nr 76, s. 4

⁴⁸⁷ Bułharyn 1852, p. 282

⁴⁸⁸ Kovacs 1999; Kovacs 2001; Midzio 1966; Pod wspólnym sztandarem... 1999; Kozłowski 1983

⁴⁸⁹ Kovacs 2016

⁴⁹⁰ Buława 2016

Polish activities were led by the “Hotel Lambert” – a ministry of foreign affairs in exile. Czartoryski actively worked for the rapprochement of the Hungarians with the Slavic peoples – for the establishment of a federation. The Slavs of the Habsburg Monarchy saw no ally in Hungary. At the Slavic Congress in Prague, which took place in May and June 1848, harsh words of criticism were spoken against the Hungarians. Henryk Dembiński went to Prague. He argued that the Slavs should side with Hungary. He addressed an appeal to the president of the Congress – Leon Thun, asking him to send a plenipotentiary envoy to Croatia and Serbia with a declaration stating that the interests of the Slavic peoples require to reach an agreement with Hungary as soon as possible. However, Dembiński’s conclusions were not on the agenda due to the shelling of Prague.

2. Invasion of Hungary

Poland at that time was under the rule of Austria (Małopolska, Cieszyn Silesia Spisz), Prussia (Pomerania, Kuyavia, Wielkopolska) and Russia (Mazovia, Podlasie, Lublin region, Volhynia, Grand Duchy of Lithuania). Most of the territories of the former Polish-Lithuanian Commonwealth were incorporated directly into Russia in the form of: North-Western Country and South-Western Country. Most of the territory of the former Duchy of Warsaw was also given to Russia in 1815 under the name of the Kingdom of Poland, which from 1831 was deprived of a constitution, army and parliament. On behalf of the tsar, it was ruled by the governor – Ivan Fyodorovich Paskevich.

In his letters to the tsar, Paskevich argued that he had complete control over the society of the Kingdom of Poland. The supervision of the secret police, the huge army and the censorship did not, however, eliminate contacts with the emigration and did not change the beliefs of the nation. The censorship ordered reprints from the reactionary German press, which were written at the request of St. Petersburg. The method was used to scare the radical revolution. For example, the Slavic congress in Prague was completely hidden in silence, and generally Slavic matters rarely occupied the press. On March 13, 1848, the tsar wrote to the governor: “Russia cannot remain an idle spectator of the general collapse of the German states. She

will be obliged ... to step into the matter with all her might and stop the revolutionary stream.”⁴⁹¹

Paskevich closely followed the events in Hungary, but hoped that he would not have to act. In addition, Paskevich was clearly irritated by the signs of the Tsar's appreciation of General Radetzky. What's more – the tsar ordered Paskevich's son to bring to Radetzki the nomination for the position of the Russian field marshal.

The Tsar and Paskevich undoubtedly wanted to help Austria, regardless of its attitude. The key argument was the role of the Poles in the new great Hungary. However, Paskevich, above all, took care of his own affairs. It was up to them to rule the Kingdom of Poland and to prevent anyone else from leading a possible intervention in Hungary. Paskevich considered the ideal plan to seize Galicia and Bukovina by controlling the roads leading to Transylvania. The occupation of Eastern Galicia was close to Paskevich's heart, as I quote: “Eternally Ruthenian land”. He advised to reject Austria's proposal to enter Transylvania, which would cause risky fighting. In addition, he proposed the occupation of Bukovina. Russia's initial plans – letter of February 24 (April 5), 1849):

- 1) Take over Galicia and Bukovina and all passages through the Carpathians,
- 2) Move troops carefully from Wallachia,
- 3) Secure the border in Moldova

“For us too, the successes of the Hungarian revolutionary government will have bad consequences, if not now, then no doubt in the future. It is quite probable that Hungary, having defeated Austria, will, as a result of the existing circumstances, be forced to show decisive support for the plans of the Polish emigration. The extent of this support and its effects cannot be assessed, but it would not be easy for the victorious Hungarians to cut themselves off from the Poles, who so vigorously supported the independence of the Magyars.”⁴⁹²

Paskevich had to revise his minimalist plan when it turned out that Austria might collapse. Paskevich did not value or preferred Austria, but above all he

⁴⁹¹ Miturin 2017, p. 227

⁴⁹² Miturin 2017, p. 56-57

was an enemy of all upheavals, including the Hungarian ones, and moreover he was afraid of the consequences on his reign in Poland.

Count Caboga went to Warsaw and with tears in his eyes asked for help for Vienna. Paskevich had to make a personally unpleasant decision immediately, without asking the tsar's consent, which took about two weeks. For Paskevich, victory was important, but preferably fought with the hands of the Austrians and with minimal Russian losses. The tsar, on the other hand, wanted a loud and spectacular victory, which required the involvement of the entire Active Army, and thus time.⁴⁹³

Paskevich organized general Paniutin's corps and sent it by rail to Vienna. It was the first railroad landing in the history of Russia. The main invasion was to come from Galicia. Paskevich intended to go slowly, carefully and to minimize losses. He was afraid of failure, loss of fame and he knew that he had an advantage and time was on his side. He was embarrassed by the presence of Tsar Konstantin's son.

Reporting on Paskevich's war activities is not the subject of this article. They can be traced, among others, in the work of Miturin.⁴⁹⁴ Paskevich's plans and reluctance towards Austria are evidenced by the transfer of information to the tsar that the Hungarians would accept Grand Duke Constantine on the throne. Indeed, Paskevich was in no hurry for the decisive battle.⁴⁹⁵ Finally, on 1 (13) VIII 1849, Görgey surrenders to the Russians near Világos. Paskevich's son brought the news to the tsar to Warsaw.⁴⁹⁶ The Tsar fell to his knees and prayed. Paskevich wrote: "Consistently their fate should be decided by Your Majesty. You have defeated Hungary, they are at your feet and the war is over".⁴⁹⁷ Two weeks later, Paskevich returns to Warsaw.

3. Disgust and Aftermath

Nicholas I, apart from Paskevich, hated independent people. He preferred obedient contractors to advisers, which led to his downfall. Herzen wrote about Paskevich: "Paskevich is not a blind executor of the tsar's will. As much

493 Miturin 2017, p. 337

494 Miturin 2014

495 Miturin 2017, p. 338

496 Kita 2020

497 Miturin 2017

as he can, he pushes away the soulless, insatiable vindictiveness of Nicholas I. However, on closer examination, it can be said that he cared primarily for himself and his relatives. Until the end of 1849, Austria did not even start financial compensation for Russia. In the Kingdom of Poland, a special committee was established to settle financial accounts with Austria for the participation of the Russian army in the war. "The Hungarian war cost us more than 10 million and we are only asking for 4 million." Paskevich demanded that Russian accounts should not pass through the control department of the Austrian empire. Everything was approved in Vienna by the end of 1850, but the payment was postponed.

Many European monarchs sent to Paskevich their first degree orders. Paskevich's position increased even more and the Tsar's confidence was boundless. In Russia, the legal evaluation of Hungary was consistently called a "revolution", i.e. a violation of the rule of law, which at the same time legitimized the armed intervention. Of course, in this context, the invasion of Hungary was considered an honorable act. The imperial ideology was reflected in the symbolic sphere. In Russia a special medal was established to commemorate the war against the Hungary. The medal "For the pacification of Hungary and Transylvania" was intended to reward the military personnel of the Russian Empire who participated in the suppression of the revolution in Hungary in June-July 1849. The medal was established by the decree of Nicholas I of January 22, 1850. It was awarded to all military personnel, including generals, officers, soldiers, as well as regimental priests, doctors and medical officials, employees who took part in the campaign "to suppress the Hungarian revolution." From May to August 1850, the St. Petersburg Mint minted 213,593 medals, and, according to the Inspection Department of the Military Ministry, 212,330 of them were awarded (Illustration No. 2 and 3). The front side depicts the coat of arms of the Russian Empire, crowned with a small image of a shining all-seeing eye. An inscription placed around it, is important in the Slavonic ecclesiastical language, which attached religious significance and emphasized the panslavic nature of the war: "God is with us. Understand this, peoples, and surrender." In terms of ideological content, "God is with us..." is treated as the equivalent of "God is Lord..." in these verses the Lord's coming to earth is glorified. On the reverse side of the medal there is an inscription

horizontally in six lines: “For the pacification of Hungary and Transylvania 1849”.⁴⁹⁸



Il. 2 and 3.: Commemorative Russian medal for the pacification of Hungary and Transylvania, avers and reverse.

We find even more symbolic content in another medal issued on this occasion. It was a commemorative medal for generals and senior staff officers with the image of a Russian double-headed eagle tearing apart a three-headed hydra (hydra of revolution) and with the same inscription around: “God is with us, understand the tongues, and submit.” On the reverse there is an inscription (in Slavic letters): “The victorious Russian army defeated and pacified the rebellion in Hungary and Transylvania in 1849”.⁴⁹⁹



Il. 4 and 5.: Commemorative medal for generals and senior staff officers, avers and reverse.

498 PSZRI, v. 25 (1850), nr 23857

499 PSZRI, v. 25 (1850), nr 23857

The tsar was waiting for the European war and Paskevich was looking at it with concern. The tsar was convinced that revolutionary aspirations would sooner or later cause a similar war, and he wanted to overcome freedom movements wherever they appeared. The tsar saw weakness in the concessions made by monarchies to constitutionalism. He regarded any share in the power of the national representative as a factor of deterioration of power, order and well-being of the country. He believed that only Russia could oppose this degradation. It was Russia's destiny. The Hungarian campaign further strengthened the tsar in this specific belief. The army was also convinced of its omnipotence. Soon this self-admiration will be brutally verified in the First Crimean War.

Paskevich clearly renounces to find a comprehensive solution for the Polish question. He considers Polish aspirations inevitable and limits himself to maintaining the superficial order. He sent other information to the tsar: "Now all Poles, local, Poznań province and Galician, are on our side because in those countries they do not see the comforts they expected from the German revolution, and in our country they dream of uniting the whole of Poland under one sceptre." agreement between Austria and Prussia in Olmütz in 1850 – "Poles became completely silent, but not in exile." However, Paskevich had no illusions. When Austria left only 20,000 troops in Hungary, he wrote: "what would happen if in our Poland and what disorder would flare up if such a small army were left in it".⁵⁰⁰

Paskevich's political views became hostage to his career. Characteristically, he fully agreed with the tsar, although he did not always share his opinion on the methods of implementation. He was a monarchist to such an extent that he saw not only constitutionalism but also in bureaucracy as his opponent, that is, in the slightest deviation from the idea of autocracy, also in the eyes of the people.

Unwavering faith in himself gave an impulse to take further steps in the abolishment of the autonomy of the Kingdom of Poland. Already in 1849, the changes in education began. On August 14, 1849, a new structure of the Warsaw school districts was approved, making its structure similar to other districts in the Empire. The fierce russificator Paweł Aleksandrowicz

500 Miturin 2017

Muchanow was nominated first as vice-curator (7 November 1849) and later as the curator (29 March 1851) of the district.⁵⁰¹

The abolishment of the Polish customs territory and customs administration, was a very important change which meant that St. Petersburg seized huge revenues from customs duties. At the same time, the Russian Customs Act and Administration were introduced. First, the Polish customs administration was dissolved. The Act of November 17, 1850 abolished the Polish customs service and introduced the Russian one subordinated to the external trade department of the Ministry of Finance of the Russian Empire. Then, on January 13, 1851 (by order of November 25, 1850), the customs border was cancelled and Russian customs tariffs were introduced [PSZRI, v. 25, 1850, nr 24594; DPKP, v. XLIII, p. 349-365]. The personnel of the customs board districts was russified already in 1851. Persons of Polish nationality were allowed only to hold the positions of office clerks.⁵⁰²

In 1851, the General Directorate of Post Offices of the Kingdom of Poland was abolished (by the decree of March 26, 1851) and its territory was transformed as the 13th Postal District of the Empire, directly subordinated to the authorities in St. Petersburg.⁵⁰³ Moreover, pursuant to the order of 10/22 April 1852, the Warsaw Censorship Committee was subordinated to the Main Board of Censorship in St. Petersburg.⁵⁰⁴

4. Summary

Russia saved the Austrian Empire. It did not and did not intend to gain any other benefits at the expense of Austria, except that the war be financed by Austria. In addition to maintaining the status quo and fighting the revolution as an international phenomenon, Russia feared the consequences for its rule in Poland. Serious consideration was given to the possibility that, in the event of victory, the Hungarians would repay their debt of gratitude to the Poles, first in Galicia and later in other Polish lands. Of course, the very

501 Latawiec, Górak, Legieć, Bogdanow 2015, p. 9-38

502 Latawiec, Górak, Legieć, Bogdanow 2016, p. 36-40

503 DPKP, v. XLIV, p. 335; Latawiec, Górak, Legieć, Bogdanow 2020, p. 27-38

504 Latawiec, Górak, Legieć, Bogdanow 2020, p. 47-49

idea of nations liberating themselves from empires was a serious threat to Russia.

We must also remember the political will of the tsar's grandmother (Ekaterina II) Alexander and Nicholas, i.e. the Eastern question. Russia was to liberate all Slavic nations from Turkish rule, occupy Constantinople and renew the Eastern Empire. A possible Hungarian victory in alliance with the Poles would have a reverse effect on the situation and Russia would officially be forced to oppose the liberation of the Slavs, i.e. Poles. The intervention in Hungary, having in mind the authorities of the uprising being reluctant to the equality and freedom of the Slavic nations, suited Russia very well and was later used in pan-Slavic movements.

Nevertheless, Paskevich was against intervention on the side of Austria. He believed that Austria did not deserve Russia's help and would not show any gratitude. He had fears of an uprising in Poland that could trigger a lack of confidence in him in ruling the country. On the other hand, he arbitrarily sent a division to defend Vienna because he knew the Tsar's goals.

It should be emphasized that during this period Paskevich cared primarily for his own fame, power and benefits. He would have never compromised his position in this war or in the next one, the Crimean. Therefore, when he was forced to act, he used all his available forces and tried to prevent the Russian army from getting involved in the main battles. He understood that any loss would be used against him. Moreover, he wanted the Austrian army to fight above all else.

The invasion of Hungary strengthened the unique position of the father-commander as the main pillar of the reign of Nicholas I. Paskevich was a conservative, which should be understood that he was above all a monarchist and a supporter of the absolute power. He considered people as an object of power and he explained his behaviour with material factors. Thus, he denied political ambitions or usurpations. Were it not for his russification activities, he could be considered a supporter of the universal empire. However, he cannot be suspected of understanding such issues. Paskevich saw all the evil and danger in the nobility and officials. The tsar was aware that he could not conflict with the commander of the largest army, the sovereign ruler of the western part of the empire, a man enjoying such a prestige throughout the country. The Spring of Nations stimulated Paskevich to work for the unification of the Kingdom

of Poland with the Russian Empire, although earlier he himself inhibited this process.

The elites of the Kingdom of Poland undertook actions similar to those of the Hungarians as early as 1831. The defeat of the Hungarians accelerated the changes in the political tendencies among the Poles. Already in 1848, clear ideological discrepancies can be seen, which will be fully revealed in the January Uprising of 1863-1864. The Poles strongly advocated the fight for the liberation of all nations from the rule of empires. The slogan "For your freedom and ours" was introduced into the program "Freedom, Equality. Independence". It was also expressed on the seal of the national government in 1863 and confirmed by the three-field coat of arms of Poland, Lithuania and Ruthenia.



Il. 6.: Coat of arms from the seal of the Polish National Government during the January Uprising 1863-1864

The threat from Russia made it clear for the Hungarian politicians in exile, especially Kossuth, to understand the necessity of cooperation between Hungarians, Poles and South Slavs in the fight for freedom. This gave the opportunity to support each other in the following years and contributed significantly to the support the January Uprising on the part of the Hungarian society. It should be emphasized that most officers of the January Uprising gained experience and formed their ideology precisely during Paskevich's invasion of Hungary. The commander of the Polish legion gen. Józef Wysocki gave a farewell speech to the Hungarian nation:

"We fought together, you know it well, not as mercenaries, not for personal interests, but in the hope that your success and our participation

will become the basis for further fighting. Fighting for your cause, we also had this goal, to become supposedly intermediaries to reconcile you with the Slavic and Roman tribes, which unfortunate politics has made your enemies [...].”⁵⁰⁵



Il. 7.:Gen. Józef Wysocki

505 Wysocki 1899, p. 132-133

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DILEMMAS OF MODERNIZATION: THE 1864 ROMANIAN CIVIL CODE

Abstract

The 1864 Romanian Civil Code, modeled on the French Code Civil, symbolizes an essential moment in Romania's legal modernization and its aspiration to align with Western legal traditions. Rooted in the ideological framework of the 1848 revolutionary movement, the Code's adoption highlights the dynamics of legal transplant, involving both opportunities and challenges. This article examines the historical context of Romanian codification, the cultural tensions surrounding the integration of foreign legal norms, and the interaction between Western influence and local realities. By analyzing seven key arguments for and against the Code's adoption, the study reveals the enduring implications of legal transplants for national identity, modernization, and legal harmonization in the global and European contexts.

Keywords: 1848 reforms, Romanian Civil Code, codification, legal transplant, French Code Civil

1. The Basics

The Romanian Civil Code (*Codul civil*) of 1864 constituted a transposition of the French *Code civil*, or, more rather its translation. It was a legal transplant, a transposition of foreign law. Like surgical transplants, the transplantation

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of law as a cultural product is not a simple process. Both forms of transplantation are a shock to the recipient organism, whether biological or social, carrying the risk of complications and even outright rejection. In the case of medical transplantation, the aim is to prevent rejection by use of medication, in effect intentionally weakening the immune system, with all the adjoining risks.

The adoption of the Romanian Civil Code of 1864 is a success-story of legal transplantation: it was in force for a century and a half, until 1 October 2011.⁵⁰⁷ However, the situation is more nuanced than it may seem. The transposition of the French Civil Code was not without challenges and complexities, making the overall process far from straightforward.⁵⁰⁸ And this – the fierce cultural struggle for and against the ‘rejection’ of foreign law – is not at all common knowledge. Moreover, its lessons are general in the context of globalization when the effects of different legal models are spread to the entire world. EU law, in fact, in many cases constitutes a ‘transposition’ of rules alien to organic development.⁵⁰⁹ This is why it is worth examining the history of the adoption and incorporation of the Romanian Civil Code of 1864, whose topicality is undeniable. The immediate ideological roots of the codification and the personal issues (the question of the political actors who promoted the codification) can be understood in the context of the *pașoptism* which loosely translates to “forty-eightism” that has become a veritable concept in the history of Romanian political ideologies. Therefore, the first question to be examined is the interrelationship between the 1848 movement and the codification achieved by that movement a decade and a half later.

507 The Romanian Civil Code of 1864 entered into force in the territory of the Romanian Old Kingdom (the Pre-First World War territory of Romania) on 1 December 1865; in Bukovina on 15 October 1938; in Southern Transylvania on 15 September 1943; in Northern Transylvania on 4 April 1945. Cf. Aurelian Ionașcu: *Partea generală*, Ed. Didactică și Pedagogică, Bucharest, 1963, p. 19. On the adoption of the new Romanian Civil Code, which entered into force on 1 October 2011, see Emőd Veress: *The Romanian Civil Code: Ten years of application*, *Jahrbuch für Ostrecht*, 2021, No. 62, pp. 387-401.

508 Manuel Guțan: *The French Legal Model in Modern Romania. An Ambition, a Rejection*, *Romanian Journal of Comparative Law*, 2015/1, pp. 129-130. For a general overview, see also Aniceto Masferrer: *Codification as Nationalization or Denationalization of Law: The Spanish Case in Comparative Perspective*, *Comparative Legal History*, 2016, Vol. 4, No. 2, pp. 100-130; Aniceto Masferrer: *Was the French Civil Code ‘the Model’ of the Spanish One? An Approach to the Uniqueness of the Spanish Civil Code*, *Glossae. European Journal of Legal History*, 2018, 15, pp. 99-124.

509 On this issue, see for example Emőd Veress: *A közös európai adásvételi jog megalkotásának a kudarca (2011-2015)*, *Korunk*, 2020/3, pp. 59-66.

2. The 1848 Movement and Its Role in Codification

In order to understand the precursors and consequences of this one year, 1848, we must in fact briefly review half a century of Romanian general and legal history. The ideas of the revolutionary-reformist 1848 movements gave rise to a social movement (the aforementioned “forty-eightism”) whose roots reach into the decades preceding 1848 and whose consequences also lasted for decades more. This movement also had a fundamental impact on legal thinking.

At the beginning of the 19th century, two small states, sometimes called the Danubian Principalities, Wallachia and Moldavia, existed at the boundary of the Russian and Turkish imperial spheres of influence, in a state of dependence, as marchlands for the armies of the two great powers, and buffers between them. Two Russo-Turkish wars (both of which ended in Russian victory) took place at the beginning of the century, between 1806–1812 and 1828–1829, which had a profound impact on the history of the two small states. In the Russo-Turkish War of 1806–1812, the Ottoman Empire sought to regain its former positions on the Black Sea. But 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 Danubian Principalities, the Sublime Porte appointed Ioan Caragea and Scarlat Callimach as the princes of the provinces of Wallachia and Moldavia, each for 7 years. The power structure in this period was also clearly oligarchic: the ruler was an agent of the Ottoman Empire, who also led an elite of lords, who wielded political and agrarian economic power, the *boyars* (a loose equivalent to feudal nobility, which however lacked the complex hierarchies of their western counterparts, its members mainly distinguished by wealth and status, not rank). The reigns of Caragea and Callimach also mark the end of an era. For Greek officials (the *dragoman*, literally meaning interpreters) who held high positions in the Turkish administration, the sultanate’s appointment as princes of the Danubian Principalities was a possible career highlight. Since these Greek princes were usually from the *Fener* district of Istanbul, this period in the history of the two principalities is known as the Fanariot Period (also spelled as Phanariot in some sources, which lasted from the early 18th century to 1821). This period was generally characterized by a rapid turnover of princes and a high level of corruption. The same prince rule in one principality at

one time and in another the next, or even rule the same principality several times with interruptions. These princes, in turn, were educated, spoke foreign languages, were familiar with both Western and Eastern culture, and were open to certain reforms. The reigns of Caragea and Callimach mark the very end of the Fanariot period.⁵¹⁰

From our point of view, it is important that the first codification projects are linked to these two princes. Attempts at legal reform were not alien to the Fanariot princes: in the 18th century, Alexandru Vodă Ipsilanti (Αλέξανδρος Υψηλάντης)⁵¹¹ also introduced a serious codification of the law – based on Byzantine and local traditions – in 1780, which for the first time included civil law norms alongside canon law and criminal law norms. Returning to the issue at hand, in 1817 Callimach promulgated the *Codul Callimach* or *Cod-ica Țivilă a Moldovei*, a civil code in Greek, the language of government at the time. The prince was dethroned by the Sultan in 1819. However, his code outlived him and was used until 1864, when the Civil Code came into force. The Callimach Code was translated into Romanian in 1833. The code also followed the Byzantine tradition but was directly influenced by the Austrian Civil Code of 1811 and the French Civil Code of 1804 (the norms of which were adopted in translation). The more pronounced Austrian influence can be explained by the fact that, in addition to Anania Cuzanos and Andronache Donici, the Transylvanian (more precisely hailing from Brașov) Saxon lawyer Christian Flechtenmacher (1785–1843), who had studied in Vienna, played a major role in the drafting of the code. Flechtenmacher often referred to the works of Franz von Zeiler, a leading figure in Austrian codification. Flechtenmacher was invited by Prince Callimach to become a lawyer and remained in Moldavia for the rest of his life, later receiving the title of boyar. Although the code was based on the Byzantine tradition, it was innovative in that it represented a rapprochement with the West. It did not seek a universal synthesis of laws, focusing exclusively on a single branch of law, civil law. It consisted of three parts: rules relating to persons, rules relating to things,

510 Interestingly, the great French Encyclopedia was commissioned by a former Fanariot ruler, Ipsilanti. The books were delivered by ship, but the ruler refused to pay the bookseller for them, as some of the volumes were stolen during transport. The bookseller, Vincent Pech, complained of this to the Sultan. Cf. A. D. Xenopol, *Istoria partidelor politice în România I*, Albert Baer, Bucharest, 1910, p. 60.

511 Alexandru Ipsilanti (1726–1807) was the prince of Wallachia between 1774–1782 and 1796–1797, and of Moldavia between 1786–1788.

and rules relating to both persons and things. The influence of the French Code is shown by the rules on guardianship, succession, marriage contracts and foreign contracts.⁵¹²

In 1818, on the initiative of Prince Caragea, a code was also adopted in Wallachia: the *Condica lui Caragea*. Caragea was censured for excessive profiteering (selling provincial offices, granting the title of boyar for money, tax hikes). During his six-year reign, he amassed considerable wealth, and when he felt he was losing the support of the Sultan, he fled, but his code survived his reign and remained in force until 1864. This code was also drafted in Greek, printed in Vienna, and later translated into Romanian. Unlike Callimach's codification, the *Condica lui Caragea* contained civil law, criminal law, and procedural law at the same time, i.e. it could be considered a traditional general code without specialization. Its drafting was mainly the work of the *logothetes*⁵¹³ Nestor and Atanasie Hristopol, who produced a Greek text of literary quality, but the quality of the Romanian translation was not the highest, also due to the immaturity of the Romanian legal language.

Both codifications are characterized by an adherence to tradition and the simultaneous need to preserve social order, but also by a cautious opening towards modernization.

The Treaty of Adrianopolis, which ended the Russo-Turkish War of 1828–1829, placed the Danubian Principalities in a peculiar dual Russian–Turkish dependency. It was in this political context that the revolutionary year of 1848 unfolded. The '48 movement bore the intellectual hallmarks of two generations: the enlightenment and classicism of the older generation and the romanticism and revolutionary fervor of the younger. Despite these generational differences, the shared objectives remained consistent: overcoming the country's backwardness, initiating transformation, and embracing Western values. The process began in literature: literary works reflected national plans, concern for the lower classes, national sentiment. Newspapers and their readers appeared, merchants, civil servants, rural intellectuals: priests, teachers, notaries. The idea of national unity was the result of romantic nationalism: a common language and the Orthodox religion gave

512 Prince Callimach was deposed in 1819 because he was suspected of collaborating with the Russians. He narrowly avoided execution, but was later, in 1821 poisoned, probably because of his sympathies with the Greek anti-Turkish liberation struggle.

513 Byzantine administrative post, in Romanian "*logofăt*", roughly equivalent to chancellor.

Romanians living in two states a common identity. This was also reflected in social struggles: the small nobility comprising the majority of the boyars argued against the magnates, demanding political rights and belonging to a single nation. The earlier concept of nationhood, based essentially on the privileges of the boyars, was in the process of being transformed, and the concept of nation began to extend downwards to the lower classes.

Historiography focused on the heroic elements of the past and reinterpreted it from a new perspective: nation-building was taking place. It was with this aim in mind that Mihai Kogălniceanu (1817–1891) published his *Histoire de la Valachie, de la Moldavie et des Valaques transdanubiens* in 1837, in Berlin). In his conceptualization, history is portrayed as the collective creation of the people, and society is not a mere aggregate of individuals or classes, but an organic and independent totality. In 1840, the journal *Dacia literară* was founded in Iasi, Moldavia, and was the leading journal of this intellectual movement. Notably, this influential journal was founded by Kogălniceanu, who had pursued studies both in France and later in Germany. Education was reformed, cultural associations were formed, and theatre became an important part of social life. Even princes were reformers. For example, in 1840, the first Commercial code based on the French model was adopted in the province of Wallachia (later extended to Moldavia).⁵¹⁴ Commercial life was certainly more open and more suited to modern regulation. Even the Ottoman Empire was open to moderate reforms. Russia, on the other hand, was not at all supportive of change.

The Revolution of 1848 unfolded differently in the two states.

In the case of Moldavia, the revolution did not actually break out. Sensing the tension, Prince Sturdza asked the revolutionaries to put their wishes in writing. Under the guidance of the poet Vasile Alecsandri, a moderate reform program was proposed in April. Notably, the most radical element was perhaps the limitation of the ruler's power through representative bodies. The overthrow the established order was not sought. Nevertheless, under Russian pressure, the ruler ordered military action and most of the movement's leaders fled abroad. (In fact, they were arrested and were to be exiled to Turkey, but some of them managed to bribe the guards at the crossing on the Danube and fled to Transylvania and then to Bukovina in the Habsburg Empire.)

514 This was replaced in 1887 by the new Italian-style Commercial Code.

One of them was Alexandru Ioan Cuza (who later became the ruler and one of the supporters of the codification). Cuza was born in 1820, graduated in Paris and completed two years at the Sorbonne Law School, but was unable to finish his studies because he had to return home. In 1837 he returned to Paris to study the military sciences and perhaps to attend lectures at the law faculty again. On his return home, he served in the army and was promoted to the rank of colonel.

In August of 1848, in Bukovina (in the territory of the Habsburg Empire), in exile, the revolutionaries formulated a new, much more radical program, which included the demand of unification with Wallachia. In addition, the revolution in Wallachia led to the invasion of Moldavia by Russian troops in September.

The revolution in Wallachia was more radical. On 9 June 1848, the Islaz Manifesto, a 22-point political program of modernization, was read out. It was drafted by Ion Heliade Rădulescu⁵¹⁵ and Nicolae Bălcescu. The Manifesto was in fact a program of bourgeois democratic transformation. According to the movement's slogan, they wanted a "country" like "abroad" ("*Vrem o țară ca afară!*", i.e. "We want a country like [we see] abroad", a reformist slogan used to this day in Romanian pro-western, reformist discourse).⁵¹⁶ In other words, the basic goal was to catch up with the West. The specific points of the manifesto were in alignment with these principles: independence, equality of political rights, universal taxation (abolition of the intricate system of tax exemptions), a representative assembly encompassing all social classes, an accountable ruler elected for five years, anti-corruption measures, ministerial responsibility, freedom of the press, emancipation of serfs and recognizing their ownership in exchange for compensation, elimination of the

515 He was of the older generation, his father was a policeman, he was a printer and newspaper owner. He played an important role in the replacement of the Cyrillic alphabet and the introduction of the Latin alphabet. In his newspapers, he gradually replaced the Cyrillic alphabet with the Latin alphabet, changing a few letters a year, so as not to lose readers who were not yet familiar with the new alphabet. Cf. Cristian Ghinea: *Cine a făcut România. Răscrucile noastre*, Humanitas, Bucharest, 2023, p. 28. In the Romanian language, the word for 'city quarter' was originally the Turkish word '*mahala*', which was replaced by the French origin word '*cartier*'. However, the word '*mahala*' has not disappeared from the language, but its meaning has changed: it has come to refer only to shanty-towns. Thus, the language reflected the option between East and West, the vision, the programme.

516 Assessing this, a contemporary historian stated that the essence of the Romanian project is still to create a country like abroad (i.e. in the West).

punishment of “beating” (i.e. caning, corporal punishment), abolition of the death penalty, and establishment of penitentiaries (“where the guilts are washed away and the guilty released reformed”), etc. The last item on the agenda was the convening of a Constituent Assembly to turn all these aims into a constitution. The revolution spread to Bucharest, the ruler (Gheorghe Bibescu) signed the proclamation and fled abroad (to Transylvania, in the territory of the Habsburg Empire),⁵¹⁷ a provisional government was formed, which started to implement the reform program. During the Turkish military intervention, the revolutionaries still had a chance for compromise and the Turks even accepted some elements of the reforms, but in September 1848 the Russian military intervention put an end to the revolution. The revolutionaries of Wallachia were also forced to emigrate.

When the youth of the 1848 revolutions were allowed to return to the country (with the exception of Bălcescu, who died of lung disease in Palermo in 1852), they brought with them the idea of forty-eightism, the idea of catching up to the West. With time, they became the political ruling elite: prime ministers, ministers, deputies, ambassadors. For example, Kogălniceanu, mentioned above, was prime minister from 1863 to 1865. The possibility of change was created by the fact that Russia had lost the Crimean War in 1856, and the Treaty of Paris, while maintaining Turkish suzerainty,⁵¹⁸ ordered the convening of temporary assemblies to decide on the organization of the two principalities. These decisions were fleshed out in 1858 by the Paris Convention, based on the great-power logic, and balance of powers (Napoleon III’s position was decisive⁵¹⁹), but it only provided for a minimum level of unification of the two principalities (a common supreme court but separate ruler, separate parliament, etc.).

517 He died in Paris in 1873.

518 *Suzerainty* denotes a state vassalage: on the one hand, a dependency between the dominant (suzerain) state and the dependent (vassal) state; on the other hand, a situation involving a certain internal autonomy of the dependent state. Thus, the sovereignty of the dependent state is limited, especially in its foreign relations.

519 The historian Iván Berend T. asks: ‘*Did Napoleon III intend to play the Napoleonic role of defeating the rival great powers at the negotiating table and act as a saviour of the national interests of small nations, redrawing the maps created and implemented at the Congress of Vienna in 1815, or did he intend to create an allied buffer state between the Russian and Turkish Empires, or perhaps both? In any case, his actions led to the realization of the Romanian national interest.*’ See Iván Berend T.: *Kisiklott történelem. Közép- és Kelet-Európa a hosszú 19. században, História – MTA Történettudományi Intézete, Budapest, 2003, p. 117.*

Alexandru Ioan Cuza was allowed to return to Moldavia in 1858, where he was appointed Minister of War. In 1859 (in a blatant violation of the Paris Convention), he was elected ruler of Moldavia and then of the Wallachia, thus creating a *fait accompli* personal union that was gradually transformed into a real unified state entity. The generation of 1848 came to power.

The parliaments and governments of the Danubian Principalities were united in 1862. One of the most fundamental political goals of the two Romanian states in the process of unification continued to be rapidly catching-up to the West. This was necessarily reflected in the legal reforms and codification plans. Cuza reigned until his overthrow in 1866 by a *coup d'état*, and was succeeded on the throne by Carol I (Karl Eitel Friedrich Zephyrinus Ludwig von Hohenzollern-Sigmaringen), who had been invited from the Prussian ruling dynasty,⁵²⁰ in an effort meant to move Romania closer to the emerging Central-European great power. However, legal modernization, including the adoption of the Civil Code, took place during the reign of Cuza, who was faithful to the ideas of the 1848 movement and imposed his reforms even by dictatorial methods. Forty-eighthism as an ideal presupposed that Romania could adopt Western models only in their entirety, not in a selective or modified form. "On the one hand, our great backwardness in relation to Western civilizations" created a "fierce desire to suddenly catch up with them and regain lost time; on the other hand, a truly revolutionary period, such as 1848, could only aim at a top-down and integral effect."⁵²¹

3. The Codification

It was in this context that the codification of private law has taken place. Alexandru Ioan Cuza's codification efforts were based on Article 35 of the Paris Convention of 1858, which authorized the unification of the laws of the two principalities, with special emphasis on the civil code. The creation of a uniform law played a particularly important role in the aforementioned unification process. As early as 1859, the ruler had ordered the introduction

520 Carol I (Charles I in English) was crowned king in 1881. He was a cousin of the Prussian monarch on his father's side and a relative of Napoleon III on his mother's side. Cf. Iván Berend T.: *op. cit.*, p. 117.

521 Eugen Lovinescu: *Istoria civilizației române moderne III. Legile formației civilizației române*, Ancora, Bucharest, 1925, p. 98.

of the French Civil Code, and a commission was to adapt the French text to local realities. This process was to be followed by the translation of the text into Romanian, but the committee only started work in 1862 and in 1863 the work was interrupted. In May 1864, Cuza staged a *coup d'état* against the conservative majority that dominated Parliament and obstructed his reform program. The Council of State (*Consiliul de Stat*) was asked to draw up the code: work began on 10 October 1864 and the complete draft was completed on 25 November. The cabinet (the Council of Ministers) approved the draft on November 25 (as the new Parliament had not yet convened) and the law was promulgated by the ruler on November 26. The Code was published between 4 December 1864 and 19 January 1865 and came into force on 1 December 1865.

4. Seven Arguments Against the Adoption of Foreign Law

The 1848 generation did not have any qualms about copying and adapting Western models. Such resentments are the product of later “fads and sensitivities”.⁵²² They were advocates of rapid change, and this impulse led to the rapid adoption of the French civil code. However, the sociological process of enactment, the actual adoption following formal approval, provoked a serious backlash that has rarely been analyzed and studied. First, I will try to synthesize, in seven points, the arguments against the adoption and incorporation of the French Code, and then the counter-reaction, i.e. the arguments in favor of modernization based on the Romanian ideas of the 1848 movement, and thus the adoption of the French Code – also in seven points.

1. The adoption of foreign law was due to the fact that the (domestic) Romanian legal culture of the time did not have the resources and energy to serve as a basis for the reform of Romanian law. Also, the aim was to modernize very quickly. In this context, the adoption of foreign law became a source of constant frustration, and a specific form of legal imperialism, which was imposed on the country from within and not by external forces.⁵²³

⁵²² Cristian Ghinea: *op. cit.*, p. 33.

⁵²³ Manuel Guțan: Codul civil de la 1865 și provocarea recreării originale a dreptului, *Revista Română de drept privat*, 2021/2, p. 152.

The code was perceived as a foreign body in relation to local reality. There is also sporadic evidence that in rural areas the code was not applied for decades, having been utterly ignored, while the old law, even customary law, prevailed. Moreover, the code was promulgated by the ruler after a *coup d'état*, in the absence of a Parliament.

2. The code was prepared in six weeks (just forty days), even if the materials of previous preparatory works were used. This way of adopting the Code became the ultimate symbol of superficiality, irrationality, vulnerability to French legal culture and disrespect for Romanian customary law.⁵²⁴ For a large part of the intellectual elite, the Code was a hastily drafted legal text that was too dependent on the French model.

3. Its content was variously stated to be a 'simple translation', a 'faithful translation', a 'slavish translation', a 'complete copy', an 'imitation' or a 'reproduction'. Moreover, the French Code was translated into a Romanian language, which at the time did not have the linguistic resources to make civil law accessible to the masses, accessibility and simplicity being precisely the positive characteristics of the French model. The creation of the Romanian Code required the mass use of neologisms or French words also transplanted into Romanian.

4. The secular spirit of the Code caused tension in relations with the Orthodox Church and in the deeply religious Romanian society. The conversion of marriage into a simple civil contract before a registrar provoked the opposition of the Orthodox Church and aroused extreme mistrust on the part of the population, for whom any relationship not sanctified by the sacrament of marriage was considered a mere concubinage. The cultural-legal tension was resolved by Article 22 of the 1866 Constitution, which made a religious blessing obligatory after civil marriage.⁵²⁵

5. Prominent Romanian thinkers have criticized the unjustified penetration of foreign models at the expense of the organic development of domestic law. The mildest criticisms involved accepting the limited, controlled and considerate use of multiple models rather than the automatic adoption of a foreign system. The problem for the moderates was that they did not really take into account the extent to which Romanian legal culture/tradition is able to offer, at least in part, its own solutions. The most vehement critics

⁵²⁴ Manuel Guțan: *Codul...*, *ibid.*, p. 157.

⁵²⁵ Manuel Guțan: *Codul...*, *op. cit.*, p. 159.

condemned the transposition itself as unworthy, which prevented a proper, authentic, genuine Romanian path of development towards modernity.⁵²⁶

In contrast to the large-scale legal transplants, of which the Civil Code is only one example, a very important theory has also been formulated, which developed into a profound philosophical trend: the theory of ‘forms without substance (content)’. The form is the transposed law, the substance is the social reality in Romania. In this view, there is little connection between substance and form. This critique was applied to most aspects of legal, political, economic and social development: the way in which modernization of the country unfolded constituted the foundation, and concretization of its presuppositions. Here we should mention Titu Maiorescu (1840–1917), to whose name this theory is primarily linked. According to Maiorescu, the Romanian, preponderantly agrarian society was not ready to receive foreign forms, lacking both the technological structure (industrialization) and its social consequences (the development of a bourgeoisie) to give them substance and sustain them.

Maiorescu is an interesting figure in the history of Romanian ideas. It has been said that in his case “the debate about the direction of development that Romania should take is emerging and is still being used: the West and modernity versus the traditions and original substance of Romanianism. It was Maiorescu who gave a philosophical formulation to the still unresolved struggle between modernism, a pro-western and revolutionary alignment with Europe on the one hand, and nativism, anti-Westernism and evolutionism, based on national character, on the other. Critical writings slowed down the structural westernization of Romania, while the author worked on the theoretical and practical level to develop the domestic ‘content’ and to bring it up to the level of the institutional forms borrowed from the West and introduced in Romania. Because of his criticism and the essential ambiguity of the solution he proposed (which stems from the fact that the theory was born in a distinctly polemical context, without being later developed in its own right), the theory of ‘forms without substance’ became a subject of debate for the following generations: the left-wing disciples of Maiorescu (Dumitru Drăghicescu, Eugen Lovinescu, etc.), together with other theorists such as Garabet Ibrăileanu and Ștefan Zeletin. The pro-European and democratic

526 Manuel Guțan: *Codul...*, *op. cit.*, p. 155.

philosophy of a revolutionary catching-up with the West, while the right-wing followers of Maiorescu (including Constantin Rădulescu-Motru and Aurel C. Popovici) espoused a philosophy of delaying European influence and preferential development of domestic traditions, an anti-nativist but also anti-Western ideology in its extreme and grotesquely distorted form, which became the justification of the extreme right during the *interbellum*. The influence of Maiorescu's rationalist critique in Romanian philosophy continued for four generations, until the Second World War."⁵²⁷

But Maiorescu was more in favor of organic development. According to his position, "first make the Romanian people more educated and active, send their sons to good schools, and under favorable circumstances the enlightenment and independence of character of a true citizen, accustomed to culture, will follow, and the legal forms which will regulate his relations in private and public life will also be formed. But do not begin with administrative regulations and constitutions, for since the world began, no people has ever been renewed by laws and governments, but rather by these as occasional expressions of its inner development, as visible results. And he who expects culture from the administration of law and government, reverses the natural order of things, brings in the spirit of centralization and patronage from the government, while depriving the citizen of his self-confidence, of that self-government which alone is worth more than all public and private laws, and which is the only support of true democracy."⁵²⁸

6. After the transposition of the Code, Romanian legal practitioners were irrevocably linked to the transposed legal model, which limited the development of local, home-grown legal culture. In other words, the transposed law hindered the organic development of domestic law, taking the place of the national legal culture and diverted intellectual energies from the creation of the national law as a national cultural product. As Maiorescu put it, "in the

527 Marta Petreu: *A román filozófia*, Korunk, 2010 / 8, p. 10.

528 Titu Maiorescu: *Contra școalei Bărnuțiu*, Junimea, Iași, 1868, pp. 101-103. The original Romanian text also uses the English phrase 'self-government' which is emphasized. While Maiorescu '*presented with scholarly dryness the falsification of all the elements of modern civilization in Romania, of the genius of the Romanian language, of the forms of culture, of the idea of the academy, public education, journalism, Caragiale presented it on the stage, The protagonists of his comedies cannot even pronounce the neologisms borrowed from French, while they manipulate each other with diabolical skill, and the fatal logic of power prevails.*' See Ambrus Miskolczy: *Modern mítoszok csapdáiban. Caragiale és Sebastian*, Kriterion, Cluj-Napoca, 2011, p. 205.

face of this trend among the Romanian public, we can in no way believe that what led them to Western culture was a meaningful appreciation of the cultural values. No, the reason was the vanity that captivated the descendants of Trajan:⁵²⁹ to show foreign nations that we were their equals in civilization at all costs, even at the cost of ignoring the truth. Only this can explain the sin that infects our public life, the fact that behind all the forms we take from somewhere, there is so little substance. And the danger is not simply the lack of substance itself, but rather that the public does not even feel the need for this substance, that our people believe and make others believe that it is a result of having taken over or created some empty form seen there from foreigners. This total lapse of judgment is the most characteristic feature of our intellectual life.”⁵³⁰

7. The massive legal transplantation has created only forms, illusions, a (legal) unreality completely detached from that extant in Romania at the time. The consternation caused by the legal transplantation was captured by terms such as ‘utter error’, ‘blindness’, ‘imitation’ or ‘law-making’ (Titu Maiorescu), ‘slavish imitation’ (Petre P. Carp, lawyer, conservative politician, Prime Minister), ‘dressing in too rich a robe’ (Carol I, ruler of Romania from 1866, who reigned as king from 1881), ‘copying’ (Alexandru Dimitrie Xenopol, historian, academic), ‘perpetual lying’ (Theodor Rosetti, lawyer, conservative politician, prime minister), ‘aping’ (Mihai Eminescu, the Romanian national poet of the second half of the 19th century).⁵³¹ Quoting

529 The Romanians.

530 Titu Maiorescu: În contra direcției de astăzi în cultura română, *Convorbiri literare*, II, no. 19, 1st December 1868, p. 303-304. This article was that first expounded in detail the theory of forms without content.

531 See Manuel Guțan: *Codul...*, *ibid.*, p. 155. Eminescu, who had been a disciple of German culture, did not have a very good opinion of the superficial import of French culture. In his poem ‘Third Epistle’, for example, he wrote the following (as translated by Petre Grimm):

*‘In the lupanars, in Paris, day and night you have been seen
With the most depraved of women and in revelry obscene,
You have lost your youth and fortune, gambling, drinking, wild and lewd,
How could Paris make you better, since in you was nothing good?
Wearing monocles like dandies, with a little walking cane,
You came back, your heads pomaded, in your brains did nought remain
But some waltz learnt in the ballrooms, nothing else was left behind:
And all prematurely withered, with an empty childish mind,
And a harlot’s dancing slippers, all the wealth you did acquire...
I admire you, proudest offspring of the Romans, I admire!’*

Maiorescu once more, the concern is that ‘the empty forms we have been boasting about until now will take revenge on us, eagerly taking on reliable content from abroad.’⁵³²

Eminescu added a distinctly nationalist overtone to the polemic stating: “Have we accepted foreign laws? Well, we did not accept them for the Romanian whose needs they did not suit, but for the economic elements to whom they were suitable and who could take advantage of them. We created the air for exotic plants, which in turn destroy the native flora.”⁵³³

5. Seven Arguments for Adopting Foreign Law

The complexity of legal transplants is demonstrated by the fact that it is possible to summarize not only the arguments against transplants but also the arguments in favor of them. Similarly to the arguments against, the arguments in favor of legal transplantation have crystallized over decades.

1. The adoption of the Civil Code was a clear expression of internal autonomy from the Ottoman Empire, the suzerain power. Thus, the French-model⁵³⁴ code was the fulfilment of the ideals of 1848, a clear statement of the country’s desire to belong to the Western cultural sphere. Regarding the possibilities of historical Romanian legal development, the adoption of the French model signifies ‘catching up’ with the West, a consciously undertaken and aspired cultural link, and also a strong political statement in favor of this direction. The political context also includes the fact that the Romanian Civil Code of 1864 achieved an important legal policy objective: after the unification of the two principalities in 1859, it created a unified area of Romanian private law, following the Callimach and Caragea Codes, while limiting the Austrian influence in the Moldavian Code.⁵³⁵ This was in the context that Romania only gained its independence as a state in 1878.

⁵³² Titu Maiorescu: *În contra...*, op. cit., p. 306.

⁵³³ Mihai Eminescu: *Paralele economice*, Timpul, 13 decembrie 1877, in *Opere X*, Editura Academiei Republicii Socialiste România, Bucharest, 1989, p. 20.

⁵³⁴ On the influence of French culture, see for example Pompiliu Eliade: *De l’influence française sur l’esprit public en Roumanie: les origines: étude sur l’état de la société roumaine à l’époque des regnes Phanariotes*, Ernest Leroux, Paris, 1898.

⁵³⁵ On this issue, see also the concluding part of the present chapter.

2. In fact, the Romanian Civil Code of 1864 cannot be considered a simple translation. It preserved certain (transferable) elements of the old Romanian customary law, such as the right of inheritance of the poor widow. The code was shorter than its French model (consisting of 1914 articles compared to the 2281 articles of the Napoleonic Code). In other words, the norms were subjected to a targeted selection according to the private law rules that served the interests of Romanian society. The rules on priority of creditors and mortgages were taken from the more modern Belgian rules of 1851 (Article 105).⁵³⁶ Some parts (around 45 articles) were modelled on the 1860 draft of the Italian Civil Code⁵³⁷ by Pisanelli, inspired by the French but improved (the Italian draft, with amendments, was finally promulgated in 1865 as the first unified Italian civil code: *Codice civile del Regno d'Italia*). Cuza explicitly drew the attention of the Committee to the Italian draft. The passages of Italian origin can be identified in the law of obligations. The Italian model also determined the structure of the titles of the law of obligations in the third book of the Romanian Code.⁵³⁸ In the final analysis, several models were used in an attempt to produce the most suitable text for Romanian society within the time available.

3. The literary critic Eugen Lovinescu (1881–1943) developed the theory of the synchronization of civilizations (*sincronimsul*, literally “synchronicity”), which clearly advocated modernization and the adoption of European models. His source of inspiration was also French: French sociology and Gabriel Tarde’s theory of imitation. The theory was particularly influential after the First World War. Lovinescu’s theory also helped the adoption of the Civil Code, justifying revolutionary, inorganic modernization. The essence of the theory was that there was a need for synchronization between ‘underdeveloped’

536 Book Three, Title XVIII.

537 Giuseppe Pisanelli (1812–1879) Italian lawyer, Minister of Justice.

538 For example, Article 1579 para. (3) is of Italian origin (taken from Article 1882 of the Italian draft), the French text does not contain such a provision. The provisions referred to state that ‘in the same way, if the loan was made in gold or silver coins and a refund of the same kind and quality was provided for, or if the intrinsic value of the coins changes, or if they are not found or are withdrawn from circulation, an amount equal to the intrinsic value of the coins at the time of the loan shall be repaid.’ The Romanian Code consisted of five introductory articles and three books: the first one regulated persons (including family law), the second one property (assets), the third one the acquisition of property and the transfer of property (including intestate and testate succession and the institutions of the law of obligations).

Romania and the 'developed' West, to reduce differences and backwardness, but that this could be achieved by preserving a certain degree of national specificity. This 'synchronization' can be achieved by adopting Western institutions, ethics and practices and applying them while preserving a valuable part of local conditions. The adoption and application of a civil code modelled on the French model clearly fits in with this assimilation, and synchronization both explains and justifies it. It transcends the simple adoption of Western culture, but 'living in the same spiritual space'.⁵³⁹

According to Lovinescu, "the revolutionary transition of the Romanian people to Western forms of civilization was easier, due to historical circumstances, than for other peoples", because in the first half of the 19th century, the social consciousness did not put up a fierce resistance to Western ideas, but on the contrary, the "seeds of the West, sown in the ground, sprouted quickly."⁵⁴⁰ The context, as per Lovinescu, was "the distant past of forgotten struggles, and the more recent: subjugation, humiliation and moral misery, the degrading influences of the East, a country open to any invading army, with the prospect of being swallowed up by holy Russia..."⁵⁴¹ Moreover, Lovinescu considered the Western orientation as a dictate of the fate: "the Romanian people, with the spiritual virtuality of the Latin peoples, being itself Latin, was anchored from the beginning in an oriental environment, by its geographic position, its historical circumstances and its religion, in stark contrast to its nature."⁵⁴² Modern Romanian civilization could therefore not have developed in any other way than by revolution, "that is to say, by a sudden and complete importation, without repeating the evolutionary stages of the civilization of the advanced peoples."⁵⁴³ And in civil law, the original inventions and ideas of a people are limited anyway, and imitation is a frequent and natural process.

4. Maiorescu also had to respond, as his theory is more of a statement of fact, and allows for the drawing of contradictory conclusions, and thus permits a positively charged interpretation as well. The transposed forms and the specific Romanian basis 'met', interacted, in fact shaped each other.

539 Cf. Marin Bucur: *Istoriografia literară românească de la origini pînă la G. Călinescu*, Minerva, Bucharest, 1973, p. 500.

540 Eugen Lovinescu: op. cit., III, p. 167.

541 Eugen Lovinescu: op. cit., III, p. 168.

542 Eugen Lovinescu: op. cit., III, p. 187.

543 Eugen Lovinescu: op. cit., III, p. 189.

The forms led, albeit more slowly, to modernization, to the adoption, to the adoption of the model, and ultimately to its organicization. But the basis did not disappear: it influenced the law in its interpretation and application to local realities. As an example, I have already mentioned the abolition of church marriage and the result of its ‘counter-reaction’ of the fundamental realities: as a solution, the Constitution of 1866 provided for a church ceremony after a civil marriage – with binding force. Essayist Adrian Marino assessed this as “the contradiction that dominates the development of modern Romania, with one face looking to the West and the other to the East and the Balkans. Since Maiorescu, it has been constantly defined as a violent clash between the Western form and the indigenous substance. Basically, we (would have) a culture of forms without substance. This definition is only partially, or rather not entirely, accurate. For some Western forms have not yet been truly assimilated, despite the empty initiatives that pop up from time to time. (Other Western forms, on the other hand, have only been partially assimilated, imperfectly and superficially. These are the creators of inevitable interferences and hybrids. Others, after all we have assimilated completely, in narrow, elite circles.) Perhaps the solution offered by Eugen Lovinescu seems the most sensible and just response to these substantive debates: the new forms must sooner or later produce adequate substance. This is a matter of gradual adaptation, critical selection, settling down and, above all, of skill. The result of a sustained and solid process.”⁵⁴⁴

The Transylvanian Hungarian philosopher Ernő Fábíán (1934–2001) also supported Lovinescu stating that “Lovinescu’s criticism is correct, because in the modernization of an underdeveloped country, forms, laws, ideologies and institutions play a decisive role, and their establishment is justified even if they are not in harmony with the existing content. Therefore, Lovinescu’s inverted formula: from form to content (“*de la formă la fond*”) expressed the necessary tasks and changes more accurately than Titu Maiorescu’s (...) anxious criticism.”⁵⁴⁵

544 Adrian Marino: *Pentru Europa. Integrarea României. Aspecte ideologice și culturale*, 2nd edition, Polirom, Iași, 2005, pp. 81-82.

545 Ernő Fábíán: *A maradandóság mértéke*, in *ibid.*: *A példaadás erkölcsé. Tanulmányok*, Kriterion, Bucharest, 1984, p. 199. In his view, the forms adopted without substance only obscured and concealed reality, the real problems of society, and plunged the country into a state of cultural-economic dependence, which had not been given the chance to find its own forms, even the same ones, and thus to develop organically.

5. The transposition of French law is in fact the result of necessity. It was obvious that the otherwise valuable traditional Romanian legal culture (written law and customary law) was not able to accommodate the rapid – and necessary – development towards modernity. In the 19th century, for Romania, modernization meant catching up with Western Europe and adopting / transplanting French law was part of the process. This was the most natural cultural option. In the given political, legal, and social circumstances, recourse to transposition was inevitable. There was simply no quick internal route to modernization and catching up with the West was the most fundamental project and dream of the political elite. According to Lovinescu, “there are also states of new formation which have been prevented by historical circumstances from developing organically; these states have developed in imitation of the revolutionary path...”, and, moreover – and this is explicitly true of civil law – “all the peoples of Europe today are in a reciprocal moral and material context”.⁵⁴⁶ The Callimach Code is not to be missed, for its “national tradition was more rather formed by the Byzantine law codes and the Austrian code”, and “we are happy to discover ourselves in Napoleon’s private [law] code (...), and through them the great legal tradition of the Roman people, since the Roman people are the true creators of law...”⁵⁴⁷ (The general code of Caragea was less successful as a codification ‘product’ compared to the purely civil code of Callimach).

6. The capacity of the Romanian legal culture to assimilate the French Civil Code is also positive. The continuous development of civil law science and the creation of high-quality legal education have also confirmed the effectiveness of the transposition. Since the second half of the 19th century, a series of Romanian private lawyers⁵⁴⁸ of great stature have carried out relevant work, based on French jurisprudence but cultivating Romanian private law.

7. Ultimately, the Romanian code can be understood as a creative adaptation of the transposed French law. The Code of foreign origin, through

546 Eugen Lovinescu: *Istoria civilizației române moderne I. Forțele revoluționare*, Ancora, Bucharest, 1924, p. 210.

547 Eugen Lovinescu: *op. cit.*, III, p. 164. The Callimachi codex was described by Pompiliu Eliade as a “freak”. Cf. Pompiliu Eliade, *op. cit.*, p. 371.

548 From the second half of the 19th century and the first half of the 20th century, it is worth highlighting Dimitrie Alexandrescu (1850–1925), Constantin Hamangiu (1863–1932) or Constantin Nacu (1844–1920).

its long application, has become a real and fully, one could say organically, Romanian law. Lovinescu captured this idea by saying that “imitation is the first form of originality, in the sense that any imitation resembling the temperament of the species becomes, in time, a specific character.”⁵⁴⁹ The originality of the Romanian “civilization, like that of most peoples, lies not in its creation but in its application and reinterpretation.”⁵⁴⁹ The success of the transplant is shown by the fact that, as I have recorded in the introductory section, the French-style code was in force until 1 October 2011, having survived several small wars and two world wars, several dictatorships, social upheavals and remained the most important source of private law in the first two decades after the regime change in 1989.

6. Summary

The question arises as to why the French codex was adopted. The adoption of models is of crucial importance in the history of Romanian civilization. In the two Romanian states, the Byzantine religious, cultural and political model was the first to dominate (14th century). Its culture-forming influence was essentially through Balkan Slavic (Bulgarian) mediation. The language of the church and the imperial chancellery was also Slavonic. When Byzantium and the Bulgarian Tsardom came under Turkish rule, the Romanian states continued to function on this model.

The Romanian language took over from Slavonic after 1600, but the Cyrillic alphabet was retained until the mid-19th century. In the following period, Turkish cultural influence can be identified, as well as Greek cultural influence in the aforementioned Fanariot period. In the fanariot period, the elites were characterized by Romanian–Greek bilingualism. The whole of Romanian society was oriental in character, for example Turkish dress was predominant. Dinicu Golescu (1777–1830), a great *boyar* from Wallachia, who wrote in his account of his travels in the West about the introduction of the things he saw there into Romania, was not allowed to visit an insane asylum he wanted to see in Vienna, lest the patients become upset by a foreign gentleman in very peculiar dress. (His four sons, however, already dressed in

549 Eugen Lovinescu: *op. cit.* III, p. 190.

the latest Parisian fashion.) What factors contributed to the profound influence of French culture within this society? Paradoxically, the first intense Western influence came from the East, during the Russian occupations of 1806–1812 and 1829–1834. Russian army officers spoke French, which became a language of mediation and a real fashion. The Greek cultural language was exchanged for French in the two Romanian principalities. In the space of just a few decades, not only was the program of rapprochement with the West established, but it was also implemented, albeit in a controversial and superficial manner under many respects.⁵⁵⁰ A very strong Francophilia developed among the elite. A sense of neo-Latin affinity also encouraged openness to French culture.⁵⁵¹ Prince Cuza had studied law in Paris (although he did not complete his studies) and the key figures in the codification process had also studied in Paris (George Crețeanu, for example), even obtaining doctorates there (Constantin Bosianu, for example, who actually led the rapid codification work). The French code thus seemed the most obvious model. The alternative to choosing the French code in 1864 would have been the Austrian code. However, its adoption was hindered by existing language barriers and the political context (relations between Austria and the United Principalities were tense, Austria did not initially recognize the election of Cuza, etc.)⁵⁵²

The problem of legal transplants is not at all an easy issue to analyze, as the investigation above demonstrates. Legal transplants can cause a culture-shock, which can lead to feelings of frustration, captivity, powerlessness and even humiliation. The adoption process raises not only legal issues but also psychological ones. This is why the positive effects of transplantation as a process (the approaches listed in subchapter 5) must be emphasized in order to make the adoption of a foreign law palatable and accepted, despite the initial cultural mismatch. A scientifically accurate picture, however, can be built up on the basis of a combined examination of the arguments for and

550 On these decades, see Ștefan Cazimir: *Alfabetul de tranziție*, Humanitas, Bucharest, 2006; Neagu Djuvara: *Între Orient și Occident: Țările române la începutul epocii moderne (1800–1848)*, Humanitas, Bucharest, 1996.

551 Grigore Ureche (c.1590–1647), a Moldavian nobleman who studied in Poland (Lemberg), realised the affinity between Latin and Romanian languages during his studies and declared in his chronicle written towards the end of his life: „De la Râm ne tragem” (We hail from Rome). The contradictory nature of the situation is shown by the fact that in Romanian Rome is not referred to by its Latin but by its Slavic name. Cf. Lucian Boia: *Românii și Europa. O istorie surprinzătoare*, Humanitas, Bucharest, 2020, p. 24.

552 See Lucian Boia, *op. cit.*, pp. 21–29.

against. Moreover, in the same person, both sets of arguments can be present at the same time: negative and positive effects can be recognized simultaneously. The Romanian Constitution of 1866 was noted to be the result of a law of total imitation, a transposition of the Belgian constitution, but those who “criticized it as an indiscriminate copy of the Belgian constitution nevertheless organized themselves into a constitutional party to defend it and demand its strict application.”⁵⁵³ This contradiction also characterized the reception of the Romanian Civil Code. Not enough has been said about these aspects of legal transplants. Furthermore, the dilemmas highlighted in this study, encompassing arguments for and against, are pertinent considerations in the context of legal unification and harmonization (approximation of laws) within the framework of European integration.

Legal unification involves the direct application European law, harmonization requires the transposition of European law, and both methods, in many aspects, contains elements foreign to organic national legal development. This process addresses and simultaneously creates challenges related to language, content, and the substantive aspects of organic national legal evolution. The national legislator would certainly draft different legislation – in terms of language or content – to achieve even identical or similar regulatory or policy objectives. In other words, the story outlined above is still current and very widely relevant.

553 Eugen Lovinescu: *op. cit.*, III, p. 99.

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RIISING VOICES OF THE PEOPLE: ECHOES OF THE REVOLUTION OF 1848 IN SERBIAN LAW

Abstract

The paper discusses the influence of the Revolution of 1848 on the law of the Principality (later Kingdom) of Serbia, where young liberal-minded men, educated abroad, brought modern ideas of political representation and debate after the “Serbian Revolution” in Hungary in 1848-49. The author focuses on parliamentarism as the primary and freedom of press as the secondary demand of this liberal intelligentsia, and traces their evolution over four decades – from the St Peter Assembly of 1848, that first made these demands, to the Constitution of 1888, that finally fully enshrined them in positive law.

Keywords: Serbia, parliamentarism, political representation, freedom of press, National Assembly

1. Prologue: Serbia 1804-1848 – a Background

The main touch of Serbs as a people with the Revolution of 1848 was, of course, that of the Serbs living in Hungary and the so-called Serbian Revolution or Serbian National Movement in 1848-49. These events are not the subject of this paper: suffice to say that they failed to drastically change the

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position of Serbs in Hungary.⁵⁵⁵ However, their sound echoed across the border, in the Principality of Serbia, still an autonomous province under Ottoman rule. There are many aspects that could be analysed, but we shall focus on the two main demands made by Serbian liberals of that time: in the first place, political representation (parliamentarism), and, secondary but still relevant, the freedom of press. The greatest attention will be devoted to the direct aftermath of the Revolution, the Assemblies of 1848 and 1858, but we shall then briefly trace the outline of development of these two key issues until their (not quite final) realisation four decades later, in the Constitution of 1888.

After four centuries of direct Ottoman rule, the uprisings of 1804-1813 and 1815, and an unstable period of dual government of Ottoman and Serbian organs in 1815-1830, the Principality of Serbia was granted internal autonomy by the *hatt-i-humayun* of 1830 and 1833, under the reign of Miloš Obrenović. Miloš passed the first Serbian Constitution, the Sretenje (Candlemas) Constitution in 1835:⁵⁵⁶ however, as it was written as if Serbia were an independent country, without acknowledging Ottoman sovereignty, Miloš was forced by the Great Powers to abolish the Constitution after only six weeks.⁵⁵⁷

Still, he pressured the Porte to enable a constitution to be passed, which led to a new one in 1838 – issued by the Sultan in the form of a *hatt-i-humayun*, and known later as the Turkish Constitution. The main structure of power remained highly similar: both the legislative and executive were shared by the Prince and the (State) Council,⁵⁵⁸ made up of officials that he appointed for life, some of whom were ministers (and could lose that post), and some ordinary councillors. However, the Council now limited the Prince

555 An extensive bibliography exists on this subject; see e.g. Perović 1952; Pavlović 1986; Popović 1990, pp. 207-309; Gavrilović 2000; Krkljuš 2008, 2010a, 2010b.

556 See all texts of Serbian constitutions in Jovičić 1988.

557 Older literature mistakenly believed that Miloš was pressured into issuing the Constitution by Mileta's revolt in 1835 and thus didn't regret its abolition; however, it is now known that he had ordered drafts to be made as early as 1829 and that he genuinely wanted to see the Constitution succeed. Whether he could have reigned as a proper constitutional monarch is a different matter. See Popović 1996; Avramović 2010, translated into English as Avramović 2020.

558 In 1835, the organ was called State Council; in 1838, only Council, in order to deny any allegations of Serbian statehood. While the name State Council was later restored, it was often referred to only as Council in short.

more strictly, and for a councillor to be deposed, a judicial verdict was no longer sufficient: the Porte's consent was required, in direct contradiction with the previously proclaimed autonomy. Among other important changes, the National Assembly, that was primarily a consultative organ in 1835, but without whose approval no taxes could be introduced or increased, and that took part in changing the Constitution along with the Prince and Council, wasn't even mentioned in 1838; individual rights were also proclaimed far more explicitly and in more detail in 1835. Any existence of an Assembly and citizens' rights was seen as a seed of the French Revolution by the Great Powers, and the Porte would not have those in its constitution for Serbia.⁵⁵⁹

Dissatisfied with the new Constitution that was imposed on him, Prince Miloš abdicated in 1839, after a failed attempt to change the regime. His son and heir, Milan, inherited the throne gravely ill and died soon afterwards, and the younger son, Mihailo, was deposed by a clique of powerful officials in 1842. They brought Aleksandar Karađorđević – son of the leader of the First Uprising – as the new Prince, confirmed by an Assembly summoned for that purpose and by the Porte (though his title, unlike his predecessors', wasn't hereditary), and largely obedient to the clique for the most of his reign. The name they became known for in Serbian history is *Ustavobranitelji* – Defenders of the Constitution, as they prided themselves on establishing institutional order in autocracy's stead. However, that order evolved into a rigid bureaucracy that contained almost no political participation of the common people, whom they perceived as children incapable of governing their own interests.⁵⁶⁰

As Jovanović notes, the broader population did not begrudge this at first but was, on the contrary, grateful that private rights were properly guaranteed now: it was only when this basic need of safety was met that an appetite for political freedom awoke.⁵⁶¹ Assemblies used to be the part of a long customary tradition in Serbia. In the Middle Ages, the *Sabor*, an assembly composed of nobility and the Church (but no third estate) reigned along with the monarch, helping him with all the more important decisions. The fall of the Serbian state to the Ottomans brought an end to this type of assembly,

⁵⁵⁹ More on this period in English in Popović 2021, pp. 3-39.

⁵⁶⁰ Jovanović 1990a, pp. 49-63.

⁵⁶¹ '*Apetit za političkom slobodom još se nije bio probudio i nije se mogao probuditi; trebalo je da se, prvo, jedna preča potreba, potreba za pravnom bezbednošću, zadovolji.*' Jovanović 1990a, p. 28.

but it lived on in a somewhat modified form under Ottoman rule, that of ecclesiastical assemblies with the participation of the most prominent lay leaders, a model that was brought over and regulated more formally by the Serbs in Hungary as well. The military nature of the First Uprising brought lay leaders to the fore again, turning the Assembly into a political body of local elders and military officers that Karađorđe frequently consulted. After the Second Uprising, Miloš managed to take the majority of power to his own hands and to partially influence the composition of assemblies, but he still had the habit of at least summoning and consulting them on a frequent (if not formally regular) basis.⁵⁶² While the medieval roots were not remembered by the common people at the time, the uprising era assemblies were fresh in their memory, and the Defenders' elitist order seemed to take away from the common folk even the simplest right to present their plights and problems to those in power who might solve them.

Similarly, the press wasn't free in this period. A Proclamation of Prince Miloš in 1832 limited it, and the Regulation on Censorship of 1841 expanded on the same ideas, forbidding the publication of any texts directed against members of government personally or against their official acts, as well as anything insulting the Christian religion and public morality.⁵⁶³ According to Slobodan Jovanović, "nothing even resembling political critique was tolerated."⁵⁶⁴

During the 1840s, a large number of young Serbian men were sent for schooling abroad, mostly to German universities,⁵⁶⁵ with a government stipend, stipulating that they would return to a job in state administration and there implement the knowledge gained at prominent foreign universities. In addition to practical skills and knowledge, those young men often came back with new political ideas gained in the surroundings where they studied. In 1848 and its aftermath, a number of them returned with ideas of political freedom, demanding a democratic constitution, sovereign National Assembly (parliament), freedom of press, ministerial responsibility etc. While

562 See Radojčić 1940; Blagojević 2008; Kršljanin 2017; Točanac 2008; Točanac Radović 2014; Mitrinović, Brašić 1937, pp. 19-47; Kandić 1960; Kandić 1961.

563 Simić 1993, p. 547; Petrović 2016, pp. 19-23.

564 'Ništa ni nalik na političku kritiku nije se trpelo.' Jovanović 1990a, p. 384.

565 They were mostly colloquially known as *Parizlije* (Parisians), but most of them only came to Paris at the end of their studies, having previously studied in Germany, Austria or Hungary. See Trgovčević 1996, pp. 33-46; Jagodić 2009; Tatić 2019.

national liberation was initially one of the key ideas as well,⁵⁶⁶ it soon gave way to the purely political demands, both also echoing with the students of the Lyceum in Belgrade. Economic issues, particularly those relating to the rural population, weren't of particular interest to them and were often even derided, while some demanded reforms in education.⁵⁶⁷

2. The Saint Peter Assembly of 1848 and Its Aftermath

As more and more people demanded to join the struggle of Serbs in Hungary, the Prince and Council summoned an Assembly to hear out the demands. No law was passed to allow it: merely a short regulation determining that one deputy be elected for every 250 taxpayers, and a number of representatives by position: all district heads, one county head and one priest from each district, one monk from each eparchy and two from the archdiocese, two officers of the border army, representatives of both sections of the Appellate court, president of the Supreme court, all bishops and the metropolitan of Serbia.⁵⁶⁸

The Assembly was supposed to be held on June 1st, but as movement of the deposed Obrenović Princes was noticed at that time (Prince Mihailo arrived in Novi Sad, the old Prince Miloš in Zagreb), it was postponed for St Peter's Day, June 28th. It met in an open field, as was customary, in the presence of the Prince and Council, with no formal procedure; arguments often broke out, and the deputies were angry at the Government⁵⁶⁹ for not summoning an Assembly in five years.⁵⁷⁰ Jovanović describes it as a revolutionary crowd, akin to the Assemblies of 1842 and 1843,⁵⁷¹ a gathering of Vučić's supporters ready to attack anyone who opposed him, similar to a country gathering or an insurrection army.⁵⁷²

566 It is worth noting that, unlike the previous generation, these young liberals had no personal experience in fighting against the Ottoman Turks, and thus viewed the idea in a somewhat distant, romantic light. Milićević 1964, pp. 20-29.

567 *Ibid.*, pp. 29-35; Vasiljević 1987, p. 25.

568 Mitrinović, Brašić 1937, p. 56.

569 When the word "Government" (Правителство, *Pravitelstvo*) is used in documents of this period, it means not a separate organ composed of ministers, but rather refers to the Prince and Council as the governing organs of the state.

570 Mitrinović, Brašić 1937, p. 56.

571 On them see *ibid.*, pp. 53-56.

572 Jovanović 1990a, p. 212.

No official records or protocols were made during the Assembly, but a list of deputies' demands and pleas was made, and the Prince's answers to them, positive or not, were afterwards printed in the official Collection of Laws for the years 1847-48.⁵⁷³ There are 95 items listed, in the order of the number of districts that had made demands of a certain kind, going down to the individual ones. Most of those concern local, everyday matters: taxes, duties and fines, local administration, the wages of village elders and doctors, bride-price and premarital exams, the conduct of local priests etc. Some concerned matters of global importance, but not directly involved in internal politics: the founding of new schools – a teachers' school, a military school and one of economics – and academic freedom of teaching, or the final removal of Turks from the territory of Serbia.⁵⁷⁴

The first on the list and the only one addressed by all 17 districts was the issue of the length of judicial proceedings, with various factors, from bad laws to the behaviour of attorneys, being mentioned as the cause. The Prince replied that the problem was well-known and that the Government was working on it, briefly listing existing reforms and a committee that the plea was forwarded to. Other pleas for judicial reform were rare. The Kragujevac district asked for county elders to preside in courts of the peace (municipality courts) and for those courts to be allowed to try bigger cases. It also asked for the instituting of a commercial court. Both were also forwarded to the judicial committee.⁵⁷⁵

The second, addressed by all but the Užice district, concerned the summoning of Assemblies in the future: 11 districts demanded that it be done every year, three that a smaller assembly be summoned every year, and a Great Assembly once every three years. One county found an assembly every three years to be acceptable, and one considered the Prince should summon it when circumstances required it. The Prince replied that the people's wish should be fulfilled, but that a regulation in this regard should first be passed, so the Constitution would not be broken, and that he has named a committee to address the issue. However, in the minds of the majority of the population, the Assembly was still an organ meant for the direct expression of the

573 Рѣшеніе 1849, pp. 173-204.

574 The Prince merely replied that the Government had already taken necessary steps.

575 Some demands for changes in material law were forwarded to the same committee – for example, the request of the Rudnik county that a new civil code be made in the spirit of the Serbian people.

wishes and needs of the common people, and not a modern parliament. This is obvious from a demand made by 11 districts, that partisanship be abolished among the people, and the creation of parties strictly punished. (Such parties as existed at the time were informal gatherings of politically like-minded individuals: no formal registration yet existed.) The Prince merely replied that it was illegal to begin with, that the police had the authority to act against parties and that he himself had issued a proclamation reminding people of that at the start of the Assembly. Six districts asked to be allowed to review the state treasury, and three more demanded accounts for the past six years.⁵⁷⁶ The Rudnik county demanded that the decisions of the Assembly be printed and publicly available, which led precisely to the printing of the demands and answers in the Collection of Laws.

Some demands concerned the executive power as well. All districts but one also made two demands regarding state officials – that those of foreign origin be fired, or at least no longer employed in the future, so that native Serbian officials could be employed, and that state officials be prohibited to engage in commerce. On the first point the Prince answered that Serbian men will be employed whenever there is a need, but that those of foreign origin could neither be fired nor excluded from consideration for service. The second demand was met – both officials and priests (regarding whom only two districts demanded it) were prohibited from engaging in commerce. Eight districts asked for members of the Council to come one from each district. There were 17 of them, as there were districts in Serbia at the time, but no relation was set by the Constitution. The Prince promised to keep that in mind when appointing Councillors in the future.⁵⁷⁷ Six districts requested

⁵⁷⁶ According to the 1835 Constitution (art. 88), the Ministry of Finance had to submit financial reports to the Assembly each year.

⁵⁷⁷ Some of the demands on this subject seem to show that deputies were not too well-informed, as they asked for things already in place in positive law. Six districts demanded that officials who take bribes be fired, to which the Prince pointed out that such a possibility, along with even harsher penalties, was already prescribed in the Regulation on Officials in 1842, reminding the executive to enforce it properly. Five districts requested that officials who lose their position due to misdemeanours by a court or Assembly's decision should lose their pensions. The reply was that those expelled from service after a court's verdict already lost their right to pension, while the Assembly had no right to dismissed state officials. Four districts demanded that officials be hired and promoted according to their capabilities, which was again already prescribed in the 1842 Regulation, and the Prince merely instructed the government to pay extra attention to the issue. The Kragujevac district demanded that incompetent officials be immediately fired, to which the

that the heredity of the princely title in the Karađorđević dynasty be negotiated about with the Porte.

The freedom of press was one of the minor demands. Only the Belgrade district asked for it, proposing already what it saw as reasonable limitations: the sanctity of the Prince's person, and no personal attacks against any citizen or the ruling and the patron Court (i.e. the Ottoman Porte). The Prince, however, replied that since "the freedom of press in our fatherland is not subject to any other limitations but those which are demanded by the interests of the fatherland and other necessary concerns, based on the current state of education in our country",⁵⁷⁸ and that thus the demand could not be met.⁵⁷⁹ Still, the importance of this issue would grow in the coming years: as Simić remarks, there was barely a session of the Assembly after that without the issue of the freedom of press being raised.⁵⁸⁰

A committee appointed by the Council had indeed drafted a law on the National Assembly soon afterwards, according to which it was to be composed solely of the representatives of the people, elected in counties and district cities. Representatives of the local administration, judiciary and Church, which had taken part in the assemblies prior to this one, were no

Prince replied, again, that the Regulation did not allow for incompetent men to stay in state service. When we look more closely, however, we see that those requests show not (necessarily) that the deputies were ignorant of the law, but that the law was not properly and uniformly enforced in practice. A similar conclusion can be drawn from a slightly different demand by three districts that three officials shouldn't be appointed from the same house. Although this familial factor was dismissed by the Prince as irrelevant and discriminatory compared to individual capability, this demand clearly shows the image of nepotism that common people could perceive in the standing of well-to-do families with many members in state service. Two districts asked that the wages of higher officials be reduced, which was refused. The Podinje district requested that county heads be appointed from the county in question, and members of district courts from that district, which was deemed to be against the common interest, but the Prince promised to keep it in mind when possible.

578 '...слобода печатнѣ нїе подложена у отечеству нашемъ никаквомъ другомъ ограничению, него ономъ, кое интереси отечества и друга нужна призрѣнія, основана на садашнѣмъ станю просвете у нашої земљи, изискую...' Рѣшеніе 1849, p. 202.

579 It is worth noting that a request for proclaiming the freedom of press had been made in March by a group of intellectuals gathered around the Belgrade Reading Room (*Čitalište beogradsko*), and the Prince and Ministry of Education seemed to view it in a favourable light: however, it is believed that this was caused by fear of revolutionary events, and that the attitude expressed after the Assembly more accurately reflects their views. Petrović 2016, pp. 23-24.

580 Simić 1993, p. 548.

longer included. However, the draft was never promulgated: the Prince and Council did not trust the people sufficiently.⁵⁸¹

3. The Saint Andrew Assembly and Miloš Obrenović's Second Reign (1858-1860)

The Saint Andrew assembly of 1858 marked the culmination of popular displeasure with the Defenders' reign (and the social and economic crisis accompanying it⁵⁸²) as well as the conflict between the Councillors and Prince Aleksandar. Having failed in the plans to bring down the Prince with the aid of the Porte or European powers, Vučić and Garašanin decided to summon an Assembly for it. As the Prince was loath to do that, they relied mostly on Obrenović supporters and young liberal intelligentsia to pressure him.⁵⁸³ However, just as he and the Council agreed to summon the Assembly the Porte voiced its opposition, withdrawing it only when Russia and France proclaimed that to be a breach of the Paris treaty of 1856, which guaranteed Serbia internal autonomy.⁵⁸⁴ After some political manoeuvring of the Prince and opposition⁵⁸⁵, the new National Assembly Act was passed on October 28th, 1858.⁵⁸⁶

While based on the 1848 draft,⁵⁸⁷ the Act took a step back regarding the composition of the Assembly: in addition to elected deputies (one for every 500 taxpayers), it included the presidents of all district and higher courts, district heads (and the governor of Belgrade), district archpriests and a prior from each of the four eparchies (§1-2). The deputies were explicitly proclaimed to represent both their county or city, as well as the entire people (§3). The date and place of the Assembly were determined by the Prince (§8), but it had the right to elect its own president (chair), vice-president and two secretaries, who could be officials outside the Assembly, with no right of vote (§4). Its purpose was 'to be in front of the face of the Government a

581 Jovanović 1990a, pp. 212-213.

582 Milićević 1964, pp. 52-57.

583 Jovanović 1990a, pp. 203-204.

584 *Ibid.*, pp. 210-211.

585 Jovanović 1990a, pp. 211-212.

586 Законъ о (Народной) Скупштини 1858.

587 Jovanović 1990a, p. 212.

faithful and accurate expression of the popular state and popular feelings’;⁵⁸⁸ its competence involved giving its opinion on matters brought before it by the Prince and Council through their ministers, informing the Government of the people’s plights and suggesting means to resolve them, as well as the people’s wishes and means of fulfilling them (§6). However, it is explicitly stated that the Assembly’s proposals have no binding force until the Prince and Council issue laws regarding them, according to the Constitution (§7).

Both the parliamentary procedure and the election of deputies was regulated in a fair amount of detail. It is worth noting that active suffrage belonged to all male citizens of age who were never convicted of a crime, except servants, though officials could not vote in districts where they worked (§29). Passive suffrage belonged to men over 30, except officials and priests (§31). This restriction was new, and was agreed upon by the Prince and Garašanin in order to prevent Vučić, the President of the Council, from entering the Assembly; for the same reason, they excluded a provision of the 1848 draft allowing Councillors to attend and speak at the Assembly’s sessions.⁵⁸⁹ Ballots were direct in cities and indirect in counties (§33), but voting was public (§38),⁵⁹⁰ a system that will remain in place for three more decades. All the sessions of the Assembly and voting within it were likewise public, while the 1848 draft had allowed secret sessions and votes.⁵⁹¹ Deputies nominally had freedom of speech and immunity for the opinions expressed in the discussions, but, simultaneously, they were not allowed to propose anything “that could offend and break the public peace and the existing legal order in the land” (§18-19).⁵⁹²

The new young generation of liberal opposition was mostly educated abroad, combining progressive ideas with romantic nationalism and the idea of fighting the Ottomans for independence based mostly on second-hand information from their elders and books. For the most part, they were divorced from the masses, but a few of them (Jovan Ilić, Milovan Janković, Ranko Alimpić) did engage in popular agitation in the countryside prior to

588 ‘...да буде предъ лицемъ Правительства вѣрно и точно израженіе народногъ станя и народны’ осеѣаня.’

589 Jovanović 1990a, pp. 213-214.

590 In the case of a tie between two candidates, preference would be given to the older one.

591 Jovanović 1990a, p. 214.

592 ‘...што бы явно спокойство и постоеій законый редъ у земљи вреѣати и нарушити могло.’

the Assembly.⁵⁹³ While most liberals did not inherently support the Obrenović dynasty, the agitation for which was growing again, they were willing to accept its return if it came with political reforms, though they preferred Mihailo Obrenović (younger, well-educated, European rather than Oriental) to his father Miloš.⁵⁹⁴

The Assembly still resembled those of old, with the deputies arriving on horseback, armed and in traditional dress. However, it was held indoors, in a hall of the 'Great brewery', with deputies sitting by district and much more formal proceedings. The Prince was prepared to dissolve it by force of arms should it turn to revolt against him (the building was, not at all accidentally, right across the street from military barracks), yet he was overthrown and fled to the Ottomans in the Belgrade fortress and then to Austria, while Miloš Obrenović was summoned back, despite other ideas and pretenders, with the Assembly itself playing the role of regent until his arrival.⁵⁹⁵ However, the dynastic change was by no means the only goal of this Assembly: the liberals were highly interested in passing a new act on the Assembly, which would turn it into a regularly summoned and more influential body – and doing so before the new Prince, whoever it may be, is instated.⁵⁹⁶ Jevrem Grujić even wanted the Assembly to pass the act on its own, as a bearer of popular sovereignty, contrary to the Constitution, claiming that the people may at any time take back the legislative power that rightfully belongs to it.⁵⁹⁷ Being the only group at the Assembly with distinct political views (as opposed to supporting a particular person's claim to power)⁵⁹⁸, well-organized and politically efficient, they managed to play a significant role despite all being young and thus mostly unknown to the public.⁵⁹⁹ Overall, the majority of the political proposals put forth at this Assembly originated from the influential

593 Jovanović even had revolutionary ideas – to surround the Assembly with armed men and to arrest the Prince and Council – that were never put to practice. Jovanović 1990a, pp. 229-230; Milićević 1964, pp. 66-69.

594 Jovanović 1990a, pp. 205-209, 216-220.

595 See more in Jovanović 1990a, pp. 215-259; Mitrović, Brašić 1937, pp. 58-60.

596 Jovanović 1990a, pp. 227-232.

597 Jovanović 1990a, p. 233.

598 The other three prominent groups at the Assembly were supporters of the Obrenović and Karađorđević dynasties, as well as a group who supported mostly Ilija Garašanin and Toma Vučić Perišić, long-time members of the State Council, seen as *de facto* rulers.

599 Vasiljević 1987, p. 52-53.

and organised actors, and were not a spontaneous expression of the people's desires.⁶⁰⁰

The Assembly was in session from November 30th to January 31st, and it passed a total of 385 decisions of various sorts.⁶⁰¹ Its workings were at times haphazard, but concrete goals were reached. At one point, the progressive young deputies gained the upper hand and on December 8th managed to draft a National Assembly Act, mostly authored by Grujić, fairly revolutionary in content and style, with provisions such as anyone who opposed free assembly proceedings being proclaimed an enemy of the people (§2) and no power being allowed to limit the rights of the Assembly (§3).⁶⁰² Still, as a compromise with Garašanin, the liberals toned down some provisions and agreed to submit the draft to the Council, instead of passing it in a revolutionary manner.⁶⁰³ Thus, even in this Act the Assembly was not proclaimed as the main legislative power: laws concerning the Prince, Council, ministers and the Assembly itself could not be issued or changed without the Assembly being heard (§4). That meant that the rest of the legislative power remained in the hands of the Prince and Council, and the problematic word 'hearing' (*saslušanja*) might mean mere consultative, not necessarily legislative power.⁶⁰⁴ Still, the Assembly had the right to propose laws (§6), control public debt, taxes and budget (§7-8) and file criminal accusations against government officials before a court (§10). It was to be summoned every year in the capital, and should elections not be held on time, last year's deputies counted as re-elected (§12-14). The suffrage base was broader, as there were no limitations by profession (§16), and no deputies by position, but only elected ones. Also noteworthy is §35: in the case of a great need, the Prince and Council could summon an extraordinary Assembly, which could be greater, but not

600 Not so with some other requests and proposals, such as those related to criminal law and criminal procedure: while the young men educated abroad were not too interested in such issues at the moment, rural deputies were well-acquainted with problems in practice. They proposed the strict punishing of fraud and bribery, criminalizing usury, punishing priests who overcharged for their services, but also reducing the strictness of punishments for theft (where even the death penalty was possible) and increasing the effectiveness of criminal procedure. Vasiljević 1987, pp. 103-106, 116.

601 Mitrinović, Brašić 1937, p. 60.

602 Milićević 1964, pp. 82-83; Vasiljević 1987, p. 25. See the text in Mitrinović, Brašić 1937, pp. 60-61.

603 Jovanović 1990a, p. 233-234.

604 The original version contained a much clearer "confirmation" (*odobrenja*). *Ibid.*, p. 234.

smaller, than the ordinary one, and would not delay the holding of the ordinary one. This is the root of the institution of the Great Assembly, which will be introduced in 1861.

However, this act never came to life. Even before the return of Miloš Obrenović, the Council made drastic changes to the Assembly draft before passing it on January 5th, 1859,⁶⁰⁵ and then changing it again (albeit minimally) on January 14th.⁶⁰⁶ While the initial general provisions remained similar (§1-4), they were toned down – e.g. anyone opposing the free holding of the Assembly was no longer an enemy of the people, but an enemy of the law, and was to be punished most strictly. The Assembly's financial competences were reduced (§7-10), it could not directly accuse officials, but had to supplicate the Council for it, and this did not extend to ministers (§11), and was to be held in 1859, but only once every three years subsequently (§13). Suffrage restrictions for servants were reintroduced (§17).⁶⁰⁷ Still, it had a consultative quasi-constitutional power, as no laws regarding the Prince, Council, ministers or the Assembly itself could be issued or changed without it being heard out (§6). The only prominent addition in the January 14th version was §2, proclaiming the freedom of press as the first and most important guarantee of the Assembly's proper work and development. It was proclaimed generally, while details were to be regulated by a special law. Miloš passed yet another National Assembly Act on June 30th, 1860.⁶⁰⁸ The changes were very minor, the only truly relevant one being that the Assembly was much smaller, with a deputy elected not on every 500, but 1000 taxpayers (§21, 25).

Miloš did not intend to build a representative government: his intention was to keep ruling more or less as he had before, but his second reign was short, cut by his death on September 26th, 1860. While the promised Press Act was never passed, press under Prince Miloš was, in fact, fairly free, as he rarely intervened to stop writings in newspapers,⁶⁰⁹ though it is noteworthy

605 Законъ о Народной Скупштини 5.1.1859

606 Законъ о Народной Скупштини 14.1.1859. The numbers of paragraphs in the text correspond to this later version.

607 See also Jovanović 1990a, pp. 276-277, though he allows for some confusion regarding the versions of the Act.

608 Законъ о Народной Скупштини, 30.6.1860.

609 Jovanović 1990a, p. 384.

that several changes of editors of the official gazette, *Srbske novine*, took place.⁶¹⁰

4. Mihailo Obrenović's second Reign (1860-1868)

Prince Mihailo reigned in the spirit of enlightened absolutism (leading to young liberals' opposition to his regime), setting out to solve the main internal and external problems of the country.⁶¹¹ Unable to formally change the Constitution without the approval of the Porte,⁶¹² in 1861-1862, he issued a set of laws concerning the central institutions of the state, considered to be a new uncoded constitution by some scholars.⁶¹³ Major changes were made to the executive as well – the Prince got the right to forcibly pension members of the (again State) Council, while the Ministerial Council was founded as a separate organ for the first time, responsible to the Prince. However, what concerns us most here is Mihailo's National Assembly Act of 1861 and the changes to the position of the Assembly.⁶¹⁴

While its competence remained consultative, and its regular sessions were still held every three years, it had to be consulted regarding the ceding or exchanging of a part of state territory, increasing taxes or changing the tax system, and changing the Constitution (§3). The Assembly could demand to inspect state finances (§4) and ask questions of ministers, but they could refuse to answer if they thought speaking publicly of an issue too early could be harmful (§36), and either way they were not responsible to the Assembly. A Great National Assembly was introduced,⁶¹⁵ with the competence to elect a new Prince if one died heirless, to approve the adoption of an heir to the throne if a Prince had no progeny, or to appoint

610 Petrović 2016, pp. 26-29.

611 See Jovanović 1990a, pp. 347-350.

612 At this point, this was a matter of form and principle rather than substance. The Porte offered Mihailo to write the text of the Constitution however he pleased (and he already had several drafts), as long as it was enacted as a *hatt-i-humayun* by the Sultan; but it was precisely this that he was unwilling to accept. *Ibid.*, p. 358; Pavlović 1997, pp. 174-193-

613 Pavlović 1997; Marinković 2019, pp. 29-30.

614 Законъ о Народной Скупштини 17.8.1861.

615 More on its nature and development in Jovanović 1900; Kršljanin 2019.

regents in a Prince was underage or unable to rule directly for another reason (§6).⁶¹⁶

The number of deputies was further reduced, as one was elected on every 2000 taxpayers (§26), while the Great Assembly had four times that number (§11). Ballots were direct in cities and indirect in the countryside (§22-23). All deputies were elected, but suffrage restrictions remained (§19-20), including a ban for those convicted of election fraud or proven to have sold their vote. It was now forbidden to attend elections or the Assembly armed (§31). The Assembly was no longer necessarily held in the capital (the Prince determined the place, §10), its dignitaries were now appointed by the Prince, who could even depose the President (§32).

While it could be argued that the Assembly's importance was marginalised,⁶¹⁷ and its importance in day-to-day governing of the state was indeed minor, it must be noted that the Assembly's power in extraordinary matters was increased. Still, Mihailo was against introducing parliamentarism, believing that the level of education and political prowess among the population was too low for it to make sense: well-known is his retort that it would be frivolous to introduce parliamentarism so Milovan Janković and a few of his friends could hold parliamentary speeches that a mere dozen men could follow.⁶¹⁸ However, in the last years of his reign, Mihailo intended to change the Constitution and, among other things, give legislative power to the Assembly: several drafts were made that show this idea clearly. Mihailo's untimely death prevented this constitutional change, but the drafts were later used as a basis for the Constitution of 1869.⁶¹⁹

There were demands for free press on all three Assemblies held during Mihailo's reign (in 1861, 1864 and 1867), and he intended to pass a Press Act. Three drafts were made between 1861 and 1866, all limiting the press to some degree with permits for printing papers and the liability of persons involved for crimes committed in a published text, but no draft was enacted. Mihailo's attitudes towards the press varied. He was ready to tolerate scholarly critique of legislation, even to provide funding for moderate, 'semi-official' political papers such as the *Vidovdan*, but he wanted to prevent any direct political

⁶¹⁶ It is worth noting that changing the Constitution during regency was expressly forbidden (§14).

⁶¹⁷ Jovanović 1990a, pp. 377-379.

⁶¹⁸ *Ibid.*, 383-384.

⁶¹⁹ Jovanović 1990a, pp. 520-522; Stefanovski 2016, pp. 13-31.

critique of the government, which included the writings of young liberals, who were growing increasingly disillusioned by his regime, and several papers were extinguished as a result.⁶²⁰

As a result, the liberal opposition published papers mostly in the Serbian Vojvodina, on Hungarian territory, where it could criticise Mihailo's policies without the constraints of Serbian censorship. The criticism grew immoderate, coming to condemn every part of Mihailo's reign. The liberal press even condemned Mihailo finally driving the Ottoman garrisons out of Serbia and receiving the keys of the cities – for the fact that he managed to gain this diplomatically, and not through force of arms.⁶²¹

Still, the liberal opposition did not primarily reside in Hungary. Many liberals became members of scholarly or youth organisations – *Društvo srpske slovesnosti* (Society of Serbian Letters, forerunner of the Academy of Sciences) and *Ujedinjena omladina srpska* (United Serbian Youth), as well as teachers at the Lyceum/Great School or judges. Unlike state administration, these positions gave them a greater freedom of speech, as any government interventions could be qualified as assaults against academic freedom, youthful patriotism or judicial independence.⁶²²

An incident that took place on January 26th, 1864, is very illustrative: the Society of Serbian Letters overstepped the line. Vladimir Jovanović and Milovan Janković proposed the awarding of honorary membership to Giuseppe Garibaldi, Ferenc Deák and Richard Cobden, and corresponding membership to a number of similar, albeit less prominent figures, such as Nikolay Chernishevsky or Saint-Marc Girardin. The Minister of Education, Kosta Cukić, who was President of the Society by position, refused to support this initiative, and disorder broke out among the members and students present in the audience. As a result of this, Prince Mihailo disbanded the Society on the very next day. Its successor, *Srpsko učeno društvo* (Serbian Scholarly Society), was formed on July 29th.⁶²³

Many more examples could be given, but summarily speaking, Mihailo's rule brought great progress to Serbia on many accounts, but its rigidity caused

620 Jovanović 1990a, pp. 384-387; Petrović 2016, pp. 31-33.

621 Vasiljević 1987, p. 54. He remarks that a later explanation attributes this to Mazzini's views that freedom cannot be gained from a ruler or through foreign aid, as that only means replacing one form of slavery by another. See also Jovanović 1990a, pp. 466-471.

622 Vasiljević 1987, p. 54.

623 *Ibid.*, p. 55.

a growing dissatisfaction of the opposition, particularly liberal youth.⁶²⁴ After his assassination in 1868, with the causes and motives of the crime still unclear,⁶²⁵ the issue of liberalisation of government was among the first on the agenda.

5. The Regency Constitution and Subsequent Laws (1869-1870)

The Great National Assembly met on June 20th, 1868, and appointed to Mihailo's underage heir, Prince Milan,⁶²⁶ a Regency composed of Jovan Gavrilović, Jovan Ristić, and Milivoje Petrović Blaznavac. However, the Great Assembly also made some demands of a political nature, requesting regular Assembly sessions every year and laws on the freedom of press and ministerial responsibility.⁶²⁷

The Regency decided to take a safeguard against any further attempts of dynastic change by pacifying the opposition with a new, more liberal constitution. The weakened Ottoman Empire, having lost its garrisons on Serbian soil, was no longer an obstacle. However, the regents acted illegally in two ways even where Serbian law was concerned, with no more than a *raison d'état* as their grounds: they changed the Constitution during the ruler's minority, contrary to the National Assembly Act, and they persuaded the State Council to renounce its constitutional power in favour of the Great National Assembly, as if an organ's competence was a private right for it to

624 Jovanović 1990a, pp. 471-476, 506-510.

625 According to the current state of scholarship, it seems most likely that the assassination was motivated by reasons of foreign policy, as Mihailo was close to starting a military action to liberate from Ottoman rule the territory of Bosnia, which he saw as historically and ethnically Serbian, but that Austro-Hungary also had pretensions towards. See e.g. Rajić 2015, p. 63.

626 Some political actors interpreted the provisions on inheriting the throne more narrowly and believed that only the descendants of Miloš Obrenović could inherit, and that thus Milan – grandson of Miloš's brother Jevrem – had to be elected Prince by the Great Assembly. However, the view that he was heir to the throne prevailed, perhaps not uninfluenced by the fact that Blaznavac arranged for the army to proclaim Milan as Prince. See more in Kršljanin 2021b, pp. 72-79.

627 *Протоколи* 1868, p. 36.

freely dispose of.⁶²⁸ The first breach of the law was needed for the change to take place at all; the second, for it to have greater legitimacy in the eyes of both the liberal opposition, and the people in general.

Known in Serbian constitutional history as a compromise between liberalism and bureaucracy that didn't fully please either side,⁶²⁹ the Regency Constitution brought a much-needed but cautious step forward towards parliamentarism. Finally, the National Assembly became a legislative body, but only the Prince had legislative initiative (art. 4, 54, 58). Up to ¼ of the Assembly was appointed by the Prince, and, unlike elected MPs, the appointed ones could be officials or attorneys (art. 45), ensuring the presence of educated people in the Assembly, but also ensuring the dominance of the numerically fewer appointed MPs.⁶³⁰ The Government was non-parliamentary (ministers could not be MPs) and politically answered only to the Prince, and the Parliament could only initiate criminal proceedings against ministers for taxatively listed crimes (art. 99-104). The Government couldn't be overthrown even on the issue of the budget, as the Prince could extend last year's budget if the Assembly didn't adopt the proposed new one (art. 64-65), turning budgetary power into a mere choice of the lesser of two evils. The Great National Assembly was now vested with the power to change the Constitution, in addition to its earlier competences (art. 89), in accordance with the regular Assembly getting legislative competence. In October 1870, these issues were expanded by several laws concerning parliamentary elections, rules of procedure, and ministerial responsibility.⁶³¹

Under this regime, parliamentary practices were developing, slowly, but steadily. Initially the poorly educated elected MPs followed the lead of the Prince's MPs, debates were few and often showed simple misunderstandings rather than a profound difference in political views. However, new generations of MPs gradually developed political acumen and managed to lead constructive debates, criticise and even influence the government. The most prominent example occurred in November 1874, when Jovan Marinović's government stepped down due to profound disagreement with the Assembly

628 The Regency had also organised a special committee, composed of state officials and intellectuals, to give its opinion on the nature of the upcoming reforms; however, this opinion was subsequently mostly ignored. See Jovanović 1990b, pp. 62-72.

629 Jovanović 1990b, p. 80-86; see also Stanković 2021.

630 Jovanović 1990b, pp. 73-75.

631 *Ibid.*, pp. 76-78; Kršljanin 2018.

regarding the contents of the reply to the Prince's throne speech that opened the session of the Assembly – despite the fact that the Constitution didn't provide for political responsibility of ministers.⁶³²

As for the press, it was proclaimed free, but within the boundaries of the law (art. 32). The subsequent Press Act,⁶³³ however, set such boundaries fairly strictly. A permit of the district police authorities was needed for the printing or sale of printed material, though the police had no discretionary power in granting it (art. 2). While there was no censorship in the sense of altering the contents of printed material, printers did have to submit copies of newspapers for approval at least an hour before distribution (24 hours or 3 days for books), and if the police found something suspicious, it could forbid the publication; if the authorities were silent, the paper could be distributed (art. 6). While the final decision was made by the court, several months could pass before a verdict was given – and should it be against the paper, then the author, editor, publisher and printer could all be criminally responsible as accomplices (art. 23-28), and all copies of the paper and plates used to print it would be destroyed (art. 48). If a paper constantly adopted an anti-government policy, a ban on publication for up to three months could be passed, and by the Minister of Internal Affairs rather than a court (art. 46). In practice, this often extinguished the paper for good. To avoid the costs of printing an issue of a paper they wouldn't be allowed to sell, papers resorted to bringing their texts to the police in the pre-print stage, and the police advised which parts of text should be removed; printers also often cut problematic parts of the text on their own initiative in the last minute, in fear of conviction. Thus, an informal censorship operated instead of a formal one.⁶³⁴

The Press Act was amended in 1875 by Kaljević's government, relaxing the control over the press. The obligation to give a copy to the police for inspection was abolished, and so was the police permit for public sale of papers and books. The paper could only be confiscated if the text committed a crime (felony, *zločin*), insulted the Prince or betrayed military secrets in wartime, and the primary person responsible was the author of the text, and other persons could only be charged in the absence of a known author. Deadlines for police decisions were set where there used to be none in place, and

⁶³² Kršljanin 2021a; Mirković 2021.

⁶³³ Закон о печатњи (штампи), 23.10.1870.

⁶³⁴ Jovanović 1990b, pp.79-80.

decisions that previously could not be appealed now could be.⁶³⁵ However, during the war years of 1876-1878 the Press Act was suspended by the Prince several times with the justification of wartime circumstances.⁶³⁶

6. The Laws of 1881: a Progressive Breakthrough

A significant change took place when the new Progressive government of Milan Piroćanac passed a line of important new laws. The Press Act of March 12th, 1881⁶³⁷ was the most liberal one yet. The permit for the issuing of a newspaper was replaced by a simple registration (art. 5), and the editor no longer had to have a faculty diploma. A paper could be seized only for insulting the ruler or inciting the people to revolt. If the police issued an order forbidding publication, it had to be filed to a court for confirmation within 24 hours (previously there had been no fixed deadline), and the court had the same time to decide the matter (art. 10). The Belgian system of successive liability of the people involved in the making of the paper was introduced, and the system of penalties was milder. Finally, the prescriptive period was very short (three months) and uninterruptible. This enabled the defendants to stretch out the proceedings to avoid punishment. Jovanović assesses that even courts practically couldn't convict journalists and editors even when they *had* obviously broken the law, turning the freedom of press "within the boundaries of the law" to unrestricted freedom in practice.⁶³⁸ It was amended thrice – in 1882, 1884 and 1898 – with the most prominent addition being the prohibition on propagating nihilism and communism in 1882.⁶³⁹

On April 1st, 1881, the very first Gatherings and Associations Act was passed. Gatherings were free and could be held without police permits: up until then, any political gatherings required a police permit, which was practically never granted. Non-political associations could now be registered without a police permit, while political ones – which had previously been illegal – needed a permit, but it could only be refused if the association's statute contained illegal provisions. Still, authorities had the right to monitor

635 Jovanović 1990b, pp. 250-251; Petrović 2016, pp. 41-42.

636 *Ibid.*, pp. 42-43.

637 Закон о штампи 1881.

638 Jovanović 1990c, pp. 69-70.

639 Petrović 2016, 74-77; Измене и допуне 1882.

the work of political associations – to send representatives to their meetings and have access to all their protocols.⁶⁴⁰ Three main political parties that had until then existed as informal groups – the Liberal, Progressive and Radical – were registered immediately, and the number of parties gradually increased over the years.⁶⁴¹

The Progressives also submitted a draft of a new Constitution in the same year, and again in 1882, as the 1869 Constitution (art. 131) demanded that two successive regular Assemblies approve of a constitutional project for the Great Assembly to be summoned. However, the last step never took place due to a political crisis in 1883. The project was supposed, among other things, to guarantee all these rights on a constitutional level and to give the Assembly full parliamentary powers. Another unsuccessful draft by the Radical Party also significantly improved ministerial responsibility.⁶⁴² However, the realisation of these ideas would have to wait for five more years.

7. The Constitution of 1888: Voices Heard at Last

The 1888 Constitution of the Kingdom of Serbia, the first after the country's formal independence,⁶⁴³ is also hailed as the triumph of liberalism. This was the first constitution to adopt parliamentarism, fully embracing those reforms where the 1869 Constitution had gone halfway. The manner of its creation is also worth noting: King Milan assembled a committee of representatives of all three parties, chairing it himself and insisting that they reach a compromise on all accounts, which the Great Assembly would later just adopt with no amendments.⁶⁴⁴

The National Assembly got the legislative initiative, and was finally the King's equal in this respect: the King couldn't even pass temporary laws in a state of emergency. MPs could present questions and interpellations to ministers (who could now be MPs themselves), and full budgetary power existed. All MPs were elected, no longer individually, but by party lists (using the

⁶⁴⁰ Jovanović 1990c, pp. 70-71.

⁶⁴¹ More in *ibid.*, pp. 123-135; Janković 1997.

⁶⁴² See more on these drafts in Marinković 2021.

⁶⁴³ Serbia was recognised as a sovereign country at the Congress of Berlin in 1878, and was proclaimed a kingdom in 1882.

⁶⁴⁴ See more in Jovanović 1990c, pp. 345-360.

D'Hondt method), and the issue of their level of education was resolved by an obligation to have at least two men with higher education on every district list (art. 100).⁶⁴⁵ For the first time, ballots were secret (art. 78), disabling the means of electoral pressure that happened on multiple occasions in the past. Key issues were still in the competence of the Great Assembly, with only cosmetic differences (art. 130-131).⁶⁴⁶

Press was now deemed free on the constitutional level, and censorship and other measures that would prevent the publishing or sale of papers were prohibited (art. 22). No prior permit was required for issuing newspapers, and printed material could only be seized in three expressly prescribed cases: if it contained insults against the King and royal house, insults against foreign rulers and their houses, or a call to arms against the state. The deadlines were the same as in the 1881 Press Act, and the liability still successive, i.e. the author of the text was primarily liable, and others were involved only if the author was unknown, resided outside Serbia or could not be legally liable. The list of other rights was also expanded and their guarantees improved, including the freedom of association (art. 25). It's worth highlighting that the death penalty could no longer be prescribed for purely political crimes, except the assassination (or attempt of one) of the King or members of the royal house (art. 13), and that the King could no longer temporarily suspend civil rights.⁶⁴⁷

8. Epilogue: an illusion and a promise

Naturally, the Constitution of 1888 was not an infallible happy ending: on the contrary, the political actors didn't seem to have been ready for all the intricacies of advanced parliamentarism. The parties abused majority when they won it, while the new regime of citizens' rights was often deemed too liberal to be put into practice.⁶⁴⁸ King Alexander abolished this constitution in 1894 (the second in a line of coups d'état of his making), restoring that of 1869 with accompanying laws, in a scandal involving precisely the freedom

645 More of this institution in Kršljanin 2015.

646 Jovanović 1990c, pp. 347-349.

647 *Ibid.*, p. 346.

648 Krstić-Mistrđelović 2018.

of press. His own short-lived Constitution of 1901 is considered somewhat of an exception, if not an aberration, in the development of Serbian constitutionalism, being the first to introduce bicameralism, not include the Great National Assembly, etc.⁶⁴⁹

However, the Constitution of 1888 was restored after King Alexander's assassination in 1903, with minor changes focusing on further limiting the ruler's power and strengthening the Assembly, ushering in the so-called golden age of Serbian parliamentarism.⁶⁵⁰ Although this was interrupted by the Great War, it was, again, precisely this constitution that formed the basis for the first constitution of the newly formed Kingdom of Serbs, Croats and Slovenians – the Vidovdan (St. Vitus' Day) Constitution of 1921. Naturally, the nature of the new state and the spirit of the new century brought with them new challenges and problems that parliamentarism tried – and at times failed – to conquer.⁶⁵¹ But that fight was fought – not meaning to disparage the modern addenda – on the basis of the Constitution of 1888.

Naturally, the line between 1848 and 1888 is not a straight one. One would be wrong to claim that all the advanced solutions of the Constitution had directly evolved from the political demands made by the Revolution of 1848, or at the Saint Peter Assembly. Various influences had mixed and fought during these four decades for the result to be achieved. Yet one of the main seeds that bloomed in 1888 was planted by the old generation of liberals, fighting for the people's right to decide and to be heard in an era when the National Assembly was most marginalised, and freedom of press almost unthinkable. And that seed was carried, at least in part, by the winds of 1848.

⁶⁴⁹ Popović 2021, pp. 70-73.

⁶⁵⁰ *Ibid.*, pp. 75-83.

⁶⁵¹ See Gligorijević 1979; Kršljanin 2020; Pavlović 2022, pp. 265-302.

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IN THE GRIP OF TRADITION AND MODERNISATION. THE REVOLUTION OF LAW IN TRANSYLVANIA (1791-1867)

Abstract

The study addresses whether from a legal point of view, we can speak of a separate Transylvanian reform era, i.e. a period when legislation was drafted in connection with the modernisation of the region, and if so, what the most important features of this period were. How long did it last, what kind of legislation was produced, to what extent they considered other legislations as models, and, in general, who the initiators of these proposals were. It queries whether there were any parallels between the Transylvanian and Hungarian reform periods in legal terms, and what the message of the Transylvanian reform period for later generations was.

Keywords: Transylvania, reform era diets

1. Introduction: Transylvania in Space and Time

1.1. Landscape

Transylvania⁶⁵³ – the eastern part of the Carpathian Basin, the so-called Transylvanian Basin, delimited by mountains – was first settled by the

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⁶⁵³ The study is a legal-historical analysis of the impact of the Hungarian April Laws of 1848 on the legislation of the Grand Principality of Transylvania.

Hungarian tribes in the second half of the 9th century, and from then on it was part of the Hungarian Crown for more than a thousand years⁶⁵⁴ – even when it became independent for a time during the Habsburg-Turkish wars. Transylvania – presumably because it is a geographically distinct unit within the Carpathian Basin – had from the beginning some kind of territorial self-government within the Kingdom of Hungary,⁶⁵⁵ which enabled it to exist independently when “the sinister turns of historical events led to the Hungarian globe being torn away from the Hungarian globe in the 1540s as a centrifugal force from some great celestial body”⁶⁵⁶ Transylvania’s independence and autonomy, however, remained conditional and goal-oriented. It was conditional, because its room for manoeuvre was shaped by the chess games of the two great powers of the time, the Turkish and the Habsburg empires. When the balance of power allowed it, Transylvania was strengthened, otherwise it had to follow the instructions of the stronger party. The fact that Transylvania exists as an independent entity with a specific purpose was already expressed by Prince Stephen Bocskai in his last will, which he wrote down as a political creed.⁶⁵⁷ And the Transylvanian princes, when they had the opportunity, tried to act accordingly, so that Transylvania for centuries always lived its independent state life “as a moon following the great celestial body”,⁶⁵⁸ looking towards Hungary.

With the weakening of the Turkish Empire, Transylvania became part of the Habsburg Empire. Although the ruler was entitled to the Hungarian

654 Cf.: §§ 1-2 of Act 18 of 1741 confirming this.

655 This follows from the Section 2 of the Tripartitum, in which the Hungarian jurist István Werbőczy wrote “...the long-approved laws and customs of the aforementioned Dalmatia, Croatia, Slavonia and Transylvania differ in certain matters and articles from the laws and customs of our country, namely this Hungary....” Werbőczy’s position is confirmed by medieval Hungarian legislation. See, for example, the Act 13 of 1464, the content of which indicates the territorial (“Transylvanian parts”) and legal specificities of this part of Hungary.

656 As Kamill Sándorfy nicely put it, “The separation with the Mohács disaster did not mean complete legal separation for Transylvania. What remained as a connecting intellectual bridge were the common laws made before 1526, and Werbőczy’s Tripartitum, the birth of which preceded the separation of Transylvania...” Sándorfy, Erdély reformkorszakának jogtörténete [The Transylvanian Reform Era’s Legal History] (Budapest, EFO, 2000. p. 69.)

657 According to this, “As long as the Hungarian Crown is up there with the Germans, a stronger nation than us, and the Hungarian Kingdom also revolves on the Germans, it is always necessary and useful to maintain a Hungarian prince in Transylvania, because it is for their benefit and protection.” (István Bocskai’s Last Will. Budapest, Magvető, 1986. p. 15.).

658 Sándorfy 2000. p. 69.

Crown, he administered it separately from the motherland.⁶⁵⁹ Despite the fact that the two parts of the country had already remained separated under Habsburg rule, the orders of the two countries maintained their desire for union and partly worked together, since their aim was to restore the original state of the country before the death of Louis II, a member of the Jagiellonian dynasty.

1.2. *Periodisation*

This essay therefore examines a three-century period in which Transylvania existed as a separate entity from Hungary. The history of the Principality of Transylvania, which took shape from 1540 under John Sigismund II until the Habsburg takeover in 1690, can best be described as “with one heart in two homelands”, since Transylvania continued to live on in the Hungarian national aspirations and traditions of the Middle Ages, on a smaller territory and under more modest circumstances. In the century and a half that followed, between 1690 and 1848, however, the interests of the Habsburg dynasty dominated the region. Transylvania’s fate was still theoretically linked to Hungary, but its future was determined by the Habsburgs’ interests, especially the fact that Kingdom of Hungary seemed easier to govern without Transylvania. The goal-oriented existence of the first century and a half, when the coexistence of the two states served a single purpose, the survival of the Hungarians, was replaced by the interests of power, which were shaped by the struggles of the two main power factors, the royal court in Vienna and the Hungarian Orders in Pozsony.⁶⁶⁰ Thus, in the second century and a half, Transylvania was on the periphery of the periphery, because although the state organisation continued to function within the old legal framework, with minor changes to facilitate the exercise of power, the important decisions were taken outside the border of the territory, as a result of the processes and struggles taking place there. In this situation, the most significant force of the Transylvanian Orders, the Hungarian gentries and the Szekler nobles, had only two objectives: a) to preserve the existing

659 Kölcsey, Ferenc: *Históriai vázolatok a két magyar haza egyesülése s Magyarországnak a részekhez való joga felett* [Historical sketches on the unification of the two Hungarian homelands and Hungary’s right to its parts] In: Kölcsey Ferenc *Összes Művei*. Budapest, Szépirodalmi, 1960. I/1231. (hereinafter: KFÖM).

660 Today: Bratislava (Slovakia)

power situation, and especially their own positions within it; b) to push for the implementation of the processes and initiatives seen in Hungary.

The stagnation of Transylvania's development was partly due to this long-unresolved stalemate. But in part, however, it was due to the fact that none of the power factors had an interest in resolving the problems that stood in the way of development, especially the fixing and standardisation of serf burdens or the enforcement of the changed ethnic proportions in decision-making, and – in addition – a pressure of international situation also did not force a solution. The changes were thus primarily the result of the spirit of the times, first the Enlightenment and then the awakening of Nationalism, which stretched the framework of the decrepit institutional system to its limits at every turn.⁶⁶¹ The decisive impulses, however, were transmitted through Hungary, as some of the decision-makers in the region also attended the Hungarian diets, where during the period of the Hungarian reform there were constant political struggles between the pro-centralisation court (Vienna) and the pro-autonomy local forces (Pozsony). In this struggle, Vienna's most important interest was to preserve Transylvania as a separate province, and this interest coincided with the interests of the majority of the Transylvanian decision-makers, as it also allowed the status quo to be maintained. Precisely because of this significant conflict of interests, the modernisation efforts in Transylvania – which can also be labelled as “Transylvanian reform era” – were slower and on a smaller scale than in Hungary.

However, at the historical moment of 1848, everything changed for a short time: the Transylvanian Orders of Nobility (primarily the Hungarian and the Szekler ‘nations’), abandoning all their previous interests, decided to make changes, which, in the light of events and the balance of power in Hungary, were approved by the Emperor. The revolutionary moment disappeared in a few months, and the period 1849-1867 was one of restoration and ensuring the primacy of imperial interests. The reconciliation, however, also returned Transylvania to the foundations of 1848, and thus began the reintegration and modernisation of the region. 1867 was ostensibly about securing Hungarian interests, but in practice it also benefited the Romanians, as the settlement of the serf burdens opened the way for the strengthening of

661 See, for example, Romanian peasant movements in the 18th and 19th centuries, Saxon (German) demands for autonomy, Hungarian national demands, language use and cultural institutions.

the Romanian landownership. The Transylvanian reform era, fought under Hungarian leadership, thus protected and served the interests not only of Hungarians but also of Romanians, which, however, did not receive the attention or recognition they deserved during the great traumas of the 20th century in Central Europe.

The following is about this process, the Transylvanian reform era, its aims, its representatives and its achievements.

1.3. Transylvanian State Organisation and Law at the End of the 18th Century

In the beautiful words of the 20th century eminent Hungarian jurist Kamill Sándorfy: „The separation with the Mohács disaster did not mean complete legal separation for Transylvania. What remained as a connecting intellectual bridge were the common laws made before 1526 and Werbőczy’s *Tripartitum*, the birth of which preceded the separation of Transylvania...”⁶⁶² In other words, as in Hungary, so in Transylvania, the Hungarian legal system and jurisprudence provided the foundation on which the state structure could be built. However, while in Hungary the basis of the structure was the 1608 Laws of the early 17th century, in Transylvania it was the so-called ‘Kápolna Pact’, which was declared in 1437, well before the fall of the medieval Hungarian state. The system was later refined in both places, first in connection with the female succession of the House of Habsburg and then in the 1790s. While in Hungary the flexibility of the historical constitution had become proverbial, the functioning of the state organisation of Transylvania in the late 19th century was meticulously laid down by the Transylvanian Diet of 1791.⁶⁶³ Although the structure was similar in the two countries, while the Transylvanian Diet was unicameral, the Hungarian Diet had two chambers at the end of the 18th century, and the official language of both bodies was Latin. The composition, seating arrangements and elections of the two assemblies also differed in a number of respects. Although the free exercise of religion had already been enshrined in law in Hungary at the beginning of the 17th century, it was in Transylvania that freedom of religion was first

⁶⁶² Sándorfy 2000. p. 69.

⁶⁶³ Thus, one might even risk describing this set of laws as constitutional laws – as, by the way, the Emperor himself hinted in his Preface to the 1791 laws. See also Sándorfy 2000. p. 248.

declared (in the world) – originally in Hungarian language – by the Diet of Torda⁶⁶⁴ in 1568.⁶⁶⁵ This specificity was also applied to the election of Transylvanian county officials and parliamentary envoys.⁶⁶⁶ The literature mentions as a difference that other territorial units (Sekler Sees and Saxon Community) existed in Transylvania in addition to the counties, but administrative units with a separate legal status (such as the Jazyg and Cumanian Sees) also survived in Hungary, and in both places they only disappeared permanently after the reorganisation of 1867.

1.4. Ethnic Composition

The Transylvanian Basin was already a mixed population area when the conquering Hungarians arrived, but for more than eight hundred years the area remained Hungarian-majority.⁶⁶⁷ Of the three nations of the Kápolna Pact, „the Hungarians arrived with Árpád in 889, the Szeklers are said to have arrived with the Huns in 374, and most of the Saxons were settled by Géza II. [...] in 1142” – recorded Kamill Sándorfy in his large-scale legal history work in the mid-20th century.⁶⁶⁸ The dates he used are in fact rather indicative, as the settlement of different peoples and ethnic groups took longer, and there are still many blank spots in the early ethnogenesis of peoples.⁶⁶⁹ However, it is also important to note that the Romanians, who played an increasingly important role in the history of Transylvania from the 17th century onwards, appear in Transylvania in the first half of the 13th century according to the data known today. After the region slowly developed into an independent principality in the 16th century, the wars generated new population movements in the area. The most important of these was the decrease

664 Today: Turda (Romania)

665 For details see Benda, Kálmán: Az 1568. évi tordai országgyűlés és az erdélyi vallásszabadság [The 1568 Diet of Torda and religious freedom in Transylvania] (Erdélyi Múzeum 1994/3-4. p. 1-5.).

666 See, for example, Act No. 11 of 1791 (Transylvania, hereinafter abbreviated as: Tra).

667 The Hungarian majority must have disappeared sometime in the middle of the 18th century, as is well documented in the thorough data of the *History of Transylvania* (Budapest, Akadémiai, 1994., hereafter: ERT).

668 Sándorfy 2000. p. 48.

669 More recently, see in detail Köpeczi, Béla (ed.) *Erdély története* [History of Transylvania] Vol. I. (Bp., Akadémiai, 1986., hereinafter: ET) and Veress, Emőd (ed.): *Constitutional History of Transylvania* (Cham, Springer, 2023, hereafter: EJT).

of the Hungarian population from the 16th century onwards, followed by the immigration of the Szeklers and the inward movement of the Romanians in the 18th century. We do not even have approximate data on the impact on population of the epidemics that regularly devastated the period.⁶⁷⁰

The Hungarian ethnic majority of the area may have disappeared by the mid-18th century. A hundred years later, in the mid-19th century, Transylvania was already clearly Romanian-majority⁶⁷¹ and the proportions had not changed significantly by the time of the dismemberment of the Austria-Hungary.

1.5. The Transylvanian Reform Era

While the beginning of the reform era in Hungary can be well defined in the light of historical facts and traditions, in Transylvania⁶⁷² dating is complicated by several factors. The results of the Diet of 1791 seem to be even more striking than in Hungary, while the reign of King (Grand Prince) Francis had more depressing effects. During this period, the Diet was not only refused to be convened – which had been declared in 1791⁶⁷³ to meet annually – but the cultural initiatives were also ‘stifled’⁶⁷⁴ which were otherwise allowed in Hungary, perhaps thanks to the influence of Archduke Joseph, the Palatine. In Transylvania, however, the orders of nobility had no such one-man representative who could ‘take matters’ directly to the Habsburg family. The orders of nobility themselves, which were part of the exercise of power, were different from those in the mother country. They were smaller in number and weaker in possessions, but the Hungarians still dominated within this group, despite the fact that they were already a minority at provincial level. This layer of Hungarian leadership gave the Transylvanian reform movement its three distinctive features. On the one hand, it was distinctly Hungarian in its language and customs from the very beginning, since its traditions had been faithfully preserved from the foundation of the Principality of

670 ET II/979.

671 For data on Transylvania from the censuses of 1850-1910, see Köpeczi, Béla (ed.): *Erdély rövid története* [Short History of Transylvania] (Bp., Akadémiai, 1989. p. 494, hereafter: ERT).

672 In Hungary, the beginning of the reform era is usually counted from the 1825/1827 Diet.

673 Act 10 of 1791 (Tra)

674 See, for example, the creation of a museum in Transylvania and the establishment of a scientific society.

Transylvania,⁶⁷⁵ and on the other hand, it was able to organise itself in a large part of the province, rather than in a single county, thanks to the dispersed nature of its estates. Thirdly, part of the estates of this group – and its kinship – were linked to Hungary, too, so that it could be involved in both reform movements at the same time. For the above reasons, we can therefore say that the Transylvanian reform movement was Hungarian-dominated from the very beginning, small in number (consisted in only a few people) and, as soon as circumstances allowed, always looked to the Hungarian movement as a model and measured its own achievements to it.

1.6. The Beginning of the Reform Era

Because of the importance of the Transylvanian Diet of 1791, one might consider the beginning of the Transylvanian reform era to be the very date of its convocation. On the other hand, the period of autocracy⁶⁷⁶ in Transylvania was also longer than in Hungary. There are two possibilities: a.) to speak of the reform era as a period of several phases; b.) to link the beginning of the reform era to a single event. In the former case, the first period of the Reform Era lasted from 1790 to 1794, followed by a period of ‘long silence’ from 1794 to 1834. The third chapter, the second period of the reform era, began with the Diet of Kolozsvár⁶⁷⁷ in 1834 – notable for the performance of the leading figure of the era, Miklós Wesselényi – and lasted until the Diet of 1848 was adjourned (in July 1848). If, however, the beginning of the reform era were to be linked to a single event, the most appropriate one would be the publication in 1833 of Miklós Wesselényi’s famous book *Balítéletekről* (On Prejudices), in which the baron announced the programme of the Transylvanian reform movement and summarised its demands. We shall see below that Miklós Wesselényi was the only protagonist of this reform era, but his insights not only recall the political struggles of the time, but also speak to the future, in that they advocate a tolerant and multi-ethnic Transylvania.⁶⁷⁸ Above all,

675 While in Hungary, some of the leaders of the reform movement, including István Széchenyi and Lajos Batthyány, only learned Hungarian well as adults!

676 Or as it is called in Hungarian history: the period of the Franciscan reaction.

677 Today: Cluj-Napoca (Romania).

678 Cf. in detail Miklós Wesselényi: *Szózat a magyar és szláv nemzetiség ügyében* [An opinion on the issue of Hungarian and Slavic ethnicity] (Leipzig, 1843), for the book’s full details see: fn. 109. For baron Wesselényi see: Egyed, Ákos: *Wesselényi Miklós és a*

because of Wesselényi himself and his role, it seems that the beginning of the reform era should be set at a single date, 1833.

1.7. *Representatives and Leaders*

The main role of Wesselényi was not predetermined. Always proud of his Transylvanian origins, Ferenc Kölcsey,⁶⁷⁹ less known for being not only a poet but also a politician, was taken by an unexpected death in 1838, leaving Wesselényi alone in Transylvania – and making the movement fragile. When the baron was removed from the scene, first by a trial, then by imprisonment, and finally by allowing him to receive medical treatment abroad, the reform movement's advance slowed and even briefly stopped. Not because others would not take up the banner that had been wrenched from his hands, but because Wesselényi stood out in knowledge, authority and work ethic, even among his most distinguished contemporaries.⁶⁸⁰

At the forefront of the movement, but still in the second row, are representatives of the most prominent Transylvanian noble families – among them the Kendeffy and Jósika families (both of Romanian origin). The most important figures were János Kemény, Ádám Kendeffy, Károly Szász, Domokos Teleki, Dénes Kemény and Farkas Veér, indicating that the movement was based on the Transylvanian nobility.⁶⁸¹

As this was a narrow group, it is not possible to isolate several generations of reformers – such as Count Széchenyi, born in Hungary in the 1790s, Lajos Kossuth or Ferenc Deák, born in the early 1800s, and József Eötvös, born in

jobbágyfelszabadítás Erdélyben 1848-ban [Miklós Wesselényi and the emancipation of the serfs in Transylvania in 1848] (Erdélyi Múzeum 1996/3-4. p. 219-228.).

679 At the end of his parliamentary speech on Transylvania, he spoke of his ancestry, *“As for myself, I was fortunate in that I was born to a Hungarian father and a Transylvanian mother. I have cherished the love of my sister countries from birth, I carry their images united in my heart; and I am embarrassed to see them kept apart by hostile circumstances. Noble Orders, my faith and my religion is this: as I know but one God in heaven, so I know but one Hungarian homeland on earth. There is no salvation in two”* (KFÖM II/81). For one of his most important works on Transylvania, see Ferenc Kölcsey: *Históriai vázlatok...* [Historical sketches...] (KFÖM I/1230-1263.). See also Sándorfy 2000. p. 255-258.

680 It was not by chance that István Széchenyi (1791-1860), the greatest Hungarian and leader of the first generation of reformers in Hungary, once chose him as a friend.

681 Two leaders deserve special attention: János Bethlen, the grandfather of the later Hungarian prime minister István Bethlen (1874-1946), who was also a great statesman by international standards, and one of the most important Hungarian Romantic writers, Transylvania's Walter Scott, Miklós Jósika (1794-1865).

the 1810s. In the context of Transylvania, it might be more appropriate to speak of three successive leaders of the reform movement. In this respect, the most prominent representative of the first generation was Miklós Wesselényi Sr. (1750-1809), the second leader was Miklós Wesselényi Jr. (1796-1850), while the last great figure of the Transylvanian reform movement was Imre Mikó (1805-1876), who finally became minister in the Andrássy government (1867-1871) after the Austro-Hungarian Compromise.

2. The Transylvanian Reform Era Diets

2.1. *The First Ray of Light – the Diet of Kolozsvár 1790-1791*

In Transylvania – as in Hungary – in the second half of the 18th century, the great figures of Central European enlightened absolutism, Maria Theresa (1740-1780) and Joseph II (1780-1790), who set aside the constitution, governed mainly by decree. The next Diet in Transylvania after 1761 – when they met in Nagyszeben⁶⁸² – was held in 1791.⁶⁸³ This was held under troubled circumstances, as between 1790 and 1792, three rulers (grand princes) succeeded each other on the throne in the distant Vienna.⁶⁸⁴ The three-decade break also left its mark on the orders of nobility, which shared power with the monarch,⁶⁸⁵ and a new generation took over. It is understandable that grievances were among the first to be put on the agenda, but the main issues also had to be found.

One of the immediate demands of the noble orders was the restoration of the legal functioning of the state. This included the restoration of the role of the Hungarian language, which was the official language of the state until the 1760s. It was obviously a fortunate coincidence that the governor-general of Transylvania at this time was Count György Bánffy (1746-1822), a member of an old Hungarian noble family, who himself supported the efforts to restore constitutionality. This is how the orders came to “breathe into

682 Today: Sibiu (Romania)

683 ERT p. 381.

684 The two cities are about 700 kilometres apart, and news travel between the two stations took several weeks.

685 Cf.: Act 7 of 1791 (Tra).

the laws an extract of the constitution of Transylvania...”⁶⁸⁶ This led to the laws that made the Grand Principality of Transylvania *de facto* a state with a written constitution for the last period of its existence. It is another matter that the rules which he himself had approved were set aside by the monarch himself, first tacitly between 1811 and 1834, and then forcefully and openly between 1849 and 1867.

Apart from the truly progressive legislation⁶⁸⁷ on the organisation of the state, the Diet was still mainly focused on securing the prerogatives of the nobility.⁶⁸⁸ But already here the idea of union with Hungary, one of the main demands of the reform era, appeared, not independently of the political demands in Hungary, in respect of which Kölcsey later said that “in Hungary, from 1715 to 1832, hardly a diet was held without the national wish for Transylvania and the Partium being mentioned.”⁶⁸⁹ The other important matter, the serf issue,⁶⁹⁰ appears at this time only on the level of declarations, and in the following – without results⁶⁹¹ – national diets (1792, 1794-1795, 1809, 1811) it was also primarily the Monarch’s concern. In Transylvania, the settlement of the serfs’ burden, which was attributed to Empress Maria Theresa, remained only declarations, and no substantial progress was made under the later rulers (Joseph II and Francis I).⁶⁹² The Diet of 1791 abolished the name of serf and relaxed the centuries-old rules of serfdom, but it merely set the direction, and failed to take any substantive measures.⁶⁹³

686 Sándorfy 2000. p. 248.

687 See Acts 1-15 of 1791 (Tra).

688 Cf. Acts 16-18 and 21-22 of 1791 (Tra).

689 KFÖM I/1230.

690 Kölcsey summed up the importance of this in 1832 with a poignancy that still holds true today: „*the patriots were now found on the serfs’ side. To arrange the subject of the serf issue in such a way that the great mass of the tax-paying people would once already enter the civic constitution; and thus the constitution would gain ten million souls that could be raised up instead of seven hundred thousand that were stultified by softness and poverty: such an idea that could only arise in a man who fervently loved his country.*” (Kölcsey, Ferenc: Parliamentary Journal, entry of 11.01.1832).

691 The laws passed by the Transylvanian Diet had to be sanctioned by the monarch. However, he could do so at any time, so for example, of the laws passed at the 1811 Diet, he approved three and only 26 years (!) later – which, of course, had no real effect. For the Letter of Ferdinand V, see: the Minutes of the Diet of the Grand Principality of Transylvania, proclaimed for 26 May 1834 in the free royal city of Kolozsvár, 28 May 1834 – 6 February 1835, 1834 / 50th session (www.hungaricana.hu, 05.08.2023).

692 Cf.: Maria Theresa (Certain Points, 1769), Joseph II (1783, 1785) and Francis I (1817-1819). For more on the drafts see ERT p. 380-384, p. 389-401, p. 403-404.

693 Cf. Acts 26-28. of 1791 (Tra).

Finally, it is worth mentioning that in Transylvania, as in Hungary, the 1791 Diet sent out committees to draw up a package of modernisation measures. The work of the seven committees – which were only discussed in substance by the Diet in the 1840s – “together provide a realistic picture of the views of the Transylvanian political elite. Hopeless stagnation on the question of serf burdens, far-sighted but impossible plans on economic policy, a Josephine legacy or nothing on the question of administration...”⁶⁹⁴

2.2. The Diet of Kolozsvár 1834-1835

Despite the fact that in 1791 a law declared that a Diet must be held annually (in Hungary this would only become a law in 1848⁶⁹⁵), only three minor Diets were held in the next two decades, and then, for nearly a quarter of a century, silence reigned again. But this was not due to the impatience of enlightened absolutism, but to the suspicion of Emperor Francis I (1792-1835), who distrusted the Enlightenment and nationalism and saw in the new ideas a potential threat to the very existence of the Habsburg Empire. He tried to prohibit or prevent not only diets, but assemblies in general, including, for example, the functioning of associations – and he did so successfully, for example, by failing to establish either a museum or a language society (which had previously been permitted in Hungary).⁶⁹⁶ However, the spirit of the times – not independently of the Hungarian public life that was reviving after 1825 – had already infiltrated Transylvania in the 1830s:⁶⁹⁷ in Kolozsvár, the Transylvanian Hungarian Theatre was already operating from 1813, and

694 EN II/1127.

695 For more information, see Ruszoly, József: *Újabb magyar alkotmánytörténet 1848-1949* [New Hungarian Constitutional History 1848-1949] (Budapest, Püski, 2002. p. 26-38.).

696 Cf. György Aranka's (1737-1817) essay 'Egy erdélyi magyar nyelvemelő társaság felállításáról való rajzolat a haza felséges rendeihez' [On the establishment of a Transylvanian Hungarian Language Society for the Noble Orders of the homeland] (Kolozsvár [Cluj], 1791). The Hungarian Reformed pastor Péter Bod had already thought of establishing such a society, and it was from him that the Transylvanian Museum was conceived, which was unsuccessfully attempted in 1819 and 1829.

697 By the beautiful words of Kamill Sándorfy: “By the time the short Diet of 1834 was over, Transylvania was filled with the modern ideas of the times, with a profound sense of the need for freedom of speech in the Diet and the counties, freedom of thought, freedom of the press, the improvement of the conditions of the serfs, the development of culture, universal education, and the sovereignty of the official Hungarian language...” (Sándorfy 2000., p. 376).

in the 1830s several social circles were formed, and literary salons were also opened in that city.

The Diet of 1834 was convened in this effervescent and already dissatisfied mood, because the Emperor wanted to comply with “Act 20 of 1791, which provided for the election of the principal offices by the Orders of Nobility.”⁶⁹⁸ Already at the news of the convocation, the political struggle began. The invitation excluded some of the opponents, while at the same time the counties called on the officials to resign their offices, which they were illegally usurping without a decision of the Diet. The conflict was aggravated by the fact that the government had been levying taxes since 1761 (more than 70 years!) without consulting the Diet. The main demand of the Opposition, which was meeting for the first time, was therefore to restore the rule of law, by which they meant ensuring the legitimate functioning of the state. However, the second priority – not independently of the Hungarian-related books already published at the time, such as Széchenyi’s three works,⁶⁹⁹ Wesselényi’s essay published in 1833,⁷⁰⁰ and Sándor Bölöni Farkas’ travelogue on the organisation and functioning of the United States⁷⁰¹ – was human and civil rights, including freedom of the press. Wesselényi, obviously aware of the activities of Kossuth and Kölcsey in Pozsony, demanded pressed public reports on the Diet’s sessions, and he bought a printing press machine at his own expense. The specific and fragile situation of the Transylvanian Opposition is shown by the fact that in early 1835 the government confiscated the printing press and adjourned the parliament. The Emperor did not stop there, however, because the royal decree also gave full powers to the Royal Commissioner, which meant suspending the constitution. A few weeks later, the leader of the Opposition, baron Miklós Wesselényi, was also put on trial, and was thus removed from public life for years, thus significantly weakening the reformist opposition in Transylvania for several years.⁷⁰²

The Diet of 1834-1835, despite the lack of concrete results, marked the flag-raising of the reform movement and the beginning of Wesselényi’s rise

698 Sándorfy 2000. p. 314.

699 Hitel [Credit] (1830), Világ [Light] (1831) and Stádium [Stage] (1833).

700 Balítéletekről [On Prejudices] (Leipzig, 1833)

701 Utazás Észak-Amerikában [Travels in North America] (Kolozsvár, János Tilsch jr., 1834.)

702 The aim was not only to weaken the opposition, but also to intimidate others, but the leaders of the Transylvanian opposition were not intimidated, but continued to fight for their goals.

as a leader. The removal of Wesselényi was also crucial: the government felt that what worked in small scale could work on large scale as well, and a few years later in Hungary it acted in a similar way towards the increasingly popular Lajos Kossuth.⁷⁰³

2.3. The Diet of Nagyszeben in 1837-1838

“A deep silence fell over Transylvania in the wake of criminal processes against baron Wesselényi. A dictatorship of royal commissioners followed.”⁷⁰⁴ In 1837, Archduke Ferdinand of Austria-Este, the Royal Commissioner, convened a Diet in Nagyszeben. This Diet was most notable for the fact that the Opposition, in retaliation for the dissolution of the 1834 Diet, overthrew the Royal Commissioner from minority. The main demands of this Diet were the restoration of the constitution and the redress of grievances. However, the question of the Union was raised here, in connection with the law of the 1832-1836 Diet of Pozsony,⁷⁰⁵ but the Orders of Nobility did not dare to move forward on this, as they had done in 1791. The emergence of nationality issues marked the beginning of a national awakening, with the reintroduction of the Hungarian official language in the drafting of laws and the equalisation of the Greek Orthodox religion.⁷⁰⁶ The work of the 1791 commissions reappears; for these, the formation of five new commissions would be considered necessary – but even the adoption of rules that had existed in Hungary for decades is discouraged as regards the settlement of serf burdens.⁷⁰⁷

2.4. The Diet of Kolozsvár 1841-1843

The Diet convened in 1841 seemed to focus on the old problems, first and foremost the restoration of the rule of law, but behind the new topics, the

703 Thanks to the wider publicity there, that action backfired: Kossuth became a martyr and emerged from trial and imprisonment clearly stronger. For a detailed account of the case, see Kosáry, Domokos: Kossuth Lajos a reformkorban [Louis Kossuth in the Age of Reforms] (Budapest, Osiris, 2002).

704 Sándorfy 2000. p. 373.

705 Cf.: Act 26 of 1836 on the reattachment of the Counties of Kraszna, Central Szolnok, Zaránd and the Countryside of Kővár to the Kingdom of Hungary.

706 This was the proposal of baron Dénes Kemény (1803-1849), one of the leaders of the opposition.

707 Sándorfy 2000. p. 399.

winds of change were already blowing. Some of the new issues were already known, since the officialisation of the Hungarian language and the establishment of cultural institutions in Transylvania had already been mentioned, but the realisation of this now falls not only on the government, but on one of the Orders, the Transylvanian Saxons, who are increasingly demanding full autonomy, not only at the disadvantage of the other two Orders, the Hungarians and the Szeklers, but also of the Romanians living in their own territory (Royal Lands/Saxon Lands Territory).⁷⁰⁸ However, the national revival is also having a positive impact on some issues. The isolation of the Germans (Saxons) brings the Hungarians closer to the Romanians, which on the one hand means the absorption of their grievances, and on the other hand, it strengthens Wesselényi's concept of making all the inhabitants of Transylvania full citizens by extending their rights. "Let those who have been denied legal civil rights and legal liberty by narrow-mindedness and short-sightedness also gain them by legal means... Civil rights and legal liberty are like blessed sunshine, which warms us no more for shutting others out..." – quotes a letter of Wesselényi written in 1842 by Kamill Sándorfy.⁷⁰⁹

The extension of the civil rights should start with the settlement of the former serfs' burdens, including Hungarians, Saxons and Romanians, but so far all the Diets have refused to do so. From now on, however, one of the Opposition's mottos will be what Zsigmond Kemény wrote in the *Erdélyi Híradó* (Transylvanian News) in 1842: "Transylvania needs two things: a settlement of serf-burdens right now, and union with Hungary as soon as possible."⁷¹⁰ The first step, then, is serfdom, but it will be followed by all the others, as the Commissions set up by the Diet had already begun to work on in 1791. The second step is the negotiation of this modernisation package, the settlement of taxation, trade, transport, education. Lastly, there is the question of the Union, which from now on becomes increasingly central, as the conservative majority opposes it and the Opposition, as the cooperation of the Orders of Nobility is increasingly torn apart by national antagonisms,

⁷⁰⁸ In other words, the Diet of 1841 already marked the awakening of the Transylvanian ethnic groups, which increasingly suppressed the moderate tendencies that still existed in all nationalities at the beginning of the 19th century, which were not trying to benefit at the expense of each other, but were thinking of the realisation of a multi-ethnic Transylvania.

⁷⁰⁹ Cited by Sándorfy 2000. p. 502.

⁷¹⁰ Cited by Sándorfy 2000. p. 496.

sees it as more and more important.⁷¹¹ The outcome was foreshadowed by the balance of power in Diet: the Opposition's strength – from minority – was only enough to send out signals, even though in 1842 the new governor-general, the distinguished historian József Teleki (1790-1855), received unexpected support. Teleki – somewhat reminiscent of Bánffy's balancing tactics – tried to achieve results not by force but by negotiation, and succeeded in several cases. The language issue, for example, was settled by a compromise (which became Act 1 of 1847 [Tr]), but in other respects the Diet achieved only modest results.⁷¹²

2.5. The Diet of Kolozsvár 1846-1847

Although the Diet of 1841 did not bring a breakthrough, Transylvanian public life was feverishly preparing for the continuation. The county assemblies were filled with modern demands. Examples include the extension of active suffrage,⁷¹³ the introduction of secret ballots in the Diet,⁷¹⁴ the abolition of large estates,⁷¹⁵ the establishment of a university of arts,⁷¹⁶ the start of railway construction,⁷¹⁷ the introduction of a land register,⁷¹⁸ the establishment of a land registry,⁷¹⁹ and the compilation of a modern Transylvanian law book in general.⁷²⁰ They are no longer content with modernising certain

711 Ferenc Deák, one of the leading figures of the Hungarian reform opposition, summed up the reformers' position on the union in a letter to Wesselényi in 1844: "*...when will the nice Transylvania ever unite with her brotherland, Hungary? Believe me, my friend, we are only half a nation without Transylvania.*" (Letter of 27.November 1844 from Ferenc Deák to Miklós Wesselényi, quoted in Sándorfy 2000. p. 319.)

712 Cf.: the 1847 articles of law, since the Emperor promulgates the laws he approves at the following Diet on the basis of the Transylvanian laws passed at the given Diet.

713 Sándorfy 2000. p. 516.

714 Sándorfy 2000. p. 517.

715 Sándorfy 2000. p. 525-526.

716 Sándorfy 2000. p. 513.

717 This was a long time coming, as train services in Transylvania – on the Arad-Gyulafehérvár [Arad – Alba Iulia] railway line – only started at the end of 1868.

718 Sándorfy 2000. p. 522.

719 Sándorfy 2000. p. 514.

720 It is worth noting that several initiatives for modern codes were taken in the Transylvanian assemblies (among these, the draft of the 1811 penal code was translated from Latin into Hungarian by the legal historian László, Balázs (Az 1811. évi erdélyi büntetőkódex-javaslat [The 1811 Transylvanian penal code proposal], Budapest, Gondolat, 2022)) (for details on the codification attempts see Sándorfy, Kamill 2000. p. 430-456), as well as the modernization of traditional law (within this see for example the modernization of the

elements,⁷²¹ but want to improve the judicial system itself. This includes, for example, reforming the court system or regulating conflicts of interest among judges.

The new Diet met in the autumn of 1846, and its central issue was the situation of the peasants (formers serfs). In addition to the results of the Hungarian Diet in Pozsony, international events also influenced the choice of topics. In particular, the uprising of 1846 in the Russian parts of Poland and the Tsar's decree of the same year, which sought to settle the burdens of the Polish peasants.⁷²² It is therefore not an exaggeration to say that the Transylvanian orders of nobility became involved in the settlement of the Transylvanian serf issue primarily in response to events abroad. In this respect, the Diet was apparently successful, as several laws (Act 3-15 of 1847 [Tra]) were passed, but as events showed, these were no longer sufficient to prevent the uprisings⁷²³ of an ethnic nature (that mainly affecting Hungarians) that broke out in 1848. In Transylvania – as the Hungarian Opposition in Pozsony had done – the Opposition started to argue for the emancipation of serfs with state compensation,⁷²⁴ but the majority of the Diet⁷²⁵ did not support it, and

penal system; the topic was also dealt with by the regular committees), and the collection of the existing body of law itself (for a more recent study of the historical body of Transylvanian law see Fazakas, József Zoltán – Fegyveresi, Zsolt – Veress, Emőd (eds.): *Források Erdély jogtörténetének a tanulmányozásához* [For a review of the sources for the study of the legal history of Transylvania] (Cluj, Forum Iuris, 2021), and for a summary see Veress, Emőd (ed.): *Constitutional History of Transylvania* (Cham, Springer, 2023).

721 See, for example, reforms by the monarchs to abolish torture in penal process.

722 Cited by Sándorfy 2000. p. 524.

723 Perhaps it is not an exaggeration to say that by the winter of 1848, Transylvania was already in the grip of a civil war, which lasted until the summer of 1849.

724 In the beautiful words of baron Dénes Kemény, member of the Opposition, delegate of Alsó Fehér County, *"How is it possible to ensure that the power of 200-300 thousand noble landlords is never misused, and that a million and a half of people never lose patience with them? This is not helped by the settlement of the serfs' burdens, but only by perpetual redemption... Anyone who doubts the beneficence of perpetual redemption has been politically asleep for the last decade... Perpetual redemption is not an end in itself... Every country has become greater and stronger to the extent to which free land has been more or less extensive. Does not the bosom of every man beat when he thinks of a country that would rival any other nation in every respect? The key to all this is free land..."* (quoted in Sándorfy ibid., p. 541).

725 In the 1846/47 Diet, it already had a conservative majority, which was able to vote down opposition motions. Sándorfy 2000. p. 569.

on the question of the abolition of the landlords' annuities they voted for solutions more favourable to landlords.⁷²⁶

The other key issue was the issue of the Union between Transylvania and Hungary, which has already been shown here to not only create a political division between the government and the diet, but also lead to a fatal rift between the different nationalities, as the interests of Hungarians, Romanians and Saxons seem to diverge in this respect. It is important to emphasise that this was only ostensibly the case, because these interests could have been harmonised later, but serious attempts to do so were made decades later, and then proved too late. The Diet also discussed some of the regular committee proposals, and as in Hungary a decade earlier, the preconditions for the modernisation of transport were discussed. More important, however, was the debate on taxes and public spending. This decision concerns the future of the country, since "[i]f we want industry and commerce to flourish in our country, and the material and spiritual prosperity that results from them to take root, if we want railways, regulated waters and other means of transport to be established here as in the developed foreign realms, if we want our nation to be strong, great and respected abroad, and our king to be mighty and glorious in his throne, then we must pay taxes..." – was the summary of what was to be done in the spring of 1847, at the General Assembly of Alsó Fehér County.⁷²⁷ Equally important was the Act on the capacity of nobles to sue (Act 16 of 1847 [Tra]), which also cut through the privileges previously enjoyed by nobles. The Diet again dealt with military matters, and with substantive issues such as the method of conscription and the length of service (Act 20-21 of 1847 [Tra]). Cultural matters were also discussed, such as a national theatre, a museum, a new parliament building and the state of education, but these were not decided either then or at the next Diet.

726 According to Kamill Sándorfy's assessment, *"The Transylvanian Diet of 1846 lasted for a year and a half, but the instructions of the delegates were almost stagnant, and they still wanted to settle the serf and landlord compensation issues based on the 1819 Cziráky Proposal. Although it was common knowledge in Transylvania that it was detrimental to the serfs..."* (Sándorfy 2000, p. 549.)

727 Sándorfy 2000, p. 553-554.

3. The Diet of Kolozsvár in 1848

3.1. Convocation of the Diet

At the opening of the 1846/47 Diet in November 1847, it seemed that after decades of stagnation, the Diet was moving forward on both key issues: cautiously but forwards on the issue of wages and backwards on the issue of the Union. However, historical events outside Transylvania put all previous debates and struggles on the back burner and set new directions with irresistible force.

The Diet was still sitting together when the Declaration of the Hungarian Opposition was published in Budapest in the summer of 1847, which “enlivened Transylvania as well.”⁷²⁸ And in the autumn of 1848, the Hungarian Diet began in Pozsony, and was already discussing the essential reforms: public taxation, the emancipation of serfs and the abolition of the ancestral legal obligations („*ősiség*”) in land inheritance. Almost immediately, the news reached Transylvania, where the counties and sees debated and passed resolutions in favour of “union, public taxation and the emancipation of the serfs.”⁷²⁹ By early 1848, not only Hungary but also Western Europe was shaking. In February, the French Revolution broke out, and in early March, Lajos Kossuth, understanding the times, “demanded a constitution for Austria and a responsible ministry for Hungary.”⁷³⁰ In fact, in mid-March, at a district meeting, he proposed that the Pozsony Diet should ask the King to convene a Diet for Transylvania.⁷³¹ These previously unimaginable pieces of news arrived in Transylvania one after the other in the second half of March. On 21 March 1848, following the news of the revolutions in Vienna on 13 March and in Budapest on 15 March, a general meeting was held in Kolozsvár, where the “vast mass of the people” demanded the convocation of the Diet and, among other things, the declaration of the Union.⁷³² And at the end of March, the opposition sends envoys to the Diet in Pozsony to implement the union. At the same time, Miklós Wesselényi publishes a newspaper

728 Sándorfy 2000. p. 571.

729 Sándorfy 2000. p. 570.

730 Sándorfy 2000. p. 571.

731 Erdélyi Híradó (1848.03.30. p. 1.)

732 Sándorfy 2000. p. 572.

article in favour of the Union and the liberation of the serfs.⁷³³ As Wesselényi writes to Kossuth at the beginning of April⁷³⁴, the union is already inevitable according to the representatives of the conservative party.

Events are happening almost simultaneously. “It’s March in Kolozsvár as well as in Pozsony, and in both places there is a feverish excitement about this month”, writes Kamill Sándorfy,⁷³⁵ and indeed: in the second half of March and the beginning of April in Pozsony, the Diet will pass the package of laws known as the April Laws.⁷³⁶ The April Laws were ratified by the Emperor on 11 April 1848 – including the laws concerning Transylvania, on the Union of the Transylvania and Hungary (Act 6-7 of 1848) and on the granting of the right to vote (Act 5 of 1848). Under these laws, the unification would otherwise have been enforceable,⁷³⁷ but the governor general of Transylvania called the Diet by the end of May, at the demand of the Transylvanian reformist opposition.

3.2. Acts of the Diet

More than a month and a half elapsed between the governor’s letter of summon of 10 April 1848 and the opening of Diet on 29 May. In the meantime, the conspiracy between the Viennese government and the ethnic minorities’ leaders began,⁷³⁸ which plunged Transylvania into civil war by the second half of the year.

The royal decree of 5 May 1848 laid down the following points of deliberation for the Diet, which in fact accepted the demands of the reform opposition: a.) a decision on the Union with Hungary; b.) the abolition of serfdom with compensation for landlords; c.) the declaration of public taxation; d.)

733 Erdélyi Híradó (1848.03.30. p. 1.)

734 Sándorfy 2000. p. 573.

735 Sándorfy 2000. p. 578.

736 Which can be seen as a kind of written constitution.

737 As in the case of the Partium, the union was implemented by a ministerial decree of 23 April 1848 (for the decree see Budapesti Hírlap of 30 April 1848, p. 1).

738 The late date of the Transylvanian Diet was already mentioned in the newspapers of the time. See for example: „*The Diet is scheduled for 29 May. For fatal days, this is too much time. And then six weeks of the Diet, again, it is to be feared that the purpose will be made more difficult by it, now that there are few constructive elements and more destructive ones; and when even the old, stubborn elements are turning to destruction, only to make the work of building and consolidation more difficult.*” (Pesti Hírlap 29.04.1848, p. 1.).

the guarantee of civil and religious rights for the Romanians; e.) the guarantee of freedom of the press.⁷³⁹ The Diet was bound to these items, but by the time of its opening, history had already gone beyond these demands. Why? Because the April Laws had already settled, or were intended to settle, these issues for the whole of the united territory: Hungary and Transylvania. So the only task of the Transylvanian Diet was to declare the Union – as the April Laws had also required it to do⁷⁴⁰ – and the Emperor himself finally recognised this, as he dissolved the Diet on 11 July by declaring the Union of Hungary and Transylvania.⁷⁴¹

In the six weeks available to it, the Diet of Kolozsvár tried to meet the expectations of the Emperor. Accordingly, it: a.) declared the Union (Act 1 of 1848 (Tra)); b.) provided for the creation of a law on suffrage (Act 2 of 1848 (Tra));⁷⁴² c.) provided for the establishment of a national guard (Act 3 of 1848 (Tra)), which was later not approved by the Emperor, who was also vigilantly guarding his military powers in Hungary. Although the majority of the articles of law dealing with the landlords' compensation⁷⁴³ (Act 4-5 of 1848 (Tra)) had been sanctioned by the Emperor (and he had asked for them to be drawn up), they would not have been necessary in the light of the April Law. This was, moreover, recognised by the Diet itself when the Press Law was drafted, since Act 8 of 1848 stated that the Hungarian Press Law (Act 8 of 1848 (Tra)) should also be applied in Transylvania. The Diet did the same in the case of the Transport Act (Act 10 of 1848 (Tra)), where it could rightly have laid down its own demand, because the Transylvanian and Hungarian reformers' railway programmes were at odds over the routing of the main lines. The Transylvanian Diet also passed a law on the public taxation (Act 7 of 1848 (Tra)), on the equality of rights of established religions, including the Greek Orthodox religion (Act 9 of 1848 (Tra)), and on a specific Transylvanian

⁷³⁹ Cited by Sándorfy 2000. p. 583.

⁷⁴⁰ Cf.: § 6 of Act 7 of 1848, which states that *"The above provision... Transylvania shall be subject to the agreement of the Diet of Transylvania to be convened as soon as possible..."*

⁷⁴¹ Acts of 1848 (Tra) Closing words.

⁷⁴² What the monarch assented, but the question itself had already been settled by Act 5 of 1848. Since Act 1 of 1848 (Tra) clarified Act 5 of 1848, thus recognising its scope, there was no need to enact Act 2 of 1848 (Tra). The most important advantage of this law is that in § 2 it stated that the Greek Orthodox Christians were to be included among the established religions!

⁷⁴³ With the exception of the law on the expropriation of special payments paid after serf plots in the Saxon Land Territory (Act 6 of 1848 (Tra)).

issue, salt prices (Act 11 of 1848 (Tra)), where it postponed a decision on the merits until later.

Only four of the acts were assented (Acts No. 1, 4, 5 by King Ferdinand V., and Act No. 2 by Archduke Stephen, the Palatine).

3.3. Assessment of the Diet

It can be seen from the above that the most important task of the last Transylvanian Reform Diet was to confirm the union already declared by the Hungarian Diet, which was supported by the Hungarian King and Grand Prince of Transylvania, the Hungarian government led by Lajos Batthyány, who had already taken office, and the all Transylvanian Noble Orders. Thus, in accordance with the material and formal rules in force at the time, the Act 1 of 1848 (Tra) was enacted, which, in addition to the declaration of Union, made several significant statements.

Already in the Preamble, he declared full equality of rights for the population, “without distinction of nation, language or religion[s]”, thus finally abolishing the old structure that had remained unchanged for more than four hundred years and granting civil rights to the serfs. Also important is the final turn of the Preamble’s last sentence, which states that “the laws hitherto existing to the contrary are hereby declared abolished.” In this way, having been placed at the top of the legislative hierarchy at the end of the Preamble, equality of rights became, in effect, one of the constitutional principles of the Grand Principality of Transylvania.

Article 1 clarified the passage of the April Laws concerning the parliamentary elections to be held in Transylvania.⁷⁴⁴

Article 2 provided for the setting up of a committee to comment on the measures and parliamentary bills of the Hungarian government concerning Transylvania. One of the two members of the committee was Hungarian, the other Romanian.

Article 3 established a transitional arrangement for the structure and functioning of the judiciary and public administration in Transylvania. The first turn of the section stated that “the structure” and personnel of the public administration and judiciary in Transylvania shall remain unchanged

744 Cf.: § 5 of Act 5 of 1848 and § 3 of Act 7 of 1848

until the Hungarian Parliament so provides. The second round of the section provided for the dissolution of the Transylvanian Court Chancellery, all powers of which, “in respect of civil, ecclesiastical, treasury and military administration, and in all branches of administration generally”, would be transferred to the Hungarian government established under the April Laws.

Under Article 4, the Hungarian government was given a free hand in personnel matters, except for the removal of judges, which could only be done for reasons specified in the law, “in accordance with ministerial responsibility.”

Even a layman can see that the text and structure of this piece of Law is a legal masterpiece, which, despite the uncertain political environment, considered the enforcement of constitutionality and legal certainty to be its most important task. It should be emphasised that the three orderly nations – Hungarians, Szeklers and Germans (Saxons), but especially the Hungarians, who made up the majority of the Orders – were able to understand the voice of the new times and, as one of their last measures, renounced their previous privileges and enshrined the equality of rights of those who had been excluded from it until then – mostly for the Romanians! The holding of the last Diet may therefore have been a politically wrong decision, since the implementation of the issues it discussed could have been handled by applying the April Laws made at the Hungarian Diet in Pozsony, and the Diet itself took too long to convene, but there is no doubt that by passing the Union Act itself, the Orders succeeded in crowning the Transylvanian reform era and realising all its important demands.

But it is important to say a few more words about the articles of law consented by the King (Grand Prince) or the Palatine of Hungary. First and foremost, Acts 4 and 5 of 1848 (Tra) (hereafter: the Laws of the Serfdom), since these laws were about the practical implementation of the equality of rights enshrined in the the Act of Union’s Preamble: the emancipation of the serfs of Transylvania. The most important statements of the manorial laws, the first of which is the fundamental one, are as follows:

- a.) the very title of the Act 4 of 1848 (Tra) is revolutionary, since it speaks of the expropriation of the payments paid by the serfs (in contrast to the technical use of the term in the April Laws (Act 12 of 1848), which speaks of the “conversion” of the payments);

- b.) the Preamble of the Act 4. of 1848 (Tra) contains the most important provision: “The manorial servitude (*'robot'*), dues and monetary payments that have been laid on the serfs' plots... are abolished by this law.”
- c.) S. 1 of the 4. of 1848 (Tra), in accordance with the April Laws, states that former landlords will receive state compensation for the annuities they have lost;
- d.) the Act 5. of 1848 (Tra) actually lays down some guidelines for the application of this state compensation in Transylvania for the Hungarian National Assembly in Budapest;⁷⁴⁵
- e.) The most important section of Act 4 of 1848 (Tra) is Section 4. § 4, the first sentence of which reads: “The citizens of the localities (former serfs with or without plot) shall not be disturbed in the use of the plots and lands which they have in their hands, whatever their nature, nor shall they be allowed to graze, to collect tree branches or reed without the intervention of the magistrate, however, if any land the nature of which is in question is found to be clearly a manor by the decision of the court referred to in the following paragraph; the landlord shall be liable to pay both the rent and the unpaid profits.” This place of law actually takes the existing situation as a starting point, which – in view of the special ethnic and social composition of Transylvania mentioned above – means that Transylvania's last Diet gave the majority of the land from the hands of the landlords, who were mostly of Hungarian nationality, to the Romanians, who constituted the majority of the serfs. “The largely Romanian serfs of Transylvania received an enormous gift from the serf emancipation of the '48: 173,781 serfs' estates, covering 1,615,579 cadastral *jugerums*,⁷⁴⁶ were converted into their own land, and that free of charge.” – summarized a century later by the Hungarian legal historian Kamill Sándorfy.⁷⁴⁷
- f.) The other parts of Act 4 of 1848 (Tra) provide for the establishment of a court (*'serf court'*) to decide on landlords' disputes on manorial dues

745 For example, that the salt revenues in Transylvania would be used to cover the compensation, cf.: § 2, Act 5. 1848 (Tra).

746 Approximately it is 2,297,358 acres.

747 Sándorfy 2000. p. 868.

and monetary payments (§ 5), the abolition of the landlords' courts (*úriszék*) (§ 9) and the provision of special services linked to certain territories or ethnic groups (§ 6).

- g.) Special provisions on manorial dues were also contained in the Act 6. of 1848 (Tra), which, however, was not assented, so formally it can only be considered as a kind of dietary resolutions. It is another matter that, as discussed above, the Transylvanian laws on serf issues could only function as guidelines in general, since they all reserved the substantive decisions to the Hungarian National Assembly⁷⁴⁸ in Budapest.

Finally, a brief mention should be made of the Transylvanian Electoral Act (Act 2 of 1848 (Tra)), which was based on the mandate of the April Laws, as Act 5 of 1848 states that "Transylvania, if it wishes to join, shall send 69 representatives to be elected in its own decision in accordance with Article 7 of that Act."⁷⁴⁹ In other words, with the April Laws (Act 5. and 7. of 1848), the Hungarian Diet created the conditions for Transylvania to make out the first elections for the first Hungarian National Assembly. In comparison, the Transylvanian Electoral Act provides in detail for the conditions of active and passive suffrage, the number of persons excluded from the election, the number of representatives elected in a constituency. Here, too, the essential provision is contained in the Preamble to the Transylvanian Electoral Act: it is a temporary law, applicable only to the election in question, which expires once it has been enacted. Article 10 of the Act empowers the Transylvanian Gubernium to issue an executive orders, but in fact, by its own detailed regulation, it also vests a significant part of this right.

In terms of the legislation itself, it seems that the Transylvanian Electoral Act was primarily necessary for the sake of certainty. Although the Transylvanian elections could have been held on the basis of the laws of the Hungarian Diet and the decrees of the Hungarian government that took office, the Transylvanian Diet also passed a law that laid down the most important

⁷⁴⁸ The wording refers to the fact that in 1848, on the basis of the laws passed by the Diet (the April Laws), which was still convened under customary law, a new body elected by the right of suffrage, the Hungarian National Assembly, met in Budapest.

⁷⁴⁹ § 5 of Act 5 of 1848 (Tra).

rules for the forthcoming elections at a high level (in law), but at the same time in the form of decrees.

3.4. The Fate of the Achievements of the Transylvanian Reform Era after the Fall of the Hungarian War of Independence (1849-1868)

The outbreak of the Hungarian War of Independence disrupted the implementation of the most of the April Laws. This was the case with two of the most important demands of the Transylvanian reformers: the union of Hungary and Transylvania, where the union was declared but the detailed rules (administrative and judicial reform) were not worked out; and the settlement of the serf question, where declarations were made but no concrete measures were taken, such as the establishment of serf courts and the payment of state compensation.

But these issues were vital, because they affected the course of everyday life, and their stalemate caused constant tensions within the state and society. Following the Habsburg Dynasty's victory, therefore, legislation had to be continued, and to do so, as a first step, the victor had to define its position in relation to the previously established body of law and legal acquis. In Transylvania in the period 1849-1868, the Habsburgs approached the two most important demands of the reform era differently.

On the question of the Union, i.e. the changes to public law, despite the fact that the Emperor (Grand Prince) himself had prescribed its creation to the Transylvanian Orders of Nobility in the spring of 1848 and had sanctioned the law, the authorities took a negative position. The March Constitution of 1849 (the so-called Olomouc Constitution) declared the destruction of the Union during the War of Independence, and with Russian military assistance, this political declaration was successfully enforced. Over the next two decades, the Habsburgs' aim was to maintain the separate status of Transylvania through structural changes in line with the political situation. To this end, they occasionally tried to win the support of various nationalities, including the Romanians.

From the beginning, the Habsburgs supported the cause of serf emancipation and – more broadly – equality of civil rights. Already the March Constitution of 1849 granted a wide range of individual liberties to all inhabitants of the Empire, including the Transylvanians. The practical implementation of serf emancipation in Hungary and Transylvania was carried out by

the Emperor through pile of royal decrees, despite the fact that this practice was in conflict with existing laws.⁷⁵⁰

The Hungarians – the second largest ethnic group after the Germans in the unified Habsburg Empire – opposed the Austrian measures from the very beginning, both in Hungary and in Transylvania. Of the two completely different concepts (the creation of a unified Habsburg Empire or the acceptance of Hungarian separation following the April Laws⁷⁵¹), a mixed concept was finally adopted, thanks to a combination of foreign and domestic political factors, and a political majority then could be created on both sides.

This political bargain provided the basis for the legal construction of the Compromise of 1867. Although it was packaged domestically on both sides as a final settlement, it was in fact a temporary arrangement, initiated and concluded by the Sovereign out of personal conviction, and thus for his lifetime. In legal terms, Austria-Hungary, the Austro-Hungarian Monarchy, was a legal regime and political product created by Franz Joseph I. as monarch, within the framework of which he was able to make the conduct of state affairs smooth and efficient by the second half of his reign, thus giving himself and his dynasty the opportunity to appear on the international stage and to participate actively in it.

The two most important demands of the Transylvanian reformist opposition were also agreed upon in the framework of the reconciliation deal. Already in 1867, the Emperor agreed⁷⁵² to the takeover of Transylvanian affairs in accordance with the April Laws.⁷⁵³ In 1868, the Hungarian National Assembly was able to pass the detailed law (Act 43 of 1868), which was

750 Cf.: Act 12 of 1791 and Act 8 of 1791.

751 In other words, the question here was also about achieving deeper integration or preserving the country's sovereignty.

752 Cf. for example: Supreme Manuscript to Count Ferenc Haller, head of the Transylvanian Court Chancellery, on the discontinuation of the operation of the Transylvanian Court Chancellery (Rendeleték Tára [Collection of Decrees and Regulations] 1867. p. 11.).

753 The election of Transylvanian MPs had already been made possible by the Emperor in his letter to the Diet of Kolozsvár in 1866. The election of the Transylvanian deputies was carried out in February–March 1866, and the Transylvanian MPs were solemnly elected in April 1866 to the Diet of Budapest, which had opened in 1865. *“Transylvania’s separation was effectively ended by this step. It was not only the pressure of the Hungarian political forces there that brought about the reintroduction of the Union, but was an indispensable condition for the success of the reconciliation negotiations aimed at consolidating the monarchy.”* (ERT 488.) It is worth mentioning that at the end of the Diet of Kolozsvár in 1866, *“...the President made a last appeal to the Saxons and the Romanians not to be alienated from the idea of Union between Hungary and Transylvania.”* (Sándorfy 2000. p. 856.)

originally provided for in the Transylvanian Union Law of 1848. The issue of serf emancipation and land compensation was, in fact, a central step in the modernisation of the country: land registration was linked to it, as was the reform of the judiciary. The settlement, which had been achieved illegally by force (by means of the royal decrees) during the Austrian occupation of Hungary, therefore remained, since its effect was positive, as it began to implement the declarations of the Transylvanian Parliament of 1848. This was followed by the realisation that the decrees were in fact, in many cases, a modern regulation, the preservation of which, even through amendments, was in the interests of society (and politics). This compromise between traditional and modern legislation had already been reached before the Reconciliation⁷⁵⁴ and received political support in 1867. However, this was also a temporary settlement, but despite the efforts of Hungarian jurisprudence, no further steps – such as the creation of a new private code to replace the partial rights of Transylvania – were taken until World War I.⁷⁵⁵

4. Outlook – the Legal Legacy of the Transylvanian Reform Era

At the end of our long discussion, we may have found some clear answers to certain questions. First of all, whether there was a separate Transylvanian reform era and what its characteristics were. We have seen that, after an early flare-up (1790-1811), it emerged relatively late and was based on a small, well-defined group, mainly Baron Miklós Wesselényi and his circle of friends. This largely ethnically homogeneous group of Hungarians sought solutions to problems specific to Transylvania, but while preserving Hungarian traditions in language and thought, it sought in spirit the betterment of the whole region and all its inhabitants. During their short period of one

754 For more on the work of the Transylvanian legislative committee of the Transylvanian Gubernium, see Sándorfy i.m. 739-791, and more recently – in connection with the National Conference of Judges – Képešsy, Imre: *Az Országbírói Értekezlet története és öröksége* [The History and Legacy of the *National Conference of Judges*] (Bp., 2023. Doctoral dissertation).

755 For more on this question see Veress, Emőd: *Kilenc évtized – az Osztrák Általános Polgári Törvénykönyv Erdélyben* [Nine decades – the Austrian General Civil Code in Transylvania]. In: Veress, Emőd (ed.): *Ad salutem civium inventas esse leges: Tisztelgő kötet Vékás Lajos 80. születésnapjára* (Kolozsvár, Forum Iuris, 2019. p. 157-171.).

and a half decades, the Transylvanian reformers looked mainly to Hungary for the search for and solution of problems, and therefore sought and found links with Hungarian reformers. Their two most important demands, for which they fought from opposition in the Diets, were, on the one hand, the union of Hungary and Transylvania, since the two countries had been separated three centuries earlier by the unfavourable foreign policy situation, or *vis maior*, because of the Turkish Empire's invasion. On the other hand, in terms of domestic policy, the abolition of serfdom was the key issue of the modernisation package: if all Transylvanians could be granted civil rights, they would also be able to assume civil obligations and the country would develop.

The human and political greatness of the Wesselényi family lies in the fact that they saw from the very beginning that the liberation of the serfs would strengthen the ethnic majority Romanians in the long run, yet they believed in ideals first and foremost, and dreamed of a common home in Transylvania for Hungarians, Romanians and Germans. Baron Wesselényi spoke on several occasions about common Hungarian-Romanian interests and the importance of Hungarian-Romanian friendship. It was thanks to him that in 1848, when the day of the Hungarian Revolution shone through the Királyhágó,⁷⁵⁶ the Diet of Kolozsvár began its work by declaring equality of rights.

In 1848, the ethnically minority Hungarians renounced their privileges and freed the serfs as one of their last measures.⁷⁵⁷ The ethnically majority Romanians benefited the most from the serf emancipation, while the predominantly Hungarian landowning class was suddenly weakened, transformed from a tax-free and privileged group into a tax-paying one, which would have had to modernise its remaining estates in the absence of capital. In other words, it is probably not far from the truth to say that the two most important winners of the Transylvanian reform era were the Hungarians

756 Pasul Craiului (in Romanian). A pass in the western ranges of the Carpathian Mountains (Erdélyi Kárpátok (Hung.), Carpații Occidentali (Rom.)) which in old Hungary was considered a kind of border between Transylvania and Hungary.

757 In other words, within a year, the Transylvanian reformers had grown up not only to the task, but also to the historical situation itself. This is why Kamill Sándorfy aptly writes that "[t]he Transylvanian legislature of 1847 is almost a century away from the Transylvanian legislature of 1848." (Sándorfy 2000. p. 572.)

and the Romanians. The former got the Union with Hungary, the latter got the vast majority of the former serf lands.⁷⁵⁸

In retrospect, the programme of Wesselényi and his friends was probably the only model that could be followed in the long term, because the two largest nations, the Romanian and the Hungarian, could feel that they were both winners. However, this model was wounded on several fronts after the Compromise of 1867: organised land purchases further strengthened the Romanian position,⁷⁵⁹ while the delay in state compensation further weakened the Hungarian position. Despite all this, the situation remained favourable for both groups until the lack of (domestic) political agreement was accompanied by a foreign policy emergency. At that time it was only temporary, as the strengthening of Transylvanianism in the Interwar period shows,⁷⁶⁰ but after 1945 it became permanent.

Despite the territorial changes, one of the messages of Wesselényi – and thus of the Transylvanian reform era – is still valid today: a long-term future in the region can only be imagined within the framework of Hungarian-Romanian friendship.⁷⁶¹ And for this, efforts must be made by both sides.

758 The third nation, the Transylvanian Germans (Saxons) chose a separate path and considered the realization of their own territorial autonomy as their primary goal, which, however, was not supported, and after a while even tolerated, neither by the Hungarian state, which was strengthening after the Compromise, nor by the Romanian state, which was establishing itself after World War I. The dead-end nature of the concept was already being pointed out by some contemporary German intellectuals, for example in a famous poem by the well-known Transylvanian German poet Adolf Meschendörfer (1877-1963) (*Siebenbürgische Elegie*, 1927).

759 For concrete data see Count Bethlen, István: *Bethlen István gróf. Az oláhok birtokvásárlásai Magyarországon az utolsó 5 évben* [On the land acquisitions by the Romanians in Hungary in the last 5 years (Budapest, 1912), and for the legal side, see Sándorfy 2000. p. 866-872.

760 Cf. Kós, Károly: *Kiáltó szó. Erdély, Bánság, Kőrösvidék és Máramaros magyarságához!* [Crying Word. To the Hungarians of Transylvania, Banat, Crisana and Maramures!] In: *Magyar Kisebbség* 1995/1. p. 9-15.

761 One of the most important messages of Wesselényi's 1843 work (*Szózat... [An opinion...]*) is: *'Our brotherly right hand should be offered to them not only for reconciliation, but for faithful work together, and offered even if they do not want to accept it. The constant manifestation of good will and sincere desire cannot fail to melt the ice, if not at first, then later on, of any coldness, even of hostile hostility – it cannot fail to inspire confidence.'* (Wesselényi Miklós: *Szózat a magyar és szláv nemzetiség ügyében* [An opinion on the issue of Hungarian and Slavic ethnicity] Budapest, Európa, 1992. p. 262.).

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TRANSFORMATIONS IN TURKEY'S LEGAL SYSTEM DURING THE “LONGEST CENTURY OF THE EMPIRE”

Abstract

The article explores the profound legal and administrative changes that occurred within the Ottoman Empire during its prolonged period of reform and decline in the 19th century. “The longest century of the empire” reflects the empire’s sustained efforts to struggle with internal and external challenges through modernization and legal reorganization. The study examines pivotal reforms like the Tanzimat and Islahat Edicts, the introduction of the Kanun-ı Esasi (constitutional law), and the codification of Islamic and civil laws, including the Majalla. These reforms symbolized a shift toward centralization, equality, and adaptation to European legal norms while grappling with the interplay of traditional Islamic law and contemporary necessities. The article contextualizes these changes against the broader socio-political upheavals in Europe, offering a comparative perspective on the transformative century.

Keywords: Turkey, Ottoman Empire, Islamic law, fundamental rights, Tanzimat Edict, Constitutional Law

Firstly, I'd like to clarify the title of my paper. The term “Longest Century of the Empire” is attributed to the renowned Turkish historian, Prof. Dr. İlber Ortaylı. He coined this term in order to describe the protracted

⁷⁶² Professor of Law, Istanbul University, Turkey.

period of the Ottoman Empire's vulnerability. Throughout the 19th century, Ottoman sultans endeavoured to ameliorate the Empire's precarious situation.⁷⁶³

1. Development of Russia

Since the latter half of the 16th century, the Russian Tsardom expanded significantly, annexing Siberia to the East and gaining substantial territories and populations. Nonetheless, for a long while, harsh climatic challenges, suffering agriculture and limited access to open sea ports rendered Russia less developed.

This began to shift under Peter the Great. His military triumphs over Sweden allowed Russia to enhance its international trade via the Baltic Sea, fostering greater European interactions. Beyond military reforms, Peter the Great introduced significant advancements in education, economy, culture, and arts. Notably, during his reign, among many modern institutions he founded the Russian Academy of Sciences.

Russian engagement in European politics intensified during the Napoleonic wars in the early 19th century. Despite the reforms of Peter the Great and Catherine II, Russia maintained a somewhat traditional and outdated domestic appearance. After the Crimean War defeat, Tsar Alexander II initiated numerous development reforms. Railways expanded across the nation, local councils were formed focusing on education, health, and public utilities, and a more structured, modern judiciary emerged.

Alexander II's most ground-breaking reform was the abolition of a land-tied form of slavery, the serf system in 1861. This emancipated tens of millions of serfs, ending a practice spanning over three centuries. By the end of the 19th century, though militarily potent, Russia remained somewhat underdeveloped and less industrialized than Europe, leading to increasing demands for reforms from various groups.

763 This text is a revised version of the paper presented at an international conference titled "Fundamental Legal Transformations in 1848 and as a Consequence of the "Springtime of Nations". The conference was organized by The Ferenc Mádl Institute of Comparative Law in Budapest on 5 April 2023.

2. The German Union

Historically, Germans did not unify under a singular state, either due to geographical discontinuities,⁷⁶⁴ or to varied political and religious factors. Although the Holy Roman Empire encompassed most Germanic territories, it essentially remained a loose federation of states.

The 1815 Vienna-set European order aimed to thwart nationalist movements and to safeguard existing state integrities. This setup favoured Austria, a prominent German state and a multinational Empire with territories spanning through Austria, Hungary, and the Balkans. This fortified the existing Prussian-Austrian rivalry.

Prussian Chancellor Otto von Bismarck dominated this era. Believing in strengthening Prussia through warfare, he followed a “blood and iron” doctrine. Skilful manoeuvres led to the defeats of Denmark, Austria, and France. Consequently, in 1871, Prussian King Wilhelm I was crowned the German Emperor in the then-conquered Palace of Versailles.

The formation of the German Empire, led by Prussia, disrupted the post-Napoleonic Metternich equilibrium. It is widely accepted that the upheaval of this long-standing order eventually precipitated World War I.

3. Establishment of the Italian Union

Since the Middle Ages, the Italian peninsula remained fragmented. By 1815, it was a patchwork of states like the Kingdom of Sardinia, various duchies, the Papal State, Naples, and large Austrian-occupied parts in Northern Italy.

The Kingdom of Sardinia spearheaded Italian unification. Notably, the Prime Minister of Piedmont, Count Camillo di Cavour, played a pivotal role. Garnering support from the French Emperor Napoleon III against Austria, Piedmont achieved military supremacy and seized parts of Northern Italy. Following these successes, other Italian regions willingly aligned with Piedmont.

Guiseppe Garibaldi's “Expedition of a Thousand” significantly contributed to the integration of Southern Italy and Sicily. After the 1866

⁷⁶⁴ Coşkun Üçok, “Alman Hukukunun Tarihi Gelişmesine Bir Bakış”, Ankara Üniversitesi Hukuk Fakültesi Dergisi, No. 7 (1950), pp. 292-321.

Prussian-Austrian war and the 1870 Prussian-French war, the Kingdom of Italy finally unified in 1870, incorporating Northern Italy and Rome.

Italian unification is attributed both to international dynamics and national strengths. This duality elucidates why Italy's unification didn't disrupt foreign policies or power equilibriums as profoundly as the unification of Germany did.

4. Ottoman Reforms in the 19th Century

The 19th century marked a period of significant reforms for the Ottoman Empire, a transformative journey that began as early as the late 18th century. Sultan Selim III (7 April 1789 – 29 May 1807) initiated these changes, only to be dethroned and tragically killed. His successor, Mahmud II (28 July 1808 – 1 July 1839), ascended the throne during one of the Empire's most tumultuous eras. Mehmet Ali Pasha, appointed by Mahmud as the governor of Egypt from 3 July 1805 to September 1848, began operating semi-independently, repeatedly besting the Sultan's forces. Concurrently, the influence and the pressure of Russian tsarism upon the Ottoman realm grew incessantly.

After the French Revolution, waves of nationalism impacted the Empire's non-Muslim population, leading to Greece, Bulgaria, and Serbia gaining independence. The Armenian national consciousness was also on the rise. Moreover, the Austrian Empire annexed Bosnia and Herzegovina. With tensions escalating in the Balkans, the Ottomans, allied with European powers, faced Russia in the Crimean War in 1854. The aftermath of the war strained the Empire's finances, resulting in significant debt to European creditors. Consequently, these European creditors seized revenue from six primary Ottoman industries: salt, stamps, silk, tobacco, alcohol, and fisheries, making the 19th century an extended financial challenge for the Empire.

In 1808, at the onset of the century, regional feudal lords sought to curtail the sultan's power. They cemented their intentions by signing the *Sened-i İttifak* (Charter of Alliance of 1808). Historian Ali Akyildiz released the first comprehensive Turkish version of this Charter, which some historians

compare to the Magna Charta, viewing it as a stride towards constitutional governance.⁷⁶⁵

This Charter encompassed several provisions. Primarily, it emphasized mutual protection and commitment to the sultanate's fortification. It advocated for the diligent recruitment and retention of soldiers to uphold religion and the state, curbed any harm towards the military, and promoted the establishment of contractors for safeguarding state revenues. All decrees came directly from the grand minister, representing the sultan. Everyone vowed non-interference in others' affairs and pledged mutual accountability.

In 1826, the Empire disbanded the Janissaries, who were perceived as the most significant barrier to reforms. Historical parallels can be drawn to elimination of the archer unit in Russia. The Ottoman elites termed this dissolution as *Vak'a-yi Hayriye* or a "good event." This decision, however, weakened the Empire, rendering it susceptible to defeats, particularly from the Egyptian governor's army.

In 1839, a landmark *firman* (a royal decree) declared equality for all Ottoman citizens, regardless of religious beliefs. It promised security in life, property and honour, and safeguarded individual rights. To gain European support, this decree was shared with foreign ambassadors in Istanbul.

The Ottoman tax system also underwent changes. While Muslims paid the *Zakāt*, non-Muslims (or *dhimmis*), were exempt. However, both groups contributed to "land and customs taxes". *Dhimmis* also had a *jizya* tax, proportional to their assets, in exchange for military service exemption. With time, the *jizya* tax collection method evolved, and under European pressure, it underwent further reforms culminating in its abolition after the Second Constitutional Monarchy in 1909.

In reality, the act of execution for political reasons had been eradicated by legislation prior to the so-called Tanzimat reforms. The Tanzimat edict of 1839 further underscored this prohibition. Henceforth, political capital punishment could only be sanctioned in specific circumstances and exclusively through a judicial ruling.

765 See Ali Akyıldız, "Sened-i İttifak'ın İlk Tam Metni" (The First Complete Text of the "Sened-i İttifak"), *İslam Araştırmaları Dergisi*, Sayı 2, İSAM, İstanbul 1998, pp. 209-222. English translation of the text does not exist but, one can find someone contents of the seven clauses in the Sened-i İttifak of 1808, see Stanford Shaw and Ezel K. Shaw, *History of the Ottoman Empire*, Cambridge, 1977, Vol. III, p. 2. See more <https://www.anayasa.gen.tr/1808si.htm>.

Let's delve a bit into the concept of confiscation, given its historical and legal significance. Confiscation – though there are varied interpretations – refers to the act of the state in seizing part or all of an individual's assets. In the Ottoman Empire, this was primarily directed at state officials. Seen either as a punitive measure or a means for the treasury to seize the assets of deceased high-ranking officials, confiscation served as a fundamental institution in the Empire, empowering central authority and shaping the economic landscape. Throughout the classical era of Ottoman law, the practice of confiscation, driven by economic necessities or political motivations, sometimes overstepped its boundaries.⁷⁶⁶ Even during its application, it faced significant criticism. Notably, several sultans decreed that those assets of the officials which were unrelated to the treasury, shouldn't be interfered with. As part of the modernization efforts within the state's administrative and legal systems, confiscation was scrutinized more stringently. The Penal Code of 1838, promulgated under Mahmud II's reign, highlighted that any arbitrary confiscation contrary to Sharia and statutory law was forbidden. The Tanzimat Edict further reinforced property rights by declaring general confiscations – which adversely impacted heirs – as wrongful and thus abolished them. This perspective, aligning with the evolving legal ideology, was incorporated into the 1876 Constitution,⁷⁶⁷ prohibiting confiscation and forced labour, except in wartime scenarios.

Another fundamental institution from the classical era Ottoman law, under scrutiny during modernization, was the practice of political murder. In essence, this entailed the ruler's imposition of the death penalty.⁷⁶⁸

766 For a criticism made by Defterdar Moralı Osman Efendi in this direction and response of Selim III's for this criticism, see: Mahmud Esad Kalıpçı, "Müsadere Kurumunda Islaha Dair Bir Teklif: III. Selim Dönemine Ait Bir Vesika", M.Ü.H.F. Hukuk Araştırmaları Dergisi – Prof. Dr. Mehmet Âkif Aydın'a Armağan, vol. XXI, no. 2 (2015), pp. 211-242.

767 The above information about the institution of confiscation is summarized from the following source: Mahmud Esad Kalıpçı, "Klasik Dönem Osmanlı Hukukunda Müsadere" (Confiscation in Classical Period Ottoman Law), Unpublished Master's Thesis, İÜ SBE, 2013.

768 Politically, murder is related to the disciplinary authority granted to the ruler in Islamic criminal law. It is controversial among jurists whether the death penalty can be given in *ta'zîr*, but for Abu Hanîfe's opinion that the death penalty can be given in this way, see: M. Akif Aydın, *Türk Hukuk Tarihi*, 16th ed., İstanbul, Beta, 2019, p. 198.

For the broad meaning of the concept of politics in the field of *ta'zîr* and an evaluation of political murder in the context of *ta'zîr*, see: Asım Cüneyd Köksal, *Fıkıh ve Siyaset: Osmanlılarda Siyaset-i Şer'iyye*, 1st ed., İstanbul, Klasik, 2016, p. 205-222. For different uses of the concept of politics in connection with Ottoman customary law, see: M. Akif Aydın, *Osmanlı Hukuku-Devlet-i Aliyye'nin Temeli*, 1st ed., İstanbul, ISAM, pp. 48-52.

However, the “*grand vizier*” (the sultan’s prime representative), and a limited number of other officials also possessed this authority. Serious offenses like attempted regicide, rebellions, banditry, misuse of power, or dereliction of duty justified political executions. Yet, similar to confiscations, this authority was sometimes misused, serving more as a political tool than a means of justice.

During the Tanzimat era, the traditional practices of political murder, which had become tools of oppression, came under rigorous examination. In 1838, during Mahmud II’s reign, the Penal Code restricted political executions of state officials, allowing them only as *hadd* (fixed) punishments or in retaliation cases. Yet, remnants of old practices persisted. The Tanzimat Edict accentuated the sanctity of life and, as a result, death sentences were strictly confined to legally defined scenarios, starting with the penal codes from 1840 onwards, ensuring an end to arbitrary executions without due process.⁷⁶⁹

In 1856, reiterating the rights conferred to non-Muslim subjects, another edict, known as the Reform Edict (*Islahat Firmanı*), was issued by the Ottoman sultan.

A pertinent question might arise: hadn’t the Ottoman state granted these fundamental rights to its citizens yet? Indeed, it had. However, while ordinary citizens enjoyed these rights, state officials (*me’mūr*) did not. As they were seen as the sultan’s servants or *kullar*, their property could be seized and their lives could be taken at the sultan’s discretion, a reality acknowledged in the Tanzimat Edict. Therefore, from 1839 onwards, with the proclamation of the Tanzimat Edict, these officials were finally endowed with job security and basic rights.

These two edicts marked pivotal milestones in the 19th century, heralding significant changes in the legal status of non-Muslims. While non-Muslims, in terms of fundamental rights, were essentially on par with their Muslim counterparts, they were largely excluded from state bureaucracy. Only a handful held roles, such as interpreters. When the Ottoman Parliament convened in 1876, both Muslim and non-Muslim representatives, reflecting the Empire’s demographic composition, took their seats. Notably,

⁷⁶⁹ The information given above about the institution of political murder has been summarized from the following source: Ahmet Mumcu, *Siyaseten Katl*, Ankara, A.Ü.H.F. Publications, 1963.

neither Russia nor any other contemporary state had such religious or ethnic diversity within their parliamentary ranks. This serves as an unequivocal evidence against any claims of Ottoman assimilation policies.

Turning our attention to the broader transformation of the Ottoman legal system in the 19th century, we note that the 1870's and the decades after saw the inauguration of European-styled legal schools. Roman law was introduced, and today's Istanbul Law Faculty, where I proudly serve, traces its roots back to these pioneering endeavours.

Throughout the century, the Ottoman Empire underwent significant legal reforms which were heavily influenced by the French judicial system. In 1868, inspired by France, the Empire established courts of appeal for civil and criminal cases, as well as administrative jurisdictions. This coexisted with the traditional *qadi* courts (sharia judges), leading to a duality in the judiciary. Furthermore, religious law and the laws borrowed from France began to exist side by side, emphasizing this duality in the legislation as well.

During the late 19th century, the roles of the prosecutor, attorney, and notary public were integrated into the court system. Historically, the responsibilities of a notary were performed by the Ottoman *qadi*. While representation in court existed, it wasn't a regulated profession. However, reforms transformed lawyering into a recognized profession, culminating in the establishment of the Istanbul Bar Association in 1878.

This era was marked by prolific legislative activity. The term *tanzimat*, emblematic of the second half of that century, signifies legislative enactments. During the Tanzimat period, the Empire adopted laws that both originated from national customs and were influenced by foreign, primarily French, laws. One monumental local legislation was the codification of the Penal Code. This code, enacted shortly after the Tanzimat Edict, emphasized safeguarding life, property, and preventing rape. It insisted on the adherence to sharia regulations and unequivocally stated that certain crimes would be addressed under these regulations.⁷⁷⁰

770 In the Gülhane Edict, it was stated that bribery destroyed the country, and poet Şinasi reflected this in his theatre play called "Poet Marriage" ("Şair Evlenmesi") which was the best of early Turkish theatrical works. See. Süleyman Şevket Tanlı, *Tarih Boyunca Güzel yazılar III*, İstanbul MEB, [1950(?)], p. 88.

However, after only eleven years, the initial penal code was replaced by the *Kanun-ı Cedid* in 1851. This revised code, while retaining many elements from its predecessor, incorporated more detailed references to sharia laws and introduced new punishments. Despite its improvements, the *Kanun-ı Cedid* was replaced by another Penal Code in 1858, which then remained in force for nearly seven decades.

In 1858, the Land Code was established, marking the first comprehensive Ottoman land regulation. Thereafter, there was an unprecedented move to codify Islamic law by the state, resulting in the creation of the Ottoman civil code (*Majalla*) based on religious law, between 1869 and 1876. Led by Ahmet Cevdet Pasha and his team of scholars, *Majalla* was groundbreaking, but it wasn't a complete civil code. While it did cover property law and obligations, general provisions of civil law, family law, and inheritance law were absent. Yet, this codification was revolutionary as it represented the intervention of the state in Islamic law, a domain previously exclusive to the *ulema* (the body of Muslim religious scholars and chief religious authorities). This shift signified the newfound regulatory role of the state in the realm of civil law, though this role still intertwined with religious scholars.

In that century, the Ottoman state began borrowing elements from the European legal system. By 1850, they had adapted the French commercial code. While Islamic law strictly forbade the charging of interests, this new code permitted it, allowing those who delayed their debt payments to be charged interest. Such a move was a clear departure from Islamic law, but was justified on grounds of *zarûret* or necessity, a concept in Islamic law that permits certain prohibitions under extraordinary circumstances.

The memorandum detailed that even though some aspects of the Code contradicted Sharia provisions, it was deemed necessary due to prevailing conditions. The argument was that the Code would be applied to both foreigners and local traders and would largely benefit Ottoman merchants. This "necessity" was universally recognized by all members of the Supreme Assembly, leading to the unanimous acceptance of the Code. The religious foundation of the decision hinged on the combined principles of common interest and necessity.

During the General Assembly in 1848, it was acknowledged that the Commercial Code that contained elements which were not in line with Sharia, was nevertheless essential due to the state's unique conditions and the

potential benefits for its subjects. The *Shaykh al-Islam*, the person representing the Islamic juristic opinion, rationalized that the new commercial law did not conflict with Sharia as it was an independent system. His stance was influenced by the economic challenges prevailing the state and the disadvantaged position of Muslim traders. The active support and compliance of the religious scholars, representing clear deviations from traditional Sharia, illustrated the scholars' acute awareness of the changing times and their preference for progress over obstruction.⁷⁷¹

The Ottoman legal system underwent further European influences: the criminal code was adopted in 1858, commercial procedure law in 1861, maritime trade law in 1863, criminal procedure law in 1879, and the civil procedure law in the same year, all inspired by French laws.

Slavery also underwent significant reforms. The Istanbul slave market was closed by Sultan Abdulmecid's decree in 1847, while orders were dispatched to provincial governors emphasizing the strict prohibition of slave trade, with violators facing punishment. By 1890, the Ottoman Empire endorsed the Brussels Convention, outlawing the trade of black slaves. In 1909, the sale of Circassian and other slaves was banned. Despite these prohibitions, traces of the slave trade persisted. Yet, by 1910, with the establishment of the Ottoman Constitution (*Kanun-i Esâsî*), there was a renewed emphasis on individual freedom. For instance, during a trial in May 1910, a slave, while making a claim, emphasized that according to the Constitution, all were free.

To sum it up, the legal transformation in the 19th century Ottoman state was profound, reflecting the state's efforts to modernize and adapt to changing global standards.

While there had been some initial developments beforehand, during the reign of Mahmud II, the Ministry of Sultan Foundations was formally established in 1826.⁷⁷² Its primary objective was to centralize the management of foundations belonging to the sultans and their relatives. Several reasons fuelled this move: the need to eliminate administrative complexities surrounding foundations, to combat corruption, to centralize

771 The information given here about interest was taken from this study. See: İlknur Yaşar Bilicioğlu, "Osmanlı Ticaret Kanunu'nun Meşruiyet Paradigması: Ulema ve Faiz", <https://dergipark.org.tr/tr/download/article-file/2832204> (date of access 04.10.2023).

772 Bahaeddin Yediyıldız, "Vakıf-Tarih", DİA, vol. XLII, p. 485.

state governance, to diminish the influence of religious groups, and to gain the favour of the West.⁷⁷³ Another notable intention was to redirect the wealth of these foundations in order to fund the establishment of a modern army.⁷⁷⁴ A discernible trend emerged wherein the state aimed to channel foundation revenues directly into the central treasury.⁷⁷⁵ As the Ministry solidified its role, it progressively assumed control over the administration of foundations linked to various institutions. By the end of Abdulmecid's reign, the Ministry controlled all foundations within the Ottoman Empire, with the exception of eight "exceptional foundations".⁷⁷⁶ Furthermore, following the closure of Bektashi lodges during Mahmud II's reign, their revenues and real estate assets were seized. These foundation assets were subsequently sold, with proceeds funnelled into the state treasury.⁷⁷⁷ It's imperative to highlight that Mahmud II's establishment of this Ministry came after he fortified central governance and neutralized opposing power centres. However, interfering with foundations was a delicate matter, particularly as an influential group of religious scholars stood behind him.⁷⁷⁸ These scholars included notable figures like Sahaflarşeyhizade Esad Efendi, Şeyhulislam Yasincizade Abdulvehhab Efendi, and Şeyhulislam Kadızade Mehmet Tahir Efendi, who played a pivotal role in easing public and religious apprehensions through their fatwas and writings.⁷⁷⁹ Though the centralization of foundation administration appeared justified, redirecting foundation revenues away from their original purposes led to the decay and weakening of many foundations. In this regard it is poignant to recall Mustafa Nuri Pasha's words on the Ministry

773 Nazif Öztürk, "Evkâf-ı Hümayûn Nezareti", *DİA*, vol. XI, p. 522.

774 Kemal Beydilli, "Mahmud II", *DİA*, vol. XXVII, p. 354.

775 In this context, the merger of the Ministry of Foundations and the Ministry of Mint; For emphasis on steps such as creating new *gedikler*, see. İpşirli, Mehmet, "II. Mahmud Döneminde Ulema ve Vakıflar", *II. Mahmud: Yeniden Yapılanma Sürecinde İstanbul*, Ed. Coşkun Yılmaz, İstanbul, 2010, pp. 274-276.

776 Öztürk, "Evkâf-ı Hümayûn Nezareti", p. 523.

777 Since the public refrains from purchasing foundation-origin immovable properties, they can be sold at low prices, see. İpşirli, "II. Mahmud Döneminde Ulema ve Vakıflar", p. 275.

778 Because they have an established religious and legal status, the descendant foundations concern the interests of many people, and the Haremeyn foundations are related to the holy cities and their people, see. İpşirli, "II. Mahmud Döneminde Ulema ve Vakıflar", p. 272.

779 İpşirli, "II. Mahmud Döneminde Ulema ve Vakıflar", pp. 272, 279.

of Foundations: “Instead of being their guardian, it became the destroyer of foundations.”⁷⁸⁰

The Islamic law *zimmeh* contract ensured protection for the lives, beliefs, and rituals of non-Muslim subjects of an Islamic state. The Ottoman Empire positioning itself as an executor of the Islamic law integrated the *dhimma* contract (i.e. contracts with non-Muslims) into its legal system. Moreover, the Ottoman Empire exhibited remarkable tolerance towards non-Muslims, which was evident in numerous practices. For instance, while modern historical interpretations given by the Balkan states often portray the Ottoman era as a dark period, the political turmoil, the economic strife, and the religious oppression that characterized the Balkans before the Ottomans were replaced with stability and order under the Ottomans’ rule.⁷⁸¹ Another testament to the Empire’s tolerance was the appointment of Gennadius Scholarius as the patriarch after the conquest of Istanbul, effectively shielding the Orthodox faith from Catholic threats. In return for this tolerance, the Patriarchate, whose influence had severely dwindled during the Byzantium’s waning days, found its religious authority and stature revitalized under the Ottoman aegis.⁷⁸²

The Ottoman Empire categorized its subjects based on their religious affiliations rather than their ethnic identities. Various ethnic groups, such as Greeks, Serbians, Bulgarians, Vlachs, and Romanians, were collectively identified as “Rum” within the Empire. The Enlightenment and French Revolution spurred nationalist movements in the Balkans. The Greeks were the first to secure their independence. Encouraged by the Russians, they first rebelled in the late 18th century, but the Ottomans suppressed this uprising. The Greeks’ disillusionment grew when the Russians failed to keep their promises.⁷⁸³ In 1821, concurrent with the Ottoman conflict with the notable Tepedelenli Ali Pasha, Greek revolts ignited in two distinct Balkan regions. While the Ottomans quelled the uprising in the Danube region, the

780 İpşirli, “II. Mahmud Döneminde Ulema ve Vakıflar”, p. 279.

781 Mark Mazower, *Bizans’ın Çöküşünden Günümüze Balkanlar*, 2. ed., trans. Ayşe Özil, İstanbul, Alfa Basım Yayın, 2017, p. 61-63.

782 Paschalis M. Kitromilides, *Aydınlanma ve Devrim Modern Yunanistan’ın Kuruluşu*, trans. Sinem Güldal, İstanbul, Alfa, 2021, p. 46.

783 Paschalis M. Kitromilides, *Aydınlanma ve Devrim Modern Yunanistan’ın Kuruluşu*, trans. Sinem Güldal, İstanbul, Alfa, 2021, p. 52

Peloponnese revolt succeeded.⁷⁸⁴ Subsequently, constitutions aiming to establish a liberal republic were drafted. Yet, by 1832, with the appointment of a Bavarian Prince as the Greek King, monarchy became the governing system.⁷⁸⁵

Before discussing other emerging Balkan states, it is crucial to examine the ramifications of the Greek Revolt for both the Ottoman Empire and the patriarchate. After the establishment of Greece, the creation of a Greek national church became an inspiration for other states desiring independence.⁷⁸⁶ Furthermore, the subjects of the Balkan nation-states were unlikely to recognize the Fener Rum Patriarch under Ottoman jurisdiction as their religious leader. This led to the patriarchate's diminishing religious authority.⁷⁸⁷ To counter the potential negative effects of Greek independence, the Ottoman Empire introduced reforms during the Tanzimat period.⁷⁸⁸ Particularly, the secularization of non-Muslim community governance after the Reform Edict (*Islahat Fermanı*) further weakened the patriarchates.⁷⁸⁹

Next is Serbia. The Serbs, who revolted in 1804, were granted autonomy by 1828-1829 and achieved full independence in 1878.⁷⁹⁰ After the autonomy of Serbia, the 1835 constitution (*Sretenjski Ustav*) aimed to curb the absolutist tendencies of the ruling prince. However, due to its liberal undertones and contradictions to Serbia's vassal status, it was rejected by the Ottoman Empire, Russia, and Austria. Hence the constitution remained in force only briefly.⁷⁹¹ The 1838 Regulation on the Internal Affairs of Serbia (*Turski*

784 Mark Mazower, *Bizans'ın Çöküşünden Günümüze Balkanlar*, 2. ed., trans. Ayşe Özil, İstanbul, Alfa Basım Yayın, 2017, p. 130-132.

785 Paschalis M. Kitromilides, *Aydınlanma ve Devrim Modern Yunanistan'ın Kuruluşu*, trans. Sinem Güldal, İstanbul, Alfa, 2021, p. 465.

786 İlber Ortaylı, *Osmanlı'da Milletler ve Diplomasi*, 8. ed., İstanbul, Türkiye İş Bankası Yayınları, 2018, p. 30.

787 Mark Mazower, *Bizans'ın Çöküşünden Günümüze Balkanlar*, 2. ed., trans. Ayşe Özil, İstanbul, Alfa Basım Yayın, 2017, p. 121.

788 İlber Ortaylı, *Osmanlı'da Milletler ve Diplomasi*, 8. ed., İstanbul, Türkiye İş Bankası Yayınları, 2018, p. 115.

789 İlber Ortaylı, *Osmanlı'da Milletler ve Diplomasi*, 8. ed., İstanbul, Türkiye İş Bankası Yayınları, 2018, p. 26.

790 Mark Mazower, *Bizans'ın Çöküşünden Günümüze Balkanlar*, 2. Ed., trans. Ayşe Özil, İstanbul, Alfa Basım Yayın, 2017, p. 121.

791 Ayhan Ceylan, "Sırbistan'ın İdare-i Dâhiliyesine Dair Kanunname: 1838 Türk Anayasası (Turski Ustav)", *Türk Hukuk Tarihi Araştırmaları Dergisi*, no. 28, 2019 Autumn, pp. 18-19.

Ustav)⁷⁹² was announced after extensive negotiations between Ottoman and Russian representatives.

Lastly, Romania (previously Wallachia-Moldova or *Memleketeyn*), which attained independence in 1878 via the Treaty of San Stefano, was under the governance of Phanariot lords until 1821. Following the 1821 Greek revolt, Wallachian-Moldavian leadership transitioned to Romanian Boyars. The exit of the Phanariot lords diminished Greek influence in the region allowing a national consciousness to form.⁷⁹³ Although Russian influence initially grew in the area, it waned after the 1848 uprisings in Bucharest, and Iasi were suppressed by Ottoman and Russian forces. This shift paved the way for increased French and Latin influences, seen as kin in the region.⁷⁹⁴ The 1865 adoption of the Code Civil further exemplified the depth of French impact.⁷⁹⁵

In the latter stages of the Ottoman Empire, Bulgaria was among the final territories to achieve autonomy and later, independence. Autonomy was first granted through the Treaty of San Stefano. However, Western powers found the demarcations in this treaty problematic, leading to a re-evaluation of the borders and of the governance in the 1878 Treaty of Berlin. As per this latter treaty, the Bulgarian Principality was formed, and its constitution was promptly crafted. This constitutional text, shaped by a Russian-led committee, was ratified by the constituent assembly in 1879.⁷⁹⁶ Even though the Treaty of Berlin conceptualized the Bulgarian Principality as enjoying autonomy under the umbrella of the Ottoman Empire, this subordination of the Bulgarian monarch to the Ottoman sultan was

792 In this text, declared in the form of a decree, the Serbian Emirate was accepted as a privileged internal administration, and the management of the Emirate was given to the chief prince Miloš Obrenovic and his family. The administration of the Emirate was shared between the prince and the parliament. (Ayhan Ceylan, “Sırbistan’ın İdare-i Dâhiliyesine Dair Kanunname: 1838 Türk Anayasası (Turski Ustav)”, *Türk Hukuk Tarihi Araştırmaları Dergisi*, no. 28, 2019 Autumn, pp. 24-27)

793 İlber Ortaylı, *Osmanlı’da Milletler ve Diplomasi*, 8. ed., İstanbul, Türkiye İş Bankası Yayınları, 2018, p. 117.

794 Mark Mazower, *Bizans’ın Çöküşünden Günümüze Balkanlar*, 2. ed., trans. Ayşe Özil, İstanbul, Alfa Basım Yayın, 2017, p. 137.

795 Marian Nicolae, Mircea-Dan Bob, *La Refonte du Code Civil Roumain et Le Code Civil du Quebec*, *La Revue Du Barreau Canadien*, 2020, Vol. 88, No. 2, p. 454. (445-454).

796 Ayhan Ceylan, *Bulgaristan Emâreti (Prensliği) Anayasası: 1879 Tırnova Anayasası*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Hukuk Sayısı, vol. 21, no. 44, 2022 Summer, p. 641.

conspicuously absent from the constitution.⁷⁹⁷ Furthermore, the Treaty of Berlin mandated the creation of a constitution for the province of Eastern Rumelia. This constitution also was accepted through a mixed committee in 1879.⁷⁹⁸ As per the constitution, which took the form of a decree, Eastern Rumelia would have been under the administration of a Christian governor. This governor would have been appointed by the sultan but would have required the endorsement of the signatory states of the Treaty of Berlin. However, the dynamics shifted when Eastern Rumelia chose to unite with the Bulgarian Principality in 1885. By 1886, the governance of Eastern Rumelia was transferred to the Principality, although its distinct legal status was preserved.⁷⁹⁹

4. The Tanzimat Edict and Its Era

The term *tanzimat* is derived from the plural of the word *tanzim*, which literally means “to organize” or “to reform”. In scholarly literature, Tanzimat refers to the “reorganization and reform of the administrative machinery” and designates the period during which these reforms took place. The era initiated with the proclamation of the Tanzimat Edict (*Gülhane Hatt-ı Hümayunu*) on November 3, 1839, the foundational actions of which trace back to 1830. While various opinions suggest different end dates for the Tanzimat period, there is a prevailing consensus that it concluded with the closure of the parliament in 1878.⁸⁰⁰

Following the dissolution of the Janissary Corps, Sultan Mahmud II introduced changes in the Ottoman central organization, which could be considered as precursor to the Tanzimat. He restructured the central bureaucracy establishing departments in *Babıali* (the central government) with clearly defined areas of expertise. In 1838, he founded the Supreme

797 Ayhan Ceylan, *Bulgaristan Emâreti (Prenslîği) Anayasası: 1879 Tırnova Anayasası*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Hukuk Sayısı, vol. 21, no. 44, 2022 Summer, p. 643.

798 Ayhan Ceylan, *1879 Bulgaristan Emâreti Anayasası ile 1879 Şarkî Rumeli Vilâyeti Anayasası'nın Mukayesesi*, Türk Hukuk Tarihi Araştırmaları Dergisi, no. 35, 2023 Spring, p. 25.

799 Ayhan Ceylan, *Bulgaristan Emâreti (Prenslîği) Anayasası: 1879 Tırnova Anayasası*, İstanbul Ticaret Üniversitesi Sosyal Bilimler Dergisi Hukuk Sayısı, vol. 21, no. 44, 2022 Summer, p. 643.

800 Ali Akyıldız, “Tanzimat”, DİA, vol. 40, 2011, p. 1.

Council of Judicial Ordinances (*Meclis-i Vâlâ-yı Ahkam-ı Adliyye*) to deliberate on and supervise the reforms, referred to as *Tanzimat-ı Hayriyye*. He commissioned the drafting of two separate penal codes for clerics and officials. Mahmud II passed away on July 1, 1839, while these reform efforts were underway.

In the accession edict of the succeeding Sultan Abdülmecid, significant principles mirroring those in the Tanzimat Edict were emphasized. These principles highlighted the importance of governance according to law and order, avoidance of bribery, the provision of safety and security for all subjects regardless of their religion, and the prohibition of officials accepting gifts. Additionally, decisions made by bureaucrats and religious scholars in a consultative assembly prior to the declaration of the Tanzimat were ratified by the Sultan. This suggests that, contrary to the opinion that the Tanzimat Edict was solely the result of Mustafa Reşid Pasha's efforts and external influences, it was supported by contemporary religious scholars and bureaucrats and was primarily driven by domestic dynamics.

On November 3, 1839, Foreign Minister Mustafa Reşid Pasha publicly read out the Tanzimat Edict in the Gülhane Park in front of a diverse audience. The edict began by referencing the adherence of the state to Quranic principles and Sharia from its inception, claiming that deviations over the past 150 years had led to its current weaknesses and impoverishment. It asserted that with adequate measures, considering its geographical position, fertile lands, and industrious people, the state could regain its former strength and prosperity within 5-10 years. Key principles of the forthcoming legislation, such as personal safety, property protection and the prevention of corruption were outlined.

After the proclamation of the Edict, Sultan Abdülmecid went to the Topkapı Palace's *Hırka-i Şerif* Chamber and swore an oath to strictly implement the stipulations of the Edict and to refrain from making any decisions without the proper legal procedures. Ulema and state officials also took an oath to fulfil the requirements of the Edict. Subsequently, anyone acting against Sharia or the Edict's stipulations would be punished according to the law, regardless of his rank or status.⁸⁰¹

801 Halil İnalcık, "Sened-i İttifak ve Gülhane Hatt-ı Hümayûnu", *Belleten*, vol. 28, no. 112, October 1964, p. 614.

The Tanzimat Edict received mixed reactions internationally. While British and French public opinion was positive, the Prime Minister of Austria, Prince Metternich expressed concerns that the edict's emphasis on limiting the powers of the monarch and high-ranking officials might inspire similar demands in his own country. Russia, on the other hand, feared the strengthening of the Ottoman state due to the Tanzimat and the increased influence of England and France over it.

After the proclamation, the Tanzimat Edict was disseminated to all provinces through regional governors and published in the *Takvim-i Vekayi*, the first fully Turkish language newspaper. Due to concerns about potential public reactions, the edict's reforms were initially implemented in relatively central cities like Edirne, Bursa, Izmir, Ankara, Aydın, Konya, and Sivas. In order to inspect the implementation of the reforms and address grievances, Sultan Abdülmecid visited places like İzmit, Bursa, Çanakkale, and the Islands in 1844.

One of the immediate implementations after the declaration of the Tanzimat Edict was the abolishment of *angarya* (forced labour or levy). Prior to the Edict, a decree sent to the governors of Rumelia in August 1838 had already addressed this oppressive practice. *Angarya*, a major cause of grievance for the *reaya* (tax-paying subjects) was officially prohibited, and those violating this prohibition were to be punished under the penal code.⁸⁰²

Following the proclamation of the Tanzimat, the working principles of tax collectors, known as *muhasşillar*, were laid down in a regulation dated January 25, 1840. It was decided to establish a council in district centres to assist these tax collectors, ensuring representation of both Muslim and non-Muslim communities in those councils.⁸⁰³ All in-kind or monetary taxes collected from the public under various pretexts by provincial officials and governors were abolished.

Following those penal codes that were implemented for clerics and officials before the declaration of the Tanzimat Edict, a new penal code consisting of forty-one articles was prepared on May 3, 1840. This code primarily established *tazir* (discretionary) punishments. Instead of directly adopting

802 Halil İnalçık, "Tanzimat'ın Uygulanması ve Sosyal Tepkiler", *Belleten*, vol. 28, no. 112, October 1964, p. 640.

803 İnalçık, "Tanzimat'ın Uygulanması ve Sosyal Tepkiler", p. 626.

European laws, the drafting approach mirrored European legislative procedures. In order to address the deficiencies of this law, a new code, known as *Kanun-ı Cedid*, was prepared in 1851 that used a similar methodology to the previous penal system.⁸⁰⁴

One of the most significant articles of the Tanzimat Edict pertained to military service. In the following years, various regulations were made in this regard. These regulations determined that conscripts would be selected by a lottery system, active service would be limited to five years, and reserve duty (*redif*) would be capped at seven years. Decisions were made to establish five armies named as Hassa, Dersaadet, Rumeli, Anadolu, and Arabistan. Additionally, in order to ensure the security of Istanbul, the *Zaptiye Müşirliği* (Police Directorate) was established.

In 1844, a general population census was conducted, revealing an approximate population of 35 million. Recognizing the correlation between successful reforms and education, Sultan Abdülmecid requested the preparation of projects to open primary schools (*sıbyan mektepleri*), secondary schools (*rüşdiyeler*), and a university (*darülfünun*). Consequently, the first *rüşdiye* was inaugurated in 1847. In the same year, an archive named *Hazine-i Evrak* was established in Babıali, introducing modern methods for document classification and preservation. In 1851, the *Encümen-i Dâniş*, the Ottoman scholarly society was founded with the objective of preparing and translating books.

5. The Islahat Edict and Its Impact

During the Crimean War, which Russia initiated under the pretext of unmet demands related to Christian holy sites in Jerusalem and its vicinity, European nations heightened pressure on the Ottoman Empire for reforms favourable to Christians. Concerned about potential negative shifts in European public opinion, the Ottoman Empire conceded to making certain reforms. However, there was reluctance to append these reforms to the treaty ending

804 Hıfzı Veldet [Velidedeoğlu], “Kanunlaştırma Hareketleri”, *Tanzimat I*, Maarif Matbaası, İstanbul, 1940, p. 176-180; Tahir Taner, “Tanzimat Devrinde Ceza Hukuku”, *Tanzimat I*, Maarif Matbaası, İstanbul, 1940, p. 226-230. Mehmet Emin Artuk, “Tanzimat Dönemi Osmanlı Ceza Kanunlarından 1840 ve 1851 Tarihli Kanunların İncelenmesi”, *Türk Hukuk Tarihi Araştırmaları*, no. 16, 2013 Güz, p. 7, 10.

the Crimean War. Viewing this as an interference with their sovereignty and internal affairs, the Ottoman administration chose to announce these reforms as a gracious edict of the sultan on February 18, 1856. The main tenets of this edict were decided upon in discussions between Grand Vizier Âli Pasha and the British and French ambassadors, Lord Stratford and Thouvenel, respectively.⁸⁰⁵ The edict was read aloud in the presence of state dignitaries, the *Shaykh al-Islam* (the chief Islamic jurist), Christian patriarchs, a representative of the Chief Rabbi, and representatives of foreign powers. Copies of the edict were then dispatched to representatives of the states gathering in Paris to negotiate peace terms.

The Islahat Edict was referenced in the ninth article of the Treaty of Paris, signed on March 30, 1856. The article asserted that foreign powers recognized and endorsed the reforms announced by the sultan for his subjects. Importantly, the edict did not provide those foreign powers any right to interfere with Ottoman internal affairs or sovereignty.

Though the Treaty of Paris, which ended the Crimean War, was warmly received in Istanbul, the Islahat Edict sparked mixed reactions. The edict emphasized the necessity of internal reforms with a view to strengthen the state. While the Tanzimat Edict had already confirmed the equality of all Ottoman subjects, it became clear over time, that the privileges and exemptions granted by past sultans to non-Muslims needed revisiting and adjustment. Consequently, the Islahat Edict introduced reforms such as life-long appointments of patriarchs, prohibition of collecting religious dues, establishment of mixed councils for non-Muslim community affairs, and the ability for all communities to repair and build new religious structures. Moreover, it stressed equality in front of the law and allowed non-Muslims to serve in government positions, to attend military and civil schools, and to provide witness testimonies in courts. Alongside these rights, the edict also introduced military service obligation for non-Muslims, with the possibility of exemption in return for a fee.⁸⁰⁶

805 Roderic H. Davison, *Osmanlı İmparatorluğu'nda Reform 1856-1876*, trans. Osman Akınhay, Agora Kitaplığı, İstanbul, 2005, p. 54; Bülent Tanör, "Anayasal Gelişmelere Toplu Bir Bakış", *Tanzimat'tan Cumhuriyet'e Türkiye Ansiklopedisi*, vol. 1, İletişim Yayınları, İstanbul, p. 16.

806 Ufuk Gülsoy, "Islahat Fermanı", *Türkiye Diyanet Vakfı İslam Ansiklopedisi (DİA)*, vol. 19, 1999, p. 186-188.

The most significant backlash to the Islahat Edict came from non-Muslim communities, particularly regarding the introduction of military service and the regulations affecting the clergy.⁸⁰⁷ In regions with mixed populations, tensions emerged, leading to Western interventions, especially in areas like Rumelia, Lebanon, and Crete. Although the Ottoman Empire protested such interventions as breaches of the Treaty of Paris, Western powers justified them as the oversight of the implementation of the provisions of the edict. In the following years, facing mounting pressure from Western powers, the Ottoman administration dispatched inspection committees to Rumelia to oversee the application of the reform program. When ascending to the throne in 1861, Sultan Abdülaziz reaffirmed the stipulations of the Islahat Edict by issuing a new royal decree, seeking to alleviate international pressures.⁸⁰⁸

6. The Constitutional Law (*Kanun-ı Esasi*)

The year 1876, when the *Kanun-ı Esasi* (Constitutional Law) was proclaimed, coincided with a tumultuous period in the Ottoman Empire. That year witnessed significant events such as the dethronement of Sultan Abdülaziz, the ascension and subsequent removal of V. Murat from the throne within a mere three months, leading to the elevation of II. Abdülhamid. During the same year, the Empire grappled with revolts in Bosnia-Hersek, escalating unrest in Bulgaria, and declarations of war by Serbia and Montenegro. Amidst the ongoing Naval Yard Conference in Istanbul – attended by the Ottoman Empire and major European powers including Russia, Britain, France, Austria, Germany, and Italy – the *Kanun-ı Esasi* was declared on December 23, 1876. This was a strategic move by the Ottoman administration to demonstrate its commitment to reforms, thereby hoping to mitigate foreign interventions.⁸⁰⁹

Before the proclamation of *Kanun-ı Esasi*, a special committee of 28 members, including non-Muslim representatives, was formed to draft the constitution. Given the inflexible stance of the Sultan on preserving his

807 Davison, *Osmanlı İmparatorluğu'nda Reform 1856-1876*, p. 60-61.

808 Gülsoy, "Islahat Fermanı", p. 188-189.

809 Mehmet Âkif Aydın, "Kanûn-ı Esâsî", *DİA*, vol. 24, 2001, p. 329.

rights, significant concessions were made to the draft by Midhat Pasha and his allies. After its approval by the Council of Ministers, the document was ratified by the Sultan.⁸¹⁰ The *Kanun-ı Esasi* fits the category of a “decree constitution” of the 19th century, marking a transition from absolute monarchy to a constitutional one.⁸¹¹

The *Kanun-ı Esasi* established the legislative body, the *Meclis-i Umumi* (General Assembly), which was comprised of both the *Meclis-i Ayan* (the Senate) and the *Meclis-i Mebusan* (the Chamber of Deputies). Following elections in the provinces, the *Meclis-i Mebusan* convened on 19 March 1877. The sultan's opening speech was read in the Assembly by the chief secretary of the palace, Said Paşa.⁸¹² The first session of the *Meclis-i Mebusan* lasted until 28 June 1877. During this period, a temporary seven-article guideline was prepared in the Assembly to facilitate the election of deputies.⁸¹³ After the elections, the *Meclis-i Mebusan* reconvened for its second session on 13 December 1877. However, this session ended prematurely on 13 February 1878 when Sultan Abdülhamid II referred to the Ottoman-Russian War as a reason to temporarily adjourn the Assembly.⁸¹⁴

The Constitution, known as the *Kanun-ı Esasi*, comprises twelve sections with a total of 119 articles. The constitutional framework established by these articles can be summarized as follows: the state is a single entity (Art. 1); the sultanate and the caliphate belong to the eldest male member of the House of Osman (Art. 2); the inviolable rights of the sultan were the appointment and dismissal of ministers, declaration of war and peace, recitation of the ruler's name in sermons, command of the army, convening and adjourning of the General Assembly, and the pardoning and mitigation of punishments (Art. 7); the official religion of the state is Islam (Art. 11); freedom of religion and conscience, as well as sectarian privileges are recognized (Art. 13); everyone has the right to education and instruction (Art. 15); the subjects of the Ottoman Empire have rights to petition, property,

810 M. Sükrü Hanioglu, “Meşrutiyet, DİA, vol. 29, 2004, p. 391.

811 Bülent Tanör, *Osmanlı-Türk Anayasal Gelişmeleri*, 28. baskı, İstanbul, Yapı Kredi Yayınları, February 2017, p. 134.

812 Ahmet Mithat Efendi, *Üss-i İnkılap*, İstanbul, Dergah Yayınları, 2013, p. 406.

813 Robert Devereux, *The First Ottoman Constitutional Period: A Study of the Midhat Constitution and Parliament*, Baltimore, The Johns Hopkins Press, 1963, p. 124; Bekir Sıtkı Baykal, “93 Meşrutiyeti”, *Belleten*, VI/21-22, Ocak-Nisan 1942, p. 64.

814 Baykal, “93 Meşrutiyeti”, p. 78.

and the inviolability of domicile (Art. 14, 21, 22); no one can be tried in a court other than the one designated by the law (Art. 23); confiscation, forced labour, and torture are prohibited (Art. 24, 26); the possibility to enact provisional laws in urgent situations (Art. 36); judges cannot be dismissed (Art. 81); trials are public (Art. 82); fiscal obligations can only be established by law (Art. 96); the government can declare martial law in areas showing signs of revolt, and if proven by law enforcement investigations, those who threaten the government's safety can be exiled by the sultan (Art. 113); the provisions of the Kanun-ı Esasi can be amended with a two-thirds majority in the Chamber of Deputies and Senate, subject to the sultan's approval (Art. 116).⁸¹⁵

This constitution laid out the framework for governance, balancing both the powers of the Sultan and the rights of the subjects within the Ottoman Empire.

815 Aydın, "Kanûn-ı Esâsî", p. 329-330.

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