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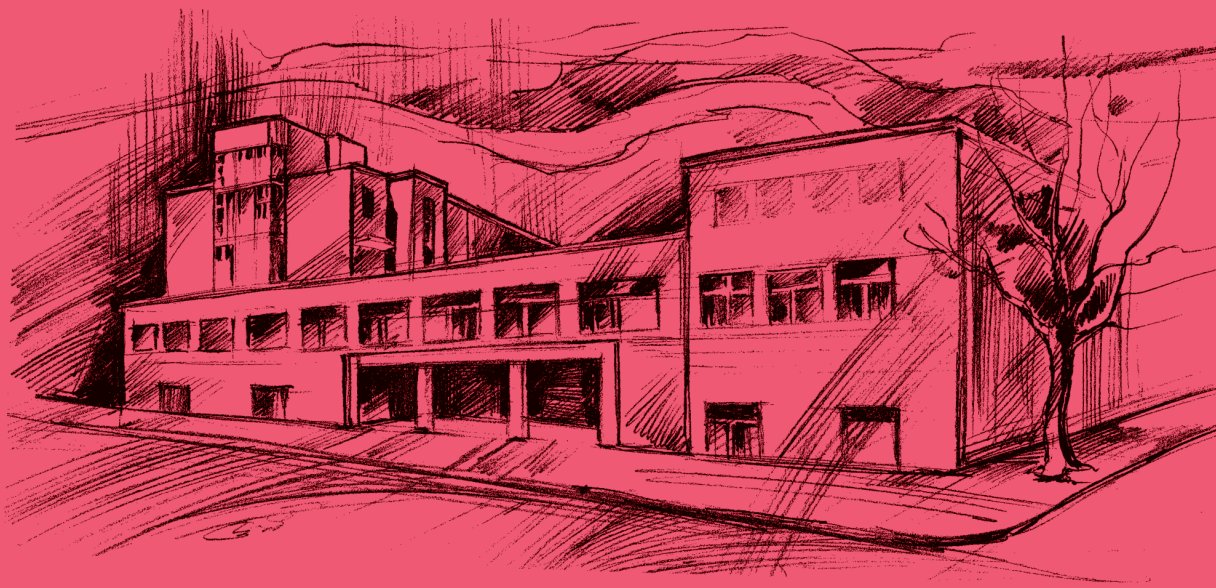
Legal-Historical Trends and Perspectives VII



teoretik

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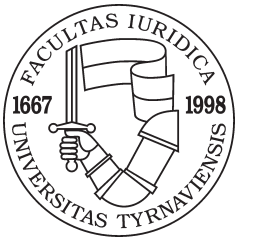

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Obsah/Content

Úvodné slovo

Každoročne môže právno-historická veda a výskum naplniť a konfirmovať v predkladanom, tradičnom periodiku – zborníka Katedry dejín práva Právnickej fakulty Trnavskej univerzity v Trnave – *Právno-historické trendy a výhľady* – dôstojný cieľ prezentácie výsledkov vedeckého výskumu a autorských úvah o práve v minulom čase a priestore.

V tomto roku sme sa ako editori rozhodli do VII. ročníka Právno-historických trendov a výhľadov zaradiť vybrané a vedecky koncízne príspevky našich ctených kolegov a účastníkov medzinárodnej konferencie s názvom „*Reformy súkromného práva v právnych dejinách*", ktorá sa organizovala v rámci medzinárodného vedeckého kongresu „*Trnavské právnické dni*" na pôde našej *alma mater* – Právnickej fakulty Trnavskej univerzity v Trnave 30. septembra 2022.

Hoci si účastníci zvolili individuálne témy, spájal ich obsahový leitmotív premien, reforiem a výziev v dejinách súkromného práva. Organizátori konferencie zvolili širšie navrhnutú nosnú tému medzinárodnej vedeckej konferencie, ktorá otvára horizonty právno-historického skúmania a poznávania reformného potenciálu práva v histórii. Každý účastník tak mohol načrieť do bohatých archívnych prameňov, ktoré poskytujú nevyčerpateľnú studnicu možných nových a staronových pohľadov na témy, problémy a výzvy súkromného práva, resp. jeho etablovaných alebo nedávno kreovaných súkromnoprávnych pododvetví. Ide teda o vždy perspektívnu tému právno-historického výskumu, ale aj súčasného pozitívneho práva, ktorá posúva a približuje rigidný systém práva na národnej aj medzinárodnej úrovni potrebám a výzvam vždy meniacich sa a rozvíjajúcich sa spoločností alebo jednotlivcov.

Obsahom zborníka sú príspevky zahraničných aj domácich autorov. Valentina Cvetković ponúkla náhľad na vývoj inštitútu zastúpenia v súkromnom práve a osobitne v srbskom práve. Marius Floare sa venoval téme právneho transplantátu a vývoju rumunských občianskych zákonníkov z rokov 1864 a 2009. Gergely Gosztonyi predstavil príspevok o posune od feudálnej cenzúry po slobodu tlače v roku 1848 na podklade práce Jozefa Irinyiho, ktorý symbolicky nazval tiež „Dvakrát dva je štyri", György Képes sa venoval Kódexu Cambio-Mercantilis, a teda prvým pokusom o kodifikáciu uhorského obchodného práva. Predmetom príspevku Tomasza Kucharskeho boli práva žien na rodinný fideikomis v druhej Poľskej republike vo svetle všeobecných zmien občianskeho práva. Carmen Todica ponúkla prehľad vývoja úpravy právnej subjektivity fyzických osôb v Rumunsku so zameraním sa na občianske právo.

Andrea Kluknavská predstavila premeny československého súkromného práva po Februári 1948. Zákonník práce z roku 1965 a jeho význam v pracovnom práve na našom území spracovala vo svojom príspevku Lucia Petríková. K niektorým historickým a právnym aspektom vybraných vecnoprávnych inštitútov po roku 1948 sa vyjadril Martin Skaloš.

Záverom ako editori vyjadrujeme nielen svoju vďaku za účasť na konferencii, za prípravu a zaslanie svojich príspevkov, ale želáme si aj, aby predložený zborník opätovne zaujal čitateľskú verejnosť, ktorej sa tak môže dostať zadosťučinenia v podobe pútavého čítania zo súkromnoprávnych kapitol našej slovenskej a tiež zahraničnej právnej histórie.

V Trnave november 2022

Adriana Švecová, Ingrid Lanczová, Adrián Gajarský

Foreword

Every year, Slovak and foreign legal historians can fulfil the worthy goal of presenting the results of their scientific research on the evolution of law in this traditional periodical conference proceeding called Legal-historical Trends and Perspectives, issued by the Department of Legal History of the Faculty of Law, Trnava University.

This year, in the VII. edition of the proceeding, we included selected and scientifically concise contributions of our respected colleagues and participants of the international conference entitled "Private Law Reforms in Legal History," organized as part of the international scientific congress Trnava Law Days, on September 30, 2022.

Although the participants chose various topics, they all reflected the transformations, reforms, and challenges in the history of private law. The conference organizers have chosen this broader theme of the international scientific conference to allow wide-ranging legal-historical research about the reform potential in legal history. Thanks to rich archival sources, the authors pointed out new perspectives on the challenges of private law, including its long-established branches and the recently created sub-branches. Therefore, it is a fruitful topic that enriches both legal historians and expert lawyers. In such research, we see a potential to bring the rigid law system at the national and international levels closer to the needs and challenges of ever-changing and developing societies or individuals.

Both foreign and domestic authors contributed to the conference proceeding. Valentina Cvetković analysed the development of the institution of representation in private law and, especially, in Serbian law. Marius Floare addressed the topic of legal transplants and the development of the Romanian civil codes of 1864 and 2009. Gergely Gosztonyi presented a paper on the shift from feudal censorship to freedom of the press in 1848 based on the work of Jozef Irinyi, which he also symbolically called "Two times two is four." György Képes devoted himself to the Codex Cambio-Mercantilis, and, thus, to the first attempts to codify Hungarian commercial law. The subject of Tomasz Kucharski's contribution was women's rights to family fideicommissum in the Second Polish Republic in light of general changes in civil law. Carmen Todica offered an overview of the development of the legal regulation of the legal subjectivity of natural persons in Romania, focusing on civil law.

From Slovakia, three legal historians contributed with their research papers. Andrea Kluknavská presented the changes in Czechoslovak private law after February 1948. The Czechoslovak Labor Code from 1965 and its importance for domestic labor law was elaborated by Lucia Petríková. Finally, Martin Skaloš commented on some historical and legal aspects of selected rights-in-rem institutes after 1948.

Last but not least, the editors express their gratitude to the authors and other conference participants. At the same time, they hope the proceeding will be an engaging reading for the expert and general public about Slovak and foreign legal history.

Trnava November 2022

Adriana Švecová, Ingrid Lanczová, Adrián Gajarský

Pohľad na vývoj inštitútu zastúpenia v súkromnom práve v odkaze na srbské právo

View of the Development of the Institution of Representation in Private Law with Reference to Serbian Law

Associate Professor Valentina Cvetković-Đorđević [1]

University of Belgrade, Faculty of Law

Abstrakt: Európska jurisprudencia 19. storočia bola poznačená učením pandektistov. Výsledkom ich práce sú moderné občianskoprávne koncepty. Zastupovanie, v podobe vytvorenej pandektistami, je jedným zo základných súčasných právnych inštitútov. Moderná koncepcia zastúpenia je založená na nahradení vôle zastúpeného vôľou zástupcu. Článok analyzuje vznik moderného konceptu zastúpenia a jeho úpravu v srbskom práve.

Kľúčové slová: zastúpenie; splnomocnenie; rímske právo; pandektisti; srbské právo.

Abstract: The 19th-century European jurisprudence was marked by the teaching of Pandectists. The modern civil law concepts are the results of their work. Representation in the form created by Pandectists is one of the fundamental contemporary legal institutes. The modern concept of representation is based on the substitution of the represented person's will by that of the representative. The article analyses the origin of the modern concept of representation and its regulation in Serbian law.

Keywords: Representation; Power of Attorney; Roman law; Pandectists; Serbian law.

1. Introduction

Modern Civil Law jurisprudence incorporates the achievements of Pandectists who tried to create a modern system – "a contemporary Roman law system" based on classical Roman law. This is the reason why the origin of many modern legal concepts is sought in classical Roman law. This is also the case with the institute of representation, the presence of which in Roman law was not questioned until recently.[2] There is a dispute in modern jurisprudence on whether Roman law recognised

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[2] In Italian Romanistics, an attitude has recently been expressed according to which Roman law did not recognise the institute of representation. The leading representatives of that attitude are Giovanni Lobrano and Pietro Paolo Onida, professors of Roman law at the University of Sassari. Their basic thesis is that the institute of representation originates from the Middle Ages and its premise,

direct representation in addition to indirect representation. Although most authors state that Roman law did not recognise the concept of direct representation, there are well-founded arguments that speak in favour of the opposite.[3] The fact that the Romans did not define and prescribe the notion of direct representation does not mean that it was not present in Roman law.[4] The merits of the doctrinal foundation of representation belong to modern jurisprudence.

2. Representation in the First Modern Civil Codes

The first modern civil codes acknowledged direct representation based on a power of attorney but linked it to a mandate contract.

The oldest civil codifications (Prussian Civil Code, French Civil Code and Austrian Civil Code) prescribe direct voluntary representation but regulate it together with the mandate. In these codifications, no distinction is made between a power of attorney and a mandate, they are used as synonyms. What was new with regard to Roman law was reflected in the fact that the legal contract concluded by the mandator directly obliged the mandatary.

In the Prussian Civil Code (*Allgemeines Landrecht Fur Die Preussischen Staaten – ALR*), voluntary representation is regulated within the 13th title in section 1, which is entitled *On the Acquisition of Things and Other Rights Through a Third Party*.[5] The first paragraph first prescribes direct representation (*things and rights can be acquired through the actions of a third party*).[6] Paragraph five defines the power of attorney (*A statement of will by which one person grants the authority to another person to undertake a legal action for him and instead of him is called an order or a power of attorney*).[7] ALR does not distinguish between power of attorney and order, but uses

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which exclusively implies acting for another (*agire per altri*), is defined in the 19th century. On the other hand, in Roman law, there was a mechanism of undertaking a legal act through another (*agire per mezzo di altri*), which cannot be considered representation in any case.

[3] The prevailing opinion in the 19th century, the influence of which is still noticeable today, denied direct representation in Roman law. Legal authors who attempted to explain the reasons why direct representation did not exist in Roman law offered different approaches. See: MITTEIS, L. *Die Lehre von der Stellvertretung nach römischem Recht mit Berücksichtigung des österreichischen Rechts*. Aalen: Scientia Verlag, neudruck, [1885] 1962, pp. 10–13. Mitteis and Savigny oppose the prevailing opinion in Romanistics in the 19th century. Both advocate the position that direct representation was possible during the development of Roman law. See: VON SAVIGNY, F. C. *System des heutigen Römischen Rechts*, Bd. III. Berlin: Veit, 1840, pp. 96–97; MITTEIS, L. *Die Lehre von der Stellvertretung nach römischem Recht mit Berücksichtigung des österreichischen Rechts*. Aalen: Scientia Verlag, neudruck, [1885] 1962, p. 51 and further.

[4] CVETKOVIĆ-ĐORĐEVIĆ, V. Neposredno zastupanje u rimskom pravu s osvrtom na moderno pravo. *Anali Pravnog fakulteta u Beogradu*, 2, 2020, pp. 124–144.

[5] *Von Erwerbung des Eigentums der Sachen und Rechte durch einen Dritten.*

[6] *Sachen und Rechte können auch durch Handlungen eines Dritten erworben werden.*

[7] *Die Willenserklärung, wodurch Einer dem Andern das Recht ertheilt, ein Geschäft für ihn und statt seiner zu betreiben, wird Auftrag oder Vollmacht genannt.*

them as synonyms. Hence, the power of attorney is considered a contract concluded by the represented and the representative.[8]

The French Civil Code (*Code Civil – CC*), similar to the ALR, equates a power of attorney with an order.[9] Art. 1984 of the CC reads as follows: *A mandate or a power of attorney is an act by which one person gives another the power to do something for the account and in the name of the principal (paragraph 1), an agreement is made only when the agent accepts the authorisation (paragraph 2).*[10]

In the Austrian Civil Code (*Allgemeines bürgerliches Gesetzbuch – ABGB*), representation is regulated within the 22nd chapter entitled *On Power of Attorney and Other Types of Running a Business*. According to Art. 1002 of the ABGB: *A power of attorney agreement is a contract by which a person accepts a task assigned to them to complete it on behalf of another*.[11]

The above-mentioned norms of ALR, CC and ABGB show that, in terms of terminology, no distinction is made between a power of attorney and an order. While ALR and CC use these terms as synonyms, the ABGB combines power of attorney and order into one term *Bevollmächtigungsvertrag* – power of attorney agreement. What all of them have in common is that the power of attorney is given within the scope of the contract on the order, and its origin and termination are conditioned by the duration of the order agreement.

3. The Origin of the Modern Concept of Representation

In the case of direct representation, the legal effects of undertaken legal acts directly affect the represented person. Considering that when undertaking a legal act, the representative declares the will, the question arises whether the declared will should be understood as the will of the representative or the will of the represented. In answering the question, contemporary legal writers tend to see the replacement of the will of the represented by the will of the representative.[12] Such an understanding of the nature of representation in private law has an interesting origin that dates back to the 13th century.

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[8] § 6 I 13 ALR: *Wird der Auftrag angenommen, so ist unter beyden Theilen ein Vertrag vorhanden.*

[9] According to the article 1153 – 1161 of the French civil law reformed in 2016 the special rules of regulation regarding representation were enacted.

[10] *(1) Le mandat ou procuration est un acte par lequel une personne donne à une autre le pouvoir de faire quelque chose pour le mandant et en se nom. (2) Le contrat ne se forme que par l'acceptation du mandataire.*

[11] *Der Vertrag, wodurch jemand ein ihm aufgetragenes Geschäft im Nahmen des Anderen zur Besorgung übernimmt, heißt Bevollmächtigungsvertrag.*

[12] LOBRANO G. M, ONIDA, P. P. Rappresentanza o/e partecipazione. Formazione della volontà 'per' o/e 'per mezzo di' altri. Nei rapporti individuali e collettivi, di diritto privato e pubblico, romano e positive. In: *Diritto@Storia* [online]. Sassari: Dipartimento di Giurisprudenza Università degli Studi di Sassari, 14, 2016, p. 9. Available at: https://www.dirittoestoria.it/14/index.htm

The modern institute of representation was created by the effects of three factors: theocratic, feudal and Hobbes'.[13]

The theocratic element is reflected in the teachings of Sinibaldo Fieschi, i.e. Pope Innocent IV about the fictitious person (*persona ficta*).[14] According to that teaching, dating back to the mid-13th century, Catholic believers represent a unity expressed by the term *persona*.[15] By creating the concept of a fictitious person (*persona ficta vel repraesentata*), the possible thought of alienating the Catholic Church from the believers it represents in its unity would be removed.[16]

The concept of representation formed in canon law in the late 13th century began to develop in feudal law.[17] The adoption of the concept of representation from canon law to feudal law was made thanks to the English king Edward I. In 1295, he summoned the so-called Model Parliament which had far-reaching consequences on the subsequent political practice because its members were delegated full power (*plena potestas*) of decision-making.

The concept of *plena potestas* in the Middle Ages developed in connection with the practice of kings in Western Europe to convene an assembly of representatives of all communities of the kingdom who had to agree to the introduction of new subsidies to eliminate the danger of enemy attacks.[18] For the work of the assembly to be efficient, the representatives had full power (*plena potestas*) when representing their communities in the assembly. This means that they were entitled to bind the members of the communities they represented by the decisions of the assembly in which they participated (usually by agreeing to an increase in subsidies). The understanding that the authority of the government should be based on the consent of subordinates was highlighted by the representatives of the Natural Law School.[19] However, the consent of subordinates as a condition of their submission has deeper roots in the past.

The summoning of medieval representative assemblies for the purpose of making important decisions was based on the *quod omnes tangit, ab omnibus tractari et*

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[13] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, p. 23.

[14] The term *persona ficta* was used by Sinibaldo dei Fieschi in his Commentary on the Decree of Pope Gregory IX. See: Onida, 2018, p. 70.

[15] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, p. 71.

[16] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, pp. 71–74.

[17] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, p. 74.

[18] POST, G. Plena Potestas and Consent in Medieval Assemblies: A Study in Romano-Canonical Procedure and the Rise of Representation 1150–1325. *Traditio: Studies in Ancient and Medieval History, Thought, and Religion*, 1, 1943, p. 370 and further.

[19] MANIN, B. *The Principles of Representative Government*. Cambridge: Cambridge University Press, 1997, p. 84.

approbari debet principle – what concerns all should be considered and approved by all, formed by the canonists based on the text from Justinian's Code (C 5.59.5.2.).[20] That fragment describes, among other things, the termination of guardianship in a situation in which there are several guardians over a minor who wants to be adrogated. Since adrogation (adoption of a person *sui iuris*) has the effect of termination of the guardianship because the adopted person acquires *paterfamilias* and thus becomes a person *alieni iuris*, the consent of all guardians is necessary since: as far as everyone is concerned, everyone must approve – *quod omnes similiter tangit, ab omnibus comprobetur.*

The *quod omnes tangit* principle in the Middle Ages first found a place in canon law, because in 1298 it was entered into the Collection of Canon Law as Regula XXIX.[21] The legal rule of canon law *(regula iuris canonici)* served to organise the work of the Catholic Church.

Besides canonists, legalists also interpret the *quod omnes tangit* principle expanding its scope of application. In this way, the Roman law solution of a private-law relationship was transferred, by the operation of medieval jurists, to the public law context in which it served to build a model of political representation.[22]

A turning point in the development of the idea of political representation occurred in 1295, when the English king Edward I, in his writ summoning the English Parliament (Model Parliament), invoked the *quod omnes tangit* principle.[23] The reason for summoning the parliament was common for that period and was reflected in the fact that the king needed financial aid in „case of necessity" – which was usually a war. What was unusual and what would make the Model Parliament a turning point in the development of parliamentarianism was that King Edward I summoned the parliament the members of which (representatives of communities) had *plena potestas*, i.e. a free mandate.[24] Based on the consent of their representatives to the proposed taxation measures in the Parliament, the communities were obliged to implement them even when members of parliament did not respect the previously received instructions of the represented when making decisions. By requesting that members of parliament have full decision-making power, King Edward I wanted to

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[20] *Codex Iustiniani* 5.59.5.2: *Tunc etenim, sive testamentarii sive per inquisitionem dati sive legitimi sive simpliciter creati sunt, necesse est omnes suam auctoritatem praestare, ut, quod omnes similiter tangit, ab omnibus comprobetur.*

[21] Sexti Decretalium, Lib. V, Tit. XII, Reg. XXIX, De regulis iuris, *Corpus Iuris Canonici*, pars secunda, Decretalium collectiones (instruxit Aemilius Friedberg), Graz 1959, 1122. See: HAUCK, J. Quod omnes tangit debet ab omnibus approbari – Eine Rechtsregel im Dialog der beiden Rechte. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Kanonistische Abteilung*, 130. Bd., 99, 2013, p. 399.

[22] MANIN, B. *The Principles of Representative Government*. Cambridge: Cambridge University Press, 1997, p. 87.

[23] MANIN, B. *The Principles of Representative Government*. Cambridge: Cambridge University Press, 1997, p. 87.

[24] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, p. 21.

ensure the collection of taxes necessary to carry out foreign policy.[25] The establishment of a free mandate made it possible to "alienate" the representative from the represented.[26] Thus, the institution of representatives was "ready" to undergo changes in relation to its ancient model.

A decisive break with the Roman concept of the nature of representation was made by Thomas Hobbes in his famous work "Leviathan" in which he presents the teaching of the state as a person who will substitute the will of individuals.[27]

4. Creation of the Modern Concept of Representation in the 19th Century

In private law, the institution of representation became the subject of interest of the German scholars – Friedrich Carl von Savigny, Bernhard Windscheid and Paul Laband. Their representation doctrine is a continuation of the medieval doctrine of this institute. Analysing legal relations in Roman families, Savigny[28] and Windscheid offered a new interpretation of the Roman phenomenon of acting through another.

In Roman law, the benefit from a legal transaction, that was concluded by a subordinate person (*alieni iuris*), belonged to his *paterfamilias*. Hence, one can get the impression that subordinate persons (*alieni iuris*) represented their *paterfamilias* when entering into legal transactions. In that case, however, there is no voluntary representation because subordinates are considered to be the "long arm" of their *paterfamilias*.[29] On the one hand, the benefit from the business concluded by a subordinate was attributed to the assets of a paterfamilias regardless of their will.[30] On the other hand, a *paterfamilias* was not initially legally responsible for the legal acts concluded by his subordinates. Such responsibility arises only with the creation of praetorian actions, the so-called *actiones adiecticae qualitatis*.[31]

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[25] According to the rule of English feudal law, the king could not demand additional taxation without the consent of his taxpayers (Edwards, 1970, pp. 142–143).

[26] ONIDA, P. P. *"Agire per altri" o "agire per mezzo di altri". Appunti romanistici sulla "rappresentanza" I. Ipotesi di lavoro e stato della dottrina*. Napoli: Jovene editore, 2018, p. 75.

[27] DI BELLO, A. *Sovranità e rappresentanza. La dottrina dello stato in Thomas Hobbes*. Napoli: Istituto italiano per gli studi filosofici, 2010, p. 69 and further.

[28] Savigny observes representation through three phases: 1. The paradigm of the institute of representation is characterised by the guardianship of a person incapable of entering transactions (D.26.1.1.pr). The guardian's role is reflected in the fact that he substitutes a ward in undertaking legal actions; 2. The transformation of the plurality of individuals into the concept of a legal person, which, by definition, is incapable of entering transactions because it has no will; 3. The representative of a legal person acquires the position of guardian. LOBRANO, G. Appunti per la lettura delle fonti. L'esempio – da non seguire – della attribuzione della "rappresentanza" al diritto romano. *Ius Romanum*, 2, Sofia, 2018, p. 61.

[29] KASER, M. *Das Römische Privatrecht*. Erster Abschnitt – Das altrömische, das Vorklassische und Klassische Recht. München: Verlag C. H. Beck, 1971, p. 262.

[30] VON SAVIGNY, F. C. *System des heutigen Römischen Rechts*, Bd. III. Berlin: Veit, 1840, pp. 92–93.

[31] GAIUS, *Inst.* IV,70 – 74.

Although Savigny's teaching lays the foundation for a new understanding of the institute of representation, for him, the *iussum domini* still represents an order (*der Befehl*) of a *paterfamilias* to a person under his authority or to a person who is not under his authority but who, based on the mandate contract, is obliged to carry out a certain legal or factual business.[32] In other words, the will of the *paterfamilias* is superior not only to the will of his son *alieni iuris* or his slave, but also to a *mandatarius* who is obliged to respect it.[33]

Twenty years after Savigny, Windscheid breaks with the Roman concept of *iussum* as an order. According to him, *iussum* is not an order but an authorisation or command (*die Verweisung, Anweisung*) for representation.[34] In addition, he expressly states that the Romans knew about the concept of a power of attorney, but did not separate it from the mandate contract.[35]

In the same year, 1866, when Windscheid published the second part of the second volume of his textbook on Pandect Law, Paul Laband published the Commentary on the 1861 General German Commercial Code (*Allgemeinen Deutschen Handelsgesetzbuchs – ADHGB*). Commenting on the provisions of that Code on representation – *Die Stellvertretung bei dem Abschluß von Rechtsgeschäten nach dem Allgemeinen Deutschen Handelsgesetzbuch*, Laband develops the thesis that the power of attorney and the mandate contract are two separate legal acts that have different assumptions, content and legal consequences.[36] Although he starts from the norms of the Commercial Code, Laband advocates the position that the aforementioned concept of power of attorney should not be limited to commercial relations only, but that every power of attorney should be distinguished from a mandate contract. Such a distinction is legally necessary because a power of attorney can exist without a mandate contract just as the mandate contract can exist without the power of attorney.[37] The history of the enactment of the General German Commercial Code

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[32] VON SAVIGNY, F. C. *System des heutigen Römischen Rechts*, Bd. III. Berlin: Veit, 1840, 93, fn. f; LOBRANO, G. Appunti per la lettura delle fonti. L'esempio – da non seguire – della attribuzione della "rappresentanza" al diritto romano. *Ius Romanum*, 2, 2018, p. 62.

[33] *Mandatum* in Roman law represented one of four consensual contracts based on which one person (*mandant*, mandator) gave an order to another person (*mandatarius*, manadatary) to undertake certain legal or factual act in his name and on behalf of the mandator. Unlike the mandate, which was concluded with a person who was not under the authority of the mandator, a *paterfamilias* could order the performance of the act to a person who was under his authority (a son *alieni iuris* or a slave). The enforcement of an obligation undertaken by the son or the slave at the behest of his *paterfamilias* or master was carried out by the praetorian action called *actio quod iussu*. On the basis of that action, the paterfamilias would be liable for the non-fulfilment of the obligation.

[34] WINDSCHEID, B. *Lehrbuch des Pandektenrechts*, Bd. II. Düsseldorf: Zweite Abtheilung, 1866, § 482, p. 391, fn. 6.

[35] WINDSCHEID, B. *Lehrbuch des Pandektenrechts*, Bd. I. Frankfurt am Main: Sechste Auflage, 1887, § 74, p. 211, fn. 1a.

[36] LABAND, P. Die Stellvertretung bei dem Abschluß von Rechtsgeschäften nach dem Allgemeinen deutschen Handelsgesetzbuch. *Zeitschrift für das gesamte Handelsrecht*, Bd. X, 1866, p. 183.

[37] DOERNER, R. *Abstraktheit der Vollmacht*. Berlin: Duncker&Humbolt, 2018, p. 48.

of 1861 shows the history of the development of the idea of the independence of the power of attorney from the general legal contract concluded between a principal and an agent. The impetus for the independence of the business power of attorney (procura) from the general legal transaction concluded between a principal and a procurator came from the representatives of the trading cities in the north of Germany.[38] They demanded the smooth development of trade, which is unthinkable without the protection of third parties who enter into business with a procurator. The requirements of representatives of the trading cities for the establishment of a business power of attorney, the content of which is determined by the law and which cannot be changed by a principal, were incorporated in the 1861 General German Commercial Code. The separation of the internal relationship between a procurator and his principal and the external relationship in which a third party participates had the effect of having a *procura* develop into a separate, independent legal transaction that differs from the general legal transaction (most often a mandate contract or an employment contract). The separation of the power of attorney from the basic legal work transaction was regulated in the General German Commercial Code, therefore, it was limited to commercial relations only. Laband's contribution is reflected in the fact that he advocated the position that every power of attorney, not just a business power of attorney, is an independent legal act that differs from a basic legal act – a mandate contract.[39] In addition, according to Laband, the institute of representation assumes the power of a representative, which does not tolerate any command from the represented party. The representative becomes the master of the legal transaction because his will substitutes the will of the represented party. Laband's teaching on the power of attorney as an independent legal act had far-reaching consequences as it was later accepted not only in the 1900 German Civil Code (Art. 167, 168 BGB) but also in other laws. The influence of that teaching is also evident in current Serbian law because, in the Contract and Torts Act, direct representation (and within it the power of attorney) is regulated separately from the mandate contract.[40]

5. Agency in Serbian Law

In the 1844 Serbian Civil Code, the institution of agency is regulated in the chapter entitled *On the Power-of-attorney and Benevolent Intervention in Another's Affairs*, in Art. 609–627. However, a mandate contract is not specifically prescribed.

The definition of the power of attorney is provided in Art. 609: *Power of attorney is a contract by which a person is given authority to act validly on behalf of another and for another.*

[38] DOERNER, R. *Abstraktheit der Vollmacht*. Berlin: Duncker&Humbolt, 2018, p. 45.

[39] DOERNER, R. *Abstraktheit der Vollmacht*. Berlin: Duncker&Humbolt, 2018, p. 47.

[40] The power of attorney is regulated in Art. 89–94 and the mandate contract in Art. 749–770 of the Law of Contract and Torts of the Republic of Serbia.

Art. 610 defines the contracting parties in a power of attorney contract: *The person who gives authority is called a principal, and the person who is given authority is called an agent. When this authorisation is put in writing, it is called a power of attorney.*

Serbian legislator in Art. 620 expressly states that the power-of-attorney is the basis of direct representation: *An act which an agent performs or contracts to do with a third party on behalf of his principal, according to the meaning of his power of attorney, with a third party on behalf of his principal is permanent and is binding both for the principal and the third party.*

Art. 622 is relevant concerning the termination of a power of attorney: *Once a principal revokes or withdraws the power of attorney, it is terminated without delay; and any subsequent action taken by the agent on behalf of the principal has neither force nor effect.*

However, the Serbian Civil Code gives protection to third parties acting in good faith if they did not know or could not have known that power of attorney had been terminated. According to Art. 627: *Transactions completed with a third party before he [agent] had been notified, or could have been notified, of the termination of his power of attorney, shall also remain in force and effect. Only the principal is entitled to claim the recovery of damages from his agent for acts performed upon the termination of his power of attorney, without giving notice of it.*

The crucial change was made in the Draft Obligations and Contracts Code, completed in 1969 by Professor of the Belgrade Law Faculty Mihailo Konstantinović. According to Art. 59, Para. 1: *A power of attorney is an authorisation issued by the person granting the authority (principal) by way of legal transaction to the authorised person (agent).*

The influence of Laband's learning is undoubtedly present in Art 59, Para. 3 of the 1969 Draft Obligations and Contracts Code: *The existence and scope of a power of attorney shall be independent of any legal relationship serving as the basis for its issuing.*

Though the 1969 Draft Obligations and Contracts Code never came into force, it had an immense impact on the creation of the Republic of Serbia's current Contract and Torts Act which also regulates the power of attorney as a separate institute, distinguishing it from the mandate contract:

Art. 89, Para. 1: *A power of attorney is an authorisation issued by the person granting the authority (principal) by way of legal transaction to the authorised person (agent).*

Art. 89, Para. 2: *The existence and scope of the power of attorney shall be independent of any legal relationship serving as the basis for its issuing.*

6. Conclusion

In modern Romanistics, there is an approach according to which Roman law did not recognise representation, but an institute defined as "acting through another" (*agire per mezzo di altri*), applied in situations in which a master gave an order to a free or subordinate person to perform a certain business. When undertaking the busi-

ness, the will of the principal remains relevant, as he is considered the master (of that business) even though the business was undertaken by another person (a son *alieni iuris*, a slave or a mandatary). According to this view, the institute of representation originates from the Middle Ages and was fully completed in pandectist science. Its essential characteristic, which makes it a qualitatively different institution from the Roman institution of "acting through another", is the substitution of the will of the represented party by the will of the representative, due to which the represented party ceases to be the master of the business, as replaced by the representative. Such an understanding was reached gradually, owing to the effect of three factors which emerged in succession: theocratic, feudal and Hobbes'. The theocratic factor is reflected in the teachings of Sinibaldo dei Fieschi, that is, Pope Innocent IV about the fictitious person (*persona ficta*). According to this teaching, dating back to the middle of the 13th century, Catholic believers form a unity expressed by the term person (*persona ficta vel repraesentata*) represented by the Catholic Church. The concept of representation, established under canon law, began to develop under feudal 13th-century law. The adoption of the concept of representation by the feudal law from the canon law was carried out thanks to the English king Edward I. In 1295, he convened the so-called Model Parliament which had far-reaching consequences on the subsequent political practice and the free mandate theory because its members were delegated full power (*plena potestas*) of decision-making. The convening of mediaeval representative assemblies to make important decisions was based on the *quod omnes tangit, ab omnibus tractari et approbari debet* principle adopted by the canonists from the Justinian's Code text (C.5.59.5.2). In addition to canonists, legalists also interpret the *quod omnes tangit* principle by expanding its scope of application. In this way, the Roman law solution of a private law relationship was transferred by the activity of mediaeval jurists to the public law context in which it served to build a political representation model. The establishment of the free mandate in English political practice in the late 13th century enabled the "alienation" of the representative from the represented party. The concept of representation as the substitution of the will of the represented party by the will of the representative was theoretically shaped by Thomas Hobbes in his work "Leviathan", in which he presented the teaching about the state as a person whose will replaces the will of individuals.

The first modern civil codes acknowledged direct representation based on a power of attorney but linked it to a mandate contract. The power of attorney as an independent institute emerged in the late 19th century under German law, with Paul Laband's theory taking the biggest credit in the separation of the power of attorney from the mandate contract.

The 1844 Serbian Civil Code regulates the power of attorney while remaining within the remit of the older doctrine which associates the power of attorney with the mandate. The 1969 Draft Contracts and Obligations Code and the Republic of Serbia's current Contract and Torts Act regulate the power of attorney as a separate institute, distinguishing it from the mandate contract.

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Právny transplantát a postupná evolúcia – rumunské civilné kódexy z roku 1864 a 2009

Legal Transplant and Gradual Evolution – the 1864 and 2009 Romanian Civil Codes

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Abstrakt: Spojené rumunské kniežatstvá Moldavska a Valašska v roku 1864 náhle nahradili svoje samostatné, ranonovoveké občianske zákonníky z rokov 1817 a 1818 mierne upravenou verziou francúzskeho občianskeho zákonníka z roku 1804, ktorý bol preložený do rumunčiny za menej ako sedem týždňov. Tento právny transplantát znamenal veľmi náhlu modernizáciu rumunského občianskeho práva, ktorým sa z neskorého stredoveku/raného novoveku vstúpilo rovno do plne rozvinutého francúzskeho systému. Niektorí právnici sa začiatkom 20. storočia sťažovali, že trvalo takmer päťdesiat rokov, kým všetky zainteresované strany tento nový občiansky zákonník plne pochopili a implementovali. Po 145 rokoch, niekoľkých minimálnych úpravách a neúspešných pokusoch nahradiť tento zákonník, bol v roku 2009 prijatý nový občiansky zákonník. Podobne ako v roku 1864, aj teraz boli parlamentné diskusie minimálne a legislatívny zhon veľký. Tento nový občiansky zákonník bol skôr evolučným krokom, ktorý bol silne ovplyvnený quebeckým občianskym zákonníkom z roku 1992 a niektorými západoeurópskymi reformami občianskeho práva posledných desaťročí.

Kľúčové slová: právny transplantát; Občiansky zákonník; napoleonský model; evolúcia; quebecký občiansky zákonník.

Abstract: In 1864, the United Romanian Principalities of Moldavia and Wallachia suddenly replaced their separate, early modern civil codes from 1817 and 1818, with a slightly adapted version of the French Civil Code of 1804, translated into Romanian in less than seven weeks. This legal transplant marked a very abrupt modernization of Romanian civil legislation, bringing it from a late medieval/early modern stage up to the fully developed French model. Some early 20th-century legal writers lamented that it took almost fifty years for this new Civil Code to be fully understood and implemented by all the stakeholders. After 145 years with minimal modifications and several aborted attempts to replace this Code, 2009 saw the adoption of a new Civil Code, with the same minimal parliamentary debates and legislative haste as the earlier 1864 version. This new Civil Code was more of an evolutionary step, being heavily influenced by the Quebec Civil Code of 1992 and some Western European civil law reforms of the last several decades.

Keywords: Legal Transplant; Civil Code; Napoleonic Model; Evolution; Quebec Civil Code.

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1. Political Context of the Mid-nineteenth Century Legal Transplant

In the mid-nineteenth century, the contemporary Romanian territory mostly comprised from three autonomous (but dependent) principalities: Transylvania (under Habsburg rule), Moldavia and Wallachia, which were vassal states to the Ottoman Empire until 1877. The 1864 civil law reforms, which will be dealt with in this contribution, pertain only to Moldavia and Wallachia, but this civil legislation would much later be extended to Transylvania, in 1943,[2] a quarter century after this principality was united to the Kingdom of Romania in 1918.

The principalities under Ottoman vassalage were gradually distancing themselves from Ottoman rule, first as a result of Russian interference and occupation after the Treaty of Adrianople of 1829, and later as a result of the 1856 Treaty of Paris, concluded after the Crimean War, when their status was collectively guaranteed by the six major European powers, although they nominally remained under Ottoman sovereignty.[3] These two principalities were joined in a personal union in 1859, by electing the same Colonel Alexandru Ioan Cuza as a prince. In the following few years, their union got deepened in every aspect, under the collective guarantee of the European powers, up until gaining full independence as a united country between 1877–1878.

2. The Earlier Romanian Civil Legislation

The principalities of Moldavia and Wallachia had attempted to modernize their civil legislation since the beginning of the 19th century and thus bring it forward from its "late-medieval" appearance. The first concrete fruits of this modernization efforts were the "Caragea Code" of Wallachia from 1818 and the "Calimach Code" of Moldavia from 1817.[4]

The "Caragea Code" was mainly a civil code in its first four parts, although it also contained some criminal law and procedural (both criminal and civil) provisions in its fifth and sixth parts. It was enacted from the beginning as a bilingual law, both in Greek (the language of the ruling class) and Romanian. It got heavily inspired by Roman and Byzantine law (mainly Justinian's legislation), local customs and only to a small degree by Western European law.[5] This Code remained applicable with some modifications up until 1865, when the new French-inspired Code came into force.[6]

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[2] CONSTANTIN, L. Unificarea dreptului român. *Revista Universul Juridic,* 2021, nr. 2, p. 12.

[3] CERCEL, S. Unificarea legislativă a Principatelor Române și consolidarea dreptului în primele decenii ale Regatului României. *Studia Universitas Babeș Bolyai – Iurisprudentia,* 65, 2020, nr. 4, p. 150.

[4] CERCEL, S. ref. 2, pp. 146–148.

[5] CERCEL, S. ref. 2, pp. 147–149.

[6] CERCEL, S. ref. 2, p. 147.

In Moldavia, the "Calimach Code" was enacted in 1817, firstly only in Greek and translated into Romanian in the 1830s. It also heavily drew its inspiration from Roman and Greek-Roman laws, traditional local customs and sparingly from Western European legal thinking.[7]

Wallachia already had a Commercial Code, since 1840, translated from its French model from 1807, but this "Wallachian" Code was also extended in 1863 to Moldavia, after the personal union of 1859.[8]

3. The Legal Transplant

Some argued that the first person to suggest the adoption of the French Civil Code for civil law reform in Wallachia and Moldavia was Victor Place, the French consul in Iassy, the capital of Moldavia, since 1855, who wrote a letter in this regard in 1859 to Alexandru Ioan Cuza, the elected ruler of both principalities.[9]

The first documented attempt to adopt a new civil code for the United Romanian Principalities was from 1862, when prince Cuza established a committee of specialists to draft a civil code by using the template of the French Civil Code of 1804. This draft was sent to Parliament in late 1863, but it was never adopted[10] due to the political turmoil enveloping the country. In 1864, the same Cuza invited the State Council to adopt a new civil code, this time by using the Italian civil code project from 1860 of Giuseppe Pisanelli, which some viewed as a mere updated version of the French original.[11] The State Council, whose president was also legally educated in France, disregarded this recommendation and used the previous local draft civil code and its original French model and thus managed to finalize the project in less than six weeks in the autumn of 1864.[12] The prince approved it, hastily signed it into law and it began to be published in the Official Journal from December 1864 through January 1865.[13] The new Romanian Civil Code of 1864 came into force on December 1st, 1865, abolishing all previous civil regulations but only as long as they contradicted the new Code, thus allowing the survival of previous laws and customs as long as they did not contravene the new rules.[14]

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[7] CERCEL, S. ref. 2, p. 148.

[8] ALEXANDRESCO, D. *Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine,* vol. 1. București: Editura tipografiei ziarului „Curierul judiciar", 1906, p. 20.

[9] DUȚU, M. Cine a propus primul introducerea Codului Napoleon în România? *Pandectele Române,* 2019, nr. 1, pp. 221–222.

[10] CERCEL, S. ref. 2, p. 167.

[11] GUȚAN, M. Codul civil de la 1865 și provocarea recreării originale a dreptului. *Revista Română de Drept Privat,* 2021, nr. 2, p. 152.

[12] CERCEL, S. ref. 2, pp. 167–168.

[13] GUȚAN, M. ref. 10, p. 151.

[14] CERCEL, S. ref. 2, p. 168.

The new Code had its critics from the beginning and its first published version was full of drafting errors that were only corrected in a second official edition in April 1865. Because the code was mainly a legal "transplant" from France, it was heavily criticized by the conservatives as lacking any "Romanian spirit" and for not concerning itself with peculiar local problems such as regulating the property of the free peasants.[15] The conservative critique of the Code could be synthesized by the famous derisive formula "shapes without substance" that was more broadly used by men of culture to attack the rapid modernization of Romania through the copying of foreign structures without adherence to local traditions.[16] This critique was also foreign-influenced, the most discernible sources being the German historical and evolutionist schools of thought.[17]

The structure of the Code broadly copied the structure of Justinian's *Institutes*, which in turn were inspired by Gaius's work, concerning itself with persons, assets, and actions. The Code had a short preliminary title on the effects and implementation of laws, the first book on persons, the second book on assets and changes to property and the third (disproportionately larger) book on the different ways in which property was acquired.[18]

The new Code was revolutionary in the united Romanian principalities because it was politically liberal by being centred on the individual and his rights, protecting the rights of the person, ensuring equality in front of the law, and equally protecting private property.[19]

The legal transplant from France was facilitated by the background similarities provided by the Christian culture and the common Roman-Byzantine law tradition, which were both the basis of legal evolution in Western Europe (France) and Eastern Europe (Romania).[20]

Some modern authors viewed this massive legal transplant from a foreign legal source and culture, without any political conquest from the country of origin, as irrational and a sign of a *"weak legal culture"* that was incapable of producing its own organic reforms.[21] The rationale of the intellectual elite for the adoption of a foreign code was as a means for "top-down" social engineering that should have accelerated the evolution of the backwards Romanian society of the mid-nineteenth century

[15] CERCEL S. ref. 2, pp. 168–169.

[16] CONSTANTIN, L. ref. 1, p. 8.

[17] GUȚAN, M. Building the Romanian Modern Law – Why is It Based on Legal Transplant? *Acta Universitatis Lucian Blaga – Iurisprudentia*, 2005, Supliment, p. 140.

[18] CERCEL, S. ref. 2, pp. 169–170.

[19] CERCEL, S. ref. 2, p. 170.

[20] GUȚAN, M. ref. 16, p. 130.

[21] GUȚAN, M. ref. 10, p. 152.

towards an evolved Western European model such as the French one.[22] At the time, there was scant theoretical thinking behind this "instinctive" approach to societal modernization of the ruling elite, but later Romanian intellectuals from the interwar period elaborated a theory of "synchronicity", based on the work of French sociologist Gabriel Tarde.[23] This theory, conceived by the Romanian philosopher and sociologist Eugen Lovinescu, explained that there was an "interdependence" between "evolved" and "backwards" societies and what begins as "servile" imitation should later morph into "adaptive" transformation of the imitating society which later produces its own cultural values.[24]

Although even later critics mockingly called the new Romanian Code a "carbon--copy" of the French original, the truth was that it was an "adapted" copy with some variations: it had about 300 articles less than the original (1914 articles for the Romanian Code versus 2281 for the French one), some institutions were carried over from ancient Romanian customary law (such as the right of inheritance of the poor widow, the legal hypothec of the married woman, the hereditary leases called *emphyteusis,* loans), there were about 45 articles copied from the 1860 Pisanelli project for an Italian civil code and some 105 articles on hypothec regulations and preferential rights (*privilèges*) were taking into account an 1851 Belgian reform law on the subject.[25]

The French Civil Code transplant was very much appreciated at the time in the united Romanian principalities for the legal equality of persons and assets, for its emphasis on contractual and personal freedom, the rule of law and the quasi-sacred nature of private property. What was much less appreciated were the regulations on dowry, the rapports between spouses, the inheritance rights (especially concerning natural children), donations, personal securities, the form of wills, all of which were considered alien to ancient Romanian customs, while the liberal regulations on (agricultural) work were enraging the powerful landowners.[26] For several decades after the enactment of the Civil Code, special regulations on agricultural deals ignored the principles of freedom and contractual liability emanating from the Code in favour of a return to "feudal-style" labour relations between the landowners and the peasant land lessees.[27]

The reasons for the choice of the 1804 French Civil Code as a model for the 1864 Romanian Civil Code instead of other available models at the time was more due to its prestige, seen here as "cultural admiration", rather than a conscious objective

[22] GUȚAN M. The Legal Transplant and the Building of the Romanian Legal Identity in the Second Half of the 19th Century and the Beginning of the 20th Century. *Romanian Journal of Comparative Law,* 8, 2017, nr. 1, p. 76.

[23] GUȚAN, M. ref. 10, p. 162.

[24] GUȚAN, M. ref. 10, p. 162.

[25] GUȚAN, M. ref. 10, p. 158.

[26] GUȚAN, M. ref. 10, p. 159.

[27] GUȚAN, M. ref. 10, p. 159.

choice between different legal solutions.[28] The French law's quality was undeniable but so were its imperfections, which were later brought to the fore by the Romanian Code's critics and by the legal doctrine and jurisprudence.

4. Decades of Adjustment

The Romanian law specialists who drafted the 1864 Code, as well as the legal scholars and the most prominent legal professionals of the time were all French-educated, some with doctorates in France. Even the prince, Alexandru Ioan Cuza, had unfinished legal studies in France.[29] Importing the familiar French legal culture "wholesale" came naturally to them, the Napoleonic Code being then considered a legal masterpiece and a source of inspiration for other national civil codes of the time,[30] such as the Belgian Civil Code, the Dutch Civil Code of 1838, and the previously mentioned project from 1860 for an Italian Civil Code.

In spite of these favourable auspices, the implementation of the new Code was fraught with difficulties. The French original source was quite secular and anti-clerical, while the Romanian society of the second half of the 19th century was very much in thrall to the Orthodox Church. The rural peasant society, which comprised about 80% of the population, rejected some new Civil Code provisions in favour of the local customs and traditions up until the early 1900s, while several cultural personalities objected to the Code from a cultural standpoint because it was supposedly "chocking" the Romanian spirit and culture.[31]

Because the French Civil Code was voluntarily adopted with slight modifications in Romania and not as a result of political conquest or foreign demands, the counter-reaction was mostly culturally motivated, and it led to a gradual adaptation of the Code through its implementation as an authentic Romanian legal construct.[32]

The "compromise" reached informally between the conservatives, that decried the legal transplant as inhibiting the organic development of a Romanian modern legal culture, and those that lamented the "irrational" wholesale import of strange French legal institutions was to find originality in the way the "transplant" was made and in the implementation of the new law in Romanian society by the constant interplay between "foreign" shapes and Romanian "substance".[33]

The intellectual strategies to adapt the French model to the Romanian content and thus conjure a Romanian national legal identity included the assimilation of ideas, principles, and institutions of French-origin by appealing to "historicism" and

[28] GUȚAN, M. The French Legal Model in Modern Romania – An Ambition, A Rejection. *Romanian Journal of Comparative Law*, 2015, nr. 1, pp. 136–137.

[29] GUȚAN, M. ref. 16, p. 135.

[30] GUȚAN, M. ref. 10, pp. 152–153.

[31] GUȚAN, M. ref. 10, pp. 153–154, 159.

[32] GUȚAN, M. ref. 10, p. 154.

[33] GUȚAN, M. ref. 10, pp. 154–161; GUȚAN, M. ref. 15, p. 140.

adopting them as our own (the result of imagined traditions from an indefinite past), the marginalization of foreign constructs as "shapes without substance" (also called "assimilation by critical rejection"), the original re-creation of the imported legal models and their "moulding" in specific Romanian ways.[34]

The Civil Code of 1864 was joined in 1887 by a Romanian Commercial Code, heavily inspired by the Italian Commercial Code of 1882, thus replacing the previous Wallachian (and later extended to Moldavia) Commercial Code of 1840, itself considered almost a translation of the French Commercial Code of 1807. The 19th-century legal thinking favoured having separate civil and commercial codes, at least for matters regarding obligations and contracts, even Napoleonic France having derived its own Commercial Code of 1807 from the third book "On the Different Ways of Acquiring Property" of their recent Civil Code of 1804.

5. A Century of (Mostly) Failed Civil Reforms

The Civil Code of 1864 was already meant to be replaced by new legislation from the beginning of the 20th century due to its "imperfect" nature.[35]

One of the first major attempts to overhaul the "ancient" code of 1864 was the one made during the "royal dictatorship" of King Charles II in the late 1930s. This new Code, published in 1940, was meant to serve as the unified and modern civil legislation for the whole Greater Romanian Kingdom, that came about in 1918 by joining Transylvania, Bessarabia, Bukovina to the smaller pre-war Kingdom of Romania. This Code never came into force due to the beginning of the Second World War, internal political turmoil and the heavy territorial losses to the USSR, Hungary, and Bulgaria in 1940.

The strangest story of survival and resilience of the old Civil Code was during the 45 years of Communist rule, from the first Communist-influenced government of March 1945 to the overthrow of the regime in December 1989. The Civil Code of 1864 was never formally repealed during that time, the only major transformation it suffered was the replacement in 1954 of its first book on persons and family law with a new, Communist-inspired, Family Code and a separate decree on natural and legal persons. There were also modifications to the statute of limitations in 1958, but otherwise, the Code formally remained unchanged, although it was frequently ignored, considered outdated and supplanted by special legislation that was more appropriate for a Communist society.

Its survival during the Communist decades was by no means guaranteed, and in the 1970s there was a serious attempt to draft a new, Communist-inspired, and ideologically sound Civil Code. The team of law school professors and law researchers worked for a long time on a new civil code project and their work was finalized in 1971 by the publication of the first draft civil code that was thought to come into

[34] GUȚAN, M. ref. 27, pp. 138–140.

[35] ALEXANDRESCO, D. ref. 7, p. 28.

force very soon afterward. A distinguished civil law professor, Gheorghe Beleiu, even published a new treatise in 1973 based on comparisons between the ancient Code of 1864 and the 1971 draft.[36] We may never truly know why this attempt failed in the end, although some suggested that the drafting commission, made up mostly of specialists educated in the liberal tradition of the ancient Code, might have subtly sabotaged the process by repeatedly asserting that the new project was not yet perfect, that it still needed improvements and it was a work in progress.[37]

The return to a democratic regime and a market economy in the 1990s, together with the massive repeal of Communist-era special legislation, brought the ancient Code back to life because its rules, together with the separate Romanian Commercial Code of 1887, were far more appropriate to the new society that came about after 1990.

6. The Twenty-First Century Civil Reform – Gradual Evolution

The Civil Code of 1864 was very much dated in the 1990s, when it was returned to relevance by the overthrow of the Communist regime and the return to a market economy. Unlike its French model, the Romanian code had never been significantly updated, only some of its sections were repealed and replaced by special laws.[38] Large areas of civil law such as property rights, contracts, inheritance, debt securities had been largely unchanged for more than a century.[39] There were few provisions in the ancient Code on public property, real estate circulation and registrations, there had not been a meaningful reform of the spouse's right of inheritance which was only mentioned in a separate law from 1943 (enacted during the Second World War), movable asset securities were largely regulated outside the Code, as were family law and the status of legal and natural persons.[40]

The first attempts to draft an updated version were from 1997 and they were intermittently continued with a new sense of urgency in the middle 2000s, when the perspective of European Union integration was imminent, the final draft being finalized only in 2008, after Romania had already been accepted in the Union.[41]

The new Code had a strangely similar process to the ancient Code of 1864: a lot of haste, a reasonably long intermittent 11-year drafting process in several committees made up of specialists (the latter of which was made up exclusively of professors at the Bucharest University law school),[42] a curtailed parliamentary debate and the

[36] BAIAS, F. Noul Cod Civil nu trebuie să ridice probleme existențiale. *Revista Română de Drept al Afacerilor,* 2012, nr. 8, pp. 23–24.

[37] BAIAS, F., ref. 35, p. 24.

[38] BAIAS, F., ref. 35, p. 24.

[39] BAIAS, F. Proiectul Noului Cod civil – un demers necesar. *Curierul Judiciar,* 2009, nr. 3, p. 123.

[40] BAIAS, F., ref. 38, p. 123.

[41] BAIAS, F., ref. 35, p. 25.

[42] BAIAS, F., ref. 35, pp. 25–27.

adoption by an abbreviated parliamentary procedure in 2009, in which the Government asked the legislature to either adopt the Civil and Criminal Codes as drafted by the government or to overthrow the executive by means of a vote of non-confidence.

Structurally, the new Code adopted a *code unique* point of view, incorporating and repealing the former Commercial Code of 1887[43] and also the Family Code of 1953, besides several statutory instruments which "grew up" around the Code, especially in the last few decades.

The Code of 2009, which came into force with several alterations from its initial published variant in October 2011, was evolutionary in nature.[44] It drew its inspiration from the 1991 Civil Code of Quebec, from French revisions to the Napoleonic Code up until 2006, from the Swiss Civil Code and the Swiss Code of Obligations, but also from international *soft-law* sources like the *Unidroit Principles* and the *Principles of European Contract Law* or reform projects like the Catala project for the reform of French Civil law..[45]

The new Code also integrated some of the evolutions in Romanian legal doctrine and jurisprudence of the last several decades, because the old Code, unlike its French counterpart, suffered almost no modifications from its original text of the 1860s, while civil law doctrine and caselaw had evolved together with the rest of society.

Meticulous legal historians have identified several Roman and Byzantine traditions, which were alive in old Romanian customary and statutory law before the 1864 Code, that were absent from the letter of that Code, and were reintroduced by the new Civil Code of 2009, although the legal doctrine and caselaw had continued to use them in circumvented ways: the action for denial of easements, possessory actions, taking measures for conserving possessed assets.[46] In spite of the old traditions of all of these "actions", their proximate source was not Roman or Byzantine law but the later foreign sources that were manifestly used by the drafters of the recent Code.[47]

One of the most radical reforms brought about by the new Code of 2009 was in the area of matrimonial property regimes, where the old single imperative matrimonial regime of community of acquisitions was replaced with a more liberal but limited choice between three different regimes, although the default one (a limited community of acquisitions) remained very similar to the previous single regime.

Divorce was made even easier than before, allowing married couples to divorce by mutual consent either in court or before a notary, even if there were children issued from said marriage, and there was also the possibility of divorce by mutual consent

[43] BAIAS, F., ref. 35, p. 29.

[44] CERCEL, S. Au devant de l'histoire. *Pandectele Române,* 2011, nr. 9, p. 14.

[45] BAIAS, F., ref. 38, p. 123.

[46] SÂMBRIAN, T. Tradiția romano-bizantină a vechiului drept-românesc receptată în unele invovații ale Noului Cod civil. *Revista de Științe Juridice,* 21, 2012, nr. 1, pp. 142–150.

[47] SÂMBRIAN, T. ref. 45, p. 150.

at the Civil Registrar's office, but the latter only if there were no underage children born out of the dissolving marriage.

One of the most controversial choices made by the drafting committee was to use the more modern *code unique* approach and "merge" the former civil and commercial codes into a single statute, which never even uses the term "commercial" as such and replaces it with the broader concept of "professional(s)". The naïve objection to this novel approach was to argue that the lack of a "commercial" code meant the death of Commercial Law as a separate legal discipline. This objection was never even raised in the similar case of Family Law, which also "lost" its separate code of 1953 in favour of a mere "book" (the second one, simply called "About Family") included in the new Civil Code, but was never thought of as a "disappearing" legal discipline.[48]

In the area of commercial law, the new Civil Code only regulates in a unified way the matter of general obligations, with the occasional special provisions for cases that involve professionals, and it also includes rules on some special contracts that are "commercial" in nature and were previously regulated either by the Commercial Code of 1887 or by special statutes. Companies were still regulated by a distinct updated statute from 1990 (although they lost the name "commercial"), insolvency had been taken outside the scope of the former Commercial Code since 1995 and had its own special statutes for the insolvency of natural and legal persons.[49] The most irksome change brought by the Civil Code and subsequent legislation was the obstinate avoidance of the term "commercial", even in areas where it was well established, and its intermittent replacement with the concept of "professionals" or "legal cases involving professionals".

This *code unique* approach was also used by the new Civil Code of Quebec of 1991, that was one of the main sources of inspiration for the Romanian Civil Code of 2009,[50] with several outside consultants for the new Romanian code being from that legal area.

The Civil Code of Quebec, which has been in force since 1994, had a discernible and officially recognized influence on the Romanian Civil Code of 2009, besides the structure itself of the code, in the areas of the status of persons, intangible rights, family law, managing the assets of someone else, the securities, some provisions on inheritance and funeral arrangements.[51]

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[48] BAIAS, F., ref. 35, pp. 29–30.

[49] BAIAS, F., ref. 35, pp. 29–30.

[50] BOȚI, I., BOȚI, V. Codul civil din Quebec – sursă de inspirație în procesul de recodificare a dreptului civil român. *Studia Universitatis Babeș Bolyai – Iurisprudentia,* 56, 2011, 1, pp. 5–7.

[51] BOȚI, I., BOȚI, V. ref. 49, pp. 5–18.

7. Conclusion

The 1864 Romanian Civil code had been a brutal legal transplant[52] from an advanced legal system (France) to a Romanian society that had barely come out of the late Middle ages. The Civil Code was used by the political and lawyerly elite as a tool for social engineering and nation-building. There was a strong cultural counter-reaction to the Code, that had lasted for decades, which led to the assimilation of foreign legal structures through local "substance", but it had also pushed the legal system to some degree of modernization and better synchronized it to pan-European tendencies of the era.

The 1864 Civil Code remained in force, with small alterations, even during the Communist regime, which was a peculiar situation in Eastern Europe, because it was never repealed and it was only partially supplanted by *lex specialis*.

The 2009 Romanian Civil Code has been a mere evolution, it was a legal update but there were no social engineering or nation-building purposes in its drafting process. There was still a Western European cultural fascination because all the major sources of inspiration were Western European (French, Swiss) or at least Western European-inspired (Quebec Civil Code). The previous Civil Code foundation was sturdy enough for a seamless transition, as there was no discernible "culture shock" after the new Code came into force, unlike at the end of the 19th century.

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Od feudálnej cenzúry k slobode slova v roku 1848 v Uhorsku prostredníctvom diela Jozefa Irinyiho

From Feudal Censorship to Freedom of the Press in Hungary in 1848 Through the Work of József Irinyi

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Abstrakt: Jedným z hlavných cieľov uhorských reformátorov v 18. storočí bol boj proti feudálnej cenzúre. Namiesto predchádzajúceho skúmania obsahu textu chceli reformisti zaviesť jeho následnú kontrolu, v dôsledku ktorej by bolo možné postihovať len nezákonný obsah. Kľúčovou postavou tohto zápasu bol József Irinyi, ktorý sa vo viacerých svojich prácach zaoberal otázkou zrušenia cenzúry a pravidlami tlačového zákona, ktorí reformné kruhy chceli vytvoriť. Tento článok popisuje cestu od feudálnej cenzúry k slobode tlače v roku 1848 v Uhorsku prostredníctvom jedného z diel spomínaného Józsefa Irinyiho.

Kľúčové slová: cenzúra; József Irinyi; Uhorsko; tlačový zákon; zodpovednosť; tlačová sloboda.

Abstract: In Hungary, the struggle against the feudal censorship of the 18th century was one of the central wishes of the reformers. Instead of prior examination of the published content, they wanted to introduce *ex-post* control, whereby only illegal content could be punished. A key figure in this struggle was József Irinyi, who in several of his works addressed the question of the abolition of censorship and the rules of the press law they wanted to create. This paper describes the path from feudal censorship to freedom of the press in 1848 in Hungary through the work of József Irinyi.[2]

Keywords: Censorship; József Irinyi; Hungary; Press Act; Liability; Freedom of Press.

1. Introduction

Every era has its anonymous or lesser-known characters, those who are not remembered in the historical memory, those who are not the subject of plays in theatres, those who are less talked about, and those whose lives are less researched. József

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Irinyi is just such a person because few people know how much influence he had on the events of March 1848 in Hungary and what his role was in the struggle for the freedom of the Hungarian press.

József Irinyi was born in 1822 when feudal censorship was in its heyday in Hungary. In 1793, Francis I declared the establishment of a printing press and censorship a royal right. When the public would have started to get information from the early libraries, he banned them in 1798. In addition, „the subscription of cafés to journals was prohibited."[3] In addition, eight years later, in 1806, he made the establishment of bookshops subject to royal authorisation, so it is clear that the monarch did everything he could – given the technical standards of the time – to control the content that could be available to the public. When a publication was allowed to appear, it had to be submitted for "preliminary auditing", i.e. preliminary censorship by the Book Audit Department of the Privy Council, which worked based on the Index Librorum Prohibitorum[4] issued by the Imperial Censorship Office.[5] This repressive system culminated in the regulation of printing and censorship by decree, which resulted in only five political newspapers operating during the period: one in Hungarian, one in Latin and three in German.[6]

2. "Freedom of the press is not outlawed."[7]

The situation remained the same in legal terms after the turn of the century. In 1820, a royal ban was imposed on importing literary and scientific journals into Hungary, which meant that the country was closing its borders from knowledge. At the same time, by the 1820s, several progressive counties had raised their problems: the county of Bars had written a petition against censorship.[8] Their arguments were twofold: on the one hand, they claimed that censorship was contrary to the noble liberties enshrined in the *Tripartitum*,[9] i.e. the right to communicate their ideas freely; on the other hand, they stressed that censorship of the content to be published was an obstacle to the progress of the country and was explicitly harmful to the spread of culture.

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[3] KELEMEN, R. Sajtószabadság vagy hadiérdek? – Az első világháború dilemmája. *Katonai jogi és hadijogi szemle*, 2, 2014, č. 2, pp. 70–71.

[4] On the history of the various Indexes, see GOSZTONYI, G. *Cenzúra Arisztotelésztől a Facebookig*. Budapest: Gondolat Kiadó, 2022, pp. 45–49.

[5] RADY, M. *The Habsburgs: The Rise and Fall of a World Power*. London: Penguin Books Ltd, 2020, pp. 234–243.

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In the reformist Parliament of 1825,[10] several similar speeches were written onto the pages of history. Still, they did not essentially express the intention to abolish censorship but instead to regulate the issue by acts, not decrees. Likewise, some suggested that the censors should not be only Catholic, but this was not heard at the time. The government's position was clear: politics should be closed to the public.

However, this position did not last long: in the Diet of 1832–1836, the position of the progressive counties was clearly that the press should be free, but they also wanted to introduce a system of *ex-post* responsibility instead of *ex-ante* control. At the same assembly, the need to create a newspaper in Diet was also raised,[11] which was seen as a way of satisfying the needs of interested *citizens* for information.

Not independently of the changing political and historical situation in Europe, a new strategy of government control can be identified in the Parliament of 1839–1840: "it was recognised that politics could no longer be kept away from the press and that the newspapers, once they had spoken, should be made to speak in the government's interest."[12] In this spirit, newspapers were allowed to report from the Diet, albeit still without the names of the speakers.[13] The issue of censorship was constantly on the agenda during the whole period. At the Parliament of 1843–44, Lajos Batthány highlighted as one of the main problems that too much depended on the censor, i.e. the same content could get caught up in one of their filters and slip through another, thus pushing valuable ideas awaiting publication into the realm of total unpredictability. At the same Diet in the House of Lords, however, it was argued – in an interesting argument for posterity – that censorship was a legitimate content-limiting measure since some of the county's documents might be illegal.[14] A characteristic feature of these few years was that while in Hungarian-language works published abroad, the institution of censorship itself was attacked, in works published in Hungary, to avoid direct confrontation with the government, the censors were the focus of the attacks, rather than the institution.

The heated situation forced most counties to reconsider their position, so "even the conservative counties changed their position (...) In 1843/44, almost the whole country wanted freedom of the press."[15] The two major parties of the time, the *Konzervatív Párt* (Conservative Party) and the *Ellenzéki Párt* (Opposition Party), disagreed on what the principal objections against the government should be: the Conservative Party did not take an open position on the issue and seemed content with

[10] HALMOS, F., KUSZÁK, Á., MÉZES, M. (eds.). *A magyarság kézikönyve*. Budapest: Pannon Könyvkiadó, 1993.

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[13] Ibid.

[14] Ibid.

[15] HOMOKI-NAGY, M. A sajtószabadság kérdése Both Ödön munkáiban. *Acta Universitatis Szegediensis: Acta juridica et politica*. 37, 1987, č. 1–22, pp. 357–358.

some kind of partial exemption for certain works from prior control and censorship, the Opposition Party considered the freedom of the press to be the minimum of constitutionalism. Two bills were drafted within the Opposition Party: one of these was by László Szalay and Lőrinc Tóth, while the other – which wanted more radical changes – was by József Irinyi. At the same time, we must remember that, according to Ödön Both, our reformers did not wish for unrestricted freedom of the press since "there is a no more dangerous enemy of freedom than the freedom of the press when abused by the rightful."[16]

How did József Irinyi become a champion of press freedom? One step was undoubtedly to prevent the publication of his travel notes. As was the practice at the time, Irinyi made extended visits to Germany, France and England, and he wanted to report his experiences to the public in writing. Censorship, however, would have mutilated the work for publication to the point where it would have been almost incomprehensible. As the censor put it, "neither its direction, nor its purpose, nor its mode of discussion, nor its principles, nor even its ideas in general, can be published". The reason for censoring the work was undoubtedly the comparison of the situation at home and abroad. Still, the fact that Irinyi did not merely offer the usual real travelogue but that the work was, in his view, "a collection of several political articles, not exactly closely related to each other."[17] As Mihály T. Révész put it, "his writings were political snapshots of the public events of the capitals, which were also offered as models for the Hungarian home, but at least presented as such."[18] István Fenyő quotes a review from that time in the *Irodalmi Őr* (Literary Guard) that the work "contains so many unusual, courageous, new, radical ideas and views that the reader who is not used to such things here will almost tire of it ... genius, sharpness and precision cannot be denied from the author."[19]

All this annoyed Irinyi to such an extent that a year later, in 1847, he published the book under his own name and at his own expense in Germany. Publishing the volume under his own name was also risky because he put an open letter at the beginning, addressed to Count György Apponyi, the Hungarian Chancellor of that time, in which he spoke out clearly and scratchily against all forms of censorship. "As I am forced to send this present work, after more than eleven months of trial and waiting, and unable to get it through the censorship, to Leipzig[20] for investigation, I have the courage, with all due respect, to raise a voice of complaint before your Excellency, the head of the government of our country at this time, against the censorship which is

[16] BOTH, Ö. ref. 6, p. 31.

[17] IRINYI, J. ref. 5, p. 5.

[18] RÉVÉSZ, T. M. Irínyi József (1822–1859). In: *JOG.történet. Az MTA–ELTE Jogtörténeti Kutatócsoport (ELKH) blogja* [online]. 21 March 2022, p. 1 [cited on 29 Oct 2022]. Available at: <http://mtajogtortenet.elte.hu/blog/revesz-t-mihaly-irinyi>

[19] FENYŐ, I. Tájékozódás a nagyvilágban: Útirajzirodalom. Irinyi József. In: PÁNDI, P. (ed.). *A Magyar Irodalom története III.* Budapest: Akadémiai Kiadó, 1984, p. 578.

[20] The place of publication finally was Halle.

practised in our country with an absurd excess".[21] Irinyi's bitterness, however, is perhaps best expressed in these lines: "Elsewhere the collegium of censorship is a body from which one can expect something, but at us, it is the death of a work that comes before the collegium."[22]

3. "A truly complicated machine of arbitrariness"[23]

Irinyi's work – perhaps it can be said that it was not necessarily the travel descriptions but the open letter that made it so famous – received a great response, and the author was invited to contribute to the *Ellenőr* (Inspector) edited by József Bajza, in which the colourful Hungarian reform opposition was represented.[24] The book was published by the *Pesti Ellenzéki Kör* (Pesti Opposition Circle), a merger of the *Nemzeti Kör* (National Circle) and the *Pesti Kör* (Pesti Circle). It was intended to be published as an art-scientific-political *almanach* instead of the art album it had previously planned. The volume, also printed in Germany in 1847, included an article by Irinyi entitled "On Press Act".

The text is almost a love letter to freedom of the press: it seems clear to Irinyi that sooner or later, freedom of the press will be achieved in Hungary, the same way as the use of the Hungarian mother tongue has been achieved, but it is also clear to him that the freedom of the press cannot be delayed: "The sooner we hurry with the time, with the introduction of freedom of the press, the sooner we will get used to it. If we had had it half a century before, everything would have been fine. If we get it today, we will sooner emerge from the pains of transition."[25] His argument is based on constitutional law: he considers preliminary censorship of the content to be published to be incompatible with constitutional life since, in his view, restricting this most important fundamental right would undoubtedly work against social participation. In addition, unlike many of his contemporaries, he is not willing to concede on this issue since, as he writes, "preliminary censorship is incompatible with real constitutional life. As certain as two times two; four. Any bargaining on this part is incompatible with the idea of constitutionalism."[26]

There is also an appealing idea in the text, based on 21st-century logic, as Irinyi argues at length for the question of *ex-post* responsibility rather than prior investigation. For him, this means that the content already published would be subject

[21] IRINYI, J. ref. 5, p. iii.

[22] Ibid., p. iv.

[23] IRINYI, J. Sajtótörvényről. In: BAJZA, J. (ed.). *Ellenőr. Politicai zsebkönyv a' Pesti Ellenzéki Kör megbizásából*. Germany, 1847, p. 101.

[24] As Róbert Hermann notes, "of the big names, perhaps the only ones missing were Eötvös and Wesselényi, who by this time had retired from the daily political battles." HERMANN, R. Az „Ellenőr" – egy ellenzéki zsebkönyv születése. *Századok*, 144, 2010, č. 3, p. 520.

[25] IRINYI, J. ref. 21, p. 95.

[26] Ibid., pp. 100–101.

to scrutiny, and if it is found to be illegal, the person responsible for its publication would be subject to legal proceedings. As Irinyi puts it: "For it is said, and this is the main defence: press laws may be strict, but what is the point of punishing someone if he has already published something; one could say that he must be prevented from doing harm, so there must be a prior investigation. This is a somewhat pleasing statement, it is true, but it is not enough. Constitutional life requires that a man should be given a chance to act, and if he makes a mistake, he should be punished, not that he should be deprived of the chance to act, so that he may not make a mistake."[27] The *ex-post* responsibility would have been embodied in a graduated system in which the author, the newspaper and/or magazine editor, the publisher, and the printing press owner could have been held liable. In addition, Irinyi envisaged a joint[28] liability system, with the exception of the owner of the printing house.[29]

This is further complicated, in Irinyi's view, by what we would now identify with the question of self-censorship: if the author knows in advance that, on the one hand, the institution of censorship itself exists, and on the other hand, that the behaviour and decisions of individual censors cannot be calculated in advance, then "a truly complicated machine of arbitrariness" is created, where the author tries to adapt to it and to invent in advance the uninventable. In this way, with the whole machinery of arbitrariness, „the creative mind becomes the censor of its own work!"[30] If we examine in detail what Irinyi wishes to achieve in connection with the above, it is clear that his whole train of thought is based on the complete prohibition of preliminary auditing, i.e. prior censorship. Irinyi considers that to be "a real massacre of the mind."[31]

It should also be emphasised that Irinyi considered it essential not only to settle substantive law issues but also to examine and regulate procedural issues since substantive law rules can be useless if procedural law does not help them to be implemented. In this context, the text refers to the establishment of a jury in press trials, which is described as a "court capable of guaranteeing civil liberty, following the examples of England, America and France"[32] and „because it is impossible to define each case of press misdemeanour in the law."[33] Irinyi notes, however, that if the – at that time non-existent – Code of Criminal Procedure could not be drafted in a sufficiently short time, the establishment and operation of an *ad hoc* press jury would be acceptable to him, since "in no case can a press case be tried by less than a jury."[34]

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[27] Ibid, pp. 99–100.

[28] Ibid., Art. 17, p. 112.

[29] In the context of joint liability, it is worth quoting Ödön Both, who criticised the idea, saying that "this elevates the publisher or editor to the position of censor of the writer." BOTH, Ö. ref. 6, p. 35.

[30] IRINYI, J. ref. 21, p. 101.

[31] Ibid., p. 94.

[32] BOTH, Ö. ref. 6, p. 37.

[33] IRINYI, J. ref. 21, p. 106.

[34] Ibid., p. 108.

It should be pointed out, however, that he sees offences committed against the King or a member of the royal family through the press as being dealt with not by a jury trial but by a Parliamentary Court, proposed by the House of Commons. Irinyi took a rather strict stance on the complete reform and restructuring of the judicial process in relation to press offences: the *de lege ferenda* proposal at the end of the text is a twenty-five-point press bill, a significant part of which deals with offences committed and punishable through the press. The maximum penalties are set at between 4,000 Forints and five years imprisonment,[35] which is much stricter than the legislation adopted later.

Irinyi mentions the deposit for the establishment of a newspaper only once, but he does not oppose it: *"I find it consistent with requiring from the political newspapers a certain amount of deposit, out of which, in case of offence, the fine imposed may be paid, and, being mutilated, it may always be replenished."*[36]

It is fascinating to note that in certain cases, despite his constant advocacy of the fight against censorship, he considers its use acceptable, namely against persons who "with uncharacteristic fury, are perpetually passionate in their agitation, spreading baseless and malicious slander."[37] Against such persons, as a judicial sanction, he sees the imposition of a preliminary censorship acceptable "for a certain period of time."[38] But he also feels that this concession does not fully coincide with his thinking, so he indicates that "if this form of punishment is, as I believe, incompatible with freedom of the press, it can be abolished later."[39]

The text published in the *Ellenőr* (Inspector) is not short of *bon mot*s that still make the reader laugh, and it is easy to imagine the impact these pictorial descriptions might have had in the pre-Internet age. One such sentence is "censorship is to a constitutional government as murder is to a chivalrous man",[40] while another is a caustic criticism of the censors themselves, stating "there are censors who are a real insult to be entrusted with the judgement of intellectual works, as who could only be employed to lead a herd of sheep."[41] The same ironic overtone appears in the section where Irinyi polemicises that even the government would gain by abolishing the preliminary censorship since it would no longer have to pay for its secret spy network, as "we would say out of all our desires, wishes, thoughts, hopes ourselves."[42]

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[35] Ibid., Art. 12, p. 111.

[36] Ibid., p. 109.

[37] Ibid.

[38] Ibid.

[39] Ibid., p. 110.

[40] Ibid., p. 100.

[41] Ibid.

[42] Ibid., p. 106.

4. "I am perfectly free from the claim that nothing can or should be done about it."[43]

As we know from history, József Irinyi was also at the centre of events in March 1848. "It was his hand that gave final shape to the famous *Tizenkét Pont* (Twelve Points)",[44] the first point of which called for freedom of the press and the abolition of censorship. On the morning of 15 March 1848, the crowd arrived at the printing house of Landerer and Heckenast with the *Nemzeti Dal* (National Song) and the *Tizenkét Pont* (Twelve Points), but without censorship permission, where (probably) József Irinyi uttered the famous words: "We at this moment seize this press in the name of the people and demand the printing of our manuscripts."[45] The pathos of the events and the patina of history does not diminish the fact that Alajos Degré – according to Gyula Illyés – recalled the events in a slightly different way:

> *"When the young people marched into the printing house to print the Nemzeti Dal (National Song) (which, by the way, the censor could find nothing wrong with), Landerer said dryly: Impossible; it doesn't have permission. We looked at one another; we didn't know how to do it. Landerer whispered: Seize the press."*[46]

The youngsters of the events in March and the celebrating crowd behind them thus *de facto* won freedom of the press, which was *de jure* confirmed the next day, 16 March 1848, by the provisional decree of the Council of the Governor. According to the first point of the decree, „the press shall operate freely without any prior censorship." The decree was communicated to the printing press owners on the same day and was read out the next day, 17 March, at the Pest City Assembly.

A few days later, on 20 March 1848, Bertalan Szemere submitted a draft press law to the Parliament, the first version of which would have required a substantial deposit for establishing a newspaper and in which the definition of press offences was not listed. Therefore the citizens could hardly have considered it sufficiently well-founded. As Antal Csengery put it the following day in the newspaper *Pesti Hírlap* (Pest Gazette):

> *"The press bill has just arrived in our capital from the Parliament.*[47] *We don't know if it is a proposal or a binding law. It was read today in the Pest County Commission before a large audience. The excitement it caused is indescribable. It has spread like lightning throughout the capital. The dissatisfaction was general."*[48]

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[43] Ibid, p. 110.

[44] RÉVÉSZ, T. M. ref. 16, p. 2.

[45] KOSÁRY, D. A pesti forradalom és a sajtószabadság. In: KOSÁRY, D., NÉMETH, G. B. (eds.). *A magyar sajtó története. II/1.* Budapest: Akadémiai Kiadó, 1985, p. 39.

[46] ILLYÉS, G. *Petőfi Sándor*. Budapest: Szépirodalmi Kiadó, 1963, p. 182.

[47] The Parliament was held in Pozsony (Bratislava).

[48] Pesti Hírlap, 23 March 1848, p. 247.

The deposit for political newspapers would have been 20,000 Forints, while in all other cases, it would have been 10,000 Forints, to which András Koltay notes that "this was an increase compared to the actual legal deposit of 15,000 Forints."[49] It was mainly because of the problems with the deposit that Irinyi spoke against the draft at the Pest City Assembly. When the proposal officially arrived in Pest on 22 March, after being read out in the Pest County Public Committee, the outraged audience – with Irinyi's tacit support – burned the text.[50]

Szemere changed his mind due to the above, and the original bill was modified. It was re-submitted to the Parliament, which adopted it on 28 March, and presented to the Emperor, Ferdinand V, on 11 April. In the amendment, and thus in the adopted text of the law, which became the first Hungarian Press Act, the scope of press offences was clarified, and the deposits were cut in half.[51] And although Mihály T. Révész rightly identifies the "middle way solutions"[52] of the law, the preamble states the most crucial thing for contemporaries: "the previous investigation was abolished forever, and freedom of the press was restored."[53]

5. Concluding thoughts

József Irinyi played a significant role in the drafting of the first Hungarian Press Act: Szemere, who – some say – had been working on the draft press law since early 1848, was familiar with his article in the *Ellenőr* (Inspector), and although he did not use all of it, we can certainly take this text into account as a source of inspiration. However, it is also certain that in the eyes of the general public Irinyi's name is not commonly associated with the legislative questions in Hungary but rather with the image of the dynamic youngsters of the events in March. However, everything Irinyi did in the period before the Press Act – as we now know it – had a noticeable influence on the events. Irinyi is an undeservedly marginalised figure in the struggle for freedom of the press in Hungary and one who deserves to have his name inscribed on the golden pages of the annals of history.

To conclude these processes, it is worth turning again to Szemere, who – as the Minister of the Interior – issued a decree of 28 April 1848 to the heads of the local administration,[54] in which he describes the tasks he expects after the adopted Press Act. Nothing says it better than the preamble ("The press is free in our country

[49] KOLTAY, A. Sajtó és jog 1848/49-ben. In: HORVÁTH, A., HAJDÚ, G. (eds.). *Magyar jogtörténeti tanulmányok – pályakezdő dolgozatok*. Budapest: Neolife, 2004, p. 67.

[50] BOTH, Ö. ref. 6, p. 63.

[51] On the regulatory solutions of the adopted law, see RÉVÉSZ, T. M. *A sajtószabadság érvényesülése Magyarországon, 1867–1875*. Budapest: Akadémiai Kiadó, 1986, pp. 15–16.

[52] RÉVÉSZ, T. M. Sajtójogi felelősség kérdése a magyar jogban. *Jogtörténeti Szemle*, 4, 1992, č. 1, p. 49.

[53] Act 18 of 1848.

[54] Pesti Hírlap, 7 May 1848, p. 409.

too."[55]) that for a brief moment in 1848, the long struggle for freedom of the press may have felt like it had finally come to a turning point, and that two times two is really four. In this, Joseph Irinyi had outstanding merit.

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[55] Ibid.

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Návrhy „Codex Cambio-Mercantilis“ koncom 18. storočia: prvé pokusy o kodifikáciu uhorského obchodného práva

Drafts of the “Codex Cambio-Mercantilis” in the Late 18th Century: First Attempts of Codification of Hungarian Commercial Law

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Abstrakt: V roku 1779 panovníčka Mária Terézia nariadila súdu Kráľovskej kúrie, aby pripravila návrh zákonníka, upravujúceho zmenkové a iné obchodnoprávne vzťahy na základe príslušných rakúskych zákonov už platných na území tzv. Uhorského pobrežia. Týmto kráľovským nariadením sa začali kodifikačné práce uhorského obchodného práva. Dve verzie „Codex Cambio-Mercantilis“ boli pripravené v rokoch 1781 a 1787. Tieto slúžili ako základ kodifikačných prác regnikolárnych výborov zriadených snemom v rokoch 1790/91. Právny výbor v spolupráci s uznávaným právnikom Mátyásom Józsefom Paravitsom z Fiume pripravil v roku 1795 tretiu verziu zákonníka. V dôsledku politických zmien po Francúzskej revolúcii ho snem nemal možnosť prijať, ale po roku 1825 bol prepracovaný novozriadeným výborom. Ani toto posledné vydanie Codex Cambio-Mercantilis z roku 1830 však nebolo prijaté. Namiesto prijatia jednotného obchodného zákonníka sa snem v rokoch 1839/40 napokon rozhodol upraviť najdôležitejšie časti obchodného práva v samostatných zákonoch.

Kľúčové slová: kodifikácia; obchodné právo; zmenkový zákon; právne dejiny; uhorské právne dejiny.

Abstract: In 1779, queen Maria Theresa instructed the Curia to prepare a draft code for bills of exchange and other commercial law relationships, based on the relevant Austrian laws already in force in the territory of the so-called Hungarian Littoral. With this royal order, the codification works of Hungarian commercial law started. Two versions of a “Codex Cambio-Mercantilis” were prepared by the Royal Table, in 1781 and 1787. These served as the basis of the codification works of the regnicolar committees established by the Diet of 1790/91. The legal committee, in cooperation with an acknowledged lawyer of Fiume, Mátyás József Paravits, prepared a third version of the code in 1795. Due to the political changes after the French Revolution, the Diet had no possibility to adopt it, but after 1825 it was re-elaborated by a newly established committee. This last edition of the Codex Cambio-Mercantilis of 1830

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was not adopted by the Estates either. Instead of adopting a uniform commercial code, the Diet of 1839/40 finally decided to regulate the most important parts of commercial law in separate laws.

Keywords: Codification; Commercial law; Law for Bills of Exchange; Legal History; Hungarian Legal History.

1. The first two draft commercial codes prepared by the Curia in 1781 and 1787

After the death of Joseph II (r. 1780–1790), his brother and heir, Archduke Leopold convened the Diet of the Hungarian Estates for 6 June 1790 to Buda, for an assembly to be held the first time since 1765.[2] As the main topics of this convention were the coronation of the new king, the election of the new Palatine (Archduke Alexander Leopold) and the reinstatement of the Hungarian constitution *de facto* suspended by Joseph II, and thus the Estates had no time to discuss further matters of legislation in proper details, the Diet finally decided to establish "regnicolar committees" in order to elaborate them "systematically" and to present them to the subsequent session of the parliament.[3] According to the original plan of the Estates, regulation of commercial law would not have been on the agenda,[4] but Leopold II (r. 1790–1792) sent a *rescriptum* to the Diet on 9 January 1791 in point b) of which he informed the Estates that the Curia (the highest forum of jurisdiction of the Kingdom of Hungary) had already prepared a "bill of exchange and commercial code".[5] According to the final, consolidated text of Act LXVII of 1790/91, the tasks of one of the newly established committees, *Deputatio Juridica*, were supplemented with the words *"Leges item in negotio cambiali, et navigationis"*.[6]

Indeed, as referred to in king Leopold's letter, in 1779 queen Maria Theresa (r. 1740–1780) instructed the Curia to prepare in cooperation with (or with the consent of) the Governorate of the Hungarian Littoral in Fiume (now Rijeka, Croatia) a comprehensive bill that could then serve as a widely accepted fundamental norm

[2] RADY, M. *Customary Law in Hungary. Courts, Texts, and the Tripartitum*. Oxford, 2015, p. 215.

[3] BÉRENGER, J., KECSKEMÉTI, K. *Országgyűlés és parlamenti élet Magyarországon. 1608–1918* [Diet and Parliamentary Life in Hungary, 1608–1918]. Budapest, 2008, p. 191; HEIL, K. A jogügyi rendszeres bizottsági munkálat szerkezeti vázlata [A structural scheme of the systematic work of the juridical committee]. *Jogtörténeti Szemle*, 3–4/2019, 75–80, p. 75; MÁLYUSZ, E. A reformkor nemzedéke [Generation of the Reform Era]. *Századok* 57, 1/1923, 16–75, p. 19.

[4] For the proposal of the Estates see *Naponként való jegyzései az 1790-dik esztendőben [rendelt] magyar Ország Gyűlésének* [Diary of the Diet of the Hungarian Estates of Year 1790]. Vienna, 1791, p. 503; *Az 1790-dik esztendőben Budán tartott Ország Gyűlésének alkalmatosságával írásba bé-nyújtott, s köz tanátskozás alá vett dolgok és munkák, mellyek azon Ország Gyűlésének naponként való jegyzéseihez tartoznak* [Things and Works Presented and Discussed at the Occasion of the Diet of Year 1790, Enclosed to the Diary of the Same Diet]. Vienna, 1791, pp. 591 and 594–595.

[5] *Az 1790-dik esztendőben...*, p. 626.

[6] For the Latin text of this Act see *Decretum generale inclyti Regni Hungariae partiumque eidem annexarum*. Tomus II, Buda, 1844, p. 216.

(*"cynosura"*) for all local and foreign merchants.[7] In addition to this, Joseph II made clear in his instruction issued in 1786 that the two Hungarian bill of exchange tribunals (he intended to establish a bill of exchange tribunal in Buda, in addition to a similar court already working in Fiume)[8] should apply the same law in the widest possible range as the courts of Austria.[9] Based on these two royal instructions, the Curia prepared two draft laws, the original one in 1781 and a revised version in 1787. Although these codification works were interrupted by the death of Joseph II,[10] fortunately both drafts are available in their original form in the archival fond of *Deputatio Juridica* in the Hungarian National Archives, thanks to the fact that they were sent to the Diet by Leopold II on 9 June 1791, attached to his above mentioned *rescriptum*.[11]

For the preparatory works, the Curia was provided with copies of all relevant laws in force in the Austrian provinces, in order to promote the widest possible legal harmonisation among the countries of the dynastic empire. Consequently, the codifiers could utilise Emperor Charles VI's *Wechselordnung* (Bill of Exchange Ordinance for Lower Austria) of 1717 in its version extended to all Austrian provinces in 1722,[12] and the renewed version thereof as issued by Maria Theresa in 1763 (*Erneuertes Wechselpatent*),[13] also in its Italian language version applied in Fiume under the title *Editto di Cambio*.[14] Furthermore, for the preparation of the regulation of commer-

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[7] *Opinio Excelsae Regnicolaris Deputationis motivis suffulta, pro pertractandis in consequentiam Articuli 67: 1790/1 elaboratis Systematicis Operatis Articulo 8. 1827. exmissae, circa Objecta ad Deputationem Juridicam relata.* Editio Secunda. Bratislava, 1831, document No. 5 (*Codex Cambio Mercantilis*), p. 3.

[8] The bill of exchange tribunal of Fiume was established by Emperor Charles VI's Privilege of 1725. For the text of the Privilege see BOROVSZKY, Samu: *Magyarország vármegyéi és városai. Fiume és a magyar – horvát tengerpart* [Counties and Cities of Hungary: Fiume and the Hungaro-Croatian Coast]. Budapest, 1900, pp. 68–69. The bill of exchange tribunal of Buda has finally not been set up. See BOZÓKY, G. *Magyar váltójog* [Hungarian Bill of Exchange Law], Vol. 1, Pécs, 1926, p. 69.

[9] ECKHART, F. *A bécsi udvar gazdaságpolitikája Magyarországon, 1780–1815* [Economic Policy of the Court of Vienna in Hungary, 1780–1815]. Budapest, 1958, p. 167.

[10] ECKHART, 1958, p. 167.

[11] SÁNDORFY, K. *Törvényalkotásunk hőskora. Az 1825–1848 évi reformkorszak törvényeinek története* [The Heroic Age of our Legislation: A History of the Laws of the Reform Era of 1825–1848]. Budapest, 1935, p. 107. In the Hungarian National Archives see under MNL OL N 105 Fasc. VI. 37. C.

[12] MNL OL N 105 Fasc. XVI. No. 108. SCHENNACH, M. P. *Rechtsgeschichte der österreichischen Wirtschaft*. Wien, 2022, p. 33. About its background see KÉPES, G. A magyar kereskedelmi jogi kodifikáció előtörténete 1792-ig [Prehistory of the codification of Hungarian commercial law] in MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarországa a jogtörténelem sodrásában* [Interactions: Europe and Hungary in the turmoil of legal history]. Budapest, 2021, 159–166, p. 160.

[13] MNL OL N 105 Fasc. XVI. No. 111.

[14] MNL OL N 105 Fasc. XVI. No. 118. See KÉPES, G. An overview of the Hungarian private law codification until 1918, with special regard to the codification aspects of a separate commercial law in ŠVECOVÁ, A., LANCZOVÁ, I. (eds.). *Právno-historické trendy a výhľady V. – Legal-Historical Trends and Perspectives V.* Trnava, 2020, 45–76, p. 49.

cial and bankruptcy law, they could use a German-Italian bilingual edition of Maria Theresa's *Neuverfasste Handlungs- und Fallitenordnung* of 1758,[15] a revised and more detailed version of Emperor Charles VI's *Fallitenordnung* (Bankruptcy Decree) of 1734.[16] Finally, for the establishment of the procedural rules for commercial litigation, they had been provided with a similar bilingual edition of Maria Theresa's judicial edict of 1758 issued for the commercial tribunals of Inner Austria and the Maritime Consulate of Trieste.[17]

These served, together with some further decrees and instructions,[18] as the basis of the *elaboratum* of the Fiume Deputation prepared on 21 March 1781,[19] the *reflexiones* of the Governorate of the Hungarian Littoral incorporated in the minutes signed by vice-governor *Pál Almásy* (1749–1821),[20] and the first draft commercial code prepared by the Curia in 1781 under the title *Codex Cambio-Mercantilis*.[21] We may know from some comments added to the revised draft of 1787 that also this first version of 1781 was elaborated by the lower forum of the Curia, the *Tabula Regia* (Royal Table).[22] The draft of 1781 consists of a preamble and seventeen articles. The articles are not divided into parts (titles), and the procedural and material norms follow each other without any strict logical order. The first eight articles deal with the establishment of bill of exchange and commercial tribunals, including the rules of their procedure, too. From § 3 of Article 1 we may know that, according to the original plan, the already functioning tribunal of Fiume would have been supplemented with further eight first-instance commercial courts to be established in the cities of Pozsony (Pressburg, now Bratislava), Sopron, Buda, Kassa (Košice), Debrecen, Újvidék (Novi Sad), Károlyváros (Karlovac) and Temesvár (Timişoara).[23]

Article 9 is about classical commercial law subjects, while Articles 10–13 interestingly return to the question of tribunals and their procedural order, followed by bill of exchange law (Article 14), taxes and fines (Article 15), bankruptcy law (Article 16), and finally – again, with a hardly understandable logic – the rules of bookkeeping (Article 17). The norms concerning commercial companies can be found under §§ 80–92 of Article 9. It can be clearly identified that these are strongly based on the *Neuverfasste Handlungs- und Fallitenordnung* of 1758. A company is inter-

[15] MNL OL N 105 Fasc. XVI. No. 110.

[16] SCHENNACH, 2022, pp. 33–34; *Tagungsbericht Zur Geschichte des Gesellschaftsrechts in Europa*. 08.11.2002, Wien. [last access: 17.05.2022]. Available at: http://hsozkult.geschichte.hu-berlin.de/index.asp?id=132

[17] MNL OL N 105 Fasc. XVI. No. 109.

[18] MNL OL N 105 Fasc. XVI. No. 112–117.

[19] *Elaboratum Deputationis Fluminensis*, MNL OL N 105 Fasc. XVI. No. 105.

[20] *Reflexiones Gubernii in Elaboratum Deputationis Fluminensis*, MNL OL N 105 Fasc. XVI. No. 106.

[21] MNL OL N 105 Fasc. XVI. No. 104.

[22] See e.g. at § 1 of the draft code of 1787: „*Operis Curiae Regiae § 2° modificat*", MNL OL N 105 Fasc XVII No 123, p. 3.

[23] MNL OL N 105 Fasc. XVI. No. 104, p. 6.

preted as an association of merchants based on a contractual agreement. Similarly to the Austrian regulation,[24] it would have been possible, by virtue of § 86, that the names of some of the members would have been known by the court only, but they would not have been indicated in the company name. Such members were called "silent" members (*socios tacitos*). They would not have been liable for the debts of the company further to their contribution to the starting capital of the company, while the members indicated in the name of the company (called *socios apertos*, "open" members) would have had several unlimited liability. The term "company" is referred to in the draft with the Latin word *societas* and the Italian word *compagnia*[25] as well, and these words are used as synonyms, i.e. there is no terminological differentiation in the text of the draft between general and limited partnerships.

The second version of the draft code, revised by the Royal Table in 1787,[26] is more sophisticated. As we can see from its long subtitle and also from some of the comments attached to the beginning of its articles, this was prepared and supplemented on the basis of the Austrian laws (simply referred to as *"Constitutio germanicarum"*) and the above cited draft code itself (of 1781). At the beginning of each article, we can read whether it was adapted from an earlier document (for example "*ex operis Curiae Regiae*") or it contains a completely new regulation. It is striking that all the procedural law regulations are missing. The reason of this is that Emperor Joseph II intended to incorporate them in its uniform procedural ordinance issued in 1785 (the famous *Novus Ordo Judiciarius*). This fact is indeed referred to in several places of the draft, and we can also find the proposal of 20 March 1787, and the report of 26 May 1787 of the Royal Table in the archival fond of *Deputatio Juridica*, concerning the application of the *Novus Ordo* to the procedure of the commercial tribunals.[27]

The draft code of 1787 does not have a preamble or preface, however, it is divided into three parts. Part I is dealing with the commercial tribunals and their relationship with the already existing Austrian commercial courts, Part II contains the norms of commercial and bankruptcy law, while Part III is the bill of exchange ordinance. Part I consists of eight articles and 81 §§. A considerable difference between this and the earlier draft is that only two further commercial and bill of exchange

[24] SCHENNACH, 2022, p. 34.

[25] The word *compagnia* probably derives from the expression *cum panis* ("with bread"), referring to the fact that the members of the family (in this sense also company) were eating and slicing bread together. See e.g. STAGNO D'ALCONTRES, A., DE LUCA, N. *Le società, Tomo I: Le società in generale, le società di persone*. Torino, 2015. G. Giappichelli, p. 5. and the relevant article of the *Enciclopedia Italiana di Scienze, Lettere ed* [last access: 25.04.2022]. Arti at: https://www.treccani.it/enciclopedia/compagnia_res-6b35e7ad-8bad-11dc-8e9d-0016357eee51_%28Enciclopedia-Italiana%29/ The first general partnerships were constituted via succession: the sons inherited their father's business and were continuing to operate it jointly. See MÁRKUS, E. Kereskedelmi társaságok [Commercial companies], in FÖLDI, A. (ed.). *Összehasonlító jogtörténet* [Comparative Legal History]. Budapest, 2018, 579–605, p. 589.

[26] MNL OL N 105 Fasc. XVII. No. 123.

[27] See documents No. 98–99 in MNL OL N 105 Fasc. XV.

courts would have added to that of Fiume: in Pest and Karlovac. Part II is quite sophisticated, especially the company law and bankruptcy regulations (Articles 11–18) elaborated on the basis of the *Neuverfasste Handlungs- und Fallitenordnung* of 1758 are much more detailed and structured than the similar provisions of the first draft. Furthermore, Part III of the revised draft code (based on the *Erneuertes Wechselpatent* of 1763) can already be considered as a proper bill of exchange code. If we make a comparison between the drafts of 1781 and 1787, we may conclude that the latter version of the *Codex* is a more thorough, professional and modern legal work than its predecessor used to be.

2. Commercial and bill of exchange law codification works between 1791 and 1795

2.1 Establishment of the regnicolar committees, and determination of their sphere of competence

The Diet convened in 1790 for the coronation of Leopold II to the city of Buda, but continuing its work in its ordinary place in Pozsony (Bratislava) from 3 November 1790 until 13 March 1791, established "no less than nine committees" later referred to as the *Deputationes Regnicolares* "to work out a thorough legislative settlement".[28] The competences and tasks of the committees were drafted at the session of 10 December 1790 of the Lower Chamber.[29] According to this document, the king's *propositiones* (legislative proposals) and the *gravamina et postulata* (grievances and counterproposals)[30] of the counties "partially contained subject matters that would need a systematic work that might require more time to be fulfilled" (*in parte talia deliberationis objecta contineant, quæ systematicam, et nonnisi longiori tempore perficiendam elaborationem requirunt*).[31] According to the unanimous opinion of eminent Hungarian legal historians researching this period, the term *systematica* should be interpreted as an authorisation of (and instruction given to) these committees to carry out codification works in a modern sense.[32]

By virtue of the proposal of the Lower Chamber dated on 10 December 1790, the tasks of the commercial committee would be listed in six points. All these were matters of national economy, without exception, such as the regulation of import duties,

[28] RADY, 2015, p. 217.

[29] *Naponként való jegyzései az 1790-dik esztendőben...*, p. 503.

[30] RADY, 2015, p. 219.

[31] *Az 1790-dik esztendőben...*, p. 591.

[32] See e.g. HAJDU, L. *Az első (1795-ös) magyar büntetőkódex-tervezet* [The first draft criminal code (1795)]. Budapest, 1971, p. 91; HEIL, K. A nemesi vármegye és a rendszeres bizottsági munkálatok [The noble county and the works of the systematic committees], in MEGYERI-PÁLFFI, Z. (ed.). *Szuverenitáskutatás* [Research of Sovereignty]. Budapest, 2020, 72–92, p. 91; HOMOKI-NAGY, M. *Az 1795. évi magánjogi tervezetek* [The Private Law Drafts of 1795]. Szeged, 2004, pp. 12–13 and 17.

development of commerce, industry, and infrastructure.[33] The Estates intended the *Deputatio Juridica* to be entrusted with the more complex works of codification of some specific areas of law. According to the original wording of the proposal, these would have been determined in the following five points: (1) coordination of competences of the courts in line with point 12 of the king's *propositiones*; (2) amending the procedural order of the judiciary in order to make it more efficient; (3) preparation of private law drafts in order to guarantee a higher level of legal certainty especially for the landlords; (4) preparation of a draft criminal code; and (5) regulation of the state of orphans in cooperation with the political committee.[34] As it can be seen from this list, the preparation of a bill of exchange and commercial code, at least according to the original plan of the Estates, was not part of the competences of the commercial and legal committee either.

However, as we have already seen, on 9 January 1791, Leopold II submitted a royal letter of response (called *rescriptum*) to the Diet about the "wishes" of the royal government. This letter was read out to the deputies of the Estates at the 22 January session of the Lower Chamber by Palatinal Protonotary[35] *János Somogyi*.[36] The king informed the Estates in point b) of the *rescriptum* that "the Curia, at the gracious request of queen Maria Theresa, after having received the opinion of the Governorate of Fiume, had elaborated a bill of exchange and commercial code", and also a newer version thereof was prepared when Joseph II introduced the *Novus Ordo Judiciarius* in Hungary.[37] According to the list of documents attached to the *rescriptum*, all those imperial and royal decrees and instructions were at the same time sent (together with the draft codes of the Curia prepared in 1781 and 1787) to the Diet that had been taken in consideration by the Curia during its commercial law codification works, and the king proposed to the Estates as well to take them into account.[38] These papers, in part manuscripts, in other parts printed documents, can still be found almost completely[39] in the archival fonds of the *Deputationes Regnicolares*.

It is strange, and the author of the present study has no idea on any specific political reason behind it, but neither the final version of the bill of the later Act LXVII of 1790/91 adopted at the session of 8 February 1791[40] contained any reference to the *Codex Cambio-Mercantilis*, neither in the list of competences of the commercial committee, nor in that of the legal committee, just a repetition of the same ques-

[33] See *Az 1790-dik esztendőben...*, p. 594.

[34] *Az 1790-dik esztendőben...*, pp. 594–595.

[35] A traditional office in the Hungarian jurisdiction, see RADY, 2015, pp. 55–63.

[36] *Naponként való jegyzései az 1790-dik esztendőben...*, 504 p.

[37] *Az 1790-dik esztendőben...*, p. 626.

[38] See *Az 1790-dik esztendőben...*, pp. 672–676.

[39] The only document that is missing is a report of Governor of the Hungarian Littoral *József Majláth* dated on 30 July 1781, referred to as MNL OL N 105 Fasc. XVI. No. 107. (The author's comment.)

[40] *Naponként való jegyzései az 1790-dik esztendőben...*, p. 504.

tions as in the proposal of 10 December 1790.[41] However, we are well aware of the fact that the list of tasks to be carried out by the *Deputatio Juridica* has finally been supplemented with the words "*Leges item in negotio cambiali, et navigationis*" in the consolidated text of law published as Act LXVII of 1790/91.[42] All in all, we can draw the conclusion that the Estates did not originally have a plan to prepare a bill of exchange and commercial code in addition to the other series of laws, but it was actually requested by the king, taking in consideration that this codification works had already been completed years before, but the code had not been introduced in Hungary. That is why the above cited short reference (that, indeed, does not contain the word *Codex*) can only be found in the definitive and officially published version of the text of Act LXVII of 1790/91.

The commercial committee, number four in the row of the *Deputationes*,[43] consisted of ten members. Its president became Count *Miklós Forgách* (1731–1795),[44] high lord (*főispán*)[45] of Nitra County, while among the other members we can find the leading Croatian economist and politician of the era *Miklós Skerlecz* (*Nikola Škrlec*, 1729–1799),[46] high lord of Zagreb County and former counsellor of the highest central administrative body of Hungary called "Royal Lieutenancy Council", representing the Croatian *Sabor* at the Higher Chamber of the Diet of 1790/91,[47] and the Governor of the Hungarian Littoral, Count *János Szapáry* (1757–1815), too.[48] *Deputatio Juridica* was listed as committee number six. It was presided by the that-time High Judge (*országbíró*) of the country, Count *Károly Zichy* (1753–1826), serving in lack of Palatine also as the president pro tempore of the Royal Lieutenancy Coun-

[41] *Az 1790-dik esztendőben...*, pp. 824–827.

[42] *Decretum generale inclyti Regni Hungariae partiumque eidem annexarum, Tomus II*. Buda, 1844, p. 216.

[43] *Decretum generale inclyti Regni Hungariae…*, p. 215.

[44] For his biography see PÁLMÁNY, B. *A magyar rendi országgyűlések történeti almanachja, 1790–1812* [A Historical Almanach of the Hungarian Diets, 1790–1812]. Budapest, 2019, pp. 130–131.

[45] RADY, 2015, p. 194.

[46] BENDA, K. Az országgyűlési rendszeres bizottságok munkálatai [Works of the parliamentary systematic committees], in MÉREI, G. (ed.). *Magyarország története, 1790–1848* [A History of Hungary, 1790–1848]. Budapest, 1980, 164–169, p. 168; HEIL, K. Adalékok a magyar borkereskedelem történetéhez [Contributions to the history of Hungarian wine trade], in MEZEY, B. (ed.). *Kölcsönhatások. Európa és Magyarországa a jogtörténelem sodrásában* [Interactions: Europe and Hungary in the turmoil of legal history]. Budapest, 2021, 120–129, p. 124; KOSÁRY, D. Pest-Buda és a Kereskedelmi Bizottság 1791-ben [Pest-Buda and the Commercial Committee in 1791], in *Tanulmányok Budapest múltjából 11.* [Studies on the Past of Budapest, No. 11]. Budapest, 1956, 127–152, p. 129. For a short biography of Miklós Skerlecz see PÁLMÁNY, 2019, pp. 164–165.

[47] SZIJÁRTÓ, I. M. *A diéta. A magyar rendek és az országgyűlés, 1708–1792* [The Diet. The Hungarian Estates and the Parliament]. Budapest, 2005, p. 431.

[48] For his biography see PÁLMÁNY, 2019, p. 359. Szapáry did not attend the Diet as the Governor Fiume and the Hungarian Littoral, but as the high lord of Severin County, because the Governor and the deputies of the city of Fiume were granted with parliamentary representation only by virtue of Act IV of 1807. See ibid., p. 20.

cil.[49] The Diet appointed no less than twenty-one members to this legal committee, from the deputies of the Lower Chamber and the members of the Higher Chamber as well, including the two highest judicial officers of the country after the High Judge himself, Magister Tavernicorum (*tárnokmester*) *Péter Végh* (1725–1807), and Personalis (*személynök*) *József Ürményi* (1741–1825).[50] As we know from the letter written in French by the newly elected Palatine, Archduke Alexander Leopold to his father Leopold II on 11 August 1791,[51] compared to the originally planned schedule (90th day after the last session of the Diet), the committees started to work with some delay, only at the beginning of August 1791.

2.2 Role of Deputatio Commercialis in the preparation of the drafts

As we have seen, by virtue of Act LXVII of 1790/91 the preparation of "laws on the commerce of bill of exchange and navigation" (*Leges item in negotio cambiali, et navigationis*) were laid down as one of the tasks of the legal committee,[52] while the commercial deputation was mandated to elaborate draft laws concerning the development of some specific areas of the economy of the country.[53] However, according to the literature, also the commercial committee would have had an important role in the preparation of the *Codex Cambio-Mercantilis*. We can read the incorrect statement first in a book of Gyula Vargha on the history of the Hungarian bank system that "the introduction of the bill of exchange law was proposed by the commercial committee established by the Diet of 1790, and moreover, this committee prepared a draft commercial code as well",[54] and unfortunately this misunderstanding is reflected in many later works of legal history, too.

Some authors also think to know that the draft commercial code of 1795 was elaborated as a part of the famous series of draft laws on commerce of Miklós Skerlecz, saying that the new draft of the *Codex Cambio-Mercantilis* was prepared by the

[49] For his biography see PÁLMÁNY, 2019, pp. 110–111.

[50] BALOGH, E. Rendszeres bizottságok a magyar büntetőjogi kodifikáció korai történetében [The systematic committees in the early history of the Hungarian criminal law codification]. *Acta Universitatis Szegediensis: Acta Juridica et Politica* 73, 2010, 71–82, pp. 76–78; MÁLYUSZ, 1923, p. 20. For the complete list of members of the two committees see *Decretum generale inclyti Regni Hungariae…*, pp. 217–218 and Act LXVII of 1790/91; with short biographical data: BALOGH, 2010, pp. 76–80; PÁLMÁNY, 2019, pp. 1572–1574. For a more detailed biography of Ürményi and Végh see PÁLMÁNY, 2019, pp. 106–107 and 108.

[51] MÁLYUSZ, E. *Sándor Lipót főherceg nádor iratai* [Documents of Palatine Archduke Alexander Leopold]. Budapest, 1926, p. 447.

[52] GÁBRIŠ, T. Právne dejiny a obchodné právo: subjektívny alebo objektívny systém práva? *Acta Facultatis Iuridicae Universitatis Comenianae* 29, 2011, 89–108, p. 98. HOMOKI-NAGY, 2004, p. 13.

[53] See Point 4 of Act LXVII of 1790/91 and the report of the commercial committee in MNL OL N 104 Fasc. I. No. 1. (*Relatio Deputationis Regnicolaris Commercialis, quoad Objecta Articulo 67. Anni 1791. Regnicolariter sibi delata*), in printed version: *Elaborata Excelsae Regnicolaris Deputationis in Commercialibus Articulo 67. Anni 1791. Ordinatae*. Bratislava, 1826, document No. 1, p. 1.

[54] VARGHA, G. *A magyar hitelügy és hitelintézetek története* [A History of the Hungarian Credit Affairs and Banks]. Budapest, 1896, p. 41.

commercial committee itself.[55] However, if we look at the report of this committee accepted at its last meeting held on 29 January 1793, we can read a summary of the works carried out by Skerlecz in the major part, but partially also by Baron *József Podmaniczky* (1756–1823).[56] In this document of fifteen pages we cannot find a word on the bill of exchange law and about the codification of commercial law. Nevertheless, in 1826, when the complete documentation of the regnicolar systematic committees will be printed (for the Diet of 1825/27), the draft of the *Codex Cambio-Mercantilis* will be placed among the *elaborata* of the commercial deputation,[57] directly before Skerlecz's famous report on the state of economy of Hungary referred to as "a colonial position"[58] entitled *Descriptio physico-politicae situationis regni Hungariae relate ad commercium elaborata*.[59]

We still could not discover the reason behind this, however the fact that the *Codex* was unfortunately inserted in a book containing the projects of economic laws prepared by the commercial committee had an obvious effect on many scholars thinking that the preparation thereof should have primarily been thanked to this *Deputatio* (and to Miklós Skerlecz personally). Actually, Skerlecz was working on projects of external trade and import duties,[60] and had not made any reference in his *Descriptio*, and in his explanatory memoranda attached to the draft laws of Hungarian economy either,[61] to his personal contribution to the preparation of the draft of the *Codex Cambio-Mercantilis*, or even to the fact that this task would still have to be fulfilled.

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[55] See e.g. PAPP, T. A magyar társasági jog fejlődése [Development of the Hungarian company law]. *Acta Universitatis Szegediensis. Acta Juridica et Politica* 58, 2000, 409–434, p. 410. The statement is accepted in many other works on legal history as well (the author's comment).

[56] BERÉNYI, P. *Skerlecz Miklós báró művei* [Works of Miklós Skerlecz]. Budapest, 1914, p. 34; HEIL, 2020, p. 79; MÁLYUSZ, 1923, p. 30; VÖLGYESI, O. Alkotmányos függetlenség és gazdasági szabadság [Constitutional independence and economic freedom]. *Magyar Tudomány* 174, 4/2013, 432–437, p. 434.

[57] KOSÁRY, D. *Bevezetés a magyar történelem forrásaiba és irodalmába. II. kötet: 1711–1825* [An Introduction to the Sources and Literature of Hungarian History, Vol. 2: 1711–1825]. Budapest, 1954, p. 385. See *Elaborata Excelsae Regnicolaris Deputationis…*, documents No. 3–6.

[58] BENDA, 1980, p. 168; HORVÁTH, A. *A részvénytársaságok és a részvénytársasági jog kialakulása Magyarországon* [Companies Limited by Share, and the Formation of the Company Law in Hungary]. Budapest, 2005, p. 151; PAJKOSSY, G. Az abszolutizmus és a rendiség utolsó küzdelmei. Az első reformtörekvések [The last fights between absolutism and the Estates. The first efforts of reform], in GERGELY, A. (ed.). *Magyarország története a 18. században* [A History of Hungary in the 18th Century]. Budapest, 2003, 125–153, p. 136; VÖLGYESI, 2013, p. 434.

[59] *Elaborata Excelsae Regnicolaris Deputationis…*, document No. 7. In original Latin version and Croatian translation see PUSIĆ, E. et al. (eds.). *Nikola Škrlec Lomnički, 1729 –1799.* Vol. 1. Zagreb, 1999, pp. 90–417. In Hungarian translation: BERÉNYI, 1914, pp. 62–115.

[60] HEIL, 2021, p. 124; HORVÁTH, Attila: *A magyar magánjog történetének alapjai* [Fundaments of History of the Hungarian Private Law]. Budapest, 2006, p. 376; KOSÁRY, 1956, pp. 129 and 147.

[61] *Projectum legum motivatum in objecto Oeconomiae publicae et Commercii perferendarum per Nicolaum Skerlecz de Lomnicza elaboratum*. Bratislava, 1826; in Hungarian version: BERÉNYI, 1914, pp. 117–527. In the archives: MNL OL N 104 Fasc. II. No. 3. The *Projecta* themselves can be found in MNL OL N 104 Fasc. III. No. 1. (The *Codex Cambio-Mercantilis* cannot be found amongst them – the author's comment.).

The expression "bill of exchange code" appears only once in an article on the preservation of the freedom of commerce,[62] while the establishment of commercial courts is mentioned also only once in the explanatory memorandum attached to the article on transportation ("indeed, if the commercial courts will be set up…").[63]

Interestingly, it was not clearly determined for the contemporaries either, whether the elaboration of a bill of exchange code was primarily a legal task (i.e. codification) or a commercial matter (i.e. matter of economics). For example, according to Point 93 of the instructions given by Pest-Pilis-Solt County to its parliamentary deputies "Maria Theresa's measure of 1780 [correctly 1779] regarding the establishment of bill of exchange courts throughout the country, can be discussed on the Diet by the commercial *and* legal committees".[64] The author of this paper (also as a lawyer) thinks reasonable that public administration tasks strictly connected to professional (technical, economic etc.) issues would be fulfilled by non-legal professionals of the given area. However, the establishment of legal norms of bill of exchange and other commercial relationships, company and bankruptcy laws and the order of law enforcement procedure could not be classified as a non-legal professional duty. These are legal matters in the strictest sense of the word, for the basis of a complete separate branch of law are to be created, of course taking also the technical aspects in consideration.

Following this track we may establish with pleasure that, although the codification works were fulfilled by the legal committee, in line with the provisions of the relevant law, an agile and productive cooperation can be observed between this committee and the commercial deputation, especially between their presidents, Counts Miklós Forgách and Károly Zichy. The commercial deputation worked in two series of sessions: first between 10 August and 24 October 1791, and later between 1 November 1792 and 29 January 1793.[65] The very first sign of cooperation with the legal committee can already be found in the archival fond with the date 28 August 1791. This was the day when vice-high judge *Tamás Tihanyi* (1752–1834), judge of the Royal Table (later of the Septemviral Table, the highest court of Hungary that time), member of the legal committee[66] held his presentation relating to the drafts of *Codex Cambio-Mercantilis* prepared by the Curia,[67] probably the same presentation he held one week earlier at the session of the legal committee.[68]

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[62] *Projectum legum motivatum…*, p. 81; in Hungarian: BERÉNYI, 1914, pp. 306 and 453.

[63] *Projectum legum motivatum…*, p. 59; in Hungarian: BERÉNYI, 1914, p. 414.

[64] KISS, A. (ed.). *Pest-Pilis-Solt vármegye országgyűlési követutasításai a 18. században* [Instructions of Pest-Pilis-Solt County to its Parliamentary Deputies in the 18th Century]. Budapest, 2015, p. 109.

[65] *Relatio Deputationis Regnicolaris Commercialis...*, p. 1.

[66] For his biography see PÁLMÁNY, 2019, pp. 554–555.

[67] MNL OL N 104 Fasc. I. No. 11.

[68] See the minutes of the meeting in MNL OL N 105 Fasc. XVII. No. 123; *Protocollus Regnicolaris Deputationis…*, pp. 8–9.

Tihanyi, after having presented all the Austrian laws and earlier *elaborata* sent by the Royal Chancellery to the committees in attachment to the royal *rescriptum* of 9 January 1791, summarised his comments in seven points. The first five points of his opinion concerned the seats and territorial jurisdiction of the bill of exchange tribunals to be established; the relationship between the noblemen (noble estates) and the execution of claims deriving from bills of exchange; and further, predominantly procedural rules of law.[69] In point 6, Tihanyi recommended the bill of exchange and commercial code to be divided into three chapters, the first of which would deal with the establishment of the commercial courts, their operation, and their relationship with each other; the second chapter would regulate bankruptcy and commercial law; while the third one would establish the rules of bill of exchange law. He suggested the draft of 1787 of the Royal Table, and his reflections thereto inserted to its margins, to be used as the basis.[70] Under point 7, he mentioned the question of legal regulation of maritime and fluvial transport, proposing the Austrian navigation laws to be adapted.[71]

As their letter of reply sent to Tihanyi on 31 August 1791 shows, the members of the commercial committee agreed to this opinion, with special regard to the commercial aspects thereof, in the meantime also proposing that, if this task can be placed on the agenda of the legal deputation, the latter should start working in line with principles and findings expressed in the vice-high judge's *referatum*.[72] In accordance with this division of tasks, Miklós Forgách forwarded on the same day to the president of the legal committee Károly Zichy the proposal of the merchants of the city of Pest "concerning the establishment of commercial tribunals" (that was probably equal to the *projectum* of the merchant mentioned in other sources by name *Izrael Ofenheimer*),[73] and it is also very probable that Forgách forwarded at the same time *György Tahy*'s draft of March 1791 on bill of exchange affairs and navigation as well to the legal committee. This document, together with Ofenheimer's material, can also be found in the archival fond of the *Deputatio Juridica*.[74]

On 25 September 1791 the Palatine, Archduke Alexander Leopold sent a letter to Miklós Forgách, attaching thereto a copy of the navigation code of the Governorate of Trieste with the opinions of the Governorate of Fiume, counsellors of the Royal Lieutenancy Council and the Royal Table, with the comment that, should its parts

[69] MNL OL N 104 Fasc. I. No. 11, pp. 7–17.

[70] MNL OL N 104 Fasc. I. No. 11, pp. 14–15.

[71] MNL OL N 104 Fasc. I. No. 11, pp. 15–17.

[72] For the letter of the commercial committee to Tamás Tihanyi see MNL OL N 104 Fasc. I. No. 11, pp. 19–20. (The author hereby would like to thank his friend, historian Gábor Nagy, associate professor of the University of Miskolc for his help in the interpretation of this hardly readable manuscript with abbreviations and corrections that was presumambly not handwritten by a professional notary but by one of the members of committee, maybe just by count Miklós Forgách himself.).

[73] MNL OL N 105 Fasc. XV. No. 92. d).

[74] GÁBRIŠ, 2011, p. 98; KOSÁRY, 1956, p. 130. For the private drafts see N 105 Fasc. XV. No. 92. e) (Ofenheimer) and l) (Tahy).

concerning the bill of exchange and commercial code fall within the competence of the legal committee, the document should be forwarded to the latter.[75] This is exactly what Forgách did: three days later he forwarded the opinions to High Judge Zichy, drawing his attention to an eminent lawyer in Fiume, *Mátyás József Paravits* (*Matija Josip Paravić*, 1753–1823), as a person with exceptional professional skills in legal matters of navigation and commercial affairs, for a possible cooperation with the legal committee.[76] Furthermore, we can find a note dated on 14 October 1791 sent from Miklós Forgách to Károly Zichy, too, also relating to the materials received from the Governorate of the Hungarian Littoral.[77]

From these documents, we may draw the conclusion that, as the merchants of Fiume were also working on drafts concerning the development of trade, it seemed simpler for them to send all their documents to Forgách's committee for further use, even if some of them concerned a legal topic. Our opinion is supported by the fact that, although the work of the commercial deputation was suspended on 24 October 1791, when the drafts about import duties and economic development, and Skerlecz's explanatory memoranda attached thereto on 22 October 1791 had all been ready, the bill of exchange and commercial law related documents were being continuously sent to the committee also thereinafter. For example, on 18 November 1791 Forgách forwarded to Tamás Tihanyi the materials originally sent to the Governor of Fiume Count János Szapáry by the Governor of the Austrian Littoral Count *Pompeo Brigido* (1729–1811).[78]

There is therefore no doubt that the *Deputatio Commercialis* did not only receive opinions and drafts on the regulation of trade, but also concerning commercial law and bill of exchange law. According to Imre Ress, "proposals and information were asked and received from the merchants of nineteen Hungarian and six Croatian cities, concerning the possibility of recovery, and removing the legal and technical barriers of the Hungarian trade".[79] Although the major part of them was about matters of commerce and economics, as we could already see, drafts and proposals belonging to the competence of the legal committee could also be found among the received materials. This can be explained, as the authors of numerous letters sent from Fiume also highlighted, with the fact that the lack of bill of exchange jurisdiction in Hungary was one of the greatest obstacles to the development of trade in Hungary. Therefore, many of the merchants urged that commercial tribunals would be established also in Hungary as soon as possible, see for example the notes of *Marco*

[75] MNL OL N 104 Fasc. I. No. 14.

[76] MNL OL N 105 Fasc. XV. No. 92. h).

[77] MNL OL N 104 Fasc. I. No. 16 and MNL OL N 105 Fasc. XV. No. 92. n).

[78] MNL OL N 105 Fasc. XVII. No. 121.

[79] RESS, I. *Kapcsolatok és keresztutak – Horvátok, szerbek, bosnyákok a nemzetállam vonzásában* [Relationships and Crossroads – Croatians, Serbs and Bosnians in the Attraction of the Concept of Nation State]. Budapest, 2004, p. 30.

Susanni in Latin,[80] *Sava Vukovich* in German,[81] and *Giuseppe Orlando* and *Andrea Lodovico Adamich* in the Italian language.[82]

In the proposal written and also published in printed version by Baron *Vinzenz von Benzoni* under the title *"Vorschlag zur Einführung eines Kommerz-Systems im Königreiche Hungarn"* we can read the following statement: "Each and every country where professional trade is planned to be introduced, especially needs to have commercial tribunals, because in lack of them commerce cannot be maintained and merchants may not exist. Therefore all places of trade have their own commercial tribunals in order to accept the merchants' complaints and to decide on them. These courts are usually called bill of exchange tribunals, and in major part consist of senior merchants, who are well aware of commercial laws and all relevant cases that may occur during trade affairs".[83] Baron Benzoni also emphasised the importance of bills of exchange in the course of trade, and drew the attention to the necessity of introduction of bill of exchange regulation in Hungary as well: "An ordinance of bill of exchange is indispensable to be introduced in the Kingdom of Hungary, in order to promote trade with foreigners, and to provide free flow of business for bill of exchange affairs".[84]

2.3 Commercial law codification works by the Deputatio Juridica

Based on our research of the original sources available in the archives, we have taken the view that the commercial law drafts (i.e., the drafts not connected to the regulation of trade but expressly belonging to the fields of bill of exchange and commercial law) weren't the result of the codification works of the commercial committee but that of the legal deputation, indeed, in accordance with the provisions of Act LXVII of 1790/91. This fact was also highlighted by the Hungarian historian Domokos Kosáry in his study mentioning these drafts as "documents in fact elaborated by the legal committee, however with the assistance of the commercial deputation".[85] During the finalisation of the *projecta*, external experts such as (especially) the Fiume

[80] *Reflexiones per quasita et responsa, informatoriae pro iis, qui nunquam fuerunt in Littorali Hungarico, concernentes propositum Districtum Commercialem assignandum Gubernio Hungarico tanquam absolute necessarium pro commercio Hungarico rite regulando* (Fiume, 27 May 1791), MNL OL N 104 Fasc. IX. No. 74/C. See also: KOSÁRY, 1954, p. 392; RESS, 2004, pp. 30–31.

[81] *Unterthänigste Bemerkungen zur Verbesserung des Commerzii*. MNL OL N 104 Fasc. XI. No. 89. See also: KOSÁRY, 1954, p. 393; RESS, 2004, pp. 31–32.

[82] *Prospetto di un Banco di Commercio & Sconti da ergersi nella Città di Fiume per animare maggiormente il Commercio nel Littore Ungarico Marittimo* (Fiume, 2 June 1791), MNL OL N 104 Fasc. IX. No. 79. See also: KOSÁRY, 1954, p. 392; RESS, 2004, p. 32.

[83] The author's translation. For the original text see BENZONI, Vinzenz Freiherr von: *Vorschlag zur Einführung eines Kommerz-Systems im Königreiche Hungarn*. Fiume, 1791, p. 11. In the archival fonds: MNL OL N 104 Fasc. XI. No. 89.

[84] BENZONI, 1791, p. 15 (the author's translation); concerning bill of exchange see ibid., pp. 12–15.

[85] KOSÁRY, 1954, p. 385 (and 393).

lawyer Mátyás Paravits recommended to Károly Zichy by Miklós Forgách[86] provided a prominent contribution. We could even venture to say that the father of the draft of 1795 of the *Codex Cambio-Mercatilis* was him, together with vice-high judge and legal committee member Tamás Tihanyi, not Miklós Skerlecz as earlier presumed by many scholars.

Deputatio Juridica had its first meeting on 13 August 1791.[87] At this session, the revision of the bill of exchange and commercial law drafts prepared by the Curia in consultation with the commercial committee, and the harmonisation thereof with the newer laws were marked at the first place among the tasks to be completed.[88] At the second meeting held on 21 August, the Austrian commercial law regulations earlier circulated among the members of the committee, and the drafts of the *Codex Cambio-Mercantilis* elaborated by the Royal Table were presented by Tamás Tihanyi.[89] The vice-high judge also summarised the most important questions to be decided concerning the compilation of the code, as we have already mentioned in relation to the session of the commercial committee held on 28 August (the written version of Tihanyi's presentation can be found in the archival fond of the commercial deputation to date).[90] As we have also seen, the proposal of the burghers of Pest on the establishment of commercial courts was sent by Miklós Forgách to Károly Zichy on 31 August 1791 to be utilised for the elaboration of the code,[91] and on 28 September 1791 a newer letter arrived as well from Forgách in which he recommended Paravits to be employed by the legal committee as an expert.

After 21 August 1791, the legal committee had no further meetings for more than a whole year, until 7 November 1792,[92] however it received also in the meantime a series of drafts and reports from different communities, counties, cities, and even from private persons, which were usually forwarded by the president of the commercial committee, as we have already seen. Consequently, many interesting preparatory documents can be found in the archival fond of the *Deputatio Juridica*, such as the comments and drafts of Bács, Szepes, Turóc and Veszprém Counties, a transcript written by the Captaincy of Buccari, a draft on bills of exchange and navigation matters prepared by György Tahy in March 1791 (months before the commencement of the committee works), and also a series of other anonymous *projecta* on the trade

[86] See the already mentioned source at MNL OL N 105 Fasc. XV. No. 92. h).

[87] MNL OL N 105 9. rak. (*Elenchus Actorum et Elaboratorum Excelsae Regnicolaris Deputationis in Juridicis Art. 67. 1790/1 ordinatae, in Archivo Regnicolari existentium*), in printed form: *Projecta et Elaborata Excelsae Regnicolaris Deputationis in Juridicis Articulo 67. Anni 1790. ordinatae*. Bratislava, 1826, p. 1.

[88] See: *Protocollus Regnicolaris Deputationis Juridicae Articulo 67. Anno 1791. ordinatae*. Buda, 1826, p. 5.

[89] MNL OL N 105 Fasc. XVII. No. 123; *Protocollus Regnicolaris Deputationis*…, pp. 8–9.

[90] KOSÁRY, 1954, p. 394. See also MNL OL N 104 Fasc. I. No. 11.

[91] MNL OL N 105 Fasc. XV. No. 92. d).

[92] *Protocollus Regnicolaris Deputationis*…, p. 10.

of bills of exchange.[93] Furthermore, Tamás Tihanyi, the rapporteur of the commercial law codification issue in the legal committee received "several opinions",[94] too.

Without any doubt, the most important of all of these documents was the opinion written by Mátyás Paravits on 13 June 1792 concerning the draft *Codex Cambio-Mercantilis* of 1787 of the Royal Table, consisting of no less than 138 numbered sheets of papers (altogether 276 pages),[95] addressed to the commercial committee and signed by the author as "lawyer, doctor of laws, and member of the same high committee".[96] From this signature we may draw the conclusion that, in May–June 1792 when none of the committees were working due to the newly convened parliament after Leopold II's death, it was not clear even for Paravits, how the tasks and competences would be divided between the two deputations, despite the fact that his person and the possibility of his assignment had been recommended by the president of the commercial committee to the attention of the legal deputation. (Maybe he had not received any feedback in this regard, and thus he remained in contact with Miklós Forgách.)

Unfortunately, Paravits's report has no preamble or any introductory part, so we are not informed from whom he received the assignment to present his opinion. The report begins *in medias res*, with comments to the given paragraphs of the draft code of the Curia. The first section commented by the author (on page 1 of his opinion) is § 16 of Article 3 of Part I, then he is following the order of articles and paragraphs of the draft code, however with significant leaps. On the fifth paper sheet, he switches to Part II, beginning with § 59, and reaches § 105 on the ninth sheet. He provides a very detailed comment to § 116 (actually 115), copying a complete text in the French language to the margin of the same side. This French text can be identified by its referred page numbers as the edition published in 1732 of *Traité général du commerce* written by Amsterdam commercial lawyer (of French origin) called *Samuel Ricard* (1637–1717), more precisely a chapter of this book entitled *Des Compagnies superieurs, ou en Commandite* ["On the superior companies, or the limited partnership"][97] Paravits summarises in Latin the substance of this company form (called by him *accomandita*, based on Italian law),[98] underlining that the external

[93] See the following documents: MNL OL N 105 Fasc. XV. No. 92. A – c), f), i), k – m).

[94] See MNL OL N 105 Fasc. XV. No. 93 (*Opiniones diversae*).

[95] MNL OL N 105 Fasc. XVI. No. 119.

[96] Ibid., at the right side of sheet 138.

[97] RICARD, S. *Traité général du commerce*. 5th edition. Amsterdam, 1732, pp. 538–539.

[98] The concept of limited liability appeared in the law of Italian cities with the business association called *commenda*, based on a contract similar to assignments or agencies, at the turn of the 11th and 12th centuries. See e.g. HILLMAN, R. W. Limited Liability in Historical Perspective. *Washington and Lee Law Review* 54, 2/1997, 615–627, pp. 621–624; LEGNANI ANNICHINI, A. L'emersione della responsabilità limitata, in IRRERA, M. (ed.). *Capitale sociale, responsabilità limitata e tutela dei terzi*. Novara, 2021, 1–24, p. 7. In Hungarian: HORVÁTH, 2006, pp. 404–405; MÁRKUS, 2018, p. 583.

members of such partnership "*ultra vires collati Capitalis non teneantur*".[99] The company form *Société en commendite*, similar to the limited partnership of our time, had long been known in Ricard's fatherland: it had been introduced by the *Ordonnance du Commerce* issued by Louis XIV in March 1673.[100]

On sheet 11 he continues with § 147, a paragraph of the draft code of 1787 not dealing with companies but belonging to Article 14 on bankruptcy. At the right side of the next sheet (i.e. page 24) he is already commenting Part III on the bills of exchange, starting with an analysis of § 171 (actually 170). From this section on, his reflections are all concerning Part III of the draft code, in a very detailed manner. While Paravits was dealing with Part I on nine and with Part II on fourteen pages, no less than 241 pages are dedicated to Part III. Thus, either the regulation of legal relationships based on bills of exchange was considered by him as the most important issue to be resolved, or this was the topic he had the best professional knowledge about. He is citing complete legal texts from different foreign bill of exchange ordinances, namely from laws not available in our Hungarian archival sources. We may presume that these regulations (patents, decrees) originated from his own bookshelves, or from the library of the Governorate of Fiume. The report ends with comments to § 297 at the left side of sheet 138 (page 275 of the expert's opinion). Taking in consideration that the draft code we know, i.e. that had been forwarded by Leopold II to the legal committee in January 1791, only consists of 296 sections, we have to assume that Paravits had received another version of the draft code for review.

The materials received in connection with the bill of exchange and commercial code, and the procedural ordinance – including the above cited reflections of Paravits – were presented by Tamás Tihanyi at the session of the legal committee held on 14 November 1792. He highlighted that, for further elaboration of such drafts, the collaboration of those experts would be needed who are not just aware of the Hungarian law, but also have practical experiences at the given subject matters.[101] Subsequently, the legal committee was dealing with other issues, and then at the meeting held on 8 January 1793 the letter of reply sent by Archduke Alexander Leopold to Károly Zichy (already circulated among the members of the committee since 2 January) was read. From this letter we know that "drafts prepared by Mátyás József Paravits and others" had been presented to the Governorate of Fiume on 31 December 1792.[102] Later, on 10 March 1793 (that was already the 33rd session of the legal deputation)[103] a report to be sent to His Royal Highness the Palatine of Hungary on

[99] MNL OL N 105 Fasc. XVI. No. 119, sheet 10.

[100] HILLMAN, 1997, p. 626; LEGNANI ANNICHINI, 2016, p. 7. For the legal norm itself see *Ordonnance du Commerce*, Title IV, Article 1, in *Ordonnances de Louis XIV, roy de France et de Navarre*. Paris, 1673, p. 8. (Hillman indicates year 1671 by mistake – the author's comment.).

[101] *Protocollus Regnicolaris Deputationis…*, p. 12; *Extractualis Series Actorum in Protocollo Deputationis Juridicae Articulo LXVII. Anno MDCCXCI ordinatae provocatorum*. Buda, 1826 (point Q).

[102] *Extractualis Series Actorum…* (point S).

[103] *Protocollus Regnicolaris Deputationis…*, p. 72.

the necessity of hearing of "some private persons from Fiume" was discussed by the committee members.[104]

As we have already seen, the final report of the commercial committee had already been ready for this time, moreover, all the other committees completed their work in 1793 as well. However, the legal deputation was continuing to have sessions until 28 February 1795,[105] that is to say that the final version of the proposals of this committee concerning the voluminous codification work could only be prepared for 1795, four years after the original resolution of the Diet on the establishment of the regnicolar systematic committees. At the meeting held on 23 August 1794, the legal deputation decided to invite *Sándor Németh*, secretary of the Governatorate of Fiume, and Mátyás Paravits to its sessions, and to pay an allowance to them,[106] and at the session of 8 September 1794, the detailed negotiation of the draft code started. First they could only deal with articles 1–4 of Part I (on the establishment of the commercial and bill of exchange tribunals), but many proposals of modification and adjustment of wording occurred already in this regard.[107] The work continued on 10 September 1794[108] but then it was suspended on the other day,[109] and restarted only on 3 December 1794, right from the very beginning of the text again. This was the first meeting Paravits and Németh personally attended.[110]

The memorandum of the meeting held on 11 December 1794 shows that, in company law matters, the committee primarily accepted the opinion of the "subcommittee of Fiume" – as we will soon see, namely Paravits – and that the original text of the draft code was amended and supplemented in line with that.[111] Similar thing happened to Part III (on the bills of exchange) at the sessions held between 13 and 23 December 1794.[112] (Fortunately we have found a handwritten draft in the archival fond of the legal committee on the margins of which it is accurately indicated, what sections were adapted from the original draft of 1787, and in what parts Paravits's comments or other proposals were used instead.)[113] On 23 December 1794 the negotiations on the draft of *Codex Cambio-Mercantilis* were concluded, and the committee made a decision on a separate draft law on shipping accidents, too.[114] Subsequently, the draft code of court proceedings was being discussed, and the meeting held on

[104] *Extractualis Series Actorum…* (point EE).

[105] *Elenchus Actorum et Elaboratorum...*, p. 1.

[106] *Protocollus Regnicolaris Deputationis…*, pp. 165–166.

[107] Ibid., pp. 179–181.

[108] Ibid., pp. 181–184.

[109] Ibid., p. 184.

[110] Ibid., p. 198.

[111] Ibid., pp. 202–204.

[112] Ibid., pp. 204–210.

[113] See MNL OL N 105 Fasc. XVII. No. 126.

[114] *Protocollus Regnicolaris Deputationis…*, p. 210.

8 January 1795 turned back to commercial and bill of exchange law, more specifically to the negotiation of its procedural law aspects.[115] This work was completed on the following day, with the approval of the procedural tax scheme, and on 10 January 1795 the legal committee continued to negotiate the private law drafts.[116]

The bill of exchange and commercial law codification works ended between 24 January and 11 February 1795 with the approval of the final wording of the drafts, with some minor adjustments and fine-tuning. At the very last session held on 28 February 1795, the *Deputatio Juridica* accepted its report addressed to Archduke Alexander Leopold, Palatine of Hungary, to which document all legal *elaborata* (including the draft bill of exchange and commercial code with all relevant separate laws) were attached. As Ferenc Nagy draws our attention in commercial law literature, it was also emphasised in the report of the legal committee that the draft of the *Codex Cambio-Mercantilis* had been revised with the assistance of Fiume lawyer Mátyás Paravits, and secretary of the Governorate of Fiume Sándor Németh,[117] and a proposal was made that Paravits would be asked to prepare a commentary in order to promote that, in the case the code would be adopted by the parliament, "this new field of law could be taught in the schools".[118]

3. A brief summary of the draft Codex Cambio-Mercantilis of 1795

In the fields of commercial (material and procedural) law in a broader sense, finally four separate drafts were elaborated. The first and also the most extensive was the bill of exchange and commercial code (full title: *Codex Cambio-Mercantilis pro Regno Hungariae Partibusque eidem adnexis in tres partes divisus*);[119] the procedural ordinance of fourteen articles for the commercial tribunals to be established the second (*Ordo Judiciarius pro Tribunalibus Mercantilibus Regni Hungariae, et partium eidem adnexarum*);[120] a separate article on the implementation rules the third (*Codex cambio-mercantilis, cum Ordine Judiciario in legem refertur*);[121] while the fourth draft was another short article, also of one page only, on the investigation of shipping accidents (*De qualiter instituenda Naufragii Proba*).[122]

The *Codex Cambio-Mercantilis* itself was divided into three parts, similarly to the draft code of 1787 used as the basis of the codification works. The first part (that is one article longer than in the former draft, i.e. consisting of eight instead of seven

[115] Ibid., p. 215.

[116] Ibid., pp. 217–218.

[117] *Projecta et Elaborata…*, document No. 1, p. 6.

[118] NAGY, F. *A magyar váltójog kézikönyve* [Manual of Bill of Exchange Law]. 4th edition. Budapest, 1904, p. 93. See *Projecta et Elaborata…*, document No. 1, p. 7.

[119] For the original manuscript see MNL OL N 105 Fasc. XVII, No. 129.

[120] MNL OL N 105 Fasc. XVII, No. 130.

[121] MNL OL N 105 Fasc. XVII, No. 132.

[122] MNL OL N 105 Fasc. XVII, No. 133.

articles) contains the norms concerning the establishment of the commercial courts, their operation and relationship with the Austrian bill of exchange tribunals.[123] Part One of the draft code of 1787 had the same title, with the minor exception that it started with the Latin words *De Constitutione…* instead of *De Institutione…* However, it would not be correct to draw the conclusion that the review was only about some grammatical corrections. There are relevant differences, too, for example that, while in 1787 – in accordance with Joseph II's plans – only two new bill of exchange courts would have been introduced further to the already existing one in Fiume (in Pest and Karlovac), the legal committee rather accepted the concept of the first draft code of 1781 about a more decentralised structure, intending to set up first-instance commercial courts in Pozsony (Bratislava), Kassa (Košice), Debrecen, and Újvidék (Novi Sad) as well.[124]

The second part of the new draft code consists of seven articles, similarly to the 1787 version, establishing the norms of commercial law in the strict sense of the term, also including bankruptcy law.[125] Article I of Part Two, consisting of ten sections marked with "§" symbol, contains the rules relating to merchants and their businesses,[126] while Article II, consisting of eight sections, deals with the rights of the merchants' spouses.[127] Here follows the article that is the most interesting for us, Article III about the companies, and their internal and external legal relationships (see later).[128] Then comes Article IV on the dissolution of companies,[129] Article V on the account books,[130] and finally two articles on the rules of bankruptcy: Article VI on the bankruptcy itself,[131] and Article VII on the measures to be taken in case of suspicion of insolvency in order to protect the interests of the creditors.[132] The numbering of the sections starts again at the beginning of each article that makes a comparison to the 1787 draft pretty difficult,[133] and we may also find some structural and material differences between the two texts.

If we look more closely at the article on company law, it is conspicious that already its title is more modern and detailed (instead of *De Contractu Societatis*: *De diversis Societatum Speciebus, ac de earum tum inter se cum ex erga Creditores Obligatione*), and that it starts with a newly inserted section (§ 1) aimed to be a clarifica-

[123] MNL OL N 105 Fasc. I., No. 7 (printed version of 1802), pp. 3–11.

[124] Ibid., p. 4.

[125] Ibid., pp. 12–30.

[126] Ibid., pp. 13–16.

[127] Ibid., pp. 16–18.

[128] Ibid., pp. 18–20.

[129] Ibid., pp. 20–21.

[130] Ibid., pp. 22–23.

[131] Ibid., pp. 23–27.

[132] Ibid., pp. 27–30.

[133] In a substantive comparison, the marginal notes in the handwritten working document found in the archives may help, see MNL OL N 105 Fasc. XVII. No. 126.

tion of terminology.[134] This first section mentions three company forms: the "open" or public (*aperta*); the "silent" or secret (*tacita*), and the "superior" or higher-level (*superior*) companies. In his doctoral thesis written in 1983, János Zlinszky translated them to "total", "limited liability" and "stock companies",[135] while in his chapter written to volume III/2 of Helmut Coing's great Companion of History of the European Private Law, he is already paralleling them to the German company forms *offene Handelsgesellschaft* (a general partnership the members of which are known to the public, that is why it is called "offen", i.e. open), the *Kommanditgesellschaft* (limited partnership), and "more or less" (*ungefähr*) to the companies limited by shares (*Aktiengesellschaft*).[136]

The classification was indeed not that advanced. Nothing else happened than the two simplest company forms, already known from the *Neuverfasste Handlungs- und Fallitenordnung* of 1758,[137] were supplemented with a third one, that is different from them in the following two aspects: on one hand the members do not run the business under their own names, on the other hand their liability is limited. These rules actually recall those known by us concerning the companies limited by shares, in the name of which none of the members' names appear, in consonance with the original meaning of the expression *societé anonyme*.[138] However, we cannot find any provision, not even a reference, to shares.[139] Furthermore, it is worth to mention that, the draft code of 1795 is using the term *"in accomandita"* (meaning limited partnership in the laws of the late medieval and early modern Italian mercantile cities) as a synonym for *superior* companies,[140] while § 6 (on the members' liability) calls the members *"accomandantes"*.[141] Knowing Mátyás Paravits's opinion dated in June 1791, we can easily identify this as an adaptation of the rules of "superior" (*superieur*) companies from Samuel Ricard's book, although without any reference to the *accomandatari* (general partners).

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[134] MNL OL N 105 Fasc. I, No. 7, p. 18.

[135] ZLINSZKY, J. A XIX. századi magyarországi magánjog forrásai és irodalma [Sources and literature of the Hungarian private law of the 19th century], in KOLTAY, A. (ed.). *A XII táblától a 12 ponton át a magánjog új törvénykönyvéig. Válogatott tanulmányok*. [From the XII Tables to a New Private Law Code. Selected Studies]. Budapest, 2013, 83–125, p. 95.

[136] ZLINSZKY, J. Ungarn, in COING, H. (ed.). *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*. Band 3.3: *Das 19. Jahrhundert. Gesetzgebung zu den privatrechtlichen Sondergebieten*, München, 1986, 3512–3525, p. 3519. See also GÁBRIŠ, 2011, p. 100.

[137] SCHENNACH, 2022, p. 34.

[138] NAGYNÉ SZEGVÁRI, K. *Jog és gazdaság. A gazdasági szervezetek jogának története* [Law and Economy. A History of the Economic Organisations]. Budapest, 1999, p. 57; STAGNO D'ALCONTRES, DE LUCA, 2015, p. 8.

[139] The form "company limited by shares" was unknown at that time at the territories of the Habsburg Empire, see SCHENNACH, 2022, p. 34.

[140] MNL OL N 105 Fasc. I. No. 7, p. 18.

[141] Ibid., p. 19.

We are not far off the truth if we determine the tripartite structure of the company law system of the draft code of 1795 with the terms general partnership (*offene Gesellschaft*), silent partnership (*stille Gesellschaft*), and limited partnership (*Kommanditgesellschaft*). However, we have to add that the "*societas superior*" would have such special kind of limited partnership that would not or not indispensably have any *accomandatari* (general partners, "internal members"). It would obviously be unhistorical to envision the nowadays very popular and widespread form of GmbH ("limited liability company") into this concept, because we are well aware of that fact that this has only existed since 1892 even in the German company law. In practice, the regulation of "superior companies" in the draft code could have led to the introduction of a company form similar to the companies limited by shares already known in Europe that time (as assumed by János Zlinszky). All in all, the company law terminology of the draft code was quite inaccurate, but it would not be fair to expect a precise definition and coherent use of legal terms from such an early draft. According to the view of legal historiography, the first actual definition and a professional separation of the company forms from each other can be connected to Napoleon's *Code de Commerce* of 1807.[142]

The third part of *Codex Cambio-Mercantilis*, consisting of fifteen sections, in itself represents almost the half of the draft code,[143] and, similarly to Part III of the draft code prepared by the Royal Table in 1787, deals with the bills of exchange. Although the structure of the third parts of the two draft codes is not completely equal to each other, more overlaps can be found between them than between the texts of the first two parts. The reason behind this fact is no else than the *Erneuertes Wechselpatent* served as the basis of the 1795 draft as well,[144] because it would not have been reasonable to regulate the requirements of bills of exchange, the legal relationships deriving from them, and the enforcement of the claims deriving from such legal relationships in a different manner. As a good example, we may quote § 1 of Article 15 on time-barring, that says that the claims deriving from bills of exchange might be enforced with "one year and one day" from the expiry thereof. It is almost for sure that this rule is a simple adaptation of the *"Jahr und Tag"* rule of Article 30 of the Austrian bill of exchange ordinance.[145]

4. Destiny of the commercial law drafts after 1795

According to the original plans, the works of the regnicolar systematic committees should have been presented to the subsequent Diet. Even if this was also original-

[142] SÁNDOR, I. *Tanulmányok a társasági jog területéről* [Studies from the Territory of Company Law]. Budapest, 2015, p. 70; SCHMOECKEL, M. *Rechtsgeschichte der Wirtschaft*. Tübingen, 2008, p. 166; STAGNO D'ALCONTRES, DE LUCA, 2015, p. 24.

[143] MNL OL N 105 Fasc. I. No. 7, pp. 31–58.

[144] NAGY, 1904, p. 94.

[145] See *Erneuertes Wechsel-Patent. Die Wechsel-Ordnung für die Königlich Boheimische, Nieder- und Inner-Österreichische Erbländer*. Vienna, 1763, p. 28.

ly planned to be convened for 1792, no one expected that, because of Leopold II's sudden death, its meeting would have to be brought together already in May. The Palatine informed his brother, the hereditary prince and thus future king Archduke Francis, in his letter dated on 20 March 1792, that he fortunately managed to agree with the committees what their operation would be suspended.[146] As we have seen, the deputations could just continue their sessions from early November 1792, and the legal committee itself consequently worked for more than further two years, completing its tasks only at the end of February 1795.

Although the main reason (and goal) of convocation of the Diet of 1792 was Francis' coronation, the question of legal disputes arising from bill of exchange and other commercial law relationships was such a pressing issue, that the Estates had to make a resolution at the new king's request that these cases would temporarily be taken to the Austrian commercial law tribunals, and the Hungarian Royal Chancellery would be responsible for the proper enforcement of the judgments thereof (Act XVII of 1792).[147] Three years later, when the commercial law drafts were finally ready, the political environment already changed. Because of the war against France, and the unveiling and liquidation of the conspiracy of the "Hungarian Jacobins" in 1794–95, the Estates did not even have the option to negotiate the drafts.[148] The documents were thus sent to the archives of the Chancellery[149] (according to a remark found on the document in the Hungarian National Archives, they were very probably handed over on 21 March 1796).[150]

The Diets between 1802 and 1812 had to deal primarily with the Napoleonic wars and other burning political issues, but this fact does not necessarily mean that the *operata* were not subjects to any discussion at all. In 1802, Francis I (r. 1792–1835) sent a message to the Estates that, "should they intend to decide in the short time that remains on the question of the *publicus fundus*[151] and the commercial laws, i.e. the so-called *mercantilis codex* and tribunals […], he will not have any objection".[152] The Estates, however, did not wish to negotiate these matters separately from the other

[146] MÁLYUSZ, 1926, p. 519.

[147] KÉPES, 2021, pp. 165–166. pp. See also SÁRKÖZI, Z. A kereskedelmi jogalkotás kezdetei és a részvénytársasági törvény kialakulása Magyarországon [The beginnings of commercial law legislation and the formation of the law on companies limited by shares in Hungary]. *Jogtudományi Közlöny* 43, 9/1988, 524–528, pp. 524–525.

[148] BÉRENGER–KECSKEMÉTI, 2008, pp. 193–194; DOBSZAY, T. *A rendi országgyűlés utolsó évtizedei (1790–1848)* [Last Decades of the Feudal Diet (1790–1848)]. Budapest, 2019, p. 241; KOSÁRY, 1956, p. 148.

[149] BENDA, 1980, p. 169; PAJKOSSY, 2003, p. 136.

[150] MNL OL N 105 Fasc. XV. No. 95. (*"NB: originalem Codicem Cambio-Mercantilem, Excelsae Cancellariae Hungarico Aulicae transmissum esse, die 21. Martii 1796"*).

[151] A state fund to be established in order to promote the development of the national economy, in line with the proposal of the commercial committee – the author's comment.

[152] *Naponként való jegyzései az 1802-dik esztendőben [rendelt] magyar Ország Gyűlésének.* Bratislava, 1802, p. 325.

elaborata. Some of their deputies mentioned that there were other important issues on the agenda, more important than the bill of exchange code, while others drew the attention to the fact that the politically sensitive questions would require more time to be discussed, therefore maybe it would still be reasonable to start with the *Codex*.[153] In view of this, the draft of the *Codex Cambio-Mercantilis* with the connected laws was printed out at the Patzko press shop in Pozsony (Bratislava). This is the first printed edition of any of the *projecta* of the regnicolar committees established in 1791.[154] Ultimately, the drafts still were not negotiated by the Diet.

In 1804, Francis I convened the Diet again and, in line with the recommendations of Archduke Joseph (1776–1847), Palatine of Hungary since Alexander Leopold's death in 1795, he repeated the royal proposal on the adoption of the *Codex* and the procedural ordinance of the commercial courts. As Palatine Joseph said, without such laws in this country "a regular commerce cannot exist" ("*kein wohlgeordneter Commerz bestehen kann*").[155] However, there was no progress at this Diet either, and neither at that of 1807, despite the fact that the king repeated his proposal on including the drafts on the agenda again, namely in point 5 of his *propositiones*.[156] The subsequent Diet held in 1811 was primarily negotiating the issue of devaluation of the currency. As we are aware from the researches of legal historian Alajos Degré, during the preparatory works of this parliamentary session, it was Zala County that recommended the *elaborata* of the committees to be placed on the agenda. "They [the drafts] were sought out from the local archives and handed over to the deputies for being informed. Of course, no one said a word about the substance of them. Consequently, they were not discussed at the county assembly".[157]

Therefore, the codification works remained unsuccessful in the whole 1790–1812 period, except for the adoption of Act XVII of 1792 as a contingency solution for legal disputes deriving from bills of exchange. In the following thirteen years, while the operation of the Diet was interrupted due to Francis I's attempt for an absolutist style of government, we do not have any information on any progress either, but the Diet newly convened by Francis I on 3 July 1825 and having sessions between 1825 and 1827 was dealing with the matter again.[158] Degré emphasises, and assesses as

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[153] *Naponként való jegyzései az 1802-dik esztendőben...*, p. 326.

[154] BÉRENGER–KECSKEMÉTI, 2008, p. 194. For the printed editions see documents No. 7–10 at MNL OL N 105 Fasc. I. (The author of this study was lucky enough to buy the first printed edition of 1802 of the *Codex Cambio-Mercantilis* from an Italian seller on the Ebay.).

[155] DOMANOVSZKY, S. (ed.). *József nádor iratai*, *I kötet: 1792–1804* [Palatine Joseph's Documents, Vol. 1: 1792–1804]. Budapest, 1925, p. 688.

[156] BALOGH, E. Császár Ferenc szerepe a magyar váltójog kifejlődésében [Ferenc Császár's role in the development of the Hungarian bill of exchange law]. *Jogtörténeti Szemle*, 2/2011, 1–9, p. 1.

[157] DEGRÉ, A. Zala megye reformkori követutasításai [Instructions to the parliamentary deputies of Zala County in the Reform Era]. *Levéltári Közlemények* 44–45, 1973–1974, 143–162, p. 155.

[158] GERGELY, A. A "rendszeres bizottsági munkálatok" szerepe a magyar reformmozgalom kibontakozásában [Role of the 'systematic committee works' in the emergence of the Hungarian political reform movement], *Tiszatáj* 28, 6/1974, 37–41, p. 37. p. See also BENDA, 1980, p. 169; HEIL, 2020,

a step forward, that also the instructions given to the parliamentary deputies of Zala County in August 1825 contained a reference to the "proposal about adopting a commercial and bill of exchange code".[159] Furthermore, we know from Orsolya Völgyesi's researches that a serious debate emerged at the session of the Lower Chamber as to whether the negotiations should start with the proposals of the commercial or the legal committee. According to the king's *propositiones*, the urbarial and legal drafts should have come first, the deputies of Szatmár County intended to start the session with the legal drafts, but the majority – as we see from the letter written by the Estates to the king on 20 January 1826 – finally put the matters of development of trade on the first place.[160]

Consequently, later in 1826, the reports of each of the regnicolar systematic committees, with all documents (draft laws) attached thereto, were printed out in the print shop of Simon Lajos Weber in Pozsony (Bratislava).[161] However, the Diet finally made a similar decision as the one had been made in 1791, saying that – now also taking in consideration the long time which had passed – the adoption of such laws would require a more thorough preparatory work (with Gábor Pajkossy's words: "the royal court and the Estates both recognised that the completion of this task would exceed the facilities of the Diet").[162] Due to these circumstances a new parliamentary committee was set up in order to carry on with the issue of codification (Act VIII of 1827: "further negotiation of the works of the systematic committees is postponed to the following Diet").[163] This newly established national committee – similarly to what it did with the other *elaborata* of 1795, but with less significant differences than we can see for example in the case of the draft criminal code – chose to prepare new draft laws instead of going forward with the already existing ones.

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p. 75; HEIL, 2021, p. 127; MÁLYUSZ, 1923, p. 30; PAJKOSSY, 2003, pp. 136 and 152; RADY, 2015, p. 217.

159 DEGRÉ 1973–1974, p. 155. See MOLNÁR, A. (ed.). *Zala megye országgyűlési követutasításai és követjelentései, 1825–1848. Válogatott dokumentumok* [Instructions to and reports of the parliamentary deputies of Zala County, 1825–1848. Selected documents]. Zalaegerszeg, 2003, pp. 17–18.

160 VÖLGYESI, 2013, pp. 435–436.

161 BÉRENGER–KECSKEMÉTI, 2008, p. 194; HOMOKI-NAGY, 2004, p. 16. See *Elaborata Excelsae Regnicolaris Deputationis...* (commercial matters) és *Projecta et Elaborata...* (legal matters).

162 PAJKOSSY, 2003, p. 152.

163 BÉLI, G. Zala vármegye Deák Ferenc által megfogalmazott észrevételei a jogügyi munkálatról [Comments of Zala County written by Ferenc Deák on the works of the legal committee], in MOLNÁR, A. (ed.). *"Javítva változtatni". Deák Ferenc és Zala megye 1832 évi reformjavaslatai*. ['To Change with Improvement'. The Reform Plans of Ferenc Deák and Zala County in 1832]. Zalaegerszeg, 2000, 285–305, p. 285; KUN, T. A reformkor kereskedelmi jogalkotása mint a modernizáció feltétele [Commercial law legislation of the Reform Era as a condition of modernisation], in HORVÁTH, A. (ed.). *Forradalom vagy reform? Tanulmányok az 1848/49-es szabadságharc állam- és jogfejlődéséről* [Revolution or Reform? Studies on the History of State and Law on the Freedom of Independence of 1848/49]. Budapest, 1999, 216–241, p. 238.

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Premeny československého súkromného práva po Februári 1948

Changes in Czechoslovak private law after February 1948

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Abstrakt: V centre pozornosti príspevku[2] stoja zmeny v oblasti československého súkromného práva so zameraním sa najmä na reguláciu súkromného vlastníctva po Februári 1948 ako aj vplyv marxisticko-leninskej ideológie na tieto zmeny.

Kľúčové slová: socialistické súkromné právo; vlastnícke právo; súkromné vlastníctvo; socialistické vlastníctvo; osobné vlastníctvo; zrušenie súkromného vlastníctva.

Abstract: The author focuses on changes in Czechoslovak private law, mainly on the regulation of private property after February 1948, as well as the influence of Marxist-Leninist ideology on these changes.

Keywords: Socialist Private Law; Property Law; Private Property; Socialist Property; Personal Property; Abolition of Private Property.

Úvod

Víťazný február 1948 a spoločenské zmeny, ktoré so sebou priniesol, viedli jednak k predefinovaniu základných kategórií právneho myslenia, k odklonu od dovtedajších hodnotových základov práva, a najmä k rýchlemu opusteniu tradičných inštitútov a tradičnej právnej teórie. Tieto zmeny, ktoré zasiahli všetky odvetvia československého práva, boli podriadené marxisticko-leninskej ideológii, boli umocnené kopírovaním sovietskych vzorov[3] a odrážali len mocenské záujmy čerstvo nastoleného komunistického režimu. Československé právo, a teda aj právo súkromné, sa stalo nástrojom nového režimu v deklarovanom triednom boji.

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[3] Obľúbené boli napr. VENĚDIKTOV, A. V. *Státní socialistické vlastnictví*. Praha: Orbis, 1950; STALIN, J. V. *Ekonomické problémy socialismu v SSSR*. Praha, 1952; BRATUS, C. N. a kol. *Marxisticko-leninská obecná teorie státu a práva*. Praha: Akademia, 1978; KARASS, A. V. *Otázky sovětského občanského práva v dílech J. V. Stalina. In Lenin a Stalin tvůrci socialistického práva*. Praha: Orbis, 1952.

V ďalšej časti príspevku sa vzhľadom na široký rozsah témy budeme venovať iba vybraným problémom súkromného práva po roku 1948. Zameriame sa na zásadné zmeny vo vlastníckom práve v kontexte nových foriem vlastníctva, na osobné a súkromné vlastníctvo a na ideové a ideologické východiská týchto zmien, najmä so zameraním sa na práce Marxa a Engelsa, presadzované najmä v päťdesiatych rokoch minulého storočia.

1. Socialistický štát a právo a jeho zvláštne pôsobenie na hospodárstvo

Ak chceme charakterizovať súkromné právo po nástupe komunistického režimu, je to možné len po zohľadnení celkového vývoja práva, ktoré je chápané ako nástroj politický, slúžiaci výhradne na napĺňanie programových vízií komunistickej strany. Nesmieme zároveň opomenúť, že socialistický štát sa mal opierať o socialistické vlastníctvo výrobných prostriedkov, mal vytvárať nové výrobné vzťahy a tieto za pomoci práva najefektívnejšie rozvíjať. Nová úloha štátu a práva teda súvisela s akýmsi zvláštnym pôsobením štátu a práva na ekonomiku, hospodárstvo.[4]

Ako uvádzajú sovietski teoretici „*prvýkrát v dejinách ľudstva*" si štát stanovil svoj cieľ vytvoriť také hospodárstvo, v ktorom sa najefektívnejšie rozvíjajú výrobné sily a v ktorom by boli čo najúplnejšie uspokojované potreby občanov novej spoločnosti.[5] Štát sa mal pri plnení tejto novej úlohy opierať o socialistické vlastníctvo výrobných prostriedkov, plánovité riadenie národného hospodárstva a vedomé využívanie ekonomického vývoja k rozmnožovaniu spoločenského bohatstva a k uspokojovaniu rastúcich potrieb členov spoločnosti. Štát a právo tak mali „vytvárať" nové spoločenské výrobné vzťahy a nový spôsob socialistického spôsobu výroby.

Zvláštnosti tohto pôsobenia sovietski teoretici videli najmä v tom, že:

1. Socialistický štát má omnoho širšie možnosti pôsobenia na ekonomiku než štát vo vykorisťovateľských spoločensko-ekonomických formáciách, pretože:
   a) politický základ socialistického štátu je neporovnateľne širší ako v štátoch spoločensko-ekonomických formáciách. Moc je v rukách väčšiny ľudu, v rukách pracujúcich, v rukách ľudu. To podmieňuje širokú účasť všetkého ľudu pri uskutočňovaní ekonomických úloh štátu, a teda k neporovnateľne širšej možnosti pôsobenia, než boli kedykoľvek v dejinách známe;

[4] Pri formulovaní svojich myšlienok o štáte zohráva dôležitú úlohu jeho téza o ekonomickej základni a nadstavbe. Marx vychádzal z teórie, že ekonomická základňa, ktorá je tvorená výrobnými vzťahmi a výrobnými silami, zároveň určuje nadstavbu, do ktorej zaraďuje štát, právo, politiku atď. Nadstavba je odrazom hospodárskej sféry, pričom medzi ekonomickou základňou a nadstavbou existuje dialektická prepojenosť, obe sa neustále vzájomne ovplyvňujú a podmieňujú. Zároveň však ekonomická základňa determinuje nadstavbu. Podľa Marxa je potom náplňou buržoázneho štátu a práva len ochrana majetkového systému. Pozri bližšie KLUKNAVSKÁ, A., SABJÁN, N. *Marx. Marxizmus. Vybrané problémy štátu a práva*. Praha: Wolters Kluwer ČR, 2022. ISBN 978-80-7676-382-1.

[5] BRATUS, C. N. a kol. *Marxisticko-leninská obecná teória štátu a práva*. Praha: Akadémia, 1978, s. 322.

b) základné výrobné nástroje a prostriedky patria štátu. V počiatočnom období výstavby socializmu sú to kľúčové pozície: pôda, vody, lesy, prírodné zdroje; najdôležitejšie priemyselné odvetvia, doprava stavebníctvo. Po definitívnom víťazstve socializmu sa stáva spoločenskou celá výroba, tak obeh, ako i spotreba.

2. Pôsobenie socialistického štátu na ekonomiku je uvedomelé a cieľavedomé. Je založené na poznatkoch vedy na vedeckom poznaní vzťahov medzi ekonomickou základňou a štátnou a právnou nadstavbou.
3. Pôsobenie socialistického štátu na ekonomiku sa podstatne líši i svojím cieľom. V spoločensko-ekonomických formáciách (pozn. autora: buržoázne) je základným cieľom pôsobenie štátu na ekonomiku zachovávať existujúce výrobné vzťahy a systém vykorisťovania existujúci v danej formácii. Cieľom pôsobenia socialistického štátu a práva na ekonomiku nie je zachovať existenciu výrobných vzťahov, ale vytvoriť nové, dokonalejšie. S nárastom výrobných síl socialistickej spoločnosti si socialistický štát kladie novú úlohu – vybudovať komunizmus, t. j. vytvoriť vyšší systém výrobných vzťahov.[6]

Za zvláštnym pôsobením štátu a práva na hospodárstvo sa však v podstate skrývali zámery nového režimu smerujúce jednak k znárodneniu všetkých výrobných prostriedkov, novému prerozdeleniu majetku s cieľom prekonať individuálne a kolektívne formy vlastníctva prostredníctvom ich splynutia až k úplnému odumretiu individuálnych foriem vlastníctva, pretože nový človek realizujúci sa vo vyššom systéme výrobných vzťahov si mal vystačiť s vlastníctvom socialistickým, resp. kolektívnym. Uvedené nám následne ozrejmuje nové chápanie vlastníckeho práva novonastoleným režimom, ktoré počítalo s postupným splývaním jednotlivých foriem vlastníctva až k ich úplnému odumretiu a k vytvoreniu jednosektorového hospodárstva, ako to projektovali Marx a Engels, ktorí hlavný nedostatok kapitalizmu videli práve v súkromnom vlastníctve výrobných prostriedkov.

2. Ideové a ideologické východiská odstránenia súkromného vlastníctva v myšlienkach Marxa a Engelsa

Marx a Engels vykladajú dejiny ako striedanie sa triednych bojov medzi vykorisťovateľmi a vykorisťovanými, medzi vládnucimi a ovládanými, medzi buržoáziou a proletariátom. Proletariátu pripisujú novú a vedúcu úlohu v novom spoločenskom poriadku, poriadku bez súkromného vlastníctva. Proletariátu zároveň pripisujú aj rolu revolučnú, pretože proletariát má byť hybnou silou v revolúcii, ktorou bude prekonaná kapitalistická spoločnosť a dôjde k prekonaniu triedneho panstva a k vytvoreniu komunistickej spoločnosti. *„Všechny dřívější třídy, když dobyly panství, snažily se upevnit své už nabyté životní postavení tím, že podrobily celou společnost podmínkám zajišťujícím jim výdělek. Proletáři mohou dobýt společenských výrobních sil jen tak, že odstraní svůj vlastní dosavadní způsob přivlastňování, a tím i celý dosavadní způ-*

[6] BRATUS, C. N. a kol. *Marxisticko-leninská obecná teória štátu a práva*, s. 322 – 323.

sob přivlastňování. Proletáři nemají nic svého, co by museli zajišťovat, jejich úkolem je zničit všechno, co dosud ochraňovalo a zajišťovalo soukromé vlastnictví. Všechna dosavadní hnutí byla hnutí menšin nebo v zájmu menšin. Proletářské hnutí je samostatné hnutí obrovské většiny v zájmu obrovské většiny. Proletariát, nejnižší vrstva nynější společnosti, se nemůže pozvednout, nemůže se vzpřímit jinak než tak, že přitom vyletí do povětří celá nadstavba vrstev, které tvoří oficiální společnost."[7] I proletariát prechádza rôznymi stupňami vývoja. Vo chvíli, keď sa proletariát organizuje na triedu, zmení sa na triedu o sebe, politickú entitu s vlastným vedomím, ktorá sa počas triedneho boja mení na revolučnú triedu, triedu, „*ktorej patrí budúcnosť*".[8]

Kľúč k tejto premene, k prerodu pracujúcej triedy a k jej oslobodeniu od vykorisťovania a útlaku, vidia Marx a Engels práve v zrušení súkromného vlastníctva, v zrušení buržoázneho súkromného vlastníctva výrobných prostriedkov, keď v Manifeste komunistickej strany uvádzajú: „*Komunistická revolúcia je najradikálnejším rozchodom s tradičnými vlastníckymi vzťahmi; nie je divu, že sa v priebehu jej rozvoja najradikálnejšie účtuje s tradičnými ideami.*"[9] S opustením tradičných vlastníckych vzťahov, teda s odumretím súkromného vlastníctva, malo dôjsť i k odstráneniu vykorisťovania, teda k odstráneniu využívania práce len na zisk.

Marxova a Engelsova vízia však vyvolala i na vtedajšiu dobu a pomery veľké pobúrenie a Marx na toto pobúrenie odpovedá: „*Děsíte se, že chceme zrušit soukromé vlastnictví. Ale v nynější vaší společnosti je soukromé vlastnictví zrušeno pro devět desetin členů; existuje právě proto, že pro devět desetin neexistuje. Vytýkáte nám tedy, že chceme zrušit vlastnictví, které předpokládá jako nezbytnou podmínku, že obrovská většina společnosti nemá vlastnictví. Vytýkáte nám tedy, že chceme zrušit vaše vlastnictví. Ano, to opravdu chceme.*" Na námietku, či to neprinesie všeobecnú lenivosť, odpovedajú: „*… podle toho by byla buržoazní společnost dávno musela zahynout na lenivost; vždyť ti, kdo v ní pracují, nic nenabývají a ti, kdo nabývají, nepracují*".[10]

Môžeme predpokladať, že Marx a Engels vedeli, že kapitalisti sa svojich privilégií nikdy nevzdajú dobrovoľne, ale budú sa brániť, práve preto prichádzajú s myšlienkou o dobytí politickej a štátnej moci robotníckou triedou v priebehu revolúcie, ktorá mala byť celospoločenskou revolúciou. Svoje politické panstvo mal proletariát využiť na to, aby „*vyrval*" všetok kapitál buržoázii a sústredil všetky nástroje v rukách štátu, ktorý by umožnil rozmnožiť masu výrobných síl.[11]

Marx vysvetľuje, že pokiaľ nebudú výrobné prostriedky patriť proletariátu, kým nebudú ich vlastníctvom, buržoázia si bude môcť vždy privlastniť väčšinu bohatstva spoločnosti a nakoniec robotnícka trieda vždy stratí a vždy strácať bude. Záro-

[7] MARX, K., ENGELS, F. *Manifest komunistické strany*. Praha: Nakladatelství Svoboda, 1974, s. 29.

[8] Tamže, s. 32.

[9] Tamže, s. 51.

[10] Tamže, s. 46 – 47.

[11] „*Proletariát využije svého politického panství k tomu, aby postupně vyrval buržoazii všechen kapitál, soustředil všechny výrobní nástroje v rukou státu, tj. proletariátu zorganizovaného v panující třídu, a co nejrychleji rozmnožil masu výrobních sil.*" Tamže, s. 51.

veň dodáva, že k tejto zmene nebudú postačovať fiškálne opatrenia, pretože fiškálna redistribúcia je jednak úplne neadekvátnym pokusom zakryť základný vzťah medzi vykorisťovaním a útlakom a jednak nemôže existovať žiadna spravodlivá distribúcia, pokiaľ je výroba realizovaná kapitalistickým spôsobom.[12]

Ak ešte v roku 1847 Engels tvrdí, že zrušenie súkromného vlastníctva bude možné jedným ťahom, od uvedeného rýchlo upustil, pretože spoločne s Marxom museli nakoniec priznať, a to v súvislosti s nízkou úrovňou výrobných síl v tom čase a faktom, že robotnícka trieda nebola pri moci a nedokázala vytvoriť dostatočnú masu výrobných síl a výrobných prostriedkov, že odstránenie súkromného vlastníctva bude prebiehať „*pozvoľna a bude možné odstrániť ho až vtedy, keď bude vytvorené potrebné množstvo výrobných prostriedkov*".[13]

V kontexte uvedeného taktiež Marx v podstate kritizuje „*zakladanie výrobných družstiev so štátnou pomocou pod demokratickou kontrolou pracujúceho ľudu*",[14] teda pod politickou dominanciou štátu, avšak zároveň si uvedomuje, že iná cesta v podstate nie je, pretože presadenie komunizmu „zdola" nie je reálne, a keďže buržoázia sa svojich privilégií nikdy nevzdá dobrovoľne, musí dôjsť k premene spoločnosti „zhora" dominanciou komunistického štátu pod demokratickou kontrolou proletariátu, a teda pripúšťa prechodnú fázu s dominanciou štátu na ceste k vyššej fáze komunizmu. Marx v podstate pripúšťa tézu o pozitívnom zrušení súkromného vlastníctva v prospech existencie družstevných a účastinných podnikov so štátnou pomocou pod kontrolou pracujúcej triedy.

Nakoniec Marx s Engelsom v Zásadách komunizmu navrhujú opatrenia, ktoré by mohli byť východiskom z vtedajších pomerov, pričom ako prvý bod už neuvádzajú zrušenie súkromného vlastníctva, ale hovoria o „*obmedzení súkromného vlastníctva*".[15]

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[12] Pozri bližšie MARX, K. *Kritika gothajského programu,* 1875 [online]. [cit. 2022-09-30]. Dostupné na internete: https://revolucnimarxismus.files.wordpress.com/2021/03/kritika-gothajskeho-programu-karl-marx-1875.pdf

[13] ENGELS, F. *Zásady komunismu*. Praha: Nakladatelství Svoboda, s. 90.

[14] Tamže, s. 18.

[15] Nejdůležitější opatření, která se už teď rýsují jako nutný důsledek nynějších poměrů, jsou tato: 1. Omezení soukromého vlastnictví progresivními daněmi, vysokými dědickými daněmi, odstraněním dědictví v boční linii (bratři, synovci atd.), nucenými půjčkami atd; 2. Postupné vyvlastňování pozemkových vlastníků, továrníků, majitelů drah a rejdařů, částečně konkurencí státního průmyslu, částečně přímo za odškodnění v asignátech; 3. Konfiskace jmění všech emigrantů a těch, kdo se bouří proti většině národa; 4. Organisace práce nebo zaměstnání proletářů na národních statcích, v národních továrnách a dílnách, čímž se odstraní konkurence mezi dělníky, a továrníci, pokud ještě budou existovat, budou nuceni platit stejné vyšší mzdy jako stát; 5. Stejná pracovní povinnost pro všechny členy společnosti až do úplného zrušení soukromého vlastnictví. Vytvoření průmyslových armád zvláště pro zemědělství; 6. Soustředění úvěrového systému a peněžnictví v rukou státu prostřednictvím národní banky se státním kapitálem a zrušení všech soukromých bank a bankéřů; 7. Zvětšení počtu národních továren, dílen, železnic a lodí, obdělání veškeré dosud neobdělané půdy a zlepšení všech dosud obdělávaných pozemků podle toho, jak se zvětšuje množství kapitálů a dělníků, jež má národ k disposici; 8. Výchova všech dětí od okamžiku, kdy mohou postrádat základní mateřskou péči, v národních ústavech a na národní útraty. Spojit výchovu s prací ve výrobě; 9. Zřízení velkých paláců na národních pozemcích jako společných bydlišť pro obce

Marx dokonca ide tak ďaleko, že pripúšťa, že rozhodujúcou hybnou silou premeny spoločnosti nebude robotnícka trieda, pretože je nezrelá, ale práve dominantný „racionálny" štát, ktorý má „*zo zvyšku hanby... demokraticky kontrolovať pracujúcich*",[16] a práve ten má prebrať úlohu hybnej, revolučnej sily na ceste k novej spoločnosti. Avšak „*vo vyššej fáze komunistickej spoločnosti, až už jednotlivci nebudú v zotročiacom područí práce a až teda zmizne i protiklad medzi duševnými a telesnými prácami; až práca nebude obyčajným prostriedkom k životu, ale stane sa prvou životnou potrebnou; až s všestranným rozvojom jednotlivca vzrastú i výrobné sily a všetky zdroje spojeného bohatstva potečú plným prúdom — až potom bude možné plne prekročiť úzky obzor buržoázneho práva a spoločnosť bude môcť zapísať na svoj prápor: Každý podľa svojich schopností, každému podľa jeho potrieb!*".[17]

Spoločnosť, teda štát, sa mal zmocniť výrobných prostriedkov a moc mala slúžiť na riadenie ľudí alebo vecí a výrobných procesov, čo malo viesť k tomu, že výrobné sily a distribúcia výrobných prostriedkov sa mala využívať podľa dostupných zdrojov a potrieb spoločnosti, čo povedie k hospodárskemu rozvoju bez kríz, k pokroku vo vede a technike. Potom môže dôjsť k odstráneniu triednych rozdielov a deleniu na prácu manuálnu a duševnú a za pomoci vzdelávania a kultúry, potom sa vyprodukuje nový človek, ktorý si rozvinie širší obzor a využije svoje vedomie a dá sa do služieb komunizmu.[18] Takíto noví ľudia budú potom riadiť spoločnosť, čiže „racionálny" štát. A dodáva, že takýto skok je možný z ríše nevyhnutného do ríše slobody a môže ho realizovať iba pracujúci ľud a až vtedy môže dôjsť k zrušeniu súkromného vlastníctva, pretože pracujúci „*nemajú čo stratiť, iba svoje reťaze, ale môžu získať svet*".[19]

Marx a Engels v súkromnom vlastníctve vidia najväčšiu prekážku prechodu k vyššej fáze komunistickej spoločnosti. Uvedomujú si totiž, že k realizácii programu komunistického hnutia nebude postačovať znárodnenie majetku či vyvlastnenie veľkých vlastníkov výrobných prostriedkov a prerozdelenie tohto majetku.[20] Prichádzajú dokonca s návrhom zrušenia dedičského práva.

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občanů, kteří budou pracovat jak v průmyslu, tak v zemědělství a slučovat v sobě výhody městského i venkovského života, aniž budou trpět jejich jednostranností a nevýhodami; 10. Zbourání všech nezdravých a špatně stavěných obydlí i městských čtvrtí; 11. Stejné dědické právo pro manželské i nemanželské děti; 12. Soustředění veškeré dopravy v rukou národa. ENGELS, F. *Zásady komunismu*, s. 90.

[16] MARX, K. *Kritika gothajského programu* [online]. 1875, s. 14 [cit. 2022-09-30]. Dostupné na internete: https://revolucnimarxismus.files.wordpress.com/2021/03/kritika-gothajskeho-programu-karl-marx-1875.pdf

[17] Tamže, s. 14.

[18] Pozri bližšie LACLAVÍKOVÁ, M. Robotník, námezdná práca a problém odcudzenia (rozbor problematiky na báze diel Ekonomicko-filozofické rukopisy a Námezdná práca a kapitál). In: KLUKNAVSKÁ, A. (ed.). *Vplyv marxisticko-leninskej ideológie na právo v Československu v rokoch 1948 – 89. Marx stále živý! K prehodnoteniu učenia K. Marxa v súčasnom právnom a ekonomickom myslení.* Zborník príspevkov. Bratislava: Wolters Kluwer SR, 2021, s. 21 – 40. ISBN 978-80-571-0352-3.

[19] MARX, K., ENGELS, F. *Manifest komunistické strany*. Praha: Nakladatelství Svoboda, 1974, s. 29.

[20] KUKLÍK, J. *Vývoj česko-slovenského práva 1945 – 1989*. Praha: Linde, 2000, s. 531. ISBN 978-80-7201-741-6.

V kontexte projektovania budúcnosti Marxom a i napriek tomu, že sám si nárokoval metodickosť a systematickosť v požiadavke, že *„bádanie musí podrobne zvládnuť látku, analyzovať rozličné formy jej vývinu a vysliediť ich vnútornú spojitosť“*[21] fragmentárnosť, určitá nesystematickosť, nedokončenosť a nedialektickosť ukazujú, že je možné tvrdiť, že ako systematik a dialektik čiastočne zlyhal, a to je možné tvrdiť i smerom k jeho myšlienkam a tézam, ktoré vychádzali z vízie, že odhalením primátu materiálnej základne pred ideologickou nadstavbou a odhalením zákonitostí ich historického vývoja dokáže predpovedať aj budúci vývoj ľudskej spoločnosti. Ale dnes už vieme, že sa mu to nepodarilo a že jeho projekcia má nedostatky. V čom sa teda Marx a Engels mýlili?

1. Marx a Engels sa mýlili v projektovaní super úlohy pracujúcej triedy ako triedy, ktorá bude hybnou a politickou silou spoločnosti a bude stáť na čele revolučnej premeny spoločnosti. Ako i sami neskôr uznávajú, pracujúca trieda nedisponuje dostatočnou masou výrobných prostriedkov, a preto k zmene musí dôjsť „zhora“ prostredníctvom štátu. Marx tu však predpokladá, že spoločnosť bude riadená štátom pod demokratickým dohľadom pracujúcich, čo sa však v „reálnom socializme“ nikdy nestalo. Štát prebral dominantné postavenie, avšak pracujúca trieda sa zmenila len na heslo, ale reálne sa na moci a riadení štátu, teda na výrobných prostriedkoch, nepodieľa. Pracujúci sa stali vo svojej podstate vazalmi štátu.
2. Marx a Engels, ale ani komunisti počas „reálneho socializmu“ nezohľadnili základné funkcie vlastníctva, resp. ich zámerne opomenuli, pretože do ich ideových a ideologických východísk nezapadali.
   a) Súkromné vlastníctvo zodpovedá *intelektuálnej nezávislosti človeka*. Je to „stimulus vitae“, prebúdza osobnú iniciatívu a posilňuje osobnú zodpovednosť, pričom eliminácia súkromného vlastníctva vedie k zotrvačnosti a nechuti pracovať, veď už Adam Smith povedal, že *„muž, ktorý nemôže získať majetok, nemôže mať iný záujem, ako čo najviac jesť a čo najmenej pracovať“*.[22] Takže tu nestačí Marxova téza, ktorú inak v určitej podobe prebrali i komunisti, že stačí zrušiť súkromné vlastníctvo a odovzdať celú ekonomiku širokej verejnosti a doterajší sebec sa premení na šťastného a nevinného anjela.
   b) Súkromné vlastníctvo slúži na *jasné rozdelenie a vymedzenie kompetencií a oblastí zodpovednosti v rámci ekonomiky*. Ak sa zruší inštitút súkromného vlastníctva, musí sa zaviesť centrálna správa a plánovanie, čo si vyžaduje obrovský byrokratický aparát. Niekoľko mesiacov po boľševickom prevzatí moci Lenin vyhlásil: *„Premena celého štátneho ekonomického mechanizmu na jeden veľký stroj, na jeden ekonomický organizmus, ktorý funguje tak, že stámilióny ľudí sa riadia jediným plánom – to je tá gigantická organizačná*

[21] MARX, K. *Kapitál. Kritika politickej ekonómie*. Zv. I. Bratislava: SVPL, 1955, s. 31.

[22] SMITH, A. *Der Reichtum der Nationen*. Leipzig, 1924. Band I, s. 395.

úloha, ktorá nám pripadla.“[23] Súkromné vlastníctvo totiž umožňuje využiť výkonovú motiváciu ako páku na zoskupenie a využitie výrobných faktorov v ekonomike prostredníctvom vysokej flexibility v prispôsobovaní sa tak, aby spoločnosť bola zásobovaná kvantitatívne dostatočnými a kvalitnými produktmi a službami. V tom je v neposlednom rade prínos pre nemajetných občanov, teda väčšinou pracujúcich a ich rodiny. Ak sú vo veľkej miere rozšírené aj súkromné výrobné prostriedky, takže tu nie je len niekoľko veľkých korporácií, ale aj široká škála stredných a malých firiem, potom majú zamestnanci aj primeranú slobodu výberu, ktorá zahŕňa aj zmenu zamestnania. Centralizovane riadené hospodárstvo tieto úlohy zabezpečiť nedokázalo.

c) Výmena je sebaurčujúca pre človeka v zmysle dať, mať-chcieť a nadobúdať, je typická len pre človeka, nie pre zvieratá. Jednotlivec má jedinečné vlastnosti, niektoré potreby sú spoločné všetkým ľuďom. Potreba je prejavom nejakého nedostatku, chýbania niečoho, čoho odstránenie je žiaduce. Potreba núti k vyhľadávaniu určitej podmienky potrebnej k životu, poprípade vedie k vyhýbaniu sa určitej podmienke, ktorá je pre život nepriaznivá. Je niečím, čo ľudská bytosť nutne potrebuje pre svoj život a vývoj. Nezohľadnenie výmeny ako jednej zo základných potrieb existencie jednotlivca a redukcia výmeny iba na osobný majetok, na to, čo si človek vlastnými rukami zarobil, resp. vyrobil pod dohľadom štátu, nemohla viesť k spravodlivému a dobrovoľnému prerozdeleniu kolektívneho vlastníctva, ako to projektoval Marx a realizovali komunisti, viedlo k špirále nespokojnosti v spoločnosti a sociálnym nepokojom.

3. Marx sa taktiež mýlil v úlohe trhu, v regulovaní obehu tovarov, nezohľadnil nedostatky a negatíva centrálneho riadenia, i keď komunisti v konečnom dôsledku podľa vzoru ZSSR prevzali skôr Stalinovu tézu o nahradení trhovej regulácie administratívne direktívnym spôsobom, namiesto Marxovej pracovnej teórie hodnoty a teórie peňazí ako všeobecného ekvivalentu tovarových hodnôt sa v nej presadzovala stalinská teória a prax pseudopeňazí.[24] Z ekonomického pohľadu nemohli vznikať a ani nevznikali reálne ceny ako signály relevantných ekonomických informácií a nedalo sa racionálne ekonomicky kalkulovať o očakávaných ekonomických nákladoch, výnosoch, ziskoch či stratách podnikov, pričom v praxi často dochádzalo k plytvaniu, preferovaniu súčasnosti na úkor budúcnosti, s dôsledkami na ekonomickú neefektívnosť, celkový úpadok ekonomiky a prenesené veľké vnútorné dlhy a iné záťaže.

Na záver je potrebné uviesť, že ideové a ideologické východiská, ktoré mali vplyv na „reálny socializmus“ preberali komunisti s ich nedostatkami, avšak len v rozsahu, ktorý komunistickému režimu vyhovoval. A tak i komunisti v Československu, rov-

[23] HÖFFNE, J. *Arbeit – Eigentum – Mitbestimmung. Ausgewählte Schriften*. Band 4. Schoeningh Ferdinand, 2019, s. 151 – 152.

[24] ČERNÍK, V., VICENÍK, J. Spor o Marxa z pohľadu metodológie spoločenských vied. In: DINUŠ, P. a kol. *Spor o Marxa*. Bratislava: VEDA, 2011, s. 25.

nako ako v iných krajinách sovietskeho bloku, preberajú nekriticky a nerealisticky marxisticko-leninskú ideológiu a sovietsku doktrínu s cieľom nastoliť komunizmus a odstrániť vykorisťovanie.

Myšlienky o odumretí, resp. odstránení súkromného vlastníctva, preberajú ďalej aj Lenin,[25] Stalin[26] a sovietska právna veda[27] a rovnako ako v ostatných štátoch sovietskeho bloku, tak i v Československu sa zmeny vo vlastníckom práve stali základom pre ideologicky podfarbené zásahy do tradičných inštitútov súkromného práva.

3. Reforma občianskeho práva a vlastnícke právo

Za asi najmarkantnejšiu premenu v odvetví súkromného práva je potrebné považovať najmä nové vymedzenie vzťahu medzi socialistickým štátom a jednotlivcom, ktoré sa o. i. dotklo aj súkromného vlastníctva, teda i občianskeho práva, ktoré malo byť pod vplyvom marxizmu-leninizmu odstránené, ako konštatoval Z. Fierlinger, predseda vlády: *„Socialistický právny poriadok neuznáva v oblasti hospodárskej nič súkromné. Všetko je verejnoprávne. Nemôže byť teda ako skôr základom občianskeho práva právo rímske, opierajúce sa o súkromné vlastníctvo výrobných prostriedkov.“*[28]

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[25] Lenin v liste ľudovému komisárovi Kurskému píše: *„My nic ‚soukromého' neuznáváme, pro nás je všechno v hospodářské oblasti veřejnoprávní“*. KNAPP, V. Aktuální problémy systému československého práva. *Právník*. CXXIX, 1990, 11, s. 964.

[26] Stalin opúšťa Marxovu teóriu o zrušení súkromného vlastníctva. Marxovu tézu o pozitívnom zrušení súkromného vlastníctva v družstevných a účastinných podnikoch so štátnou pomocou a kontrolou proletariátu nahrádza svojou tézou o jeho negatívnom zrušení cestou zoštátnenia, resp. zovšeobecnenia súkromného vlastníctva kontrolovaného straníckou byrokraciou a namiesto rozvinutia Marxovej tézy o úlohe trhu v regulovaní obehu tovarov sa v nej presadila Stalinova téza o nahradení trhovej regulácie administratívne direktívnym spôsobom. V kontexte uvedeného môžeme teda vyvodiť, že Stalinov výklad marxizmu-leninizmu, ktorý sa pokladal za dogmu, sa odklonil od pôvodného učenia Marxa, ktorý svoje učenie považoval za historicky podmienenú analýzu problémov. Marx, podľa nášho názoru, takýto vývoj nemohol v kontexte svojej doby ani predpokladať. Ideológia stalinizmu viedla k podstatnej deštrukcii Marxovho pokusu o nekapitalistickú cestu rozvoja spoločnosti. ČERNÍK, V., VICENÍK, J. Spor o Marxa z pohľadu metodológie spoločenských vied, s. 25.

[27] Napríklad Pašukanis sa venuje aj otázke práva slobody, právu na vlastníctvo a dochádza k rovnakému názoru ako Marx v spise O židovskej otázke. I podľa neho individuálne právo na život, sloboda a vlastníctvo nemajú absolútnu ani abstraktnú existenciu, ale existujú len preto, že ich štát chráni. Štát garantuje ich ochranu, preto sú v moci štátu bez obmedzení. Zároveň skúma podrobne i samotný inštitút vlastníctva a tvrdí, že právna veda si nevie s týmto inštitútom poradiť, a preto inštitút súkromného vlastníctva vymedzuje výlučne negatívne, ako zákaz užívať vec niekým iným ako vlastníkom. Pašukanis tvrdí, že vzťah právneho subjektu k veci musí byť definovaný ako vzťah k iným právnym subjektom a nie k veci samej. Pozri bližšie MARX, K. *Zur Judenfrage*. MEW. Band 1. Berlin: Dietz, 1956, s. 347 – 377; REICH, N. Marxistische Rechtstheorie zwischen Revolution und Stalinismus. Das Beispiel Pašukanis. In: *Kritische Justiz*, 1972, s. 100 a nasl.

[28] FIERLINGER, Z. Za socialistický právní řád. *Právník*, 1950, č. 4, s. 428. Citované podľa BĚLOVSKÝ, P. Občanské právo. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Masarykova univerzita, 2009, s. 426.

Základ pre reformu občianskeho práva vrátane vlastníckeho práva položila Ústava z 9. mája (ďalej len „ústava), ktorá predznamenala nové pojatie štátu a práva, ale aj novú úpravu vlastníctva ako takého. „*Právo a stát se nedá od sebe oddělit. Souvisí spolu a vznikají současně. Proto bylo třeba nové právní úpravy, vztahující se na zcela nové společenské poměry, upravující zcela nový typ společenského vlastnictví, upravující zcela nové vztahy mezi lidmi, kde pracovní síla, člověk, nejcennější kapitál lidské společnosti, přestává být zbožím. Proto bylo třeba odstranit starou vykořisťovatelskou právní úpravu, proto boj proti buržoazii od r. 1945 a boj proti pokusům o obnovu kapitalismu byl také bojem proti buržoaznímu právu, bojem za lidově demokratický řád.*“[29] A tak už ústava deklaruje, že všetko hospodárstvo má slúžiť verejnému záujmu a hospodárska sústava je primárne založená na znárodnení nerastného bohatstva, priemyslu, veľkoobchodu a peňažníctva; na ochrane drobného a stredného podnikania a na nedotknuteľnosti osobného majetku. Zároveň sa do ústavy pretavil zámer prezentovaný už v marci 1948 ministrom poľnohospodárstva J. Ďurišom, ktorý plánoval konečnú úpravu pozemkovej držby so zdôraznením, že „*pôda patrí tým, ktorí na nej pracujú*“.[30] S uvedeným súviselo i stanovenie najvyššieho výmeru pôdy, ktorý mohol byť v súkromnom vlastníctve, na výmeru nie viac ako 50 ha. Znárodnenie sa tak stalo súčasťou prechodu v rámci komunistického režimu a taktiež súčasťou socialistickej ekonomickej reformy.

V časti Práva a povinnosti občanov ústava garantovala, že každý občan môže nadobúdať nehnuteľnosti a iný majetok, vykonávať zárobkovú činnosť na akomkoľvek mieste v Československu.[31] Okrem garancie, že vlastníctvo môže byť obmedzené len zákonom, z ústavy plynuli i povinnosti smerom k súkromnému vlastníctvu. Každý občan bol povinný pracovať podľa svojich schopností a svojou pracou prispievať k prospechu celej spoločnosti, neškodiť záujmom spoločnosti a usmerňovať výkon vlastníckeho práva podľa jednotného plánu pre národné hospodárstvo.[32]

Už ústava upravovala zvýšenú ochranu socialistického vlastníctva a hospodárskej základne štátu, čo je zrejmé z toho, že výrobné prostriedky ako také mohli byť len v socialistickom vlastníctve, teda buď v družstevnom, alebo v národnom vlastníctve. K naplneniu tejto úlohy cestou kolektivizácie a zriaďovania jednotných roľníckych družstiev malo napomôcť i opustenie zásady *superficies solo cedit*[33] a dvojfázové-

[29] Schôdza ÚNZ z 25. októbra 1949, vystúpenie spravodajcu posl. Dr. Bartuška [online]. [cit. 2022-09-30]. Dostupné na internete: https://www.psp.cz/eknih/1948ns/stenprot/049schuz/s049001.htm

[30] Schôdza ÚNZ z 21. marca 1948, vystúpenie ministra poľnohospodárstva Ďuriša [online]. [cit. 2022-09-30] Dostupné na internete: https://www.psp.cz/eknih/1946uns/stenprot/100schuz/s100001.htm

[31] § 8 Ústavy 9. mája (ústavný zákon č. 150/1948 Zb. Ústava československej republiky).

[32] § 8 a § 9 Ústavy 9. mája (ústavný zákon č. 150/1948 Zb. Ústava československej republiky).

[33] Zásada *superficies solo cedit* stanovuje, že všetky stavby či iné objekty, ktoré sa nachádzajú na pozemku a sú pevne spojené so zemou, patria neoddeliteľne k tomuto pozemku. Vlastník pozemku je teda vždy zároveň vlastníkom všetkých stavieb na pozemku. Podľa § 155 OZ 1950: Vlastníkom stavby môže byť osoba rozdielna od vlastníka pozemku, došlo k opusteniu tejto zásady, čo súviselo s kolektivizáciou a tým, že družstvá ako také hospodárili na pozemkoch, ku ktorým zostalo

ho nadobúdania vlastníckeho práva k nehnuteľnostiam, pretože vlastnícke právo sa podľa novej úpravy prevádzalo už samotnou zmluvou. To viedlo k degradácii významu katastra nehnuteľností.[34]

Ústava otvorene deklarovala nové predstavy o funkcii vlastníckeho práva, ktoré mali smerovať k likvidácii súkromného vlastníctva na úkor „nových" spoločenských foriem vlastníctva (štátne a družstevné), pričom osobné vlastníctvo malo byť len výsledkom osobnej práce, rovnako ako nové predstavy o hospodárskej úlohe štátu a práva v centrálne riadenom národnom hospodárstve. A práve nový Občiansky zákonník mal rozbiť tradičné inštitúty a nahradiť ich novými, ktoré by zodpovedali novému spoločensko-hospodárskemu usporiadaniu, ktorého jediným cieľom bolo podrobenie si všetkých výrobných prostriedkov a výrobných síl, vrátane celej súkromnej sféry občanov. Zachovanie čo i len nejakej súkromnej sféry človeka bolo pre komunistický režim úplne neprijateľné.

Nový Občiansky zákonník bol prijatý 25. októbra 1950 ako zákon č. 141/1950 Zb. (ďalej len „OZ"), ktorý ustanovuje za svoje základné piliere paradoxne socialistické vlastníctvo: *„Nové hospodářské poměry naší společnosti našly své vyjádření především v právní úpravě vlastnických vztahů. Znárodnění našeho průmyslu, peněžnictví a podstatné části naší distribuce a dopravy znamená odstranění vykořisťování člověka člověkem. Právně vyjádřeno to znamená, že se tento znárodněný majetek stává vlastnictvím státu, vlastnictvím pracujícího lidu, socialistickým státním vlastnictvím. Socialistické vlastnictví, t. j. státní vlastnictví a vedle něho vlastnictví družstevní je základním pilířem našeho nového občanského zákoníku."*[35]

Nový Občiansky zákonník zaviedol nové vymedzenie vzťahu medzi socialistickým štátom a jednotlivcom, občianskoprávne vzťahy strácajú svoju dominanciu a opúšťa sa i tradičné chápanie súkromného vlastníctva. Tradičné chápanie súkromného vlastníctva ako práva absolútneho v zmysle nadvlády nad vecou, ktorého úprava v tomto kontexte vychádzala z občianskych zákonníkov 19. stor. (vplyv rímskeho práva), bolo zavrhnuté ako účelové, zastaralé a individualistické, ale najmä nezodpovedajúce programovej vízii komunistického režimu a ideológii marxizmu-leninizmu.[36] Okrem opustenia tradičného pojatia inštitútu vlastníctva dochádza i k opusteniu dualizmu práva[37] a občianske právo sa redukuje v podstate len na úpravu majetko-

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vlastnícke právo ich pôvodným vlastníkom. Uvedené ešte skomplikovalo ustanovenie Občianskeho zákonníka 1950, ktoré zaradili stavby taktiež za nehnuteľnosti.

[34] GÁBRIŠ, T. *Dejiny práva na Slovensku po roku 1945* [online], s. 44 [cit. 2022-09-30] Dostupné na internete: https://www.flaw.uniba.sk/fileadmin/praf/Pracoviska/Katedry/KPDPK/Sylaby/Dejiny_prava_na_Slovensku_po_roku_1945.pdf

[35] Schôdza ÚNZ z 25. októbra 1949, vystúpenie spravodajcu posl. Dr. Bartuška [online]. [cit. 2022-09-30] Dostupné na internete: https://www.psp.cz/eknih/1948ns/tisky/t0519_00.htm

[36] BĚLOVSKÝ, P. Občanské právo. In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Masarykova univerzita, 2009, s. 440. ISBN 978-80-210-4844-7.

[37] Knapp bol toho názoru, že súkromné právo, resp. dualizmus práva by sa tak mohli stať útočiskom ideologického nepriateľa socializmu. KNAPP, V. Právo veřejné a soukromé. *Právník,* 1950, s. 82. Po-

vého práva – vecné práva a záväzky – a stáva sa nástrojom na presadzovanie hospodárskych a ideologických cieľov.[38]

Občiansky zákonník rozlišoval vlastnícke právo a vecné práva k cudzej veci, ktoré zahŕňali právo stavby, vecné bremená, ktoré obmedzujú vlastníka veci v prospech niekoho iného, a to tak, že vlastník je povinný buď niečo trpieť, alebo sa niečoho zdržať, alebo niečo robiť (právo požívania a právo užívania pre vlastnú potrebu či výmenok slúžiaci na zabezpečenie rodičov po odovzdaní poľnohospodárskej usadlosti ich deťom), záložné a zádržné právo.

4. Kolektívne a individualistické formy vlastníctva podľa novej úpravy

Nová právna úprava občianskeho práva reflektovala ústavu v kontexte nových vlastníckych foriem a rozlišovala vlastníctvo socialistické, teda štátne a družstevné vlastníctvo ako druhy kolektívneho vlastníctva, a vlastníctvo osobné a súkromné ako formy individuálneho vlastníctva.[39] Dominantné postavenie a v podstate neobmedzenú ochranu poskytoval právny poriadok len kolektívnym formám. Uvedené súviselo s dominanciou verejného poriadku a dominanciou verejného záujmu pracujúcej triedy ako väčšiny na budovaní socializmu, ktorý mal štát nad záujmom súkromným, či už záujmom jednotlivca, alebo záujmom kolektívu, pretože takéto záujmy boli podľa vtedajšej mienky vždy v záujme súkromných vlastníkov, teda kapitalistov, ako aj všetky záujmy, aj verejné mali v kapitalizme smerovať vždy len k ochrane ich súkromného vlastníctva.[40]

Súkromné vlastníctvo sa malo podľa novej úpravy v Občianskom zákonníku spravovať ustanoveniami danými pre vlastnícke právo, pokiaľ z nich nevyplýva, že platia len o vlastníctve socialistickom alebo osobnom. Súkromné vlastníctvo nebolo vyhlásené za nedotknuteľné a ochrana sa týkala len ochrany pred neoprávneným zá-

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zri bližšie aj KNAPP, V. *Předmět a systém československého socialistického práva občanského*. Praha: Nakladatelství ČAV, 1959.

[38] *„Z analysy současné vývojové etapy a z tendence dalšího vývoje plyne, že nový občanský zákoník bude upravovat nové občansko-právní vztahy občanů. Proto bylo z občanského zákoníka vyloučeno právo rodinné již kodifikované, které upravuje společenské vztahy člověka k manželství i k rodině. Proto nebylo kodifikováno zvláštní právo obchodní, které bylo právem privilegovaných vrstev kapitalistického státu. Proto tam nebylo pojato právo pracovní, neboť dřívější řád to odůvodňoval a ostatně to vyjadřovalo jeho podstatu. Za kapitalismu byla pracovní síla zbožím a stávala se předmětem koupě a prodeje stejně jako jiné zboží. V naší nové společnosti, kde práce stává se věcí, slávy a hrdinství, budou pracovní poměry upraveny ve zvláštním kodexu práce“*. Schôdza ÚNZ z 25. októbra 1949, vystúpenie spravodajcu posl. Dr. Bartuška [online]. [cit. 2022-09-30] Dostupné na internete: https://www.psp.cz/eknih/1948ns/stenprot/049schuz/s049002.htm

[39] Pozri bližšie JÚDA, V. Mnohorakosť foriem vlastníctva v Československej socialistickej vede občianskeho práva. Vplyv klasikov marxizmu-leninizmu na budovanie pojmu socialistické vlastníctvo. In: KLUKNAVSKÁ, A. (ed.). *Vplyv marxisticko-leninskej ideológie na právo v Československu v rokoch 1948 – 89. Marx stále živý! K prehodnoteniu učenia K. Marxa v súčasnom právnom a ekonomickom myslení*. Zborník príspevkov. Bratislava: Wolters Kluwer SR, 2021, s. 41 – 67.

[40] KNAPP, V. *Právo veřejné a soukromé*, s. 82.

sahom, ktorá bola obmedzená vzhľadom na dominanciu socialistického vlastníctva a vzhľadom na obmedzenia voľného nakladania so súkromným vlastníctvom, napr. nezastavané pozemky boli považované za výrobný prostriedok a mohli sa prevádzať len na štát alebo na socialistickú organizáciu na to osobitným predpisom oprávnenú.[41] Ďalším obmedzením bolo to, že záložné práva a vecné bremená mohli vznikať len zo zákona.

Ústava taktiež ustanovovala, že osobný majetok je nedotknuteľný a proklamovala, že nedotknuteľný je najmä majetok osobnej spotreby, úspory z práce a dedičstvo. Vzorom pre túto úpravu „osobného vlastníctva" bola sovietska ústava z roku 1936, ktorá stanovila: „*Osobní vlastnické občanu na své pracovní důchody a úspory, na obytný dum a vedlejší domácí hospodářství, na předměty domácího hospodářství a domácí potřeby, na předměty osobní spotřeby a osobní pohodlí, stejné jako dědické právo na osobní vlastnictví občanu je chráněno zákonem.*"[42] V osobnom vlastníctve podľa Občianskeho zákonníka mohli byť najmä predmety domácej a osobnej spotreby, rodinné domčeky[43] a úspory nadobudnuté prácou (osobný majetok).

Obmedzenia platili aj pre osobné vlastníctvo. Významné obmedzenie predstavovalo ustanovenie § 129 OZ, podľa ktorého v osobnom vlastníctve mohol byť len jeden rodinný domček. Osobný majetok mal byť nedotknuteľný, avšak napr. podľa § 130 ods. 2 OZ veci nahromadené v rozpore so záujmom spoločnosti nad mieru osobnej potreby vlastníka, jeho rodiny a domácnosti, nepožívali ochranu osobného vlastníctva, teda neboli nedotknuteľné. Za neodôvodnený zásah do slobody mať majetok je potrebné zaradiť aj zavedenie inštitútu bezpodielového spoluvlastníctva manželov ako kogentnej úpravy a jedinej možnej právnej formy pre úpravu týchto majetkových vzťahov manželov bez možnosti zmluvnej modifikácie.[44]

Na osobné vlastníctvo sa zároveň nahliadalo ako na odmenu za prácu, ktorú občan odvádza pre celok, pre socialistickú spoločnosť a prácou nadobudnutý pôvod osobného majetku tak bol prepojený so socialistickým vlastníctvom.

Celková úprava súkromného vlastníctva v Občianskom zákonníku smerovala k vytvoreniu dojmu, že nový režim splnil svoju základnú tézu a víziu svojho programu na ceste k vyššej fáze usporiadania spoločnosti a „zatočil" so súkromným vlast-

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[41] Až na stanovené výnimky nemohol súkromný vlastník podľa § 491 ods. 2 zmluvne prevádzať nezastavané stavebné pozemky a navyše pri stanovení maximálnych cien sa u pozemkov vychádzalo z predpisov o cenách z roku 1939.

[42] Stalinská ústava. Praha: 1950. Citované podľa BĚLOVSKÝ, P. *Občanské právo*, s. 449.

[43] Gábriš poukazuje, že aj použitie zdrobneniny „domček" malo určite naznačiť skromnosť stavby. § 198 navyše spomína aj „záhradku." Pojem „domček" sa používa konzistentne v celom Občianskom zákonníku. Definícia „domčeka" je uvedená v § 128 ods. 1 a 2. „*Rodinný domček je obytný dom, v ktorom aspoň dve tretiny podlahovej plochy všetkých miestností pripadajú na byty. Rodinný domček môže mať najviac päť obytných miestností nepočítajúc do toho kuchyne. Väčší počet obytných miestností môže mať, ak úhrn ich podlahovej plochy neprevyšuje 120 m²; z obytných kuchýň sa do tohto úhrnu započítavajú len plochy, o ktoré výmera kuchyne prevyšuje 12 m². Za podmienok uvedených v odseku 1 sa za rodinný domček považuje aj obytná časť roľníckej usadlosti.*"

[44] ČÍŽKOVSKÁ, V. Vlastnická svoboda a občanské právo v socialistické společnosti. *Právník*. 1968, CVII, č. 9, s. 794 – 795.

níctvom, ktorého existencia bola pre komunistický režim neprijateľná. Nová regulácia nadobúdania individuálneho vlastníctva tak mala potlačiť majetkové rozdiely v spoločnosti a pripraviť ľudí na prechod k štátnemu zriadeniu bez individuálneho majetku, kde všetky osobné potreby, ktoré v socialistických podmienkach má ešte uspokojovať inštitút osobného vlastníctva, budú zaisťované prostredníctvom spoločenského „kolektívneho" vlastníctva.[45] Podľa V. Čížkovskej bol v praxi československého práva súkromný vlastník jednoznačne diskriminovaný oproti osobnému tým, že súkromné vlastníctvo bolo natoľko obmedzené, že nemožno hovoriť o majetkovej slobode ako základe jeho právnej úpravy.[46]

Vtedajšej právnej vede sa nepodarilo vymedziť definičné rozdiely medzi osobným a súkromným vlastníctvo a problémy v tejto oblasti zotrvávali po celú dobu existencie „reálneho socializmu".[47] Hlavným identifikačným znakom pre odlíšenie socialistického vlastníctva od inej formy bol charakter predmetu vlastníckeho práva, t. j. majetok, pričom zdrojom osobného vlastníctva mohla byť iba práca a neskôr i účel využitia (osobná potreba alebo zisk).

Z uvedeného môžeme jednoznačne vyvodiť, že úprava súkromného práva po roku 1948 opustila autonómiu vôle subjektov, ktorá je vnímaná ako princíp hlásajúci, že nikto sa nemôže ocitnúť v určitom právnom postavení proti svojej vôli a tiež ako prirodzenoprávna sloboda vôľu vyjadriť a slobodne realizovať.[48] S uvedeným úzko súvisí i sloboda vlastníctva, ktorá je neoddeliteľným prvkom súkromnej sféry jednotlivca. Práve prirodzený charakter vlastníckeho práva sa nestotožňoval s ideou marxisticko-leninskej ideológie, pretože vlastnícke právo a slobodu nakladania s majetkom pokladali za účelový nástroj kapitalizmu slúžiaci len kapitalizmu a súkromným záujmom vykorisťovateľov. *„Panstvo nad vecou"* muselo byť podriadené socialistickej regulácii, ktorá mala spoločnosť a jej obyvateľov pripraviť na prechod ku komunizmu, kde individuálne a súkromné nebude existovať. Nakoniec mal i jednotlivec stratiť svoju možnosť slobodného osobného rozvoja a akejkoľvek súkromnej sféry, aj tej najosobnejšej.

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[45] Pozri bližšie BĚLOVSKÝ, P. *Občanské právo*, s. 448 – 454.

[46] ČÍŽKOVSKÁ, V. *Vlastnická svoboda a občanské právo v socialistické společnosti,* s. 794 – 795.

[47] Zaoberali sa napríklad otázkou, či roľník, ktorý hospodári na svojej pôde môže plody, ktoré získal obrábaním pôdy nadobúdať do súkromného vlastníctva. Význam mala i otázka nadobudnutia vecí nepoctivo „majetok získaný z nepoctivého zdroja nepožíva ochranu osobného vlastníctva. Nepoctivo nadobudnuté veci boli považované za súkromné vlastníctvo". Pozri bližšie KNAPP, V., PLANK, K. Osobné vlastníctvo. *Právny obzor*. 1952, s. 418.

[48] Slobodná možnosť mať či nadobúdať a využívať majetok (vlastnícka sloboda); slobodná možnosť nakladať s majetkovými hodnotami a právami; slobodná možnosť rozvoja osobnosti človeka a jeho tvorivej duševnej činnosti, ako aj rozhodovanie o svojom majetku pre prípad smrti. Pozri bližšie LAZAR, J. *Základy občianskeho hmotného práva I.* Bratislava: IURA EDITION, 2004, s. 15.

Záver

Keď Marx a Engels prichádzajú so svojou tézou o odstránení súkromného vlastníctva, vtedajšia spoločnosť ju vníma s nevôľou a je veľmi pravdepodobné, že vtedy si asi nikto nevedel predstaviť zrušenie, resp. obmedzenie súkromného vlastníctva a autonómiu vôle. Po skončení druhej svetovej vojny a po Víťaznom februári 1948 sa tieto tézy stávajú nielen v Československu, ale aj v ostatných štátoch sovietskeho bloku realitou.

Za najvýznamnejšie zásahy do súkromného práva môžeme s poukazom na už uvedené zaradiť snahu o odstránenie tradičných princípov kontinentálneho poňatia *ius civile* vybudovaného na základe rímskeho práva; odstránenie tradičného právneho dualizmu rozlišujúceho právo súkromné a verejné; centralizmus a kogentnú právnu úpravu; snahu o potlačovanie individualizmu a presadzovanie kolektivizmu; triedny charakter práva; redukciu tradične rozsiahlej civilistickej matérie a zúženie občianskeho práva na majetkové právo; presadzovanie hospodárskych a ideologických cieľov a prehnanú snahu o zjednodušovanie právnej úpravy.

Obmedzenie samotného vlastníckeho práva bolo komunistami prezentované ako prednosť, ktorá mala zaistiť najvýznamnejšie výrobné prostriedky, ktoré mali zostať v rukách pracujúceho ľudu (triedny charakter) a slúžiť verejnému záujmu celej spoločnosti na ceste k vyššej forme usporiadania ľudskej spoločnosti – komunizmu. Tento cieľ mal byť o. i. dosiahnutý práve zrušením súkromného vlastníctva, resp. jeho obmedzením, preto Ústava 9. mája a následne Občiansky zákonník z roku 1950 reflektujú tieto nové požiadavky do novej úpravy vlastníckych vzťahov, v ktorých dominantné postavenie a garantovanú ochranu malo len socialistické vlastníctvo.

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Práva žien na rodinný fideikomis v druhej Poľskej republike vo svetle všeobecných zmien občianskeho práva

Women's Rights Towards Family Fideicommissa Assets in the Second Republic of Poland in the Light of the General Civil Law Changes

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Abstrakt: Rodinný fideikomis bol právny inštitút, ktorý predstavoval v ranonovovekej Európe výsledok reinterpretácie klasického rímskoprávneho konštruktu. Rodinné fideikomisy v Poľsku boli časťou rodinného majetku. Išlo o nehnuteľnosti a hnuteľné veci vyňaté z viacerých všeobecných pravidiel súkromného práva (najmä vlastníckeho, záväzkového a dedičského). Právo zriadiť fideikomis mal občan mužského pohlavia (šľachtic alebo mešťan) s plnou spôsobilosťou na právne úkony. Fideikomisy neboli predmetom klasického dedenia a ich rozdelenie, predaj alebo použitie na účely hypotéky bolo zakázané. Iba jeden mužský rodinný príslušník bol oprávnený spravovať fideikomis ako správca, čo očividne znevýhodňovalo ostatných mužských a všetkých ženských rodinných príslušníkov. Autor sa v príspevku venuje právnej situácii žien v rodinách s fideikomismi. Ich práva na fideikomis boli minimálne; všeobecne boli v tejto súvislosti vylúčené z akéhokoľvek vplyvu alebo rozhodovania. Nebolo im umožnené, aby sa (až na zriedkavé výnimky) stali formálnymi „správcami" fideikomisov. Manželky správcov a ich dcéry mali však nárok na určité finančné výhody. Autor sa príspevkom snaží poukázať na to, ako zmeny v postavení žien na začiatku 20. storočia ovplyvnili nazeranie na fideikomisy a ich praktické využívanie. Analýza pokrýva obdobie medzivojnového Poľska s účinným pruským a nemeckým právom (tiež však s prihliadnutím na konkrétne ustanovenia poľského práva – najmä zákon z roku 1921). Autor analyzuje právne ustanovenia a spisy odvolacích súdov, ktoré získal z archívov deponovaných pri súdnom dohľade nad fideikomismi. Autor zároveň poukazuje na praktické problémy a ťažkosti žien z rodín so zriadenými fideikomismi.

Kľúčové slová: rodinné fideikomisy; Allgemeines Landrecht of the Prussian Kingdom; BGB; poľské právo; práva žien; majetkové právo; dedičské právo.

Abstract: The family fideicommissa was a legal institution invented and justified in early modern Europe by reinterpreting classical roman law construction. Family fideicommissa were certain assets of family fortune – estates and movables, excluded from many general rules of civil law (especially property, obligation, and inheritance). A male citizen (preferably nobleman or bourgeois) with full legal capacity was entitled to establish fideicommissa

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as a founder. Fideicommissa assets were not inheritable; their division, selling, or using as a mortgage, were prohibited. Only one male family member was entitled to manage the fideicommissa assets as a trustee, with the apparent disadvantage of other male and all female family members. The paper is devoted to situations of women from the fideicommissa families. Their rights towards fideicommissa assets were minimal; they were generally excluded from any influence or decision-making. It was also impossible for them (with rare exceptions) to become formal fideicommissa 'trustees'. Wives of trustees and their daughters were entitled to certain financial benefits and claims. The author tries to present how general changes in women's position in civil law at the beginning of the 20th century affected the idea and practical functioning of family fideicommissa. The analysis covers Interwar Poland under Prussian and German law (and also particular Polish provisions – especially the Law of 1921). The analysis covers legal provisions and files of the appeal courts acquired from archival research due to court supervision over various fideicommissa. The author tries to show some practical problems and struggles of women from fideicommissa families.[2]

Keywords: Family Fideicommissa; Allgemeines Landrecht of the Prussian Kingdom; BGB Civil Code; Polish Law; Women's Rights; Property Law; Inheritance Law.

1. Introduction – the essence of the family fideicommissum

The process of creating family fideicommissa in the German States in the early modern period was initially of dependent nature – it was shaped by patterns originating from Spain and the Apennine Peninsula.[3] However, the further development of this phenomenon in the particular German States and in German legal culture, was given a specific character over time. This resulted from the development of German legal doctrine on the basis of the applied Roman law.[4] Therefore, the abstract perception of the nature and construction of fideicommissa in Germany in the nineteenth and early twentieth centuries differed significantly from other legal systems in Europe. However, the basic features of the concept remained common to the whole European legal culture. These common features of family fideicommissa in the European legal culture of early modernity are: 1) Purpose, namely that of preserving the family estate intact for the generations to come, so as to ensure the family would keep the appropriate social status. 2) A specific procedure and form of their creation, via an act at law of its founder's, with the consent of the state. After the founder's death, it was impossible for the current trustee to change the nature of the fideicom-

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[3] Especially valuable theoretical remarks, see: ZOLL, F., WASILKOWSKI, J. (ed.). *Encyklopedja podręczna prawa prywatnego: założona przez Henryka Konica*, t. 2, *Księgi wieczyste – ordynacje rodowe*. Warszawa: Instytut Wydawniczy Bibljoteka, 1936, p. 1223; SÓJKA-ZIELIŃSKA, K. *Fideikomisy familijne w prawie pruskim (w XIX i pocz. XX w.)*. Warszawa: Wydawnictwa Uniwersytetu Warszawskiego, 1962, p. 7–11.

[4] SÓJKA-ZIELIŃSKA, K. *Fideikomisy familijne w prawie pruskim (w XIX i pocz. XX w.)*, p. 7–58.

missum property; such change was either forbidden or required the consensus of all the male family members. 3) Granting all the fideicommissum assets to one person (the trustee), who did not have full property rights to them. 4) Excluding the fideicommissum assets from the inheritance order, both statutory and testamentary, they were acquired on different principles resulting from the founding act (they were not inherited from the trustee as from a natural person). 5) A limited ability to dispose of or encumber the assets, to a varying degree, from prohibiting alienation and encumbrance to more flexible solutions.[5]

In Prussia, family fideicommissa developed, as throughout Germany, as early as in the 16th century. However, only the regulations of the *Allgemeines Landrecht* for the Prussian Kingdom of 1794 [hereinafter referred to as the ALP] were of crucial importance for shaping the specificity of Prussian fideicommissum, both in terms of substantive and procedural aspects. Particularly important are the regulations contained in Part 2, Title 4 [*On common family rights*], in Chapters: 3 [*On entailed estates*]; 4 [*On succession order in the case of the entailed estate*] and 5 [*On separation between the successor of the entailed estates and heirs of the last holder*].[6] It would be a truism to say that at the time of the publication of many ALP regulations, they have already been anachronistic.[7] The problem of the inadequacy of their solutions increased with the dynamic development of more and more complex forms of economic life in the course of the 19th century. The ALP regulations were therefore modified and supplemented in later acts quite often during the 19th century. From the practical point of view, the most important law of this type, significantly modifying the regulations regarding family fideicommissa, was the Act entitled *The law on family resolutions at family fideicommissa, family foundations and fiefdoms* of 15 February 1840,[8] which created the new issue of performing legal acts under the fideicommissum by a 'trustee' with the consent of the closest male family members – "expectants" in the form of family resolutions. The second Act was also issued in 1840. It referred to family fideicommissa, *fideicommissum substitutions and family foundations in the Duchy of Silesia* of 15 February 1840, which extended the ALP provisions to the Silesian province,[9] and the third *Act concerned the jurisdiction of the judicial authorities in the cases of family fideicommissum* of 5 March 1855 (regulated the jurisdiction of courts and supervision over fideicommissa).[10]

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[5] NAWORSKI, Z., KUCHARSKI, T., MOSZYŃSKA, A. Fideikomisy familijne w Drugiej Rzeczypospolitej – główne postulaty badawcze. *Czasopismo Prawno-Historyczne*, 72/1, 2020, p. 27–43.

[6] For the purposes of the paper, the Polish translation was used: *Powszechne Prawo Krajowe dla Państw Pruskich*. Poznań: Wilh. Deker i Spółka, 1826, t. I – IV.

[7] General Characteristic of APL, PADOA-SCHIOPPA, A. *A history of law in Europe*, Cambridge: Cambridge University Press, 2017, p. 427–428.

[8] Official texts – German and Polish language versions in the bilingual set of Prussian laws for the Grand Duchy of Poznań: *Gesetz-Sammlung für die Königlichen Preussischen Staaten*, 1840, No 3, 2070 [further as: *Gesetz-Sammlung*].

[9] Gesetz-Sammlung, 1840, 3, 2071.

[10] Gesetz-Sammlung, 1855, 9, 4178.

This legal status was maintained after the unification of Germany, as well as after the entry into force of the modern codification of German Civil Law – the German Civil Code BGB of 1896. Pursuant to Article 59 of the provisions introducing the Code, "it shall be without prejudice to the provisions contained in national laws referring to fiefdoms […] or to family goods'. Article 60 of this Act stated, that the 'national' Prussian mortgage laws were maintained,[11] as well as regulations restricting the trade in certain goods (BGB provisions on the purchase of goods from an unauthorized person were applied thereto).[12]

The Second Republic of Poland has not introduced any revolutionary legal provisions to regulate the issue of fideicommissum. Prussian and German laws for the former Prussian partition were supplemented only by the Act of 18 November 1921 *on family estates in the former Prussian District* together with the implementing regulation.[13] Based on a similar German law (of 1919),[14] it aimed at facilitating the abolition of fideicommissa by virtue of a family resolution (Articles 2–7) enabling the introduction of an administrator in the event of economic problems or improper administration of the fideicommissa (Article 9) as well as establishing Courts of Appeal to exercise supervisory authority over fideicommissa (Article 11). The status of German fideicommissa in Poland and the supervision over fideicommissa located on both sides of the border were settled by international bilateral agreements with the Weimar Republic.[15] It was only before the outbreak of World War II that the Polish Parliament adopted laws completely abolishing family fideicommissa in Poland.[16]

The following text is devoted to family fideicommissa existing in the areas of the Second Republic of Poland in the former Prussian Partition territory (Pomerania and Greater Poland) governed by the Prussian-German-Polish laws in the years 1921–1939. In this area, during the period under discussion, there were approximately 50 family fideicommissa. Unfortunately, archival documents referring only to some of them were preserved in the supervisory files of the Appeal Court in Poznań and Toruń and private archives collections of fideicommissa families. These sources will form the basis for the practical comments made in this paper.

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[11] On Prussian mortgage law, see SZAFRAN, F. *Działalność władz ziemskich a hipoteka i kataster*, Warszawa: Nakładem Ministerstwa Reform Rolnych, 1930, p. 122.

[12] For the purposes of the paper, the official Polish translation was used: ZABOROWSKI, T. (transl.). *Niemiecki Kodeks cywilny wraz z ustawa wprowadzającą*. Poznań: I. Leitberg, 1899.

[13] Dz.U. Nr 100, poz. 715. *Rozporządzenie wykonawcze Ministra Sprawiedliwości z dnia 31 stycznia 1922 r. do ustawy z dnia 18 listopada 1921 r. o dobrach rodzinnych w b. dzielnicy pruskiej* (Dz.U.1922, Nr 14, poz. 129).

[14] German provisions were sometimes used as an interpretation guidelines for Polish law of 1921.

[15] *Układ polsko-niemiecki o dobrach rodzinnych*. Dz.U.R.P. 1926, Nr. 17, poz. 99.

[16] Ustawa z dnia 7 sierpnia 1937 r. *o zniesieniu fideikomisu Pszczyńskiego*. Dz.U. 1937 nr. 60 poz. 474; Ustawa z dnia 13 lipca 1939 r. *o znoszeniu ordynacyj rodowych*.

2. Fideicommissum statutes as a source of regulation

In addition to the sources of generally applicable law regulating the general rules of concerning fideicommissa, granting a statute by the founder (which regulated the detailed issues of the functioning of the particular family fideicommissum), was a formal requirement for its effective establishment. However, neither the ALP provisions nor any subsequent laws clearly specified the formal requirements that such statutes should meet. Several provisions laid down only certain guidelines on the requirements for introducing solutions to the statutes.[17] Sometimes the ALP provisions, regulating fideicommissum, referred to dispositive norms – they indicated a model solution, at the same time expressly permitting its modification in the statutes. The intention of the legislator was to ensure the possibility of flexible shaping of the rules regulating the fideicommissum, in accordance with the will of the founder and the interests of the family. We find such provisions especially often in the case of general characteristics of the rights and obligations of the trustee and the order of succession in fideicommissa.[18]

The ALP provisions in the Polish translation referred to the statutes as a "foundation activity" or "foundation deed".[19] In the Polish Act of 1921 (art. 6), the term "foundation deed" was also referred to in this context, in addition to the concept of the statute. The collected source materials indicate that the statutes contained certain fixed clusters or groups of regulations. Among the most common and repeated, were the following: lists of estates included in the fideicommissum, establishing the official name of the fideicommissum, establishing the rules and order of succession (and the manner of taking over the fideicommissum by subsequent trustees from the technical point of view), the rules of the management of the fideicommissum during the period when the trustee remains minor, the rights and obligations of the trustees (most often in terms of permissibility of carrying out independent legal actions, and in particular the free investment in property subject to fideicommissum or supplementing it with new assets), clarification of the position and rights of "expectants", the family council and family control bodies over the fideicommissum (e.g. forced administrator), issues concerning supervision over the trustee and mechanisms securing the financial situation of family members, finally, the rules of settlement in the case of abolition of fideicommissum.[20]

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[17] Such solutions shall include the issues discussed below excluding damage caused by fire, which was in principle an obligation to introduce the obligation to conclude fire insurance contracts in the statutes.

[18] ALP: Part. II, Title 4, Section 3, § 74, 134, 135, 139, 140, 142, 145, 146, 147, 164, 166, 179, 182, 189, 190.

[19] This resulted from the appropriate application of the regulations on the establishment of family foundations adopted by APL to the establishment of fideicommissa, see ALP: Part II, Title 4, Section 3, § 62.

[20] The majority of fideicommissa statutes was lost. In Polish archives I was able to find only a few: *Statute of the Fideicommissum of the Bieler family with regard to the Mełno estate.* State Archive in Poznań [further: SAP]. Appeal Court of Poznań [further: ACP], No 771, no pag; *Statute of the*

3. Legal situation of women in the case of family fideicommissa pursuant to applicable statutory provisions of law

A characteristic feature of the succession in the case of family fideicommissum within the entire European legal culture was the complete exclusion of women from acquiring it. Such a solution was considered a natural consequence of the adopted patriarchal system of family law. A woman, through marriage, "left" her own family and joined her husband's family, which was symbolized by taking his surname. Meanwhile, the estates subject to fideicommissum were to secure the prestige and position of the founder's family. Consequently, the principle expressed in the APL provisions was that in the absence of patrilineal descendants of the male line of the family, i.e. none of the male line members of the family descending from the founder was alive, the fideicommissum would be abolished by the law itself. The estates subject to fideicommissum were then transformed into the full property of the last trustee.[21] However, we can observe certain flexibility here, as this provision was created as a dispositive legal norm. The founders were given the option of allowing for the acquisition of the fideicommissum by the male descendants of the founder, who were related to the trustees as the female line members of the family, in the event that none of the male line family members was alive. The founder could also, at one time and exceptionally, allow for the succession by a woman herself and taking over the position of a fideicommissum trustee by her, if none of the male descendants of the last trustee was alive. In such a case, the next trustees were, of course, the male descendants of the founder from the family line of that woman.[22] In practice, this solution, provided for in the ALP as an exception to the rule, was dominant in the statutes of particular fideicommissa. This was probably related to the need to ensure maximum stability as well as the longest possible duration of fideicommissa.

The above-described rules have not changed throughout the entire duration of family fideicommissa in Poland, also after the First World War and the rebirth of the Polish State. The situation of women with regard to fideicommissum was not mentioned at all in the Act of 1921, and the Act of 1939 did not separately secure their position in the case of abolition of all fideicommissa.

Fideicommissum of the Chomse family with regard to the Orło estate. SAP, ACP, No 772, envelope p. 379, *Statute of the Fideicommissum of the Fischer-Mollard family with regard to the Trzmiel estate*. SAP, ACP, No 773, pp. 1–48; *Statute of the Fideicommissum of the Hochberg family with regard to the Krusz estate*. SAP ACP, No 776, pp. 1–70; *Statute of the Fideicommissum of the Paleske family with regard to the Swarożyn estate*. SAP, ACP, No 786, pp. 1–63.

[21] 'When all male descendants of the founder of the fideicommissum were no longer alive, and if the founder has not made any decision as far as his female descendants are concerned, the entailed estate remains in the hands of the last trustee and his male descendants and it becomes their free own property'. ALP, Part 2, Title 4, Section 3, § 189.

[22] 'When the descendant of the first founder acquires the fideicommissum for the first time, in accordance with the above-described principles, then with him a new order of succession begins, which also [...] will apply to his descendants'. ALP, Part 2 Title 4, Section 3, § 198.

4. The legal situation of women with regard to family fideicommissum pursuant to the Statutes of particular fideicommissa

The statutes of particular family fideicommissa regulated primarily the issue of establishing detailed rules of succession. Most of them were similar to each other in this respect – in most cases, the rule of primogeniture was adopted.[23] However, they differed with regard to specific mechanisms, including possibilities and rules of female succession.

The clauses with a very restrictive content were included in the statute of the Kries family fideicommissum established with regard to the Smarzewo estate. The full text of the Statute has not been preserved, but its content can be reconstructed from secondary sources. They suggest that the solution provided for in the ALP was adopted here and the female succession was completely excluded. Clause 4 explicitly provided that, "If in all of the above-mentioned Kries family lines none of the male descendants was alive, then the estate with manor farms shall lose the character of the family entailed estate".[24]

Restrictive regulations were also contained in the statute of the fideicommissum in the Szpęgawsk estate of the von Paleske family, established by Wilhelm Paleske. The estate subject to fideicommissum could only be acquired by male descendants according to the rules of primogeniture. The right of succession first passed to four male lines of sons descending from the sons from the founder's second marriage (Wilhelm Edward, Bernard, Wilhelm Henryk and Konstanty). Only if none of the direct male descendants of the eldest son was alive, then the succession was transferred to the line initiated by his younger brother. Of course, subsequently, the indicated principles also referred to male lines descending from the yet unborn sons of the founder from the same marriage. Only in the absence of potential successors from among the sons of the founder from the second marriage and their descendants, the son of the founder from the first marriage (Alexander) or his eldest direct male descendant could become a trustee. Only in the absence of male descendants in any line initiated by the founder's sons, the daughter of the founder – Teresa (or also other daughters of the founder, born from his second marriage after the statute

[23] The essence of primogeniture is presented in the ALP, Part II, Title 4, Section 4, § 189–202: "According to primogeniture, first, the firstborn son [...], excluding all brothers born after him, becomes the legitimate successor." The only exception that I am aware of was the fideicommissum regarding the Niegolewo estate, where the ultimogeniture was applied. In this case, always the youngest male descendant of the family was appointed a trustee.

[24] Further, statute also stipulated: 'With regard to succession, it is worth noting that the Statute contains very strict requirements in terms of the trustee's marriage. He would lose his rights in the case of marrying a woman of English nationality or Slavic origin, or if she is not a member of the Evangelical church'. We do not have the original Statute, I was able to reconstruct provisions from: *Project of Resolution to change Fideicommissum Statute*. SAP, ACP, No 777, pp. 70–74.

had been issued) and their direct male descendants were eligible to succeed.[25] However, the founder changed his will concerning the issue under discussion in the form of a separate deed issued two years later. It was then assumed that the daughters of the founder from the second marriage (and their male descendants) were eligible for the succession of the fideicommissum in the absence of the male lines initiated by the founder's sons from the second marriage, and before the son from the first marriage and his male descendants. Similar rules were applied in the draft statute of the fideicommissum, which was drawn up in 1830s.[26]

More favourable rules concerning the female succession were applied in the Statute of the Fideicommissum of the Bieler family with regard to the Mełno estate. According to Clause 5, after the establishment of the principle of indivisibility and the transfer of the entire fideicommissum to one trustee, it was established that the succession was to take place, "according to the principles of primogeniture and among an equally treated class, in the order of priority of men over women".[27] In the first place, therefore, a trustee was appointed from among the male descendants of the previous one, by birth order. In the absence of the direct male descendants of the trustee, the succession was transferred to his daughters, also by birth order. What is important, only after that secondary lines of the family were eligible for succession (analogous principles of succession were adopted by them). This meant that each line of female descendants obtained the right of succession in the absence of male descendants in this line, before further male relatives.[28]

Similar rules were adopted with reference to the succession of the Fischer family fideicommissum concerning the Trzmiel estate. In the Statute, the founder established four lines of successors, descending from each of his four children. In the first place, the fideicommissum was to be acquired by the founder's eldest son (Ernst) and

[25] According to Article 3 of this draft statute, after the death of the potential founder – Nathandel Ludwik, the subsequent trustees of the fideicommissum would be appointed from among, "his [...] descendants born of the marriage, only male, excluding female descendants, according to the principles of primogeniture". The lack of male descendants, even if female descendants were alive, always resulted in the transfer of the fideicommissum to the oldest male line of direct descendants of the founder. If none of them was alive, the succession was transferred to the descendants of Piotr Paleske – the potential founder's brother. Only if the last male trustee of this line did not have any male descendants "this fideicommissum shall pass on to the female descendants of the last trustee, according to the provisions of the Allgemeine Landrecht [...]." If there were no daughters and there was no acceptance or possibility to meet the requirements set out in the statute, it resulted in the abolition of the fideicommissum by virtue of law, and the property included in it became the subject of "free inheritance", Art. III i IV *Project of Statute of the Fideicommissum of the Paleske family with regard to the Szpęgawsk estate*. SAP, ACP, No 786.

[26] See *Appendix to the Statute (9. 06. 1858)*. SAP, ACP, No 786.

[27] § 5 *Statute of the Fideicommissum of the Bieler family with regard to the Mełno estate*. SAP, ACP, No 771.

[28] Of course, this statute included also other reasons for exclusion from succession than gender – illegitimate origin, practicing other religion than Evangelism, loss of civil rights, mental illness, resulting in the appointment of an administrator, being deaf and dumb, being placed under guardianship due to "profligacy and drunkenness" (§ 21–26). Similar rules § 3–4. *Statute of the Fideicommissum of the Fischer-Mollard family with regard to the Trzmiel estate*. SAP, ACP, No 773.

his descendants – first male descendants by birth order, then female descendants. After the total extinction of the Ernst line, the succession was to pass on to the next lines – first, the line descending from the younger son (Paul), then descending from the founder's daughters (Anna and Małgorzata).[29]

The ALP regulations – for the sake of the family which used the fideicommissum – enabled the husband of the woman who acquired fideicommissum by way of succession, to apply to the king for the right to use the surname and Coat of Arms of her family. As a rule, this authorisation was used under the fideicommissum statutes and this solution was treated as *sine qua non* condition for effective succession. Such clauses were included, in particular, in the statutes of the fideicommissa of the families: Bieler family, with reference to the Mełno estate[30] and Hochberg family, with reference to the Krucz estate[31] and Paleske family, with reference to the Szpęgawsk estate.[32] The only exception that I am aware of was the statute of the Fischers family concerning the Trzmiel estate in which this issue has not been addressed. However, it was a fideicommissum founded by a representative of the bourgeois class, not a nobleman. Nevertheless, it cannot be excluded that the rule of taking the surname of a founder by a man from another family, who acquired a fideicommissum through marriage, would still be applied here even on the basis of common social customs.

The legal situation of a widow of a deceased trustee of the fideicommissum was extensively discussed in the statutes. It was particularly important from a practical point of view, as the ALP provisions did not address this issue. Almost every statute of the fideicommissum, which I have already analysed, contained some form of obligation to pay a benefit called a "pension" to widows. In some statutes the amount of the benefit was explicitly provided for, the method of its calculation was specified[33] or the technical issues concerning its securing and payment were regulated. As a rule, the widow was deprived of her right to a "pension" in the event of death and remarriage. According to certain sources, there were also some restrictions of widows' rights. According to the statute of the Bieler family referring to the Mełno estate, such pension was not due when, before the death of the trustee, the spouses

[29] § 2 *Statute of the Fideicommissum of the Fischer-Mollard family with regard to the Trzmiel estate*. SAP, ACP, No 773.

[30] "If any trustee no longer uses my surname and Coat of Arms, he is obliged to ask for state permission to use my surname and Coat of Arms". In: *Statute of the Fideicommissum of the Bieler family with regard to the Mełno estate*. SAP, ACP, No 771.

[31] § 9 *Statute of the Fideicommissum of the Hochberg family with regard to the Krusz estate.* SAP, ACP, No 776.

[32] § 7 *Statute of the Fideicommissum of the Paleske family with regard to the Szpęgawsk estate*. SAP, ACP, No 786.

[33] § 12, 18 of the statutes provided that the widow's benefit was to be calculated on the basis of the amount of the fee paid each year by the trustee to the so-called reserve fund (it was to increase the capital available to the trustee, if necessary, and help to prevent the indebtedness of the fideicommissum).

were separated and only one widow was entitled to receive the pension at a time.[34] The rights of the widow of the deceased trustee in the statute of the fideicommissum concerning the Kruch estate of the Hochberg family were regulated otherwise. It provided for the granting of the right to the "widow's property". It included accommodation of the widow in a separate mansion and covering the maintenance costs of the widow herself, her closest relatives and servants with the funds from the fideicommissum. This right would expire at the time of the change of widow's marital status – remarriage of the widow.[35]

A different solution regarding the benefit for the widow of the trustee was provided for in the statute of the fideicommissum of the Fischer-Mollard family with regard to the Trzmiel estate. According to the founder's will, each trustee was to be completely excluded from the inheritance of the personal property of his predecessor, which was not included in the fideicommissum. Half of this private fortune was to be inherited according to the principles of statutory inheritance by all the other descendants of the previous trustee, and the other half of it was to provide income to the widow until her death or remarriage.[36] This was, of course, a solution in which the amount of the widow's benefit was not possible to estimate.

Due to the scarce APL regulations, less attention was paid in the statutes to the issue of the benefits for the trustee's daughters. The statute of the fideicommissum of the Bieler family regarding the Mełno estate provided only for a general indication of the amounts designated for benefits payable to the younger siblings of the trustee, regardless of gender.[37] Some of the statutes did not contain any regulations in this regard – e.g. the fideicommissum of the Paleske family regarding the Szpęgawsk estate.[38]

Finally, it is worth mentioning that there was a specific regulation concerning the benefits for women from families with fideicommissa. This was the case with the fideicommissum of the Chomse family referring to the Orle estate. The full content of the statute is not available, but the draft resolution on the abolition of the fideicommissum indicates that in Clause 36 it provided for a separate benefit for Augusta Chomse – the widow of one of the founder's distant family members. Unfortunately, we do not know what kind of benefit it was or on the basis of what legal title or for

[34] § 19 of the statute provided that, "in the event of a few widows of successively deceased trustees, the widow who was the first to obtain her rights to the pension shall be entitled to this pension". This was an extremely unfavorable solution, especially considering the social culture of that time when remarrying was not uncommon in the case of elderly trustees and much younger women.

[35] § 24 *Statute of the Fideicommissum of the Hochberg family with regard to the Krusz estate.* SAP, ACP, No 776.

[36] § 5 *Statute of the Fideicommissum of the Fischer-Mollard family with regard to the Trzmiel estate*. SAP, ACP, No 773.

[37] § 28 *Statute of the Fideicommissum of the Bieler family with regard to the Mełno estate*. SAP, ACP, No 771.

[38] *Statute of the Fideicommissum of the Paleske family with regard to the Szpęgawsk estate*. SAP, ACP, No 786.

what actual reason it was granted to her under the statute.[39] In the draft resolution on the abolition of this fideicommissum prepared a few years later, the estate was to be transferred in full to the oldest son of the trustee – named Cunon. Benefits for his siblings were settled separately. His four brothers (Udo, Armin, Rold and Gerd) were to receive the amounts of Marks 55,000, Marks 50,000, Marks 45,000 and Marks 40,000, respectively, after abolition of the fideicommissum. Each of the three sisters (Herta, Ewa and Lora) was to receive only the amount of Marks 20,000.[40] It is worth pointing out here that slightly smaller benefits – amounting from Marks 10,000 to Marks 15,000 were to be received by other distant male relatives of the last trustee – "expectants" from other lines of the Chomse family. Such differentiated amounts probably reflected the value of pensions intended for the children under the statutes. The draft resolution separately regulated the benefit that should have been paid to the wife of the current trustee – Charlotte.[41]

5. The problems faced by women from families with fideicommissa from a practical point of view, on the basis of the supervisory files maintained by the Courts of Appeal

As already pointed out, in theory, as a rule, women could neither act independently as trustees of the fideicommissa nor could they exercise control or manage the property subject to fideicommissum.[42] The ALP (like other civil codes in force in various territories of the Second Polish Republic) explicitly excluded all rights of women to decide about and supervise the management of the estate subject to fideicommissum. Only male members of the family – "expectants" were entitled to such rights. In practice, in the first half of the 20th century, the approach to these strict rules became more flexible. This is especially noticeable in the case of Maria Anna Potulicka-Skórzewska. After her husband, Zygmunt, the trustee of the fideicommissum, had died, by virtue of his will, she was authorized to carry out the current management over the fideicommissum until their son George reached the age of majority. That order of the trustee was respected by the state authorities. The widow herself, in a letter to the Ministry of Justice, claimed, with some exaltation and probably exaggeration, that she had been administering the fideicommissum personally

[39] The abolition resolution provided that in connection with the abolition of the fideicommissum, this woman was to receive a benefit in the amount of 100 Deutsche Marks, payable monthly in advance. § 7 *Draft family resolution on the abolition of the Orle family estate in the Grudziądz poviat*. SAP, ACP, No 772, p. 241v.

[40] § 9 *Draft family resolution on the abolition of the Orle family estate in the Grudziądz poviat* and the *Mortgage Depreciation Plan.* SAP, ACP, No 772, p. 376–378.

[41] § 7–11 *Draft family resolution on the abolition of the Orle family estate in the Grudziądz povia.* SAP, ACP, No 772, p. 366v, 368.

[42] For example, under the Russian law, a woman – Maria Ekse became official trustee of family fideicommissum, Lithuania Central State Archives in Vilnius, Appeal Court in Vilnius, No 3193.

for almost 40 years.[43] Thus, she suggested that she had been performing administrative activities while her husband was still alive. There is not enough source material to verify the accuracy of such a statement.

Some practical problems were associated with the fact that women from families with fideicommissum did not have the status of fideicommissum "expectants", i.e. the lack of possibility to participate in making decisions regarding its administration. In this respect, particular attention should be paid to the dispute concerning the fideicommissum of the Paleske family on the Szpęgawsk estate. In the first half of the 1920s, an attempt was made to abolish this fideicommissum in accordance with the Act of 1921. Two sisters of Olaf Paleske, the trustee of the fideicommissum – Baronesses Arabella Paleske and Teresa Paleske, demanded to be given the opportunity to participate in the adoption of a family resolution, on equal terms to male "expectants". In a letter to the Court of Appeal, an advocate representing both women skilfully manipulated the legal status, trying to convince the Court that his clients were entitled to the status of "expectant", despite the different wording of the ALP provisions. He referred to the following three arguments. Firstly, he argued that the influence on the adoption of the family resolution should be the result of the very fact of close kinship with the trustee. The second argument was pointing out to difficult economic situation of both women. Permitting them to influence the decision to abolish the fideicommissum was intended to provide them with adequate financial protection. In the third argument, the advocate presented a very interesting interpretation of the purpose of the ALP provisions and the clauses of the Statute. The advocate claimed that since the statutory objective of the fideicommissum was to "establish the greatness of the family v. Paleske", at the same time "it is not consistent with this objective that the sisters of the trustee of the fideicommissum, who have the same surname, live like beggars".[44] This statement proves that in the first half of the 20th century the phenomenon of the family fideicommissum was misinterpreted and was considered anachronistic. The essence of it was to deprive family members of their property, in order to accumulate all the property for one owner and thus protect the position of the family. The advocate attempted to reverse this assumption by pointing out that for the sake of the family, the most important thing was to treat all members of the family with dignity and respect, regardless of their gender.

The Wegner family faced a similar dilemma in the case of the fideicommissum referring to the Ostaszewo estate. In 1922, the last trustee – Kurt Wegner, who had two minor sons (Hermann and Gerda) and three daughters (two adult daughters – Margerete and Gertrud and a minor daughter Alice), made an unsuccessful attempt to abolish the fideicommissum. In the draft resolution prepared by the notary public both of the trustee's daughters were referred to as "potential expectants".[45] Moreover, the documents prepared for the purpose of the proceedings enumerated not

[43] *Countess Anna Potulicka Skórzewska to the Minister of Justice (1938)*. SAP, ACP, No, 787.

[44] *Plenipotentiary Czesław Karauze to the Appeal Court of Poznań*. SAP, ACP, No 786, p. 41.

[45] SAP, ACP, No 786, p. 41, 57.

only the closest male second-degree relative – Franciszek Hoffmann but also Kurt's sister – Marta Arnoldt.[46]

Based on the limited source material, we gathered information about securing the widows of fideicommissum trustees. First of all, the above-described mechanism of paying "pensions" to widows, in practice, was not effective and did not provide them with adequate financial security. It resulted both from the insufficient amounts of these benefits and, in particular, payment defaults. The 'pension' for the widow of the trustee was not alimony within the meaning of the Family Law. Therefore, the obligation to pay such pension often gave way to other debts encumbering the estate subject to fideicommissum – especially those secured by a mortgage. It can be illustrated by the example of the fideicommissum of the Radolin family with reference to the Jarocin estate. During the period of intense economic problems and the exceptionally bad financial situation of the fideicommissum in the first half of the 1930s, the administrator of the estate informed several times about the inability to pay the "pension" due to the widow of the trustee – the Duchess Joanna Radolin.[47] The Duchess herself repeatedly asked for the sums of money due to her in emotional letters written in German language and sent to the Court of Appeal in Poznań from Berlin, where she lived.[48] Despite the pressure exerted by the Court on the administrator, these outstanding payments have not been settled for many years.[49]

The analysis of the situation of Maria Anna Potulicka-Skórzewska, the widow of Zygmunt Potulicki-Skórzewski, the trustee of the fideicommissum referring to the Próchnów estate, brings us interesting conclusions about the widow's pension and the position of the widow of the trustee in general. According to the preserved documents, the widow demanded payment of the pension arrears at least from 1932,[50] but at the end of 1937 and in the first months of 1938 the lack of progress in the repayment of this obligation was reported. It was not possible to obtain funds to pay to the widow, but the attempt to enter the mortgage security for her claim in the Land Register also failed. The problem was not only the bad financial situation of the fideicommissum but also the need to obtain the required written consent from the two closest male "expectants". In addition, the entry in the Land Register required

[46] In the end, the fideicommissum in Ostaszewo was not abolished, and after the death of Kurt Wegner, his eldest son, Hermann, became a trustee. During his life, Kurt's daughters and Hermann's sisters attempted to abolish the fideicommissum, as "possible expectants" of the fideicommissum, see *Act by notary public dr Józef Wiśniewski 28.09.1922*. State Archive in Bydgoszcz Appeal Court of Toruń, No 59, no pag.

[47] *Administrator to the Appeal Court of Poznań, 16.07.1930*. SAP, Akta Radolinów z Jarocina ["further" ARJ], No 4352, no pag.

[48] E. g. *Letter from 27.05.1930*, we have also answers from administrator dated 3.06.1930, 12.03.1931. SAP, ARJ, No 4352, no pag.

[49] *Appeal Court to the administrator, 9.06.1935*, the answer from 12.03.1931 r. SAP, ARJ, No 4352, no pag.

[50] The widow very emotionally accused her son of mismanagement, the administrator of the fideicommissum of dishonesty, and the Appellate Court of negligence in supervision and disregard for her opinion.

an agreement between the "expectants" and the creditors of the fideicommissum. The administrator of fideicommissum and the Court of Appeal supervising it, in their correspondence to the Ministry of Justice, claimed that they were determined to quickly pay off their liabilities to the widow. At the same time, however, they were sceptical about the prospects of success. In one of the letters of the Court of Appeal referring to this case, it was explicitly stated that it would be "very difficult" to reach an agreement between the "expectants" and the creditors. The position and limited possibilities of the widow in this case resulted from the very unfavourable regulations of the ALP and the statute of the fideicommissum. The widow's pension was not alimony, but an ordinary claim resulting from a unilateral legal act, unsecured by a mortgage. Debt collection enforcement from the fideicommissum in the first place aimed at satisfying privileged creditors – public and mortgage creditors.[51] The court and the administrator of the fideicommissum, therefore, pointed out that there is no legal obligation to give priority to satisfying the widow's claims. Moreover, the pressure was also exerted on her, trying to convince her to limit her claims and to live in the Prochnów mansion in order to reduce the maintenance costs. The attitude of the widow claiming her rights was very unfairly assessed in the documents, as she was referred to as "intransigent".[52]

The situation of the widow of the trustee of the family fideicommissum is also to some extent illustrated by the dispute within the von Alvensleben family. Their fideicommissum referring to the Ostromeck estate was the richest in the territories of Greater Poland and Pomerania within the borders of the Second Republic of Poland. In 1932, the trustee of the fideicommissum – Joachim got married for the second time to a Hungarian operetta singer – Gizela Kaszonyi. This resulted in a serious dispute between the trustee and his son from the first marriage – the closest "expectant" and potential successor of the fideicommissum – Albrecht. Since the mid-1930s, he has submitted numerous applications to the Court of Appeal in Poznań for the introduction of legal administration of the property subject to fideicommissum or directly for deprivation of Joachim's position as a trustee. In addition to the improper management of the estate, the basic accusation against the trustee was his profligacy – especially spending huge amounts of money on "fancies" and gifts for the young wife. Interestingly, Gizela herself actively participated in the dispute by submitting extensive written explanations to the Court of Appeal. It is worth paying attention to her argumentation because apart from underestimating the charges and defending her husband, one can find there real concerns typical of the wife of the fideicommissum trustee. In one of her letters, she wrote, "my half-son Albrecht [...] is against me and accuses me of immoral and improper conduct [...] he persecutes me as well

[51] The court clearly states that "[…] being aware of the undoubtedly difficult situation of the mother of the accused trustee, the Court of Appeal, although it did not have a special statutory obligation to do so, made efforts to assist Maria Potulicka-Skórzewska in a difficult situation in some […] way. If the efforts made so far have not been successful, it was caused by circumstances beyond the control of the Court", *Appeal Court to the Minister of Justice, 30.03.1938*. SAP, ACP, No 787, p. 51.

[52] *Appeal Court President to the Minister of Justice*, 18.12.1937. SAP, ACP, No 787, pp. 47–48.

as our marital life in order to lead to our separation. He protests against the smallest gifts given to me by my husband, forgetting that in the event of his death, I will have only a modest pension."[53] We can see here that the wife of theoretically the richest nobleman in the region did not feel secure about her future. She realised that there was no chance of acquiring an inheritance of her husband, neither according to the statutory rules nor based on the will. She was also aware of the fact that after the possible death of a much older spouse, she will have only a very small pension at her disposal, and obtaining it may be very difficult, as a result of the negative attitude of another trustee towards her.

6. Conclusion

Summing up the above considerations, it should be stated that the family fideicommissa were legal institutions closely related to European feudalism. This was demonstrated in the recognition of the following: the key role of land estates for economic trading, the precedence of prestige and the position of the family over the individual welfare of its members, and the patriarchal model of the family, discriminatory for its female members. Changes in civil law at the end of the nineteenth and early twentieth centuries and the increasing dominance of the principles of universality and equality of civil rights of the individual (also with regard to gender) resulted in moving away from the feudal patterns. In the first half of the 20th century, fideicommissa have already been an anachronistic institution in civil law. The indivisibility of the estates and their exclusion from trading did not meet the requirements of a dynamic economic life. At the same time, excluding women from the succession of the estate was contradictory to the changes introduced to the inheritance law. This often caused a sense of injustice in women from families with family fideicommissum, whose situation was relatively worse, compared to the wives and daughters of ordinary landowners. In practice, the lack of the "expectant" status was particularly bothersome for women, and thus lack of influence on decisions regarding the administration or the abolition of the fideicommissum. Moreover, satisfying the claims of the widows of the trustees concerning the pension was also a huge problem. The specific construction of the fideicommissum also led to a frequent escalation of family disputes over property.

Unfortunately, the process of abolition of fideicommissa in Poland by means of a legislative act – a parliamentary act – did not regulate separate instruments that could improve the situation of female members of families with fideicommissa. The Act of 1939 regulated only the obligation to pay a widow's pension and other benefits to the family also after the abolition of the fideicommissum [Article 7(1)(c)].

[53] *Gizela von Alvensleben to the Appeal Court 2.08.1938*. SAP, ACP No 769. On the social repercussions of this particular case: ŁASZKIEWICZ, T. *Ziemiaństwo na Pomorzu w okresie dwudziestolecia międzywojennego*. Inowrocław – Toruń: Polskie Towarzystwo Historyczne, 2013.

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Zákonník práce z roku 1965 a jeho význam v pracovnom práve na našom území

The Labour Code of 1965 and Its Importance for Labour Law on our Territory

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Abstrakt: Cieľom príspevku je poukázať na dôležitú skutočnosť vo svetle slovenského pracovného práva, a to prijatie Zákonníka práce v roku 1965. V rámci reforiem súkromného práva má prijatie tohto pracovnoprávneho kódexu zásadný význam, pretože dovtedy slovenské pracovné právo nebolo kodifikované. Príspevok reflektuje na význam tohto Zákonníka práce na našom území s uvedením jeho základnej charakteristiky, no na druhej strane sa poukazuje aj na negatívne aspekty tohto pracovnoprávneho kódexu.

Kľúčové slová: Zákonník práce; slovenské pracovné právo; reformy; súkromné právo; kodifikácia; kódex.

Abstract: The aim of this article is to point out the milestone in Slovak labour law, concretely the adoption of the Labour Code in 1965. In the framework of reforms of the private law, the adoption of this employment code was of essential importance as it was the first national labour law codification. The article reflects the characteristics of the Code, its positives and negatives.

Keywords: Labour Code; Slovak Labour Law; Reforms; Private Law; Codification; Code.

Úvod

Prijatie Zákonníka práce v roku 1965 možno považovať za významný medzník v dejinách slovenského pracovného zákonodarstva. Do tohto obdobia slovenské pracovné právo nebolo žiadnym spôsobom kodifikované.

Pokiaľ išlo o rozmiestňovanie pracovných síl, od prijatia ústavy v roku 1960 naďalej platil v tejto oblasti zákon č. 70/1958 Zb. Nastala však legislatívna zmena v rozmiestňovaní absolventov stredných a vysokých škôl. V roku 1963 bolo vládne nariadenie č. 24/1959 Zb. nahradené novou právnou úpravou a neskôr nasledovalo

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nariadenie č. 74/1965 Zb., na základe ktorého bol zamestnávateľ povinný uzavrieť so študentom ešte pred skončením štúdia pracovnú zmluvu.[2]

1. Všeobecná charakteristika pracovných podmienok

Zákonom č. 58/1964 Zb. sa upravila starostlivosť o tehotné zamestnankyne a matky. Na základe tohto zákona bola dĺžka materskej dovolenky 22 týždňov s hmotným zabezpečením z prostriedkov nemocenského poistenia. Ďalšia (neplatená) materská dovolenka sa poskytovala v trvaní do jedného roku veku dieťaťa.[3]

„K podstatnej zmene v tomto období došlo najmä v oblasti rozmiestňovania pracovných síl. Zákon č. 70/1958 Zb. odstránil podmienku predchádzajúceho súhlasu okresného národného výboru so založením a skončením pracovného pomeru.“[4]

Ako už bolo spomenuté, vládnym nariadením č. 74/1965 Zb. sa znova zaviedla kontraktačná povinnosť zamestnávateľa. Zamestnávateľ bol povinný uzatvoriť so študentom pracovnú zmluvu ešte pred skončením štúdia.[5]

2. Prijatie Zákonníka práce v roku 1965

V histórii pracovného práva na našom území má mimoriadny význam rok 1965, v ktorom bol prijatý zákon č. 65/1965 Zb. *Zákonník práce* zo 16. júna 1965.[6] Zákonom č. 65 došlo ku kodifikácii pracovného práva[7] s účinnosťou od 1. januára 1966. Keďže *„išlo o prvú jednotnú úpravu pracovnoprávnych vzťahov, zákonník práce z hľadiska svojej osobnej pôsobnosti sa vzťahoval na všetky kategórie zamestnancov. Súčasne prvý Zákonník práce predstavoval prvú samostatnú úpravu pracovnoprávnych vzťahov. Bol komplexnou úpravou pracovnoprávnych vzťahov“*.[8] Charakteristickým znakom prvého Zákonníka práce bola kogentnosť.[9] Zrušil aj zvyšok dekrétu o vše-

[2] BARANCOVÁ, H., SCHRONK, R. *Pracovné právo.* Bratislava: Sprint 2, 2018, s. 49.

[3] Týmto zákonom boli priznané prestávky v práci na dojčenie a sťaženie rozviazania pracovného pomeru výpoveďou a okamžitým zrušením zo strany zamestnávateľa.

[4] BARANCOVÁ, H., SCHRONK, R. *Pracovné právo*, s. 49.

[5] Uvedená právna úprava, pokiaľ by sme ju porovnali s predchádzajúcim obdobím, síce porušovala zásadu zmluvnosti v pracovnom práve, avšak pozitívny aspekt bol v tom, že zamestnávateľ si mohol vybrať konkrétneho študenta a študent mal už počas štúdia zabezpečené pracovné miesto.

[6] TKÁČ, V. et al. *Pracovné právo.* Banská Bystrica: Belianum, 2021, s. 34.

[7] Prijatím tohto pracovnoprávneho kódexu došlo k unifikácii právnej úpravy všetkých pracovných kategórií, ktoré dovtedy podliehali osobitnej právnej regulácii.

[8] BARANCOVÁ, H., SCHRONK, R. *Pracovné právo*, s. 50.

[9] V tomto smere sa výrazne uplatňoval princíp „čo nie je dovolené, je zakázané“.

obecnej pracovnej povinnosti.[10] Pokiaľ išlo o reformu mzdovej politiky,[11] k tejto nikdy nedošlo. Taktiež kontrola ONV nad náborom pracovníkov zostala v platnosti až do roku 1991.

3. Dôležité zmeny Zákonníka práce

Za zásadnú zmenu možno vnímať, že tento nový Zákonník práce v § 279 zrušil XXVI. hlavu *Všeobecného občianskeho zákonníka,* ktorý bol vyhlásený 1. júna 1811. Príprava prvého pracovnoprávneho kódexu trvala na našom území z historického kontextu od roku 1962. V Zákonníku práce z roku 1965 boli upravené právne normy jednotne pre všetky kategórie pracovníkov, no na druhej strane pre niektoré druhy pracovných vzťahov mal Zákonník práce subsidiárnu alebo delegovanú pôsobnosť. Pôsobila tu značná hypertrofia právnej regulácie pracovných vzťahov.[12]

Keďže išlo o prvú pracovnoprávnu kodifikáciu na našom území, zabezpečila sa tak väčšia prehľadnosť a dostupnosť právnej úpravy a pracovné právo sa tak „emancipovalo" od občianskeho práva. S tým malo súvis aj obmedzenie zmluvnej slobody, a to zavedením princípu „čo nie je dovolené, je zakázané".[13]

Zákonník práce výrazne zjednotil predtým roztrieštenú úpravu. Odstránil česko-slovenský právny dualizmus a podriadil pracovnoprávne vzťahy jednému právnemu režimu. Odstránil tak kritizované čiastkové úpravy pre rôzne kategórie pracovníkov.[14]

Charakteristickým znakom tohto pracovnoprávneho kódexu bola kogentnosť právnej úpravy, teda len výnimočne bolo možné stanoviť odchýlky od Zákonníka práce dohodou účastníkov.[15]

Zákonom č. 174/1968 Zb. sa zverila kontrola nad dodržiavaním BOZP nezávislým štátnym orgánom, a to úradom bezpečnosti práce.[16]

„V roku 1966 došlo k ďalšiemu skráteniu pracovného času a v roku 1968 sa týždenný pracovný čas skrátil na 42 a pol hodiny v týždni a vyhl. č. 63/1968 Zb. zaviedla päťdňový pracovný týždeň. Na 40 hodín v týždni sa skrátil aj pracovný čas u zamestnancov výrobnej sféry pracujúcich s nepretržitým trojzmenným režimom práce. Zákonom č. 88/1968 Zb. bola materská dovolenka predĺžená z 22 na 26 týždňov."[17]

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[10] Dekrét prezidenta republiky č. 88/1945 Zb. o všeobecnej pracovnej povinnosti, ktorý vyžadoval predchádzajúce administratívne súhlasy ONV pre dohodnutie a rozväzovanie individuálnych pracovných pomerov s pracovníkmi.

[11] Malo ísť o väčšie právomoci pre jednotlivé podniky.

[12] TKÁČ, V. et al. *Pracovné právo.* Banská Bystrica: Belianum, 2021, s. 34.

[13] SKALOŠ, M. *Právny poriadok Československa v rokoch 1948 – 1989*, s. 223.

[14] Tamtiež, s. 223.

[15] Kogentným spôsobom bola upravená najmä oblasť bezpečnosti a ochrany zdravia pri práci a oblasť pracovných podmienok.

[16] Tento zákon prispel k zlepšeniu situácie v kvalite pracovných podmienok zamestnancov.

[17] BARANCOVÁ, H., SCHRONK, R. *Pracovné právo.* Bratislava: Sprint 2, 2018, s. 50.

V auguste v roku 1968 nastala intervencia vojsk Varšavskej zmluvy (t. j. vojsk Zväzu sovietskych socialistických republík, Nemeckej demokratickej republiky, Poľskej ľudovej republiky, Maďarskej ľudovej republiky a Bulharskej ľudovej republiky). Obdobie po vstupe cudzích vojsk až do zmien v roku 1989 sa označuje ako obdobie tzv. normalizácie.[18]

Z hľadiska vývoja pracovného práva, možno toto obdobie vnímať ako obdobie zneužívania pracovného práva v politických zápasoch. Z pracovného práva sa postupne vytrácala etika a slušnosť. Zásady rovnosti, slobody a ľudskej dôstojnosti, ako základné elementárne ústavné princípy práva v každej civilizovanej krajine, boli hrubo potláčané a ľudia boli diskriminovaní.[19]

Pojem dobré mravy bol mnohým ľuďom natoľko vzdialený, keďže pravidelne dochádzalo k potlačovaniu základných ľudských práv a slobôd,[20] a pritom *„dobré mravy, dobrá viera či slušnosť majú svoje miesto v práve od gréckych a rímskych čias. Našli by sme ich tam ešte skôr, pretože slušnosť, ako aj spravodlivosť, neboli neznámymi kategóriami Starého i Nového zákona*".[21] V samotných rímskych textoch nenájdeme žiadnu konkrétnu definíciu pojmu dobré mravy alebo dobrej viery. Okrajovo možno pri dobrej viere povedať, že ide o právne nezáväzné etické príkazy, ktoré však boli všeobecne dodržiavané a uznávané.[22]

Pokiaľ ide o pôsobnosť Zákonníka práce z roku 1965, je nesporné, že pod svoju pôsobnosť zahrnul celý rad pracovníkov štátnej správy. *„Tento zjednocovací trend vychádza z postulátu rovnakého vzťahu všetkých občanov k výrobným prostriedkom a tiež rovnakého postavenia všetkých občanov v pracovnom procese."*[23]

4. Významné novelizácie

Z hľadiska novelizácií Zákonníka práce z roku 1965 možno spomenúť *zákon č. 153/1969 Zb., ktorým sa menil a doplňoval Zákonník práce*. V zmysle tohto zákona boli prijaté reštrikcie a sprísnenie pracovnej disciplíny.[24] Zákon č. 153/1969 Zb. bol prijatý v tzv. normalizačnom období, ktoré nasledovalo po vpáde vojsk Varšavskej zmluvy do Československa v auguste 1968. Predmetná novela umožňovala politické

[18] TKÁČ, V. et al. *Pracovné právo.* Banská Bystrica: Belianum, 2021, s. 34 – 35.

[19] Porov. ONDROVÁ, J., ÚRADNÍK, M. *Ústavné súdnictvo v Slovenskej republike.* Banská Bystrica: Belianum, 2021, s. 5.

[20] Porov. SMOLKOVÁ, S., DZIMKO, J. Osobitosti dokazovania v sporoch s ochranou slabšej strany. In: *Interpolis´21: recenzovaný zborník vedeckých prác z medzinárodnej vedeckej konferencie Interpolis 2021*. Banská Bystrica: Belianum, 2021, s. 303 – 304.

[21] POLÁČEK TUREKOVÁ, Z. Dobré mravy z pohľadu právnej teórie a súdnej praxi. *Notitiae novae facultatis iuridicae Universitatis Matthiae Belii neosolii*. Banská Bystrica: Belianum, 2016, roč. 20, s. 318.

[22] Tamtiež, s. 318.

[23] SKALOŠ, M. *Právny poriadok Československa v rokoch 1948 – 1989*, s. 223.

[24] Táto prvá novela Zákonníka práce sa označuje aj ako tzv. „normalizačná novela Zákonníka práce".

rozhodnutia pri skončení pracovného pomeru výpoveďou alebo okamžitým skončením. Pokiaľ ide o zjavné diskriminačné prvky, zaviedli sa normalizačné skutkové podstaty možnosti jednostranného skončenia pracovného pomeru zo strany „*socialistickej organizácie*" výpoveďou, ak „pracovník svojou činnosťou narušil socialistický spoločenský poriadok a nemá preto dôveru potrebnú na zastávanie doterajšej funkcie alebo svojho doterajšieho pracovného miesta".[25]

Pracovný pomer sa mohol skončiť okamžite, ak pracovník narušil svojou činnosťou socialistický spoločenský poriadok takým závažným spôsobom, že jeho zotrvanie v organizácii do uplynutia výpovednej doby nie je možné bez ohrozenia riadneho plnenia úloh organizácie.[26]

V *zákone č. 20/1975 Zb., ktorým sa menia a dopĺňajú niektoré ďalšie ustanovenia Zákonníka práce,* boli uvedené nové dôvody výpovede[27] alebo okamžitého skončenia pracovného pomeru zo strany organizácie,[28] ktoré zrušili normalizačné a diskriminačné dôvody skončenia pracovného pomeru po viacerých protestoch Medzinárodnej organizácie práce.[29]

Zákonom č. 20/1975 Zb. išlo o tzv. druhú novelu Zákonníka práce. *„Hlavným účelom druhej novely Zákonníka práce, zák. č. 20/1975 Zb., bola nová právna úprava rozviazania pracovného pomeru, zvýšenie ingerencie odborových orgánov v pracovnoprávnych vzťahoch, prehĺbenie starostlivosti o zamestnané matky, ako aj o zamestnancov, ktorí utrpeli pracovný úraz alebo boli postihnutí chorobou z povolania.* "[30]

V prvej polovici 80. rokov došlo k rozsiahlej politicko-právnej analýze účinnosti Zákonníka práce, ktorej následkom bola rozsiahla novela v roku 1988, ktorá zasiahla takmer všetky oblasti úpravy.[31]

Pokiaľ išlo o konkrétne zmeny, bolo možné uzatvoriť pracovný pomer na dobu určitú, stanovila sa jednotná výpovedná doba v dĺžke dvoch mesiacov, touto rozsiahlou novelou sa umožnilo dať výpoveď pracovníkom z akéhokoľvek dôvodu alebo bez uvedenia dôvodu, došlo k skráteniu pracovnej doby na 43 hodín týždenne.[32]

Došlo aj k zmierneniu vplyvu „ideológie". Zo základných povinností vedúcich pracovníkov „dôsledne uplatňovať socialistické zásady odmeňovania" sa tak stala povinnosť „zabezpečovať odmeňovanie podľa mzdových predpisov". Odstránená

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[25] TKÁČ, V. et al. *Pracovné právo.* Banská Bystrica: Belianum, 2021, s. 35.

[26] Uvedené diskriminačné ustanovenia boli predmetom kritiky Medzinárodnej organizácie práce a umožnili sa vyrovnať s oponentami režimu počas okupácie štátu zo strany vojsk Varšavskej zmluvy.

[27] Nové dôvody výpovede boli uvedené v ustanovení § 46 ods. 1 písm. e) predmetného zákona.

[28] Nové dôvody okamžitého skončenia pracovného pomeru zo strany organizácie boli uvedené v ustanovení § 51 ods. 1 písm. c) predmetného zákona.

[29] TKÁČ, V. et al. *Pracovné právo.* Banská Bystrica: Belianum, 2021, s. 35.

[30] BARANCOVÁ, H., SCHRONK, R. *Pracovné právo.* Bratislava: Sprint 2, 2018, s. 51.

[31] Niektoré zmeny boli jazykového a terminologického charakteru, niektoré sa dotýkali špecifikácie federálnych a národných kompetencií.

[32] SKALOŠ, M. *Právny poriadok Československa v rokoch 1948 – 1989*, s. 228.

bola aj povinnosť vedúcich pracovníkov „vytvárať priaznivé podmienky pre zvyšovanie ideologickej úrovne pracovníkov“.[33]

5. Úskalia právnej úpravy z roku 1965 a porovnanie so súčasnou právnou úpravou

Je všeobecne známe, že k potrebe vydania Zákonníka práce prispel aj vývoj v iných právnych odvetviach, išlo najmä o prijatie nového Občianskeho zákonníka (zákon č. 40/1964 Zb.) a Hospodárskeho zákonníka (zákon č. 109/1964 Zb.). Prijatie týchto právnych predpisov malo za následok medzery v právnej úprave.

Za tzv. nóvum možno považovať ustanovenie zákazu zamestnávania žien niektorými prácami, čo sa v praxi prejavilo ako kontraproduktívne, pretože to viedlo k výraznému obmedzeniu možnosti uplatnenia žien na trhu práce aj bez toho, že by znamenalo skutočné zlepšenie pracovných podmienok.[34]

Cieľom Zákonníka práce z roku 1965 bol rozvoj socialistickej spoločnosti. V predmetnom pracovnoprávnom kódexe výrazne absentovali pojmy zamestnanec a zamestnávateľ na rozdiel od aktuálnej slovenskej pracovnoprávnej úpravy. Tým, že sa upustilo od pojmov zamestnanec a zamestnávateľ v Zákonníku práce z roku 1965, sa poukázalo na opustenie tovarového chápania práce. Namiesto pojmov zamestnávateľ a zamestnanec sa zaviedli pojmy socialistická organizácia a pracovník.

Mzda nebola obligatórnou náležitosťou pracovnej zmluvy. Pracovný pomer mohol vzniknúť aj na základe rámcovej pracovnej zmluvy na zabezpečenie „dobrovoľnej“ účasti pracovníkov na hromadných akciách, ktoré boli organizované na výpomoc pri poľnohospodárskych a podobných krátkodobých prácach alebo na zabezpečenie práce vo výrobe a prevádzkovej praxi žiakov a študentov.[35]

Na základe rámcovej pracovnej zmluvy vznikal pracovný pomer nástupom do práce bez toho, aby bolo potrebné uzatvoriť pracovnú zmluvu s jednotlivými pracovníkmi a končil sa vykonaním dojednanej práce alebo uplynutím dojednanej doby, ak nebolo dohodnuté inak. Išlo tak o značný zásah do zmluvnej slobody.[36]

Pokiaľ išlo o skončenie pracovného pomeru, pracovný pomer sa mohol skončiť na základe právneho úkonu podobne ako v zmysle súčasnej platnej pracovnoprávnej úpravy, a to dohodou, výpoveďou, okamžitým zrušením (teraz skončením) a zrušením (teraz skončením) v skúšobnej dobe.

Základná výmera dovolenky bola dva kalendárne týždne v kalendárnom roku, teda o dva týždne menej ako podľa súčasného Zákonníka práce. „*Za určitých splnených podmienok aj tri, resp. štyri týždne. Pracovník, ktorý pracoval v tej istej organizá-*

[33] Tamtiež, s. 228.

[34] Tamtiež, s. 224.

[35] Tamtiež, s. 224.

[36] Uvedené konanie bolo v rozpore s čl. III Zákonníka práce z roku 1965. Podľa uvedeného zákonného ustanovenia platilo, že „pracovnoprávne vzťahy, v ktorých sa pracovníci zúčastňujú na spoločenskej práci podľa tohto zákonníka, môžu vzniknúť len so súhlasom občana a socialistickej organizácie“.

cii po celý kalendárny rok pod zemou pri ťažbe nerastov alebo pri razení tunelov a štôlní, mal nárok aj na dodatkovú dovolenku v dĺžke jedného kalendárneho týždňa."[37]

Pri výmere dodatkovej dovolenky bola vtedajšia právna úprava kompatibilná so súčasnou úpravou v zákone č. 311/2001 Z. z. *Zákonník práce* v znení neskorších predpisov (ďalej len „ZP"). Podľa súčasnej pracovnoprávnej úpravy tento typ dovolenky má osobitný charakter spočívajúci v určitej kompenzácii pre zamestnanca pracujúceho v sťažených pracovných podmienkach. Zamestnancovi umožňuje v rámci dlhšej dovolenky, než majú ostatní zamestnanci, regenerovať svoje sily, čím aspoň čiastočne plní aj ochrannú funkciu.

Právny nárok na dodatkovú dovolenku vyplýva priamo zo Zákonníka práce, pričom vznik nároku na túto dovolenku sa posudzuje samostatne, nezávisle od splnenia podmienok pre iné druhy dovoleniek. Nárok na dodatkovú dovolenku majú zamestnanci, ktorí pracujú u toho istého zamestnávateľa po celý kalendárny rok pod zemou pri ťažbe nerastov alebo pri razení tunelov a štôlní. Do druhého okruhu zamestnancov patria zamestnanci, ktorí vykonávajú zvlášť ťažké alebo zdraviu škodlivé práce. Ide o zamestnancov, ktorí:

a) trvale pracujú v zdravotníckych zariadeniach alebo na ich pracoviskách, kde sa ošetrujú chorí s nákazlivou formou tuberkulózy a syndrómom získanej imunitnej nedostatočnosti (HIV/AIDS),
b) sú pri práci na pracoviskách s infekčnými materiálmi vystavení priamemu nebezpečenstvu nákazy,
c) sú pri práci vo významnej miere vystavení nepriaznivým účinkom ionizujúceho žiarenia,
d) pracujú pri priamom ošetrovaní alebo pri obsluhe duševne chorých alebo mentálne postihnutých aspoň v rozsahu polovice určeného týždenného pracovného času,
e) pracujú nepretržite aspoň jeden rok v tropických alebo iných zdravotne obťažných oblastiach,
f) vykonávajú mimoriadne namáhavé práce, pri ktorých sú vystavení pôsobeniu škodlivých fyzikálnych alebo chemických vplyvov v takom rozsahu, že môžu vo významnej miere nepriaznivo pôsobiť na zdravie zamestnanca,
g) pracujú s dokázanými chemickými karcinogénmi alebo pri pracovných procesoch s rizikom chemickej karcinogenity.[38]

Pokiaľ zamestnanci vykonávajú niektorú z uvedených prác, vzniká im nárok na dodatkovú dovolenku *v trvaní jedného týždňa*. Možno ju poskytnúť popri dovolenke za kalendárny rok, ale aj popri dovolenke za odpracované dni. Ak však zamestnanec pracuje za týchto podmienok len časť kalendárneho roka, prislúcha mu za každých 21 takto odpracovaných dní jedna dvanástina dodatkovej dovolenky.

Druhy prác zvlášť ťažkých alebo zdraviu škodlivých, pracoviská a oblasti, kde sa také práce vykonávajú, ustanoví všeobecne záväzný právny predpis, ktorý vydá

[37] SKALOŠ, M. *Právny poriadok Československa v rokoch 1948 – 1989*. 2. doplnené a prepracované vydanie. Banská Bystrica: Belianum, 2021, s. 224.

[38] Porov. ustanovenie § 106 ods. 1 – 2 ZP.

Ministerstvo práce, sociálnych vecí a rodiny SR po dohode s Ministerstvom zdravotníctva SR a Ministerstvom zahraničných vecí a európskych záležitostí SR.[39]

Všeobecne platí zásada, že na účely Zákonníka práce možno čerpať dodatkovú dovolenku iba vo forme pracovného voľna, teda nie je možné jej preplatenie formou náhrady mzdy. *Zamestnanec je povinný si ju čerpať prednostne pred dovolenkou za kalendárny rok, resp. dovolenkou za odpracované dni.* Pri porušení pracovnej disciplíny boli ukladané rôzne kárne opatrenia, a to pokarhanie, verejné pokarhanie, zníženie alebo aj odobratie prémií alebo odmien atď.[40] *„Dozor nad bezpečnosťou a ochranou zdravia vykonávalo ROH. Pri spôsobení škody zamestnanec, s výnimkou prípadu nedbanlivosti, zodpovedal za celú výšku škody – avšak s moderačným právom. Pracovnoprávne spory rozhodovali súdy a odborové orgány v rozhodcovskom konaní.*"[41]

V porovnaní so súčasnou pracovnoprávnou úpravou Zákonník práce z roku 1965 upravoval aj tzv. učebný pomer.[42]

Pokiaľ išlo o dohody o prácach vykonávaných mimo pracovného pomeru, súčasný Zákonník práce upravuje tri dohody, a to dohodu o vykonaní práce, dohodu o brigádnickej práci študentov a dohodu o pracovnej činnosti. Na druhej strane Zákonník práce z roku 1965 upravoval len dva druhy týchto dohôd, a to dohodu o pracovnej činnosti a dohodu o vykonaní práce, ktorá sa mohla uzavrieť aj ústne, čo je podľa súčasnej pracovnoprávnej úpravy neprípustné.

Spomedzi úskalí právnej úpravy Zákonníka práce z roku 1965 nemožno nespomenúť aj zopár svetlých aspektov. Za pozitívum možno vnímať, že predstavoval univerzálny právny predpis spočívajúci v tom, že upravoval pracovnoprávne vzťahy všetkých zamestnancov bez ohľadu na ich pracovné zaradenie. Bol napísaný zrozumiteľným spôsobom.

Záver

V roku 1965 prijatím Zákonníka práce na našom území došlo ku kodifikácii pracovného práva a zároveň k unifikácii právnej úpravy všetkých pracovných kategórií, pretože sa vzťahoval na celé vtedajšie práceschopné obyvateľstvo.

Kogentným spôsobom bola upravená problematika pracovných podmienok a bezpečnosti a ochrany zdravia pri práci. Len výnimočne sa pripúšťali odchýlky od tohto Zákonníka práce, a to dohodou účastníkov. Počas obdobia svojej účinnosti bol predmetný Zákonník práce takmer štyridsaťkrát novelizovaný. Po celú dobu platnosti bol Zákonník práce z roku 1965 charakteristický prevažujúcim kogentným charakterom jeho ustanovení a napriek viacerým novelám stále bol predmetný pracovnoprávny kódex výsledkom vplyvu vládnucej ideológie.

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[39] Tamtiež, ustanovenie § 106 ods. 3.

[40] Uvedené kárne opatrenia boli charakteristické pre sankčný charakter pracovného práva.

[41] SKALOŠ, M. *Právny poriadok Československa v rokoch 1948 – 1989*. 2. doplnené a prepracované vydanie. Banská Bystrica: Belianum, 2021, s. 224.

[42] Učebný pomer upravoval právne postavenie učňov.

Prvá priama novela Zákonníka práce, ktorá bola realizovaná zákonom č. 153/1969 Zb., bola prijatá v tzv. normalizačnom období, po vstupe vojsk Varšavskej zmluvy do Československa v auguste 1968. Táto novela priniesla so sebou aj výrazné diskriminačné prvky, a to najmä v systematickej časti rozviazania pracovného pomeru výpoveďou alebo okamžitým zrušením zo strany zamestnávateľa. Rozšírili sa tak možnosti organizácie ukončiť pracovný pomer okamžite alebo výpoveďou z politických dôvodov. Pracovné právo v tzv. normalizačnom období bolo nástrojom represálií voči stúpencom reforiem zo 60. rokov a oponentom režimu.

Druhá priama novela Zákonníka práce (zákon č. 20/1975 Zb.) však tieto diskriminačné prvky jednostranného skončenia pracovného pomeru z predchádzajúcej novely odstránila. Prispeli k tomu aj početné protesty Medzinárodnej organizácie práce.

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K niektorým historickým a právnym aspektom vybraných vecnoprávnych inštitútov po roku 1948

On Historical and Legal Aspects of Selected Rights-in-Rem Institutes After 1948

doc. JUDr. PhDr. Martin Skaloš, PhD.[1]

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Abstrakt: Cieľom príspevku je poukázať na zmeny v právnej úprave niektorých vybraných vecnoprávnych inštitútov po roku 1948.

Kľúčové slová: vývoj; Občiansky zákonník; právny poriadok; vecné práva; Československo.

Abstract: The aim of the article is to comment on some historical and legal aspects of selected rights-in-rem institutes after 1948.

Keywords: Development; Civil Code; Legal Order; Rights-in-Rem; Czechoslovakia.

Úvod

Do nášho právneho poriadku sa všeobecná, inštitucionálna a ucelená úprava vecného práva po takmer štyridsaťročnej absencii vrátila prostredníctvom novelizácie Občianskeho zákonníka (zákonom č. 509/1991 Zb.) a je obsiahnutá v jeho druhej časti. Do 1. apríla 1964 počas platnosti Občianskeho zákonníka z roku 1950 bola síce ešte samostatná úprava vecného práva jeho súčasťou vrátane jednotlivých druhov vecných práv, avšak v značne modifikovanej podobe ovplyvnenej najmä nahradením jednotného pojmu vlastnícke právo sústavou viacerých druhov a foriem vlastníctva v zmysle dominujúcej socialistickej doktríny.

Občiansky zákonník z roku 1964 až do roku 1983 obsahoval rozptýlenú právnu úpravu vecných práv. Vecné práva netvoria homogénnu skupinu práv, ale v rámci týchto práv rozlišujeme dve podskupiny: vlastnícke práva a vecné právo k cudzej veci. Vlastnícke právo až do novely Občianskeho zákonníka z roku 1991 bolo upravené v druhej časti zákona pod názvom Socialistické spoločenské vlastníctvo a osobné vlastníctvo a v ôsmej časti, kde bola zakotvená úprava súkromného vlastníctva vo veľmi zúženej podobe. Z vecných práv k cudzej veci bolo retenčné právo upravené iba v § 278 v súvislosti s poskytovaním opravy a úpravy veci; záložné práva a vecné bremená podľa dikcie § 495 mohli vzniknúť len na základe zákona.

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1. Chápanie pojmu vec po roku 1948

Pojem vec nebol v jednotlivých právnych poriadkoch často presne vymedzený. Nie je to však inak ani v súčasnosti v podmienkach Slovenskej republiky, kde legálnu definíciu tohto pojmu v Občianskom zákonníku nenájdeme (podľa § 23 Občianskeho zákonníka č. 141/1950 Zb., ktorým došlo k prekonaniu obdobia právneho dualizmu rakúskeho a uhorského práva, boli vecou ovládateľné hmotné predmety a prírodné sily, ktoré slúžia potrebe ľudí).[2]

Nadobudnutím účinnosti v súčasnosti platného Občianskeho zákonníka došlo k legislatívnej zmene týkajúcej sa objektu občianskoprávnych vzťahov v tom zmysle, že pojem „vec" už legálne definovaný nebol a tento právny stav pretrváva až dodnes. Otázka, prečo zákonodarca opustil právnu úpravu z roku 1950 a pojem vec už nedefinoval, bola založená na skutočnosti, že vec je prírodný fakt, ktorý právo nemôže definovať. Ustanovenie § 23 OZ z roku 1950, takisto ako česká právna úprava, pri legálnej definícii veci používa pojem „vec v právnom zmysle", čím zvýrazňuje možnosť použitia tejto definície len vo vzťahoch právnych, nič však nenasvedčuje tomu, že by uvedená definícia zodpovedala aj skutočnému ponímaniu pojmu vec v myslení ľudí tak, ako ho zvyknú používať v bežnej komunikácii na identifikáciu predmetov hmotnej povahy.

Medzi krajiny, ktoré nedefinujú pojem vec v právnom zmysle, patrí aj slovenská právna úprava, ktorá sa vecami ako predmetom občianskoprávnych vzťahov zaoberá v § 118 OZ (č. 40/1964 Zb. v znení neskorších predpisov), avšak bez bližšej konkretizácie pojmu vec, ktorý vo svojich ustanoveniach často používa. Podľa odseku 1 uvedeného ustanovenia platného Občianskeho zákonníka predmetom občianskoprávnych vzťahov sú veci, a pokiaľ to ich povaha pripúšťa, práva alebo iné majetkové hodnoty.[3] S rozlišovaním vecí na hnuteľné a nehnuteľné počíta aj platný Občiansky zákonník v ustanovení § 119, v ktorom výslovne definuje len veci nehnuteľné, a to ako pozemky a stavby spojené so zemou pevným základom. Výslovná definícia hnuteľných vecí v Občianskom zákonníku absentuje, no napriek tomu možno dospieť k ich definícii na základe *argumentum a contrario* a považovať za ne všetky veci, ktoré nemajú povahu nehnuteľností.[4]

2. Vplyv ústavného vývoja na socialistické vecné právo

Pred prijatím novej ústavy po druhej svetovej vojne sa v programe tretej vlády Národného frontu Čechov a Slovákov (tzv. „budovateľskom programe") uvádzalo, že

[2] FICO, M. *Vývoj inštitútov vecných práv.* Košice: UPJŠ, 2013, s. 9.

[3] Rovnako možno poukázať aj na potrebu vymedzenia ďalšieho významného pojmu, a to pojmu majetok. Bližšie pozri Ministerstvo spravodlivosti SR. Legislatívny zámer Občianskeho zákonníka. Príloha k Justičnej revue, č. 8 – 9/2002, s. 36.

[4] Pokiaľ ide o klasifikáciu vecí na hnuteľné a nehnuteľné, vzhľadom na absenciu definície hnuteľných vecí, bolo by vhodné do Občianskeho zákonníka výslovne uviesť, že hnuteľnými vecami sú všetky ostatné veci (iné ako nehnuteľné veci).

nová ústava musí zmariť nádeje všetkých, ktorí stále ešte dúfajú v navrátenie znárodneného hospodárstva hŕstke veľkokapitalistov. Na druhej strane sa však ústavnej ochrany dostane súkromnému podnikaniu drobnému a strednému, najmä potom má byť ústavne zabezpečený poctivo nadobudnutý majetok našich poľnohospodárov, živnostníkov, obchodníkov a všetkých ostatných fyzických i právnických osôb.[5] Následne to bolo konkretizované v § 9 Ústavy 9. mája 1948, podľa ktorého súkromné vlastníctvo bolo možné obmedziť len zákonom. Zároveň bolo stanovené, že nikto nemôže zneužívať vlastnícke právo ku škode celku.[6]

Ôsma kapitola Ústavy 9. mája (§ 146 – § 164) zakotvovala hospodárske zriadenie Československej republiky. Pre hospodárske zriadenie republiky sa stala charakteristickou existencia troch sektorov hospodárstva – socialistického, malovýrobného súkromného a kapitalistického. Za základ hospodárskeho zriadenia ústava vyhlásila socialistický sektor, ktorý vznikol predovšetkým znárodnením.[7] V súlade s vymedzením hospodárskych sektorov ústava upravovala vlastníctvo výrobných prostriedkov.[8] Formálne bolo zavedené monopolné štátne vlastníctvo národného majetku (§ 149 ods. 1) a boli vymedzené kontúry osobného vlastníctva (§ 158 ods. 2). Súčasne bola formálne zakotvená ochrana súkromného vlastníctva (§ 158 ods. 1, § 9). Unáhlenosť znenia Ústavy 9. mája ilustruje § 149 ods. 2 zavádzajúce tzv. komunálne vlastníctvo, ktoré však nikdy nebolo upravené ďalšou legislatívou a v praxi sa nevyužívalo. Občiansky zákonník z roku 1950 túto formu vlastníctva celkom vypustil.[9]

Socialistické vlastníctvo zakotvila v dvoch hlavných formách ako socialistické štátne vlastníctvo (národný majetok) a družstevné vlastníctvo. Ústava potvrdzovala rozsah znárodnenia a za národný majetok sa pokladalo nerastné bohatstvo a jeho ťažba, zdroje energie a energetické podniky, bane a huty, prírodné liečivé zdroje, výroba predmetov slúžiacich zdraviu ľudu, podniky s viac ako 50 zamestnancami, banky a poisťovne, verejná doprava, pošta, telegraf, telefón, rozhlas, televízia a film. Taktiež sa za národný majetok pokladal akýkoľvek verejný statok slúžiaci všeobecnému prospechu, znárodnený podľa ustanovení osobitných zákonov.

Súkromné vlastníctvo začalo byť výrazne potlačované. Výrazom toho bolo, že ustanovenie o súkromnom vlastníctve sa vzťahovalo jednak na vlastníctvo „malovýrobcov nevykorisťujúcich cudzie pracovné sily", jednak na kapitalistické vlastníctvo, ktorého rozsah bol však značne obmedzený. V súlade s vykonávaným znárodnením

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[5] GRONSKÝ, J. *Komentované dokumenty k ústavním dějinám Československa II. 1945 – 1960*. Praha: Karolinum, 2005, s. 218.

[6] PRÍBEĽSKÝ, P. Metamorfózy vlastníckeho práva v postmodernej dobe. *Justičná revue*. 2012, roč. 64, č. 12, s. 1402 – 1403.

[7] Znárodnenie sa stalo vo všetkých kľúčových oblastiach národného hospodárstva s výnimkou poľnohospodárstva základnou súčasťou socialistickej ekonomickej a sociálnej reformy.

[8] „Výrobní prostředky jsou buď národním majetkem, nebo majetkem lidových družstev, anebo jsou v soukromém vlastnictví jednotlivých výrobců." (§ 146 Ústavy 9. mája z roku 1948).

[9] BĚLOVSKÝ, P. *Občanské právo.* In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Mezinárodní politologický ústav, 2009, s. 432 – 433.

a pozemkovou reformou ústava ustanovila najvyššiu prípustnú hranicu súkromného vlastníctva, a to pri podnikoch 50 zamestnancov a pri pôde 50 ha (ak išlo o pôdu, na ktorej vlastník sám pracoval). Okrem toho ústava ešte hovorila o osobnom vlastníctve k predmetom domácej a osobnej spotreby.[10]

Podľa Knappa právo poskytuje vlastníctvu ochranu. V tom sa javí výrazne aktívna úloha právnej nadstavby a jej spätné pôsobenie na ekonomickú základňu. Vládnuca trieda svojím právom chráni svoje vlastníctvo. Ani otázku ochrany vlastníctva nemôžeme chápať len v zmysle formálnoprávnom, ale musíme vždy pozorovať ochranu vlastníctva v určitej historickej súvislosti a v určitej spoločnosti. Buržoázny štát chránil svojím právom buržoázne súkromné vlastníctvo. Ľudovodemokratický štát poskytuje zvýšenú ochranu socialistickému vlastníctvu a osobnému, ale predovšetkým štátnemu socialistickému vlastníctvu, ktoré je najvyššou formou vlastníctva[11] a malo najvyššiu ochranu. V Ústave 9. mája to bolo vyjadrené v § 30 ods. 2, ktorý ukladal povinnosť ochrany a starostlivosti o národný majetok všetkým občanom a v § 125, ktorý ukladal starostlivosť o národný majetok národným výborom. Teda bolo vecou štátu, ako aj vecou každého občana, aby chránil národný majetok a napomáhal jeho rozvoju. Aj v Občianskom zákonníku malo najvyššiu ochranu štátne socialistické vlastníctvo.[12]

Víťazstvo socializmu bolo dovŕšené a patrične konštatované prijatím novej tzv. socialistickej ústavy ČSSR v roku 1960. Problematiky občianskeho (a v jeho rámci vecného) práva sa najviac dotýkajú čl. 7 a nasl., lebo hovoria jednak o hospodárskej sústave Československa, jednak o štrukturalizácii vlastníckeho práva, resp. rozdelenia hodnôt medzi jednotlivé subjekty. Podľa čl. 7 bola znovu zakotvená socialistická hospodárska sústava, ktorá stála na centrálnom plánovaní s pripustením drobného súkromného hospodárenia, avšak za prísneho zákazu vykorisťovania človeka človekom. Čl. 8 sa už priamo dotýkal štrukturalizácie vlastníctva. Uvádzal, že socialistické spoločenské vlastníctvo má dve základné formy, a to štátne vlastníctvo, ktoré je vlastníctvom všetkého ľudu (národný majetok), a družstevné vlastníctvo (majetok ľudových družstiev).

Pod národný majetok boli zaraďované predovšetkým nerastné bohatstvo a základné zdroje energie, základný lesný fond, vodné toky a prírodné liečivé zdroje, prostriedky priemyselnej výroby, hromadnej dopravy a spojov, peňažné a poisťovacie ústavy, rozhlas, televízia a film a ďalej aj najdôležitejšie spoločenské zariadenia ako zdravotnícke zariadenia, školy a vedecké ústavy. Družstevné vlastníctvo bolo spojené predovšetkým s užívaním pôdy rôznych vlastníkov, združenej pre spoločné družstevné hospodárenie. Popri socialistickom vlastníctve bolo ústavne tiež zakotvené osobné vlastníctvo, a to konkrétne čl. 10. Išlo o vlastnícke právo k spotrebným predmetom, predovšetkým k predmetom osobnej a domácej spotreby, rodinným

[10] SKALOŠ, M. *Slovenské a československé dejiny štátu a práva v rokoch 1945 – 1989.* Banská Bystrica: PrF UMB, 2011, s. 169.

[11] KNAPP, V. *Vlastnictví v lidové demokracii.* Praha: Orbis, 1952, s. 403 – 404.

[12] KNAPP, V. *Vlastnictví v lidové demokracii.* Praha: Orbis, 1952, s. 407 – 408.

domčekom, ako aj k úsporám nadobudnutým prácou. Ústavne bolo zakotvené aj súkromné vlastníctvo, aj keď len ako prežívajúci inštitút.[13] Popri štrukturalizácii vlastníctva ústava ďalej zakotvila základné rámcové pravidlá pre zakladanie hospodárskych organizácií ako napríklad národných podnikov.

S uvedenou ústavnou úpravou korešpondovala i úprava vlastníckeho práva v Občianskom zákonníku z roku 1964. Subjektom osobného vlastníctva mohol byť iba občan a subjektom súkromného vlastníctva občan alebo iná než socialistická organizácia. Jednotlivé druhy a formy vlastníctva sa ďalej rozlišovali aj predmetom. Predmetom osobného vlastníctva nemohli byť výrobné prostriedky (napr. pozemky). Odlišnosť bola daná aj osobitnou sústavou právnych prostriedkov ochrany. Najsilnejšie právne postavenie mal ten, kto vystupoval v mene štátu (tzv. štátny vlastník) a najslabšie postavenie súkromný vlastník. Teda socialistické právo rôznych vlastníkov nepovažovalo za rovnocenný subjekt.

K odstráneniu tejto diskriminácie a opätovnému zjednoteniu právneho postavenia všetkých vlastníkov došlo u nás ústavným zákonom č. 100/1990 Zb. z 18. apríla 1990, ktorým sa menila vtedajšia Ústava ČSSR a ústavný zákon o československej federácii. Novo formulovaný článok 7 Ústavy ČSSR stanovoval, že vlastníctvo a iné majetkové práva občanov, právnických osôb a štátu sú chránené ústavou a zákonmi. Štát poskytuje všetkým vlastníkom rovnocennú ochranu. Ďalej bolo v článku 8 stanovené, že vlastníctvo zaväzuje a nesmie byť zneužívané na ujmu práv iných osôb alebo spoločnosti. Zároveň bolo v článku 12 upravené, že výkon vlastníckeho alebo užívacieho práva nesmie poškodzovať ľudské zdravie, životné a prírodné prostredie nad mieru stanovenú zákonom. Týmto zákonom bolo odstránené nezmyselné triedenie vlastníctva na jednotlivé druhy a opäť sme sa vrátili k jednotnému pojmu vlastníctva. To znamená, že bez ohľadu na to, kto je vlastníkom, objektívne právo im poskytuje rovnaké postavenie a rovnakú právnu ochranu.

V rámci československej federácie bola úprava vlastníckeho práva na ústavnej úrovni finalizovaná prijatím ústavného zákona č. 23/1991 Zb., ktorým sa uvádza Listina základných práv a slobôd. Úprava vlastníctva bola v Listine základných práv a slobôd zaradená do článku 11 a vlastnícke právo bolo upravené ako základné ľudské právo. Konštatovalo sa, že každý má právo vlastniť majetok a vlastnícke právo všetkých vlastníkov má rovnaký zákonný obsah a ochranu. Zároveň bolo ustanovené, že vlastníctvo zaväzuje a nesmie byť zneužité na ujmu práv druhých alebo v rozpore so zákonom chránenými všeobecnými záujmami. Jeho výkon nesmie poškodzovať ľudské zdravie, prírodu a životné prostredie nad mieru stanovenú zákonom. Zároveň bola upravená garancia dedenia a vyvlastnenia a tiež sa vytvorila možnosť, aby určitý majetok mohol byť výlučne v štátnom vlastníctve alebo len vo vlastníctve fyzických a právnických osôb so sídlom v ČSFR.

[13] Ústava zachovala možnosť malého súkromného hospodárstva „založeného na osobnej práci a vylučujúceho vykorisťovanie cudzej pracovnej sily“ (čl. 9).

3. Zmeny v oblasti vecných práv po prijatí Občianskeho zákonníka z roku 1950

Popri Ústave 9. mája aj ustanovenia § 100 a nasl. OZ z roku 1950 priniesli celkom nový jav, ktorým bola štrukturalizácia vlastníctva, resp. jeho rozlišovanie podľa subjektu, ktorý bol nositeľom vlastníckeho práva k určitej veci na socialistické vlastníctvo, osobné vlastníctvo a súkromné vlastníctvo.[14]

Vytvorenie troch typov vlastníctva rozbíja zakorenené rímskoprávne predsudky o jednotnom vlastníctve ako o neobmedzenom panstve človeka nad vecou. Pod týmto pojmom podľa dobových ideológov ukrývala buržoázia vykorisťovanie, zdôrazňujúc nevyhnutnosť kapitalistickej formy podnikania.[15] Vlastníctvo nového typu, nevykorisťovateľské spoločenské vlastníctvo, t. j. štátne socialistické vlastníctvo, prípadne vlastníctvo socialistických spoločenských organizácií je zárukou narastajúceho blahobytu a zárukou pred vykorisťovaním. S týmto vlastníctvom nie je v protiklade nevykorisťovateľské vlastníctvo jednotlivca k osobnému majetku, ktorého rast pokračuje ruka v ruke s rozvojom vlastníctva socialistického, a teda s rozvojom blahobytu pracujúcich. Sluší sa preto zabezpečiť privilegované postavenie socialistického vlastníctva pred vlastníctvom súkromným, ktoré slúži alebo môže slúžiť vykorisťovaniu, t. j. prinášať bezprácny dôchodok a ktoré v našich spoločenských pomeroch nie je doteraz vytlačené. Bližšie vymedzenie pojmu socialistickej spoločenskej organizácie je nutné ponechať na vývoj a prax.[16]

Podľa dôvodovej správy k Občianskemu zákonníku *„vlastnícke právo osnova nedefinuje; definícia vlastníctva nejaví sa ani potrebnou"*.[17] Tento svoj názor vláda zakladá na socialistickej právnej teórii, podľa ktorej „pri definícii pojmu vlastníckeho práva musí marxisticko-leninská teória práva vychádzať z Marxovho pojmu vlastníctvo ako privlastnenie predmetov prírody jednotlivcom vo vnútri určitej spoločenskej formy a jej prostredníctvom, vlastníctvo ako pomer jednotlivca alebo kolektívu k výrobným podmienkam alebo prostriedkom – ako k svojím". Ak sa prevedie Marxov ekonomický pojem privlastnenia do právnej reči, treba vlastnícke právo definovať ako „právo jednotlivca alebo kolektívu používať výrobné prostriedky a výrobky vo svojej moci a vo svojom záujme na základe sústavy triednych pomerov, ktorá v danej spoločnosti existuje, a v súlade s touto sústavou".[18]

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[14] KNAPP, V., LUBY, Š. a kol. *Československé občianske právo. II. zväzok*. 2. vydanie. Bratislava: Obzor, 1974, s. 21 a nasl.

[15] „Typickým rysom kapitalistického súkromného vlastníctva výrobných nástrojov a prostriedkov je jeho vykorisťovateľský charakter. Vlastnícke právo buržoáznej spoločnosti nie je ničím iným, ako právom prisvojovať si cudziu nezaplatenú prácu" (Marx).

[16] Zdroj: Národní archiv v Prahe, Oddělení fondů státní správy z let 1945 – 1992, Archiv Ministerstva spravedlnosti – nespracovaný fond: Kodifikace trestního a občanského práva, karton 4.

[17] Dôvodová správa vlády ČSR k § 100 – § 106. Dostupné na internete: http://www.psp.cz/eknih/1948ns/tisky/t0509_10.htm

[18] Marxov pojem vlastníctva je známy predovšetkým z predhovoru knihy Ku kritike politickej ekonómie. V „náčrte" základných téz kritiky politickej ekonómie Marx definuje vlastníctvo ako „pomer

Občiansky zákonník z roku 1950 opustil tradičnú zásadu, podľa ktorej „povrch ustupuje pôde", alebo že „vlastník pozemku je aj vlastníkom stavby na ňom postavenej".[19] Hlavným dôvodom pre uplatnenie tohto kroku boli problémy, ktoré by mohli nastať jednotným roľníckym družstvám: za predchádzajúcej platnej úpravy by sa stavby postavené jednotnými roľníckymi družstvami na súkromnom pozemku stali majetkom vlastníka pozemku. Rovnako tak vďaka tomuto kroku bolo možné, aby si občania postavili domy v osobnom vlastníctve na štátnom alebo družstevnom pozemku. Preto ustanovenie § 155 uvádzalo, že vlastníkom stavby môže byť osoba odlišná od vlastníka pozemku.[20]

Pokiaľ ide o nehnuteľnosti, Občiansky zákonník opúšťa zásadu dovtedajšieho práva, že prevod vlastníctva k nehnuteľnej veci sa uskutoční až zápisom do pozemkovej knihy alebo uložením listiny na súde. Nová právna úprava ponecháva zápis prevodu vlastníckeho práva k nehnuteľnostiam (uloženie listiny) len z dôvodov potrebnej kontroly a evidencie. Aj pri nehnuteľnostiach platí zásada, že k prevodu vlastníctva nastane, pokiaľ je zmluva skutočnosťou (jej perfekciou). Pokiaľ sa v § 112 ustanovuje, že prevod vlastníctva sa zapíše do pozemkových alebo železničných kníh, tento zápis so zreteľom na to, čo ustanovuje § 111 ods. 1, má iba deklaratórnu povahu.[21]

Zákon č. 141/1950 Zb. v § 143 uvádza, že držiteľom je ten, *„kto s vecou nakladá ako s vlastnou alebo kto vykonáva právo pre seba"*. Teda je zrejmé, že aj po zmene spoločenských pomerov bola zachovaná disjunkcia medzi držbou veci ako faktickým stavom a držbou práva, na vznik ktorej sú potrebné – na rozdiel od držby veci – špecifické podmienky. Práve tak aj súčasný Občiansky zákonník (zákon č. 40/1964 Zb.) v § 129 ods. 1 veľmi vhodne rozlišuje držbu veci a držbu práva a v ods. 2 obmedzuje možnosť držania práva na práva pripúšťajúce opätovný alebo trvalý výkon.

Inštitút vecných bremien sa v našom právnom poriadku po prvý raz objavil v Občianskom zákonníku z roku 1950 a nahradil tým tzv. služobnosti a reálne bremená, ktoré boli a dodnes sú súčasťou občianskoprávnych úprav väčšiny európskych krajín. Termín pojem a inštitút vecných bremien sa v iných právnych poriadkoch nevyskytuje.[22]

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jednotlivca k prírodným podmienkam práce a reprodukcie ako k podmienkam objektívnym". Ďalej Marx hovorí: „Jednotlivec sa chová k objektívnym podmienkam práce jednoducho ako k svojim." In: VENĚDIKTOV, A. V. *Státní socialistické vlastnictví.* Praha: Orbis, 1950, § 2 a § 3.

[19] K uplatňovaniu zásady *„superficies solo cedit"*, resp. k záveru, že „stavba nie je súčasťou pozemku", bližšie pozri FIALA, J., KINDL, M. a kol. *Občanský zákoník. Komentár. I. díl.* Praha: C. H. Beck, 2009, s. 353 a násl.

[20] DÁVID, R. *Československé socialistické občanské právo (1948 – 1989).* In: VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. a kol. *Vývoj soukromého práva na území českých zemí. I. díl.* Brno: Masarykova univerzita, 2012, s. 418 – 419.

[21] Národní archiv v Prahe, Oddělení fondů státní správy z let 1945 – 1992. Archiv Ministerstva spravedlnosti – nespracovaný fond: Kodifikace trestního a občanského práva, č. 327/1949 – V/i, karton 2.

[22] Z ustanovenia § 166 zákona č. 141/1950 Zb., ktorý konštatuje, že *„vecné bremená obmedzujú vlastníka veci v prospech niekoho iného, a to tak, že vlastník je povinný niečo trpieť, alebo sa niečoho zdržať, alebo niečo konať"*, ani z viacero ďalších lakonických ustanovení tohto kódexu nemožno

4. Vecné práva podľa Občianskeho zákonníka z roku 1964

Československý právny poriadok vymedzil 4 základné formy vlastníctva: štátne vlastníctvo a družstevné vlastníctvo (ako kolektívne formy vlastníctva) a ďalej osobné vlastníctvo a súkromné vlastníctvo (ako individuálne formy vlastníctva). Názvy jednotlivých typov vlastníctva sa odlišovali v priebehu vývoja, predovšetkým však s prijatím Občianskeho zákonníka z roku 1964. Ten prestal napríklad používať pojem štátne vlastníctvo, pretože zákonodarca použil širší pojem „socialistické spoločenské vlastníctvo", ktorý štátne vlastníctvo zahŕňa.[23]

Tzv. socialistické vlastníctvo samo osebe nebolo typom vlastníckeho práva, ale kategóriou súboru právne privilegovaných typov vlastníctva, do ktorej patrilo vlastníctvo štátne, družstevné a osobné. Občiansky zákonník z roku 1964 ustanovil, že zdrojom osobného vlastníctva môže byť výlučne práca občana v prospech spoločnosti (prípadne iný poctivý zdroj) a že predmety osobného vlastníctva musia mať spotrebný charakter. Okrem toho Občiansky zákonník z roku 1964 ustanovil ako kritérium pre určenie osobného vlastníctva aj rozsah majetku,[24] daný nielen objemom majetku, ale aj veľkosťou konkrétnych vecí, predovšetkým rodinných domov (§ 128). Občiansky zákonník z roku 1964 pripúšťal aj súkromné vlastníctvo, základom ktorého bolo vlastníctvo výrobných prostriedkov, novo limitované tým, že nemohlo slúžiť vykorisťovaniu človeka človekom, teda že výrobné prostriedky mohol využívať len ich vlastník.

S deklarovaným pokrokom v zospoločenšťovaní výrobných prostriedkov a spontánnym procesom zjednocovania foriem socialistického vlastníctva došlo aj k zmene legislatívneho prístupu k štruktúre vlastníctva. V Občianskom zákonníku z roku 1964 sa pojem štátne vlastníctvo už vôbec neobjavuje, a to aj pre znenie čl. 8 ústavy z roku 1960, podľa ktorého: „*Socialistické spoločenské vlastníctvo má dve základné formy: štátne vlastníctvo, ktoré je vlastníctvom všetkého ľudu (národný majetok), a družstevné vlastníctvo (majetok ľudových družstiev).*" Išlo o dôsledok zámeru presunúť všetku úpravu hospodárenia s národným majetkom do Hospodárskeho zákonníka a ďalších osobitných predpisov. V nadväznosti na znenie ústavy Občiansky zákonník z roku 1964 používa pojem tzv. socialistické spoločenské vlastníctvo bez ďalšieho rozlišovania na štátne alebo družstevné vlastníctvo.

Súčasne došlo k rozšíreniu výpočtu prípustných foriem socialistického vlastníctva, lebo popri vlastníctve štátnom a družstevnom Hospodársky zákonník novo pripustil vlastníctvo spoločenských a iných socialistických organizácií. Do budúcnosti

viac vyčítať, avšak možno povedať, že tento zákonník vlastníkovu služobnosť ani vecné bremeno neumožňoval.

[23] Prívlastok „spoločenské" síce používal vo vzťahu k socialistickému vlastníctvu už Občiansky zákonník z roku 1950 (§ 100), avšak v tomto prípade išlo skôr o ideologické vyjadrenie povahy inštitútu než o súčasť názvu novej formy vlastníctva.

[24] Presná hranica rozsahu majetku nebola výslovne ustanovená zákonom. Určitým vodidlom pre súdne rozhodovanie bol § 126, ktorý ustanovil, že osobné vlastníctvo slúži na uspokojovanie osobných hmotných a kultúrnych potrieb.

bolo možné, aby štát nielen zveril časť štátneho majetku do užívania socialistickým organizáciám, ale rovnako aby tento majetok na socialistické organizácie priamo previedol. Konkrétne mohlo ísť napríklad o budovy, pozemky, výrobné zariadenia a pod. Uvedenú koncepciu možno vidieť napríklad v ustanovení § 8 Hospodárskeho zákonníka, podľa ktorej platilo, že socialistickým spoločenským vlastníctvom je štátne vlastníctvo, družstevné vlastníctvo, ako aj vlastníctvo spoločenských a iných socialistických organizácií.

Družstevné vlastníctvo bolo považované, rovnako ako štátne vlastníctvo, za kolektívnu formu prisvojovania (na rozdiel od osobného a súkromného vlastníctva), avšak hierarchicky zaradenú na nižšiu úroveň, ako je štátne vlastníctvo. Išlo o kategóriu vlastníctva zaraďovanú medzi štátne vlastníctvo a osobné vlastníctvo, pričom práve toto začlenenie determinovalo jeho hranice. Predmetom vlastníctva ľudových družstiev nemohlo byť to, čo mohlo byť výlučne predmetom štátneho vlastníctva. Naopak to, čo mohlo byť predmetom individuálneho vlastníctva, sa mohlo stať predmetom aj štátneho alebo družstevného vlastníctva. Socialistická koncepcia v rámci hierarchizácie vlastníckych práv taktiež vymedzila presné hranice predmetov týchto vlastníctiev.[25]

Ďalším významným aspektom socialistického vlastníctva bol spôsob, akým sa teória občianskeho práva dokázala vyrovnať so skutočnosťou, že družstvá hospodária s (súkromným) majetkom jednotlivých osôb. V prípade družstevnej formy ide o spoločenskú formu hospodárenia, ktorá je súčasne podporovaná socialistickým štátom. Ak je člen družstva vlastníkom vneseného majetku, tento majetok je využívaný na uspokojovanie záujmov celej spoločnosti. Vďaka tomu aj všetky príjmy plynúce z činnosti družstva sa mohli stať osobným vlastníctvom, nie súkromným, lebo nepochádzali zo špekulatívnych zdrojov a ani z vykorisťovania.[26]

Komunistickou ideológiou bola rešpektovaná aj individuálna forma socialistického vlastníctva v podobe tzv. osobného vlastníctva, ktoré zodpovedalo ideologickým kritériám. Tým stálo osobné vlastníctvo v protiklade k súkromnému vlastníctvu, ktoré bolo koncepčne odmietané marxistickým učením ako jeden zo základných pilierov kapitalistických výrobných vzťahov. Aj napriek nedostatočnému zákonnému vymedzeniu osobného vlastníctva v prvej fáze jeho úpravy, v legislatívnej úprave 60. rokov nedošlo prakticky k žiadnej zmene. Ústava z roku 1960 len prevzala vymedzenie osobného vlastníctva z predchádzajúcej ústavnoprávnej úpravy s jedinou zmenou. Z demonštratívneho výpočtu ústavy z roku 1948[27] bol v ústave z roku 1960 vyradený majetok z dedičstva, ktorý bol presunutý do samostatného druhého od-

[25] BĚLOVSKÝ, P. *Občanské právo.* In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Mezinárodní politologický ústav, 2009, s. 447 – 448.

[26] Bližšie pozri DÁVID, R. *Československé socialistické občanské právo (1948 – 1989).* In: VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. a kol. *Vývoj soukromého práva na území českých zemí. I. díl.* Brno: Masarykova univerzita, 2012, s. 454.

[27] Podľa § 158 ods. 2 Ústavy 9. mája z 1948: „Osobní majetek občanů je nedotknutelný. Toto ustanovení se týká zejména předmětů domácí a osobní spotřeby, rodinných domků a úspor nabytých prací, jakož i dědického práva na ně."

seku článku 10.[28] V novej úprave bola zvolená rovnaká cesta ako v Občianskom zákonníku z roku 1950, ktorý ústavnoprávne vymedzenie osobného vlastníctva taktiež prevzal, s výnimkou dedičstva (§ 105 OZ z roku 1950).[29]

Rámcové vymedzenie osobného vlastníctva v zákonnej úprave si vynútilo jeho bližšie rozpracovanie v právnej teórii. Právna doktrína sa zhodla na troch základných rysoch osobného vlastníctva: nerozlučná spojitosť so socialistickým spoločenským vlastníctvom, pôvod spočívajúci na práci občana v prospech spoločnosti[30] a spotrebný charakter. Okrem uvedených všeobecných znakov sa identifikácia osobného vlastníctva upínala predovšetkým na povahu predmetu osobného vlastníctva, a to *de iure* na základe § 146 ústavy z roku 1948 a čl. 8 ods. 2 ústavy z roku 1960.[31] Predmetom osobného vlastníctva mohli byť takmer výlučne veci spotrebnej povahy, t. j. veci, ktoré zo svojej povahy vylučujú možnosť ďalšieho nekontrolovateľného rozrastania majetku a majú slúžiť čisto na uspokojenie osobných potrieb. Veci, ktoré sa užívaním nespotrebúvajú, predovšetkým však výrobné prostriedky (pozemky, stroje, priemyselné stavby a ďalšie), boli z osobného vlastníctva vylúčené. V osobnom vlastníctve sa však mohli nachádzať aj predmety prakticky schopné produkcie, pokiaľ neboli používané v rozpore s princípmi socialistického spolužitia. Malo ísť predovšetkým o predmety domácej a osobnej spotreby, rodinné domčeky a úspory nadobudnuté prácou. Občiansky zákonník z roku 1964 výpočet rozšíril o príjmy zo sociálneho zabezpečenia a rekreačné chaty (§ 127 OZ z roku 1964).

Podľa ustanovenia § 123 OZ (v znení k 1. aprílu 1964) platilo, že veci, ktoré sú určené na osobnú potrebu občanov, prevádzajú sa zo socialistického spoločenského vlastníctva do ich osobného vlastníctva alebo sa im prenechávajú do osobného užívania. Napriek právnym problémom pri vymedzení osobného vlastníctva s ohľadom na pracovný pôvod jeho predmetu, úprava Občianskeho zákonníka z roku 1964 ešte rozšírila okruh predmetov, na ktoré sa mala vzťahovať podmienka pracovného pôvodu. Zatiaľ čo do roku 1964 bol pracovný pôvod osobného vlastníctva požadovaný iba v súvislosti s peňažnými úsporami, s účinnosťou nového Občianskeho zákonníka sa formálne vzťahoval na všetky veci. Išlo o dôsledok inovatívneho prístupu úpravy Občianskeho zákonníka z roku 1964, ktorý už zohľadňoval prechod na jednosektorovú (socialistickú) ekonomiku, keď § 125 OZ z 1964 ustanovil, že *„zdrojom osobného vlastníctva je predovšetkým práca občana v prospech spoločnosti"*. Na základe dovtedajších skúseností bolo ponechané slovo „predovšetkým", aby zostával priestor

[28] Čl. 10 ústavy z roku 1960: 1. Osobné vlastníctvo občanov k spotrebným predmetom, najmä k predmetom osobnej a domácej potreby, rodinným domčekom, ako aj k úsporám nadobudnutým prácou je nedotknuteľné. 2. Dedenie osobného majetku je zaručené.

[29] Podľa § 105 OZ z roku 1950: „V osobnom vlastníctve sú najmä predmety domácej a osobnej spotreby, rodinné domčeky a úspory nadobudnuté prácou (osobný majetok). Osobný majetok je nedotknuteľný."

[30] Od začiatku 50. rokov do popredia na úkor pracovného pôvodu bol stavaný účel použitia predmetu vlastníctva. Typickými príkladmi zdrojov osobného vlastníctva nepracovného pôvodu boli výhry z lotérií, dary a tiež predmety dedičstva.

[31] VENĚDIKTOV, A. V. *Státní socialistické vlastnictví.* Praha: Orbis, 1950, s. 357.

aj pre ďalšie predmety nadobudnuté iným spôsobom ako osobnou prácou. Išlo predovšetkým o veci, ktoré doktrína pripúšťala do osobného vlastníctva. Aj napriek formálnemu sprísneniu podmienky pracovného pôvodu sa vo svojich dôsledkoch nová úprava Občianskeho zákonníka z roku 1964 v praxi nijako výrazne nepremietla.[32]

Občiansky zákonník z roku 1964 v § 125 zopakoval, že *„zdrojom osobného vlastníctva je predovšetkým práca občana v prospech spoločnosti"*. Vo vzťahu ku kritériu pôvodu vlastníctva taktiež v druhom odseku toho istého paragrafu určil, že *„majetok získaný z nepoctivého zdroja nepožíva ochranu osobného vlastníctva"*. Zo začiatku ustanovenie o nepoctivom zdroji majetku nebolo chápané jednoznačne. Predovšetkým nebolo jasné, akú má povahu vlastníctvo veci, ktorá bola nadobudnutá nepoctivo. Z upretia právnej ochrany bolo možné iba vyvodiť, že v takom prípade bude vec v súkromnom vlastníctve.[33] Súkromné vlastníctvo v tomto svetle bolo akousi zvyškovou formou vlastníctva, kam patrili prípady vlastníctva majetku, ktoré neboli zlučiteľné s princípmi socialistického spolužitia a hospodárstva.[34]

Podľa § 129 OZ z roku 1964 v osobnom vlastníctve mohol byť iba jediný rodinný dom, lebo práve tento počet zabezpečoval dôstojné právo pracujúceho na bývanie a súčasne bránil (vtedy neakceptovateľnému) zhromažďovaniu majetku. Pokiaľ občan vlastnil dva alebo viac rodinných domov, pri druhom a ďalších domoch nešlo o vlastníctvo osobné, ale o súkromné vlastníctvo. Rovnaké závery platili pre stavebné parcely. Osobné vlastníctvo malo skutočne existovať iba v takom rozsahu, ktorý postačuje na uspokojovanie základných potrieb jednotlivca. Čokoľvek navyše, čo neslúži na uspokojovanie týchto potrieb, nemohlo byť už súčasťou osobného vlastníctva. Do budúcnosti sa však počítalo s tým, že v komunistickej spoločnosti osobné vlastníctvo nebude potrebné, lebo základné potreby každého jednotlivca budú uspokojované priamo zo zdrojov celej spoločnosti.[35]

Oproti osobnému vlastníctvu nemalo súkromné vlastníctvo ako ďalšia forma individuálneho vlastníctva povahu vlastníctva socialistického typu. To sa odrážalo predovšetkým na vývoji zákonnej úpravy súkromného vlastníctva. Zatiaľ čo začiatkom 50. rokov bolo súkromné vlastníctvo vnímané ako prežitok starých buržoáznych vzťahov, avšak v rámci politiky postupného prechodu k socialistickým hospodárskym pomerom aspoň tolerovanou formou vlastníctva, v 60. rokoch sa stáva už

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[32] Aj naďalej sa napríklad diskutovalo o možnosti osobného vlastníctva peňazí nadobudnutých vlastnou prácou mimo socialistického sektora v súkromnom hospodárstve, ktoré ešte pripúšťala ústava z roku 1960.

[33] KNAPP, V., PLANK, K. a kol. *Učebnice československého občanského práva II*. Praha: Orbis, 1965, s. 50.

[34] Zatiaľ čo v marxistickej ideológii rozdiel medzi osobným a súkromným vlastníctvom bol jasne vymedzený, v oblasti právnej úpravy tento rozdiel nebol jednoznačný. Hlavným dôvodom odlíšenia obidvoch foriem vlastníctva bolo potlačenie súkromného vlastníctva, ktoré bolo od začiatku považované za dožívajúcu formu vlastníctva, ktorá sa vytratí s pokrokom pri budovaní socialistickej spoločnosti.

[35] Bližšie pozri DÁVID, R. *Československé socialistické občanské právo (1948 – 1989)*. In: VOJÁČEK, L., SCHELLE, K., TAUCHEN, J. a kol. *Vývoj soukromého práva na území českých zemí. I. díl*. Brno: Masarykova univerzita, 2012, s. 454.

nežiaducim inštitútom. Preto úprava súkromného vlastníctva v Občianskom zákonníku z roku 1964 bola doslova skrytá až do záverečných ustanovení zákonníka (časť 8. Záverečné ustanovenia, hlava 1. Úprava iných občianskoprávnych vzťahov § 489 a násl.),[36] kde v § 489 bolo uvedené, že občianskoprávne vzťahy vznikajú aj z individuálneho vlastníctva k veciam, ktoré nie sú predmetom osobného vlastníctva (súkromné vlastníctvo), a že aj toto vlastníctvo je chránené proti neoprávneným zásahom. Je zrejmé, že rovnako Občiansky zákonník z roku 1964 do budúcnosti počítal s odstránením, resp. s razantnou redukciou súkromného vlastníctva a za jedinú prípustnú formu vlastníctva jednotlivca považoval osobné vlastníctvo.

Občiansky zákonník č. 40/1964 Zb. v pôvodnom znení inštitút vydržania neobsahoval. Z tohto dôvodu bolo potrebné vychádzať z toho, že po 1. apríli 1964 nebolo možné vlastnícke právo k nehnuteľnostiam nadobudnúť vydržaním ani v tom prípade, ak vydržacia doba začala plynúť pred uvedeným dátumom, teda za účinnosti predchádzajúceho zákonníka. Platnosťou novely Občianskeho zákonníka č. 131/1982 Zb. sa do nášho právneho poriadku vrátil inštitút vydržania. Nastali zmeny v tom zmysle, že sa zúžil okruh osôb spôsobilých vec vydržať len na fyzické osoby, teda občanov, a nepriznala sa organizáciám, teda právnickým osobám. Rovnako táto novela obmedzila okruh vecí, ktoré mohli byť vydržané. Zákonom č. 509/1991 Zb. bolo obnovené tradičné chápanie inštitútu vydržania. Zrušené bolo obmedzenie jeho použitia, predovšetkým obmedzenie predmetov spôsobilých na vydržanie fyzickou osobou a vylúčenie možnosti právnickej osoby nadobudnúť vlastníctvo vydržaním.[37]

Kódex z roku 1964 sa vecným bremenám vo svojej originálnej verzii vôbec nevenoval a nepoznal ich. Novelou z roku 1982 (č. 131/1982 Zb.) boli do Občianskeho zákonníka doplnené vecné bremená, a to zhruba vo forme, ako to bolo v kódexe z roku 1950. Ani novelizácia Občianskeho zákonníka z roku 1991 (zákon č. 509/1991 Zb.) sa už k členeniu na služobnosti a reálne bremená nevrátila, ale v podstate prevzala právnu úpravu vecných bremien uzákonenú v novele z roku 1982, ktorá bola prijatá najmä z dôvodu dlhodobo pretrvávajúcej potreby zriaďovať vecné bremená v praxi.[38]

Novela Občianskeho zákonníka č. 509/1991 Zb. opustila princípy, na základe ktorých boli vybudované vzťahy medzi podielovými spoluvlastníkmi. Išlo o princíp dohody, jednomyseľnosti a práva veta. Bolo upustené od delenia spoločných záležitostí týkajúcich sa spoločnej veci na bežné a nie bežné tým, že z dovtedajšieho znenia Občianskeho zákonníka sa vypustilo ustanovenie § 138. Právne pomery spoluvlastníkov navzájom upravuje ustanovenie § 139, ktoré hovorí, že: *„Z právnych úkonov týkajúcich sa spoločnej veci sú oprávnení a povinní všetci spoluvlastníci spoloč-*

[36] BĚLOVSKÝ, P. *Občanské právo.* In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Mezinárodní politologický ústav, 2009, s. 453 – 454.

[37] CIRÁK, J., FICOVÁ, S. et al. *Občianske právo. Všeobecná časť.* Šamorín: Heuréka, 2008, s. 79.

[38] Občiansky zákonník z roku 1964 totiž upravoval vecné bremená veľmi stručne v prechodných a zrušovacích ustanoveniach a v podstate neumožňoval vznik vecných bremien okrem prípadov, keď vznikali zo zákona.

ne a nerozdielne. O hospodárení so spoločnou vecou rozhodujú spoluvlastníci väčšinou počítanou podľa veľkosti podielov. Pri rovnosti hlasov, alebo ak sa väčšina alebo dohoda nedosiahne, rozhodne na návrh ktoréhokoľvek spoluvlastníka súd. Ak ide o dôležitú zmenu spoločnej veci, môžu prehlasovaní spoluvlastníci žiadať, aby o zmene rozhodol súd."[39] Uvedené zákonné ustanovenie je právnou skutočnosťou solidárneho záväzku bez toho, že by bolo rozhodujúce, či tento právny úkon vznikol za účasti jedného spoluvlastníka z vlastnej vôle, so súhlasom ostatných, alebo či konali všetci spoluvlastníci spoločne.

5. Právo osobného užívania v socialistickom právnom poriadku

Kľúčovou zmenou v dovtedajšej úprave majetkových práv[40] bolo tvrdé presadzovanie celkom nových inštitútov, ktorých zmyslom bolo odnaučiť ľudí od potreby vlastniť, pričom boli opakovane zdôrazňované výhody užívania vecí oproti ich vlastníctvu. Tradičný inštitút vlastníckeho práva bol do značnej miery odsunutý do úzadia s cieľom nahradiť ho určitými substituujúcimi inštitútmi, ktoré mali ľudí prinútiť k zmene prístupu k majetku. Išlo predovšetkým o rôzne varianty inštitútu tzv. osobného užívania, ktoré malo postupne nahradiť nielen vlastnícke právo, ale aj vecné práva vrátane vecných práv k cudzej veci (predovšetkým vecných bremien). Prakticky išlo o inštitút oprávňujúci predovšetkým jednotlivca na užívanie majetku v štátnom a družstevnom vlastníctve, a to formou blížiacou sa obsahom vecným právam k cudzej veci. Teda išlo o akési kvázi vlastníctvo, resp. o navodenie dojmu o ňom. Jeho význam mal však predovšetkým ideologické pozadie a bol proklamatívne vyjadrený v § 124 OZ z roku 1964, ktorý opisoval rolu, akú užívanie má zohrať pri reforme spoločnosti za pôsobenia noriem občianskeho práva: „*Společenskému užívání občanů slouží veřejná zařízení, jako zařízení dopravní, zdravotní, kulturní, sociální, tělovýchovná a rekreační.*"[41]

Rozdelenie statkov medzi členov socialistickej spoločnosti sa neuskutočňovalo iba na základe nadobúdania majetku do osobného vlastníctva, ale aj umožnením, aby štát časť socialistického majetku prenechal občanom do osobného užívania.[42] Teda nešlo o prevod vlastníckeho práva, ale o poskytnutie možnosti užívania časti socialistického (spoločného) majetku na účely uspokojovania oprávnených materiálnych i kultúrnych potrieb. Osobné užívanie bytov, iných miestností a pozemkov bolo upravené v ustanoveniach § 152 a nasledujúcich. Právo osobného užívania bolo zru-

[39] VOJČÍK, P. a kol. *Občiansky zákonník – stručný komentár.* 2. vydanie. Bratislava: Iura Edition, 2009, s. 326.

[40] Komunistická doktrína zavrhovala samotný pojem vecných práv.

[41] § 124 OZ z roku 1964 (zákon č. 40/1964 Zb.).

[42] KNAPP, V., LUBY, Š. a kol. *Československé občanské právo. I. svazek.* 2. vydání. Praha: Orbis, 1974, s. 75 a nasl.

šené po zmene spoločenských pomerov po roku 1989, keď bolo zo zákona zmenené buď na vlastníctvo, alebo na nájom.[43]

Inštitút osobného užívania nebol úplné nóvum. Konštrukčne bol vybudovaný na staršom inštitúte trvalého užívania, ktorý bol upravený už v Občianskom zákonníku z roku 1950.[44] Na rozdiel od osobného užívania, ktoré malo uspokojovať osobné potreby občanov, účelom trvalého užívania bolo predovšetkým poskytnúť časť národného majetku do užívania socialistickým právnickým osobám, predovšetkým však roľníckym družstvám, teda neštátnym organizáciám. Predmetom trvalého užívania mohol byť ako hnuteľný, tak aj nehnuteľný majetok, hoci podľa vl. nar. č. 110/1953 Zb. bolo možné hnuteľné veci odovzdávať do trvalého užívania len výnimočne, a to vtedy, ak sú pre to osobitné dôvody. Teda prakticky inštitút trvalého užívania najčastejšie slúžil na zriaďovanie stavieb na štátnej pôde, čo bolo základom pre neskorší inštitút osobného užívania pozemku.

Inštitút osobného užívania (resp. „práva osobného užívania") bol koncipovaný predovšetkým pre individuálnu právnu dispozíciu s pozemkami a bytmi. Osobné užívanie pozemkov bolo náhradou nielen vlastníckeho práva k pozemkom, ale aj ostatných tradičných vecných práv, predovšetkým však zrušeného inštitútu vecných bremien (resp. služobností).[45] Konkrétny význam osobného užívania definoval § 198 OZ z roku 1964: *„Právo osobního užívaní pozemků slouží k tomu, aby si občané na pozemcích, ke kterým se právo zřídí, mohli vystavět rodinný domek, rekreační chatu nebo garáž anebo zřídit zahrádku."*[46]

Úprave právneho pomeru občanov k bytom a pozemkom venoval Občiansky zákonník z roku 1964 osobitnú pozornosť. Samotná úprava užívania bytu predstavuje 37 ustanovení, spolu s úpravou ďalších obytných i nebytových priestorov a pozemkov 69 ustanovení, čo v porovnaní s úpravou držby alebo vydržania po novelizácii v roku 1982 je rozdiel 68 ustanovení zákona. Rovnako vecné bremená, ktoré ABGB upravoval v 58 paragrafoch, novela Občianskeho zákonníka z roku 1964 zahrnula iba do dvoch ustanovení (9 odsekov). Naopak kolosálna zákonná úprava bytov a pozemkov sa s novelou Občianskeho zákonníka z roku 1964 ešte rozšírila.[47]

Osobné užívanie sa postupne stalo univerzálnym prostriedkom na riešenie ťažkostí, ktoré sa po zavedení Občianskeho zákonníka z roku 1964 začali rýchlo objavovať. Príkladom v tomto smere môže byť inštitút vydržania, ktorý bol Občianskym

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[43] K právu osobného užívania bližšie pozri ČEŠKA, Z. a kol. *Občanský zákoník. Komentár. I. svazek*. Praha: Panorama, 1987, s. 539 a nasl.

[44] § 103 ods. 2 OZ z 1950 (zákon č. 141/1950 Zb.).

[45] OZ z roku 1964 inštitút vecných bremien upravoval, avšak iba s ohľadom na pretrvávajúce právne vzťahy z predchádzajúceho Občianskeho zákonníka. Budúcnosť vecných práv k cudzej veci však bola naznačená umiestnením na samotný koniec Občianskeho zákonníka medzi záverečné ustanovenia (§ 495).

[46] Pozri § 198 OZ z roku 1964 (zákon č. 40/1964 Zb.).

[47] BĚLOVSKÝ, P. *Občanské právo.* In: BOBEK, M., MOLEK, P., ŠIMÍČEK, V. (eds.). *Komunistické právo v Československu. Kapitoly z dějin bezpráví.* Brno: Mezinárodní politologický ústav, 2009, s. 447 – 448.

zákonníkom z roku 1964 eliminovaný, avšak v reakcii na sťažnosti praxe znovu zavedený novelou č. 131/1982 Zb.[48] Občiansky zákonník v novelizovanom znení v § 135a ustanovil, že vydržanie síce spôsobuje zmenu subjektu vlastníckeho práva (rovnako ako tradičné chápanie tohto inštitútu), avšak nadobúdateľom sa stane nie držiteľ, ale *ex lege* štát. Pritom samotnému držiteľovi vznikne vydržaním iba oprávnenie, aby s ním bola uzatvorená dohoda o osobnom užívaní držaného pozemku. Išlo o krkolomné prispôsobenie tradičného inštitútu, ktorého existencia sa v právnom poriadku ukázala ako nevyhnutná, v duchu nového občianskeho práva.

Záver

Vecné právo bolo považované za základ a kostru nového občianskeho práva po prijatí Občianskeho zákonníka z roku 1950 (č. 141/1950 Zb.). Chápanie vecí bolo podstatne zúžené, pretože nimi kódex rozumel nie aj práva ako tzv. veci nehmotné, ale len ovládateľné fyzické predmety a prírodné sily slúžiace potrebám človeka. Rovnako Občiansky zákonník omnoho užšie ako predchádzajúca právna úprava chápal inštitút držby, pretože rozlišoval len držbu oprávnenú a neoprávnenú a oprávnenému držiteľovi poskytoval proti tretím osobám zásadne rovnaké práva ako vlastníkovi. Vlastníctvo sa stalo dôležitou kategóriou politického významu. K výraznej zmene v oblasti nakladania s nehnuteľnosťami došlo aj zrušením zásady „*superficies solo cedit*“, ktorá platila v našom práve dlhé obdobie. Predmetná zmena bola vyjadrená jednak v § 25, podľa ktorého súčasťou pozemku je všetko, čo na ňom vzíde, stavby nie sú súčasťou pozemku, jednak podľa ustanovenia § 155, podľa ktorého vlastníkom stavby môže byť osoba rozdielna od vlastníka pozemku. Namiesto predchádzajúceho delenia na služobnosti a reálne bremená zákonník zaviedol jednotný inštitút vecných bremien.

Občiansky zákonník z roku 1964 vychádza z diferenciácie vlastníctva a jednoznačne preferoval tzv. socialistické vlastníctvo. Dve veľké novely (zákon č. 131/1982 Zb. a zákon č. 509/1991 Zb.), ale najmä novela Občianskeho zákonníka z roku 1991 odstránila uvedené nedostatky a v nadväznosti na ústavný zákon č. 100/1990 Zb. zaviedla jednotný režim vlastníckeho práva a zároveň rozšírila možnosti zriadenia vecných bremien a záložných práv na úroveň obvyklú vo vyspelých demokratických krajinách.

Zatiaľ čo v prvej etape reformy občianskeho práva dochádzalo k deformácii tradičných rímskoprávnych inštitútov podľa ideologických požiadaviek na výstavbu ľudovodemokratického právneho poriadku, v druhej etape, na základe prijatia Občianskeho zákonníka z roku 1964, bolo viacero týchto inštitútov eliminovaných a nahradených celkom novo vykonštruovanými inštitútmi zodpovedajúcimi kritériám výstavby socializmu a komunizmu. Najzásadnejšou zmenou bolo rozbitie jednotného inštitútu vlastníctva a, naopak, význam nadobudli nové rozmanité formy

[48] Vydržanie v rokoch 1964 – 1982 zostalo v československom právnom poriadku upravené iba v zákone o medzinárodnom práve súkromnom.

užívania poľnohospodárskej pôdy a bytov, ktoré svoj široký význam vlastníctva výrazne potlačovali.

Jednou z hlavných ústavných téz po roku 1989 sa stala rovnosť obsahu všetkých foriem vlastníctva, ktorá sa dostala aj do ústavy. Všeobecne sa očakávalo, že zakotvenie rovnosti foriem vlastníctva prinesie ekonomické bohatstvo a rozvoj, realita však bola zložitejšia. Je paradoxné, že inštitút vlastníctva sa veľmi zdiskreditoval práve pri snahe o dosiahnutie spravodlivosti. K nespravodlivému rozdeleniu vlastníctva v posledných desaťročiach prispeli inštitúty ako reštitúcie, ale najmä privatizácia.

Nožnice sociálnej nerovnosti medzi bohatými a chudobnými sa stále viac roztvárajú. Nerovnosť a nemerateľnosť bola vždy, avšak prvýkrát sa spája s demokraciou a sociálnym štátom. Stredná trieda je utláčaná, resp. speje k zániku. Inštitucionálne zvládnutie vzťahu sociálnej solidarity bohatých a chudobných je nakoniec i jedným zo základov úspechu všetkých moderných spoločností.

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Legislatívny vývoj úpravy právnej spôsobilosti fyzických osôb v Rumunsku

The Legislative Evolution of the Regulation of the Natural Person's Civil Capacity in Romania

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Abstrakt: Predkladaná štúdia je náhľadom do vývoja najdôležitejších právnych predpisov týkajúcich sa právnej subjektivity fyzickej osoby v Rumunsku. Autorka analyzuje Občiansky zákonník z roku 1864, zákon o rodine a vyhlášku č. 31/1954 o fyzických a právnických osobách a následne sa venuje reformným ustanoveniam Občianskeho zákonníka z roku 2011. Článok analyzuje aj relevantný nález Ústavného súdu Rumunska. Na záver sa autorka zaoberá novelou rumunského Občianskeho zákonníka, ku ktorej došlo v dôsledku označenia opatrení uložených na ochranu dospelých so zhoršenou rozlišovacou schopnosťou ako protiústavných.

Kľúčové slová: spôsobilosť; opatrovník; úsudok; závet; dar.

Abstract: The study is a foray into the legislative evolution of the most important legal regulations regarding the civil capacity of the natural person in Romania. The author analyses the Civil Code of 1864, the Family Code and Decree no. 31/1954 regarding natural persons and legal entities, and subsequently deals with the reforming provisions of the Civil Code of 2011. The article also analyzes the relevant Decision of the Constitutional Court. Finally, the article discusses the legislative amendment of the Romanian Civil Code that occurred as a result of the unconstitutionality in the field of measures applied to adults with impaired discernment.[2]

Keywords: Capacity; Guardian; Discernment; Testament; Donation.

1. Introductory considerations

The legal capacity to conclude a legal act is nothing but the expression of this freedom of action in terms of law.[3]

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[3] RIZOIU, R. *Legal act theory course.* Bucharest, Hamagiu Publishing House, p. 161.

Romanian civil law recognizes two forms of capacity: the capacity to use, respectively the capacity to be the holder of civil rights and obligations, and the capacity to exercise, the capacity to exercise rights and assume obligations by concluding civil legal acts.

The regulation of this civil capacity, in both forms, is not even currently a unitary one, contained in a single normative act, but dispersed, in different normative acts, following the model of the previous regulation of the Civil Code from 1864, and of the Family Code, acts currently repealed.

2. The civil capacity of the natural person in the previous regulation of the current Civil Code

2.1. The capacity to use. The legal time of conception

The ability to use belonging to the natural person was enshrined as a principle of art. 4 paragraph 1 of Decree no. 31/1954 regarding individuals and legal entities:[4] *"civil capacity is recognized for all persons"*; art. 5 paragraph 1 of the Decree: *"the natural person has the capacity to use and, apart from the cases provided by law, the capacity to exercise"* and art. 15 point 1 of the Constitution: *"citizens benefit from the rights and freedoms enshrined in the Constitution and other laws and have the obligations stipulated by them"*.

Art. 7 paragraph 1 of the Decree enshrined the principle according to which *"the capacity to use begins from the birth of the person"*. Therefore, from the date of birth, the natural person acquired capacity for use, that is, the person had the general and abstract ability to acquire rights and obligations. Art. 7 para. 2 of the Decree established an exception, stipulating that: *"the rights of the child are recognized from conception, but only if he is born alive."* The exception, recognized since Roman law, crystallized in the adage: *infans conceptus pro nato habetur, quoties de commodis ejus agitur* (the conceived child is considered born whenever this is in his interest). In Romanian civil law, it is known as the anticipated capacity of use.

Romanian civil law, unlike other legislation (for example the French) did not claim the condition of the viability of the child born[5] therefore, to acquire the capacity for anticipated use it is enough to be born alive, regardless of how long the child lives. In order to be considered to have been born alive, the child must have breathed at least

[4] Published in Official Bulletin no. 8/30 January 1954, amended by Law no. 4/1956 (B.O. no. 11/4 April 1956), currently repealed by the current Civil Code.

[5] Viability presupposes that a born child has all the necessary organs, which are sufficiently developed to allow him to live. In the legislations in which viability is a condition for the acquisition of personality, the legislator considered it simpler not to take into account the ephemeral life of children born prematurely or with malformations, called *monstra vel prodigia*. In our law it is enough for a child to live only a few moments. So the effectiveness of acquiring personality, respectively the ability to use it, is subordinated to the event of the birth of a living child (UNGUREANU, O., MUNTEANU, C. Observations regarding the natural person and legal personality. *Pandectele Române* 4, 2005, pp. 182–186).

once, a test that can easily be achieved through a forensic examination that certifies the presence of air in the lungs (docimasia test).

The exception of the acquisition of the use capacity starting with conception presents a major interest in the matter of succession and liberties. The child conceived before the death of the parent participates to the inheritance together with the descendants born until the date of the opening of the succession (the death of the parent).

The exception of anticipated capacity for use indicates the date of the child's conception as the date of acquiring the capacity. Since this date, at the stage of the development of medical sciences at that date, cannot be established precisely, the legislator resorted to the establishment of a legal presumption regarding the period of conception. Thus, art. 61 The Family Code regulated the legal time of conception as „*the time between the three hundredth and the one hundred and eightieth day before the birth of the child. It is counted from day to day*".

When establishing the presumption, two terms were considered: the maximum term of the gestation period, established as 300 days and the minimum term as 180 days. Thus, the interval of 121 days (and not 120, because the 180th day is also taken into account) between the maximum term and the minimum term of gestation is the legal time of conception. The child born alive can claim as the day of his conception any day of the 121-day interval.

In the context in which the state of science at that time did not allow the precise determination of a certain date of conception, it was appreciated in practice and specialized literature as art. 61 from The Family Code established two presumptions: the presumption of the longest gestation (of 300 days) and the shortest gestation (of 180 days) and the presumption of the possibility of conceiving the child on any day between the 300th and the 180th day before birth. The first presumption was considered to be an absolute one, the contrary proof being inadmissible because it would end up that, through a court decision, the law would be modified.[6]

The second presumption was considered relative, the proof of conception being possible only in a certain portion of the 121-day interval, excluding the other part of this interval.

2.2. The exercise capacity

If the mere existence of the natural person is sufficient for him to have civil rights and obligations, this existence is insufficient for the subject of law to personally conclude civil legal acts. Thus, only the natural person who has reached a certain mental maturity can validly, consciously and safely conclude civil legal acts. This mental maturity is acquired only after the minor has reached a certain age. According to art. 8 of Decree no. 31/1954, the natural person acquired the full exercise capacity at the age of majority.

[6] Decision no. 13 of 1991, of the Supreme Court of Justice, Law, 1, 1992, p. 11.

In relation to the existence and quality of discernment, the physical person's exercise capacity presented three states: lack of exercise capacity, restricted exercise capacity, full exercise capacity.

The lack of discernment necessary for a natural person to be able to participate in legal relations under civil law determines a lack of exercise capacity of the natural person in the case of minors under 14 years of age and persons placed under prohibition. Discernment appears gradually, being present to a small extent in minors between 14 and 18 years of age with limited exercise capacity. The major person was considered by the law as having the discernment necessary to conclude civil legal acts, alone and personally, benefiting according to the law from the age of 18, of full exercise capacity.

2.2.1. Lack of exercise capacity

A first regulation in the matter was contained in art. 11 paragraph 1 of Decree no. 31/1954 which enumerates the categories of natural persons lacking legal capacity. *"They do not have exercise capacity: the minor who has not reached the age of 14; the person placed under the ban*". Also art. 950 of the Civil Code was limited to regulating legal incapacity in contractual matters, stating: *"Incapable of contracting" are: 1. minors; 2. prohibitions*. From a practical point of view, in testamentary matters, the minor's lack of legal capacity extended up to the age of 16, as art. 806 of the Civil Code stated: *"A minor under the age of 16 cannot dispose in any way..."*.

The legislator considered that the minor who did not reach the age of 14 did not have discernment and therefore cannot be allowed to personally conclude legal documents. If the minor under 14 lacked discernment due to his young age, the judicially prohibited person lacked discernment due to alienation or mental debility. The measure of placing under ban the person who lacks discernment due to alienation or mental debility is taken by the court, which communicates the decision of placing under irrevocable ban to the guardianship authority, in order to appoint a guardian.

Art. 11 para. 2 of Decree no. 31/1954 ordered *"For those who do not have legal capacity, legal documents are made by their legal representatives"*. Thus, persons lacking legal capacity could not personally participate in the conclusion of legal acts, but only through representation, respectively parents and guardians.

2.2.2. Limited exercise capacity

The limited exercise capacity ensured the minor a gradual transition from lack of exercise capacity, when his legal acts were concluded by his legal representative, to full exercise capacity, when he concluded them personally and alone.

In order not to deprive the minor who has reached the age of 14 of the possibility of participating in legal life, but also to protect him, art. 9 para. 1 of Decree no. 31/1954 stipulated that: *"the minor who has reached the age of 14 has limited*

exercise capacity. The legal acts of the minor with limited capacity are concluded by him, with the prior approval of the parents or the guardian".

This main regulation in the matter had to be supplemented with the legal norms contained in art. 105 para. 2 of the Family Code which stipulates that *"after reaching the age of 14, the minor exercises his rights and fulfills his obligations on his own, but only with the prior consent of the parents in order to protect him against abuse by a third party."*

The minor between 14 and 18 years old could conclude legal documents personally, and not through a legal representative, but with the consent of the legal guardian. Therefore, the minor with limited exercise capacity was protected, not represented. Legal protection was carried out by the parents, the guardian or the county or local council of the municipality of Bucharest, in whose territory resides the person or family to whom the child was entrusted for adoption.

A regulation of overwhelming importance allowed the minor, upon reaching the age of 16, to dispose of half of what he would have had as an adult (art. 807 Civil Code).[7]

Only a limited number of legal documents are forbidden to minors aged 14–18, they being allowed only to adults: the donation contract; legal documents guaranteeing the obligation of another (mortgage, pledge, suretyship).

2.2.3. Full exercise capacity

The date on which the natural person acquired full exercise capacity was established by a series of legal provisions. According to art. 8 of Decree no. 31/1954: *"The full exercise capacity starts from the date when the person becomes of age. A person becomes an adult upon reaching the age of eighteen. The minor who marries thereby acquires full exercise capacity."* Similar provisions were also found in art. 4 Family Code: *"A man can marry only if he has reached the age of eighteen, and a woman only if she has reached the age of sixteen. However, for valid reasons, the marriage of a woman who has turned 15 can be approved*".

Therefore, two ways of acquiring full exercise capacity were distinguished: by reaching the civil coming of age, i.e. on the date of being the age of 18 (the standard situation of acquiring full exercise capacity) and by concluding the marriage by the woman before turning 18. According to art. 4 Family Code, the woman could marry if she turned 16 or, for valid reasons, even at 15. In the latter case, the consent of the general mayor of the city of Bucharest, or of the president of the county council within whose radius the woman resides, was required, consent which is given on the basis of a medical opinion (exceptional situation).

[7] The will being an essentially personal legal act, it cannot be concluded either by a representative or with the consent of the legal guardian. Thus, until reaching the age of 16, the minor cannot make a will through a representative or with prior consent. The minor who has reached the age of 16 can dispose of half of his property on his own and without prior consent.

3. The civil capacity of the natural person in the current Civil Code

The current Civil Code repealed both the provisions contained in the Civil Code from 1864, but also the special laws that outlined the unitary regulation of individuals, namely: Decree no. 31/1954 regarding natural and legal persons and the Family Code from 1954. We appreciate the fact that the legislator of the current Civil Code created a unitary and general regulation of the institution of persons (including the family).

Also in the current regulation of the New Civil Code, the quality of civil law subject of natural persons is expressed by their civil capacity. Any natural person has civil capacity, i.e. has the capacity to participate in civil legal relations as a subject of rights. In this sense art. 28 Civil Code. generically regulating "Civil Capacity" expressly stipulates: *"civil capacity is recognized for all persons"* (paragraph 1), *"every person has the capacity to use and, except for the cases provided by law, the capacity to exercise"* (paragraph 2).

3.1 Regulation of usage capacity

Currently, the capacity has found a well-deserved regulation in the Civil Code that defines both the capacity to use and the moment of commencement. According to art. 34 Civil Code, *"Capacity for use is the person's ability to have civil rights and obligations"*.

After art. 35 Civil Code, thesis I, enshrines the principle according to which *"the capacity to use begins from the birth of the person (...)"*, art. 36 Civil Code thesis I establishes an exception, stipulating that: *"the rights of the child are recognized from conception, but only if he is born alive."*

The exception of the acquisition of the capacity for use from conception presents a major interest in the matter of succession and liberties. Thus, art. 957 of the Civil Code establishes in paragraph 1 that: *"a person can inherit if he exists at the time of opening the inheritance. The provisions of art. 36 (…) are applicable"*. By law, the legislator considers that a child who is not conceived cannot succeed. Therefore, interpreting the legal text per a contrario, the child conceived before the death of its author will be able to reap the inheritance, respectively to inherit it. Moreover, the text recognizes the conceived child as a successor, without distinguishing between legal and testamentary inheritance. In this way, the child conceived before the death of the parent participates in the inheritance together with the descendants born up to the date of the opening of the succession (the death of the parent).

The previous civil code had in art. 802: *"he is able to receive by donation between the living anyone who is conceived at the time of the donation. Anyone who is conceived at the time of the father's death is able to receive inheritance by will."* Even if the current Civil Code no longer contains a similar provision, we appreciate that the conceived child can also be the beneficiary (donee) of a donation. As an argument, we invoke the provisions of art. 989 para. 2 of the Civil Code, according to which *"the person*

who does not exist at the date of drawing up the liberality can benefit from a liberality if it is made in favor of a capable person, with the latter having the task of transmitting the object of the liberality to the beneficiary as soon as it is appropriate", because the conceived child is considered to exist precisely to be able to receive rights.

Similar to the previous regulation, art. 412 Civil Code para. 1 regulates the legal time of conception, *"The time interval between the three hundredth day and the one hundred and eightieth day before the birth of the child is the legal time of conception. It is calculated day by day*".

Regarding the absolute or relative nature of the presumption of the legal time of conception, by law, it is appreciated that the legislator has settled any controversy on this subject, through the principle provision of art. 412 para. 2 Civil Code *"Through scientific means of proof, it is possible to prove the conception of the child in a certain period of the time interval provided for in para. (1) or even outside this range*".

The specialized literature indirectly concludes that the presumption is a relative one, because it is allowed to prove that the fact of conception took place both within a period of the 121-day interval provided by the law, and outside of this interval.

However, the mentioned text is far from putting an end to the doctrinal divergences. Thus, in the opinion, it is appreciated that the provisions of art. 412 para. 2 (according to which scientific means of proof can be used to prove conception even outside the 121-day interval), refers exclusively to the situation where conception takes place in the laboratory, through the use of medically assisted human reproduction techniques (M.U.A.M.). The embryo thus obtained can be cryopreserved for future use. The embryo can be implanted in the future mother's uterus after a certain period of time, after its conception in the laboratory. The time interval can be established by the doctor or it can remain at the discretion of the future parents. In another opinion, the presumption does not apply in the case of the use of medically assisted reproduction techniques because in these cases the moment of conception can be established with accuracy. We appreciate that in such cases the moment of conception is given by the moment of implantation of the embryo in the mother's uterus (embryo transfer), although the civil legislation in the matter is not immune to criticism since it only regulates medically assisted human reproduction with a third donor.

The question can arise, what is the legal regime of the embryo between the moment of its conception in the laboratory through the in vitro fertilization of the ovum with the spermatozoon and the moment of the embryo transfer? In the same way, the presumption would be useless if only the establishment of the child's paternity is not in question because the DNA test can accurately establish the child's parentage.

3.2 Regulation of exercise capacity

By law, the date on which the natural person acquires full exercise capacity is established differently by the Civil Code. According to art. 38 Civil Code: *"(1) The full exercise capacity starts from the date when the person becomes of age. (2) The person*

becomes an adult upon reaching the age of 18." Pursuant to art. 39 para. 2 Civil Code *"The minor acquires, through marriage, full exercise capacity"*. According to art. 40 Civil Code, *"For valid reasons, the guardianship court can recognize the full capacity of the minor who has reached the age of 16. For this purpose, the parents or the guardian of the minor will also be heard, taking, when necessary, the opinion of the family council"*.

Therefore, three ways of acquiring full exercise capacity are distinguished: by reaching civil majority, i.e. on the date of turning the age of 18 (the standard situation for acquiring full exercise capacity); by concluding the marriage by the minor before turning 18 (first exception); by the recognition of full capacity by the guardianship court (anticipated exercise capacity), in the case of the minor who has reached the age of 16 (second exception).

The Civil Code establishes two special cases of acquiring full exercise capacity.

The first hypothesis concerns the acquisition through the effect of the law (ope legis, by law) of the full exercise capacity as a result of the conclusion of the marriage. Thus, according to art. 39 Civil Code para. 1 *"The minor acquires, through marriage, the full exercise capacity"*, and in addition to art. 272 para. 2 of the Civil Code specifies: *"For valid reasons, a minor who has reached the age of 16 can marry on the basis of a medical certificate, with the consent of his parents or, as the case may be, the guardian and with the authorization of the guardianship court in whose jurisdiction the minor has domicile"*.

This way of legally acquiring the full exercise capacity is subject to the condition that the minor is 16 years old and the marriage is validly concluded. To the extent that the marriage is annulled, the minor who has not reached the age of 18, but was in good faith at the conclusion of the marriage, retains full legal capacity. In this sense, art. 39 para. 2 Civil Code provides: *"If the marriage is annulled, the minor who was in good faith at the conclusion of the marriage retains full legal capacity"*. Good faith presupposes the husband's ignorance of the cause of the nullity of the marriage.[8]

The second hypothesis of the acquisition of full exercise capacity is regulated by art. 40 of the Civil Code, establishing anticipated exercise capacity *"For valid reasons, the guardianship court can recognize a minor who has reached the age of 16 full exercise capacity. For this purpose, the parents or the guardian of the minor will also be heard, and when necessary, the opinion of the family council will be taken"*. In this case, the minor's incapacity is replaced by an anticipated exercise capacity, with the authorization of the guardianship court.

Anticipated exercise capacity does not operate automatically, but must be pronounced by the guardianship court, following a request of the minor in this regard (any minor who has reached the age of 16).

[8] According to art. 293 para. 1 of the Civil Code, the marriage concluded in violation of the provisions regarding personal and free consent, bigamy, the prohibition of marriage between relatives in the direct line as well as collateral up to the fourth degree inclusive, the prohibition of the marriage of the alienated or the mentally retarded and of the formal conditions are sanctioned with absolute nullity the presence of 2 witnesses), as well as non-compliance with the minimum marriage age (art. 294 Civil Code).

The request can only be made in the interest of the minor and only for valid reasons, the assessment of which is left to the discretion of the guardianship court. In practice, these fundamental reasons are quite rare, but we appreciate that they could constitute justified reasons for the acquisition of anticipated exercise capacity: the conclusion of a will (considering that, currently, the person without exercise capacity or with limited exercise capacity cannot dispose of his assets through liberality – art. 988 paragraph 1 Civil Code), the possibility of carrying out economic activities[9] as members of a family business, the donation of organs and tissues.

The guardianship court, beforehand, will have to listen to the minor's parents or guardian, and, in the case of guardianship, the law also requires the opinion of the family council. The law does not specify whether it is a contentious or non-contentious procedure. Since by requesting the recognition of the anticipated exercise capacity of the minor, the establishment of an adverse right against another person is not sought, we appreciate that such a procedure is a non-contentious one.

The effects of anticipated exercise capacity concern both the person and the assets of the minor.[10] Regarding the person of the minor, the anticipated exercise capacity has the effect of terminating parental authority and guardianship, giving the minor the right to manage his patrimony. In relation to assets, the minor with anticipated exercise capacity has the legal status of an adult: he can conclude any type of legal act, he can exercise any action in court, he assumes his obligations and will be liable in case of non-execution.

4. The constitutional dilemma related to the capacity of the natural person

A controversial text introduced by the current Civil Code refers to the prohibition of the person with the consequence of the lack of exercise capacity. Thus according to art 164 of the Civil Code *"(1) Persons who do not have the necessary discernment to take care of their interests, due to alienation or mental debilitation, will be placed under judicial interdiction. (2) Minors with limited legal capacity can also be placed under ju-*

[9] Government Emergency Ordinance no. 44/2008 regarding the conduct of economic activities by authorized natural persons, individual businesses and family businesses (Official Gazette no. 328 of 25.04.2008). According to the concept of the ordinance, natural persons applying for authorization to carry out the activity individually and independently or as sole entrepreneurs of an individual enterprise, as well as the representative of the family enterprise, must be 18 years old, and the family members must be 16 years old.

[10] Anticipated exercise capacity is similar to the full emancipation regulated in the Civil Code of Quebec. According to art. 175 Quebec Civil Code: *"Full emancipation takes place through marriage, It may also, at the request of the minor, be declared by the court, for a serious reason; in this case, the holder of parental authority, the guardian or any other person to whom the minor was entrusted, must be requested to give his opinion, as well as, if necessary, the guardianship council."* Art. 176 Quebec Civil Code: *"Full emancipation gives the minor the full capacity to exercise his civil rights, as if he were an adult."*

dicial interdiction". By Decision no. 601/2020,[11] the Constitutional Court declared unconstitutional the provisions of article 164 paragraph 1 of the Civil Code.

Art. 164 para. (1) of the Civil Code regulates the placing under a judicial ban of an adult who no longer has the necessary discernment to take care of his interests due to alienation or mental debility, defined[12] as a mental illness or a mental handicap that determines the mental incompetence of the person to act critically and predictively regarding the social-legal consequences that may arise from the exercise of civil rights and obligations. In order to be ordered to be placed under judicial prohibition, there must be a legally designed medical diagnosis of a mental illness or a mental handicap that determines the lack of discernment necessary to take care of one's own interests. Although from a medical point of view mental retardation represents a mild form of mental deficiency, from a legal point of view it encompasses all its forms, regardless of the person's degree of incapacity.

From the way the measure of placing under judicial interdiction is regulated by art. 164 para. (1) of the Civil Code does not show that it refers to the total lack of discernment of the person in relation to the multitude of interests that he can manifest in the different areas of life. Or, although the person in question can show a conscious will in a certain field, by being placed under a judicial ban, he loses his capacity to exercise. The Convention on the Rights of Persons with Disabilities[13] establishes that a measure of protection is instituted taking into account the existence of different degrees of capacity, but the Romanian legislation provides for limited exercise capacity only with regard to minors between the ages of 14 and 18 (art. 38 and 41 from the Civil Code), not the limited exercise capacity of the minor who, as a result of being placed under judicial interdiction, will be completely deprived of this, legal acts to be concluded, on his behalf, by a legal representative [art. 43 para. (2) of the Civil Code]. Therefore, a protective measure such as placing under a judicial ban must be regulated only as an ultima ratio, as it presents an extreme seriousness that involves the loss of civil rights as a whole and which must be carefully analyzed every time, including in the aspect of whether other measures or proved ineffective in supporting the civil capacity of the person.[14]

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[11] Regarding the exception of unconstitutionality of the provisions of art. 164 para. (1) of the Civil Code, published in the Official Gazette no. 88 of January 27, 2021.

[12] Art. 211 of Law no. 71/2011 for the implementation of Law no. 287/2009 regarding the Civil Code, published in the Official Gazette of Romania, Part I, no. 409 of June 10, 2011.

[13] Law no. 221/2010 for the ratification of the Convention on the Rights of Persons with Disabilities, adopted in New York by the United Nations General Assembly on December 13, 2006, opened for signature on March 30, 2007 and signed by Romania on September 26, 2007, published in the Official Gazette of Romania, Part I, no. 792 of November 26, 2010.

[14] In its jurisprudence, the European Court of Human Rights ruled, in essence, that a measure that has the effect of total incapacity must be proportionate to the degree of capacity of the person in question and adapted to his individual circumstances and needs, the mental disorder must either "of the type or degree" that would justify such a measure, the interference with a person's right to respect for his private life constitutes a violation of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, unless he has was *"prescribed by law"*, pursued a legitimate

In solving the exception, and in declaring the text as unconstitutional, the Court held that the measure of placing under judicial prohibition regulated by art. 164 para. (1) of the Civil Code is not accompanied by sufficient guarantees to ensure respect for fundamental human rights and freedoms. This does not take into account the fact that there may be different degrees of incapacity, nor the diversity of a person's interests, it is not ordered for a fixed period of time and is not subject to periodic review.[15]

The impact in the judicial practice of the mentioned Decision was the suspension of the procedure of placing under the ban for almost two years. The effect was felt immediately, in the absence of the prohibition, an adult without discernment was considered a person with full exercise capacity, and the legal documents concluded by this person (until the appearance of the Decision, incapable) were considered as being validly concluded.

5. Changes brought to the institution of civil capacity

Considering that, by Decision no. 601/2020 regarding the exception of unconstitutionality of the provisions of art. 164 para. (1) The Civil Code and the alignment of national legislation with the requirements imposed by the Convention on the Rights of Persons with Disabilities, the Parliament of Romania adopted Law no. in the Official Gazette no. 500 of May 20, 2022. The amending law introduces three protection systems for the adult without discernment or with impaired discernment due to an intellectual or psychosocial disability: assistance for concluding legal acts, judicial counseling and special guardianship. The competence of appointing the assistant for the conclusion of legal documents belongs to the notary public, and the establishment of legal advice and special guardianship remains an attribution of the court of law (guardianship court).

The major who, due to an intellectual or psychosocial disability, needs support to take care of himself, to manage his patrimony and to exercise, in general, his rights and civil liberties, can request the notary public to appoint an assistant. The assistant is authorized to act as an intermediary between the major who benefits from

objective and was a measure *"necessary in a democratic society"* (see in this regard the Judgment of 31 May 2016 pronounced in the Case of A.N. v. Lithuania, paragraph 123, Judgment of 27 June 2006 pronounced in the Case of Shtukaturov v. Russia, paragraph 94). The European Court of Human Rights ruled in its jurisprudence that deprivation, even partially, of legal capacity should be a measure of last resort, applied only if the national authorities, after carrying out a careful analysis of the possible alternatives, have come to the conclusion that no other measure, less restrictive, would serve purpose or when another less restrictive measure has not been tried without success (Judgment of 18 September 2014, pronounced in the Case of Ivinović v. Croatia, paragraph 44).

[15] These criteria are also regulated in the legislation of other countries, such as France, where the duration for which the measure is instituted is expressly established, as well as the conditions under which it can be renewed or extended, i.e. the establishment of the measure cannot exceed 5 years or, as the case may be, 10 years, renewed for the same period or for a period that cannot exceed 20 years (art. 440 par. 3 of the French Civil Code) and Switzerland, where the measure must be lifted as soon as possible and re-examined at regular intervals (art. 383 of the Swiss Civil Code).

the assistance and third parties, being presumed to act with the consent of the major in granting the assistance. The assistant can send and receive information on behalf of the major and can communicate to third parties the decisions made by him. Instead, the assistant cannot receive, use or communicate information about the major except with his consent and only to the extent that it is necessary to fulfill his task.

The appointment of the assistant does not affect the exercise capacity of the major. He retains the full capacity of exercise and concludes the legal ones himself. The assistant does not conclude legal documents on behalf of the major, nor does he approve the documents that he concludes himself.

On the other hand, the major who benefits from judicial counseling has limited exercise capacity. Regarding the major placed under special guardianship, the Law amending the Civil Code is incomplete, not specifying the type of capacity he benefits from. We appreciate, as we will show in the following, that the effect of this special guardianship is precisely the lack of exercise capacity of the major who benefits from this protective measure. In the light of the new article 164 of the Civil Code, as amended, the adult who cannot take care of his own interests due to a deterioration of his mental faculties, temporary or permanent, partial or total, determined following the medical and psychosocial evaluation, and who needs support in forming or expressing his will, can benefit from judicial counseling or special guardianship, if taking this measure is necessary for the exercise of his civil capacity.

A person can benefit from judicial counseling if the deterioration of his mental faculties is partial and it is necessary to be continuously counseled in the exercise of his rights and freedoms, in the sense that he will benefit from a restricted capacity to exercise. The institution of judicial counseling can be done only if adequate protection of the protected person cannot be ensured by establishing assistance for the conclusion of legal documents.

A person can benefit from special guardianship if the deterioration of his mental faculties is total and, as the case may be, permanent and it is necessary to be continuously represented in the exercise of his rights and freedoms. From the moment the legislator uses terminology, the legal representation in the documents he concludes, the minor placed under special guardianship is deprived of exercise capacity.

The institution of judicial counseling is ordered for a period that cannot exceed 3 years, and special guardianship for a period that cannot exceed 5 years. However, if the damage to the protected person's mental faculties is permanent, the court can order the extension of the special guardianship measure for a longer period, which cannot exceed 15 years. Through the decision by which judicial counseling or special guardianship was instituted, the guardianship court establishes, depending on the degree of autonomy of the protected person and his specific needs, the categories of documents for which approval of his documents or, as the case may be, his representation is necessary. The court can order that the protection measure concern even

only a category of documents or refer only to the person of the protected person or only to his assets.

In the case of legal assistance and special guardianship, a guardian will be appointed, either by the person who will benefit from the protection measure, or by the court. Thus, Any person who has the full capacity to exercise can designate by unilateral act or agreement, concluded in authentic form, the person who is to be appointed guardian to take care of the person and his assets in the event that he would be placed under judicial counseling or special guardianship. In the absence of an appointed guardian, the guardianship court appoints in this capacity with priority, if there are no valid reasons, the husband, the parent, a relative or cousin, a friend or a person who lives with the protected person if the latter has close ties and stable with the ward, able to fulfill this task, taking into account, as the case may be, the ties of affection, personal relationships, material conditions, the moral guarantees presented by the person called to be appointed guardian, as well as the proximity of residences or residences. The same person can have the capacity of assistant in the notarial procedure.

A second important change regarding the capacity of the person, brought by the new law, is the category of documents that the person with limited exercise capacity can conclude without the consent of the legal guardian (parent or guardian). In addition to the acts of preservation and administration that do not prejudice him, and the acts of small disposition (as in the initial regulation of art. 41 of the Civil Code), the acts of acceptance of an inheritance and a donation with burdens were added. The provision thus puts an end to doctrinal divergences regarding the minor's ability to accept wills and donations.

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the acts of acceptance of an inheritance and a donation with burdens were added. The provision thus puts an end to doctrinal divergences regarding the minor's ability to accept wills and donations.

6. Conclusions

The recent amendment of the Romanian civil code was a large-scale legislative intervention in the civil law protection measures, beneficial fo natural persons with intellectual and psychosocial disabilities. It introduced some legal instruments of adequate support and protection for these people to support their dignity, rights and freedoms, their will, needs and preferences. However, the implementation will not be easy for notaries and courts, and will lead to doctrinal discussions and contradictory judicial practice in the upcoming years.

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