

THE CODIFICATION OF PRIVATE LAW IN HUNGARY IN HISTORICAL PERSPECTIVE

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Legal theorists and practitioners in Hungary are confident that the new Civil Code will be completed this year and will enter into force in 2013. It is justified therefore to consider the history of the codification of private law in Hungary over the past one and half centuries.

I. Calls for the codification of private law in the early 19th century

The reader will recall that Hungary's transition from feudalism to capitalism began later than in the western part of Europe. The ups and downs in the evolution of the Hungarian Civil Code aptly illustrate those in the history of Hungarian society. To demonstrate Hungary's delay in historical progress, as late as in the middle of the 19th century feudal restrictions prevented the sale of real estate.¹ In 1830 István Széchenyi argued for cancelling those restrictions in his *Credit* but as late as the 1840s the drafting of new rules had just begun (especially in commercial law).² Suffice it to say that the most common transaction: the sale of movables was regulated in a relatively satisfactory manner as a part of the law on bills of exchange of 1844.³ Until then there were no such rules in Hungarian law.

A committee that the Diet appointed by Act 67 of 1791 to formulate recommendations about a reform of private law⁴ completed its work by 1795⁵, but the Diet did not debate it. (In 1826 the recommendations of the committee were printed and published.) Anyhow, those recommendations did not transcend feudal private law. The task of the committee was to systematize and rationalize the messy feudal law that could be found in *Tripartitum*, separate laws and the verdicts of higher courts. Following Act 8 of 1827, the revised committee recommendations assumed their final form by 1830 but the Diet of 1832 did not debate them in their entirety. That was partly because during their county-level discussion some called for a genuine codification of private law.⁶

¹ About fief and entailment, see János ZLINSZKY: „Ungarn”, in: Helmut Coing (Hrsg.): *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, III/2. Munich, 1982, 2198ff.

² See: Ferenc MÁDL: *Kodifikation des ungarischen Privat- und Handelsrechts im Zeitalter des Dualismus*, in: Csizmadia/Kovács (eds.): *Die Entwicklung des Zivilrechts in Mitteleuropa*. Budapest, 1970, pp. 87-119 (p. 98); János ZLINSZKY: op. cit. 2151, 2157.

³ Act VI of 1844, B, Article 1.

⁴ *Projectum Legum Civilium per Regnicolarem Juridicam Deputationem Articulo 67. 1791. ordinatam elaboratum*

⁵ For an original and profound analysis of those recommendations, see Mária HOMOKI-NAGY: *Az 1795. évi magánjogi tervezetek (Recommendations about a Reform of Private Law, 1795)* Szeged, 2004; c.f. : MÁDL: op. cit. pp 97ff.

⁶ HOMOKI-NAGY: op. cit. in footnote 5, p. 14ff.

The Revolution of 1848 promised to free private law from its feudal restrictions. Among the very important Laws in April 1848, Act XV of 1848 provided for the drafting of a Civil Code by eradicating entailment and submitting that bill to the next Diet.⁷ However that noble project was not implemented because of the upheavals of the War of Independence and its eventual failure.⁸ Had the circumstances been propitious, Hungary would have had the right expert for codification. László Szalay, who had been appointed to head to project, was a scholar of European standing. Indeed he was expert on aspects of codification.⁹ After the fall of the War of Independence, he emigrated to Switzerland, where he participated in the finalization of the Civil Code of the Canton of Valais.¹⁰ (Recent research has found that his participation was of minor significance.¹¹)

II. Austrian Civil Code forcibly introduced in Hungary in 1853

At a time when László Szalay was in emigration in Switzerland and the Hungarian Diet was dithering, on 29 November 1852 the emperor issued a letter patent¹² that introduced in Hungary the Austrian Civil Code, the *Allgemeines bürgerliches Gesetzbuch* (ABGB). Enacted in Austria in 1811, it entered into force on 1 May 1853 in Hungary and Croatia, Slavonia, the Serbian Voivodship and the Banat of Temeswar (Temeswarer Banat) - which had been separate Habsburg crown lands since 1849. The emperor issued a separate letter patent¹³ for Transylvania, where that law entered into force on 1 September 1853.

Hungary's relationship with the two-hundred-year-old ABGB began under an unlucky star because its introduction was involuntary.¹⁴ Even an Austrian commentator had this to say about this issue: „Es wurde nach dem unglücklichen Ausgange des ungarischen Unabhängigkeitskampfes durch die Katastrophe bei Világos die oft und öfter beschworene Verfassung der Ungarn einfach vernichtet; mitten unter Waffenlärm musste die ordnungsmäßige Legislatur schweigen; Gewalt und Willkür trat an die Stelle des Gesetzes.“¹⁵ The Hungarian career of the ABGB began during a rigorous, neo-absolutist era, which in Hungary is associated with the Austrian minister of the interior of the time: Alexander Bach. In its time the ABGB was a modern law book of private law, though inferior in quality to the French *Code Civil* (1804). It could have ensured a better framework for Hungary's transition

⁷ C.f.: MÁDL: op. cit. p. 99ff; János ZLINSZKY: op. cit. p. 2195ff, p. 2198ff.

⁸ Entailment was abolished in 1852 by a letter patent of the emperor, which made it compulsory for Hungary to adopt the Civil Code of Austria.

⁹ At his age of 27 SZALAY published a famous article, entitled "Codificatio" in *Budapesti Szemle* (volume 1840/1841).

¹⁰ In a letter of 1853 SZALAY referred to Valais as a canton that is "most in need of development". Quoted by NIZSALOVSKY in the article referred to in the next footnote, p. 70.

¹¹ See Endre NIZSALOVSKY: "Szalay László kodifikációs külföldi kapcsolatai és a sioni epizód" (László Szalay's International Relations in the Field of Codification and the Episode in Sion), in: Nizsalovszky: *Tanulmányok a jogról* (Essays on Law), Budapest, 1984, pp. 57-88.

¹² RGBl. 246/1852; on the background in terms of constitutional law, see: Christian NESCHWARA: *Die Geltung des Österreichischen Allgemeinen Bürgerlichen Gesetzbuches in Ungarn und seinen Nebenländern von 1853 bis 1861*, ZRG/GA 1996, pp. 362-376.

¹³ 29 May 1853: RGBl. 99/1853.

¹⁴ About the preparations for the introduction of the ABGB, see János ZLINSZKY: op. cit. 2151; NESCHWARA: op. cit. p. 364ff.

¹⁵ Karl PUTZ: *System des ungarischen Privatrechtes*, Vienna, 1870, p. 50; c.f.: MÁDL: op. cit. p. 101.

to capitalism than the corresponding Hungarian laws. However, at a time when Hungarians were still reeling from the tragic aftermath of a lost war of independence, they hated the ABGB and saw it as an instrument of violence of an alien oppressor. They could not wait to get rid of a law they had never asked for and replace it with their centuries old indigenous private law regulations, obsolete as those laws were. That hostility was a flagrant example of a confrontation between modernism and a misinterpreted patriotic fervour. Alas, not the last one!

The ABGB entered into force alongside complementary decrees (listed in its appendix) and in part with statutes quoted thereby.¹⁶ It replaced the laws, decrees and customs¹⁷ that had covered private law before. The provisions on marriage (Part One, Chapter Two) only had to be implemented in part.¹⁸ Until 1861 further laws were adopted,¹⁹ for example laws covering the land registry, the mines and forests.

The implementation of the ABGB had a bumpy start, as one would expect. That has to go on record even if several private law regulations had been implemented in Hungary and Transylvania before the introduction of the ABGB. The application of the ABGB was problematic although its first full Hungarian translation had been published as early as in 1847²⁰ and in 1854 it was published with detailed commentaries.²¹ The annotated publication served several aims - as explained by its author. It retold the birth of that law book, listed its main endeavours, pointed out how its provisions made up a system, discussed the transformation of Hungarian private law and, finally, compared its main legal institutions with those of other law books.²² That having said, for the Hungarian legal practitioners the philosophy of the ABGB was entirely new and the four decades of experience in its application in Austria was unknown.²³ The law schools started to teach the ABGB but that was nothing more than an investment in the future. As the ABGB had no ex post facto effect,²⁴ the old Hungarian legal provisions also remained in force - which was another obstacle in the way of ABGB's reception in Hungary. Under such circumstances the ABGB's application was haphazard and as a consequence, legal cases were protracted and at times the administration of justice was chaotic. That amplified public animosity towards that Austrian law, which had been disliked to start with.²⁵

¹⁶ See NESCHWARA: op. cit. p. 367ff.

¹⁷ Art. I des Kundmachungspatents vom 29. November 1852.

¹⁸ See NESCHWARA: op. cit. p. 365ff.

¹⁹ János ZLINSZKY: op. cit. 2197ff.; Neschwara: op. cit. p. 372ff.

²⁰ János KIS: *Közönséges polgári törvénykönyv az ausztriai monarchiának minden német örökös tartományok számára* (Ordinary Civil Code for Each of the German Eternal Provinces of the Austrian Monarchy). Buda, 1847. The official text of the law came out in a bilingual (Hungarian and German) edition in 1853: *Allgemeines österreichisches bürgerliches Gesetzbuch kundgemacht mit dem Patente vom 29. November 1852 in den Königreichen Ungarn, Kroatien und Slawonien, der serbischen Woïwodschafft und dem Temeser Banat (samt den auf dieses Gesetzbuch sich beziehenden in dem Anhange enthaltenen nachträglichen Verordnungen)*, Vienna, 1853.

²¹ Gusztáv WENZEL: *Az Ausztriai Általános Polgári Törvénykönyv Magyarázata* (Commentaries for the Ordinary Civil Code of Austria), Pest, 1854.

²² WENZEL: op. cit. p. VI.

²³ WENZEL himself also mentions those difficulties: op.cit. p. V.

²⁴ Article 5 of the ABGB explicitly prohibits the ex post facto effect; for exceptions to that rule, see NESCHWARA: op. cit. p. 371.

²⁵ C.f.: NESCHWARA: op. cit. p. 374ff.

Legal historians have just started to examine the way the ABGB was applied in Hungary in litigation cases and out-of-court proceedings. Such work must rely on a thorough archival research.²⁶ The few cases that have been analysed show that the rules enshrined in that law book managed to penetrate court practice, despite said difficulties in its application and the brevity of the period when it was in effect. That can be seen in the field of personal rights and the law of contracts. It can be seen even more in the field of the law of property: after the new land registry rules had come into effect on 15 December 1855,²⁷ the legal framework of the sale and purchase of real estate changed thoroughly. In recent years Mária Homoki-Nagy has published relevant findings about noteworthy cases, and her findings are based on systematic archival research. Those litigation cases evidence that - in the absence of relevant Hungarian statutes - there was genuine need for the rules offered by the ABGB in the following fields: personal rights (for instance, declaring a person major²⁸, declaring a person legally dead²⁹) and family law disputes (as for instance in adoption cases³⁰).³¹ The same applies to the following areas: terminating marital property³², certain institutions of contract law, as for instance, breach of contract,³³ damages³⁴ and earnest payment.³⁵ The ABGB's provisions on contracts for services³⁶ could also be used efficiently.³⁷

After the Austrian army suffered a serious defeat in the battle at Solferino in 1859, a politically weakened Austrian emperor was prepared to work out a political compromise with Hungary. The first step towards the Compromise was the October Diploma of 1861.³⁸ That year the emperor issued an order in which he requested that a provisional system of the administration of justice in compliance with the Hungarian nation's legal expectations be put into place. For that purpose, he set up a committee under the leadership of Count György Apponyi, head of the Supreme Court, which had been reopened in 1860. A related judicial conference (*Országbírói Értekezlet*) was held between 22 January and 4 March 1861, where those present included judges of the Supreme Court and regional courts, university professors, politicians and lawyers. The purpose of the conference was to decide how to restore and complement Hungary's traditional legal system.³⁹

The judicial conference set up a subcommittee to work out provisions on replacing the Austrian law book with the traditional Hungarian private law. Contrary to its mandate, the

²⁶ See Mária HOMOKI-NAGY: "Az Osztrák Polgári Törvénykönyv hatása a magyar magánjogra" (The Influence of the Austrian Civil Code on the Hungarian Private Law), in: Lajos Rácz (ed.): *Kormányzás és kodifikáció - Tanulmányok az Újkori Európa jogfejlődéséről* (Governance and Codification - Essays on the Development of Law in Modern Europe), Budapest, 2006, pp. 227-247 (p. 229ff).

²⁷ A decree of 18 April 1853 recommended adopting the Austrian land registry rules.

²⁸ Articles 174 and 252 of the ABGB.

²⁹ Articles 24 and 112-114 of the ABGB.

³⁰ Articles 179-186 of the ABGB.

³¹ Mária HOMOKI-NAGY: "Az Osztrák Polgári Törvénykönyv és a kiegyezés" (The Austrian Civil Code and the Compromise), *Jogtörténeti Szemle*, no. 3, 2007, pp. 16-23.

³² Articles 825ff of the ABGB.

³³ Article 919 of the ABGB.

³⁴ Articles 1295, 1331ff of the ABGB.

³⁵ Article 908 of the ABGB.

³⁶ Articles 1151ff of the ABGB.

³⁷ HOMOKI-NAGY: op. cit. in footnote 26 above, p. 238ff.

³⁸ October Diploma (Diplom vom 20. Oktober 1860, RGBI. 226); see items 1, 4 and 5 on the administration of justice.

³⁹ György RÁTH has published the documents of the judicial conference in two volumes: *Az országbírói értekezlet a törvénykezés tárgyában* (Judicial Conference on Legislative Matters), Pest, 1861; c.f. MÁDL: op. cit. p. 102ff.

subcommittee tabled a recommendation on maintaining the effect of the Austrian law book on a provisional basis. Reasonable as that position was, the majority of the participants in the judicial conference vehemently opposed it. Thus the traditional Hungarian private law was restored into its status⁴⁰ and - apart from few exceptions - the provisions of the ABGB and the majority of related laws were abrogated.⁴¹ The Provisional Rules of Legislation were meant to stay in force until the adoption of a new Civil Code (a project that has resurfaced). Both chambers of the Parliament approved the provisional rules but - to emphasize their temporary character - they were not formally enacted. After the emperor approved the provisional rules, they were promulgated at a session of the Supreme Court on 23 June 1861 and in the official gazette and they were sent to the courts in writing. The Provisional Rules of Legislation entered into force on 23 July 1861 and - contrary to their often emphasized “provisional” character - their majority were in force for roughly a century, until 1 May 1960. By contrast, the Austrian law book remained in force in Transylvania, Croatia, Slavonia, the Banat of Temeswar, the Military Border Area and Fiume.

As indicated by the above recommendation of the subcommittee of the judicial conference, Hungary’s leading legal practitioners were divided in their attitudes to the ABGB. Many of them knew that Hungary needed it along its road to capitalism and that “alien” as it was, it was at par with the requirements of the era. Soon after the ABGB’s rescission in 1861, that opinion could be widely heard. Critics of that decision argued that it was a mistake to replace such a modern law book with the messy, feudal Hungarian private law. They added that the evolution of Hungary’s legal system could not be continued where it had been put on hold in 1848 because the legal relations brought about pursuant to the ABGB could not be simply undone.

Let us illustrate those views with a quotation from Rezső Dell’Adami⁴²: “The Austrian Civil Code was repealed in Hungary in the wake of the judicial conference’s recommendation fifteen years ago. It was the only Code of private substantive law Hungary has ever had. A single decision had cancelled a law book that, imperfect as it was, created some kind of order in the field of substantive private law and as such transcended chaos. ... That decision was not motivated by consideration or foresight; it fell victim to an eruption of patriotic fervour, one that seeks to drive out everything that was brought in by the arch enemy. ... The fatal Moloch of our national well-being: political prowess has once again devoured a victim: systematic private law.”⁴³ Dell’Adami - a renowned legal theorist, who died young - has written a major essay about the future of Hungarian private law. Discussing what he referred to as the “problems of the national origin” of private law,” he wrote: “In our view the only scholarly

⁴⁰ See: Anton ALMÁSI: *Ungarisches Privatrecht*, Band i. Berlin/Leipzig 1924, p. 5ff; Richard ZEHNTBAUER: *Einführung in die neuere Geschichte des ungarischen Privatrechts*, Freiburg (Switzerland), 1916, p. 22ff; c.f.: MÁDL: *op. cit.* p. 105ff; Emil BÖSZÖRMÉNYI-NAGY: “Das ungarische Erbrecht im Dualismus”, in: Csizmadia/Kovács (eds.): *Die Entwicklung des Zivilrechts in Mitteleuropa*, Budapest, 1970, pp. 413-429 (p. 415ff).

⁴¹ NIZSALOVSKY (see his work in footnote 11 above, p. 72ff) sheds light on an interesting historical counterpart: in 1815, following the fall of Napoleon, the Swiss canton of Valais - unlike other cantons, as for instance, Bern and Geneva - abrogated the French *Code Civil* (after a five-year period), just like the Hungarian judicial conference the Austrian law book in 1861.

⁴² Lawyer and associate professor (1850-1888)

⁴³ Rezső DELL’ADAMI: *Az anyagi magyar magánjog codifikációja. A nemzeti eredet problémája* (Codification of Hungarian Substantive Private Law. Problems of National Origin), Budapest, 1877, p. 1ff.

conclusion can be as follows: when, in the course of codifying private law, we have to decide whether or not to accept and implement certain principles and institutions of law, our criterion must not be their national origin, instead, their utility, that is to say, whether or not they are in unison with the needs, interests and conditions of society today.”⁴⁴

The above quotes from Dell’Adami (and the entire essay) convey ideas that are identical with and confirm what Zsigmond Kemény, the famous Hungarian writer and essayist wrote decades before, in 1843: “Our institutions have few original features, even if our legal theorists and journalists state the opposite. If our private and public law is a far cry from those of other countries of Europe, that is not because our fathers had radically new ideas on how to run this country. No doubt, that is because the countries that are ahead of us in transcending feudalism have long discarded the institutions that we still cherish.”⁴⁵

III. The influence of ABGB on judicial practice after 1861

In 1861 the effect of the old Hungarian private law was fully reinstated - in principle.⁴⁶ In practice, the effect of certain statutes was maintained: some letter patents of the emperor, as for instance, parts of the letter patent of 1852 on entailment; certain Austrian provisions of law, as for instance, those protecting intellectual property. Temporarily the Provisional Rules of Legislation did not forbid the implementation of certain provisions of the ABGB. Let us illustrate that point by some examples: the Austrian law book’s provisions on declaring someone legally dead remained in force until 1868⁴⁷ and those on adoption until 1877.⁴⁸ Most important and of the longest lasting effect among the Austrian statutes that remained in force was the land registry rules of 15 December 1855. The key features of the Austrian land registry rules (abstracts of title function as public records; ownership is constituted when a title is entered into the registry etc.) remained in force as recently as 1973 and its main components are still valid.

Among the ABGB provisions that remained in force were the general land registry rules and those referring to the sale and purchase of real estate.⁴⁹ The ABGB’s influence could be felt for decades in various areas, not just in the field of the law of property. The courts also referred to it in contract law cases.⁵⁰ Hungarian judicial practice relied on the ABGB in tort law until the end of the 19th century. Only at that time did the Hungarian courts stop adhering to the principle of delictual fault. From then on higher courts did not define damages in

⁴⁴ DELL’ADAMI: op. cit. p. 323ff.

⁴⁵ Zsigmond KEMÉNY: “A bíróségekről és a büntetőeljárásról” (On Courts and Criminal Procedure), in: *Korkivánatok* (Paragons through Ages), new print: Budapest, 1983, p. 296.

⁴⁶ See Stefan MALFÉR: *Das österreichische Allgemeine bürgerliches Gesetzbuch in Ungarn zur Zeit des „Provisoriums“ 1861-1867*, ZNR 1992, p. 32ff.

⁴⁷ Act LIV of 1868; c.f.: Imre ZLINSZKY: *A magyar magánjog mai érvényben* (Hungarian Private Law Currently in Force), Budapest, 1891, p. 4ff.

⁴⁸ Act XX of 1877; c.f.: Imre ZLINSZKY: op. cit. p. 643ff.

⁴⁹ Provisional Rules of Legislation, Chapter One, Articles 21 and 145.

⁵⁰ ALMÁSI: *ibid.*; ZEHNTBAUER: op. cit. p. 23ff.

proportion to liability as before, pursuant to Article 1324 of the ABGB, instead, they invoked the principle of full damages by factoring in profit lost.⁵¹

The ABGB may have been officially abrogated in Hungary but it survived in judicial practice in private law for a long time.⁵² Szladits is justified in stating that after 1861 the ABGB continued its influence in judicial practice in a wider scope than what was necessitated by the adoption of the land registry rules. Let us emphasize however that in the majority of cases the Supreme Court correctly distinguished between cases that formally belonged to the competence of the ABGB and those where the provisions of the Austrian law book were only referred to by courts as precedents.⁵³

Overall, in the final decades of the 19th century, and especially during the 1860s and 1870s, the ABGB exerted a strong influence on Hungarian judicial practice although the Hungarian higher courts had an eye on provisions also of other non-Hungarian law books. Nearly ten years after the ABGB was abrogated in Hungary, during a national conference of legal practitioners, a delegate proposed to reactivate the entire Austrian law book in Hungary.⁵⁴ Although the Austrian law book had not been in force in its entirety for years, a new volume offering commentaries on it was published.⁵⁵

As mentioned above, if the provisions of the Provisional Rules of Legislation had been strictly interpreted, it would have been allowed to apply the property law rules of the ABGB only in cases when a transaction changed the ownership status of a registered property. Actually however it was inevitable to apply nearly each of the ABGB's rules that affected any legal aspects of a registered property. Right from the outset judicial practice accepted a broader interpretation of that rule.

There was some uncertainty as to which of the property provisions of the ABGB should be considered as being formally in effect in Hungary. Note that the ABGB did not differentiate between movable and immovable property in the context of numerous rules of property law. It defined common norms for all things: movables, registered and unregistered real estate, rights that appear in a land registry and those that do not. Let us mention as examples the following articles: use (Article 504ff), usufruct (Articles 509ff and 517ff), limitation and acquisitive prescription (Article 1451ff). While applying the ABGB courts usually did not differentiate between registered property and other chattel and rights. They applied the ABGB's law of property rules even in cases where the objects concerned were not registered property. It was almost inevitable to do so in cases where judicial decisions covered both registered property and other chattel. Often courts did not cite specific articles of the ABGB and yet their rulings relied on the ABGB even in cases that did not affect land registry affairs. The legal situation

⁵¹ László ASZTALOS: "A magyar burzsoá magánjogtudomány fejlődése a kiegyezéstől az I. világháborúig" (The Evolution of Capitalist Private Law in Hungary between the Compromise and the First World War), Acta Facultatis Politico-Iuridicae Universitatis Budapestinensis de Rolando Eötvös, Nominatae X (1968), pp. 71-89 (p. 75).

⁵² ZEHNTBAUER: *ibid.*

⁵³ Károly SZLADITS: A magyar magánjog (Hungarian Private Law), vol I, Budapest, 1941, p. 95ff.

⁵⁴ Imre HÓDOSSY: "Indítvány az ABGB. ideiglenes visszaállítása tárgyában" (Proposal Temporarily to Reintroduce the ABGB), quoted in Szladits: op. cit. p. 96, footnote 104.

⁵⁵ Bálint ÖKRÖSS: Ausztriai Általános Polgári Törvénykönyv, felvilágosító jegyzetekkel s az ezen törvénykönyvre vonatkozó törvényekkel és rendeletekkel kísérvé (Austrian Ordinary Civil Code with Explanatory Comments and Related Laws and Decrees), Volume One, Pest, 1865.

of Hungary was messy after 1861 as entail had been abolished but new rules were not introduced to substitute it. Besides, the system of land registry - which had adopted the Austrian model - included numerous statutes that had been conceived in the spirit of the ABGB.

IV. Proposed draft law books: 1900-1928

In the meantime - with surprising speed and at a high quality that was in contrast to the messy legal situation after 1861 - preparations got underway to work out Hungary's own code of private law. First sections of a law book were elaborated: general part (1871, 1880), property law, contract law and inheritance law (between 1880 and 1885), and family law (1892). A comprehensive draft version (alongside reasoning) incorporating the various parts was compiled between 1885 and 1900 and published in 1900.⁵⁶ After the text was further revised,⁵⁷ it was introduced to the Lower House of Parliament by the minister of justice as a bill in November 1913.⁵⁸ An ad hoc committee was set up to make further revisions. In 1915 it submitted to the Parliament the fourth version⁵⁹ with the recommendation that the Parliament should only debate it following the end of the world war. However, history followed another course.

In the course of that late-19th-early 20th-century codification projects the drafters and the members of the parliamentary committee did an impressive comparative effort - as it is documented in related records. They carefully analysed the *Code Civil* and the ABGB - the two major classic law books conceived on the basis of natural law - and the Saxon Civil Code and the Zurich Civil Code, furthermore, draft versions of the Civil Code of Dresden and Bavaria and provisions of the OR [*Obligationsgesetz*] of Switzerland. The utmost care and attention to detail in drafting the new Hungarian Civil Code are really impressive even by present standards.

In the field of the law of property the ABGB retained its dominant position. The minister of justice declared that it was not timely to open the debate on the draft law by discussing the law of property first. The proceedings of a conference of 27 October 1883 on the general principles of the proposed Civil Code quotes the minister of justice, who chaired the event, as saying: "As the majority of the law of property provisions of the ABGB are in force in this country, adopting the [new] law of property provisions of the [new] code of private law is the least urgent among its chapters."⁶⁰ This is what Konrad Imling, author of the law of property chapter of the first comprehensive draft code, wrote in 1900 in the reasoning. He used present

⁵⁶ Magyar Általános Polgári Törvénykönyv tervezete öt kötetben részletes indokolással (A Draft of the Hungarian Civil Code, with a Detailed Reasoning), Volume I-V., Budapest, 1901-1902.

⁵⁷ A magyar általános polgári törvénykönyv tervezete, második szöveg (A Draft of the Hungarian Civil Code, second version).

⁵⁸ A polgári törvénykönyv törvényjavaslata, az országgyűlés elé terjesztett szöveg (Bill containing the Civil Code, the text submitted to the Parliament)

⁵⁹ A törvényjavaslat bizottsági szövege (Text of the bill as submitted by the ad hoc committee)

⁶⁰ A királyi Igazságügy-minisztériumban felvett Jegyzőkönyvek az Általános Magyar Polgári Törvénykönyv tervezetének tanácskozásairól (Proceedings of Debates about the Draft Text of the Hungarian General Civil Code, Recorded in the Royal Ministry of Justice), Budapest, 1885, p. 5.

tense although he referred to the work of previous years. “It is only too natural that legal practice relies on the ABGB’s rules whenever it has to solve a legal problem about which the Hungarian sources of law offer no solution even though these [provisions of the ABGB] are not in force in this country.”⁶¹

The dominant role of the ABGB ceased first in codifying contract law. Its prime cause was that in 1875 Hungary adopted its first Commercial Act,⁶² and its framers used the German ADHGB as a model. For a long time thereafter that Commercial Act served as an important source of Hungary’s uncodified private law, especially in the field of contract law. The courts applied the rules of the Commercial Act in disputes over contracts. Let us list some examples: entering into contracts, interpreting cases, rescinding lesion beyond moiety, delivering contracts, joint and several liability, penalty for delay, earnest payment, retention money, legitimate interest, and damages. If it was possible to establish the commercial character of a contract, the provisions of the Commercial Act could be applied in other fields of private law even if the parties concerned were not traders.⁶³

From then on German private law exerted a major influence on the evolution of Hungarian private law. That process gathered momentum after drafts of the BGB were published, then that code was adopted and it entered into force. The BGB had the strongest influence on Hungarian contract law. However the Hungarian architects of private law did not adopt the BGB philosophy of handling legal cases and the related general part. Even the earliest draft, the one dated of 1900, rejected a “great” general part, as based on the German BGB. The same attitude survived in later draft codes, the Civil Code of 1959 and the Civil Code that is currently in the making.⁶⁴ Hungarian legislators still hold that abstract rules are not practicable especially in fields where unilateral acts [*negotium unilaterale*] play the greatest role, that is, the law of last wills. In that field the private law of most countries considers it justified to apply specific provisions. Consequently, the common rules of contracts were regulated in a more detailed manner and - in the absence of specific provisions - it was required that the rules of contracts have to be applied to unilateral acts on a case by case basis.

In the wake of the First World War and the Treaty of Trianon, preparations of the Civil Code only resumed in 1922. The fifth version of the proposed draft code was named *Magánjogi Törvénykönyv Javaslat* (Draft Private Law Code or DPLC in short). The minister of justice introduced it in the Lower House on 1 March 1928.⁶⁵ Act XXII of 1931 provided for the setting up of an expert committee to discuss the DPLC and prepare its parliamentary debate. The most modern private law code of the era, the ZGB [*Zivilgesetzbuch*] of Switzerland had an undeniable influence on the DPLC as can be seen especially on the rules enunciated in the introduction and the emphasis on the equity principle.

⁶¹ Quoted by Endre NIZSALOVSKY: Magyar magánjog, II. kötet (Hungarian Private Law, Volume II), Budapest, 1928, p. 5.

⁶² Act XXXVII of 1875.

⁶³ Károly SZLADITS: op. cit. p. 97.

⁶⁴ Lajos VÉKÁS (ed.): Szakértői javaslat az új Polgári Törvénykönyv tervezetéhez (Expert Recommendation for the Draft of the New Civil Code), Budapest, 2008, p. 61.

⁶⁵ Bill no. 500.

After the DPLC was introduced to the Parliament in 1928, textbooks discussed the law of property in the context of the DPLC yet they often also supplied the relevant passages of the ABGB. The foreword of one of those textbooks writes: “I have included in this textbook the entire law of property chapter of the DPLC. In addition I felt obliged to include the relevant provisions of the ABGB because they strongly influenced Hungarian judicial practice for three quarters of a century even if they partly lacked the strength of written law [in Hungary]. It is improbable that the DPLC can terminate that influence within a short time as earlier versions [of the private law code] could not neutralize the impact of that Austrian law book for decades. ... It is my duty to include in this volume [parts of] the ABGB because the purpose of this book is to show the present legal situation of this country and many of the law of property provisions of the ABGB are integral parts of it.”⁶⁶ The same textbook recurrently writes - as for instance when discussing the notion of chattel - that “our law is close to the ABGB”.⁶⁷ It is hardly surprising then that as late as between the two world wars the ABGB was a part of the subject-matter taught at law schools in Hungary. (It was the only foreign law book to have that status.) Among the surviving effects of the ABGB I wish to emphasize the rejection of the principle of abstraction when title of ownership is transferred. Although the German example had an influence on Hungarian private law for a long time but eventually the ABGB and judicial practice proved that the principle of abstraction can be dispensed with.⁶⁸

Although there was consensus on that the DPLC is of a high professional standard and many of its provisions were adopted by the courts, that draft did not become law either - mainly due to political considerations. The main political motivation was that the private law of post-Trianon Hungary should not be fully severed from the private law of the territories that had been adjudicated to the neighbouring countries. Note that the ABGB was in force in Transylvania (until 1945) and in Czechoslovakia, including the former Upper Hungary (until 1964). Following repeated delays the historical events took again another course.

V. Private law and its codification without private property: 1953-1959

Private property, the principal *raison d'être* of private law, shrank to a minimum in the wake of state expropriations and the collectivization of agriculture following the Second World War. State-owned enterprises controlled the dominant part of the means of production. Yet they did not own them, their duty was to steward them. As the enterprises were not owners only stewards of the undividable state property, their transactions only resembled private law transactions in form. Genuine private law conditions could be found, with few exceptions, only in the field of personal property. It is fair - albeit not quite exact - to say that under socialism civil law was private law without private property.⁶⁹ Paradoxically, Act IV of 1959,

⁶⁶ NIZSALOVSKY: op. cit. in footnote 61 above, p. 5.

⁶⁷ NIZSALOVSKY: op. cit. in footnote 61 above, p. 108.

⁶⁸ See Lajos VÉKÁS: *Az új Polgári Törvénykönyv elméleti előkérdései* (Preliminary Theoretical Questions Related to the Forthcoming Civil Code), Budapest, 2001, 213ff.

⁶⁹ “Privatrecht ohne Privateigentum”, see Lajos VÉKÁS: “Integration des östlichen Mitteleuropa im Wege rechtsvergleichender Zivilrechtserneuerung”, *ZeUP*, 22 (2004), pp. 454-476, (pp. 454ff).

Hungary's first Civil Code, which is still in force, was conceived and finalized in that era (between 1953 and 1959). (Its draft was published in 1957.)

It is hardly surprising therefore that during the era since the change of regime in 1990, legislators had no other option but responding to the thorough economic and social changes by repeatedly modifying the Civil Code. Given their historical context, the norms enunciated in Act IV of 1959 can only be interpreted as abstract conjectures about private law transactions. That having said, those norms have proved to be resilient as they have survived sweeping economic and social changes. That is because they were formulated with professionalism. Still, the fundamental changes that the past two decades have brought require a comprehensive reform: the creation of a new civil code. In 1998 the Hungarian Government of the time adopted a decision on having a new civil code framed. The relevant government resolution says there is a need for a law book that is abreast of international practice, one that "will become the constitution as it were of the economy".⁷⁰

SUMMARY

The Codification of Private Law in Hungary in Historical Perspective

LAJOS VÉKÁS

The new Civil Code of Hungary will enter into force in 2013. The author summarises the main steps in the prehistory of this codification over the past centuries.

The reader will recall that Hungary's transition from feudalism to capitalism began later than in the western part of Europe. The ups and downs in the evolution of the Hungarian Civil Code aptly illustrate those in the history of Hungarian society. Firstly, Act XV of 1848 provided for the drafting of a Civil Code. However, that noble project was not implemented because of the upheavals of the War of Independence and its eventual failure. Instead of an independent codification the Austrian emperor issued a letter patent that introduced 1853 the Austrian Civil Code of 1811, the *Allgemeines Bürgerliches Gesetzbuch* (ABGB). Hungary's relationship with the ABGB began under an unlucky star because its introduction was involuntary.

Therefore the so-called Judicial Conference (*Országbirói Értekezlet*) in 1861 abrogated the provisions of the ABGB and restored the former Hungarian private law into its status. In the next decades preparations got underway to work out Hungary's own code of private law. A comprehensive draft version (alongside reasoning) was compiled between 1885 and 1900 and published in 1900. In the wake of the First World War and the Treaty of Versailles, preparations of the Civil Code only resumed in 1922. The fifth version of the proposed draft

⁷⁰ Government resolution 1050/1998 (IV. 24.).

code (DPLC) was completed in 1928. Although there was consensus on that the DPLC is on a high professional standard and many of its provisions were adopted by the courts, that draft did not become law either - mainly due to political considerations.

Paradoxically, Act IV of 1959, Hungary's first Civil Code, which is still in force, was conceived and finalized in the era (between 1953 and 1959) when private property, the principal *raison d'être* of private law, was limited to a minimum in the wake of state expropriations and the collectivization of agriculture following the Second World War. It is therefore hardly surprising that the fundamental changes that the past two decades have brought require a comprehensive reform: the creation of a new civil code.

RESÜMEE

Eine Kurzdarstellung der Geschichte der ungarischen Privatrechtskodifikation

LAJOS VÉKÁS

Ein neues Zivilgesetzbuch wird in Ungarn 2013 in Kraft treten. Der Aufsatz fasst dessen Vorgeschichte im 19-ten und 20-ten Jahrhundert zusammen.

Bereits das Gesetz XV vom Jahre 1848 beschloss die Schaffung eines bürgerlichen Gesetzbuches. Wegen des niedergeschlagenen Freiheitskampfes konnte dieser Plan nicht verwirklicht werden. Stattdessen wurde 1853 mit einem kaiserlichen Patent das österreichische ABGB von 1811 in Kraft gesetzt. Wegen der oktroyierten Einführung wollte man in Ungarn das „fremde Gesetz“ nicht behalten.

Die Judexkurialkonferenz von 1861 beschloss die Geltung der früheren ungarischen materiellen bürgerlichen Privatesetze wiederherzustellen und die des ABGB, sowie der dazu ergangenen Nebengesetze formell zu beenden. In den darauf folgenden Jahrzehnten wurden mehrere komplette Entwürfe herausgearbeitet. Der erste Entwurf von 1900 wurde vom Parlament trotz in- und ausländischer Anerkennung zur neuen Überprüfung in die Ausschüsse zurückverwiesen. Der zweite Entwurf wurde 1913 vorgelegt, wegen des Kriegsausbruchs aber nicht verabschiedet. Ihn zeichneten eigenständige Lösungen aus, obwohl er von ausländischen Kodifikationen (u.a. dem deutschen BGB, aber auch dem schweizerischen ZGB und der österreichischen ABGB-Novelle) nachweislich beeinflusst wurde. Der letzte Entwurf wurde 1928 dem Parlament vorgelegt. Auch wenn dieser Entwurf ebenfalls nicht zum Gesetz wurde, so gingen viele seiner Bestimmungen doch in die Gerichtspraxis über und wurden Gewohnheitsrecht. So gehörte Ungarn Mitte des 20-ten Jahrhunderts zu den wenigen Ländern auf dem europäischen Kontinent, in denen keine erfolgreiche Privatrechtskodifikation stattgefunden hatte.

Ein großes Paradoxon der neuzeitlichen ungarischen Privatrechtsentwicklung stellt die Tatsache dar, dass das erste und auch heute gültige Zivilgesetzbuch zwischen 1953 und 1959 geschaffen wurde, zu einer Zeit also, in der das System des Privateigentums fast vollständig liquidiert wurde. Trotz der fachlichen Qualitäten dieses Gesetzbuches, die den erwähnten Vorentwürfen und der anspruchsvollen Arbeit der Kodifikationskommission zu verdanken sind, haben die grundlegenden Änderungen nach der Wiedereinführung der Marktwirtschaft in 1990 den Kodex in vielerlei Hinsicht reformbedürftig, gar überholt, werden lassen. Die gänzlich veränderte Rolle des Privateigentums und die Wiedereinführung der Marktwirtschaft haben eine komplette Neufassung des Gesetzbuches erforderlich gemacht.