MÁRIA HOMOKI-NAGY

# GÁSPÁR MENYHÁRTH*

*(1868–1940)*

## *I. Biography*

Gáspár *Menyhárth* was born in Ekel in 1868. He finished high school in Gyulafehérvár and continued his legal studies at the University of Kolozsvár, where he became the doctor of legal studies in 1891. After mandatory military service, he sat the political sciences exam in 1893. In 1895, he passed the Bar exam and opened a law office at Kolozsvár. In 1898, he acquired a habil. degree in the field of Hungarian private law at the University of Kolozsvár. In 1911 – in the year of Károly *Haller's* death – he was appointed to the public ordinary professor of Austrian private law at the same university. After World War I, together with his colleagues, he had to leave Kolozsvár, and continue his university career first in Budapest in 1919, then in Szeged since 1921. In the most difficult times, he was the dean of the Faculty of Law and Political Sciences, in 1919/1920, he had to organize the escape of the Faculty, and then in 1920/1921, he was re-elected as a dean, which was unusual but appropriate.[1] In his office, he made concerted efforts to move the University to Szeged and often negotiated with the Mayor of Szeged, Szilveszter *Somogyi*, regarding the transfer of the university, including the Faculty of Law and Political Sciences. These were not easy times since many supposed that two universities at Budapest and Debrecen are enough for mutilated Hungary. The voices in the shadows in the months leading up to the organization of the escaped University of Kolozsvár was described by the dean as follows: "[…] *seemingly pleasing voices could be heard about that two universities are enough, if not too much for this shrunken, small country deprived of all of her economies. Four is almost a luxury."*[2]

The University of Szeged opened its doors in 1921, and Gáspár *Menyhárth* was elected as its first rector. On the 10th of October in 1921, at the opening ceremony, the rector welcomed the governor, the prime minister, the mayor, and the university citizens as well. Then and throughout his university career, he always faithfully believed:*"We*

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* Translated by Tamás Pongó, PhD, Senior Lecturer at the University of Szeged, Faculty of Law and Political Sciences.

1 MARJANUCZ – SZABÓ – TÓTH – VAJDA (ed.) 2019, 247–250.

2 MARJANUCZ – SZABÓ – TÓTH – VAJDA (ed.) 2019, 248. Gáspár Menyhárth, 10 October 1921.

*are not a newly established university* […] *The personality of the university is given by its establishment, the spirit that is being born inside and spread all over: its faculty, which do and transfer science in its unique way: the youth, which is being nurtured in its atmosphere and through them, the spirit of the university is implemented into life: its past, traditions, and direction of progress."*[3]

The Faculty of Law and Political Sciences elected him to dean once again, and he held this office between 1927 and 1928. In 1929, he was elected as a member of the upper house and performed this duty until 1932.[4] As an acknowledgment of his academic work, the Hungarian Academy of Sciences elected him to be corresponding member in 1937. On behalf of the Kolozsvár Bar, he was a member of the committee responsible for the preparation of the private law code between 1907 and 1908.

At Kolozsvár, he was elected to the member of the municipality's legislative committee in 1899, an office which he held until 1919. He quickly got involved in the public life of Szeged as well, and acknowledging his work, he was elected to be a lifetime member of the municipality's legislative committee in 1929. Participated in the establishment of "*Ferenc József Tudományegyetem Barátainak Egyesülete [Association of the Friends of Franz Joseph University]"*, and held the office of managing president. He was a member of the *Dugonics Society* and a member and president of the *Mikes Literature Society* since its establishment in 1922.[5] Between 1936 and 1940, he edited the *The Law* professional journal.

In 1938, the faculty thanked the 40-years of academic and 28-years of teaching work of Gáspár *Menyhárth* with an Album. When he reached the age of 70, upon his retirement, István *Csekey*[6] said goodbye on behalf of his colleagues. At that time, Gáspár *Menyhárth* was the only one, who was still alive from the professors of Kolozsvár. "*Gáspár Menyhárth connected the present with the future. He was the one, who always raised his wise words on behalf of the »Kolozsvár traditions», He was the last dean of the Faculty of Law of the University of Kolozsvár and the first rector of the University of Szeged. […] By your leave, our university will be poorer with an indispensable color. Your wise love of tradition, respect for the law, and endeavor to justice and equity under rigid law left indelible marks […]*"[7]

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[3] MARJANUCZ– SZABÓ– TÓTH– VAJDA (ed.) 2019, 253.

[4] In January 1927, Károly *Tóth* lawyer, and after his sudden death, Bálint *Kolosváry* was elected to a member of the upper house by the university in April 1928. In December 1928, – after *Kolosváry* was placed to Budapest – Pál *Szandtner*, and after his replacement, Gáspár *Menyhárth* was elected in 1929. MUDRÁK 2018.

[5] Délmagyarország 5 February 1922. 3.

[6] István *Csekey* (1889-1963) was a student of Gáspár *Menyhárth* at Kolozsvár, and a colleague at the University of Szeged between 1931 and 1940.

[7] Archives of Manuscripts of the Hungarian Academy of Sciences Ms. 4706/84. *István Csekey's speech.*

*II. Academic work*

The process of the codification of Hungarian private law, the fate of the drafts of the first part, and the first draft in 1900 and after significant amendments, the second draft submitted to the House of Representatives in 1913 accompanied the whole life of Gáspár *Menyhárth*. It is considered symbolic that, that he did not become the successor of Károly *Haller* at the Department of Austrian Private Law at the University of Kolozsvár but rather provided deliberate comments on some parts of the codification drafts. As Károly *Haller* finished the Commentary of the Austrian Civil Code (hence ACC), Gáspár *Menyhárth* also wrote the *Explanation of the Austrian General Civil Code I-II*, which was published in 1914. In the foreword, he expressed his belief that the Hungarian private law code will be made soon, therefore the duality of sources of law, deriving from the fact that the Hungarian customary law and law were in force together with the rules of the ACC in Transylvania, will cease to exist. *"The ACC has a foreign origin, but its application in the Hungarian law was a common practice (adapted law). Its situation in the Hungarian legal system can be described with the term partial law (ius particulare) since it is applied only in some parts of the united territory of the country. The Hungarian private law is levitating above it as a nationwide law."* [8] Together with József *Illés*, he believed that *"matrimonial property law* […] *is the only part of the thousand years of development of the Hungarian private law, which reflects the most complete image of legal continuity."*[9]

It does not mean that he would not analyze the institutions of property law in addition to the family law institutions, such as the characteristics of adverse possession or the rules of land register law. Also, he wrote the *Contract law* textbook, was a member of the authors of the Commentary of *Hungarian Private Law* edited by Károly *Szladits*, where he published his article regarding the donation contract.[10] In the course of private law codification, he published well-founded articles concerning some rules of contract law and inheritance law.

In the present article, I will analyze those publications, which are of particular importance for a legal historian. Gáspár *Menyhárth* was a professor of living law, his works are still important today – even if the ungrateful posterity let them be forgotten – in the 21st-century development of private law. With changed social relations, however, the development of science reassigned some of his articles to the field of legal history, which are revealing of the legal world of the past, but also hold a mirror up to the lawyer of today.

[8] MENYHÁRTH 1914, 14. cf. HOMOKI-NAGY 2018, 75.
[9] ILLÉS 1900, 6.
[10] MENYHÁRTH 1942.

*Customary law and law*

One of the fields of his academic interest focused on the founts of private law, in particular the examination of customary law. During private law codification works, the role of sources of law, particularly the customary law and law, stood in the focal point of academic debates. The sources of private law were first defined by *Werbőczy* in the Foreword of *Tripartitum*, determining the law, as man-made law, and customary law, as a decisive source of law. "Custom is law determined by practice, which serves as law when there is no law." [Tripartitum Foreword Title X.]. According to its famous provision, customary law has three types of force: it can be law-explaining, law-replacing, and desuetude (law-breaking) customary law, depending on what is accepted by the judicial practice. [Tripartitum Foreword Title XII.]. This had determined the development of Hungarian private law for centuries. In the age of early steps of private law codification, the authors of the first drafts had no intention to mention sources of law. Neither in the first private law draft made in 1795 nor the second draft with comments in 1830, which was submitted to the House of Representatives, governed the relationship between customary law and law.[11] After the suppression of the War of Independence in 1848-1849, the Austrian government entered the Austrian Civil Code (ACC) into force both in Hungary and in Transylvania, which brought changes in the history of sources of law. Since the ACC had no retroactive effect, thus in every private law relation which originated before the 1st of May of 1853, the Hungarian private law, including customary law shall be applied. The National Meeting of Judges repealed the ACC in 1861, but the property law rules regarding land register remained effective until the Hungarian private law code was made. [Provisional Judicial Rules 21.§] The October Diploma did not allow the union of Hungary and Transylvania, so ACC remained in effect in Transylvania. After the Austro-Hungarian Compromise of 1867 – concerning the sources of law – this situation did not change, because the ACC remained in effect in Transylvania with the amendment if the Hungarian National Assembly adopts new private law legislation, its scope will cover Transylvania as well. Simultaneously, any amendments of the ACC were prohibited from entering into force in Transylvania.[12]

The ACC raised law to the top of the hierarchy of legal norms for two reasons; first, it considered civil law as a set of laws governing the legal relations between people;[13] secondly, it prohibited the application of customary law.[14] On the contrary, in Hungary, among private law sources of law, customary law and law were being applied together for centuries as living sources of law. Commercial law was the first code that placed the law at the top of the hierarchy of applicable sources of law concerning commercial relations but acknowledged that in certain cases commercial customs may have an important role.

[11] Cf. HOMOKI-NAGY 2004.
[12] MÁRKUS 1907.
[13] ACC 1. § "In a state, civil law is the set of those laws, which determine the private rights and obligations between the citizens of the state."
[14] ACC 10. § "Custom may only be taken into consideration, if any law refers to it."

Analyzing the sources of law characteristic and the relation between law and customary law, Gáspár *Menyhárth* concluded that the rule outlined in ACC 1. § *"*[…] *does not have general application any more even in the territorial scope of the code."*[15] In the field of Hungarian law, "legal custom" is a source of law, law cannot be considered as the exclusive source of law.

In connection with this, *Menyhárth* asked the question, whether *desuetude* (law-breaking custom) could be established in those territories, such as Transylvania, where the ACC remained effective? *"Is living law different in few things than the law of the code?" Menyhárth* justifies with some examples that rules contrary to ACC provisions evolved in practice. He proved that law-breaking and law-replacing customs were established in Transylvania. *"Living law is different regarding several institutions, than the rule of the law."*[16] Only that law is good, stated by *Menyhárth*, which is *"rooted in the living sense of law of the people."*[17] According to his teaching, the foundation of the law shall be found in the custom established earlier. *"As in every person's life, custom creates law, before law itself, thus legislation establishing law finds its reason, ground, explanation in customary law as well."*[18] In conclusion, custom and legislation are equal lawmaking factors.

On the one hand, the question needed clarification, because the Hungarian legislative power itself maintained that the ACC was effective in Transylvania. On the other hand, the Act 4 of 1869 on judicial power declared in terms of the law applicable by the judge that "*the judge shall administer and adjudicate under the law, decrees adopted and promulgated under law, and customary law*." [Act 4 of 1869. 19. §] A similar law entered into force in Transylvania as well. Therefore, such a situation occurred that one law allowed the judge to apply customary law, but the other expressly forbade it. *Menyhárth* called attention to the fact that the legislator did not explain what customary law means. In his opinion, the Act of 1869 provided the opportunity for the judges to decide the case at hand pursuant to their own deliberation under law, decree, or if it exists, customary law. *Menyhárth* criticized the rule of ACC, which prohibited the application of customary law. Gusztáv *Schwarz* shared his standpoint as well. "*Most of the new laws prohibited or tied up customary law, and customary law still lived happily. Even if the prohibition of laws would have some effects: the fact the legislator could destroy it does not mean that she would thank her for her life.*"[19]

The relation between the two sources of law made the amendment of the Act LIX of 1881 on civil judicial procedure even more difficult, which governed the Curia's right to decision-making. Pursuant to the law, the Curia was obliged to decide the cases at hand in a plenary session to ensure the uniformity of law,[20] which decisions had

[15] MENYHÁRTH 1908.
[16] Ibid.
[17] Ibid. 341.
[18] Ibid.
[19] SCHWARZ 1909, 82.
[20] Reasoning of Act LIX of 1881: "[i]t provides that in terms of uniformity of judiciary certain controversial legal issues shall be submitted to the plenary session of united civil panels before deciding. If such measures seem to be necessary and appropriate in those states, which has private law code, then its

mandatory effect for lower courts in the whole country under the provisions of Act I of 1911.[21] *Menyhárth* emphasized that these decisions are not sources of law –a judge cannot make law – but still influencing the applicable law. He used this argument to characterize the judicial practice as well. In judicial practice, the decision issued by the Curia provided an opportunity to establish new customary law by judicial practice. The decisions must have reasoning and the arguments in this affect and become common beliefs, and later customary law through the general application. The Curia's *"*[…] *institution of principal agreement in plenary session extends to the territorial scope of the Austrian Civil Code as well."*[22] In doing so, the Curia fulfilled such an obligation to ensure the uniformity of law in the whole country. Even if it is desuetude or law-replacing customary law, it will not be developed from one day to another. Often, the judge interprets the existing law or in lack of law decides the given case by analogy. When judge-applied custom became general in practice, then he made his decision, not under law but developed customary law. Living law – as *Menyhárth* told – is the law applied in judicial decisions and living customary law together. By analyzing the existence of customary law, Gusztáv *Schwarz* examined the "role of legal authorities" and shared the same standpoint as *Menyhárth*.[23]

Here, it shall be briefly mentioned that Gáspár *Menyhárth* applies legal custom and customary law as synonyms. It seems very odd if we compare *Menyhárth's* thoughts with one of Károly *Haller's* observations regarding codification. *Haller* emphasized that legal custom is not a source of law, it is just a developing norm, and it will only become a source of law, i.e. customary law if it can be enforced by a judge.[24] In his university lecture, *Menyhárth* distinguished custom, legal custom, and customary law as follows: *"Custom is nothing else than practice to settle a certain situation in life."* Legal custom is such a custom, which has a legal characteristic, *"*[…] *static approach with legal characteristic is customary law, and its dynamic approach is legal custom."* Therefore, if we look at the relationship between customary law and law as two decisive sources of law, then Gáspár *Menyhárth* declares as a fact that the living Hungarian private law applied customary law in addition to law as a decisive source of law in the first third of the 20th century, which gradually developed from legal custom through everyday practice and judicial practice of courts. [25] Gusztáv *Schwarz* concluded as follows: *"[l]aw-making custom necessarily based upon a mistake – a mistake, as many suppose, is not the obstacle of customary law development, but its necessary precondition. The most important case of this law-making by customary law nowadays is that of the so-called customary law interpretation (usualis interpretatio).*"[26]

appropriateness and necessity can be questioned even less in our country."

[21] MENYHÁRTH 1908, 342.

[22] Ibid. 382.

[23] SCHWARZ 1909, 95–97.

[24] HALLER 1881, 421. JELLINEK 1882, 174–175. Cf. HOMOKI-NAGY'S *article about Károly Haller* in this volume.

[25] MENYHÁRTH 1931a, 9.

[26] SCHWARZ 1909, 92. Zoltán *Kérészy* also strengthens the standpoints of *Menyhárth* and *Schwarz*.

*The situation of a child born out of wedlock in the Hungarian private law*

The regulation of family law and inheritance law had a unique role in the history of Hungarian private law codification. These two fields of private law became the focus of professional interest when István *Teleszky* prepared the inheritance law draft and published his scientific preparatory article.[27] In addition to the critical comments on certain rules of intestate succession, those observations had decisive importance, which raised the question of how can inheritance law be regulated, and if it is not known yet, what will be in the family law draft? Maybe, this influenced Gáspár *Menyhárth* – in addition to his practical experiences and human attitude – to express his thoughts regarding some institutions of family law.

*The paternity action*

Paternity action was one of these questions, and he published an article in 1893 for the first time. The question and the answer given in the 18-19th century today belongs to the field of legal history. Despite this fact the method of interpretation used by *Menyhárth,* of statutory instruments (exegesis) can still be taught today.

The anomalies concerning the so-called paternity action applied strictly to the legal status of the child born out of wedlock, in contemporary vocabulary the unlawful child. The child born out of wedlock obtained his mother's legal status, the maintenance and education were the mother's obligation, and according to our traditional law, he had no family relationship even with the mother's relatives. His legal capacity was limited, even if his father was a noble, he did not inherit his noble status. "*Those, who are originated from unlawful beds, are not receiving the benefits and decorations of blood; they will not be awarded name, nobility, title, inheritance after their sires. Their parents are obliged to keep and educate them; because it is a natural obligation, which cannot be broken by any law.*"[28] Legalization may be done by retroactive marriage – if the conditions are met – or royal pardon.[29] The practice that evolved over the centuries did not prohibit the seeking of the father, but no law or customary law obliged the father to maintain the child born out of wedlock. However, it must be emphasized that the child could not inherit his father's ancient and donated possessions, but the father may impart to his child from his established by will.

The situation changed after the ACC entered into force. The ACC 163. § allowed the seeking of the father for the child born out of wedlock. For this, either the mother should prove that she had intercourse with the man she named within the presumed period of conception, or the father himself could acknowledge the child as his own.[30]

[27] TELESZKY 1876.
[28] FRANK 1845, 159. *Tripartitum* I. Title 106.
[29] BÉLI 1999, 51.
[30] "Against whom it is proven pursuant to the method of the judicial procedure that had an intercourse with the mother of the child in the period no less than six and no more than ten months until birth; or who

However, the father needed to include the acknowledgment in a public deed. After the Marriage law [Act XXXI of 1894] entered into force, the acknowledgment must be registered in the birth certificate as defined by law. Gáspár *Menyhárth* analyzed and criticized the practice established by the rules of ACC in several articles.[31] In a comparative analysis he introduced the idea that the ACC preceded its time in this issue because the Code Civil expressly denied the seeking of the father of the child born out of wedlock. On the contrary, the Austrian code declared that *"[…] being born out of wedlock may not cause detriment in civic honor or promotion for the child.*" [ACC 162. §] For this reason, it allowed the seeking of the father. If the father acknowledged his child, it does not mean that his noble title, rank behooved the child.[32]

If the father acknowledged the child as his own, he was obliged to maintain the child. *Menyhárth* emphasized that the child born out of wedlock may claim the same amount of maintenance from his mother as lawful children do.[33]

If the father did not acknowledge the child, then the mother had the opportunity to file a "paternity action" against the – as *Menyhárth* says – "probable" father of the child. In the lawsuit, only the intercourse within the conception period must be proven. *Menyhárth* criticized this provision of the Austrian Civil Code and the judicial practice that developed from it. If the intercourse within the conception period was proven against the husband in the paternity action, there was no excuse for the man. He could not refer to the fact that the plaintiff woman had intercourse with another man as well within the same period.[34] *Menyhárth* raised the unfairness of this practice since it happens in everyday life that the mother has intercourse with more than one man at the critical time. However, the judicial practice gave the right to the woman to decide against which man she wants to file a claim, and it inevitably included the possibility of abuse. *Menyhárth* also raised the possibility that in each case the court may establish the "paternity" of two men if intercourse with the mother at the critical time was proven in both cases. Both men may be obliged to pay maintenance equally. For comparison, he mentioned adoption as an example, where the education and maintenance of the child were both the blood parent's and the adoptive parent's obligation.[35]

*Menyhárth* compared the ACC provision and the established Hungarian practice to the rules of the German Civil Code and the draft of the Hungarian Civil Code made in 1913. The father of the child born out of wedlock – according to both the BGB and the Hungarian draft – was considered the man, *"[…] who had intercourse with the mother during the period of conception of the child, unless the mother pursued lechery as a business."* [draft of Act of 1913 215. §] The Hungarian judicial practice did not allow for the defendant in

testifies it outside of the court, the presumption shall be that he begot the child." ACC 163. §.

[31] MENYHÁRTH 1893; Transylvanian Official Gazette (Erdélyrészi Jogi Közlöny) 1913. MENYHÁRTH 1905a.

[32] "Biological children are generally excluded from the rights of the family and relatives, they have no claim for the family name of the father, nobility, coat of arms and other benefits of the parents; they bear the family name of their mother." ACC 165. §.

[33] "Maintenance is the obligation of the father, if he is not capable to maintain the child, such an obligation burdens the mother." ACC 167. §.

[34] MÁRKUS 1907, 31.

[35] MENYHÁRTH 1913, no. 5. 35.

the paternity lawsuit to refer to the objection that the woman had intercourse with others during the conception period, and the draft civil code in preparation rejected it as well. Exceptionally, the action of the woman was denied, if the woman's "bawdy lifestyle" was proven.[36] Such an exception would be raised to the level of law by the draft. This judicial practice and its appearance in the draft was criticized by *Menyhárth*.

In analyzing this issue, he specifically addressed the responsibility of the judge: *"the judge's duty is to administer justice, and the forced application of legislative attributes prevents him from doing so. The legislator should and must be humanist since it adopts law among people for the people: the judge, even if he individualizes the law, cannot be considered to anything else than the applier of the fair law, otherwise, he degrades himself from a good judge to a bad legislator. In the paternity lawsuit, two controversial interests are facing each other: the child's and the defendant fathers. Both shall be equally seen and assessed to find the truth of the given case. The interest of the child is to find the person who provides him maintenance and education ensured by law; the interest of the defendant is to be obliged only to the extent that the law provides and is responsible for the child's birth."*[37]

*Menyhárth* did not find the term paternity action acceptable. On its own, proving that someone had intercourse at the presumed time of conception with the mother of the child, did not make a man a father of the child. It only established a contractual relationship, where the oblige is the child and the obligor is the "father", whom no paternal power was provided by law. The only way to receive it, is if the mother did not take care of the child, then he could take the child.[38] In *Menyhárth's* opinion, this contractual relationship should not be placed in family law, but in contract law.

The establishment of paternity created a claim for the maintenance, education, and care of the child born out of wedlock. The extent of this was determined by the social status and financial situation of the parents. Parents could agree on the amount of "alimony", but the guardian authority must approve it.

Pursuant to the practice of the Curia, the alimony was awarded for the child born out of wedlock until he attained the age of 12, which was strongly criticized by *Menyhárth* as well. This solution was rooted in the practice that in the peasant society, a 12-year-old child became capable of earning, could work as an apprentice, or serve as a maid. *Menyhárth* rejected the maintenance of this practice. He acknowledged that the ACC and the established judicial practice primarily evaluated the claim for alimony, but in his opinion, the child born out of wedlock was entitled not just to alimony but to care and education as well. This cannot happen until the age of 12.[39] (The draft of 1913 recommended the payment of alimony until the child attained the age of 16.)

In 1893, *Menyhárth* shed light on the further issue of paying and claiming alimony in practice. How should the court act, if the mother does not enforce her claim within a

[36] The establishment of unworthiness of the mother and of the widow in other context developed from this practice.
[37] MENYHÁRTH 1913, no. 4. 28.
[38] MENYHÁRTH 1913, no. 4. 27.
[39] MENYHÁRTH 1893, no. 47. 378.

short period after the child's birth but after years? His strong opinion was summarized as follows: *"*[…] *the purpose of child alimony is to cover the necessary costs of the child's maintenance and education.* […] *if the mother, who is also obliged to contribute to the child's maintenance, did not claim alimony at the time and she could raise the child from her own, the father cannot be obliged to retroactively reimburse the costs equal to the amount of child alimony."*[40] The alimony that was not claimed cannot be claimed retroactively as damages, because the basis for damages is unlawful action or omission, but the legal title of unpaid debt also cannot be determined, since unless the alimony is not claimed by someone, then he had no debt in that period.

*The issues of intestate succession of the child born out of wedlock*

Another issue which was deeply analyzed by Gáspár *Menyhárth* is that of intestate succession of the unlawful child. The basis of intestate succession was kinship under family law. During this research, he raised the question of whether a child born out of wedlock can be considered as a lawful heir, and if so in whose inheritance? Is he entitled to a forced share? Can anyone inherit after him, and may anyone claim a forced share from him?

Pursuant to the issues raised, it can be clearly seen that *Menyhárth* covered the whole system of inheritance law to provide the most complete answer concerning the inheritance law of the unlawful child. First, he compared the standpoints of the academic world. According to the rules of intestate succession, first, the testator's descendants, including their children, inherit. Ignácz *Frank* accepted this rule only for children born out of lawful marriage.[41] János *Suhayda* shared the same standpoint. "Natural children born in an unlawful bed cannot inherit after their parents."[42] In regard to *Ignácz Frank, we assume that an unlawful child may inherit after his mother, Suhayda* completely excluded this, because, in his opinion, it had basis neither in law nor in customary law. *Mór Katona* described the old Hungarian judicial practice: *"Among the many loopholes of Hungarian law, one of the finest is that unlawful children may not inherit at all; they may only claim maintenance and education costs from those to whom they owe their origin."*[43] Although, he acknowledged that the child born out of wedlock may inherit from his mother under ACC. Therefore, he criticized the National Meeting of Judges because they did not include this rule into the PJR (Provisional Judicial Rules) provisions established by them. Moreover, PJR 9. § provided that *"[…] in the absence of a will, every property of the testator passes to the descendent lawful children."* Imre *Zlinszky*[44] and Gusztáv *Wenzel*[45]

[40] MENYHÁRTH 1893, 379.
[41] FRANK I. 1845, 480. "According to law, everyone's own children are in the first place regarding inheritance; assuming they were born in lawful bed or as such.
[42] SUHAYDA 1874, 331. §.
[43] KATONA 1872, no. 32. KATONA 1899, 223. "Descendants born out of wedlock inherit only from their mother, according to today's clearer approach, even if the mother has lawful descendants; in lack of law, our practice excluded the unlawful child, which is incompatible with inheritance based upon blood."
[44] ZLINSZKY 1891, 667.

shared this standpoint as well. Contrary to them, Elek *Dósa*,[46] Mihály *Herczeg*[47] supposed the unlawful child may inherit such a property of the mother, which can be freely disposed of by her under our traditional law. The difference between these viewpoints is primarily rooted in the different approach concerning the property in the two systems: in the bound proprietary system the property belongs to the clan under the law of antiquity; in the donation system, it embodied the king's prime proprietary rights; and the property could not be freely disposed of in any systems, which excluded the possibility of inheritance of the unlawful child. Some extended this rule to the inheritance of the mother, while others acknowledged the inheritance of the unlawful child from the mother's property. We can find opinions between these two standpoints, which only acknowledged the inheritance of the mother's legacy if the mother has no other lawful heir.

By analyzing the different viewpoints, Gáspár *Menyhárth* pointed out an interesting characteristic of Hungarian private law, which derived from the above-mentioned sources of law system. Opinions can be categorized in terms of who considered what as a source of law in deciding this issue. Those, who analyzed the issue under the law, more precisely, according to the norms provided by *Werbőczy* in *Tripartitum*, acknowledged the inheritance of the child born out of wedlock from the mother's legacy. However, those who analyzed the judicial practice denied this inheritance.[48]

After the dominant opinions of academic literature, *Menyhárth* explored the sources of law most helpful in resolving this issue. First, he analyzed *Werbőczy's* teaching and determined that such a child was considered as lawful, who was born in wedlock of his parents, or within ten months after the father's death. [*Tripartitum*. I. 17.; II.62.] Only lawful children inherited equally from the paternal legacy. According to *Werbőczy's* teaching, however, children born out of incestuous marriage did not inherit either from the paternal or maternal property. [*Tripartitum*. I.102.] Consequently, *Menyhárth* concluded two parts of *Werbőczy's* teaching concerning the inheritance of children born out of an incestuous marriage and born out of wedlock. These two parts were merged; therefore, the judicial practice did not acknowledge the right to inheritance of unlawful children from the estate of their parents. *"The shifting approach has shocked the practice of the written, more correctly, the humanism of written law in Hungary.*[49] *Menyhárth* and *Katona* called the legislator out on such humanism. *"The utmost duty of the legislation is to govern the arising situations in compliance with the contemporary necessities without prejudice."*[50] Therefore, *Menyhárth* determined that according to *Werbőczy's* teaching, the children born out of wedlock had the right to inherit from the mother. If the mother had lawful children, he received an equal share per capita of the maternal property; if there were no legal heirs, then he could obtain the whole legacy.

[45] WENZEL 1879.
[46] DÓSA 1861.
[47] HERCZEGH 1885.
[48] MENYHÁRTH 1905a, 2.
[49] Ibid. 5. He referred to the article of Gusztáv Wenzel published in Jogtudományi Közlöny 1970. No. 36., where Wenzel introduced a judgment, in which the court decided that the inheritance of the mother, who died without a will, was inherited by the treasury instead of her child born out of wedlock.
[50] KATONA 1872, 229.

The following issue was whether the unlawful child could receive from the paternal legacy. On the one hand, answering this question became necessary after the ACC entered into force, on the other hand, the fact that the father is actionable made it important to establish a uniform judicial practice. As he wrote about paternal action in the – above-mentioned – articles, *Menyhárth* pointed out that the father could acknowledge his child born out of wedlock, which must be registered in the birth certificate provided by law. On the other hand, if the father did not acknowledge his child, the mother has the right to file an action to prove that she had intercourse with the man named in the claim at the presumed time of conception. If the court found this, the "probable father" may be obliged to maintain the child. The remaining question is, why the Hungarian judicial practice did not acknowledge the right to inheritance of paternal legacy of the child born out of wedlock. It is especially questionable in that case when the father solemnly acknowledged his son. Why was it necessary – except for the obligation of maintenance – if the child could not inherit. *"Based upon a mere acknowledgment, the practice did not feel entitled to allow inheritance after the acknowledging father, who would otherwise have been able to take action at will."*[51]

If we simultaneously analyze the provisions of inheritance of PJR, we can find in 9.§, which governs the intestate succession of descendants, that only "lawful descendants may inherit", but in the case of ascendants and collateral relatives, it provides "descendant heirs". Moreover, concerning matrimonial inheritance, the PJR provides that *"[...] matrimonial inheritance may take place under Hungarian law, a) concerning assets acquired, if there are no descending straight heirs; b) regarding inherited assets, if there are no descending, ascending or collateral heirs."* [PJR 14. §] Consequently, if there is no lawful descendant, ancestor, or collateral relative, then the unlawful child even precedes the surviving spouse in inheritance.

Therefore, *Menyhárth* found that the child born out of wedlock can inherit the mother's legacy, but cannot inherit the father's legacy even if the father had no lawful heirs under the rules of ACC and PJR. The right to intestate succession of the child precedes the surviving spouse and ancestors regarding the testator mother's public property acquired.

*Menyhárth* raised the issue of whether the unlawful child had the right to claim the forced share. According to PJR 7. §, yes he does, because this article provides "descending heir", i.e. if the mother made a will regarding her whole inheritance, then the right to claim the forced share of the child born out of wedlock opened against the testamentary heir, so the will may be challenged. However, the judicial practice was not uniform in this regard. It occurred that they allowed the claim of forced share of the child born out of wedlock even if there were lawful heirs. In *Menyhárth's* opinion, this is not right, since the PJR 9. § excludes the inheritance of the unlawful child if there are lawful descendants. Therefore, the unlawful child cannot be entitled to a forced share if there were lawful heirs. However, if the mother had no lawful child, then he could claim his lawful share of inheritance of the maternal legacy.[52]

[51] MENYHÁRTH 1905a, 14.
[52] MENYHÁRTH 1905a, 15.

*Menyhárth* also raised the question as to who is entitled to inherit after the child is born out of wedlock? His own child, in the absence of a child, only the mother, and his collateral relatives. His father cannot, because if the unlawful child cannot inherit after the father, then they do not have the reciprocity, so the father also cannot inherit after the child, even if he acknowledged the child as his own.

These anomalies should have been resolved during the codification of private law. In his inheritance draft, *Teleszky* would provide the lawful right to inheritance for the child born out of wedlock, if the father acknowledged him as his child and had no lawful child, surviving spouse and his parent was not alive. *Menyhárth* criticized this approach, in his opinion, if the father acknowledges his child born out of wedlock as his own, then why would the legislator maintain the distinction between the child born in lawful and in unlawful bed in the field of inheritance law.

Gáspár *Menyhárth* compared the judicial practice, the standpoints of academic literature to the relevant sources of law resolving this issue and found that the child born out of wedlock had the right to inherit from his mother even if the mother had lawful heirs, and he could claim the forced share of the mother's inheritance. His right to inheritance from his father was also recognized if the father acknowledged his child or it was proven because of a paternity action that the man had intercourse with his mother during the conception period.

*The right of survivorship*

Among the family law institutions, he dealt with the right of survivorship several times. We could say that the right of survivorship developed over several centuries and remained a legal institution under the rules of the ancient Hungarian matrimonial property law even in the 20th century, but this is just partially true. On its own, its placement in the system of private law provoked debates, because of the allowance of the widow, which ensured the financial status of the widow can be placed in family law, including matrimonial property law. Since the claim to ensure the right of survivorship is established at the moment of the husband's death, it could be placed in the system of inheritance law, regardless of the fact that it does not strictly connect to the rules of inheritance law. In the orderly Hungarian private law, the first analytical academic literature constructed the system of special rights of women and categorized the right of survivorship into a special group together with the maiden quarter, engagement gift, dowry, and the right of maiden. In the private law system of the civil age in the age of codification, it became unsustainable. In the process of precise code-making, not only the certain legal institutions should be defined, but their place in the system must be determined. While the engagement gift or dowry could be easily placed in the field of matrimonial property law, but the maiden quarter ceased to exist due to abolishment of the law of antiquity. The ACC entered into force; the right of survivorship and the very similar right of maiden could be placed in matrimonial property law except for the elements of allowance, or in foreign property law based upon the beneficial ownership of the widow, and even in inheritance law. It was well-represented by the contemporary

academic literature. *Menyhárth* consistently had the standpoint that the right of survivorship shall be discussed within matrimonial property law, and he did not find it appropriate to include it in the rules of inheritance law. In his opinion, on the one hand, ensuring the right of survivorship preceded intestate succession, and on the other hand, the death of the husband only meant the starting date of the effectiveness of the right of survivorship. He drew attention to the fact that not the right of survivorship, but the clearly distinguishable inheritance of the widow and spouse belongs to the field of inheritance law. Proving this, he introduced a decision of the Regional Court of Appeal of Szeged adopted in 1893, which declared that *"[…] the right of survivorship based on family relation, and it is a consequence of the spouses living together and performing the obligations of the woman deriving from the household status."*[53]

To determine every essential element of the content of the right of survivorship, it became necessary to examine not only the historical development but the changes of the substantial characteristics of this legal institution. Gáspár *Menyhárth* undertook to do so in the last decade of the 19th century when the minister of justice convened the committee, whose duty it was to prepare the draft of the Hungarian private law code. In all his articles, *Menyhárth* endeavored not only to introduce the historical development of this legal institution but to discover and introduce to readers in-depth its substantial characteristics, changes, and sources of law establishing this legal institution. He did so because he was convinced that *"*[…] *matrimonial property law and its inheritance law is more permanent than other rights."*[54] By doing so he wanted to emphasize his opinion that family law and inheritance law are the fields of private law, where old and new Hungarian private law institutions can be introduced. In the field of property law and contract law, especially after the abolition of the bound proprietary system and the entry into force of the ACC, it was hard to find independent Hungarian legal institutions. However, the Hungarian development of private law was not smooth in any field, since in the absence of a code, the current judicial practice kept alive and transformed our legal institutions. *"Our former system of possession and the related laws were antiqued by the passing of time, and the changing trade and economic life deformed the original characteristics of old relations, new ones were brought to the surface, and old doctrines were no longer applicable for the most part of the new and changed category of property rights; and we have no code or anything which can satisfactorily replace it, and judicial practice is not uniform rather ambiguous regarding principles* […] *the most masterful decisions are not rooted in Hungarian law."*[55]

*Menyhárth* tried to explore the source of law of the root of right of survivorship. It is publicly known that the origin of this legal institution leads back to Title 24 of the II. Decree of St. Stephen. Our first king changed the ancient rule with this provision, under which the clan of the deceased husband took care of the widowed woman, even by remarrying a brother or relative of the husband. Owing to this state of affairs, she stayed in the clan of the deceased husband, the dowry brought to the husband's clan by

[53] MENYHÁRTH 1894, 71.
[54] MENYHÁRTH 1894, 45.
[55] Ibid.

marriage remained in the clan, and the husband's relative took care of the orphaned children. St. Stephen provided the opportunity for the widow to decide whether she would like to remarry and if yes, within the husband's clan or to a male member of another clan.[56] Whether she wants to raise her children. The decision was in the hands of the woman. If she decided to live in the deceased husband's clan, then the clan must take care of her. The woman came under the power of her husband by marriage, who was obliged to take care of his wife under ancient custom. The husband's obligation passed to the clan until the wife remarried.

What did this obligation mean in everyday practice? Originally, it guaranteed the maintenance of the family, because the husband ensured to protect the father's inheritance for his children, which was originally owned by the clan. By doing so, they took care of the widow's maintenance, which was valued equal to the marriage lien, as it was written in the academic literature, allowance and care appropriate to the husband's rank and social status must be provided. The rules of this were eventually settled by *Werbőczy* in the *Tripartitum*, which ensured that she could remain in the ancient and donated possessions of her husband together with the orphaned daughters while concerning the husband's property acquired the right to inheritance was even provided if the husband registered his wife's name in the letter of acquisition. [*Tripartitum*.I.102.] The essence of the right of survivorship was summarized by Ignácz *Frank*, who found the essence of this right under the established practice in the 19th century as follows: the widow could remain in the house of her husband, she was entitled to a proper allowance to the extent which was appropriate considering the husband's dignity; moreover, on her new marriage, she could even claim to be married off.[57] The wide interpretation, established in practice, of the content of the right of survivorship, resulted in the heirs of the deceased husband being unable to acquire the possession of inheritance in many cases. It became necessary that this right of the widow can be limited by the lawful heirs.

The National Meeting of Judges restored the right of survivorship under the ancient Hungarian customary law with the restriction that its limitation can only be claimed by "descending direct heirs". [PJR 16. §] According to *Menyhárth*, at the time of private law codification, the essence of the right of survivorship, determined by the provision of PJR, was the widow's beneficiary ownership regarding her husband's inheritance. Such beneficiary ownership can only be limited to the descending heirs' beneficial use.[58] If the right of survivorship transformed into beneficiary ownership, then it became a property law institution, within that a personal easement in the field of foreign property law under the private law dogmatics of civil age.[59] As a property law legal institution, it

[56] Ibid. 49.
[57] FRANK 1845, 528–532. Cf. FOGARASI 1845, 122–123.
[58] MENYHÁRTH 1894, 67. Imre *Zlinyszky* accepted *Menyhárt's* standpoint. ZLINSZKY 1891, 616. KEMÉNY 1892, 130–131. In this brief article, the author proved based on judicial orders that in different parts of the country, sometimes *"right of survivorship"*, sometimes *"beneficiary ownership"* and sometimes only "*beneficial use"* was registered in the land register.
[59] FOGARASI 1845, 123. "[…] the right of survivorship is only temporary and just means beneficially […]"

could be registered in the land register. *Menyhárth* further analyzed the content of this right and found, if descending heirs limited this beneficiary ownership or provided beneficiary use of the house, then it only resulted in beneficiary use, and if heirs undertook the obligation of allowance, then the right of survivorship transformed into probate encumbrance, which was a proprietary burden of the inheritance. According to the rules of land register, however, rights and obligations specified in their extent and content can be registered. If they were doing so with the old name of the right of survivorship, in this regard it could not be considered as specified content. Therefore, the judicial practice established that beneficiary ownership, beneficiary use, or proprietary encumbrance was registered in the land register's encumbrance sheet.[60]

The judicial practice was not uniform regarding the content of beneficiary ownership ensured to the widow under the provision of PJR. These appropriate measures could vary in terms of the appropriate housing, allowance, or marrying off. *Menyhárth* found the latter important as well, and its historical antecedents can be found in Hungarian private law. He did not find it satisfactory that the Curia could only "maybe" ensured the marrying off for the widow. According to his standpoint,*"[…] this doctrine could have been precisely defined, the wife shall remain in his deceased husband's property and has beneficiary ownership under her right of survivorship, and this right can be limited to housing and allowance by the descending lawful heirs."*[61] The prepared draft of the civil code in 1913 defined the right of survivorship as beneficiary ownership on the testator's inheritance. [Draft of 1913 1553. §]

In summary, he defined the extent of right of survivorship as the widow is entitled to the beneficiary ownership of her husband's inheritance and accordingly, she has the enjoyment of the fruits and freely disposes of them. She was also entitled to lawful and good faith right to possession provided by law. However, it was prohibited for the woman to encumber the possession, and of course, to cause any damage.

The subject of the right of survivorship could consist of movable assets and real estate. Except for those properties, which ensured the right to inheritance of the widow. It means that she could be the beneficiary owner of her husband's inherited property, her husband's property acquired before marriage, half of the property acquired during the marriage, and she could be the owner of the other half as public acquirer under the spousal inheritance. In *Menyhárth's* opinion, the widowed wife could not become the beneficiary owner of the fidei-commissum possession.

*Menyhárth* examined the relationship of right of survivorship to inheritance, even though he did not consider it an inheritance law institution. Although, ensuring the right of survivorship meant a probate encumbrance for the heirs. The probate encumbrance is the testator's obligation, which must be provided from the inheritance, in this sense the right of survivorship preceded the inheritance. What was the relationship of right of survivorship to the forced share? In *Menyhárth's* opinion, the forced share is also provided by law for the necessary heirs, but since they are heirs as well, the right of survivorship

[60] MENYHÁRTH 1894, 68.
[61] Ibid. 74.

preceded the obliges of lawful share of inheritance. If the testator's inheritance allowed, the necessary heirs, but only the descendants may limit the extent of the right of survivorship under the provision of PJR.[62]

What was the relationship between the right of survivorship and the donee by testator? By analyzing the judicial practice, *Menyhárth* noticed, the Curia provided the opportunity for the widow to challenge the donation made by the testator under PJR 4. and 8. §§. The Curia reversed the lower courts' judgments, which found on the contrary that the widow is not entitled to challenge the testator's donation due to the enforcement of the right of survivorship.[63] *Menyhárth* found the Curia's decision wrong. In his understanding – which was the same as the lower courts' interpretation – the referred provisions of PJR did not even mention the donee's obligation to honor the liabilities. The PJR only protected the descendant heirs' forced share.[64] Under the strict rule of the law, it meant in everyday life, if the testator donated the entirety of his property in his life, then the descendant heirs could only claim their forced share from the donee, but the widow could not claim the beneficiary ownership. Here, the centuries-old principle was violated, which declared that the widow must receive appropriate care after her husband's death. However, Gáspár *Menyhárth* was consistent regarding the interpretation of customary law norms and legal texts.

When the Private Law Bills, was made and submitted to the National Assembly for debate in 1928, it did not become a code. In judicial practice similar uncertainty was revealed regarding the content of beneficiary ownership of the widow under the right of survivorship as in the last decades of the 19th century. Gáspár *Menyhárth* noticed that in the reasoning of judgments deciding on the right of survivorship of peasant women in villages, the Act VIII of 1840 was often referred to, which governed the issues of inheritance of serfs. This was the law, which extended the rules of inheritance of noble law to serfs, including the right of survivorship. Can a piece of law adopted nearly a hundred years ago help to understand the right of survivorship? In this law, on the one hand, it was declared the serf widow could claim housing, allowance, and care, which could not even be deprived of by the husbands' will and must be ensured by the heirs. The law also settled, if the children of the widow are the heirs, they could only share the property, ensuring the beneficiary ownership was precisely recorded. However, if the stepchildren must provide the right of survivorship, the widow received one child's share of the property under the title of allowance and care. Such a provision of the law was only kept alive by judicial practice in the 20th century regarding the peasants in villages. *Menyhárth* rejected this practice: *"*[…] *in principal teachings, but mostly in judicial practice, the Act VIII of 1840, in particular 18.§, is often referred to as a piece of legislation, which provided that the extent of the right of survivorship of commoners', peasants' and village people' second or further wives is different than the right of survivorship of the first wife, if, in the case of stepchildren, this rule applies not to the*

[62] Ibid. 90–92.
[63] MENYHÁRTH 1897, no. 32.
[64] "The right to donation is limited by descendent straight heirs, and if they were not exist, by the lawful share of the living parents." PJR 4. §.

*beneficiary ownership of the deceased husband's whole property, but the beneficiary ownership of one child's share.*[65] In accordance with equal treatment, *Menyhárth* disagreed with the practice to discriminate certain classes of society on any grounds in the first third of the 20th century.[66] In this regard, he criticized both the lower courts' and the Curia's practice. In his opinion, the Act VIII of 1840 became invalid at the moment, when the liberation of serfs was declared in 1848. Regarding providing the right of survivorship, such a principle shall be considered, which *"was the leading thought of the right of survivorship from Saint Stephen through Werbőczy and the National Meeting of Judges until nowadays: preferably to provide such a way of living and livelihood for the widow, she was entitled to while her husband was alive."*[67]

The academic work of Gáspár *Menyhárth* covered the research of Austrian and Hungarian private law. He loved to analyze certain family law institutions and the related inheritance law issues. He comprehensively knew the judicial practice, which he often criticized for misinterpreting the current legal provisions or disregarding the centuries-old internal development of private law legal institutions. Also, he often criticized the legislators as well, if they disregarded such a historical development, which defined the essence of a nation's legal life.

The limits of this article did not allow for an in-depth examination of his work in the field of property law and contract law, and the observations made to the draft of the Civil Code of 1913. The articles introduced above did not only prove his comprehensive professional knowledge – of the contemporary judicial practice and academic literature – but his deep humanism, which helped him to find the opportunity within the strict system of laws to recommend the best possible solution to the legislators for fellow human beings.

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[65] MENYHÁRTH 1934a, 362.
[66] Ibid. 363.
[67] Ibid. 364.

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