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## *INTRODUCTION*

Being a member of the Szeged society of jurists is a feeling that determines our existence.

We are proud of our institutional past, the strength of our community, the knowledge and experience, which we have acquired here. The faculty decided to create a series of volumes about professors who were pivotal in the development of the law as an academic subject. The reader is holding in their hands the first memorial volume commemorating our professors who practiced before 1945, celebrating the 100<sup>th</sup> anniversary of the first academic year in Szeged in 1921.

The city of Szeged, since 1790, desired to have its own higher education institution, which eventually came to fruition due to the tumultuous history of the times. The University of Kolozsvár was not relocated taking into consideration the wishes of the individuals, but in line with public interest. The location that was the most suitable at a country level was Szeged.

The volume has a purpose: to pay tribute to our professors by showing the past of our Faculty. This is done by looking at the lives of the professors which span seven decades of university history which highlights the roots of our thinking. In addition to the academic work of our professors and the bibliographic data of the most important academic works, our volume also provides a short biographical overview along uniform editorial principles, which is unique both in its content and scope.

In addition to the academic work of the professors of the Faculty of Law of Kolozsvár/Szeged before 1945, we are proud of humanity, values, commitment to academia, homeland, and the community of our professors. Their example provides us with the motivation to strive for excellence. Our identity and our future are also rooted here, as “the ultimate goal is to awaken the sense of truth in ourselves, to cultivate it. To learn not to know the law, but to feel the truth, is to make our second argument what is inter virtualens summum bonum: that is, justice. The correct end goal of any study of law can only be to familiarise ourselves with the practice of truth. It is not the law, not the jurisprudence, that is the ornament of humanity. In fact, they can be just as much a curse as a blessing. The only ornament in this field is a just man who is enthusiastic about the idea of law.” (Béni Grosschmid)

Former rector István Schneller – in the name of Bálint Kolosváry, who was still in Kolozsvár – handed over the new rectoral chain to Gáspár Menyhárt with these words: “do not forget about the traditions of the University of Kolozsvár.” We will not forget the traditions of the Faculty of Law Kolozsvár/Szeged as well.

Happy reading,

*Márta Görög*  
Dean



MÁRTON SCHULTZ

## ELEMÉR BALÁS P.\*

(1883–1947)

### *I. Biography*

As the life and academic work of Elemér Balás P. (full name: Elemér Balás Piri) has already been examined by several authors, I will begin with a brief overview of this topic.<sup>1</sup>

Elemér Balás P. was born in Szabadka (Subotica) on the 28th of January, 1883. He died on the 17th of December, 1947. He received his law degree in 1905, in Kolozsvár (Kolozsvár). He was active as a legal scholar in three great fields of law. Regarding his educational activities, it is notable that he acquired habilitation in criminal law in 1943, in Szeged. Between 1937 and 1940, he was head of department in Szeged, and then was professor of Hungarian civil and criminal law (both judicial and substantive) in Kolozsvár for his remaining years. However, it is notable that Hungarian law was not yet in full effect in Northern Transylvania. Between 1945 and 1947, he was head of the department in Szeged.

He began his judicial career in Makó as a trainee judge, before moving onto Szeged as a trainee judge at the local regional court. This was followed by his activities as a deputy prosecutor and then full prosecutor in Nagykikinda. At the peak of his career, he became a judge of the royal Supreme Court.

Regarding his academic work, it is notable that he held his academic inauguration speech with the title of *Perception of litigation and criminal policy* in 1943.<sup>2</sup> He was an invited member of the Hungarian Academy of Sciences from 1937, and later, an ordinary member.

He was a leading member of several associations, committees and boards. He was the chairman of the Copyright Expert Committee, a member of the Medical Examiner Committee of the Regional Court, the co-president of the Industrial Property Law Association, the vice-president of the Press Law Society and the Social Sciences Association.

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\* Translated by Gábor Hajdu, PhD candidate at the University of Szeged, Faculty of Law and Political Sciences.

<sup>1</sup> NIZSALOVSKY 1948, 151. RÁCZ 1983, 412–413. PÓLAY 1984, 84–86. ZVOLENSZKI 1998, 174–175. JUHÁSZNÉ ZVOLENSZKI 2018, 837–840.

<sup>2</sup> See also: *MTA tagajánlások* 1943 [Hungarian Academy of Sciences Membership Recommendations 1943]. MTA, Budapest, 1943. 18–19.

## II. Academic work

Although Elemér Balás P. worked both in the field of criminal and private law, it is possible to describe two great directions that determined his academic work. One of these were the legal questions relating to the new challenges of science and technology. The other was the legal manifestation, and assessment, of the societal perspective founded on the social sciences-based human-property duality concept. I will highlight both of his theories in these two areas during the examination of his work, as well as focus on his most important theories from a personal and property perspective on specific legal fields.

For the 70th anniversary of *Elemér Balás P.*' death, a memorial book was created, with *András Koltay* as the editor. I will also note the most important observations of the book's authors (*Klára Gellén, Zsolt Konkoly, András Koltay, Péter Mezei, Tamás Nótári, Magdolna Vallasek, Emőd Veress*).

### *Alexander Elster and trialism*

In order to understand the property and personal perspective of *Elemér Balás P.*, we must know which academic currents affected his thinking. Unfortunately, the books read by *Elemér Balás P.* in Kolozsvár are mostly lost. This is due to the moving of the faculty from Kolozsvár to Szeged during a time of war, and so only a portion of the books arrived at the new university, the rest disappeared or were destroyed. The books were first transported by train to Budapest, and then only from there to Szeged.

*Alexander Elster* was a devotee of the trialist approach to intellectual property. His textbook was cited several times by *Elemér Balás*.<sup>3</sup> According to *Elster*, intellectual properties do not constitute a single whole, but neither consist of parallel personal and property relations, but rather that competition law appears in them as a third element. As such, he believed that industrial property rights had three elements: (1) there must be an intellectual property, which (2) is capable of existing in a marketable form, and which (3) is capable of participating in industrial competition.<sup>4</sup> This Elsterian thought posited that in order to have characteristics of property law, the property must also be competition-capable.<sup>5</sup> And it will be competition law that separates the personal and property rights aspects.<sup>6</sup> As such, he posited that it was more logical to speak of trialism, instead of dualism, within this context.<sup>7</sup>

*Balás* did not fully adopt this trialist perspective, but it can be observed that competition law occasionally intrudes into his works on statutory/regulatory law and dynamic property law, with regards to the personal-property relationship. However, he did not assign the same importance to it as *Elster*, he conceptualized its place in the legal system and its effect on intellectual property differently.

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<sup>3</sup> ELSTER 1928.

<sup>4</sup> ELSTER 1928, 6.

<sup>5</sup> ELSTER 1928, 51.

<sup>6</sup> ELSTER 1928, 24.

<sup>7</sup> ELSTER 1928, 25.

*The social academic basis of personal and property perspectives*

The static and dynamic perspective on property, as well as the personal perspective, are constant elements in Balás' work. In any given study of his, he first analyzes the topic from a general, historical perspective, before he specifies it into the given legal fields. These experiences constitute his theory (synthesize in its application to competition law) that he described in 1940, in his study, titled "*Dynamic property perspective in private law. The fundamental problem of competition law.*" He expounded upon three terms here: (1) the personal perspective, (2) the static property perspective and (3) the dynamic property perspective. According to Balás, the personal and property societal perspective's essence is, in general, the human relation to the environment. "*This relationship develops differently in different eras. This is based on how much the so-called environment stands between man and man, and on the other hand, it depends on what is considered the environment by man in the different eras: does he include other men into it, or only the environment in its strictest sense with only non-personal elements included.*"<sup>8</sup> The ancient era was defined by staticity.<sup>9</sup> Staticity "*attempts to ensure the constancy of human will, and its predominance, and through this, amplify the order of things and their stability in a direction in accordance with the needs of society.*"<sup>10</sup> This mostly manifests in the field of property law in modern legal systems, as they determine the fundamental order and rules of property relationships in society.

He placed great importance on Christian philosophy, which he highlighted even during his examination of statutory/regulatory law in relation to personal rights. "*Personhood independent of the outside world is a Christian concept, it was unknown before Christianity. [...] The man surrounded by Christian thought then uses the idea of infinity on property as well, the person-less objects of the outside world, and thus believes them to be capable of infinite effort. This is even beyond their natural attributes, as under the influence of man, they gain a new kind of mobility, due to the brand of human intellect and personality being upon them. And so, property becomes more personified, such as technical and intellectual properties, which, to some extent, rise above the objects of the outside world and enter the higher regions of personhood.*"<sup>11</sup>

*Criminal Law*

Balás' research in the field of criminal law is also chronological, and thus historical-comparative as well. He emphasizes in relation to Roman law that its criminal law was based on staticity, much like its private law, but it had no great effect on the criminal law of the modern age. Balás considered this static perspective to be the reason for the small significance of Roman criminal law, and the fact that greater attention was paid to private law (through *iniuria* cases).<sup>12</sup> According to Balás, "*unlike Roman law, medieval law*

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<sup>8</sup> BALÁS 2018, 488–489.

<sup>9</sup> BALÁS 1938, 16.

<sup>10</sup> BALÁS 1940, 9.

<sup>11</sup> BALÁS 1941, 626–627.

<sup>12</sup> BALÁS 1942, 16.

*emphasized the personal perspective, and criminal law was also heavily personalized. Punishments were mostly symbolic, mirroring the crimes. [...] It was not important that there would be a balancing of scales, based on amount or weight, between crime and punishment. Rather, the purpose of punishment was to express that the perpetrator committed a crime, and thus scare other members of society away from committing similar crimes, and to show how someone committing such and such crimes will end up. This greatly symbolic, mirroring manner of punishment is undoubtedly founded upon a personal perspective.*"<sup>13</sup> This does not mean, however, that the element of property did not appear. But this was not in the context of the relationship between crime and punishment, but appeared in connection with the perpetrator. According to *Balás*, the use of the perpetrator for various cruelties rendered him akin to a property or object.<sup>14</sup>

### *Press law*

In relation to press law, *Balás* explained his theory in his work titled "*Radio, copyright, press law*". This theory was mostly tested by him in areas where the radio met with copyright. *Balás* criticized the German legal literature on the subject, he opposed the Kammergericht's<sup>15</sup> view that multiplication only applies to physical objects.<sup>16</sup> He expounded upon the relationship between copyright and press law, their legal construction. According to *Balás*, the two legal fields "*are very close to each other, but are not the same. They are close to each other, because the object of both is intellectual content expressed outwardly and understandable for others. Until the intellectual content manifesting in the human spiritual life does not reach expression, there is no copyright or press law issue to talk of. In order for either of these legal fields to have actual relevance, signs must come into being in the outside world, signs that make it possible for other individuals to understand the intellectual content.*"<sup>17</sup> From this, it can be observed that with regards to their character, both legal fields are influenced by the personal perspective. This becomes apparent to third persons through its relationship with the physical world, and from which originates its utility, utility that can be regulated by law. However, press law does not retain its purely ideal character, as it primarily serves the interests of the economy and market. The property dynamicity intrudes into the regulation at several points, on matters such as liability, legal protection and impinging. *Balás* points out that "*press law and copyright both take into account the objectification of intellectual content, not the inner, non-expressed aspects of spiritual life. [...] In press law, the objective view is found in the special regulatory method of media liability. In places with separate media liability, it is always the case that in essence, they are not making the individual liable for what they wrote, but rather look for who is liable for what is published by the press.*"<sup>18</sup>

<sup>13</sup> BALÁS 1942, 17.

<sup>14</sup> BALÁS 1942, 17.

<sup>15</sup> The Kammergericht is a court of appeal in Berlin, which unlike other similar courts, is not named Landgericht, following Prussian traditions.

<sup>16</sup> BALÁS 2018, 214.

<sup>17</sup> BALÁS 2018, 221.

<sup>18</sup> BALÁS 2018, 223.

*Balás* contrasted the phonograph with the radio, from the perspective that while in the case of the former, the expressed content physically manifests, is recorded in a permanent manner in a physical object, a disc, this is not the case with radio.<sup>19</sup> We can observe similar divergences with relation to cinematography. “*The cinematograph is one of those devices that express thought in such a manner, that the signs expressing it are recorded with a kind of permanency on a physical object, the film, and distribution thus involves the film being produced in multiple copies, and is transmitted to third persons through specific devices, not through direct human senses [...]*”<sup>20</sup> It can be observed that regulations which are connected to personal and property perspectives were compared with each other through contrasting the radio and other forms of expression.

*András Koltay* conclusively remarked that the connection with the whole of press law, that “the work of Elemér Balás P. is unsurpassed to this day in several respects. The author was a multifaceted genius, who was not only active in several different legal fields, but was at the same time a dedicated researcher and a practical expert, whose contribution to academics did not end with his research on the theoretical foundations of press freedom and regulation.”<sup>21</sup> *Vallasek Magdolna* examined the author’s stance with regards to press freedom and censure. She pointed out that *Balás Elemér* does not oppose the view that “in certain circumstances, censure is a legitimate or at least acceptable tool of the state. [...] Elemér Balás P. does not deal in detail with the question “to which extent is censure a legitimate restriction on freedom of speech.”<sup>22</sup> *Klára Gellén* emphasized the following in relation to the right to press correction: “Elemér Balás P. was ahead of his time in seeing the full reality and complexity of press activity, its character and function, the objective behind the institution of press correction, and the factors restricting press activity.”<sup>23</sup> *Vallasek* reached similar conclusions: “Elemér Balás P. is one of the first jurists dealing with press law who examined the regulation of new media, such as the radio.”<sup>24</sup> *Koltay* also recognized the importance of the property-esque character of the press in the life work of *Elemér Balás P.*, and called it a “magisterial work.”<sup>25</sup> Finally, he emphasizes that “which Balás P. wrote, is applicable to internet communication just as much as it was to the press of his own time.”<sup>26</sup>

### Copyright

When it comes to copyright, the personal and property perspective appears in two ways: on the one hand, through copyright’s development as one or the other perspective gained prominence, and on the other hand, through the assessment of current law.

<sup>19</sup> BALÁS 2018, 232.

<sup>20</sup> BALÁS 2018, 227.

<sup>21</sup> KOLTAY 2018, 136.

<sup>22</sup> VALLASEK 2018, 100.

<sup>23</sup> GELLÉN 2018, 17.

<sup>24</sup> VALLASEK 2018, 95.

<sup>25</sup> KOLTAY 2018, 147.

<sup>26</sup> KOLTAY 2018, 154.

In the *Copyright and property dynamism* study found in the Szladits memorial book, Balás examines the property perspective and its dynamism in relation to works created through intellectual activity, beginning with Roman law. With regards to Roman Law, he accepts the position of Kohler and Elster, and emphasizes that “the Romans did not know the importance of intellectual property, neither as an object or a subject of law. But consciously accepting the importance of intellectual property is the *conditio sine qua non* of regulation directed towards copyright protection.”<sup>27</sup> As such, in the Roman era, works were only considered properties, their creative aspect was not legally assessed, this had to wait until the invention of printing.<sup>28</sup> The work always carries the creator’s, the author’s, personality, the assessment of this being the personal perspective. According to Balás, “we can only speak about a work where rules do not provide the content of the activity, but rather the person must fashion this content according to their personality.”<sup>29</sup>

After the advent of printing, the personal opinion, the recognition of the author also appeared, though only in a basic manner. Balás considered this a process of development, in which the personal perspective gained ever greater importance. He pointed out that authors were at first anonymous and thus without personhood. This was followed by the process of individualization, as shown by the author’s name being noted on works.<sup>30</sup> The invention of printing led to a degree of depersonalization between the author and his work. In a similar fashion, the audience was gradually distancing themselves from the author. Balás concluded his assessment of the dynamic property perspective on copyright as follows: “in copyright, the property does not appear due to its own natural attributes (and the consumption capability following from these), but rather only in its capacity as the carrier of an intellectual property. Or alternatively, as an expression of some kind of meaning that is completely alien to the natural character of the property, but as a result of this special meaning, the property is viewed as holding special importance from a legal and economic perspective (independently of its natural character), capable of effecting independent mobility in the market that would not be possible without it expressing this special meaning, if it did not carry an intellectual property. Even in copyright, property appears as an independent, personified, dynamic element.”<sup>31</sup> In the end, he reached the opinion that without the development of property dynamism, copyright would have not appeared at all.<sup>32</sup>

Copyright preceding the Second World War was characterized by dualism. The two copyright-related laws in effect until then did not address the question of personality rights, instead, those were made into law by the consistent practice of the royal Supreme Court<sup>33</sup>, with regards to the Roman Convention.<sup>34</sup> Elemér Balás P. interpreted the mixing of personal and property relations in the following manner as a consequence of the dualism of personality and property rights: “the intellectual property itself [...] demands

<sup>27</sup> BALÁS 1938, 7.

<sup>28</sup> BALÁS 1938, 8. NEUMANN 1895, 988.

<sup>29</sup> BALÁS 1938, 10.

<sup>30</sup> BALÁS 1938, 18.

<sup>31</sup> BALÁS 1938, 24.

<sup>32</sup> BALÁS 1941, 664.

<sup>33</sup> LEGEZA 2017, 150.

<sup>34</sup> BALÁS 2018, 699–703.

*property substratum, property that can be viewed in two ways itself: in a static fashion, as a natural object, and in a dynamic fashion, as a carrier of meaning, which endows the property with independent mobility beyond its natural character, provides it with separate marketability. [...] However, as intellectual property, manifesting from the property substratum, it separated from its author to some extent, it can be multiplied without the assistance of the creator, etc., therefore the property rights of the author do not exclusively cling to him as much as the more intellectual rights, they become transferable. [...].*<sup>35</sup> Balás considered the commercial value of the author's work as a sign of property dynamism, through which it became a product.<sup>36</sup> This transformation made it possible for intellectual property to have independent mobility as a property in commerce.

In relation to copyright, Péter Mezei examined in detail the copyright law proposal of Balás, its system and dogmatics. Mezei also highlighted that the author looked to several international examples, but still used solutions that fitted into Hungarian traditions as well.<sup>37</sup> In relation to the rights connected with the author, Mezei noted that "Balás P. did not tie the protection of rights connected with the author to the duration of the protection of property rights. Thus, his Proposal followed the French dualist example in this regard, and would have provided unlimited duration for the realization of these intellectual interests. Hungarian legislation did not adopt this solution in the end, but [...] followed the German monist direction with specific protection durations."<sup>38</sup> He also highlighted the linguistic novelties of Balás' concepts, which enriched the Hungarian literature on copyright. According to Mezei, the proposal "suggested the use of several excellent terms, and as such, multiplication and dissemination are unavoidable elements of contemporary norms. In other cases, however, his use of expressions remained without reaction. Examples include Balás P. using the term "intellectual creation" (szellemi alkotás) instead of "author's work" (szerzői mű), "intellectual interests" (szellemi érdekek) instead of "rights tied to the person" (személyhez fűződő jogok) "showing originality, and compared to this is individually novel and capable of conveyance" (eredetiséget mutató, s ehhez képest egyénien újszerű és közlésre is alkalmas) instead of "individual, original character" (egyéni, eredeti jelleg), "linguistic creation" (nyelvi alkotás) instead of "writer's/literary work (írói/irodalmi mű), "sale" (értékesítés) instead of "use" (felhasználás), and "indirect acquirement" (közvetett elsajátítás), instead of "adaptation" (átdolgozás)."<sup>39</sup> Alongside Mezei, Tamás Nótári also noted that Balás wanted to evade the work-specific perspective in copyright, and instead moved towards a more general regulatory direction.<sup>40</sup> Mezei assesses Balás' copyright law proposal as "containing reformist views to its fullest extent, from terminology to structure, and most importantly, in its substantive provisions."<sup>41</sup>

<sup>35</sup> BALÁS 1941. 665.

<sup>36</sup> BALÁS 1941. 684.

<sup>37</sup> MEZEI 2018, 45. 47.

<sup>38</sup> MEZEI 2018, 51. LEGEZA 2017, 150.

<sup>39</sup> MEZEI 2018, 46.

<sup>40</sup> MEZEI 2018, 45. NÓTÁRI 2018, 91.

<sup>41</sup> MEZEI 2018, 54.

### *Personality rights*

Only few pieces of legal literature concern themselves with describing personality rights in comprehensive terms, textbooks and other works (*for example Szladits, Fehérváry, Kolosváry*)<sup>42</sup> only examine the protection of personality rights in 1-2 pages. *Alajos Bozóky* examined personality rights in a detailed manner in the Fodor private law book,<sup>43</sup> but he did so when the field had no legal practice, as it was not even recognized legally speaking. Additionally, the rules he explained were based on the teachings of *Gierke*,<sup>44</sup> which he largely borrowed and interpreted in a Hungarian normative context. *Artur Meszlény* only examined normative rules (including judicial practice) in 1931.<sup>45</sup>

In essence, *Elemér Balás P.* was the first to comprehensively examine personality rights and insert them into the Hungarian legal system. It is interesting to note he examined personality rights in a unified manner, when it was only existing in fragments in actual statutory/regulatory law. *Balás* did not mention it explicitly, and it is not self-evident from reading his work, but in most cases, the legal basis of personality rights was not §§. 107-108 of the Hungarian Private Law Code of the time<sup>46</sup>, but other regulations found in the legal system: grounds for divorce, statutory definitions of crimes, copyright. The recognition of personality rights by judicial practice was not given thorough attention, though at the time of the book's publication in 1941, it was already protected by judicial practice on a general basis. It was meritorious of this personality rights system that *Balás* attempted to examine each right individually, with the right to one's name being given special attention, which also has the richest jurisprudence in the Hungarian legal system, and thanks to which personality rights as a whole were eventually accepted by judicial practice. In my opinion, this is the case because it was the first right that could not be clearly decided based on other legal passages. Additionally, the need for redress did not manifest primarily in the context of monetary or other compensation (as opposed to other personality rights), but rather in the prohibition of continued infringement as soon as possible. *The rules of non-pecuniary damages are not found in the personality rights part, because it was a different legal basis than the one protecting intellectual interests.*

However, we do not receive normative information on the right to one's internal likeness, specifically on its contents and potential infringements. Nor did he examine in-depth post-mortem personality rights, even though they were already recognized in legal practice. Despite these issues, the creation of this comprehensive review of personality rights was indubitably a meritorious accomplishment for *Elemér Balás P.*. His work provided great assistance to the judicial practice of his time, in a similar fashion to the "Nagy-Szladits" which served as a basis for judicial practice in lieu of the private law code.<sup>47</sup> Even more so, *Balás'* theory of personality rights, his observations on the subject, continue to influence legal literature to this day, and even has influence on newer judicial practice.<sup>48</sup>

<sup>42</sup> SZLADITS 1933. FEHÉRVÁRY 1942. KOLOSVÁRY 1944.

<sup>43</sup> BOZÓKY 1901.

<sup>44</sup> GIERKE 1895.

<sup>45</sup> MESZLÉNY 1931.

<sup>46</sup> Magyarország Magánjogi Törvénykönyve, 1928 [Private Law Code of Hungary of 1928].

<sup>47</sup> The name of the 6-volume private law work that was published by Grill and edited by Károly Szladits.

<sup>48</sup> BDT 2018. 78.

In Balás' opinion, personality rights are exclusively ruled by the personal perspective, they do not possess property characteristics. "*However we conceive of the personality, the notion that it does not belong to the outer world is correct.*"<sup>49</sup> Although the personality has an effect on the outside world, and manifests within it, Balás states that: "*it is never these outward manifestations that are the objects of personality rights protection, but always the personality itself, in its above-empiric character.*"<sup>50</sup> Trademarks and brand names, as objects of the outside world, fall under a property perspective, through their primary function as signifying the company and the product. In the case of using personal names for such purposes, or for the purposes of marketing, the name leaves its above-empiric character, it is objectified, and enters into a close relationship with the objects of the outside world. Balás believed that such property-centric transformations of the name fall under not personality rights, but competition law (or potentially, trade law).<sup>51</sup>

It seems Balás' opinion on the subject has already been surpassed. There is a tendency towards interpreting personality rights as not only protecting personal, intellectual interests, but interests related to property as well, and thus these interests, and the property perspective connected to them, cannot be classified away into the realm of competition and intellectual property law. In the case of competition law, it is because the infringements of personality rights in the 21st Century do not typically occur between competitors. As for intellectual property law, it is because the legal objects of the personality rights that have become objectified still retain a strong connection to personalities. It was for this reason that German and Austrian jurisprudence have accepted the inheritability and limited marketability of personality rights.<sup>52</sup> It was for this reason that I have encouraged the acceptance of a property personality right that combines the property and personal perspective, as the subjective right of objectification-based property personality protection.<sup>53</sup> The dominant German position, based on Götting<sup>54</sup> is that, as also followed by Austrian jurisprudence.<sup>55</sup> Property and personal relations mix inside personality rights, in a similar fashion to copyright, while Beuthien believed that personality products with a property value are completely subjugated by property dynamics.<sup>56</sup> In contrast, I am of the opinion that only a slice of the personal sphere can be separated from the above-empirical character with regards to the objectifiable personality traits, while in other respects and in fundamental character, personality rights do not support a property perspective.<sup>57</sup>

In the Balás memorial book, personality rights were unfortunately only examined in the context of a study on the right to one's image, but not in a comprehensive context. Zsolt Konkoly highlighted the "dualist concept" of the right to one's image in *Elemér Balás P.*' work, the concept of the physical image that pays respect to the human bodily dimension,

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<sup>49</sup> BALÁS 1941, 624.

<sup>50</sup> BALÁS 1941, 625.

<sup>51</sup> BALÁS 1941, 646, 648, 652, 655, 656.

<sup>52</sup> NJW 2000, 2195 – Marlene Dietrich; BGH NJW 2000, 2201 – Der blaue Engel; SZ 2010/70 – Maria Treben

<sup>53</sup> SCHULTZ 2019, 126.

<sup>54</sup> NJW 2000, 2195 – Marlene Dietrich; GÖTTING 2001, 585.

<sup>55</sup> OGH SZ 2010/70 – Maria Treben.

<sup>56</sup> BEUTHIEN 2003, 1220.

<sup>57</sup> SCHULTZ 2019, 117–120.

and the metaphorical (internal) image”<sup>58</sup>, which did not appear in the works of his contemporaries in such a form. *Konkoly* called this *Balás*’ own theory.<sup>59</sup> In truth, he borrowed this concept from German law. This can be seen in the work he wrote on personality rights.<sup>60</sup>

The concept of the internal image is a product of German legal literature in the 20s and 30s. This is also called the “life-image” (*Lebensbild*), which expression later became commonly used. The definition of “life-image” did not go through German judicial practice either in such a way. It lives on as part of the statutory definition of the general infringement of post-mortem personality rights, as the “*unlawful distortion of the departed’s life-image*.”<sup>61</sup>

### *Competition law*

*Balás*’ most expansive and detailed work on the subject concerns competition law, in relation to which he examined the essence of “good morals” on a theoretical, statutory/regulatory and practical level as well. He considered the law’s prerequisite to be capitalism, as only in capitalism does property gain independent mobility, and competition law protects and supports this independent movement of the property.<sup>62</sup> “*The personal element may only appear in system-compliant competition insofar as it relates to the proper expression of the products’ concrete advantageous qualities, to rousing the interest of the consumers, and to provide them with the necessary information.*”<sup>63</sup>

*Balás* separated property and personal morals, and in relation to the predominance of the property element, he highlights that “*the central nature of the property can only be possible alongside certain moral behaviors, namely, if the property element is realized unadulteratedly and entirely.*”<sup>64</sup> He examined this individually for each private law statutory definition of competition law (false praise of products, impinging, imitation, denigrating fame and credibility, snowball-contract, exposing or unlawfully utilizing business or industrial secrets), including business bribery as well. In his opinion, all of these definitions shared a common element in the moral character of property, and disagreed with *Ulmer*<sup>65</sup> in this context, who believed that it is not possible to find a common ground for the whole of competition law and its individual statutory definitions.<sup>66</sup>

All private law statutory definitions of competition law thus protect the moral character of property, and are thus objective, and only support the independent, person-lacking movement of the product (property), even if the personal element appears to manifest in them. This personal character is only illusory, and serves the dynamism of property. “*The false praise of products appears to have a property-esque fact residue, while the fact residue of impinging appears to reflect on personal attributes: name,*

<sup>58</sup> KONKOLY 2018, 39–40.

<sup>59</sup> KONKOLY 2018, 39.

<sup>60</sup> BALÁS 1941, 639.

<sup>61</sup> BGHZ 50, 133 – Mephisto; NJW 1990, 1986 – Emil Nolde.

<sup>62</sup> BALÁS 1940, 19.

<sup>63</sup> BALÁS 1940, 19–20.

<sup>64</sup> BALÁS 1940, 28.

<sup>65</sup> ULMER 1932.

<sup>66</sup> BALÁS 1940, 63.

*company, etc. However, the personal character immediately disappears, or is forced into the background, if we examine the fact residue closer, and determine that persons are only involved insofar as they act in relation to their business enterprise. And the business enterprise, by definition, is the negation of personhood: the enterprise is a function of commerce, without regards to the relations of elements serving this function, and thus also without regards to the person of the owner.”*<sup>67</sup>

Based on the analysis of statutory/regulatory law and legal practice, Balás concluded that courts use the terms of business competition and unfair competition correctly. He mainly related this to the Swiss and German laws and legal practice, and specifically criticized the German system. He furthermore highlighted that from a property perspective legal practice placed too much emphasis on the prohibition of comparative advertisement.<sup>68</sup>

He concluded that the essence of business competition lies in that the property perspective is predominant, properties compete with each other, the personal perspectives are not directly connected to the subject.<sup>69</sup>

Balás consistently reinforced his opinion in his studies on the mutual interaction of personal and property elements in competition law. An opinion which he later expressly detailed, that property interests relating to personalities must be separated from personality rights and dealt with in the context of competition law, within statutory/regulatory law. Furthermore, it is probable that this idea came to him from competition law itself, as he expressed this view even before he expounded upon any kind of theory relating to property perspectives. The degradation of the personal element, the objectification, chiefly appeared in trademarks and brand names, in relation to the statutory definition of servile imitation (character-impinging). The goal of the legal institution is to signify the company and the product. Here, the watershed question is whether the personality right fully objectifies itself and thus is only tied to property dynamism, or if the objectification is only partial, and the relationship with personality rights is still extant.<sup>70</sup>

#### *The utility of personal and property perspectives in contemporary times*

We can see the expansion of the personal perspective on property elements in that animals were removed by the Hungarian legislature from the definition of property, and accomplishes their protection through expansive definitions.<sup>71</sup> However, we can also observe developments in the opposite direction if we examine the monetary value and commerciality of personality rights. In this regard, the property element intrudes into the most personal rights defending personality, and opens them up for competition and commerce.

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<sup>67</sup> BALÁS 1940, 31–32.

<sup>68</sup> BALÁS 1940, 62.

<sup>69</sup> BALÁS 1940, 63.

<sup>70</sup> KUNCZ – BALÁS P. 1924. 42. From the judicial custom: K. IV. 1753/1939. K, P. IV. 3967/1937.

<sup>71</sup> Act V of 2013, Section 5:14. paragraph 3.

With regards to copyright, monism<sup>72</sup> is penetrated by the property perspective, and the legislator makes it possible to transfer property rights. These are typically the cases, in which the author is forced into the background, the personal quality is rudimental. These include software<sup>73</sup>, databases<sup>74</sup> and works created for marketing.<sup>75</sup> We can observe a similar dynamic in works created in relation to employment contracts, where property rights transfer to the employer.<sup>76</sup>

Artificial intelligence represents similar challenges in relation to intellectual property law, and private law in general, as the human subjectivity, sensibility and expression of intent are all reflected in the actions of the artificial intelligence, and this touches upon the basis of private law, the capacity to act, and the personality of the author. *Balás* hypothetically would say that the expansion of the personal perspective beyond humans not only touched businesses (legal persons), but extended beyond to animals, and the artificially thinking, independently willed artificial intelligences as well.

*Balás* correctly seized the essence of competition law, but the personal element intrudes into it even today, as celebrities are incorporated into advertisement, which led to personality rights falling under a property perspective in Germany.<sup>77</sup> This is the case as well for influencers. The *customer to customer* advertisement is based on a personal character, but it is subjugated to the dynamic property perspective, serving the product.<sup>78</sup>

From this, it can be seen that *Elemér Balás P.* developed a dualistic societal perspective that stands the test of time even with the challenges of today's technology, which can be described through this perspective just as well.

### Conclusion

Based on the different professional directions manifesting in the work of *Elemér Balás P.*, he is rightly called the last Hungarian legal polymath. *Balás* is not only considered one of the greatest Hungarian jurists because of his contributions to social sciences, as well as the dynamic property and personal perspectives he pioneered, but also because of his dogmatics-organizing work on the various individual legal fields, which continue to hold much importance to this day.

The legal genius of *Elemér Balás P.* can be characterized as follows:

He was on the one hand, deeply practical, not only a theoretical expert, so he always took into account the needs of his current era, society, economy and technology, and adjusted the law to them. This is otherwise very characteristic of the Szladits school of jurists, and appears in the work of *Elemér Balás P.* as well. On the other hand, he was characterized by his theoretical perspective, his ability to organize, which did not stand

<sup>72</sup> Act LXXVI of 1999, Section 9 paragraph 1 (Szt. in the following).

<sup>73</sup> Szt. Section 58 paragraph 3.

<sup>74</sup> Szt. Section 61 paragraph 2.

<sup>75</sup> Szt. Section 63 paragraph 1.

<sup>76</sup> Szt. Section 30 paragraph 1.

<sup>77</sup> NJW 1992, 2084 – Joachim Fuchsberger.

<sup>78</sup> See for example the Competition Authority's #GVH#Adequacy#Opinion-leader guidance. [http://www.gvh.hu/data/cms1037278/aktualis\\_hirek\\_gvh\\_megfeleles\\_velemenyezer\\_2017\\_11\\_20.pdf](http://www.gvh.hu/data/cms1037278/aktualis_hirek_gvh_megfeleles_velemenyezer_2017_11_20.pdf) (downloaded: 20.03.2020.).

alone, but was synthesized with practical needs. Thirdly, his examination, assessment and often critique of foreign legal models can also be highlighted. This is shown by how he published in several languages himself. Fourthly, his ability to see into the future, and his need to address the legal challenges of the future are also notable: his sensitivity to new technologies, and his decision to place them at the centre of legal examination. Fifthly, the organic nature of his work, the respect for Hungarian legal traditions, including the constantly evolving legal language.

Based on these particularities, we must agree with *András Koltay*, according to whom *Elemér Balás P.*' work is not only a curiosity of legal history, but is also a repository of valuable legal statements and observations that can be used even today,<sup>79</sup> knowledge that will be cherished as part of Hungarian law forevermore.

### III. His selected works

*A sajtódeliktum.* [*The press delictum.*] Pallas, Budapest, 1922.

(KUNCZ ÖDÖN – BALÁS P. ELEMÉR) *A tisztességtelen verseny.* [*The unfair competition.*] Politzer Zsigmond. Budapest, 1924.

*A tisztességtelen verseny büntetőjoga.* [*The criminal law of unfair competition.*] Váci Kir. Orsz. Fegyint. Budapest, 1924.

*Rádió, szerzői jog, sajtójog.* [*Radio, copyright, press law.*] Publication of the Sajtó. Budapest, 1927.

*Szerzői jogi reformtörekvések.* [*Reform attempts in copyright.*] Publication of the Sajtó. Budapest, 1927.

*Kártérítési sajtójog.* [*Compensation in press law.*] Polgári Jog 1930, 501–514.

*Az okozatosság büntetőjogi problematikája.* [*The criminal law problem of causality.*] Publication of the Hungarian Academy of Sciences. Budapest, 1936.

*Szerzői jog és dologi dinamizmus.* [*Copyright and property dynamism.*] In: Emlékkönyv dr. Szladits Károly tanári működésének 30. évfordulójára. Grill. Budapest, 1938. 3–24.

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*A modern perjogi tudomány fejlődési iránya.* [*The developmental direction of modern litigation science.*] In: Emlékkönyv Kolosváry Bálint dr. jogtanári működésének 40. évfordulójára. Grill. Budapest, 1939.

*Dinamikus dologi szemlélet a magánjogban. A versenyjog alapproblémája.* [*Dynamic property perspective in private law. The fundamental problem of competition law.*] Magyar Jogászegyleti Értekezések 1940. 37–100.

*Személyi és dologi társadalomszemlélet.* [*Personal and property societal perspective.*] Társadalomtudomány, 1940. 129–156.

*Személyiségi jog.* [*Personality rights.*] In: Szladits Károly (ed.): Magyar magánjog I. Grill. Budapest, 1941. 624–663.

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<sup>79</sup> KOLTAY 2018, 135.

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- Személyi és dologi szemlélet az anyagi büntetőjog és a perjog fejlődésében.* [*The personal and property perspective in the development of substantive criminal law and litigation.*] In: Eckhart Ferenc – Degré Alajos (eds.): Emlékkönyv dr. viski Illés József ny. r. egyetemi tanár működésének 40. évfordulójára. Stephaneum. Budapest, 1942. 15–32.
- A Széchenyi-Kossuth-ellentét hírlapi vitájuk tükrében.* [*The Széchenyi-Kossuth conflict in light of their debate in newspapers.*] Kolozsvári Magyar Királyi Ferenc József Tudományegyetem. Kolozsvár, 1943. 1–230.
- Perszemlélet és kriminálpolitika.* [*Perception of litigation and criminal policy.*] Academic inauguration speech. Budapest, 1947.
- Törvényjavaslat a szerzői jogról.* [*Law proposal on copyright.*] Magyar jogászegylet. Budapest, 1947.

Full list of Elemér Balás P. ' works:

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BÉLA RÉVÉSZ

## ISTVÁN BIBÓ\*

(1911–1979)

### *I. Biography*

When examining István Bibó's relationship with Szeged, different periods can be considered.<sup>1</sup> In 1925, the appointment of his father as director of the Szeged University Library made the then 14-year-old son a resident of Szeged. This period came to an end a decade later, after his doctorate, his various study trips to Europe and the death of his father in 1935. If we take into account his affiliation to the University of Szeged, this marks a new era of his 'Szegedness'.<sup>2</sup> Accordingly, his student status began in 1929 and lasted until 1934, but in June 1940 he was habilitated as a tutor at the University of Szeged, and then followed the university back to Kolozsvár, although he had been working at the Ministry of Justice since December 1938. After the Second World War, he was moved back to Szeged, where the Minister of Religion and Public Education appointed him the head of the Department of Politics as an ordinary public lecturer in August 1946. He held this status until September 1950, when the Ministry relieved him of his duties and transferred him to the reserve staff. But his connection to Szeged in the broadest sense can be said to be, above all, of an intellectual nature. The "Szeged School of Legal Philosophy"<sup>3</sup> created by Gyula Moór and Barna Horváth had an inspiring influence on the formation of his academic thought from the time he was a student. He always considered his membership to this neglected moral and intellectual community – as is clear from his correspondence with his fellow academic and fateful friend József Szabó<sup>4</sup> – genuine. As István Szentpéteri said: "In addition to Szeged's increasingly renowned university, some of the youth movements and organizations that

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\* Translated by Réka Brigitta Szaniszló, PhD candidate at the University of Szeged, Faculty of Law and Political Sciences.

<sup>1</sup> Main literature used for István Bibó's biography: KENEDI JÁNOS: *Bibó István életrajzi adatai [Biographical Data of István Bibó]*. In: *Bibó István összegyűjtött munkái*. 4. köt. [Collected works of István Bibó. Vol 4] Press release by: Kemény István és Sárközi Máttyás. Bern: Európai Protestáns Magyar Szabadegyetem. 1981. furthermore: *Bibó-émlékkönyv II. [Bibó Memorial Book II]* Budapest, Századvég, 1991. HUSZÁR 1986. HUSZÁR 1989. LITVÁN – S. VARGA 1995. H. SZILÁGYI 1992.

<sup>2</sup> Major literature dealing specifically with the relationship between *Bibó* and Szeged: RUSZOLY 2014. RUSZOLY 2012. SZABADFALVI 2013, 1–2. SZABADFALVI 2011 SZENTPÉTERI 1989. SZENTPÉTERI 1989, 3.

<sup>3</sup> RÉVÉSZ 2017.

<sup>4</sup> RÉVÉSZ 2016.

embodied civic progress were nationally known and recognized. István *Bibó* lived and was formed in this environment during the years when the characteristic traits of his personality began to emerge.”<sup>5</sup>

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“István *Bibó* did not write an autobiography.” At least this is how Tibor *Huszár* explained in the introduction to his 1989 volume why it was necessary to bring to public attention all the documents, fragments, biographical conversations that could fill this gap.<sup>6</sup> An autobiography for the public can indeed be seen as an imperfection from the *Bibó* oeuvre. But since he spent almost the entire period of his employment as a public servant, he was obliged by bureaucratic requirements to write his biography permanently, and his application for a wide variety of grants and scholarships required him to compile his life story. It is another matter to ask what has been preserved in the various archives.

The archival discipline is probably the strictest in the records of any secret service. Thus, since István *Bibó* was a “target” of the state security agencies from the time of the proceedings initiated against him on 23 May 1957 for its role during the revolution until his death<sup>7</sup>, his biography, written at the beginning of the proceedings, was kept in the most secure place. At his first interrogation on 24 May 1957 – his occupation was described as “bookkeeper (former Minister of State)” – the Major of the Political Investigation Department of the Ministry of the Interior<sup>8</sup> asked him to present his curriculum vitae. What was said at this time is safely preserved for posterity in the minutes and the archives of the Ministry of the Interior.<sup>9</sup>

“I was born in Budapest in 1911. My father was a librarian and museologist. In 1925 my father was appointed library director in Szeged. I graduated in Szeged in 1929, and in 1933 I received a doctorate in law and political science. With the Magyary scholarship, I spent a year studying in Vienna and then in Geneva. In August 1934 I was appointed as a clerk at the Budapest Court. In 1938, I was assigned to the Ministry of Justice, where I worked in the Legal Opinions Department. From 1935 I was connected to the youth circle of the March Front. At the meeting held in 1937 or 1938, I was a founding and supervisory committee member of the people’s front-covered organization “Mix” [sic! - MIKSZ:

<sup>5</sup> SZENTPÉTERI 1989, 42.

<sup>6</sup> HUSZÁR 1989, 5.

<sup>7</sup> GYARMATI 2013, 1.

<sup>8</sup> József *Bodrog*, the first investigating officer in the case against István *Bibó*, had worked in the police since 1945, and from 1948 at the State Protection Authority. From 1957 he was Deputy Head of the Political Investigation Department of the Ministry of the Interior, but he conducted the interrogation of István *Bibó* as a major in the Investigation Department. In 1962 he was removed from the Ministry of the Interior on disciplinary grounds, and two years later he was appointed head of the Administrative Department of the Hungarian Cable Works. Állambiztonsági Szolgálatok Történeti Levéltára Állambiztonsági archontológia [Historical Archives of the State Security Services State Security Archaeology] [https://www.abtl.hu/ords/archontologia/f?p=108:1- Downloaded on 03.12.2019.]; HORVÁTH 2013, 1–2.

<sup>9</sup> Jegyzőkönyv *Bibó István* 1. kihallgatásáról [Minutes of the first hearing of István *Bibó*]. Budapest, 1957. május 24.-én. BM II: Főosztály VIII. Osztály. *Bibó István és társai*. ÁBTL 3.1.9. V-150003/34. The part of the testimony published here is taken from pages 28-29 of the minutes, since the text first published in the volume *A fogoly Bibó István vallomása az 1956-os forradalomról* [*The Testimonies of the Prisoner István Bibó on the 1956 Revolution*] (edited by Katalin S. Varga, Budapest, 1996) differs from the original minutes in some points.

Művészek, Írók, Kutatók Szövetkezete {Artists, Writers, Researchers Cooperative} – R. B.]. On 16 October 1944, I was arrested by the Arrow Cross in the Ministry of Justice for left-wing conspiracy and issuing anti-Jewish identity cards, then I was handed over to the Gestapo, which sent me back to the Ministry of Justice, where I was set free by the Arrow Cross minister. During my arrest, I was interrogated by an Arrow Cross leader of the Justice Department named *Szatmári*. My interrogation concerned the exemption certificates, why I had issued them. I spent the siege in Pest, at 28 Ráday Street. Liberation caught me in Budapest on 15 January 1945. At the end of February 1945, I was called to public administrative work in the Ministry of the Interior established in Debrecen. I took part in the democratic reorganization of the public administration, in the work of the preparation of the internal law, especially in the preparation of the electoral law of 1945 and its technical implementation. From December 1945 to the summer of 1947, I was engaged in political journalism in several articles, mostly published in the newspapers *Valóság* and *Válasz*, in which I argued in favor of a people's front, coalition democracy and against the one-party system. In the summer of 1946, I was appointed by the government as an ordinary public lecturer of constitutional and public administration studies at the Faculty of Law of the University of Szeged. In 1947, in addition to the university teaching position, I was appointed Vice President of the Institute of East European Studies. This post was abolished in the autumn of 1949 with the reorganization of the Institute. In the autumn of 1950, I was appointed to the reserve staff as a university lecturer. In January 1951, I was appointed librarian at the University of Budapest and subsequently promoted to the post of library researcher.

After 1948 I did not engage in political journalism. I have been a member of the National Peasant Party since 1945, and my last political activity was to make speeches for the National Peasant Party in rural towns, Szekszárd, Kaposvár, Nagykanizsa, Zalaegerszeg, at intellectual meetings during the 1947 elections. During the period following the elections until 30 October 1956, I did not engage in political activity. On 30 October 1956, I was elected a member of the NPP [Nemzeti Parasztpárt {National Peasant Party} – R. B.] Steering Committee in my absence. On the afternoon of 2 November 1956, at a joint meeting of the NPP leadership, I was nominated as a minister on a conditional basis in case the Peasants' Party should be given a second ministerial portfolio. I was appointed Minister at noon on 3 November 1956, but I did not enter the Parliament until the next day at dawn, on-call, and left at noon on 6 November.”

The interrogation report accurately reflects the understandably defensive nature of Bibó's testimony. The emphasis on his involvement in the Ministry of Justice's actions to save Jews<sup>10</sup>, the details of his persecution by the Arrow Cross, and the evasion of the repeatedly voiced theme of the danger of dictatorship during the coalition period, were all intended to counter the probable accusations that would have been presented to him in the Imre Nagy trial verdict: “a determined, extremist representative of the bourgeois restoration.”<sup>11</sup>

<sup>10</sup> For the activities of the Ministry of Justice led by Gábor *Vladár* during the *Lakatos* government (29 August 1944 – 16 October 1944) – including the role of István Bibó – see RÉVÉSZ 2019, 137–152. DÉNES 2013, 4.

<sup>11</sup> *Ítélet Nagy Imre és társai bűnperében. Az Igazságügyminisztérium közleménye a Nagy Imre és társai ellen lefolytatott büntető eljárásról* [Judgment in the Trial of Imre Nagy and Others. Ministry of Justice Statement on the Criminal Proceedings against Imre Nagy and his Associates]. Az MTI jelenti. Népszabadság, Issue on 17 June 1958, 3.

If, however, we look not at his testimony, which was written for “official use”, but as the details of his (auto)biographies,<sup>12</sup> written many times and in many different ways, we clearly see a picture of a committed intellectual, who intended to put himself at the service of scientific research.

Although István *Bibó* did not become a member of the Szeged Young Art College during his university years,<sup>13</sup> nor did Ferenc *Erdei*, they maintained good relations through their good friend, Béla *Reitzer*, who worked diligently in the enthusiastic and proactive society led by György *Buday*, in “the enhancing community”, as Miklós *Radnóti* called them.<sup>14</sup> His academic interest developed during his university years in Szeged, especially when he had lectures on legal theory by Barna *Horváth* and international law by László *Búza* and he had the possibility to work in their seminars for several years. In 1933 he obtained a doctorate in law and in 1934 a sub auspiciis doctorate in political science. He spent the academic year 1933/34 in Vienna. He attended lectures on legal theory and international law given by Alfred *Verdross* and had the opportunity to read his works at *Verdross*’ seminars. In 1935, with special paid leave and a state scholarship of 2,280 pence, he attended lectures on political history by Guglielmo *Ferrero* and on international law by Paul *Guggenheim* and Hans *Kelsen* at the Institut Universitaire des Hautes Études Internationales in Geneva. His first major work on international law, the Szankciók kérdése a nemzetközi jogban [Question of Sanctions in International Law], was published in 1934,<sup>15</sup> followed in 1935 by his important study on legal theory, A kényszer, jog, szabadság [Coercion, Law, Freedom].<sup>16</sup> In October of that year, he participated in the second congress of the Institut International de Philosophie du Droit et Sociologie Juridique, commissioned and supported by the University of Szeged, and in Budapest, he was elected a member of the Hungarian Society for the Study of Law and Social Sciences, of which he later became a clerk.

In 1934, he was removed as a law clerk at the Budapest Court of Justice, then as a court clerk, he was transferred to the Ministry of Justice, where he was mainly engaged in drafting legal opinions until 16 October 1944.<sup>17</sup> Little is known of his official work, and few records of his service have survived. “While the external life history suggests the figure of a middle-class young man embedded in the existing power structures, the letters he wrote in these years reveal the figure of a radical social reformer deeply dissatisfied with the status quo and seeking an active political role.”<sup>18</sup>

In June 1936, he was again granted special leave, because of having been awarded a Carnegie Fellowship by the Académie de Droit International in The Hague. At the summer open university on international peace, he attended, among others, the lecture by Dag *Hammar-skjöld*, who later became the second Secretary-General of the United Nations.

<sup>12</sup> Supra note 1.

<sup>13</sup> The Szeged Youth Art College was a youth grouping formed in the 1930s, mainly of students of the Faculty of Arts, with a scientific and artistic objective. They are also credited with setting up the first organized college village study group. CSAPLÁR 1967.

<sup>14</sup> PÉTER op. cit.

<sup>15</sup> BIBÓ 1990, 5–52.

<sup>16</sup> BIBÓ 1935.

<sup>17</sup> RÉVÉSZ 2018.

<sup>18</sup> KOVÁCS 2004, 299.

In June 1940, the Faculty of Law and Political Sciences of the University of Szeged habilitated him as a private tutor in legal philosophy, but his habilitation was transferred to the University of Kolozsvár, where he gave private lectures on legal philosophy of the 20<sup>th</sup> century in the second half of the academic year 1941/42. He applied for the chair of Social Theory at the Faculty of Humanities of Pázmány Péter University in Budapest and prepared a syllabus and timetable for four semesters. In addition to general sociology, the draft, which was divided into major and specialized colleges of social theory, included topics such as: “The history of the national idea and the social theory of the national community”; “The social function of the elite”; “The social theory of Marxism”; “The development of European society and the Christianity”, and sociological issues of Hungarian society: “The Hungarian peasant-society”; “The social ideal of the gentleman and the position of the gentry in society”; “The social theory of the minority question”; “The social role of public administration in the Modern Era”, etc. However, his draft was not accepted by the Faculty of Humanities, and the chair was filled by someone else. At the University of Kolozsvár, he gave private lectures on the theory of legal sources and the majority of social power (plurality) and the separation of state powers in the second half of the academic year 1943/44.<sup>19</sup> He also gave lectures regularly at the Györfly College: in February on the crisis of the birth order, in March on the gap between democratic and fascist Europe, etc. He drafted a petition for a pardon for Ferenc *Erdei*, who was sentenced to two months’ imprisonment, and through his intervention *Erdei* had his sentence reduced.<sup>20</sup> Co-editor of the Magyar Jogi Szemle [Hungarian Law Review], which he resigned from for reasons of principle after the German occupation of Hungary. He prepares a “Draft Peace Offer” to remove obstacles to resistance to the Nazis.<sup>21</sup> This document, containing a description of the situation and a program of action, sees the principal obstacle to the broadening of resistance is the mutual fear of the working and middle classes, but because of the difficulties of reproduction the distribution of this document is prevented. On 16 October 1944, he was arrested at the Ministry of Justice for left-wing behavior and for issuing exemption certificates, then he was handed over to the Germans, who returned him to the Hungarian authorities a few days later, and he was soon released.

His friend Ferenc *Erdei*, as Minister of the Interior of the Provisional National Government in Debrecen, wrote a letter to the Prime Minister at the end of February 1945, requesting that István *Bibó* be transferred from the Ministry of Justice’s reserve staff to the Ministry of the Interior as a Ministerial Advisor. After the government moved to Budapest, he took over the Department for the Preparation of Legislation. Together with Ferenc *Erdei*, they worked on the reform of the county system,<sup>22</sup> and he was the National Peasant Party’s delegate to the Legal Reform Committee.<sup>23</sup> He was a key participant in the preparation of the electoral law and the November 1945 elections. Opposed to the

<sup>19</sup> The latter lecture series already indicates his growing interest in public law, political science, including democracy, the separation of powers and current affairs.

<sup>20</sup> TÓTH 1986.

<sup>21</sup> Hungarian Academy of Sciences Library manuscript catalogue, Ms 5109/225–226. First communication: SZILÁGYI 1983, 12.

<sup>22</sup> GYARMATI 1989, 34. Written version of a lecture given at the Móra College in Szeged in the spring of 1989.

<sup>23</sup> The so-called Legal Reform Commission, a coalition-based advisory body to the Council of Ministers, was primarily intended to prepare the organizational reform of the public administration. GYARMATI 1991, 139.

official opinion he was against the expulsion of Germans in Hungary.<sup>24</sup> For the next three years, he gave lectures on political theory, the political situation, state life and public administration in various cities of the country, at the invitation of various social organizations, almost every two weeks<sup>25</sup>.

After the interruption in the legal continuity of the Franz Joseph University in Kolozsvár, the reorganization of the Faculty of Law in Szeged started between June and September 1945. Politics remained one of the sixteen departments authorized by the government. At the Faculty Council meeting on 4 December 1945, the Faculty proposed the appointment of István *Bibó* to the chair. *Bibó* was then a ministerial adviser and later head of a department at the Ministry of the Interior. For this reason, and also because of the lengthy appointment procedure, *Bibó* did not start teaching in the first post-war academic year in Szeged. In the spring of 1946, the University of Debrecen also invited *Bibó* to take up the vacant head of the Department of Politics at the University of Debrecen. In his response that he does not accept the position, he referred to the importance of his position at the Ministry of the Interior, but he mostly rejected the opportunity because of the invitation from the University of Szeged<sup>26</sup>. In July, he left the Ministry of Interior to become a professor at the Faculty of Law and Political Sciences at the University of Szeged. His return was welcomed by a warm letter adopted at a meeting of the Faculty of Law: "It is true that it is a good and great task to be active in an important – one might say key – position in the life of the state. But if it is true that the power of love is a more enduring value than the love of power, then there is nothing more beautiful and uplifting than the academic vocation, which is essentially a vocation of devotion and giving."<sup>27</sup> As a public ordinary lecturer at the university in the academic year 1946/47, *Bibó* took over the five-hour-per-week lectures on politics at the main college. His two-hour-per-week minor courses: Introduction to Political Science and The Problems of Democracy were closely linked to the Department's teaching profile, but as a substitute, he also taught international law temporarily.

At the beginning of 1947, he gave his inaugural lecture at the Academy of Sciences entitled The Separation of Powers, Then and Now. In September, the Minister of Religion and Public Education entrusts him with the position of Vice President and Director of the Pál *Teleki* Institute of Eastern European Studies, established in 1941, and appoints him Director of the Institute of Social Sciences. During this period, he is permanently released from his teaching duties in Szeged, he is substituted in lecturing and examinations at the main college, but he continues to lecture at the minor colleges and perform other university duties. Thus, *Bibó* continued to give lectures on Freedom, Representation, Self-Government (1947/48, Semester I), Legitimacy (1947/48, Semester II), Modern Theories of the State (1948/49, Semester I), The Development of European Nations and the Nationality Question (1948/49, Semester II), and Administrative Territorial Planning (1949/50, Semester I).

In September 1949, the East European Institute of Science was abolished and his appointment as Director and Vice-Chairman came to an end. In mid-November, he was

<sup>24</sup> FÜLÖP 1977, 12. KUPA 2016.

<sup>25</sup> According to his own records, he gave a total of 86 lectures between 1945 and 1948. LITVÁN – S. VARGA 1995, 334–338.

<sup>26</sup> For correspondence with the University of Debrecen, see HUSZÁR 1898, 331–332.

<sup>27</sup> RUSZOLY 2014, 458.

downgraded from a corresponding member of the Academy to a “consultative member”. During 1949, György *Antalffy* was accepted by the Hungarian Scientific Council<sup>28</sup> as a public extraordinary lecturer in the Department of Politics and was appointed as a professor to Szeged from 1 February 1950.<sup>29</sup> In September of the same year, György *Antalffy*, now Dean of the Faculty of Law, invited Bibó to submit his application for retirement. A month later, he was transferred to the reserve staff of the University of Szeged, and his post was terminated on 31 December.<sup>30</sup> From the beginning of the following year, he was employed as an independent librarian at the University Library in Budapest.<sup>31</sup> His employment officially lasted until the end of 1958. After the publication of his study on the Jewish question in 1949<sup>32</sup>, he had no publications in Hungary until 1973.

Today, the most interesting part of his biography is not related to his academic activities, but to his reengagement in 1956, and more specifically to his role in the government of Imre *Nagy*.<sup>33</sup> On 30 October 1956, he took part in the reorganization of the National Peasant Party, and from 1 November under its new name, the Petőfi Party. On 2 November, the party nominated him as a minister in the new, third Imre *Nagy* government, thus he was appointed Minister of State on 3 November. On 4 November, together with Zoltán *Tildy*, he negotiated with the Soviet troops occupying the National Assembly building, and on the same day, he issued a proclamation as the only representative of the legitimate government. He left the building only on 6 November and was relieved of his duties by István *Dobi*, President of the Presidential Council, on 12 November, when the Imre *Nagy* government was dismissed. The Budapest Central Workers’ Council adopted his draft as the basis for their negotiations with the Kádár government<sup>34</sup>. In early December, *Bibó* held talks with Indian Ambassador K. P. S. Menon and presented him with a document entitled Declaration on the Principles of the State, Social and Economic Order of Hungary and the Path of Political Expansion<sup>35</sup>. Between February and April 1957, he drafted a study entitled *Magyarország és a világhelyzet* [*Hungary and the World*], which he managed to get to London, where it was published.

After the collapse of the revolution, it seemed for a moment that there was a chance for his peaceful return to the University of Szeged. At least this is what is revealed in a letter sent

<sup>28</sup> According to the resolution of the Secretariat of the Hungarian Working People’s Party adopted at its meeting of 1 July 1948, “The care of popular democracy for high culture is almost symbolized by the measure of the three-year plan to establish a National Scientific Council, whose task is to direct the scientific reconstruction and to unify the management of the scientific institutes. In this supreme scientific body, the idea of self-government of science on the one hand, and unity of science and nation on the other, is realized. The development of science is a matter for the scientists, but also for the nation, and for this reason a body should be established for the management of science, which, alongside the government, will manage the affairs of Hungarian science with the highest authority in the interests of the whole nation.” A Központi Vezetőség Értelmiségi Osztályának javaslata Magyar Tudományos Tanács létesítésére [Proposal of the Intellectual Department of the Central Executive Committee for the establishment of a Hungarian Scientific Council.]. Ea. Kállai Gyula. National Archives of Hungary (hereinafter abbreviated: MNL) OL M-KS 276. fonds 54. bundle 3. 1. July 1948. Read more: KÓNYA 1998.

<sup>29</sup> RÉVÉSZ 2003.

<sup>30</sup> BALOGH 1999, 48.

<sup>31</sup> KERESZTURI 2010, 41–66.

<sup>32</sup> BIBÓ 1949.

<sup>33</sup> BIBÓ ifj. 2011.

<sup>34</sup> BIBÓ 1983, 62.

<sup>35</sup> See M. A. Rahman’s summary report on the situation between 1 and 17 November 1956, dated 18 November 1956, 32–40.

by József Szabó<sup>36</sup> to Bibó at the end of January 1957: “I introduced the idea of setting up a Department of Public Administration in the faculty. Unfortunately, it met with immediate opposition from Martonyi. He claims that it is in public law. I pointed out to him that this seems to be a misconception, and that the two subjects are no more the same than financial law and finance, or constitutional law and politics. Nevertheless, he stuck to his position but promised to reflect on his own part on what administrative law discipline could be made autonomous. If you have any further ideas, it would be good to raise them as well...”<sup>37</sup>

Instead of his hoped-for return to Szeged, however, Bibó was arrested at the end of May 1957 and sentenced to life imprisonment in early August 1958 for “crimes committed under the leadership of a conspiracy to overthrow the people’s democratic state order”.<sup>38</sup> He began his sentence in Vác penitentiary but, after taking part in a hunger strike, he spent a year in the Márianosza prison under more restrictive conditions from March 1960. With the amnesty proclaimed in March 1963, István Bibó also received a public pardon.<sup>39</sup>

Two months later, he was able to find a job as a research assistant in the library of the Central Statistical Office<sup>40</sup>. Due to his deteriorating health in prison, he was retired at the beginning of 1971, at his request. During his retirement, he organized his work, undertook translations, and published small works. In 1976, he published in London, bypassing the Hungarian authorities, his *A nemzetközi államközösség bénultsága és annak orvosságai* [The Paralysis of International Institutions and the Remedies] in English.<sup>41</sup> In 1974, he was unable to accept the invitation from the director of his old school, the Institut Universitaire des Hautes Études Internationales in Geneva, because his passport application was refused by the Ministry of the Interior. István Bibó died of a heart attack on 10 May 1979. He was buried in the public cemetery in Óbuda on 21 May. At his funeral, alongside Gyula Illyés<sup>42</sup>, János Kenedi gave the eulogy.<sup>43</sup> “Democratic thinking cannot be forced underground, because it is animated by all the demands that called István Bibó from the library room to a public role, and which are still alive after his silencing”. This was the first open action by the opposition.

Bibó’s spiritual resurrection was indeed imminent. It was upon the initiative of János Kenedi that a group of Hungarian intellectuals were preparing to compile a tribute volume to Bibó during his lifetime, for his upcoming 70<sup>th</sup> birthday. The tributes because of the celebrated author’s death resulted in a memorial volume, which, after being rejected by a state publisher, was published in samizdat. Seventy-six authors commemorated István Bibó in essays, poetry and prose in the undertaking, which was one of the most important manifestations of opposition in Hungary in the early 1980s. The importance of the

<sup>36</sup> Professor József Szabó was removed from the University of Szeged in 1950 at the same time as István Bibó, but he managed to return to the Faculty of Law in 1956 as head of the Comparative Constitutional Law Department. RÉVÉSZ 2013.

<sup>37</sup> Szabó József levele Bibó Istvánnak 1957. január 24. [Letter from József Szabó to István Bibó 24 January 1957.] MTA Kézirattár MS 5118/3-10. 8. fonds. First communication: RÉVÉSZ 2014, 380.

<sup>38</sup> *A Bibó-, Göncz-, Regéczy-per ítélete.* (gépirat) [The Bibó, Göncz and Regéczy Trials. (typescript)] Budapest, (s.n.) 1958. 44.

<sup>39</sup> ZINNER 2012, 125.

<sup>40</sup> NEMES 2011. Furthermore: KERESZTURI 2010. 72–81.

<sup>41</sup> BIBO 1976. BIBÓ 2011. SCHWEITZER 2015. KURDI 2012.

<sup>42</sup> ILLYÉS 1979, 6. *Búcsú Bibó Istvántól* [Farewell to István Bibó], Tiszatáj 1979/7. 143–144.

<sup>43</sup> KENEDI 1992, 227.

memorial book was further enhanced by the fact that it was born out of a collaboration between the popular and urban opposition.<sup>44</sup>

## II. Academic work

István Bibó published more than half a hundred monographs and major studies, not counting small publications and book reviews, while after 1949 his publications were practically impossible to publish due to a ban on publication for almost a decade and a half. It would be rather embarrassing to try to force these works – or their authors – into the traditional classification of academic systematics. Of course, the question can be sidestepped, since it is sometimes said that he was the “last Renaissance man”, a true polymath, or, more modernly, a true interdisciplinary academic. All this may be true, but Ferenc Erős’s remark is apt: “The Bibó’s reception is shared today by several disciplines. The oeuvre has become a hunting ground for historians, political scientists, lawyers and politicians.”<sup>45</sup> In other words: it is the work itself that is worth dealing with, rather than its genre classification.

There is no doubt that István Bibó was the greatest, also internationally recognized democratic political thinker of the 20<sup>th</sup> century. After his initial writings on legal philosophy and public administration, his post-1945 studies are still important pillars of modern social science thought. In his arguments, he crossed the canonical boundaries of philosophy, political science, social, economic, political, democratic, state history and theory, public administration, political psychology, and social psychology with an ease that was self-evident, always identifying with the terms that humanist moral postulates. It was precisely in this respect that Gábor Kovács, for example, saw as decisive the Bibonian method of approaching political problems, the essential element of which was the application of a very strong social-psychological vision.<sup>46</sup>

His ideas about his academic future were formulated early on: “*I imagined my own career path... as first trying to reach the position of university professor by making use of the opportunities around me and to gain the relative independence from which public life and politics could be then made. Because ultimately I always wanted to do politics...*”<sup>47</sup> The failure of his ambitions was sometimes explained by his naivety<sup>48</sup>. According to Mihály Vajda, the basis for this may have been Bibó’s conviction that “moral order is not only a necessary condition for a livable world, but is also present in the world, and there is no force that can permanently undermine this order.”<sup>49</sup> Moreover, Bibó was also aware that practical politics is the art of compromise, but a compromise that does not mean abandoning principle and does not destroy the political identity of the compromiser. These moral conditions, as his career has shown, have always determined his relationship

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<sup>44</sup> RÉZ ET AL. 1991.

<sup>45</sup> ERŐS 2013, 247.

<sup>46</sup> KOVÁCS 2004, 299.

<sup>47</sup> HUSZÁR 1989, 30.

<sup>48</sup> BIBÓ ifj 2013.

<sup>49</sup> VAJDA 2008, 3.

to political practice in the circumstances in which he has found himself in a position of decision as a result of historical developments.<sup>50</sup>

From the beginning of his university years, his academic career was generously supported by Barna Horváth, an internationally renowned professor of legal philosophy and a good friend of his father. He supported him in his seminar lectures, helped him with his publications and contributed greatly to his frequent scholarship applications abroad. The young István Bibó turned to legal philosophy under the influence of Barna Horváth. In his 1935 study, in *Kényszer, jog, szabadság* [Coercion, Law, Freedom]<sup>51</sup> that he submitted as a doctoral thesis, he applied the Barna Horváth synoptic method. Here he analyzed categories such as violence, value, and legitimacy. The element that later became the leitmotif of his entire oeuvre emerged from the field of thought defined by these three concepts: power. But another idea also emerged here, which runs through the entire oeuvre as a dominant motif: the need to exercise power underpinned by moral values.<sup>52</sup>

The friendly relationship between the mentor and the apprentice does not, of course, influence the strict, objective evaluation of Bibó's youthful academic work that Barna Horváth formulates in the petition in which Dezső Keresztúri, the Minister of Religion and Public Education, explains in 1946 why he considers István Bibó suitable for appointment as an ordinary public lecturer.<sup>53</sup> In connection with his book *Kényszer, jog, szabadság* [Coercion, Law, Freedom], published in 1935, he also stresses that, despite its virtues, it "has not yet provided a mature solution to the subject." Moreover, his characterization of Bibó's thinking as "subtle intuition, witty reflection, even dialectic" is not meant as praise, but to emphasize that "his thinking is not rationalistic." He seeks coercion within a competing view of various regularities, and by freedom, he means the corresponding "conception of relations based on negative congruence" and "freedom from alien regularity", and finally, Bibó considers it characteristic of law that it simultaneously exercises the most objective – because it is the most predictable and foreseeable – coercion and realizes the most objective freedom.

He spent most of the academic year 1933/1934 in the library of the Institut Universitaire des Hautes Études Internationales in Geneva. During this period, he also wrote an important study on the law of war.<sup>54</sup>

The most important scientific contribution of Bibó's ministerial activities is his 1941 study entitled *A bírói és közigazgatási funkció szociológiájához* [The Sociology of the Judicial and Administrative Function].<sup>55</sup> Bibó accurately perceives the ambivalence between his status in an undemocratic system of government and his democratic thinking. It is only years later, in the Jewish Question, that he gives a theoretical explanation of this ambivalence: "There was undoubtedly a European half of the Hungarian administration,

<sup>50</sup> István Bibó came close to politics three times in his career. He first joined the March Front in 1937–38 through Erdei, then the National Peasant Party after 1945, and for the third and last time in 1956 he entered the world of politics. KOVÁCS 2004, 297–298.

<sup>51</sup> Supra note 21.

<sup>52</sup> KOVÁCS 2011.

<sup>53</sup> Proposal by Dr. Barna Horváth, professor, to the Minister of Religion and Public Education for the appointment of István Bibó as an ordinary public lecturer 1946. In: Huszár 1989, 332–341. Ruzsoly 1992, 95–111. The submission is annexed to the study. LITVÁN – S. VARGA 1995, 343–350.

<sup>54</sup> BIBÓ 1936, 14–27.

<sup>55</sup> BIBÓ 1941, 136–143. (The study was not included in the four-volume Selected Studies.)

of the Hungarian clerks, whose legal rigor, professionalism and conscientiousness differed sharply and clearly from the other half of the Hungarian administration, which was imperious, dilettante and disrespectful of human dignity. This better part of the Hungarian public administration and bureaucracy tried to keep the application of the Jewish laws within the framework of the legal order and legal certainty, and at that time this was indeed the smartest and most correct thing to do.”<sup>56</sup>

Half a century later, Bibó’s *A magyar demokrácia válsága* [The Crisis of Hungarian Democracy] outlined his vision of socialism as a decentralized, participatory economic democracy that did not exclude some form of the free market. In the situation of post-war reconstruction, he considered that “reconstruction has certain tasks which today can only be solved in capitalist forms, i.e. by increasing the sense of security, stimulating entrepreneurship, attracting capital, obtaining loans, etc.”<sup>57</sup> Bibó was thus an early and consistent advocate of a “Third Alternative” or “Third Way”<sup>58</sup>, according to which “the fight against exploitation cannot mean, or even tolerate, the rejection of already established forms of political and public freedom.” Thus, for Bibó, the “Third Way” was a specific way of expressing his eclectic, independent, radical vision of a socialism that is deep-rooted, decentralized and combines elements of nationalization, the free market and, in particular, workers’ autonomy, and of an economic life from which domination through exploitation has been eliminated - all in a distinctively Hungarian way.<sup>59</sup>

The idea of the obligations arising from the “gifts of small-nation status” reappears nearly three decades later in Bibó’s late essay *A nemzetközi államközösség bénultsága...* [The Paralysis of the International Community of States...].<sup>60</sup> What seems to be Bibó’s most important idea in this work is that it should be acknowledged that principles that are correct in themselves can contradict each other in certain situations. In such cases, the solution is not to choose one or the other, but to try to find a mediation between the contradictory principles without adhering to any of them.

\*

Is István Bibó still topical? – the question is often asked. Perhaps only if we consider, above all, his way of thinking and the impartiality it expresses. His critics say that his specific analyses can often seem naive in a world that has changed so much. But his legacy is important for people in today’s world, and even for politicians. First and foremost, it shows that political issues can be tackled with courage and without fear. The “revolution of human dignity”, this peculiar Biboian category translated into the language of political philosophy, is nothing other than the process of the emergence of a democratic political personality. Bibó always stresses the fundamental role of a genuine political public sphere in this process of socialization. It is one of the most essential elements in the series of instruments that prevent democracy from degenerating into an oligarchic reality behind a democratic appearance.

“Historically speaking, we may say that the democratic forms of government have

<sup>56</sup> BIBÓ 1948. 637.

<sup>57</sup> Ibid. 47.

<sup>58</sup> Ibid. 77.

<sup>59</sup> MURAY 1994, 526.

<sup>60</sup> Supra note 41.

*been the fairest forms of government of mankind and that the purposeful, rapid, successful effects and prosperities of tyranny have been marred by the tragedy of its collapse. It follows from all this that liberty and communal antipathy do not exist entirely through institutions representing fictions of the public will. The fact that a state has a parliament elected by the people does not tell us anything about the degree of freedom of that society. The freedom of society is determined by the extent to which and the methods by which the individual participates in the formation of social authority. Universal freedom can only be achieved through the freedom of small units [...]"<sup>61</sup>*

### III. His selected works

1. *Mit jelentett a reformáció az emberiség számára?* [What did the reformation mean for humanity?]. Egyházi Híradó, Issue on 10 November 1928, 2–3.
2. Pálosi Ervin: *A társadalmi törvények helye a természetben* [The place of social laws in nature]. Budapest, 1930. – Társadalomtudomány 1932/1. 93–94. (review).
3. *A nyílt tengeri légi kikötők kérdése* [The issue of airports on the high seas]. Külügyi Szemle 1932/4. 392–394.
4. *A szankciók kérdése a nemzetközi jogban.* [The question of sanctions in international law]. A M. Kir. Ferencz József Tudományegyetem Jog- és Államtudományi Intézetének Kiadványai 3.
5. *Kényszer, jog, szabadság.* [Coercion, Law, Freedom]. Acta Litterarum ad Scientiarum Reg. Universitatis Hung. Franciscus-Josephianae. Sectio: Juridico-Politica 8.
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7. Reitzer Béla: *A proletárnevelés kérdéséhez* [On the question of proletarian education]. Szeged, 1935. (Szegedi Fiatalok Művészeti Kollégiuma. No. 14.) Athenaeum 1935/5–6. 312. (review).
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14. *Etika és büntetőjog.* [Ethics and criminal Law]. Társadalomtudomány 1938/1–3. 10–27.
15. *A Code of International Ethics, Prepared by the International Union of Social Studies.* 144. Oxford, 1937. Revue Internationale de la Théorie du Droit 1938/4. 358. (review).
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<sup>61</sup> Bibó 2004, 153–154.

17. Erdei Ferenc munkássága a magyar parasztság válságának irodalmában [*The work of Ferenc Erdei in the literature of the crisis of the Hungarian peasantry*]. Társadalomtudomány 1940/4. 503–516.
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ELEMÉR BALOGH

## GYÖRGY BÓNIS\*

(1914–1985)

### *I. Biography*

The youngest and most outstanding medievalist legal historian of the Department of Legal History of Szeged – Kolozsvár<sup>1</sup> and of the local guild of legal historians<sup>2</sup> is *György Bónis*. He was also the youngest (public, extraordinary) person promoted to be the (public, extraordinary) professor at our university when it moved back to Kolozsvár in 1940. The exceptionally talented, ambitious scholar-teacher enthusiastically dedicated himself to the world of higher education. Motivation came from his family, the intellectual heritage brought from home and his immaculate class standing predicted a bright future for him.

The Bónis family belonged to the lower nobility of Szatmár county. The family had established historical pedigree, such as Ferenc *Bónis* (1627–1671) who had been executed for participating in the Wesselényi conspiracy. *Bónis* György was born in Budapest to a father with a qualification in law and a mother with a Hungarian French lecturer degree (Emma Ilona Wallon). Due to the influence of his mother, the whole family was a great supporter of the arts and opera. He started to learn English privately. He took advantage of his English proficiency on an English jamboree (Birkenhead, 1929) that provided him with a lifelong experience.

He graduated from the illustrious and rigorous secondary school of the Piarists in Pest, and then, the eminent student did not ease on his efforts during his studies at the university: he graduated with an honour of *sub auspiciis gubernatoris* from the law school.<sup>3</sup> In the days following graduation, he immediately travelled to England. Upon the recommendation and advice of Zoltán *Magyary* he earned a scholarship for further studies.

He had been advised by Sir William *Holdsworth* (Cambridge) to travel to London where he was admitted to the London School of Economics, where he attended the lectures of Professor Theodor F. *Plucknett*. In those early days the idea, that he would

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<sup>1</sup> The name of Kolozsvár in Romanian is Cluj-Napoca.

<sup>2</sup> The apt and popular phrase of “guild of legal historians” was invented by the excellent legal historian Professor István Kajtár (1951–2019) from Pécs, who has recently passed away.

<sup>3</sup> His inauguration took place on the 22<sup>nd</sup> of October 1936: as part of the program, he was asked to read out an excerpt from his dissertation. Conf. BÓNIS 2007, 108.

like to deal with the ecclesiastic judiciary, had been conceived, hence he asked for relevant literature from *Le Bras* in London. A few years later he published an article on the English legal historiography in Hungary.<sup>4</sup> It is worth mentioning that during his stay in England he was not only active in the academic field, but he was also involved in scouting that provided him lifelong experiences and attitude. He attended a Gilwell-type scout camp. For his mandatory study written about the camp he was awarded the BADEN POWELL Wood Badge as well as the officer tie.

Although he graduated with honours, he also participated in a foreign study trip, it was not easy for him to find a job. Although he was invited by chief justice DEGRÉ Miklós to the Royal High Court of Justice in Budapest, he refused, as he had already been engaged in legal history. He writes about his choice of career in his memoir as follows: “For a long time, I did not want anything else but to become a Piarist teacher. [...] Being admitted was not a problem at that time, and I engaged myself in legal history.”<sup>5</sup> At first he worked in the University Library as a trainee without any remuneration (!), then by the end of 1938 he joined the ÁDOB<sup>6</sup> which also meant a low level of salary. He also completed the librarian training program. He had a smattering of collecting legal folkways under the supervision of István Györffy (1884–1939). The early death of his mentor prevented him from continuing this work.

Shortly afterwards he was hired by the ministry of culture, where József Stolpa state secretary looked for a *sub auspiciis* doctor. Under the supervision of János Pusztai councillor his task was to collect legislative measures of the ministry of culture; in the ministry he became acquainted with János Martonyi, who later became his colleague at the university. While he was preparing for his exam in administrative law, he was informed about his promotion in Kolozsvár (his private teacher training was in progress in Budapest). The teaching body of the faculty of law resumed its activity in the treasury city after the university had returned home to Kolozsvár. Some staff members were confirmed in their ordinary professor status (László Búza, István Csekey, Erik Heller, Sándor Kornél Túry, Barna Horváth, Elemér Balás P., Kálmán Személyi), some were newly promoted to be professors (Károly Schneller, János Scheffler, István Székely, István Szász), and three of them were also newly promoted to be public extraordinary professors (Elek Boér Jr., János Martonyi and György Bónis) by the minister of culture. Bónis’s department had just become vacant. He wrote in his memoir as follows: “There were not many legal historians at that time. My friend Lojzi Degré or I should have been chosen [...] I was suggested by János Pusztai and uncle Feri. The great miracle had happened: I was not even 27 years old, when I was promoted to be public extraordinary professor at the University of Kolozsvár. I was the youngest professor in the country. It was humorous that I had almost been denied entrance to the dean’s office, when other professors entered.”<sup>7</sup>

Bónis and the university spent five years in Kolozsvár. He delivered the main course and seminar with the assistance of his first assistant lecturer Domokos Gyallay Pap. He

<sup>4</sup> BÓNIS 1940.

<sup>5</sup> BÓNIS 2007, 105.

<sup>6</sup> National Committee of Unemployed Graduates; his employment was approved by Pál TELEKI.

<sup>7</sup> BÓNIS 2007, 111.

was a very strict examiner, but he allowed some students from Ruthenia to take their exams in Rumanian.<sup>8</sup> He was a regular visitor of the archive, where he became acquainted with Lajos KELEMEN. The years he spent in Kolozsvár resulted in the acquaintance and friendship with Zsigmond JAKÓ. During the summer holidays he continued to work on collecting legal customs. His other assistant lecturer, Ernő TÁRKÁNY SZÜCS, who stayed loyal to this research field and whose book<sup>9</sup> was published by Bónis in Kolozsvár, and was of great assistance.

By the time the Soviet front line came closer, every member of the faculty (except László BUZA<sup>10</sup>) left Kolozsvár for the capital: *"We continued to play the role of the University of Kolozsvár in Budapest. Sándor Túry was promoted to be dean by the transitional rector."*<sup>11</sup> When the siege of Budapest took place, Bónis was a deputy commander of a unit with around 60 soldiers subordinated to a German unit. Bónis had tried to sabotage the co-operation when the German commander snapped at him as follows: *"Verteidigen wir unsere Hauptstadt oder ihre?"*<sup>12</sup> This sentence told everything. ... A Soviet soldier had thrown a hand grenade at him, but it did not explode, it only caused him an ugly bruise on his leg. Due to his injury his duty ended. Elemér Balás P. provided him with a temporary ID card and then the ministry of culture issued him a certificate written in Russian that relieved him from all work including *"málenkij robot"* – the infamous forced labour. In March 1945 he went back to Kolozsvár with his family. His journey was very adventurous.

The first and shocking news was the news of his dismissal. In his No. 100/1945. arrangement, based on the report of an "appellate committee for clean-up", Vasile POGACEANU (Prefect of Kolozsvár Town and Cluj county) dismissed 27 professors and 2 private lecturers, who were "antidemocratic, chauvinist or fascist" teachers – Bónis György was the only dismissed lecturer being forced to leave the Faculty of Law. On 20 March Bónis submitted an appeal to the university council that sustained it with a confirmation and soon, the prefect overruled his decision. Many started to support Bónis, such as Áron MÁRTON with whom he also had a close friendship. The current international environment was well described by the fact that Bónis did not have a passport, only a temporary one provided by the Swedish embassy. By using his temporary passport, he made a short visit to Budapest in 1947, where he listened to a speech – held right after the "blue-tag elections" – of Gyula Móor in the Parliament from the balcony. In that speech many of the abuses were pointed out: *"I was impressed by the virile resistance of my teacher. Soon he was dead, unfortunately."*<sup>13</sup> Soon after his return to Kolozsvár, Bónis was arrested. He spent around 10 days in custody, where: *"I was not given a blanket, but I was placed in good company: grand-bailiffs, mayors were together. We spent our time with mah-jong."*<sup>14</sup> His wife travelled to Bucharest where she visited Bónis's assistant lecturer, Domokos Gyallay who had been working at the Hungarian embassy. Due to his intervention the minister for justice set Bónis free. Two days later he was deported from Transylvania, so he travelled to

<sup>8</sup> "By the way, I took on a teacher to learn Romanian, which was very useful later." BÓNIS 2007, 112.

<sup>9</sup> TÁRKÁNY SZÜCS 1944.

<sup>10</sup> Comp. RUSZOLY 1965, 354–357.

<sup>11</sup> BÓNIS 2007, 115.

<sup>12</sup> BÓNIS 2007, 116.

<sup>13</sup> BÓNIS 2007, 119.

<sup>14</sup> BÓNIS 2007, 121.

Szeged where he presented himself to the dean, János *Martonyi* and started to work as a public ordinary lecturer. *Bónis* had a different relationship with the members of the teaching staff who re-started its activity after the war. His relationship was tense with *Antalffy* and Aladár *Halász* from the beginning, but he formed a good friendship with Elemér *Pólay* and Róbert *Horváth*. He had asked for a scholarship in Rome that was granted to him for research about the history of ecclesiastical judiciary, but his trip failed. He joined the positive declaration of the congregationalists in April 1948 and he held a speech in the National Country Party (that he also joined to), and he became an honorary member of the Tornyai Society. He did not join the MDP, but he was a faculty chair of the Hungarian-Soviet Society. He was also the president of the local peace and international committees of the Patriotic People's Front. He continued to work on his research about the folkloric legal traditions with the support of the Institute of Folk Studies. During his activity he became acquainted with László RÉVÉSZ. The two of them had started to work on the plans of an Eastern European Institute of Legal History.

In the meantime, the number of lecturers in Szeged increased because the Faculty of Law and law academies in Debrecen had been closed. Emil *Schultheisz*, Gyula *Dezső* and József *Perbír* joined the staff. *Bónis* became a candidate in 1952 after the Soviet model of the academic grading system had been introduced. It was a disappointment, as Géza *Marton* recommended the title of "doctor of sciences" to him. Soon he had a chance to travel abroad: the *Ius Romanum Medii Aevi* searched for a Hungarian fellow and Géza *Marton* recommended *Bónis* to the editor (Erich *Genzmer*); *Bónis* met József *Klima* from Prague in Leyden, where he participated in the congress of the Association for Legal History of the Antiquity.

The revolution of 1956 and the role he played in it was a significant episode in *Bónis*'s life. In the evening of the 23<sup>rd</sup> of October, he was working on a report about the scientific connections of the faculty abroad, when he heard about the events that took place in the capital on the radio. As the events rapidly advanced, *Bónis* found himself among the members of the Revolutionary Committee of the University of Szeged,<sup>15</sup> his most important task was to calm the students down. At the meeting held by rector Dezső *Baróti* the issue of the professors that should be removed from the university came into question. *Bónis* recommended *Antalffy*, but based on Elemér *Pólay*'s suggestion, István *Kovács* was added to the list: these two professors were suspended by the (incomplete) faculty council on the 2<sup>nd</sup> of November.<sup>16</sup> On the 17<sup>th</sup> of November *Bónis* went to Budapest as a member of the delegation of the University; they intended to meet János *Kádár* who did not have time to meet them. Instead of *Kádár*, they met with Gyula *Kállai* and Ferenc *Hont*. The revolutionary committee of the university was disbanded quickly, *Bónis*

<sup>15</sup> The Faculty of Law probably delegated three or four members to the committee: József *Perbír*, *Bónis*, and Ödön *Both*, and maybe Géza *Tokaji*. *Bónis* became a member of the newly composed university council, he participated on its sessions on 8, 15 and 20 in November. On the session held on the 15<sup>th</sup> of December he was absent. Comp. PÉTER 2001.

<sup>16</sup> There is no record left behind from this session that can reliably be called historical – it is missing from the volume containing the records of the faculty council meetings, but as József believes it: "With a canvassing and lucky research they might be found." Maybe five participants were at the session: the dean, Emil *Schultheisz*, *Bónis*, and *Pólay*, *Buza* and *Martonyi*. Comp. RUSZOLY 2002.

commented on this as follows: “*It is not possible to play 49 in the Bach era.*”<sup>17</sup> Kovács and Antalffy were soon reinstated at the faculty.

The time of calling to account had come. The censors held a disciplinary hearing against Bónis on the 6<sup>th</sup> of June in 1957. The censors were Tibor Vas and Aladár Sipos. There were questions related to academic policy, but the main issue was the above-mentioned report from the faculty council’s meeting which served as a ground for the removal of Antalffy and Kovács. Local press continuously and tendentiously attacked those who had participated in the revolution, such as Bónis. The press brought up that old falsehood that Bónis’s godfather was Bálint Hóman: the truth on the other hand was that Albert Szent-Györgyi baptized the little Bónis... The sanction was a dismissal from the university. Bónis was informed about this in a simple letter. The political police interrogated him once, they were mostly interested in his past in Kolozsvár: Bónis recalled the words of his interrogator: “*If there had been more people like the professor, we could not have gotten here.*”<sup>18</sup> Bónis visited Szeged once more in 1969, when Elemér Pólay and Ödön Both organized a conference about the impact of Roman law in Hungary (the actual tasks of organization were done by Imre Molnár and József Ruzsoly senior lecturers), Bónis could not have been missed. Some awkward situations probably occurred, Bónis referred to them in his memoirs: “*We solemnly shook hands with Antalffy, then my German friends took me home by car.*”<sup>19</sup>

Bónis and his family had moved to Budapest where he spent the rest of his life. At first László Gerevich, the director of the Museum of Budapest, gave him a position and once asked him during a conversation: “*And did you not look at the map? We did not think about how enormous the country was we confronted, that cannot be stopped even by kids who sacrificed their life heroically. I undoubtedly paid a high price for the revolution, but I am proud that I participated in the freedom fight of the Hungarian people.*”<sup>20</sup> He got a permanent job in the Metropolitan Archive during the Autumn of 1957. His chief in office was János Ort. His academic activity was not hindered, but as there were a few medieval sources, his position was professionally outlying. His foreign connection revived slowly. He visited Dublin; he became a member of the *Commission Internationale d’Histoire des Assemblées d’Etats*. The famous academic community was formed in 1937. He became friends with Helli Koenigsberg who the president of the committee of the above-mentioned community was. He was a regular participant of the committee’s congresses; one was organized by him in Székesfehérvár.

He participated in the historian world congress held in Moscow as a delegate of the Academy of Science. He had prepared to comply with an invitation to Sweden when the invasion of Czechoslovakia took place in 1968. Bónis was summoned to the Academy and asked not to share his opinion officially. On his way back to Hungary he went to Münster via Copenhagen to visit the German legal historian days. From Münster he was taken to Nürnberg by his friend, Professor Hans Thieme (Freiburg im Breisgau), by car.

<sup>17</sup> BÓNIS 2007, 127.

<sup>18</sup> Ibid. 129–130.

<sup>19</sup> Ibid. 131.

<sup>20</sup> Ibid. 130.

He travelled to Munich and Frankfurt, where he delivered a lecture at Helmut Coing in the Max-Planck-Institut für europäische Rechtsgeschichte. He became acquainted with Professor C. R. Cheney at a conference in Switzerland who offered to arrange for him a year long guest lecturer position in Cambridge. The authorisation of this position was hindered by his superior Ágnes Ságvári. The English cultural attaché (Hewer) had to personally intervene to secure the permission, but only for three months instead of one year... He could not even deliver proper lectures in England, but he managed to continue his research. He came back via Paris and Switzerland (with his wife), they visited friends on the way home.

As he got closer to 60, prior to his expected retirement, he managed to create a close amicable working relationship with Tibor Klaniczay, through him with the institute of literary studies of the Academy. Klaniczay sent him to Tours in 1974 to deliver a lecture about the history of the legal profession – he announced his retirement from Tours to his colleagues. The following year he was invited to the United States due to the intercession of Professor Sweeney. It seemed for a while that the Ministry of Foreign Affairs, the Academy and even the Ministry of Labour would consent to his travel, but one week before the departure Miklós Szabolcsi deputy director and József Farkas rapporteur on human resources asked him to postpone his trip, as he will not deliver “lectures in the field of literary history.” It was obvious that someone wanted to throw obstacles in his path... Bónis desperately indicated that his ticket had already been bought. At last, he could travel, but as he arrived in Pennsylvania, he was hospitalized. He was not able to recover completely from his stroke.

His rehabilitation process took place over the course of several steps. In 1963 he received a letter but his department at the university was never returned to him. To retrieve his professorship or probably his department, he sent several letters to people he believed to be competent. I quote from his dramatic letter sent to Gyula Kállai, who was the first deputy chair of the council of ministers, on the 17<sup>th</sup> of November 1963: “*It has been seven years since we visited you with three other fellow professors as delegates of the University of Szeged [...] At the time of the above-mentioned visit of the delegation I did not even presume that I will not be professor at the University in half a year. I do not intend to trivialize my political mistake committed in 1956, but I claim that my disciplinary dismissal in June 1957 was suggested with prejudice. There is a statement of fact in the disciplinary resolution which is against the findings of the investigation. I was provided with no chance to amend the evidence. Almost ten years of good work, that had been recognized by the Party and the State, spent in the Department at the University of Szeged, my candidate title earned in 1952, the Academy award won in 1954, the foreign congress and peoples’ front delegation in 1956 are dwarfed by the intention of personal retorsion. After 17 years of service as university professor, I, alongside with my family, were turned out [...] 93 publications in the field of legal history, 16 university and archive training textbooks stand behind me [...] It is hard to bear for seven years my exclusion from the official legal sciences and lecturer’s work, as well as the financial concerns. As I am in my 50<sup>th</sup> year after thirty years of scientific work I consider it as timely to raise the question whether my homeland is in need of my work in the field where I am competent and – I feel – I could be useful the most.*”<sup>21</sup> The answer, obviously negative, was given to him presumably orally. His further attempts, one after another, also failed.

<sup>21</sup> RUSZOLY 2002, 13–14.

His actual rehabilitation took place only after his death, when the likewise historical turn happened. The university bestowed him a *post-mortem professor emeritus* title after Professor József Ruszoly recommended it. His memory is faithfully preserved by the department of legal history of the faculty: we commemorated him on the day of his birth, as well as on the day of his death (1994, 1995). György Bónis's passing away was embedded into a fate-like context, as if legal historians of an era had left the existence together: one year earlier his closest professional and human friend, his colleague from Pécs, Alajos Degré (1909-1984), in 1985 Andor Csizmadia (1910-1985) and his successor in Szeged, Ödön Both (1924-1985) passed away. György Bónis's professional memory was perpetuated by numerous recensions,<sup>22</sup> partially published abroad. His rich professional achievement in publications is preserved in carefully and exhaustively compiled bibliographies.<sup>23</sup> His academic material heritage is kept by us at the University of Szeged in the room that used to be his room as the head of the department and later was named after him at the tenth anniversary of his death (Bónis György Seminar).<sup>24</sup>

## II. Academic work

György Bónis's academic interest soon, in his university years, turned to legal history. Ferenc Eckhart, who was his master and an excellent legal historian of his age, played a major role in this choice. He had other brilliant professors as well, such as Pál Angyal, Károly Szladits, Gyula Moór. Bónis wrote his first academic works during the seminars led by Eckhart. His scientific oeuvre was rather complex, but most of his works, both quantitatively and qualitatively the most well-known on the level of the international scientific community, concentrated on studying the legal instruments of Hungarian and European medieval times. He was inspired by Max Weber's historical-sociological approach, by the works of Helmut Coing in the field of legal history that were written from the European dimension in a systematic approach, but all along Bónis remained a sovereign Hungarian legal historian. He was a researcher who studied passionately specifically the Hungarian legal instruments and the specificities of the legal culture, but he did not lose sight of the European mechanisms for a moment. It cannot be stated that he represented a dry legal positivist approach, he always saw and made sense of the creative power of the human mind when he was studying Hungarian and European legal culture. Respect of the sources without conditions was always a guiding principle for him, this attitude was left behind as a heritage for those coming after him. Within the European-wide legal historian approach of György Bónis, the strong enquiry for Anglo-Saxon law deserves to be highlighted. The year he spent in London as a scholarship holder had an ever-lasting impact on him; the strong historical spirit of English law strongly

<sup>22</sup> János Zlinszky, who considered himself as a student of Bónis, was the first who published a nice and rich commemoration about the academic life of Bónis in German: ZLINSZKY 1987, 487–494. majd Ruszoly József. RUSZOLY 2008, 62–66. RUSZOLY 2009, 604–622. RUSZOLY 2015, 299–311. I also commemorated Bónis several times: BALOGH 1997, 659–662. BALOGH 1999, 41–42. BALOGH 2018, 7–12.

<sup>23</sup> P. MIKLÓS 1995, 509–524. STAUBER 2001.

<sup>24</sup> KÁVÁSSY – TAMÁSI 2014.

affected his academic approach. He quickly noticed those historical, dogmatical parallelisms, that are stemming from the common features of the English and Hungarian legal system, insomuch as both countries lived within the framework of their historical constitution. Endorsing this professional aspect raised him from among his contemporaries, as only a few of his contemporaries spoke English (prior to the world war Latin, German and French were taught in Hungarian secondary schools).

### *The career entrant*

One of his first, truly significant studies, that was dealing with one of the significant results of the early codification efforts in the field of Hungarian criminal law, was written in the seminar led by Ferenc *Eckhart*.<sup>25</sup> His results immediately made him stand apart from the community of Hungarian legal historians (that was not so populous at that time either). This achievement is remarkable because *Bónis* – taking his later works into consideration – only dealt with the questions of history of criminal law tangentially. Although Lajos *Hajdu* did not even consider the source as incorporation, by evaluating the work, I believe, *Bónis* was closer to the reality.

The examined study was the work, in the contemporary Latin *praxis criminalis*, submitted to the parliament assembled between 1712 and 1715. The work was actually a criminal code proposal that was later named as *Bencsik-proposal* in the literature after the scholar delegate from Nagyszombat who actually prepared it. The taxonomic structure of the draft characteristically reveals the dogmatic way of thinking: procedure law occupied the first place, as according to the contemporary approach the judge first needs to be aware of the different methods of apprehension than the dogmatic regulations of the crime. Thus, practicality exists strongly, however it must be considered as a huge dogmatic progress, that while *Werbőczy* classified the different acts based on the punishments, *Bencsik* did the same according to the criminal acts. This is the product of the modern legal approach: judges need the statutory term of a crime in the first place that can be called up for the actual case, the question of the punishment can come only afterwards.

The operetta provides a thorough procedural regulation. Regarding the apprehension, it immediately ascertains the principle that exists throughout the whole work, that differentiate between noble and commoner perpetrators. Differentiation prevails in the nobility as well: nobleman possessing an estate can only be apprehended after investigation and being summoned, nobleman without an estate, if he is a public criminal, can be apprehended without being summoned (*servatis servandis*), if he is non-public criminal, he must be summoned. If a felon is caught in the act, he can be apprehended even by a peasant, thus neither prior nor so-called summons from handcuffs (*ex-vincula*) is necessary. The proposal warns the judge not to listen to the denunciation and to abandon summoning the felon only if the suspicion (*indicium*) is well grounded. If the person of the culprit is probable but the subjects of the suspicion are remote (*remota*) too, if the person of the culprit is obvious and the subjects of the suspicion are close, only one is enough for the apprehension without summons.

<sup>25</sup> BÓNIS 1934. This firstly did not receive a huge recognition from Lajos Hajdu, who – somewhat provocatively and intentionally – titled his book defended as a candidate dissertation very similarly; HAJDU 1971, 21–24.

Basic institution of the part dealing with evidence is torture. Its regulation rests upon the Austro-German legal solution based on the *Carolina*. The proposal counts on the testament, let it be voluntary or enforced, of witnesses and especially the accused person as main evidence (*regina probationum*). If the accused is in denial, the burden of proof falls on the accusing authorities – to that extent the principle of investigation prevails. In a process against a noble man at least two other nobles are required as witness, if the case is evident (if not evident, even more witnesses are needed); witnesses must be unobjectionable, they must appear personally in front of the court and they swear an oath on the head of the accused (*iuramentum corporale*). If neither of the evidence provided by witnesses lead to a satisfactory result, nor confession exists, last judgement cannot be made, only an interim judgement is allowed (*sententia interlocutoria*), that orders the torture.

The proposal contains significant statements regarding the implementation of the sentence. Sentence must be executed even in that case if the aggrieved party settled with the offender (except if the king pardoned the offender). Necessary acts must be carried out by nobody else other than the executioner. If the convicted person is seriously ill, the execution must be postponed; if he dies before the execution, the provision of the sentence concerning the corpse shall be carried out. Error (wrong hit, rip of the rope, etc.) cannot hinder the execution.

The Bencsik-proposal did not have a taxonomically separated general part, nevertheless those principles and legal instruments can be filtered and read out that play the role of a general part. It is unnecessary to look for an abstract term of delict, instead the proposal defines the ordinary punishments. Ordinary punishment is the death penalty (*poena ordinaria*): hanging, decapitation, death by flames, break someone on a wheel. The proposal knows aggravated versions as well, such as quartering, tying to a horse tail, burning with fiery pliers, etc. Penalty imposed by the judge (*poena arbitraria*) took place in case of non-capital proceedings, where the sanction can never be death, but for example imprisonment or cob.

The most elaborated and dogmatically most fully-fledged chapter is the one regulating homicide. Its cases: intentional, committed with the intention of wounding, homicide by negligence, homicide by accident or homicide committed in necessary self-defence. Deliberate homicide (*homicidium deliberatum*) entailed death penalty, but there is room for a settlement (!). In case the settlement is successful, mercy shall be granted. An act which is according to the modern terminology an assault resulting in death (*homocidium animo tantum vulniderandi*) is sanctioned at the judge's discretion if it is committed by unsuitable means – decapitation if a deadly tool was used. Homicide by negligence (*inopinatum, seu casual culposumque homicidium*) stems from the allowance of an otherwise forbidden act or carelessness, but the *animus* is missing. Its punishment is imprisonment. In case of unintentional homicide (*simpliciter fortuitum, seu casuale*), if the offender is not even encumbered with the lowest level of negligence, there is no punishment. Homicide committed in a legitimate, necessary defence situation is unpunished, if every moderate means of defence were exhausted. If not, it can be sentenced by judicial, even ordinary punishment.

Such a clear and exact differentiation among the cases of homicide could not be found so precisely neither in the Hungarian, nor in the Austrian substantive law. The separate regulation of aggravated assault resulting in death is rather remarkable. Bencsik-proposal is highly elevated above its time not only by the special consideration of the intention, but also by the involvement of the problem of eligibility and by solving the issue of the

inadequate causality (namely if the result does not fit the previous facts and it was not foreseeable under normal circumstances, the punishment is more moderate), while the also proposal sheds light on the excellent legal sense of the praxis that inspired it a lot.

Bónis's dissertation serves with valuable details of a less discovered field of expertise. It examines one of the judicial reforms of the 18<sup>th</sup> century: *The reform of the judicial organization in the age of Charles the third* (1935). The scientific curiosity of the young Bónis permanently searched for great topics. What he touched and created was always everlasting. His work, that directly followed the study on the Bencsik-proposal, dealt with one of the outstanding developments of the consolidation after the Peace Treaty of Szatmár, namely the reform of the Hungarian judicial system of medieval origin. Continuously functioning judicial structure based on the district courts, that still frames the Hungarian judicial system today, was developed at that time. The young scholar studied in the sources with curiosity the role of the local legal society, its increasing intellectual quality, the spread of literacy and the importance of its functionality.

#### *Professor from Kolozsvár*

The blossoming of György Bónis's creative activity took place during the years he spent in Kolozsvár. He wrote an outstanding small monograph with the title of *Magyar jog – székely jog (Hungarian law – Szeklers law)* (1942). The author writes about the importance of the topic as follows: "*I have considered the studying of the law of the Székelys as a dear obligation of mine since the day of my return to the University of Kolozsvár as legal historian-lecturer when I started my teaching and researcher position. But the time of the fulfilment of my obligation was brought closer by the general inquiry that turned on the first celebrated days of our return home to the true mirror of the legal system of the Székelys that reflected the specific particularities of our nation.*"<sup>26</sup> In spite of the results set forth works of the pioneers (Károly Szabó, János Connert, Elek Dósa, Bálint Hóman), that revealed the ancient and, in many aspects, specific laws of the Székelys, highlighted that there are many things to do regarding partial studies and exploration of sources. Bónis supported the previous goal by involving students and by setting the longstanding regular curricular items (Judicial system of the Székelys, right for jurisdiction of the Székelys). The other goal was supported by urging the publication of legal historical sources within the framework of the *Scientific Institute of Transylvania*. The young and perhaps a bit impatient professor from Kolozsvár did not wait for the results of the thorough and very time-consuming basic research. He stepped forward with a work which summarised the situation based on the available sources and literature.

His research was commenced by the statement of the scientific history according to which the Hungarian law is uniform, its main features were not split up by local laws, because the effect of the law always originated from the will or at least allowance of the king. Medieval law of the Székelys seemingly contradicts this principle because its origin cannot be traced back to any of the granted ancient royal privileges.

Székelys have lived as a separate country within the state of the twin nation Hungarians.

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<sup>26</sup> BÓNIS 1942, 3.

*Bónis* turned to the examination of the question with the idealistic methodology of comparative historiography that was learnt from Max *Weber*. *Bónis* knowingly followed the work of Elemér *Mályusz*, who gave a uniform view of the historical development of legal status of every nationality living in Hungary. The work reviews every relevant element of the Székely legal system. It takes the question of Székely genesis into consideration, the source of law of their legal status (privileges of 1499, the Tripartitum, census of 1555, et cetera). He deals with the constitution of Székelys in a separate chapter, that – beyond mapping the whole public organizational structure – contains a detailed comparison with the parallel Hungarian, nationwide solutions. He also expands abundantly the relationship between the military role and their status, beside the detailed analysis of the seat system.

*Bónis* dedicates a separate chapter to the institutions of the Székely private law, as the research in this field of legal history was underdeveloped. The royal donation system never prevailed in Székely Land. This fact served as a fundamentum of Székely legal identity in the Middle Ages. It also means that the right to the reversion (escheatage) of royal estate (*ius*) never “functioned” in this area, hence a wide range of autonomous institutions had been developed in the customary system. The privilege of 1499 was a breach in the shield, as by this time the king had a chance to confiscate and then to re-donate the lands and stocks of a Székely man in case he became unfaithful. The privilege also serves as an example of the affirmation of old rights. It reflects the ancient practices of Székelys by ascertaining the ban on arbitrary demolition of a house or execution. The old Székely legal practice of exile and loss of moveable assets has revealed itself in the documents from the 15<sup>th</sup> century. *Bónis* highlights that characteristic of Székely private law, too, according to which the line of the daughters enjoyed the right of inheritance following the line of the sons (*fiúleányosság* – son-daughtership): “Exactly the general silence of the diplomas attests to the fact that in Székely Land, in case of defect, the land never escheated to the king.”<sup>27</sup> Without enumerating other examples, *Bónis* summarizes his research results as follows: “Hungarians adopted the impact of the West and they reshaped it in their own image, the Székelys, in their peripheral situation, preserved further their increasingly obsolete traditions. [...] The Hungarian law transferred the institutions adopted and converted from the Western legal systems. Thus, the old Székely law is an amalgam of the ancient institutions and the impact of Hungary.”<sup>28</sup>

He created his essential work (that is nowadays, unfortunately, hardly accessible in its original edition) during his stay in Transylvania: *Feudalism and orders in the medieval Hungarian law* (*Hűbériség és rendiség a középkori magyar jogban*) (1947), that deals with the most important questions and institutions of the medieval Hungarian social development. To evaluate this monograph properly, it is worth knowing that *Bónis* approached the sources as a medievalist with a qualification in legal sciences. I emphasize this because his peers in academic discussion were mostly historians, who did not possess such a deep knowledge in the field of Roman law and canon law as he did.

The way he worked with sources is impressive: he practically utilized every extractable information of the available source, in addition he relied on sources (e.g., formulary of Beneéthy) that can be found in the bishopric library of Gyulafehérvár

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<sup>27</sup> Ibid. 71.

<sup>28</sup> Ibid. 98.

(Batthyaneum). The context of the book covers the whole medieval Hungarian history. His most important statement regarding the society during the period of the Árpád dynasty was that the decisive weight of the royal *family* characterizes and shapes the relations of the society with the greatest force. This society can be best described with the attribute of *patriarchal*. This relationship is not or barely defined legally – this is the point where the Hungarian feudalism can be sharply separated from the Western feudalism.

One of the reoccurring basic thoughts of the book is the realisation of *Bónis*. According to this realisation the Hungarian development can be best characterised by this legally less defined state of the central power, that can be traced back to the definiteness, that strongly relies on the traditions of the first couple of centuries following the foundation of the state. It is rather remarkable, that in Western comparison, the substance of the rights in rem of the feudalism is not precisely defined in Hungary in neither of the sides of the feudal relationship. Thus the “*sourdough*” of the Hungarian feudalism is not the feudal right that had become in rem in nature in the West, but all along the authority, the personality. The key term of the Hungarian development is *familiarity* (*familiaritás*). Feudalism and estates cannot be diametrically opposed to each other in our country: “*as a lesson learned from thorough analysis of familiarity, we came to the conclusion that the Hungarian constitutional development does not have a separate era of feudalism but features of the feudalism and the estates emerged at once from the patrimonial basic structure of the state.*”<sup>29</sup>

The book introduces in detail the evolution of ecclesiastical and noble orders, the guarantees of privileges of the orders, with special regard to the legal guarantees. We can read valuable analysis about the ecclesiastical nobles, too. This monograph is a scientific *ars poetica* in the oeuvre of young György *Bónis*: brilliant intellectual achievement to prove how the medieval Hungarian social and legal development was open to adopt Western patterns, while it confidently preserved its own traditions. *Bónis*, after he had left Kolozsvár and Szeged as well, published a study analysing a precious medieval legal source: *The formulary of Somogyvár* (1957). Its substance served the research and publication of sources. *Bónis* relied on it in many of his essays written about ecclesiastical jurisdiction, and it is also included in his posthumous source publication about the functioning of the Holy See. Examination of formularies, that are the most precious, but less researched relics of legal sources, played an important role in *Bónis*’s oeuvre.

### *The professor in Szeged*

As long as he could, he stayed in Kolozsvár, but from 1947 we found him in the Department of Legal History in Szeged. His creative mood and energy are unchanged, but he published less essays with monographic standard. Research of the medieval times becomes more dominant in his oeuvre, just like the exploration of the legal profession. He draws on the Renaissance age for his work titled *A Hungarian lawyer from the age of Jagiellons* (*Egy Jagelló-kori magyar jogász*) (1953).

He wrote a biographical monograph about the outstanding character of the Hungarian Enlightenment: *József Hajnóczy* (1954). It is important to emphasize here, that *Bónis* dealt

<sup>29</sup> BÓNIS 1947, 385.

with the topic as a legal historian: *"In this study we wish to deal with the life, work and views of Hajnóczy on this theoretical ground; with Hajnóczy, the legal scholar, what he first and foremost was."*<sup>30</sup> He also cites Győző Concha, who stated that Hajnóczy had elaborated every important institution of the constitutional monarchy, and history confirmed him: *"Indeed, the executioner of Vérmező had extinguished the flames of life in Hajnóczy, who was not only a noble man with excellent character, but also a great spirit."*<sup>31</sup> He cites an important thought from Henrik Marczali too: *"No doubt, he is our first academic author in the field of public law [...] He is perhaps the first Hungarian, in whom the general progress grows together with the notion of remanence and development of the Hungarian nation."*<sup>32</sup>

He introduces in detail Hajnóczy's journey of life, always emphasizing the elements and significance of legal-political literacy. He began as clerk of magnates, he was an incumbent of emperor Joseph, he rose to the office of deputy bailiff of Szerém. He had consciously collected (for 17 years) the sources and literature for his work he was planning to write about the Hungarian public law. The French revolution and its ideas undeniably floated his constitutional comprehension towards the republican notion. Bónis presents in a dramatic way the high treason trials and its phases launched against him: the process at the board of enquiry in Vienna and the trial at the Royal Court. Thorough analysis can be read about the legal and political views of Hajnóczy. Basis of political sciences and role models (*Rousseau, Montesquieu*) serves as ammunition for him. Discussion of human rights in Hajnóczy's work is an extremely important chapter: *"We cannot be surprised that Hajnóczy, the translator of the French Declaration and constitutions, the enthusiastic adherent of the revolution, wanted to transplant human rights into the Hungarian constitution, and he was the first in Hungary who elaborated the system of Human Rights."*<sup>33</sup> Hajnóczy not only set up a hierarchy among human rights, but he mentioned religious freedom, personal liberty, and the freedom of the press. Hajnóczy also believed that one of the severe problems of the Hungarian political reality was the ability of the non-noble citizens to bear possession of estates and office, and the related cause of equal tax treatment. Constitutional limitation of the royal power was also emphasized in his works, but what is very essential is the demand of the representative parliament, the reform of the national assembly based on the participation of the privileged estates. One of the pivotal principles regarding the restructuring of the power branches is that the members of the executive branch cannot be members of the national assembly.

Hajnóczy did not accept the unadulterated orderly character of the historical Hungarian constitution of his time. He wanted a new constitution, radically new statutes: *"I would call basic law those, that would generally define the rights of the nation; that would draw a bright borderline between the legislative and executive power; that would point out the way either of acquisition of ownership of movable or immovable property, or of the search for compensation of the infringed right; that would order the sanctioning of civil crimes; it would prescribe the cost of the administration of the state, as well as the assurance of the rational of external security and internal peace, but the first and foremost important foundations of the*

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<sup>30</sup> BÓNIS 1954, 7.

<sup>31</sup> Cf. CONCHA 1885, 154–168.

<sup>32</sup> MARCZALI 1906, 405–406.

<sup>33</sup> BÓNIS 1954, 188.

above mentioned would be just pinned down.”<sup>34</sup> Bónis then continues: “So what was, or what should be the content of the basic laws and the implied constitutions, we do not know: assertion and assurance of human rights, ability of non-nobles to bear possession and office, equal tax treatment, constitutional monarchy, national assembly based on popular representation, ministerial accountability, democratic state administration, national army, citizenship encompassing nationalities, Hungarian state language, separation of the church and the state, in one word: the freedom and independence of the country through the liberation and unification of the nation.”<sup>35</sup>

Bónis wrote another biography, too, about our first king: *King Stephen (István király)* (1956). Although he writes in the preface that: “Hero of this book is not Stephen, the statesman, the lawmaker, the organizer of the church, as before; its heroes are the Hungarian people, that lived through the radical transformation of their agriculture, society, public organisation and belief under the guidance of a great man”,<sup>36</sup> On the other hand, the legal historian Bónis starts speaking in this work. He enumerates the thematic order followed in his textbook about universal legal history, when, at first, (after a short public historical overview) he talks about social history, then comes the introduction to the public organisation and legal institutions. After the summary of the crisis of shepherds’ society and the introduction of Stephen’s family, he draws the contours of the foundation and protection of the Hungarian state. He dedicates a large space to the analysis of contemporary legal sources, statutes. Regarding the practice followed during the construction of the royal counties he emphasizes the Frankish patterns (*comitatus*) and those specific Hungarian characteristics, that are different from the German model. Namely, the monarch did not pursue the political division of the country, but he searched for the best ways of economic and military administration of royal estates.

Bónis summarizes as follows: “A scholar who delves into the period will see the elemental crisis of the 10<sup>th</sup> century, the crisis of the economy, society and politics threatening with devastation, who recognizes in King Stephen the great statesman of his people, the worker of the solution of the crisis.”<sup>37</sup>

György Bónis’s authorial work in the field of textbooks is also significant. His students had noted down his lectures at the time when he was working in Kolozsvár. These notes (as classic university notes!) were published, too: *Hungarian constitutional and legal history* (1941, 1943).<sup>38</sup> After the war, in all respects, a completely new regime of cultural policy came. As a sign of the new regime new individual textbooks were not allowed to be written, instead teaching materials were unified nationwide. So, students of the three faculty of laws of the country had to prepare from the same notes and textbooks, all of these had to be understood as a tool of the nationwide, centrally controlled governance of higher education. Since none of the legal historians, that started before the war and served further after, were not removed from their chair by the power, the greatest

<sup>34</sup> HAJNÓCZY 1791, 115–116.

<sup>35</sup> BÓNIS 1954, 291–292.

<sup>36</sup> BÓNIS 1956, 6.

<sup>37</sup> Ibid. 156.

<sup>38</sup> The bibliography of Bónis contains these in detail, as well as the subsequent university notes written during his years in Szeged. We also know the names of coworkers and students preparing the “row material” of the first notes: Sándor P. Gyallay, József Stépán.

of them could prepare these works: *Bónis*, along with his master Ferenc *Eckhart*, and his best friend, Alajos *Degré*, had written university notes.

Universal legal history, that was introduced following the Soviet model, neither had significant educational antecedents, nor summary scientific literature, thus the textbook (*Universal state and legal history – Egyetemes állam- és jogtörténet*) (1957), that was written by Márton *Sarlós* and *Bónis*, can be said to be a pioneer. His human and professional relationship with his co-author, to put it mildly, was tense, however the book, as a whole, is considered an outstanding achievement. I quote from József *Ruszoly*: “*I can confess with some exaggeration that the Universal state and legal history textbook written by Bónis and Sarlós (1957) is still one of the best of its kind, at least considering the chapters written by Bónis. It is a tragic grimace of fate, that he could not teach or examine from it. It was on the market only for a couple of years. I still learnt from it in 1958/1959.*”<sup>39</sup> I would like to add to this characterisation, that the improved textbook material of the main course still looked after by the Department of Legal History of Szeged is essentially based on this source. So, both the relevant chapters of the textbook prepared by Ödön *Böth* and used nationwide, and the *European legal and constitutional history* (2011) written by his successor József *Ruszoly*, are conceptually and in many details were created on a basis that is following the foundations of *Bónis*’s textbook.

#### *The scholar archivist*

After he had been separated (forever) from his dear students, he obtained a new position and research opportunity in Budapest, at the Budapest City Archives. The young scholar expended all his energy on research. He published a brilliant work about the legal life of an older era of the capital: *Judicial practice of Buda and Pest after the expulsion of the Turks. 1686-1708* (*Buda és Pest bírósági gyakorlata a török kiűzése után. 1686-1708*) (1962) and in the same year he worked on another topic from the 20<sup>th</sup> century: *György Nagy and the republican movement prior 1914* (*Nagy György és az 1914 előtti magyar köztársasági mozgalom*).

The longest-lasting values of *Bónis* György’s legal historical works were born out of the exploration of medieval Hungarian legal life put in the European context. Important document of his academic interest is the framework of the academic doctoral dissertation offered in the memory of Imre *Hajnik*: the book titled *Legal intelligentsia of Hungary before Mohács* (*A jogtudó értelmiség a Mohács előtti Magyarországon*) (1971). The key and favourably used term of “legal intelligentsia” and its research historical significance is already exposed in the title and in the preface: “*My study deals with the legal intelligentsia – a layer that applies and develops the Hungarian feudal law – of the era between the late Árpáds and Mohács. It intends to understand their career, their economic and social status in the contemporary Hungarian society, as well as in Europe belonging to the sphere of influence of Rome and canon law. It wants to prove, that the division of labour in the field of intellectuality resulted in the »new, ascending order of legal fraternity« (Engles), national equivalent of the German Juristenstand, the French gens de justice, and the English*

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<sup>39</sup> RUSZOLY 2002, 13.

legal profession, is worthy of research attention. It wishes to suggest the conviction, that without the thorough knowledge of the legal intelligentsia, neither the development of feudal legal customs, nor the history of our judicial organisation, nor the pace and extent of the reception of Roman law, nor the genesis of the late-flourishing Hungarian jurisprudence cannot be understood.”<sup>40</sup> We must agree with every word of this program, furthermore, I add, *Bónis* bore the brunt of this grandiose undertaking.

In this book, that was perhaps the masterwork of his life, *Bónis* deals – with systematic thoroughness, following through historical ages dictated by chronology, in considerable detail – with the literacy, legal knowledge and role of personal circle that formed the national legal profession. In the first chapter, he overviews the local circumstances until the end of the Angevin period: at first, we can read about the jurists of the royal chapel and chancellery, then the circle broadens: national chief judges come, first and foremost the palatine [*nádor*] and the judge of the royal court [*országbíró*], beside them we find the prothonotaries [*ítélőmester*]. The domestic legal system and nationwide legal practice had come into existence and grown stronger in the early centuries, mainly based on their legal knowledge, experience, intelligence and diligence. People dealing with law by occupation naturally emerged from the holy orders in the early times: “So, by the 13<sup>th</sup> century a powerful layer of clerics had come into existence, of which the legal intelligentsia, as a next step of the social division of labour, had been differentiated.”<sup>41</sup> Knowledge of the medieval intelligentsia had significantly been carrying legal content, that is one of the important characteristics of the European development.

*Bónis* does not forget about the notaries [*jegyző – notarii*] when he characterises an era. Notaries are usually the writers of diplomas carrying legal content. Their knowledge and role permanently and significantly lifted them from the rank of simple clerks. They often undertook advocacy tasks that were not only permitted, but also more than promising from the point of view of law seekers, since personal appearance of practical depositories of legal literacy meant an increased potential in a case. The role in Hungary can be compared to the role of notaries in Western European countries. At first, they had just led the records of trials in front of the Holy See. Then, after their role as the writers of diplomas became stronger, they founded the institution of public credibility.

In the next chapters *Bónis* gives the chronicle of the age of king Sigismund and king Mathias, and finally the decades that showed the symptoms of decay at the end of the Middle Ages. The broadly understood 15<sup>th</sup> century is the heroic age of the evolution of the medieval, autonomous Hungarian legal system. We can read a thorough analysis about the jurist staff of all the judicial forums (royal council, chancellery, court of personal presence, royal administration), with special regard given to the prothonotaries. Independent jurisdiction of these jurists, using the seals of chief judges, meant the peak of the institutional development: “Statutorily recognized jurisdiction of the prothonotaries of the curia in the age of Mathias had lasted unaltered during the rule of the Jagiellons, moreover it perhaps covered a wider range. Anyhow, the great abundance of data points that prothonotaries were an integral part of the central judiciary of their age, without their contribution no

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<sup>40</sup> BÓNIS 1971, 7.

<sup>41</sup> Ibid. 21.

decision could have been made in any of the significant cases.”<sup>42</sup> It is not a side remark, that Bónis had attached an archontology to the book, that gives the list of every chief judge and prothonotaries in eight charts from 1322 until Mohács.

In his book’s preface, Bónis refers to the fact that two important chapters had been left out due to the “limitations imposed by the publishing possibilities”. On the other hand, his doctoral dissertation contains the missing chapters: the mapping of the Western and Central European analogies, as well as a detailed introduction to the works (elaboration of Roman law, canon law, and the feudal legal customs) of Hungarian legal scholars. These works were published in the subsequent years. First, his small monograph on the analogies was published: *Legal intelligentsia in the medieval Western and Central Europe* [A jogtudó értelmiség a középkori Nyugat- és Közép-Európában] (1972). Bónis phrases the main message; the definition and genesis of “legal intelligentsia”. When he is thinking about the jurists seceding slowly from the medieval clerical layer, Bónis cites the words of Zsigmond Jakó, whom Bónis met, got to like, and always esteemed during his stay in Kolozsvár: “This laicization had started everywhere within the framework of ecclesiastical intellectualism, but it led only after centuries of co-existence to the more or less definite separation of the components occupying secular positions.”<sup>43</sup> As a summary of his work, Bónis concludes in a graphically described form the personal circle of those who had a cleric status, an intellectual position, and legal knowledge. He separates two classes, depending on whether they participated in university education. Those, who had graduated from university [doctors], often became politicians, diplomats, and – mainly at the holy sees – judges and prosecutors [procurators]. The other group is formed by those lawyers that were trained in the practice [practicals]. They were typically not scholars in the field of Roman law and canon law, but they were experts of national or at least local law. It is safe to declare that Bónis pays the biggest attention to the above-mentioned group of jurists, he fought for their legal historical appreciation. The summary reads as follows: “I consider as a legal intelligentsia [...] that layer, which, over the arts-like knowledge, had acquired the art of Roman, canon or local law at the university or in the practice; having these in possession, they functioned in the politics, diplomacy, jurisdiction, legal transactions, or in the public administration, and they made their living as a jurist or civil servant, or perhaps they could gain wealth [...]”<sup>44</sup>

The other chapter in his academic doctoral dissertation is the monograph published about sources of the Hungarian medieval legal system: *Elements of our medieval law. Roman law, canon law, customs* [Középkori jogunk elemei. Római jog, kánonjog, szokásjog] (1972). In this work, Bónis evaluates in detail and correlates the relationship and role played in the medieval Hungarian legal system of the three major sources of law. From the scientific point of view, Roman law had the primacy: “Without being one-sided, we can say that the measure of legal development in each country is the extent to which it had been able to adopt Roman law, by way of Bologna or Byzantium. Since the canon law directly passed the principles and theorems of Roman law on the states of Latin culture and states joining Latin Christianity – transforming them according to its

<sup>42</sup> Ibid. 379.

<sup>43</sup> JAKÓ 1967, 20.

<sup>44</sup> BÓNIS 1972a, 174–175.

purposes and interests –, it can be suggested as a further measure of the value of the relationship to the canon law. These coordinates determine the place of medieval Hungarian law in the European development [...] “Chemical composition of the medieval Hungarian legal system is the compound of these elements that cannot be exactly determined.”<sup>45</sup> At first, he enumerates the Hungarian relics and achievements of Roman and canon law, then he analyses their effects: “Characterising in summary the impact of Roman and canon law prior to Mohács, at first, we have to observe the absence of every sort of reception of Roman law, even the ‘theoretical’ reception, too [...] civil law – as a sort of »natural law« - enjoyed great prestige, but it was not considered to be a system in force.”<sup>46</sup> Effect and presence of Roman law can be seen mainly in the terminology of the Latin-language Hungarian legal life.

The richest section of the book reports about the domestic customary law. Bónis devotes two chapters to the topic: in one of them, he writes about the records of domestic customary law, and in the other about the results of romanization of our medieval law. [*The way of Werbőczy and Pápóczi – Werbőczy és Pápóczi útja*]. The recording of customary law in our country was often the fruit of the diligence of private individuals, and among these we read a lot about the formularies that also served the needs of the practical teaching of law. These sources of law were both textbooks of substantive law and, and even more so, of procedures, with specific examples. These are also the neglected works of our jurisprudence and legal education, that are mostly handled and evaluated with the aim of completeness by Bónis. The analysis of the practice of chancery and places of testimony [*loca credibilia/testimonialia – hiteleshely*] opens a window on a barely known reality of domestic legal education. Regarding *Ars Notaria* he concludes that the education had combined the written and verbal methods. Bónis is rather reticent when he analyses the Werbőczy’s works, and he also strikingly cautious about the *Tripartitum* [*Hármaskönyv*]: “The author knew for some extent the Roman law, and – as it had been observed for a long time – he used it in its theoretical parts.”<sup>47</sup> Bónis, on the other hand, discusses in detail the freshly-appeared manuscript of Imre Pápóczi canon of Pozsony, that illustrates well another possible path to domestic romanisation.

Encouraged by his master, Ferenc Eckhart, György Bónis was given the idea of writing the history of medieval Hungarian ecclesiastical judicature since he was a university student. He was never unfaithful to this goal; he tirelessly collected material throughout his life. During his scholarship year in England, he collected the most relevant English material on the subject; mapping German and French sources was also among his plans. In order not to lose this very important part of his life’s work, in the twilight of his life, he decided to publish his notes in the form of regesta. He did not live to see the publication of his work: the manuscript of the *Regests of the Holy See* [*Szentszéki regeszták*] (1997) has been edited by the author of these lines.

The research results on the national and European institutions of ecclesiastical jurisdiction also appear in all his major writings, but nine of the studies had been devoted specifically to this topic. Some of them were published in German, French, and English,

<sup>45</sup> BÓNIS 1972b, 7–8.

<sup>46</sup> Ibid. 107.

<sup>47</sup> Ibid. 237.

thus the international academic community was also introduced to his research in this area. His summary study published in the prestigious German legal history journal deserves a specific emphasise: *Die Entwicklung der geistlichen Gerichtsbarkeit in Ungarn vor 1526* [*The development of ecclesiastical jurisdiction in Hungary before 1526*] (1963), which I have translated into Hungarian, and placed at the end of the volume containing the collection of regests of the Holy See.<sup>48</sup> In this study, Bónis summarizes in a “compressed file” the most important domestic results of a major topic that could not be written as a monograph. Knowing his other works well, I have read this work several times with a sinking heart, wherein every sentence the condensation of academic working hours, days, and years glows. The text is so dense that without the detailed citations and analyses of his above-mentioned works, it is barely comprehensible. It is a kind of summary of György Bónis’s life’s work, which is a single vast whole created with artistic perfection and passion: the medieval Hungarian and European legal culture, and the scholarly chronicle of the relationship between the two.

As an epilogue, it is worth mentioning that with the encouragement of Professor József Ruszoly, who also claimed to be a student of Bónis, I edited and published all the studies of György Bónis that were published in German with the help of him and my colleague Éva Tamási, with the title of *Beiträge zur ungarischen Rechtsgeschichte, 1000–1848* [*Contributions to Hungarian legal history, 1000-1848*] (2018). The chapter titles of the volume present the results of the oeuvre published in German in a structured way: *Gelehrtes Recht und Juristenstand* [*Learned Law and Jurisprudence*] – *Gewohnheitsrecht und Gesetz* [*Customary law and statute*] – *Stände und Städte* [*Estates and Cities*] – *Nachruf und Historiographie* [*Obituary and Historiography*]. I have placed in a separate subchapter those two lists that contain Bónis’s publications in languages other than German, as well as his book reviews concerning German legal historiography.

### III. His selected works

*A magyar büntető törvénykönyv első javaslata 1712-ben* [*The first draft of the Hungarian Penal Code in 1712*]. Sárkány Press. Budapest, 1934. (Publications of the Angyal Seminar 26)

*A bírósági szervezet megújítása III. Károly korában* [*The renewal of judicial organisation in the age of Charles III*]. (Systematica Commissio), Sárkány Press. Budapest, 1935. (Értekezések Eckhart Ferenc jogtörténeti Szemináriumából 5 [Essays from the Seminar on the Legal Historical Seminar of Ferenc Eckhart 5].)

*Az angol alkotmánytörténetírás tegnap és ma* [*English constitutional history yesterday and today*]. Századok (74) 1940. 181–211.

*Magyar jog – székely jog* [*Hungarian Law – Székely Law*]. Royal Hungarian Franz Joseph University of Sciences. Kolozsvár, 1942.

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<sup>48</sup> BÓNIS 1997, 621–658.

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- Die Entwicklung der geistlichen Gerichtsbarkeit in Ungarn vor 1526.* Zeitschrift der Savigny-Stiftung für Rechtsgeschichte Kanonistische Abteilung (49) 1963. 174–235.
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- Középkori jogunk elemei. Római jog, kánonjog, szokásjog [Elements of our medieval law. Roman law, canon law, customs].* Közgazdasági és Jogi Könyvkiadó Press. Budapest, 1972. [BÓNIS 1972b]
- Szentszéki regeszták. Iratok az egyházi bíraskodás történetéhez a középkori Magyarországon [Regests of the Holy See. Papers on the history of ecclesiastical jurisdiction in medieval Hungary].* (The manuscript left behind by the author was attended and edited by BALOGH ELEMÉR), Püski Press. Budapest, 1997. (Jogtörténeti Tár 1/1)
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LÁSZLÓ BLUTMAN – SZILVIA KERTÉSZNÉ VÁRADI

## LÁSZLÓ BUZA\*

(1885–1969)

### *I. Biography*

László Buza was born on February 8, 1885, in Sárospatak. His father, János Buza was the teacher at the College of the Reformed Church at Sárospatak, also the presbyter, later the chief caretaker of the local Reformed Church. It is interesting to mention that among his paternal ancestors several noblemen can be found, the Buza family itself was noble, they received the title from István Bocskay in 1606 with the added name, “Váradi”.<sup>1</sup> His wife was Jolán Szádeczky-Kardos (1893–1944), and his sons: dr. László Buza (1914–1987) veterinarian, bacteriologist and Zoltán Buza (1917–1944).<sup>2</sup>

He attended law schools at the Academy of the Reformed Church at Sárospatak, as well as in Budapest, Berlin and Kolozsvár (Kolozsvár) between 1904 and 1908. In the academic year of 1904–05 he won the university’s award at Cluj for an essay about Roman law. Already during his university-level studies he published academic writings, for example his essay on Female criminality (*A női kriminalitás*), written for the legal theory course, had been published by Bódog Somló in the journal titled *Husadik Század*, in 1908.<sup>3</sup>

At the Magyar Királyi Ferenc József Tudományegyetem (Hungarian Royal Franz Joseph University) of Kolozsvár, he received a doctorate of law in 1908, and of political sciences in 1909, *sub auspiciis regis*.<sup>4</sup>

He had already received his first appointment before finishing his state exams, in 1908, at the age of 24, to the Law Academy of Sárospatak. From 1912, he was the tutor at the University of Kolozsvár, and between 1918 and 1923 the public extraordinary lecturer of the Law Academy of the Reformed Church at Sárospatak, where he taught public law, political sciences and international law.<sup>5</sup> Also here the dean at the academic years of 1914/15 and

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<sup>1</sup> KOVÁCS 2016, 126.

<sup>2</sup> Ibid. 128.

<sup>3</sup> Ibid. 129.

<sup>4</sup> Those students could apply for this title who had excellent results in all of the high school and university exams; out of the students at the University of Kolozsvár only one could receive the honour of being awarded with the juris doctor title and a valuable gold ring in the presence of the ruler (or his designated representative).

<sup>5</sup> ÁMÁN 2019, 105.

1921/22, and public director (rector) of the College of the Reformed Church at Sárospatak at the academic years of 1917/1918, 1918/1919 and 1919/1920. In the meantime, he applied to the vacant posts at the Departments of Public Law of the Law Schools of the University of Kolozsvár and Debrecen, but he was not selected to either of the places.<sup>6</sup>

After the peace treaty of Trianon, the University of Kolozsvár moved to Szeged, and started its first semester in 1921, named Ferenc József Tudományegyetem (Franz Joseph University). *Buza* was invited with the unanimous decision of the Faculty of Law to fill the post of public ordinary lecturer in the academic year of 1922/23.<sup>7</sup>

In Szeged, he could excellently profit from his experiences gained at Sárospatak, because a lecturer of the Academy of Law had to teach almost every field of law, and from 1923, *Buza*, as well as all the professors at the university of Szeged, had to oversee several courses. In addition to teaching, his research activities had been characterised by answering new, colourful and exciting professional questions.<sup>8</sup> His saying that became a byword: “If you do not understand something, write a monograph about it.”<sup>9</sup>

This is also evidenced by the fact that at the university of Szeged, he was the head of the Department of Criminal Law in the academic year 1924/25, the Department of International Law between 1923 and 1940, and the Department of Public Law in the academic years of 1936/37 and 1939/40.<sup>10</sup>

He also actively participated in public and social life. From 1932 he administered the library of the Institute of Law and Political Sciences, he presided over the economic committee of the university between 1937 and 1940, and he had been a member of the National Expert Commission of Copyright Law between 1927 and 1933.<sup>11</sup> On the invitation of the Secretary-General of the League of Nations he participated at a study trip in Geneva in 1930.<sup>12</sup> He was the dean of the Faculty of Law in the academic year of 1932/33, pro-dean in 1933/34 and pro-rector of the university in 1939/40.

He was the invited member of the Commission of Legal Sciences of the Hungarian Academy of Sciences between 1930–1937, the corresponding member of the Hungarian Academy of Sciences from 1938, and the ordinary member of it from 1946. He spoke well in English, German, and French.

After the Second Vienna Award (1940), *Buza* along with the Faculty of Law, moved back to Kolozsvár. There he was the public ordinary professor of International Law between 1940–45, the dean of the Faculty of Law in the academic year of 1940/41 and the rector of the university in the academic year of 1943/44. All the professors at the university except *Buza*, fled to Hungary in 1944 from the approaching front line, he stayed at the Faculty of Law as the only law professor. Excluding statistics and legal history, he taught all other courses, on Tuesdays for the first, on Wednesdays for the second, on

<sup>6</sup> The commission did not support the application of any of the candidates, thus neither László *Buza*, nor István *Csekey* or Kálmán *Molnár* had been admitted. See BALOGH 2010, 86.

<sup>7</sup> KOVÁCS 2016, 131.

<sup>8</sup> BLUTMAN 1985, 593.

<sup>9</sup> BALOGH 1999a, 61.

<sup>10</sup> BALOGH 1999b, 90–91.

<sup>11</sup> KOVÁCS 2017, 29.

<sup>12</sup> KOVÁCS 2016, 128.

Thursdays for the third and on Fridays for the fourth-year students, thus ensuring the continuity of the university and education in the war-torn academic year of 1944/45.<sup>13</sup>

He actively participated in the organisation of Bolyai Tudományegyetem, the Hungarian university in Romania, where he received contractual appointment from the Romanian Government in 1945 to the Department of International Law. He was the member of the council of Bolyai University and participated in its governing, where, as a Hungarian citizen, he could teach until 1947. He was also the member of the commission consisting of renowned public figures, who elaborated a memorandum on the setting of the boundaries of Transylvania based on its ethnic composition and submitted it to the great powers in December 1945.<sup>14</sup>

Because of the termination of the independent Hungarian university of Kolozsvár in 1948, he moved back to Szeged, where the formerly fleeing professors of Kolozsvár has re-organized the Faculty of Law and Political Sciences in 1945. He took over the leadership of the Department of International Law in 1948 and was the dean of the Faculty in the academic years of 1949/50, 1951/52, 1952/53, and filled the post of pro-dean in the academic years of 1950/51 and 1953/54.<sup>15</sup>

As the renowned researcher of International Law he was the president of the Commission of Legal and Political Sciences of the Hungarian Academy of Sciences between 1960-64, president of the Hungarian Association of Lawyers between 1959-1965, the board member of the Hungarian branch of the International Law Commission, the member of the presidential council of the Hungarian Society of Foreign Affairs, the board member of the Hungarian Society of Social Sciences, the president of the committee of the city of Szeged Patriotic People's Front, and the main caretaker of the Trans-Tisza Parish of the Reformed Church.<sup>16</sup>

He was awarded the Order of Labour in 1955 and 1960, the golden class of the Order of Labour in 1966. He received the Attila József Memorial Medallion in 1966. As his protégé József *Ruszoly* wrote about him: Professorship and university work was not simply a profession for him, but a lifestyle. "Cultivating science and distributing new results were interconnected for him."<sup>17</sup>

His tutorial activities were of the highest standards. Among his protégé one can find numerous renowned scholars, for example István *Bibó*, József *Szabó*, Lajos *Takács*, the professor of Kolozsvár, as well as Géza *Herczegh*, the only Hungarian judge of the International Court of Justice as of today and Károly *Nagy*, his successor in the leadership of the Department of International Law.<sup>18</sup>

He published approximately 150 articles and several books, and actively participated in the writing of the *Diplomáciai és nemzetközi jogi lexikon* (Encyclopaedia of Diplomacy and International Law), published in 1959. He was the member of the editorial board of the Hungarian journals titled *Külügyi Szemle*, *Acta Juris Hungarici*, and *Acta Juridica*.

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<sup>13</sup> BALOGH 1999a, 62.

<sup>14</sup> KOVÁCS 2016, 132.

<sup>15</sup> BALOGH 1999a, 62.

<sup>16</sup> RUSZOLY 1965, 357.

<sup>17</sup> Ibid. 356.

<sup>18</sup> BALOGH 1999a, 61.

After 58 years of professorship, he retired in 1966, at the age of 81, unique even among university professors. He died at the age of 85, on 18<sup>th</sup> October 1969, in Budapest. The domestically and internationally renowned scholar of the science of international law was laid to rest in the Farkasréti Cemetery receiving funeral honours from the Hungarian Academy of Sciences.<sup>19</sup>

## *II. Academic work*

### *1. The period of Sárospatak (1908–1923)*

As a professor of law at the Legal Academy of Sárospatak, the research of László Buza primarily focused on the field of constitutional law. He published numerous shorter studies which had nothing to do with international law. Thus, he wrote about the legal theory of obstruction (*obstructio*) (1912), the duty to vote (1913), the rules of procedure of the House of Representatives (1916), the requirements with respect to the Hungarian heir apparent to the throne (1916), and about the public law status of the royal family (1918). He even published a longer book on the legal responsibility of ministers (1911).

At the beginning of his scientific career, it was characteristic in his field of research to deal systematically with the legal problems of state territory. This resulted in his probably most significant (and longest) writing of the years spent in Sárospatak, the monograph titled *Államterület és területi fenségjog* (State territory and territorial sovereign rights) (1910). The book generally is in the field of constitutional law: it analysed in detail – based on extensive German literature –, the connection between state power and state territory, the legal characteristics of state territory and the possible restrictions of “territorial sovereign rights”. Nevertheless, the topic inevitably has international law aspects, primarily at those points where constitutional law and international law concerns, overlap each other. For example, at the beginning of the analysis he could not avoid trying to define the state, which is an important question also from the perspective of international law (e.g. at the nascence of a state). From this point of view, the restriction of territorial sovereignty is also similar, because this is typically materialized by way of international obligations and international actors. This question is later also discussed in his works related to international law. Connecting point is the definition of territorial sovereignty, which is one of the main elements of the definition of sovereignty used today. A part of his work is the analysis of sovereignty.

Buza, however, did not like the word sovereignty. Based on the works of the German *Preuss*, he thought that sovereign states existed only in the 17-18<sup>th</sup> century (the absolute monarchies), because that was the period of the absolute level of state power. In the 20<sup>th</sup> century state power is legally controlled (not absolute), thus the expression sovereignty can only be used in a very restricted way. It also resulted from this, that he did not consider sovereignty as the indispensable feature of statehood.<sup>20</sup> The concern

<sup>19</sup> KOVÁCS 2017, 31.

<sup>20</sup> See BUZA 1910a, 8 and 57. his opinion changed by the end of his career, e.g. BUZA 1967, 38.

about “half-sovereign states” again pointed towards international law (Ibid. 153-154): for a very long time, even today, international lawyers have been intrigued by the issue how state-like institutions and states with restricted or diminished sovereignty can be placed within the frame of the system of Westphalia.

The above-mentioned demonstrates that at the connecting points of constitutional law and international law, *Buza* had already then crossed over to the field of international law. The clear by-product of his research in constitutional law was, for example, the study analysing the international legal status of air space (“air territory”), in 1910, which can be regarded as his first scientific work in the field of international law. Also, at the connecting point of constitutional law and international law was where his analysis on the legal status of the state of Bosnia-Herzegovina had come to light (1911), or the overview of the role of the parliament in making a treaty (1914).

Besides his interest for constitutional law, the young tutor of law at Sárospatak, sometimes had already conducted independent international legal research, motivated by the current events of his age. With regards to that it is worth mentioning that he published a short study on the international legal status of airplanes and airships during an armed conflict (1914) or his writing titled *A háború és a nemzetközi jog* (“War and international law”) (1916).

The pragmatic method of research had by then already featured in his work, which was characteristic of him throughout his later academic career. He found legal problems mature enough for legal research in the events, phenomena, process of international relations and the analysis led him from this to the general questions of international law. Rarely can we see such a work from him, which approaches a general international legal dogmatic topic comprehensively from its beginning to the end.

After the Great War Hungary lost the bigger part of its territories and became independent, with a changed state structure, and with high number of Hungarian minorities staying outside the new boundaries. The international order also significantly changed in Europe. This opened countless number of topics to be processed both in the field of constitutional law and international law. László *Buza* chose the latter.<sup>21</sup> By the end of his years in Sárospatak his attention clearly turned to international law.<sup>22</sup> This period is closed by two studies worth mentioning.

The first one, titled “*A nemzetközi jog jogi természetéről*” (About the legal nature of international law) is a two-piece work which aims at proving the legal character of his new field of research (1922). He did this by contradicting such famous theoretical opponents as Bódog *Somló* or Géza *Marton*, who openly denied that international norms would have been legal norms, because without sanction and enforcement those cannot be called that. *Buza* presented a witty solution. Based on the classic differentiation by *Somló* (order-law versus promise-law) he argues that international law is a “conditional promise-law”, and as such it cannot entail norms of sanctions, similarly to domestic law where these also cannot be found in relation to domestic norms of promise-law. Thus,

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<sup>21</sup> He published one or two shorter studies in the sphere of constitutional law as well, see e.g. *A jogfolytonosság* (*The continuity of law*) (1921).

<sup>22</sup> See his German-language study: *Die Entstehung der Tschechoslowakischen Republik im Lichte de Völkerrechts* (1921).

the lack of sanctions does not hinder international law being regarded law, namely “external public law”. However, this creative argumentation can be challenged, thus today we do not use this against the notions contesting the legal nature of international law. He could not state that all international norms were promise-law. In present day it is evident, that the principle of sovereignty and consensus is broken at several points of the process of formation of international law.<sup>23</sup> On the other hand, such views also existed which did not consider promise-law norms law, - not even in domestic law -, but only “pseudo-legal norms”.<sup>24</sup>

The other study, to be mentioned here, but mostly forgotten since, is about the settlement of the status of the Aaland-islands, titled *Aaland-szigetek helyzetének rendezéséről* (1922). He dealt with the international legal status of the islands (which state is entitled to sovereignty over it) and its demilitarization. But its significance mostly was, that – as to our knowledge, for the first time in Hungarian –, it presented the system of individual and collective minority protection for the Swedish minority living on the islands, as well as its international guarantees (the Finnish-Swedish treaty and the control by the League of Nations). This settlement based on territorial autonomy later served as a viable ideal, a sample for protection of minority rights. *Buza* had the same opinion, he thought that this was the point where the sovereignty of states and the right to self-determination still match each other.<sup>25</sup>

## 2. The first period in Szeged (1923–1948)

The insecure situation (and then termination) of the Legal Academy of Sárospatak led László Buza to Szeged (1923), where the university of Kolozsvár found refuge. Here the invitation and post were undoubtedly linked to international law (public law was taught by Ödön Polner in Szeged).<sup>26</sup> He threw himself into the analysis of new international legal phenomena with great vigour. At the beginning his research had two main streams.

He had always been fascinated by the international community as a system, and its operation within the legal framework set by itself (questions of “international constitution”). After the First World War international legal order became institutionalized, as part of the general settlement the League of Nations (*la Société des Nations*) was established. *Buza* sensed that this was an event of historical significance in the history of the cooperation of states, where a certain kind of international public power has emerged. Later in his course-book, he considered it not a simple international organization, but an “association of states”. He regularly followed and analysed the operation of the organization, which he summarized

<sup>23</sup> Later he argued for the legal nature of international law by claiming that a certain kind of “international power” was behind it, BUZA 1935a, 6.

<sup>24</sup> E.g. SZLADITS 1941, 8.

<sup>25</sup> BUZA 1922a, 17. This study has become forgotten by today, which might have three causes: on the one hand the difficulty to access it (it was published in the Yearbook of the College of Sárospatak); on the other hand, in the subsequent decade more works dealt in detail with the territorial autonomy of the Aaland-islands; thirdly that the author utilized this study in his later grand monograph about the protection of minorities, though in a significantly supplemented way (see below).

<sup>26</sup> SCHWEITZER 2017, 11.

in a German-language monograph, titled *Die rechtliche Natur der Mandate des Völkerbundes* (1927).

The other main stream of his research – which was a direct result of the Trianon peace – aimed at the analysis of the protection of minorities based on international law. The study about the Åland-islands set the ground for this, after which in five years, during the first few years of his stay in Szeged, he prepared a monograph of more than 400-pages, dealing with the international legal situation of the protection of minorities: *A kisebbségek jogi helyzete: a békeszerződések és más nemzetközi egyezmények értelmében* (The legal status of minorities: in accordance with the peace treaties and other international agreements) (1930).<sup>27</sup> Since the main institutional guarantor of international protection of national minorities was the League of Nations, the two main streams of research partly covered each other. The monograph discovers and analyses in detail the characteristics of the system of minority protection between the two world wars, the circle and content of the rights ensured by the treaties, the practical forms of minority protection. A separate part was dedicated to the “formal minority law”, which reviewed the procedural issues of law enforcement at the League of Nations. The monograph, also won the prize of the Academy, is the comprehensive and detailed imprint of the most developed multilateral system of minority protection in legal history until then, of which only chips remained after World War II.

Besides these the new law professor also found time to deal with certain other questions of the settlement after World War I. For example, he wrote about the international legal guarantees of the recovery loan (1924), or about the international legal aspects of the military control over Hungary (1925). He also paid attention to those international topicalities which could be approached by legal means. After the conclusion of the Lateran Treaty almost immediately he published a shorter article, which dealt with the changed international legal state of the Vatican (1929). In one or two studies his general interest in constitutional law surfaces, though by maintaining the international legal perspective: e.g. *A királykérdés nemzetközi jogi vonatkozásai* (The international legal aspects of the royal question) (1928).

After the monograph on minority protection the next big step for him undoubtedly was the compilation and publication of his general course-book on international law (1935). In this work he summarized his notions about international law. With respect to a course-book it is not the only important factor which is included in it, but also what is omitted by the author, and what is the system and view connecting the written text. Buza divided international law into two major parts. There is the “international constitution”, which describes the international legal order and the general legal state of the states in the international community. Besides this stands “ordinary international law”, which summarizes the (remaining) bigger part of international norms. The two groups of norms are equal, there is no distinction between them from a formal point-of-view, with respect to their status as a source of law.

In the course-book the author, besides discussing international constitution, devotes the remaining bigger part to the “*liberty of the state*”. Inner and outer liberty of the state (the possibility of free action) is put in contrast with “*international power*”, of which

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<sup>27</sup> The monograph had been preceded by studies, e.g. *L'affaire des colons hongrois du Bânât et de la Transylvanie: devant la Société des Nations* (1926).

the League of Nations is a party. It is not difficult to discover that the dual liberty of the state means sovereignty. Nevertheless, *Buza* was reluctant to speak about sovereignty, which he considered to be an absolute, and to which states are not entitled by the 20<sup>th</sup> century.<sup>28</sup> But he could integrate several classic topics of international law under the liberty of the state, starting from the prohibition of intervention, through participation in international legislation, to such issues of state responsibility as the application of self-help. It can be concluded in general that the opposition of international constitution/public power to state liberty, as a principle of order, does not work well. For example, he had to include international organizations, through which the state participates in the execution of international law, in the category of outer liberty of the state. At the same time, he put the regulation of diplomatic relations in the category of international constitution, while those primarily serve the execution of the interests of the state.

After the publication of his course-book, new trends had emerged in the research of *Buza*. He published several studies, which were not dedicated to practical issues or an existing international affair, but comprehensively analysed a legal dogmatic question relating to the fundamentals of the operation of international law. This time the dogmatic analysis does not have a subsidiary role while discussing a practical issue, but they are the subject of a study in their own right. Studies with comprehensive and deep legal dogmatic analysis can be listed here, such as: the application of force (1937, in German), the legal nature of recognition (1939, in Hungarian, 1940, in German), the abuse of rights and the principle of *bona fides* (1940), international legal delict (1942), the punishments applied in international law (1945).<sup>29</sup>

In relation to international events, in the 1930s the interest of the professor was directed in three ways. Sensing the crisis of the settlements subsequent to World War I, he researched the possible legal basis of change, generally and with respect to Hungary [see e.g., the voluminous study on the role of the League of Nations in changing those international legal norms which could not be applied (1931), or about the international legal basis of territorial revision (1933)]. He tried to provide a general review on how national socialism viewed international law [e.g. *A nemzetiszocialista Németország és a nemzetközi jog* (1936) (The national socialist Germany and international law)]. Around the end of that decade, he tried to evaluate the international crisis from the point of view of international law [e.g. *Az európai válság a nemzetközi jog tükrében* (1939) (The European crisis in the mirror of international law)].

He moved back to Kolozsvár as a corresponding member of the Hungarian Academy of Sciences and one of the leading international lawyers in the country. But the years spent in Kolozsvár were too hectic and he could not continuously produce such high level works as before. The hardships relating to the war, being the rector (1943/44), the burden of education in the last years and the existential insecurity distracted too much energy from research. Naturally, the war itself and the settlement after the war offered numerous topics to be analysed. In the chaotic times, when the

<sup>28</sup> He represented such an absolutistic point of view, that the definition of sovereignty *eo ipso* excludes the legal restriction of the sovereign. BUZA 1922b, 119. Contradicting that, he regularly used the expression 'sovereignty' in his works.

<sup>29</sup> Regarding the approach probably his shorter, humbler work on neutrality can also be included here (1939).

previous international legal order finally disintegrated, he searched for something to hold on to [e.g. *A nemzetközi jogalkotás jelszavai és alapelvei a bécsi kongresszus óta* (1942) (The phrases and principles of international legislation since the Vienna Congress)]. He also paid attention to the emergence of the new international order after the world war and the rise of new world powers. He wrote about the statehood of the Soviet Union (1945), about international legal sanctions (1945), about the new principles introduced in the Charter of the United Nations (1946).

### 3. The second period in Szeged (1948–1966)

Buza, when moving back to Szeged, by that time a full member of the Hungarian Academy of Sciences (1946), could not pick up where he had left off. Circumstances had changed significantly. In contrast to many others, he could keep his membership in the Academy, he could teach at the university of Szeged, and he could publish his works. But when reviewing these, it is the impression of the reader that brave dogmatic analysis, ingenious argumentation, and creative solutions to practical problems of international law are less prevalent in his works than before.

Undoubtedly, the study on the role of the principles of legality and justice in international law (1957) and the one on necessity in international law (1958, in Hungarian, 1959, in English) belong to the highest level. Since the “international constitution” had always been a focal point of his professional interest, it was evident that he dealt with the characteristics of the new international legal order built on the system of the United Nations [*A nemzetközi közhatalom szervezete az Egyesült Nemzetek Alapokmánya szerint* (1949) (The organization of international public power according to the Charter of the United Nations), or *A nemzetközi ellenőrzés mint a törvényesség biztosítója a nemzetközi életben* (1965) (International control as the guarantee of legality in international life)].

Even though he had a role in writing the collective course-book of international law, characteristic to the socialist era, this was only a supporting role. This course-book was generally used in the higher education of law throughout Hungary (living for four editions), and in it he was the author of the chapters on state territory, population of the state and treaty law.<sup>30</sup> When compared to the length of the book, this represented only about 15% of it. At the same time, he also participated in the writing of numerous articles of the Encyclopedia of Diplomacy and International Law (*Diplomáciai és nemzetközi jogi lexikon*, 1959).

He finished his career in higher education at the age of eighty-one, and left Szeged in 1966. A new opportunity opened for the academic, he could publish a book summarizing the main issues of international law. This is how his ‘swan song’ was born in the form of a book: *A nemzetközi jog fő kérdései az új szellemű nemzetközi jogban* (1967) (The most important questions of international law in the new spirit of

<sup>30</sup> In the first edition (1954), written by four authors (BUZA LÁSZLÓ, FLACHBART ERNŐ, HAJDU GYULA and VITÁNYI BÉLA), the part on the population of the state was written by someone else. The second edition had three authors (1958), the third (revised) and the fourth (unrevised) edition (1961, 1968) was in large part written by Hajdu and in a small part by Buza.

international law). Compared to the wide title, the book is rather thin with a surprisingly narrow focus, at least based on its contents: it covers the subjects of international law, the settlement of disputes, and to several general issues of international law, such as the concept of international law, the types of international legal rules and the relationship between international and domestic law. Nevertheless, the narrowly constructed titles hide numerous legal topics, typically discussed very briefly, often in a style of brief statements expressing the opinion of the author. (For example, in the chapter on the state as a subject of international law one can find analysis not only about the constituent elements of the state, but also about the status of the Antarctic, the right of servitude, or minority and human rights – this latter part is surprisingly lengthy).

The unique structure of the book and the different proportion or disproportion of the length of topics naturally can be explained by the author's opinion on what represents the main issues and what belongs to the "new spirit" of international law. However, the latter is far from being evident. It is still visible that *Buza* differentiated two levels of international law, but alongside another intersection than previously: "classic international law" and "international law of new spirit". According to him, the latter one is in contrast with the first one and by containing new norms (e.g. the prohibition of the use of force) and new organisational solutions (e.g. the United Nations) it extrudes legal solutions of classic international law from interstate relations. This might be the explanation for leaving out such fields from the book, as treaty law (the norms of which had just been under codification at that time), or the multifaceted problems of the responsibility of states for internationally wrongful acts (later researched in depth by *Buza*'s disciple and later his assistant, Károly Nagy).

Today, this book is the most cited publication of László *Buza*. Understandable, since it has a comprehensive character, it is available, easy to read and comprehend, and he stated his final point-of-view on many issues of international law in it. But the reader should not expect in depth analysis throughout, since it is a book of synthesis, which records definitions, classifications and opinions developed by the author. With respect to a few aspects, the book can be disputed, but generally it is the coherent summary of the state of "international constitution", as it was at the middle of the 1960s.

#### *4. General characteristics and aftermath of his academic work*

Notwithstanding the vicissitudes of the 20<sup>th</sup> century, László *Buza* had a long, diligent, nice span of professional life, lasting from the reign of Emperor Franz Joseph to the Kádár-regime, from the chestnut tree-filled shady garden at the College of the Reformed Church at Sárospatak, through Kolozsvár to the present building of the Faculty of Law in Szeged. To briefly highlight and list the features of his life would be an ungrateful task. But those, who know it can hardly debate two of its characteristics: the public law positivism of the academic and his practical, problem-solving approach.

The strong sense of legal positivism escorted him throughout his career. He was not willing to think about timeless conceptual structures or to research the rules of the "right

law". In the introduction to his 1935 course-book he highlighted this.<sup>31</sup> Even though he was intrigued by the moral foundations of law,<sup>32</sup> he always observed legal norms through the lens of the actual legal text and the behaviour of states. He did not have illusions: international law is a means in the international powers and has to be researched as it is established by the states. When *Buza* arrived in Szeged, together with Ödön *Polner* they represented legal positivism in public law at the Faculty of Law, as a counterpoint to the then determinant approach of neo-kantianism, influenced by Bódog *Somló*.

An important consequence of his positivism is, for example, that all his life he consequently said: there are no objective legal norms, which would be obligatory for states who had not accepted it.<sup>33</sup> He did not acknowledge the existence of *ius cogens* norms (or that certain norms of customary law would break the principle of sovereignty), not even in his final book, while only two years later, the majority of states accepted that in the Vienna Convention on the Law of Treaties (1969). He could not really accept the principle of *pacta sunt servanda*, since he had not found the positive legal basis for it in general international law.<sup>34</sup>

At such a field of law, which is extensively and directly related to politics, as is international law, it is not always easy to provide clear legal analysis. *Buza*, grounded in the positivist approach, aimed at demonstrating the phenomena through the eyes of the lawyer, arguing like a lawyer, avoiding statements of political style. In 1938, the academics who nominated him for the membership in the Academy also highlighted this in relation to his course-book: "It is his particular merit, that he analyses this material dominated by political elements only from a legal point of view and sheds light on it with soberness lacking illusions and with impartiality."<sup>35</sup>

We already praised László *Buza*'s ability to rise from the specific practical problems to the analysis of issues of general international law. He very quickly reacted to the events and actualities of international politics. For example, the Finnish-Swedish treaty on the settlement of the status of the Åland-islands was approved by the Council of the League of Nations on June 24, 1921 and already the following year his study on it was published. One year after *Blériot* crossed the La Manche Channel by airplane, he wrote a study about the legal status of airspace, and in 1914, at the start of World War I he published a paper on the international legal status of airplanes and airships (zeppelins) in armed conflicts. He tried to describe the relationship of the ideology of German national socialism to international law as early as 1936.

It is not always easy to clearly grasp the aftermath or influence of an excellent legal academic who has been dead for half a century by now. Legal analysis tends to erode quickly, no matter how brilliant a study might be, when based on changing legal texts or relating to already terminated organizations and procedures, they easily become useless. (Only a few fields of legal research can avoid that.) But often we use terms, definitions, distinctions, classifications, and arguments, and we are not even aware that those had been introduced into the national legal literature by László *Buza*. For example, he was the one

<sup>31</sup> BUZA 1935a, IV. later similarly e.g. BUZA 1967, 9.

<sup>32</sup> Cf. *A dekalogos és a nemzetközi jog* [*The Decalogue and public international law*] (1947).

<sup>33</sup> BUZA 1922a, 14.

<sup>34</sup> BUZA 1967, 34–35.

<sup>35</sup> Cited by KOVÁCS 2017, 29.

who very early on discussed, in a high impact study the monistic and dualistic approach to the relationship of international and domestic law, as well as the issue of primacy.<sup>36</sup>

The works of László Buza cannot be overlooked by those international lawyers, legal historians and historians who wish to research the League of Nations, the system of minority protection between the two world wars, or are interested in the legal implications of the European crisis preceding World War II. He had numerous brilliant statements with regard to the legal dogmatic fields as the basis of international law (e.g. sources of international law, questions of treaty law, certain aspects of the responsibility of states etc.), which can be thought-provoking or be directly followed by his professional successors. He analysed the Charter of the United Nations (the text of which is still unchanged, aside from a few minor exceptions) in-depth in several studies, thus these works can still be instructive even today. At the same time, when remembering Buza, most Hungarian international lawyers would primarily cite the “theory on the programmatic norms”, which he discussed in detail in an ingenious and in-depth study published in 1957 (*A törvényesség és az igazságosság elve a nemzetközi jogban*; [The principle of legality and justice in international law]).<sup>37</sup>

Personal impressions of him fade, since most of his direct colleagues and disciples are also dead by now, but at the Faculty of Law of Szeged legends concerning him still exist. These combine his punctuality, his classes planned by the preciseness of an engineer and held with a characteristic style of speech, his strict daily routine, his deep affection toward teaching, students, and the university, and above all the ethos of professorship surrounding him.<sup>38</sup>

### III. His selected works

*Államterület és területi fenségjog: államjogi tanulmány.* [State territory and territorial sovereign rights] Grill. Budapest, 1910. (1910a)

*A levegőterület nemzetközi jogi helyzete.* [The international legal status of airspace] Politzer. Budapest, 1910.

*A miniszterek jogi felelőssége.* [The legal responsibility of ministers] Grill. Budapest, 1911.

*Bosznia és Hercegovina államjogi helyzete: s a bosnyák-hercegovinai tartományi illetőség.* [The legal status of Bosnia-Herzegovina – in public law.] Pfeifer. Budapest, 1911.

*Az obstructio jogtana.* [The legal doctrine of obstruction] Grill. Budapest, 1912.

*A parlament szerepe az államszerződések kötésénél.* [The role of the Parliament in treaty-making] Budapest, 1914. (published by the author)

*A repülőgépek és léghajók nemzetközi jogi helyzete a háborúban.* [The international legal status of airplanes and airships in an armed conflict] Jogtudományi Közlöny. 1914/45. 453–455.

*A magyar trónörökösben megkivántató kellékek.* [The requirements with respect to the Hungarian heir apparent to the throne] Franklin. Budapest, 1916.

<sup>36</sup> BUZA 1922c, 386–388.

<sup>37</sup> Analysis of this theory has been published even fifty years later, BOROS 2009.

<sup>38</sup> See RUSZOLY 1965.

- A képviselőház házszabályai: államjogi tanulmány.* [The rules of procedure of the House of Representatives: public law study] Ref. Főiskola Ny. Sárospatak, 1916.
- A háború és a nemzetközi jog.* [War and international law] Ref. Főiskola Ny. Sárospatak, 1916.
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MÁTÉ PÉTERVÁRI

## ISTVÁN EREKY\*

(1876–1943)

### *I. Biography*

*“But in addition, I must draw your kind attention to the following: my area of expertise is not constitutional law, but administrative and financial law.”<sup>1</sup>*

*Extensive research in legal science with administrative law at the focal point*

István Ereky is an acknowledged administrative jurist and a full member of the Hungarian Academy of Sciences in the first half of the 20th century. His interests extended to numerous fields of law, he dealt with private law at the beginning of his career, taught the legal aspects of criminal litigation, published in the field of constitutional law, as well as commenting on the reform of higher education. His work in legal history is bigger than some contemporary legal historians. The quote above refers to this versatility, as in his surviving letter in connection with a request he reminded Gyula Szekfű, that he considers the discipline of public administration his main area. However, the eminent historian of the Horthy era cannot be blamed for asking the author on a topic of constitutional law, as looking at Ereky's life and publications he seems to be more “omnivorous”.

When we study the trajectory of his life, we are familiarised with a person who is fully committed to their university career, who was able to be admitted to the University of Szeged due to his extraordinary determination. The imprint of the turbulent decades of Hungarian history can also be traced in the development of his career, as it was a result of the Trianon peace treaty, that the law professor moved to the Southern Great Plain and became a defining figure of the first Szeged era of the university.

Of the four sons of István Ereki (nee Wittmann) and Veronika Takáts Dukai István Ereky, was the oldest, born on December 26, 1876, in Esztergom. Until 1893, his father

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<sup>1</sup> OSZK Kézirattár [National Széchenyi Library manuscript archive] Fond 7/469.

bore the surname Wittmann, which was then changed to Ereki.<sup>2</sup> The family breadwinner was a state employee from 1873 after his military service, first as a prison supervisor of the Royal Regional Court of Esztergom,<sup>3</sup> then he was a postmaster from 1874 also in Esztergom,<sup>4</sup> and from 1882 in Sümeg.<sup>5</sup> The career of the two oldest siblings blossomed as university lecturers. In addition to István Ereky, his younger brother, Károly, was also attracted by academic research, thus becoming one of the founders of the field of biotechnology in Hungary.<sup>6</sup> Later his brother also tried himself at politics as the Minister of Food in the Friedrich cabinet and later as an MP.

István Ereky spent his high school years in Sümeg and Székesfehérvár, during which time he gained extraordinary language skills, which is proved by his translations of poems from French which were published during his high school years.<sup>7</sup> Later, from 1894 he read law at the Royal Hungarian University of Budapest,<sup>8</sup> where he graduated in Law and Political Sciences in 1898. During his university years, he spent the academic year 1896–1897 at the University of Vienna.<sup>9</sup> After completing his studies, he did his pupillage for a short time, then he was employed as a legal trainee at the Budapest Criminal District Court from November 1898.<sup>10</sup> In May 1900, Ereky was appointed as a clerk to the Royal District Court of Rétság,<sup>11</sup> then he was transferred to the Royal Regional Court of Kalocsa in November 1901, retaining his position as a clerk.<sup>12</sup> He was appointed to the Royal District Court of Sümeg as a clerk in September 1902,<sup>13</sup> where he was promoted to recorder in August 1903.<sup>14</sup> Later he held the position of council registrar of the Royal Court of Appeal of Győr.<sup>15</sup>

<sup>2</sup> Budepesti Közlöny Vol. XXVII. No. 279. 1. SZENTIVÁNYI 1895, 67. In the description of the name change, the surname is mentioned as Ereki, but in 1893 István Ereky seems to have used it with y. Szerkesztői üzenetek. Ország-Világ Vol XIV. No. 44. 716. The change of name also was a subject of ridicule in connection with the brother who entered a political career. "Károly Ereki addresses Gyula Berki:

- Gyula, how is it that you write your name with i, even though I know you are noble.

- You're right, Károly! Even my great-grandfather was noble and he also wrote his name with an i. But how is it that you write it with y, even though your father still wrote with double n."

(A t. nemzetgyűlés folyosójáról. Borsszem Jankó Vol. LIV. No. 2762. 6.)

<sup>3</sup> Budepesti Közlöny Vol. VII. No. 85. 707. Magyarország tisztii czim- és névtára 1874, 212.

<sup>4</sup> Postai Rendeleték Tára Vol. VIII. No. 17. 72. Magyarország tisztii czim- és névtára 1875, 277. Magyarország tisztii czim- és névtára 1879, 253.

<sup>5</sup> Postai Rendeleték Tára Vol. XVI. No. 3. 15. Magyarország tisztii czim- és névtára 1884, 197. Magyarország tisztii czim- és névtára 1887, 241.

<sup>6</sup> FÁRI – KRALOVÁNSZKY 2004, 240–268. Koi 2018, 1.

<sup>7</sup> HUGO VIKTOR: *Elise*. (translated by István EREKY) Ország-Világ Vol. XV. No. 7. 114. HUGO VIKTOR: *Dal*. (translated by István EREKY) Ország-Világ Vol. XV. No. 22. 373.

<sup>8</sup> *A Budepesti Királyi Magyar Tudomány-Egyetem almanachja MDCCCXCIV-XCV. tanévre [Almanac of the Royal Hungarian University of Budapest for the school year MDCCCXCIV-XCV].* 1895, 84. *A Budepesti Királyi Magyar Tudomány-Egyetem almanachja MDCCCXCV-XCVI. tanévre [Almanac of the Royal Hungarian University of Budapest for the school year MDCCCXCV-XCVI].* 1896, 87.

<sup>9</sup> *A Budepesti Királyi Magyar Tudomány-Egyetem almanachja MDCCCXCVII-XCVIII. tanévre [Almanac of the Royal Hungarian University of Budapest for the school year MDCCCXCVII-XCVIII].* 1898, 94. Koi 2018, 2.

<sup>10</sup> Budepesti Közlöny Vol. XXXII. No. 266. 1. Magyarország tisztii czim- és névtára 1889, 657.

<sup>11</sup> Budepesti Közlöny Vol. XXXIV. No. 112. 1.

<sup>12</sup> Budepesti Közlöny Vol. XXXV. No. 256. 1.

<sup>13</sup> Budepesti Közlöny Vol. XXXVI. No. 209. 1.

<sup>14</sup> Budepesti Közlöny Vol. XXXVII. No. 177. 1.

<sup>15</sup> *Uj jogakadémiai tanár [New teacher at the law academy].* Budepesti Napló Vol. IX. No. 244. 4.

His first scholarly work on private law was published in 1903, so his name may have appeared in several places in connection with vacant teaching positions. Finally, after the unanimous nomination of the Faculty of Law he was elected out of 27 candidates the extraordinary teacher of governance law and statistics on a temporary basis in September 1904 by the governing council of the Prešov Evangelical Academy of Evangelical Law.<sup>16</sup> A year later he was awarded tenure,<sup>17</sup> then in 1906 he was made full professor.<sup>18</sup> In 1908 he made his habilitation at his alma mater, the Royal Hungarian University of Budapest, which was approved by the Minister of Religion and Education in the beginning of 1909.<sup>19</sup> He taught *Jurisprudence, Hungarian Administrative Law and Statistics of the Hungarian State with regards to Austria*,<sup>20</sup> in addition to which he held seminars in administrative law for a few semesters,<sup>21</sup> and lectured on military administration, the new Defense Forces Act and on emigration as an elective course.<sup>22</sup> He also taught the law of Hungarian criminal litigation in the academic year of 1912–1913.<sup>23</sup> The aim of the law academies was to provide a lower level of legal education than the universities, with an emphasis on practice.<sup>24</sup> The academy in Prešov stood out in terms of the number of students from the academies.<sup>25</sup>

The upward curve of *Ereky's* career is shown by the fact that, thanks to the intervention of Győző Concha, he was able to go on a one-year study trip to London, England, from January 1910 delegated by Ministry of Religion and Public Education.<sup>26</sup> He studied the local administration and the competition system.<sup>27</sup> Returning from his study trip, he married Erzsébet Petracsek on December 18, 1910, with whom they later had a child together.<sup>28</sup>

In March 1914, *Ereky* learned that a call has been issued for a total of 22 law departments in Debrecen and Bratislava, with a deadline of 31 March. It was possible to apply for more than one department at a time, so he planned to apply for an appointment to a “department of legal history or administrative law”.<sup>29</sup> The value of university tenures in the era is shown by the fact that, according to the correspondence between *Concha* and *Ereky*, they engaged in serious lobbying so that *Ereky* could obtain the necessary support.<sup>30</sup> Prior to the decision on the appointment, it was a matter of great tension that, according to leaked news, his religion could place him at a disadvantage in the evaluation of the applications.<sup>31</sup> In addition, in a letter to *Concha*, who supported

<sup>16</sup> *Uj jogakadémiai tanár [New teacher at the law academy]*. Budapesti Napló Vol. IX. No. 244. 4. RAFFAY 1905, 3.

<sup>17</sup> CSENGEY 1906, 2.

<sup>18</sup> LUDMANN 1907, 2.

<sup>19</sup> *Beszédek* 1910, 41. KÉPESSY 2014, 115.

<sup>20</sup> SZUTÓRISZ 1910, 60–62.

<sup>21</sup> RAFFAY 1905, 40–42. GAMAUF 1911, 75–76. OBETKÓ 1912, 92–94.

<sup>22</sup> CSENGEY 1906, 42–45. LUDMANN 1907, 45–48. DRASKÓCZY 1913, 100–103.

<sup>23</sup> DRASKÓCZY 1913, 102. LUDMANN 1914, 94.

<sup>24</sup> ÁMÁN 2018, 18–20.

<sup>25</sup> BRUCKNER 1996, 49. STIPTA 2009, 65–66. MEZEY 1998, 14–15.

<sup>26</sup> SZUTÓRISZ 1910, 19. GAMAUF 1911, 25. MTA Kézirattár [Manuscript Archives of the Hungarian Academy of Sciences] Ms 4811/141. 143.

<sup>27</sup> GULYÁS 1990, 686.

<sup>28</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/147.

<sup>29</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/158.

<sup>30</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/158–164.

<sup>31</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/163.

him, he justified his moderate public activity with his work invested in his academic work.<sup>32</sup> In connection with this, he explained that he had never carried out any political activity other than joining the National Labor Party<sup>33</sup> at the encouragement of Mihály Réz. Among his public roles, he highlighted his position as honorary chief notary of Sáros county.<sup>34</sup> Finally, the concerns proved to be unfounded, and on August 26, 1914, the Sovereign appointed *Ereky* professor of the Department of Public Administration and Financial Law of the newly established Royal Hungarian Elizabeth University in Bratislava.<sup>35</sup> As a qualified teacher of statistics and jurisprudence, he also gave lectures on these subjects to students at the university in Bratislava.

*The connection between István Ereky and the city of Szeged*

As a result of the Trianon peace treaty, the fate of the universities of Kolozsvár and Bratislava were called into question with the fragmentation of the country's territory, as they were separated from the motherland by the change of national borders. Together with *Ereky*, the professors at the Elizabeth University of Bratislava were expelled from the territory of the newly founded Czechoslovakia, but the faculty of law of the university, unlike the other faculties, maintained its operation until August 20, 1921 in the city.<sup>36</sup> Due to the refusal to swear allegiance to the Romanian king and the governing council, the teachers of the Royal Hungarian Franz Joseph University in Kolozsvár were also forced to leave the city. The exiled teachers first received refuge in the capital during the occupation of the country, where they resumed education in March 1920.<sup>37</sup> The National Assembly of Hungary adopted the Act no XXV. of 1921 which once again provided a "home" for both universities, as the Royal Hungarian Elizabeth University of Bratislava moved to Pécs, while the University of Kolozsvár moved to Szeged.<sup>38</sup>

Among the university professors from Kolozsvár, the Transylvanians also repatriated after taking over the university by Romania, except three of them remained in Kolozsvár. Among them was Mihály *Bochkor*, who taught of Hungarian constitutional and legal history at the university in Transylvania. For this reason, István *Ereky* taught the subject in 1920/21. academic year at the Franz Joseph University, which held the legal education in Budapest.<sup>39</sup> *Bochkor* was eventually unable to follow the moving university as he passed away on November 3, 1920, in the then Kolozsvár. On June 17, 1920, the faculty council unanimously elected István *Ereky* to fill the vacant tenure in Budapest.<sup>40</sup> Confirming the

<sup>32</sup> "I am not saying it in vanity that I have published nearly 2,000 pages, including my most recent work. It made it impossible for me to perform any public activities." MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/164.

<sup>33</sup> Munkapárt [Labour Party]

<sup>34</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/164.

<sup>35</sup> Budepesti Közlöny [Budapest Gazette] Vol. XLVIII. No. 201. 14. DRASKÓCZY 1915, 61–62.

<sup>36</sup> KARDOS – KELEMEN – SZÖGI 2000, 119.

<sup>37</sup> *A Magyar Királyi Ferenc József-Tudományegyetem almanachja [Almanac of the Hungarian Royal Franz Joseph University].* 1932, 34.

<sup>38</sup> ÁMÁN 2017, 22.

<sup>39</sup> KOKOLY 2018, 536.

<sup>40</sup> PÉTERVÁRI 2014, 30.

decision of the faculty council, Governor Miklós Horthy, appointed István Ereký together with Albert Kiss and Ferenc Finkey, from the Royal Hungarian Elizabeth University to the university moving to Szeged on September 22.<sup>41</sup>

Ereký has been deputising Elek Boér (the older) since 1921 in the teaching of administrative and financial law at Franz Joseph University until 31 December 1924, when the governor finally entrusted him with the management of this department permanently.<sup>42</sup> However, he was also able to continue teaching Hungarian constitutional and legal history, till the first semester of 1927–1928 as a deputy, which was then entrusted to Béla Iványi.<sup>43</sup>

István Ereký took an active role in the management of the university in Szeged, being elected dean of the Faculty of Law three times, a position held in the academic years 1923–1924, 1931–1932 and 1939/40.<sup>44</sup> On one occasion, he was entrusted to lead the whole university, in the academic year of 1938–1939 he benefitted the university by performing the duties of the Rector.<sup>45</sup>

Belonging to the new university, István Ereký became a corresponding member of the Hungarian Academy of Sciences in 1921,<sup>46</sup> and his inaugural speech was given on April 10, 1922, entitled *The Development of Administrative Law and Administrative Science*. The Academy also awarded the Sztrókay Prize in 1921 for his two-volume work entitled *Studies in Legal History and Public Administration*, which was found to be the worthiest of the law and political science works published in 1918 and 1919.<sup>47</sup>

In 1930 he was again awarded an academic prize for his monograph on legal persons and was awarded the Marczibányi Prize,<sup>48</sup> and also this year, he received the Corvin Wreath in recognition from the governor when the award was established.<sup>49</sup> In 1934, István Ereký was deemed to be worthy to be elected a full member of the Hungarian Academy of Sciences.<sup>50</sup> His inaugural speech in 1935 was based on his later published monography *Public Administration and Self-Government*, which examined concepts in the light of current international dogmatic trends.<sup>51</sup> In 1939, the Hungarian Academy of Sciences rewarded his work again, this time with the Academy's Grand Prize for his two-volume work entitled *Public Administration Reform and the Self-Government of Large Cities*.<sup>52</sup>

<sup>41</sup> Hivatalos Közlöny Vol. XXIX. No. 24. 291.

<sup>42</sup> Hivatalos Közlöny Vol. XXXIII. No. 3. 24.

<sup>43</sup> *A magyar királyi Ferenc József-Tudományegyetem tanrendje. Az MCMXXVII-XXVIII. tanév első felére felére [The curriculum of the Hungarian Royal Franz Joseph University for the first half of schoolyear MCMXXVII-XXVIII]*. 1927, 20.

<sup>44</sup> Ibid. 26–28.

<sup>45</sup> *A Magyar Királyi Ferenc József-Tudományegyetem tanrendje 1938/39. tanév első felére [The curriculum of the Hungarian Royal Franz Joseph University for the first half of schoolyear 1938-39]*. 1938, 7.

<sup>46</sup> Akadémiai Értesítő [Academic Bulletin] 1943, 367.

<sup>47</sup> Akadémiai Értesítő [Academic Bulletin] 1921, 109–114.

<sup>48</sup> KORNIS 1942, 42.

<sup>49</sup> ÁMÁN 2019, 81.

<sup>50</sup> Akadémiai Értesítő [Academic Bulletin] 1934, 235.

<sup>51</sup> EREKY 1939.

<sup>52</sup> Akadémiai Értesítő [Academic Bulletin] 1939, 40. See his relationship with the Hungarian Academy of Sciences: PÉTERVÁRI 2014, 30–32.

In addition to his successful academic work, he headed the Department of Administrative and Financial Law of the University of Szeged until its return to Kolozsvár in 1940.<sup>53</sup> However, the fate of the university greatly influenced *Ereký's* life towards the end of his career, as he did not follow the institution when he returned to Kolozsvár. On October 19, 1940 he was appointed professor of administrative and financial law at the Elizabeth University of Pécs.<sup>54</sup> However, he could not spend much time in Pécs, as István *Ereký* died in Budapest on May 21, 1943.<sup>55</sup> His funeral was held on the estate in Lipótfá, where József *Holub* placed the wreath on behalf of the Hungarian Academy of Sciences.<sup>56</sup>

## II. Academic work

Due to the extensive nature of the academic work of István *Ereký*, it is not possible to represent and evaluate within the framework of this study. Instead I would like to present his works from the beginning of his career, which primarily provides an opportunity to summarize his works on the history of public administration and provides additions to the stage of his life that includes his path to the university tenure. This also justifies how the professor in Bratislava was able to become a full professor of the Department of Hungarian Constitutional and Legal History of the Royal Hungarian Franz Joseph University in Szeged due to his work on constitutional and legal history at the suggestion of Pál *Szandtner*, as the Faculty recognized his suitability for the position by highlighting his monographies on this topic.<sup>57</sup> Several well-written academic works have already presented his scholarly work in the field of public administration.<sup>58</sup>

István *Ereký* published his first work in connection with the codification of the Hungarian Civil Code,<sup>59</sup> when he expressed his views on the regulation of legal persons in response to drafts published in 1900.<sup>60</sup> He wanted to contribute in the most detail to the systematization of the rules for associations. He called on both comparative and historical methodology to help with this question. He went back to Roman legal and Germanic historical foundations and, by analysing these rules, highlighted the most important principles that could be considered during codification. He also examined the French association regulations in his historicity, with which he could supplement the Hungarian codification works, which are mainly based on German foundations. He followed the same method in his study of foundations.

<sup>53</sup> BALOGH 2003, 186.

<sup>54</sup> *A Magyar Királyi Ferenc József Tudományegyetem tanrendje 1940/41. tanév [The curriculum of the Hungarian Royal Franz Joseph University schoolyear 1940-41]*. 1942, 32.

<sup>55</sup> *Akadémiai Értesítő [Academic Bulletin]* 1943, 366.

<sup>56</sup> ÁMÁN 2019, 81.

<sup>57</sup> PÉTERVÁRI 2014, 30.

<sup>58</sup> SZAMEL 1977, 147–159. POLNER 1944, 69–110.

<sup>59</sup> EREKY 1903.

<sup>60</sup> HOMOKI-NAGY 2017, 493. HOMOKI-NAGY 2018, 199.

For his career and academic advancement, the young lawyer made great sacrifices. Under his contract with the publisher, he financed the publication of his work himself.<sup>61</sup> The Franklin Company only provided the opportunity to sell the books under a commission agreement,<sup>62</sup> what solution proved to be worthwhile, as thanks to this publication he was appointed to the Eperjes Evangelical Academy Law.

As an extraordinary and then ordinary professor of administrative law, his interest also turned to this topic. He planned a four-volume monography discussing the two levels of the Hungarian local government, the county, and the community.<sup>63</sup> The method of his work is the historical examination of the legal institutions.<sup>64</sup> It seems that when writing the volumes, he aspired to the incoming vacancy at the Department of Administrative Law<sup>65</sup> of the Royal Hungarian Franz Joseph University Hungarian which was filled on August 24, 1908 by Elek Boér (the older).<sup>66</sup> The first two volumes were published in 1908 under the title *The Hungarian Local Government*.<sup>67</sup> The revised first volume was published by Ereký in 1910. At the beginning of the first volume, he presented the unsettled division of territory of the time of the Compromise based on the data of the 1873 Szapáry Bill.<sup>68</sup> The Act XLII of 1870 left its county structure unchanged,<sup>69</sup> as the Act on Municipalities only unified the organization of public administration bodies, but maintained the names and territories.<sup>70</sup> He pointed out that this municipal structure was not sustainable from the point of view of taxation either, because the provisions of the law related to home tax were not enforceable.<sup>71</sup> The purpose of this introduction was to present the historical antecedents leading to the territorial divisions of his own era. The administrative development processes of this period were excellently illustrated in the introduction to the chapter: “Two great statesmen of modern Hungary worked hard on the great work of the transformation. One, as on many other occasions, brought the material together, pointed out the flaws, and with bold hands with attention to the smallest details, he drafted a huge and organic whole; and the other, like many afterwards, backed down from the subversive

<sup>61</sup> “The cost of printing the work in 500 copies with 20 sheets is 1180 crowns, each additional sheet costs 56 crowns, including envelope and stapling.” OSZK Kézirattár [National Széchenyi Library manuscript archive] Fond 2/395.

<sup>62</sup> “We take the finished work into a bookstore commission by settling it on June 30 of each year and paying you 60% of the price of the copies sold, or if there is a counter-invoice, to settle it with you.” OSZK Kézirattár [National Széchenyi Library manuscript archive] Fond 2/395.

<sup>63</sup> MTA Kézirattár [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/132.

<sup>64</sup> Ibid.

<sup>65</sup> “And as I learned that the filling of the Kolozsvár department will take a long time, - since then, that is, for the fourth month in a row, I have done nothing but revise the existing manuscript. and in addition, I am gathering material for the purpose which Your Dignity deems it necessary, - for the purpose of the future description of the old Hungarian county organization and the competence of the individual bodies on a theoretical basis.” MTA Kézirattár [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/132.

<sup>66</sup> *A Kolozsvári M. Kir. Ferencz József Tudományegyetem almanachja és tanrendje az MCMVIII-IX.-dik tanév II. felére* [The almanac and curriculum of the Hungarian Royal Franz Joseph University in Kolozsvár for the 2nd term in the schoolyear MCMVIII-IX]. 1909, 10.

<sup>67</sup> EREKY 1908/a.

<sup>68</sup> KI 1872, X. k. 36–408. KI 1872, XI. k. 3–67.

<sup>69</sup> EREKY 1910, 73–76. VARGA 2007.

<sup>70</sup> VARGA 2002, 59. VARGA 2010, 119.

<sup>71</sup> EREKY 1910, 81–93. SZIVESSY 1933, 10–11. STIPTA 1995/a, 156–159.

*radical transformations and with a sober attachment to the past, realized a few inevitably necessary fragments of grand plans and bold thoughts.*"<sup>72</sup>

With these words, he illustrated the relationship between Szapáry's 1873 bill and Kálmán Tisza's reforms concerning the division of administrative territories. Szapáry's proposal which established the requirements of modern public administration was not accepted by the National Assembly<sup>73</sup> however, he was able to successfully implement some of his measures during his term as Prime Minister.<sup>74</sup> At the time of writing, the acts no XXI of 1886 and XXII of 1886 contained the rules for the municipalities, so he also analysed the rules of these two acts dealing with the division in his work.<sup>75</sup>

Subsequently, he criticized the administrative organization of his own era, the elimination of the already mentioned disproportions had not been carried out by the legislator since the Compromise. Due to this fact it was not possible to implement real self-government, the different potentials of the counties making this still impossible.<sup>76</sup> He stated that the reason for the incorrect structure of the Hungarian administration was that Hungary was essentially a colony of the Habsburg Empire, so the strong powers of the municipalities contributed to the preservation of Hungarian statehood,<sup>77</sup> and even after the compromise they were not intended to be completely deprived of that position as a result of the precarious relationship with Austria, thus, the election of officials remained in the hands of the municipalities, which typically hinders the placement of the administration on the right basis.<sup>78</sup> In addition, the Hungarian National Assembly considered its natural goal to remove nationalities from the local administration,<sup>79</sup> for which it is necessary to leave the regulations unchanged. After a lengthy analysis, he thus came somewhat surprisingly to the conclusion, that due to these two factors, the complete reform of the Hungarian public administration is not possible, as the Hungarian legislator cannot create a situation in which certain counties can be the guarantees of national aspirations. Accordingly, he based his later investigations on the fact that it is only possible to change the Hungarian public administration to an extent that does not endanger the leading role of the Hungarians in Hungary and does not shift the balance of relations with Austria in a negative direction.<sup>80</sup>

In the next chapter, he presented the English and French administrative organization in his historicity, laying the foundation for his later comparative studies. Following *Concha*, however, he noted that the trend of discovering kinship between the Hungarian and English administrations was wrong.<sup>81</sup> Contemporary literature agrees with this statement.<sup>82</sup> He then provided theoretical guidance for the comparative methodology, stating that the study of the kinship of certain legal institutions should also take into

<sup>72</sup> Ereky 1910, 100.

<sup>73</sup> CSIZMADIA 1976, 148–149. STIPTA 1976, 117–118.

<sup>74</sup> STIPTA 1995/b, 6. CSIZMADIA 1976, 149–153.

<sup>75</sup> EREKY 1910, 113–118.

<sup>76</sup> Ibid. 132–135.

<sup>77</sup> VARGA 2009, 230–231.

<sup>78</sup> EREKY 1910, 139–142.

<sup>79</sup> SZÉKELY 2018, 167.

<sup>80</sup> EREKY 1910, 153–154.

<sup>81</sup> Ibid. 205.

<sup>82</sup> SZENTE 2016, 30–31.

account their nature, as in the case of simpler legal institutions, the only reason for the similarity is that two nations can find the same solutions to certain issues under the same social and economic conditions, meaning kinship research is only possible in the case of more complex legal institutions. He thus saw the meaning of the comparative methodology as gaining insights into the obscure patches of the history of our national past, as well as recognizing principles that lead to beneficial or detrimental processes in certain situations or determining trends.<sup>83</sup>

He closed the chapter by breaking down the history of the Hungarian public administration into epochs, from which it can be deduced how he planned to build his grandiose work. The first era belonged to the centralized state organization from the 11th to the 13th century, followed by the era of centralization and moderate county self-government from the last decade of the 13th century to the Mohács disaster. He linked the period from the beginning of the rule of the Habsburg dynasty to the beginning of the 18th century to the classical county self-government. However, the period between 1711 and 1790 was associated with the destruction of the municipality, which was characterized by the rulers were experimenting with the French *préfet* system at that time. The first half of the 1800s led to the disintegration of the noble's county, the continuation of which, in turn, led to Austrian centralization. The seventh era was his own age.<sup>84</sup> The seven eras thus set up would certainly have served as the structure of his monography.

The first two volumes were intended to present the history of public administration in the first period, as it summarizes the history of secular and ecclesiastical public administration since the founding of the state. In the course of his work, he sought a comprehensive analysis, so he also examined the factors leading to the development of regulation; for this reason, he also devoted a great deal to the summary of economic and social relations in the second volume. It is also worth familiarising oneself with the background of the finished work, because *Ereky* himself admitted that he wanted to start the work at the appearance of the local government, however, in the course of studying the sources, he realized that the noble's county was not a legal institution established "independently of everything", but it evolved from the royal county following organic development.<sup>85</sup> In this connection, it is worth noting that today's contemporary literature<sup>86</sup> has reached the same conclusion as *Ereky* thus, it can be stated that he was one of the forerunners of this idea.

He saw the novelty of his work in processing the history of the royal counties based on the Várad regestrum, which no one had previously dealt with in this respect. He pointed out that previous research typically looked for traces of the noble's counties in this period, while he in contrast sought to explore the reality. He described this concept vividly in a letter to *Concha*: "*On the contrary, I, assuming that the Hungarian constitution and the Hungarian county self-government did not pop out completely*

<sup>83</sup> EREKY 1910, 206–207.

<sup>84</sup> Ibid. 210.

<sup>85</sup> "*The county existed before the 13th century and in fact the royal county of the centralized Hungarian state is the foundation on which the noble county with the local government was built. This centralization lasted for more than a quarter of a millennium; it was impossible to ignore its description.*" MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/134.

<sup>86</sup> TRINGLI 2009, 487–518.

*ready, in attila and spurred boots from Minerva's head, I thought it right to not be looking in the past for what I wanted to find and what flatters national vanity, but what the data left to us prove.*"<sup>87</sup>

However, only a fraction of the grandiose plans outlined earlier was to be realized. In his work *Studies of the County Self-Government*, also published in 1908, he wrote a larger study of the first period of the noble's county, in addition to his itemized legal analysis of the lord-lieutenant's powers of control. The other study in the volume examined the prominent administrative tasks of the lord-lieutenant in the state organizational system of the period, after a brief historical introduction, also considering Italian, French, Prussian, and English regulations. There is no close connection between the two studies, so it is strange that after the large volumes presenting the first period, the author truncated the next detail of the series. The reason for this was that *Ereky* was preparing for the habilitation, which he wanted to carry out in the field of administrative law, and for this, however, he also had to produce an item of legal scientific work, so it became necessary to publish his finished study quickly.<sup>88</sup> In addition, he justified the separate publication of the historical dissertation on the grounds that due to his significant expenses so far, the preparation of newer volumes may be difficult,<sup>89</sup> and from this, again, it can only be inferred that he made serious financial sacrifices for his academic advancement.

In the legal history themed part of this volume he reviewed the period following the centralized administration of the 11-13th centuries' administration. He associated the epoch with efforts to limit the power of the span and to establish a noble's county.<sup>90</sup> He thus linked the beginning of the era to the appearance of the first county officials, the *iudex nobilium*,<sup>91</sup> but noted that this was not an immediate transition, as officials from the royal counties could only be replaced by officials from the noble's county at the end of a longer process.<sup>92</sup> The connection of the establishment of the noble's county to the nobles judges who appeared at the end of the 13th century is also in line with the position of today's contemporary literature.<sup>93</sup> The French and English comparisons were not left out of this work either, he compared the position of lord-lieutenant with the *sheriff* and the *préfet*.<sup>94</sup> He contrasted the English justices of the peace with Hungarian county officials, but concluded that there were few similarities between them.<sup>95</sup> At the end of his work, based on his

<sup>87</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/134.

<sup>88</sup> *First of all, to be able to publish one of my itemized legal studies and thus allow me to make a habilitation in administrative law. For me, the habilitation is not only a question of qualification, but also a question of bread, because the state raised the salaries of law academy teachers to the state university standard, but only for those who have a habilitation. For me, therefore, the habilitation means a difference of 1,600 crowns a year, its prolongation means lagging behind in pay classes and compensation.*" MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/135.

<sup>89</sup> *"The second was that the material had already been collected for many parts of the continuation of my work, however, I will only be able to continue if something so far recoups my cost of 5,000 crowns, and I would receive funding from the academy to publish additional volumes."* MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/135.

<sup>90</sup> EREKY 1908/b, 7.

<sup>91</sup> Ibid. 44–45.

<sup>92</sup> Ibid. 50–51.

<sup>93</sup> TRINGLI 2009, 497. ZSOLDOS 1994, 488–489. BÉLI 2008, 80–81.

<sup>94</sup> EREKY 1908/b, 64–65.

<sup>95</sup> Ibid. 87–89.

conclusions regarding the English counties, he condemned the state organization based on the nobles' counties for its contribution to the processes leading to the division of the country into three parts.<sup>96</sup> It gives a special value to his study that he supported the conclusions with his personal research in the archives of Sáros County, of which the most important Latin documents were translated into Hungarian as an appendix to the volume. In this connection he made an interesting statement in the preface to the volume: "*Of the monographies of each county, I could not use at all those that barely dealt with the county as a legal institution, or if they did, they used the general legal history rather than the archives of the county concerned. These monographies do not have any legal historical value.*" With this statement, he marked the exploration of archival sources as a clear goal of legal history research already in the first decade of the 20th century.

Looking at the list of the author's published works, it can be noted that the second edition of his book *The Hungarian Local Government* took place already in 1910. The reason for this was that because of the success of the book and *Concha's* positive criticism, the Ministry of Religion and Public Education ordered 200 copies for the administrative libraries from *Ereky*, however, the author no longer possessed enough copies of the book, which he thus replaced by ordering a new edition.<sup>97</sup> The recommendation for the volume was therefore addressed to *Concha* Győző.

It is clear from his career that his close relationship with his "master," *Concha*, greatly helped shape *Ereky's* career. Győző *Concha* was an outstanding administrative jurist of the period, who became a full member of the Hungarian Academy of Sciences in 1900.<sup>98</sup> During his university years, the professor taught the young law student, who was invited in 1907 with Géza *Magyary*, a litigation lawyer, to be the first reader of his administrative work to be published.<sup>99</sup> From this correspondence emerged a lively academic connection between them that *Ereky* considered himself a disciple of *Concha* and at the time of his death he also gave one of the memorial speeches at the Academy.<sup>100</sup>

### Assessment

A beautiful parallel can be discovered between István *Ereky* and the city of Szeged, as both the young lawyer and the city mobilized extraordinary energies so that their destiny would be intertwined with the university. Thanks to the special turns of life and the stormy years of the country, the two aspirations were realized with the move of the University of Kolozsvár to Szeged. After decades of struggle, the city could become the home of a higher education institution, while *Ereky*, who had no previous connection with the city, could also complete his university career in Szeged as a culmination of almost two decades of work. The end of his career almost coincides with the relocation of the Faculty of Law to Kolozsvár, made possible by the second Vienna decision.

<sup>96</sup> Ibid. 115–116.

<sup>97</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/143.

<sup>98</sup> Koi 2013, 85–87.

<sup>99</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/131.

<sup>100</sup> MTA Kézirattára [Manuscript Archives of the Hungarian Academy of Sciences] Ms. 4811/135. 149. 185. EREKY 1935, 1–74.

Examining the administrative history parts of his academic work, it can be stated that Elemér Balogh's statement is correct, that the Department of Legal History in Szeged was occupied by a person who did not consider himself to be a legal historian at the university in Szeged is correct, but who deserves recognition also in this field.<sup>101</sup> Works on public administration typically rank him among the greatest administrative jurists of the era dealing with dogmatics,<sup>102</sup> however, on the basis of his work on administrative history, his results "stood the test of time," in the future, in the history of science of legal history, he can claim a place among the noted lawyers dealing with legal history.<sup>103</sup>

### III. His selected works

*Tanulmányok a magyar általános polgári törvénykönyv tervezete köréből* [Studies from the draft of the Hungarian General Civil Code]. Franklin-Társulat. Budapest, 1903.

*A magyar helyhatósági önkormányzat. Vármegyék és községek I-II. k. A vármegye* [The Hungarian local government. Counties and municipalities I-II volume. The county]. Grill. Budapest, 1908. [EREKY 1908/a]

*Tanulmányok a vármegyei önkormányzat köréből* [Studies from the field of county self-government]. Grill. Budapest, 1908. [EREKY 1908/b]

*A magyar helyhatósági önkormányzat. Vármegyék és községek. I. k. A vármegye.* [The Hungarian local government. Counties and municipalities Volume I. The county] Grill. Budapest, 1910.

*Jogtörténelmi és közigazgatási jogi tanulmányok. I. k. I. és II. rész* [Legal history and administrative law studies. Volume I Part I and II]. Prešov, Sziklai Henrik. 1917.

*Jogtörténelmi és közigazgatási jogi tanulmányok. II. k.* [Legal history and administrative law studies. Volume II]. Sziklai Henrik. Prešov, 1917.

*A tárgyi és alanyi jogok dualizmusa. Az alanyi közjogok rendszere* [The dualism of material and subjective rights. The system of subjective public rights]. Dunántúli Egyetemi Könyvkiadó. Pécs, 1928.

*Közigazgatási reform és a nagyvárosok önkormányzata I. k.* [Administrative reform and city self-government Volume I]. Székesfővárosi Házinyomda. Budapest, 1932.

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<sup>101</sup> BALOGH 1999, 40.

<sup>102</sup> LÓRINCZ – NAGY – SZAMEL 1976, 401. JAKAB 2015, 196.

<sup>103</sup> STIPTA 2015, 147–148.

- A Budapesti Királyi Magyar Tudomány-Egyetem almanachja MDCCCXCVII–XCVIII. tanévre [Almanac of the Royal Hungarian University of Budapest for the school year MDCCCXCVII–XCVIII]. Magyar Királyi Tud.-Egyetemi Könyvnyomda. Budapest, 1898.
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MÁRTA GÖRÖG

## BÉNI GROSSCHMID\*

(1851–1938)

### I. Biography

Béni *Grosschmid* is considered the “Master” of the defining private law scholars of Hungary in the early 20th Century.<sup>1</sup> *Grosschmid* also participated in the codification work that established the foundations for the renewal of contract law, while maintaining respect for tradition and family ties in inheritance and family law. He was born on the 9th of November, 1851<sup>2</sup>, in Máramarossziget, to a family of ancient noble jurists of Saxon extraction. As his nephew, Sándor *Marai* noted about his family: “[they] are of Saxon descent, who migrated to Hungary in the XVIIth Century, faithfully serving the Habsburgs, and whose ancestor was rewarded by Emperor Leopold II with nobility. This ancestor was revered as »Chief Commissioner Count Kristóf« by the family, and who directed the royal treasury’s mines around Máramaros.”<sup>3</sup> His father was Károly *Grosschmid*, his mother Klementína *Radányi* of Rozsnyó descent.<sup>4</sup> He completed his

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\* Translated by Gábor Hajdu, PhD candidate at the University of Szeged, Faculty of Law and Political Sciences.

<sup>1</sup> And so especially Károly *Szladits*. See: SZLADITS 1948, 1. HAMZA – SÁNDOR, 2. Ifj. *Szigeti László* In: ifj. SZIGETI 1932, 427. *Meszlény Artur*. Lásd: MESZLÉNY 1931, 429–431. Further important representatives of the Béni *Grosschmid* school include: Bálint *Kolosváry*, Salamon *Beck*, Antal *Almási*, the latter of whom was a private professor of the Kolozsvár university from 1910 of the Budapest university from 1927, and of the Szeged university between 1926 and 1940; Vö. WEISS 2006, 102.

<sup>2</sup> Different sources record different dates for *Grosschmid*’s birth. 6 November 1851 is present in the following works: SZINNYEI 1955–1956., SÁNDOR 2013, 135., the Digitális Törvényhozási Tudástár [Digital Legislative Database], the Jogifórum [Legal Forum] (downloaded on 11.12.2019.); other sources list 6 November 1852 as birthdate: Magyar Nemzet, Issue on 8 September 1938. 2., *Magyar Életrajzi Lexikon* [Hungarian Biographical Lexicon] 1967, 623., Nemzeti Örökség Intézete [Institute of National Heritage] (downloaded on 17.12.2019.); *Tudósportál* [Knowledge Portal] (downloaded on 18.12.2019.); 1852 is present in the following sources: *Révai Kétkötetes Lexikona* 1. [Two-Volume Révai Lexicon 1.] A-J, Budapest, 1947. 508., *Új Lexikon* [New Lexicon] 1936, 1540. *Új Idők Lexikona* [Lexicon of new times] 1938, 2826., the obituary of *Pesti Hírlap*: *Pesti Hírlap* release of 8 November 1938, 4. Emília *Weiss* considers the alteration a result of a mistake in the *Hungarian Legal Lexicon* in her treatise, as it marks 1852 as the year of birth for *Grosschmid*. WEISS 2006, 114. end note no. 2. In contemporary documents, 9 November 1851 is used, and thus we also consider it as the true date. See especially: *A Magyar Jogászegylet Grosschmid előadása* [The Hungarian Lawyer Association’s *Grosschmid* lecture] 1936, 711. VLADÁR 1936, 325.

<sup>3</sup> MÁRAI electronic release without page number.

<sup>4</sup> ROKOLYA 2017, 13.

high school studies in his hometown, Máramarossziget, as well as Nagyvárad (Oradea). He started his legal studies in Vienna, and he acquired his doctorate in law at the University of Budapest in 1872. He received the Sztrókay Award of the Academy in 1873,<sup>5</sup> with justification from general secretary János Arany, for his treatise titled *On the legitimate portion*. The treatise and the award were accompanied by public accolade. The next stage of his life found him at first in a judicial career, then a career at the justice ministry, and finally as an attorney. In 1880, he became a private professor of the Law and State Sciences Faculty of the University of Budapest. Between 1882 and 1885, he was a teacher of civil justice, then of trade and bill of exchange law at the Legal Academy of Nagyvárad. Starting from the 1884/1885 academy year, he was, for nearly seven years, a public extraordinary lecturer then a public regular lecturer at the Ferenc József University of Kolozsvár. In 1890, he became a professor of the Law and State Sciences Faculty of the University of Budapest, at its Hungarian Private Law Department.<sup>6</sup> As an university professor he was “considered a peculiar teacher, he did not care too much about the zeal of his students, hated those who tried to cram subjects, and would rather let someone who knew nothing about the exam questions but was an intelligent person pass, than someone who crammed for the exam and jabbered the answers without ceasing. [...] he was capable of silently listening to an examinee for hours on end, patiently and comfortably, while the examinee squirmed and sweated. You do not address the subject, but I see that you are intelligent, he would sometimes say.”<sup>7</sup>

He was the dean of the Law and State Sciences Faculty of the University of Budapest for the academic years of 1897/98 and 1913/14.<sup>8</sup> In 1917/1918, he was the university's rector.<sup>9</sup> In the 1890s and the 1900s, on request of the Justice Ministry, he was an active and notable participant of codifying Hungarian private law, especially on the field of

<sup>5</sup> SZLADITS 1948, 3. *Szladits Károly I. tag gyászbeszéde Grosschmid Béni I. tag ravatalánál* [Eulogy of First Member Károly Szladits at the bier of First Member Béni Grosschmid] 1938, 204. VÉKÁS 2013, 261. There are sources indicating the year 1872 as well. See: SZINNYEI 1955–1956.

<sup>6</sup> As Gábor *Vladár* wrote in his valedictory: “28 June 1890 is a lucky date in the yearbooks of our university, on which Hungarian youth received another great lecturer in the form of Béni Grosschmid at the Department of Private Law.” VLADÁR 1938, 326.

<sup>7</sup> MÁRAI electronic release without page number.

<sup>8</sup> The University's 1914/1915 almanac gave the following summary of his biography: “BÉNI GROSSCHMID is the doctor of legal sciences, credible public and bill of exchange lawyer, doctor at royal Hungarian university of Budapest, public and regular lecturer of Hungarian private law and mining law, former chairman of the third foundation examining committee and the legal examining committee, member of the judicial practice examining committee, consultant then editorial member of the permanent committee established by the royal Hungarian ministry for the purposes of preparing the general private law code, member of the Hungarian lawyer association's directorial committee, extraordinary then regular lecturer of civil litigation, bill of exchange and trade law at the royal legal academy of Nagyvárad, public extraordinary lecturer of Austrian civil law at the royal Hungarian Ferenc József university of Kolozsvár, inner member of the governmental review of legal sciences committee, dean and lecturer's body president of the Budapest royal Hungarian university in the years 1897/98 and 1913/14, pro-dean of the same in 1899/00 and currently, Hungarian royal court counselor, elected correspondent member of the Hungarian Academy of Sciences, honorary member of the national association of Hungarian legal trainees, the pro-dean of the law and political sciences faculty (he was named extraordinary lecturer at the university of Kolozsvár in 1887, and he was named regular lecturer for the same university in 1890).”

<sup>9</sup> *Grosschmid Béni 1917–18. tanévi Rector Magnificusnak Rectori székfoglalója*. [Inaugural speech of Grosschmid Béni as the Rector Magnificus of 1917-1918] 17–76.

family law<sup>10</sup> and inheritance law. As a result of his manifold accomplishments, such as participating in the preparation of the civil marriage law of 1894, the draft of the first civil code,<sup>11</sup> as well as his notable work in the preparation of several other laws,<sup>12</sup> he was named royal court counselor in 1899.<sup>13</sup> He went into retirement as a professor from the Hungarian Private Law Department of the Law and State Sciences Faculty of the University of Budapest at seventy-seven years old, on the 31th of August, 1928.<sup>14</sup> He was elected as a corresponding member of the Hungarian Academy of Sciences on the 10th of May, 1901.<sup>15</sup>

He decided to change his old aristocratic surname,<sup>16</sup> as a university student, to Benő Zsögöd, after a Szekler village found in Csík county. His motivation was to express his sense of belonging to his Hungarian identity. He later returned to his original surname in 1904.<sup>17</sup> The public was surprised by this later, unusual decision, and this reaction was even reported in the press.<sup>18</sup> According to Gábor Vladár, Grosschmid explained his motives as follows: “In my zeal as a young man, I hungarianized my German-sounding name, and adopted the name of a small Transylvanian spa-town instead. I later regretted this, as I felt that I have caused offence towards the piety I owe to my ancestors, who acquired honors for many centuries with their German surname, as sub-prefects and other county and city officials in Nagybánya and the surrounding counties. Thus, our welding with Hungarian identity is expressed stronger, if I continue to use my German surname, if I serve my country with my German surname, and attempt my utmost to enrich its culture.”<sup>19</sup> He also told the story of his name-changing to Pál

<sup>10</sup> VÉKÁS 2014, 81.

<sup>11</sup> Benő Zsögöd participated in the preparation of the draft as a consultant member of the permanent committee for the preparation of the Hungarian general civil code. In: Jogtudományi Közlöny Szerkesztősége: *A magyar általános polgári törvénykönyv tervezetét előkészítő állandó bizottság jegyzőkönyvei*, 1897. [Minutes of permanent committee for the preparation of the Hungarian general civil code, 1897.], 5.

<sup>12</sup> Regarding the family property law chapter of the draft of the general Hungarian civil code see the minutes of the meeting on the 10th of December 1897. In: Jogtudományi Közlöny Szerkesztősége: *A magyar általános polgári törvénykönyv tervezetét előkészítő állandó bizottság jegyzőkönyvei*, 1897. [Minutes of permanent committee for the preparation of the Hungarian general civil code, 1897.], 71–86.

<sup>13</sup> As Ady notes on the 1st of February 1903 in the Nagyvárad Journal: “Zsögöd Benő Grosschmid becomes a notable with his gracious court counsellorship [...]” ADY electronic release without page number (downloaded on 17 December 2019).

<sup>14</sup> After his retirement, he lived in complete seclusion at the vacation house of his son, Lajos Grosschmid, in Visegrád. The Pest News (Issue on 8 September 1938, 4.), quoting his nephew’s words: “He reached the legal age limit when he went into retirement; he lived next to the Duna in a vacationing site, woke up at dawn, swam in the Duna as an eighty years old, and worked in his room until dusk, leaning on the writing table.”

<sup>15</sup> SÁNDOR 2013, 135. Magyar Nemzet, Issue on 8 September 1938. 2., Magyar Nemzet, Issue on 11 September 1938. 18. He held his inaugural speech with the title *Intestate Succession in the laws of Solon. A Magyar Tudományos Akadémia tagjai 1825–1973* [Members of the Hungarian Academy of Sciences 1825–1973] 1975, 93. However, other sources list him as a regular member. See: *Új Idők Lexikona* [Lexicon of New Times] 1938, 2826.

<sup>16</sup> Márαι wrote the following on the origins of the family name: “My father’s German name, and the village of ancestors that still stands in Saxony, shows that the family was in the service of the elector of Saxony at the state’s mint, they smithed Saxon coins for centuries, they were Groschen-Schmieds, coinsmiths.”

<sup>17</sup> The bulletin announcing it: Budapesti Közlöny 1904/147. 1. SZINNYEI 1955–1956.

<sup>18</sup> Cf. Pesti Hírlap, Issue on 29 June 1904. 1–2. Pesti Hírlap, Issue on 30 June 1904. 3–4. Független Magyarország, Issue on 7 July 1904. 8. In Szeged press: Szeged és Vidéke 1904. július 1., 7. Szeged és Vidéke, Issue on 3 July 1904. 3.

<sup>19</sup> VERESS electronic release without page number (downloaded on 17 December 2019).

Angyal as follows: “in the early 70s, I wanted to express my burning feeling of Hungarianness outwardly as well, and I picked the name of a small settlement in Csík, Zsögöd (Jigodin), almost on a whim; later, to show my noble origins, I used my two surnames together, and later returned to my original one.”<sup>20</sup>

He did not prize formality much, “he was never present where he was celebrated.”<sup>21</sup> As such, among other events, he failed to appear at the celebratory session convened for his 80th birthday, and at the *Grosschmid* Cup’s award ceremonies organized by the private law seminar of the Royal Pázmány Péter University.<sup>22</sup> At the behest of Károly Szladits, the Hungarian Lawyer Association decided in 1935,<sup>23</sup> that in order to “[...] deepen the importance of *Grosschmid*’s work in the public consciousness”<sup>24</sup>, they would hold *Grosschmid* lectures on a yearly basis.<sup>25</sup>

*Grosschmid* was not only a trailblazer in legal science but was also one of the first long-distance swimmers of Hungary, who, according to credible contemporary sources, also achieved notable feats in this regard.<sup>26</sup> As the notary of the *Buda Gymnastics Association*, he participated in the unification of the latter organization and the *Buda Gymnastics Circle*, and in 1875, he participated in the creation of one of Hungary’s largest associations, the *Budapest (Buda) Gymnastics Association*.<sup>27</sup>

His notable relative, Sándor Márai<sup>28</sup> was a writer. Furthermore, *Grosschmid* was the paternal uncle of the famous movie director Géza Radványi<sup>29</sup>, and was also the elder brother of Géza *Grosschmid*, the famous lawyer, politician, and senator of the city of Kassa.

The death of his wife in the December of 1937<sup>30</sup> broke *Grosschmid*’s spirit,<sup>31</sup> and in about a year, he died on the 7th of September, 1938, at half past nine in the morning,<sup>32</sup> in

<sup>20</sup> ANGYAL 1938, 323.

<sup>21</sup> GAJZÁGÓ 1938, 80.

<sup>22</sup> VLADÁR 1936, 629., GAJZÁGÓ 1938, 70. János Nyulászi, the editor-in-chief of *Civil Law*, also held a cup speech. NYULÁSZI 1935, 587–592.

<sup>23</sup> See in detail: Nyulászi János *serlegbeszéde* [Goblet-speech of János Nyulászi] 1935, 587. footnote marked with an asterisk.

<sup>24</sup> *A Magyar Jogászegylet Grosschmid előadása* [The Grosschmid lecture of the Hungarian Lawyer Association] 1936, 711.

<sup>25</sup> Antal Almási held the first lecture of the 1936 Grossschmid-cycle with the title “*Grosschmid and family law*.” See the summary: *A Magyar Jogászegylet Grosschmid előadása* [The Grosschmid lecture of the Hungarian Lawyer Association] 1936, 711. One of the last were organized by the Hungarian Lawyer Association in the year of his death. *Grosschmid-ünnep a Magyar Jogászegyletben* [Grosschmid-celebration in the Hungarian Lawyer Association] 1938, 261–262.

<sup>26</sup> The press of the time said the following about the more than thirty kilometers long swim between Pest and Vác: “Benő Zsögöd led the swim for a good while from the start, then Szekrényessy and then Bachmayer, who retained his position afterwards to become the winner at 200–250 laps; Kálmán Szekrényessy gained second place, and Benő Zsögöd third place with 100 laps behind.; [...] Benő Zsögöd arrived in the best condition, and it seemed, that we could predict another victory for him in a newer competition with sufficient further training.” Vadász-Lap, Issue on 16 July 1881. 231.

<sup>27</sup> Jogifórum, Tudóspotál (downloaded on 18 December 2019).

<sup>28</sup> Original name: Sándor Károly Henrik Márai *Grosschmid*.

<sup>29</sup> Born Géza *Grosschmid*, who adopted the name of *Radványi* after his parental grandmother. He was the 1947 director of the *Valahol Európában* movie, and after the Second World War, one of the first directors of the Theatre and Movie School’s movie department. (Abroad, he was the discoverer of Louis de Funes).

<sup>30</sup> Magyar Nemzet, Issue on 8 September 1938. 2.

<sup>31</sup> Pesti Hírlap, Issue on 8 September 1938. 4.

<sup>32</sup> Ibid.

Visegrád.<sup>33</sup> His death was mourned by his five children.<sup>34</sup> His coffin was carried from the aula of the central university building to the National Graveyard on the Fiume Road,<sup>35</sup> where he was laid to rest in a solemn gravesite donated by the capital,<sup>36</sup> on the 10th of September, 1938.<sup>37</sup> Two years later, his son, Lajos *Grosschmid*<sup>38</sup>, mathematician, professor and dean of the Economics Faculty of the University of Budapest (1932-1933), was laid to rest alongside his father. The grave was declared protected by the National Memorial and Piety Committee in 2004.

## II. Academic work

### Grosschmid (Zsögöd) the genius of civilistics

*Grosschmid* was a genius legal scholar, the “Iliad of Hungarian private law.”<sup>39</sup> Reading and understanding his works is an intellectual challenge requiring concentration.<sup>40</sup> “In essence, *Grosschmid* affected Hungarian legal sciences through his loyal apprentice, Károly Szladits, who was the leading private lawyer of Hungary in the first half of the XXth Century. Szladits made him digestible, spread his theories in a comprehensible fashion.”<sup>41</sup> As László *Asztalos*, said: “Szladits translated Grosschmid into Hungarian.”<sup>42</sup>

His primary work<sup>43</sup> was undoubtedly *Chapters from our contract law*,<sup>44</sup> which was a trendsetter regarding the developmental curve and interpretation of Hungarian private law.<sup>45</sup> It was described as an “epochal work”,<sup>46</sup> a “book of eternal significance”<sup>47</sup> “notable

<sup>33</sup> See the circumstances of his death: Magyar Nemzet, Issue on 8 September 1938. 2. Elhunytát számos gyászír adta a jogászközönség tudtára, így többek között a *Polgári Jog* is. Polgári Jog Közgazdaság és Pénzügy 1938/7. 1. Pesti Hírlap, Issue on 8 September 1938. 4. Magyar Nemzet, Issue on 8 September 1938. 2.

<sup>34</sup> Lajos *Grosschmid* was a regular lecturer of mathematics at the university, István was chief director of Malert, Sándor was a judge, and two daughters. Pesti Hírlap, Issue on 8 September 1938. 4. Magyar Nemzet, Issue on 8 September 1938. 2.

<sup>35</sup> 41, N/A, 1, 36

<sup>36</sup> Pesti Hírlap, Issue on 10 September 1938. 9.

<sup>37</sup> Ibid. On the funeral: Magyar Nemzet, 1938. Issue on 11 September 1938. 18. Pesti Napló, Issue on 8 September 1938. 17.

<sup>38</sup> At his son's birth, Grosschmid used the Zsögöd surname, and thus the son was named Lajos *Zsögöd* as well, which changed back to the original aristocratic name only later, in 1904.

<sup>39</sup> MESZLÉNY 1931, 430.

<sup>40</sup> Cf. CSEHI 2012, 18. SÁNDOR 2013, 136.

<sup>41</sup> ECKHART 1936, 83.

<sup>42</sup> ASZTALOS 1973, 14.

<sup>43</sup> “The colossal measure of his life's work is most obvious, beyond the Chapters, in his Law Doctrine.” ALMÁSI 1931, 431. More details on the work: ALMÁSI 1931, 431–438.

<sup>44</sup> See the general review of the work in current legal literature: WEISS 2006, 103–105. VÉKÁS 2019, 33–48.

<sup>45</sup> The first edition of the I. volume was released in 1898, the second edition in 1901, and the II. volume was released in 1900. Both volumes received a celebratory edition in 1932-1933. The work is not “only” about classic contract law institutions, but also “scattered specific contract law branches”, such as the obligations appearing in property law, inheritance law and family law.

<sup>46</sup> SZLADITS 1936, 6.

<sup>47</sup> WEISS 2006, 104.

peak amongst the mountain ranges of Hungarian private law science”,<sup>48</sup> a “ [...] peerless work in the legal literature of the world.”<sup>49</sup> *Szladits* described him as follows: “The main objective of his life’s work was to lead back our legal science to that independent national basis, in which there was a break in 1848 and which was removed under the influence of a foreign legal system.”<sup>50</sup> In the words of Emília *Weiss*: “[...] he contributed to the scientific foundation of independent legal thought, and with regards to several of his achievements, he contributed to legal science from the entire world’s perspective.”<sup>51</sup>

Károly *Szladits*<sup>52</sup> – “the humble apostle of Grosschmid’s genius”<sup>53</sup> – commented on his monumental, two-volume work that creating a comprehensive picture of its detailed elements would be akin to writing an entire book on them.<sup>54</sup> Even so, this book was completed: an inner circle of *Grosschmid*’s students<sup>55</sup>, for the occasion of their “Master’s” 80th birthday, gifted *Grosschmid* a two-volume Glossary on the Chapters, alongside a festive edition of the Chapters.<sup>56</sup> Their goal was to “[...] summarize the perpetually meaningful achievements of the Chapters, and expand them with their own thoughts and from the perspective of contemporary use, with respect to the changed circumstances and law.”<sup>57</sup> The students organized a great festivity at the Vigadó of Pest, on the occasion of the Master’s 80th birthday: “His fellow teachers, his former students, various famed lawyers and judge, around two thousands of them came to celebrate *Grosschmid*, and even the minister appeared. But they waited unsuccessfully for him at the appointed hour: he sent a letter to the minister, he thanked the celebration, but excused himself, stating that he »will not let his life be shortened by such an event. «”<sup>58</sup> Artúr *Meszlény* appropriately expressed the respect and acknowledgement towards the Master and his work: “Our Master, you rise like an inspirative marble statue representing the old grandness of our law, amidst the bleakness of devastation that affects even the field of law. You, with your very existence, with the triumphant accomplishments of your immortal works, with the all-understanding wisdom and clear soul that looks across a lifetime’s struggle, express the intactness of Hungarian law, Hungarian private law, its

<sup>48</sup> VÉKÁS 2013, 257.

<sup>49</sup> SZLADITS 1948, 6.

<sup>50</sup> SZLADITS 1936, 6.

<sup>51</sup> WEISS 2006, 104.

<sup>52</sup> “Károly Szladits, »who served the genius of Grosschmid with filial piety and complete adherence throughout a human lifetime.«” *Beck Salamon felszólalása* [Words of Salamon Beck] 1935, 593. Károly Szladits dedicated his regular membership inaugural speech at the Hungarian Academy of Sciences to the memory of Béni Grosschmid. The speech was later also printed. See: SZLADITS 1948, 1–8.

<sup>53</sup> BECK 1938, 394.

<sup>54</sup> SZLADITS 1936, 11.

<sup>55</sup> Cf. *Grosschmid Béni: „Fejezetek Kötelmi jogunk köréből” új jubileumi kiadása* [New celebratory edition of the “Chapters from our contract law.”] 1932, 108.

<sup>56</sup> Glossza [Glossary] 1932–1933., The Glossarys comprised of twenty-two authors’ writings, and they also contributed its editorial board. Members of the editorial board: Antal *Almási*, Nándor *Baumgarten*, Viktor *Bátor*, György *Blau*, Bernát *Besnyő*, Salamon *Beck*, Gyula *Dezső*, Béla *Frigyes*, László *Fürst*, Frigyes *Görög*, Ödön *Kuncz*, Lóránt *Lőw*, Olivér *Markos*, Gáspár *Menyhárh*, Artúr *Meszlény*, Endre *Nizsalovszky*, János *Nyulási*, Béla *Reitzer*, Bertalan *Schwartz*, Kálmán *Személyi*, Károly *Szladits*, Lajos *Tóth*. For book introductions: IFJ. SZIGETI 1932, 426–429.

<sup>57</sup> IFJ. SZIGETI 1932, 427.

<sup>58</sup> MÁRAI electronic release without page numbers.

harmony with the requirements of morality, its living roots deep within the nation's heart, and its eternalness alongside the nation."<sup>59</sup>

The sophisticated dogmatic analysis of *Grosschmid*, his trailblazing scientific systemizations aimed at realizing the requirement of "fairness" amongst the forms of statutory/regulatory law. In his statements siding with modern thinking, some feudal residue can still be found. His work was characterized by preserving and promoting the national traditions of legal thinking.<sup>60</sup> He desired to build a new Hungarian private law in opposition to German law.<sup>61</sup> *Grosschmid*'s work "is characterized in the field of family and inheritance law by conservatism, maximal respect for legal traditions, but in regard to contract law, his work is characterized by daring progress, which essentially created the Hungarian contract law from nothing."<sup>62</sup> Beyond contract law, *Grosschmid* achieved forever important accomplishments in the fields of trade law, private international law,<sup>63</sup> inheritance law, and family law<sup>64</sup> as well. His works and statements on the latter subjects were guided by the desire to preserve traditions and his feelings on family matters. As this is the field where change is not recommended, even if everything else changes. As Károly Szladits expressed in his valedictory on behalf of the Pázmány Péter University and the Hungarian Academy of Sciences: "With his bright discussion papers and excellent treatises, he successfully ensured the perpetual continuation of our national institutions in the field of family and inheritance law, and through this, established the foundation for the further independent national evolution of our private law."<sup>65</sup>

Due to the limits of the current volume, we emphasize *Grosschmid*'s role in the development of inheritance law, especially his contribution to the codification of inheritance law, for multiple reasons. On the one hand, most analyses are connected to his Chapters, and on the other hand, we can establish a parallel between the draft of the inheritance law book of our private law code and his thought.<sup>66</sup> The codification of Act V of 2013, the Civil Code, was built upon the basic idea of "preservingly renewing", and during the creation of the inheritance law book, the Codification Editorial Committee placed great importance on only altering inheritance law when it was especially justified.<sup>67</sup> As Lajos Vékás noted in his treatise: "If you like, we acted in the spirit of Grosschmid, who firmly believed and repeatedly emphasized that inheritance law institutions freed from »traits contrary to the spirit of current times« should not be changed."<sup>68</sup>

*The debate between István Teleszky and Benő Zsögöd – Zsögöd and the codification of inheritance law*

<sup>59</sup> MESZLÉNY 1931, 429.

<sup>60</sup> Cf. WEISS 2006, 101.

<sup>61</sup> Cf. ehhez SZLADITS 1948, 5. 7. PESCHKA 1959, 60. ASZTALOS 1973, 75.

<sup>62</sup> PÓLAY 1974, 8.

<sup>63</sup> BALLA 1931, 450–452.

<sup>64</sup> According to *Almási*, the legal foundation of the basics of the marriage law, fully or at least in major part, is the work of *Grosschmid*. ALMÁSI 1937., 3.

<sup>65</sup> Magyar Jogi Szemle 1938/8. 327.

<sup>66</sup> See in details: VÉKÁS 2019, 50–63. VÉKÁS 2013, 257–263.

<sup>67</sup> *VÉKÁS* (ed.) 2012, 537. VÉKÁS 2013, 258.

<sup>68</sup> VÉKÁS 2013, 258. Vékás 2019, 51.

*Zsögöd's* role in the codification of inheritance law is best assessed in relation to the Teleszky-draft on the subject. In essence, the codification of inheritance law was founded upon the debate and discourse of two great minds: *Teleszky és Grosschmid*.

István *Teleszky*, a lawyer from Nagyvárad, proposed during the 1871/II. Assembly of Hungarian Lawyers that, before the codification of civil law, inheritance law should be codified, a proposal which the Assembly approved.<sup>69</sup> Based on this support, the justice ministry requested that *Teleszky* prepare the draft of the inheritance law section of the Hungarian Private Law Code.<sup>70</sup> *Teleszky* begun his work, the result of which was released in 1876 inside his treatise titled *To the rules of our inheritance law*.<sup>71</sup> This treatise merited praise from the Hungarian Academy of Sciences in the Sztrókay-award.<sup>72</sup> The treatise's central question was whether lineal succession should be kept in the legal system, or not. He summarized his opinion as follows: "[...] Hungarian legislation cannot maintain the separation between inherited and acquired wealth when it comes to regulating intestate succession; but a unified system of succession must be created, connecting the intestate succession to the natural familial ties, and *without regard to examining the origin of different elements of the deceased's wealth*."<sup>73</sup> The publication of the work caused a great, national debate, with *Zsögöd* at the helm of it. *Zsögöd* published his *Inherited and acquired wealth* treatise in the 1877-1879 volumes of the *Hungarian Justice*.<sup>74</sup> In this work, he supported, sometimes vehemently, the institution of lineal succession. As if in response, *Teleszky* released his inheritance law draft's general segment and his materials on intestate succession with an explanation as a private edition, in 1881.<sup>75</sup> The debates became constant, but for a time, *Zsögöd* stayed out of them and kept his distance. In 1882, the justice ministry released the full text of the Teleszky-proposal with the title: *General Private Law Code. Inheritance law*.<sup>76</sup> "István Teleszky's [...] inheritance law draft [...] was a direct descendant of the proposal in the National Judicial Assembly to completely sidestep traditional Hungarian inheritance law in favor of keeping the (then temporarily effective) Austrian civil code's inheritance law."<sup>77</sup> *Zsögöd* "strongly attacked" <sup>78</sup> this official draft of inheritance law in the coming civil code, this so-called Teleszky-draft.<sup>79</sup> The reason behind this was mostly the method of legislation of the era, which rested upon the "copying" of foreign law. "*The direction of our codification is marked by a certain degree of flippancy. To reach great goals with small tools, non-existent tool, as if this were possible. We copy some sort of foreign code, with acknowledged great personal excellency, but without any deeper inner work, and proclaim that the nation is progressing.*" *Zsögöd* voiced his displeasure at the *Teleszky*-draft of inheritance law.

<sup>69</sup> TELESZKY 1872. ZSÖGÖD 1887, 49.

<sup>70</sup> CSIZMADIA 1979, 36.

<sup>71</sup> TELESZKY 1876.

<sup>72</sup> PÓLAY 1974, 7. ZSÖGÖD 1887, 49.

<sup>73</sup> Emphasis by the author. TELESZKY 1876, 286.

<sup>74</sup> ZSÖGÖD 1877, 1878, 1879.

<sup>75</sup> TELESZKY 1881.

<sup>76</sup> TELESZKY 1882.

<sup>77</sup> KOLOSVÁRY 1938, 58.

<sup>78</sup> MIKSÁTH electronic release without page number (downloaded on 17 December 2019.)

<sup>79</sup> On the Teleszky-draft, including its background, see in detail: PÓLAY 1974.

Reflecting on the draft proposal, *Zsögöd* released a series of extremely aggressively toned articles in the *Hungarian Justice's* 1882-1883 years.<sup>80</sup> (Besides *Zsögöd*, *Dell'Adami* Rezső also fiercely attacked the draft, but unlike *Zsögöd*, from a radical and not conservative perspective.<sup>81</sup>) An expert's council of judges, attorneys and law professors, assembled at the request of the justice ministry, began debating *Teleszky's* proposal in the autumn of 1883, which it finished in 1886.<sup>82</sup> Meanwhile, *Zsögöd*, out of private diligence (*ex privata diligentia*), wrote in 1885 his own draft proposal regarding intestate succession, even though as he put it: "*the signs so far do not indicate in the slightest that these foundations would find much sympathy with the focus of the current direction.*"<sup>83</sup> In contrast to István *Teleszky*, he approached the matter differently, with the intent of protecting against German intellectual influence. In this work, he analyses and assesses the *Teleszky-draft* (Government-draft), and the "text agreed upon by the ministerial session"<sup>84</sup> (Session). He utilized the tool of legal comparison here, with specific attention paid to certain passages of the Austrian Civil Code, the Saxon Civil Code, and the Zürich Code. His line of thought was heavily influenced by respect to the family and the familial feeling,<sup>85</sup> the value system of his era. One manifestation of this was his thoughts on dower (which was exclusively reserved for the surviving wife): "*The ethical foundations of our dower, the roots of which reach back all the way to the law of Saint Stephen [...] is a certain chivalrous intent towards the weaker sex, and those stronger ties that bind a woman's position to her husband's (and not vice versa). The woman, even as a widow, is under the protective shield of her husband's name and social status, and dower transfers this shield to the estate as well. Furthermore, dower is a sort of continuation of the spousal maintenance obligation the husband had while alive. The chief objective is not to grant capital to the widow, it is to ensure her maintenance, which is one of the strongest postulatums of our national succession system's principles.*"<sup>86</sup> In *Zsögöd's* proposal, the dower is maintained for the duration of the widowhood, but unlike the *Teleszky-draft*, he restricted it to residence and maintenance, and made it possible for the descendants to restrict the widow's usufruct to one quarter of the estate, half of the estate in case of lineal successors.<sup>87</sup> The arguments raised against the "institution of dower" in the justification of the government-draft<sup>88</sup> are as follows: "*it is just as much not a Hungarian institution, but an imitation of similar foreign law, as the [rules of] lineal succession*" "*It clashes with the principle of reciprocity, in that it furnishes the woman with privileges regarding her deceased husband's estate that a man does not possess regarding his deceased wife's estate, [...] it often proves an impossible obstruction to finding a new husband.*" As such "*how much more is it correct, if the estate is divided, immediately upon the*

<sup>80</sup> ZSÖGÖD 1882, 1883.

<sup>81</sup> Cf. PÓLAY 1974, 17–18. CSIZMADIA 1979, 36–37.

<sup>82</sup> PÓLAY 1974, 19.

<sup>83</sup> ZSÖGÖD 1901, 63. p

<sup>84</sup> Ibid. 64.; TELESZKY 1884.

<sup>85</sup> Cf. WEISS 2006, 106.

<sup>86</sup> ZSÖGÖD 1901, 84.

<sup>87</sup> PÓLAY 1974, 20. VÉKÁS, 259.

<sup>88</sup> *Az általános magánjogi törvénykönyv tervezete. Öröklési jog. Indokolás* [The draft of the general private law code. Inheritance law. Justification.] 1883, 43.

deceased's passing, between relatives and the spouse in an equitable fashion that makes each of them the unrestricted owner and master of their own part of the estate that they can manage and harness as they desire. Thus, living with good understanding between each other, the widow, without risking the loss of material advantage, can remarry and raise good citizens for the nation.”<sup>89</sup>

Zsögöd also dealt extensively with the problem of lineal succession in his proposal, maintaining its continued necessity. His conception rested on the principle of return, the restriction of the thread of lineal succession, and the construction of lineal inheritance as a form of *singularis successio*.<sup>90</sup> Regarding the return of lineal sub-estates, he supported an approach based on the Schaffhausen codex, but still different from it:<sup>91</sup> he supported lineal succession only in relation to the predecessor and their descendants, the person from whom the sub-estate originally “descended from, but not in general the family side from which it came.”<sup>92</sup> He cut short the potential thread of return, however, restricted it to a narrower group of relatives, the parents and grandparents and their descendants. He himself acknowledged that this restriction is “a great change in principle of our historical law.”<sup>93</sup> According to Zsögöd: “For the cause of lineal property, beyond our national legal thought, there are arguments, at least according to us, which are more significant than letting the woman »raise useful citizens« in her new marriage.”<sup>94</sup> The family, as a value, returns later in his proposal concerning spousal succession<sup>95</sup> as well: “The ethical basis of spousal succession is spousal love, or rather the notion that in the case of childlessness, the spouse is going to be the person closest in the world (even beyond the father, mother and sibling) to the deceased. Based on this, with regards to property where the individuality of the deceased can be accepted as an ethical center, the spouse should precede all other successors excluding the child. As it is she, who, as Verböczi said, is more than a sibling to a man.”<sup>96</sup>

After the expert's council debate between 1883 and 1886, Teofil Fabinyi justice minister presented the proposal to the national assembly on the 8th of January 1887. A week later, Zsögöd communicated fresh concerns about the reversionary succession part of the proposal<sup>97</sup> in his *Maintaining families and the inheritance law proposal*<sup>98</sup> treatise. He asked two questions in this regard and responded to both: 1. “Is there some kind of

<sup>89</sup> Quotes ZSÖGÖD 1901, 94.

<sup>90</sup> ZSÖGÖD 1901, 133.

<sup>91</sup> The Schaffhausen “codex's side-succession order, while falling relatively closest to the Hungarian, still possesses such stark differences, that even though we can consider it a relative to the Hungarian, we still have to see it as a completely different succession system.” ZSÖGÖD 1901, 182. „this succession, at least based on our opinion, is far behind our nation's. Exactly the two principles on which the Hungarian system's internal harmony rests, using the deceased's personality as a basis for non-lineal property [...], the leading principle of descending inheritance and restricting the return [...], cannot be found in this succession by any means.” ZSÖGÖD 1901, 189.

<sup>92</sup> Emphasis from the author. ZSÖGÖD 1901, 133.

<sup>93</sup> Emphasis from the author. ZSÖGÖD 1901, 134.

<sup>94</sup> ZSÖGÖD 1901, 94.

<sup>95</sup> Which succession, in contrast to the dower, are two-sided. ZSÖGÖD 1901, 96.

<sup>96</sup> Emphasis made by Zsögöd. ZSÖGÖD 1901, 97.

<sup>97</sup> Cf. PÓLAY 1974, 21. in Pólay's treatise “Családfenntartás és örökjogi javaslat.” [Family maintenance and inheritance law proposal]

<sup>98</sup> ZSÖGÖD 1887, 49–69.

progression in the reversionary succession as found in the proposal, compared to the current institution in place, that significantly strengthens the maintenance of family” and 2. “And in general, what is the relationship between the institution of substitution and Hungarian intestate succession from the perspective of family maintenance, and most importantly, can it compensate for the other in this regard?”<sup>99</sup> One week later, Dell’Adami attacked the proposal in two ways: on the one hand, he thought that the institution of dower should be removed, and on the other hand, he recommended establishing the same position of succession for the children born out of wedlock as the children born in marriage.<sup>100</sup> Under the influence of the legal literary opinions that turned up, the justice ministry reviewed the proposal, and the modified *Law Proposal on Inheritance law* (alongside its justification) went in front of the national assembly convened on the 26th of September, 1887, at its session on the 22th of October. At the same time, the justice minister formally proposed the transfer of the proposal to the justice committee for purposes of debate.<sup>101</sup> The proposal was supported by the assembly’s justice committee, and so its passing was considered likely. But then, as a sudden turn, the justice minister asked Zsögöd to prepare the law proposal for effectiveness.<sup>102</sup> In 1889, the monarch named Dezső Szilágyi the justice minister, whom Zsögöd convinced of the notion that family and inheritance law are so closely tied together that inheritance law cannot be codified without codifying family law. Thus, the minister removed the proposal from the assembly’s schedule,<sup>103</sup> and the inheritance law codification ended without legislative results. This does not mean, however that the codification process was fully without results: Zsögöd’s fierce and enduring efforts prevented the disappearance of legal institutions like lineal succession, which remain a living part of Hungarian private law to this day.

Grosschmid (Zsögöd) left a complex and outstanding life’s work behind for private lawyers. A life’s work,<sup>104</sup> which though can be difficult to read and interpret, but still “[...] shows an unmatched originality when it comes to learning, processing and translating law, with his width of knowledge, incredible and original associative ability, and unique perspective.”<sup>105</sup> His importance and unavoidability is unquestionable in almost all fields of private law.<sup>106</sup> He was the shaper of the early 20th Century’s, and thus our current, Hungarian private law.<sup>107</sup>

“Who was and who will be Grosschmid throughout the centuries, is known and will be known by all Hungarian lawyers.”<sup>108</sup>

<sup>99</sup> ZSÖGÖD 1887, 58–59.

<sup>100</sup> PÓLAY 1974, 21.

<sup>101</sup> Cf. PÓLAY 1974, 22.

<sup>102</sup> Cf. PÓLAY 1974, 25.

<sup>103</sup> CSIZMADIA 1979, 37.

<sup>104</sup> Regarding the 1931 compilation of his life’s work, see especially: BLAU 1931, 438–441. IFJ. NAGY 1931, 442–445. IFJ. SZIGETI 1931, 452–455.

<sup>105</sup> CSEHI 2012, 18.

<sup>106</sup> In the *Chapters*, “he lay the foundations of the modern Hungarian contract law.” WEISS 2006, 106.

<sup>107</sup> “He was not only a master of his chosen field, but also a creator and discoverer of it. His writings suggested to the reader that nobody else dealt with private law before him, and that there is no point in significantly changing his statements afterwards.” MÁRAI.

<sup>108</sup> ANGYAL 1938, 324.

### III. His selected works

*Kiskorúak utáni törvényes öröklésről.* [Intestate succession after minors.] Budapest, 1879. „Külön lenyomat a „Magyar Igazságügy” X. kötetéből.” [Special release from the 10th volume of “Hungarian Justice.”]

*Csődítörvény: (1881: XVII. törvénycikk): jegyzetekkel, utalásokkal és magyarázattal.* [Bankruptcy Act: (Act XVII of 1881): with notes, implications, and explanation.] Budapest, 1881.

*Ungarisches Concursgesetz, (XVII. Gesetz-artikel vom Jahre 1881) mit Anmerkungen, Parallelstellen und Erläuterungen.* [Hungarian Concurs Act, (XVII. Act of 1881) with annotations, parallel passages and explanations.] 1881.

*Polgári törvénykezési rendtartás és végrehajtási eljárás: az 1868. LIV., 1881. LIX. és LX. törvénycikkek szakszerű használat céljából egybegyűjtve.* [Civil litigation and execution: Acts LIV of 1868, LIX of 1881 and LX of 1881 collected for professional use.] Budapest, 1881.

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*Fejezetek kötelmi jogunk köréből.* 2. kötet. [Chapters from our contract law. Volume 2.] Athenaeum Irodalmi és Nyomdai R.-Társulat. Budapest, 1900.

*Magánjogi tanulmányok, tervezetek és kisebb dolgozatok főként az öröklési, kereskedelmi és családi jog köréből: a „Magyar Igazságügy”-ben és másutt megjelent, továbbá némely kéziratban maradt dolgozatok gyűjteménye 1. kötet.* [Private law studies, drafts, and smaller treatises chiefly about inheritance law, trade law, and family law: collection of treatises released in „Magyar Igazságügy” or retained in certain manuscripts. Volume 1.] Politzer Zsigmond és Fia. Budapest, 1901.

*Magánjogi tanulmányok tervezetek és kisebb dolgozatok főként az öröklési, kereskedelmi és családi jog köréből: a „Magyar Igazságügy”-ben és másutt megjelent, továbbá némely kéziratban maradt dolgozatok gyűjteménye 2. kötet.* [Private law studies, drafts and smaller treatises chiefly on the subjects of inheritance law, trade law, and family law: collection of treatises released in „Magyar Igazságügy” or retained in certain manuscripts. Volume 2.] Politzer Zsigmond és Fia. Budapest, 1901.

*Hitel és reáluzsora.* [Credit and real usury.] Politzer Zsigmond és Fia. Budapest, 1902.

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GYÖRGY ATTILA NÉMETH

## ERIK HELLER\*

(1880–1958)

*Erik Heller* taught substantive and procedural criminal law between 1925 and 1944 at the Ferenc József University as a full professor for almost 38 semesters. He began his career as a practicing lawyer, besides this activity he published continuously, and later obtained a university teacher qualification. He committed himself to an academic career at the time of his appointment as a full professor in Szeged. With this study, I intend to draw a portrait of one of the decisive figures of the criminal sciences between the two world wars. Following a brief overview of his career, I present his perception of the theories of punishment. In the second part of the study, I address the views of Erik Heller on the essential issues of the criminal dogmatics, such as the concept of criminal offence, unlawfulness and guilt.

### I. Biography

#### *Judicial career*<sup>1</sup>

*Erik Heller* was born in Budapest, on May 15, 1880 as the child of engineer, physicist *Ágost Heller*<sup>2</sup> and *Georgina Bolberitz* of Bleybach. His siblings were *Farkas Heller*,<sup>3</sup> *René Lothár Heller*<sup>4</sup> and *Georgina Heller*.<sup>5</sup>

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<sup>1</sup> I reconstructed the stations of *Erik Heller's* judicial career primarily on the basis of the report of *Gyula Moór*, which was prepared on December 18, 1924, in order to comment on the professorial applications received for filling the department in Szeged. *Moór Gyula egyet. ny. r. tanár előadói jelentése*. MNL Csongrád Megyei Levéltár Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1924/25, VIII. 4. b, iktatószám: 82. [Report of Gyula Moór, full professor. National Archives of Hungary (hereinafter abbreviated: MNL), Csongrád-Csanád County Archives of National Archives of Hungary (hereinafter abbreviated: CSCSML), Documents of the Faculty of Law of Ferenc József University of Szeged 1924/25, VIII. 4. b, file number: 82.] 2. In the following: Moór-report.

<sup>2</sup> Pest, August 6, 1843 – Budapest, September 4, 1902. Physicist. His most significant work is the *Geschichte der Physik von Aristoteles bis auf die neueste Zeit* [The History of Physics from Aristotle to Modern Times]. Cf. OROSZI – SIPOS 1990, 1493.

He was inaugurated as a doctor of law in 1904 at the Faculty of Law of the University of Budapest (the predecessor of ELTE). From 1906, he worked at the Royal Regional Court of Győr as a substitute notary,<sup>6</sup> from 1908 as a notary,<sup>7</sup> and from 1912 as a royal council notary. At the beginning of 1913, he was appointed substitute district court judge in Nezsider (now Neusiedl am See in Austria), and in november he served in the same position at the Royal Criminal District Court in Budapest.<sup>8</sup> He later officiated as substitute regional court judge in Budapest,<sup>9</sup> and was appointed as judge to the Royal Regional Court in Budapest in 1914.<sup>10</sup> In this position, he was assigned as a juvenile court judge by the Minister of Justice for three years.<sup>11</sup> From 1916 he was employed in the Ministry of Justice, wherein from 1919 he became an undersecretary,<sup>12</sup> then in 1921 he was appointed royal deputy chief prosecutor.<sup>13</sup> In 1923 he obtained a university teacher qualification at the Faculty of Law of the Budapest University (between 1921 and 1950 Pázmány Péter University).<sup>14</sup>

#### *Educational activities in Szeged*<sup>15</sup>

Simultaneously with the appointment of *Erik Heller* to the Department of Substantive Criminal Law, he was commissioned to lecture the criminal procedure law course as well. The reason for this was that after the assignment of *Ferenc Finkey*, the Head of the Criminal Law Department, as deputy crown prosecutor, and the death of *Adolf Lukáts*<sup>16</sup> on May 20, 1924, the Department of Substantive Criminal Law also became vacant.<sup>17</sup> Because of this, the competent committee proposed<sup>18</sup> that, between the two positions of

<sup>3</sup> Budapest, May 9, 1877 – Budapest, September 29, 1955. Economist, full professor at the Budapest University of Technology and Economics, member of the Hungarian Academy of Sciences. See more: OROSZI – SIPOS 1990.

<sup>4</sup> Budapest, 15 May 1878. – Budapest, 2 March 1929. Engineer, chief inspector of railways and shipping.

<sup>5</sup> She was born in Budapest on 17 May 1880, she was the twin sister of Erik Heller, the date of her death is unknown. See: My Heritage Company, Geni-adatbázis. [<http://bit.ly/georgineheller>, downloaded on 05.01.2020.].

<sup>6</sup> Moór-report, 2.

<sup>7</sup> Index by names for the 1908 volume of the *Jogtudományi Közöny*.

<sup>8</sup> See: HELLER 1913a, 49., and Moór-report, 2.

<sup>9</sup> Moór-report, 2.

<sup>10</sup> Ibid. 2.

<sup>11</sup> See: “HIREK” rovat. [“NEWS” column.] *Az Est* 1914/5. 4.

<sup>12</sup> Moór-report, 2.

<sup>13</sup> Ibid. 2.

<sup>14</sup> Budapesti Királyi Magyar Pázmány Péter Tudományegyetem Jog-és Államtudományi Karának ülései, 1922–1923 (HU-ELTEL 7.a.23.) 1923. április 12. IV. rendkívüli ülés. [Minutes of the meetings of the Faculty of Law and Political Science of the Royal Hungarian Pázmány Péter University of Budapest, 1922–1923 (HU-ELTEL 7.a.23.) 12 April 1923. IV. Extraordinary Meeting.] 124, 125.

<sup>15</sup> I am grateful to Tamás Vajda, archivist of the University of Szeged, for providing me with archival materials related to Heller's years in Szeged.

<sup>16</sup> Felsősolva, 1848 – Budapest, 1924, professor at the legal academy in Pécs, judge at the Regional Court of Appeal from 1891, then from 1894 professor of criminal law in Kolozsvár. See: HUSSEIN 2020a, 463–464.

<sup>17</sup> *Az 1924. május 21-én tartott IV. rendkívüli kari ülés jegyzőkönyve*. MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1923/24, VIII. 4. b, iktatószám nélkül. [Minutes of the IV. extraordinary faculty meeting held on 21 May 1924. MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1923/24, VIII. 4. b, without file number.]

<sup>18</sup> The chairman of the committee was *Ignác Kosutány*, its members were *Gáspár Menyhárt*, *Károly Tóth*, *Albert Kiss*, *László Buza*.

the head of the criminal law departments, only the position according to the substantive criminal law should be filled, and the person to be appointed to that position should also be responsible for holding the criminal procedural lectures without additional remuneration. Following the adoption of the motion in this matter at the 1st extraordinary meeting on September 25, 1924, they called for the application on the 25th of October.<sup>19</sup> The committee supplemented by the Dean *Gyula Moór* and *István Ereky*, compiled a report on the applications received,<sup>20</sup> the draft of which was prepared by *Moór*, who was the elected rapporteur of the committee, by the 18th of December. I referred to this document earlier as the *Moór-report*. A total of seven people applied for the announced position: *Ervin Hacker*,<sup>21</sup> *Erik Heller*, *Lajos Zehery*,<sup>22</sup> *Kálmán Gerőcz*,<sup>23</sup> *Emil Grandpierre*,<sup>24</sup> *János Samassa*<sup>25</sup> and *Bertalan Landori Kéler*.<sup>26</sup>

*Moór* criticized the applicants' scientific and academic literary work. Regarding *Heller*, he noted that "his skills predominate in analyzing judicial, especially technical legal issues", although he can be said to be less experienced in resolving theoretical, and philosophical questions.<sup>27</sup> In his report, the professor recommended *Erik Heller* and *Ervin Hacker* in the first place, between the two of them, he considered *Hacker* more worthy to fill the department. In the second place, he supported the appointment of *Lajos Zehery* as an extraordinary professor, furthermore the appointment of *Emil Grandpierre* as full professor.<sup>28</sup> At its meeting on December 19, the committee fully accepted the rapporteur's recommendation according to the order of the appointments.<sup>29</sup> This opinion was also discussed by the faculty council<sup>30</sup> on the same day.<sup>31</sup> After the voting, the faculty supported

<sup>19</sup> MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1924/25, VIII. 4. b, iktatószám: 82. [MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1924/25, VIII. 4. b, file number: 82.].

<sup>20</sup> Ibid.

<sup>21</sup> Bratislava, 1888 – Miskolc, 1945, university teacher at the university of Bratislava from 1919, then from 1920 teacher at the legal academy in Miskolc. He worked in many branches of the criminal sciences, including criminal statistics, criminology and prison law. See: NAGY 2013, 83.

<sup>22</sup> Szeged, 1893 – Budapest, 1968, university teacher in criminal procedure law at the University of Szeged from 1922, then from 1940 judge at the Curia. See: HUSSEIN 2020b, 787–799. FARAGÓ M. 1993.

<sup>23</sup> Sátorajjáújhely, 1888 – Sátorajjáújhely, 1965, from 1912 teacher at the Calvinist legal academy in Sárospatak. *Moór-report*, 2.

<sup>24</sup> Nagykanizsa, 1874 – Budapest, 1938, from 1910 judge at the regional court in Kolozsvár, from 1918 Government Commissioner in the county of Cluj, and from 1922 teacher of general legal knowledge at the teacher training institute in Kolozsvár, father of the writer *Emil Grandpierre Kolozsvári*. Ibid. 5.

<sup>25</sup> Born in Verebely, in 1867, extraordinary professor at the Roman Catholic legal academy in Eger, later representative in the Hungarian Parliament. Ibid. 5.

<sup>26</sup> Born in Komárom, in 1897, lawyer candidate, assistant pastor. Ibid. 5.

<sup>27</sup> Ibid. 10.

<sup>28</sup> *Moór-report*, 20.

<sup>29</sup> *A m. kir.-i Ferenc József Tudományegyetem felterjesztése gróf Klebelsberg Kunó m. kir. vallás- és közoktatásügyi Miniszter Urnak*. MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1924/25, VIII. 4. b, iktatószám: 82. [*Proposal of the Royal Hungarian Ferenc József University to Count Kunó Klebelsberg, Royal Hungarian Minister of Religion and Public Education*. MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1924/25, VIII. 4. b, file number: 82.].

<sup>30</sup> It consisted of the 12 full professors of the faculty, each with one vote.

<sup>31</sup> *Kivonat az 1924. december 19-én tartott IV. rendes kari ülés jegyzőkönyvéből*. MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1924/25, VIII. 4. b, iktatószám: 82. [*Excerpt from*

the appointment of *Erik Heller* as a full professor in the first place, then the appointment of *Ervin Hacker* also as a full professor in the second place and the appointment of *Lajos Zehery* as an extraordinary professor in the third place.<sup>32</sup> *Kunó Klebersberg* submitted a personal proposal to the governor in accordance with this motion, who assigned *Heller* on September 23, 1925, to head the Department of Substantive Criminal Law as a full professor.<sup>33</sup> The newly appointed professor took the official oath on October 11.<sup>34</sup>

Besides lecturing substantive law five hours per week, *Heller* also took care of the criminal procedure law course in the same number of hours (under the name of the Hungarian Criminal Jurisdiction) – which from the I. semester of the 1936/37 academic year, was solely announced in the fall semester – until 1940.<sup>35</sup> From the autumn of 1941, *Elemér P. Balás* took over the teaching of the procedure law.<sup>36</sup> During his professorship, *Heller* was dean twice: in the academic year of 1933/34<sup>37</sup> and – now in Kolozsvár – in the academic year of 1943/44.<sup>38</sup> In each year after holding the dean's office, and also in the academic year of 1940/41 – instead of *István Ereky* – he performed the duties of the formal dean's<sup>39</sup> tasks.<sup>40</sup> On May 14, 1943, he was elected a corresponding member of the Hungarian Academy of Science, the title of his inaugural lecture: *Subjectivism and objectivism in the criminal law*.<sup>41</sup> He left the Ferenc József University in the summer of 1944 in order to fulfill the invitation of the university in Budapest. After his departure,

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*the minutes of an ordinary faculty meeting held on 19 December 1924.* MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1924/25, VIII. 4. b, file number: 82.].

<sup>32</sup> *A m. kir.-i Ferenc József Tudományegyetem felterjesztése gróf Klebelsberg Kunó m. kir. vallás-és közoktatásügyi Miniszter Urnak.* MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1924/25, VIII. 4. b, iktatószám: 82. [*Proposal of the Royal Hungarian Ferenc József University to Count Kunó Klebelsberg, Royal Hungarian Minister of Religion and Public Education.* MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1924/25, VIII. 4. b, file number: 82.].

<sup>33</sup> MNL Csongrád Megyei Levéltár, Szegedi Ferenc József Tudományegyetem Jogi Karának iratai 1925/26, VIII. 4. b, iktatószám: 190. [MNL, CSCSML, Documents of the Faculty of Law of the Ferenc József University of Szeged 1925/26, VIII. 4. b, file number: 190.].

<sup>34</sup> *Ibid.*

<sup>35</sup> *A magyar királyi Ferenc József Tudományegyetem tanrendje az MCMXXXVI-XXXVII tanév első felére.* [Curriculum of the Royal Hungarian Ferenc József University for the first half of the MCMXXXVI-XXXVII Academic Year.], Szeged Városi Nyomda, Szeged, 1936. 34.

<sup>36</sup> *A magyar királyi Ferenc József Tudományegyetem tanrendje az 1941/42. tanév első felére.* [[The Curriculum of the Royal Hungarian Ferenc József University for the first half of the 1941/42. Academic Year.], a m. kir. Ferenc József Tudományegyetem Kiadása, Kolozsvár, 1941. 16.

<sup>37</sup> *A magyar királyi Ferenc József Tudományegyetem tanrendje az MCMXXXIII-XXXIV tanév első felére.* [The Curriculum of the Royal Hungarian Ferenc József University for the first half of the MCMXXXIII-XXXIV Academic Year.], Szeged Városi Nyomda, Szeged, 1933. 26.

<sup>38</sup> *A magyar királyi Ferenc József Tudományegyetem tanrendje az 1943/44. tanév első felére.* [The Curriculum of the Royal Hungarian Ferenc József University for the first half of the 1943/44. Academic Year.], a m. kir. Ferenc József Tudományegyetem Kiadása, Kolozsvár, 1943. 3.

<sup>39</sup> Translator's note: The formal dean was the all time vice-dean.

<sup>40</sup> *A magyar királyi Ferenc József Tudományegyetem tanrendje az 1940/41. tanév második felére.* [The Curriculum of the Royal Hungarian Ferenc József University for the second half of the 1940/41. Academic Year.], a m. kir. Ferenc József Tudományegyetem Kiadása, Kolozsvár, 1941. 12. István Ereky was the head of the Department of Administrative and Financial Law until 1940, but he did not follow the university to Kolozsvár. On 19 October 1940, he was appointed a full professor at the Erzsébet University of Pécs. PÉTERVÁRI 2014, 30. See more: PÉTERVÁRI 2020, 197–211.

<sup>41</sup> FEKETE 1975, 106, 107. His academic inaugural lecture was published in 1944, in Kolozsvár in the form of an independent book as a part of the Acta-series. HELLER 1944.

*Elemér P. Balás* took over the management as the deputy head of the Department of Substantive Criminal Law.<sup>42</sup>

*Professorship and retirement in Budapest*

Following the retirement of *Pál Angyal*, on the proposal of the committee rapporteur *Gyula Moór*<sup>43</sup> – based on *Angyal's* commendable expert opinion – the council of the Faculty of Law of the Pázmány Péter University on June 21, 1944 invited *Heller* with a majority to head the Department of Substantive and Procedural Criminal Law.<sup>44</sup> He held the substantive and procedural law lectures in Budapest until 1949. Together with the ideological reorganization of the education of criminal justice, he was exiled to head the Department of Ecclesiastical Law.<sup>45</sup> He retired on November 12, 1949, however nominally – until the formal termination of the ecclesiastical education – he operated at the Budapest faculty for another six months.<sup>46</sup> *Miklós Kádár* became his successor at the department.<sup>47</sup>

The reckoning of the so-called bourgeois criminal law also affected his academic membership: on October 31, 1949, together with his brother, he was one of the 122 academics who were qualified as deliberative members.<sup>48</sup> His academic membership was restored in 1989.<sup>49</sup> *Heller's* is set apart because of his ideological basis which could not undermine his passionate research enthusiasm, after his retirement he continued with the creative work.<sup>50</sup> He died on October 15, 1958, at the age of 78.

<sup>42</sup> BALOGH 1999, 91.

<sup>43</sup> From 1929, *Moór* headed the Department of Philosophy of Law at the University of Budapest. SZABADFALVI 2006, 173.

<sup>44</sup> Budapesti Királyi Magyar Pázmány Péter Tudományegyetem Jog- és Államtudományi Karának ülései, 1943–1944 (HU-ELTEL 7.a.43.) 1944. június 21. VIII. rendes ülés. [Meetings of the Faculty of Law and Political Science of the Royal Hungarian Pázmány Péter University of Budapest, 1943–1944 (HU-ELTEL 7.a.43.) June 21, 1944. VIII. Ordinary Meeting.], 40. [Hungaricana adatbázis <http://bit.ly/2tmexyZ>, cit. 2020. 02. 01.].

<sup>45</sup> BÉKÉS 1972, 286.

<sup>46</sup> Budapesti Pázmány Péter Tudományegyetem Jog- és Közigazgatástudományi Karának ülései, 1949–1950 (HU ELTEL 7.a.49.) 1949. szeptember 14. [Meetings of the Faculty of Law and Public Administration of Pázmány Péter University of Budapest, 1949–1950 (HU ELTEL 7.a.49.) September 14. 1949.], 16. Hungaricana adatbázis [<http://bit.ly/2TNiYx7>, cit. 2020. 02. 02.] Valamint BÉKÉS 1972, 286.

<sup>47</sup> Ibid. 290.

<sup>48</sup> At the time of the reorganization, the Academy had 257 members, of whom only 102 regular and correspondent members and one honorary member were re-elected under the new statutes, and 122 of the old members became deliberative members. According to the newly adopted statutes of the Academy, the deliberative members could use their membership address as "deliberative", attend the meetings of the departments of the Academy, except in closed sessions, and speak up in scientific matters. However, they did not have the right to vote or to speak up in organizational and property matters. See: ALEXITS 1950, 10., 11.

<sup>49</sup> *Önálló Akadémiát!* [*Independent Academy!*], Magyar Nemzet 1989/104. 4.

<sup>50</sup> MÓRA 1959a, 102.

## II. Academic work

### *A brief overview of his significant works*

Initially, he was specifically interested in problems with practical relevance, which is illustrated excellently by his regular case explanations published in the Repository of Criminal Law, and also by his several shorter articles in the Journal of Jurisprudence. He later turned to dogmatic and legal theory questions.

He did not only deal with juvenile criminal law as a judge, but he elaborated upon it in his theoretical work in this field. In addition to numerous case studies on the subject, he also published a shorter paper on the domestic legislative developments in the renowned German journal *Zeitschrift für die gesamte Strafrechtswissenschaft* in 1911 with the title *Die Reform des Jugendstrafrechts in Ungarn* (The Reform of the Juvenile Criminal Law in Hungary).<sup>51</sup> The first amendment of the Code of Csemegi<sup>52</sup> the Act XXXVI of 1908 introduced relevant innovations in the substantive criminal law of juveniles, however for the adaptation of the procedural law to this changed legal environment had to be waited until 1913. (This was the Act VII of 1913 on the Court of Juveniles). He dealt with these difficulties regarding the application of law arising from the deficiencies of the juveniles' criminal procedural law in his first monograph published in 1912 in Budapest with the title *Criminal Procedure Law in Criminal Cases of Juveniles, with special regard to the Tasks of the Legislation*.<sup>53</sup>

Gyula Moór considered this work in his report, written in accordance with the filling of the Department of Criminal Law in Szeged, to be the most substantial. He explained his reasoning, as the work "establishes many clever critical remarks and, in particular discussing certain detailed issues, reveals a non ordinary legal mind."

He presented his first work specifically dealing with theories of criminal law on June 6, 1921 in the II. department meeting of the Hungarian Academy of Science with the title *The Review of the Theories of Criminal Law*. It happened here that he first elaborated his understanding of the theories of punishment, which – with some minimal differences – he represented consistently throughout his entire career.<sup>54</sup> Among his dogmatic works, his study *Material Subjective Guilt*, which also constitutes the milestone of his scientific research regarding guilt, deserves to be stressed,<sup>55</sup> as well as his presentation *Material Unlawfulness and Criminal Law Reform* held on June 12, 1938 in the Department of Criminal Law of the Hungarian Lawyers Association, in which he specified his conception of unlawfulness.<sup>56</sup>

He also carried out outstanding activities, recognized by his colleagues as a textbook writer in the field of substantive criminal law. In the seventh year of his professorship in Szeged, in 1931, he published his first textbook. The work, consisting of nine

<sup>51</sup> HELLER 1911. Checked by: HEALY 1911, 282–284.

<sup>52</sup> Translator's note: The Code of Csemegi was the first Hungarian codified Criminal Code.

<sup>53</sup> HELLER 1912. Cf. Moór-report, 10.

<sup>54</sup> Cf. HORVÁTH 1981, 226.

<sup>55</sup> HELLER 1936.

<sup>56</sup> The text of the presentation was also published in the same year in the Menyhárt Memorial Book. See: TURY (ed.) 1938, 219–239.

chapters, discussed substantive criminal law from the position of criminal law within the Hungarian legal system and the determination of the concept of criminal sciences to the doctrine on the concurrence of offences.<sup>57</sup> In his critique, *Miklós Degré*<sup>58</sup> called the textbook a serious and nice work, which shows that its author takes a strictly theoretical approach to criminal law, but at the same time also follows the court practise with interest.<sup>59</sup> The second volume of this textbook was published in 1937, in which, in addition to the detailed discussion of the sanctioning system, he also dealt with military and printing press criminal law, as well as the criminal law of juveniles.<sup>60</sup> According to the critique of *Pál Angyal*, the second volume "proclaims the glory of the Hungarian legal literature and gives its creator a well-deserved reputation".<sup>61</sup> With respect to *Emil Schultheisz*, who praises the didactic virtues of the work, *Heller* takes an original view on virtually every major issue and usually supports his ideas with a convincing argument.<sup>62</sup> In the same year he also published an abbreviated textbook for educational purposes,<sup>63</sup> which was republished in 1945 with minor modifications.<sup>64</sup>

He also elaborated literary activity in the field of criminal procedure law. His study *The Principle of Ne Bis In Idem in Criminal Law* was published in 1932,<sup>65</sup> and he also disclosed a paper in 1939 on the topic of identity of acts in the memorial book of Kolosváry.<sup>66</sup> He wrote the first volume of *The Handbook of the Hungarian Criminal Law* in 1947.<sup>67</sup> The work included the static part as we refer to it nowadays, as well as the procedure of the council of the regional court from the dynamic part. The second part of this handbook was published as a lithography in 1949 in Budapest.<sup>68</sup> With his last piece of work he translated the whole material of the Hungarian criminal procedure law in German, therefore the Act III of 1951 and its amendment the Act V of 1954. It was published in Berlin in the year of his death.<sup>69</sup>

*The theory of punishment of Heller: retributive punishment (Vergeltungstheorie), retribution (Vergeltungsdogma), deterrence*<sup>70</sup>

His theory of retributive punishment is explained in his work *The Review of the Theories of Criminal Law*, which eventually found its legal basis in the rule of law.<sup>71</sup> In

<sup>57</sup> HELLER 1931.

<sup>58</sup> Vác, 14 October 1867 – Budapest, 27 February 1945. Judge, between 1926 and 1937 he was the head of the Regional Court of Appeal in Budapest. Between 1927 and 1937 he was a member of the upper house. Between 1915 and 1937 he was the editor of the criminal law journal Repository of Criminal Law. Magyar életrajzi lexikon internetes változat, *Degré Miklós* címszó. [<http://bit.ly/36dxYY9>, downloaded on 07.01.2020.].

<sup>59</sup> DEGRÉ 1931, 444.

<sup>60</sup> HELLER 1937b, 186–262. Fifth book: Exceptional, special and extraordinary criminal law.

<sup>61</sup> ANGYAL 1938, 60.

<sup>62</sup> SCHULTHEISZ 1939, 101.

<sup>63</sup> HELLER 1937c, Foreword.

<sup>64</sup> HELLER 1945.

<sup>65</sup> HELLER 1932.

<sup>66</sup> HELLER 1939.

<sup>67</sup> HELLER 1947.

<sup>68</sup> MÓRA 1959a, 102.

<sup>69</sup> HELLER 1958.

<sup>70</sup> Cf. HORVÁTH 1981, 217–219.

<sup>71</sup> HELLER 1924, 126.

his opinion the rule of law is nothing more than a sum of legal dogmas, thus the legal acts as a whole.<sup>72</sup> The punishment is implied by the fact that the rule of law has been damaged: *“not by immorality of the act, nor by the fact that it is dangerous to the values protected by law.”*<sup>73</sup> The retributive punishment is the reciprocation of the criminal wrongdoing with an equivalent punishment, thus it is retribution that essentially carries the character of the *malum*.<sup>74</sup> However, *Heller* was not satisfied with that, but rather sought to find a common basis for the punishment aiming for the protection of the society and for the aprioristic retributive punishment. In his opinion, the contrast between the punishment that aims to prevent crime commission, therefore serving the protection of society and the absolute punishment that exclusively enforces the principle of retribution, is only existing insofar as the absolute theory expresses the punishment as self-serving.<sup>75</sup> Retribution and the punishment that aims for the protection of the society are not contrary to each other, because retribution can also serve the protection of the society and the inviolability of the rule of law like the retributive punishment. Moreover, in reverse, the retributive punishment is in fact the only punishment that is compatible with the principle of retribution.<sup>76</sup>

He put the act at the center of his examination, however the punishment needs to take into account the personality of the perpetrator, since it is primarily a psychological coercion targeted at changing the direction of the perpetrator's will.<sup>77</sup> The nature and the intensity of the coercion needed in order to change the direction of the will is dependent on the content and the intensity of the unlawful will. However, individualisation has – according to *Heller* – two barriers: On the one hand punishment can only aim what can be achieved by coercion, it must never be transformed into a means of correction or education, and on the other hand it also needs to target not only the overcome of the perpetrator's unlawful will, but also other individuals'. Without recognizing this, the punishment could be neglected if it can be shown that in the meantime the will of the perpetrator has changed in the right direction. With this, the idea of general prevention appeared in his work.<sup>78</sup>

*Heller's* psychological coercion was in sharp contrast to the theory of correction of the new trends (including the Italian positivism and the intermediary theory of *Liszt*.) The theory of correction itself necessarily leads to indeterminate punishments, which he considered improper, since the good behavior of the convicted – according to *Heller's* view – is nothing more than the false appearance of improvement.<sup>79</sup> He tried to resolve this contradiction: In a system based on the theory of correction the retributive punishment cannot prevail, while conversely, within the punishment intended psychological coercion, the theory of correction can be fulfilled to a greater extent.<sup>80</sup>

<sup>72</sup> Ibid. 121.

<sup>73</sup> Ibid. 128.

<sup>74</sup> Ibid. 123, 129. and NAGY 2013, 80.

<sup>75</sup> HELLER 1924, 129.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid. 128.

<sup>78</sup> There is no means of general prevention for the authorities other than psychological coercion. Indirectly: public education, culture, public welfare etc. See: HELLER 1924, 131.

<sup>79</sup> HELLER 1924, 133.

<sup>80</sup> Ibid. 137. and Ibid. 133.

Based on his view, between the theory of retributive punishment and the (preventive) theory of the protection of the society, the theory of retributive punishment should be enforced primarily, however besides that the legitimacy of the theory of social protection must also be recognized. It follows that, if it is possible without the prejudice of the principle of retributive punishment, the requirements of social protection should also be met.<sup>81</sup> Heller saw the future of criminal law in the following elements: in the imposition of punishment alongside the principle of retribution – if the principle allows it – in the content of the punishment based on special prevention, and in the security measures as a supplement to the criminal institutions in case of their failure. In his assessment, he has come to the conclusion that the retributive punishment is the best defence punishment.<sup>82</sup>

Briefly summarizing Heller's theory of punishment, it can be stated, that he considered the retributive punishment conceived in the spirit of the classical criminal law school<sup>83</sup> as primary, and within its frame, he also allowed some room for the social protection aspects of the school of criminal policy of Liszt.<sup>84</sup>

András Szabó<sup>85</sup> academic, late full professor at our faculty and the representative of the neoclassical criminal law school,<sup>86</sup> could be seen as a follower of the tradition pursued by Erik Heller in the sense that he also developed his own theory arising from the concept of retributive punishment. For both authors punishment is retribution,<sup>87</sup> the essential element of which is its *malum* content. Based on Heller the most important, according to Szabó the exclusive role and purpose of the punishment is to maintain the rule of law, thus the integrity of legal and ethical norms, when sanctions from other legal branches cannot help.<sup>88</sup> Both focused on the act committed instead on the personality of the perpetrator, furthermore they denied the right of indeterminate sanctions to exist.<sup>89</sup> Heller's theory of punishment also attracted the attention of István Bibó, who quoted the author's conclusion ("the retributive punishment is the best defence punishment") in his study *Ethic and Criminal Law*. Bibó considered Heller's concept to be kind of a bridging theory that pointed out that only the retributive punishment can have the deterrent effect that is necessary for prevention.<sup>90</sup> Moór did not

<sup>81</sup> Ibid. p. 134.

<sup>82</sup> Ibid. p. 139.

<sup>83</sup> See its particularities: NAGY 2013, 100–102.

<sup>84</sup> Ferenc Nagy calls it intermediary theory, see: NAGY 2013, 105–107. and LISZT 1905, 126–179.

<sup>85</sup> Radnót, 1928 – Pilisborosjenő, 2011, criminologist, member of the Constitutional Tribunal between 1990–1999. See: SEREG 2016. [<http://bit.ly/37fEfkn>, downloaded on 12.02.2020.].

<sup>86</sup> See: NAGY 2013, 109, 110.

<sup>87</sup> 23/1990 (X.31.) Decision of the Constitutional Tribunal, Szabó András's parallel opinion: "The purpose of the punishment is in itself: in the public declaration of the integrity of the legal system, in retribution that does not consider the purpose." Cf. NAGY 2013, 109.

<sup>88</sup> See: 23/1990 (X.31.) Decision of the Constitutional Tribunal, Szabó András's parallel opinion. And HELLER 1924, 121.

<sup>89</sup> SZABÓ 1993, 54.: "Here, the principle is the following: you remain in prison until you are changed for the better [...] This practice is harmful and dangerous because it is based on illusions: the moment of change is neither known or recognizable. [...] Since the convict wants to be released, it is in his interest to prove his virtue or, if this is lacking, to simulate it." In Heller's view: "Because, admittedly, irreproachable behavior usually only gives the appearance of improvement, and even if the convict's improvement is real, it is only a temporary improvement due to harmful influences, which, if the sentenced person is returned to free life, will soon disappear due to the harmful factors affecting him again." HELLER 1924, 133.

<sup>90</sup> BIBÓ 1984, 518.

consider this work successful: in his report, which has been quoted several times, he critiqued, when the author discovers the legal basis for the punishment in the rule of law itself, he falls into a *circulus vitiosus*, thus into a self-explanatory argument. According to *Moór* “there is no point in seeking the legitimacy of material legal institutions from the point of view of material law.”<sup>91</sup> As he writes: “the legitimacy of the legal institutions can only be justified on the basis of higher criterias outside and above the rule of law...”<sup>92</sup>

*The definition of criminal offence and the role of the statutory elements of criminal offence*

Heller comprehensively elaborated the doctrine of criminal offence in his textbook “*The conditions of imposing criminal sanctions*”<sup>93</sup> (later: “*The conditions of practicing criminal law*”).<sup>94</sup> According to his own definition: “*the criminal offence means the fulfilment of the statutory elements of the criminal offence, unlawfulness and guilt.*”<sup>95</sup> Prior to the appearance of *Heller*, *Ferenc Finkey* and *Pál Angyal* considered the criminal offence as an unlawful conduct threatened by criminal punishment,<sup>96</sup> whereas *Rusztém Vámbéry* and *Albert Irk* defined it as a conduct, which is unlawful, guilty and punished.<sup>97</sup> For Heller the novum was that he abolished the independence of the statutory elements of the criminal offence, and he rendered the fulfilment of the statutory elements as the part of the concept of criminal offence.<sup>98</sup>

If we compare the different criminal offence constructions of the four generations of professors in Szeged (*Heller*, *Schultheisz*, *Tokaji*, *Nagy*),<sup>99</sup> we can see that the concept of criminal offence most recently represented by the criminal law school in Szeged is closest to the concept of *Heller*. In the textbook of *Professor Ferenc Nagy* – who finished his book before he died on May 8, 2020 – the following definition can be read: “criminal offence is such an act, which fulfills the statutory elements of the criminal offence, and which is unlawful and guilty.”<sup>100</sup>

<sup>91</sup> *Moór*-report, 13.

<sup>92</sup> *Ibid.* p. 13.

<sup>93</sup> HELLER 1937, 54.

<sup>94</sup> HELLER 1945, 67.

<sup>95</sup> HELLER 1931, 121.

<sup>96</sup> FINKEY 1914, 197. ANGYAL 1920, 66. Cf. LAKÓ 1982, 283. and TOKAJI 1984, 24.

<sup>97</sup> VÁMBÉRY 1918, 169. Cf. LAKÓ 1982, 284. and TOKAJI 1984, 24.

<sup>98</sup> HELLER 1931, 145, 146. Cf. LAKÓ 1982, 284. and TOKAJI 1984, 24.

<sup>99</sup> *Emil Schultheisz* broadened *Heller*’s concept with the element, “that the act has the peculiarity that if it is punished, then the purposes of the punishment can be achieved.” – quoted by, TOKAJI 1984, 25. According to *Géza Tokaji* a criminal offence is “such an act, which is dangerous to the society, guilty and which fulfills all the statutory elements of the criminal offence, thus the law threatens it with punishment.” TOKAJI 1984, 11.

<sup>100</sup> NAGY 2020, 147, 148.

*His views on unlawfulness*

At the beginning of the XX. century in the German literature – in response to the excessive rigidity of the formal unlawfulness based on positivism – the theory of material unlawfulness appeared, which by researching the content of unlawfulness, tried to find an explanation for the reason for the declaration of unlawfulness within the frame of positive law.<sup>101</sup> A wide variety of opinions emerged in connection with that momentum which can constitute the material aspect of unlawfulness.<sup>102</sup>

Heller – just like several Hungarian authors<sup>103</sup> – rejected the doctrine of material unlawfulness, because he saw the danger of legal uncertainty<sup>104</sup> and judicial arbitrariness in it.<sup>105</sup> He insisted all along, that unlawfulness means nothing more, than formal contradiction with the law.<sup>106</sup> He only accepted the provisions of the material law, under which he meant the rules of legal sources and customary law, as the standard values of unlawfulness.<sup>107</sup> He wanted to eliminate the rigidity of the written law – *de lege lata* – with the materialization of unlawfulness through the proper interpretation of the law. The interpretation is appropriate, if it decides on the question of unlawfulness by collating all the laws (which basically means the requirement of the unity of the legal system), furthermore if it establishes the applicable law from the internal, rather than the external meaning of the written law, and – according to the newer edition of his textbook – if it determines the scope of the statutory elements of the criminal offences properly.<sup>108</sup> This requirement can be satisfied by the correct establishment of the true nature of that legal interest, which is wished to be protected, namely by teleological interpretation.<sup>109</sup>

Heller expressed in his presentation *Material Unlawfulness and Criminal Law Reform*, which further details his views on unlawfulness, that the contrast between formality-materiality can be resolved without harm to the principle of legal certainty by converting material unlawfulness to formal unlawfulness.<sup>110</sup> To achieve this, he formulated four *de lege ferenda* proposals. According to this, it should be expressed in the general provisions of the Criminal Code, that criminal offence can only be an unlawful act (1), in respect of the proposed German Criminal Code Bill of 1925, those acts should be generally exposed from the scope of unlawfulness, whose lawfulness (*sic!*) is excluded by any law, or written sources based on law or customary law (2).<sup>111</sup>

<sup>101</sup> LAKÓ 1982, 285.

<sup>102</sup> See: HELLER 1931, 150, 151. *Ferenc Finkey* represented the most advanced view in Hungary. Based on his views, lawlessness as the general criterion of the punishable act reveals to us two essential features: 1. The formal criterion of the punishable act, namely the irregularity, the opposition to the law, and prohibition; 2. the opposition to the society, undutifully insulting or endangering the legitimate interests of others (legal property). The latter is the material criterion of the punishable act. FINKEY 1914, 197.

<sup>103</sup> VÁMBÉRY 1918, 224., ANGYAL 1920, 67.

<sup>104</sup> See more: HELLER 1938, 236.

<sup>105</sup> HELLER 1931, 151.

<sup>106</sup> *Ibid.* 148., HELLER 1945, 104.

<sup>107</sup> HELLER 1938, 225.

<sup>108</sup> HELLER 1931, 151., HELLER 1945, 105.

<sup>109</sup> *Ibid.*

<sup>110</sup> HELLER 1938, 237.

<sup>111</sup> Heller's contradiction, which most probably arises from a misspelling, can be resolved by reading the text of the quoted work: § 20 Ausschuß der Rechtswidrigkeit. Eine strafbare Handlung liegt nicht vor, wenn

The list of grounds for justification should be expanded in line with the dominant viewpoint in the literature (3). Furthermore, it should be granted, with the more precise description of the statutory elements of the criminal offences, that those cases, which are not considered as unlawful by the public belief, remain outside of the statutory elements (4).<sup>112</sup>

### *His view on guilt*

Similarly to the changes that took place in the field of unlawfulness in the German criminal science, the formal concept of guilt<sup>113</sup> – which was called a psychological concept of guilt in the first two decades of the XX. century – was also replaced by a material concept which included an evaluative element, the so-called normative concept of guilt.<sup>114</sup>

Heller changed his conception several times in relation to the concept of guilt, however he insisted all along that guilt consists of an evaluation free psychological and an evaluative normative, also called axiological<sup>115</sup> category.

In his textbook from 1931, he defined the concept of guilt, as the characteristic of an unlawful conduct, which makes it undutiful.<sup>116</sup> The psychological element of this construction is the so-called psychological causality, in which Heller saw the role of the personality in the creation of the act, consequently the causality of the personality.<sup>117</sup> However it is not determined by the individual personality itself, but by the reflection of the personality in the act, that is, the influence of the personality on the act.<sup>118</sup> Contrary to Liszt's conception, by Heller the personality falls outside the scope of the legal assessment,<sup>119</sup> because the law is not interested in the individuals themselves, but in the certain actions of the individuals.<sup>120</sup> According to Heller, one component of this psychological element is the subjective causality, and the other is the relationship of the consciousness of the perpetrator to the norm violated by the act.<sup>121</sup> Subjective causality is a criminally colorless concept: it is the psychic relationship embodied in intent or negligence between the perpetrator and the act committed by him/her. These two elements together serve the subject of the normative value judgement of guilt.<sup>122</sup> In the

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die Rechtswidrigkeit der Tat durch das öffentliche oder bürgerliche Recht ausgeschlossen ist. [20. § The exclusion of unlawfulness. There is no punishable act, if the unlawfulness of the act is precluded by a provision of public or civil law.] L. Amtlicher Entwurf eines Allgemeinen Deutschen Strafgesetzbuches von 1925. [The Bill of the German Criminal Code of 1925.] [<http://bit.ly/stgb1925>, downloaded on 12.02.2020.] Based on this, the second half of Heller's sentence sounds like this: "...whose unlawfulness [...] is excluded..."

<sup>112</sup> HELLER 1938, 237, 238.

<sup>113</sup> See: BELING 1906, 180. In Hungary: FINKEY 1914, 156. See more: LAKÓ 1982, 288.

<sup>114</sup> See: FRANK 1907, 519–547. See more: LAKÓ 1982, 288.

<sup>115</sup> Value theory (Greek): philosophical theory of values. [From the online edition of *Kislexikon* <http://bit.ly/2Ny399X>, downloaded on 02.12.2020.].

<sup>116</sup> HELLER 1931, 182.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid. 181.

<sup>119</sup> Cf. TOKAJI 1984, 59.

<sup>120</sup> HELLER 1931, 181.

<sup>121</sup> Ibid. 183.

<sup>122</sup> Ibid.

first concept of Heller, the normative element of guilt is the moral value judgement of the causality of the personality, essentially the undutiness itself, which may lead to the perpetrator being blamed. An unlawful act counts as undutiful, if the image, which based on a legal norm was supposed to become a deterrent motive, has not become one, even if it could have so.<sup>123</sup>

In his study from 1936, the element of normative guilt (here it is already called axiological),<sup>124</sup> which did not change in content,<sup>125</sup> was no longer considered as value judgement establishing guilt, but as one, which is itself the subject of a value judgement. The value judgement establishing guilt is henceforth the so-called judgement on psychological statutory elements of the criminal offence.<sup>126</sup> The psychological statutory elements of the criminal offence, that can be considered as a new concept (and which cannot be identified with the psychological element included in the earlier guilt construction) consists of two elements: the value-free, and thus not evaluable subjective causality, which embodies the psychic relationship, and an evaluable normative element, which does not change in content.

In his last textbook published in 1937 and 1945, he took the view that guilt is the attribute of the unlawful act, which makes it reprehensible.<sup>127</sup> The use of the term reprehensible instead of undutifulness followed in 1931 did not bring change in relation to the content, although the unfavorable ethical assessment of reprehensibility was no longer the normative element of guilt, because it was embodied by the relationship between the consciousness of the perpetrator and the norm breached by the act<sup>128</sup> (the knowledge or the possibility of knowing of the breached norm).<sup>129</sup> The subjective causality becomes reprehensible, if the normative element of guilt also contributes to it.<sup>130</sup>

In his study from 1936 *Material Subjective Guilt*, which has been cited several times, Heller extensively examined the concept of expectability (in German: Zumutbarkeit), which constitutes the central point of the normative concept of guilt<sup>131</sup> and has been the subject of heated debates in the German literature. Based on this, in case of exceptional (abnormal) situations accompanying the act (for example necessity), it is not reasonable to expect that the perpetrator motivates himself to refrain from committing a crime, so reprehensibility has to be neglected.<sup>132</sup> He feared for the softening of the frame of criminal law in case of applying the reasons excluding

<sup>123</sup> Ibid. 182.

<sup>124</sup> Guilt is always a kind of assessment, so it is more expressive to call the normative element of guilt its axiological element. HELLER 1936, 12.

<sup>125</sup> He continued to see the normative element of guilt in the fact that the potential realization of the unlawful result will not hold back the perpetrator from the determination of the act. HELLER 1936, 12.

<sup>126</sup> Ibid. 13.

<sup>127</sup> HELLER 1937, 108., HELLER 1945, 133. Heller already found the application of the term 'reprehensibility' more expressive in 1936, because the innermost sense of guilt is related to punishment, and the application of punishment is based on the moment of reprehensibility. HELLER 1936, 12.

<sup>128</sup> See more: HELLER 1945, 150, 151.

<sup>129</sup> HELLER 1937, 109., HELLER 1945, 134.

<sup>130</sup> HELLER 1937, 109., HELLER 1945, 134.

<sup>131</sup> "Kern des normativen Schuldbegriffs." – the name comes from Reinhard Moos. See: MOOS 2004, 891.

<sup>132</sup> HELLER 1936, 9. See: GOLDSCHMIDT 1913, and GOLDSCHMIDT 1930.

expectability generally above the law, which are determined based on the judge-made law standards.<sup>133</sup>

In what did Heller find the significance of the doctrine of expectability in order to feel the need to deal with it in this prestigious study of his? He considered it an important achievement, that among the grounds of excuse, those whose place in the dogmatic system was difficult to determine could thus be easily introduced into the doctrine of criminal offence: these are exceeding the limit of the necessity, the threat and the defense from fear, fright or confusion. As the doctrine pointed out: in these cases impunity can be explained by the fact that the legal system does not presuppose refraining from committing an unlawful act due to an abnormality of motivational circumstances.<sup>134</sup> Furthermore, he undoubtedly considered the doctrine of expectability's merit to be able to explain the grounds of excuse related to certain statutory elements of the criminal offences regulated in the special part of the Criminal Code. Such grounds of excuse are regulated in 224. § of the Code of Csemegi – which could be concluded from the prohibition of self incrimination – concretely: "the one shall not be punished for the acts regulated in this chapter [different forms of perjury]: who by admitting the truth would accuse himself/herself by committing a punishable act". The doctrine of expectability clarifies the previously mentioned cases' dogmatically unclear place in the dogmatic system, by placing all the reasons regulated either in the general or specific part of criminal law in the category of ground of excuse.<sup>135</sup>

Summarizing his views about guilt, it can be stated, that Erik Heller was the first representative of the normative concept of guilt in Hungary, with which he paved the way for the establishment of the multi-elemented<sup>136</sup> complex concept of guilt, which is nowadays represented in its main features by the criminal law school in Szeged.<sup>137</sup> The reception of the expectability as an element of guilt and the doctrine of reasons of expectability began in the Hungarian criminal law based on the work of *Erik Heller*.<sup>138</sup> *Emil Schultheisz* and *Géza Tokaji* have already considered the expectability of the lawful conduct as an independent conceptual element of guilt. This concept was represented by Ferenc Nagy, the doyen of the criminal law school in Szeged until his death.

<sup>133</sup> HELLER 1936, 21, 22. See more: 1945, 170.

<sup>134</sup> HELLER 1936, 20.

<sup>135</sup> Ibid. 21.

<sup>136</sup> In Hungary the first multifaceted concept of guilt was created by *Emil Schultheisz*. SCHULTHEISZ 1948, 47.

<sup>137</sup> In the mind of *Ferenc Nagy* guilt is an imputable psychological relationship between the perpetrator and his/her act dangerous to the society and its consequences. The elements of guilt: appropriate age (age of punishability), legal capacity, intent or negligence and the expectability of a behavior in conformity with the law. NAGY 2020, 258.

<sup>138</sup> Basically, this process was completed with the legal uniformity decision 2/2002, when the expectability was recognized as an element of guilt by judicial law, thus in positive law as well. According to the relevant provision of the decision: "The expectability of a conduct that conforms a norm constitutes the element of guilt. Everyone is obliged to refrain from committing punishable acts, the law expects that the behavior of a citizen is influenced by the "community motive". However, there are situations in which this cannot be expected at the expense of criminal liability."

*Appreciation of Erik Heller*

Mihály Móra appreciated Heller's oeuvre briefly in two necrologies in the columns of the *Journal of Jurisprudence* and the *Zeitschrift für die gesamte Strafrechtswissenschaft*. The author highlighted the exceptional quality of Heller's textbook<sup>139</sup> and his widespread interest beyond substantive law in both places.<sup>140</sup> However, the content of the two commemorations are not identical. According to Móra, in the paragraph which can only be read in the Hungarian text, in Heller's "substantive law works [...] the direction gaining its space between the two world war reflects, which is characterised by the struggles, artificial abstractions, ambiguities and contradictions of foreign bourgeois criminal law theory deviating from the path of legal positivism."<sup>141</sup> It cannot be said that this classification, guided by these political considerations, is well-founded, especially in light of the knowledge of his opinion regarding the rejection of the doctrine of material unlawfulness and the reasons excluding expectability above the law.

According to Imre Békés's assessment in 1970, Heller – unlike Angyal – did not write to the practitioners of law, but to the representatives of science, "his choice of topic was always from a legal dogmatic point of view and not a practical one."<sup>142</sup> Békés's opinion can slightly be shaded by the fact that indeed during his professorship the dogmatic problems took over by Heller's work, but at the same time we should not forget about his case explanations, which were mostly written in the period he spent as a practitioner of law, as well as about his substantive and procedural law textbooks, that provided several practical examples and thus can be used to the benefit of practicing lawyers. In regard to Békés, Heller was inspired by the German dogmatical problem-searching and solving, he was not interested in the horizon, but tempted by the abyss."<sup>143</sup> This statement is true in that he examined most thoroughly, among his contemporaries, and in some areas criticised substantially the prevailing doctrines of the German criminal dogmatics around that time, with which he undoubtedly strengthened its scope in Hungary.<sup>144</sup>

Békés pointed out to Heller that "the abstract nature of his problems and his cumbersome authorial style locked him in an ivory tower."<sup>145</sup> While he did deal with abstract legal theory issues – in my personal view – it was precisely because of his susceptibility to practical problems and his work as a textbook writer that he could not be accused of becoming a "room scientist".<sup>146</sup> At the same time, in terms of his authorial style, it can indeed be stated that he was not able to compress his chain of thoughts in all cases, therefore it sometimes became extensive and difficult to understand.<sup>147</sup>

<sup>139</sup> MÓRA 1959a, 99., MÓRA 1959b, 192.

<sup>140</sup> MÓRA 1959a, 100., MÓRA 1959b, 192.

<sup>141</sup> MÓRA 1959b, 192.

<sup>142</sup> BÉKÉS 1970, 288.

<sup>143</sup> Ibid.

<sup>144</sup> Cf. NAGY 2014, 139., and NAGY 2020, 143, 144.

<sup>145</sup> BÉKÉS 1970, 288.

<sup>146</sup> Agreeing with Mihály Móra. MÓRA 1959b, 192.

<sup>147</sup> In particular: HELLER 1924. I refer here to the line of reasoning described in the context of retributive punishment, which contains contradictory statements in some places, for example "The retributive punishment is therefore retribution in the true sense of the word [...] The idea of purpose is outside the notion of

Taking this all into consideration *Imre Békési* still considered *Erik Heller* the greatest theoretical dogmatist of the so-called “bourgeois Hungarian criminal law science”.<sup>148</sup> In connection with Heller, even in 2009 a simplistic and obviously erroneous appreciation emerged, according to which his summary and systematizing works had primarily didactic value.<sup>149</sup> Even his textbooks, which undoubtedly carry didactic value, are much more than just being called “summarizing and systematizing” works.

Based on what is described in this study, it can be stated, that *Erik Heller* was a fruitful and versatile personality in criminal science between the two world wars, who can be rightly considered the school-founder representative of the criminal law school in Szeged in view of his work elaborated in the field of the doctrine of criminal offence. The dogmatic framework laid out in his textbooks always serves as a starting point for future generations of criminal justice.

### III. His selected works

*Kizárja-e a törvény a fölmentés indoka miatti semmisségi panaszt?* [Does the law preclude a nullity complaint for a reason for dismissal?] *Jogtudományi Közlöny* 1908/32. 250, 251.

*Die Reform des Jugendstrafrechts in Ungarn.* [The reform of juvenile criminal Law in Hungary.] *Zeitschrift für die gesamten Strafrechtswissenschaft* 1911/6. 616-635.

*Bűnvádi perrendtartás a fiatalkorúak bűnügyeiben, figyelemmel a törvényhozás feladataira* [Criminal procedure law in criminal cases of juveniles, with special regards to the tasks of the legislation.]. Budapest, 1912.

*A közveszélyes munkakerülés vétsége miatt fiatalkorú ellen kiszabott fogházbüntetés tartama meghaladhatja az 1913. XXI. tc-ben meghatározott fogházbüntetési tételek leghosszabb tartamát.* [The duration of a prison sentence imposed on a juvenile for a misdemeanor of publicly dangerous avoidance of work may exceed the length of the maximum duration of prison sentence set out in the Act XXI of 1913.] *Büntető Jog Tára* 1913/4. 49-51. [HELLER 1913a]

*A fiatalkorúak bíróságáról szóló törvény és a fiatalkorúak bírái és ügyészei, valamint a pártfogó tisztviselők részére tervezett továbbképző tanfolyam.* [The training organised for the act of the juvenile's court and for the juvenile's judges, prosecutors and probation officers.] *Jogtudományi Közlöny* 1913/11. 90–98. [HELLER 1913b]

*A Büntetőjogi elméletek bírálata.* [Criticism of criminal theories.] Magyar Tudományos Akadémia, Budapest, 1924.

*La dottrina del tentativo nel progetto Rocco.* [The doctrine of attempt in the Rocco project.] In: Galgano, Salvatore (ed.): *Annuario di Diritto comparato e di Studi legislativi*, I. Roma, 1930. 253–280.

*A magyar büntetőjog tankönyve. Általános rész I. félkötet.* [The textbook of the Hungarian criminal law. Half volume no. I. of the general part.] Szent István Társulás, Szeged, 1931.

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retribution.” HELLER 1924, 128, 129., then half a page later: “Retributive punishment is the only punishment aiming for the protection of the society, which is compatible with the principle of retribution...”

<sup>148</sup> BÉKÉS 1972, 288. Cf. NAGY 2013, 81.

<sup>149</sup> LAMM 2009, 295.

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NORBERT VARGA

## ÖDÖN KUNCZ\*

(1884–1965)

### I. Biography

The internationally renowned professor of private law was born on 18 January 1884 in Arad to a family of intellectuals.<sup>1</sup> Ödön Kuncz recalled his years as a law student at the University of Kolozsvár as follows: in his memoirs, we read that he attended lectures on Roman law by Lajos Farkas, on Pandekta law by Mór Kiss, while the history of law was taught by Kelemen Óvári. “*With the eyes of a child, I could already see in Farkas, as a freshman, the scientist strongly influenced by the countryside who was ungracefully narcissistic, but otherwise exceptionally strong and talented; in Mór Kiss, the genius poseur, who was no longer seriously interested in science, and in Kelemen Óvári, the ungraceful bookworm with a civil appearance, who read and researched a lot.*”<sup>2</sup> It is also clear from his recollections that his professors (e.g. Ernő Nagy, Rezső Werner, Antal Klupathy, Adolf Lukács, Károly Haller, György Jancsó, Sándor Vályi, Sándor Kolosváry) who taught him from the second year onwards had a significant influence on his later academic work. “*As a sophomore law student, I also started to study law. Together with my colleague Gyula Frieheisz, we wrote a thesis on the matrimonial law of ius civile.*”<sup>3</sup> For him, the fourth year was the year of the final exams. Regarding his daily schedule, he said: “*studying from 6-10 a.m. 10-11 (1/2 to 12) snack, office work, then study until 1 p.m.; lunch and rest until 1 to 3 p.m.; study from 3 to 6 p.m., walk from 6 to 8 p.m. [...] with diligent colleagues who were also preparing for the final exams.*”<sup>4</sup> His determination and perseverance paid off. He graduated from law school as

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<sup>1</sup> The life of Ödön Kuncz can be known from the publication of his manuscript, which was redacted by Magdolna Kuncz. KUNCZ 2017.

<sup>2</sup> KUNCZ 2017, 29.

<sup>3</sup> Ibid. 32.

<sup>4</sup> Ibid. 44.

a doctor of law and political sciences with a king's ring (*sub auspiciis regis*).<sup>5</sup> Albert Apponyi, minister of religion and public education, traveled to the doctoral ceremony on behalf of the king.<sup>6</sup>

After graduating from university, he worked briefly as a law clerk and later as a deputy notary at the Commercial and Exchange Court in Budapest from 1907. He passed the bar exam in 1908.<sup>7</sup> Following his study trip to Germany (Berlin, Dresden, and Hamburg) (1908-1909),<sup>8</sup> he worked as a notary-general from 1909. He was first a law clerk at the Royal Court of Appeal in Budapest from 1907,<sup>9</sup> then appointed by the Minister of Justice as a notary at the Royal Commercial and Exchange Court in Budapest,<sup>10</sup> and from 1910 he was a notary of the council for three years.<sup>11</sup> In 1911, he was appointed as a draftsman in the Law Preparation Department of the Ministry of Justice,<sup>12</sup> where he dealt mainly with commercial law and credit law. Ödön Kuncz was entrusted with the study of the so-called gold balances and the preparation of the relevant decree.<sup>13</sup> In an interview with the *Új Nemzedék* [New Generation] newspaper, he said the following: "[...] I spent two months during the summer studying this issue. The purpose of my current trip is to see what has been done in this field in Germany and what experience has been gained in practical economics with regard to gold balances."<sup>14</sup>

He was also involved in the preparation of several laws, as he is credited with the reasoning of the bill of exchange law in 1913/14,<sup>15</sup> the private limited companies bill in 1917, and the major amendment of the Commercial Act in 1921,<sup>16</sup> as well as the drafting of the bill on limited liability and silent companies. He also contributed to the codification of the Unfair Competition Act.<sup>17</sup>

<sup>5</sup> *Hungarian Encyclopedia of Biography*. 1967, 1031-1032. News about graduates with honours from the Faculty of Law: Budapesti Hírlap 2 September 1906 8. <https://dtg.ogyk.hu/hu/component/k2/item/310-kuncz-odon> (Date of download: 20.03.2020).

<sup>6</sup> The inaugural ceremony was opened by Rector Gergely Moldoványi, where the dean read out the royal inscription that Ödön Kuncz "passed all his exams with distinction." *Minister Apponyi in Cluj Napoca*. Pesti Hírlap 5 March 1907. 8. *Sub auspiciis inauguration at the Univ. of Kolozsvár*. Pesti Hírlap 1 March 1907. 10. Hungary, 21 December 1906. 12. Magyar Nemzet 21 December 1906. 5.

<sup>7</sup> *Hungarian Encyclopedia of Biography*. 1031-1032.

<sup>8</sup> KOZÁK PÉTER: Kuncz Ödön. <http://www.nevpont.hu/view/6828> (Date of download: 20.03.2020.)

<sup>9</sup> Appointment: Hungary 23 June 1907.

<sup>10</sup> Gazette of Budapest 15 October 1909.

<sup>11</sup> In his work as notary of the council, he presented the Ungro-Croata capital increase case. Pesti Napló 5 May 1912.

<sup>12</sup> On his appointment to draftsman: Hungary 6 April 1918. 16.

<sup>13</sup> *The minister of finance ordered to study the procedure of gold balance in Germany*. Hungary, 31 August 1924. 13.

<sup>14</sup> *University professor Ödön Kuncz is sent abroad to study gold balances*. Új Nemzedék 5 October 1924. 2. For the gold balance, also known as the pence balance, see: 7000/1925. MoF decree.

<sup>15</sup> *Bill on Bill of Exchange* Világ, 29 March 1914. The draft decree set the value of the gold koruna at 1/5 of a dollar. *Success of former university professor of Kolozsvár*. Ellenzék 12 January 1925. 4.

<sup>16</sup> *Shareholders organising against the Tébe. The shareholders' defense association is formed*. 8 Órai Újság 25 August 1922. p. 4.

<sup>17</sup> <https://dtg.ogyk.hu/hu/component/k2/item/310-kuncz-odon> (Date of download: 20.03.2020.) Co-authored with Elemér P. Balázs the explanation of the law. Budapesti Hírlap 4 September 1924. 9. The practice of the Szeged Court of Appeal on unfair competition was analyzed: KRUSÓCZKI 2018, 249.

During his university teaching career, he was a private lecturer in commercial law from 1911,<sup>18</sup> a public extraordinary professor from 1914, and a public ordinary professor from 1916 to 1919 at the University of Kolozsvár.<sup>19</sup>

During World War I, he was a soldier from 1914 to 1915 and, like the other professors, was forced to leave Kolozsvár after the end of the war in December 1919. He then taught for eight years at the Faculty of Economics of the University of Technology from 1920,<sup>20</sup> and from 1928 to 1949, he was a public ordinary professor at the Department of Commercial and Exchange Law of the Péter Pázmány University.<sup>21</sup> He served as Dean of the Faculty in the academic years 1933/1934<sup>22</sup> and 1943/1944.<sup>23</sup> His academic career was ended by forced retirement in 1949.<sup>24</sup>

In recognition of his academic work, he became a corresponding member of the Hungarian Academy of Sciences in May 1930.<sup>25</sup> He was recommended as a Corresponding Member by István Ereky,<sup>26</sup> Ferenc Finkey, Frigyes Fellner, and Ferenc Kováts, considering that he has been a recognized domestic scholar of commercial and bill of exchange law after his *sub auspiciis regis* doctorate, having participated in the drafting of the bill on private limited companies and the major amendment to the Commercial Law, having edited the journal *Kereskedelmi Jog* (Commercial Law) and having published numerous articles on commercial law. In the recommendation for membership, it was highlighted that “we must acknowledge that Ödön Kuncz [...] is generally very successful in combining his dynamic legal science method with a dogmatic analysis of the law.”<sup>27</sup> In this recommendation, it is also stated that his decades of research on securities have made him the foremost expert of his time. “The value of Ödön Kuncz's work on the law of trade and bills of exchange is greatly enhanced by the fact that Kuncz himself was involved in the drafting of the contract law section of the Civil Code and therefore takes into account the future law, the draft Civil Code when studying the law in force today.”<sup>28</sup> Ödön Kuncz was recommended as a full member of the Hungarian Academy of Sciences in 1944 as “[...] the most outstanding and most dedicated” cultivator “of Hungarian commercial law and especially of Hungarian private limited company law in Hungary at this time”, “[...] whose academic works are the size of a small library, - and are

<sup>18</sup> Gazette of Budapest 12 October 1911.

<sup>19</sup> *Hungarian Encyclopedia of Biography*. 1031–1032. He delivered a presentation on unfair competition at the Hungarian Academy of Sciences on 31 March 1921. *The issue of unfair competition*. Nemzeti Újság 1 April 1921. 5. His appointment to public ordinary professor was reported: Gazette of Budapest 27 June 1916.

<sup>20</sup> His appointment to the University of Economics. Köztelek 22 January 1921. 74.

<sup>21</sup> *Reaffirmation in university positions*. Official Gazette.

<sup>22</sup> On his election see: *New deans of the University of Péter Pázmány*. Budapesti Hírlap 2 June 1933. 8.

<sup>23</sup> As Dean, he delivered a lecture titled *The concretisation of good moral in credit law*, in the ceremonial hall of the St. Stephen's Society, in the framework of the Catholic Assembly of Lawyer. *The Catholic Assembly of Lawyers demanded the prevalence of pure morality*. Nemzeti Újság 6 December 1933.

<sup>24</sup> <https://dti.ogyk.hu/hu/component/k2/item/310-kuncz-odon>. *Kuncz Ödön*. <http://lexikon.katolikus.hu/K/Kuncz.html> (Date of download: 20.03.2020.)

<sup>25</sup> Budapesti Hírlap 11 May 1930. 3.

<sup>26</sup> PÉTERVÁRI 2014, 29–38.

<sup>27</sup> *Member recommendations of the Hungarian Academy of Sciences in 1926*. 16.

<sup>28</sup> *Ibid.* 17.

acknowledged to be the most valuable works of Hungarian commercial and private limited company literature. Our Academy elected him to its membership based on his tireless activity and his excellent literary qualities, and in the years since then Ödön Kuncz's work has, without a moment's pause, increasingly deepened the literature of Hungarian legal science."<sup>29</sup> It has been recommended by eminent jurists such as Károly Szladits, Géza Marton, Endre Nizsalovszky, László Gajzágó, Ferenc Finkey, Pál Angyal, Bálint Kolosváry, vitéz Gyula Moór and Móricz Tomcsányi.<sup>30</sup> Political developments also made his career more difficult, because in October 1949 he was reclassified as a consultative member of the Academy. His correspondence membership was only rehabilitated in 1989, following the political transition.<sup>31</sup>

Celebrating his 25 years of teaching, his friends, admirers, and students published a volume, the foreword of which gives the reader an idea of what "the Professor" was like. "The impact of the words spoken from the lips of the dedicated professor to his students of twenty-five years at the university department could not be estimated even if the untold masses of listeners could be gathered together to give their testimony. Those who have heard Ödön Kuncz's lecture once, who have been influenced by his suggestive power, which is a divine gift [...]", will never forget his greatness as a professor.<sup>32</sup>

In his career, he held several important positions in professional organizations, such as Director of the Institute of Economic Law of the *Hungarian Lawyers Association*, President of the Credit Law Section of the *Hungarian Lawyers Association*, and President of the Arbitration Board of the German Hungarian Chamber of Commerce.<sup>33</sup> He was Vice-President of the Competition Law Section of the *Association of Industrial Property Rights* from 1935 to 1939 and became Co-President in 1965.<sup>34</sup> At the meeting of the Competition Law Section of the *Association of Industrial Property Rights* on 6 March 1925, Ödön Kuncz's speech also showed that he was a committed supporter of arbitration. At this meeting, the participants analyzed the jurisprudence of chamber juries and arbitration tribunals.<sup>35</sup> Kuncz reflected on the conditions of the time: "[...] *the economic life cured the feverish disease that had set in after the war and the revolutions, with the medicine called resolution. The illusions were dispelled, the era of the boom that had made sudden wealth possible ended, and the tiresome, sweaty but the only honest means of making a profit had once again regained its rights: productive work. This productive work, which is the lifeblood of the economy, is inconceivable without competition. However, it is in the public interest that this competition which saves the nation should be a noble competition.*"<sup>36</sup> After the *Association for the*

<sup>29</sup> *Member recommendations of the Hungarian Academy of Sciences in 1944.* 21.

<sup>30</sup> *Ibid.* 23.

<sup>31</sup> <https://dti.ogyk.hu/hu/component/k2/item/310-kuncz-odon>. GLATZ 2003, 759–760.

<sup>32</sup> COTTELY – MEZNERICS – PUSKÁS 1939, V.

<sup>33</sup> KOZÁK. He advocated the establishment of arbitration courts and emphasized the importance of their establishment. *The establishment of arbitration courts*. Pesti Hírlap 26 January 1926. 18.

<sup>34</sup> [https://www.gvh.hu/pfile/file?path=/gvh/rendezvenyek/gvh25/jogtorteneti\\_kiallitas/kiallitasi\\_anyagok/gvh\\_tortenelmi\\_1000x2000\\_kygur\\_korr2\\_.pdf&inline=true](https://www.gvh.hu/pfile/file?path=/gvh/rendezvenyek/gvh25/jogtorteneti_kiallitas/kiallitasi_anyagok/gvh_tortenelmi_1000x2000_kygur_korr2_.pdf&inline=true) (Date of download: 20.03.2020.)

<sup>35</sup> *Meeting of dispute of the Association of Industrial Property Rights*. Iparjogi Szemle 1 April 1925. 1.

<sup>36</sup> *Ibid.* 2.

*Protection of Business Integrity* was merged into the *Association of Industrial Property Rights*, elections were held in 1925, and Ödön Kuncz became the Association's Secretary-General.<sup>37</sup> Ödön Kuncz was also a member of the Cartel Committee.<sup>38</sup>

Ödön Kuncz died in 1965 in Budapest and was buried in the Farkasréti cemetery on 26 March.<sup>39</sup>

## II. Academic work

### *Introduction to the science of law*

The main field of Ödön Kuncz's academic work was commercial law, but this does not mean that he did not deal with the "realm of law" in general, since in his opinion "[...] *if I want to know a city in all its details, I act very wisely if I, first of all, go up to a higher point and there show myself the main parts of the city, its roads, its most notable buildings, etc. and only then start to study the details.*"<sup>40</sup>

Therefore, I consider it necessary, before I present some of the areas of commercial law that he has worked on, and because an analysis of his entire scholarly work would be an almost impossible undertaking, to present his book *The Realm of Law*. Kuncz considered general information on the realm of law to be the task of a "legal encyclopedia". In his opinion, "[...] *the exclusive realm of law should be made accessible to everyone, but not by researching and criticizing abstract, speculative legal and general principles, not by dogmatic analysis of laws, but by systematizing the »legal institutions« that come to our attention all the time and by describing the exclusive realm of law in a way that is as clear as possible, based on economic, social and legal-political aspects!*"<sup>41</sup> The book was essentially a summary of his lectures on the *Encyclopedia of Law*. His intention was to make the processes of economic law more accessible for the students of the Faculty of Economics and Business Administration and to draw their attention to the problems of contemporary public law. The *Realm of Law* was thus a textbook. At the Faculty of Law of the Péter Pázmány University, he was given the task of teaching the subject *Introduction to Law and Political Sciences*, so he revised his book in 1945. This revised edition also dealt with private law legal protection. It aimed to define general concepts and legal doctrines in relation to substantive law.

If we look at the structure of his textbook, it is clear that the private law section (general doctrines, personal law, law of properties, including property law, contract law, commercial law, war economic law, as well as inheritance law and private international law, private law

<sup>37</sup> Az Ujság 13 February 1925. 12.

<sup>38</sup> GOMBOS 2016, 103.

<sup>39</sup> Magyar Nemzet 24 March 1965. 6.

<sup>40</sup> KUNCZ 1946, 3.

<sup>41</sup> Ibid. 3.

legal defense) were given a more prominent role than the public law section (constitutional law, administrative law, international law, criminal law, church law).

In addition to a detailed introduction of commercial law, which formed the backbone of his academic career, he placed emphasis on assessing the impact of war on law. He emphasized that “[...] *the law of normal economic life was established on the foundations of unrestricted private property and freedom of contract, the direct corollary of which was the abstention of the state from direct interference in the economic activities of individuals.*”<sup>42</sup> The economic situation created by the war, characterized by the breaking down of a sharp barrier between private and public law, provided the opportunity for state intervention. One form of state intervention was to protect the public interest by preventing price rises for public necessities and keeping the distribution of available stocks within optimal limits. Those measures which provided mainly criminal law protection against price raise abuses, restricted the flow of goods.<sup>43</sup>

#### *A specific field of economic law: unfair competition and cartels*

One of the most important stages of his life was his work in the ministry, including the codification of certain areas of commercial law. He was involved in the drafting of the Unfair Competition Act (Act V of 1923), and after it entered into force, together with his colleague, Elemér P. Balás (department adviser, Ministry of Justice), they published a commentary entitled *Unfair Competition (Explanation of Act V of 1923, supplemented by the executive decrees)*.<sup>44</sup> Ödön Kuncz wrote the introduction, which described the actuality of the topic, the legal protection, and the establishment of the law, and he also notes chapters I-II and IV of the book's section explaining the law, where he introduced some of the criminal law limitations of violations of business integrity.<sup>45</sup>

Ödön Kuncz has compiled a monograph on the rules of commercial law and the bill of exchange law of his time, the knowledge of which is indispensable for the development of modern legal science if we wish to examine the given legal institutions in their historical context. A detailed presentation of his book on commercial law is the backbone of the present article. The monographic analysis meant that Ödön Kuncz dealt with certain areas of industrial property rights, including trade and company marks, patents and design protection, and unfair competition, in his book *The Hungarian Commercial and Bill of Exchange Law Textbook*. After studying his book, we can identify the areas of contemporary legal education and the teaching of commercial law that the professor focused on. These included the development of commercial law. The first chapter of his textbook can be divided into two large sections on the general part of commercial law, where he introduced commercial companies in general (e.g. the occasional merger, the cartel, the concern), while in the special part (the legal relations

<sup>42</sup> Ibid. 104.

<sup>43</sup> Ibid. 109. Basically, this meant the regulation of usury, and usury courts were set up to settle such disputes.

<sup>44</sup> KUNCZ – BALÁS 1924.

<sup>45</sup> Ibid. 21–73.

of certain commercial companies) he provided a detailed analysis of the general partnership, the silent partnership, the private limited company, the limited liability company, the co-operative. In the second part of his book, he analyzed commercial transactions, introduced the trade law and bill of exchange law in rem, and gave an insight into securities law, banking and credit transactions, payment transactions, the regulation of bills of exchange and cheques. Finally, he concluded his textbook with an analysis of commercial purchase and publishing deal, insurance, and transport. In his opinion, the reason for such a complex analysis of the subject is that “[...] *these areas of commercial law not only cover a large and varied subject matter but are constantly and significantly expanding as a result of economic development.*”<sup>46</sup>

His dedication as a professor and his desire to meet the needs of his students is exemplified by the fact that he did not want to write a collection of laws or a commentary or a handbook, but a textbook. The writing of a textbook is one of the most difficult genres, which is why I would like to draw the reader's attention to Kuncz's words that students “[...] *need a textbook. A textbook that explains the content of the rules of living law in a clear and lucid manner, that brings the mass of laws into a clear system and constructs clear and sharp legal concepts that enable them to find their way around. A textbook that makes it easier for them to study collections of laws, commentaries, handbooks, and monographs.*”<sup>47</sup>

After reviewing the vast material, the author has chosen to focus on a field that is less often discussed when the name of Ödön Kuncz is mentioned. Professor Kuncz's name is intertwined with the study of classical commercial law. The analysis of unfair competition was the author's choice, and he aimed to introduce an area of law the actuality of which is indisputable and represents a less studied part of Ödön Kuncz's work.

The chapter on protection against unfair competition first seeks to define the concept of unfair competition itself. The freedom of contract, which is a general principle of private law, is the basis of free competition, which allows everyone to “*seek his own fortune as his strength permits.*”<sup>48</sup> According to Kuncz, the aim of commercial competition is nothing less than the conquest of consumers, the means of which can only ever be fair and honest. The use of unfair means is a public danger since it can lead the honest trader to use unfair means. In his opinion, it is impossible to say exactly when competition is unfair. Nevertheless, the author has attempted to define the concept which he considered elusive a few lines earlier and to resolve the resulting contradiction for his students. “*The inexhaustible imagination of commercial life is daily throwing up new acts which the moral sense of honest traders regards as contrary to business integrity. And in general, we can say no more than that we are faced with unfair competition when one uses for the purpose of competition an instrument which is against business integrity.*”<sup>49</sup> Ödön Kuncz himself quickly declared that it is for the courts to decide in a particular case whether the conduct is fair or unfair.

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<sup>46</sup> KUNCZ 1938, III.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid. 48.

<sup>49</sup> Ibid.

The author of the textbook seeks to improve the definition by distinguishing between acts that promote confusion and acts that attack competitors in the context of unfair competition. The confusion, in this case, may be subjective (e.g. use of another company's name or trademark) or objective (e.g. advertising fraud, enticement to buy).

Afterward, Ödön Kuncz deals with the issue of private law protection, which included injunctions, damages, publication of the judgment, and recompense. Private law protection could be conceived in the framework of the Unfair Competition Act (Act V of 1923) under the *generalis clausula*, while criminal law protection was provided in relation to the statutory facts. The *clausula* provided by Act 1.§ allowed the court to grant private law protection against any conceivable manifestation of unfair competition, which only protected business competition that was contrary to business integrity and morality.<sup>50</sup>

The law considered it necessary to explicitly set out some typical cases of unfair competition, statutory facts, namely: advertising fraud (fake praising), usurpation and imitation, denigration (defamation of reputation or credit), snowball contract, breach of confidence (betrayal or misappropriation of a business or industrial secret) and business bribery. In this paper, I present the author's explanation of the snowball contract. “*One should not enter into a so-called snowball contract (hydra, check, avalanche), whereby the buyer or customer of a service will only acquire or receive the goods or services if a certain number of buyers or customers are acquired and if this is not achieved, the contract will be at a disadvantage according to its terms. Such a contract, and any further contract made on the basis of it by the buyer or customer with third parties, are null and void; the purchase price or consideration paid must be returned and the seller or the party obliged to supply the service is liable for any damage caused.*”<sup>51</sup> The classic home of the snowball contract was Switzerland, where the seller, for example, would sell a gold watch to the buyer at a much lower price than the market price on condition that the buyer paid the purchase price in advance and received the watch only if he placed a certain number of coupons with subsequent buyers, who would also receive the watch on the same terms as the first buyer. In the analysis of Kuncz's example, he points out that the name of the contract refers to the avalanche-like process of acquiring and recruiting customers. In this case, the seller's calculation was immoral, since he gave the watch to the buyer who placed the coupons at a low price because he surely expected that the subsequent buyers would be unable to place the coupons and that he would thus make a huge profit on the remaining purchase price. “*The apparent cheapness of the purchase price and the apparent ease with which the coupons to be taken up can be placed, at first sight, are attractive to the public and lure them away from the competitors which market the goods at the normal market price.*”<sup>52</sup>

In the fourth chapter on commercial companies, the characterization of cartels is presented as a continuation of the previous topic. He defined the concept of a cartel as follows. “*A cartel is an agreement between legally independent undertakings engaged in similar or related economic activities with a view to adapting production to*

<sup>50</sup> Ibid. 50–51.

<sup>51</sup> Ibid. 56.

<sup>52</sup> Ibid. 56–57.

*consumption, eliminating, or at least substantially reducing free competition (in short, regulating competition) and thereby obtaining monopoly-like advantages.”*<sup>53</sup>

In my opinion, the cartel was the “flower”<sup>54</sup> of the proliferation of unfair competition and free competition in the interwar period. Therefore the Cartel Act (Act XX of 1931) had to regulate state control and intervention against cartels, given that the economic policy of the time considered cartels a necessary good and the law accepted this. According to Kuncz, the difference between a cartel and a trust was that the cartel companies retained their legal independence from the trust and sought to monopolize prices. Moreover, permanence, or at least a fixed duration conglomeration, was an essential element of the cartel, since otherwise, we could have talked of a rather ad hoc merger. The Cartel Act did not define what a cartel was, which is why other forms of economic competition regulatory organization (e.g. trusts) in addition to cartels were also covered by the Act.

Ödön Kuncz focused on the introduction of the private law of cartels, concluding with a description of the procedural and public law of cartels as defined in the Cartel Act. In the present study, I intend to focus on the private law of cartels.

The organization of the cartels was very diverse. The form of a cartel was usually a private law company. There were three types of cartels: without quota, with quota but not centralized, and with quota and centralized. In the first case, a looser bond was established between the members, which was without a quota, and included the conditional cartel, the price cartel, the rayon (territorial) cartel, and the goodwill guarantee cartel. These cartels usually took the form of a private law partnership, with the result that the cartel contract is no more than a deed of partnership. There were usually no corporate assets. The contract exhaustively regulated the management of the business, termination, withdrawal, exclusion, consequences of breach of obligations, i.e. liquidated damages, among others. The quota cartel also fixed the quantity that the members could produce of the goods in question per period and the rate at which each member was entitled to market the goods. This agreement was often supplemented by the fixing of the price and the conditions of sale. The only restriction was on production; each member was free to sell. This cartel usually took the form of a private law partnership. The “*most perfectly organized form of cartels*”, as Kuncz stated, was the cartel with quota and centralization of sales, which not only determined the conditions of sale, price, and quota but also centralized the sale of the goods produced.

“*The cartel, as a form of organization, will sooner or later fight its way into a legal suit that meets its needs.*” Kuncz’s statement suggests that the regulation of cartels, in particular the private law of cartels, still requires further steps. The Cartel Act focused primarily on cartel law, regulating the question of cartel law enforcement and cartel supervision (e.g. cartel court, cartel commission).<sup>55</sup>

Cartel agreements were only valid in writing. The documentary constraint was a requirement for all cartel agreements, as opposed to the obligation to present, which had

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<sup>53</sup> Ibid. 122.

<sup>54</sup> On the private law history of the cartel, see: HOMOKI-NAGY 2016, 39–53.

<sup>55</sup> KUNCZ 1938, 124. On the history of cartel supervisory organs: SZABÓ 2016, 64–84., STIPTA 2016, 53–64.

to be fulfilled if the cartel involved at least one commercial company or at least one industrial or commercial undertaking employing more than twenty employees.<sup>56</sup>

*Kuncz* also dealt separately with three very important issues related to cartels: the legal status of cartel members, the protection of the interests of *outsiders* and competitors not included in the cartel, and finally the means by which the Cartel Act addresses cartels that have a harmful impact on the economy.

The cartel treaty was the basis for the private law of cartels. According to *Kuncz*, “[...] *the legal position of a cartel member is characterized not so much by its rights as by its obligations, because the cartel, for the purpose it pursues, is »binding« (aliquid non facere) on its members.*”<sup>57</sup> Therefore the treaties placed great emphasis on ensuring the members' obligations, for example by stipulating liquidated damages, depositing a security deposit, and, in the case of a legal dispute, involving an arbitration clause. An important question of the private law of cartels was how a member could be released from the obligation he had voluntarily undertaken and withdraw from the cartel. In *Kuncz's* view, this would be for the ordinary courts to decide. The cartel tried to force *outsiders* out of competition or even into the cartel by price-fighting and by business isolation (boycotts, exclusion). This is where the role of the Cartel Act was crucial, as it had to protect the public interest and the common good. Against such conduct of cartels, which was dangerous to the public interest, *Kuncz* considered self-defense and the initiative of economic life to be a more effective means than judicial protection, and the public anti-cartel enforcement, which left action primarily to the administrative authorities. In the first case, the most effective counter-organization is the co-operative movement. In the second case, the anti-cartel enforcement, based on the protection of public interest, provided administrative and judicial legal protection against abuses. Administrative protection was provided by the Minister for Industry, the Cartel Committee, the Price Analysis Committee, the Royal Hungarian Legal Directorate, and the Cartel Court.

The law also introduced the protection of branded goods, which meant goods put on the market by the manufacturer with the same quality, the same appearance (packaging), and the same marking (e.g. trademark), setting the same retail price. In this case, the producer endeavored that the trader marketed the goods at the price he had set because this price ensured the profitability of production and the stability of the consumer base. The price set was also appropriate for the retailer because a fair profit was considered in setting the price. The Branded Goods Decree (Decree No. 5999/1935 M.E.) accepted the Curia's statement that the scope of the Cartel Act also covered the protection of branded goods, except that “[...] *they apply to agreements concluded to ensure that goods marketed under a particular shape and name (so-called branded goods) are sold at a set price.*”<sup>58</sup>

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<sup>56</sup> Ibid. 125.

<sup>57</sup> Ibid. 125.

<sup>58</sup> Ibid. 130.

*Minor studies on commercial law*

It cannot be said that *Kuncz* examined only the changes of commercial law, economic law, on the contrary, he summarized the rules and practice relating to companies in the book *Contracts in personal and property relations*, which was published as the eighth chapter of the *Hungarian Private Law* handbook, Volume IV (*Special Part of Contracts*), edited by Károly Szladits.<sup>59</sup> In this chapter, he introduced in detail the specific characteristics of companies, contrasting them with associations; the definition and purpose of the company, the background to the regulation of *societas* and *Gesamthand*, and the articles of incorporation. While introducing and analyzing the rules, he considered the contemporary practice and the relevant provisions of the Hungarian Private Law Bill of 1928. The application of both legal comparison and historical method can be discovered in his study.<sup>60</sup>

Ödön *Kuncz's* academic work was not only enormous in terms of its physical size but also extremely wide-ranging if we look at his smaller studies. In 1939, on the occasion of his 25th anniversary as a professor, a collected volume entitled *Struggle for Economic Law* was published, about which István Antal, Tihamér Fabinyi, and Endre Nizsalovszky wrote the following in the foreword: “[...] Ödön *Kuncz's* quarter-century of university lecturing coincides with a period of serious events in the history of mankind. The works collected in this volume reflect this quarter of a century in the powerful work of this eminent academic, law-editor, and lecturer.”<sup>61</sup> I do not undertake to present these studies in detail in this study, but I would like to provide a comprehensive picture of the scope and volume of Ödön *Kuncz's* professional activities.

Ödön *Kuncz* dealt in his studies with the current issues of the law of credit, its reform, especially with regard to the legal status of commercial employees, and the establishment of a Central Court of Registration.<sup>62</sup> In commercial law, he published studies in which he analyzed the general reform of this field of law, the commercial labor law, the company law rules of the MTJ (1418. and 1440.§§ ), the introduction of the gold balance or the Swiss commercial law. In several of his minor writings, he has returned to the regulation of unfair competition and cartel law. In most of the papers of this volume, he analyzed what he called problems of stock corporation law, supporting his arguments with domestic and international examples. He has dealt with issues such as the continuation of a dissolved private limited company, the increase of share capital, the nullity of a private limited company, the regulation of the contribution, the pre-emption right of shares, the remuneration of board members. The volume concludes with his studies on co-operative law.

In 1941, after the publication of the first volume, the second volume of his studies was published, mainly on the law of shares and co-operatives. “In this present volume,

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<sup>59</sup> KUNCZ 1942.

<sup>60</sup> Ibid. 709–746.

<sup>61</sup> COTTELY – MEZNERICS – PUSKÁS 1939, V.

<sup>62</sup> His work titled *Legislative Tasks in the Field of Credit Law and The Reform of our Credit Law*. In: COTTELY – MEZNERICS – PUSKÁS 1939, pp. 43–63.

too, the lion's share is taken up by essays dealing with the reform of the law of shares and the fundamental questions of co-operative law. But in addition to these, a whole range of actual issues are also highlighted, always with the thoroughness of a scholar, the wisdom of a Hungarian, a sense of social justice and an artistic hand.”<sup>63</sup> In his studies, written in Hungarian, German and French, he dealt with the right of shareholders to challenge the location of domestic branch companies, German law of shares, the law of shares reforms, among other things.<sup>64</sup> Regarding co-operative law, he has written on such topics as the principles of Rochdale and the concept of co-operative law, and the reform of the cooperative law of Transylvania and Germany.<sup>65</sup>

I would like to conclude my study on Ödön Kuncz with the words of the professor, quoting from a work in which he spoke about the role and task of the young lawyers, words that can serve as a guideline for the 21<sup>st</sup>-century reader of law. “*You can see the far-reaching, difficult, important, and noble tasks that must be carried out by one who dedicates himself to the true profession of a lawyer. And yet I say that the task of the young Hungarian lawyers is easy. The pantheon of Hungarian lawyers is full of such illustrious names, such great intellectual and moral treasures have been bequeathed to you by your legal predecessors, that your task can only be one: to be worthy of them.*”<sup>66</sup>

### III. His selected works<sup>67</sup>

*A jog birodalma bevezetés a jog- és államtudományba.* [The realm of law, introduction to the law and political sciences.] Grill Könyvkiadó Vállalat. Budapest, 1946.

*A kartelltörvény-javaslat időszerűsége és célközönsége.* [Timeliness and purpose of the Cartel Law draft.] Kereskedelmi jog (27) 1930/8-9. 169–174.

*A korlátolt felelősségű társaság szabályozásának alapelvei.* [The principles of the regulation of limited liability company.] Jogállam (27) 1928/6. 270–288.

*A magyar bankjog problémái.* [The issues of Hungarian bank law.] Gazdasági jog 1941/7. 385–396.

*A magyar kereskedelmi és váltójog tankönyve.* [The textbook of Hungarian commercial law and bill of exchange law.] Grill Károly Könyvkiadóvállalata. 1938.

*A magyar kereskedelmi- és váltójog vázlat.* [The outline of the Hungarian commercial law and bill of exchange law.] Grill Könyvkiadó Vállalat. Budapest, 1928.

*A részvény-bevonás /amortizáció/ és az élvezeti részvény tanulmány a részvényjog köréből.* [Retirement of shares /depreciation/ and beneficial share study in the field of law of shares.] Grill Könyvkiadó Vállalat. Budapest, 1914.

*A részvényjog reformjáról.* [On the reform of the law of shares.] Franklin. Budapest, 1927.

<sup>63</sup> Ibid. V.

<sup>64</sup> Ibid. 3–395.

<sup>65</sup> Ibid. 395–533.

<sup>66</sup> COTTELY – MEZNERICS – PUSKÁS 1939, 24.

<sup>67</sup> His minor studies: COTTELY– MEZNERICS– PUSKÁS 1939, and COTTELY– MEZNERICS– PUSKÁS 1941.

- A részvénytársaság védelme igazgatósági tagjainak egyéni érdekeivel szemben.* [The protection of private limited company against the individual interests of the board members.] Gombos. Kolozsvár, 1909.
- A részvényváltás lerovásának egynehány vitás kérdése.* [Some contentious issues on the waiver of share privilege.] Kereskedelmi jog (19) 1922/5. 74–79.
- A rochdale-i elvek és a szövetkezet jogi fogalmának körülírása.* [The description of the principles of Rochdale and the legal concept of co-operative.] Athenaeum. Budapest, 1935.
- A szövetkezet és a törvényhozás.* [The co-operative and the legislation.] Magyar jogi szemle (1) 1920/5. 301–308.
- A társasági jog egyenlősítésének egynehány problémája.* [Some issues on the equalization of company law.] Gazdasági jog 1943/7. 385–390.
- A tisztességtelen verseny (Az 1923: V. törvénycikk magyarázata, kiegészítve a törvényt végrehajtó rendeletekkel).* [The unfair competition (The explanation of Act V of 1923, supplemented by the executive decrees.)] (co-author: BALÁSP. ELEMÉR). Politzer Zsigmond és fia kiadása. Budapest, 1924.
- A tisztességtelen verseny problémája.* [The issue of unfair competition.] Kereskedelmi jog (18) 1921/11–12. 84–88.
- Alaptőkefelemelés tanulmány a részvénytársasági jog köréből.* [The increase of share capital study in the field of private limited company law.] Grill Könyvkiadó Vállalat. Budapest, 1911.
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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.<sup>1</sup> 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.*”<sup>2</sup>

The University of Szeged opened its doors in 1921, and Gáspár *Menyhárth* was elected as its first rector. On the 10<sup>th</sup> 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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<sup>1</sup> MARJANUCZ – SZABÓ – TÓTH – VAJDA (ed.) 2019, 247–250.

<sup>2</sup> 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.*"<sup>3</sup>

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.<sup>4</sup> 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.<sup>5</sup> 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<sup>6</sup> 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 [...]*"<sup>7</sup>

<sup>3</sup> MARJANUCZ–SZABÓ–TÓTH–VAJDA (ed.) 2019, 253.

<sup>4</sup> 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.

<sup>5</sup> Délmagyarország 5 February 1922. 3.

<sup>6</sup> István Csekey (1889-1963) was a student of Gáspár Menyhárth at Kolozsvár, and a colleague at the University of Szeged between 1931 and 1940.

<sup>7</sup> Archives of Manuscripts of the Hungarian Academy of Sciences Ms. 4706/84. István Csekey's speech.

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*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.*"<sup>8</sup> 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.*"<sup>9</sup>

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.<sup>10</sup> 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 21<sup>st</sup>-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.

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<sup>8</sup> MENYHÁRTH 1914, 14. cf. HOMOKI-NAGY 2018, 75.

<sup>9</sup> ILLÉS 1900, 6.

<sup>10</sup> 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.<sup>11</sup> 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 1<sup>st</sup> 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.<sup>12</sup>

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;<sup>13</sup> secondly, it prohibited the application of customary law.<sup>14</sup> 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.

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<sup>11</sup> Cf. HOMOKI-NAGY 2004.

<sup>12</sup> MÁRKUS 1907.

<sup>13</sup> 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.”

<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> Only that law is good, stated by Menyhárth, which is “rooted in the living sense of law of the people.”<sup>17</sup> 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.”<sup>18</sup> 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.”<sup>19</sup>

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,<sup>20</sup> which decisions had

<sup>15</sup> MENYHÁRTH 1908.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid. 341.

<sup>18</sup> Ibid.

<sup>19</sup> SCHWARZ 1909, 82.

<sup>20</sup> 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.<sup>21</sup> *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.*"<sup>22</sup> 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*.<sup>23</sup>

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.<sup>24</sup> 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 20<sup>th</sup> century, which gradually developed from legal custom through everyday practice and judicial practice of courts.<sup>25</sup> 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*)."<sup>26</sup>

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

<sup>21</sup> MENYHÁRTH 1908, 342.

<sup>22</sup> Ibid. 382.

<sup>23</sup> SCHWARZ 1909, 95–97.

<sup>24</sup> HALLER 1881, 421. JELLINEK 1882, 174–175. Cf. HOMOKI-NAGY's article about Károly *Haller* in this volume.

<sup>25</sup> MENYHÁRTH 1931a, 9.

<sup>26</sup> 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.<sup>27</sup> 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.*"<sup>28</sup> Legalization may be done by retroactive marriage – if the conditions are met – or royal pardon.<sup>29</sup> 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.<sup>30</sup>

<sup>27</sup> TELESZKY 1876.

<sup>28</sup> FRANK 1845, 159. *Tripartitum* I. Title 106.

<sup>29</sup> BÉLI 1999, 51.

<sup>30</sup> "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.<sup>31</sup> 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.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup> *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.<sup>35</sup>

*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. §.

<sup>31</sup> MENYHÁRTH 1893; Transylvanian Official Gazette (Erdélyrészi Jogi Közlöny) 1913. MENYHÁRTH 1905a.

<sup>32</sup> “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. §.

<sup>33</sup> “Maintenance is the obligation of the father, if he is not capable to maintain the child, such an obligation burdens the mother.” ACC 167. §.

<sup>34</sup> MÁRKUS 1907, 31.

<sup>35</sup> 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.<sup>36</sup> 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."*<sup>37</sup>

*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.<sup>38</sup> 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.<sup>39</sup> (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

<sup>36</sup> The establishment of unworthiness of the mother and of the widow in other context developed from this practice.

<sup>37</sup> MENYHÁRTH 1913, no. 4. 28.

<sup>38</sup> MENYHÁRTH 1913, no. 4. 27.

<sup>39</sup> 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.*"<sup>40</sup> 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. Ignác *Frank* accepted this rule only for children born out of lawful marriage.<sup>41</sup> János *Suhayda* shared the same standpoint. "Natural children born in an unlawful bed cannot inherit after their parents."<sup>42</sup> In regard to *Ignác 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."<sup>43</sup> 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*<sup>44</sup> and Gusztáv *Wenzel*<sup>45</sup>

<sup>40</sup> MENYHÁRTH 1893, 379.

<sup>41</sup> 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.

<sup>42</sup> SUHAYDA 1874, 331. §.

<sup>43</sup> 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."

<sup>44</sup> ZLINSZKY 1891, 667.

shared this standpoint as well. Contrary to them, Elek Dósa,<sup>46</sup> Mihály Herczeg<sup>47</sup> 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.<sup>48</sup>

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.*"<sup>49</sup> 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.*"<sup>50</sup> 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.

<sup>45</sup> WENZEL 1879.

<sup>46</sup> DÓSA 1861.

<sup>47</sup> HERCZEGH 1885.

<sup>48</sup> MENYHÁRTH 1905a, 2.

<sup>49</sup> 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.

<sup>50</sup> 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.*”<sup>51</sup>

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.<sup>52</sup>

<sup>51</sup> MENYHÁRTH 1905a, 14.

<sup>52</sup> 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 20<sup>th</sup> 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.*”<sup>53</sup>

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 19<sup>th</sup> 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.*”<sup>54</sup> 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.*”<sup>55</sup>

*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

<sup>53</sup> MENYHÁRTH 1894, 71.

<sup>54</sup> MENYHÁRTH 1894, 45.

<sup>55</sup> 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.<sup>56</sup> 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 *Ignác Frank*, who found the essence of this right under the established practice in the 19<sup>th</sup> 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.<sup>57</sup> 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 *Menyhárt*, 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.<sup>58</sup> 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.<sup>59</sup> As a property law legal institution, it

<sup>56</sup> Ibid. 49.

<sup>57</sup> FRANK 1845, 528–532. Cf. FOGARASI 1845, 122–123.

<sup>58</sup> MENYHÁRTH 1894, 67. Imre *Zlinysky* 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.

<sup>59</sup> 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.<sup>60</sup>

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.*"<sup>61</sup> 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

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<sup>60</sup> MENYHÁRTH 1894, 68.

<sup>61</sup> 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.<sup>62</sup>

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.<sup>63</sup> *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.<sup>64</sup> 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 19<sup>th</sup> 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 20<sup>th</sup> 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

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<sup>62</sup> Ibid. 90–92.

<sup>63</sup> MENYHÁRTH 1897, no. 32.

<sup>64</sup> "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.*<sup>65</sup> 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 20<sup>th</sup> century.<sup>66</sup> 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.*"<sup>67</sup>

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.

### III. His selected works

*Atyasági kereset és a törvénytelen gyermek tartása.* [Paternity action and the maintenance of the unlawful child.] Jogtudományi Közlöny 1893/47. 370–372. 1893/48. 377–379.

*Özvegyi jog.* [Right of survivorship.] Kolozsvár, 1894.

*Özvegyi jog az ajándékozás viszonyában.* [Right of survivorship in relation to donation.] Jogtudományi Közlöny 1897/32. 300–301.

*Törvénytelen gyerek törvényes örökösödéséről a magyar jog szerint.* [On the intestate succession of the unlawful child under the Hungarian law.] In: Dolgozatok a magánjog köréből. Lepage Lajos K. Kolozsvár, 1905, 1–21. [Menyhárth 1905a]

<sup>65</sup> MENYHÁRTH 1934a, 362.

<sup>66</sup> Ibid. 363.

<sup>67</sup> Ibid. 364.

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KRISTÓF SZIVÓS

## SÁNDOR PLÓSZ\*

(1846–1925)

### *I. Biography*

*“As I stood at his bier, [...] his gentle, smiling scholar-figure, his intellect in the serenity of his blue eyes, every bit of his knowledge and desire of knowledge and the modesty from knowing the finiteness of the minute human knowledge appeared from the smokes more vividly than vivid.”<sup>1</sup>*

### *1. Introduction*

Sándor Plósz was an epoch-making figure of the Hungarian law of civil procedure, whose work still is the basis of the modern procedural codification efforts since he – as *Fabinyi* pointed out – “created with his great legislative genius one of the most modern and greatest codes of civil procedure of the contemporary era”<sup>2</sup> with the Act I of 1911. *Plósz* heralded from an “educated middle-class family”, his paternal grandfather was an engineer, his paternal grandfather was *Imre Kreiner* a legal historian and his father, *Lajos Plósz* was a doctor.<sup>3</sup> Three of the four children were boys, all of them became “the champions of Hungarian culture, useful and elegant members of the society”, in which the paternal education played a significant role.<sup>4</sup>

*Plósz* became a Juris Doctor in 1868. In 1922, he told it had been much more difficult to complete the legal studies in his era; they had to attend the lectures diligently and study

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\* Translated by the author.

<sup>1</sup> MESZLÉNY 1925, 145.

<sup>2</sup> FABINYI 1930, 150.

<sup>3</sup> LENGYEL 1904, 147.

<sup>4</sup> Ibid. 148. While Sándor was a corresponding (1884), ordinary (1894), honorary (1902) and then directory (1902) member of the Hungarian Academy of Sciences, his older brother Pál was a corresponding member (1880) of the Academy and his younger brother Béla was an ordinary professor of the veterinary academy.

hard for their final exams, although newspapers containing jokes had already depicted lawyers then “as young men who do not attend the classes and play pool all the time.”<sup>5</sup> Parallel to the acquisition of the general (1868) and bill of exchange (1869) law degrees, he worked in the judicial system where he climb the professional ladder quickly: he was elected as a clerk at a municipal court in November 1867;<sup>6</sup> he was granted the “judicial vote” at the Municipal Court of the City of Pest upon the proposal of Lajos *Bogisich* in 1871.<sup>7</sup> Moreover, he became a vice-judge<sup>8</sup> at the District Court of the City Centre.<sup>9</sup> His first studies were published in this time in the *Jogtudományi Közlöny*.<sup>10</sup> He was appointed as judge at the Municipal Court of Pest in February 1872.<sup>11</sup>

In October 1872, Francis Joseph I appointed *Plósz* as ordinary professor of the laws of civil procedure, bill of exchange and commerce to the newly established Royal University of Kolozsvár.<sup>12</sup> In connection with it, *Dárdai* mentioned that the appointment of *Plósz* “is an inappreciable gain for not only the University of Kolozsvár but for the academic cultivation of domestic procedural law as well.”<sup>13</sup>

## II. Academic work

### 1. Academic work before his ministership

The year 1880 brought a significant change to the life of *Plósz* since the House of Representatives ordered Minister of Justice Tivadar *Pauler* in April to “take the development of proposals to the future introduction of orality, publicity and immediacy in civil procedure in hand immediately. Until the proposal of these, all judicial reforms shall be regarding the public orality and immediacy as reachable aims at the earliest convenience.”<sup>14</sup>

*Pauler* found it convenient and inevitable to “obtain orientation of the details of the newest foreign codes of civil procedure from legal scholars. Thus, they, who know our domestic relations as well, shall study not only the previous but the newer provisions, recognise not only the letters of the law and its provisions but its application in the everyday life, its effect on the practical life and comparing it to the provisions necessary in our relations. They shall make a report, based upon which it would be possible to propose a code of civil procedure to the legislator, which could meet our expectations

<sup>5</sup> LOVIK 1922, 4.

<sup>6</sup> Pesti Napló 1867/266. Melléklet [Supplement].

<sup>7</sup> Budapesti Közlöny 1871/16. 322.

<sup>8</sup> According to Act XXXI of 1871, the district courts consisted of a district judge, and vice-judges were appointed next to him when necessary. See in details STIPTA 1997, 130.

<sup>9</sup> Budapesti Közlöny 1871/295. 6477.

<sup>10</sup> PLÓSZ 1871a, 360–363. PLÓSZ 1871b, 399–403.

<sup>11</sup> Budapesti Közlöny 1872/36. 281.

<sup>12</sup> Budapesti Közlöny 1872/226. 1805. The monarch appointed his elder brother, Pál to an extraordinary professor to the Faculty of Medicine so both of them were founding professors of the University of Kolozsvár.

<sup>13</sup> DÁRDAI 1872, 302.

<sup>14</sup> Minutes of the House of Representatives (KN) 1878 Vol. XII. 222.

regarding the newest achievements of the jurisprudence and the results of the legal practice, comparing and applying them to our relations.”<sup>15</sup>

Thus, the minister entrusted Plósz and member of the House of Representatives Kornél Emmer. Plósz was entrusted to study the German civil procedure since Germany – similarly to Hungary – struggled with the written procedure, and the Imperial Code of Civil Procedure (*Reichscivilprozeßordnung*) based on orality and immediacy was enacted during that time.<sup>16</sup> Plósz published his first draft on the code of civil procedure in 1885<sup>17</sup> containing the provisions of the entire civil procedure (apart from the special rules of the taking of evidence).<sup>18</sup> In contrast, the draft of Emmer<sup>19</sup> regulated only those questions, in which he differed from Plósz, so especially in the rules of preparing the procedure and the trial.

In 1889, Dezső Szilágyi became the Minister of Justice, who announced a wide range of reforms. This included the civil procedure as well since he wished to remodel the procedure and it was intended to come into force at both municipal courts and courts of appeal.<sup>20</sup> The necessity and the principles of the reform of the civil procedure were not in question in Hungarian public opinion, the only question was whether the whole procedure should be reformed or just some parts of it.<sup>21</sup> Eventually, Szilágyi worked towards a partial reform and he entrusted Plósz<sup>22</sup> to work out the part of legal remedies of the summary procedure, which was fulfilled in 1889. Plósz reworked the draft at the beginning of the 1890s in detail and extended it to the whole summary procedure. Finally, it was announced as Act XVIII of 1893 in the Hungarian Collection of Acts. In parallel, Act XIX of 1893 on the order of payment procedure was also enacted. As a result, the reform was partial, but not according to the original concept of Szilágyi, since not a part of the procedure was reformed but the whole. It was partial because it was realised only at the level of the district courts.

These steps were important stages in the creation of the code of civil procedure because the future code was based on those provisions which were introduced in the summary procedure. Thus, the courts had had a possibility to get accustomed with the oral and immediate procedure in cases with smaller significance before the reform of the ordinary procedure was realised. On the other hand, this solution was advantageous because the legislator could receive important practical feedbacks as well. Based on these, Plósz could revise the rules of the future code of civil procedure if necessary. Plósz brought in ingeniously the principle of the free evaluation of evidence not just to the summary procedure but to the ordinary procedure as well since a provision of the summary procedure (Section 215) ordered that the rule of free evaluation should be applied in the ordinary procedure as well.<sup>23</sup> In parallel with the codification of the

<sup>15</sup> KN 1878 Vol. XV. 242.

<sup>16</sup> Ibid.

<sup>17</sup> PLÓSZ 1885. (hereinafter referred to as Draft).

<sup>18</sup> TÉRFY 1902, 393.

<sup>19</sup> EMMER 1911, 3–77.

<sup>20</sup> The ministerial work of Szilágyi is reviewed by ANTAL 2016, 64–73. in details.

<sup>21</sup> TÉRFY 1902, 566.

<sup>22</sup> Plósz was second secretary from 1894, then first secretary of state of the minister after. *Plósz Sándor életrajza* [Bibliography of Sándor Plósz]. A Jog 1899/10. 81.

<sup>23</sup> KENGyel 2014, 29–30.

summary procedure, *Plósz* published the draft of the code of civil procedure as well.<sup>24</sup> The work of the professor at that time was characterised by *Stiller* with an artistic example: “he provided the material for many excellent acts, he gave a form to it and his master [*Szilágyi*] only consented to these artistic works.”<sup>25</sup>

## 2. The ministership of Sándor Plósz

After the resignation of Sándor *Erdély* (Minister of Justice after *Szilágyi*), there was general agreement that *Plósz* would be the Minister of Justice in the government of Kálmán *Széll* but of course other names were mentioned as well, for example the appointment of Ignác *Darányi*<sup>26</sup> or the return of *Szilágyi* as well.<sup>27</sup> The monarch appointed *Plósz* to Minister of Justice on 26 February 1899 who served in the office until 1905. In connection with his appointment, *Stiller* wrote that “he [...] will take that fermenting force whose seeds were planted by the fertilising activity of *Szilágyi* to every aspect of our policy of justice.”<sup>28</sup>

One of the first tasks of the minister was to propose the bill on the electoral jurisdiction according to the pact among the parties. Regarding this, “he did not have other job than to revise the former text of *Szilágyi* in the House of Representatives and to modify it to meet the new demands.”<sup>29</sup> As a result, the Act XV of 1899 was enacted.

The new minister held his introductory speech on 12 April 1899 in the House of Representatives during the negotiation of budget of justice, just like *Szilágyi*.<sup>30</sup> He emphasised that he could not provide any novelties to the House since “the bigger but most of the smaller legislative questions of justice waiting for solution have been set for a long time. Moreover, their solution is already in an advanced stage.”<sup>31</sup> Regarding this, he especially emphasised the work of *Szilágyi*, which was not a coincidence since the former minister had been the first since 1875 who had specific, coherent plans.<sup>32</sup> *Plósz* mentioned several legislative topics waiting for solution.<sup>33</sup>

1. He mentioned the case of the general Civil Code, the most important task. In the 1880s, several legal scholars prepared drafts regarding each part of the code (among which only the bill of *Teleszky* on the law of succession was proposed to the House of Representatives).<sup>34</sup> However, only the law of marriage had been regulated in an act (Act XXXI of 1894). *Erdély* had formed an editorial committee in 1894 to create a draft for which he was given a promise that it would be ready in the first half of 1899. *Plósz*

<sup>24</sup> PLÓSZ 1893.

<sup>25</sup> STILLER 1899, 77.

<sup>26</sup> Alkotmány 1899/48. 2.

<sup>27</sup> Kis Újság 1899/57. 2.

<sup>28</sup> STILLER 1899, 77.

<sup>29</sup> RUSZOLY 2015, 636.

<sup>30</sup> ANTAL 2016, 64.

<sup>31</sup> KN 1896 Vol. XXI. 407.

<sup>32</sup> ANTAL 2016, 64.

<sup>33</sup> Here I mention the tasks of “big codification” only due to the extent of the study. However, he mentioned other questions like the settlement of the land register or the inspection of insurance companies. KN 1896 Vol. XXI. 410–411.

<sup>34</sup> SZLADITS 1941, 98.

supported this effort.<sup>35</sup> The first draft of the general Civil Code was published in 1900 which had extensive influence on the development of private law.<sup>36</sup> Eventually, the bill on the Civil Code was proposed to the Parliament in 1914.

2. He also suggested that one of our first codes, the commercial act (Act XXXVII of 1875) should be revised. Regarding this, he thought that this task could not be postponed until the Civil Code had been enacted. He thought that although the first draft of the Civil Code should be waited for, but when it becomes public, the reform of the commercial act had to begin immediately. The two should progress then parallelly. Moreover, there were such questions (for example the rules regarding companies limited by shares and cooperation) which were independent from the Civil Code, therefore some parts of the reform could be realised.<sup>37</sup> The amendment of the commercial act did not occur during the ministership of Plósz.

3. The partial reform of the civil procedure was realised in 1893 which worked well in practice: “those who do not consider things to be in mint condition and who do not want to avoid the existing deficiencies, will be forced to confess, that this act is suitable for our relations. The reform of the civil procedure therefore shall continue in this direction.”<sup>38</sup> The draft of the whole procedure was sent to the chamber of lawyers, courts of appeal and the municipal courts for review. They submitted their opinions and as a result, at the beginning of the ministership of Plósz, the draft was being revised based upon the reviews.<sup>39</sup>

Regarding his *ars poetica*, Plósz failed to achieve the most important goal: he could not get the act enacted. The draft had been ready since 1893 to “be taken to the Parliament when the situation becomes more favourable.”<sup>40</sup> After the revision having been mentioned in the ministerial introductory speech, Plósz submitted<sup>41</sup> the bill on the code of civil procedure<sup>42</sup> to the Parliament on 29 January 1902, which was recommended for acceptance by the judicial committee with amendments.<sup>43</sup> The interior political scandals of the first decade of the 20<sup>th</sup> century (eg. the so called ‘handkerchief-voting’, after which István Tisza and the Liberal Party were overthrown at the election) resulted in the Parliament only enacting the act in November-December 1910 (Act I of 1911).<sup>44</sup>

4. He mentioned other procedural questions in his speech. He wished to enrol the order of payment procedure, the procedures concerning marriage and mining in the code of civil procedure. He intended to care about procedures of land consolidation as well, but he did not know whether it should be done in the code of civil procedure, in the act which would regulate how the code would come into force or in a different act. Regarding the executions (especially the procedures with smaller value), he found it important to make them cheaper. However, he did not find the revision of the act on

<sup>35</sup> KN 1896 Vol. XXI. 407–408.

<sup>36</sup> SZLADITS 1941, 99. The draft of 1900 and the bill of 1914 was influenced by the German BGB more than the ABGB. See HOMOKI-NAGY 2013, 92. in details.

<sup>37</sup> KN 1896 Vol. XXI. 408.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid.

<sup>40</sup> Plósz Sándor életrajza [Bibliography of Sándor Plósz]. A Jog 1899/10. 81.

<sup>41</sup> KN 1901 vol. II. 128.

<sup>42</sup> Documents of the House of Representatives (KI) 1901 Vol. III. Doc. No. 102.

<sup>43</sup> KI 1901 Vol. III. Doc. No. 412.

<sup>44</sup> Concerning the final years of the codification see KENGyel 2014, 30–32.

executions (Act LX of 1881) relevant. Furthermore, the revision of the act would have only been necessary if the Civil Code had been enacted because there were several connections between the two.<sup>45</sup>

5. In his opinion, a more relevant was the revision of the order of lawyers since their problems would not have been solved if both the criminal and the civil procedure had proceeded according to the principle of orality. The chambers had to be strengthened so that “*they could realise the conditions of their vitality and prosperity and remedy their own problems if possible.*”<sup>46</sup>

6. He found it an important task that the code of criminal procedure (Act XXXIII of 1896) come into force. Act XXXIV of 1897 prescribed that it should occur on 1 January 1900 at the latest (Section 1), but it would have been possible earlier as well if the Minister of Justice had ordered it. According to Plósz, however, many obstacles remained before the act could come into force. He emphasised *inter alia* the infrastructural questions regarding the introduction of jury-system (only 23 of the 65 municipal courts had an appropriate room for this purpose)<sup>47</sup> and other regulatory obligations as well (so three bigger and several smaller decrees were also necessary).<sup>48</sup> It was a success for him that the code of criminal procedure could come into force on the day which had been prescribed in Act XXXIV of 1897.<sup>49</sup>

7. Finally, he mentioned the necessity of the enactment of a novel to the Criminal Code (Act V of 1878) which became necessary because of the Code of Criminal Procedure. According to Plósz, the system of legal remedies of the Code of Criminal Procedure will place a great burden upon the higher courts, so the amendment became justified. Plósz waited so that these amendments would decrease the burdens of higher courts. The requalification of some felonies to misdemeanour (and transferring them to district courts instead of municipal courts) or the introduction of conditional condemnation belonged here.<sup>50</sup> Several drafts were made for the amendment of the Criminal Code during the ministership of Plósz based on his request: Illés (1901), Angyal and Finkey (1903) prepared a draft each, and eventually Angyal wrote the draft of the final text (1904).<sup>51</sup> The novel was finally enacted in 1908 (Act XXXVI of 1908).

### 3. What is not mentioned in the biographies: Plósz as a communist professor of law?

The frames of the extent of this study make it possible to refer to the period, when Géza Magyar, Plósz and five other professors<sup>52</sup> were accused of being communists at the Faculty of Law of the University of Budapest only in brief.

<sup>45</sup> KN 1896 Vol. XXI. 408–409.

<sup>46</sup> KN 1896 Vol. XXI. 409.

<sup>47</sup> Regarding the jurors the found it positive that census of the jurors was completed at every municipal court. About the organisation of the juries see in ANTAL 2006, 245–251. in details.

<sup>48</sup> KN 1896 Vol. XXI. 409–410.

<sup>49</sup> Decree No. 3200. of the Hungarian Royal Minister of Justice on the taking of the Code of Criminal Procedure (Act XXXIII of 1896) into force.

<sup>50</sup> KN 1896 Vol. XXI. 410.

<sup>51</sup> ANGAL 1909, 38.

<sup>52</sup> Béni Grosschmid, József Illés, Károly Kmety, Gyula Pikler and Károly Szladits.

After the First World War, the revolutionary government wanted to extend its influence upon the University of Budapest which was one of the centres of intellectual life. The efforts to reform concentrated mainly on the Faculty of Law since a new, young, and re-educated professionals were necessary instead of the inherited state apparatus inherited in administration and jurisdiction to perform the diverse and new tasks of the social transformation.<sup>53</sup> It arised, among others, that the professors being above seventy years of age, like Győző *Concha* and *Plósz*, should retire.<sup>54</sup>

After the initial steps, the real hostility between the government and the university began when Zsigmond *Kunfi* became the Minister of Education.<sup>55</sup> The appointments became a question of prestige for the government<sup>56</sup> which had been practised by the university as a custom. *Kunfi* broke with this practice and he appointed seven professors to the Faculty of Law and organised departments without asking the council of the university. “The indignation of the professors knew no boundaries”<sup>57</sup> because of this, and on 3 February 1919, they refused to inaugurate the new professors completely. The reaction of the government was that they suspended the autonomy of the university on 4 February and appointed Oszkár *Jászi* as a government commissioner. His duty was to prepare the reforms and to lead the administration of the university. *Kunfi* notified the council of the university in a transcript “for the record.”<sup>58</sup>

The aforementioned is important in the *Plósz*’s work since on 27 February 1919 a committee was formed for the realisation of the reforms, whose chair was *Plósz*, its members consisted of some of the “old” and the new professors (except for *Jászi*). Between 15 and 20 March (directly before the proclamation of the Socialist Republic), the committee had four sessions,<sup>59</sup> but they did not have any meetings during the Socialist Republic.<sup>60</sup> The committee became the object of fierce discussions on the sessions of the council of the faculty.<sup>61</sup>

Some articles had been published in the press and because of that, *Magyary* and *Plósz* made allegation of defamation by the press, altogether against six persons.<sup>62</sup> They highlighted those articles, which committed crime in their opinion and emphasised that “every single word of all of the statements in the aforementioned publishments are, without any exceptions, fictitious; none of the written characters are true. We have never had even the slightest connection with communism and its representatives. We did not

<sup>53</sup> *Litván* gave three reasons why the government started the reform of universities. LITVÁN 1968, 401–402.

<sup>54</sup> *Az Újság* [The Newspaper] 1919/14, 2–3.

<sup>55</sup> At the beginning, the university pursued a waiting, dilatory tactics. LITVÁN 1968, 402–403.

<sup>56</sup> HAJDU 1968, 295.

<sup>57</sup> LITVÁN 1968, 404.

<sup>58</sup> *Ibid.* 407.

<sup>59</sup> Minutes of the Council of the Faculty of Law of Eötvös Loránd University [ELTE Lt. 7/a. ÁJTK tanácsüléseinek jegyzőkönyvei] Vol. 20. (1919/20) 33/919.20.

<sup>60</sup> *Pesti Hírlap* [Pester Journal] 1919/142, 4.

<sup>61</sup> Minutes of the Council of the Faculty of Law of Eötvös Loránd University [ELTE Lt. 7/a. ÁJTK tanácsüléseinek jegyzőkönyvei] Vol. 20. (1919/20) 33/919.20. 353/919-20. Supplements of the Minutes [ELTE Lt. 7/a-II. Jegyzőkönyvek mellékletei]: the minutes of the extraordinary sessions of 28 October, 30 October, 5 November, 7 November and 12 November 1919.

<sup>62</sup> The defendants (with the title of the newspaper in brackets): János *Bogyó* (*Az Újság*), István *Geréb* and Bence *Pártos* (*Pesti Hírlap*) Tamás *Stettner* (*8 Órai Újság*), István *Szegedi Schenk* (*Szózat*) and Ödön *Szirmay* (*Új Nemzedék*).

take part in any movements not only in the favour of the communism, but [...] we had stood apart from the direction of the Károlyi cabinet prior to that. [...] We had confined ourselves only to the fulfilment of our official duties, which derived from our position, until the communism terminated the operation of the Faculty of Law.”<sup>63</sup>

The prosecutor’s office indicted against the defendants on 8 March 1920, since they “stated such facts about professors Sándor Plósz and Géza Magyary, so about public officers related to the practice of their public offices which could be a basis of a criminal or disciplinary procedure against them if the stated facts were true. These facts would expose them to public condemnation.”<sup>64</sup>

The procedure of the municipal courts cannot be found in the archive sources, so we do not have any information about the outcome of the case. We know from daily newspapers that the first main hearing was held on 2 July 1920 where *Magyary* and *Plósz* appeared in person. The defendants asked for the establishment of the truth. They alluded to the resolutions of the council of the university and asked that some professors, who were members of the so-called certifying committee, should be heard as witnesses. The court approved this request, ordered the procurement of the data and the hearing of the witnesses, and postponed the main hearing to 19 July.<sup>65</sup>

The lawyer representing the *Pesti Hírlap* [*Newspaper of Pest*] made a statement on the second main hearing that the “Pester Newspaper always seeks the truth and whenever it fails so (even if it happens really rarely), then it faithfully corrects it. When it registered the news accusing professors Plósz and Magyary, it declared the true facts the next day after it made sure about the illegitimacy of the original news. To provide the victims a full compensation, it declares before the court that the two scholars showed irreproachable and patriotic behaviour during both the Károlyi Era and the dictatorship.”<sup>66</sup> The defendants of the *Newspaper of Pest* then revoked their statements which were accepted by the victims and the prosecutor’s office dropped the charge against them. The other defendants, however, rejected making such a statement. The municipal court then decided based on the proposal of the prosecution and the defence that “it supplements the taking of evidence on the requests of the parties and postpones the main hearing for an uncertain time”<sup>67</sup> to ensure the taking of evidence is complete. Since we do not have any description of the professors that would state their communist activities, so they must have cleared their names.

#### 4. The abstract theory of the right of bringing an action into court of Plósz

*Magyary* characterised the scientific work of *Plósz* in a way that “he does not belong to the fertile writers. He rarely writes but his every literary utterance is an event.”<sup>68</sup> Although *Plósz* said in 1922 that he esteemed his works *A bizonyítási teherről* [*On the*

<sup>63</sup> Archives of Budapest (hereinafter referred to as: BFL) VII.18.d. 5. d. 13/1920.

<sup>64</sup> Ibid.

<sup>65</sup> 8 Órai Újság 1920/157. 3.

<sup>66</sup> Pesti Hírlap 1920/171. 3.

<sup>67</sup> 8 Órai Újság 1920/171. 3.

<sup>68</sup> MAGYARY 1914, 185.

*burden of proof*]<sup>69</sup> and *A törvényes vélelem természete* [*The nature of the legal presumption*]<sup>70</sup> the most,<sup>71</sup> regarding its influence, his work *A keresetjogról* [*On the right of bringing an action into court*]<sup>72</sup> of 1876 is worth highlighting. The Plósz'ian spirit stands out from this study the most, which characterised the future Code of Civil Procedure.<sup>73</sup> Plósz did not extend his examination to the whole procedure, just to one of its most important aspects, the action. This work can be considered to be the fundamentum of his academic conviction. He did not write about this subject anymore, however, it occupied him until the end of his life.<sup>74</sup> The author divided his work into three parts: firstly, he examined the different opinions, then he dealt with the procedural definition of the right of bringing an action into court, and finally, he examined this legal institution from the aspect of procedural and substantive laws.

#### 4. 1. The mistakes of the material theory

Plósz analysed the opinions of different authors at length, from which I highlight the most important ones due to the limits of the length of the study. Plósz saw the mistakes of existing theories mainly, that they wrote about the right of bringing an action into court not from the point of view of the procedural but from the substantive law.<sup>75</sup> He highlighted its most important representative, *Savigny*, who looked at this right as not being "other" but a new form of the law. The law changes due to its infringement, so the right of bringing an action into court is "just a momentum in the life of the law."<sup>76</sup> However, Plósz acknowledged the merit of *Savigny's* doctrine since it gave a clear and sharply finite definition.<sup>77</sup>

Plósz rejected *Wetzell's* theory, who also derived the right of bringing an action into court from the infringement,<sup>78</sup> because it would have resulted in the rejection of the plaintiff's action if the infringement were not proven before the court. The deduction can be made from the study that "proving before the judge" means that the infringement had to be proven before the caesura (in Roman law: *litis contestation*), so during the foundation of the procedure. He found that problematic because while the rejection referred to "this time" in Hungarian law (which did not result in *res iudicata*), it was "*final in the old Roman law since the consumtio was not weakened*" (it resulted in *res iudicata*).<sup>79</sup> He thought that the main mistake of the theory was that it counted the material belonging to the foundation of the procedure only to be the conditions of winning the litigation.<sup>80</sup>

<sup>69</sup> PLÓSZ 1916, 517–533.

<sup>70</sup> PLÓSZ 1912, 75–99.

<sup>71</sup> LOVIK 1922, 4.

<sup>72</sup> PLÓSZ 1876, 167–187. and 231–259. For the German translation, see PLÓSZ 1880.

<sup>73</sup> *Magyary* considered this to be his greatest work apart from the procedural reforms. MAGYARY 1927, 5.

<sup>74</sup> *Ibid.*

<sup>75</sup> PLÓSZ 1876, 167. *Tóth* also said that "the right of bringing an action into court is different from the subjective private law." TÓTH 1912, 586.

<sup>76</sup> About the theory of *Savigny* see SAVIGNY 1841, 4–149. especially p. 4–17.

<sup>77</sup> PLÓSZ 1876, 169.

<sup>78</sup> WETZELL 1878, 149–156.

<sup>79</sup> PLÓSZ 1876, 172–173.

<sup>80</sup> *Ibid.* 173.

#### 4. 2. Plósz's concepts and their realisation

##### *About the action – the preparation of the foundation of the procedure*

The action is independent from the private law, it belongs to the procedural law since the existence of the private law is uncertain until the judgment, so the private law and the right of bringing an action into court are two different things (abstract right).<sup>81</sup> The perception of this was obviously that the civil procedure shall be considered to be an act of the public law.<sup>82</sup> We have other theories in the Hungarian procedural jurisprudence, like the so-called exact theory of *Bacsó*<sup>83</sup> or the dual theory of *Magyary*.<sup>84</sup> It is very interesting that *Farkas* identified the abstract right of bringing an action into court as the right to access the court a century later.<sup>85</sup>

The ministerial grounds of the Code of Civil Procedure named the subpoena as the first preparatory act which could be misleading. The act called the statement of claim as the document initiating the procedure since “this title has been accepted”,<sup>86</sup> the act “*respects the traditions formally*.”<sup>87</sup> Therefore, it is a better phrasing if we consider the request for subpoena (or letter of subpoena) to be the first preparatory act.<sup>88</sup> It is worth mentioning that *Plósz* called the first preparatory act the subpoena because according to the original text “the subpoena occurs to a date set by that party who wishes to negotiate” (Section 184 of the Draft). However, it would have been the duty of the chair of the panel to schedule a due date in a way that the party would have requested the letter of subpoena at the recorder for scheduling the due date. The liberal concept of the German ZPO may be seen through the draft of 1885. Although the basic concept of *Plósz* remained the same regarding the trial in the Code of Civil Procedure, the liberalism of it became “more gentle” due to the influence of the Austrian ZPO of 1895. Luckily, it never lost its liberal character completely.

The plaintiff was not bound to the content of the statement of claim. What is more, it could be stated for the Code of Civil Procedure generally that written statement could have relevancy only if they were presented by the parties at the oral hearing as well. As *Magyary* wrote: “what was submitted in the request for subpoena by the plaintiff had only effects upon the condition it was presented as an action in the oral hearing.”<sup>89</sup>

Regarding the elements of the statement of claim, it was important from the point of view of this study that it had to contain the action which the plaintiff wanted to present at the preparatory hearing, so the submission of the right which he wished to enforce and an explicit claim (Section 129 paragraph 1 point 3 of the Code of Civil Procedure).

<sup>81</sup> Ibid. 173. BACSÓ 1907, 17.

<sup>82</sup> *Plósz* also took this view, although it was elaborated by *Magyary*, and *Bacsó* joined this view later as well. BALOGH 2019, 20.

<sup>83</sup> BACSÓ 1910. The work is analysed by BALOGH 2019, 21–23. in details.

<sup>84</sup> MAGYARY 1924, 357–358.

<sup>85</sup> FARKAS 1985, 559.

<sup>86</sup> KI 1910 vol. IV. Doc. No. 73. 272.

<sup>87</sup> PLÓSZ 1911, 6.

<sup>88</sup> MAGYARY 1899, 337.

<sup>89</sup> KI 1910 Vol. IV. Doc. No. 73. ir. 272.

One of the most important results of the theory of Plósz can be observed here because he wished to take the principle of contingent cumulation out of the Hungarian civil procedure with this rule. The impact of this principle resulted in the most important element of the action becoming the factual basis, the statement of the right and the claim next to it were pushed into the background.<sup>90</sup> The principle of contingent cumulation meant that a part of the stage of *in iudicio* (meritorious hearing) was transferred before the caesura (*litis contestatio*), so the foundation of the procedure could speed up proceedings.<sup>91</sup>

It is worth highlighting Section 129 point 3 here Plósz demanded the statement of the right only because in his opinion, the subject of the matter was the statement of the right, not the factual basis or the deduction deriving from them. The aim of the procedure is that the court shall make a judgment regarding the statement of the right.<sup>92</sup> The difference between individualisation (*Individualisierung*) and the particulars of the claim (*Substantiierung*) divided the procedural jurisprudence of the era. Since Plósz put the statement of the right forward in opposition with the factual basis (in order to exclude the principle of contingent cumulation), the Code of Civil Procedure demanded the statement of facts to such an extent only which was absolutely necessary to make the right of the defendant different from other rights. It made it possible for him to individualise his claim. Several contemporary scholars criticised this. According to Magyary, “the action consists of the submission of the facts which make the basis of the legal protective claim – the factual basis – and the claim for a legal protection. It is regrettable that the first element of these two, the submission of the facts, is not emphasised enough in the Code of Civil Procedure.”<sup>93</sup> Jancsó also expressed his concern because of this: “regarding our relations, was it right to leave the old familiar (the particulars of the claim) to espouse to the position of individualisation?”<sup>94</sup>

The submission of the facts had a preparatory role in the Code of Civil Procedure which was embodied in the rule that should the party omit his obligation to prepare the trial resulting in a postponement, he shall bear the burden of the costs caused by his omission (Sections 179 and 203 of the Code).<sup>95</sup> It reveals that while the statement of the right prepared the foundation of the procedure, the submission of facts and proof prepared the meritorious hearing. Thereby, the deduction of Magyary becomes understandable: “the principle of individualisation is not exclusive in the Code of Civil Procedure but a minimal requirement only that can be supplemented with the rest: the particulars of the claim”,<sup>96</sup> with the risk that if it resulted in postponement, then the plaintiff would burden its costs (regardless of whether he would be the winning party).

Since the Act LIV of 1868 (our previous Judicial Ordinance) was built on the particulars of the claim, it could be said it was natural after the Code of Civil Procedure came into force that the complete submission of the facts remained in the legal practice. I found very few

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<sup>90</sup> PLÓSZ 1876, 244–245.

<sup>91</sup> Ibid. 245.

<sup>92</sup> PLÓSZ 1927, 235.

<sup>93</sup> MAGYARY 1924, 354.

<sup>94</sup> JANCÓS 1912, 375.

<sup>95</sup> KI 1910 Vol. IV. Doc. No. 73. ir. 273.

<sup>96</sup> MAGYARY 1924, 355.

procedures in the archive sources where the plaintiff had submitted a preparatory document after the preparatory hearing, which supports the aforementioned.<sup>97</sup> Consequently, *a contrario*, it was unnecessary because the plaintiff had already prepared the meritorious hearing in the statement of claim. The certain propagation of the Judicial Ordinance emerged in the usage of terminology as well, for example the plaintiff submitted an “ordinary action”,<sup>98</sup> or in another case, the plaintiff requested that the defendant should be invoked to “an ordinary procedure”<sup>99</sup> (the Code of Civil Procedure abolished the dual system of ordinary and summary procedures).

It was criticised, however, that the Code did not demand the request for subpoena to be incorporated into the statement of claim since the act obfuscated its feature to be a letter of subpoena, although it was obvious from the spirit of the act.<sup>100</sup> The statements of claim always consisted of the request of invocation, so did the following one as well: “I request through my lawyer certified under A./ that the court: set a due date for the trial and invoke the defendant to it through the council of village of Inárcs-Kakucs and require him after the procedure to pay within 15 days under the burden of execution 5300 crowns and its interest rate of 5% from 1 May 1918. I also request the court to require him to pay the charged, the sought to claim and the future costs of the procedure.”<sup>101</sup>

If the statement of claim did not meet the requirements, it had to be rejected. However, another phrasing emerged both in jurisprudence and legal practice that the court “rejects it without issuing an invocation.”<sup>102</sup> It was the phrase from which the deficiency of our current regulation can be observed. The statement of the legislator that they returned to the terminology of rejection because of the revival of our procedural traditions (Act I of 1911) must be dealt with because the terminology of “without issuing an invocation” of Act III 1952 [Section 130 paragraph (1)] has become obsolete and problematic. In the system of the current Code of Civil Procedure, the defendant shall submit his defence in a written form before the hearing. Thus, the rejection as phrasing has returned, only one of the aspects of its content remained, namely that the court denies the foundation of the procedure from the plaintiff. However, the rejection of Act I of 1911 (and Act III of 1952) had another implicit element that can be found through answering a question: what was the aim of issuing the invocation? It was that the defendant be present at the (preparatory) hearing and submit his defence in an oral form (from this point of view it does not matter whether it was an acknowledgement). To summarise, the real content of the procedural traditions has unfortunately disappeared after a century.

<sup>97</sup> For example, the plaintiff proposed a preparatory document in a case in order to “finish the hearing in the set due date.” Archives of Pest County (hereinafter referred to as: MNL PML) VII.1.b. 7. d. 313/1916/3. The preparation of the defendant was *de facto* compulsory since he could not give any reasons of his defence during the preparation.

<sup>98</sup> MNL PML VII.1.b. 2. d. 15/1916/1.

<sup>99</sup> MNL PML VII.1.b. 3. d. 159/1916/1.

<sup>100</sup> MAGYARY 1898, 149.

<sup>101</sup> MNL PML VII.1.b. 243. d. 3141/1918/1.

<sup>102</sup> Archives of Csongrád-Csanád County (hereinafter referred to as: MNL CsML) VII.1.b. 692. d. 478/1922. TÓTH 1923, 495.

*On the foundation of the procedure*

According to Plósz, whether the procedure comes into existence or not “*is a separate question which has only such a connection with winning or losing the procedure that it is a condition of both possibilities.*”<sup>103</sup> In his opinion, the action is just a part of the acts founding the procedure, its aim is to convince the defendant and the court about the necessity of the procedure (“*[...] it is against the court and the opposing party*”).<sup>104</sup> Consequently, he divided the first instance proceeding during the codification into two parts: preparation and meritorious hearing.<sup>105</sup> The only aim of the preparation was that the defendant submit a defence, to be more exact, a defence on the merit (he asks at least partially dismissal of the action). It is important to highlight, however, that although the Code of Civil Procedure used the word hearing for the preparation as well, the preparatory due date (or simply preparation)<sup>106</sup> became used in practice, which derives from that doctrinal conception of Plósz that the “*trial is [...] a uniform whole*”<sup>107</sup> which shall be used for the meritorious hearing.

One of the components of the stage of preparation was the action, so Plósz attributed – as we saw – not just a preparatory role to it,<sup>108</sup> but it was an initiative of the foundation of the procedure as well. The aforementioned has a connection with the independence of the right of bringing an action to court from the private law because the latter did not have to exist during the foundation of the procedure, it was enough to state it.<sup>109</sup>

Regarding the acts founding the procedure, Plósz differentiated between two essential moments: the communication of the claim and the submission of the defence on the merit.<sup>110</sup> In opposition to this, Magyary distinguished three acts: the communication of the claim, the request of the court for the defendant to submit his defence and the defence of the defendant.<sup>111</sup> It is more fortunate if we look at the foundation of the procedure as a progress. Based on this, the following definition can be given: the foundation of the procedure is the sum of the procedural acts between the communication of the claim and the defence on the merit. It could happen that more preparatory hearings were necessary to reach the defence of the defendant.

It is also worth looking at the foundation of the procedure as a progress since many acts could happen between the communication of the claim and the defence of the defendant, which had an influence on the defence. To sum up, I divide the acts founding the procedure into two parts: on one hand, according to the ranking of Magyary/Plósz, direct acts were the communication of the claim, the request of the court for the defendant to submit his defence and the defence itself (direct form of the foundation).

<sup>103</sup> PLÓSZ 1876, 233.

<sup>104</sup> Ibid. 235.

<sup>105</sup> PLÓSZ 1917, 47.

<sup>106</sup> Eg., “We request the court to set a due date to the preparation based on our statement of claim” and not for preparatory hearing. MNL PML VII.1.b. 7. d. 313/1916/1. It is worth mentioning, however, that the minutes of the preparatory and the meritorious hearing were unified formally (“minutes of oral hearing”).

<sup>107</sup> KI 1910. Vol. IV. Doc. No. 73. 310.

<sup>108</sup> PLÓSZ 1876, 235.

<sup>109</sup> Ibid.

<sup>110</sup> PLÓSZ 1927, 122.

<sup>111</sup> MAGYARY 1924, 346.

On the other hand, indirect acts were the amendment of the claim and the raising dilatory defence (indirect form of the foundation), provided that they were raised before the peremptory defence of the defendant since the foundation reached its goal and finished after that.

According to another grouping possibility, the communication of the claim and the peremptory defence were indispensable acts (like *Plósz* highlighted it) because the foundation of the procedure was not possible without them. On the other hand, the amendment of the claim and the dilatory defence were eventual acts since they were not necessary for the peremptory defence.

These theoretical explanations must be supplemented with three additives. Firstly, although the abandonment of the action could happen during the preparatory hearing as well, it shall not be considered to be even an indirect preparatory act since if that happened, then a peremptory defence could not be proposed since all of these became irrelevant (there was no action). The dilatory defence could be an indirect preparatory act only if the court rejected them because if an obstacle of the procedure stood, the court had to terminate the procedure, so a definite obstacle abounded for the procedure. The indirect character arised from if the court rejected the dilatory defence, then the defendant did not have another choice than to propose a defence on the merit<sup>112</sup> so a peremptory defence.

Secondly, both the indirect preparatory acts and the abandonment of the action were mixed acts since they – in certain boundaries – could be proposed not only in the preparatory hearing (opposite to the communication of the claim and the peremptory defence). Thirdly, the legal practice and the jurisprudence considered not only the defence to be a peremptory defence but the acknowledgement as well. The act, however, meant the defence on the merit of the defendant (the denial of the statement of the right)<sup>113</sup> under the peremptory defence in a technical sense. This derives from that *Plósz* put the statement of the right in the foreground. Thus, the phrasing of the Code of Civil Procedure is not completely precise that after the peremptory defence, the consent of the defendant was necessary for an amendment of abandonment of the action (Section 187 paragraph 1 and Section 188 paragraph 1). In case of an acknowledgement, thus, the defendant had to be forced to perform a service (e. g. pay a determined sum) immediately in the form of a judgment, so the abandonment of the action or the amendment of the claim became irrelevant.

One final question shall be answered: was the critique correct in stating that because the Code of Civil Procedure was afraid of falling into the realm of the written procedure<sup>114</sup> the principles of orality and immediacy were not overemphasised by the act? Let us takes as an example, the settlement at the trial. To abandon the action after the defence on the merit, the consent of the defendant was necessary. The settlement was a private law contract of the parties, a disposal of the subject matter of the action before the judge on the oral hearing or a joint request of the parties before a delegate judge or requested court with the aim of the termination of the procedure.<sup>115</sup> On the contrary, if the parties did not settle the issue before a judge (or requested the termination without a reasoning), that should be

<sup>112</sup> MESZLÉNY 1911, 193.

<sup>113</sup> BACSÓ 1917, 116.

<sup>114</sup> OBERSCHALL 1896, 4.

<sup>115</sup> MAGYARY 1924, 508–512.

considered be an amendment of the action and a consent to it. Therefore, the court had to terminate the procedure, it did not have to decide about the litigation costs (otherwise requested by the plaintiff)<sup>116</sup> and the eventual order setting the due date of the preparation had to be set aside.<sup>117</sup>

A settlement is concluded in both cases but in the first one it was concluded before a judge according to the principle of immediacy. The act, however, associated different legal consequences to them because if the settlement were approved by the court with an order, it had the same effect as a judgment (so it could be executed). Moreover, since it was concluded before the judge, it was part of the minute, so the contract was a public deed.<sup>118</sup> The settlement out of court resulted in an order terminating the procedure and the legal effects of submitting a statement of claim were upheld. These differences derive from the principle of immediacy, it was, however, gratuitous, and unsuitable to associate a smaller legal effect to an act based on the will of the parties that was concluded out of court (especially if they inform the court about it in a common submission).

### Summary

It is undeniable that Plósz attributed a great significance to the principles of orality and immediacy, and he wished to distance himself from Act LIV of 1868 (e.g., the statement of the right was put at the forefront and the facts in the background; the assessment of acts taken out of court) in his *ars poetica* that could be said to be exaggeration. It is important to highlight, however, that the system of foundation and preparation of the procedure, the wide case managerial powers of the court and the means of sanctions of acting in bad faith (preterition and the obligation of telling the truth: Section 222 of the Code of Civil Procedure) established such a medium that was returned to by the procedural legislation several times, despite the noxious effects of the socialism. Although Plósz was the member of the Liberal Party,<sup>119</sup> his work was universally acclaimed in politics. The representatives of the jurisprudence all praised the achievements of the professor whether they supported the solutions of the Code of Civil Procedure or not. This is almost an unrepeatable success regarding the current status of the procedural jurisprudence.

<sup>116</sup> Curia 1917 ápr. 2. VII. 1346. sz. PD III. (1918) 130. (PD marks the collection of high court decisions edited by Marcel Kovács. PD is followed by the number of the volume, the the year of publish in brackets and the number of the decision).

<sup>117</sup> Point 1. of the matters of principles of the agreements by meeting of the chairs of panels of the Municipal Court of Budapest on 1 December 1915. PD II. (1917) 53.

<sup>118</sup> MNL PML VII.1.b. 8. d. 364/1916/4.

<sup>119</sup> See Plósz Sándor *prorammbeszéde* [Programme speech of Sándor Plósz], 2.

### III. His selected works<sup>120</sup>

*A bizonyítási teherről* [On the burden of proof]. In: Jogi dolgozatok a Jogtudományi Közlöny ötven éves fennállásának emlékére: 1865–1915. Budapest, 1916. 517–533.

*A keresetjogról* [On the right of bringing an action to the court]. Magyar Igazságügy 1876/3 and 4. 167–187. és 231–259.

*A magyar polgári perrendtartás tervezete* [The draft of the Hungarian Code of Civil Procedure]. Magyar Királyi Egyetemi Könyvnyomda. Budapest, 1885.

*A magyar váltójog kézikönyve* [The handbook of the law of bills]. Pesti Könyvnyomda. Budapest, 1877.

*A per szerkezete az új perrendtartásban* [The structure of the procedure in the new Code of Civil Procedure]. Magyar Jogászegyleti Értekezések 1911/14. 3–22.

*A törvényes vélelem természete* [The nature of the legal presumption]. Jogállam 1912/1-2. 75–99.

*Magyar polgári törvénykezési jog* [Hungarian law of civil procedure]. Szent István Társulat. Budapest, 1906.

*Törvényjavaslat a magyar polgári perrendtartásról. Előadói tervezet* [Bill of the Hungarian Code of Civil Procedure. Draft of the rapporteur]. A m. kir. igazságügy-miniszter megbízásából. Budapest, 1893.

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ÉVA JAKAB

## ELEMÉR PÓLAY\*

(1915–1988)

### *I. Biography*

The present volume takes the professors at the University of Szeged, Faculty of Law and Political Sciences prior to 1945 into consideration, it undertakes to sum up their academic and tutorial work. Technically, Elemér *Pólay* could not take part in this review since it is avowed that his career began in Miskolc and/or Debrecen, and he came to Szeged in 1949, after the war. However, it is a fact that Elemér *Pólay* was a leading professor of the faculty between 1949 and 1985 – the one, who may have had the greatest international respect and the most affluent academic work. His university career had already begun before the years in Szeged because he taught at the Evangelical Legal Academy of Miskolc<sup>1</sup> since 1945. He habilitated at the University of Debrecen in 1946, after which he held lectures for some semesters there with the titles of “The role of the praetor in the development of Roman private law” and “The edicts of the praetors and aediles curules”.<sup>2</sup> His educational and academic work outside Szeged, however, covers only some years – his university career evolved actually in Szeged.

Elemér *Pólay* was born on 23 August 1915 in Zombor. Initially, his family originated from Upper Hungary; maybe this is why his father, who was a teacher in a high school, could start a new life in Miskolc after the catastrophe of Trianon. *Pólay* grew up in Miskolc, he passed through his schools there and he finished his legal studies there as well. He owed his classical literacy to the excellent teachers of the Royal Catholic György Fráter High School of Miskolc, who sowed the seed of respect for the ancient cultures deeply into the students. Elemér *Pólay* was an eminent student, he finished the studies with distinction. After the matura examination, he enrolled at the Evangelical Legal Academy of Miskolc in 1933, where he also stood out from his fellow students. At that time, seminars were organized for talented students, where they had the possibility to familiarise with the basics of academic research under the leadership of a renowned professor. Documents and later publications testify that *Pólay* excelled in two such seminars: by Károly *Schneller* he learnt

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<sup>1</sup> *Pólay* was an extraordinary legal academic teacher from 1945; after his habilitation, he became an honorary ordinary professor of the Legal Academy from 1946. Cf. STIPTA 2009, 83.

<sup>2</sup> P. SZABÓ 2015, 46.

the basics of Statistics and Sociography, and he became familiar with the basics of researching Roman law and ancient legal history with the leadership of Zoltán *Sztehló*. We are going to return to his experience from the seminar later.

After the completion of the legal academic studies, he took his final exams at the University of Pécs: in 1937, he obtained his legal and in 1938, his political doctorate (*doctor utriusque iuris*). Meanwhile, he took part in two study visits abroad, both times in Berlin. The longer trip in 1938 was especially significant considering his latter career; we discuss his experience in detail in the next segment of the study.

He started to build his career at the university and the court simultaneously after he had returned home: during the war, he worked in Debrecen, then in Miskolc for a few years. He got to Szeged in 1949, after the closure of legal academies and the Faculty of Law in Debrecen. The university career of Elemér *Pólay* evolved in Szeged, at the Faculty of Law and Political Sciences. He became the leading and acclaimed researcher of the domestic and international romanistics from here and he educated generations of lawyers with excellent educational work and taught them the basics of private law here. All his students learnt that guideline of civilistics, which was formulated by Ulpian in the golden age of the classical Rome that is still valid today and Professor *Pólay* interpreted it authentically: “*honeste vivere, alterum non laedere, suum cuique tribuere*.”<sup>3</sup>

The significance of his academic work is testified by seven monographs, 140 studies and the several conference lectures on both domestic and international conferences. In the frame of the current study, we could only deal with the studies of the early years from his affluent work.

## II. Academic work

### *The beginning of the educational and academic career*

My study deals only with the studies of *Pólay* which were born before or during the war and tries to examine them in their context so embedded in their political and university milieu when possible.<sup>4</sup> The starting point of the examination is an early, less known work of *Pólay*: *The legal perception of the national socialism and the Roman law*. According to the bibliographical data, the study was published in 1939. However, it was published in the 7-8th (September-October) and 8-9th (October-November) issues of the *Miskolci Jogászélet [Juristic Life of Miskolc]* in 1938, in two parts.<sup>5</sup> It is avowed that

<sup>3</sup> Ulp. D. 1,1,10,1; It is quoted in the chapter „A jog fogalma általában és a jogalkalmazás a rómaiaknál” [*The definition of law in general and application of the law by the Romans*] in the legendary textbook: BRÓSZ – PÓLAY 1986, 64.

<sup>4</sup> This study does not intend to cover the bibliography of Elemér *Pólay*. For the topic cf. JAKAB 2015, 17–32. MOLNÁR 1999a. MOLNÁR 1999b. 7–12.

<sup>5</sup> The *Juristic Life of Miskolc* was the official journal of the Legal Academy of Miskolc of the Tisza Lutheran Diocese, its responsible editor had been Béla *Zsedényi* university private professor, ordinary teacher of the legal academy. BRUCKNER 1996, 108–109. highlights that the *Juristic Life of Miskolc* was considered to be a popular and “sellable” academic journal which had a high reputation in professional circles. Its profile included discussing current professional issues in a critical spirit. At the same time, it sought to address “new

Pólay studied in Berlin with the scholarship of the Evangelical Legal Academy of Miskolc in 1938 at the University of Friedrich-Wilhelm. He listened there to the Roman law lectures of Paul Koschaker<sup>6</sup> and the economic historical lectures of Werner Sombart.<sup>7</sup>

His examined study summarised his experience, which derive supposedly from his experience in Berlin mainly. However, the attacks of the NSDAP against the Roman law left a mark in Hungary as well.

The Hungarian jurisprudence was traditionally German oriented, the history of the country predetermined it. In the interwar period, the official policy of culture mutually urged (both from the Hungarian and the German side) the strengthening of the bilateral and scientific relations.<sup>8</sup> For example, an extended delegation of lawyers visited Hungary for a week in 1935, with the support of the NSDAP, with the leadership of Walter Raeke<sup>9</sup> to expand the official German ideology.<sup>10</sup> The Department of Foreign Affairs of the *Akademie für Deutsches Reich* founded in 1933 urged legal comparative researches and formed a working group for the Hungarian relationships (*Arbeitsgemeinschaft für Deutsch-Ungarische Rechtsbeziehungen*), and they elected several acclaimed Hungarian scholars to its corresponding members.<sup>11</sup> Several studies examined the legal policy of the Nazi Germany in that time in Hungary.

So, the “national socialistic legal perception” flowed into Hungary through several channels. The German political campaign against the Roman law exploded especially at the National Conference of Tertiary Education, where some of the participants made a speech against the education of Roman law.

It is probably not a coincidence that the Roman law was discussed at that time in Hungary. Although point 19<sup>12</sup> of the *Parteiprogramm* of the NSDAP, which initiated the attack against the Roman law on an ideological basis, is dated back to 1920, the new *Studienplan* (curriculum) by Karl August Eckhardt<sup>13</sup> came into force in Germany in 1935 decreasing the number of Roman law lectures at the universities significantly.<sup>14</sup> It is enough to highlight a short quote from Eckhardt’s 1935 work to illustrate the severity of the situation: “Noch immer lebt die deutsche Rechtswissenschaft in den Gedankengängen des römisch-gemeinen Rechts [...], die geistige Grundhaltung wird heute noch durch das Pandektensystem bestimmt. Diesem System gilt unser Kampf.” It is plausible that the

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constitutions and social issues in countries near and far” through in-depth studies. Bruckner mentions Pólay’s related study here.

<sup>6</sup> We discuss the oeuvre and the years in Berlin of Paul Koschaker later.

<sup>7</sup> Although Werner Sombart (1863–1941) became an emeritus in 1933, but he taught at the Friedrich-Wilhelm University until 1938. Sombart is a well known sociologist and economist, who was a member of the *Akademie für Deutsches Recht* from 1933, but the *Preussische Akademie der Wissenschaften* and the *Bayerische Akademie der Wissenschaften* also elected him into their memberships.

<sup>8</sup> For the topic cf. HERGER 2019, 95. 97–100.

<sup>9</sup> Raeke was a representative in the *Reichstag*, and the chairman of the *Deutscher Anwaltsverein*, HERGER 2019, 97–98., who aki excelled as one of the coryphei of the racist purge of the German Bar Association.

<sup>10</sup> HERGER 2019, 97.

<sup>11</sup> HERGER 2019, 99. mentions the names of Zoltán Magyary, Ödön Mikecz, István Oswald, József Stolpa, Géza Töreky, Gábor Vladár and László Radocsay.

<sup>12</sup> For this point of the party programme of the NSDAP cf. PIELER 1990, 440. BEGGIO 2018a, 227–230.

<sup>13</sup> Karl August Eckhardt, member of the NSDAP and *SS Sturmbannführer*, the spiritual father of the reform.

<sup>14</sup> Cf. BEGGIO 2018b, 645–646. FRASSEK 2000, 294.; FINKENAUER 2017, 2. The related text is quoted by ECKHARDT 1935, 7.

events in Germany urged some representatives of the domestic profession to the frontal attack against the Roman law.

Finally, Gábor *Vladár* (later Minister of Justice) snubbed the attackers in the fiery debate on the congress: “[...] those wishes which emerged in favour of the repression of the education of Roman law could feed upon the fashion deriving from Germany.”<sup>15</sup>

Regarding the German changes, the moderate view of Gábor *Vladár* is well illustrated by for example his Preface written for *The Legal Professions in the Nazi Germany* by Béla Csánk (published in 1941). The first paragraph is still about that deep impact that the exposition of the changes in the legal system of Germany inflicted on the reader. He continues, however, that the newer knowledge shall be compared with our existing knowledge and evaluate them in the light of that.<sup>16</sup> Moreover, he highlights that the German change is a “revolutionary” phenomenon, which “shows the picture of six-seven years of turmoil. The Germans themselves illustrate the legal life of this era with the expressions of »Umbau«, »neue Grundlegung«, »Revolution« and other that mean rooted innovation.”<sup>17</sup> Such basic theorems were questioned in this “legal revolution” like the hierarchy of the sources of law, the relationship between law and judge, the relationship between public and private law or the connection between law and moral. *Vladár* emphasises the process, in which the “battle of ideologies” gained a great role, has not finished; the inertia of the revolutionary momentum led to many abuses.<sup>18</sup> Then he cautioned carefully that the Hungarian import of the national socialistic ideas should not be hurried: “The simple adaption to the changes is not »development« itself. It becomes development if it comes with evaluation, so with the examination whether the progression towards the change is valuable from the point of view of the nation, it is not more rightful to prevent or [...] at least neutralise the change (cocoon as the song says: »If I see the beginning of the tempest, I tip my hat.«).”<sup>19</sup> The reduction of the education of Roman law was taken off the agenda in 1936 – in which the determined standpoint had a huge significance – so the eight hours through two semesters of Roman law remained in the curriculum.<sup>20</sup>

Pólay was not a member of the academical circles in 1936 since he had not finished his university studies yet. It is avowed that he studied at the Evangelical Legal Academy of Miskolc between 1933 and 1937 and he took his final exam (*rigorosum*) at the University of Pécs:<sup>21</sup> as we have previously mentioned, he became a doctor of law in 1937, then doctor of political sciences in 1938.<sup>22</sup> He faced the tensions of the tertiary education just after, during his studies in Berlin and after his return.

The national socialistic attacks were a real threat, to which the domestic representatives of Romanistics reflected again and again. The writings of Nándor Óriás and Kálmán Személyi pointed out the Christian elements embodied in the Roman law, they referred to

<sup>15</sup> Gábor *Vladár*’s opinion is also referred to by PÓLAY 1972, 8. The era is analysed in more detail in this volume by POZSONYI 2020, from fn 31. (in printing).

<sup>16</sup> VLADÁR 1941, IV.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid. V.

<sup>19</sup> Ibid. VI.

<sup>20</sup> POZSONYI 2020, fn 34.

<sup>21</sup> According to contemporaries, Lutheran students mostly chose Pécs to pass their doctoral examinations.

<sup>22</sup> JAKAB 2015, 18.

this when justifying the importance of Roman law.<sup>23</sup> Albert Kiss examined the relation between Roman law and Germanic law and came to the statement that the deep difference between the two systems propagated by the NSDAP cannot be sensed.<sup>24</sup> Since the national socialistic attacks concerned primarily the form of the Roman private law built by the Pandectists, Nándor Óriás recommended put the Roman public law at center stage and introduce it into the education.<sup>25</sup>

Károly Sándor Túry, representing the University of Szeged at the National Congress of Tertiary Education, who taught commercial law highlighted that those parts of Roman law shall be taught (and those shall be in every case) which “express thoughts existing in modern legal systems as well”, so which may be considered to be a modern *ius gentium*.<sup>26</sup>

Although Elemér Pólay did not belong to the university lecturers he could notice the danger threatening Roman law from his teachers or the press. He certainly faced closer the national socialistic conception and its emerging consequences on the German university education during his studies in Berlin. Before having a closer look at the political attacks against the Roman law, it is worth reviewing the life, the work and a study being important in our topic of the Berliner mentor of Pólay, Paul Koschaker.

### *Berlin 1938*

As we have already mentioned, Elemér Pólay, who just became a Doctor of Law, was awarded with the scholarship of the Evangelical Legal Academy of Miskolc, with which he enhanced his legal knowledge. At this time, Austrian born professor, Paul Koschaker (1879-1951) taught Roman law, who was one of the Romanists with the highest prestige.<sup>27</sup> Koschaker began his career in Graz whence he got to Prague after his habilitation, where he began teaching in 1909. Later he stood on the lecture platform in Leipzig between 1915 and 1936, where he turned his attention to tables with cuneiform. An excellent cohort of professors gathered in Leipzig at that time, which was favourable to the formation of multidisciplinary trends. Koschaker founded the *Keilschriftsrecht* in this period, which was the trend researching the law of clay tablets.<sup>28</sup> He was invited, however, to the department of Römisches Rechts und vergleichende Rechtsgeschichte in Berlin in 1936, where he could develop the academic research of the tables with cuneiform and the early Eastern legal cultures apart from the Roman law.<sup>29</sup> Koschaker is one of the fathers of “comparative legal history”, who pointed out that there is much Eastern influence in Greek and Roman legal systems.<sup>30</sup> He organised a research group to study the ancient Eastern laws in Berlin as well (*Seminar für Rechtsgeschichte des Alten Orients*).

<sup>23</sup> ÓRIÁS 1936. SZEMELYI 1939. Cf. PÓLAY 1972, 17–18.

<sup>24</sup> KISS 1937, particularly from 9.

<sup>25</sup> ÓRIÁS 1936, 7–8.

<sup>26</sup> Magyar Felsőoktatás [*Hungarian Tertiary Education*] Vol. II. 93.; quotation based on PÓLAY 1972, 18.

<sup>27</sup> Koschaker was born in Klagenfurt, absolved his legal studies in Graz, then obtained a doctoral degree there (*sub auspiciis Imperatoris*). His teacher in Graz, Hanaušek sent him to improve in Leipzig to Ludwig Mitteis, with whom he found it hard to get along with, but later became his loyal student. Cf. BEGGIO 2018a, 33–35.

<sup>28</sup> KOSCHAKER 1929, 188–201. PFEIFER 2001, 11.

<sup>29</sup> BEGGIO 2018b, 660–662.

<sup>30</sup> Cf. RIES 1980, 608. VARVARO 2010–2011, 303–315.

The personality and the research of *Koschaker* had a great impact on *Pólay* – since he had been receptive to the comparative research which took the legal systems of the ancient East into consideration on Zoltán Sztehló's Roman law seminar; this is reflected by the choices of topic regarding some of his early studies: the criminal law of the Code of Hammurabi<sup>31</sup> and the culture of irrigation in the old Egypt.<sup>32</sup> The features of the research movement represented by *Sztehló* and *Koschaker* were on the one hand the strong theoretical vein and on the other hand, the comparative legal ambition and the multidisciplinary approach<sup>33</sup> – which proved to be decisive on the approach of *Pólay* throughout his entire work.

Supposedly the long study of 1938 was the processing of the impressions made on *Pólay* in Berlin. The title of the study is confusing at the first glance: *The Legal Perception of the National Socialism and the Roman Law*. However, the first lines of the study gives an authentic picture about the true confession of the author: „»The national socialism – says Wilhelm Coblitz, the leader of the German Rechtsrechtsamt – sees his historical task in that it shall give German law to the German people.« This sentence makes it clear why the situation of the Roman law is questionable in the national socialistic German Empire.»<sup>34</sup>

It is a striking coincidence that Paul *Koschaker* published an 86 page long small monograph in 1938 with the title of *Die Krise des römischen Rechts und die romanistische Rechtswissenschaft*, which contains the extended version of his lecture on the December 1937 session of the *Akademie für Deutsches Recht*.<sup>35</sup>

These were such years in the history of German romanists that the lectures of several acclaimed legal historians were suspended or even banned, many acclaimed professors were dismissed from their positions urging them to leave even the country if possible.<sup>36</sup> The Roman law embodied the liberal, non-national civil law in the eyes of the national socialistic politics, which they intended to substitute with the “real national” law based on the Germanic custom law. Several young scholars became the spokesmen of the national socialistic concepts, for example Franz *Wieacker* or Ernst *Schönbauer*.<sup>37</sup> *Koschaker*, however, stood upon the traditional values. This belief and attitude were brought home to Hungary by his student, Elemér *Pólay* as well.

#### *Pólay's creed in addition to Roman law*

Elemér *Pólay* published an extensive study in 1938 on the columns of the *Legal Life of Miskolc* about the legislative and jurisprudential concepts of the national socialistic

<sup>31</sup> PÓLAY 1936a, 53–58.

<sup>32</sup> PÓLAY 1936b, 218–223.

<sup>33</sup> BEGGIO 2018a, 50.

<sup>34</sup> PÓLAY 1939, 125.

<sup>35</sup> It is part of *Koschaker's* career that he was also elected a member of the *Akademie für Deutsches Recht*, which was formed in 1933 under the chairmanship of Hans *Frank*. This stage of his life path is critically analysed by BEGGIO 2018a, 83.; GIARO 2001, 166.; BEGGIO 2018b, 647.

<sup>36</sup> It is sufficient to refer to the fate of Fritz *Schulz* here, whose adversity was documented in detail by ERNST 2004, 105–203.

<sup>37</sup> The publications of a Finnish research group led by Kaius *Tuori* report on the careers of prominent Roman lawyers during dictatorships. “*Reinventing the Foundations of European Legal Culture 1934–1964*”.

party, the second part of which (pages 173-204) defends the Roman law specifically against the strengthening attacks. There are no bibliographical data, but it is obvious that the teachers in Miskolc, maybe Béla Zsedényi, the editor responsible for the *Legal Life of Miskolc* asked the young man returning home from the research trip in Berlin to present the German relations in detail. The first sentence already quotes the basic theorem of the German party programme through the interpretation of Wilhelm Coblitz (leader of the *Reichsamt*), which led to the inevitable collision with the Roman law: “the historical task of the national socialism is to give German law to the German people.”<sup>38</sup> The Roman law is not the product of the German folk spirit, but it is a foreign law being the basis of the law of the ancient Roman Empire. Then it influenced the German legal development in the form of the *ius commune* having been educated at the universities of North Italy, which led to the complete reception through the *Reichskammergerichtsordnung* of 1495.<sup>39</sup>

The other main argument against the Roman law formulated in point 19 of the *Parteiprogramm* as well as it transmits materialistic world order, which became the basis of the capitalist private law through the theory of the German Pandectistics of the 19<sup>th</sup> century. “So, the task of the national socialism is dual in the legal field: [...] on the one hand, it shall force the law being foreign for the German folk spirit to the background firstly then oust it completely and establish a German law based on the old German principles; on the other hand, [...] it shall exclude the Roman law principles »serving the materialistic world order« and, instead of that, establish the (German) legal system based on the principle of »Gemeinnutz vor Eigennutz«, which defends not only the individual interests and it makes the public service fundamental for the law.”<sup>40</sup>

In the first part of the study, Pólay outlines the national socialistic legislature (pp. 129–134.) then the baselines of the law of the national socialistic state (pp. 134–155.) objectively, in a descriptive style. Most of the enacted acts on the influence of the national socialism concerned public law, administrative law, racial and family law, law of succession, labour law relations and the protection of some cultural values. Regarding the public, the German unity and the almightiness of the Führer were established by the *Gleichschaltung der Länder* of 1933 and the *Gesetz über den Neuaufbau des Reiches* of 1934.<sup>41</sup> The national socialistic racial theory rewrote the family law strongly as well since the family policy was connected to the protection of the “purity of the race”, especially through the prohibition of marriage and sexual intercourse with Jews. (*Blutschutzgesetz*, 1935). The ideology of “Blood and Soil” made the soil and the agricultural peasantry as one of the main basic pillars of the state. The current rules of property and succession were amended in light of this.<sup>42</sup> It fought against the Marxist doctrines in labour law to bring down the organisation of the working class and its attempts of class struggle (e.g., prohibition of strikes). The “Aryanisation” of the culture belonged to the

<sup>38</sup> PÓLAY 1939, 125.

<sup>39</sup> BRÓSZ – PÓLAY 1986, 88–89.

<sup>40</sup> PÓLAY 1939, 127. cites the introductory words of Coblitz to the *Handbuch of Franz* in Hungarian translation.

<sup>41</sup> Ibid. 129–130.

<sup>42</sup> Ibid. 181–182. He lingers in the presentation of land distribution statistics. This evokes reminiscences for his Jurate-era participation in the Statistics Seminar, where he wrote a professional study on the distribution of land holdings and the relationship between population density in the Mezőcsát district under the leadership of Károly Schneller, cf. BRUCKNER 1996, 193–194.; even HORVÁTH 1993, 13. mentions Pólay as a talented student of Schneller – I would like to say thank Richárd Gyémánt for the reference.

protection of cultural interests which led to the persecution of Jewish artists and creators and the destruction of their works many times (*“entartete Kunst”*).

The extensive argument of the national socialist organisation of law and state can not be the aim of this study. I would highlight those thoughts from Pólay’s informative description which are important to understand the attacks against Roman law. The propaganda centered the focus of the German people and its reasonings, it reshaped the constitution and the cardinal parts of the legal system referring to its interests.<sup>43</sup> The community, the public interest was highlighted in such a way to make it possible to deny the individual freedoms. The idea of “community” became a central category also in private law to deny the theoretical basic principles of Pandectists deriving from Roman law. They defined law arbitrarily and subjectively; the following sentence became a common saying: “Alles was dem Volke nützt, ist Recht, alles was ihm schadet, ist Unrecht”.<sup>44</sup> Hans Frank added that “[...] Recht ist das, was arische Männer für Recht finden.”<sup>45</sup>

These few quotes already show that the definition of law and the border of law and unlawfulness fell under a completely subjective judgment in the national socialist concept: *“The national socialism considers the people and not the state to be the source of every law. A certain act, which is the canon of every law, is written in the soul of the people from time immemorial. This is the »eternal legal idea« whose carrier is the people, the source of every law.”* quotes Pólay the argumentation of the German coryphæi. The idea of the “protection” of race and soil led to the reshaping of the law of property on soils and the law of succession (*Reichserbhofgesetz, REG, 1933*).<sup>46</sup> The enumeration could be continued far further...

However, let us turn our attention to the problems relating directly to Roman law.

In the second part of his study, Pólay shortly summarises the history of the German reception of Roman law and the pandectist jurisprudence. This part of his writing is mainly reminiscent of reasons of Koschaker’s *Kampfschrift* of 1938. He maps the history of the revival of Roman law from the works of glossators in the 12<sup>th</sup>-13<sup>th</sup> century to introduce the process of the formation of the unique European legal development, the supranational *ius commune*.<sup>47</sup> He highlights that Roman law was the treasure trove of the “educated and destined ones” for centuries which did not leave a mark upon in the laws of the German cities. However, it was the scholarly law and the basis of the public and private law in the Holy Roman Empire (surmounting the laws of the provinces), firstly under custom law, then accepted by a specific legislative act from the 15<sup>th</sup> century.

It is remarkable that Pólay implicitly challenges the national socialist charges when introducing the “law of pandect”: he emphasises that the German customary law had a big impact on the received Roman law: *“The spread of the law of pandect, however, did not involve that some German legal theorem did not remain valid. They stayed as local customary law.”*<sup>48</sup>

The development of the German private law occurred along two parallel lines: the sciences of the law of pandect and German private law. This process was ended with the

<sup>43</sup> PÓLAY 1939, 134.

<sup>44</sup> Ibid. 128. cites the text of Frank and Coblitz 1935, XIV.

<sup>45</sup> PÓLAY 1939, 128.

<sup>46</sup> Ibid. 151.

<sup>47</sup> Ibid. 155.

<sup>48</sup> Ibid. 158–159.

enactment of the BGB: the *Bürgerliches Gesetzbuch* (enacted on 18 August 1896; came into force on 1 January 1900) created a unified private law in the Empire.<sup>49</sup> “The aim of the national socialism was to eliminate this private law order to replace it with a German system of private law rooted in the German soul and in German soil.”<sup>50</sup> Pólay emphasises that not the “pure Roman law”, primarily the classical law of the ancient Rome was targeted by attacks but “the law, which based on the codification of Justinian and was applied to the relations of modern life infiltrated by German legal reference. It considers the basic principles and basic institutions of the Roman law to be incompatible with the principles of national socialism, not its detailed rules.”<sup>51</sup> Pólay fights to clear and make Roman law presentable in order to rescue it from the line of fire of national socialist attacks.

He then points out that the national socialists have been proclaiming their new perception for ten years, but they only published “the principles of the new private law”, the detailed regulation is still awaiting. In his opinion, such code is not expectable in the foreseeable future, so the BGB based on Roman law will not be overturned for a while. He warns about the importance of the international and European basic principles and institutions of private law based on historical foundations; it would not be practical for Germany to break away from European culture.<sup>52</sup>

Pólay examines the national socialist charges against Roman law; he emphasised again that the basis of the attacks was not the ancient Roman law but the liberal ideas of the 19th century embodied in the BGB. According to the national socialism, liberalism is promiscuity which lead to license and the degeneration of freedom; therefore, it shall be eliminated.<sup>53</sup> In their opinion, Roman law is too technical, practical, stern and a legal system being insensible to social problems, which puts individual interest at the foreground. Pólay emphasises that these features are rather virtues than mistakes of Roman law; he then debates the pertinence of the charge of social insensibility. The main points of his reasoning: Roman law has its roots in the past, but the German folk spirit also has historical roots, it is not just modern law; sanity is a virtue of every legal system; the respect of individual interest is natural in private law; Roman law also has its ethical principles and so on. Undoubtedly, reading the rough, harsh attacks of the German jurists committed to the national socialism, Pólay’s enthusiastic reasoning seems to be aimless fight. Let us cite another example: “According to Kersten, Roman law obfuscates the national consciousness as well and makes the individual selfish, whereas the German law gives direction to the individual for his behaviour and this direction is prescribed by the public will [...]. While Roman law is the law of individualism, German law is the community’s law.”<sup>54</sup>

Pólay then examines each legal area to point out the differences between Roman law and national socialist private law (emphasising again that the new code promised by the NSDAP was not ready; at the time of closing the manuscript, only the regarding policies of the party programme are known). He highlights, for example, that the Roman law of persons knows the subjects and objects of the law and it “classifies humans [to the

<sup>49</sup> Ibid, 160.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid. 161.

<sup>53</sup> Ibid. 162. with contemporary national socialist literature.

<sup>54</sup> Ibid. 164–165.

subjects of law] *without any individual, racial etc. differences*"; whereas the national socialism makes distinctions based on race and it excludes a certain number of persons from some rights.<sup>55</sup> The "new" legal concept is not homogeneous regarding the objects of law, i. e. the things as well since it differentiates between living and non-living objects. Another reason against Roman law was that the doctrine of legal persons remained mainly unfinished. Pólay points out in the law of things that although the definition of things in the classical law was general and unified, but the archaic law differentiates between *res Mancipi* and *res nec Mancipi* from the point of view of "peasantry law"; "*this categorisation of the archaic law all defended the protection of Italian estates.*"<sup>56</sup> Several leading Roman jurists at that time tried to develop this saving thought to prove the sensibility of Roman law to social and economic aims and to introduce that the Roman property was not always and not solely individualist phenomenon. Let us turn our attention to the monographs regarding the property of the young Max Kaser.<sup>57</sup> The national socialist acts took trees, living animals, some natural treasures (cliffs, springs etc.) and soils being farming estates out of the general definition of things and gave them special protection.<sup>58</sup>

According to national socialists, property is "extended to impurity in Roman law"<sup>59</sup> since the owner may do anything with his thing, without any regard to the necessities of the community. Therefore, the national socialist legislature set up restrictions regarding the property and introduced a form of property declared to be new by the *Reichserbhofgesetz* (1933, fundamental of *Blut-und-Boden-Ideologie*). It was a hereditary farmland which was under the supervision of the state and the right to dispose of it was restricted both between living ones and in case of death as well. Furthermore, it was also restricted regarding the subjects based on racial, economic, and moral aspects.<sup>60</sup>

The right to dispose of the *Erbhof* was qualified a new property being different from Roman law. Many jurists were committed to national socialism. Especially the name of Franz Wieacker was associated with this view; in his opinion, there is a completely new definition of property which is not based on the principles of Roman law anymore.<sup>61</sup> He stressed that the entitled person of the *Erbhof* has a *Gemeinschafts- und Pflichtgebundenes Sondereigentum* since it is not just a simple property but the essential of this right is „eine verantwortliche und sozialrechtlich beschränkte eigene Zuständigkeit des Gemeinschaftsgliedes."<sup>62</sup> Pólay also cites the opinion of Wieacker: "*According to Wieacker, every experiment is superfluous which want to ensure consistency between the property of BGB so that the Roman law and the definition of property of the REG.*"<sup>63</sup> The new order of ownership thus created of course is not based on the principles of Roman law, where everything is equal from the point of view of ownership, but it suits the new perception of ownership that makes a profound difference between things.<sup>64</sup>

<sup>55</sup> Ibid. 168.

<sup>56</sup> Ibid. 174.

<sup>57</sup> KASER 1939. KASER 1943.

<sup>58</sup> PÓLAY 1939, 176.

<sup>59</sup> Ibid. 177. – quoting Lange's words.

<sup>60</sup> For the institution see Ibid. 177–189.

<sup>61</sup> WIEACKER 1934, ss. 1446. Cf. RÜTHERS 2012, 177–178. ISENSEE – KIRCHHOF 2010, § 173.

<sup>62</sup> WIEACKER 1936, 36. WIEACKER 1934, Sp. 1449. Cf. for the topic Akademie für Deutsches Recht XV.

<sup>63</sup> Emphasis taken from Pólay.

<sup>64</sup> PÓLAY 1939, 184.

Pólay strongly criticised Wieacker that he wants to divide things „according to the size of liability which the owners retain against the community.”<sup>65</sup> Thus, several different forms of property would arise, which would put the obligations (and not the rights) of owners in the foreground.

Pólay reviews the experiments of the German jurisprudence to the theoretical classification of the *Erbhof* founded by the *REG*. Then he asserts that the *Erbhof* is not a *sui generis* new property but a strongly restricted form of the Roman property; similar constructions exist in other European legal systems as well: “In our opinion – no matter how pleasing the recent perception may seem – we are forced to join to the second group that sees a severely restricted form of property in the property on the *EH*.”<sup>66</sup> Then he emphasises that the Roman property was not unlimited as well. In contrary, we know several boundaries that make differences in some cases regarding the types of things (e.g., *res Mancipi* – *res nec Mancipi*). The national socialist concept differs from it since it increased the extension of the restriction of property significantly.

It is worth having a closer look at the situation of the law of obligations, its relation to the national socialist principles since Roman law was fiercely attacked in this area as well. According to the allegations, the doctrine of legal transactions, the theory of principles of will and declaration are too individual since the idea of duty should be subordinated to community ideas that go beyond obligations. The principle of will shall be rejected; in its place, the economic equality of the contracting parties shall prevail and the conclusion of the contract shall be dependent on whether the given *obligatio* “is allowed by the law” and “if it is compatible with the community thought”<sup>67</sup> The liberal private law based on Roman law grants “the creditor a monopolistic situation against the debtor”; it orders the obligation to be completed even if “it resulted in the complete economic destruction of the debtor.”<sup>68</sup> Pólay raises the following question concerning this: “Let us examine whether the aforementioned principles were foreign to the national socialism which introduced such a principle into its legal system based on the Roman law, so was the basis of these principles in Roman law?”<sup>69</sup>

#### *Some early studies of Pólay – against the national socialist legal concept?*

Hereinafter, I would like to mention two studies from Pólay whose choice of topic and reasoning take – in my opinion – his aforementioned thoughts further, contextualizing them in an academic dissertation.<sup>70</sup>

<sup>65</sup> Ibid. 184–185.

<sup>66</sup> Ibid. 185.

<sup>67</sup> Ibid. 190.

<sup>68</sup> Ibid. 191.

<sup>69</sup> Ibid.

<sup>70</sup> The core of both studies was formed in the years of the Law Academy of Miskolc, where Pólay was a diligent and enthusiastic member of the Roman law seminar of Zoltán Szehló. He was already involved in academic life here and won the prize for three consecutive academic years for his dissertations on Roman law: in topics of interest (academic year 1933/34), *patria potestas* (next year) and *datio in solutum* (academic year of 1935/36), cf. BRUCKNER 1996, 197.

The whole academic work of Pólay was characterised by the affinity for the law of obligations. This could be the reason why his early studies on Roman law draw on the law of obligations. Reading his study debating the national socialist legal concept, the reader has the impression that the choice of topic of his studies published before or during the war were determined by his fierce opposition which first appeared here.

Pólay went into more depth in these topics by processing them in such a way so that he could implicitly deny the charges of the national socialist propaganda against Roman law. This effort is particularly conspicuous in case of “*Datio in solutum*” and “*Interest*”.<sup>71</sup> Both topics concern the intersection of economy and law and in both cases, it is about that the legislature reflects on the dysfunctions of the economic life.

It is without doubt that Roman law stands on the ground of private autonomy: the will of the parties is primary in contract law, the terms of contracts were called also *lex contractus* in the sources; the parties enact an “act” with the consensual and bilateral will for the legal relationship between them.

Pólay, however, has already indicated in his study concerning national socialism that “there already had been such legal provisions in the oldest times when they sought to defend the debtors willing to ease the strictness of the ancient acts of debt.”<sup>72</sup> He covers the acts restricting the interest in a few lines, which appeared from the time of the Twelve Tables in Rome: “Based on these, Roman law was falsely accused with the charge that it made the creditor unilaterally dominant with making the will of the parties sovereign and it sank the debtor to slavery.”<sup>73</sup>

The copy of *Datio in solutum* also has the seal of the “Roman law seminar of the University of Debrecen” Pólay began with the study of terminating the obligation, analysing the legal effects of the performance of contract in the light of the Pandectist theory. He cites Steiner, Koschaker, Partsch<sup>74</sup> and other representatives of the “ancient legal history” to justify that the private law of the ancient East also had already known the possibility of giving in payment and the difference between *Schuld* and *Haftung*; similarly, their impression upon the old-German law could be observed (the reference to the old-German law is also a reason against the national socialist charges).<sup>75</sup> The execution on the body of the insolvent actor showed – without doubt – the strictness of Roman law and the weaker situation of the debtor, but Pólay highlighted that acts defend the debtor as early as the 4th century BC against the cruelty of the creditor.<sup>76</sup> The giving in payment (*datio in solutum*) appeared early in Roman law with the mutual will of the parties; so the parties had the possibility to change the object of the obligation if the debtor could not offer the original service for performance (*in solutum dare* and *accipere, pro debito accipere*).<sup>77</sup>

<sup>71</sup> PÓLAY 1938a, 51. és PÓLAY 1943, 24. Géza Marton praised his clear pandectist reasoning of *Datio in solutum* in particular.

<sup>72</sup> PÓLAY 1939, 191.

<sup>73</sup> Ibid. 192. On the following pages, Pólay describes the national socialist concept in housing and employment contracts, as well as in family law and law of succession. These arguments cannot be detailed in the present study due to lack of space.

<sup>74</sup> PARTSCH 1909. STEINER 1914. KOSCHAKER 1911. PÓLAY 1938a, 6.

<sup>75</sup> PÓLAY 1938, 16–17.

<sup>76</sup> Uo. 8–9.

<sup>77</sup> Ibid. 12.

The Pandectists did not like this legal institution since an *aliud* service occurred. Some scholars tried to insert the phenomenon into a stricter theoretical system, so as to evaluate the legal institution as *compensatio*, exchange, sale or settlement. Pólay, in the end, follows the definition of Steiner, according to which in case of *datio in solutum*, it is about a dissolution of liability with the consensus of the creditor with the service of “other what has been agreed.”<sup>78</sup> Pólay emphasises that the *datio in solutum* is the transaction in the *communis opinio*, so the agreement of the equal parties based on mutual trust.

Later, Justinian’s law made it compulsory for the creditor in some cases to accept “the other service” to protect the debtor being economically vulnerable.<sup>79</sup> All this testify the social-economic sensibility of the “equitable Roman law” and that it took the interests of the community into consideration at the expense of the individual interest.<sup>80</sup>

Pólay’s study on the interest show similar considerations: the author tries forging reasons against the national socialist attacks against the Roman law. The interest (*foenus*) is the legal institution of the credit life: Pólay presents – obviously under the influence of the seminar in Berlin – the related rules of the old-Babylonian, Hebrew, Greek, Egyptian and the German laws in a comparative legal chapter. It is interesting that according to Tacitus, Germans were unaware of the interest.<sup>81</sup>

The study reviews the provisions restricting the interest in six chapters in the around thousand-year history of Roman law, which aimed to repel usury.<sup>82</sup> He can introduce several examples to justify that the Roman law scolded the individualist approach as well as the too liberal protectionist approach. He also demonstrated that the Roman law took into consideration not only the “dominance of the creditor” in the law of obligations but it respected the interest of the debtor (and the community with that) as well.

He then corrects that although the old German customary law and canon law did acknowledge the rationale of the interest, but it is not only reasonable from the economic side but necessary as well: “In general, the legal institution of interest was known in the legal systems of all ancient people in general. This institution owed his existence to economic rationality; in case it was not obvious that when the fruit of the estate and animals etc. were due to the owner as a reward for the work invested. However, the money lent or otherwise invested and circulated: the capital shall not bring any benefit for the owner who takes risk possibly up to the entire capital with its investment and circulation. It is natural, therefore, that the material Roman perception had the principle that there is *quid pro quo* for the usage of the capital.”<sup>83</sup>

Finally – due to the limits of the study –, I would refer shortly to the habilitation work of Pólay with titled *A praetor szerepe a római magánjog fejlődésében* [*The role of the praetor in the development of Roman private law*] published in 1944 in Miskolc also reflected several times – in defence of the Roman law – on the national socialist attacks. These criticisms could be diagnosed not explicitly but “between the lines”; however, knowing the 1939 study of Pólay, the reading is obvious. For example, he phrases the

<sup>78</sup> Ibid. 16, 27.

<sup>79</sup> Ibid. 28.

<sup>80</sup> Ibid. 48–49.

<sup>81</sup> PÓLAY 1943, 5–6.

<sup>82</sup> Ibid. 7.

<sup>83</sup> Ibid. 22.

evaluation of *edict* of the *praetor* as legislative phenomenon as follows: “During the creation of the *edictal* rules, the *praetor* takes the practice controlled by the decrees as a basis, so as a result, validates the legal conviction of the people in it. [...]”<sup>84</sup>

Then he clarifies that it is a common act of the people and the magistrate (who proclaims the *edict* based on his *imperium*), so it has the “*consensual will of the people and the magistrate*.” Roman law also knew the importance of “folk spirit” and took it into consideration in the legislation. The assertion is unfounded that the role allocation of *Volksgeist* is the “foundation” of the national socialism.

To sum up, it can be stated that Elemér Pólay’s comprehensive study about the national socialist legal concept is really interesting from many aspects, an important work for the body of academic history. On the one hand, he visualises a detailed picture about the legislation induced by the party programme of the NSDAP in Germany in an objective manner. He covers briefly the acts enacted in the topics of laws of persons, family, property, succession, and obligations. He seeks to give a critical classification and theoretical evaluation of the changes executed in the legal system, measuring them in the system of private law perfected by Pandectists. On the other hand, he advocates in the defence of his chosen discipline, the Roman law. He tries to deny the national socialist attacks against Roman law, systematically point by point, for example, he resolutely attacked *Wieacker*’s theories of property being celebrated in Germany. Pólay’s study is a valuable proof of the Hungarian situation, the spread of the national socialist studies and the trends against them.

#### *Some remarks about Pólay’s work*

Finally, I would like to return to the praise of the oeuvre of Pólay. His work for the habilitation has an outstanding significance among the academic works before the war which deals with the legislative work of the *praetor* being decisive in the development of the preclassical and classical Roman law. It is a well-known principle that “*praetor ius facere non potest*.” The *praetor* is not a legislator but someone who applies the law: his primary task is the seizure and supervision of the jurisdiction (*iurisdictio*). It can be observed, however, from the early stage of the development of Roman private law that the statements of the parties and the decision of the magistrate about the recourse and through the fixation of the cause of the case, the *praetor* actually forms, changes, corrects the substantive law. This study of Pólay is still a guide for Hungarian romanists. He returns to the topic one more time in his oeuvre: around thirty years later, he extends his analysis to the thinking of Roman jurists in general. He enlightens the relationship between magistrate and jurisprudence, pointing out that the scientific approach has a constant and fertilising influence on the legal practice. His pioneering work, which had a great international resonance was the monograph introducing the contracts of the waxed boards of the Roman Dacia versatily. Its chapters were published in foreign language, in foreign journals and volumes. His works about pandectistics are fundamental: it is well known that this German jurisprudential trend of the 19th century was refining in the

<sup>84</sup> PÓLAY 1944, 166–167.

creation of the German Civil Code. The influence of pandectistics, however, went far beyond borders: its system, definitions, legal institutions and elaboration of its theory still has influence on the continental and even in the common law systems on the theory of private law. Pólay presents in depth, with a monographic demand, the main strands of German pandectistics and then its impact on the development of the Hungarian private law. The last significant research topic of his oeuvre was the *iniuria*. The *iniuria* includes the real- and verbal forms of the personal injury, the infringement of personality rights; thereby drawing the attention of the profession to a field of private law, which, in the 1980s, was a novelty even in the realm of legal history. In addition to his research published in monographs, he wrote several other private law studies; I would like to refer in particular to his work on succession and family law.

The academic work of Elemér Pólay is outstanding, it was unique in the Hungarian jurisprudence. His numerous monographs and studies serve as examples to his descendants. However, quality is more important than quantity: his writings reflect such a high professional-research standard and ethics, such an honest determination, desire for knowledge and innovative thinking that stands out high from the post-war jurisprudential landscape. His impact and significance are also marked by the fact that he was able to appear in international forums even in the period of isolation and was able to keep pace with the very high quality of international Roman legal research. He also published his monographs and studies in a foreign language and undertook and actively engaged with international competition. His work and humanity set an example for us all.

### III. His selected works

- Hammurabi törvénygyűjteményének büntetőjoga* [The criminal law of the Code of Hammurabi]. Miskolci Jogászet 12 1936/3-4. 53–58. [PÓLAY 1936a]
- A régi Egyiptom öntöző kultúrája* [The culture of irrigation in the old Egypt]. A Földgömb VII 1936/6. 218–223. [PÓLAY 1936b]
- Datio in solutum*. Miskolc 1938. [PÓLAY 1938a]
- A földbirtokmegoszlás, népsűrűség és a népszaporodás kapcsolatai* [Relationships between land distribution, population density and population growth]. Jogakadémiai szemináriumok értekezései 10. sz. Miskolc, 1938. [PÓLAY 1938b]
- A német nemzeti szocialista jogfelfogás és a római jog* [The legal perception of the national socialism and the Roman law]. Ludwig István Könyvnyomdája. Miskolc, 1939.
- A kamat a római jogban* [The interest in Roman law]. Miskolc, 1943.
- A praetor szerepe a római magánjog fejlődésében* [The role of the praetor in the development of Roman private law]. Miskolc, 1944.
- A római jog oktatása a két világháború között Magyarországon* [The education of Roman law in the interwar period Hungary]. Acta Universitatis Szegediensis de Attila József nominatae, Acta Juridica et Politica, tom. XIX. Fasc. 2. Szeged, 1972. 3–23.
- A pandektisztika és hatása a magyar magánjog tudományára* [The pandectistics and its effect on the science of Hungarian private law]. Acta Universitatis Szegediensis. Acta Juridica et Politica, tom. XXIII. Fasc. 6. Szeged, 1976.
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BARNABÁS KISS

## ÖDÖN POLNER\*

(1865–1961)

### *I. Biography*<sup>1</sup>

Ödön *Polner* was born on 15th March 1865 in Fürjes-pusztá, which is near to Békéscsaba. He spent his early childhood in a mansion there. His ancestors were mostly German craftsmen, several of them became part of the Hungarian nobility. In 1873, as he turned eight, he was sent to Budapest to his uncle's house to start learning in the third grade. After finishing the fourth grade in the Evangelical Primary School, he continued his studies in the Evangelical Secondary School of the Deák Square, it was an eight-year-term school in his time.

He began his university studies at the University of Technology, but after a semester he matriculated to the Faculty of Law. He was promoted to the Doctor of Law in 1889.

He started his professional career in the Royal Regional Court of Budapest on 30th October 1889. We know from his memoirs that his real professional purpose was to become a university professor. His interest and knowledge in public law was proved as he wrote a paper about the Public Law Relations between Austria and Hungary in 1890 for the Royal Hungarian University of Budapest for which he received 200 Forints of the shared prize. His work was printed at his own expense in the summer of 1891.<sup>2</sup>

*Polner* thought that joining the Ministry of Justice will be fruitful for his ambitions of becoming a professor. His wish came true with the help of Dezső *Szilágyi*, the current Minister of Justice as he was appointed for further duty in the Ministry of Justice after he was released from the service in the district court in August 1891. In the ministry he participated in the preparations of several significant government bills and intergovernmental treaties, and he continued his academic work as well. He was strengthening his intent to achieve teaching authorization; he published another paper while

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<sup>1</sup> We relied on the book of Ödön *Polner* about his life in this part of the paper, which was edited by his grandson. POLNER 2008. The recollections of his grandson in the book of the scientific meeting organised by the University of Szeged, Faculty of Law also helped. HAVASS 2008, 57.

<sup>2</sup> POLNER 1891, 218.

he was a ministry trainee. He was encouraged by Ágoston *Lechner*, who was a professor of public law and one of the reviewers of his prize-winning paper. In 1893, he wrote the paper called '*The Executive Power in the Hungarian Constitution*'<sup>3</sup> and it was published in the new journal called '*Jogi Szemle*'. In his curriculum he reviewed this paper as the highest level of quality from all his work. He achieved his teaching authorisation in 1895 based on this work and became the private professor of public law at the University of Budapest. He was appointed as extraordinary university professor in 1905.

In 1908 he became a corresponding member of the Hungarian Academy of Sciences. In his inaugural address he analysed again the legal base of the relations between Austria and Hungary in 1912. The paper also was published in the book '*Ünnepi Dolgozatok*' celebrating the 40th anniversary of Győző *Concha*'s appointment as a university professor.<sup>4</sup>

The Act XXXV of 1912 established two new universities in Pozsony and Debrecen. (Szeged also applied to become a university seat but failed.) In Pozsony firstly only the Faculty of Law was established in 1912. Here, in the Elizabeth University *Polner* became an ordinary university professor of public law and politics in 1914. He became the dean with the given powers of the rector of the Faculty of Law in 1915-1916. He was the rector of the university in its last year, in 1918-1919 during the Czech occupation (1.1.1919). The Czech authorities suspended the university operations, and the professors were placed under police surveillance. *Polner* was arrested for a short time on 4th February 1919. Later he was interned in Moravia for about six weeks.

After the Treaty of Trianon, he taught in Budapest, then in Pécs. The University of Pécs is the successor of the University of Pozsony. *Polner* played a key role in the relocation to Pécs.

Ödön *Polner* accepted the invitation of the University of Szeged, and he became the Head of the Department of Public Law in 1923 to live closer to his birthplace, Fürjes. He was the Head of the Department until his retirement in 1935. During his years as a Head of Department, he was vice dean twice, 1926-1927 and 1929-1930, prorector in 1927-1928 and he was the dean of the Faculty of Law and Political Sciences in 1928-1929. From 1931 until his retirement, he was the coeditor of the *Acta Juridico – Politica*, the scientific journal of the Faculty of Law. He was the leading university professor of the '*Student Protection Office*' between 1935 and 1938.

A great celebration was organised for the 70th birthday of Professor Ödön *Polner* by the Faculty of Law and Political Sciences in 1935. A two-volume book was written by the eminent experts of the legal studies of the time. Some of the authors of the first Volume: László *Buza*, István *Csekey*, István *Ereky*, Ferenc *Finkey* and Barna *Horváth*. The *Luther Association of the University of Szeged* published a book on the 70th birthday and the 10th anniversary of high patronage of Ödön *Polner*. The foreword stated: 'in the name of his blessed extensive work.'<sup>5</sup>

The peak of his academic career was when the Hungarian Academy of Sciences elected him as an ordinary member. His inaugural address was about '*Some Important*

<sup>3</sup> POLNER 1893, 94.

<sup>4</sup> POLNER 1912, 19.

<sup>5</sup> The book was edited by president László *Benkő*.

*Issues of the State Life*’ which was published in 1935.<sup>6</sup> From 1945 he was an honorary member of the Hungarian Academy of Sciences, albeit he was downgraded to a conferring member in 1949. He became the Doctor of Sciences according to the ‘socialist classification system’ in 1952. The General Assembly of the Hungarian Academy of Sciences restored his ordinary membership only after his death in 1989.

After his retirement, Ödön Polner did not ignore his connection with the University of Szeged. He was the director of the abovementioned Student Protection Office where he received student requests for assistance daily. He continued his work on the actual issues of public law and the work of the eminent Hungarian public lawyers with great intensity. Most of these were published, but some of them were kept as manuscripts. Polner mentions his book *‘The Upper Part of the Holy Crown of Hungary’* which was published in 1943,<sup>7</sup> and a 49 pages long critique about the history of awards and medals which he wrote in 1943.

The once celebrated academic was in a very undignified situation during and after the second world war. He lost almost everything of importance apart from his family. After the normalisation of the circumstances of the war, he was the lecturer of comparative constitutional law at the University of Szeged until 1950-1951. He stayed in contact with some of his faculty members and students. László Buza and Sen. János Martonyi, who offered the eulogy at his funereal as the dean, should be mentioned among them.<sup>8</sup> One of his late students, György Antalffy also respected the ignored professor, and supported some of his requests.

Ödön Polner died at the age of 96 on 7 February 1961 in Szeged. His grave in the Inner Cemetery was declared to be protected by the National Committee of Memorial and Piety.

After the death of Ödön Polner the University of Szeged held a memorial conference for the 100th birthday of the late professor in 1965. The Polner family and the Faculty of Law and Political Sciences of the University of Szeged placed a plaque on his late apartment at 5 Klauzál Square 10th October 2008. A scientific conference was held, and a memorial book was published on this afternoon.<sup>9</sup>

## II. Academic work

The science of Hungarian public law was dominated by the historical school, which was based on describing and glorifying the instruments of the feudal public law institutions like the ‘national resistance’ in the second half of the 19<sup>th</sup> century.<sup>10</sup>

The start of the scientific career of Ödön Polner was in the last decade of the 19<sup>th</sup> century when the dogmatic school became dominant in the Hungarian public law theory. This new direction of public law was rooted in Germany. Paul Laband’s (1838-1921) *Public Law of the German Empire* -which was published in 1876 - is the classic

<sup>6</sup> POLNER 1935.

<sup>7</sup> POLNER 1943, 150.

<sup>8</sup> János Martonyi also wrote a short memorial which was published in 1961 in the *Jogtudományi Közlöny*.

<sup>9</sup> KISS 2008.

<sup>10</sup> TAKÁCS 1959, 56. ACZÉL-PARTOS, 2008.

work of the school. Ernő Nagy (1853-1921), who was a Hungarian student of *Laband*, opposed the dominant historical school in his book in 1887,<sup>11</sup> playing a determinant role in integrating the dogmatic school in Hungary. “I am not alone with the thought that the usage of the so-called historical method while analysing the public law is not enough anymore. Life and the science of public law are also urging the dogmatic examination.” the Professor of the Judicial Academy in Nagyvárad wrote in the foreword of his book. He demanded the understanding of Hungarian public law in force as legal science.

The legal dogmatism appeared as the analytical branch of the positivist school in the Hungarian public law. “The Dogmatist School took the leading role in the field of public law using scientific objectivity, introducing positivist methods, using a great set of data and processing a wide range of legal rules.”<sup>12</sup> This approach defined the work of Ödön Polner as well.

Some of *Polner's* work did not become public, as several of his papers, letters, and records on the solutions of actual issues of public law ended up in the archives.<sup>13</sup>

The published scientific work of Ödön Polner is extensive and comprehensive. Besides writing comprehensive monographs and papers, he was also heavily involved in preparatory legal work and reviewing draft laws. He did these tasks with great professional accuracy and scientific professionalism. He wrote 73 original or individually printed papers, 12 newspaper articles and 70 headings in the 6 volumes of the *Magyar Jogi Enciklopédia* published between 1898-1907 (His literary work can be found in part III.).

If one aims to summarise the work of Professor Polner per topic, the following list can be formed:<sup>14</sup>

1. The public law relations between Hungary and Austria (the definition and classification of the state relations in detail, the legal nature of the constitutional treaties, the public law characteristics of the *Pragmatic Sanction*, the legal view on the Austro-Hungarian Compromise and common portfolio).
2. The executive power in the Hungarian constitution, functions, and organisation of the government.
3. Laws of election, the nature of suffrage and voting arbitration.
4. Issues of the law of the parliament, functions and organisation of the parliament and the conditions of becoming a member of the parliament.
5. The public law between the two world wars, the question of the throne and the solution of the question of the king in Hungary.
6. The public aspects of the exceptional powers decreed in war situations.
7. Great historical figures (Ferenc Deák, Lajos Kossuth, II. Ferenc Rákóczi), and the work of illustrious public lawyers (Győző Concha, István Ereky, Geysa Ferdinandy, Ernő Nagy).

<sup>11</sup> NAGY 1887.

<sup>12</sup> TAKÁCS 1959, 56.

<sup>13</sup> The author of this paper gave the documents which were found in the library of the Department of Constitutional Law to the Library of the University of Szeged in 2011.

<sup>14</sup> KISS 2008, 11–12.

The varied subjects of the list demonstrate the impossibility his life's work's detailed presentation in a short paper. Therefore, only the first four topics which are better linked to the current public law issues will be examined from *Polner's* work.

The first significant area is the issue of state relations, the analysis of the relations of Hungary and Austria from the public law viewpoint. The first scientific work of *Polner*, the '*Public Law Relations between Hungary and Austria*', published in 1891, represents the growing influence of the public law dogmatism in Hungary.<sup>15</sup> According to László *Buza*, the young author successfully eliminated the untrust regarding the dogmatic method and provided a significant contribution in the process of the method becoming exclusive in the Hungarian literature of public law. Ödön *Polner* established his vast historical, political and legal knowledge, his nimble-witted legal thought and his fine use of the dogmatic legal method with this paper that he became one of our best public lawyers - *Buza* wrote.<sup>16</sup>

His work contains three parts. In the first part he examined the state relations in general, analysing the modern state relations individually. The second part studied the historical development of the relations between Hungary and Austria until 1867. The third part examined the current (1891) situation of the two states by studying the public law bases and the common portfolio. The starting point of his observation was the following issue: is the entity one state with different organisation in some questions or two or more separate states?

His classification of the state relations was more detailed as the classification used nowadays. The three-part division of the state relations, federation, confederation, and alliance, are necessarily crossed by the so-called unions, the personal union and the real union in his system of definitions.

He deduced clearly that the relations between Hungary and Austria were a personal union from 1723, from the *Pragmatic Sanction* until the Austro-Hungarian Compromise, so the states were independent. The relations of the two states are international and based on an international treaty, not an internal state treaty which is between the monarch and the nation. The *Pragmatic Sanction* and the Act XII of 1867 as well is an international treaty externally and an ordinary law internally.<sup>17</sup> He proved that the relations between Hungary and Austria were a personal union after the Austro-Hungarian Compromise as well because, the nowadays generally used, real union only exists if the common monarch unifies the two state powers. The so-called common portfolio does not mean the unification of the state powers.

*Polner* examined the public law relations of Hungary and Austria several times for decades. Our short review of these works is based on László *Buza*.<sup>18</sup>

One of the topics was the legal nature of the constituent contracts, internal state treaties. In his paper published in 1902,<sup>19</sup> he opposed Ágost *Lechner* and Geysa *Ferdinandy*, stating that the theory of the internal, between the nation and the monarch, state treaties is outdated and alien to the spirit of our public law and the public law view of

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<sup>15</sup> POLNER 1891, 218.

<sup>16</sup> BUZA 1935, 5–6.

<sup>17</sup> KISS 2008, 12.

<sup>18</sup> BUZA 1935, 11–19.

<sup>19</sup> POLNER 1902, 52.

the constitution. He supported the view that the *Pragmatic Sanction* created a confederation as it only established a common order of succession in the two states. In his inaugural address given as the corresponding member of the Hungarian Academy of Sciences in 1912,<sup>20</sup> he maintained his view that the *Pragmatic Sanction* is an international treaty. He said that the statement of the Act XXII. of 1867 about the *Pragmatic Sanction* being a 'base contract' which is 'between the royal monarchy and Hungary' is not contradictory with his stand. The definition by law cannot be decisive about the scientific and theoretical qualification of the legal nature of the provisions. That is the reason why the *Pragmatic Sanction* is an international treaty in the view of the Austro-Hungarian Compromise Act as well, which was concluded between two international entities, two states, the Hungarian state, and the Austrian royal house - according to *Polner*.

Ödön *Polner* examined the material questions of the relations between Hungary and Austria in detail, so he analysed the common portfolio comprehensively. He wrote every heading about the common portfolio in Volume 5. of the *Magyar Jogi Lexikon* which was edited by Dezső *Márkus*, published in 1904. In these writings he always supported the whole sovereignty and independent statehood of Hungary. He stated that both the external relations and the defense relations only partly common, or to be more precise and clearer: only '*decided with common understanding*'.

The issue of succession emerged in *Polner's* work in 1916 with the accession to the throne of Charles IV. in connection with the relations of Hungary and Austria. According to his memoir, he actively participated in the preparations of the coronation as a public law expert.<sup>21</sup> During the process, he phrased the royal pledge and oath, the precise title of the king and the definition of the participating dignitaries in the coronation. He examined the conditions of the Hungarian order of succession in a special issue of the *Jogtudományi Közlöny*, which was published for the coronation of Charles VI.<sup>22</sup> In two earlier issues of the *Közlöny*, he proposed solutions to the name and the title of the new king, which can show the independent statehood of Hungary, meaning that the monarch is the head of state of two sovereign states.<sup>23</sup>

Another significant part of the work of Ödön *Polner* is related to the scientific definition of the executive power. The author's aim was to define the executive power without classifying this expression appropriate or correct in his fine work in 1893.<sup>24</sup> The reason for choosing this title was that the Hungarian laws and the constitution used this expression and accepted the division of powers for legislative, executive, and judicial powers. In his opinion, the conclusion which can be made is the following: '*what is not legislation and not judicial activity is a power of the executive. Albeit defining is not enough.*'<sup>25</sup> Therefore, there is also a need to define the executive power in a '*positive direction*'.

Chapter V. of Ödön *Polner's* work has three main parts. Firstly, he tried to define the executive power with a theoretical depiction. He rejected the classical theory of the

<sup>20</sup> POLNER 1912.

<sup>21</sup> POLNER 2008, 363–364.

<sup>22</sup> POLNER 1916a.

<sup>23</sup> POLNER 1916b.

<sup>24</sup> POLNER 1893, 1.

<sup>25</sup> POLNER 1893, 2.

division of powers into three branches. He divided the exercise of governmental authority into two parts, the legislative power, and the executive power. He saw the judicial power as a part of the executive power. That was the reason for examining judicial issues in his work.

Afterwards, he analysed the forms of governmental actions and their classification. He distinguished four different forms of governmental action based on a quite formal categorisation. The first is the rulemaking, which is a legislative function if it becomes a law. The second is the '*administering*', which is the direct exercise of power on the individuals. The two forms of the '*administering*' are the justice and the administration. The third branch of the governmental action is the '*right-granting action*'. According to Polner, these are the actions which will influence the relations between the individuals or the relations between the individual and the state, as an example: land registration, appointment of a custodian etc. The fourth form is '*administration without authority*' which is a governmental action without expressed power. The last three governmental actions are part of the executive power in Polner's understanding.

In the third part of the paper about the executive power, the organisational framework of the executive power and the legal position of the examined institutions were analysed with great precision and multi-faceted scientific integrity by the young scholar.

The issue of the legislation on the voting system had outstanding importance in the work of Ödön Polner. It can be concluded from his publications that his interest was based on the codicator's point of view. It must be said that his views in this area were not very progressive even in his own time. In his defense: his opinion was based on solid theoretical aspects which can be seen as logically using his point of view as a starting point.

He created the base for his work about the suffrage in the paper '*The Nature of the Suffrage*', which was published in the *Jogtudományi Közlöny* issue 37 in 1901.<sup>26</sup> This paper '[...] is not about just the suffrage, moreover, for the most part it is about the human rights in general and especially his public law rights and their place in the classification of human rights.' he wrote.

In the introduction of the paper, he contradicted the widespread view that the elections are an exercise of an individual right, the right to vote. In his opinion, the voting is not an exercise of a right, suffrage is not a human right. He agreed with Laband and Jellinek that the election is a governmental action which creates a public body. Through the elections a defined group of citizens contribute in 'giving life to a public body'.

The ability to vote is the '*voting authority*' according to Polner. '*The voting authority is a possibility for someone participating in a state action called the elections and his will to be taken into consideration when choosing the head of a state institution. The voting authority is nor a human right, neither an individual right, so it is not appropriate to call the voting authority the right to vote and view it as a right.*'

Polner did not only view the right to vote as a human right, but also the political rights in general. '*These political rights are not human rights, but the power of the public authority.*'

According to Polner, there is a genuine difference between the political rights and other human rights. Polner was against the natural law theory of human rights and

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<sup>26</sup> This work was published with additional part as a separate paper called 'The Nature of Suffrage'.

excluded the political rights from the group of human rights. In his view, the political rights are not subjective rights but the rules of the exercise of governmental authority in essence. The only common feature between the political rights and the other human rights is that *both 'are the freedom of action given by the legal order of the state.'*

He gave a specific explanation for the limitation of political rights against the movements of the time with aim to widen the range and subjects of political rights. Different aspects must be taken into consideration during the distribution of rights and the distribution of powers - he wrote. The sense of justice would not allow for not enjoying the same rights during the division of rights for everyone. On the contrary, it is acceptable to give different powers to the state institutions as *'defined only for the public interest'* expediency dictates. According to Polner, *'the only guideline for deciding who is capable of exercising power is the fact whose power is beneficial for the state.'*

He has two preliminary principles while examining human rights. The first is that *'human rights exist only in a state, only as a reason of state measures.'* The other theorem of Polner: *'the main type of human rights nowadays are the property rights'*, so the property rights are the most perfect, the most well-defined parts of the system of human rights. Then he analysed the general, *absolut*, and the *relative* property rights of the man in the level of principle.

He not just created theoretical works about the suffrage, but also examined several laws and bills and published his critiques mostly. Among others, he analysed the bill on the right to vote in 1918,<sup>27</sup> which, with the ideas of Polner, became the Act XVII of 1918 with several modifications, albeit it did not enter into force. I would only like to note as a matter of interest that the original bill, for the first time in Hungary, aimed to give the right, with certain conditions, for women to vote as well, but this opportunity was abandoned by the Special Suffrage Commission.

He made no attempt to hide his opinion against the widening of the political rights. While he did not aim to examine this political trend *'sympathetic for the freedom-loving people'*, his *'codicator's opinion'* was against the widening of the right to vote. *'State function, and the right to vote as well, can be trusted with only the people who has the needed moral, intellectual and material guarantees to use this power for the people properly.'*<sup>28</sup> Polner wrote in the introduction of his paper. Polner examined the provisions of the bill with the absolute precision of a lawyer. These were drafted with the Act XIV of 1913 in mind. As this law was a positive step for *'regularity and legal accuracy'* in the field of election laws in his view, he thought that an amendment would be enough instead of adopting a whole new text of a law to spare time, energy, and money.

Polner firstly analysed the most significant provision of the new bill, the material side of the suffrage. More importantly, his objection was that the base of the suffrage is not the citizenship, as it was in the earlier laws (1848, 1874, 1913), but the fact of being a man or a woman. He suggested a change to make citizenship an essential component and as an inseparable part of the right to vote in Hungary.

Without examining the technical details, the paper sheds light on another important principle, the issue of the cultural census, the *'intellectual qualification'*. According to

<sup>27</sup> POLNER 1918, 35.

<sup>28</sup> Ibid. 65.

*Polner*, one of the most significant type of 'intellectual collaterals' was the educational attainment. In his view, the 'educational attainment is capable of being moral collateral' in relation to its educational value.<sup>29</sup> He was against the widening of the right to vote, he suggested that the condition for the right to vote should be not four, but six school grades successfully finished, which was the limit of the compulsory education.

*Polner* criticized very strictly the whole evolution of the Hungarian legislation on the elections from the codificational point of view in his presentation at the Law Department of the Group of Friends of the Royal Hungarian Franz Joseph University in 22 March 1933.<sup>30</sup> He harshly criticized the earlier laws, albeit the Act XXVI of 1925, which was in force at the time, received especially detailed review. He thought that the Act XIV of 1913 is the best from the codificational point of view. However, no elections were held based on the rules of this law. In his opinion, the laws and regulations adopted after 1913 show continuous deterioration. The lowest point was the Act XXVI of 1925 in his opinion. The law used voting definitions incorrectly, misunderstood the legal nature of some provisions or contained contradictory or even unenforceable measures as a reason of superficiality. In his presentation, he explained again his theory that the right to vote is not an individual right won by private interest, but a public authority given by the public interest.

The following can be stated about the views of *Polner* related to the general characteristics of the right to vote from his works: He supported the secrecy of the ballot and the plural suffrage. He thought that plural suffrage is amenable to protect public interest where universal suffrage is used.

He strictly opposed the demand of universal suffrage again and again. In his view, the widening of political rights cannot be an end in itself. 'State function, and the right to vote as well, can be trusted with only the people who has the needed moral, intellectual and material guarantees to use this power for the people properly.' *Polner* wrote in the introduction of his paper.

On the issue of women's suffrage, he thought that this right should be given to the self-financing women to compensate their 'sorrowful situation' as a reason of the social and economic circumstances they must work instead of living only their women's avocation.

Ödön *Polner* opposed the proportional electoral system. He supported this view in his paper called 'Suffrage and Governance at Parliamentary Level' which was published in the journal *Jogtudományi Közlöny* issue 23. in 1934. According to *Polner*, the proportional electoral system neglects the public interest totally to give space to the struggle between the party interests. The members of the parliament are not elected by the people but appointed by the party leaders. In his opinion, the proportional electoral system excessively hinders the possibility of governance at the parliamentary level. The governance at the parliamentary level is in danger from two sides: the one-sided party monopoly, generally if the suffrage is limited, and the case of too many parties, mostly if the suffrage is widened, with the fragmentation of the party relations. Ödön *Polner* concluded: the healthy operation of the governance at parliamentary level could only

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<sup>29</sup> Ibid. 66.

<sup>30</sup> The presentation was published in the 8. 'Booklet of the Group of Friends' presentations in Szeged.

happen in a two-party system. His sympathy for the two-party system could be traced back to his interest in the English constitutional history, which he analysed in detail several times from his years of adolescence, according to his curriculum.

The fourth examined topic of the work of Professor *Polner* is parliamentary law. He wrote the '*Studies in the Field of Hungarian Parliamentary Law*' in 1902, when he still was an extraordinary university professor in Budapest.<sup>31</sup> The extensive work contains three main chapters:

- I. The parliament as a state organ
- II. The conditions of becoming a member of the parliament
- III. The authority of the members of the parliament and its expiration

The volume also has an Appendix called the *House of Magnates and the Magnates*.

The author analysed the '*legal status of the parliament*' in the A) subchapter of the first chapter. He stated in the introduction that the importance of the parliament increased due to the usage of the governance and the parliamentary level principle. He did not want to examine this political question but aimed to analyse the parliament as a state organ from the legal standpoint.

The parliament is one institution with two parts in the system of the state institutions, this is one of the Professor's key ideas. *Polner* stated, against the typical view of the foreign scholars, '*the Hungarian Parliament is not an identical name for two institutions but one institution with two independent parts which are parts of the whole. The two chambers of the parliament are the House of Representatives and the House of Magnates, the two parts together constitute the parliament.*'<sup>32</sup>

The unity of the parliament was undisputed before 1848, as the functions developed uniformly, the two chambers were usually united. The two chambers combatted the king as one institution and the contacts were based on the unity of the parliament. The laws of 1848/1849 have not changed this structure, however, the connection in the relations of the two chambers loosened but did not ceased to exist. The two chambers united less frequently, they contacted the king independently and the two chambers did not have a common president like the Palatine of Hungary had been until 1848. The main evidence for *Polner* concerning the unity of the parliament was the fact that the king must call, open, and dismiss the two chambers in a uniform manner. If one of the chambers has a special, independent function, in this part the chamber 'is an institution existing and functioning as an independent institution from the parliament.' As an example, the House of Magnates had a function based on the Act VIII of 1871 and the Act XXVI of 1896 to have disciplinary public authority over the judges of the Curia and the administrative courts. The Act VII of 1885 made the House of Magnates a continuous institution with everlasting elements. The House of Magnates was an independently existing institution from the parliament albeit only in the view of the special functions.

In *Polner's* opinion, it has a constitutional and political significance that the parliament is one institution containing two parts and the operations of the two parts are

<sup>31</sup> POLNER 1902, 123.

<sup>32</sup> Ibid. 6-7.

intertwined, despite that this connection cannot be defined in the laws.<sup>33</sup> The parliament is the representative of the nation's interest against the other constituent factor of the state, the king. It could be more capable for the task if the two institutions consider themselves as one. Thus, if there would be a conflict, it could be solved more efficiently. The chambers are capable of not just supporting, but also controlling each other as their aim should be to achieve *'the proper, lawful and unabated functioning.'* Therefore, there is a need for the possibility of criticizing and disputing the functioning of each other as this method will lead for self-restriction and self-policing among the chambers and their members. According to the author: *'without self-restrictions and self-policing, there could be no governance at parliamentary level.'*<sup>34</sup>

Polner continued his work with stating that the discussion of the proceedings of a chamber does not mean a dispute between the two chambers as a debate on the speakers or what was said. *'Because while the parliament is a unit, the two parts are legally independent from each other, so there is no subordination in between: one chamber is not answerable to the other.'*<sup>35</sup> Due to the characteristics of both chambers, the House of Representatives can be seen as the chamber with hegemony as it is the institution representing the nation. Thus, only this chamber can have initiatives. The House of Magnates evolved from the old committee of the high dignitaries of the churches and the peers, and it was rather the advisory body of the king during the justification of the laws.

In the next subchapter, Polner analysed the relations between the parliament as the representative of the nation in the political sense and the king as the other factor of the state. He distinguished between three eras based on these aspects.

During the Late Middle Ages, in the first era of the parliament, the king attended to the parliament, and he chaired it himself. Therefore, the king was part of the definition of the parliament. *'The parliament was the whole nation with the king as the leader of the nation, meaning the whole state, the whole body of the Holy Crown of Hungary in these times.'*<sup>36</sup>

During the times of the Habsburg kings, after foreign kings were coronated, this relation ceased to exist. The parliament was seen as a separate institution from the king in accordance with the spirit of the classic estate constitutionalism, there has been a duality. From this time, the king is not part of the parliament, the king is outside of the parliament. It was customary for the king to chair the parliament until 1848. If the king has not been in the parliament, he sent proxies instead of himself. The personal presence ceased to exist in the Habsburg times, the king attended the assemblies very rarely or not at all. The written contact became general instead of personal contact, using humble petitions (*humillima repraesentatio*) and lenient royal answers (*rescriptum*).

The third era in Polner's work is the end of the 19th. century and the beginning of the 20th. century, his own time period. He criticized the *'current theories'*, the basic point of the 'modern' state law of his time. The general theory was to see the parliament as an independent institution from the king using the system of the classic estate constitutionalism. The only contradicting example can be found in England, which was

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<sup>33</sup> Ibid. 9.

<sup>34</sup> Ibid. 10.

<sup>35</sup> Ibid. 11.

<sup>36</sup> Ibid. 12.

*Polner's* favorite model, where the power of the king was decreased in practice. That was the reason why the king was seen as a part of the parliament. The formula '*King in Parliament*' expressed that the parliament, and the king as a part, can do anything. *Polner* quoted from *Concha's* work on the English constitution, as 'The king is the head, beginning and end of the parliament.'<sup>37</sup>

*Polner* did not oppose openly the 'spirit of the age' which accepted the distinguished powers of the parliament and the king. However, he tried to 'put back' his opinion about the united power of the parliament and the king in his work about the sovereignty. This principle is the parliamentary sovereignty in the classical constitutional law theory created on the model of the English constitutional monarchy. He summarized the fundamental points:

*'The highest, greatest power in Hungary is the legislative power as the law is the strongest decision of a state, which can change any other decisions, but no other decision can contradict it. Only the king and the parliament together has the power to legislate. The greatest power can be wielded only by the king and the parliament together. Therefore, the parliament and the king are sovereigns together if they are acting together. However, the king is a sovereign in himself, while the parliament is not.'*<sup>38</sup>

Hereunder the author stated that the parliament is not on the same level as the king. As the king has more power than the parliament because he is not only part of the legislative power, but he also has the executive power. Moreover, the king has the power to cancel the parliament under certain conditions. The king has greater independence from the parliament like the parliament has from the king. The parliament does not have as strong influence over the king as the king has over the parliament because the parliament which elects the king cannot take away his power. In the question of the legislative power, the two parties are dividing the power, albeit it will not show externally. On one hand, the '*enactment of laws*' is a right of the king. On the other hand, formally the laws are the '*decisions of the king*'. *Polner* ends this idea with a '*seemingly small circumstance*'. He aimed to prove that the parliament is not a sovereign itself, it is not '*on the same shelf as the king*' with the customary expressions: the parliament sends '*propositions*' to the king and the king sends '*resolutions*' to the parliament.

In the following, the author examined the relationship between the parliament and the citizens, and their totality, the nation, as the parliament gains its origins from the actions of the king and the votes of the people as well. *Polner* strongly supported the idea that the parliament is not the legal representative of the nation. What is representation from a legal point of view? the author asked.

*'The representative, who is present in the place of someone else, as if they were someone else. The representative has the power to act as the client would act or should act. The representation is a strict relationship between the representative and the client, as there could be different types of relations between the client and the representative: it could be authorisation, representation or no kind of relation.'*<sup>39</sup>

The author demonstrated the evolution of the legal relations with the history of the parliament. In the beginning, when the personal attendance of the peers was the rule,

<sup>37</sup> Ibid. 14.

<sup>38</sup> Ibid. 17.

<sup>39</sup> Ibid. 19.

they were 'authorised' by their clients, substituting them. This connection turned to a 'posting and intermediary' relation later. The earlier characteristics of the envoys ceased in 1848. The possibility of commending, answerability and revocation ceased to exist. The elections, *Polner* wrote about his own era, '[...] are a simple choice of who should be the Member of the Parliament with the power of law, albeit without authorisation. The election will not give any power to the representative, it is only the process of choosing a person who will have the proper power later.'<sup>40</sup>

In the B) subchapter of Chapter I., Ödön *Polner* precisely analyses the influence of the king on the establishment, existence, and operation of the parliament. In his reasoning, he distinguished clearly between the close-knitted phenomena and defined the meaning and legal nature of the king's functions. The analysed sub-questions were the following:

- the periodicity of the parliament (it is not a continuously existing institution);
- the difference between 'the announcement and the summoning' of the parliament;
- the opening of the parliament as the customary precedent of the inauguration of the parliament;
- the inauguration of the parliament;
- the duration of parliament, which ceases from time to time according to the decision of the king,;
- the termination of parliament;
- the limitations on the dissolving of the parliament;
- the intervals of the parliament; and finally,
- the periods of parliament.

In Chapter II. the author analysed the conditions for membership in the House of Representatives and in the House of Magnates. With his preciousness, he distinguished between the ability to be elected as a representative and the capacity to become a representative. It must be mentioned that he examined in detail the question of incompatibility later. He wrote a separate paper about the incompatibility bill in 1933.<sup>41</sup> In his paper he distinguished the incompatibility from the incapability to be elected and from the reason terminating the representative's term of office as well. He stated correctly that the incompatibility can be used as a condition for other functionaries as they cannot hold certain positions, cannot have certain occupations, cannot act in certain manners, and cannot take certain actions. In a situation of incompatibility, the representative always has a choice: he could resign from the position or terminate the incompatible circumstance.

Professor *Polner's* outstanding and rich work and the situation of the public law in his time cannot and must not be assessed from the viewpoint of today's constitutional law after several decades. One thing is certain: Ödön *Polner* has taken seriously the task of the scientists, which was defined by László Buza in 1935 as the following: 'The role of science is the same in every field; to state the objective truth without taking into consideration any side aspect [...] However, the public lawyer should never forget that the impact of his theories could influence the life of the nation. This requirement is the national understanding of the public law theory. It cannot be a task of a public lawyer

<sup>40</sup> Ibid. 24.

<sup>41</sup> POLNER 1933, 17.

to showcase political party programs as whole laws or to flatter the national vanity with a statement of academic look.<sup>42</sup>

Ödön Polner always stood for values of the Hungarian historical constitutionalism, the independence of the nation and the parliamentarism, basing his work on scientific professionalism and professional correctness. A good example: there was a constitutional law meeting in February 1922, where he stood against Horthy, Bethlen, Klebersberg, the Minister of Interior, and Tomcsányi, the Minister of Justice, and stated his professional opinion against the government's point of view: the suffrage cannot be ruled in a regulation.

Instead of a summary: Ödön Polner's attitude, professional accuracy and competence can be an example for contemporary public lawyers.

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<sup>42</sup> BUZA 1935, 5–6.

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Volume 4. Budapest, 1903.:

*High Court of Justice, Indemnity, Indigenatus, Kabinetiroda, Képviselőház. [High Court of Justice, Indemnity, Indigenatus, Cabinet Office, House of Representatives]*

Volume 5. Budapest, 1904.:

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PÉTER MEZEI

## BÓDOG SOMLÓ\*

(1873–1920)

### *I. Biography*<sup>1</sup>

The volume containing this study is published on the 100<sup>th</sup> anniversary of the death of Bódog Somló. On this occasion, this professional biography is pleased to outline Bódog Somló's work in the field of legal theory (sociology and philosophy of law). However, there is no possibility for a detailed and thorough explanation for three reasons.

First, due to the limited space available, the following study will only touch upon the most important stages of Somló's oeuvre, we will not have the opportunity to present many of his works in detail. Bódog Somló's scientific oeuvre is a mixture of less important (unechoed), outdated, and internationally successful items. This study focuses on its merits on the latter, internationally successful items.

Secondly, Somló's significance in the Hungarian legal theoretical thinking cannot be measured merely by his published studies. If nothing else, the role he played in the history of the *Huszadik Század* (*Twentieth Century*) and the *Társadalomtudományi Társaság* (*Society of Social Sciences*), as well as the "Somló affair" ("Somló-affér"), that placed the scientific/academic freedom in crosshairs, must shortly be remembered.

Thirdly, many have already attempted to thoroughly arrange Somló's scientific works, so we also wish to avoid any repetition. Sources, that were considered during the analysis below, were basically published in three waves.<sup>2</sup>

First, after Bódog Somló's death, his "dearest student from Kolozsvár,"<sup>3</sup> Gyula Moór dealt with his intellectual heritage. The second wave is represented by the "*Somló Renaissance*" appearing in the second half of socialism. At this time, several analyses were published about his life path and his major works. Lastly, after the political changeover, thorough exploration of Somló's works began with the wide range of

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<sup>1</sup> A comprehensive understanding of Bódog Somló's biography is only possible by being familiarised with the following sources: SZEGŐ 1976, 420–421. SZABADFALVI 2011, 155–171. SZABADFALVI 2016, 215–221. TAKÁCS 2016a, 191–223. TAKÁCS 2016b, 3–71.

<sup>2</sup> Comp. especially: SZABADFALVI 2016, 215–216. 6. footnote TAKÁCS 2016a, 218–222.

<sup>3</sup> SZABADFALVI 2016, 220.

publication of analyses and manuscripts. This trend has continued to the present day, culminating in the centenary scientific commemoration of the *Juristische Grundlehre* [*Basic Jurisprudence*] in 2017, as the crown of his scientific career.<sup>4</sup>

Taking all of the above mentioned into consideration, I review hereinafter the life path, professional fulfilment of Bódog Somló, I describe the essence of his most important works, in order to pay our respect to “the best know figure of the Hungarian legal philosophical tradition”,<sup>5</sup> who was titled as “one of the most original and interesting figures” of the scientific life of the turn of the century even by the researchers of the socialist era.<sup>6</sup>

Bódog Somló was born originally as Felix *Fleischer* on 21 June 1873 in Bratislava, into a civilian family with “medium income and medium education.”<sup>7</sup> His father, Leopold *Fleischer*, was a railway officer at the Imperial and Royal Austrian State Railways Company (from 1883, it operated under the name Austro-Hungarian State Railways Company); his mother was Jozefin *Weinberger*. His parents were of Jewish religion, so he was registered in the register of births of denomination, but in 1891, *Somló* converted to Roman Catholicism of his own free will. At the same time, he changed his name first to Bódog *Fleischer* and then to Bódog *Somló*. He completed his elementary school in Budapest, and his secondary studies in Zilina, Trenčín and Timișoara. Although he did not mention it in one of his biographical articles in 1913,<sup>8</sup> he started his Hungarian legal studies at the Faculty of Law of the Hungarian Royal University of Budapest. After a semester, and due to his family moving again (this time from Timișoara), he continued and completed his legal studies at the Hungarian Royal Franz Joseph University of Kolozsvár. He obtained his doctorate in legal sciences in 1895, and then his doctorate in state sciences in 1896. During 1895 and 1896 he spent one year in military conscripted service, and he also took eight months in a trainee lawyer position in Kolozsvár. On the proposal of Gyula *Pikler* he spent the autumn (winter) semester of the 1896/1897 academic year in Leipzig, and the spring semester (summer) in Heidelberg, as a state scholarship holder. Following his return to home, between 1898 and 1903 he found a position at the Central Directorate of the State

<sup>4</sup> To celebrate this properly, the Institute of Legal Sciences of the Research Center for Social Sciences of the Hungarian Academy of Sciences organized a trilingual conference on 10 November 2017 in Budapest. See: <https://jog.tk.mta.hu/esemeny/2017/10/juristische-grundlehre-100> (Last visited on 17 December 2019).

<sup>5</sup> SZABÓ 2016, 239.

<sup>6</sup> BODZSONI 1975, 140.

<sup>7</sup> TAKÁCS 2016a, 192.

<sup>8</sup> “1. I was born in Pozsony [Bratislava], on 21 July 1873. – 2. I completed the secondary school in Zsolna [Zilina], Trenčsén [Trenčín] and Temesvár [Timișoara], and my legal studies in Kolozsvár [Kolozsvár], Leipzig and Heidelberg. – 3. I became in 1899 a private lecturer of legal philosophy at the University of Kolozsvár [Kolozsvár], in 1903 a lecturer at the law academy of Nagyvárad [Oradea], and in 1905 a professor of legal theory and international law at the University of Kolozsvár [Kolozsvár], and I still am at the moment. – 4. I am a collaborator to the following journals: *Jogállam* (State of the rule of law), *Huszadik Század* (Twentieth century), *Athenaeum*, *Archiv für Rechts- und Wirtschaftsphilosophie* (*Archive for Philosophy of Law and Economics*), *Grünhuts Zeitschrift für das private und öffentliche Rechte* (*Grünhuts Journal for Private and Public Rights*). – 5. List of my works: *A nemzetközi jogbölcselet alapelvei*. (*Basic Principles of International Legal Philosophy*) 1898; *Állami beavatkozás és individualizmus* (*State intervention and individualism*), 1903; *Zur Gründung einer beschreibenden Soziologie* (*On the foundation of a descriptive sociology*). Berlin, 1909; *Der Güterverkehr in der Urgesellschaft* (*Freight transport in the primitive society*). Bruxelles. 1909; *Az érték problémája* (*The problem of the value*). Budapest, 1911.” See: TAKÁCS 2016a, 191. Partially cited by SZEGŐ 1976, 420–421.

Railway Company in Budapest. He worked first as an assistant draftsman and then as a draftsman from 1901.

In the spirit of his commitment to scientific work (at the same time recognizing the complete absence of interest in practical jurisprudence), he did his best to get a university chair as soon as possible. According to the rules at that time, this could only take place after habilitation. First, he habilitated in legal philosophy in Kolozsvár in 1899, and three years later, he completed another habilitation in political science. However, the title of private lecturer he gained after the habilitation did not mean a full-time university position. His application for the lecturer position (that, in most of the cases, was supported by small slipwind) was refused three times (by the legal academy of Sighetu Marmatiei, Pécs and Bratislava).<sup>9</sup> However, he – when he still was assistant drafter at the State Railway Company – proved his commitment to sciences early by playing a central role in the launch of the first major Hungarian journal of legal sociology, the *Husadik század* (*Twentieth century*), in 1900. In 1913, he referred to himself in his above mentioned short lexical biography as a “contributor” to the journals of *Jogállam* (State of the Rule of Law), *Athenaeum*, *Archiv für Rechts- und Wirtschaftsphilosophie* (Archive for Philosophy of Law and Economics) and *Grünhuts Zeitschrift für das private und öffentliche Rechte* (Grünhuts Journal for Private and Public Rights). He also played a central role – together with Ede Harkányi and Gyula Pikler – in the foundation of *Társadalomtudományi Társaság* (Society of Social Sciences) in 1901, where he also played an active role in several functions until 1913.

Finally, he won the reward of his persistent efforts in 1903, when he took the place of the public lawyer Ernő Nagy, who left for Budapest, and started his lecturer work at the legal academy of Oradea in the field of politics, Hungarian public law, and encyclopaedia. Shortly afterwards, in 1905, the University of Kolozsvár offered him the cathedra of the retiring Rudolf Werner.<sup>10</sup> At first, he became a public extraordinary, then, from 1909, an ordinary professor. Until 1918, he worked as a professor of legal philosophy and international law in Kolozsvár. He was also an elected Dean of the Faculty in 1916, his mandate was for one year, in line with the contemporary traditions.

In late autumn of 1918 – following the Romanian occupation of Transylvania – he moved to Budapest and left his cathedra in Kolozsvár to Gyula Moór. He was appointed (with governmental support) as a professor on 3 December 1918 at the Faculty of Law in Budapest, he took his oath on 20 December. Nationwide politics of at the beginning of 1919 left deep wounds in academic freedom. Zsigmond Kunfi, minister for education, appointed seven new professors to the Faculty of Law [among them was Oszkár Jászi, who was the editor in chief of *Husadik Század* (*Twentieth Century*) after Bódog Somló], however, the appointments were not in accordance with the university practice (appointment procedure), which led to angry demonstrations at the Faculty of Law. Bódog Somló – confronting many of his former friends, among them Oszkár Jászi –, opposed, within the framework of protest, the appointment procedure by supporting the principle of university autonomy, and later he kept himself away from faculty council’s work.<sup>11</sup>

<sup>9</sup> Regarding these unsuccessful attempts see: TAKÁCS 2016a, 193–194. Regarding his letter to his parents about the second unsuccessful attempt to Sighetu Marmatiei see TAKÁCS 2016b, 35–37.

<sup>10</sup> SZABADFALVI 2016, 217. Rudolf Werner was one of those two professors who assessed (appraised) Somló’s works so far during his habilitation process in legal philosophy in 1899. See: SZABADFALVI 2016, 216.

<sup>11</sup> SZABÓ 2016, 246.

After the revolutionary period elapsed, the Faculty of Law decided to reconsider every appointment that took place between 31 October 1918 and 21 March 1919. The above mentioned seven professors were deprived of their cathedra, however, Bódog Somló's appointment was declared "to be maintained".<sup>12</sup> As a new assault on university autonomy, following the provisions of the government of Republic of Councils of 7 April 1919, every lecture, basic exam, and mid-term exam was terminated temporarily and then permanently. The aim was to demote the Faculty of Law of Budapest to a "vocational training institute."<sup>13</sup>

Somló made his own will in September 1920, wherein – as he was a divorcee and childless – he named the League of Land Protection (Területvédelő Liga) as the successor of his possessions. He left his library and manuscripts to Gyula Moór. He travelled to Kolozsvár, that was occupied by Romanians, on 26 September 1920, where he committed suicide by his own hand in the Házsongárd cemetery (central cemetery in Romanian), near to the grave of his mother. He was laid to eternal rest at the same place.

Researchers dealing with the oeuvre of Bódog Somló have tried to give explanations and make sense of the ending of his life in such a manner. Although a definite answer could be hard to find, several reasons could have contributed to his final decision – especially his life path, the contemporary political difficulties, and his scientific principles –, that can offer a real background for the understanding of his suicide. To be exact, Somló did not have a child, and he was divorced from the same woman twice. His brother (Gusztáv) also pushed life away by committing suicide. Kolozsvár, as it was known in the "old order", was lost, moreover, his new position in Budapest did not bring him relief and enough creative freedom either.<sup>14</sup> The revolutionary mood of 1918-1919 did not fit his moral values, and the formation of the (anti-Semitic) Horthy regime was also far from his cosmopolitan, European personality. We do not have conclusive evidence as to whether this new environment, despite his Jewish origin, his early baptism, caused him any tension. From this point of view, it might be particularly interesting, that he left for Kolozsvár on the very same day (26 September 1920) when the famous (infamous) Act of 1920:XXV of the Horthy regime was promulgated, which introduced the *numerus clausus*, i.e. the possibility of participation in higher education in accordance with "nationality proportions". Still, we do not have any reason to believe that this specific act had induced Somló's ultimate aggravation.<sup>15</sup> On the one hand, the Faculty of Law of Budapest had already limited the number of students admitted in 1919 by its own internal "anti-Jewish" decision,<sup>16</sup> on the other hand, Somló's earlier will suggest that he made the

<sup>12</sup> TAKÁCS 2016a, 210–214.

<sup>13</sup> SZABÓ 2016, 247. As Somló succinctly stated in his diary: "[the] Faculty of Law is disbanded". See: Ibid.

<sup>14</sup> Bódog Somló made the following entry in his diary on 10 February 1919: "*The world of activity, of action, with the hundreds of demands it makes on those who live in it, with its fundamental irrationality, which demands constant decisions even where it is impossible to make a rational decision, since it is impossible to take all factors into account – this world is my fiercest enemy, even its breeze is a poison to me. This world is the sworn enemy of intellectual concentration, contemplation and self-reflection.*" See: TAKÁCS 2016a, 213. Miklós Szabó has a similar opinion, who captures the essence of Somló's character as follows "*seeking the tranquillity that promises the possibility of cultivating science and fleeing from the (public and private) turbulence that disturbs this tranquillity and makes the life of a scientist impossible*". See: SZABÓ 2016, 242.

<sup>15</sup> SZABÓ 2016, 254–255.

<sup>16</sup> Ibid. 254.

big decision before the *numerus clausus* act was promulgated. What seems to be more relevant is what Péter Takács has convincingly pointed out: the “question of the right acts” has always been in Somló's academic work.<sup>17</sup> In such a period that was burdened with personal tragedies, in an age fraught with danger, it is feasible, that for Somló, beside the shrinking academic freedom, suicide seemed to be the only “right” solution.<sup>18</sup>

## II. Academic work

In many ways, the work of Bódog Somló could be called epoch-making, but it would perhaps be more accurate to say that it was “epoch-demarcating”. His name is associated with the establishment of the neo-Kantian school that gained ground in Europe at the end of the 19<sup>th</sup> century and pushed traditional approaches of natural law and positivist legal philosophy into the background. Prior to this turn in the second decade of the 20<sup>th</sup> century, Hungarian legal philosophy was largely permeated by naturalistic (natural scientific) positivism, as well as evolutionism; the most important school of legal philosophy was Gyula Pikler's theory of discretionary law.<sup>19</sup> Somló himself began his academic work at the end of the 19<sup>th</sup> century under the influence of the latter trends, as well as Herbert Spencer's individualism. At the same time, it was also confirmed that from 1896 onwards, Somló was reading the works of Immanuel Kant.<sup>20</sup> From this broad foundation, Somló finally emerged by means of the publication of his magnum opus of his neo-Kantian position, the *Juristische Grundlehre* [*Basic Jurisprudence*], in 1917. Hereinafter, let us look at the periods of Somló's scientific activity, his most important works, and the details of the epoch-making “Somló affair.”

### Bódog Somló's creative periods

Among the researchers of Bódog Somló's academic work, the question of practical relevance often arises, how many eras Somló's career can (or should) be divided into.<sup>21</sup> The traditional (in the words of Miklós Szabó “cliché”<sup>22</sup>) understanding was started by Gyula Moór. Accordingly, Somló's career can be divided into two major periods: “Within the 24 years of Bódog Somló's literary work from 1896 to 1920, two major phases can be distinguished. Both phases, excluding the transition, span roughly a decade of his work. In the first period, Somló was influenced by Herbert Spencer, his scientific interests primarily oriented around sociological questions. In the second phase, he took his stand on the foundation of Kantian philosophy and his scientific interests revolved around the basic concepts of law and, to an ever-increasing extent, philosophical problems.”<sup>23</sup>

<sup>17</sup> TAKÁCS 2016a, 215.

<sup>18</sup> For a different understanding, see: *ibid.* 215–218.

<sup>19</sup> For a description of Gyula Pikler's theory, see: SZABADFALVI 2011, 97–108.

<sup>20</sup> SZABÓ 2016, 243.

<sup>21</sup> BODZSONI 1975, 123–143. SZABÓ 2016, 240–242. TAKÁCS 2016a, 206–207.

<sup>22</sup> SZABÓ 2016, 240.

<sup>23</sup> For the preface of Gyula Moór, see: SOMLÓ 1926, 4.

Moór put the shifting period between 1907 and 1910, emphasizing the years of 1909 and 1910, when his work, *A jog értékmérője* (*Measures of the value of law*) was published first in German then in Hungarian language.<sup>24</sup> The second phase evolving afterwards was characterized by the adoption of the neo-Kantian position, which was marked by Rudolf Stammler.<sup>25</sup> In this period, the most important element of the Somló-oeuvre, the *Juristische Grundlehre* (*Basic Jurisprudence*), was written between 1912 and 1916, and it was published in 1917.

This canon, that was completely accepted during the time of the Socialism,<sup>26</sup> has become obsolete in many aspects.<sup>27</sup> On the one hand, there are convincing arguments that the two periods of Somló's work cannot be "sharply" separated from each other. Already in the first period, Somló was a significant critic of the discretionary theory of law and significant neo-Kantian impacts can be detected at the end of the first period. Somló's drawing-away from the first period therefore clearly took place on a gradual, step-by-step basis.<sup>28</sup>

But even more important, however, is the opinion that was emphasized by Katalin Szegő since the 1970s.<sup>29</sup> According to this, following the publication of the *Juristische Grundlehre* (*Basic Jurisprudence*), Somló wished to complete value doctrine-related studies, and as a preliminary study of this, he wrote his ethical (philosophical) manuscripts, which Somló referred to under the title of *Prima Philosophia*.

As Mikós Szabó citest: "we have got the basic studies, now we can move on to the study of values/moral philosophy".<sup>30</sup> According to Katalin Szegő "we have to notice this second turn, even if it is not that spectacular as the first one, as it is the only way to understand that, in the oeuvre of Somló, two different versions of Kantianism prevailed: the neo-Kantianism of the Baden-type (I also count to this amongst the legal philosophy of Kelsen), as well as the Kantian-inspired critique of epistemology, that is more akin to phenomenology."<sup>31</sup>

To put it differently, the first period, in the light of sociological/positivist thinking, can be considered as the Somló's "doctrine of facts", the second, neo-Kantian era can be seen as Somló's "basic doctrine", that should have been followed by the "value doctrine."<sup>32</sup> This third period remained unfinished. He got stuck with his ethical analyses, although according to his letters written to Gyula Moór, the work "was mostly done"<sup>33</sup> by February 1919. However, instead of publishing his manuscripts, he changed and continued to work on his manuscript on state theory, which he had also begun in 1918. He also left these unfinished for posterity.

<sup>24</sup> In Hungarian language, see: SOMLÓ 1910.

<sup>25</sup> SZABADFALVI 2016, 217.

<sup>26</sup> This is based on a detailed – but heavily critical – analysis by Imre Szabó. See SZABÓ 1955.

<sup>27</sup> Another, relatively recent study is also known that continues to insist on this double periodization. See: SZEGVÁRI 2004.

<sup>28</sup> SZABÓ 2016, 240.

<sup>29</sup> "At the end of his life, he was preoccupied with general philosophical questions, especially those of epistemology. The posthumous work testifies to his strong departure from Kantian philosophy, and he tries the Leibniz-Bolzano line of legal philosophy". See: SZEGŐ 1976, 422.

<sup>30</sup> SZABÓ 2016, 244.

<sup>31</sup> SZEGŐ 1999, 12. See furthermore FUNKE – SÓLYOM 2013, 49–89.

<sup>32</sup> SZABÓ 2016, 246. and 251.

<sup>33</sup> Ibid. 253.

*About his major works*

His first, more significant jurisprudential writings were published with the title of *A parlamentarizmus a magyar jogban* [*The parliamentarism in Hungarian law*],<sup>34</sup> and *A nemzetközi jog bölcséletének alapelvei* [*Fundamental principles of the theory of international law*].<sup>35</sup> The second one also served as a basis for his habilitation in legal theory and largely reflects the influence of *Piklerian* discretionary theory of law,<sup>36</sup> although some elements of it have already seceded from it.<sup>37</sup> Furthermore, his work *Allami beavatkozás és individualizmus* [*State intervention and individualism*],<sup>38</sup> published in 1903, served as a basis for his second habilitation in the field of political sciences. These early works were a faithful reflection of the prevailing scientific epistemology of the era – and for example the first decade of the *Huszdik Század* [*Twentieth Century*] journal as well –, evolutionism, social Darwinism and historical materialism are reflected in them.

In the *State intervention and individualism*<sup>39</sup> for example, he did not find the state interventions triggered by monopolistic-capitalistic development to be an attack on individual freedoms. Moreover, going beyond *Spencer's* individualistic theory, he considered that state intervention can be understood as a modern manifestation of the natural law of adaptation. *Somló* considered the “legislative activity” as an artificial intervention in the order of nature because of natural development and, at the same time, natural selection. In this way, *Somló* rejected *Spencer's* view that state intervention is an obstacle to natural selection. Ultimately, according to *Somló*, the ideal status is the one, in which the state, with extensive knowledge, intends to intervene comprehensively. The goal is nothing else, but the “increasing state regulation, combined with increasing political freedom: this is the ideal of development.”<sup>40</sup>

In the same period, *Somló* – already habilitated but still without a cathedra – published his science-promoting pocketbooks reflecting the ideas of Herbert *Spencer*, with the titles of *Ethika* [*Ethics*] (1900), *Jogbölcsélet* [*Legal Theory*] (1901) and *Szociológia* [*Sociology*] (1901).<sup>41</sup> He published his work of *Jogbölcséleti előadások* [*Lectures on Legal Philosophy*]<sup>42</sup> – in line with the requirements of the era – as a public lecturer that has already received cathedra.<sup>43</sup> In this volume, *Somló* analyses the general/normative characteristics of legal philosophy, endowing it with a sociological character; and he examines the legal theoretical background of criminal law in a separate volume.<sup>44</sup>

<sup>34</sup> SOMLÓ 1896.

<sup>35</sup> SOMLÓ 1898. Comp. BODZSONI 1975, 125–126. SZABADFALVI 2016, 216.

<sup>36</sup> “The development of international law is not the product of emotions and legal theories, but of pragmatism.” See SOMLÓ 1898, 49.

<sup>37</sup> So, “from the theory of subjective appropriateness itself, no exact institution can be derived”. See. *ibid.*

<sup>38</sup> SOMLÓ 1903a.

<sup>39</sup> Comp. BODZSONI 1975, 127–130. SZABADFALVI 2016, 217. TAKÁCS 2016a, 198.

<sup>40</sup> SOMLÓ 1903a, p. 175.

<sup>41</sup> TAKÁCS 2016a, 198.

<sup>42</sup> SOMLÓ 1906.

<sup>43</sup> SZABADFALVI 2016, 217.

<sup>44</sup> Comp. BODZSONI 1975, 131–133. SZABADFALVI 2016, 217.

The end of *Somló*'s first creative period began roughly at the time when he noticeably and knowingly turned against his former mentor, Gyula *Pikler*. As a part of the exchange of ideas in 1907 on the pages of the *Huszadik Század* [Twentieth Century], *Somló* opted for the thesis of "objective sociology" instead of the discretionary theory of law. *Somló* was therefore sharply criticised by *Pikler*.<sup>45</sup> The debate between *Somló* and Zoltán *Rónai* in 1910-1911, that also unfolded in the *Huszadik Század* [Twentieth Century], can be considered similarly significant, in which the parties expressed their different views on the "right law" as a measure of value.<sup>46</sup> Finally, in 1911 *Somló* delivered a public lecture on the acceptance of the Stammlerian neo-Kantian position and the use of it as the basis for his scientific work.<sup>47</sup> It brings us to *Somló*'s second great creative period.

The most important element of this period – and at the same time the oeuvre of *Somló* – is the *Juristische Grundlehre* [Basic jurisprudence].<sup>48</sup> In his book, *Somló* analysed the *a priori* concept of law and its conceptual elements, and he also tried to find the *genus proximum* of law. He found it in the "rule" itself. Accordingly, he defined law as an "empirical-intentional normative rule"<sup>49</sup> and he tried to distinguish it from other types of norms. In this context, he used the term "*Nomologie*" ("*Nomology*") or the expression of the doctrine of legal norms. This legal norm is issued by the legislative power ("*Rechtsmacht*"). *Somló* – moving away from the legal-sociological point of view<sup>50</sup> that still characterises the Legal Philosophy lectures – found that the orders of the "legislative power" must normally be implemented; this power factor must be the highest power of all; it must regulate a wide range of life conditions; it must be permanent (i.e., not temporary) in nature; it cannot be bound exclusively to one single person, nor to a smaller group of people (especially if that person or persons are the embodiment of transient power relations); they must operate in an institutionalised form; finally, the recipients must show obedience to the rules.<sup>51</sup> In his hierarchy of sources of law, *Somló* distinguished between expressly declared and non-expressly declared primary law and he also recognized the same forms of secondary law.<sup>52</sup> He ranked the judicial customary law in the category of non-expressly declared secondary law. There are two ways in which it can evolve: either it enforces and applies social conventional rules (folk customs), or it creates its own practice. However, for primary customary law to emerge (that is of equal validity to the expressly declared primary law, and thus it might even repeal it), a declaration by the legislator is still needed, since such a source of law of this level can only be created by the legislator. What is more, if the judge departs from pre-existing

<sup>45</sup> For details of the relevant publications see: TAKÁCS 2016a, 202. Footnote 37.

<sup>46</sup> For *Somló*'s main work in these regards see. SOMLÓ 1910. The bibliographical data of responses and counter-responses see. TAKÁCS 2016a, 203. footnote 38. See: továbbá SZABADFALVI 2016, 218.

<sup>47</sup> Ibid. 217. Footnote 16.

<sup>48</sup> In the following, the author of the study has relied on the version of the *Juristische Grundlehre* [Basic Jurisprudence] extracted in Hungarian by *Somló* and subsequently republished in 1995 under the title *Jogbölcsészeti [Legal Philosophy]*. For an analysis of the volume see in particular BODZSONI 1975, 138–140. SZEGVÁRI 2004, II.2. point; SZABADFALVI 2016, 218–220. TAKÁCS 2016a, 208.

<sup>49</sup> SZABADFALVI 2016, 219.

<sup>50</sup> SOMLÓ 1906, 40–77.

<sup>51</sup> SOMLÓ 1995, 23–34.

<sup>52</sup> Ibid. 97–109.

statutes, this does not repeal the primary law. According to *Somló*, in this case, too, the act of the supreme authority is necessary in this case as well.

Although judges may interpret legal norms contrary to its specific content, so there is an opportunity to apply the law in a different way, but only in that case if there is a specific legal authorisation to do so. He holds that the same applies to the amendment of the law.<sup>53</sup>

*Somló* writes the following about legal loopholes: “a gap in the law means that the law needs to be amended.”<sup>54</sup> However, the silence of the law itself does not necessarily demand the gap to be filled, since, according to his point of view, accepting the theory of the logical closeness of law, the silence of the law also covers a clear regulation. In this case, the judge must dismiss the claim. Therefore, the fact that he recognizes the possibility of the mentioned legal provisions, does not mean that he accepts them. He always concentrated on “legal loopholes” only as a concept of legal policy, it only appeared in his thinking as the disapproval of the law. According to his concept, however, a loophole in law enforcement does not exist, as “it always can be decided on the ground of the existing law, whether a particular case is prohibited, ordered, permitted or legally irrelevant.”<sup>55</sup> So, if there is a need to amend the law, then there can be different reasons for it. If the law needs to be replaced to be correct, we can speak of a “loophole of correctness”, if, however it must be replaced to become applicable, we can talk about “loophole of application”. According to *Somló*, the latter one has the following variants: “when the judge is able to arrive at the applicable principle with clear logical activity”,<sup>56</sup> we can talk about “logical loopholes”. He provided the name of a “loophole of alternativeness” for the case where the judge lays down several applicable principles. The third version is the “loophole of assessment”, where the judge is called upon to supplement the law based on a moral assessment. A special case is when there is an actual loophole but there is no authority that could fill that (contrary to the previous ones, where the judge could proceed), so the law remains incomplete. These norms are typically those which regulate the duty of the supreme power.<sup>57</sup> Since the statute excludes the legitimate solution of the question, the loophole can only be filled through an infringement, i.e., illegitimate means. This is the case of “absolute loophole”.<sup>58</sup>

Following the publication of *Juristische Grundlehre* [*Basic Jurisprudence*], prominent Hungarian and European researchers sent letters to congratulate *Somló*, or they wrote positive (of course, in more than one case, mixed with criticism) review about the

<sup>53</sup> Ibid. 113–122.

<sup>54</sup> Ibid. 123.

<sup>55</sup> MOÓR 1921, 21.

<sup>56</sup> SOMLÓ 1995, 124.

<sup>57</sup> Typically, if according to the law, the throne shall remain within one dynasty, but the dynasty dies out, or the ruler does not name a successor before his/her death, although he is obliged to do so. For the examples see *ibid.* 125.

<sup>58</sup> *Somló* had already published his views on legal loopholes in 1911 in his study *A jog alkalmazásáról* [*On the Application of Law*]. See. SOMLÓ 1911. This position has not changed substantially since then. On the theory of legal loopholes, see in detail MEZEI 2002, Footnote 19–21. and the related main text; MEZEI 2003, Footnote 25–28. and the related main text; SZEGVÁRI 2004, Footnote 167–170. and the related main text.

volume.<sup>59</sup> As Szabadfalvi also notes: the monograph “made Somló a must-cited author in the international literature of legal philosophy for decades.”<sup>60</sup>

After the publication of *Juristische Grundlehre* [Basic Jurisprudence], Somló – realizing, that the basic doctrine of law is not confined exclusively to substantive law – wanted to extend his volume published in 1917 with an analysis of value doctrine. As, however, he himself referred to it in his letter written to Gyula Moór, elaboration of this “Wertlehre” (Value Doctrine) can only take place after systematic fixation of his own ethical, epistemological thoughts. He referred to his related manuscripts as his “first philosophy” (“Prima philosophia”). However, in 1918 and 1919 practically everything in his life had changed. After the defeat in the World War (and to escape the impending Romanian occupation) he moved to Budapest, but his scientific creative community was not left undisturbed. By this time, he desisted from finishing his first philosophy.<sup>61</sup> Finally, his notes were edited and published by Gyula Moór in 1926.<sup>62</sup> This work has remained unrivalled.

Following his move to Budapest, he started to work on the last academic project of his life in the field of state theory. According to the words of Péter Takács “he would have presented the author’s view on the state embedded in the history of state theory”.<sup>63</sup> These thoughts of Somló are preserved in his autograph manuscript containing almost 600 pages. The work has never been finished in its entirety and its publication also remained fragmentary until 2016. Somló submitted the sections on Plato and Machiavelli for publication himself, the former one was published during his life,<sup>64</sup> the latter was only published in the journal of *Társadalomtudomány* [Social Science] after his death, following Gyula Moór’s obituary.<sup>65</sup> Csaba Varga<sup>66</sup> and Péter Takács<sup>67</sup> have published further fragments, before the latter published the full manuscript and analysed it in a meaningful way in 2016.<sup>68</sup> Two excellent studies about Somló’s dissertations in the field of state theory were also published in this same volume.<sup>69</sup>

<sup>59</sup> See: SZEGVÁRI 2004, Footnote 229–233. and the related main text; SZABADFALVI 2016, 218–219. TAKÁCS 2016a, 208–209.

<sup>60</sup> SZABADFALVI 2016, 218. For the most important works quoting Somló, see I. SZABADFALVI 2011, 164. Footnote 661. The correctness of Szabadfalvi’s statement is faithfully confirmed by the fact that even the American legal philosopher Lon Luvos Fuller analyses and even criticises Somló’s position in his 1969 work. And criticism is only made of works that are considered by the researcher reflecting on them. See: FULLER 1969, 110–112.

<sup>61</sup> SZABADFALVI 2016, 220. TAKÁCS 2016a, 208. és 214.

<sup>62</sup> SOMLÓ 1926.

<sup>63</sup> TAKÁCS 2016a, 10.

<sup>64</sup> SOMLÓ 1920, 290–300.

<sup>65</sup> SOMLÓ 1921, 41–69.

<sup>66</sup> SOMLÓ 1981, 819–835. SOMLÓ 1985a, 363–373. SOMLÓ 1985b, 778–783.

<sup>67</sup> SOMLÓ 2016, 75–87.

<sup>68</sup> TAKÁCS 2016a.

<sup>69</sup> VARGA 2016, 157–167. TAKÁCS 2016c, 169–187.

*Academic-producing work of Somló*

Bódog Somló, in addition to his scientific achievements, also left an outstanding academic legacy. In this regard, his role in the launching and running of the journal *Huszadik Század* [Twentieth Century] and *Társadalomtudományi Társaság* [Society of Social Science] mentioned earlier, stands out.

The idea of the journal *Huszadik Század* [Twentieth Century] was conceived in 1896, on his return from a study trip to Germany in 1896.<sup>70</sup> He started the foundation of the journal with friends<sup>71</sup> from Kolozsvár and Budapest in 1899, and the first volume was published in January 1900. Somló not only gave the name, but, for a while, he was also an associate editor and then editor-in-chief at the journal. Although the journal started from an essentially radical side, it has always remained open to publish the opinion of opposing views. After he stepped back from editing, Somló published (with decreasing intensity) for a while in the journal, but after 1911 he did not maintain any substantial professional relationship with it. Even so, in one decade, more than forty of his writings have been published in the *Huszadik Század* [Twentieth Century]. This drawing-away can partially be explained by his distance from the others – and from the scientific public life in general – and partially by the fact that it was at this time that he was gaining increasing international prestige, so his publications were (perhaps the risk might be taken) published by journals more prestigious than the *Huszadik Század* [Twentieth Century]. The *Huszadik Század* [Twentieth Century] was finally banned in 1919, although, – as Péter Takács points out – it would probably have been doomed to disappear even if it had not been banned, since a significant part of the circle of authors/editors had become “regime-extraneous” or had emigrated from the country.<sup>72</sup>

Somló’s other major academic role can be linked to the founding of the *Társadalomtudományi Társaság* [Society of Social Science] in 1901. He worked in this organisation as its secretary (1901–1903), and as a member of the electoral board (1902–1906), then, under the presidency of Gyula Pikler (between 1906 and 1913), he served as a vice president of the Society.<sup>73</sup> The original membership of the Society was mainly made up of civic intellectuals who embraced Western values, but after a time, adherents of the values of left-wing liberalism, Christian humanism and socialism were admitted. Among the distinctive figures of the Society – at least for a while – fit well together Rusztem Vámbéry, Oszkár Jászi and his brother, Vilmos, Béla Kenéz, Pál Szende, Ákos Pulszky or even Gyula Pikler. However, differences in worldviews led to a serious leadership crisis in 1905 and 1906, in which Bódog Somló – repelling the attack on the incumbent leadership – also played an active role in resolving it.<sup>74</sup> The Society was the

<sup>70</sup> According to the entries in his diary “we have decided with József Ferencz and Bálint Kolosváry to publish a journal in the field of legal sciences”, that “would publish more interesting news from abroad” and “clearly scientific studies”. Quoted by: TAKÁCS 2016a, 195. Footnote 17. See furthermore SZEGŐ 1976, 422.

<sup>71</sup> Among the latter, the names of Rusztem Vámbéry and Oszkár Jászi are worth mentioning, from whom he finally diverged at the end of his life for political and moral reasons.

<sup>72</sup> TAKÁCS 2016a, 195. Footnote 19.

<sup>73</sup> SZEGŐ 1976, 423. TAKÁCS 2016a, 196–197.

<sup>74</sup> For excerpts from the records of the extraordinary general meeting of the Social Science Society, which include Somló’s speech that triggered a storm of applause, and Somló’s role in the preparations for the

publisher of the *Huszadik Század* [Twentieth Century] until 1919, when the paper and the Society itself were banned.

### *The “Somló affair”*

Bódog *Somló*, beyond his academic results, had a direct impact on the history of Hungarian science and education in at least one other case. We can commemorate the polemics traditionally known as “*Somló affair*”,<sup>75</sup> as a struggle fought for the preservation of educational and scientific freedom.

The debate was erupted by one of Bódog *Somló*’s lectures in 1903. In his lecture at the *Society of Social Science* on *The theory of social development and some practical applications*, which he later published in the *Huszadik Század* [Twentieth Century],<sup>76</sup> by expressing his evolutionist position, he broke the spear for the acceleration of social development through state intervention. However, in his lecture, and later in his essay, he also made numerous statements that were controversial for the conservative circles. Thus, for instance “*to recognize the necessary development of society [...] but not do everything possible to ensure that this development, this re-adaptation can take place as quickly and as smoothly as possible, would be like knowing electricity, but not putting it at the service of mankind, it would mean as much as travelling on draught cattle on the winding country road next to a speeding railway.*”<sup>77</sup> Elsewhere, he criticised education (its conservative methodology) – with words that still deserve attention today. Thus, according to him, school “*almost entirely miss their its task of directing attention forward, towards the hopeful future, but it they only turn it backwards. [...] [The] most of the bitter work of learning is spent mostly on learning such things that are no longer true.*”<sup>78</sup>

The debate about *Somló* – that took place in the academic community for a while –, gained huge publicity thanks to Endre *Ady*, who was working in Oradea at the same time. *Ady*’s article *Merénylet a nagyváradi jogakadémián – Somló Bódog ügye* [Assassination at the Law Academy of Oradea – the case of Bódog *Somló*], published in the *Nagyváradi Napló* [Oradea Diary], was later published in the *Budapesti Napló* [Budapest Diary]. The debate’s growth and importance was unstoppable at both the national – and even international<sup>79</sup> – scale (and importance), it also formed part of a parliamentary interpellation, and prompted a “confession” from the critical professors at the Academy of Law in Oradea.

Five of the seven other professors of the faculty turned to the Minister of Culture with an inscription, asking him to suspend (dismiss) Bódog *Somló*. The seriousness of the controversy is faithfully confirmed by the fact that the professors from Oradea were even willing to “falsify” the content of *Somló*’s study in their inscription. So, although *Somló*

subsequent duel between the (agitator) Pál *Wolfner* and Gyula *Pikler*, which did not escalate to violence, see. TAKÁCS 2016b, 52–60.

<sup>75</sup> See in detail: SZEGŐ 1976, 423–425. SZEGVÁRI 2004, Footnote 93–99. and their associated main text; TAKÁCS 2016a, 198–200.

<sup>76</sup> SOMLÓ 1903b.

<sup>77</sup> Ibid. 402.

<sup>78</sup> Ibid. 405.

<sup>79</sup> SZEGŐ 1976, 423–424.

wrote the following at one place: “therefore, the criminal code must not judge the value of acts merely in relation to the existing society but must be based on the value which they have in relation to the permanent aims of the society. For this reason, the criminal code cannot have the task of attacking everything that is hostile to the existing society, but it can only achieve its aim of defending society if it also respects the efforts to change the existing form of society.”<sup>80</sup> The professors of Oradea, however, in their inscription cited below, placed the phrase “the existing form of society” after the phrase “the monarchical form of state in our country” in parentheses<sup>81</sup> - almost accusing this young teacher of treason. Similarly, Somló was criticised for his “radical”, “anti-religious” and “agitating” opinions.<sup>82</sup>

Somló, in his letter to Minister Gyula Wlassich, respectfully but with scholarly fastidiousness, defended his earlier position.<sup>83</sup> In his letter, he found the “imputation”, the attribution of an idea to someone else, the most hurtful on behalf of his critics.<sup>84</sup> Gyula Wlassich finally adopted a position of academic and educational freedom, and did not suspend Bódog Somló from his position. Although Somló was acquitted of the charges following the ministerial decision, feeling the unfavourable collegial atmosphere around him, he was happy to change his cathedra in Oradea for the one in Kolozsvár in 1905.<sup>85</sup>

### III. His selected works<sup>86</sup>

*A parlamentarizmus a magyar jogban.* [Parliamentarism in Hungarian law]. Gibbon Albert könyvkereskedése. Gombos Press. Kolozsvár, 1896.

*A nemzetközi jog bölcselétének alapelvei.* [Fundamental principles of the theory of international law]. Franklin. Budapest, 1898.

*Der Ursprung des Totemismus. Ein Beitrag zur materialistischen Geschichtstheorie.* K. Hoffmann Rechtswissenschaftlicher Verlag. Berlin, 1900.

*Ethika.* [Ethics]. [Stampfel-féle tudományos zsebkönyvtár 59.] [Stampfel scientific pocket library 59] Károly Stampfel. Budapest, 1900.

*Jogbölcsélet.* [Legal Theory]. [Stampfel-féle tudományos zsebkönyvtár 75.] [Stampfel scientific pocket library 75] Károly Stampfel. Bratislava, 1901.

*Szociológia.* [Sociology]. [Stampfel-féle tudományos zsebkönyvtár 79.] [Stampfel scientific pocket library 79] Károly Stampfel. Bratislava, 1901.

*Állami beavatkozás és individualizmus.* [State Intervention and Individualism]. Politzer. Budapest, 1903. X.

<sup>80</sup> SOMLÓ 1903b, 403–404.

<sup>81</sup> Citing: TAKÁCS 2016b, 42.

<sup>82</sup> For the whole inscription see *ibid.* 42–45.

<sup>83</sup> Gyula Wlassich knew Bódog Somló from earlier. Somló met the minister in person before applying for the post at the Law Academy in Bratislava, hoping for a helping hand in getting him on the cathedra, but the meeting was presumably unsuccessful. According to Somló’s diary entry, the minister “did not give me much to say.” Comp. TAKÁCS 2016a, 194. Footnote 12.

<sup>84</sup> For the relevant part of Somló’s letter, see. *Ibid.* 200. Footnote 28.

<sup>85</sup> SZEGVÁRI 2004, Footnote 99. and the associated main text.

<sup>86</sup> For a complete list of Somló’s scientific works and publications see TAKÁCS 2016a, 225–237.

- A társadalmi fejlődés elméletéről és néhány gyakorlati alkalmazásáról.* [About the theory of social development and some aspects of its practical application] [keynote speech of the Society of Social Science]. Huszadik Század (4) 1903/7. 397–409.
- Jogbölcséleti előadások.* [Lectures in Legal Theory]. 1<sup>st</sup> brochure: General Part. 2<sup>nd</sup> brochure: A büntetőjog bölcselate [Theory of criminal law] [For manuscript purposes]. k. n.. Kolozsvár 1906. 1<sup>st</sup> brochure: 1–134. 2<sup>nd</sup> brochure
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RICHÁRD GYÉMÁNT

## TIVADAR SURÁNYI-UNGER\*

(1898–1973)

### I. Biography

The third head of the Department of Statistics in Szeged was vitez Tivadar *Surányi-Unger*. Tivadar *Surányi-Unger* was born on 4 February 1898 – in the “metropolitan city” of Hungary – in Budapest.<sup>1</sup>

He graduated from the Lutheran grammar school in his hometown, in Budapest. He pursued his university studies in Budapest, at the Pázmány Péter University and the universities of Graz and Vienna. In Graz, the capital of Styria, he received a doctorate in law and political science in 1919, and in Budapest, first in 1920 a doctorate in humanities (philosophy) and economics in 1921. A few years later, in 1924, he also passed the exams for judges and lawyers.<sup>2</sup> His teaching “career” began in 1925 when he was appointed as a private tutor at the József Nádor University of Technology. The following year, in 1926, he was already teaching at the Miskolc Law Academy. Then, as the successor of Dezső *Laky* (1921–1926) and Ferenc *Kováts* (1926–1929), he worked at the Department of Statistics of the Franz Joseph University<sup>3</sup> in Szeged from 1929. In 1928 he was appointed as a private tutor, and at the same time – from 1929 – he became the head of the Department of Statistics in Szeged. His tenure as head of the Department of Statistics and Economics and later of the Department of Economics and Finance, lasted from the beginning, from 1929 to 1939. During his years in Szeged, he was appointed first – on 24 January 1929 – a public extraordinary lecturer, and then – on 29 June 1933 – a public ordinary lecturer.<sup>4</sup> His responsibilities essentially included the teaching of the courses of economics and statistics. From the time of the appointment of Károly *Schneller* (1893–

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<sup>1</sup> KENYERES 1982. Online availability: <https://www.arcanum.hu/hu/online-kiadvanyok/Lexikonok-magyar-eletrajzi-lexikon-7428D/s-778D5/suranyi-unger-tivadar-77C7E/> (Downloaded: 17. August 2019.)

<sup>2</sup> KOVÁCS – LENCSES – RÓZSA 2014, 641.

<sup>3</sup> The Department of Statistics in Szeged – under the chairmanship of Tivadar *Surányi-Unger* (1929–1939) – was called the Department of Statistics and Economics from the academic year 1929/1930 to the academic year 1934/1935, and then from the academic year 1935/1936 to the academic year 1939/1940 it was called the Department of Economics and Finance. Then, with the return of Károly *Schneller*, the department split up. As *Schneller* only took over the teaching of statistics, the lectures in economics and political science were left to Tivadar *Surányi-Unger*. BALOGH, ELEMÉR ET AL. 1996, 96–97. HORVÁTH 1993a, 7.

<sup>4</sup> BALOGH ELEMÉR ET AL. 1996, 65.

1953) as head of the department, in 1939, for a year, he solely taught economics.<sup>5</sup> During his years in Szeged, in the academic year 1936/1937 he was Dean of the Faculty of Law and Political Science, and in the academic year 1937/1938 he was the Provost of the Faculty.<sup>6</sup> Tivadar *Unger-Surányi* left the University of Szeged – officially – on 19 October 1940. Later, between 1940 and 1945, he became the head of the Department of Economics and Finance at the Elizabeth University in Pécs. After the Second World War – in 1945 – he emigrated but remained on the staff of the University of Pécs as an academic professor on leave until 1948. He was released of his post on 20 February 1948 by the Minister for Religion and Public Education. By that time, Tivadar Unger-Surányi had been living abroad with his family for many years.<sup>7</sup>

One of the most significant figures of the Franz Joseph University in Szeged – today the University of Szeged – was professor Tivadar *Unger-Surányi*. Professor Róbert *Horváth* (1916–1993), who later – between 1953 and 1986 – was also head of the Department of Statistics, wrote the following about Tivadar *Unger-Surányi*: “He embarked on his academic career as an economic philosopher and economic historian, and he retained this preference for the cultivation of economics to such an extent that the cultivation of statistics occupied a relatively minor place in his academic work. At first, he did more to support his theoretical work in crisis history, and later to support his career as a practical economic politician and as a price-government commissioner.”<sup>8</sup>

In 1935, he was accepted as a corresponding member of the Hungarian Academy of Sciences. Farkas *Heller*, a regular member, Alajos *Kovács*, vitez Gyula *Moór*, Dezső *Laky*, and Ákos *Navratil*, corresponding members, were his recommenders.<sup>9</sup> After the Communist takeover (1948), he was excluded from the ranks of academics and was only rehabilitated after the regime change in 1991.<sup>10</sup>

Between the two world wars, he was involved in the drafting of several legislative acts as an economic policymaker, and later he was appointed price-government commissioner. At the request of Prime Minister Count Pál *Teleki* (1879–1941) (1939–1941), he was head of the Economic Studies Department at the Prime Minister’s Office and executive vice-president of the Hungarian Economic Information Committee.<sup>11</sup>

Professor *Surányi-Unger* was also an internationally recognized authority. During his years in Szeged, he was invited to the University of Southern California in Los Angeles as a visiting professor three times (1935, 1937, 1939).<sup>12</sup> His contact with foreign countries intensified after the Second World War when he emigrated. In the spring of 1945, he left for Austria with his family, from where he emigrated to the United States, also with his family. Initially, between 1946 and 1949, he became a

<sup>5</sup> GYÉMÁNT – KATONA 2008, 97.

<sup>6</sup> BALOGH ET AL. 1996, 86.

<sup>7</sup> SIPOS 1997, 181–182.

<sup>8</sup> HORVÁTH 1992, 225.

<sup>9</sup> *Tagajánlások 1935-ben [Member pledges in 1935]*, Magyar Tudományos Akadémia. Budapest, 1935. 37.

<sup>10</sup> In 1991, the Presidium of the Hungarian Academy of Sciences repealed its decision of 23 April 1948, which had declared the exclusion of the Hungarian Academy of Sciences on the grounds of unfairness. This decision rehabilitated Tivadar *Surányi-Unger* and four other corresponding members of the Academy – Károly *Balás*, Károly *Papp*, Henrik *Schmidt* and Zoltán *Vámosy*. EGRI 1991, 109–110.

<sup>11</sup> HILD 2019, 141.

<sup>12</sup> GYÉMÁNT – KATONA 2008, 97.

professor at the Syracuse University in New York State, founded in 1870, however, this “relationship”, albeit shared with Göttingen (Universität Göttingen), continued until his retirement.

Tivadar *Surányi-Unger* has taught at several universities abroad as a visiting professor. In 1945 and 1946 he was invited to Innsbruck, the capital of Austrian Tyrol, and in 1950 he returned to the University of Los Angeles for the fourth time. He subsequently visited universities in Germany, including Kiel (1952), Berlin (1953, 1954) and Munich (1955). Then, from the second semester of 1958, he divided his time and teaching between the universities of Syracuse and Göttingen, alternating between the two, each semester. He retired in the United States in 1964, however, he continued teaching in Göttingen until 1966. He then retired for good.<sup>13</sup> In Göttingen he was elected Dean in 1964; at the same time, he was Head of Department until 1958 and 1966. Other universities were also able to claim him as a visiting professor. In Europe he visited Sankt Gallen, Marburg and Tübingen. He also worked in some universities on the Asian continent, including Shanghai in China and Mumbai in India.<sup>14</sup>

*Surányi-Unger* has published extensively. Until his emigration (1945), his writings were published both within and beyond the Hungarian borders. The total number of these publications is estimated at 105. Abroad, he has mainly published in English and German. After his emigration, he published another 60 papers in English, German, French and even Japanese.<sup>15</sup> These could not have been officially published in Hungary.

The fact that several scientific societies included him among their members is proof of his outstanding expertise. He was a member of the *Hungarian Statistical Society* (HSS) from 1926, and later became a member of the board of trustees in 1937. He was also vice-president of the Scientific Committee of the *National Statistical Council* (NSC) and the *Scientific Committee of the Hungarian-German Society*. As a member of the electoral committee, he participated in the work of the *Hungarian Economic Society* and the *Hungarian Foreign Affairs Society*. He was also a founder and board member of the *American Association for Comparative Economics* and a founder and – until his death – director of the *Institute for the Study of Economic Systems* (*Institut zum Studium der Wirtschaftssysteme*) in Göttingen.

In 1939, he was awarded the French “*Ordre de Mérite Agricole*” for his work in the field of French agricultural research.

The long and eventful – scientific-academic and personal – life of Tivadar *Surányi-Unger* ended on 1 November 1973 in New York, USA.

## II. Academic work

Tivadar *Surányi-Unger*’s research was mainly in theoretical economics, economic history, and business cycle theory, but he also dealt with questions of economic philosophy. He also considered the solution of foreign economic problems to be an

<sup>13</sup> SIPOS 1997, 182.

<sup>14</sup> GYÉMÁNT – KATONA 2008, 97.

<sup>15</sup> SIPOS 1997, 182.

important area of his research. In the latter field, he focused on the economic issues of Eastern Europe, to which his academic work was an important contribution.

He made a conscious effort to combine the possibilities offered by the various “disciplines” and to grasp the so-called “interdisciplinary links”. Although more than 160 of his works have been published, his best-known work is perhaps his textbook of *Magyar nemzetgazdaság és pénzügy* [Hungarian National Economy and Finance], published in 1936.

Tivadar Surányi-Unger’s approach was activist, convinced that only a purposeful, active state economic policy could overcome socio-economic problems.<sup>16</sup>

After publishing a few small studies, Tivadar Surányi-Unger already in 1921 published a major book for the Hungarian professional public. The 160-page book is entitled: *A gazdasági válságok történetének vázlata 1920-ig* [A Sketch of the History of Economic Crises until 1920]. The author stated the following about the aim of the book: “I aimed to present as complete a history of the crises as possible, at the expense of which - for understandable reasons - I had to make concessions only in order to preserve the work in its present modest volume, so I shall touch briefly only on the economic crises of the minor states and the ancient and medieval periods, the latter step being mainly due to lack of practical expediency. The conditions of those times were so different from those of the present, and their crises so different in form, that I must consider their detail beyond the scope of my subject; but, by their particular and local character alone dwarfs the importance of the economic disturbances of the modern age.”<sup>17</sup> At the same time, the author excuses himself for the sometimes dry and depressing statistics, but, as he has indicated, their application is essential.

Surányi-Unger began his book by defining the concept of economic crisis and describing its types. The author distinguished five major types of economic crisis. At the same time, he referred to Arthur Speithoff’s “six” division.<sup>18</sup> Nor has he ignored the interpretations and sayings of major economists in world history, such as David Ricardo (1772–1823). In particular, the economic crisis is a natural “intermezzo” in the course of social development.<sup>19</sup>

After clarifying the conceptual and theoretical background, the economic crises of antiquity and the Middle Ages are first discussed and explained in a linear order. He notes that “major monetary crises were also encountered in antiquity; these were mainly caused by the simultaneous minting of large quantities of gold.” He cites the conquests of Alexander III (Alexander the Great) (356–323 BC), king of Macedon (336–323 BC), and the Gallic campaigns of Julius Caesar (100–44 BC). Then he comes to say that, although there were crises in the Middle Ages, “the largely shallow medieval economy could not have produced major shocks.”<sup>20</sup> A natural consequence of low economic standards was, for instance, famines, which in the British Isles, as an example, were on average a decade apart.

<sup>16</sup> KOLLEGA TARSOLY ET AL. 2000, 91–92.

<sup>17</sup> SURÁNYI-UNGER 1921, 4.

<sup>18</sup> SPIETHOFF – SCHUMACHER 1918, 228.

<sup>19</sup> RICARDO 1846, 160.

<sup>20</sup> SURÁNYI-UNGER 1921, 9–11.

Surányi-Unger has written extensively on the economic crises of the early modern period. He first briefly describes the so-called “*Lübeck trade crisis*”. “*It is an interesting symptom, however, that the first major shock of this kind did not occur in the then-booming Pyrenean states of England or Holland, but in the economically strongly downwardly trending Hansa, and especially in Lübeck.*”<sup>21</sup> He saw the reason for this in the “shift of emphasis” caused by the discovery of America in 1492.

The world’s first major stock market crash, the so-called “*Dutch Tulip Mania*” (1637), was not left out of the description of the crises that affected the Dutch, one of the “most sober-minded” nations in the world. Trading in tulip bulbs as a commodity with a fictitious value had disastrous consequences. There was a time when a tulip bulb could buy a canal-side (“gracht”) house in Amsterdam.<sup>22</sup> The country struggled to recover from the crisis caused by the speculative frenzy.

Tivadar Surányi-Unger wrote mainly about the British Isles in the context of the recent crises. For example, the “*goldsmith era crises in England*”, the “*The Great Recoinage of 1696*” and the “*Bank of England crises of the 18<sup>th</sup> century*” are not missing from his description of economic crises. However, he has also written about the economic problems of France under King Louis XIV of France (1643–1715) in the context of the “*Law system*”. The value of the work lays in its intention to give a brief, comprehensive characterization of each economic collapse. His work is easy to follow even for the “layman”. Due to space constraints, it is also worth noting that the “focus” of this book is rather on the economic events of the 19<sup>th</sup> century. There is also a separate chapter on the economic problems in the aftermath of the First World War. The author examines each of the economic crises country by country, including Britain, France, Japan, the United States, Italy, Germany and Russia. He also devotes a chapter to the economic crises in Hungary.<sup>23</sup>

In 1923, after his first book was published in Hungary, he presented again a major publication to the professional public. His book, in German, was published in Jena of Thuringia. He published the book, or more precisely its first volume, with his own money, as the German publisher – Gustav Fischer – saw no “guarantee” of a return. In 1923, Tivadar Surányi-Unger was only 25 years old and unknown to the German professional public. His work – entitled *Philosophie der Volkswirtschaftslehre. Ein Beitrag zur Geschichte der Volkswirtschaftslehre* – became a huge success; the 400-page book was virtually “snapped up.”

The German publisher – in 1926 – published the second, thicker volume of 547 pages already at his own expense. This substantial work, consisting of two volumes, dealt with the methodological issues of economics, including its history of development in the light of philosophical developments. His books were essentially concerned with the “philosophical strands” of economics.<sup>24</sup>

Surányi-Unger was very prolific during this period. He had not even allowed himself a moment to breathe, and in 1927, in Germany, he published another book, *Die Entwicklung der theoretischen Volkswirtschaftslehre im ersten Viertel des 20. Jahrhunderts*. This time

<sup>21</sup> Ibid. 11.

<sup>22</sup> *Hollandiában véget ér a tulipánláz* [Tulip Fever ends in the Netherlands]. 7. February 2006. National Geographic. [https://ng.hu/kultura/2006/02/07/hollandiaban\\_veget\\_er\\_a\\_tulipanlazi/](https://ng.hu/kultura/2006/02/07/hollandiaban_veget_er_a_tulipanlazi/) (downloaded on 12. August 2019.)

<sup>23</sup> SURÁNYI-UNGER 1921, 13., 14., 29–68., 90–124., 159–160.

<sup>24</sup> *Tagajánlások 1932-ben* [Member pledges in 1932], Magyar Tudományos Akadémia. Budapest, 1932. 24–25.

he described the “current” – at that time – trends in the development of economics, with special reference to the specific features of, for example, Germanic and Anglo-Saxon research trends, and made comparisons between them. He did not neglect to present the results of research in different cultural areas.<sup>25</sup>

The “resounding success” of his second book is indicated by the fact that during his stay in the United States (1931), his latest German-language volumes, entitled *Economics in the Twentieth Century: The History of its International Development*, were published in English, in an expanded version. The young Tivadar Surányi-Unger was greatly assisted in the publication of this work by Professor Edwin R. A. Seligman of Columbia University.<sup>26</sup>

The early works of the young researcher, published abroad, captured the relationship between economics and philosophy. He was particularly suited for this, as his education predestined him for it. He was also one of the first to summarize the history of the development of economics. Nor was he far removed from examining the philosophical foundations of economic theories.<sup>27</sup> After his initial work, he turned his attention steadily to economic policy and business cycle theory.<sup>28</sup> In the field of economic policy, he considered state involvement and intervention to be of primary importance.<sup>29</sup>

The aforementioned trend in his life “culminated” mainly in the 1930s.<sup>30</sup> A good example of this is his paper *A gazdaságpolitika tudományos alapkérdései* [*The Scientific Foundations of Economic Policy*] (1927). “This work seeks to highlight the normative nature of economic policy and, on this basis, to identify the guiding aspects of economic policy. Its results are undoubtedly debatable, but this work is also a testimony not only to the author’s thorough training but also to his talent for reflection and his excellent writing skills.”<sup>31</sup> His writings also appear in the field of the relationship between economics and statistics. The most important examples of these are *Statisztika és a közgazdaságtan* [*Statistics and Economics*] (1927) and *A statisztikai módszer szerepe a közgazdaságtanban* [*The Role of the Statistical Method in Economics*] (1928).

Róbert Horváth, who later became the head of the department (1953–1986), wrote the following about Tivadar Surányi-Unger’s statistical work: “His first major works on statistics reflect a change in scientific understanding: his 1928 major study on the role of statistics in economics provides information for Hungarian economists, and his 1929 German-language monograph, the *Mathematical Statistics Handbook*, provides information for Central European economists in general. He did not, however, write any textbook on statistics other than the latter, and his university notes, published in 1929, were based on the stenographic notes of a student and were not changed afterwards. (This work, a cautious attempt to provide a textual summary of the essentials of mathematical statistics for law students, reflects mainly the influence of Béla Földes.)”<sup>32</sup> Surányi-Unger

<sup>25</sup> SURÁNYI-UNGER 1927a, 1–2.

<sup>26</sup> *Tagajánlások 1932-ben. [Member pledges in 1932]* 1932, 25.

<sup>27</sup> KOVÁCS – LENCSE – RÓZSA 2014, 641.

<sup>28</sup> BEKKER 2000, 17.

<sup>29</sup> SURÁNYI-UNGER 1927b, 110–127.

<sup>30</sup> KOVÁCS – LENCSE – RÓZSA 2014, 641.

<sup>31</sup> *Tagajánlások 1932-ben. [Member pledges in 1932]* 1932, 25.

<sup>32</sup> HORVÁTH 1993, 1003.

considered himself an economist but did not dispute the role of statistics in the study of certain economic issues, although his work also draws attention to the differences and “dangers” of this approach. *Surányi-Unger*’s views on the role of statistics in economics include the following: “[...] the better the “applied” parts of an economic curriculum are built up, the more it can draw on the aids of statistics even at its starting points. This explains the phenomenon that in less abstract economic theory research, the statistical method, which is purely empirical in composition, has such a relatively wide scope of application.”<sup>33</sup> Tivadar *Surányi-Unger*’s work – whether in economics, statistics or economic policy – is always concerned with theoretical and philosophical questions. He sought the link between the problems of economics and economic policy and the work of the “great thinkers”.<sup>34</sup> However, he cannot be regarded as “just” a theoretical “room scientist”, since he has made several study trips abroad and, based on his experience, has also shed light on practical issues.

It was thanks to his wide-ranging knowledge of philosophy and economics and their literature that Professor Willy Moog (1888–1935) asked him to write a volume on economic philosophy. Thus, was born his work “*Geschichte der Wirtschaftsphilosophie*” (1931), which became one of the “milestones” of his work on economic philosophy.

Tivadar *Surányi-Unger* was constantly travelling, but these trips were not always for lectures but for research. He travelled to areas of importance for the world economy. He visited the United States and Japan, but also the Soviet Union and Australia. The purpose of these trips was to gain a deeper understanding of the economic conditions and development of each country. He published articles and studies about his study trips in German journals. Thanks to his study trips, he wrote, for example, *Amerika társadalmi problémái [The Social Problems of America]* (1929), *Der nationale Gedanke in China und in Indien* (1930) and *Über das theoretische Grundproblem der sowjet-russischen Wirtschaftspolitik* (1931). Tivadar *Surányi-Unger*’s work had already become significant by the early 1930s. As a result of this, for the first time, in 1932, an attempt was made by its recommenders – full member Jenő Gaal, and corresponding members Farkas Heller, István Dékány and Ákos Navrátil – to elect the extremely prolific Tivadar *Surányi-Unger* as a corresponding member of the Hungarian Academy of Sciences – in the II. class A) subclass. The first attempt failed. Nevertheless, it can be said that Tivadar *Surányi-Unger* has already written more than 30 publications, several of which have been published abroad, thus increasing the author’s recognition at home and abroad.

Tivadar *Surányi-Unger*’s academic work took a major turn in the 1930s. In 1935, his Academy’s recommenders wrote the following about the renowned economist: “In addition to his articles published in the *Jahrbücher für Nationalökonomie und Statistik*, he again came up with a major German work in 1933 entitled »Weltwirtschaftspolitik im Entstehen«. This work provides an in-depth analysis of public needs from the author’s particular point of view, grouping these needs according to the various state objectives. *Surányi-Unger*’s book also reflects the wide-ranging knowledge which the author has acquired not only through his reading and academic reflection, which exceeds the usual level in professional circles but also through the broadening of his horizons, which is the

<sup>33</sup> SURÁNYI-UNGER 1928, 9.

<sup>34</sup> SURÁNYI-UNGER 1927b, 115.

result of his travels throughout almost the entire educated world. The common features and trends in the public needs of the civilized world, beyond the philosophical perspective of public needs, are what the author seeks to capture in this work and to assess in terms of the emergence of world economic policy. This work also shows that the author has a definite line of research, the results of which he seeks to develop in his work.”<sup>35</sup>

The efforts of the academy’s members were finally crowned with success. In 1935, Tivadar *Surányi-Unger* was elected a corresponding member of the Hungarian Academy of Sciences. The renowned economist did not rest, however, and published further important works. In 1935, for example, he published a 30-page work entitled *Gazdasági rugalmasság és változékonyság [Economic Flexibility and Variability]*. This was followed by *Magyar nemzetgazdaság és pénzügy [Hungarian National Economy and Finance]* (1936). This massive textbook – nearly 620 pages – is considered by many to be the most famous “representative” of Tivadar *Surányi-Unger*’s academic work. Tivadar *Surányi-Unger* wanted to achieve a threefold goal with the publication of this massive volume. As he said in the introduction to the book, written in Szeged: “*I have a threefold aim. The first is to provide a comprehensible first introduction for those interested in Hungarian economics and finance, even without professional preparation. Secondly, to provide my students with a short textbook. And thirdly, to review the path of my economic research from the height of a summary of my findings so far.*”<sup>36</sup> The second objective, namely the publication of a short textbook, is somewhat modest, because the book is by no means short, but rather a detailed work aiming at completeness. At the same time, the author has made no secret of the fact that the work is a retrospective of his work to date, and a summary of his work. As *Surányi-Unger* wrote: “*It is good to look back sometimes on our journey so far, to draw from its unified viewpoint to guide us in our future endeavors.*”<sup>37</sup> The structure of Tivadar *Surányi-Unger*’s volume is essentially twofold. The general part deals with the so-called “*Social Economy*”. Within this, the first book is entitled “*Szabad gazdaság*” [*Free Economy*] and the second “*Közületi gazdaság*” [*Public Economy*]. The second, special part is entitled “*Magyar jólét*” [*Hungarian Welfare*] (Book 3). The volume is accompanied by an appendix, a literary review, which includes a rich index of names and subjects. As stated in the introduction to the book: “*The main body of the present work [...] is divided into two parts. In its general part, it explains the basic principles of social economics which are equally necessary for understanding all kinds of broader economic contexts. Among them, however, it emphasizes above all those that are important for our Hungarian national economy. [...] The special part then gives the special social economics, i.e., applies our general lessons to our Hungarian welfare. [...] Of the three books in the work, the first two are devoted to the general part, the third to the special part. Our first book illuminates the permanent basis and framework of all social-economic life, the context of a free economy. [...] Our second book, on the public economy, then explains the context of the living social economy. [...] Our third book, which contains the special part, first looks at the special features of our Hungarian national economy from the point of view of public objectives. Finally, it reviews the most important issues of our Hungarian*

<sup>35</sup> *Tagajánlások 1935-ben. [Member pledges in 1935]* 1935, 36–37.

<sup>36</sup> *SURÁNYI-UNGER* 1936b, 3.

<sup>37</sup> *Ibid.*

*economic policy Hungarian social policy and Hungarian public finances in an interdisciplinary perspective. Based on their examination, it also points to practical ways that can lead to a higher standard of our overall welfare.*"<sup>38</sup>

Following the publication of the voluminous volume *Magyar nemzetgazdaság és pénzügy* [Hungarian National Economy and Finance] (1936), the author was awarded a prize by the Hungarian Academy of Sciences in 1937. The swift recognition was certainly a tribute to the author's considerable work. The textbook focuses on economic policy, but also deals with general issues of price regulation and capital management.<sup>39</sup>

*Surányi-Unger's* work has gone on to be published. The second edition of the book was published in 1943, during the Second World War. The second edition was published in two volumes of 852 pages, rather than one, partly for reasons of space. At the same time, the two volumes were justified by the fact that the first volume, containing the general part, was expected to become obsolete much more slowly than the second volume, which provided a special part based on the latest economic statistics.<sup>40</sup>

At the end of the study, it is worth pointing out that Tivadar *Surányi-Unger* also dealt with the outstanding importance of the capital, Budapest, as did Dezső *Laky* (1887–1962), the first head of the Department of Statistics in Szeged. Of course, the two approaches differ – also in content. While Dezső *Laky* was concerned with the population development of the capital city between 1900 and 1920, Tivadar *Surányi-Unger* examined the economic importance of Budapest within our country.

In his two-volume work *Budapest szerepe Magyarország gazdasági életében I-II*. [The Role of Budapest in the Economic Life of Hungary I-II], the author covered the period between 1925 and 1934. Tivadar *Surányi-Unger's* work was prepared at the request of Lajos *Illyefalvi I.*, Director of the Statistical Office of the Budapest Metropolitan City of Statistics. The author of the volumes wrote: "I present my statistical research on the economy and finance of Budapest in this book. [...] My main aim has been to provide a clear overview for a wider readership. [...] It is for purely technical reasons that this book is published in two volumes. The first volume contains the first two parts of the work, on agriculture and industry, and trade and commerce. In the second volume, we present the third, fourth and fifth parts of the book, examining credit, income distribution and the public household, and summarize our findings."<sup>41</sup>

The two-volume work was published in parallel with the *Magyar nemzetgazdaság és pénzügy* [Hungarian National Economy and Finance], also published in 1936. The author explicitly referred to this parallel work in the following way: "If the reader wishes to obtain more detailed and systematic information on the questions of national economics and finance which are only incidentally touched upon here, I draw his attention to my other work, which was written in parallel and which I have mentioned."<sup>42</sup>

As already mentioned, Tivadar *Surányi-Unger* left his homeland, Hungary with his family after the Second World War in 1945. He foresaw that the "new" regime that was "taking shape" would not be favorable to his later work or that of his colleagues. He

<sup>38</sup> Ibid. 1–3.

<sup>39</sup> KOVÁCS – LENCSES – RÓZSA 2014, 641.

<sup>40</sup> SURÁNYI-UNGER 1943, 1.

<sup>41</sup> SURÁNYI-UNGER 1936a, 7.

<sup>42</sup> SURÁNYI-UNGER 1936b, 7.

was right. The academic careers of renowned economists such as Farkas *Heller* (1877–1955) and Ákos *Navratil* (1875–1952) ended in an undignified manner. Tivadar *Surányi-Unger*, on the other hand, moved to the United States with his family after a brief stay in Austria. There he continued his academic work and acquired American citizenship. In the last decades of his life abroad, he turned partly to international and comparative economics and partly to his earlier research in economic philosophy. In many of his writings, he examined and analyzed the differences between the market economies of the West and the socialist economic systems of the East, with particular emphasis on the ideological features.<sup>43</sup>

After the Second World War, Tivadar *Surányi-Unger* – according to Róbert *Horváth* – “still recognizes three target systems on the plane of economic policy theory: the North American one, followed by some Western European ones, which try to improve capitalism by means of experimental economy, and thirdly, the Soviet economy and its followers. In practice, however, there are only two “blocs” because the differences between the first two target systems based on capitalism are really only instrumental and thus negligible.”<sup>44</sup>

At the end of his life, *Surányi-Unger* returned to his former favorite subject, to economic philosophy. His last book, *Wirtschaftsphilosophie des 20. Jahrhunderts*, published in 1967, was also written in this spirit.

The – “statistical” – significance of Tivadar *Surányi-Unger*’s scientific work is increased by the fact that “he was the first in the international literature to attempt to develop statistical economics, ahead of the research of Colin Clark and Jean Fourastié.”<sup>45</sup>

After a sketch of Tivadar *Surányi-Unger*’s academic work, it is worth quoting one of his statements, which is still relevant today, as a concluding thought: “*Science has two proletarians: the statistician and the historian. As a result of their long, sweaty work, their individuality is completely lost, because of the demands of strict objectivity the diligent worker, who tirelessly piling up data, must disappear into the background. The finished work is then the basis that can be processed and built upon, the fruit of which the worker enjoys, reaps its rewards; its commodity is the element of the medium that moves the public, the final factor in the production process. The statistician and the historian modestly retreat behind the machinery of the bustling factory, and with speedy diligence continue their hard work, aware that the whole factory rests ultimately on their shoulders. Both the theoretical and the practical economist can only build on the foundations laid by the two disciplines mentioned above. [...] to successfully move on to new paths is only possible armed with these two weapons of empiricism. As the statistical method has recently gained ground in a gratifyingly wide range of circles, so worrying is the symptom of a move away from the historical basis. Even in the remedy of our economic ills, the search for similar situations in the past and the extraction of their lessons can lead to far more results than the mass accumulation of empty, idea-like fictions hanging in the air.*”<sup>46</sup>

<sup>43</sup> HILD 2019, 142. 177.

<sup>44</sup> HORVÁTH 1993, 1009.

<sup>45</sup> KOVÁCS – LENCSEŠ – RÓZSA 2014, 641.

<sup>46</sup> SURÁNYI-UNGER 1921, 3.

*III. His selected works*

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