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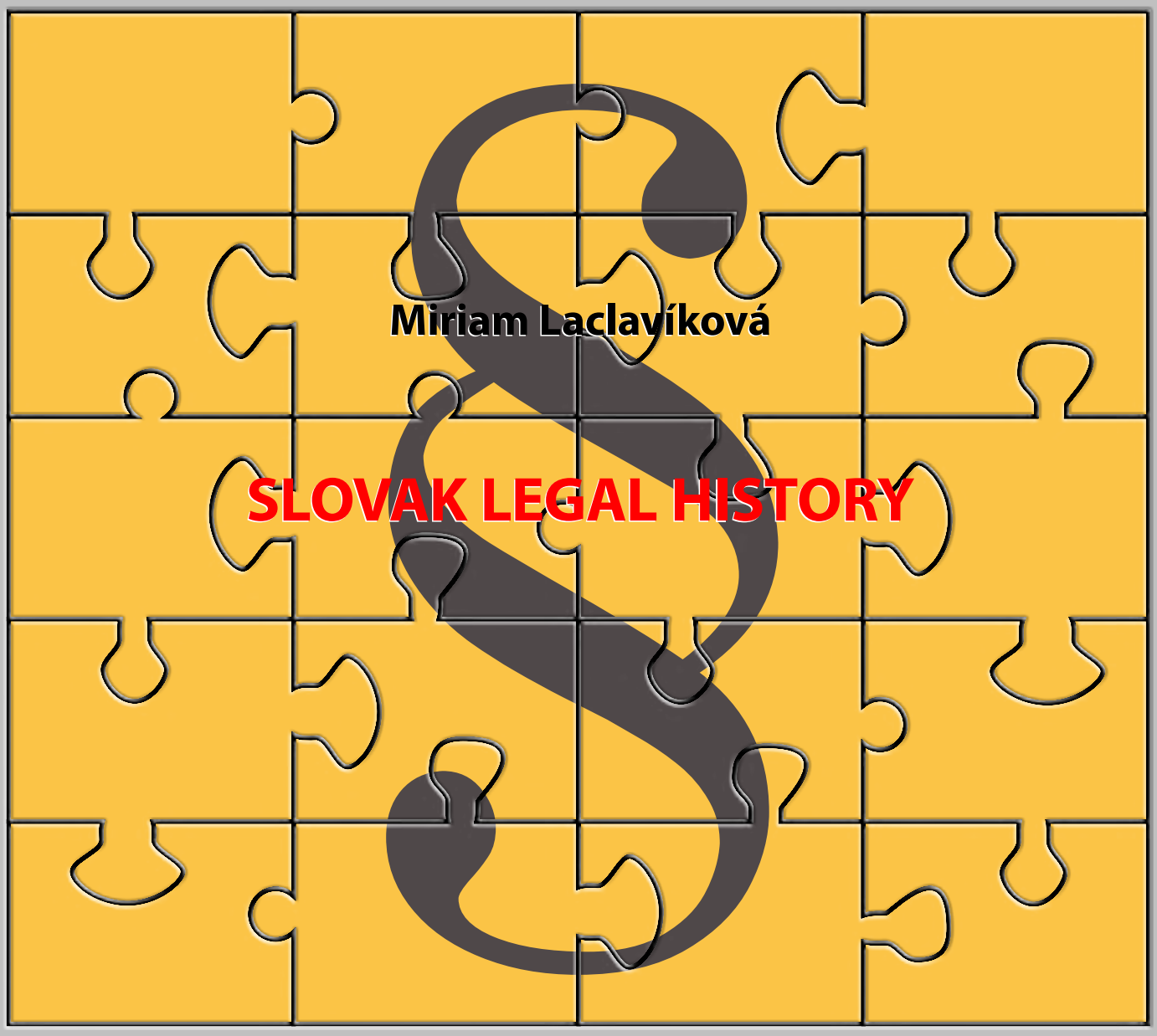

Miriam Laclavíková

SLOVAK LEGAL HISTORY

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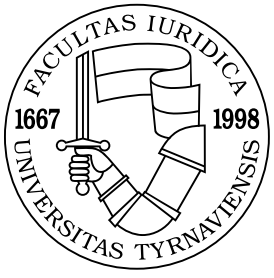
Miriam Laclavíková

SLOVAK LEGAL HISTORY

(with regard to the State and Law until 1918)



Slovak Legal History

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Content

1 Introduction

Introductory View of the Nature and Internal Changes of the State and Law in Slovakia until the year 1918)

The beginnings of the development of state and law in our country are related with the period of the early Middle Ages. Medieval law, in contrast to the Roman law, was not divided in public and private law. Nature of early-medieval patrimonial state and the application of patrimonial theory in the construction and consolidation of the state organization created preconditions for the formation of a universal law system without classical Roman law classification of rules and legal areas (branches of law). The priority function of the state and its law in the early Middle Ages was to protect the interests of the state, its bodies and officials, along with the protection of the Church. Equally important was the protection of property within the meaning of sovereign's "private" ownership of state from which there comes any other property (**the patrimonial theory**). In the further development the existence of legal particularism which characterizes all the states of medieval Europe was closely related to the differentiation of the population in the state and its territorial fragmentation. **Legal particularism** meant the fragmentation of a single legal system into several smaller subsystems, applied on both the personal and the territorial level. On the personal level - between individuals and social classes (varyingly privileged or non-privileged groups of the population) there were created large public-law differences, which, in the spirit of the rule of universalism, were transferred to all areas of the legal life. These differences showed up mostly in relationship of individuals (as members of different social classes) to the land - the most important economic value at that time and the result was the non-existence of legal equality. The essence of the classification of law in the Middle Ages (and on our territory also in the Modern Age) was the classification into the rules applicable to particular estates. **The basis of the law system was the noble law (as state law) written in the Opus Tripartitum containing provisions of a constitutional nature, capable of filling gaps in other particular law subsystems. In other aspects the individual subsystems (municipal law (town's rights), serfs' law (rights of serfdom), rights of free districts (Germans in the Spiš region), etc.) were developing relatively independently.**

The basis of the medieval Hungarian law was ***aviticitas*** (fixation of the land ownership in the hands of the family), **the special status of nobility and their exclusive ownership capacity**, limited by royal law (*ius regii*) resulting from the donation sys-

tem. Duties of a nobleman were concerned particularly with their relationship to the state and the sovereign (the Holy Crown) under penalty of the treason (*nota infidelitatis*). The majority of the state population acted under **serfdom obligation without ownership of farmland, which use** and also the rights and obligations in relation to the landlord were determined mainly by the relations within the urbarial system. The serfs (villeins) were subject to judicial and administrative powers of the landlord (noble). Over time, the free royal towns as legal persons were also tied into some form of public-law commitment. In contrast with nobles, the relationship with the state (Crown) was not made by every single towner, but by the town as whole under a privilege. Towners were put into this legal relationship indirectly, as derived from that of the city. **Towns and towners formed a specific community** with a relatively high level of legal culture and legal conscience and their relatively independent development significantly contributed in the creation of the most advanced particular legal system (municipal law, town's law).

Change in political and social situation and the radical turn in the development of law and justice in our country took place in 1848, although the leading into this change was quite clear since the late 18th century (it is proofed by acts – laws partly equalizing nobility and non-nobility, e.g. same access to the state institutions; efforts to reform the economic system of the country, etc.). Following the abolition of feudalism under the articles of Bratislava's March Constitution there was also established the elimination of estates differences and **declaration of equality of all the persons before the law**. Equality before the law became a key basis of the new law system within the developing citizens' state.

The formation of modern law, which origins can be observed since the late 18th century, in terms of the sources of law was associated with partial regulations, legal customs and legal jurisprudence with inspiration in the form of codification (but failed) initiatives, particularly in the works of the special commission *Deputatio in iuridicis*. Declaration of the Bratislava's March Constitution of 1848 significantly confirmed the already-begun change of the society - from a society of estates to civics' society with outstanding revolutionary and formal-legal guarantee. The weak aspects of this legal change were - the incidence of blank-spaces, non-systematic formulation and its proclamative character (e.g. cancellation of *aviticitas* and of the urbarial system). The imposed Austrian law in the period of Bach's absolutism tried to overcome this situation on certain level, but it was perceived as "unconstitutional solution". By the October Diploma (of 1860) which opened up the way to the Austro-Hungarian Compromise of 1867, the sovereign ordered to return to constitutionality. For Hungary it basically meant a return to its own Hungarian law and consequently to its own Hungarian statehood.

Content continuity with medieval and modern law was maintained also after 1848, following the decision of the Judex-Curiae-Conference (1861) and the reflection of some of its determining principles can be seen in the following legal development. The most important requirement of legal development after 1848 became the question of codification, more or less resonating within each of the branches of law.

The initial school of thought of the 19th century became liberalism, which was trying to empower the status of the person as an individual in the sense of a free and independent carrier of individual natural rights. An individual was to be liberated from the "old orders" and from social stratification of society in the meaning of belonging to a certain social estate (state). There were, thus, removed traditional links of an individual in respect to the social estate, land or a particular interest corporation (craft) and there was established freedom and the market economy. There were created conditions for free business activity based solely on contractual freedom (liberty of contract). Hungary, which was marked by underdevelopment, its agrarian character and quite "conventional" establishment of social stratification, resisted new ideas of liberalism in a quite long period of time, as evidenced by the slow reflection on dynamic legal development in Western Europe. Lagging of Hungary in comparison with other western European countries occurred in area of the jurisprudence and legal thinking, which can be demonstrated on the example of half a century late discussions among the representatives of legal-historical and natural-law schools and it can be also manifested in the Temporary Court Rules of the Judex-Curiae Conference.

The period of the late 19th century is characterized by codification efforts in various legal areas, which (with the exception of civil substantive law and administrative law) were successfully terminated. Thanks to the quality of the completed legislative work, Hungary reached the level of the countries of Western Europe. The about mentioned is also indicated by the fact that the majority of the adopted regulations during the Dual Monarchy was applied in the territory of Slovakia also after the creation of the inter-war Czechoslovak Republic until the 50-ies of the 20th century.

The present publication provides an insight into the legal history of Slovakia and Slovaks in the period since the end of the Great Moravian Empire until the establishment of the Czechoslovak state in 1918. Following the example of the work, which is until today still unsurpassed and its author is the leader of the Slovak civil law science – proffesor Štefan Luby *„History of Private Law in Slovakia*" (*Dejiny súkromného práva na Slovensku)* as an introduction we will define territorial, personal, cultural and time substrate necessary for appropriate determination and presentation of relevant social and consequently legal-historical facts relating to the current Slovakia.

Territorial substrate

In the beginnings of the 11th century, there began the process of integration of Slovakia into the Hungarian Empire in the initial, relatively independent position of an autonomous administrative unit - Border Mark (*confinium*). Since the end of the 11th century (the reign of King St. Ladislaus) Slovakia was already *de facto* and legally part of the Hungarian state. In the Middle Ages there was formed the term *"Partes superiores regni Hungariae"*, indicating the fact that the territory of Slovakia was at that time already ethnically defined approximately as it is in the todays´ range. The economic and strategic importance of Slovakia to the Hungarian State is demonstrated not only by the developed urban settlements and colonization, but also by significant mining operations (copper, gold, silver). As a result of the defeat in the Battle of Mohács and of the occupied territories of Hungary (more precisely Pannonia) by Turks, state, cultural

and church life (until 1848) moved from Buda to Bratislava (where in the building of the todays´ University Library would meet the Hungarian parliament) and to Trnava (Trnava and its University became a centre of education and culture). The problem of determination of the Slovak border appeared in all its scope after the 1st World War in 1918, when it was necessary to determine the boundaries of the new Czechoslovak state, as Slovakia became a part of it. Since 1918, Slovakia became part of Czechoslovakia and this status remained the same (with a short period of independence in the form of the Slovak Republic (1939-1945)) until the creation of the independent Slovak Republic in 1993.

Personal substrate

Under personal substrate we will focus on Slavic and Slovak ethnicity, which in our country settled down in the 6th century, and which substantially contributed to the cultural development of the multi-ethnic Hungarian state. Slavonic culture formed in Great Moravia had an undeniable influence on the beginnings of the formation of the Hungarian state and law, as evidenced by the terminological origins of several old Hungarian words, e.g. *király* – king - kráľ; *Királyi Udvar* - royal court - kráľovský dvor, *vajda* – Duke - vojvoda, *család* – family – čeľaď etc. In addition to these Slavic influences, legal development was conditioned also by external influences - mainly the influence of **German law**, the Roman law and Canon law. Reception of the **Roman law** in the territory of Hungary did not occur, although we can partly consider the reception of its terminology. In the major works of Hungarian legal science (as seen in the Verböczy's *Opus Tripartitum*) or in legislative activity there can be observed both -terminological influence, but certainly also significant material influence of Roman law, especially on the theoretical foundation of legal institutions. **Canon law** had a significant impact on the content of the law, mainly in the Middle Ages, particularly in the area of family law (marriage), hereditary law (wills), law of obligations (prohibition of taking the interests) etc. After 1526, but especially after 1848, during the Bach's absolutism there increased the impact of **Austrian law.**

Culture substrate

With regard to our interests (the history of state and law) we tried to connect the culture substrate with development of the legal culture in Hungary. The first University in Hungary arose in Pécs during the reign of Louis the Great (1342 – 1382). During the existence of Pécs University the king Sigismud tried to establish another University in Óbuda. However, both universities concluded their activities during the 15th century. The last University fonded before 1526 was the *Academia Istropolitana* in Bratislava. In the Middle Ages Canon law and Roman law were the basis of legal education and legal culture. All of these universities existed for rather a short time, so they were mainly the universities in Prague, Vienna, Krakow that were attended by the students from Hungary (and Slovakia).[1]

[1] See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)]. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, Vydavateľské oddelenie, 2008, p. 52 - 54.

The most significant University became the University of Trnava provided general studies (*studium generale*) in 1635-1777. At first it comprised faculties of philosophy and of theology, led by the Jesuits. Later on faculties of law (1667) and of medicine (1769) were added. Among eminent jurisprudence scholars of the Law Faculty of the Trnava University can be named Martin Svätojánsky-Szentiványi, Johannes Sambucus, Josephus Benčík, Franciscus Otrokocsi, Johannes Rendek etc. During the 18th century the Trnava University was reformed according to the Vienna University. The move of the university from Trnava to Buda in 1777 meant a loss of direct stimuli to the development of scientific research.[2] On the other hand, by concentrating the students (and professors) from Slovakia a centre influencing cultural language (A. Bernolák) arose in the University of Trnava.[3]

Trnava in the Middle Ages[4*]

Culture substrate is defined by the culture of Slovak ethnic; meanwhile the knowledge of the history of development of law is an inherent component of our own national identity. This is closely related to the formation of the Slovak national conscience as ethnic and later as the nation. Slovak manifestations of national conscience can be already observed in the modern evolution in the 17th and 18th century in form of defence and canticle works (J.B. Magin (*Apology*), S. Timon, M. Bell, A.F. Kollár). Demands of the Slovaks from the period before 1848 were mainly interested in preserving linguistic balance against magyarization in the Church. In this period, there were present also efforts of codification of the Slovak literary language (A. Bernolák, Ľ. Štúr). After 1848 there was a radical change. Slovaks and their first (cultural and political) representations came with constitutional plans on separate or at least an autonomous state life in the federated Hungary.[5] In this context it is especially important to mention the petition movement in 1848 which led to the manifesto of the Slovak People

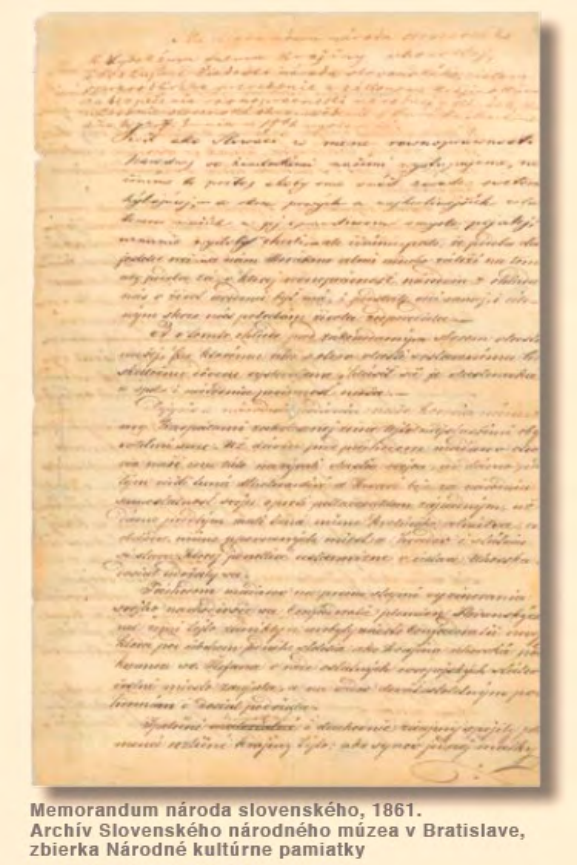
2 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia. Studia Historica Slovaca XXI. MANNOVÁ, E. (ed.). Bratislava: Historický ústav SAV, Academic Electronic Press, 2000, p. 175.

3 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 13.

4 http://library.thinkquest.org/22618/strmes/s1e.html (cit. 31. 10. 2012).

5 See also MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia]. Košice: Aprilla, s.r.o., 2008, p. 85 – 91, p. 103 – 107 and BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918. Bratislava: Vydavateľstvo Slovenskej Akadémie Vied, 1971, p. 63 - 67.

– the ***"Demands of the Slovak Nation"***[6] (Liptovský Mikuláš in May 1848) and then to the cultural and political movement in 1861, during which there was created crucial political manifesto of the Slovak nation, *de facto* program of the part of its representation: Old School, later the Slovak National Party – the ***"Memorandum of the Slovak Nation"***[7] (Martin in June 1861).



Memorandum národa slovenského, 1861.
Archív Slovenského národného múzea v Bratislave, zbierka Národné kultúrne pamiatky

Memorandum of the Slovak Nation [8*]

This mentioned autonomist program, always maintaining the constitutional framework of Hungary, remained also later as the basis of political and national platform of the Slovak representation until the end of Hungary. In response to a relatively hard magyarization there raised numerous Slovak petitions, which led to at least elemental

6 Programme demands of Slovak political group formulated in *„Demands of the Slovak Nation"* in essence agreed with the programme of the Hungarian Revolution with significant exception of national demands of Slovaks.

7 Basis of the *„Memorandum of the Slovak Nation"* was a limited form of autonomy (Slovak District called Okolie) in the framework of the Kingdom of Hungary. After the dissolution of the Hungarian Parliament by Vienna, the Slovaks placed the so-called *Vienna Memorandum* – the most comprehensive constitutional programme of the Slovaks before 1918 – in the hands of the Emperor in December 1861. Its basis was political and cultural autonomy for Slovaks. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 209.

8 http://www.google.com/imgres?imgurl=http://www.dekoracie-vianoce.sk/image/Memorandum%2520naroda%2520slovenskeho%25201.jpg&imgrefurl=http://www.dekoracie-vianoce.sk/281,0,Vyrocie-Memoranda-naroda-slovenskeho-7.-Jun.html&h=593&w=375&sz=90&tbnid=vN3HjkVIwTD-BM:&tbnh=90&tbnw=57&prev=/search%3Fq%3Dmemorandum%2Bn%25C3%25A1roda%2Bslovensk%25C3%25A9ho%26tbm%3Disch%26tbo%3Du&zoom=1&q=memorandum+n%C3%A1roda+slovensk%C3%A9ho&usg=__K02eC2VNsBSEXzBfHfsAvI_o-9A=&docid=cFoYoUNuzdznSM&hl=en&sa=X&ei=mYqGUJS2JMfk4QSfmoCABg&ved=0CFAQ9QEwBg&dur=530 (cit. 31. 10. 2012).

preservation of the Nationality Act of 1868, together with the establishment of the some Slovak secondary schools and foundation of the Slovak supra-confessional organization - *Matica Slovenská*. Fundamental change in the political situation in the 1st World War definitely transferred the whole Slovakia and the Slovaks to the Czechoslovak statehood and then to its own Slovak statehood.

Time substrate (concepts of the periodization in the development of state and law)

In determining the particular basic lines of development, more specifically in determining the periodization of development of state and law in our country we can apply several points of view. The simplest is the classification into the medieval and modern law, and medieval and modern state. The boundary between medieval and modern law is not the same as the historical boundary between medieval and modern times. New way of thinking, typical for modern times, is associated with a new view of the human being as an entity of rights devoid of ties related to its social status. The new way of thinking is associated with the elimination of the social estate system, too. This period, thus, directly led to period of development of the modern law.

According to the nature of relations between the privileged and non-privileged social groups and taking into account the actual distribution of political power there can be classified the following periods in the development of State and Law:

1. patrimonial period
2. (social) estates period and
3. modern period.[9]

Patrimonial period is characterized by application of the so-called patrimonial theory, according to which the country (state) was the object of royal law, it was considered as its "property" or a heritage and all the state power came from and concentrated in the hands of the monarch. The monarch was in the position "above the state". Estates period is associated with a weakening of monarch´s central power, and he loses their exclusive position in the state apparatus. The social estates are trying to gain share of the state authority and the state acts as an "estates community" or "estates corporation" within the meaning of unity of the sovereign and estates. The state of the modern type is the product of a period of the enlightened absolutism, the sovereign is gradually becoming a "state official", but he was still "above the state". The state power is shared not only by estates (i.e. privileged groups of the society), but also by the people - unprivileged social classes, as shown and clearly reflected in the revolutionary social rebellions of the 19th century. The State, in the observed historical development and in the meaning of the above mentioned, must be understood differently from today's consideration of the state as supreme public organizational unit.

[9] See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia]. Ostrava: Key Publishing, 2007, p. 24 - 26.

This consideration is applied only in the Modern Age and during the development of the modern state and law.

Periodization according to form of government and state regime[10]:

Monarchy era

1. patrimonial state (till the middle of the 13th century)
2. state of feudal fragmentation (middle of the 13th century till the beginning of the 15th century)
3. state of the estates (beginning of the 15th century – 1526)
4. absolutist state (1526 – 1848)
5. revolution (1848-1849)
6. neo-absolutism (1849-1860)
7. provisional period (1860-1867)
8. constitutional monarchy (1867-1918)

Republic era

1. since 1918 to date

The period of the patrimonial state can be identified with the period of the formation of early feudal monarchies, whereby in our area there were two states of that type – the Great Moravia and the Hungarian early feudal state (10th – 12th centuries). During the existence of early feudal monarchies there occurred the consolidation of state and formation of the bases of the law system (legal rules conserved from the time of Great Moravia (*Zakon sudnyj ljudem* etc.) and from the early reign of Árpád dynasty (the laws (decrees) of St. Stephen, Ladislaus and Coloman).

St. Konštantín (Cyril) and Metod[11*]

[10] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848). Plzeň: Aleš Čeněk, 2009, p. 11.

[11] http://www.gymza.sk/gymza/archiv/1D-dejepis/ve.htm (cit. 31. 10. 2012).

The primary manifestation of the feudal disintegration was the fragmentation of the state into a number of relatively independent (legally and economically) counties, which not always completely respected the central authority of the state represented by the sovereign. The monarchy of feudal fragmentation is characterized by legal particularism and by fragmentation and weakening of the central feudal power, resulting in the adoption of the Golden Bull of Andrew II setting out the limits of the sovereign with respect to nobility. Estates monarchy is characterized by the fact that the political power is executed not only by the sovereign, but there are involved also the estates, i.e. social groups that had political rights, which were manifested e.g. by the fact that they could participate in the Hungarian Diet (the county congregations, too) and occupy public offices. The period of absolute monarchy essentially coincides with the period of late feudalism. The monarch is the head of state, who is unlimited in his power, nor even by constitutional provisions neither by the existence of other state bodies (in our area it is the reign of the Habsburg dynasty). Revolutionary years 1848-1849 in Hungary are characterized by specific development of state and law, thus explaining their individual definition and classification. The following neoabsolutistic regime was a denial of the constitutional rights of Hungary, in the spirit of *Verwinkungstheorie* with imposed Austrian law with the aim to stabilize and consolidate the Hungarian legal order. Period of provisory was a preparatory phase for the next period of the Austro-Hungarian Compromise in terms of law and state, applied in the conditions of constitutional monarchy.

Periodization according to social and economic character of the state and legal status of the population[12]**:**

Feudal state (9th century – 1848)

Bourgeois-civic state (1848-1948)

Socialist state (1948-1989).

[12] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 11.

Prehľad panovníkov a prezidentov a obdobie ich vlády na území Slovenska

1. SAMO 623/4–658/9
2. PRIBINA okolo 800–861
3. MOJMÍR I. okolo 830–846
4. KOCEĽ 861– okolo 876
5. RASTISLAV 846–870
6. SVÄTOPLUK 871–894
7. MOJMÍR II. 894–907
8. SVÄTOPLUK II. koniec 9. stor.–zač. 10. stor.
9. GEJZA 940–997
10. ŠTEFAN I. 997–1038
11. PETER 1038–1041 1044–1046
12. SAMUEL ABA 1041–1044
13. ONDREJ I. 1046–1060
14. BELO I. 1060–1063
15. ŠALAMÚN 1063–1074
16. GEJZA I. 1074–1077
17. LADISLAV I. 1077–1095
18. KOLOMAN 1095–1116
19. ŠTEFAN II. 1116–1131
20. BELO II. SLEPÝ 1131–1141
21. GEJZA II. 1141–1162
22. ŠTEFAN III. 1162–1172
23. LADISLAV II. 1162–1163 protikráľ
24. ŠTEFAN IV. 1163–1165 protikráľ
25. BELO III. 1173–1196
26. IMRICH 1196–1204
27. LADISLAV III. 1204–1205
28. ONDREJ II. 1205–1235
29. BELO IV. 1235–1270
30. ŠTEFAN V. 1270–1272
31. LADISLAV IV. KUMÁNSKY 1272–1290
32. ONDREJ III. 1290–1301
33. VÁCLAV (LADISLAV) 1301–1305
34. OTO 1305–1307
35. KAROL RÓBERT 1308–1342
36. ĽUDOVÍT VEĽKÝ 1342–1382
37. MÁRIA 1382–1395
38. KAROL MALÝ 1385–1386
39. ŽIGMUND 1387–1437
40. ALBRECHT 1438–1439
41. VLADISLAV I. 1440–1444
42. LADISLAV V. 1453–1457
43. MATEJ KORVÍN 1458–1490
44. VLADISLAV II. 1490–1516
45. ĽUDOVÍT II. 1516–1526
46. JÁN ZÁPOĽSKÝ 1526–1540
47. FERDINAND I. 1527–1564
48. MAXIMILIÁN 1564–1576
49. RUDOLF 1576–1608
50. MATEJ II. 1608–1619
51. FERDINAND II. 1619–1637
52. FERDINAND III. 1637–1657
53. LEOPOLD I. 1657–1705
54. JOZEF I. 1705–1711
55. KAROL III. 1711–1740
56. MÁRIA TERÉZIA 1740–1780
57. JOZEF II. 1780–1790
58. LEOPOLD II. 1790–1792
59. FRANTIŠEK I. 1792–1835
60. FERDINAND V. 1835–1848
61. FRANTIŠEK JOZEF I. 1848–1916
62. KAROL IV. 1916–1918
63. TOMÁŠ G. MASARYK 1918–1935
64. EDVARD BENEŠ 1935–1938
65. EMIL HÁCHA 1938–1939
66. JOZEF TISO 1939–1945 EDVARD BENEŠ 1945–1948
67. KLEMENT GOTTWALD 1948–1953
68. ANTONÍN ZÁPOTOCKÝ 1953–1957
69. ANTONÍN NOVOTNÝ 1957–1968
70. LUDVÍK SVOBODA 1968–1975
71. GUSTÁV HUSÁK 1975–1989
72. VÁCLAV HAVEL 1989–1992
73. MICHAL KOVÁČ 1993

13*

13 * ŠKVARNA, D. et al.: Lexikón slovenských dejín. [Lexicon of Slovak History]. Bratislava: Slovenské Pedagogické nakladateľstvo, 1997, s. 344.

2 Sources of Hungarian Law

Legal theory[14] **generally divides the sources of the law into:**

- **material** (phenomena and factors of social life that affect the law-making process, and on which the law-making process is based)
- **formal** (specific forms of law - written or unwritten - which can determine the content of law and identify its creator (originator).

In the following interpretations we will discuss particularly the formal sources of law, and also the material sources, but only partly, due to the introduction of circumstances of constitutional development.

The most important sources of Hungarian law till 1918 included:

- **custom,**
- ***Opus Tripartitum,***
- ***Temporary Court Rules of Judex Curiae Conference,***
- **written law (act, statute),**
- **court decision and binding decision of Curia Regis,**
- **decree and royal decree,**
- **privilege,**
- **statute**[15]**.**

2. 1 Custom

Custom *(antiqua consuetudo regni)* was the oldest and the fundamental source of Hungarian (particularly private) law. From the viewpoint of form, customary law is unwritten law; in Hungary, however, the norms of customary law were recorded in writing in the *Opus Tripartitum*. The application of the norms of customary law was recognized in Hungary by the state authority – custom was a formal source of the law and as

[14] Compare with for example PRUSÁK, J.: Teória práva. [Theory of Law]. Bratislava: Vydavateľské oddelenie PF UK, 1995, p. 188.

[15] The stated classification does not respect the chronological point of view, nor the meaning perspective that during the observed development fundamentally changed. As a criterion there was chosen mater-of-fact and practical didactic continuity.

such customs were applied by the courts or other state authorities (e.g. by references to legal customs contained in particular laws, decrees or orders)[16].

Till the beginning of the 16th century, custom was the prevailing source of law. It was partly attributable

- to the imperfect legislative process (initially, the ruler was the exclusive legislator; the Hungarian Diet started to develop as a consolidated body in the 15th century);
- and to the problems with the publication of laws (validity of laws was limited to the period of life of the issuing ruler and then depended on the fact whether or not the law was accepted by the ruler's successor or the customary law) [17].

In the society, the difference between formally different sources of law (customary law and statutes) gradually disappeared; customary law was considered to be the older, more comprehensive and the fundamental source of law. The disadvantages of the predominance of unwritten customary law in Hungary included lack of transparency and non-systemic nature of legal rules leading to arbitrary judicial practice and legal uncertainty[18].

Since the end of 15th century codifying efforts were growing in the Hungary. These efforts tended to:

- collect and write customary law, especially noble customary law (the *Opus Tripartitum*);
- collect and systemize Hungarian laws (acts and royal decrees) for the purpose of redacting the Hungarian Collection of Laws (*collectio decretorum – Corpus Iuris Hungarici*);
- collect court decisions (*Decisiones Tabulae, Planum Tabulare*).

Next we will deal with the first way how the legal customs were collected and put in the written form. These efforts are represented by Štefan Verböczy in the work - *Opus Tripartitum*. *Opus Tripartitum* has quite non - systematic position within the hierarchy of sources of the Hungarian law, a part of the legal science understands it as a separate source of law *sui generis* (the author of this work respects this point of view becuase of the didactic reasons); other part of the legal science defends the position of the *Opus Tripartitum* as the legal custom (the mentioned opinion is the closest to the author´s point of view) and a part of the legal science considers the *Opus Tripartitum* as an act (it is interesting to consider that this opinion should probably be the closest to particular users of the *Opus Tripartitum* in the Middle Ages, as the *Opus Tripartitum* is generally understood as a decree, the law - "*Decretum Tripartitum*", "*Decretum generale*").

[16] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 35.

[17] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia]. Bratislava: Iura Edition, 2002, p. 53 – 54.

[18] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 36.

The issuance of the *Opus Tripartitum* significantly influenced the development of customary law; unwritten customary law was transformed into written customary law (with the preserved opportunity of its further development). Štefan Verböczy dealt with the term "custom" also in theory and tried to define the features and the functions of customs[19].

Štefan Verböczy (1465 – 1541)[20*]

According to Verböczy's Tripartitum (*Prologue*, chapter 10, § 3-7), certain requirements must be met for a legal practice to be recognized as custom, including

- *reasonability in nature*,
- *praescriptio* (lapse of a period of time, after which a practice is accepted as customary law; this period starts when the custom was first exercised)
- and *frequentia actuum* (repeated application of the custom, based on the general acceptance of its contents).

According to recent literature[21], the (distinguishing) features of custom include:

- being followed for a prolonged period of time and in reality by a certain community,
- definiteness of the rights and obligations granted or imposed by the custom
- and general acceptance of its binding nature by the community.

According to Verböczy's Tripartitum (*Prologue*, chapter 11, § 3-5) custom had three fundamental functions (values):

- derogative function – *abrogatory value* – (power to repeal the written law);

19 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 36.

20 http://en.wikipedia.org/wiki/Istv%C3%A1n_Werb%C5%91czy (cit. 12. 11. 2012).

21 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918]. Bratislava: Vydavateľstvo Obzor, 1992, p. 61.

- interpretative function – *explanatory value* - (the custom could be used to interpret/construe the provisions of written laws);
- and complementary function – *substitutive value* - (custom was supposed to fill the gaps existing in written laws),

which were assigned to custom as a source of law already by Verböczy.

The derogative function – agrogatory value of custom - (as the power to repeal the written law (act)) was limited before 1848 as follows:

- only a generally recognized (country, royal) custom and a general law were legal norms of equal value and equal legal force;
- a local (particular) custom and a general law were no longer equal legal norms and the particular custom was no longer able to override the written law[22].

Opus Tripartitum

Prologue, Chapter 10 – What custom is and what is necessary to affirm custom

Now custom has to be discussed. Vhence it shoul be known that custom is a certain law, arising from practice, taken for law where law is deficient. It does not matter whether it is based on writing or on reason, since reason also supports laws. Moreover, if law is built upon reason, then everything that is built on reason is law; providing it agrees with religion, comports with order, and serves salvation. It is called custom, for it is, as it were, common practice and human use because it is in common use.

§ 1 But to be more clear: custom may (for our purpose) be defined thus: it is that certain *ius*, introduced through the practices of whomsoever can by public authority enact laws. Therefore custom also falls within the name of *ius*, and if a prince orders that one should judge according to *ius*, then a judge can pass judgment according to custom and the statutes of the place. Contrariwise: a comon law falls within the name of custom. Thus, if someone makes mention of custom in his plaint, then a common law may be seen as meant.

§ 2 Any people can introduce a local custom. In order that custom be effective and hold force, a few things are necessary.

§ 3 First: it must be reasonable. It is reasonable when it aims and advances the goal of law. The goal of canon and divine law is the beautitude of the soul. The goal of civil law is the common weal. Therefore, if a custom aims at the beautitude of the soul, it is reasonable by canon and divine law; and if it opposes an eternal goal, it is unreasonable. According to civil law, a custom is reasonable if it aims at the common weal. And since in this regard there are no specific rules, say that a custom may be regarded as reasonable if it does not contradict natural law, the law of nations, or positive law.

§ 4 But since law is founded on reason it seems that no custom can be reasonable that contradicts law. Considering the different kinds of reason, it must be said that a custom may be reasonable even if it contradicts a reasonable law. Depending upon their different purposes, two opposites may be true at the same time, for example, to marry or not to marry.

§ 6 Secondly, custom must be prescriptive, i.e., it must last for an appropriate time and must receive force in the course of that time required for prescription. But this holds only for canon law and it is not required even by that law unless it contradicts positive law. According to civil law, a decade, that is the passage of ten years, is sufficient for the introduction of a custom, even if it contradicts civil law. If, however, a custom contra-

[22] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 63.

dicts canon law, then the space of forty years is required. Yet, if a custom is introduced in the absence of law, then, even in respect of canon law, a decade seems to be sufficient. The passage of ten years begins from the time the first act is performed by the people.

§ 6 What I have said concerning civil law, that ten years is sufficient overall, is limited to cases where custom is invoked in matters that are not reserved to the prince as the mark of his supreme power. For then a custom cannot be introduced except after so long a time that no one can recall when the custom started.

§ 7 Thirdly, according to the common opinion of the doctors, repetition of the act is needed. Say, however, that a repeated act is not in itself necessary for the establishment of a custom. But because the consent of the people cannot be deduced from one single act, the repetition of the act can be seen as the cause and custom as the effect. And it is necessary to have so many and such well known acts that is becomes in all likelihood known to most of the people, for it is not the act but the tacit consent of the people that establishes custom. Thus, when the tacit consent of the people can be deduced, then the great recurrence of acts is unimportant. What is more, a custom can occasionally be introduced by a single act with a repeated cause lasting for as long as it takes to establish a custom; for example, a custom can be introduced if someone has a bridge on the public road or something of this kind.

Prologue, Chapter 11 – How law differs from custom; and on the threefold value of custom

And law differs from custom in three ways. First: as tacit and express.

§ 1 Second: as written and unwritten, though this is not an essential difference. For the law of the prince, even if unwritten, does not fail to be law. And if custom is put in writing, it still remains custom; for example Customs of Fiefs which are written down.

§ 2 Third: as momentary and continual; because custom cannot be introduced in an instant. What is tacit progresses at a slower pace than what is expressly stated. Nor is that which emerges from inference as certain as that which is expressed. Therefore, custom cannot be introduced by the people at once, but only gradually.

§ 3 Custom has a threefold value. Namely, explanatory, as it is the best interpreter of the law; so when law is doubtful, we have to refer to the custom of the place, and if it is clear from that there is no need to deviate from the meaning given by custom.

§ 4 Secondly, it has abrogatory value, because it supersedes law when when it contradicts custom.

§ 5 Thirdly, it has sunstitutive value, because it replaces law where this is deficient[23].

Recording of customary law in writing stabilised the development of law in Hungary, even though attempts were made (in the middle of the 16th century and then at the beginning of the 18th century) to make a revision of the *Opus Tripartitum* (*Quadripartitum, Novum Tripartitum*). None of the two works became a law and customary

[23] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: od najstarších čias do roku 1790. I. [Sources of Law in the territory of Slovakia: since earliest times to 1790]. Trnava : Typi Universitatis Tyrnaviensis, 2007, p. 200 – 201; BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), Budapešť: Charles Schlacks, Jr., Idyllwild CA, CEU, 2005, p. 31 – 35.

law (base on the *Opus Tripartitum*) preserved the position of fundamental source of Hungarian law till 1848[24].

The year 1848 brought a turnaround in the Hungarian law. At the last session (meeting) of the Hungarian Estates Diet there were abolished the most important institutes of the medieval law, and thus came time for the conversion of the medieval feudal state to a civic state based on equality of all before the law. Within the legal system there was built dualism of public and private law. The Statutory Article (abbr. Art.) XV/1848 on abolition of *aviticitas* obliged the Hungarian Ministry to draft the bill of Civil Code and submit it to the next session of Diet, with what at the level of the sources of law there is associated the demand for fundamental change - weakening the importance of legal custom and on the contrary, enhancing the importance of the law. Codification efforts emerging in Hungary were in the full compliance with the codification efforts in other European countries (French *Code Civil* from 1804, Austrian *Allgemeines Bürgerliches Gezetsbuch* from 1811). At that period, the legal custom was confronted with skepticism about accommodatation of the customary law[25] stemming from doubts, whether the customary law is able to adapt to large revolutionary changes, and thus, whether it is capable of its own internal reform due to the fundamental change in the social structure.

Historical development did not allow implementation of the Hungarian codification plans. Laws adopted in March 1848 (by the Hungarian historiography known as "April laws" by the king's grant of sanctions; in Slovakia, there is established the name "Bratislava's March Constitution") were too gappy to have the "codification ambition"). However, it is important to mention that they include the revolutionary provisions changing feudal state to a civic ("capitalist") state and removing feudal legal relationships based on the *urbarial system* and *aviticitas*. In the next era of Bach absolutism (1849 - 1860), the Vienna government tried to fill the gaps created in the private and public law by the process of enforcing Austrian law. By the Patent of 29th November 1852 there was enforced the Austrian Civil Code on the territory of Hungary (*Allgemeines Bürgerliches Gezetsbuch, ABGB*), and it entered in force in Hungary May, 1st, 1853. In the area of private law, which was previously regulated almost exclusively by the legal custom, occurred an entirely new situation, the Austrian Civil Code due to its exclusivity did not allow to apply the legal custom (in the resolution, the judge is bound only by law), and also forbade the creation of new customs (position of law as a fundamental source of law).

Austrian General Civil Code (ABGB)

(selection of provisions)

Introduction, in general about the civil laws. The concept of civil law.

§ 1 Summary of acts, that govern the mutual private rights and duties of citizens in the state, forms the state´s civil law.

[24] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 36 - 37.

[25] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 56.

§ 2 Ignorance of the law is no excuse, if the law was properly declared.

Beginnings of the competence (effectiveness) of the acts

§ 3 The range (effectiveness) of the Act and the legal consequences flowing of it begin immediately with its declaration, if in the declared law itself was not shifted its effectiveness.

Range (scope) of the Act

§ 4 Civil laws bind all citizens of the countries for which they were declared. Citizens are bound by these acts also during the legal actions and procedures that are done outside of the country, if these acts limit their ability to carry out these actions and procedures, and if these actions and procedures have to cause legal consequences also in these countries. To what extent are strangers bound by these laws is provided in the following head.

§ 5 Acts do not operate retrospectively, thus they do not apply for actions that occurred earlier, nor for the rights that were acquired earlier.

The duration of the Act

§ 9 The Acts remain valid as long as their legislator himself canceled or changed them.

Other types of legislation:

a) customs (habits)

§ 10 The habits can be taken into consideration only in those cases when the Act itself relies on them.

b) statutes

§ 11 Within Statutes of the provinces and of the provincial districts have the power of act only those statutes that will be expressly confirmed by landlord after the announcement of this Code.

c) judicial decisions (decrees)

§ 12 Arrangements made in individual cases and court judgments issued in individual legal disputes never have legitimate power, they can not be applied to other cases or to other persons.

d) privileges

§ 13 Privileges and exemptions granted to individuals or even entire communities are treated just like any other law, unless political statements specifically provide otherwise.[26].

From the point of view of the Hungarian constitutional law, the unconstitutional regime of Bach's absolutism and the enforced Austrian law lasted a relatively short time - till 1860, when Emperor by the October diploma ordered to return to the constitutionality and to the old Hungarian law. Returning to the old Hungarian feudal law and overcoming the need for reform and stabilization of the law system should be provided by the Temporary Court Rules adopted by the Judex Curiae Conference in 1861 and understood (like the *Opus Tripartitum*) as the source of the law *sui generis*.

Development in the field of private and public law after the adoption of the Temporary Court Rules had a dual direction:

[26] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918]. Trnava: Typi Universitatis Tyrnaviensis, 2012, p. 204 – 205.

- through the development of customary law, in particular in the area of judicial practice and since 1912 in the area of judicial practice of the Royal Curia (*Curia Regis*) in the form of binding curial decisions
- and through partial codifications.

In the late 19th century in Hungary there culminated efforts to codify individual sections of private and public law. In the period of Dualism there increased the importance of jurisprudence (legal science), which tried to fill in temporarily created gappy legal system, particularly in the area of private law, also because of the fact that the major source of private law was still the legal custom, which was increasingly developed and systematised by the decision-making and later law-making activities of the Royal Curia (*Curia Regis*).

In the Hungarian jurisprudence (legal science) of dualism there were not created independent scientific theories dealing with customs and legal relationship between law and custom. Representatives of the Hungarian jurisprudence were mostly based on the predominant legal-philosophical directions: historical jurisprudence and natural law jurisprudence and positivist legal philosophy, theory and legal- sociologic theory. The most serious debate was recorded between representatives of historical jurisprudence and natural law jurisprudence[27]. Historical jurisprudence [28] considered as law that element, which is law in terms of the legal convictions of the people, it perceived the creation and development of the law as a slow, organic process, natural development of perceiving law by people excluding external intervention. Custom and law were thus expressions of the national legal awareness, but the custom was its direct manifestation and law - an indirect expression. Impact of the historical jurisprudence on Judex Curiae Conference was evident from the text of the Temporary Court Rules and decision-making activities of the Royal Curia (*Curia Regis*) until the 80-ies of the 19th century. Natural law jurisprudence and positivist legal philosophy[29] rejected the idea of a slow organic development of law and of emphasizing the national character of the "old Hungarian law", as the Hungarian law "was not created as the subject of life and legal awareness of the Hungarian nation, but by the introduction of foreign institutes that met everyday needs". Legal-historical development "agreed with" natural law jurisprudence with regard to the acceptance of the need of codification. Fundamental codifications in individual legal areas of the Dual Monarchy definitively confirmed the change in the system of sources of law – enforcement of the fundamental position of the Act at the expense of retreating customs.

The only exception in this change remained substantive civil law, which in spite of prolonged codification efforts[30] retained legal custom as a major source of law. In 1895 *Pemanent Commision for Drafting the Civil Code* was established. Its work brought about the bill published in 1900. The bill of Civil Code had not the law making ambi-

[27] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 63-65.

[28] Among its prominent leaders in Hungary belonged Béni Grosschmid.

[29] Among its prominent leaders in Hungary belonged Reszel del Adami and István Teleszky.

[30] MÁDL, F.: Kodifikation des ungarischen Privat-und Handelsrechts im Zeitalter des Dualismus. In: Die Entwicklung des Zivilrechts in Mitteleuropa (1848-1944). CSIZMADIA, A. - KOVÁCS, K. (eds.). Budapešť: Akadémiai Kiadó, 1970, p. 112 -113.

tion. Actually it was a suggestion of public discussion and rewiev. It consisted of five parts: persons, family law, *res* (rights *in rem*); law of contract (law of obligations) and law of inheritance.[31] Marital personal law did not become a part of the bill of Civil Code and this area was regulated in particular act (Matrimony Act XXXI/1894). Unlike in the previous draft, there was no general part. Legislative aims ("motives") of this draft were issued during 1901 – 1902. Governmental bill of Civil Code (so called "second text") was introduced to parliament (namely special parliamentary committee) in 1913 and again in 1915. The codification was not successful with regard to 1st world war. The bill of Civil Code was influenced mostly by German BGB, Austrian ABGB, but it had original provisions, too.[32]

Draft of the Civil Code (1900)

(selection of provisions)

I. part: Personal Law, Chapter: 1 Persons, Section: 1 A person

§ 1 A person (a man) is born with legal capacity.

§ 2 Minor can reach the age of majority after completing 24th year of life. Court extends the period of underage for three years, if there are substantial reasons to fear that a minor after reaching the 24th year will still not be able to care for themselves or their affairs for some time due to their immaturity.

§ 4 An underage woman may acquire age of majority by marriage. An invalid marriage does not have this effect. The dissolution of marriage does not reverse such acquired age of majority.

§ 6 Legal capacity begins by reaching the age of majority.

§ 14 Legal capacity ends with death.

§ 16 The one who is missing and whose death thus can not be proved, will be declared by court as a dead person if

1) since their birth have passed thirty years, and counting from the end of the year in which they were last known to be alive, there have passed ten years;

2) since their birth have passed seventy years, and counting from the end of the year in which they were last known to be alive, there have passed five years;

3) participated in the war, during which he was missing, and from that time on there is missing any message, and counting from the end of the year, when the war ended, three years have passed;

4) shipwrecked, and from that time on there is missing any message, and from the shipwreck three years has passed or

[31] BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 415.

[32] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 172-173.

> 5) came into danger of death in other circumstances, and from that time on there is missing any message, and after the circumstances giving rise to the danger of death, three years have passed.[33].

The period of the first Czechoslovak Republic was characterized by unification and codification efforts in all areas of law. They were very important in Slovakia and Subcarpathian Ruthenia (as a parts of the Czechoslovak Republic), especially in the area of civil (substantive) law with regard to the character of sources of law and to their formal and content diversity (legal custom, judicial practice, laws and decrees in Slovakia and ABGB in Czech lands). The successful completion of the codification of substantive civil law[34] did not happen, in 1937 there was proposed a draft of the Czechoslovak Civil Code to the Parliament, drafted according to the framework of the ABGB. These efforts were spoiled by the World War II. In the so-called legal two-year period (1948 - 1950) using the previous codification proposals there was prepared the Civil Code No. 141/1950 Coll. and in the 60-ies of the 20th century Civil Code No. 40/1964 Coll., which in the amended version applies to the present.

2. 2 Opus Tripartitum

Opus Tripartitum (with full title *„Opus Tripartitum Iuris Consuetudinarii inclyti Regni Hungariae partiumque adnexarum"*) was the most important collection of the Hungarian noble medieval law. Demands for codification of noble customary law resulted in issuing the Art. VI/1498 and Art. X/1500 and Štefan Verböczy became the responsible and empowered person[35]. Verböczy drew mostly from law of custom, using also written laws (acts), royal decrees, privileges, statutes and court decisions. In 1514 he turned his work in to the special committee (elected by the Diet) to study and to consider the bill. November, 19, 1514, the *Opus Tripartitum* was confirmed in the form prescribed for law sanctioning. However, the king failed to adjust his seal on the *Opus Tripartitum*, so the sanctioning was not complete and perfect. The reasons of the king's decisions were not clear to the present times. *Opus Tripartitum* did not become a code of law, but by virtue of customary law it became binding. In its nature it was a private legal book[36] (more precisely private collection of customary law of Hungarian nobles). *Opus Tripartitum* was published in printed version first in 1517 in Vienna and since 1628 became an integral part of a collection of Hungarian law *Corpus Iuris Hungarici.*

Opus Tripartitum structure[37]:

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33 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 136.

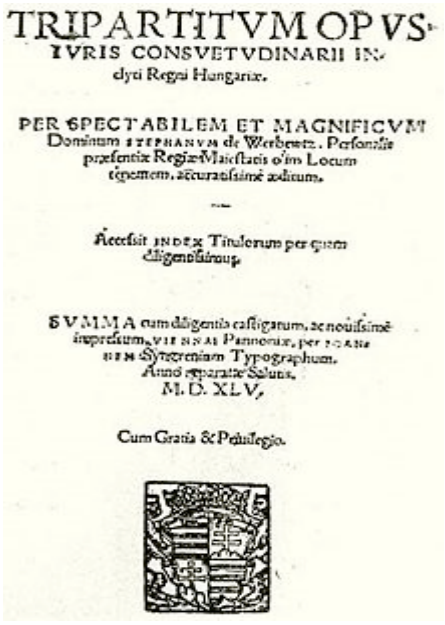
34 Similarly - unsuccessfully ended attempts to codify the areas of civil procedural law, commercial law and criminal law (substantive and procedural).

35 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 82.

36 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 50.

37 See also LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 83-84; MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 58-59.

- Commendation (*comendatio*) – the author's adress to the king;
- Prologue (*prologus*) – in 16 titles Verböczy deals with justice and law, law of custom, written laws (acts), court practice etc. The character of the prologue is theoretical and no normative;
- 1st part of work itself (*prima pars*) – in 134 titles Verböczy deals with the Hungarian private noble law, especially *rights in rem*, law of obligations, law of inheritance, family law etc.;
- 2nd part of work itself (*pars secunda*) – in 86 titles Verböczy deals with the sources of law, procedural law etc.;
- 3rd part of work itself (*pars tertia*) – in 36 titles Verböczy deals with the particular laws as towns/municipal law, serf/liegemen law, Transylvanian and Croatian law etc.;
- Commendation (its conclusion);
- Deed of confirmation.


TRIPARTITVM OPVS
IVRIS CONSVETVDINARII IN
clyti Regni Hungariæ.

PER SPECTABILEM ET MAGNIFICVM
Dominum STEPHANVM de Werbewcz. Personalis
præsentiæ Regiæ Maiestatis olim Locum
tenentem, accuratissimè additum.

Accessit INDEX Titulorum per quem
diligentissimus

SVMMA cum diligentia castigatum, ac nouissimè
impressum, VIENNÆ Pannoniæ, per IOANNEM
HAMANN Sytzrenium Typographum.
Anno reparatæ Salutis
M. D. XLV.

Cum Gratia & Priuilegio.

Opus Tripartitum (Wienna, 1545)[38*]

Although the *Opus Tripartitum* did not become an act (written law), it was used and accepted as a source of law by the court practice, by the legislation (*Tripartitum* was designated as *"Decretum generale"*), by the legal science and literature.[39] *Opus Tripartitum* changed the form of customary law, instead of unwriten customary law it introduced written customary law.

Opus Tripartitum

38 http://sk.wikipedia.org/wiki/Tripartitum (cit. 12. 11. 2012).

39 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 109.

Prologue, Chapter 2 – *Ius* and its divisions

Ius as far as it concerns our purpose, is the good and the just that follows from justice. And for our purpose, this applies to our customs, whether written or unwritten.

§ 1 Hence, *ius* is the general name and a law is an aspect of *ius*. For every *ius* consists of laws and customs, that is, the written and unwritten law. For in terms of Cicero's definition, the law is the art or knowledge of goodness and fairness, and because of this we (jurists) are deservedly called priests, that is those who administer the sacred laws and to each his rights.

§ 2 In other words, *ius* is called the collection of legitimate commands that incline us to observe what is good and fair, and which is useful and equitable or true, namely justice.

§ 3 The law is, thus, of two kinds: the one is public law, the other private. Public is the one which refers primarilly to the rule and government of kingdoms, as well as the commonweal, matters sacred, the clergy and the magistrates. Therefore, whoever causes harm to the clergy, to things sacred or to magistrates – that is, to the governors of the people – can be accused by anyone of a public crime. The private is separate law, which pertains to the benefit of particular persons. And this latter is of three kinds: namely, natural law (ius naturale)[40], the law of nations (ius gentium), and the civil law (ius civile).

§ 4 Natural law is common to all peoples, because it exists everywhere by virtue of natural instincts and not by any establishment, and as nature has taught to all animals. And it belongs not only to humankind, but also to every animal. From this come the union of man and woman, the begetting and upbringing of children, the same liberty for all and the capacity to acquire what is in the sky, on the land and in the sea. Then: to return things from safe-keeping or money lent, and to repeal with force a neighbor's violence. Because these or similar act, are never regarded as unjust, but natural and fair.

§ 5 Then, by natural law, we mean what is contained in the law of Moses and in the Gospels which command that one should do to others what one wishes done to oneself and which forbid doing to others what one would not like done to oneself. Hence the verse: „What you wish to happen to you, do to me, what not, avoid! Thus you shall live on earth by the law of the polis." ...

§ 7 The law of nations is of two kinds, namely, primeval and secondary. The primeval law of nations is what all peoples have applied since the beginning of time and what was created by natural wisdom, without any establishment by the people, such as not to hurt anyone, and so on. And that is no different from natural law, except in the way it is perceived. For it is called both natural law and the law of nations, but from different perspectives: natural, insofar as it emanates from natural reason; and of the law of nations, because the peoples have applied it without any specific establishment since the beginning of the world. And by this law, a slave has a free status, because according to natural law all men are born free.

§ 8 The secondary law of nations is the law that peoples have introduced not by natural reason but by reason of the public good and for common use. And it is oftentimes different from natural law. For by natural law everything was common and everyone free; but by the law of nations are division of land and the separation of property was invented which brought about war, captivity, slavery and other such things, contrary to natural law. This law of the nations brought about almost al contracts, such as buying, selling, lease and similar things.

[40] From the wording, that natural law is given by God himself and remains steadfast and stable and is observed by all nations in the same way it can be presumed that the author of the *Opus Tripartitum* came close to the ideas of natural law founder Hugo Grotius. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 48. See also HATTENHAUER, H.: Evropské dějiny práva. [European History of Law]. Praha: C. H. Beck, 1998, p. 362.

> § 9 Civil law is what each people or city created for itself for divine or human purposes. And it is called civil law, as if it were the specific law of the city, which may be understood in three ways. First, in general, as it is universally observed in every city. Secondly, in particular, because it is created by each people or city for itself, and for divine and human purposes. Thirdly, and especially; as the special law of the Romans, which is also called imperial law....[41].

The *Opus Tripartitum* as a collection of customary law did not become a codification work even in this period; it was used as a source of the Hungarian law instead. In 1548 (Art. XXI/1548), due to the pressures from the lower nobility, a revision of the *Opus Tripartitum* was ordered, in response to allegations that it did not contain the valid law and that it tended to be beneficial for middle-class nobility. The treatise elaborated by the revision commission led by Martin Bodenarius was titled ***Quadripartitum.*** The collection now consisted of four parts after the first part of the *Opus Tripartitum* had been divided into two. Even though the paper was discussed in the diet in 1553, it did not become a law[42]. It even did not apply as customary law and was eventually forgotten. The treatise was issued in print as late as in 1798. Repeated requests for codification of Hungarian customary law led to the establishment of a separate commission (in 1715), which was given the task of codifying the customary law. The work of the commission resulted into a treatise called ***Novum Tripartitum.*** As to its nature, it was not a separate piece of work; in fact, it only contained annotations to the *Opus Tripartitum,* and they did not become a law as the *Quadripartitum*[43].

Revolutionary legislation of March of 1848 abolished almost all Tripartitum. Only a part of its provisions remained in force and it was in the area of property relations between spouses, adoption, inheritance rights (noble widow succession and inheritance right, unworthiness to inherit). The aforementioned provisions of the Tripartitum amended and developed in the judicial practice of the Royal Curia (Curia Regis) were canceled only by the adoption of the Civil Code of 1950 and by the Family Law Act of 1949.

2. 3 Temporary Court Rules of the Judex Curiae Conference

After Bach's absolutism regime and removal of the enforced Austrian law, Hungarian law was confronted with:

- the need to return to the old Hungarian law in order to ensure continuous development and consolidation of the legal order,

41 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: od najstarších čias do roku 1790. I. [Sources of Law in the territory of Slovakia: since earliest times to 1790], p. 195 – 196; BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 21 – 23.

42 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 51.

43 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 33-34.

- the need for the imprescindible reform of the Hungarian private and public law with the possibility of maintaining certain provisions of the Austrian law,
- and the need to create a new organization of the Hungarian judiciary (court system).[44]

Judex Curiae Conference (meeting between January 23 and March 4, 1861) under the leadership of the royal judge (*iudex curiae regiae*) count Apponyi had the task of solving these problems. According to the Temporary (Provisional) Court Rules of Iudex Curiae Conference (abbr. Temporary Court Rules) prepared by this Conference:

- the original Hungarian law was to be restored with regard to the changes of revolutionary legislation (Bratislava's March Constitution, 1848);
- the original Hungarian law was to be restored with only real estates being governed by the relevant ABGB rules; also retaining the Austrian rules governing Mining Regulations and the Land Register.

Judex Curiae Conference thus created a starting point for the creation and development of the Hungarian private and public law, different from the law in force in the rest of the Habsburg monarchy countries.

Temporary Court Rules included eight Chapters[45], namely:

1. General Private Law and Civil Procedure;
2. Criminal Procedure;
3. Bill–of-Exchange Law;
4. Bankruptcy Law;
5. Commercial Law;
6. Urbarial Law;
7. Mining Law;
8. Advocacy and Notaries Public Regulations.

Their individual provisions, on one hand, included referring standards (explicit reference to the earlier law, or. general reference to the customary law) and amending provisions of the earlier legislation, on the other hand, stated also new legal standards, e.g. a new system of law of inheritance, the provisions of which were almost completely removed due to the cancellation of *aviticitas*.

Temporary Court Rules were accepted by the Hungarian Diet (on July, 1 and 20, 1861) and by the Emperor. Curia Regis as the Hungarian Supreme Court declared them

[44] MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 302. See also MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 101.

[45] See DAUSCHER, Anton: Das ungarische Zivil- und Strafrecht nach den Beschlüssen der Judex-Curial-Conferenz. Vienna : Manz, 1862.

binding for court practice. Temporary Court Rules were distributed by the county, where they began to be applied immediately by *sedrias* (county courts)[46].

Temporary Court Rules can be regarded as the source of law *sui generis*. They acquired their binding effect via sanctioning the legal custom, although from the point of view of customary law this case was an atypical situation. Temporary Court Rules do not become mandatory as a result of long-term use and conservation, but by a common measure (acceptance) of components of the legislative, executive and judicial powers. Although Temporary Court Rules were recommended only as a temporary substitute for judiciary, not only became the basis of the Hungarian private law, but also became the basis of the private law in Slovakia until 1950.

Temporary Court Rules of Judex Curiae Conference

I. Civil Law; A. Material law

(selection of provisions)

§ 1 Civil Private Law Acts were restituted, but with the following additions required by the need for public confidence, legal continuity and the actual situation.

§ 21 Similarly, all the provisions of the Austrian General Civil Code (hereinafter ABGB), which affect Land-Register order of 15 December 1855 and determine the type of acquisition or disposal of real estate, remain valid until the decision of the Parliament.

§ 23 Finally, there is provided that under the statutory protection there will be preserved also the intellectual creations forming property and enjoying a similar legal protection[47].

2. 4 Written Law (Act)

Written law (act) in the broadest sense may be characterised as a generally binding legal act adopted by a body (public body) authorised to do so by the constitution, subject to the fulfilment of the prescribed conditions concerning its form and publication.

The legislative power in Hungary was initially exercised exclusively by the ruler (king); according to the Hungarian constitutional law, the laws (*decreta)* issued by him applied for the term of life of the issuing ruler. The validity of statutory provisions could be preserved afterwards in two ways: if they were accepted and confirmed by his successor or if they were taken over into the body of customary law. The nobility was given the possibility to take part in the legislative process from the 13th century onwards; first, their role was limited to the advisory one (within the royal council, in general assemblies of nobles or in church assemblies). In 1298, the first restriction on legislative power of the ruler was imposed by adoption of Act - Article XXIII/1298, according to which the ruler was not able to issue any king's order without the royal council (to be confirmed by at least two magnates and two prelates). As to legislative

46 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 104.

47 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 136.

activity of the rulers from the Arpád dynasty, the laws (decrees) of King Stephen, king Ladislaus and king Coloman[48] are most important (regulation of penal law, canon law and partly private law).[49]

King's laws (decrees) issued in the 13th century were not legal acts in the current sense, as they were issued as privileges granting certain rights to the nobility and clergy. These decrees included the Golden Bull of Andrew II (Article I/1222) having the form of a privilege, by which the ruler defined the rights of the nobility[50]. The Golden Bull of Andrew II (*Bulla Aurea*) provided the basis of the Hungarian nobility rights. The Golden Bull defined the concrete duties of king as the guaranties of the Hungarian nobility (*servientes*) position towards public (state) power[51]. The most important provisions of Golden Bull were: a nobleman may not be imprisoned without a court judgement; a nobleman is subject to direct judicial power of the king; Hungarian nobility's *ius resistendi et contradicendi*[52], the nobles and the church were freed from all taxes, the nobles could not be forced to go to war outside of Hungary and were not obligated to finance it etc. The king committed himself to calling an assembly at *Székesfehérvár* on the feast day of Saint Stephen the King (20th August), to which any noble (*serviens)* could come and submit his complaints to the king[53] or palatine (as a deputy of king).[54]

The Golden Bull of Andrew II (1222)[55*]

[48] **The Decrees of St. Stephen** - published in *Corpus Iuris Hungarici* are divided into two books. The first book contains the Saint Stephen's Admonishments to his son Emeric and is divided into an introduction and ten chapters. The second book is a royal decree and consists of an introduction and 55 chapters. **The Decrees of St. Ladislaus** - published in *Corpus Iuris Hungarici,* are divided into three books. **Decrees of Coloman** – published in *Corpus Iuris Hungarici* are contained in two books. Both books of decrees contain various royal laws and synod decrees. MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia]. Košice: Aprilla, s.r.o., 2008, p. 25.

[49] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 37.

[50] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 37.

[51] The Golden Bull is equivalent to the *Magna Carta Libertatum*.

[52] Ius resistendi was the right to disobey the King when he acted contrary to law.

[53] BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 46.

[54] Palatine (*comes palatinus*) was the highest officer of the Kingdom, the king's deputy, foremost judge of the nobility etc. His rights were codified in the *Articuli de officio palatinatus* of 1486. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 453.

[55] http://www.google.com/imgres?imgurl=http://upload.wikimedia.org/wikipedia/commons/thumb/8/84/Aranybulla1.jpg/250px-Aranybulla1.jpg&imgrefurl=http://en.wikipedia.org/wiki/Golden_Bull_of_1222&h=201&w=250&sz=16&tbnid=c0DcVcmbxzmgtM:&tbnh=90&tbnw=112&prev=/

Neither one original of the Golden Bull is preserved; its text is published in the *Corpus Iuris Hungarici* according to the confirmation of the Golden Bull issued by Louis I the Great in the 1351. The Golden Bull was amended, changed and confirmed several times by the rulers (1231, 1267, 1351 et al.)[56].

Golden Bull of Andrew II (1222)

(the selection of articles)

On behalf on the Holy Trinity, Andrew, Dei Gratia the King of Hungary ... order:

Art. I.: We order that the king is obliged to summon an assembly at *Székesfehérvár* yearly on the feast day of Saint Stephen the King (20th August), to which any *serviens* (any nobleman) could come and submit his complaints to the king or palatine (as a deputy of king).

Art. II.: No nobleman may be arrested (in an unfair way), nor can he be oppressed by the desire of any higher power.

Art. III.: The noblemen are declared to be exempt from the payment of taxes, nor will money be collected from their treasures. Neither will their residences be occupied, nor their villages, and these may only be visited by those who have been invited. No taxes will be levied on the Church.

Art. IV.: If any nobleman dies without a male heir, his daughter will receive a quarter of his possessions; the remainder of his property shall be given to others, but if, as a result of their deaths, they cannot take possession of these properties, then these properties shall pass into the hands of their closest living relative; if this is not possible, then the King shall inherit them.

Art. VII: If the King wishes to send his armies outside of the Kingdom the noblemen will not be under obligation to go with him, if the monarch doesn't pay them. However if an invading army enters in the Kingdom, all of them must serve to expel it.

Art. VIII.: The Hungarian Palatine may judge everyone in the Kingdom without any differentiation; but he cannot take try any nobleman without the King's approval.

Art. XXVI.: Hungarian properties cannot be given to foreigners.

Art. XXXI.: In order for this document to be lawful, and put into use for the future, seven copies, each sealed with the Golden Seal, will be made of it ... if the king broke the provisions of the Golden Bull, the bishops and nobles had the right to resist.[57]

During the reign of king Sigismund[58], king Matthias Corvinus and king Vladislas II it was issued several statutory articles regulating the area of Hungarian noble law (Mat-

search%3Fq%3Dgolden%2Bbull%2Bhungary%2B1222%26tbm%3Disch%26tbo%3Du&zoom=1&q=golden+bull+hungary+1222&usg= YhNh5TGBu28f9 LOM6saPjie5SE=&docid=YIO0OfqiPWMQqM&hl=en&sa=X&ei=aJaGUK2CMubT4QT0hYD4Dw&ved=0CDUQ9QEwAw&dur=381 (cit. 12. 11. 2012).

56 The Golden Bull of Andrew II (1231), so as the Golden Bull of Béla IV (1267) did not contain the *ius resistendi et contradicendi*. This right was replaced by the right of excommunication.

57 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: od najstarších čias do roku 1790. I. [Sources of Law in the territory of Slovakia: since earliest times to 1790], p. 85 - 89.

58 Sigismund of Luxembourg (so as Matthias Corvinus) introduced important military, financial and administrative reforms. His attempt to create a "royal town estate" is also important. Throughout his reign, Sigismund was very concerned with observance of the rights of the towns. The consolidated relations and stability in the country also helped the favourable development of the towns. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 81.

thias Corvinus's *Decretum maius* of 1486 a Vladislas's *Decretum maius* of 1492) and regulating the area of town's (municipal) law (King Sigismund's *Decree Minor* of 1405) etc.

The principle of the constitutional law, according to which the legislative power in Hungary is exercised by the ruler together with the Diet, developed only at the break of the 14th and the 15th century. This laid the cornerstone for distinguishing between royal and diet decrees. The principle, according to which a decree applied during the life of issuing ruler only, lost its validity when decrees started to be issued by the Diet. It was replaced by a new principle of permanent validity of diet decrees[59]. Ruler (Hungarian king) had the opportunity to issue royal decrees, which were very similar to the written laws (acts) with regard to their form and their content.

In Hungary, laws were referred to as statutory articles *(articuli, abbr. Art.);* all statutory articles adopted in one session of the Diet were combined into a *decretum*. For a Hungarian law (acts, decrees) to apply[60]:

- it had to be **duly sanctioned** (the crowned head attaching to the text of the law the opening and closing promulgation clause and his seal and signature),
- and **published**. Initially, laws were pronounced orally in the session of the Diet, with written copies subsequently sent to the counties[61]. Later on (from the 15th century onwards), printing was used[62].

After the battle of Mohács and after the Hungarian throne had been taken by the Habsburgs, first attempts were made to create a collection of Hungarian laws. The first collection of handwritings issued in print in 1581 was made by the Trnava native Ján Sambocký. The matter of Hungarian laws was then covered more comprehensively by Zachariáš Mošovský and Mikuláš Telegdy in their *Decreta, Constitutiones et Articuli inclyti Regni Hungariae,* which was published in Trnava in 1584. The collection (together with other laws and the Tripartitum) became the basis for *Corpus Iuris Hungarici,* which was issued in 1696 by Martin Szentiványi, a professor of the University in Trnava. The *Corpus Iuris Hungarici* was originally only a private collection; similarly to the *Opus Tripartitum*, it became binding after being taken over by customary law. After the *Corpus Iuris Hungarici* had become an official collection, Maria Theresa gave the task of publishing it to the Jesuits in Trnava (in 1743) and later to the University in Pest[63].

59 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 38.

60 See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 70.

61 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 38.

62 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 71.

63 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 34.

In the legislative activity, the area (currently defining) of public law had maintained its dominance for long time, only in the late 18th and early 19th centuries there was adopted by the Diet a number of laws affecting the private law[64]. In the sphere of private law, the legal custom still remained dominant. The Acts continued to be issued in the form of statutory articles (articles) associated into larger units – decrees, until 1832 they were issued only in Latin, in the years from 1832 to 1836 they were published in Latin and in Hungarian and since 1836, the texts of laws were published in Hungarian language.

Revolutionary legislation from the March 1848 was intended to restructure the Hungarian legal system, at material (content) level and also formally with an impact in enhancing the position of the Act as a source of law. Laws adopted by the Diet in March 1848 forming the Bratislava's March Constitution abolished in Hungary the fundamental institutes of medieval law and feudal social structure. Declaration of equality of all before the law eliminated the estate character of the state. These laws include in particular:

- Art. VIII/1848 on introducing general system of taxation (derogating noble tax exemptions);
- Art. IX/1848 on derogating urbarial duties and landlord courts (in connection with Art. X/1848, Art. XI/1848, Art. XII/1848 and Art. XIV/1848) – abolishment of serfdom;
- Art. XIII/1848 on derogating church tithes;
- Art. XV/1848 on derogating the *aviticitas*.[65]

Bratislava's March Constitution established the provisions of inviolability of personal security and inalienability of property, the progress of which can be found in the abolition of feudal property concepts of divided ownership of land and *aviticitas*.[66] It was originated the institute of the private property (private ownership) as absolute, exclusive and unlimited rule of law of a person over a thing, with special regard to the land as a thing (*res*) in legal sense.

Revolutionary legislation of 1848 removed almost entire medieval feudal law established on the basis of the *Opus Tripartitum* and its basic structural pillars - *urbarial system* and *aviticitas*. The area of constitutional law and the organization of government bodies at central (the Hungarian parliament, independent Hungarian ministry (government)) and at the local level were similarly affected. Art. III/1848 constituted Hungary as an independent State with independent Hungarian Cabinet and its Minis-

[64] Art. IV-XII/1836 on urbarial relations; Art. XIV/1840 on testaments; Art. XV/1840 Bill-of-Exchange Act; Art. XVI-XXII/1840 on commercial law etc.

[65] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 83 - 84.

[66] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 123.

ters[67], its own law-making Diet, the Monarch and his representative the Palatine.[68] Art. V/1848 provided for the right to elect the Lower House upon qualifications based on the origin, property and education[69]. It began the process of democratization, namely through the application of constitutionalism (state organs being bound by the constitution), parliamentarianism (sovereignty of the people, the right to vote, government responsible to Parliament) and the exercise of fundamental civil rights[70].

Bratislava's March Constitution

(selection of articles and their provisions)

Art. IV/1848 on sessions of Hungarian Diet

§ 1 National Assembly will take place each year in Budapest, and it will be held by His Majesty for states annually, if circumstances allow that, and for winter months.

§ 2 Acts, that were made, can be confirmed by His Majesty, even if the annual assembly is being held.

§ 3 Representants of people will be elected for the three-year Assembly, and for all the meetings of the Assembly within three years. ...

Art. VIII/1848 on introducing general system of taxation

All residents in the Hungarian state and in related parts, with no difference, generally and accordingly have to pay general tax. ...

Art. XV/1848 on abolishment of the ativicitas

The system of aviticitas is abolished as basis and it is ordered:

§ 1 Ministers will elaborate legal book (Civil Code) on the basis of entire and perfect abolishment of the *aviticitas*, and will submit the provisions of this book to the next session of the Diet. ....

Art. XVIII/1848 on printing (press)

Since the prior censorship was for ever destroyed, and freedom of the press was restored, to ensure this, it is temporarily ordered

§ 1 Anyone can publish in printed form their ideas, share and diffuse them freely.

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67 Hungarian Cabinet consisted of the Prime Minister and eight Ministers. BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 57.

68 BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 56-58.

69 Under Art. V/1848 the right to be elected to the Lower House was subject to qualifications. As a result of the application of qualifacations, the number of voters increased from 1.6% to 6 % of the whole population. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 124 - 125.

70 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 117.

> § 2 Sharing ideas in printed form means any such sharing that is realized either orally, via images, printing, via lithography or woodcarving, and that by municipal act have begun either freely distributed, or sold in printed form[71].

Cancellation of medieval law and the current failure to establish a new law together with state-political factors of the change of the state from the estate to civil state made the way for enforcement of the Austrian law in Hungary during Bach's absolutism. Sovereign and the Vienna Goverment applying *Verwirkungstheorie* (i.e. the theory of loss of rights for the Hungarian independence) replaced the Hungarian constitutional law and legislation activities of the Hungarian parliament by enacting activities in the form of patents. Gaps in the Hungarian law, as results of the nature of the revolutionary acts of the year 1848, were filled with the Austrian legislation, i.e. via enforcement of laws:

- Civil Code (Allgemeines Bürgerliches Gesetsbuch) of 1811,
- Bill-of-Exchange Act of 1850,
- Provisional Civil Procedure Act of 1852,
- Mining Act of 1854,
- Land Register regulation of 1855,
- Provisional Bankruptcy Act of 1853,
- Act on non-suit continuation of 1854
- Criminal Code of 1852 etc.

After the fall of Bach absolutist government, Austrian mining law, land-register law and relevant provisions of the Civil Code governing the transfer of real estate remained in force as a result of the principles adopted by the Judex Curiae Conference.

In the 19th century the position of act as a source of law was greatly strengthened, as change of this position was associated not only with strengthening of codification efforts in Europe, supported by the onset of a new legal and philosophical movement, but also with the reform of outdated legislative process in Hungary and with adoption of rules for publication together with the creation of the official collection of laws. Since 1848 (Art. IV/1848) there was allowed to sanction individually and to promulgate articles as separate acts.

During the period of dualism there were successfully solved problems associated with publication of laws and the creation of a single collection of the Hungarian laws. The way of sanctioning and process for publication of laws were governed by the Articles III/1868 and XIII/1870. According to their provisions, laws adopted in both houses of the Hungarian parliament subsequently sanctioned by the monarch were published in the official Collection of Laws -, which was published in Hungary only since 1882 under the Art. LXVI/1881. This collection also included older laws issued after 1865. *Országos törvénytár* (Hungarian Collection of Laws) was issued by the Ministry of Interior. Individual parts of the collection were provided with the date of issuing, which was also the date of declaration (publication) of the laws contained therein. The same day the collection was circulated to courts and authorities of the country.

[71] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 173, 178 – 179, 182.

The effectiveness of articles (laws) generally came into force the 15-th day after their publication in the collection, if the article itself did not state different starting date of its effectiveness. Laws were published in the official Hungarian language[72].

Article III/1868 on promulgation of statutes (acts)

(selection of provisions)

Under the provisions of Paragraph 2 of the Article IV/1848 in the matter of the promulgation of laws there is ordered:

§ 1 Each act, after being sanctioned by His Majesty, is declared in both national houses (council chambers) and it shall be published (declared) immediately by the Government in the collection of national laws established for this purpose.

§ 2 Together with the text of the law there will be declared also the date of the grant of the royal sanction, and the day of the declaration in both national houses.

§ 3 The Act, which is declared in this way, is generally trustworthy (in force).

§ 4 Unless otherwise provided by law, or otherwise determined by the ministry, law becomes effective on the 15th day following its publication in the collection of national laws. ...

§ 7 After its publication, the collection of national laws is immediately sent *ex officio* to all offices.

§ 8 The Ministry is responsible for ensuring that any act after its declaration be published in the current languages of the Hungarian Crown countries in reliable translations, be sent to the competent offices.

Constitutional changes, made as a result of the Austro-Hungarian Compromise, had a direct impact on the intensification of work on the codification of individual sections of private and public law in Hungary. Within public law remained non-codified the area of administrative law and within private law the area of substantive civil law.

In the following interpretations we will present a brief overview of the major codifications (whether of partial or general nature) in individual areas of law that will be characterized more extensively in the following chapters of the present work:

1. Substantive civil law

In the area of substantive civil law, which probably needed codification the most, there were adopted only partial, but fairly extensive legal regulations. Civil Code was not adopted, although works on its text took more than 20 years.

Partial legislation on **personal and family law:**

- Article (abbr. Art.) XXIII/1874 on women' legal age,
- Art. XX/1877 on guardianship and custodianship (and its revision – Art. VI/1885),

[72] In accordance with the Article XLIV/1868 (Nationality Act) it was allowed to issue laws in plausible translation into the language of the nationalities living in Hungary.

- Art. XXXI/1894 on marital law (Matrimony Act),
- Art. XXXII/1894 on religion of children,
- Art. XXXIII/1894 on Registers of Birth, Marriages and Deaths etc.

Legislation on ***rights in rem*** remained in form of legal customs; legal regulation was concerned mainly with the legislation of expropriation, *iura in re aliena* (substantive rights in another's property), organization of legal relations following the cancellation of urbarium (urbarial system) and of the organization of ownership relations to non-urbarial land:

- Art. XLI/1881 on expropriation,
- Art. XX/1883 on hunting, Art. XXIII/1885 on water law, Art. XIX/1888 on fishing, Art. XII/1894 on the pastoral economy and pastoral police,
- Art. XLIII/1868 on reimbursement of purchaising urbarial obligations, Art. LIII/1871 on legal and property issues arising from the abolished urbarial relations, Art. LIV/1871 on isolated settlements, Art. XXII/1873 on settlements (in connection with Art. XXV/1896), Art. V/1894 on colonization, Art. XIX/1898 creating forestry communities of the former urbarial members, Art. XIX/1898 on state administration of communal and other forests and mountain pastures, moreover on legislation of the economic administration of forests and mountain pastures used together, which is an integral property of the associations of possesors and of forest ex-landowners, Art. XXXIX/1908 on property legislation, particularly on urbarial segregation, land consolidation and coupage, Art. X/1913 on pastures and their owners etc.

Changes also affected the **Land-register rights**, Land-Register Regulation of 1855 remained in force, and was subsequently modified and supplemented by several laws:

- Art. XXIX/1886 on Land Registers (and its revisions - Art. XXXVIII/1889, Art. XVI/1891, Art. XV/1900, Art. VII/1912)
- Art. XXIX/1892 on inscribing ownership of the real holder and on correcting the land-register entries etc.

Similarly, in the area of the **Law of obligations**, where there the legislator affected the system of customary legislation only minimaly, by the determination of the amount of interest rate and railways responsibility for damages:

- Art. XXXI/1868 on abolition of usury laws, Art. VIII/1877 on limitation of interest rate, Art. XXV/1883 on usury and harmful loan acts, Art. XXXV/1895 on determination of statutory interest rate, Art. XXXVI/1895 on reduction of the statutory interest rate
- Art. XVIII/1874 on liability for death or personal injury to the person caused by the railway track,
- Art. XXXI/1883 on hire purchase etc.

Partial laws also affected the **Labour law**, which was understood as part of the law of obligations:

- Art. XIII/1876 on relations between farm laborers and the farm owner, Art. II/1898 on relations between employers and agricultural laborers, Art. XLI/1899 on day laborers and workers employed in hydro-constructions, road constructions and railway constructions, Art. XLII/1899 concerning legal relations between farm owners and harvesting machine owners, Art. XVII/1900 on relations between farm owner and administrative staff, Art. XXVIII/1900 on forest workers, Art. XXIX/1900 on relations between tobacco producers and tobacco gardeners, and Art. XLV/1907 on relations between farm owners and his menials (domestic servants) etc.

Significant changes affected mainly **Commercial law, the Law relating to Bills of Exchange and Cheques** (understood similarly in relation to the law of obligations), which essential source of law became the Act:

- Commercial Code Art. XXXVII/1875, Bill-of-Exchange Act Art. XXVII/1876, the Art. XVII/1884 Craftsman Act, Art. LVII/1908 on transfer of undertakings, Cheque Act Art. LVIII/1908, the Art. LXIV/1912 on the effect of *vis major* for rights establishing the bills of exchange, commercial bills and cheque.

In the area of **Law of inheritance** there were provided for mainly the formal requirements of wills:

- Art. XXXV/1874 on testaments written by public notary,
- Art. XVI/1876 on formal requirements of testaments etc.

Codified were **copyright and the related rights of intellectual property:**

- Copyright Act Art. XVI/1884,
- Art. II/1890 on Trademarks amended by Art. XLI/1895,
- Art. XXXVII/1895 on patents for inventions.

2. Civil procedural law

The area of civil procedural law was successfully codified in contrast to the area of civil substantive law. The basic codifications were Civil Procedure Code - Article LIV/1868 and next Civil Procedure Code - Article I/1911.

Art. I/1911 Civil Procedure Code in conjunction with its implementing norm Art. LIV/1912 became the basis for the organization of the judicial system and the civil court proceedings in Hungary and in Slovakia as part of Czechoslovakia until 1950. Specific types of proceedings were governed by individual laws; succession procedure was provided for by Article XVI/1894 and the execution by the Article LX/1881 Execution Act.

3. The substantive criminal law

Development in criminal law came into successful codification via adoption of the basic codes, like those of the Article. V/1878 Criminal Code and Art. XL/1879 Offences Code. Among other partial legal regulations we may include:

- Art. XLI/1914 on protection of honor; Art. XIV/1914 Press Act; Art. XL/1914 on criminal law protection of agencies; Art. XXI/1913 on publicly dangerous loafer; Art. XXV/1883 on usury; Art. XXI/1890 and the XXX/1912 on crimes against the armed forces etc..

4. Criminal procedural law

The area of **criminal procedural law** was successfully codified by the adoption of basic code - Criminal Procedure Code Art. XXXIII/1896 (significant amendment was realized by Article XXXIV/1908) with implementing norm - Article XXXIV/1897. Article XXXIII/1897 on jury courts became a specific criminal procedural rule.

5. Administrative Law

During the period of Dual Monarchy **administrative law** was characterized by considerable disunity and fragmentation of its legislation.

After the Austria-Hungary Compromise (*Ausgleich*) the radical reform of local administration occurred – by virtue of Municipal Act XVII/1870 and its revisions (Articles VI/1886 and XXI/1886) and Communities Act XVIII/1871 and its revisions (Articles V/1876, Art. VI/1886 and Art. XXII/1886).

Then there started estabilization of a specialized administration (building offices, forestry offices, industrial inspectorates, tax authorities, etc.) and also modifications of partial sections of the administration (administration of education, defense, public health, etc.). A special feature of this legal sector was significant incidence of changes in secondary legislation (government and ministry regulations).

2. 5 Judicial decision and binding decision of Curia Regis

In addition to customary law and written laws, the judicial practice having the form of decisions of courts developed an important position. In a system of law with the predominant source of law being the customary law, the judicial practice of the court necessarily had a great importance, because "it was the courts, which decided what is and what is not law". Related to this is also the extremely important role of the legal science in the Hungarian legal system[73].

Before 1848, decisions of the court were not considered a source of binding law; nevertheless, they enjoyed extraordinary authority. The principles contained in court decisions were often sanctioned by the customary law and so, though indirectly, became part of the body of law. That means, forensic (judicial) customary law also exist-

[73] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 38-39.

ed[74], in addition to customary law developed by usage. Even after the issuance of the *Opus Tripartitum* (1514), the Hungarian legal system used three sources of law – written laws, custom and judicial practice (*decreta, consuetudo et usus fori).* This classification influenced also the subsequent development of the system of law between 1526 and 1848, which included the development of customary law (also through the revision of the provisions of the Tripartitum), creation of a collection of laws (resulting into the issuance of the *Corpus Iuris Hungarici)* and issuance of collections of court decisions (*Decisiones Tabulae* and *Planum tabulare*[75] issued during the reign of Vladislas from the Jagel dynasty and Maria Theresa, respectively)[76].

Opus Tripartitum

Second part, Chapter 6: Whence our custom that is to be observed in court originates

§ 11 Thirdly and finally: custom has emanated from the verdicts of the justices ordinary of the kingdom and from repeated letters of adjudication passed and delivered and composed in one and the same order, manner and procedure on many occasions, and confirmed by judicial execution.[77]

A significant change in the legal system realized in 1848 and the subsequent enforcement of the Austrian law made a place for more fundamental reform of the Hungarian judicial system in order to:

- separate the judiciary from the administration,
- nationalize the judiciary,
- remove particularism based on the granted privileges,
- create a transparent hierarchy of courts with a precise definition of their competencies.

After the restitution of Hungarian medieval law due to the principles adopted by the Judex Curiae Conference there were restored the Hungarian court organization and the relevant procedural laws. Judiciary was partially separated from the procedure of administration, creating a single competence of Curia; functions of the highest Hungarian judges were abolished and the organization of courts was rebuilt by creating four-stage judicial organization. Article IV/1869 on procedures of judiciary introduced the principle of judicial independence and incompatibility and also stated the qualification prerequisites for the exercise of judicial office. Crucial requirement which was

[74] Applying customs in the court practice caused the important change. These customs became the customs confirmed by the court practice. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 44.

[75] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 91 and p. 93.

[76] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 39.

[77] BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 233 - 235.

associated with the reorganization of the judiciary became a requirement of consistency of jurisprudence. Compliance with this requirement should ensure the Articles LIX/1881 and XXV/1890, which confirmed the right to pronounce the so-called fundamental decisions on contentious issues to the Royal Curia (*Curia Regis*), and later also to Royal Courts (*Royal Tabulae).* However, they failed to remove inconsistencies and contradictory from judicial practice.[78]

Development in forensic practice led to new legislation, to definitive strengthening of the position of judicial decisions and to their recognition as a formal source of law. In 1911 civil procedural law was legally codified by Article I/1911 (Civil Procedure Act). Article LIV/1912, which gave effect to the Code of Civil Procedure, confirmed the some decisions of Royal Curia (the so-called binding decision of Curia Regis) as binding source of law, which was equivalent to act and the legal custom.

The new legislation followed three basic requirements:

- qualification requirement (establishment of four specialized expertise tribunals (senats) in the Curia),
- requirement of centralization of the judiciary,
- and requirement of change in the nature of judicial decisions in regard to their recognition as a source of law.

Royal Curia (*Curia Regis*) pronounced five types of decisions:

- **ordinary decisions,** affected only in its content and binded only the proceedings parties,
- **fundamental decisions,** which did not have generally binding nature of Decision of Curia Regis, but for their change there was required a decision in the form of binding decision of Curia Regis (decision of legal uniformity). Although these decisions were not a formal source of law, their importance was significant, because most of the principles established by Royal Curia, were originally adopted as a fundamental decision. Part of them, selected by a special committee, used to be published in the official collection of the Royal Curia (*Curia Regis*) together with binding decisions of Curia Regis,
- **decisions of legal uniformity** which had a generally binding nature of Decision of Curia Regis. These decisions were not pronounced as a judgment in a particular case, but as general legal decisions addressing the issue that occurred when discussing the case. Decisions of legal uniformity were pronounced by a special Senate of the Curia - Senate of Legal Uniformity in cases of contradictory practice of lower courts and in cases of contradictory fundamental decisions of the Curia at the request of some of the Senates in the Curia. Changing of decisions of the legal uniformity was possible by the Curia only via its plenary decision,
- **Plenary decisions** were generally binding Decisions of Curia Regis pronounced by plenary of civil, criminal or mixed senat of the Curia at the request

[78] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 138.

of the Minister of Justice, the President of the Curia and some of the Senates of the Curia. Plenary decisions were pronounced in cases of change in the legal principle contained in the decision of legal uniformity. Their status was stronger compared with that of decision of legal uniformity in the sense that they could be changed by the Curia only via a qualified plenary resolution,

- **Qualified plenary decisions** were generally binding Decisions of Curia Regis pronounced under favorable opinion of the qualified majority of the plenary of the Curia Senates, in cases of changes or cancellation of plenary decisions of the Curia.[79]

We can state from the aformentioned analysis of individual types of decisions of the Royal Curia that the status of formal sources of law (generally binding legal norms) had only three of them - the decision of legal uniformity, plenary decision and qualified plenary decisions, that can be characterized as *"acts of formal law-making power of Curia, which bind as the law and can only be changed by law (act, statutory article) or higher (stronger) decision of Curia Regis or by legal custom, which has abrogatory value (derogative power)"*[80]. Since 1912 Royal Curia (*Curia Regis*), as the Hungarian Supreme Court, gained the right to law-making, that is, the right to issue normative legal rules of general application. Binding decisions of Curia did not have character of judgments in a particular case, but the nature of general decisions containing legal norms. Binding decisions of Curia together with selected fundamental decisions were published in the official collection the *Polgárijogi Határozatok Tára* and their binding came in force on the 15th day following their publication, which also complied with the condition of their legal publication.

Importance of decisions of Curia Regis for the area of law, especially private law, was significant. They formed and presented the so-called forensic customary law. Invalidation of the decisions of Curia Regis occurred in the area of substantive civil law only by the efficiency of the first Czechoslovak Civil Code no. 141/1950 Coll.

2. 6 Decree, royal decree, governmental regulations and regulations of an executive department

In the early Middle Ages, the decrees (*decreta*) as a source of law were generally binding legal norms, acts of the king's legislative authority, which were issued by the king - ruler with (or sometimes without) the consent of the Royal Council. The patents and prescripts issued during the reign of the Habsburgs also had the nature of decrees in this sense. According to the Hungarian constitutional law, the authority of the ruler to issue decrees was limited in such a way that the decrees were considered to be an extraordinary and temporary manner of creating generally binding legal norms and were valid for the life of the issuing ruler only (they could remain valid, if confirmed

[79] MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 340 - 341.

[80] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 96.

by the ruler's successor or by sanction of the customary law) [81]. The decrees initially really replaced the issuance of laws. Even before the year of 1848, the principle was developed in the Hungarian constitutional law that decrees must not contradict the law; this principle, however, was not always respected. As to contents, decrees were limited in such a way that they could not interfere with the private law. The decrees in this sense were part of the written body of law, with the problem that there existed no publication standard. Royal decrees (after 1526, decrees were issued both by the king and by the individual dicasteries and by the Governor's council) were (similarly to the laws) published in private collections only. The status of decrees as the acts of the more-or-less exclusive legislative power of the king was removed by the legislation of March 1848[82].

Article III/1848 aimed to limit via its provisions the sovereign´s enacting powers by mandatory countersignature of the government, or of the responsible minister. During the incoming era of Bach absolutism, legislative competence of the Hungarian parliament and the enacting activities of the Hungarian government were replaced by the sovereign law-making process undertaken in the form of patents and regulations. In terms of content, they focused on filling the gaps in the legal system due to the nature of the revolutionary laws of 1848. In Hungary, the regulations of this type were:

- Land Register Regulation of 1855,
- Patent of 1852 on abolishment of the aviticitas
- and Urbarial Patents No. 38 a 39 of 1853,

which substantially affected the sphere of private law, not only in this period but also during the following period as their provisions were taken by Judex Curiae Conference.

After the Austro-Hungarian Compromise (1867), there was made place for changing the nature of regulations as a form of law. The scope of enacting activities of the Hungarian government was designed "*extremely broad and was not limited only to performing of the laws.*" Hungarian government (or its individual ministers) was able to *"issue regulations not only secundum legem, but also praeter legem"*[83]. The publication of government and ministerial regulations was governed by the Art. LIII/1880, under the provisions of which the official collection of regulations should be the collection *Rendeletek Tára* issued only once a year. Regularly issued collection of regulations was the collection *Budapesti Közlöny* that according to the literature became official collection of regulations by power of customary law. For the area of private law the most important are the regulations of the Hungarian Minister of Justice, such as:

- regulation of the Hungarian Ministry of Justice No. 27564/1887 on private testaments,
- regulation of the Hungarian Ministry of Justice No. 947/1888 on temporary revision of Land Registers Regulations,

[81] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 102-103.

[82] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 39 - 40.

[83] ZAVACKÁ, K.: K tradícii nariaďovacej právomoci na Slovensku. (I. časť). [Tradition of enactory competence in Slovakia (1st part)]. In: Právny obzor, 85, 2002, no 5, p. 430.

- regulation of the Hungarian Ministry of Justice No. 68300/1914 on procedure in commercial and bill-of-exchange cases etc.

However, the area of private law was undoubtedly affected also by the regulations issued under specific mandates for the government, the so-called empowering laws - Article LXIII/1912 on emergency measures in the event of war, Article LXIX/1912 on war fulfillments, such as they were:

- regulation No. 982/1916 M.E. and No. 3154/1916 on illegitimate children,
- regulation No. 3983/1916 M.E. on notification of marriages,
- regulation No. 3984/1916 M.E. on marriage through respective plenipotentiaries,
- regulation No. 3787/1916 M.E. on prohibition of increase of rent and of termination of the rent,
- regulation No. 4000/1917 M.E. on income from property,
- regulation No. 4180/1917 on rental of flats,
- regulation No. 897/1918 M.E. on profit-sharing from the joint stock companies and the cooperatives,
- regulation No. 2938/1918 M.E. on better use of pastures and mountain pastures,
- regulation No. 3296/1918 M.E. on use of the forests and others.

Regulations were implemeted into legal system of the first Czechoslovak Republic with the following problem of the need to ensure the translations of their provisions into Slovak language.

Regulation No. 3982/1916 M. E. on increased private-law protection for the maintenance (subsistence) of family members and illegitimate children

(selection of provisions)

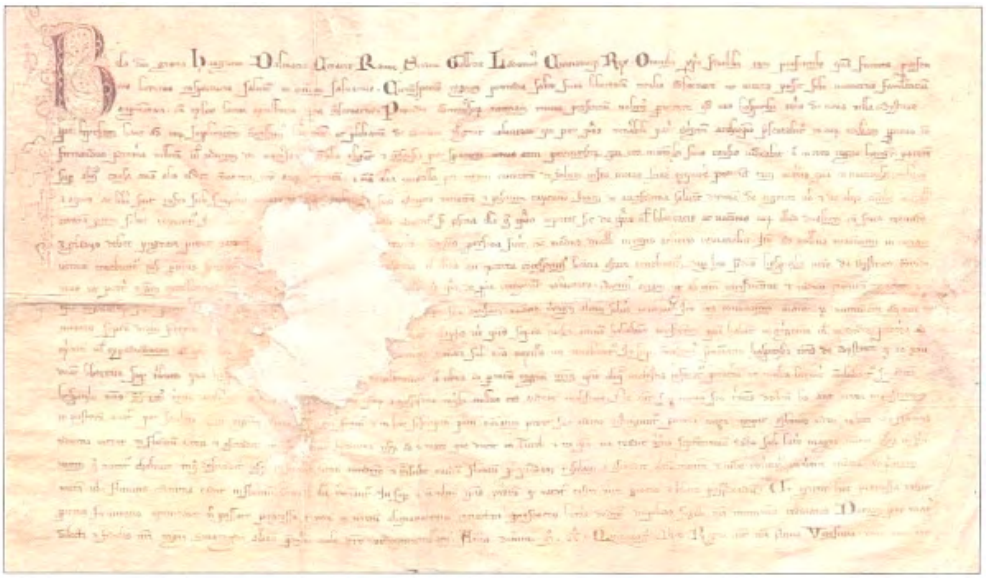
The Hungarian Royal Ministry orders under the mandate (authorization) issued under the provision of the § 16. Article LXIII/1912 on emergency measures in the event of war and the § 14. of the Article L/1914, due to the results of the war, required increased private-law protection for the subsistence of family members and illegitimate children as follows ...

§ 2 A person on whom lies an obligation to support an illegitimate child due to an illegitimate conception, is required in addition to paying alimony, to refund mother the birth expenses, and if the mother had as a result of pregnancy and childbirth other necessary expenses, he is obliged to pay also those expenses, which are necessary for

the maintenance of the mother two weeks before and four weeks after birth due to her social status and the financial circumstances of the person liable to support**.** ...[84]

2. 7 Privilege

In the medieval Hungarian law, privileges were one of the most important sources of law. In the Middle Ages, privileges were not much different from the laws, as they very often had similar content (granting of a right) and there was no big difference between a deed of a privilege and the written form of royal decrees. Privileges often served as the basis for the creation of customary law; several legal institutes were created in this way (e.g. the entire donation system). A privilege may be defined as an *"act creating an objective norm and granting subjective rights to individuals or a certain group of individuals"*[85].



Privilege of Banska Bystrica (1255)[86*]

For a privilege to be valid, certain requirements concerning its contents and form had to be fulfilled[87]. The requirements concerning the contents of the privilege included truthfulness of the contents, external truthfulness and issuance of the privilege by a crowned ruler (or the palatine). At the same time, the privilege must not have contradicted the natural law, *ius divine*, the written laws and morality and must not have infringed third party rights (*salvo iure alieno*). The formal requirements on privileges

84 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 267 - 269.

85 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 77.

86 http://www.obnova.sk/clanok/banska-bystrica-listina-mestskych-privilegii-z-roku-1255 (cit. 21. 10. 2012).

87 See also LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 78.

included form and style of the privilege, attachment of the prescribed clauses, signature and privilege seal, dating and publication within the community, to which the person concerned belonged, within one year. Privileges related to individual persons or communities (Saxons in the region of Spis) or towns. [88]

The oldest preserved privileges include the towns' privileges, as the privilege of the town of Trnava of 1238, town of Stary Tekov of 1240, the towns of Krupina and Zvolen of 1244. Bratislava was granted a privilege in 1291. Privileged towns became an important phenomenon in the medieval society. Their inhabitans (immigrants or *domestic populi*) gained a special position. The burghers of privileged towns were fried from the authority of *comes* (the head of county (*comitatus*)) and became autonomous communities. They could elect a mayor and town council to represent the town community and could elect their parish priest. Judicial authority of the most important royal towns could be complete and applicable to all matters. Their inhabitans had the right to freely dispose of their movable and immovable property and could freely migrate from place to place. They could hunt, catch fish, quarry stone and extract timber for their own use.[89] On the other hand they had also military duties; they had to provide a certain number of soldiers. The most important towns were royal towns, other towns were landlords's towns (landlords could be secular or ecclesiastical feudal landlords)[90].

Privilege of Trnava, 1238

(selection of provisions)

In the name of the Holy and the Undivided Trinity, Belo, by God's grace forever king of Hungary .... we give this to the eternal memory; .... As the city in Bratislava county, which is called Zumbothel (Trnava), seems to be the most appropriate to settle guests, we give guests living in this city and those who would like to move in there then, such a privilege that they will belong to the royal crown and they can not be subject to the jurisdiction of anybody or any (other) regulations. They can not be forced to enter in such troops, where the king is not physically present. .... They are obliged to appear just before the royal court, or before those whom they have elected as mayor of the town (community). Mayor, who was elected by the community togehter or by its bigger or wealthy part, must be confirmed by the king. Mayor has a right to judge in all civil and the throat disputes arising among them, or between them and the foreigners. .... All who come to live to the community are subjects only to the mayor. .... We wish, in terms of the provisions of the priest, to retain their universal right, and it is the right to freely elect a priest ... If any of them dies without an heir, has the right to leave their movable property to anyone. Given by the hand of our court officer, master Štefan, in 1238 [91]....

The status of privilege as a source of law changed in 1848, when privileges stopped to be the sources of objective law and were changed to individual administrative acts[92].

88 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 40.

89 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 50.

90 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 51.

91 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: od najstarších čias do roku 1790. I. [Sources of Law in the territory of Slovakia: since earliest times to 1790]., p. 177-179.

92 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 40.

Even though the position of privilege as a source of law changed in 1848, the privileges that arose before this year retained their position and the nature of the source of law. The act on the abolition of nobility adopted soon after the establishment of the Czechoslovak Republic (Act no. 61/1918 Coll.) confirmed the cancellation of the public-law differences between nobles and non-nobles, however, according to the interpretation of judicial practice, private-law differences still remained in force.[93]

2. 8 Statute

Statutes as the source of particular law can be characterised as general legal norms adopted by territorial or interest corporations with the aim of regulating their own internal affairs. The statutes could only be created on the basis of the *ius statuendi* (the statute creation law), which was granted to the relevant corporation by a royal privilege[94]. They were thus secondary legal norms, which could not have contradicted the laws or the customary law. According to the Hungarian constitutional law, it was not possible for a statute to regulate questions of the private law; this principle, however, has not been always complied with[95].

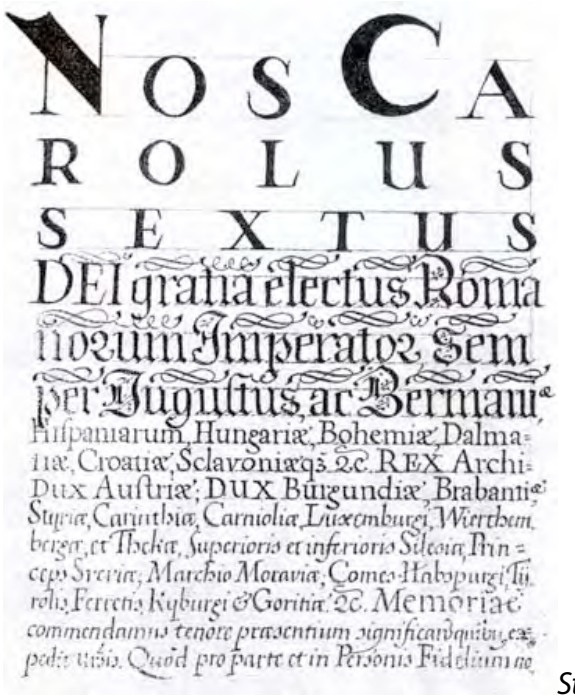
In Hungary, three types of statutes existed:

- statutes of towns,
- statutes of counties (later statutes of municipalities and communities)
- and statutes of interest corporations.

[93] At this level, we can find the judicial practice of the Supreme Court of the first Czechoslovak Republic, which accepts private-law privileges arising from granted privileges.

[94] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 79.

[95] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 40 - 41.



NOS CA
ROLUS
SEXTUS
DEI gratia electus Roma
norum Imperator Sem
per Augustus, ac Germa
Hispaniarum, Hungariæ, Bohemiæ, Dalma-
tiæ, Croatiæ, Sclavoniæq; &c. REX, Archi-
Dux Austriæ; DUX Burgundiæ, Brabanti
Styriæ, Carinthiæ, Carniolæ, Luxemburgi, Wurtthem
berger, et Thekiæ, Superioris et inferioris Silesiæ, Prin-
ceps Sveviæ, Marchio Moraviæ, Comes Habspurgi, Ti
rolis, Ferretis, Kyburgi & Goritiæ &c. Memoriæ
commendamus tenore præsentium significamusq;
pedit visis. Quod pro parte et in Personis Fidelium no

*Statute (*Košice, 1738)[96*]

The oldest statutes included the statutes of towns. Some towns had common statutes (e.g. the *ius tavernicale* as the law of tavernical towns). The statutes of counties started to develop in Hungary with the development of the county organisation. For a county statute to be valid, it must have been issued based on a decision of a duly convened county congregation. The oldest preserved statutes of Slovak counties include the statutes of Bratislava and Trenčín. The third group of statutes comprised the statutes of interest corporations (in medieval times, these were mostly guilds). The oldest preserved guild statutes from Slovak towns are from the 15th and 16th century[97].

Journeyman´s Statute of the Guild of the Gingerbread Makers, 1821-1830

(selection of provisions)

Contents of Articles relating to the profession of gingerbread maker and to the apprentices, who have to behave in accordance with Christian religion, religiously, faithfully and diligently, if they want to master this craft.

1. It is necessarry to determine the same period for learning for the gingerbread maker´s son and also for a stranger, who also aspires for gingerbread maker´s profession.

2. The Apprentice has to come from an honest parents´family, to have been raised in a family relationship and can not come from a vassal state.

3. Apprentice should complete the training within the whole four years. ...

5. Apprentice does not make debts....

7. Apprentice has to have only God in mind and should be diligently praying. ...

15. Apprentice must work hard, be conscientious and be to the benefit of his master.

96 http://www.cassovia.sk/historiaclanky/cechy/ (cit. 20. 10. 2012).

97 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 41.

18. It is not appropriate, that the apprentice stay outside the house.

19. Apprentice should be virtuous. ...

21. How the Apprentice should behave at fairs: when goods are unloaded at home, Apprentice should not be late, but rapidly and with appropiate caution unload the goods. He can not damage or destroy anything...

24. Gambling is completely prohibited for the Apprentice[98]...

Statutes with private-law content were mostly created on the basis of legal authorization for statute-making body. These legal mandates (authorizations) included for example:

- Art. XXV/1883 (Statutes of Actionable Pub Credit),
- Art. XL/1907 (Statutes of grooms´conditions),
- Art. LIX/1912 (Statutes of tenancy conditions).

Statutes as secondary legal norms remained in force also after the reception of laws to the legal system of the Czechoslovak Republic and they had a special place for example in areas as legislation on rental of flats.

98 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 272 - 274.

3 Fundamental Institutes of Hungarian Law valid in the Territory of Slovakia (till 1918)

3. 1 Persons

Persons may in general be characterised as legal entities, i.e. entities, which are recognized by law as persons in the legal sense, i.e. as having legal personality. Over time, the law started to distinguish between two types of legal persons – natural persons (human beings) and juristic persons (associations of persons or property)[99]. Distinguishing juristic persons was not known in old times, later, under the influence of canon law, some fictitious persons were granted legal capacity[100].

3. 1. 1 Natural persons

The legal personality of a natural person depended in the Middle Ages (and partly also in the Modern era) on its natural faculties and on the qualities derived from his/her social status. As a result of social and legal processes in the period of end of the 18th and early 19th centuries was the formation of a unified legal notion of a person as a subject of law based on the position of equality and equity. The basis for the Hungarian situation became removal of medieval, so-called status characteristics conditioning the status of the person and their legal personality (such as religious beliefs, the estates membership etc.) and promotion of natural human characteristics as determinants of their ability. **Art. XXIII/1874 on women' legal age** became very important regulation, full legal age was acquired only at the age of 24, equally both for men and women. A woman younger than 24 years of age could acquire full legal age by marriage. With the mentioned age limit (24 years) there was associated the possibility of emancipation. Other important provisions in relation to the majority, the extended period of the minority, emancipation, restriction of legal capacity and others were contained in **Art. XX/1877 on guardianship and custodianship.**

The status of natural persons was determined by the **capacity to enjoy rights** and the **capacity to carry out act-in-law** (capacity to contract).

[99] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 43.

[100] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 92.

1. Capacity to enjoy rights – capacity to have certain subjective rights (to have a status of person). Initially, not every individual had this capacity and the law of early medieval times conditioned the existence of this capacity with the following:

- birth, and initially also acceptance of the child into the family by the child's father;
- and status of freedom.

The birth of a human being was completed with the separation of the infant from the body of the mother; at this moment, the infant must have been alive for the legal assumption to apply that the child was born alive (in the most ancient times, the child was considered to be alive if he/she cried or moved). Already in medieval times, there existed the possibility of recognizing certain property rights of a *nasciturus - foetus* (unborn yet conceived child), who acquired certain rights (particularly the inheritance rights), however, not the obligations (charges). The legal personality of *nasciturus* was made conditional upon the child being born alive.[101] **The state of freedom** was similarly important in early medieval times; it was required that the child is born in the status of freedom and not as a slave.[102]. Slavery in the early Middle Ages did not have the form of Roman slavery, in which slave was deemed a thing[103].

The capacity to enjoy rights ceased to exist:

- upon death
- or upon being declared dead.

Proclaiming a person to be dead was regulated by Civil Procedure Act **- Art. I/1911.** The complaint may be made by the husband, the heir or other person with a legal interest in the proceedings and the person could be declared dead from the birth of whom thirty years have passed, and that was at least ten years missing, or a person from the birth of whom seventy years have passed and has been missing for at least five years. Special cases were cases of emergencies (shipwreck and other).

2. Capacity to carry out act-in-law (capacity to contract) - the capacity to carry out legal acts (acts with legal consequences) was the capacity to acquire subjective rights and assume obligations by one's own acts and in one's own name. This capacity also included liability for illegal action (the-so called liability for delicts). In medieval and in modern times, the capacity to carry out act-in-law was conditional on the social status (the status of the individual, characterised by his/her status attributes) based on feudal principle of hereditary inequality.

The status attributes of a man included:

a) **age;**

[101] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 105.

[102] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 43.

[103] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 92.

b) **health;**
c) **spendthrift (unthrift);**
d) **gender (sex);**
e) **marital status;**
f) **honour (honesty reputation);**
g) **religion;**
h) **state citizenship (state affiliation);**
i) **occupation (profession);**
j) **membership to estates (estate affiliation)**[104].

Revolutionary laws of Bratislava's March Constitution caused crucial changes is the status attributes of a man in connection with capacity to carry out act-in-law. In general, status attributes based on biological and natural reasons (age, health, partly gender) retained their significance. The place and importance of status attributes based on membership to estates (estate affiliation) was partly or completely lost.

a) Age (*aetas*)

The use of age as an important status attribute was, in medieval times, limited by difficulties with the establishment of age. At first, no birth registers were maintained in Hungary; parish registers were introduced by the church after the Trident Council (in the 16th century)[105]; state birth registers were introduced as late as at the end of the 19th century (art. XXXIII/1894 on state birth registers). For this reason, it was not the real age that mattered. It was the level of physical development instead, which was usually determined by an inspection in front of a place of authentication, or in towns in front of the town council (a deed of age was issued after the inspection). Level of physical development depended on the level of sexual development and ability to live independently; for this reason, it was not the same with each individual.

The Hungarian medieval law distinguished between the following age limits[106]:

- **infantry (non-lawful age) – *aetas illegitima*** (until 12 years of age – applicable both to men and women). Infants did not possess the capacity to contract and must have been represented in legal acts (by their statutory representative – father, guardian). Their legal acts were invalid *ex lege;*
- **adulthood - maturity** (men between 12 (14) and 24 years of age, women from 12 to 16 years of age (or until marriage)). Adults had limited capacity to contract: they were able to appoint the procurators in process; sons were able to

[104] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 44. For more information see also LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 165 et seq.

[105] MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 150.

[106] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 167 – 169.

take part in a forced division of the family's property; with certain limitations, they were able to assume obligations and create a lien over their property.

- **full legal age – *aetas perfecta*** (men reached full legal capacity by their full age at 24, women reached full legal capacity by their full age at 16 (or marriage)). Persons in full legal age had unlimited capacity to contract. Full legal age could exceptionally be obtained at an earlier age; the king or the palatine were authorised to grant a privilege (in case of liegemen and towners, this was done by the landlord or town council) waiving the age requirement for the purpose of obtaining full legal age. [107] The age of 60 was considered to be the age limit of **senescence (*senectas*).**[108]

The legal system after 1848 continued to respect the age of majority for 24 years, moreover, the Article XXIII/1874 stated this age as the age of majority also for women. Legal age limit was considered to be general, the individual laws (for example the Marriage Act) contained specific provisions on entry into full legal age for their purposes. Age of majority (24 years) was relatively high. Opportunities to overcome it were created by Article XX/1877 on guardianship and custodianship via independization of a minor under decision of the Guardian Court. Generally, children below 12 years of age were legally incompetent, aged over 12, the children had capacity to some acts in law, and if aged over 14 they could freely dispose of their income, aged over 16 they could be witnesses at a marriage ceremony, and after reaching the age of 18, any person could seek to be pronounced to have reached full legal age. An individual could be deemed to have reached full legal age by obtaining, at the age of 18, paternal consent or consent of the guardian, or permission granted by the Guardian Court to do independent enterprise activities, or upon the paternal consent to keep a separate household[109]. The age of the minority could be prolonged (under Art. XX/1877), where a person was unable to take care of himself (illness - physical disorder or mental disorder, spendthrift (unthrift) etc.).

During the first Czechoslovak Republic the age of majority was reduced to 21 years and after World War II adjusted to the current age limit of 18 years.

b) Health (*sanitas*)

A disorder (first also a physical disorder, later on a mental disorder only) or bodily defects had big importance in the medieval times, as they influenced the level and extent of capacity to contract. To protect the interests of sick persons and with regard to the formalism of legal acts in the Middle Ages[110], the principle applied that they

[107] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 44 - 45.

[108] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 105.

[109] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 173 - 174.

[110] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 105 - 106.

remained under the power of a father or guardian until they recovered from the disease[111].

In modern law, the legislative basis for restriction of legal capacity for mental illness became the Article XX/1877 on guardianship and custodianship. Legal acts of mentally ill persons were void *ex lege*, while there was not required that the person was, prior to the particular legal act, deprived of legal capacity by court proceedings. For persons not capable to legally act (mentally ill persons, deaf persons who were not able to communicate in sign language; feeble-minded or deaf persons, who as a result of these diseases were not capable of managing their assets) there was obligatorily assigned a guardian (husband, father, grandparent, or person from the side relatives).

c) Spendthrift (*prodigentia*)

Spendthrift (unthrift) as a status attribute was related to the inability to take care of one's own property affairs. A spendthrift was subject to *sequester* (administration of property done by another person) ordered by the authorities (court), usually at the complaint of potential heirs.[112] The contents of sequester was the limitation (or withdrawal) of the right of the person to dispose with his/her property (the spendthrift was able to dispose with his/her property with certain limitations, he could not assume obligations in his own name, he could not act as a guardian for another person, etc.)[113].

Since 1877 in cases of spendthrift (unthrift) there was obligatorily imposed guardianship linked to the restriction of legal capacity based on the Article XX/1877.

d) Gender (*sexus*)

In medieval law, gender was an important status attribute of human being. Being male had several advantages (*privilegia favorabilia)*; females, on the other hand, had more disadvantages (*privilegia onerosa)* and lesser advantages.[114]

Equalisation of women and men was done in the noble law by a special legal act called **prefection (*prefectio*).** Prefection was a royal act, which granted the (noble) woman the inheritance right to noble (donation) property. The woman thus entered into the "rights of the man" in case the male descendants of the entire family died out[115].

The advantages (*privilegia favorabilia*) of being male included:

- the ability to own donation property and rights (relating to military merits)

[111] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 45. See also LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 169.

[112] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 169.

[113] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 45.

[114] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 169 - 170.

[115] Prefekcion (*prefectio in filium, in heredem masculinum*) was based on royal privilege, by which the king „promoted" the daughter (or daughters) of a nobleman, deceased without male heir in the third (since 1397 fourth) degree, to a son, authorized her to inherit the paternal fortune just as if she were a man. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 454.

- men were the heads of families (they were the carriers of power under family law – *patria potestas*).

The disadvantages (*privilegia onerosa*) of females included:

- the fact that they had to stay under the power of the father or guardian until marriage (till 1874);
- they could not be guardians for others, except widow for her own children;[116]
- they were only usually entitled to inherit movable goods or landed property that had been bought for cash. On the other hand, some landed property was defined at the time of its donation by the king as being inheritable by the owner's sons as well as his daughters.


Women in the Middle Ages[117*]

Their advantages included so called special women's rights as dowry, special widow right (*ius viduale*), special virgin right (*ius capillare*), filial quarter (*quarta puellaris*) etc. and achievement of full legal age earlier in the age of 16 (or since marriage).

Elimination of differences based on status characteristics of gender became a part of the legislation of the period of dualism and the subsequent period of the Czecho-slovak Republic with a certain effect for public law (active and passive suffrage etc.) and private law (position of woman in the family and in the society).

e) Family/marital status

Marital status or the status of kinship had a rather big influence on one's capacity to carry out act-in-law (different status of father, mother, legitimate and illegitimate

116 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 45 - 46.

117 http://www.google.sk/imgres?imgurl=http://www.zeitlerweb.com/img/1485women.jpg&imgrefurl=http://www.zeitlerweb.com/midages.htm&h=528&w=618&sz=101&tbnid=cbm9T3Zo7-JUfM:&tbnh=90&tbnw=105&prev=/search%3Fq%3Dmedieval%2Bages%2B%252B%2Bimage%26tbm%3Disch%26tbo%3Du&zoom=1&q=medieval+ages+%2B+image&usg=__8wh-LcLsqfN7BSIXnHLoSWQEmPA=&docid=dX-KoQARVy6p4M&hl=sk&sa=X&ei=fjaJUNLoFMSq4gTQwoH4Bg&ved=0CCYQ9QEwAg&dur=3346 (cit. 21. 10. 2012).

children, agnates and cognates, etc.). It is remark, that only married man's oath was of full value[118].

Equality of women and men in our country is associated with the period of the first half of the 20th century (legislation of the inter-war Czechoslovak Republiyc and the Act on Family law of the year 1949).

f) Honour (honesty reputation)

Honour (*bona fama*) was understood as the respect enjoyed by a person in his/her social environment.[119]

The Hungarian law distinguished between two cases of loss of honour:

- **factual loss of honour (*infamia facti*) –** was caused by a negative assessment of the person in the society, often in connection with the performance of certain "dishonest" occupation (hangman), lifestyle (prostitutes, etc.)[120] or the family status (illegitimate children).
- **legal loss of honour (*infamia iuris, infamy*) –** it occurred according to the law or based on a court decision concerning a certain act of dishonesty, such as, taint of infidelity (*nota infidelitatis*), breach of a promise given with the guarantee of honour, contempt of the court, misappropriation of the ward's property, counterfeiting and forgery, violence against private persons nas property etc. The consequences of the legal loss of honour were extremely unfavourable:
  - the infamous person was not able to inherit after the person, against whom the infamous act was committed,
  - he/she was not able to exercise the father's rights,
  - he/she was not able to act as a guardian,
  - he/she could not be a witness in court proceedings etc.[121]

In the 19th century honour lost its position of status characteristics, however, it retained its actual meaning in connection with the protection of honour (criminal delict of slander etc.).

g) Religion (*religio*)

In the medieval and partly in the modern times, religion[122] played an important role, considering the privileged status of certain religions (the Catholic Church in par-

[118] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 93.

[119] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 170.

[120] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 106.

[121] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 46.

[122] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 171 - 177.

ticular), compared with the members of other religions (Jews, Muslims, Greek Catholic and, till the issuance of the Patent of Tolerance[123] in 1781, also Protestants)[124].

Religious beliefs were equalized in our territory by legislation of the years 1865 - 1867, and it removed delimitation of capacity to carry out act-in-law based on the membership of a particular church. However, particular importance of the membership to a certain church is found in the following period, namely in Article XXXII/1894 on religion and treating the cases of children of different parents´ religious faiths with relevance for bringing up the children.

h) State citizenship (state affiliation)

The term of citizenship, as currently understood, was not know in medieval times. The importance of the status attribute of citizenship increased in connection with the colonisation[125] of the territory and with the rise of colonisation policy. Foreigners[126] were to some degree disadvantaged (*privilegia odiosa*) compared to the rest of the domestic population:

- foreigners were not allowed to assume state functions and offices;
- they were in principle not able to acquire real property and every native had the right to redeem real property owned by foreigners (*the right of retract)* etc.).

A special advantage (*privilegium favorabilia*) for foreigners was that legal norms setting forth punishments were binding for foreigners after the lapse of three months; other legal norms applied to them one month from their pronouncement[127].

The importance of citizenship changed considerably after the removal of the estate differences in the 19th century within the creation of the modern international private law based on the principle of reciprocity.

123 Patent of Tolerance (Patent of Toleration) granted the same legal status to Lutheran, Calvin and Russian orthodox believers and made them equal to Roman Catholics in consideration of civil law status (e.g. in performing official functions). However, they were not equal in the religious sense, yet. Religious equality was granted to them only within the reign of Leopold II, who succeeded to the throne after Joseph II's death. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 82.

124 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 47.

125 Immigrants (*hospites*) formed a special group in the population. They were mostly people from abroad, who have the right to live according to the customs of their homelands. In Slovakia, foreign immigrants settled especially in newly founded boroughs, where they became burghers. They formed a special social group between the nobility with full rights and the dependent serfs. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 52.

126 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 177 - 180.

127 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 47.

i) Occupation (profession)

Occupation influenced the individual's social status from medieval times[128]; in this respect, three special categories of privileged occupations developed: clergymen[129], traders and clerks (officials). In modern times, a special class of "honoraciores", i.e. persons making their living by intellectual work mostly in a free occupation (e.g. lawyers, doctors, etc.) developed. These individuals were, to a large extent, equal with the nobles and the provisions of the noble law applied to them[130].

Medieval scientist with his scholars[131*]

j) Membership to estates (estate affiliation)

Fundamental relevance of estate affiliation is immanent feature of medieval law.[132] Removal of its importance and promotion of equality before the law is associated with laws of the Bratislava's March Constitution (1848) and with legislation of the period of

128 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 180 - 181.

129 The nobility and the clergy were the two basic estates, which decided on the destiny of the country. The ecclesiastical hierarchy was almost identical with the hierarchy of the nobility. The members of the highest group – the prelates, as archbishops, bishops and representatives of some monasteries - came almost exclusively from the rank of the magnates. The middle layer – canons and priests of rich parishes – was more or less identical with the middle nobility, and their standard of living was also similar. The lowest level – village parish priests and chaplains – often came from serf families and poor nobles. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 91.

130 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 47 - 48.

131 http://cs.wikipedia.org/wiki/Vzd%C4%9Blanost_ve_st%C5%99edov%C4%9Bku (cit. 09. 11. 2012).

132 For more information see LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 181 - 203.

dualism[133]. According to the aforementioned facts the nobility finally lost its privileged position, subjects (serfs) were exempted from urbarial duties and former estates social stratification gave way to a general principle of equality of all before the law.

The noble estate

The noble estate formed in the 13th century and consequently nobility became the leading class in the society[134]. Under the Hungarian medieval law only nobles created the *populus* (nation in political sense[135]) in contrast to *plebs* (other peoples). Initially and formally, all noblemen were equal (*una et eadem nobilitas*). Thereafter, the nobility as a social group was divides into certain relatively closed groups. The middle and especially the most numerous lower nobility had hardly any share in power in the Middle Ages. The destiny of the country was decided by the aristocracy, or its elite – the barons, who formed the king's council together with the highest ecclesiastical dignitaries or prelates.[136]

The legal status of nobility was characterised with fundamental and auxiliary (higher *homagium*, independent procedural capacity etc.) noble prerogatives and also estates' obligations.

Fundamental prerogatives of nobles[137]:

- personal freedom of the noble (a noble could not be deprived of his personal freedom without a valid decision of the court, with certain exceptions, such as taint of infidelity (*nota infidelitatis),* if caught to have committed murder, incendiarism or burglary, etc.);
- the noble was subject to the jurisdiction of the crowned king; and even the king did not have the right to interfere with his personal freedom or property without giving him a hearing and without a legal ground;
- free ownership of nobles; their property was not subject to any tax[138], tithe or customs obligations;
- nobles possessed the *ius resistendi et contradicendi* (the right of armed resistance), abolished in 1687.

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133 The differences by origin or by estates status had special (temporary) value in the area of private law (law of inheritance and property relations between spouses). These differences (relevant in the territory of Slovakia) were abolished by the Constitution of 1948 and by the first Czechoslovak Civil Code of 1950.

134 In medieval Hungary noblemen represented a wide stratum of landowners, holding property granted by the king and enjoying, in principle, equal rights regardless a wealth and status. Their privileges were guaranteed by the Golden Bull of Andrew II (1222). BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 452.

135 Hungarian nation (*natio Hungarica*) was made up only of nobles – the bearers of all political rights.

136 See also BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 89.

137 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 196.

138 The nobility and the Catholic clergy were freed from the payment of taxes in the Hungary. Thus the whole tax burden was born by the serfs and, to a lesser extent, the towns-people, who did enjoy some exemptions. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 148.

The fundamental obligations of the nobility to the sovereign (mostly under the public law) were the following[139]:

- general military duty (nobles were obliged to personally perform military service in defence of the empire);
- allegiance and loyalty to the sovereign (perpetrators were considered to have committed the taint of infidelity (*nota infidelitatis)*)[140].

The basis of the rights of the nobility in Hungary throughout the Middle Ages and the Modern Age was the Golden Bull of Andrew II of the year 1222. The nobility lost its privileged position by adopting a revolutionary laws of the Bratislava's March Constitution of 1848, with the fact that a part of its contents persisted either in legal or or in factual form. Nobility (as interpreted by the judicial practice in Slovakia) was in the public law completely removed soon after the establishment of the Czechoslovak Republic by the Act No. 61/1918 Coll. on the abolition of nobility, orders and titles.

Towns' estate

A uniform towns' estate formed in the 13th and 14th century, after the fall of the system of castles. Free royal towns and their inhabitants were exempted from the power of the nobility (landlords and counties) and they started to create their own town administration and local administration. Free royal towns (towns of master of treasury (*tavernicus)* and towns of *personalis*, especially mining towns) soon acquired collective nobility and had a similar status as nobles.

In the free royal towns, the towners had the following privileges (rights)[141]:

- personal freedom, which they could not be deprived of without a decision of the court;
- separate town courts, i.e. towners were not subject to landlord and county courts;
- legal acts were made by towners in front of their town offices (free disposition with the property between those alive and also in case of death) etc.[142].

139 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 197.

140 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 48.

141 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 199.

142 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 48 - 49.

Bratislava in the Middle Ages[143*]

The character and the scope of the towns-people rights were defined in the towns' privileges[144] (towns' charters). Since the 16th century nobles tried to acquire the houses in the towns with important respect to the prerogatives of nobles. Town's (urban) privileges lost their significance with regard to the previous economic, social and political status of the towns. The royal towns gradually came under the authority of counties and a significant manifestation of their general decline was that at the end of the 17th century their representatives in the Lower House of the Hungarian Diet had just one collective vote.[145]

Liegemen estate (class of serfs)

Liegemen estate (in medieval and modern times, liegemen/serfs/villeins were not considered to form an estate, i.e. a group of the population with political rights; they were considered to be *plebs* with no membership to the estates) formed in the 13th century. Liegemen in principle possessed the right of free movement until 1514[146]. From this time onwards, liegemen were gradually degraded to serfs; as the serfs were tied to land both economically and legally. The freedom of movement was granted to

143 http://www.google.com/imgres?imgurl=http://www.slovakiatravels.com/images/stories/citta/pressburg.jpg&imgrefurl=http://www.slovakiatravels.com/sk/co-vidiet/mesta/bratislava/historia.html&h=530&w=750&sz=145&tbnid=e7hnzg2w0bnBfM:&tbnh=90&tbnw=127&prev=/search%3Fq%3Dstredovek%25C3%25A1%2BBratislava%26tbm%3Disch%26tbo%3Du&zoom=1&q=stredovek%C3%A1+Bratislava&usg=__HIZdhKOoRpoib6csoGJbTEBu97k=&docid=Hv2ZKnHkqqhdmM&hl=en&sa=X&ei=_4iGUOD7CvSQ4gTRsIHwBA&ved=0CDAQ9QEwBDgK&dur=4475 (cit. 09. 11. 2012).

144 See chapter "Privilege".

145 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 150.

146 A milestone was the suppression of the peasant uprising of George Dózsa (1514) and the law accepted as a result of it that essentially collectively punished the whole class of serfs. The laws incorporated into the legal codes known as Opus Tripartitum abolished the already rather limited rights of movement and bound the serfs to the soil. Only nobles could own or hold land. They could lease or rent it to serfs for certain payments or services. The nobles had to be compensated for the damages and detriments caused by the peasant revolt in the form of unpaid work of the serf estate, initially set at one day each week from one settlement, a monetary rent in the amount of one florin, payment in kind and "gifts" or perquisites. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 147.

serfs in 1785, by decree of Joseph II abolishing the serfdom in Hungary. Liege system was abolished in 1848 based on the statutory provisions of the Bratislava's March Constitution[147].

The liege relationship meant the bondage of the liegeman to the lord; this relationship was not one between free legal entities (in medieval times, such relationship could only exist between nobles).

The liegeman – lord relationship was characterised with[148]:

- mandatory allegiance and obedience,
- judicial authority of the lord over liegemen (with the exception of felonies)
- and fulfilment of liegemen obligations and duties.

On the other hand, liegemen were allowed to own movable (not immovable) property, such as work tools[149]. These provisions were a part of special particular system of serf/liege/villeins law and a system of Hungarian noble law. Serfs (liegemen) had their own system of law of inheritance. The estate of a liegeman died without any heirs, belonged to the landlord (*caduca,* escheat).

While in earlier times, relations between serfs and landlords were mainly in the sphere of private law, the introduction of a state defines Register of serfs' property (*urbarium*) in 1767 – 1772, substantially changed the position of serfs. The ***Urbarium***, that is oficially confirmed document of the extent of the serfs' obligations, put into harmony the size and quality of the soil used and the obligations resulting from it. Deviation from the determined framework was regarded as a threat to the tax base of the state, and serfs had the right to legal protection. However, the introduction of the *Urbarium* was only the first step on the road leading to abolition of the system of feudal dependance of the serfs on the landlords. The system of the personal dependance of the serfs remained in effect until 1785[150]. The end of special liegemen status (as well as urban status) is associated with the removal of estate society and with introduction of modern law based on the principle of equality of all before the law since 1848.[151]

Protection of personality rights

The emergence of institutionalized protection of personality rights (protection of name, civic and personal honour and integrity) was associated with the development of modern law in the period from the late 19th century and relates to recognition and defining of the nature of the non-material harm (*satisfactio*) in addition to provisions on compensation for (material) damage. Medieval and modern law was not able to

147 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 49.

148 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 202-203.

149 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 49.

150 After the abolition of perpetual serfdom, the serfs could freely migrate after fulfilling their economic obligations, and they could marry or send their children to learn a craft or study without the landlord's consent. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 164-165.

151 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 204.

create an effective system for the protection of personality rights based on the rules of private law providing not only the prohibition of unlawful conduct, but at the same time binding to provide a compensation for damage, particularly non-pecuniary damages (ideal damage).

In medieval times, the protection of private (i.e. also personal and personality) interests was related to the protection under the penal law, in the form of the so-called offences under the private law (delicts). Such delicts included: acts of might (*actus potentiae)*[152] - maior and minor; slander (*dehonestatio*); abuse of a name (*larva; personae larvatae* - puppets); frivolous prosecution (*calumnia*)[153]; betrayal of fraternal blood (*proditio fraterni sanguinis*) – an attempt to deny inheritance rights to an eligible kinsman; and partly also delicts relating to deeds (forgery, proffering false documents)[154].

3. 1. 2 Juristic persons

The abstract term of juristic person developed much later than the term of natural person. Juristic persons may be characterised as organisations of persons or property, established for a certain purpose and recognized by law as having legal personality.[155] Legal literature of the Modern Ages distinguished between the following types of juristic persons:

- *fiscus regius* – the royal administration, the name used for the state (Holy Crown) or the sovereign also in financial relationships under the public law;
- counties and free districts (e.g. the association of Spiš towns);
- towns and communities (municipalities);
- church corporations under the public law – churches recognised by the state and church corporations;
- companies – guilds and commercial companies;
- foundations – mostly church foundations – associations of property established for education, cultural or other charitable purpose[156].

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[152] Acts of might were delicts committed by nobleman against persons and property in a violent manner. Major acts included violent attack of noble houses, the seizure of estates, unlawful detention of a nobleman or killing or assaulting one. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 441.

[153] Frivolous prosecution (*calumnia*) - unfounded and vexatious litigation. Such offences as prosecuting the same case in two different courts, acquiring satisfaction twice (*dupplex via*) or claiming an obligation already settled (*dupplici sub colore*) were classified as *calumnia*. Anyone so convicted had to pay his man-price (*homagium*). BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 448.

[154] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 234 et seq.

[155] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 205.

[156] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 52. See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 107 - 109.

3. 2 Things

In medieval and modern law, things were considered to be materially or legally definable and defined items of the outside world, whose important quality was their controllability[157]. In this sense, a man was not considered as a thing only if he/she was free and alive[158].

In history, several classifications of things developed, which were important for transactions with particular things. Below are listed some of the most important classifications[159]:

- **breakdown into movable and immovable things** – the distinction between particular things in the middle ages did not fully correspond to the current breakdown into movable and immovable things based on physical properties, as certain immovable items (e.g. pledged real property) were considered to be movable items and vice versa, certain movable items (such as accessories of real properties, equipment of real properties, herds counting more than 50 horses, etc.) were considered to be immovable property;
- **breakdown into divisible and indivisible things** – defined as the possibility of independent economic use of divided parts; it was distinguished between economic and legal divisibility;
- **breakdown into consumables, inconsumable items and items subject to wear and tear** – based on the length of economic use of individual items;
- **breakdown into substitutable (items designed for generic purpose) and non-substitutable items (items designed for individual purpose)** – based on their capability of being substituted in a legal transaction. Substitutable items were defined by quantitative indicators, such as number, weight, etc. (e.g. money); non-substitutable items were defined by qualitative indicators and were unique (e.g. works of art);
- **breakdown into items admissible for legal transaction and those excluded from legal transaction**; based on the fact whether or not it was admissible to make legal transactions with particular items [160] etc.

Rights in rem related to any **corporeal (tangible) things.** Incorporeal (intangible) things were excluded; rights were not considered as things (especially intellectual property rights), yet. In the Modern Age immovable thing meant the land; everything

[157] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 52.

[158] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 109.

[159] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 52 - 53. See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 97 - 98.

[160] See also LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 216 et seq.

firmly attached to it, was a part of immovable property (principle *superficies solo cedit* - the house, non-harvest crop etc.). Other things are movable.[161]

[161] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 179.

4 Development of Branches of the Hungarian law

4. 1 Private Law

4. 1. 1 Family Law

Individualist family (father, mother, children) formed in the early Middle Ages. Initially, individualist family existed as part of the broader family, the so-called "family nediel" (undivided family). The **undivided family** was the association of relatives, who lived together from certain indivisible property[162].

The gradual loss of economic and social importance of the undivided family led to a strengthening of the position and gradual emancipation of individualist families. The relationships existing within the undivided family partly survived as the relationships to the broader kinship. It was distinguished between **blood kinship** in the direct line of descendants, consisting of persons springing one of the other (ascending line – a person and its ancestors (ascendants) and descending line – a person and its descendants). The side line of kinship consisted of persons with a common ancestor (cousins, etc.). In addition to blood kinship, the legal kinship based on adoption **(kinship by adoption)** and **spiritual kinship** (based on christening or confirmation) developed[163].

Family law regulated and regulate relationships between spouses (personal and property relations), relationships between parents and children and so-called surrogate family relations (adoption, guardianship and custodianship)[164].

Marital personal law

Marital personal law of the Middle Ages and a large part of the Modern Age was based on canon law, which had a significant influence on the content and nature of the institutes of marital law. Family and marital law changed in the era of enlightenment and was influenced by the development of new (modern) law in the 19th centu-

[162] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 301.

[163] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 55. See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 115 - 116.

[164] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 94.

ry[165]. The Emperor Jozef II tried to strengthen the influence of the state in the area of marital personal law, but his Decree (Patent) was valid only for the Protestants.

Within the development of marital law, the period of the 19th century brought a significant shift caused by a clash between the conservative religious-oriented concept of the institution of the marriage and liberal concept based on religious tolerance and understanding of marriage as a civil institute.[166] In practice, there were dealt mainly the questions about forms of marriage (civil or religious form) and the issue of admissibility and subsequently concrete legislation on divorce.[167] In Hungary, in the 19th century, the controversy transformed into preparation and later adoption of the **Matrimony Act - Art. XXXI/1894**[168]**.** Matrimony Act was the codification of marital personal law and partial codification of private (civil) law. Matrimony Act did not include legal regulation of the whole area of marital personal and property law. The property relations between spouses and part of their personal relations were still regulated by customary law subsequently developed by judicature and binding-decisions-making activity of *Curia Regis*.

Engagement (*sponsalia*)

Engagement was a legal institute introduced into the marital law under the influence of the church (with regulation done by Trident Council). It was understood as a contract, by which a man and a woman gave the promise to get married in future[169]. **Engagement had important legal effects:**

- engagement gave rise to a legal claim to enter into a marriage; in case of a breach of engagement, the injured party of the engaged couple could demand compensation of damages caused by the breach of the promise to enter into marriage in future;
- engagement was a legal obstacle to marriage with another person[170].

[165] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 55.

[166] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 130.

[167] BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848 - 1918, p. 309.

[168] In connection with Art. XXXI/1894 were issued Art. XXXII/1894 on Religion of Children and Art. XXXIII/1894 on Registers of Birth, Marriages and Deaths.

[169] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 309.

[170] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 55. See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 116.

Medieval society [171*]

Development of social and legal relations in the 19th century brought a new attidute to the engagement. Engagement did not constitute a legal obligation to enter into marriage. Under the provisions of the Matrimony Act (Art. XXXI/1894), the party who was at fault for not entering into the matrimony (a legal union), was bound to compensate any costs incurred by the other party in relation to the planned marriage (marriage preparations etc.). The party at fault was obligated to return the gifts accepted from the other party or the other party's relatives.[172] Engagement constituted a moral obligation to enter into marriage.

Marriage (*matrimonium*)

Since the Middle Ages, the law started to regard marriage as a **marriage contract**, influenced in particular by the church. **The form, in which marriage was entered into,** changed over time, from abduction of the bride (banned by Decrees of King Stephen and Coloman), through the purchase and sale of the bride up to the contract of marriage. The bride and the groom became the parties to the contract and marriage was established by a consensus of the betrothed couple. The church initially only

171 http://classroomclipart.com/clipart-view/History/Middle_Ages/Science/SMLA_439B_jpg.htm (cit. 14. 11. 2012).

172 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 174.

blessed the contract of marriage; later on, it introduced the requirement that marriage be entered into in front of the church, in public and in front of witnesses[173]. Later on, it required a notification (of marriage) to eliminate the obstacles to marriage, if any.


Marriage in the Middle Ages[174*]

In the historical development, the following obstacles to marriage (impediments in marriage) existed:

1. **excluding impediments** (obstacles invalidating marriage):
   - **absolute impediments:** existing marriage; monastic vow, sanctification as a clergyman (priesthood); impotence,
   - **relative impediments:** blood kinship in direct line with no limitation and in the side line till the 4th degree (consanguinity); spiritual kinship (baptism, confirmation); legal kinship (adoption); the relationship of a brother or sister in law, crime (murder of husband) and different religion (Christians and Jews, Christians and pagans));
2. **banning impediments** (did not cause invalidity of marriage): sacred time (Lent or Advent), ban by the church (ecclesiastical ban), continuing engagement with someone else, etc.

Article on Marital Law of 1894 (so called Matrimony Act XXXI/1894) did not reflect the legal definition of marriage and jurisprudence did, more or less, settle on the understanding of marriage as a contract. Within the most radical changes that were brought by the Matrimony Act into legal system in our territory, we can include the enactment of **obligatory civil (state) form of the solemnization of marriage** (until then, there existed only a religious form of marriage)[175]. The engaged couple could de-

[173] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 313. See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 151.

[174] http://adamcova.blog.sme.sk/c/75556/Svadba-v-stredoveku-ochrana-zien.html (cit. 31. 10. 2012).

[175] Obligatory civil marriage secularized Hungarian family law. VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 193.

cide whether after contracting the civil marriage they will marry also by the ecclesiastical form. Any marriage contracted just before the church (only by ecclesiastical form) was sanctioned by rules of criminal law (offence) and for such concluded marriage there did not appear any legal consequences.

Impediments in marriage were defined in Matrimony Act in a relatively complex way on the basis of legislation of Canon Law but also taking into account the state (secular) interests. Matrimony Act differentiated between **excluding and banning obstacles to marriage (impediments in marriage). Excluding impediments** (resulting in a void marriage) included: legal incapacity, minority, kinship, valid marriage, spousal homicide in which the surviving spouse acted as an accessory etc. **Banning impediments** (marriage continued to be valid with certain restrictions) consisted in adoption, guardianship, adultery (the party at fault was not permitted to enter into marriage with the adulterer) etc.[176] To enable the identification of the existence of impediments in marriage the Act retained the institute of marriage banns (notifications of marriage).

Initially, **marriage was terminated** for two reasons only, namely the **death** of a spouse and **separation (divorce)**[177]. Originally, separation was left to the discretion of the husband; later on, the reasons for separation included infidelity, bad-tempered abandoning of husband or enslaving; the possibility of making an agreement of separation also existed. The church was against the separation of marriage, respecting the principle of indissolubility of marriage, and upheld the position that it could only be separated **by separation from bed and board (*separatio a thoro et mensa*).** Separation from bed and board only meant the abolishment of the obligation of the spouses to live together, even though they were still legally married. A couple was able to seek separation from bed and board for certain reasons only (infidelity, renegade from the catholic belief, felony, cruel behaviour, etc.). After separation from bed and board, the spouses were not able to remarry until the death of one of the spouses[178].

Matrimony Act of 1894 deflected from the principle of the indissolubility of marriage by allowing divorce (the older terminology used the term separation). Legislation on divorce was based on the principle of fault, as it was the case in other European countries. **The grounds for dissolution (divorce) were absolute**, in which case the court was obligated to make a dissolution order (adultery, fornication against the laws of nature, desertion, physical cruelty etc.) **and relative**, in which case the court had a discretion to make a dissolution order (gross breach of matrimonial obligations, indecent conduct of the marital spouse etc.). Provissions of this Act permitted divorce only in cases of breakdown of marriage where further cohabitation was unbearable for husband seeking divorce. Before a dissolution judgment, based on relative grounds (usually also on absolute grounds, too) separation was ordered from bed and board for the

[176] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 175.

[177] LUBY, Š.: Dejiny súkromného práva na Slovensku [History of private law in Slovakia], p. 319.

[178] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 56-57.

period of six months to twelve months for the purpose of possible reconciliation[179]. Only such a husband can claim for the separation/divorce, who was by violation of marital duties damaged (innocent spouse). A dissolution judgment determined the spouse at fault or both spouses, too.

Matrimony Act retained the **institute of separation from bed and board (*separatio a thoro et mensa*)**, representing a compromise between conservatives and liberals. Separation from bed and board had the same property aspects as divorce[180] and the grounds for obtaining the separation from bed and board or the divorce were the same. It was important, that the marriage legally continued and the spouses could renew cohabitation at any time. The existing marriage, however, was an impediment to a new marriage. The consequences of separation from bed and board could be eliminated by restoring marital cohabitation, which was duly communicated to the court. If separation from bed and board existed more then two years, either party could demand the separation to be changed to divorce.

In the 20th century, the area of marital personal law made several major changes, in 1919 (Act No. 320/1919 Coll. of Laws) there was established optional form of the conclusion of marriage (civil or ecclesiatical form), which was in 1949 (Act No. 265/1949 Coll. of Laws)[181] replaced by again obligatory civil manner. Legislation on divorce was based on the principle of fault pending the adoption of the Family Act of 1963.

Relationships between spouses

The relationships between spouses were first characterised by the predominance of the husband with broadly defined power of the husband and father (sale of wife to slavery, separation). With marriage, the woman passed from under the authority of the father to that of the husband. During the Middle Ages, the power of the husband over his wife became much narrower and the personal and property status of the woman (wife) was strengthened. The personal relationships between the spouses were based on the existence of various conjugal rights and obligations, such as the obligation and the right to live in a common household, obligation of mutual respect and support, family power of the husband over the children and the wife, etc.)[182].

[179] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 175 - 176.

[180] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 320-321.

[181] The first Czechoslovak Family Act – Act No. 265/1949 Coll. of Laws covered regulation of marital personal law, property relations between spouses and relationship between parents and children, too.

[182] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 57.

Spouses in the Middle Ages [183*]

In the Matrimony Act of 1894 there are clearly visible the tendencies to gradually weaken the position of husband as head of the family in favour of more emancipated status and partially applying decision-making competence of wife. The aforementioned tendencies (although under the influence of ideological reasons) found their expression in the equal marital rights and duties under the legislation of 1949, as well as under laws of the next period.

Marital property law

Marital property law comprised a set of legal norms regulating the property relationships between spouses. The norms of marital property law belonged to the *rights in rem*, law of inheritance and law of obligations. Marital property law and its norms served two basic functions – **maintenance function** (sustaining the living of one of the spouses (particularly the widow) in case of termination of marriage) and **contribution function** (mutual financial assistance and support during marriage)[184].

The transformation of Hungarian legal order as a result of adopting revolutionary laws of the Bratislava's March Constitution eliminated the almost whole medieval law. As one of residuals, however, remained the status – related conditionality within some institutes of marital property law – dowry (*dos*) and model of separated assets of both spouses, typical for the former nobility and honoratiores and on the other hand the

183 http://classroomclipart.com/clipart-view/History/Middle_Ages/Science/SMLA_383B_jpg.htm (cit. 31. 10. 2012).

184 For more information see LACLAVÍKOVÁ, M.: Formovanie úpravy majetkových vzťahov medzi manželmi : (od vzniku uhorského štátu do prvej československej kodifikácie rodinného práva). [Creation of property relation of spouses (since establishment of Hungarian Monarchy to the first Czechoslovak codification of family law]. Bratislava : VEDA vydavateľstvo Slovenskej akadémie vied, 2010, p. 28.

model of co-acquisition of property during the marriage, characteristic to former unprivileged classes. Regulation of marital property law having its foundation in a legal customs, partial laws coming from the period before 1848 and in the judicial practice (since 1912 in the binding decisions of *Curia Regis* as a Supreme Hungarian Court).

The fundamental principle of marital property law was the unlimited independence of the wife for property law purposes, which enabled the existence of a relatively equal position between spouses with some correction of property and social differences (dowry, dower, *paraphernalia*).

Medieval Society [185*]

The basic legal institutes of marital property law included[186]:

1. **Separate (exclusive) property of husband/wife –** property, which was acquired by one of the spouses prior to marriage, or which was acquired by either of them during marriage against no consideration (inheritance, bequest, gift), as well as items serving the personal needs of spouses (clothing, jewels, work tools of one of the spouses), also referred to as paraphernal property. According to the Hungarian law the husband was not the administrator of the exclusive property of his wife by virtue of law.
2. **Property acquired jointly by spouses (co-acquired property, *coaquisitio*) –** was property acquired while the spouses lived together, other than exclusive

185 http://classroomclipart.com/clipart-view/History/Middle_Ages/Science/SMLA_483B_jpg.htm (cit. 21. 10. 2012).

186 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 57 - 58. See also LACLAVÍKOVÁ, M.: Formovanie úpravy majetkových vzťahov medzi manželmi : (od vzniku uhorského štátu do prvej československej kodifikácie rodinného práva). [Creation of property relation of spouses (since establishment of Hungarian Monarchy to the first Czechoslovak codification of family law], p. 117 et seq.

property of one of the spouses. This institute fully revealed the existence of differences between the estates, as marital association of property could only exist among liegemen and towners; in case of nobles and the so-called honoraciores, a special contract of marriage was required (as the assumption applied in noble law that the main acquirer of property was the husband). Co-acquisition in principle represented the difference between the property which the spouses had at the end of marriage and the property, which they had when entering into marriage, after deducting the exclusive property of both spouses. During 19th century marriage contracts became common in the towns communities, with possible regulation of the bulk of co-aquired property.

3. **Alimentation and maintenance obligation between spouses -** initially, it was understood as the part of husband's duties, as the maintenance obligation of the husband to the wife. Basic legislation on the maintenance obligation of the husband to the wife (and to his children) in the modern law was governed by the Article XXXI/1894. Gradually, with the possibility of expanding the property's independence of the wife, and also with the possibility of her employment toghether with the admission of legal separation there occurs in the area of judicial decisions since the late 19th and early 20th centuries the establishment of the maintenance obligation of the wife to the husband.
4. **Dowry *(allatura uxorea)*** was property brought into marriage by the wife from her family to finance the cost of common household. Dowry usually consisted of movable property and exceptionally also of immovable property. Dowry was given to the husband for usage and the wife had at any time the right to demand the return of dowry. After the death of the wife, the dowry passed into her heirs. Unlike Austrian law, in the Hungarian law did not exist the obligation (legal requirement) to provide a dowry, which was associated with relatively strong maintainance of wife by other institutes of matrimonial property law and inheritance law.
5. **Dower (*dos*) –** was the most important legal institute of noble marital property law. Initially, dower (dos) was the property belonging to the wife from the husband's property in connection with husband's social status and his property. The claim for the dower (*dos*) became payable only upon the death of the husband. It represented the property rights of the widow relating to the property of her deceased husband against his heirs. Widow had the right of lien to the husband's property. In the *Opus Tripartitum* the dower[187] was defined as a wife's reward for her fidelity and virginity. The amount of the dos depended on the agreement between the spouses, on the social status and on the number of marriages entered into by the wife. The law distinguished between two types of the dower (*dos*):

[187] Dower (*dos, dotalitium*) was the grant of the husband to his wife on the occasion of their marriage. The dower was usually given both in land and chattels, but the woman did not have free disposal of the land so given, which was managed together with her husband's goods. After her husband's death, the widow could keep the dower unless she remarried. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 446.

- statutory dower (the wife of a baron 400 golden ducats, the wife of a magnate 200 golden ducats and the wife of a lower noble 20 golden ducats)
- and contractual dower (it was higher than the statutory dos and, if established, the claim for statutory dos ceased to exist).

Since the end of 19th century the importance of this institute became decreasing. A specific feature of the Hungarian law was the possibility of establishing a *contrados* by the wife for the benefit of her husband.

6. **Paraphernal property –** was the exclusive property of the wife. It consisted of items used for personal needs of the wife (most often clothing and jewels) donated to the wife upon entering into marriage by her husband, parents or third parties. After 1848 the paraphernal property lost its independent position and it became a part of the separate (exclusive) property of wife (or husband).

In the first half of 20th century the property relations between spouses were prevailingly based on the system of co-acquired property of spouses **–** model of community of property **(*coaquisitio coniugalis*).** The codification of family law (and within it marital personal and property law) took place in our territory in 1949 by adopting the Act No. 265/1949 Coll. of Laws on family law (ZoR) which came into effect January, 1st 1949. New arrangement of marital property law was established in a form of "*statutory community of property*".

The arrangement of marital property law based on the institute of "statutory community of property" applied until the 60's in our territory, when the legal regulation of this relations was set apart into a new Family Act No. 94/1963 Coll. of Laws in relation to adoption of the Constitution of 1960 and subsequent recodification of individual legal branches. The legal regulation of marital property relations (except the maintenance obligations between spouses) was incorporated into provisions of the Civil Code. Since the Civil Code No. 40/1964 Coll. of Laws came into force, the institute of tenancy by entirety – so called BSM ("bezpodielové spoluvlastníctvo manželov"), has become the corner stone of the legal regulation of marital property relations. This institute, considering the later amendments, applies on the territory of the Slovak Republic up to the present time.

Relationship between parents and children

Medieval and modern law strictly distinguished between **legitimate and illegitimate children**, with the latter having a lower status (being children of illegitimate origin) throughout the Middle Ages and for a large part of the Modern era. A legitimate child was a child born after at least six months from marriage and a child born within ten months after the termination of marriage. The presumption of legitimate origin of a child was a refutable one; the possibility of refuting it, however, was complicated by the level of scientific knowledge for determination of paternity (filiation). The status of illegitimate children could be changed by legitimation of subsequent marriage of the child's parents or by legitimation of mercy by a royal privilege[188].

[188] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 326.

The relationships between parents and legitimate children included the following rights and duties[189]:

- the right of supervision and discipline;
- the right to raise the child (with predominant role of the father as part of the father's power);
- the right to give consent to marriage;
- the right to alimentation and child maintenance, if necessary;
- the obligation to protect the child and the child's property;
- and child maintenance obligation, etc..

Among legitimate children, sons and daughters had a different status. Only the sons had a direct share in the family property and could claim this share in case the family property was to be divided. Unmarried daughters, who lost their father had the so-called **virgin's (hair) right *(ius capillare)***, which included the right for maintenance adequate to their social status and the right to trousseau and dowry in case of marriage[190]. Daughers had a special position in the area of the law of inheritance. They had a special right - **filial quarter (*quarta puellaris*)**. For the area of the *rights in rem*, law of obligations and law of inheritance, different position of sons and daughters was removed in 1848.

Legal development after 1848 brought tendencies to improve the legal status of illegitimate children. As the basis of the legal status of illegitimate child, however, still remains the fact that illegitimate child was outside the hereditary rights in relation to his/her father or father's relatives and was not a subject to his/her father's power. Decisions of the Royal Curia (*Curia Regis*) gradually strengthen the position of an illegitimate child also by determining the maintenance obligation[191], which is reflected also in the regulation of the Ministry of Justice of the year 1916 on increasing private-law protection for the maintainance (subsistence) of family members and illegitimate children.

Interest of the state and society for the protection of personal and property matters of minors and vulnerable persons is clear also from the **Article XX/1877 on guardianship and custodianship**. Although, this act was based on the construction of paternal power, the issues of raising children were gradually beginning to be seen as common to both spouses, which formed the preconditions for a broader understanding of family power. Child maintenance obligation (minor and have-nots), which was primarily covered by his/her father, and only then for the case of his inability to fulfill his mainte-

189 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 59.

190 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 59.

191 Illegitimate child had to be supported by his/her father until he/she was able to earn money (under the judicial practice of the 19th century and early 20th century). Such children were legally represented by their mother. See also FAJNOR, V. – ZÁTURECKÝ, A.: Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi. [Outline of the private Law valid in Slovakia and Subcarpathian Ruthenia]. 3. vyd. Šamorín: Heuréka, 1998, p. 461 et seq.

nance obligations passed upon the mother and the child's grandparents. Maintenance obligation for an illegitimate child was primarily covered by his/her mother in the first place and ended as well as for the legitimate child, when a minor could feed himself/herself by his/her own work.

Special legislation for religious education of children was included in **Article XXXII/1894 on religion of children**, whereby if the parents of the diffrent religion do not agree otherwise on their religious education, the father decides about boys´ education and the mother decided about girls´ education. Under the provisions of **Article XXXI/1894 on marital law (Matrimony Act)** for divorce of marriage, the court decided to entrust the child to the care of one parent and about the maintenance obligation of parents. Children until the seventh year of age (girls also after that age) were usually placed in the care of the mother. Taking into account the principle of fault, the marital law then stated that children from the age of seven years, provided that the parents do not agree otherwise, are usually entrusted to the care of the innocent parent of the divorce (if both parents are guilty of divorce, the sons were entrusted to their father and daughters to their mother).

The period of the 20th century confirmed the tendencies to protect the child rights. The definitive extinction of differentiation between the status of legitimate and illegitimate children in our territory occurred via effectiveness of the Constitution of 9th May 1948 and the Act on Family Law of 1949.

Paternal power (*patria potestas*)

In the law that applied prior to 1848, the parents-children relationship was dominated by the paternal power *(patria potestas),* which the **father (grandfather) had over his children (or grandchildren)**[192]. Paternal power initially included the power over the child's life and death, the right to keep the child at his, later deciding about the education and future occupation of the child and statutory (legal) representation of the child. The father (*pater familias*) administered the property of his children with no obligation to keep accounts. The power of the father ceased to exist upon death, emancipation of the son, marriage of the daughter, etc[193].

In the 19th century paternal power was modified and concentrated in the area of property matters, the father was guardian of children and administrator of their property while they were minors, but with the restriction that significant (essential) acts had to be approved by the Guardian Court. After reaching the age of 16, the paternal power was limited in the area of personal rights. The basic legal regulation of paternal power was done by **Article XX/1877 on guardianship and custodianship,** by customary law and judicial practice. Paternal power terminated by death of the father or the child, the child's majority, adoption without reservation of paternal power, or where it was abolished by the decision of Guardian Court, if the child had been neglected by his father. Paternal control could be limited by official measures, or even

[192] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 331.

[193] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 59.

suspended (if father was under a custodianship, or if he was sentenced to imprisonment for a term exceeding one year)[194].

Termination of the institute of paternal power and its replacement by the so-called parental power was provided for in the Act on the Family Law of 1949.

Surrogate family relations

Guardianship

Guardianship (*tutela*) developed from the collective protection of the child by the family; later on, this relationship came under the control of the public power and its purpose was to defend the public interest (protection of the ward and the ward's property). Guardianship applied to **children who lost their father at an early age** (before the 12th year of age in case of boys, until marriage in case of girls and until recovery in case of mentally disordered). Guardianship was the tutelage over orphans under lawful age, in practice it was the right of control of their possession[195].

According to the manner of establishment, it was distinguished between the following types of guardianship[196]:

1. natural and statutory guardianship (according to the law, it belonged to the mother and the grandfather);
2. statutory guardianship (according to the law, it belonged to relatives in the side line, who reached the age of 24);
3. testamentary guardianship (based on the regulation contained in the testament);
4. appointed guardianship (established by the relevant authority, in case there were no guardians according to the law or testament).

The role of the guardian was considered to be a civil duty and the claim of the guardian for remuneration was introduced by law as late as in the 18th century. The guardian became the statutory representative of the ward, looked after the ward's education and health, held disciplinary power over the ward and was the administrator of the ward's property (the obligation to keep accounts did not apply to statutory and natural guardian); the guardian was also the ward's legal (procedural) representative. Guardian's activities were subject to control by guardianship authorities. Guardianship ceased to exist upon death, by coming of age, by marriage (in case of girls), but also by dismissal due to breach of obligations, etc.[197]

Guardianship and custody were regulated in mentioned Article XX/1877. Guardianship applied to all minor persons who were not under paternal control

[194] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 176.

[195] BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), , p. 448.

[196] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 334-335.

[197] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 59 - 60.

(mother was the legal guardian of illegitimate children). Guardians were either appointed (by father, also in testament), or statutory (mother, grandfather), or appointed by guardianship court. In the case if it was not possible to establish the guardian from family, the Guardian Court appointed other suitable person. Duties of a guardian (so as a custodian, too) included legal representation, upbringing and education of the represented person. They were annually accountable.[198] Guardianship and custodianship represented the duties in public interest, in addition to the guardian and custodian there was the State taking care of the wards.

Custodianship

Custody *(cura)* replaced the father's power over adult men until they reached full legal age, in case they decided for custody. The following types existed:

- elected custody (established based on the adult ward's own decision); The right of the ward to choose his custodian was abolished in 1715);
- testamentary custody;
- custody ordered by the authorities.[199]

Custody was regulated by provisions of Article XX/1877 on guardianship and custodianship. Custodianship secured the interests of persons who were ill or prodigal (spendthrift). Custodianship was awarded primarily to husband, then to father, and then to other relatives (with the exclusion of women, except for mother and wife)[200]. According to the provisions of Article XX/1877 custodianship represented obligation (duty) in the public interest.

Adoption

Adoption (*adoptio*) was an institute known in the medieval law, regulations concerning the same were contained already in the *Opus Tripartitum*[201]. The aim and the purpose of adoption at this time was resolving devolution of property; for the adoption to be valid (in case it affected donation property), the consent of the sovereign and the admission of the adoptee into the noble estate were required[202].

Two types of adoption existed:

- **adoption as a son** (the adoptee was taken in as the legitimate child of the adoptive parent and became his legitimate heir, provided however, no son of the adoptive parent was born in marriage);

198 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 176 - 177.

199 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 338 - 339.

200 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 177.

201 Under the *Opus Tripartitum* adoption was one of the ways of acquiring noble status and inheritance rights when default of issue was anticipated. It required royal consent. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 442.

202 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 60 - 61.

- **fraternal adoption**[203] (the adoptee was taken in as the sibling (brother) of the adoptive sibling). Fraternal adoption could also be done reciprocally[204].

The base of adoption was a contract on adoption as a son or on fraternal adoption. Every adoption, however, was valid on the condition that no legitimate heir was born to the adoptive parent/sibling.

The essence of the institute of adoption did not change during the period of dualism, the property interest was still placed to the forefront at the expense of personal interest in terms of child care. Adoption was specifically modified by the regulations of the Ministry of Justice. The relationship between the adoptive parents and the adopted child was based on a contractual relationship subject to the approval of the Ministry of Justice. By adoption there was created the relationship only between the adopted child and the adoptive parents, the adoptees´ original ties to his family by blood did not end, as did not end the maintenance obligation of the biological parents to the adopted child. Adoption could terminate under agreement or under cancellation of adoption by court judgment. The first act on adoption in our territory occurred during the first Czechoslovak Republic (Act no. 56/1928 Coll. of Laws).

Institute of adoption contained in the Act on Family Law of 1949 was based on the emphasis of public interest and the refusal of a contractual nature of this institute. In terms of this act between the adopted child and the adoptive parents there was originated within personal and property relations a relationship identical to the relationship between parents and children.

Art. XXXI/1894 on marital law (Matrimony Act)

(selection of provisions)

Chapter 1: Engagement

§ 1 Under engagement there is not created any actionable right to marry.

Chapter 3: Solemnization of marriage

§ 28 Preceding the marriage there should be banns.

§ 29 Marriage is contracted before the state authority (civil official).

§ 30 Marriage which was not contracted before the state authority (civil official) is not considered as the marriage under this Act.

§ 38 For the conclusion of marriage there is required free consent of persons entering into a marriage. Coercion, mistake and the deception (§ 53 -55) exclude the free consent.

Chapter 5: Termination of marriage

§ 73 Marriage expires

[203] Fraternal adoption was often used as a part of a mutual inheritance pact between families, by the terms of which the one would succeed to the other's property in the event of default of issue. Pacts of this sort necessarily required the royal consent. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 442.

[204] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 330.

a) by the death of a spouse. If a person is declared dead, there is decisively assumed that the person declared dead did not survive the day, which is the day of resolution, as determined by death;

b) by statement of judicial dissolution of marriage.

§ 85 In the judgment of divorce of marriage the husband or spouse is declared guilty of divorce of the marriage.

If the marriage was divorced due to the culpability of both spouses, the judge declares as guilty the both spouses. By the judgment of divorce of marriage there is prohibited to contract the marriage for the husband declared as guilty because of infidelity (adultery), with the person with whom he has committed adultery.

§ 90 The husband - man declared by the judgment of separation as guilty, is obliged to adequately maintain his innocent wife in accordance with his wealth and social status, because the income of woman is not sufficient for her maintainance. Maintenance is payable in cash monthly and in advance[205].

Art. XX/1877 on guardianship and custodianship

(selection of provisions)

Chapter 1: General provisions

§ 1 A person reaches the age of majority by reaching the 24th year, within the legislation relating to women there remained unaffected provisions of the Article XXIII/1874.

§ 2 Minors are subjects to paternal authority or guardianship.

§ 8 Age of minority must be extended (by court decision) when the person, which is located under the paternal power, or guardianship, is physically or mentally unable either after reaching 24th year to earn money by herself/himslef, or during her/his minority got highly in debts or lived such a run-down life, for which she/he must continue in the paternal power or guardianship.

§ 11 In the case of indigent minors, in the first place their father is obliged to maintain and bring them up and if he is unable to do so, he must to do it together with their mother and if the father is entirely unable to do so, then mother and finally grandparents will take care of such children. .... However, a mother must maintain her illegitimate child ...

Chapter 2: Paternal power

§ 15 Paternal power over the legitimate child is carried out by the father. As a result of this power the father is the lawful (legal) representative of minor children and is authorized to manage property of his children usually without obligation to keep accounts, as well as to appoint a guardian for them and exclude anyone from guardianship.[206]

Act No. 265/1949 Coll. of Laws on Family Law

(selection of provisions)

Solemnization of marriage

[205] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 300 – 309.

[206] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 291 – 297.

§ 1 Marriage shall be contract by the affirmative declaration of the man and woman before the local National Committee to enter together in marriage. If this statement of the spouses is not realized before the local National Committee, the marriage will not be contracted.

Marital rights and duties

§ 15 In marriage, a man and woman have the same rights and the the same duties. They are obliged to live together, to be faithful and help each other.

§ 22 Property, which will be gained by either spouse at the time of the marriage - excepting what will inherit or gain as a gift, and what serves for his/her own needs, or for the performance of his/her profession – is considered the co-acquired asset. Co-acquired assets of both spouses are their common property (statutory community property).

Divorce

§ 30 If, for important reasons, there emerged between spouses profound and lasting disruption, the husband or spouse can ask the court for divorce. The husband or spouse who caused the disruption, can require a divorce, only if the other spouse gave consent to a divorce. If the spouses have minor children, the marriage is not be divorced, unless this would be contrary to the interests of these children.

§ 31 The decision, by which the marriage is divorced, must also contain whether the spouses - or which of them - are guilty of divorce. The verdict of guilt can be omitted, if requested by both spouses.

Parental powers

§ 52 Minor children are under parental power.

§ 53 Parental powers (parental authority) include mainly the rights and duties of parents to handle children acts, to represent children and to manage their property. It must be carried out according to the interest of children and the benefit society.

4. 1. 2 Rights in rem

From subjective point of view, *rights in rem* grant general legal power over a thing (ownership right) or partial legal power over a thing (rights in another's property, *rights in rem* in a thing of another, *iura in re aliena*). The fundamental institute of *rights in rem* was the **ownership right**, initially existing in the form of collective ownership by the family only (individual ownership by individuals was admissible in exceptional cases only). Throughout the Middle Ages, ownership rights related mostly to movable property only[207]; **with respect to immovable property, special**

[207] *Rights in rem* are (just like in Roman law) absolute rights. They are applicable *erga omnes* - in relation to everybody. It means that the owner (as a "lord of the thing") has either entire or partial (*iura in re aliena*) power over it. During the Middle Ages and during the Modern Age ownership rights identical with conpemporary ownership rights related to movable things only. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 99.

arrangements under the public law[208] **developed (donation system, urbarial system)** [209]**.**

The cornerstone of rights in things in medieval Hungary was the **donation system (providing the basis for the rights of nobles in real property)** and **urbarial system (providing the basis for the (use) rights of liegemen in real property)**, which was based on the provisions of the public (state) law.

Regulation on donation and urbarial system was characterized by immanent feature of state and law of the medieval period, and it was division of the society into estates as legally distingueshed and mutually unequal groups. Bondage of the substantive rights with the family law and the law of inheritance was reflected in certain forms of commitment of property, specifically in the principle of *aviticitas* and the *fideicommissum*, with a mission to preserve family (kin) assets for future generations. The year 1848 brought the removal of the medieval law and its basic institutions - *aviticitas*, donation system and urbarial system. There was created possibility for the development of modern substantive law based on Roman law. Elimination of donation system and *aviticitas* during the period of dualism required a new legislation of the *rights in rem* and the law of inheritance. Elimination of urbarial system and regulation of the serf's duties was associated with the adoption of the legislation forming part of a new private law (urbarial law).

Donation system

The donation system might be perceived as a set of legal norms regulating the rights to donation property granted for certain merits (particularly the military ones) under the king's law (*ius regii)*. The granting of donation property[210] was virtually the only way for acquiring real property in the Middle Ages, as (in line with the patrimonial theory) the sovereign was considered to be the owner of all landed property and acquisition of ownership was derived directly from the sovereign. Unlike Western Europe, the fief system did not develop in Hungary (the donation system existed in its place) [211].

The effects of donation included:

[208] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 61.

[209] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 377.

[210] The donation was the general form of obtaining landed property in medieval Hungary, usually from the king. Land donated by the king was also considered the mark of nobility. Land that had escheated to the ruler on account of default of issue or of the taint of infidelity might be petitioned for by a prospective grantee and was seldom denied. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 446.

[211] The basic differences between fief system and system of donation consisted of: - the impossibility to transfer the utility property from a vassal to another vassal (donation may be granted only by the monarch, later in a limited range by the palatine); - the public-law nature of the obligations arising from the grant of donations (donation was not a contract, the monarch granted a noble by a reward for the proven (especially military) service and merit and the noble duties to the sovereign were not particularily specified in donations since resulted from the Public Law); - and the inheritance and irrevocability of donations.

- nobilitation (acquisition of nobility),
- acquisition of the lord's power over liegemen/serfs living on the donation property,
- acquisition of inheritable donation ownership (usually by male descendants only and exceptionally also by female descendants).

The donation property was returned back to the sovereign as a result of two legal facts (the medieval law called them **devolution titles)** [212]:

- default of issue (*defectus seminis)*[213]*;*
- and the taint of infidelity (*nota infidelitatis).*[214]

Donation system was abolished by the Aviticitas Patent (issued in 1852) during the period of Bach's absolutism. In general, donation system was abolished by Bratislava's March Constitution.

Aviticitas (grandfather's property)

Institute of *aviticitas* was connected with character of the medieval *rights in rem* and with the donation system. *Aviticitas* was property legally inherited from ancestor to descendant; this property was bound to the family and could not be alienated (except with the consent of all family members).[215] It represented a legal right of the descendants to the family property (which passed onto the heirs by virtue of law) and was an expression of the bondage of the property to become the property of descendants[216]. Property, which was subject to the system of *aviticitas*, thus belonged to the entire family (kindred) and as such should be preserved for the family (to maintain noble life style). The *aviticitas* was abolished by Bratislava's March Constitution (Art. XV/1848).

212 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 398 a n.

213 Default of issue was the lack of legitimate (male) heirs after the death of a nobleman, unless one of the daughters was prefected (*prefection*). The notion was crucial for the escheat of property to the crown. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 445.

214 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 61 - 62.

215 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 98 - 99.

216 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 155.

Medieval society[217*]

Urbarial system

Urbarial system was a set of legal norms regulating the rights and obligations of liegemen and the lord concerning the use of noble landed property by liegemen (agrarian system of the Hungarian Kingdom). According to its use, noble landed property was divided into the ***dominical,*** farmed by the landlord (namely by liegemen) and the **rustical** as land owned by the landlord but cultivated by liegemen (urbarial and liege land)[218]. Urbarial system was based on the idea of divided property.

The landlord was the owner of urbarial land (*dominium directum);* liegemen merely had the right of use of the urbarial land (*dominium utile),* namely the right to possess the land (*ius possidendi)*, to use it (*ius utendi)* and a limited right to dispose with it (*ius disponendi*), the latter with the consent of the landlord only. Liegemen, on the other hand, had certain urbarial obligations, including monetary, natural and work obligations[219].

The bondage of liegemen was based on the provisions of the public law specified in more detail by local customs and the so-called urbariates (urbarial registers)[220]. Urbariates were books maintained by the landlord keeping record of liegemen obliga-

217 http://www.gymza.sk/gymza/archiv/1D-dejepis/SDV%20spolo%C4%8D..htm (cit. 09. 11. 2012).

218 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 62.

219 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 408 et seq.

220 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 125.

tions[221]. Private urbarial books were abolished during the reign of Maria Theresa, who issued the first official urbarial document [222]– the *Urbarium* for Hungary[223].

Maria Theresa (1740 – 1780)[224*]

From the beginning of the 19th century onwards, the calls for abolishing liege system as a feudal anachronism became stronger. In 1840 (Art. VII/1840 and Art. VIII/1840), liegemen were given the possibility to redeem themselves from the urbarial relationship by paying the redemption price to the lord. This was the first step towards the abolishment of the urbarial system, which was completed by the revolutionary laws of 1848 (Art. IX/1848, Art. XII/1848). Landlord courts were abolished by Art. IX/1848 and Art. XI/1848[225].

Articles on the abolition of liegeman system (villein's bondage system) in 1848 did not resolve *rights in rem* relating to the land used by former liegemen. These articles only abolished obligations of the liegeman system, but did not constitute a title of a disposal of the former urbarial real estate of the liegemen. From the legal point of view urbarial land still remained in ownership of landlords. After 1848, there began elimination of urbarial relationships which characterized the entire period of dualism. Its main feature was the transformation of public-law urbarial relations to private-law relations.

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221 In order for a liegeman to carry out his obligations he received into his possession (but not ownership) a piece of land to farm. Its measure was not given by law or by directions of state authorities, it followed only from local situation. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 29.

222 *Urbarium* was the official document setting extent of the obligations if liegemen towards their landlord. See chapter "Persons" and "Liegemen estate (class of serfs)".

223 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 62 - 63.

224 http://sk.wikipedia.org/wiki/M%C3%A1ria_Ter%C3%A9zia (cit. 09. 11. 2012).

225 See chapter „Written law (act)".

During Bach's absolutism mainly two imperial patents issued on 2nd March 1853 affected the area of former serfs' and urbarial relations (no. 51 – 52/ 1853). These were:

- Patent regulating the relations of the former serfs and the former landlords in the urbarial villages,
- Patent, which dealt with a refund for canceled urbarial obligations.[226]

These patents remained effective also after Judex-Curiae-Conference and were applied until the efficiency of Article LIII/1871 on legal and property issues arising from the abolished urbarial relations[227], which became the basis for the new legislation on *rights in rem* in connection to former urbarial land. Other legal rules issued during the period of dualism[228] regulated non-urbarial land (contractual etc.), residual urbarial land (remanency), *iura regalia minora* and collective ownership of forest and pasture usufructs. In terms of private law the elimination of urbarial relations brought expropriation of the owner of property (the former landlord) in favour of a former liegeman. Expropriation involved the serf holding, but also the accessories (ancient demesne rights, as evidenced by such kind of easement, which was subject to the feudal forest, pastures, etc.). The land and the rights were transferred as a property of liegemen (to their until then *de facto* holders) without compensation.

In addition to urbarial relations, in practice there occurred also non-urbarial relations based on the contract concluded between landowners and the liegemen (so-called contractual liegemen, contractual serfs). The non-urbarial relationships were diffrent from the urbarial by the fact that they were not covered by provisions of public law or legislation of March of 1848. The status of non-urbarial serfs and purchase of non-urbarial properties used by them were provided for only during the Dual Monarchy (Art. XXV/1896, Art. XXII/1873, Art. LIV/1871 etc.)[229].

Ownership right and protection of ownership right

The oldest form of ownership right was the co-called collective ownership right (**collective ownership** by kindred (*genus*) and later by families). **Individual ownership**[230] of family or lineage members developed in parallel to the collective ownership and, for a long time, was limited to movable things (particularly personal items, such as weapons, clothing and jewels). Ownership of immovable property was subject to special provisions of the public law of medieval state (*iura regalia*, donation system

[226] BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 141 and see also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 191 – 192.

[227] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 133.

[228] See chapter „Written law (act)".

[229] BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 260 – 261.

[230] Individual ownership was already accepted by laws of St. Stephen.

and urbarial system)[231]. Medieval terminology used the term *possessio perpetua*, *iura possessionaria* or *possessio hereditaria*.[232]

In the Middle Ages it was originated:

- **ownership of donation lands** (nobles' ownership of immovable property which was granted under the king's law (*ius regii*), and therefore it was not ownership under the Roman law;
- **divided ownership** - special type of ownership, in which the term "ownership" under the Roman law was divided into the ownership of the substance (*dominium directum*) and ownership of the benefit (*dominium utile*) or in the other words into the radical ownership and the profits (use) ownership. This was reflected in the concept of urbarial system[233] and town (municipal) ownership[234];
- **ownership under the Roman law concept** (mainly movable property of nobles and liegemen (e.g. tools).

Ownership or rather possession of land was the ultimate criterion for legal status of the person, family and kind (genus).[235] A unified term of ownership was created as late as in 1848, with the abolishment of the donation system, aviticity and urbarial system, together with the removal of the medieval nature of the state based on the existence of estates.

In essence, the modern law and the jurisprudence returned to Roman-law concept of *rights in rem*. Jurisprudence understood ownership right exempt from medieval public-law bonds as **the highest legal authority over the thing, according to which the owner can freely and solely dispose of the thing as a private in the sense that he/she can do with this thing everything, that is not prohibited for him/her by law, and simultaneously also may exclude any foreign intervention directed towards this thing.**

Ownership right as the general, direct legal rule over a thing gave the owner a whole number of rights[236], the most important of which were the following:

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231 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 63.

232 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 99 - 100.

233 In the urbarial system the rustical land ownership was the landlord's and serfs living on this land had only utility ownership.

234 In the free royal towns the town as a whole owned municipal land and the towners had only utility ownership (profit of their houses etc.). VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 124.

235 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 99.

236 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 389.

- **disposition - right of disposal** (*ius disponendi, ius alienandi*) – the right to dispose with the thing (in case of donation property, this right was limited by the devolution right of the king and in case of *aviticitas* property by the rights of relatives and neighbours)
- **possession - right of possession** (*ius possidendi*) – the owner had the full right to hold the things owned by him in his possession and was able to exclude anybody else from exercising influence on the things.
- **use - right of use and enjoyment** (*ius utendi et fruendi*) – entitling the owner of the thing to use the property and to derive profits or benefits from the property[237].

Restrictions of the ownership rights were related to medieval estates character of the society, in the Modern period of legal development they were replaced by restrictions on grounds of public interest. Various public-law ownership restrictions adopted during the dualism were concerned with the use of forestal and agricultural real estate (e.g. Article XII/1894 on agriculture and pastoral police, Article XXXI/1879 Forest Act). A new regulation in this area was connected with the institute of Expropriation[238].

Protection of ownership right

Protection of ownership right developed together with the protection of possession, with visible influence of the Roman law. In most ancient times, ownership right was most often protected by **self-help**; the procedural law rules for the protection of ownership right developed only later.[239] They included:

- ***rei vindicatio*** (*rei vindicatio*) – could be filed by the owner of the thing or by the person, who was illegally deprived of the possession of the thing;
- **writ of quare impedit** – (*actio negatoria*) - to defend against and exclude rights to someone else's property, to defend against disturbance of possession, etc.[240].

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237 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 63.

238 The most important public law's restriction of ownership rights was (and is) the expropriation. Medieval law with regard to its nature and application of the donation system did not recognize expropriation, with exception when on the property there were found minerals - subject to mining right. Turning point came in the 19th century under the influence of development in transport and the overall industrialization of the country, along with the removal of the medieval understanding of the *rights in rem* and creation of a single concept of ownership. Before 1848, the standard used for expropriation was Article XXV/1836 governing expropriation only for the purpose of construction of railways and water channels. Its application to other cases of public interest was expanded by judicial practice. In 1881 new modern legislation (act) on expropriation and determination of compensation (damages) was adopted in the form of the Article XLI/1881 on expropriation. The basic principle of the new act was that the expropriation was possible only in the public interest. Compensation and the amount thereof were administered by real estimating of the real estate property.

239 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 391.

240 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 64.

Possession

The medieval law did not distinguish between possession and ownership[241]. These two institutes were separated and characterised more precisely under the influence of the development of modern procedural protection of possession (in the *Opus Tripartitum*, the only protection of possession was self-help) and under the influence of Roman law (through ABGB). Articles on repossession rights adopted in the beginning of 17th century (in 1608 and 1609), in the beginning of 19th century (in 1802 and 1807) and Civil Procedure Act (1911) regulated a special form of procedure – shortened procedure for the renewal of possession (the so-called summary reposition) with the aim to regulate temporarily the possession of the property until the issuance of a final decision in the dispute)[242].

***Iura in re aliena* (substantive rights in another's property)**

Substantive rights in another's property (*iura in re aliena*) are rights, which entitle an entity (person) to use, enjoy the profits of or to possess certain rights to another's property[243]. **Substantive rights in another's property in the Middle Ages and the Modern Era included:**

- ***iura regalia minora;***
- **regal mining rights;**
- **servitudes;**
- **real encumbrances;**
- **pledge.**

***Iura regalia*[244]**

Iura regalia minora comprised the rights of use and enjoyment belonging to the owner, usually as attachment to donation property[245]. *Iura regalia minora* as the *iura in re aliena* (rights to another's property) further included the right to fairs, toll right, right of ferry, right to tap (beer), right to cut of meat, right of mill, hunting right and fishing right[246]. *Iura regalia minora* represented either rights for use belonging to the owner as an accessory of donation property or rights that belonged to the owner only if they

241 According to the medieval law, both the *corpus* (acquisition of factual power over the property) and *animus* (the will to possess the thing) were required for the establishment of possession. Possession ended by factual loss of power over the property or by the loss of the possessor's will to possess the property (*derelictio).* Differentiation of the concepts relating to possession and detention (de facto power over the thing) was not known to the elder law. LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 423.

242 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 66.

243 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 377.

244 The medieval law distinguished between two types of *iura regalia*: *iura regalia maiora* and *iura regalia minora*. *Iura regalia maiora* formed the part of the public law; these were the exclusive rights of the sovereign, which included the right to appoint church dignitaries; and special privileges (*iura regalia)* to the post, salt, coins and customs.

245 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 410.

246 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 410 - 412.

were subject to a separate royal privilege. Rights in another's property were deemed *iura regalia minora* and even though they were the institutes of the medieval law, they were not abolished by the revolutionary legislation adopted in March 1848[247]. The efforts to remove them from the law (as these institutes did not correspond to the unified concept of a property) appear in subsequent periods of Bach's absolutism and the dualism. Urbarial patents of 1853 maintained the pre-1848 legislation (rights for tapping, rights for mill and the fishing rights), but a part of *iura regalia minora* became the subject of compensation, and therefore ceased to exist (charge of burning alcohol, the exclusive right to sell meat, etc.). During the period of dualism there were newly provided for the hunting law (Article XX/1883 on hunting, according to which hunting became an integral accessory right of land ownership) and the fishing law (Article XIX/1888 on fishing, whereby fishing law became an integral accessory of land ownership and it belonged to the owner of the riverbed), the monopoly of tapping the alcoholic beverages and the right for mill.

Servitude (*servitutes*)

The Hungarian medieval law did not know the term servitude[248] (*servitutes)* as the *iura in re aliena* known from the Roman law. Servitudes were used in particular areas of the law. The stabilization of the general institute – servitude[249] occurred in jurisprudence and in judicial practice during the second half of the 19th century, under the influence of the Austrian ABGB based on Roman-law concept of servitude. Under the Hungarian law servitudes were the rights to another's property entitling the holder of servitude to use the property of another person and this limitation applied to any further owner of the property; or the owner of the property was obliged to refrain from certain actions relating to his property for the benefit of the person authorised under the servitude[250]. The legal reason of creation of servitude (except from servitudes arising by statute (act)) was a contract, testament or acquisition by endurance (*praescriptio*). Procedural-law protection of servitudes was based on the protection of possession.

Real encumbrances

Real encumbrances were rights to another's property (*iura in re aliena*), which were very similar to the servitudes. They were obliging the owner of the landed property to make regular (usually financial) payments relating to the ownership of the land. Medieval law (valid prior to 1848) included among real encumbrances obligations arising

[247] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 64 - 65.

[248] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 126.

[249] Servitudes were broken down into land servitudes (e.g. servitude of pavement, carriage way and passage for livestock, servitude of drawing of water, servitude of grazing) and personal servitudes (e.g. the right of dwelling). LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 414 - 415.

[250] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 65.

from the relationship between patrons and the obliged entities and the church (**real patronage – easment, patron's right** etc.).[251]

Pledge (*impignoratio*)

The medieval law regarded pledge as an institute of the law of contract[252] enabling the creditor to take a certain thing from the debtor's property as a security for the future insolvency of debtor. The year of 1848 (and the abolishment of bondage of real properties by *aviticitas* and donation system) opened the possibility for the development of the pledge as the accessory right used to satisfy the receivable of pledgee from the pledge in case it is not paid duly and in time[253].

Types of pledge in the historical development[254]:

- **forfeitable pledge (*vadimonium*)** – it was based on the oldest contract of pledge; under the vadimonial pledge (vadimonial obligation security) subject of security immediately after being handed over by the lien debtor to the lien creditor passed to his ownership. In the case of debt discharge the creditor passed the subject of the security back to the lien debtor[255],
- ***pignus* – lien** - pledge to movable property,
- ***antichresis*** - pledge to immovable property – it came into existance under the eccleciastical ban of interest collection. Under the *antichretic* pledge the pledgee had the right to enjoy the benefits derived from the property; these benefits were either regarded as interest. Antichretical lien remained in Hungary for a long time, and thus it was impossible to develop a more modern form of the pledge to property - hypothecary pledge. Hypothecary pledge (**mortgage** in immovable things) was adopted in Hungary late, namely in the 19th century.

Pledge to movable property (*pignus*)

Pledge to movable property (*pignus*)[256] was established by contract and by delivering the pledge to the pledgee (*traditio*); the latter was not authorised to use the pledge without the pledgeor's consent. If the entire debt was not repaid at the agreed time, the pledgee had the right to sell the pledge; he had to account to the pledgeor for any surplus remaining after discharging his debt (*hyperocha)*. After 1848 there ocurred development of the *pignus* coupled with more dynamic industry and commerce, but the basis consisting in Roman law was concerned. Codification of commercial law (Comercial Code XXXVII/1875) enabled also to acquire a plegde (lien) to movable property pledgee *in bone fide* from a non-owner. Commercial law also stated a number of cases

251 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 126.

252 See FERANCOVÁ, Miriam: Zabezpečenie pohľadávok zriadením záložného práva v historickom vývoji. [Securing obligations through the lien in historical development]. In: Zabezpečenie pohľadávok a ich uspokojenie. VII. Lubyho právnické dni. Bratislava : Iura Edition, 2002, p. 169-225.

253 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 65.

254 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 416 - 421.

255 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 104.

256 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 417.

of statututory (act) pledge. Other rules governing pledge to movable property (*pignus*) were covered by Article XIV/1881 on loans guaranted by *pignus*. Its purpose was to protect the public interest in the business of providing loans secured by a pledge to movable property (*pignus*).

Pledge to real (immovable) property

The development of legislation on pledge to real (immovable) property[257] was marked especially by the bondage of disposition of immovable property in law before 1848. Contractual pledge to real properties was established with the handover of the property to the pledgee into ***antichretic* pledge** (the pledgee had the right to enjoy the benefits derived from the property; these benefits were either regarded as interest or set-off against the pledgeor's debt). The contract of pledge needed to be authenticated by a place of authentication[258]. Antichretical pledge was based on favouritation (preference) of the position of the pledgee and its creation was related to circumventing the church ban of interest collection[259]. Antichresis was abolished in the second half of 19th century and in connection with this the mortgage could developed in Hungary. The delay was caused by necessity to have the Land Registers (more precisely well run Land Registers) as a basis of mortgage, as the mortgage debtor continues to use the estate (immovable thing), only mortgage right of the mortgage creditor is entered into the Land Registers.[260]

The first attempt to introduce **a mortgage lien** into the Hungarian law was done by Article CVII/1723 based on Austrian legislation, which, however, did not succeed in practice, thus allowed continuing in use of the antichretical liens (pledge) on real estate. A new solution was the Article XXI/1840 governing the institute of the mortgage lien based on the creation of a pledge via intabulation. New legislation on mortgage was based on the principle of publicity, credibility and priority of documentation[261].

Formation of a modern regulation of the *rights in rem*

In 19th century the basis for formation of a modern system of the *rights in rem* in our country became the removal of estates differences and creating conditions for the development of a market economy. Development of the relations of production was associated with the need to provide loans (credits), and also with providing (securing) them with the means of repayment within the *rights in rem*. Restriction of freedom of disposition with the *rights in rem* as a remnant of the medieval law became an obstacle to the further development not only of freedom of an individual but also of freedom of his property. Elimination of disparities among different types of assets tied to the principle of estates prepared space for the development of general *rights in rem*, which were based on traditional institutes of Roman private law, such as possession,

257 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 417 - 421.

258 BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), , p. 453.

259 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 127.

260 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)]., p. 105.

261 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 420.

ownership, pledge (lien) and servitudes. From the formal point of view, the sources of the *rights in rem* were mostly in the form of customs supplemented by special legal regulations (arrangement of urbarial relations, regal rights, expropriation, etc.) in our territory. From the material point of view, they were based on the principle of *numerus clausus*, i.e. a limited number of relations within the *rights in rem*, unlike relations within law of obligations. Efforts to unify *rights in rem* in the interwar Czechoslovak Civil Code were not successful.

Although, the adoption of the first common Czechoslovak Civil Code of 1950 (no. 141/1950 Coll. of Laws) was a unification and codification basis, it was formed on a completely different basis than Roman law in the area of *rights in rem*. A similar character can be seen also in subsequently adopted Civil Code no. 40/1964 Coll. of Laws. Return to the Roman law concept of the *rights in rem* occurred only after the political changes of 1989.

Real Estate Records

Revolutionary changes in the Hungarian legal order from 1848 brought the need for a new and more transparent registration of rights to real estate (*rights in rem*). The method of keeping of records about real properties in medieval Hungary was far from perfect. Places of authentication (*loca credibilia*)[262] were not able to ensure that records of rights to real properties are maintained in a systematic manner; adding to the complexity of the system was also the existence of town books and county protocols.[263] In the Middle Ages, records of rights to real property were maintained chronologically, based on personal folios. The attempts to introduce land books (Land Registers) in 1723 and 1840 failed[264].

During Bach's absolutism a significant reform in the registration of rights to real estate happened. In the years 1849-1851 there was introduced a compulsory registration of urban (municipal) and urbarial lands, which was followed by registration of noble land made in 1853. There were thus created Temporary Land Register Protocols to show the actual *rights in rem* at the time of their notification. Land Register Protocols were to be later replaced by Land Book Inserts contained in the Land Register. Austrian Land Register Regulation of 1855 (No 222/1855 Coll.) remained the basic regulation in the area of land registers and cadasters. The issues and rules concerning Land Registers and Railway Land Registers and Cadasters were spread out in enormous amount of regulation.[265]

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262 Places of authentication (loca credibilia) were were cathedral or collegiate chapters (*capitula*) and – mostly Benedictine, Premonstratensian and Hospitaller – convents. They substituted for the notaries public of other countries. They issued under their authentic seal documents recording private legal transactions, and sent out witnesses to certify the actions of royal bailiffs etc. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 453.

263 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 421.

264 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 67.

265 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 181. For more information see also FAJNOR, V. – ZÁTURECKÝ, A.: Nástin súkromného

The new system of land registration was planned to remove these deficiencies by the principles of publicity, intabulation and specialty. Publicity included the availability of the Land Register for all entities with a legal interest, and the possibility to rely on the consistency of the land register with actual *rights in rem*. Applying principle of intabulation brought a radical change in the register of rights to real estate; the basis of rights to real estate was not the *traditio* (delivery), but the registration, intabulation of rights in the Land Register. Specialty was the expression of overcoming the institute of general mortgage, under it the pledge should be established only to ensure a specified asset and only in relation to a particular property.

Land Register order was organized by the Land Register Protocols being replaced by **Land Register Inserts**, which consisted of three parts: Part A (proprietary nature), Part B (owners) and Part C (land charges, pledges etc.).[266] Each Land register Insert was designed in such a manner that the registered owner of several lands was only one person, or according to ideal shares the determined co-owners. Intabulation principle was reflected in the existence of two basic types of notes - **entry** and **recording**.

Recording, contrary of the entry, constituted or terminated the right entered into the Land Register, thus securing the priority of legal changes that were to be supported by documentary evidence submitted within a specified period as a proof of legal title. Apart from entry and recording, so called **noting down** (as another 3rd type of records) served the purpose of information (restriction of property rights, disputes over property etc.).[267] Intabulation principle was not applied completely; the exception was the acquisition of rights via inheritance or via acquisition by endurance (*praescriptio*), when the record had only character of a registration. Another exception was the existence of an unregistered land in the land register, which was acquired by *traditio* (delivery) as in case of movables. Entry of ownership took place under entry authorization, which was a legal act of an authorized and obliged person leading to the creation, modification or termination of the right to property (*rights in rem*).

Land Register Regulation of 1855 (No 222/1855 Coll. of Austrian Laws) issed in December, 15, 1855

(selection of provisions)

IV. Records in the Land Register

§ 59 Records in the Land Register are:

a) entry (based od intabulatio principle),

b) recording (based on pre-notatio principle),

práva platného na Slovensku a Podkarpatskej Rusi. [Outline of the private Law valid in Slovakia and Subcarpathian Ruthenia], p. 93.

266 FAJNOR, V. – ZÁTURECKÝ, A.: Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi. [Outline of the private Law valid in Slovakia and Subcarpathian Ruthenia], p. 121 et seq.

267 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 181.

c) noting down[268].

Art. XLI/1881 on expropriation

(selection of provisions)

§ 1 Expropriation is allowed only in the public interest ...

§ 9 Expropriation is allowed only in connection with immovable things. Expropriation can not be obstacled with the quality of expropriation of the possesed property nor with person as the owner.

§ 10 Via expropriation the property is acquired free of lend charges, or is acquired for temporary use provided by this Act.

§ 23 Expropriation is realized (made) with full and fair compensation.

§ 26 The amount of compensation shall be determined usually in cash.[269]

Civil Code No. 141/1950 Coll of Laws

(selection of provisions)

3rd part: Rights in rem. Chapter 7: Ownership right; Forms (types of ownership)

Socialist ownership

§ 101 Socialistic property is either form of state ownership or cooperative form of ownership.

§ 102 The National property is owned only by socialist state.

§ 105 Personal ownership

As the personal property are considered items mainly for domestic and personal consumption, family houses and savings gained by work (personal property). Personal property is inviolable.

§ 106 Private ownership

Private property shall be governed by the provisions established for ownership right, if they do not state that they only apply to the personal or socialist property.

§ 110 Land ownership

The ownership of the land, based on the principle –"land belongs to those who work there" - is governed by the Civil Code unless specific provisions provide for otherwise.

4. 1. 3 Inheritance Law (Law of Inheritance)

Inheritance law comprises a set of legal norms regulating the devolution of property of a deceased person into other persons (the heirs). After 1848 rules of

[268] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 318 – 324.

[269] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 324 – 331.

inheritance law belonged to the system of *rights in rem*. Since the second half of 19th century law of inheritance became an antonomous part of privat law with its basic term **"hereditaments (hereditage)"** as comlex of benefactor's property rights.

Medieval inheritance law was influenced by **the existence of the estates and particular validity of its norms**. Universal succession did not apply in the medieval law of inheritance; to the contrary, several types of inheritance developed, depending on the membership of the deceased to the estates and on the nature of the property. As a result, special **noble law of inheritance** (including special clerical law of inheritance) and **urban (municipal) and liege law of inheritance** developed, all of them as relatively closed systems, with the possibility of mutual influence on the contents of the norms between them.

Law of inheritance can be divided into **testate and intestate succession.** If the testator does not settle his property issuses in the testament or inheritance contract, the succession occurs under law (intestate succession).

The titles of inheritance included:

- **testament (will),**
- **act (statute),**
- **codicil**
- **and inheritance contract (deed of succession).**[270]

Noble law of inheritance

Important norms (acts) of the medieval noble law of inheritance were:

- **the Golden Bull of Andrew II of 1222, which was confirmed by Louis I the Great in 1351 (in the form of Decree)**. This confirmation abolished the testing right of the nobility in case of non-existence (dying out) of statutory heirs, preventing testamentary dispositions (in a legal way) with inherited property (received by donation and other property). This regulation enabled the further development of the donation system safeguarding the property; by the application of the devolution title of default of issue *(defectus seminis),* donation property returned to the sovereign;
- **the *Opus Tripartitum*.**

As to **intestacy**, the noble law of inheritance distinguished between three classes of statutory heirs[271]. Intestate succession followed only if testator did not leave testament or inheritance contract.

The **first class of statutory heirs** consisted of direct **descendants** (legitimate children only). Descendants as statutory heirs were not equal in their rights; it was

[270] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 67.

[271] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 514 et seq. See also VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 127 - 129.

distinguished between properties reserved for men and the so-called special rights of women. It was only male descendants who could inherit donation property (women could inherit it in exceptional cases only), the father's house (the youngest son) and family deeds (the oldest son). Female descendants had special inheritance rights, which included the daughter's right to one quarter of the property – **filial quarter *(quarta puellaris)***[272]. The filial quarter was handed out from the donation property of the male branch and belonged to women and their descendants always together (all women of the same grade were entitled to one quarter of the property). A special right of women was also the **virgin's (hair) right *(ius capillare)*** saying that each daughter was entitled to subsistence and dwelling in the family house corresponding to her status and to a corresponding dowry and trousseau upon marriage after the benefactor's death.[273]

The second class of statutory heirs – **ascendants** - became entitled, if there were no descendants. Later on, inheritance by the bereaved spouse received precedence over inheritance by ascendants (particularly with respect to movable property). A special inheritance claim was inheritance by the widow (**widow succession**). The widow inherited (also in parallel with the descendants), the wedding ring, the husband's suit and yoke, one half of the stud farm, the share of children in acquired pledges of her husband and of all acquired movable property (including that acquired by inheritance), except for weapons, books and the signet ring. In addition to widow inheritance, the **widow's right** also existed in the Hungarian law. It comprised special rights of the widow, such as the right of usufruct to the entire estate of the husband (the right of widow to stay and live in the testator's property and enjoy the right to use it (until 1687 in the entire property, then only in the *aviticitas* property, because she inherited the aaquired property).[274] The widow would loose these rights when remarrying.

The third class of statutory heirs (if there were no descendants or ascendants) comprised indirect relatives (collaterals). Among the collaterals, it was distinguished between agnates (male descendants of any of the ancestor's sons) and cognates (female descendants of any of the ancestor's sons or male and female descendants of any of the ancestor's daughters). As a principle, agnates inherited property reserved for men and cognates inherited property reserved for women.[275]

Inheritance by testament (will) in noble law of inheritance was significantly influenced by the Golden Bull of Andrew II (confirmed by Louis I the Great in 1351), ar-

[272] Filial quarter was the hereditary portion of noblewomen due from inherited estates of their fathers. The filial quarter eas, in theory, paid in cash. In practice, however, it was often given out in landm in a good number of cases, especially in the 13th and 14th centuries. BAK, J. M. – BANYÓ, P. – RADY, M. (ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 447.

[273] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 67 - 68.

[274] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 105.

[275] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 68.

ticles (laws) of 1715 and 1729 (Art. XXVII/1715 and Art. XXIV/1729). These articles (laws) set the formal and content (material) requirements on testaments.

Among the **content (material) requirements** of wills there were included: ability to establish a testament (age of 12 years, common sense and the ability to express the will in generally understandable terms), real, serious and free will of the testator, the testator's capacity to dispose of the property, determination of the heir (since 1715 it was allowed to establish a testament only for legacy) and possible determination of executor of testament.

Formalities of testaments were: precise identification of the testator, witnesses and other persons involved in the establishment of a testament or mentioned in the testament, precise identification of the property, the absence of rewriting, errors, and cuts, etc..; date and place of establishment of the will; the testator´s and witnesses´ signatures, its publication one year after the death of the testator, etc..

The noble law distinguished between the following types of testaments:

- **private noble testament** (written down by the benefactor and signed under the presence of five witnesses of equal status; in case the testament was not written and signed in the benefactor's own hand, the presence of an additional (the sixth) witness was required);
- **public noble testament** (written down in front of a place of authentication);
- **privileged testament** (written down as a charitable testament supporting a religious or public interest; military testament, testament for the benefit of descendants (exclusively for the disposition with the acquired property); testament written down in the place and at the time of plague epidemics).
- **Special types were:**
- **codicil** (considered to be a complementary or sometimes a separate testament making dispositions with a smaller part of the property; the codicil required the presence of a lesser number of witnesses; codicil did not state the heir and it was a form of Roman law legacy);
- **inheritance contract** (in the Middle Ages, it had a form of contract on brother adoption).[276]

Municipal law of inheritance

Municipal law of inheritance[277] was influenced by the extent and character of town privileges, legal customs (frequently based on the rights of *hospites* (guests) who settled in the town) and town statutes.

Intestacy in the municipal law of inheritance came close to the noble law during the 17th century (Art. CXVII/1659).

The first class of heirs comprised descendants and the wife, with no difference between male and female descendants. The rights of descendants to inherit could not

[276] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 68 - 69. See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 105 - 106.

[277] LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 530 – 531.

be omitted.[278] **The second class** comprised ascendants and indirect relatives (equally men and women) according to the type of the estate: *aviticitas* property, to be inherited by the line of the family, from which this property was originated; and acquired property, after taking out one half of the property acquired during marriage (co-acquisition), to be inherited by the spouse and indirect relatives (collaterals).

The estate of a towners who died without any heirs, belonged to the town. Since 1852 eschated property did not devolve to the town as before, but to the state[279].

As to **inheritance according to the will** of the deceased, the municipal law of inheritance distinguished between two types of testaments:

public testament (made in writing or orally in front of the town council or two of its members and a notary);

oral (private) testament (written and signed by the benefactor under the presence of five witnesses).[280]

Liegemen (serfs) law of inheritance

Intestacy in liege law of inheritance[281] (made up mostly of particular customary law) was, in the 19th century, influenced by articles (laws) IX/1836 and VIII/1840. According to the said articles, the **first class of heirs** comprised descendants (equally men and women), with restricted possibility of dividing urbarial property (which required the consent of the landlord). In case there were no descendants, one half of the acquired property was inherited by the bereaved spouse (he/she already had a claim to the other half of the commonly acquired property). If there were no descendants, the inherited, not acquired property was inherited only by ancestors - ascendants (**second class of heirs**) and if there were no ancestors, by indirect (side) relatives – collaterals (**third class of heirs**).

Inheritance by will in liege law of inheritance depended on the type of property and the capacity to make testamentary dispositions with the property. Since the adoption of articles of 1836 and 1840, liegemen were free to dispose by will with movable property and acquired landed property; the above-mentioned articles (laws) granted them (full) testamentary freedom (movable property and acquired immovable property (but after division of co-acquired property of spouses). One half of the property acquired during marriage (co-acquisition) belonged to spouse.

The estate of a liegeman died without any heirs, belonged to the landlord[282] (*caduca,* escheat). After 1852 the escheat devolved to the state.

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278 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 160.

279 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 106.

280 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 69.

281 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 531 – 532.

282 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 69 - 70.

Creation of a new Law of Inheritance (Law of Inheritance in the Modern Age)

Creation of a new Law of inheritance is connected with abolishment of system of *aviticitas* (Art. XV/1848, Patent on abolishment of *aviticitas* of 1852), with abolishment of differencies between inherited and acquired property, donation and non-donation property and property of male and female branch.[283] Removal of these differences overcame the estate nature of the law of succession and eliminated the disparity between the descendants – sons and daughters. As a result, the requirement of creating a new law of inheritance became very important, and it was reflected in the Temporary Court Rules of the Judex-Curiae-Conference (1861)[284].

Norms contained in the Temporary Court Rules brought:

- **definitive removal of estates particularism in the law of inheritance and basis of the inheritance succession according to the principle of universal succession,**
- **equity and equality of decscendants – sons and daughters - (removal of property distinguishing of male and female branches in relation to the donation property, the abolition of the filial quarter and virgins´right**.

Their provisions established the foundations of a new law of inheritance, and should have only temporarily limited validity, planned to be applied only until the expected Hungarian private law codification. Judex-Curiae-Conference therefore developed a new framework structure of the law of succession, but which was definitely not comprehensive legislation. Austere and simple legislation of the Temporary Court Rules and the fact that in many aspects there remained valid the provisions of the law of inheritance of before 1848, which were based on the custom, created the possibility for the creation of other provisions of the law of succession in the area of legislative activity of the Royal Curia (*Curia Regis*) as the Hungarian Supreme Court. In view of the failure of the Hungarian (and interwar Czechoslovak) codification efforts, the rules established by the Judex-Curiae-Conference became the basis of the law of inheritance in our territoty until the first Czechoslovak codification of civil law - Civil Code (Act No. 141/1950 Coll. of Laws).

Family property in trust (*fideicommissum*)

Fideicommissum was a special institute of Hungarian law based on the idea of restricted ownership. It was a relic of medieval (or feudal) law. By system of *fideicommissum* the noble families could maintain the family property in one compact whole. The owner of *fideicommissum* property could not charge the property while there was so called expectant heir of the property. This property rights were indivisible and inalienable. By this system of restricted ownership the subdividing and fragmenting of property among several descendants of noble families was prevented by entrusting the property of the family into the hands of one member of the family as the „head of the family". This medieval institute was not abolished by Judex-Curiae-Conference

283 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 533.

284 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 533 et seq.

(1861), mainly because it was a basis of economic power of nobility. *Fideicommissum* was finally abolished in Slovakia by Czechoslovak Act No. 179/1924 Coll. of Laws.[285]

Intestacy rules

Temporary Court Rules of Judex-Curiae-Conference (1st part, § 1-18) created a new system of intestacy rules. By this system the nearer group (class of heirs) excluded the more remote group (class of heirs). It was called the „system of parentels". Escheat belonged to the state.

First class of heirs comprised descendants, equally men and women. Heirs inherited whole property, regardless of its kind. Succession in the first class of heirs was based on the known principles of inheritance - *per capita* in the first line of descendants and *in stirpes* in the descendants of other lines. The descendands which were closer relatives of the testator excluded the distant relatives from the process of inheritance in their line, which means that there was applied system of gradation.

Second class of heirs comprised ascendants (if there were no descendants). In this class law distinguished between acquired property and **inherited (branch) property**. Inherited property had to return to the nearest ascendant of relevant branch and if there was no heir, the property lost its branch character.[286] The concept of branch property was a new way to maintain old family property within the family after revocal the system of *aviticitas*. Acquired property was inherited first of all by the surviving spouse.

Before adoption of the Temporary Court Rules **mutual marital succession** covered succession of movable and acquired property in case of childlessness and without existence of testament (Art. XI/1687 for noble law and Art. VIII/1840 for liegemen law). Mutual succession of spouses followed the succession of descendants and was before the inheritance of ascendants and collaterals taking into account the potential incidence of the inherited (branch) property.

In relation to the hereditage of a testator there could be applied different hereditary successions. Hereditage was disintegrated into several parts, which was contrary to the principle of universal succession, as to such parts of the hereditage could be applied subjective right to the succession of different persons.

Widow's right

Under the Temporary Court Rules the medieval **widow's right** remained in validity. It was special right of the widow to stay and live in the testator's (deceased husband) property and enjoy the right to use it untill her new marriage. In the Modern Age heirs could ask for reduction of widow's right.

[285] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 180.

[286] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 178.

Mandatory Proportion for Family Members (Legal share of inherited Property)

The purpose of the mandatory proportion for family members was to provide for certain share of the hereditage for closed relatives, especially descendants or ascendants (patents only) of deceased person.[287] If benefactor did not devise any of his estates to his descandants or parents, they were entitled to a half of their legal share as the share they would obtain if the decedent died intestate, as intestacy rules apply.[288] Mandatory proportion for family members was applied notwithstanding the contrary provisions of testament. Testament was in that part invalid. Medieval law did not recognize this institute of legal share of inherited property in connection with existance of another (public law) restrictions with dispositions of *aviticitas* property.

The basis of the regulation of mandatory proportion became only two relatively austere and sipmle provisions of the Temporary Court Rules[289], partly inspired by the provisions of ABGB. Austere character of this reguation allowed its further development in judicial practice. Judicial practice extended the right for mandatory proportion also for adoptive children, but their claim was related only to such property of a person which she/he possessed at the time of adoption. Ilegitimate child, being outside the hereditary rights in relation to her/his father or father's relatives, could only inherit property from mother and her relatives. Illegitimate child had a right of legal share (mandatory proportion for family members) only in relation to his mother. An adopted child, to the contrary, could inherit from blood relatives and from the adoptive parents.[290]

Disinheritance (*exhereditatio*)

Temporary Court Rules remained in validity provisions of the *Opus Tripartitum* (1st part, Art. 52 and 53)[291] in connection with disinheritance of son or father. After 1848, especially 1861 the institute of disinheritance was developed by judicature.

Inheritance unworthiness (*indignitas*)

Temporary Court Rules did not provide for the inheritance unworthiness, which remained based on the provisions of customary and statutory law before 1848 (Tripartitum, and Act. Art. VI/1625 and Act. Art. XI/1723). During dualism this institute was developed and adaptated to new social conditions only in judicial practice and it also created new subject matters of inheritance unworthiness. A person who killed or at-

287 FAJNOR, V. – ZÁTURECKÝ, A.: Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi. [Outline of the private Law valid in Slovakia and Subcarpathian Ruthenia], p. 508 et seq.

288 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 177.

289 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 534.

290 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 177 - 178.

291 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 534.

tempted to kill the decedent, willfully destroyed, hid or defrauded the testament, was unworthy and so was not entitled to inheritance[292].

Inheritance by testament (will)

In the period of dualism the Temporary Court Rules and Art. XVI/1876 on formal requirements of testaments became the basis of testamentary succession.

The *mortis causa's* legal acts included:

- ***donatio mortis causa* (gift causa mortis)**[293]
- **codicil**[294]**,**
- **inheritance contract**[295]**,**
- **and testament (will).**

Testament (will)

Temporary Cort Rules eliminated particularism (particular laws) and formalism in the testamentary succession, especially in connection with a large number od witnesses. **New Act – Article XVI/1876 on formal requirements of testaments regulated 5 types of testaments (wills)**[296]**:**

1. **private written testament** (holographic testament - written and signed by the benefactor under the presence of two witnesses; alographic testament - written by other person under the presence of four witnesses);
2. **private oral testament** (was valid if the decedent died within three months since writing the testament. If the deceased died after this period, oral testament was valid only in the case when a person who wanted to exercise (claim) the right of such a testament showed that the deceased since the end of the three month period up to his death was in such a situation (condition) that he/she could not establish a newer testament),
3. **private testament deposited with a notary public,**
4. **public testament** (made before a notary public or before a district court with two witnesses or another (the second) notary. This form of testament was bound with validity of testaments of deaf and mute people, also in case, if they could write or read, or for minors under 18 years),

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292 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 177.

293 After 1848 law did not distinguish between *donatio mortis causa* and will. Formalities of both legal acts were similar.

294 Difference between the will and the codicil was in contents of these legal acts. Codicils concerned measures other than appointment of heirs, they for example could establish a legacy.

295 Inheritance contract in the sense of present-day was in use after 1848. The basis of its regulation became customary law and provisions of ABGB.

296 FAJNOR, V. – ZÁTURECKÝ, A.: Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi. [Outline of the private Law valid in Slovakia and Subcarpathian Ruthenia], p. 529 et seq.

5. **privileged testament** (made in favor of the descendants or a spouse, without witnesses because testament was written in the person' own hand; made in times of the plague, onboard a vessel at sea, or at the time of war).

The basis of the law of inheritance in Slovakia applicable to the testate and intestate succession b became rules of the Judex-Curiae-Conference, which were partly complemeted by the laws (legislation) and judicial practice. Law of inheritance was applied in this form in our territory (with respect to the failure of codification efforts) until the entry into force of the first Czechoslovak Civil Code no. 141/1950 Coll., which, among other things, limited the legal acts of *mortis causa* only to testament (will) and within the intestacy it created new classes of heirs.

Temporary Court Rules of Judex-Curiae-Conference

(selection of articles)

Testament

§ 7 In the absence of direct heirs of the descending line and of parents the right to test applies to all inherited and acquired property; but if there are any direct heirs in the descending line, or parents, the order can not apply to their legal share.

The mandatory share is equal to half of what would inherit the heirs in the descending line after the testator´s death, if he died without a last order. Last Order (testament) is therefore null in this section and direct heirs in the descending line, and if there are none, then the living parents may require the inclusion of this half.

The exceptions to this rule, as there is the possibility of disinheritance, are only the cases referred to in titles 52 and 53 I. part of the *Opus Tripartitum*[297].

Art. XVI/1876 on formal requirements of testaments, inheritance contracts and *donatio mortis causa*

(selection of privisions)

Chapter 1: Private written testament

§ 1 For the validity of written private testament

a) if the testament was written and signed by the testator in the whole content, two witnesses;

b) in any other cases there are required four witnesses.

§ 2 Those who have not reached 18-year, hereinafter blind, deaf and mute, or who are sane defective; or who have recently been working for a crime, or have been accused for a false oath or been money-grubbering and have been legally convicted, can not be witnesses in written private testament.

[297] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 247 – 248.

§ 3 Witnesses at realizing testament must be all together present and certificate that regarding to the deceased person there did not happen any lie or misconception.[298]

Civil Code Act No. 141/1950 Coll. of Laws

Part 5: Law of Inheritance; Chapter 34: Succession

(selection of provisions)

Acquisition of heritage

§ 509 The heritage shall be acquired by the testator's death.

§ 510 Heir may be either natural or legal person.

§ 511 The heir can take either all of the deceased's estate or a proportion of it, or even individual things or rights.

§ 512 It is possible to inherit by law, will or both of these titles of inheritance.

§ 513 If the heir does not acquire the heritage under will, instead of him are called the legal heirs, and what is not acquired by any heir, eventually is acquired by the state as escheat.

4. 1. 4 Law of Contract (Law of Obligations)

Compared with the other parts of the private law, the law of contract developed slower, which was related to the nature of medieval property law (initially dominated by the principle of collective ownership and later influenced by the bondage of property by *aviticitas*) and the slow development of trade relations, whose purpose was acquisition of property values.[299] The oldest attempts to regulate by statutes (laws) the predominant customary law of contract aimed to restrict and regulate trade in certain places, with certain persons, etc. The *Opus Tripartitum* also contained only few (non-systematically arranged) provisions of the law of contract. The oldest type of contract was the contract of reciprocal exchange (permutation), which was gradually, with the development of the monetary system, replaced by the purchase contract.[300]

Law of contract operating *inter partes*, only between the parties to the contract recognizing one party's claim and the other party's obligation to perform.[301] Institutes of the law of contract had their basis in the Roman law. Obligations arose from:

- **acts-in-law (from contracts)**
- or from **wrongful acts (delicts)**.

298 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 367 – 372.

299 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 447.

300 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 70.

301 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 102.

Initially contracts were **real**, their rise and performance required factious performance of both parties (from hand to hand). They were **formal and symbolic**[302], too. Since the late 13th century emphasis was put more on the will of the parties than on the form, passing from real contracts to **consensual contracts**. The will of the parties was fundamental for a contract to be made.[303] Entities in contracts (obligations) could (and can) be two or more parties and the subject matter of obligation is perfomance. In the Middle Ages the obligation security was very important (guarantee by a person (bondage or hostage), personal guarantee by a property (*fideiussio*) and guarantee in rem – lien (*vadimonium, pignus, antichresis*)[304].

Medieval market[305*]

Law of contract experienced a more rapid development in the first half of the 19th century, influenced by modern codifications of the private law and particularly the ABGB (Austrian General Civil Code). In Hungary the new emerging trend was introduced by commercial laws of 1840 and radical changes in the private law (brought about the legislation of March 1848). ABGB impact on the development of the law of obligations in Hungary during the Dual Monarchy was weakened by the adoption of Commercial Code - Article XXXVII/1875. Commercial Code governed a large part of the law of obligations and its provisions were applied analogically in the judicial practice in connection with interpretation of the general part of private law.[306] Individual institutes and contract types of the law of obligations experienced significant development in the field of judicial practice with their more casuistry profiling.

302 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 130.

303 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 102.

304 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 455 et seq.

305 http://classroomclipart.com/clipart-view/History/Middle_Ages/Science/SMLA_338B_jpg.htm (cit. 14. 11. 2012).

306 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 448.

Individual types of contracts[307]:

Contract of permutation (*permutatio, concambium)*

Contract of permutation was the oldest type of law of contract, based on real exchange (from hand to hand). With the development of monetary relations, the purchase contract gradually came into the foreground. The provisions relating to the purchase contract applied accordingly also to the contract of permutation (contract of reciprocal exchange), with the latter preserving the status of a separate type of contracts.[308]

Contract of purchase *(emptio venditio)*

Contract of purchase was a contract, by which the seller sold or undertook to sell to the purchaser a certain thing in exchange for payment (or obligation to pay) by the purchaser. The contract was entered into by agreement of the parties over the object of purchase and the purchase price.

In contrast to the Contract of purchase relating to the real estate, Contract of purchase of movables was marked by lower formality of its conclusion. Contract of purchase of movables represented the title of acquisition of ownership. The acquisition of ownership of immovable assets was not a contract of purchase, but separate legal action - *fassio perennalis* with following *statutio* (institution)[309]. Special arrangements were associated with the importance of immovables, especially donation and *aviticitas* property. The medieval law was dominated by strict formalism, which is obvious particularly when looking at purchase contracts transferring real property. Medieval restrictions were removed and a uniform legal framework for purchase contracts (particularly those relating to real properties) introduced in 1848. In connection with disposition of immovable property the real estate records (in the form of Land Registers) had significant importance.

Medieval law refused purchase of things from non-owner, these contracts were invalid. Law in the Modern Age allowed the purchase from non-owner (e.g. under the Commercial Code, purchase of movable things and purchaser was *bona fide*).

307 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 475 et seq. See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 158 - 159.

308 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 71.

309 BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 449.

Typical European Market [310*]

Deed of gift (*donatio)*

Deed of gift was a contract by which the donor conveyed or undertook to convey property to the donee and the donee accepted the property (gift) into his ownership. The deed of gift came close to its current meaning after 1848. Judicial practice of the end of 19th and beginning of the 20th centuries created the possibility to appeal donations, and it was in the case of gross ingratitude of the donee in the specified events (cases).

Contract of societas *(societas)*

Contract of *societas* was a contract, in which two or more parties undertook to contribute in a particular manner to the attainment of a defined common objective. This type of contract emerged under the influence of the Roman law and the most frequent purpose, for which it was entered into, was creating various work associations (deracination of forests, etc.), with associations formed by capital participation (in the form of corporations) emerging in the Modern Era only.[311]

Commodatum

Commodatum was a real contract based on the Roman law, by which one of the parties left certain thing/things (irreplaceable, non-substitutable thing/things) to be used by another person, without reward, with the latter binding himself to return the thing/things after a certain period of time or on demand (the latter case referred to as *precarium).*[312]

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310 http://www.google.com/imgres?imgurl=http://www.stredovek.wz.cz/dedina4.jpg&imgrefurl=http://www.stredovek.wz.cz/obchod.html&h=358&w=610&sz=67&tbnid=1cQL5s9o7jbfM:&tbnh=90&tbnw=153&prev=/search%3Fq%3Dstredovek%25C3%25A9%2Bmesto%26tbm%3Disch%26tbo%3Du&zoom=1&q=stredovek%C3%A9+mesto&usg=__cOxNj69RWgkPBzJfqRK6HXATM8=&docid=g4jYxhLeUqwaPM&hl=en&sa=X&ei=MliGUOe2CO2Q4gSoooDgCA&ved=0CCMQ9QEwAg&dur=403 (cit. 12. 11. 2012).

311 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 71 - 72.

312 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 72.

Loan contract *(mutuum)*

Loan contract (*mutuum*) was a contract, by which the lender undertook to provide to the borrower certain substitutable thing/things (items, which can be replaced by other items of the same kind, usually money), with the borrower undertaking to return the thing/things (money) in the same kind and quantity after a certain period of time. Already in the medieval times, it was distinguished between an interest-bearing and interest-free loan. Under the influence of the church (which considered the loan to be a friendly service), it was forbidden for Christians to receive interest on loans or letting of other chattels. The legislator took a different position with respect to the Jews, who were allowed to receive interest. The law of the period of dualism brought the legislation on the amount of interests for a loan (Art. XXXI/1868, Art. XXXV/1895, Art. XXXVI/1895 et al.). Distinguished between the contractual interest and statutory interest[313] (statutory interests were also late charges (interest for delayed payment)). Usury was prohibited by Article XXV/1883.

***Locatio conductio rei* (hiring contract, rent and lease)**

Locatio conductio rei (hiring contract) was a contract giving the right to use a certain thing against a reward (the rent). The oldest form of *locatio conductio rei* included letting of land, homestead and livestock. Later on, it was distinguished between fruit-bearing chattels (letting of land) and other chattels. The law after 1848 brought distinction and separation of tenancy and labour relations, which were then dealt with in separate rules of the law of obligations (leasehold contract, contract for work and employment contract).[314] The rights and obligations of the lessor and the lessee were based on the Roman law; the lessor was obliged to deliver the leased object to the lessee and to maintain it in a state (condition) for the agreed use. The lessee held the thing in detention and had usually the right to use it or leave it for use to a third party (sub-letting). To ensure payment of rent the renter had the legal lien on movable assets brought by the lessee. Even in the early 20th century municipal statutes and particular customs were of special importance for rental of apartments.

***Locatio conductio operis* (contract for work)**

Locatio conductio operis (contract for work) was a contract, by which the contractor agreed to carry out certain works (and do a thing or work) against reward to be provided by the employer (as the other contractor). Before 1848, the law started to differentiate between the hiring of labour and hiring of work, with the object of the former being the labour of an employee, while the object of the latter was the execution of certain works.[315] After 1848 contract for work was developed in the judical practice.

313 The maximum amount of interest was set up to 6% per annum until 1868, and later since 1877 to 8% per annum, in 1895, it was reduced to 5% per annum. Implementation of the interest rate was not unjust enrichment, it was a natural obligation.

314 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 488.

315 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 72.

***Locatio conductio operarum* (employment contract)**

Locatio conductio operarum (employment contract) was a contract, which (similarly to the contract for work) developed from the hiring contract, with the two types developing into separate types of contract. Employment contract was a contract, by which an employee agreed to carry out certain labour for the employer against reward (wage, salary). The contract had to contain an agreement over the type of labour and an agreement about the reward (wage, salary) for the labour.[316]

Contract of mandatum *(mandatum)*

According to the Hungarian medieval law (and partly law after 1848, too) contract of mandatum *(mandatum)* was identical with the power of attorney (powers of representation, warrant).[317] The procurement of a certain thing for the *mandator* was usually done based on the contract of mandatum entered into between the *mandator* and the *mandatarius*. *Mandatarius* was generally not entitled to remuneration for execution of the *mandatum*. He had to take care himself of procurement of this certain thing, substitution (representation) in the exercise of *mandatum* was only possible if the Contract of mandatum contained a substitution clause. The power of *mandatorius* (e.g. attorney) was granted for certain procedure[318], to procure a certain thing (e.g. to enter into a contract) and for a certain period of time (until the cancellation of the power of *mandatorius*).

Contract of deposit (*depositum*)

Contract of deposit was a contract, by which a movable thing was given by one person to another to keep it for reward. Initially the contract existed without reward. It developed from friendly deposit, in which case no reward was paid for the keeping of the thing. This changed after 1848, when a reward was to be paid for the keeping of the thing. Like previous contract types also Contract of deposit after 1848 developed especially in the area of judicial practice. Specific rules were established by judicial practice for deposit of things in pubs and in passenger transport, where the responsibility for the deposit was moved to entities operating the business.

Contract of pledge

Contract of pledge was a contract, by which the pledgeor gives a certain thing to the pledgee as a security for repayment of his obligation.[319]

Liability resulting from illegal action

In medieval law, liability resulting from illegal action (wrongful acts – delicts) was based on the private-law nature of the penal law, in which the individual institutes

316 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 72 - 73.

317 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 495.

318 BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 450.

319 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 73.

developed: right of revenge, right of vendetta, right of composition (redemption and monetary compensation) and later determination of damage and compensation of damage (actual damage and lost profit). In the 19th century, the general substance of liability for illegal action was developed by judicial practice and the legal science, with the element of punishment removed from the provisions concerning compensation of damages. This gradually led to the differentiation between private and penal (public) law.[320] Legislation on extent of compensation was based on the general principles of compensation for actual damages. Compensation for lost profit depended on the degree of culpability and base of duties of one who caused the damage. Compensation was provided in cash, or by repairing to the original state (*restitutio in integrum*). The determination of damages developed differently in case of compensation for non-pecuniary damage; in the case of unlawful deprivation of liberty, damage conected with the human death, injury and damage to honour (*satisfactio*).

An important part of the private law were rules related to the legislation on liability without culpability of subject liable to compensate damages (liability for the acts of others and responsibility for the operation of certain equipment). Strict liability of operators of certain transportation equipment was first provided for by the Article XVIII/1874 on liability for death or personal injury to the person caused by the railway track.

Labour Law

In the Middle Ages, there existed no employment contract in the current sense, caused by the existence of the liege system (relation liegeman to lord) or guild system (relation master craftsman – journeyman – prentice) binding the labour of individuals in a different way. The legal science included labour-law relations under the hiring contract. New rules regulating labour law developed in the 19th century, owing to the elimination of the medieval bondage of goods and labour and the overall economic development.[321] Newly emerging employment relationships, which were incorporated into the general private law of this period were built on the idea of freedom of bussiness activities and freedom of contract (liberty of contract)[322], which in turn led to the dominance of entrepreneurs in negotiating working conditions of employees with individual consequences of social inequalities and pauperization.

Before 1848 the employment contract was defined as a part of law of obligation. The first rules of the labour law were part of the laws regulating commercial activity (enterprising). They were mandatory in nature and had social contents (restrictions of child labour). Article XVII/1840 on legal position of factories contained provisions that allowed the employment of children less than 12 years old only for such work, which did not damage their health and development. Art. XVI/1840 on traders regu-

320 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 73.

321 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 73.

322 BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848 - 1918, p. 288.

lated labour-law relations, too. After restoration of old Hungarian legal order (1861) the austere provisions of Wildner's acts on commercial law from 1840 became the only regulation of labour law relations.

In the period of dualism the area of labour law was markedly developed. Adoption of many particular and independent labour-law rules (as Art. XIII/1876, Art. II/1898, Art. XLI/1899, Art. XLII/1899, Art. XXVII/1900, Art. XXVIII/1900, Art. XXIX/1900, Art. XLV/1907 etc.)[323] in connection with the concrete works - jobs became the characteristic feature of that period.

Development of the legislation in the area of trade and commercial law had a specific nature; the legislation of these areas was extended to workers in the industry. The Trade Act of 1872 established the maximum daily working time[324] for 16 hours. Children and adolescents could work from 8 to 10 hours. The second Trade Act (1884) increased the labour-law protection of women after childbirth. Commercial Code (1875) partially provided for employment conditions of auxiliary service, trade and craft personnel. Commercial law obliged the employer to continue the payment of wages in the event of an employee injury for a period of six weeks, and it stated the reasons for termination of employment and adjusted the length of the notice period etc.

A common feature of individual labour-law rules fragmented according to type of work was the prevailing non-mandatory character of those rules. This legislation applied for the relationship of employer and employee only in case, if it was not provided for otherwise in their employment contract. Only those provision of the labour law of the period of dualism, in which it was expressly stated, or those, which in their nature had a public character, and should not refer only to the relations of employer and employee, had the mandatory nature. Rate of optionality of labour relations in the coming period gradually decreased, by which the social-law protection of the employee was established.

During the first Czechoslovak Republic there was adopted Act on legal relations between employees and employers in Slovakia and Subcarpathian Ruthenia (Act no. 244/1922 Coll.), which was replaced only by the first common Czechoslovak Labour Code no. 65/1965 Coll. of Laws.

Commercial Law

In the Middle Ages commercial law (only as a imanent part of private law) was a set of rules refering to traders an their organizations – guilds[325]. The nature of commercial law was based on the existence of the estates and had a personal nature; it constituted a separate (particular) legal system applicable to particular entities (traders). The birth

[323] See chapter „Written Law (Act)".

[324] VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 195. See also MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 134.

[325] In order to carry out the guild system reform it was ordered in 1730 to collect the statutes of all Hungarian guilds. The aim was to remove all statutes issued by other institutions than the Royal Chancellery and to dissolve the respective guilds. Unfortumatelly, this effort was failed. BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 107.

of commercial law in the current sense is the product of development of the modern law in the 19th century. It was based on the rejection of the nature of the commercial law based on the estates and its transformation into a modern branch of the law suiting the new requirements of that time. In the second half of 19th century legal science defined term "credit law" (it was term of wide comprehension), which covered the area of commercial law and rules regulating enterprising, as bill-of-exchange law (Art. XXVIII/1876) and bankruptcy law (Art. XVII/1881) etc.

Guild banners and craftsmen in the Medieval and Modern Ages[326*]

The creation of the Hungarian commercial law is connected with articles adopted in 1840 (Wildner's Commercial Acts) as Art. XVI/1840 on traders[327]; XVII/1840 on legal status of factories; Art. XVIII/1840 on legal status of commercial companies[328], Art. XIX/1840 on chambers of commerce and jobbers and Art. XX/1840 on freight carriers. Wildner's Commercial Acts remained the basis of Hungarian commercial law until the Commerial Code (Art. XXXVII/1875) came into efficiency[329]. Commercial Code represented the „*lex specialis* regulation" in connection with area general private law (especially its part – law of contracts).

Commercial Code drafted by professor Apáthy was the fundamental codification of the area of commercial law in the period of dualism. The code remained in validity (with revisions) on the territory of Slovakia during whole existance of the Czechoslovak and Slovak Republic and it was abolished (abrogated) by the first Czechoslovak Civil Code Act No. 141/1950 Coll. of Laws (with exception to the cooperatives). Influence of the Commercial Code was very important and the area of commercial law had been created as the antonomous part of private law. The general provisions of Commercial

326 http://www.oskole.sk/?id_cat=8&clanok=18241 (cit. 12. 11. 2012).

327 Article XVI/1840 on traders regulated the establishment and the termination of the legal status of a trader, keeping of commercial books, legal relationships between the trader and his employees and certain relationships of obligation arising from trade.

328 Article XVIII/1840 on legal relationships in commercial companies distinguished between commercial companies in the narrow sense (as an unlimited partnership) and joint stock companies.

329 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 130.

Code referred to subsidiary usage of trade customs, and where there were no such customs, the general private law was to be used. The first part of Commercial Code defined a "trader", rules of bookkeeping (e.g. accounting books), procuration and employees of trader. In the first part of Commercial Code the positions of business companies was regulated, too. The Commercial Code recognized partnership (public company), limited partnership (in Slovak "komanditná spoločnosť"), joint-stock company and cooperative company. The second part of Commercial Code contained contracts.[330]

Until 1918 the Commercial Code was not revised, and development of the area of comercial law concentrated on issuing particular laws[331], as Art. LVII/1908 on transfer of undertakings etc. Czechoslovak unification and codification efforts in the area of commercial law were not successful and the Commercial Code of 1875 remained the fundamental legal rule in this area on the territory of Slovakia. Significant intervention in the area of commercial law in the period of the Czechoslovak Republic was extention of validity of the originally Austrian legislation on limited companies in the territory of Slovakia, as the Hungarian legislation did not provide for this kind of companies. After the political changes of 1948 Commercial Law lost its former status and importance in connection with the effort to build specific type of legislation - the so-called Socialist Economic Law ("Hospodárske právo" in Slovak language). The Renaissance of the commercial law took place after 1989 via adoption of the Commercial Code no. 513/1991 Coll. of Laws.

Law of Bill-of-Exchange

Until 1840, the legal rules concerning the bill-of-exchange law did not exist in Hungary, on the contrary to the Austria. However, the project of Bill-of-Exchange Code of 1795 prepared by *Deputatio in iuridicis* (special committee for reform of Hungarian legal order) had a great (material) importance. Needs of development of the market and ensuring the flexibility and efficiency of the business relationships created quite a strong push for wider application and for concrete laws regulating bills of exchange as abstract commercial papers. Codification of the bill-of-exchange law was addressed by the Hungarian parliament in 1839 and the draft of Bill-of-Exchange Code was based on Austrian and German model. Bill-of-Exchange Code was adopted by Hungarian Diet in 1840 (Art. XV/1840) and it remained in validity until 1850 in connection with its replacement by Austrian Bill-of-Exchange Code. Temporary Court Rules of Judex-Curiae-Conference in 1861 restored the old Hungarian bill-of-exchange law. Return to the old law of bills of exchange was seen as "harm" to the commercial interests of Hungary, which later required the adoption of a new Bill-of-Exchange Code. New Bill-of-Exchange Code (Art. XXVIII/1876) was adopted in 1876 and it was influenced by German Bill-of-Exchange Act, too. During the period of dualism the Cheque Act (Art. LVIII/1908) was adopted. During the first Czechoslovak Republic there was adopted a new Bill-of-Exchange Code no. 1/1928 Coll., which was replaced by still currently effective Code – Bill-of-Exchange and Checks Code - Act no. 191/1950 Coll. of Laws (with amendments).

330 See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 185 - 188.

331 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 194.

Commercial Code Art. XXXVII/1875

(selection of provisions)

Part 1: Traders and business companies, Section 1: Traders

§ 3 Trader is the person carrying out business transactions in his name as a "trader".

§ 4 Provisions on traders are valid for business companies, too.

Section 7: Business companies

§ 61 Business companies are:

1) partnership (public company),

2) limited partnership ("komanditná spoločnosť"),

3) joint-stock company

4) cooperative company.

§ 63 Trading companies can under their company (name) acquire the rights, take on commitments, acquire property and other rights to the property, may sue or be sued in legal proceedings. [332].

Art. XXVIII/1900 on forest workers

(selection of provisions)

Chapter 2: How to conclude the employment contract

§ 2 The determination of conditions of the contract is subject to the free agreement of the parties, but agreements, which are contrary to the law, are invalid.

§ 3 Each contract must contain:

a) identification of the type, duration or amount of work;

b) determination of remuneration;

c) agreement on the cost of transport of workers, the advance, the working tools, accommodation, heating and transport of drinking water.[333]

Art. XVIII/1874 on liability for death or personal injury to the person caused by railway track

(selection of provisions)

§ 1 When in traffic, even though public in an unauthorized railway someone loses their lives or suffer a trauma to the body, the railway company is liable for these damages caused by rail, excepting when the company proves that the death or injury to the body was caused by unavoidable events (vis major), which the railway company could not

[332] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 396 – 416.

[333] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 448 – 451.

hinder or was caused by the fault of the person killed, or of person suffering injury to the body.[334]

Civil Code – Act No. 141/1950 Coll. of Laws

(selection of provisions)

Part 4: Law of obligations, Chapter 11: Establishment and content of the obligations

Establishment of obligations

Reasons for obligations

§ 211 obligations arise from the implementation of a uniform economic plan, from legal acts, mainly from contracts, also from the caused damage, from unjust enrichment and from other factors listed in the Act.

Obligations of the implementation of a uniform economic plan

§ 212 Implementation of a uniform economic plan is provided for by contracts specifically adjusted to the needs of economic planning (economic contracts). According to the needs of economic planning, the respective authorities can establish certain obligation. Such created legal relations shall be governed by this Act, unless stated otherwise.

Obligations related to contracts

§ 213 The contract is concluded as soon as the parties agree on what should be the contract contents.

4. 2 Criminal (substantive) Law

Criminal (penal) substantive law was a set of legal rules regulating the people's conduct forbidden under the threat of punishment fixed by law.[335] The key task of the penal law from ancient times and throughout the Middle Ages was the protection of feudal ownership of land, protection of private (individual) ownership and protection of state authorities and the church. The Hungarian penal law was based on customary law, partial laws and (local) statutes of counties. Penal law was codified as late as in the 19th century. Medieval penal law had the **nature of private law** (with the exception of the so-called *crimen publicum,* i.e. offences against the state) and the punishment of the offender was for long left to the private initiative of the injured party or the injured party's family.[336]

As to the body of the offence, the following delicts became clearly distinguished during the Middle Ages:

[334] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 395 – 396.

[335] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 109.

[336] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 78.

- **public delicts** (going against the sovereign and the state and its authorities – lese majesty (*crimen lease Maiestatis*), infidelity (*nota infidelitatis*), later on delicts against religion, church and morality;
- **private delicts**[337] **–** prosecuted under a private suit (including e.g. acts of might (*acta potentiae*) – maior and minor, slander (*dehonestatio*), abuse of name (*larva*), frivolous prosecution (*calumnia*), betrayal of fraternal blood (*proditio fraterni sanguinis*), delicts relating to deeds (forgery etc.), detaining a liegeman, damages caused by livestock (*damnificatio per pecora*))[338].

The system of values protected by the rules of the penal law included **property interests** (protection of ownership of land and private ownership – e.g. theft, robbery, incendiarism), **protection of human life and health** (e.g. murder, manslaughter, bodily harm), **protection of morality and religion** (e.g. witchcraft, infidelity, bigamy, abortion, false accusation or perjury) and **protection of personal freedom or house freedom** (e.g. violent breaking into the house, enslaving).[339]

The predominant principle in the system of punishments was that delicts against an individual or his family (or kindred) were punishable by the injured party (or his family) as their private affair as part of the **vendetta – blood feud** (which was used not only in case of murder, but also in case of slander or bodily harm). The punishment of delicts by the state was initially also based on the idea of revenge; the principle of unlimited revenge (as in the case of vendetta), however, did not apply. It was replaced by the principle of reasonable revenge (the so-called ***talio*** *"an eye for an eye, a tooth for a tooth"*). Influenced by the church (and also in the interest of the state power), the system of redemption from revenge started to be increasingly applied in the later development, where the decision to take revenge (vendetta) or redemption was initially in the hands of the injured party. The system of redemption from revenge laid the cornerstone for the **composition system** (*compositio – homagium* – redemption), which was applied in the penal law.[340] The medieval law regarded ***homagium***[341] as the price of the murdered person, as an appraisal of his/her life (more precisely his/her head). The offender (of murder, manslaughter or bodily injury leading to death) had the possibility to redeem himself from the death penalty by paying to the bereaved family a certain financial amount as compensation for death. The redemption was initially paid in personal chattels (e.g. livestock); later on, it was paid in money and its amount depended on the agreement of the parties or on the decision of the so-called court

337 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 234 - 240.

338 See also chapter „Persons" and its „Protection of personality rights".

339 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 78-79.

340 LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 240 - 243.

341 *Homagium* (man-price) was remnant of the archaic system of justice in which composition replaced revenge by a fixed monetary payment usually due for killing, the amount of which depended on the social status of perpetrator. The man-price of barons was 100, and of nobles and burghers 50 marks. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 451.

of conciliation. Contrary of the *homagium*, the *birsagium* was a fine paid for breaking procedural law.[342] Over time, certain components of the public law were introduced into the system of redemption (trial *ex officio*; delinquent breached the law and public order and claim of the judge to a portion of the redemption amount as remuneration for public service etc.).[343]

Development of criminal law (with regard to the character and coverage of its regulation) was connected with period of estates monarchy (special criminal law of nobles, burghers, serfs etc.). Protection of State and Monarch (crimes against the State, betrayal of the Monarch, infidelity to the Monarch etc.), protection of the Church (heresy, blasphemy, withcraft) and protection of feudal ownership remained the most important values of that period. Severe punishment and torture were the typical features of the medieval criminal law.

The system of punishment included:

- capital punishment[344] – death penalty - by beheading or hanging; under municipal law also by breaking with a wheel and burning at the stake etc.;
- corporal punishment – (some of them were crippling penalties, too) - in the form of mutilating (cutting the nose, ear, tongue, blinding etc.), beating, burning a stigma, hair cutting and others;
- imprisonment – in the earliest period (until 12-13th centuries), sale to slavery, sending to exile or imprisonment were distinguished;
- property penalties – forfeiture of property, *homagium*, *compositio*, fines (*birsagium*) etc.;
- shaming penalties (loss of honor) – the nobility law recognized only the right to solemn excuse, municipal law also used pillory and cage;
- ecclesiastical penalties – excommunication, fasting, compulsory pilgrimage etc.[345]

[342] *Birsagium* was the monetary punishment paid by parties at law for breaking procedural rules. Two-thirds of the fine usually went to the judge, one-third to the opposing party. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 447.

[343] MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 79.

[344] Capital punishment (*capitalis sententia*) was loss of life and property, but in fact usually only one of the two; if physically executed (which happened very rarely in practice), the victim's heirs retained his estates; but if he was pardoned by the king, then the estates was confiscated. The king retained the right, however, both to pardon a nobleman for a capital offence and, simultaneously, to return his estate. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 444.

[345] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 111. See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 161 - 163.


Capital punishment in the Middle Ages [346*]

Another typical feature of the medieval penal law was symbolism in inflicting punishments; the so-called retributive punishments symbolising certain offences developed (such as cutting off the hand of a thief, cutting off the tongue of a rioter or slanderer; false accusation was punishable by the same punishment, which would be inflicted on the unjustly accused person had he been convicted etc.).

Medieval criminal law used to focus mainly on the objective aspect of the crime, there were sanctioned such actions, which in conflict with the law caused a detriment. Subjective factors such as the degree of individual culpability were normally not investigated separately. By development of the criminal science and practice towards subjectivism, terms such as intention - willful tort and negligence gradually gained their meanings.

Criminal law in Hungary was un-codified area until adoption the Criminal Code in the period of dualism. Development of this area was marked by efforts to overcome the fragmentation of criminal rules and by efforts to unify judicial decisions. Even in middle of the 19th century jurisprudence (which tried to organize systematically the rules of substantive criminal law) referred to the provisions of the old Arpad laws, more than 800 years old. Remnants of medieval perception of law were also evident in the structure of crimes, which were divided into public and private crimes.

The medieval and modern Hungarian penal law was highly fragmented and, at the level of practical application, did not provide legal certainty, with the existence of arbitrary and contradictory judicial practice. With the aim of improving the situation, the collection of Hungarian laws the *Corpus Iuris Hungarici* also included the Austrian penal act the *Praxis Criminalis Ferdinandea.* This attempt to unify the judicial practice and to remove fragmentation of the penal law, however, failed. At the end of the 18th century, during the reign of Joseph II, the principles *nullum crimen sine lege* and *nulla poena sine lege* were introduced for the first time into the penal law on our territory. In 1795, a draft of criminal code entitled *Codex de delictis eorumque poenis* was submitted to the Hungarian diet, but it was not adopted.[347] This draft of Criminal Code consisted of two parts, the first part dealing with procedural law and the second part with substantive

346 http://21stoleti.cz/blog/2010/04/17/popravy-a-muceni-20-stoleti-horsi-stredoveku/ (cit. 14. 11. 2012).

347 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 80.

ciriminal law.[348] In 1852 Austrian *"Codex on felonies, misdemeanors and petty offenses"* was adopted for Hungary. Restoration of Hungarian legal order done by Judex-Curiae-Conference and its Temporary Court Rules had a significant influence on the area of criminal (penal) law. The basis of legislation became the elimination of the estate particularism, which was in contradictory with the requirement of equal treatment of people in general.[349]

Long-lasting efforts codification efforts in the area of criminal (substantive and procedural) law were finished in the period of dualism. During this period the Criminal Code (Art. V/1878), Offences Act (Art. XL/1879) and Criminal Procedure Act (Art. XXXII/1896) were adopted. They were drafted by Karol Csemegi, professor of criminal law at the University of Budapest[350].

Criminal Code (Art. V/1878) was based upon so-called dogmatic school of penal law. According to its doctrine the crime and not the offender was in the foreground. Punishment imposed had to be in proportion to the offence committed.[351] Hungarian criminal law classified crimes into felonies (intentional conduct), misdemeanors (intention or negligence) and petty offenses. Felonies, misdemeanors and petty offenses were not strictly defined. The Hungarian Criminal Code drafting the definition of a crime, from a formal point of view, addressed the need to distinguish the concept of social harm of actions by casuistic draft of subject matters (bodies of delicts).[352] For the period, when it was created, the Code was very complex in terms of the formulation of the subject matters (bodies of delicts), and therefore it was often referred to as *"the Act only for lawyers"*.

Crimimal Code consisted of two parts, the first part dealing with general provisions in its 9 chapters and the second part dealing with felonies and misdemeanors in its 42 chapters. Principles as „*nullum crimen sine lege"* (§ 1, sect.1) and *"nulla poena sine lege"* (§ 1, sect. 2) were fundamental principles of the Criminal Code of 1878.

Delicts were classified into:

- delicts instigated publicly – officially (by public prosecutor);
- delicts instigated by a request (request of injured person or his/her legal representative), e.g. breach of letter and telegraph privacy by private persons, intrusion into privacy of a person's home; theft of foodstuffs.

The system of punishment included:

348 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I. (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 113 - 114.

349 See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 303.

350 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 131.

351 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 190.

352 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 197.

- inprisonment (penal servitude („káznica"); solitary confinement („žalár") – in cases of felonies, incarceration (in cases of misdemeanors) and state penitentiary);
- fines and
- death penalty (felony of murder and high treason).

Criminal liability arose at the age of 12 (§ 83 of Criminal Code and its revisions in § 15 a 16 of Art. XXXVI/1908 – Criminal Code Amendment).

The area of criminal law was successfully codified in the period of dualism. The codification abolished the uncertainty and unsecurity existing in this area. Humanization became the leading feature of criminal law (possible conditional suspension of sentence; so called extraordinary lenience, by which the punishment could be reduced to the lowest minimum, or the type of punishment could be changed accompanied by re-qualifying the crime; possibility of parole etc.) but, on the other hand, some problems were connected with national minorities (abuses of criminal law, magyarization etc).

Codification efforts in the area of criminal (substantive) law were not successfull during the whole existence of the inter-war Czechoslovak Republic[353] and Criminal Code of 1878 remained in force in Slovakia until 1950 with particular amendments. It was abolished by the first Czechoslovak Criminal Code – Act No. 86/1950 Coll. of Laws.

Art. V/1878 Criminal Code

(selection of provisions)

Part 1: General provisions; Chapter 1: Introductory provisions

§ 1 Crime or offence is only that action, which was declared as a crime by the law. Nobody may be punished (fined) for crime or offence via other punishment than that which was established by the law before committing the crime.

Chapter 2: Classification of crimes and punishments

§ 126 The crime of high treason commits one,

1) who murders the king or intentionally kills him or attempts to perform such acts;

2) who insults the king´s physical integrity or makes him unable to reign;

3) who gives the king to the enemy´s powers, or obstructs the performance of his reign, or deprives his liberty by force or under the threat of violence;

4) who attempts to execute any of the acts mentioned in the previous paragraphs.[354]

Offences Act Art. XL/1879

(selection of provisions)

[353] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 242 - 244.

[354] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 529 – 553.

Part 1: General provisions

§ 1 Petty offense is such an act that

1) by Act;

2) by Ministerial Regulation (Order);

3) through a jurisdiction (municipal office) or 4) through right of jurisdiction non-governing royal city or town with established Municipality by an issued statute

declares as an offense.[355]

Criminal Code – Act No. 86/1950 Coll. of Laws

(selection of provisions)

Ratio legis of the Criminal Code

§ 1 Criminal Code protects the People's Democratic Republic, its socialist construction, the interests of working people and of individuals and educates to respect the rules of socialist coexistence. The means to achieve this purpose are the threat of punishment, sentencing and execution of sentences and security measures.

Principles of criminal liability

§ 2 Crime (criminal act)

As a Crime is defined only such an act that is dangerous for society, and which result, that is stated by the Act, was commited by the perpetrator.

Death penalty

§ 29 The death penalty is carried out by hanging, and at time of increased threats to homeland it can be carried out by firing squad.

Instead of death penalty provided for in the law shall be imposed by the court the sentence of imprisonment for life or for fifteen to twenty years, if, given the personality of the offender or the seriousness of the mitigating circumstances, the death penalty would be excessively strict.

Pregnant woman can not be imposed the death penalty; in this case there is imposed instead of the death penalty provided by law, sentence of life imprisonment. Under the conditions specified in paragraph 2, the court imposes instead of sentence of life imprisonment, the imprisonment for fifteen to twenty years.

4. 3 Procedural Law (civil and criminal)

Medieval procedural law regulated the procedure by courts and other authorities when resolving legal issues (within the area of civil, criminal and administrative law). It is very important that no distinction was made between the civil and penal procedure (the first signs of their separation can be observed in the judicature of the counties in the 16th century).

355 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 553 – 560.

Initially, the procedure was public, immediate and oral; it started with the filing of a suit (complaint). The parties to the dispute were the plaintiff and the defendant (initially summoned and brought in by the plaintiff, consequently by the *pristaldus* and by royal bailiff (*homo regius*)[356]). The process started with the presentation of the suit, followed by the defendant's response (who was often accompanied by his relatives). The judge (who only played a passive role in the entire procedure) called on the parties to find an amicable settlement and if no amicable settlement was reached, the court set a new date for the hearing. The second hearing was used for preliminary taking of evidence. The most frequently used means of evidence were inspection by the court, presentation of written deeds (deeds bearing a trustworthy seal were of particular value) and testimonies by witnesses (a special role was played by the so-called purifying witnesses, whose task was not confirming the claims of either of the parties, but to help a party to the dispute by creating a favourable situation for it).[357] The value of testimony depended on the status of the witness. [358] In the process of evidence-taking, the judge played a passive role, he did not seek to examine the facts; he usually merely set a condition, whose fulfilment brought victory in the dispute.[359] The conditions set by the judge included oath[360] (taken by witnesses, deponents, purifying witnesses or parties to the disputes), duel[361] and ordeals. [362]

356 Royal bailiff (*homo regius*) was nobleman from the same county representing the king or a royal judge, but usually selected from persons proposed by plaintiff, officiating, together with the wintness of the chapter of authentication at institutions, perambulations of boundaries and summons. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 443.

357 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 138.

358 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 75-76.

359 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 114.

360 Oath (*iuramentum*) was a mode of proof that survived in Hungary until the 19th century and was sworn by one or both litigants supported by a number of oath-helpers, as defined by a judge depending on the value of the case and the status of the oath-helpers. BAK, J. M. – BANYÓ, P. – RADY, M. (ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 453.

361 Judicial combat (*iudicium duelli*) was a form of ordeal survived in Hungary into the late Middle Ages, despite ecclesiastical protests. BAK, J. M. – BANYÓ, P. – RADY, M. (ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 444.

362 Ordeals (trial by God) represented a special institution in the procedure leaving the decision to a force majeure (the God's will). The most frequently used ordeals included ordeal by water (e.g. in trial by hot water the person was required to pick an object from boiling water with uncovered hands), ordeal by red-hot iron, ordeal by scales, ordeal by the cross, ordeal by sacred meal or battle. Records of the trials by God held in Hungary are contained in a unique source, the Varadin Register (12th – 13th century). See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 115.

Punishments in the Middle Ages [363*]

Initially, decisions of the court were issued orally only; from the 12th century onwards, the requirement for written decisions of the court came to the foreground. Two types of judgments were issued in court procedure; preliminary judgment (decision to take evidence) and final decision (decision of the case).

Accusation procedure had the following features[364]:

- the procedure started exclusively based on a suit filed by the plaintiff (injured party);
- in the procedure, a party could be represented (statutory representative, attorney (procurator)[365] as an official representative of the party to the procedure)),
- court procedure was contradictory and subject to strict formalism;
- court procedure applied the principle of hearing; the procedure was oral and immediate (it was required that the parties be present),
- passive role of the judge, who only supervised compliance with the rules of procedure;
- possibility of amicable settlement in any phase of the dispute;

363 http://21stoleti.cz/blog/2007/09/20/stredoveky-zlocin-a-trest-od-a-do-z/ (cit. 31. 10. 2012).

364 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 76. See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 164 - 166.

365 Attorney (*procurator*) – the parties could be represented by attorney in all suits proceeding before the principal courts (exemption was actions introduced by "personal prohibition"). Few of them had received formal legal education, most having acquired their skills through pupillage (*in patvariis*) or by previous court service. In order to represent a party in court, the person had to present letters of attorney. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 442.

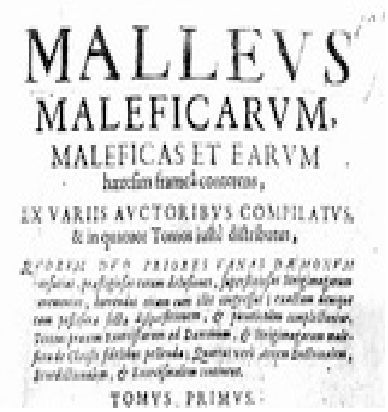
- use of several means of evidence (ordeals, oath of the parties to the procedure, oath by (purifying) witnesses; from the 13th century onwards also written evidence);
- application of the principle of success;
- over time, other parties were allowed to take part in the court procedure (side parties to the procedure);
- the judgment was initially carried out by the prevailing party, later on by court personal;
- initially, no appeals were allowed (they developed first in the judicature of towns approximately from the 14th century onwards).

From the 14th century, the accusatory process (precisely a process based on private suit) was replaced by the inquisitional (investigation) procedure. Court procedure changed from immediate oral procedure into a written one, with written documents increasingly serving as the means of evidence. The legislator also paid increased attention to procedural questions (e.g. Decretum Maius by Matthias Corvinus). Gradually, the civil and the penal process became distinguished (which can be observed at county level).

Court procedure of this time consisted of the following phases: summoning, opening of procedure, entry into dispute, evidence-taking, issuance of judgment, means of appeal and execution of judgment. The parties were summoned by a subpoena issued by the court, which was limited by time, as (central) courts did not meet without interruption (the so-called octaval judicature (octave court) applied – periods of court meetings in octaves of 4 larger church holy days)[366]. The procedure commenced with the presentation of the suit by the plaintiff, followed by response of the defendant with objections or meritorious defence (entry into dispute). This was followed by taking of evidence with the burden of evidence on the side of the plaintiff; the plaintiff had to justify his claim; otherwise, he would run the risk that the suit would be rejected. Written deeds (and particularly deeds bearing a trustworthy seal) gained on importance as the means of evidence; testimonies by witnesses still preserved their importance. Testimonies relating to the case at hand were at this time referred to as inquisition (inquest). In practice, simple inquisition (simple inquest) was used (it was most often proposed by the plaintiff, with the aim of gathering relevant evidence for the case and had the form of on-the-spot inquiries among relatives, neighbours, etc.), along with public inquisition. Public inquisition - common inquest (*inquisitio communis*) was done during the court procedure, questioning of witnesses was done by a representative of the court authority under the presence of the parties to the dispute; such questioning usually involved a larger number of witnesses without regard to their social status;

366 Octave court (*octava*) was the term of the session of royal courts of justice, they were usually four annually, beginning on or around the eighth day after a major feast (such as Epiphany, St. George's, St. James's and Michaelmas) and lasting 30 - 40 or more days. St. George's and Michaelmas were often called the greater octaves. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 453.

their testimonies, however, were not equal in value[367]. In the inquisitional procedure, the role of the judge was no longer a passive one; he started to act as an active element (the judge himself could procure evidence even without the plaintiff's action). The means of evidence further included oath and inspection by court. The procedure ended with the issuance of judgement. Legal remedies, which developed at this time, included the appeal (developed by judicature of the towns); the renewal of procedure and armed resistance (in case of disputes over lands, showed symbolically by the drawing of the sword).[368]


MALLEVS
MALEFICARVM.
MALEFICAS ET EARVM
EX VARIIS AVCTORIBVS COMPILATVS,
TOMVS PRIMVS.

Malleus Maleficarum[369*]

The inquisitional procedure had the following features[370]:

- the procedure started either *ex oficio* (e.g. prosecution of notorious felons) or based on a suit filed by the plaintiff (injured party),
- the parties to the procedure were increasingly represented by attorneys; enjoined parties could take part in the procedure in addition to the (main) parties (plaintiff and defendant);
- the procedure was still contradictory and subject to strict formalism;
- the procedure was gradually transformed from an oral into a written one (still, there existed the possibility of oral court procedure);
- the judge became an active element in the proceedings (possibility of procuring evidence also without the plaintiff's help);
- the possibility of reaching an amicable settlement at any stage of the procedure (even after the issuance of judgment) was preserved;

367 See also BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 449.

368 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 76 - 77.

369 http://commons.wikimedia.org/wiki/Category:Malleus_Maleficarum (cit. 31. 10. 2012).

370 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 77 - 78. See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 166 - 168.

- use of several means of evidence (with written documents coming to the foreground, followed by testimonies, oath and inspection by court);
- the principle of success still applied;
- the judgment was executed by the court and the personal of the court (or a representative of a place of authentication); in the penal procedure, torture was used;
- use of legal remedies – post-trial remedies (appeal, renewal of procedure, armed resistance).

Out of court settlements were common and frequently used; these settlemente were possible also after the instigation of judicial proceedings, often with the judge's consent. In this matter it is important that the basic idea of medieval dispute resolution was to restore order and peace and to prevent any further, especially armed conflicts.[371]


Torture in the Middle Ages [372*]

After structural and procedural division of civil and penal procedure the following types of procedure were used: written civil procedure, oral civil procedure (in front of lower instance courts, such as municipal judges, landlord's tribunals), written penal procedure. Most cases were handled by county courts. The procedural law (of both the civil or penal process) was not codified on our territory until 1848. It was based on customary law and partial statutory articles from various times. In procedural law, the status (membership to the estates) of the party to the procedure was deciding throughout the Middle Ages and partly also in the modern era.

System of Judiciary in the Middle Ages and in the Modern Age

In the Midle Ages the judicial powers[373] were exercised in the first place by the **king – Monarch** as the supreme judicial authority. In the period of feudal fragmentation (as it is clear from the text of the Golden Bull of 1222) the judicial powers with respect to the nobles were in the hands of the **palatine** (as a judge of nobles and as a

371 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 116.

372 http://21stoleti.cz/blog/2007/09/20/stredoveky-zlocin-a-trest-od-a-do-z/ (cit. 31. 10. 2012).

373 See STIPTA, I.: Dejiny súdnej moci v Uhorsku do roku 1918, p. 13 – 25.

deputy of the king). In the central judiciary the judge royal (*judex curiae regiae)* had the important place, too.

In the local judiciary judicial powers of palatine were exercised in assemblies of nobles in **palatine congregations - palatinal congregations,** (abolished in 1486), in which the disputes were presented to the palatine for decisions. Consequently, legal disputes between nobles within a county (*comitatus*) were resolved in county (*comitatus*) congregations. Judicial powers over liegemen as part of the powers of a lord were exercised by **landlord courts.**

During the period of estate's monarchy the reform of central judiciary took place. In this matter it was important, that the principle of personality was still applied. The **Monarch – king** and the **Royal Council**, chaired by the king acted as the Supreme Court.[374] The ***Tabula Regia*** (the court of royal presence headed by Judge Royal (*iudex curiae regiae*)[375], the court of special royal presence headed by the Chief Chancellor and the court of personal king's presence headed by *Personalis*)[376] was a court of lower instance. The term **Curia** became a common reference to the highest royal courts in Hungary.

Noble judicature on local level was exercised by palatine congregations and county congregations, from which the county court **sedria – *sedes iudicaria*** (consisting of the main county head, his deputy, servants and assessors)[377] developed. Judicial powers in towns were exercised by the mayor, the market judge and the Jews judge. The appeal authority was either the home town or, in the case of towns of *tavernicus* and towns of *personalis* - the **tavernicus** and the **personalis**, respectively. Landlord's judicature over liegemen was exercised by the **landlord**, with the **sedria** as the appeal authority.[378]

In 1723, the system of Hungarian noble courts went through far-reaching reforms. After the reform, replaced with a four-tier system:

1. *Tabula Septemviralis* (Seven-Lords Board) as the Supreme Court,
2. *Tabula Regia* headed by *Personalis*,
3. *Regional Tabulas* in Trnava and Prešov (replacing the abolished protonotarial courts),

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374 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 101.

375 Judge royal (*iudex curiae regiae*) was the second highest judge of the Hungarian Kingdom (after the palatine) and the king's deputy in matters of justice. The judge royal held the separate court in the *Curia Regis*, where he tries cases of the nobility. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 450.

376 See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 74.

377 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 101 - 102. See also MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 52 – 53.

378 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 19 and p. 22 - 23.

4. *Sedria* (*sedes iudicaria)* as the county court.[379]

The system of landlords' courts was formed by three levels: 1. – the landlord; 2. – the Sedria; 3. – Governor's (*Locum Tenens*) Council.[380]

After 1848, during the period of neo-absolutism **reform of the judiciary** took place. Its aim was to abolished the feudal type of judiciary and to establish the principle of "independence of judges" in exercising the judicial powers. After 1860/1861 (the October Diploma and Judex-Curiae Conference), the feudal Hungarian courts were restored, and only after the Austria-Hungary Compromise some reform within the organization of courts occurred. The structure of general courts included the Royal Curia (*Curia Regis*) as the Supreme Court, the Royal Tabulas (*Tabulae Regiae)* in Košice and Bratislava, the Royal Courts (formerly *sedriae* – county courts), and finally district courts.[381] Special courts consisted of commercial courts and courts dealing with bills-of-exchange, arbitration courts, stock exchange courts, jury courts etc.[382] According to the Article XXXIII/1871 it was created Public Prosecution Office. Another reform took place during the period of the inter-war Czechoslovak Republic.

Civil Procedural Law

Hungarian Diet adopted the important acts dealing with civil procedings in 1832 -1836 and then in 1840. Bratislava's March Constitution of 1848 realized several changes in the system and charakter of judiciary, but Diet did not adopted Civil Procedure Act. During the Bach's absolutism Austrian Provisional Civil Procedure Act was passed in the Hungary with effect of creation three-tier system of courts. Temporary Court Rules of Judex-Curiae-Conference restored the old Hungarian system of courts and restored the old procedural norms of civil proceedings, but with significant amendments. Under their rules three types of proceedings: summary oral proceedings, regular oral proceedings and regular written proceedings existed.

Requests for legal certainty and stability were connected with codification efforts in the area of civil procedure law. Civil procedure Act – Art. LIV/1868[383] was adopted soon, but it was replaced by a new Civil Procedure Code – Art. I/1911, which came into efficiency in January, 1st, 1915.[384] Civil Procedure Code (Art. I/1911) and Art. LIV/1912 (by which it came into effect) became the basis of court system and the basis of civil proceedings in Hungary. These procedural norms remained in validity on the territory

379 See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 215 – 216 and LUBY, Š.: Dejiny súkromného práva na Slovensku. [History of private law in Slovakia], p. 92.

380 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 32.

381 MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 311 – 312.

382 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 144.

383 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 129.

384 VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 196.

of Slovakia, as a part of the Czechoslovak Republic, with particular amendments until 1950, when a new Civil Procedure Code – No. 142/1950 Coll. of Laws was adopted.

Civil Procedure Code of 1911 be treated as „excelent code of those times"[385]. Special proceedings were as proceedings in inheritance matters (Art. XVI/1894) and proceedings in execution of judgments (Art. LX/1881) were contained in special laws. Civil procedure was based on following principles: oral proceeding, directness, public nature, disposing with the case, hearing the case and discretion in weighing the evidence.[386] The main proceedings were preceded by preliminary proceedings commencing on the case, which ended by the defendant´s enterance into litigation. The main proceedings consisted of the meritorious hearing, evidence and judgment. Means of proof included: witnesses, documentary evidence, site inspection, experts, examination under oath and the party's oath as such. Permissible remedies included: appeal, complaint, review od appeal and renewal of the proceedings/re-trial (against final judgment on the grounds set by law).[387] There were special rules concerning the proceedings in summary cases of repossession and in summary cases concerning balks (bounds) between fields, the jurisdiction of courts dealing with mining matters, matrimonial proceedings, paternity disputes, guardianship, proceedings related to pronouncing a person to be dead etc).[388] Code of Civil Procedure was due to its nature progressive procedural code corresponding to the legal development in the period of the commencing 20th century.

Criminal Procedural Law

Until 1848 the criminal procedure law was based on estate's particularism and on unequality of the proceeding's parties. Changes in the legal system made by the March Legislation of 1848 significantly influenced also the criminal process leading to the real modifications of the procedures in cases of press offences, where except of jury judiciary anchored also the following principles: equality of the parties, oral proceeding, directness, public nature, discretion in weighing the evidence and mandatory advocacy[389]. During Bach's absolutism, the enforced Austrian rules governing criminal procedure repeatedly reduced publicity and orality with the enhancement of the inquisition proceedings. Judex-Curiae-Conference restored old Hungarian procedural norms with the abolishment of differences in procedure concerning the noble and non-noble people and with the confirmation of equality – equality of the parties regardless social (estate's) status. Corporal punishments were abolished in 1871 (Art. LII/1871)[390].

385 STIPTA, I.: Dejiny súdnej moci v Uhorsku do roku 1918. [History of judiciary in Hungary until 1918]. Košice: nica, 2004, p. 238.

386 STIPTA, I.: Dejiny súdnej moci v Uhorsku do roku 1918. [History of judiciary in Hungary until 1918], p. 231.

387 See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 198 - 200.

388 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 481 – 482.

389 STIPTA, I.: Dejiny súdnej moci v Uhorsku do roku 1918. [History of judiciary in Hungary until 1918], p. 206.

390 Torture was abolished during the period of enlightened absolutism.

At the same time codification efforts in the area of criminal procedure law began. It is interesting, that professor Karol Csemegi was the leader of codification works in the area of criminal procedure law likewise in the area of criminal substantive law.[391] The first draft of the „Temporary Criminal Procedure Court" (so called „yelow book") was prepared in 1872. In the Hungarian courts this draft was applied as a temporary legislation, but the Royal Curia (*Curia Regis*) had a substantive role fulfilling the gappy provisions via judicial practice. In 1896 Criminal Procedure Code (Art. XXXIII/1896) was adopted by Hungarian Diet. In connection with Criminal Procedure Code Hungarian Diet adopted Art. XXXIII/1897 on trial by jury[392] and Art. XXXIV/1897 by which Criminal Procedure Code came into effect (with date January, 1, 1900).

Criminal Code governed proceedings in criminal matters by defining the four basic phases [393]:

- preparatory proceedings - involved so called **tracking** (purpose of which was to ascertain the facts necessary for the prosecutor's determination on whether to make (formal) accusation) and **investigation** (conducted by the court to determine whether criminal proceedings should continue by trial or be discontinued);
- preliminary proceedings - the transition from the preparatory proceedings and a trial. It consisted of accusation and summons;
- trial - was the core phase of criminal proceedings. After opening the hearing, the defendant was heard, followed by the reading of the indictment and questioning the defendant in this case. The longest phase of the trial was evidence involving examination of witnesses (including cross-examination and confrontation), expert testimony, and reading of the written evidence (e.g.record of the proceeding of a house search, etc.). After proving, there followed the accusation speech of the accuser (prosecutor or private prosecutor), defending speech of the defendant and then of his attorney. Right to the last speech always belonged to the defendant. After the non-public consultation on the judgment there was pronounced the sentence, which mandatorily consisting of two parts - verdict and reasoning;
- legal remedies – they included on the one side appeal, complaint, complaint for erroneous proceedings and remedial measure for maintaining legal uniformity, re-trial on the other side[394].

391 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 132.

392 BIANCHI, L. a kol.: Dejiny štátu a práva na území Československa v období kapitalizmu 1848-1945. [History of State and Law on the Territory of Czechoslovakia in the period of Capitalism]. I.: 1848-1918, p. 418 - 419.

393 LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 570 – 571.

394 See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 200 - 201.

Criminal Procedure Code distinguished the delicts (crimes) instigated publicly – officially (by public prosecutor) and the delicts instigated by a request (request of injured person – as a misdemeanor of minor bodily harm, misdemeanor of damage caused to other person's property etc.).

Criminal Procedure Code was the significant legal rule of that period. It was based on principles: oral proceeding, directness, public nature, equality of the parties and mandatory advocacy.[395] The criminal procedure was a combination of two proceedings' systems – the accusation procedure and the inquisitional procedure with separation of tasks and competences of the prosecution, the defense and the court. Criminal Procedure Code of 1896 (with amendments) remained in validity on the territory of Slovakia until the first Czechoslovak Criminal Procedure Code (Act No. 87/1950 Coll. of Laws) came into efficiency.

Civil Procedure Code Art. I/1911

(selection of provisions)

Section 3:Proceedings before the courts of First Instance, Chapter: Action

§ 129 Action have to imply:

1) identification of court;

2) identification of parties ....

3) text of action ... presentation of rights, that the accuser wants to apply ...

In accusation with the aim to prepare proceedings, it is necessary to presente also the facts by which the accuser justifies the action, and also evidence of the same.

§ 130 Accusation may commence on the basis of judge resolution, or on the basis of any right or legal relationship if exists or does not exist, also based on whether any document is legal or not.

§ 134 The accusation must be registered in the court in the Hungarian language in writing in two copies ... however, if there are more defendants, the accusation must be in so many other copies that each individual defendant can receive a copy. [396]

Criminal Procedure Code Art. XXXIII/1896

(selection of provisions)

Chapter 1: General provisions

§ 1 Criminal case could be instigated only upon an accusation basen on law and only against a person reasonably suspected of having committed a felony, misdemeanor or offense.

Chapter 3: Public Prosecution (King's Prosecution)

§ 33 Duty of public prosecution is to ascertain the facts necessary for the prosecutor's determination on whether to make (formal) accusation in a cases, which were communicated to him, *ex offo* pursue criminal acts and in a criminal-action proceedings repre-

[395] STIPTA, I.: Dejiny súdnej moci v Uhorsku do roku 1918. [History of judiciary in Hungary until 1918], p. 209 – 211.

[396] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 481 –500.

sent the public action (perform the public prosecutor's office). When the royal prosecutor represents the action , the meritorious jugdement can not be declared without the hearing the royal prosecutor.

Chapter 18: Trial

§ 293 Proceeding (trial) is usually public. In proceedings, the sentence shall be always publicly declared, except for those decisions that were brought at such meetings from which the public was excluded.

The court may at any time order exclusion of the public either from the entire main proceedings or from one of its parts when the publicity of the proceedings would endanger public order or public morality [397].

4. 4 Administrative Law (with regard to the organization of local administration)

In former times so as on the present administration incorporated central government (represented by central government agencies and consequently ministries) and general local government (counties, districts, *municipia* etc.). Local territorial self-governing administration and interest self-governing administration (represented by professional chambers and associations) was important part of administration, too. Until 1848 the basic organization of public administration and local self-governing administration included the **counties** divided into **districts** and **free towns**.

In the early Middle Ages the administrative law did not distinguish between state administration and self-administration. Term „public administration" cannot be used for this period because it was an administration of the king's private property – state with the population (patrimonial theory).[398] The territory of Great Moravia (as early feudal monarchy) was broken down into **counties** (*"župa"* in Slovak language). The administrative centres of royal counties were fortified settlements (castles), which formed the basis of tax and church organisation. Each royal county was led by a royal county head (*comes*), who represented the king on the territory of the county.

Hungarian state basically adopted model of local administrative organization created during the Great Moravian Empire.[399] During the reign of Stephen I, the territory of the state was broken down into **royal counties** (*"comitatus"* in Latin, *"župa"* in Slovak) led by **county heads** (*"comes"* in Slovak referred to as *"župan"*), too. They were appointed directly by the king and they were responsible to the king. Comes commanded the county armed forces and judged all disputes between inhabitans of his county. He also performed all administrative functions and collected payments in kind

[397] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 570 –594.

[398] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 69.

[399] Continuity with the proceding period was archeologically proved at various county castles, for example Bratislava, Nitra, Stary Tekov. BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 42.

and tolls from the dependent population.[400] Considering the patrimonial nature of the state, this was a form of private administration of the king's property. For easier tax collection and performance of judicial powers, royal counties were further broken down into **centuriates** and **decanates**.

Stephen I.[401*]

The 13th century was an important milestone in development of local administration.[402] The changes in local administration were brought about by the abolishment of the patrimonial nature of the state, as the royal counties (as an expression of the private administration of the king's property) changed to **noble counties (*comitatus*, "župa")**.[403] Noble counties were an expression of the changes in ownership, in connection with fact that former royal territorial units now (wholly or partly) were owned by nobles (who obtained ownership through gift of land). As to territory the noble counties were identical to the royal counties. By the end of the 13th century the royal counties were gradually transformed into noble (aristocratic) counties, where elected representatives of the nobility participated in the administration and judiciary.[404] The noble counties became the basis of **noble self-administration** and were further internally broken down into **districts**. Each noble county (*comitatus*) was led by the **county head (*comes, ispán*)** appointed by the king (replacing the royal county head), who represented both the interests of the king and those of the county nobles. The county head appointed a **deputy (*vicecomes, alispán*),** who took over the role of the head of the court. Each district was led by the **royal servant**, who was helped by the **assessors** and a **notary**.[405]

400 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 42 - 43.

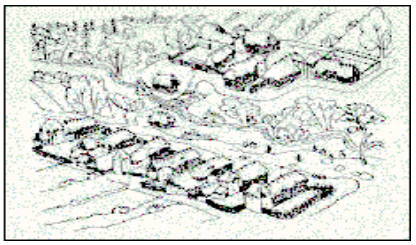
401 http://fara.sk/piestany/patron.html (cit. 21. 10. 2012).

402 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 32.

403 Noble county was the self-governing corporation, initially of nobles called *servientes regis*, gradually replaced the early medieval royal counties, based upon castle districts. BAK, J. M. – BANYÓ, P. – RADY, M. (Ed. and trans.): Stephen Werböczy: The customary Law of the Renowned Kingdom of Hungary in Three Parts (1517), p. 445.

404 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 51.

405 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 19 - 20.


Medieval village[406*]

The system of local administration based on counties (*comitatus*) was reinforced with the increasing autonomy of the counties during the period of the estates' monarchy. The territory of Hungary was still divided into **noble counties**, which consisted of **districts** and **communities** as the lowest units. County officials were divided into two groups:

- royal officers (the main county head (*comes*), his deputy (*vicecomes*) and the notary) and
- noble officers (servants and assessors).

The county was led by the **county head (*comes*)** appointed by the king from among the nobles. In his absence, he was represented by the **deputy county head (*vicecomes*)** elected by the county nobles from among candidates proposed by the main county head. The true carriers of county self-administration were the **servants** elected by county nobles, who were in charge of individual **districts**. As a rule, there were 4 servants in each district. The servants were helped by **assessors**. The most important body of the county (*comitatus*) self-administrative organisation was the county congregation (*congregatio)* as an assembly of all county nobles. Its powers included election of all county self-administration bodies, of representatives of county nobles in the Hungarian Diet and passing decisions concerning all important affairs of the county. Judicial powers of county congregation were later transferred to the *sedria* (*sedes iudicaria*). The county congregation met either in as an assembly of all county nobles (also referred to as ***congregatio generalis***); or an assembly of a part of the nobles from all districts, or all nobles from one district (also referred to as ***congregatio particularis***).[407] The decisions of the county *congregatio particularis* had to be subsequently confirmed in the session of the *congregatio generalis*. [408] The towns developed a special local administrative organisation (with special status of the free royal towns).[409]

406 http://www.gymza.sk/gymza/archiv/1D-dejepis/SDV%20spolo%C4%8D..htm (cit. 08. 11. 2012).

407 BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 75.

408 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 23. See also MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 50 - 51.

409 MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 32 - 35.


Town in the Middle Ages [410*]

The system of local administration based on counties (*comitatus*), which stabilised in the previous period, survived also during the absolutism era. The territory of Hungary was thus further broken down into **counties (*comitatus*)**, which preserved their self-administrative status. The county (*comitatus*) was led by the **county head (*comes*)**, who had two **deputies** (deputy county heads - *vicecomes*). Administrative affairs were discharged by the notary. In the chaotic conditions of the 16th and 17th centuries, the county administration remained in the hands of the county nobility who guarded the autonomous position of the counties as teritorial-administrative units. From 15th century the minor nobility gradually strengthened their influence over the administration of the counties (e.g. right to elect the *vicecomes* in connection with transformation of the function of comes to the formal, ceremonial function).[411]

The counties were further broken down into **districts** led by chief **servants**. Important dignitaries further included deputy servant acting as the lieutenant of the servant and sworn assessors. The districts were broken down into circles led by servants.[412]

County self-administration survived till 1785, when it was abolished by a radical reform of Joseph II, who divided the entire territory of Hungary into **10 administrative districts (regions)** as higher administrative units[413]. Administrative districts were led by the king's commissioners, who were appointed (and could only be removed from office) by the king. The district reform was received with resistance by the Hungarian nobility, which regarded it (and had good reason to do so) as an attack against its constitutional freedoms and a direct tool of Vienna centralism. In 1790, Joseph II called the reform off in the full extent. The system of local administration then returned to self-administration of the counties.[414]

410 http://www.gymza.sk/gymza/archiv/1D-dejepis/SDV%20spolo%C4%8D..htm (cit. 08. 11. 2012).

411 BREZOVÁKOVÁ, B. et al.: A Concise History of Slovakia, p. 147.

412 See also MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 211 – 212 and VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 91 - 93.

413 Following this reorganisation, 3 districts were formed on the territory of Slovakia: Nitra District, Banská Bystrica District and Košice District.

414 MOSNÝ, P. – LACLAVÍKOVÁ, M.: History of state and law on the territory of Slovakia. (from ancient times till 1848), p. 32 - 33.

Declaration of equality of all before the law in March 1848 following the revocation of estates state should create a new starting point of building local government administration and self-government based on civic and representative principles.

During the Bach's absolutism military and consequently civil administration was installed in Hungary. From historical or law-historical point of view it was temporary solution and attempt to stabilisation of revolution and post-revolution situation.[415] After the fall of Bach's absolutism (and issuing the October Diploma and Temporary Court Rules of Judex-Curiae-Conference) the pre-revolution county organization was restored.

It was only after the Austria-Hungary Compromise (1867) that some essential reforms of local administration occurred[416]:

- Art. XLII/1870 Municipal Act (amended by Art. VI/1886 and Art. XXI/1886);
- Art. XVIII/1871 Communities Act (amened by Art. V/1876, Art. VI/1886 and by Art. XXII/1886).

Under this reform of administration there were created **county *municipia***, **municipal towns** and **special *municipia*** divided into **districts**. The *municipia* fulfilled the tasks of self-government and also the tasks of the public (state) administration. *Municipium* was headed by main county head (*župan, ispán)* appointed by the King on the advice of the Minister of Interior. His deputy was *vicecomes (alispán*) – deputy county head – as the highest elected municipal official.[417]

The highest self-governing body was the municipal committee. Municipal committee consisted of elected members (50%) and of the so-called virilists (50%). Virilists were the holders of certain offices or ranks and the payers of the highest municipal taxes. Municipal committee created their other bodies – the permanent committee (organizing functions), the public administration committee (settling competence disputes between public (state) organization and local self-governing administration) etc.[418] *Municipia* as self-governing units exercised some functions of general state administration. They had the important power to issue their own statutes.[419]

Lower administrative units were **communities** (towns were communities, too) and they comprised of the towns with established councils, the large communities (villages) and the small communities (small villages).

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[415] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 92 - 94.

[416] BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 168.

[417] MALÝ, K. – SIVÁK, F.: Dejiny štátu a práva v Česko - Slovensku do roku 1918. [History of state and law in Czecho-Slovakia until 1918], p. 309 – 310.

[418] See also BEŇA, J. – GÁBRIŠ, T.: Dejiny práva na území Slovenska I (do roku 1918). [History of Law in Slovakia I: (until 1918)], p. 168 – 169 and VOJÁČEK, L. – SCHELLE, K.: Právní dějiny na území Slovenska. [Legal history of Slovakia], p. 179.

[419] MOSNÝ, P. - HUBENÁK, L.: Dejiny štátu a práva na Slovensku. [History of state and law in Slovakia], p. 114.

During the dualism the **specialized local administration** was established (building offices; forestry offices; industrial inspectorates; tax offices etc.). In general, the area of administrative law was characterised by the hypertrophy of rules, by fragmentation and casuistry of legislation. In the mentioned form it was also accepted by the first Czechoslovak Republic. During the inter-war Czechoslovak Republik (so as during the following eras) several reforms of administration and self-administration took place (namely we can mention provincial reform in 1928, county reform during the Slovak Republic and region and district reform from the period of socialism).

Art. XXI/1886 Municipal Act

(selection of provisions)

Chapter 1: On the competence of municipium

§ 2 Competence (powers) of municipium consist of :

a) local self-government administration;

b) state (public) administration (in the municipium);

c) other matters in the public interest.

Chapter 4: County head (comes, ispán)

§ 56 Municipium is headed by main county head (*župan, ispán)* appointed by the King on the advice of the Minister of Interior.

Chapter 5: Municipal bodies

§ 67 Main officials in the municipium are:

a) deputy county head (*vicecomes, alispán*);

b) main notary and other notaries; ...

e) doctor;

f) head teller;

g) auditor;

h) account clerk...;

i) keeper of archives;

j) veterinarian[420].

Art. XXII/1886 Communities Act

(selection of provisions)

Chapter 1: On communities

§ 1 Communities are

a) towns with established councils (under § § 63);

b) large communities (villages) without councils, which are capable to perform duties imposed on them by law;

[420] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 618 – 625.

c) small communities (small villages), which are (for their limited material funds) unable to perform duties imposed by law and which for this purpose must be united with other communities.

§ 2 Within the limits of the law a community handles its own internal affairs separately, it performs (delegates) legal and administrative provisions relating to the state administration and self-administration[421].

[421] LACLAVÍKOVÁ, M. – ŠVECOVÁ, A.: Pramene práva na území Slovenska: 1790 - 1918. II. [Sources of Law in the territory of Slovakia: 1790-1918], p. 625 – 631.

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