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VARIAE

Tactica retorică în procesul lui Sextus Roscius din Ameria

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REZUMAT
Pro Sexto Roscio Amerino este primul „caz penal" al lui Cicero, în care încearcă să-și disculpe clientul de acuzațiile fictive, aduse de rudele acestuia și de confidentul *dictatorului*, care au încercat să se folosească de pretextul masacrelor ordonate de Sulla. Rudele lui Sextus Roscius cel tânăr l-au acuzat pe acesta de patricid, susținând că în luna iunie a anului 81 î.Hr. a dispus uciderea tatălui său. Aceste rudenii au obținut cu ajutorul lui Chrysogonus, confidentul lui Sulla, ca numele victimei – deși era considerată un partizan al *dictator*ului – să apară pe lista celor atinși de *proscriptio*, și astfel averea sa să poată fi scoasă la licitație, astfel atât Chrysogonus, cât și rudele ar fi beneficiat din plin de bunurile celui ucis, exceptând „evident" pe fiul lui Roscius cel bătrân, care va fi astfel lipsit de moștenire. Pentru a se bucura nestingheriți de avuția acaparată în mod mârșav, au vrut să înlăture moștenitorul legal, iar pentru asta l-au învinuit pentru *par(r)icidium*. Cazul masca o zonă politică mlăștinoasă, drept urmare se bazau pe faptul că niciun *advocatus* mai însemnat al vremii nu se va angaja să susțină apărarea. Tânărul Marcus Tullius Cicero însă a decis că își va asuma cazul care părea pierdut, nu atât din considerente juridice, cât din cauze politice; întreprinderea sa – finalizată cu succes – presupunea o doză considerabilă de curaj, expunere precisă și iscusință oratorică, dar a pus bazele prestigiului său de *advocatus* ambițios, și a dat startul carierei sale de orator și de actor al vieții publice. Ulterior însuși oratorul vorbește, pe de o parte de recunoașterea obținută de discursul de apărare rostit cu succes, pe de altă parte, în schimb, aduce critici serioase stilului său de atunci, considerându-l exagerat și dezlânat, totodată recunoaște și importanța propriului curaj.
În cele ce urmează mai întâi vom releva pe scurt situația istorică, după care vom schița contextul juridico-legislativ al delictului, care a constituit baza acuzării, în final vom analiza expunerea aplicată în decursul *Pro Roscio Amerino*, respectiv tactica oratorică, prin care a demascat adevăratele motive și vehicule ale acuzării, obținând achitarea inculpatului.
CUVINTE CHEIE
Cicero, Pro Sexto Roscio, retorică clasică, drept penal roman.

Rhetorical Tactics in the Trial of Sextus Roscius of Ameria

ABSTRACT
Pro Sexto Roscio Amerino is Cicero's first "criminal case", in which he attempts to clear his client of false accusations brought by his relatives and the confidant of the dictator, who sought to exploit the pretext of the massacres ordered by Sulla. The relatives of the young Sextus Roscius accused him of parricide, claiming that in June of the year 81 BC, he had ordered his father's murder. With the help of Chrysogonus, Sulla's confidant, these relatives managed to have the victim's name—despite being considered a supporter of the dictator—added to the list of those affected by *proscriptio*, thus allowing his estate to be auctioned. In this way, both Chrysogonus and the relatives would fully benefit from the wealth of the murdered man, while *obviously* excluding the son of the elder Roscius, who would thus be deprived of his inheritance. To freely enjoy the wealth they had dishonourably seized, they sought to eliminate the rightful heir by accusing him of *parricidium*. The case concealed a treacherous political landscape, relying on the assumption that no prominent *advocatus* of the time would dare to take on the defence. However, the young Marcus Tullius Cicero decided to assume the seemingly hopeless case, not so much for legal reasons but rather for political ones. His endeavour—ultimately successful—required considerable courage, precise argumentation, and skilled oratory. It laid the foundation for his reputation as an ambitious *advocatus* and marked the beginning of his career as an orator and a participant in public life. Later, the orator himself reflected on the recognition he gained from the successful defence speech, while also harshly criticizing his early style, considering it exaggerated and unpolished. At the same time, he acknowledged the significance of his own courage.
In the following, we will first briefly outline the historical background, then sketch the legal and legislative context of the crime that formed the basis of the accusation. Finally, we will analyse the rhetorical approach employed in *Pro Roscio Amerino*, particularly the oratorical tactics through which Cicero exposed the true motives and mechanisms behind the accusation, ultimately securing his client's acquittal.
KEYWORDS
Cicero, Pro Sexto Roscio, classical rhetoric, Roman criminal law.

I. FUNDALUL ISTORIC AL DISCURSULUI *PRO ROSCIO AMERINO*

Prin discursul său susținut în 80 î.Hr. în apărarea lui Sextus Roscius din Ameria, Marcus Tullius Cicero, aflat atunci la etatea de douăzeci și șase-douăzeci și șapte de ani, și-a asumat pentru prima oară rolul de apărător într-un proces penal.[1] Această epocă a republicii romane este caracterizată prin așa-numita restaurație sulliană, în urma căreia strategul s-a impus ca un *dictator* cu dreptul de a legifera și de a conduce statul (*dictator legibus scribundis et rei publicae constituendae*). Pentru această procedură care i-a legitimat toate faptele anterioare, a primit sprijinul lui L. Valerius Flaccus, cel care, deținând funcția de *interrex*, a inițiat o lege în acest sens. După victoria sa în data de 1 noiembrie 82 î.Hr. de la Porta Collina, Sulla i-a scos în afara legii pe adepții

1 Referitor la problema datării vezi T. E. Kinsey: *The Dates of the Pro Roscio Amerino and Pro Quinctio*, *Mnemosyne*, 1/1967, pp. 61–67.

adversarilor săi, Marius și Cinna, respectiv i-a trecut pe lista *proscrișilor* pe baza legii denumite *lex Cornelia sive Valeria*. Numele celor vizați – în urma proscripțiilor și-au pierdut viața aproximativ 4 700 de cetățeni – a ajuns pe o tablă (de aici și denumirea procedurii: *pro-scribere*), iar cetățenii erau obligați să-i prindă pe cei trecuți pe listă, respectiv să anunțe autoritățile în legătură cu locul unde se află proscrișii. Pe capul fiecărei persoane atinse de *proscriptio* s-a fixat o recompensă de 12 de mii de *denarius*, iar în cazul în care un proprietar proscris era ucis de către sclavul său, pe lângă premiul în bani a primit și *status libertatis* și dreptul de a purta „Cornelius" ca *nomen gentile*. Urmașii celor proscriși au fost privați de dreptul pasiv de vot, averea lor a trecut în proprietatea statului, bunuri licitate apoi pe Forum, o situație ideală pentru acaparatorii profesioniști (*sectores*).[2]

Asemenea vremuri istorice primejdioase comportă în sinea lor prin natura lucrurilor posibilitatea unor abuzuri, iar un exemplu eclatant în acest sens este și starea de fapt care a constituit baza pentru *Pro Roscio Amerino.* Sextus Roscius cel bătrân era un cetățean înstărit din Ameria, o localitate din Umbria, aflată la 83 de kilometri spre nord de Roma. Roscius-tatăl trăia la Roma, și, pe lângă o însemnată avuție compusă din bunuri mobile, era proprietarul a 13 domenii din provincie, iar administrarea acestora pe timpul procesului era încredințată fiului său, care avea aproximativ 40 de ani. Relația dintre cei doi poate că nu era cea mai cordială, datorită probabil diferenței stilului de viață: în timp ce tatăl avea o atitudine urbană, fiul a adoptat o condiție rustică. După încetarea legală a proscripției și a confiscării de averi, a procedurii de *proscriptio*, deci după 1 iunie 81 î.Hr., Roscius cel bătrân este ucis în preajma Circus Flaminius, în timp ce se întorcea de la o cină. Rudele victimei, Titus Roscius Capito și Titus Roscius Magnus, aflate în relații dușmănoase cu cel ucis, l-au informat pe L. Cornelius Chrysogonus, confidentul și libertul lui Sulla. Chrysogonus a obținut ca numele lui Roscius-tatăl să fie introdus ulterior, după termenul legal, pe lista celor vizați de *proscriptio*, bunurile sale să fie confiscate și scoase la licitație, deși acesta era adeptul lui Sulla. Chrysogonus a apărut în postura de cumpărător oficial – căci nu a îndrăznit nimeni să liciteze împotriva sa –, a cumpărat avuția de 6 milioane de *sestertius* la un preț de două mii (!) de *sestertius.* Rudele lui Roscius au primit un premiu consistent. Lui Capito i-au revenit trei domenii, iar Magnus a devenit intendantul afacerilor lui Chrysogonus. Pentru a-și salva viața, Sextius Roscius-fiul s-a refugiat din Ameria la Roma, unde s-a adăpostit în casa lui Caecilia, unul din reprezentanții prestigioasei ginți Metellus. Chrysogonus, Capito și Magnus, simțind că averea acaparată nu e în siguranță, au decis să-l acuze pe fiul victimei pe baza unor indicii false, de patricid [*par(r)icidium*] și astfel să-l extermine. Acuzația era deosebit de șubredă, dar se bizuiau pe faptul că datorită relației lui Chrysogonus cu Sulla nu va îndrăzni nimeni să-l înfrunte pe C. Erucius, acuzatorul cu o reputație îndoielnică. Au greșit

2 Gerhard Krüger (1994)(ed.): *Tullius Cicero, Rede fur Sextus Roscius aus Ameria*, Reclam, Stuttgart, p. 143 și urm.; Friedrich Richter, Alfred Fleckeisen, G. Amon (1906): *Ciceros Rede fur Sex. Roscius*, B. G. Teubner, Berlin–Leipzig. Expresia de *proscriptio* desemna inițial doar licitația uzuală în decursul procedurii de faliment *(proscriptio bonorum)* și doar după măsurile luate de Sulla a primit conținutul de *măcel politic*. Cf. Theodor Mommsen (1899): *Romisches Strafrecht*, Duncker & Humblot, Leipzig, p. 938. Despre derularea procedurilor de *proscriptio* dictate de Sulla vezi Sallustius: *De coniuratione Catilinae* 51.

însă în acest moment. Tânărul Cicero care avea la activ doar un caz de drept privat, cel al lui Quinctius, și-a asumat această sarcină periculoasă și delicată, achitându-se de ea cu brio.

Combaterea acuzării oficiale nu era o problemă dificilă, din moment ce Erucius nici nu se forța prea mult să prezinte în mod verosimil versiunea sa.[3] Singurul argument palpabil împotriva inculpatului era faptul că nu i-a audiat pe sclavii prezenți la uciderea tatălui său și nu a înregistrat în proces verbal mărturiile acestora. Când a dorit să procedeze astfel, nu a avut deja ocazia, pentru că între timp sclavii au intrat în suita lui Chrysogonus. Dificultatea procesului era, deci de sorginte politică. Cu un simț tactic uimitor, Cicero a reluat în mod frecvent ideea că Sulla nu are știință de mârșăviile fostului său sclav,[4] precum nici Jupiter nu se poate ocupa cu măruntele probleme ale muritorilor.[5] S-a adresat păturii *nobilitas* – căci recucerirea influenței și statutului acesteia se datora lui Sulla – să se delimiteze de elementele de teapa lui Chrysogonus, slujind astfel din nou interesele lui Sulla, care a accentuat atât de mult nevoia acurateței procedurilor judecătorești.[6]

Potivit acestei intenții, *oratio* prezentat de Cicero se structura astfel.[7] Introducerea (*exordium, prooemium*) pregătește auditoriul pentru cele ce urmează (*conciliare*),[8] ca mai apoi prin *narratio*[9] să se prezinte subiectul tratat al procesului (*docere*) care să primească accentul cuvenit. În *partitio*[10] Cicero schițează ordinea proiectată a probării, urmată de *argumentatio*,[11] scopul căreia este convingerea (*probare*). Partea de *argumantatio* poate fi disjunsă în trei secvențe: Cicero se axează mai întâi pe Erucius,[12] apoi pe Roscius Capito și Magnus,[13] ulterior pe Chrysogonus.[14] Partea denumită *peroratio* își propune primordial să apeleze la sentimentele auditoriului.[15] Evident, oratorul nu va recurge în mod mecanic la segmentarea prezentată, va avea escapade frecvente (*egressio, digressio*), prin care dorea de asemenea să-și câștige auditoriul în favoarea sa, respectiv a clientului său.[16] Cicero va face o anumită disociere între persoana lui Chrysogonus, preferatul lui Sulla, și rudele lui Roscius, încercând să abată suspiciunea săvârșirii crimei asupra lor, în timp ce nu va omite să evidențieze în mod repetat convingerea politică a victimei – un adept fidel al lui Sulla –, respectiv rolul și răspunderea socială a nobilimii.[17] Discursul este caracterizat pe tot parcursul său de un anumit patos exagerat, fapt pus ulterior pe seama

3 Cicero: *Pro Roscio Amerino* 59 și urm.
4 Cicero: *Pro Roscio Amerino* 21. 25. 26. 91. 110. 130.
5 Cicero: *Pro Roscio Amerino* 131.
6 Cicero: *Pro Roscio Amerino* 154 și urm.
7 Krüger (1994): p. 146.
8 Cicero: *Pro Roscio Amerino* 1–14.
9 Cicero: *Pro Roscio Amerino* 15–29.
10 Cicero: *Pro Roscio Amerino* 29–36.
11 Cicero: *Pro Roscio Amerino* 37–142.
12 Cicero: *Pro Roscio Amerino* 37–82.
13 Cicero: *Pro Roscio Amerino* 83–123.
14 Cicero: *Pro Roscio Amerino* 124–154.
15 Cicero: *Pro Roscio Amerino* 143–154.
16 Cicero: *Pro Roscio Amerino* 13. 29 și urm.; 55 și urm.; 59 și urm.; 64 și urm.
17 Krüger (1994): p. 147.

tinereții chiar de oratorul însuși,[18] obișnuință de care se va descotorosi cu succes după studiile sale din Grecia.[19] În *Pro Roscio Amerino* a recurs des la elemente exagerate, arhaizante și de limbă vorbită, de la care s-a delimitat în momentul în care devenise un orator matur.[20] Discursul – din moment ce Roscius-fiul a fost achitat[21] –, respectiv asumarea pericolelor la care s-a expus susținând acest demers,[22] i-au adus și lui Cicero roadele pe măsură, căci, din acest moment era considerat unul dintre primii *advocatus* ai Romei.[23]

II. REGLEMENTAREA JURIDICĂ A DELICTULUI DE *PARRICIDIUM*

Acuzația adusă lui Sextus Roscius era *par(r)icidium*, adică (patri)cid – la fel era uzitată această expresie într-o accepțiune mai largă, dacă cineva a comis o crimă, în mod voit, cu rea intenție.[24] Se presupune că încă în timpul lui Romulus era în vigoare legea potrivit căreia romanii nu aveau o pedeapsă aparte pentru uciderea rudelor, deoarece uciderea oricărui cetățean roman era considerată ca fiind o crimă împotriva tatălui.[25] Ulterior omuciderea a fost încadrată în trei stări de fapt: prin *homicidium* era denumită crima în general, *sicarius* era denumirea asasinului la drumul mare, și *veneficus* era denumirea celui care a comis delictul prin otrăvire, respectiv al criminalului care acționează mișelește. Pentru contracararea acestor fapte Sulla a constituit un *quaestio* separat prin *lex Cornelia sicariis et veneficis*, dar până atunci sarcina investigării criminalilor revenea instanțelor denumite *quaestores par(r)icidii.*[26] Deși etimologia populară deduce expresia *par(r)icidium* (și forma scrisă de *parricidium* este frecventă) din *patricidium,* adică din uciderea părintelui, dar varianta a fost considerată de Mommsen ca fiind nefondată din punct de vedere a istoriei limbii.[27] Potrivit lui Mommsen exista deja în epoca lui Cicero o etimologie populară eronată, prin care expresia *par(r)*

18 Cicero: *Brutus* 108.
19 Cicero: *Brutus* 316.
20 Cicero: *Orator* 107; Cicero: *Philippicae in Marcum Antonium* 2, 30 și urm.
21 Plutarchus: *Cicero* 3, 6.
22 Cicero: *De Officiis* 2, 51.
23 Cicero: *Brutus* 312.
24 Sex. Pompeius Festus: *De verborum significatione* 221. *Parricida non utique is, qui patrem occidisset, sed qualemcunque hominem indemnatum … Si qui hominem liberum dolo sciens morti duit, par(r) icidas esto.*
25 Plutarchus: *Romulus* 22. Referitor la alte aspecte – primordial sacrale și etice – vezi Agamben, G.: *Homo Sacer. Sovereign Power and Bare Life.* Stanford 1998.
26 János Zlinszky (1991): *Római büntetőjog*, Nemzeti Tankönyvkiadó, Budapest, p. 109; John Duncan Cloud: The primary purpose of the lex Cornelia de sicariis, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 2/1969, pp. 258–268; Bernardo Santalucia (1998): *Diritto e processo penale nell' antica Roma*, Giuffrè, Milano, p. 146; Pál Sáry: A lex Cornelia de sicariis et veneficis, *Publicationes Universitatis Miskolcinensis: Sectio Juridica et Politica*, 2001, pp. 301–325, p. 301.
27 Mommsen (1899): p. 612.

icidium, însemnând crima premeditată, a fost uzitată pentru *patricid*, respectiv *uciderea unei rude*.[28]

Lex Pompeia de par(r)icidiis tratează *par(r)icidiumul* din nou într-o accepțiune restrânsă, cea a suprimării părinților, rudelor și aparținătorilor,[29] după ce străvechea denumire romană de *par(r)icidium* a fost înlocuită cu expresia *homicidium*. Astfel Pompeius a considerat că intră sub incidența legii crimele sau tentativele de asasinat a rudelor ascendente și descendente, a fraților, unchilor și mătușilor, al copiilor acestora, concubinului/ei, logodnicilor, părinților concubinului și logodnicului-logodnicei, copilului logodnicului/nicei și concubinului/nei acestuia, părintelui vitreg, copilului vitreg și asupra *patronus*ului care și-a eliberat sclavul.[30] Actele de *par(r)icidium in senso stricto* erau destul de rare – după cum reiese din sursele noastre –, primul caz de acest gen cunoscut cu un făptaș anume, și anume L. Hostius ne parvine din perioada de după cel de al doilea război punic. Cazul primului ucigaș al unei mame – documentat cu nume –, cel al lui Publicius Malleolus a fost tratat cu detalierea cuvenită de manualele de retorică,[31] și astfel avem informații despre amănuntele pedepsei aplicate *par(r)icizilor*, respectiv *poenae cullei*: ucigașul era cusut într-un sac de piele și aruncat în apă.[32] Inițial *poenae cullei* era probabil mai degrabă o jertfă menită să îmbuneze puterile supreme, un *procuratio prodigii*, decât o sancțiune.[33] Romanii denumeau prin *pax deorum* rostul obișnuit al lumii, stadiul său calm, ceea ce însemna o atitudine pașnică a zeităților față de oameni, iar dacă această rânduială s-a stricat, schimbarea era pusă pe seama zeilor care au ieșit din starea lor de liniște.[34] Perturbarea ordinii cosmice, deci orice întâmplare neobișnuită, inedită era socotită drept *prodigium*.[35] Un astfel de fenomen, care atenta la *pax deorum* era considerat și *par(r)icidiumul*.

Etimologia cuvântului *prodigium* este îndoielnică, în interpretarea lui Wade-Hofmann *prodigium* provine din *pro-aio*, potrivit căruia expresia *prodigium* înseamnă

28 Mommsen (1899): p. 613.

29 Herennius Modestinus: *Digesta Iustiniani* 48, 9, 1. *Lege Pompeia de par(r)icidiis cavetur, ut, si quis patrem matrem, avum aviam, fratrem sororem patruelem matruelem, patruum avunculum amitam, consobrinum consobrinam, uxorem virum generum socrum, vitricum, privignum privignam, patronum patronam occiderit cuiusve dolo malo id factum erit, ut poena ea teneatur quae est legis Corneliae de sicariis. Sed et mater, quae filium filiamve occiderit, eius legis poena adficitur, et avus, qui nepotem occiderit: et praeterea qui emit venenum ut patri daret, quamvis non potuerit dare.*

30 Zlinszky (1991): p. 113; John Duncan Cloud: Parricidium: from the lex Numae to the lex Pompeia de parricidiis, *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung*, 1971, pp. 1–66.

31 Cicero: *De inventione* 2, 149.

32 Referitor la analiza simbolicii *poena cullei* și a reflectării ei în perioade ulterioare vezi Florike Egmond: The Cock, the Dog, the Serpent, and the Monkey. Reception and Transmission of a Roman Punishment, or Historiography as History, *International Journal of the Classical Tradition*, 2/1995, pp. 159–192.

33 Mommsen (1899): p. 922 și urm.

34 Thomas Köves-Zulauf (1995): *Bevezetés a római vallás és monda történetébe*, Telosz, Budapest, p. 61.

35 Clemens Zintzen (1979): Prodigium, in *Der Kleine Pauly IV*, Deutscher Taschenbuch, München, p. 1151.

prezicere, respectiv *indicație.*[36] Această abordare nu pare a fi satisfăcătoare, deoarece *„prodigium în sine nu spune nimic"*, și chiar e nevoie de o interpretare a expresiei, astfel se explică recurgerea la sprijinul *pontifecșilor,* a *cărților Sibylla* sau a *haruspecșilor.*[37] Pare mai corectă interpretarea potrivit căreia cuvântul provine din compoziția *prod-agere*, astfel că *prodigium* nu înseamnă altceva, decât *„puterile supranaturale aflate sub suprafață vor sparge această scoarță și vor deveni evidente."*[38] În momentul apariției *prodigiumului*, fie el privat sau de stat, după ce i s-a deslușit semnificația, deci a fost interpretat, trebuia să se procedeze la *procuratio*, iar modalitatea înfăptuirii acestuia se decidea tot în urma propunerilor interpreților, în cazul repetării frecvente a aceluiași *prodigium*, *pontifecșii* au decis același mod de ispășire.

Sancționarea *par(r)icidului*, adică *poenae cullei* care putea fi considerat drept *procuratio* –procedeu practicat și în perioada imperială – se desfășura astfel: după anunțarea verdictului fața condamnatului a fost acoperit de o piele de lup, de picioare i s-au legat tălpi de lemn, pentru ca suflul său să nu polueze aerul, iar pasul său să nu contamineze pământul. După acesta a fost biciuit până la sânge,[39] introdus într-un sac confecționat din piele de bovine împreună cu o maimuță, un cocoș, un câine și o viperă. Sacul a fost cusut și aruncat în mare,[40] astfel persoana, care a încălcat orice lege naturală nu putea avea contact direct cu nici un element al naturii, cu apa, lumina soarelui, pământul sau aerul, neavând posibilitatea de a le pângări. Autorii perioadei imperiale fac referiri dese la animalele enumerate,[41] mai ales că împăratul Claudius avea o plăcere deosebită de a urmări executarea acestor pedepse capitale calificate.[42] Nu putem avea un răspuns absolut sigur la chestiunea alegerii animalelor, fiindcă – tocmai prin caracterul simbolic al sancțiunii – de cele mai multe ori chiar și autorii antici sunt nevoiți să se lanseze în presupuneri.[43] Câinele ca cel care îndeplinește sarcini de pază și de avertizare – respectiv cel care eventual a neglijat aceste sarcini –, maimuța ca o caricatură a omului, șarpele ca dușmanul viclean din natură, iar cocoșul fiind animalul zeiței Hecate, divinitatea nopții – iată argumentele care ar valida prezența acestor animale la ceremonie.[44]

Evident, această pedeapsă cruntă nu constituia o amenințare reală pentru Roscius, fiindcă ar fi avut posibilitatea de a se folosi de *ius exulandi* – având în vedere că în cazul

36 Alois Walde, J. B. Hofmann (1954).: *Lateinisches etymologisches Worterbuch*, Carl Winters Universitätsbuchhandlung, Heidelberg, p. 368.
37 Zintzen (1979): p. 1153
38 Köves-Zulauf (1995): p. 62.
39 Biciuirea făcea parte în general din pedeapsa capitală, în mod frecvent se aplica drept o sancțiune care ea însăși avea un deznodământ fatal. Cf. Titus Livius: *Ab Urbe Condita* 1, 26, 11.
40 Herennius Modestinus: *Digesta Iustiniani* 48, 9. 9 pr. *Poena par(r)icidii more maiorum haec instituta est, ut par(r)icida virgis sanguineis verberatus deinde culleo insuatur cum cane, gallo gallinaceo et vipera et simia: deinde in mare profundum culleus iactatur. Hoc ita, si mare proximum sit: alioquin bestiis obicitur secundum divi Hadriani constitutionem.*
41 M. Annaeus Seneca: *Controversiae* 5, 4; L. Annaeus Seneca: *De Clementia* 1, 15; Iuvenalis: *Saturae* 8, 214; 13, 155.
42 Suetonius: *Claudius* 34.
43 Richter, Fleckeisen, Amon (1906): p. 13.
44 Plinius maior: *Naturalis historia* 29, 57; Ovidius: *Fasti* 1, 455 ; Iuvenalis: *Saturae* 13, 233; Cicero: *De natura deorum* 1, 97; Plautus: *Mercator* 761.

său nu se putea vorbi de *par(r)icida manifestus* –, deci de dreptul de a pleca într-un exil autoimpus. Acest drept i se cuvenea oricărui cetățean roman, în cazul în care procedura pornită împotriva sa pentru un delict sancționabil cu pedeapsa capitală ar fi luat o turnură nefastă, și exista pericolul de a fi găsit vinovat. Astfel e o exagerare retorică din partea lui Cicero, că oratorul vorbește de mai multe ori de faptul că Chrysogonus dorește cu orice preț sângele lui Roscius.[45] *Exiliumul* nu era, deci o pedeapsă, ci o cale de a scăpa de pedeapsă.[46] Roscius, dacă într-adevăr se temea de sentința capitală, avea destulă vreme să aleagă calea exilului, iar acuzatorii săi ar fi fost și în acest caz extrem de satisfăcuți.[47]

Dezbaterea judiciară propriu-zisă a avut loc fără ca evenimentul concret să fi fost depistat exact, și fără audierea eventualilor martori. Locul crimei și perioada zilei în care s-a comis, sunt cunoscute, data asasinatului însă nu, așa cum numărul atacatorilor, respectiv cel al făptașilor rămân la fel în ceață. Erucius a prezentat martori, cărora părțile puteau să le adreseze întrebări, dar potrivit spuselor lui Cicero fiecare dintre acești martori a fost mituit din banii acuzatorilor. Mărturia sclavilor putea fi luată în considerare ca atare în proces, doar dacă ele ar fi fost obținute în urma torturii (*tormentum, eculeus)*. Doi sclavi ar fi putut într-adevăr să aducă contribuții pe fond în proces, iar acuzatul putea să-și predea sclavii pentru a fi torturați *(in quaestionem polliceri)*.[48] Sextius Roscius ar fi fost dispus să facă acest gest, din moment ce sclavii ar fi probat tocmai nevinovăția sa, dar din cauza confiscării averii, aceștia nu mai făceau parte din proprietatea sa, și nu i-a rămas altă posibilitate, decât să-i solicite lui T. Roscius Magnus predarea sclavilor (*in quaestionem postulare)*, acesta fiind administratorul avuțiilor lui Chrysogonus. Magnus a refuzat acest lucru, iar în această perioadă încă nu era valabilă regula impusă în perioada imperială, potrivit căreia în decursul procesului se poate derula acest procedeu de probare chiar și în pofida refuzului proprietarului de sclavi.[49] În asemenea cazuri judecătorul trebuia să decidă dacă sclavii au depus mărturie doar sub tortură, ori dacă mărturia lor oglindește realitatea.[50]

45 Cicero: *Pro Roscio Amerino* 6.
46 Zlinszky (1991): p. 78.
47 Richter, Fleckeisen, Amon (1906): p. 14.
48 În același timp sclavul nu putea fi constrâns să depună mărturie împotriva stăpânului său (cf. Cicero: *Pro Milone* 59; Tacitus: *Annales* 2, 30, 12.), dar în funcție de gravitatea acuzației tribunalul avea dreptul de a cântări dacă face abstracție de aplicarea acestui principiu juridic. Cf. Domitius Ulpianus: *Digesta Iustiniani* 48, 18, 1, 17–18; Mommsen (1899): p. 447 și urm.
49 Cf. Paulus: *Sententiarum libri* 5, 16, 3.
50 Domitius Ulpianus: *Digesta Iustiniani* 48, 18, 1, 22. 27. Despre această chestiune vezi mai pe larg Imre Molnár (1998): Tanúvallomások (kínvallatás) értékelése a bűnösség megállapításánál az ókori római büntetőjogban, in *Emlékkönyv Dr. Szabó András 70. születésnapjára. Acta Universitatis Szegediensis de Attila József Nominatae: Acta Juridica et Politica (Tom.53.; fasc. 17.),* pp. 243–250, p. 249.

III. EXPUNEREA ÎN PRO ROSCIO AMERINO

Este evident ca pentru reconstrucția expunerii din Pro Roscio Amerino să pornim de la partea de *narratio*[51] a discursului. Roscius cel bătrân putea să se plimbe prin Roma liniștit și pe vremea proscripțiilor lui Sulla,[52] deoarece avea nenumărați prieteni din rândul celor din categoria *nobilitas*, care ulterior – în timpul discursului – au venit în ajutorul fiului său, acuzat de patricid.[53] Mâna destinului l-a răpus însă dintr-o altă direcție: două rude ale sale,[54] T. Roscius Capito și T. Roscius Magnus, cu care era într-o relație dușmănoasă de multă vreme, au uneltit pentru a-l ucide.[55] În legătură cu elementele concrete ale omorului nici Cicero nu depune eforturi pentru a elucida aspectele neclare:[56] Roscius cel bătrân a fost răpus la Roma în anul 81 î.Hr., într-o seară de toamnă, tocmai când se întorcea acasă de la o cină.[57] Vestea uciderii va ajunge chiar în aceeași zi în Ameria, dar mesagerul Mallius Glaucia – prietenul lui Roscius Magnus – se grăbește să aducă informația la casa lui Roscius Capito, și nu fiului victimei.[58] Din evoluția ulterioară a evenimentelor se poate deduce într-o manieră univocă mobilul ucigașilor: acapararea avuției deținute de Roscius.[59] Rudele victimei îl informează de îndată pe L. Cornelius Chrysogonus,[60] libertul lui Sulla, aflat tocmai în Volaterrae, solicitându-i sprijinul pentru obținerea dreptului de a dispune asupra averii defunctului. Chrysogonus se arată dispus să le ofere această posibilitate: deși termenul proscripțiilor a trecut de luni de zile, îl va trece pe Roscius cel bătrân pe lista celor loviți de proscripție,[61] iar din acest moment avuția sa de șase milioane de *sestertius* poate fi confiscată, averea fiind acaparată chiar de însuși Chryogonus pentru doar două mii de *sestertius.*[62] Administrarea averii îi este încredințată lui Roscius Magnus în calitate de *procurator*, iar acesta nu ezită să se folosească de posibilitatea de a se îmbogăți peste noapte;[63] trei din cele treisprezece domenii ale victimei sunt acaparate de către Roscius Capito,[64] în timp ce fiul celui ucis va fi pur și simplu izgonit din casa părintească.[65]

51 Cicero: *Pro Roscio Amerino* 15–29.
52 Cicero: *Pro Roscio Amerino* 16.
53 Cicero: *Pro Roscio Amerino* 1–4. 27. 77. 119. 147–149.
54 Evident Cicero nu se străduie să evidențieze relația de rudenie – în cazul de față *cognatio* – dar în cazul lui T. Roscius Capito putem să deducem acest lucru cu destulă siguranță din pasajul respectiv al discursului. Cf. Cicero: *Pro Roscio Amerino* 96.
55 Cicero: *Pro Roscio Amerino* 17. 87.
56 Cicero: *Pro Roscio Amerino* 97–98.
57 Cicero: *Pro Roscio Amerino*18. 126.
58 Cicero: *Pro Roscio Amerino* 19. 95–99. 102.
59 Wilfried Stroh (1975): *Taxis und Taktik. Die advokatische Dispositionskunst in Ciceros Gerichtsreden*, De Gruyter, Stuttgart, p. 55.
60 Cicero: *Pro Roscio Amerino* 20. 105–108.
61 Cicero: *Pro Roscio Amerino* 20 și urm.; 32.
62 Cicero: *Pro Roscio Amerino* 6. 21.
63 Cicero: *Pro Roscio Amerino* 21. 23. 108.
64 Cicero: *Pro Roscio Amerino* 17. 21. 99. 103. 108. 115. 117.
65 Cicero: *Pro Roscio Amerino* 23 și urm.

Cetățenii din Ameria sunt scandalizați, și demonstrându-și indignarea vor trimite o delegație pentru a prezenta în fața lui Sulla apartenența politică a lui Roscius cel bătrân – anume devotamentul său față de Sulla – și prejudiciul suferit de Roscius cel tânăr.[66] Printre delegați se află însă și Roscius Capito, care va încerca prin toate metodele să-și deruteze colegii,[67] Chrysogonus la rândul său va întreprinde tot ce-i stă în putere, încât cei din Ameria să nu ajungă în fața lui Sulla, promițându-le că va interveni personal pentru invalidarea proscripției instituite ulterior și pentru a-l repune în posesie pe fiul victimei.[68] Rubedeniile provinciale naive au făcut cale întoarsă cu o promisiune falsă, rostită cu hotărâre, fără a-și fi atins scopul, iar Chrysogonus și acoliții săi au decis că va trebui să-l ucidă și pe Sextus Roscius pentru a se bucura liniștiți de averea dobândită în mod mișelesc[69] – candidatul- victimă se va refugia însă la Roma, sub ocrotirea prietenilor tatălui său.[70]

Cei care doreau să-și păstreze averea, n-aveau deci de ales decât *justizmordul*: l-au acuzat pe fiul victimei de patricid.[71] Reprezentarea acuzării a fost asumată de Erucius, având o experiență solidă în această postură,[72] căruia Roscius Magnus, administratorul averii deținute de Chrysogonus îi va servi cu nenumărate sfaturi „utile”[73] – dar Roscius Magnus nu deținea rolul de *accusator* în înțelesul strict al termenului tehnic: potrivit lui Cicero el își ocupă locul printre acuzatori,[74] și e menționat în *peroratio* în această postură,[75] dar retorul n-ar fi scăpat cu siguranță ocazia de a menționa drept impertinență, ieșită din comun, calitatea sa de acuzator.[76] Roscius Capito apare în proces ca martor,[77] iar lui Chrysogonus – ca om de încredere al lui Sulla și factor influențator al evenimentelor – îi revine rolul de a împiedica devoalarea fundalului real al faptelor.[78] Potrivit acuzației, omorul a survenit în urma unei intrigi din cadrul familiei: tânărul Roscius își ura dintotdeauna tatăl,[79] iar când părintele ar fi plănuit dezmoștenirea fiului, acesta a decis să-l ucidă pentru a împiedica astfel pierderea moștenirii.[80] Cicero susține că doar prin intervenția sa a fost posibilă demascarea acestui complot josnic, potrivit căruia însuși Chrysogonus dorește să-și păstreze avuția lui Roscius cel bătrân, iar cei care-i sunt complici în această tentativă nu sunt alții, decât ucigașii înșiși.[81]

66 Cicero: *Pro Roscio Amerino* 24–25.
67 Cicero: *Pro Roscio Amerino* 26. 109–117.
68 Cicero: *Pro Roscio Amerino* 26.
69 Cicero: *Pro Roscio Amerino* 13. 26.
70 Cicero: *Pro Roscio Amerino* 27.
71 Cicero: *Pro Roscio Amerino* 28.
72 Cicero: *Pro Roscio Amerino* 28. 55 . 61. 89.
73 Cicero: *Pro Roscio Amerino* 35.
74 Cicero: *Pro Roscio Amerino* 17. 87. 95. 104.
75 Cicero: *Pro Roscio Amerino*152.
76 Stroh (1975): p. 56. Opinia lui Zumpt este, în schimb, contrară – August Wilhelm Zumpt (1871): *Der Criminalprozess der romischen Republik*, B. G. Teubner, Leipzig, p. 519.
77 Cicero: *Pro Roscio Amerino* 84. 101–103.
78 Cicero: *Pro Roscio Amerino* 5. 28. 58. 60 și urm.
79 Cicero: *Pro Roscio Amerino* 40 și urm.
80 Cicero: *Pro Roscio Amerino* 52–54. 58.
81 Stroh (1975): p. 57.

La prima vedere prezentarea lui Cicero ni se pare rotundă și lipsită de contradicții – ținând cont mai ales de faptul că tânărul Cicero în rolul apărătorului pășește pe scenă ca un apărător îndârjit și curat al adevărului și a moravurilor. Acuzația adusă celor doi Roscius nu e fundamentată în mod corespunzător, opinează mai mulți specialiști precum Heinze,[82] Langraf,[83] Lincke[84] și Stroch.[85] Motivul faptei lor e logic, din moment ce ambii au profitat de pe urma omorului,[86] dar în momentul uciderii nu erau nici pe departe siguri în succesul planului lor. Pe deoparte vremea proscripțiilor și a confiscării averilor trecuse deja în momentul crimei, și Chrysogonus încă nu trecuse de partea celor doi Roscius. Pe de altă parte, potrivit relatării ciceroniene, Roscius Capito a primit trei domenii tocmai în aceeași perioadă,[87] când Chrysogonus i-a încredințat spre administrare lui Roscius Magnus domeniile acaparate de omul lui Sulla: mai târziu însă îl vedem pe Roscius Capito în rândul delegației amerienilor, care doreau să-și ridice vocea în favoarea retrocedării bunurilor celui ucis, cele ale lui Roscius cel bătrân fiului acestuia. Cum l-au împuternicit, deci pe Roscius Capito să facă parte din delegație, și cum a reușit să-i păcălească pe membrii acesteia, complotând cu Chrysogonus – cel puțin potrivit afirmației lui Cicero? În opinia lui Stroch explicația lui Cicero despre credulitatea rubedeniilor de la țară nu e altceva, decât un topos.[88] În cazul în care Capito ar fi fost într-adevăr trimis la Volaterrae, împreună cu delegația, atunci ar fi beneficiat mai târziu de domeniile primite.[89] Cicero însă nu poate dezvălui această variantă în fața judecătorilor, deoarece ar oferi inerent temei supoziției potrivit căreia Chrysogonus l-a mituit pe Capito în calitatea acestuia de membru al delegației, deci începutul comuniunii de interes dintre cei doi nu poate fi datată în perioada premergătoare comiterii crimei. Interesul apărării impune ca „implicarea" lui Capito în șirul evenimentelor să survină cât mai repede, căci prin asta se poate dovedi temeinicia ipotezei unei alianțe dintre Roscius Magnus și Roscius Capito.

Probatoriul lui Cicero pornește de la faptul că nevinovăția lui Roscius cel tânăr nu poate fi demonstrată înlăturând orice dubiu – respectiv nu poate dezminți în totalitate, pe de o parte faptul că fiul victimei se afla în momentul uciderii acestuia în Ameria, și nu la Roma – locul faptei, pe de altă parte nu poate exclude în mod univoc patricidul ca motivație a dobândirii de foloase (deposedarea ulterioară de moștenire nu exclude speranța de a o obține în momentul faptei). Astfel apărătorul trebuie să găsească făptuitorul (făptuitorii), cu care poate fi substituit Sextus Roscius cel tânăr, menționat în rechizitoriu, deci trebuie să obțină ca versiunea proprie să devină plauzibilă.[90] În mod

82 Richard Heinze (1960): Ciceros politische Anfange, in: Eberhard Bruck (ed.): *Vom Geist des Romertums*, B.G. Teubner, Darmstadt, p. 101.
83 Gustav Landgraf (1914): *Kommentar zu Ciceros Rede Pro Sex. Roscio Amerino*, Teubner, Leipzig–Berlin, p. 170.
84 Ernst Lincke: Zur Beweisfuhrung Ciceros in der Rede fur Sextus Roscius aus Ameria, *Commentationes Fleckeisenianae* 1/1890, p.187 și urm.; p. 193 și urm.
85 Stroh (1975): p. 57 și urm.
86 Cicero: *Pro Roscio Amerino* 17. 84–88. 99. 107. 152.
87 Cicero: *Pro Roscio Amerino* 21.
88 Stroh (1975): p. 58.
89 Lincke (1890): p. 196.
90 Stroh (1975): p. 59.

curios însă Cicero nu va opta pentru explicația cea mai evidentă, care s-ar putea însuma astfel: în spatele crimei se află în primul rând Chrysogonus (cu Roscius Magnus ca posibil părtaș), din moment ce el a avut cel mai mult de câștigat de pe urma delictului, respectiv el a fost cel care a împiedicat audierea sclavilor în calitate de martori oculari – iar Capito, inițial scandalizat de nelegiuire, a fost mituit de Chrysogonus, și astfel a închis ochii în mod serviabil asupra acestei nedreptăți. Cicero era conștient că nu poate inițiа un atac direct împotriva lui Chrysogonus! Nu e întâmplător că el nu dorește audierea ca martori a delegației din Ameria, din moment ce aceștia probabil ar mărturisi faptul că libertul lui Sulla l-a mituit pe Roscius Capito, și astfel argumentația apărării s-ar nărui. Nici lui Erucius, reprezentantul acuzării nu-i stă în interes audierea acestor martori, deoarece astfel atenția s-ar îndrepta inevitabil asupra chestiunii care viza cea mai interesată persoană în comiterea crimei – oricine ar putea concluziona fără deprinderi logice deosebite: cel mai implicat în acest sens era Chrysogonus, comitentul său. Cicero îl acuză deci pe Chrysogonus, favoritul lui Sulla, dar concomitent îl și disculpă, iar greutatea delictului va fi aruncată în mare parte asupra lui Capito și Magnus.[91]

Ne confruntăm cu o situație deosebit de paradoxală. De ce a dorit Chrysogonus cu orice chip condamnarea lui Roscius cel tânăr pentru patricid, din moment ce el însuși a inclus victima pe lista celor pedepsiți prin *proscriptio*, obținând averea acesteia prin licitație tocmai în aceste condiții? De ce nu s-a folosit Cicero de faptul licitației moștenirii victimei (*venditio bonorum*) pentru a dovedi nevinovăția, respectiv lipsa motivației clientului său? Heinze ne oferă o explicație deosebit de plauzibilă la aceste întrebări. Dacă Roscius cel tânăr ar fi încercat să se deculpabilizeze, mai exact să demonstreze lipsa crimei, ar fi slujit astfel chiar intereselor lui Chrysogonus, deoarece ar fi recunoscut justețea licitației moștenirii paterne, iar pe sine s-ar fi lipsit de o bază legală în revendicarea moștenirii. O decizie de achitare bazată pe o astfel de argumentație ar fi fost în beneficiul lui Chrysogonus.[92] Stroch aduce o precizare ipotezei formulate de Heinze în privința unui element, dar prin aceasta, explicația devine și mai solidă. Citând legile lui Sulla privind proscripțiile, Cicero face o distincție între cele două motive ale sechestrului și licitației de bunuri: pe de o parte se vor licita din oficiu bunurile celor care au fost efectiv trecuți sub *prescriptio*, pe de altă parte bunurile celor uciși în confruntări armate cu adepții lui Sulla.[93] Inițial Cicero insinuează că Chrysogonus a reușit să dobândească avuția lui Roscius cel bătrân pentru că acesta făcea parte din prima categorie,[94] iar în acest punct al pledoariei modul de exprimare al oratorului devine oarecum nebulos; ulterior însă – în momentul în care analizează faptul licitației prin prisma juristului – ne demonstrează în mod univoc că Chrysogonus l-a trecut în mod vădit pe cel ucis în categoria cetățenilor, care au fost răpuși în luptele cu adepții lui Sulla.[95] Roscius cel tânăr nu putea deci să se apere nici măcar teoretic recunoscând

91 Stroh (1975): p. 60 și urm.
92 Heinze (1960): p. 99.
93 Cicero: *Pro Roscio Amerino* 126. *Ut aut eorum bona veneant, qui proscripti sunt … aut eorum, qui in adversariorum praesidiis occisi sunt*.
94 Cicero: *Pro Roscio Amerino* 32.
95 Cicero: *Pro Roscio Amerino* 127.

patricidul, dar având în vedere cele impuse de *proscriptio*, s-ar fi referit la faptul că din punct de vedere juridic, acțiunea sa nu poate fi calificată ca fiind delict – dacă nu și-ar fi asumat greutatea patricidului (în cazul de față nefiind sancționabil în mod penal, ci i s-ar reproșa „doar" din punct de vedere moral), îi era suficient să se refere la faptul că tatăl său a fost ucis în decursul luptelor.[96] Procesul s-ar fi finalizat oricum prin achitare, însă moștenirea ar fi rămas în continuare la dispoziția lui Chrysogonus – prin urmare inculpatul ar fi fost nevoit să-și asume rolul care i s-a destinat potrivit scenariului impus prin acuzare. Cicero dorea să modifice tocmai această distribuție!

În rechizitorul său Erucius nu face referire nici la numele lui Chrysogonus, nici la *vendetio bonorum*,[97] începând de aici – potrivit logicii acuzării – apărarea ar avea două posibilități: ori va eluda și ea faptul licitației bunurilor victimei, ori și-ar construi strategia de apărare chiar pe acest aspect, potrivit căruia existența *vendetio bonorum* ar demonstra faptul că Roscius cel bătrân și-a pierdut viața în lupta cu adepții lui Sulla, și nu ar fi fost ucis de fiul său. Dacă apărarea ar urma prima traiectorie, atunci Crhysogonus ar ieși într-o primă fază învingător în această cauză, căci inculpatul ar fi fost judecat pentru patricid, dar în același timp ar deveni evident că libertul lui Sulla este posesorul ilegitim al averii victimei, și oricând se poate aștepta la un proces din partea familiei Roscius, un demers, în care aceștia și-ar formula dreptul asupra acestor bunuri. Dar dacă apărarea ar opta pentru cea de a doua cale, și Roscius cel tânăr ar fi fost achitat potrivit tacticii adoptate de Chrysogonus – încât omorul s-a produs în decursul luptelor –, atunci Chrysogonus ar putea păstra bunurile celui ucis, fiindcă astfel se asigură legalitatea licitației, iar fiul victimei n-ar putea emite pretenții asupra moștenirii paterne.[98] Interesul lui Chrysogonus era deci tocmai achitarea inculpatului în acest fel!

Prin cele expuse se explică, de ce era atât de slab rechizitoriul lui Erucius, de parcă nici nu se străduia cu adevărat să obțină judecarea inculpatului.[99] Potrivit lui Cicero, Erucius și-a întocmit neglijent punctele de acuzare, sperând că nimeni nu ar îndrăzni să vină în apărarea inculpatului, căci astfel își asuma o înfruntare cu Chrysogonus, un personaj plin de influență – deși în rechizitoriu nici nu apare numele lui Chrysogonus. În schimb, dacă presupunem că proprietarii bunurilor celui ucis n-ar fi fost interesați de condamnarea inculpatului – căci pentru planurile lor era mult mai convenabilă versiunea cu Roscius ucis în timpul luptelor, și confiscarea legitimă a averii – devine de înțeles atitudinea reținută a lui Erucius: ar fi fost imprevizibil rezultatul unui rechizitoriu bine construit și de efect, din moment ce în cazul unei apărări mai slabe judecătorii l-ar fi condamnat pe inculpat. Acuzarea se așezase, deci pe poziții de așteptare, dorind să afle direcția spre care apărarea va evolua: dacă vor întra în capcana tacticii care viza salvarea vieții inculpatului, pierzând astfel averea, Chrysogonus și ai săi și-au atins scopul. Dacă acest lucru nu se va întâmpla, atunci într-o etapă ulterioară a procesului vor putea potența presiunea asupra judecătorilor pentru a-i determina să-l condamne pe inculpat. Au oferit un exemplu desăvârșit despre cum poate servi în cea

96 Stroh (1975): p. 61 și urm.
97 Cicero: *Pro Roscio Amerino* 60.
98 Stroh (1975): p. 62 și urm.
99 Cicero: *Pro Roscio Amerino* 59.

mai bună măsură un rechizitoriu slab tocmai interesele acuzării! Acuzarea a recurs și la un alt tertip: Capito îi dă de știre inculpatului ce fel de acuzații (adevărate, ori false) le-ar prezenta judecătorilor în mărturia sa. În general nu se obișnuiește ca adversarul să fie „inițiat" în culisele strategice ale acuzării – exceptând cazul în care scurgerea anumitor informații nu sunt de natură să intimideze. Prin interacțiunea bine armonizată dintre Erucius și Capito, reprezentantul acuzării va eluda anumite informații în fața instanței, martorul acuzării însă va „atenționa" inculpatul, să nu emită speranțe exagerate pe baza rechizitoriului blând.[100]

Cicero ar fi putut alege între cele două căi „oferite" de acuzare, respectiv a treia traiectorie, cea „proprie." Dacă primește colacii de salvare aruncate de adversar, potrivit cărora moartea victimei a fost pricinuită nu de fiul ei, ci se datorează confruntărilor armate, ar fi salvat viața inculpatului, totodată ar fi fost nevoit să-și ia rămas bun pentru totdeauna de la avere. (Un apărător mai puțin talentat poate ar fi urmat această tactică, căci, să nu uităm: pentru cel aflat la marginea înecului chiar și cârligul i se pare ca o funie spre scăpare!). Dacă nu se va referi la licitația menționată de acuzare, persoana asistată și-ar putea păstra averea, în schimb nu-l va scoate de sub învinuirea cu patricidul, viața clientului său fiind în continuare în pericol. (Nu se știa ce alte mărturii acuzatoare ar fi depus Capito și ai săi în decursul procesului? Datorită stării de spirit ar fi făcut probabilă condamnarea pentru patricid – precum recunoaște și Cicero.)[101] Evident – la rândul său și Chrysogonus trebuia să țină cont și de această variantă – Cicero ar putea să demaște și să demonstreze intenția reală a acuzării, potrivit căreia scopul nu e altceva, decât achitarea inculpatului, și astfel acapararea averii sale. Dar în acest caz putea să urmeze următorul raționament: dacă apărarea ar pune la îndoială legalitatea *vendetio bonorum*, pe de o parte l-ar plasa într-o lumină negativă pe Sulla însuși, căci toate acestea s-au produs în numele său,[102] pe de altă parte printre judecători pot fi mulți senatori care și ei au speculat la rândul lor situațiile create de proscripții, deci atacarea *en bloc* a licitațiilor ar fi fost o greșeală tactică gravă. În fine, dacă victima nu și-a pierdut viața în lupte și nu a fost ucisă de fiul ei, s-ar pune întrebarea, pe bună dreptate, cine putea fi atunci ucigașul adevărat. Potrivit principiului *cui prodest,* evident Chrysogonus ar fi cel care ar putea fi bănuit ca instigator, dar ar fi nevoie de o doză considerabilă de îndrăzneală – sau mai degrabă de tupeu –, ca apărarea să caute făptuitorul printre confidenții cei mai apropiați ai lui Sulla, cel care pe deasupra a fost numit proprietar al bunurilor defunctului de către *dictator*.[103]

Cicero alege ca punct de pornire cea de a treia traiectorie, însă nu o parcurge până la sfârșit: pe de o parte clarifică faptul că scopul primordial al acestui proces nu este răzbunarea morții lui Roscius cel bătrân, ci deciderea sorții averii sale, pe de altă parte lasă în penumbră strădania acuzării, ca procedura să se finalizeze prin achitarea lui Roscius cel tânăr. Va întreprinde orice, ca judecătorii să realizeze ce urmărește strategia adversarului, mai mult: va accentua în mod repetat, până la sfârșitul procesului că Chrysogonus dorește condamnarea fiului victimei la pedeapsa

100 Stroh (1975): p. 64.
101 Cicero: *Pro Roscio Amerino* 28.
102 Cicero: *Pro Roscio Amerino* 6. 143.
103 Stroh (1975): p. 65.

capitală pentru a acapara astfel averea. Modul ciceronian de reprezentare este deci cu mult mai patetic decât realitatea: inculpatul luptă pentru viața sa, nu pentru avere, îi imploră pe judecători să nu-l priveze de viață pe sărmanul care a fost lipsit de avuție, și nicidecum să-l reinstaureze în posesia averii pe păgubitul proscripților.[104] Propria sa tactică este de asemenea tăinuită, căci scopul ei este, printre altele, tocmai redobândirea bunurilor inculpatului.[105] În decursul acestui demers tactic, evident va trebui să lanseze un atac împotriva lui Chrysogonus, favoritul lui Sulla, despre care, potrivit cuvintelor sale, se știe că are o influență enormă asupra chestiunilor publice:[106] potrivit afirmației lui Cicero sclavul eliberat a acaparat în mod ilegal averea bărbatului ucis, și a intentat din culise procesul bazat pe învinuiri născocite împotriva fiului victimei pentru a-și păstra averea obținută. Este de o importanță vitală, *in senso stricto*, ca în acest moment oratorul să opereze o disjuncție severă dintre persoana lui Sulla și cea a lui Chrysogonus: potentatul statului nu are știință de procedura libertului, căci dacă ar ști, nu ar permite ca sub protecția numelui său să se comită o asemenea ticăloșie strigătoare la cer![107] Poate că delegația din Ameria să fi fost ajunsă în fața lui Sulla, dar *dictatorul* le-a respins cererea, pentru a-și avantaja confidentul – nu întâmplător apărătorul nu-i citează ca martori pe membri delegației, însă realizează faptul că nici acuzarea nu le poate adresa această întrebare, deoarece astfel l-ar pune pe Sulla sub o lumină proastă: Erucius e nevoit să tolereze cum Cicero îl scoate nevinovat pe Sulla în această cauză, fiindcă dacă-l contrazice, el însuși îl va denigra pe *dictator*.[108]

În acest punct, la contrastarea dintre Sulla și Chrysogonus, vocea lui Cicero sună foarte fals, totodată nu poate exagera în atacurile lansate împotriva lui Chrysogonus: îl poate denigra doar în măsura în care e neapărat necesar din punct de vedere al cazului, deci este nevoit să-l disculpe de sub acuzația de omor, presupunând că va identifica ucigașul potrivit. Aici intră în ecuație Roscius Capito și Roscius Magnus. Persoana lui Capito ar fi ideală pentru identificarea unui ucigaș, prin modul său de viață și datorită moralității sale depravate,[109] respectiv pe baza câștigului obținut, compus din cele trei proprietăți de teren, dobândite din averea victimei. Dar faptul că a fost ales printre membri delegației trimise la Sulla – fiind membru al conducerii consiliului orășenesc din Ameria,[110] aspect care de altfel ar putea face dubitabilă evidența traiului său depravat – par a contrazice această supoziție. În cazul lui Magnus situația este tocmai inversă: stilul său de viață nu poate fi contestat, iar din moartea victimei va profita doar în mod indirect, însă în momentul crimei se află la Roma, iar Chrysogonus îl numește administratorul averii obținute la licitație.[111] Luați în parte nu sunt, deci potriviți în viziunea lui Cicero pentru rolul de ucigaș, în tandem însă formează un cuplu care se

104 Cicero: *Pro Roscio Amerino* 7. 32. 49. 128. 143 și urm.; 150.
105 Heinze (1960): p.102.
106 Cicero: *Pro Roscio Amerino* 6.
107 Cicero: *Pro Roscio Amerino* 6. 21 și urm.; 25. 91. 127. 130.
108 Stroh (1975): p. 66 și urm.
109 Cicero: *Pro Roscio Amerino* 17. 84. 100.
110 Cicero: *Pro Roscio Amerino* 25.
111 Cicero: *Pro Roscio Amerino* 17. 86.

potrivește de minune în prezentarea oratorului, și astfel Cicero va crea din ei perechea Castor–Pollux a cazului, activând într-o unitate de intenție de nezdruncinat.[112]

Oratorul își construiește dispoziția cu o iscusință uluitoare: după obișnuitul *prooemium* ar trebui să urmeze partea de *narratio,* cuprinzând versiunea proprie despre evenimente, succedată de *argumentatio,* cu rolul de a întări cele spuse. Dat fiind că *narratio* în versiunea proprie nu ar oferi o variantă rotundă completă, Cicero va intercala în *prooemium* cel mai important element din *argumentatio* înainte de *narratio*.[113] La începutul discursului îi informează pe judecători printr-o tiradă copleșitoare: asasinatul slujește scopurilor lui Chrysogonus, și nu intereselor inculpatului, procesul nu urmărește altceva, decât ca Chrysogonus să-și poată păstra averea acaparată în mod ilegal. N-a rostit nici un cuvânt de omorul săvârșit, și totuși reușește să răstoarne distribuția rolurilor. Cazul lui Roscius cel tânăr este în sine un rechizitoriu la adresa lui Chrysogonus, iar reprezentantului acuzării îi rămâne în cel mai bun caz doar posibilitatea de a se apăra.[114] Cu greu s-au putut sustrage judecătorii de sub influența acestui efect – puteau avea impresia că Cicero le-a deschis ochii, și începând din acest moment erau predispuși să treacă peste micile inadvertențe ale apărării.[115] Oratorul s-a abținut anume ca în *argumentația* intercalată în *prooemium* să nu facă referire directă la crimă, respectiv să urmărească făptașii, pentru că dacă ar fi procedat astfel, în virtutea *cui prodest* suspiciunea s-ar fi îndreptat de îndată către Chrysogonus – iar Cicero trebuia să se ferească de această situație. Despre modul asasinatului trebuia, deci să se refere în *narratio*.[116] După ce îl descrie amănunțit pe Roscius cel bătrân, și nu scapă ocazia de a accentua faptul că acesta era adeptul ferm al *nobilitas*, și partizanul lui Sulla însuși,[117] îi cheamă pe scenă – pe Capito și Magnus, ca un cuplu de nedisociat, apropiat de Chrysogonus.

În acest moment își prezintă ipoteza referitoare la mobilul și circumstanțele asasinatului. Aici urmează argumentele vizând trecutul celor doi: Cicero îl numește pe Capito gladiator vechi, ceea ce se dovedește o *appositio* destul de dezonorantă, și remarcă faptul că Magnus i s-a alăturat ca discipol. Constatările referitoare la trecutul făptașilor pot fi deduse din însăși crima comisă. Partea de *narratio* urmărește succesiunea evenimentelor – evident prin reliefarea intensificată a momentelor dramatice –, și se abate doar într-un singur punct de la această abordare: potrivit oratorului, Capito și-ar fi primit partea cuvenită din averea victimei încă înainte de a participa la delegație, astfel judecătorilor li se demonstrează că acesta a fost părtaș la grupul infracțional. Partea de *argumentatio*[118] care urmează, e precedată de un *partitio* succint.[119] Potrivit

112 Stroh (1975): p. 68.
113 Cicero: *Pro Roscio Amerino* 6 și urm.
114 Heinze (1960): p. 101; Karl Büchner (1964): *Cicero: Bestand und Wandel seiner geistigen Welt*, Winter, Heidelberg, p. 83.
115 Stroh (1975): p. 69.
116 Cicero: *Pro Roscio Amerino* 15–29.
117 Cicero: *Pro Roscio Amerino* 15.
118 Cicero: *Pro Roscio Amerino* 37–142.
119 Cicero: *Pro Roscio Amerino* 35–36.

regulilor *anticategoricii,*[120] Cicero înșiră mai întâi probe[121] care susțin nevinovăția lui Roscius cel tânăr, ca mai apoi să se avânte la atac împotriva lui Capito și Magnus[122] – scopul în acest moment fiind apărarea vieții clientului său. Urmează o demonstrație care vizează modul abuziv în care Chrysogonus și-a acaparat în chip injust averea[123] – aici oratorul e motivat de recuperarea moștenirii paterne, relatarea lui Cicero despre asasinat cuprinde deja presupoziția ilegalității de la bun început a licitației.[124]

În partea de *argumentatio* care urmărește disculparea lui Roscius cel tânăr, Cicero își începe pledoaria prin enumerarea așa numitei *argumenta vita.*[125] Potrivit lui Cicero reprezentanții acuzării nu pot aduce nici un argument, care ar atenta împotriva modului de trai al lui Roscius cel tânăr. Erucius îl acuză de delapidarea banilor publici (*peculatus*),[126] dar nu aduce probe de fond pentru justificarea afirmației sale. Cicero extrage din context acuzația de *peculatus* – care totuși trimitea spre o anumită aviditate –, și, încadrând-o în categoria celorlalte neadevăruri, o respinge scurt. Relevarea așa-numitei *argumenta e causa*[127] e mult mai incisivă și precisă, decât ar pretinde cele prezentate de Erucius. Oratorul își cucerește simpatia auditoriului prin divagații prelungi și oferă un spațiu larg toposurilor obișnuite (mustrarea de conștiință a acuzatorilor, prețuirea de grad înalt de care se bucură stilul de viață al țăranului în Roma, etc). Construcția așa-numitei *argumenta e facto* e mult mai originală.[128] Acuzarea a susținut că Roscius cel tânăr și-a ucis tatăl în postura de făptaș indirect, apelând la sclavi.[129] Cicero însă nu ia în considerare această afirmație, și va analiza pe rând următoarele posibilități: Roscius însuși i-a curmat viața tatălui său, ori apelând la ajutorul altora – liberți din Roma sau Ameria, respectiv sclavi. Din moment ce sclavii apar doar la finele enumerării, oratorul este de părere că această posibilitate ar fi fost utilizată de clientul său – în măsura în care el ar fi fost făptașul – doar în ultimă instanță. Totodată combate această acuzație cu ușurință, invocând faptul că Roscius cel tânăr a fost cel care a solicitat audierea sclavilor și chiar aplicarea torturii în timpul depoziției, iar Roscius Magnus și Chrysogonus au fost cei care au împiedicat audierea sclavilor. Partea următoare a pledoariei, denumită *argumenta e tempore* pregătește atacul împotriva lui Capito, Magnus și Chrysogonus.[130]

În decursul acestei ofensive Cicero își înșiră argumentele, urmând succesiunea cronologică a evenimentelor.[131] Mai întâi trece în revistă seria ce ține de *argumenta e causa* și *argumenta e vita anteacta,* referitoare la Roscius Magnus, cel care e prezentat

120 Cf. Quintilianus: *Institutio oratoria* 7, 2, 23.
121 Cicero: *Pro Roscio Amerino* 37–82.
122 Cicero: *Pro Roscio Amerino* 83–123.
123 Cicero: *Pro Roscio Amerino* 124–142.
124 Stroh (1975): p. 70 și urm.
125 Cicero: *Pro Roscio Amerino* 37–39.
126 Cicero: *Pro Roscio Amerino* 28. Despre starea de fapt referitoare la *peculatus* vezi Mommsen (1899): p.767.
127 Cicero: *Pro Roscio Amerino* 40–73.
128 Cicero: *Pro Roscio Amerino* 73–81.
129 Cicero: *Pro Roscio Amerino* 79.
130 Cicero: *Pro Roscio Amerino* 80 și urm.
131 Cicero: *Pro Roscio Amerino* 83–123.

de orator drept asasin efectiv.[132] Cadrul oferit de *argumenta e facto* – înglobând *argumenta e loco*,[133] *e tempore*,[134] e *tempore consequenti*[135] – este completat în primul rând de rolul atribuit mesagerului Mallius Glaucia, cel care aduce știrea asasinatului, și de detalierea importanței acestui mesaj care ajunge la Capito.[136] Prin această procedură Cicero îl readuce în prim plan pe celălalt Roscius, pe Capito, complicele crimei, împotriva căruia înșiră deîndată motivarea formulată pe baza *argumenta e causa*[137] și *argumenta e vita*,[138] încheindu-și pledoaria printr-o tiradă îndreptată împotriva celor doi Roscius.[139] Cicero însă nu este consecvent în analiza importanței știrii ajunse la urechea lui Chrysogonus,[140] prin accentuarea cantității profitului va deschide însă oportunitatea de a prezuma motivul crimei.[141] Faptul că a zăbovit prelung asupra rolului delegației trimise la Volaterrae, vizează intensificarea antipatiei față de Capito.[142] În acest punct Cicero revine din nou asupra refuzului posibilității de a audia sclavii,[143] ceea ce, deși susține nevinovăția lui Roscius cel tânăr, oferă în schimb o suprafață neînsemnată de atac împotriva acuzatorilor, din moment ce oratorul e nevoit să afirme că stăpânul actual al sclavilor, Chrysogonus e mai puțin implicat în actul propriu-zis, el i-a ajutat pe Capito și Magnus doar prin puterea sa (*potentia*) să persevereze în mârșăvia lor (*audacia*).[144] Acest ultim „argument" probabil nu putea fi unul convingător pentru judecători, dar având în vedere împrejurările politice primejdioase ale cazului, oratorul a preferat să enunțe că din partea sa încearcă să judece cu „bună-credință" activitatea lui Chrysogonus: și anume, faptul că Chrysogonus e corupt, nu-l face ucigaș.[145]

Partea de *argumentatio* îndreptată împotriva lui Chrysogonus conține nenumărate dificultăți, printre altele și datorită alterării textului,[146] cu toate acestea Cicero trebuia să rezolve o problemă dificilă de echilibristică printre diferitele interese. Într-o primă fază va concentra pe vânzarea ilicită a averii victimei,[147] apoi va accentua în mod repetat faptul că ideea intentării procesului și cel care a pus lucrurile în mișcare, nu este altcineva decât Chrysogonus, motivat doar de păstrarea în acest fel a averii acaparate ilegal.[148] Schițarea fundalului psihologic nu reprezenta o problemă, dificultățile s-au ivit în momentul, și mai ales în legătură cu modul de prezentare a argumentelor;

132 Cicero: *Pro Roscio Amerino* 84–91.
133 Cicero: *Pro Roscio Amerino* 92.
134 Cicero: *Pro Roscio Amerino* 93.
135 Cicero: *Pro Roscio Amerino* 93–98.
136 Cicero: *Pro Roscio Amerino* 92–98.
137 Cicero: *Pro Roscio Amerino* 99.
138 Cicero: *Pro Roscio Amerino* 100.
139 Cicero: *Pro Roscio Amerino* 102–104.
140 Cicero: *Pro Roscio Amerino* 105–107.
141 Cicero: *Pro Roscio Amerino* 108.
142 Cicero: *Pro Roscio Amerino* 109–118.
143 Cicero: *Pro Roscio Amerino* 119 și urm.
144 Cicero: *Pro Roscio Amerino* 122.
145 Stroh (1975): p. 74.
146 Cicero: *Pro Roscio Amerino* 124–142.
147 Cicero: *Pro Roscio Amerino* 124–131.
148 Cicero: *Pro Roscio Amerino* 132 și urm.

Cicero trebuia să evite ca judecătorii proveniți din rândul *nobilitas* să se simtă ofensați: pe de o parte și ei înșiși, erau beneficiarii proscripțiilor, deci oratorul era nevoit să se ferească de contestarea corectitudinii și legitimității confiscărilor de averi și a licitațiilor, căci în acest caz era foarte probabil ca nobilimea să facă front comun împotriva avocatului care ataca procedura de *proscriptio*, precum și în fața clientului său.[149] Astfel Cicero va proceda mai întâi la o disociere tăioasă între faptele lui Chrysogonus și procedura celorlalți beneficiari ai proscripțiilor,[150] după care se avântă într-o argumentare plină de patos, afirmând că în măsura în care judecătorii se vor delimita de matrapazlâcurile unor astfel de parveniți – și aici apelează clar la conștiința de clasă a nobilimii și la invidia umană –, cauza clasei nobiliare va străluci cu atât mai măreț și mai imaculat.[151]

După ce oratorul a măgulit ceea ce însemna *nobilitas* în amorul său propriu, trebuie să convingă judecătorii să accepte două pretenții diametral opuse: pe de o parte că Roscius cel tânăr nu are altă dorință decât să i se cruțe viața, iar pentru aceasta ar fi dispus să-și cedeze în mod benevol averea lui Chrysogonus[152] – pe de altă parte nu putea să omită scopul efectiv, acela de a redobândi moștenirea paternă odată cu obținerea achitării clientului său. Printr-o inspirație genială va disjunge deci pretenția acuzatului și dorința sa proprie (formulată într-o manieră generalizantă): când îi implora pe judecători să-i cruțe viața lui Roscius, vorbește în numele clientului său[153] – iar când revendică restabilirea situației materiale legitime, se va adresa judecătorilor pe propria voce, dar în numele ordinii publice, solicitând siguranța juridică.[154] Astfel menține revendicarea legală, vizând moștenirea paternă, în schimb nu va tempera avântul patetic din *peroratio* prin care imploră pentru milă, referindu-se la legile eterne ale umanității.[155] Iar în timp ce judecătorii urmăresc pătrunși frazele dramatice ale lui Cicero, pot uita lesne de subiectul real al procesului, ceea ce îi interesează de fapt pe părți: de cele șase milioane de *sestertius*.[156]

Cicero considera și el însuși pe bună dreptate, că acest discurs rostit la vârsta de 26 de ani este o capodoperă,[157] din moment ce a rezolvat mai multe sarcini diametral opuse, prin strălucita sa tactică oratorică: și-a clădit propria versiune despre crimă, prin care a demascat, și totodată a lăsat în ceață intențiile adversarului; a renunțat în numele clientului său la moștenirea paternă de mai multe milioane, concomitent cu susținerea pretenției acuzatului de a redobândi averea, făcând referire la apărarea ordinii publice; a construit „ierarhia nelegiuiților", la polul căreia se situau Magnus și Capito, în postura de asasini, în centru cu Chrysogonus, care era „doar" lacom și corupt, iar în comparație cu criminalii, celălalt pol reprezintă un contrast total, figura lui

149 Stroh (1975): p. 75.
150 Cicero: *Pro Roscio Amerino* 124–125.
151 Cicero: *Pro Roscio Amerino* 135–136.
152 Cicero: *Pro Roscio Amerino* 144.
153 Cicero: *Pro Roscio Amerino* 128.
154 Cicero: *Pro Roscio Amerino* 129.
155 Cicero: *Pro Roscio Amerino*143–154.
156 Stroh (1975): p. 76.
157 Cicero: *Brutus* 312.

Sulla, un *dictator* care nu știe de abuzuri și fărădelegi, iar supușii și confidenții săi s-au folosit de numele său cu rea-credință.[158]

Stroh recunoaște virtuțile de conținut ale discursului, dar aduce critici în mai multe rânduri, când evaluează structura acestuia. Obiecțiile sale vizează faptul că *partes orationis* se succed potrivit cerințelor pregătirii oratorice în mod strict, chiar școlăresc, și lasă impresia unui *superstitio praeceptorum*,[159] o insistență aproape superstițioasă în privința respectării celor însușite. Astfel Cicero procedează la o disjuncție prea abruptă între *narratio* și *argumentatio*, respectiv nu dezvoltă până la capăt unele idei (cum ar fi de exemplu trimiterile la dorința de înavuțire a lui Magnus, sau la cele care se refereau la presupusa tentativă de asasinat atribuită lui Roscius), elemente care ar fi putut trezi bănuiala – sau măcar interesul – auditoriului.[160] Aceste chestiuni de amănunt și elemente criticate ar fi fost abordate probabil cu mai multă circumspecție de un Cicero ajuns la maturitate, dar nu trebuie să ignorăm că e vorba de un *oratio* care este de fapt cel de al doilea discurs al unui orator de 26 ani, însă prima încercare serioasă și de succes în domeniul unor cazuri mai grele.

Excesele formale, elementele abuzive ale unui *asianism* baroc, horcăitul patetic împins uneori până la limitele bunului simț au fost îndepărtate prin practică și studii oratorice ulterioare din stilul ciceronian. Cu toate acestea putem observa deja în *Pro Roscio Amerino*, desfășurându-se în toată splendoarea, genialitatea dispoziției oratorice, mânuirea precisă și totuși dinamică a faptelor legale, realizarea magistrală a mixajului argumentației logice și topice, trăsături care ulterior au servit ca temelie pentru ceea ce va deveni așa numita *ars oratoria* ciceroniană.

158 Stroh (1975): p. 77.
159 Quintilianus: *Institutio oratoria* 4, 2, 85.
160 Stroh (1975): p. 78.

Historical Aspects of the Non-translative Effect of Real Estate Contracts in Serbia: From the Serbian Civil Code to Current Legislation

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ABSTRACT
This paper explores the evolution of property rights and land registry systems in Serbia, spanning from the adoption of the Serbian Civil Code in 1844 to the dawn of the 21st century. In its early stages, three distinct systems coexisted: land registers, property deed systems, and property cadastres, with the first two serving as the primary legal records. Following the introduction of the 1844 Serbian Civil Code, which was based on the Austrian model, the land register system was established, though its implementation proved challenging. The onset of the socialist regime in 1946 ushered in a shift towards state ownership of property, with confiscation and nationalization becoming widespread practices that fundamentally altered property rights and registry procedures. However, despite these changes, private ownership persisted, albeit in limited forms. A landmark in this progression came with the 1981 Real Estate Transactions Act, which allowed the sale of privately-owned immovable property, though subject to certain restrictions. After the fall of socialism, efforts to unify and modernize property records reached a significant milestone with the establishment of the Republic Geodetic Institute in 1992. Subsequent legal reforms, including the Real Estate Transactions Act of 2014 and the 2018 Act on the Procedure of Registration in the Cadastre of Immovable Property and Utilities, reinforced the legal frameworks governing property registration and the transfer of ownership, aiming to ensure transparency and legal certainty in property transactions. This historical account delves into the interplay between legal reforms, societal changes, and property rights in Serbia over the past two centuries.
KEYWORDS
Property rights registration, Serbian Civil Code, land registers, socialist regime, nationalization, real estate transactions.

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Aspecte istorice ale efectului non-translativ al contractelor privind proprietatea imobilelor în Serbia: de la Codul Civil sârb la legislația actuală

Rezumat
Acest articol examinează evoluția drepturilor de proprietate și a sistemelor de evidență funciară în Serbia, de la adoptarea Codului Civil sârb în 1844 până la începutul secolului 21. Inițial, au coexistat trei sisteme distincte: registrele funciare, sistemul cărților de proprietate, respectiv cadastrul de proprietate, primele două având rolul principal de registre legale. După adoptarea Codului Civil sârb din 1844, bazat pe modelul austriac, a fost introdus sistemul registrelor funciare, dar implementarea sa a întâmpinat dificultăți. Începutul regimului socialist din 1946 a adus o schimbare către proprietatea de stat, confiscarea și naționalizarea devenind practici răspândite care au schimbat fundamental drepturile de proprietate și procedurile de evidență. Cu toate acestea, proprietatea privată a continuat să existe într-o formă limitată. Legea privind tranzacțiile imobiliare din 1981 a reprezentat un moment crucial, permițând vânzarea proprietăților imobile private, însă cu anumite restricții. După socialism, eforturile de unificare și modernizare a evidenței proprietăților au culminat cu înființarea Institutului Geodezic al Republicii în 1992. Legislația ulterioară, inclusiv Legea privind tranzacțiile imobiliare din 2014 și Legea din 2018 privind procedura de înscriere în cadastru a proprietăților imobile și a utilităților, a consolidat cadrul juridic al înregistrării proprietăților și al transferului dreptului de proprietate, având ca scop claritatea și securitatea juridică a tranzacțiilor imobiliare. Această prezentare istorică analizează relația dintre reformele juridice, evoluțiile sociale și drepturile de proprietate în Serbia în ultimele două secole.
Cuvinte cheie
Înregistrarea drepturilor de proprietate, Codul Civil sârb, registre funciare, regim socialist, naționalizare, tranzacții imobiliare.

I. INTRODUCTION

In classical Roman law, a contract of sale was regarded as a consensual juridical act, meaning that it came into existence when the parties reached an agreement on both the price and the object.[2] From that moment, the parties were bound to fulfil their respective duties: to deliver the goods, and to pay the price.[3] Furthermore, the seller's obligation was to ensure that the object was in peaceful possession rather than to transfer ownership.[4] However, if the object represented a fundamental means of production, the seller was also required to adhere to the *mancipatio* formalities.[5]

In such instances, the mere conclusion of a contract was insufficient to transfer ownership rights on the object involved. This was particularly true when the object of

2 Magdolna Sič: Translativno dejstvo ugovora o kupoprodaji u zapadno rimskom vulgarnom pravu i zadržavanje ovog koncepta u savremenim pravnim sistemima, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 3/2004, pp. 285–311, p. 286.
3 Sič (2004): p. 286.
4 Sič (2004): p. 286.
5 Sič (2004): p. 287.

a contract was immovable property, which was considered a fundamental means of production.[6] In these cases, the transfer of ownership rights required not only the conclusion of a contract but also a public act to effect the conveyance of those rights.[7]

Although transfers of land were rare in those times, when they did occur, they were carried out through a ritual known as *mancipatio.* This process was highly ceremonial, involving the presence of five witnesses and a scale-bearing measurer, thus ensuring both the public nature and the legitimacy of the change in ownership.[8]

Property boundaries were safeguarded through symbolic gestures, and transactions were made public, offering the necessary legal protection at a time when the distinction between ownership and possession had not yet fully developed.[9] In early legal conceptions, possession of property was intrinsically linked to ownership—whoever used, physically occupied and declared the land as their own was considered its rightful owner and could exercise control over it.[10] Due to the absence of established legal conceptions, the mere fact of possession was regarded as sufficient evidence of ownership, obviating the need for written records or a defined legal framework discriminating between various forms of property rights.[11]

As time passed, the notion that the transfer of rights to immovable property should be public and ceremonial took root in Germanic law as well, with courts eventually assuming pivotal roles.[12] This shift arose from the economic and existential significance of land, leading to the establishment of a custom where ownership of immovable property was transferred personally before the court. Both the transferor and the transferee made statements regarding the transfer of ownership,[13] which were recorded in the court and subsequently entered into official books for systematisation.[14] This custom laid the foundation for the formal process of acquiring property and other real rights to immovable property, culminating in the practice of registration in public official books.[15]

Although courts were established in Serbia during the First Serbian Uprising at the beginning of the 19th century, no written civil laws existed at the time.[16] It was not until 1844, with the enactment of the Serbian Civil Code, that provisions regarding the non-translative effect of a contract on the sale of immovable property were introduced.[17] As the Code was drafted based on the Austrian Civil Code of 1811, it incorporated the

6 Sič (2004): p. 288.
7 Sič (2004): p. 288.
8 Magdolna Sič: Katastri, zemljišni registri i isprave o kupoprodaji u Starom Rimu – Elemeneti modernih zemljišnih knjiga, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2/2013, pp. 279–302, p. 280.
9 Sič (2013): pp. 280–281.
10 Sič (2013): pp. 280–281.
11 Sič (2013): p. 281.
12 Radenka Cvetić: Evidencija nepokretnosti, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 1–3/2002, pp. 297–312, p. 299.
13 Cvetić (2002): p. 299.
14 Cvetić (2002): pp. 299–300.
15 Cvetić (2002): p. 300.
16 Dušan Nikolić: Dva veka građanskog prava u obnovljenoj srbiji (1804–2004), *Zbornik radova Pravnog fakulteta u Novom Sadu*, 2/2004, pp. 277–309, p. 281.
17 §292 and §294, Serbian Civil Code 1844.

relevant provisions pertaining to the non-translative effect of a real estate sale contract as well.[18]

As has already been noted, the economic and existential significance of land underscored the necessity for a public and solemn process in transferring property rights. Such records were entrusted to courts or other competent state authorities, thereby imbuing them with legitimacy and authority.[19] Over time, the development and expansion of real estate transactions gave rise to the need for a reliable means of publishing the acquisition of ownership rights to real estate, thereby ensuring legal certainty in these transactions.[20]

Initially, the purpose of registration in the land registers was to provide publicity, making information about the true legal status of immovable property accessible to the widest possible audience. However, influenced by Germanic law, the acquisition of real rights to immovable property became conditional upon registration in official public books.[21] Consequently, the function of most registers on immovable property did not merely reflect the legal status of immovable property; rather, registration itself became a constitutive act for the acquisition, limitation, transfer, or termination of ownership rights to real estate.[22]

Building upon the historical foundations of the non-translative effect of a real estate sales contract in Roman law, this paper explores the historical development of the non-translative effect of contracts concerning the transfer of ownership rights in immoveable property, and the evolution of real estate registration systems. The focus is on their progression from the formalised registration requirements of the 1844 Serbian Civil Code to the current legislation. The paper explores how these systems have adapted to ensure legal certainty and transparency in real estate transactions, emphasising their crucial role in establishing and protecting property rights while facilitating public access to property information within the framework of contemporary legal norms in Serbia.

II. THE ADOPTION OF THE SERBIAN CIVIL CODE

At the time of the enactment of the Serbian Civil Code in 1844, registration in the land registry books, the real estate cadastre, or the deed transfer process was a constitutive action for the acquisition of ownership rights over immovable property based on juridical acts.[23]

18 Sič (2004): p. 288.
19 Miodrag Orlić: Uvođenje i obnavljanje zemljišnih knjiga, *Glasnik Advokatske komore Vojvodine*, 2000, pp. 413–437, p. 428.
20 Cvetić (2002): p. 300.
21 Cvetić (2002): p. 300.
22 Cvetić (2002): p. 300.
23 Cvetić (2002): p. 301.; Orlić (2000): p. 51.; Slavka Zeković, Miodrag Vujošević (2018): Uticaj kontekstualnih faktora na politiku građevinskog zemljišta i urbanog razvoja u Srbiji, in Jean-Claude Bolay, Tamara Maričić, Slavka Zeković (ed.): *Podrška procesu urbanog*, Cooperation and development center (CODEV), Beograd, p. 37.

During this period, three distinct and parallel systems of records existed in Serbia, each serving to document property rights or other pertinent information, concerning immovable property, its owners (or holders), and any encumbrances on immovable property—essentially, the legal status of the land.[24] These systems included the land register system, which focused on recording legal transactions relating to property; the property deed system, which documented ownership and transfers; and the property cadastre (land cadastre), which provided a comprehensive overview of land plots and their legal status.[25]

Among these, the property cadastre did not hold the same legal significance as the other two systems, as it only recorded information on the users (or holders) of particular real estate, rather than the owners.[26]

In contrast, the land register system and the property deed system served as the primary legal registers of rights concerning immovable property, containing information on ownership and any encumbrances, thus detailing the legal status of the land.[27]

The land register system was introduced following the adoption of the Serbian Civil Code of 1844.[28] In recognition of Serbia's autonomy within the Ottoman Empire, Miloš Obrenović commissioned an influential Serbian lawyer and writer, Jovan Hadžić, to draft a civil code.[29] Hadžić, drawing inspiration from the 1811 Austrian Civil Code (*Allgemeines bürgerliches Gesezbuch*—ABGB) created the Serbian Civil Code, which was enacted in 1844.[30]

Austrian legal literature notes that the system of land registry records became formally regulated with the coming into force of the Austrian Civil Code, since it provided the general principles of land registers, forming a normative framework for the development of real estate registers.[31] A key advancement in Austria's 19th-century land registration system was the completion of the first comprehensive land cadastre, known as the Land Tax Cadastre.[32] Though primarily intended to assess land taxes, this cadastre became an indispensable, detailed record of land ownership throughout much of the Austro-Hungarian Monarchy.[33] It laid the foundation for a more formalized and structured approach to land records, aiding in the standardisation of property transactions and land management. The land registry system itself was thoroughly governed by legislation under the General Land Registry Act of 1871.[34]

24 Cvetić (2002): p. 300.
25 Cvetić (2002): p. 300.
26 Zeković, Vujošević (2018): p. 37.
27 Zeković, Vujošević (2018): pp. 37–38.
28 Orlić (2000): p. 435.
29 Emőd Veress (2022): Private Law Codifications in East Central Europe, in Pál Sáry (ed.): *Lectures on East Central European Legal History*, Central European Academic Publishing, Miskolc, p. 176.
30 Attila Dudás: A polgári jog kodifikációjának történeti áttekintése Szerbiában, *Jogtörténeti Szemle*, 1/2013, pp. 9–17, p. 10.
31 Sofija Nikolić: Evidencija nepokretnosti u Austriji, *Glasnik Advokatske komore Vojvodine*, 10/2011, pp. 503–520, p. 504.
32 Nikolić (2011): p. 504.
33 Nikolić (2011): p. 504.
34 Nikolić (2011): p. 505.

The Act codified principles of registration, notably the principle of registration itself and the principle of trust, while also affirming the maintenance of land records.[35] This legislation laid a firm legal foundation for a transparent, reliable, and systematically ordered approach to land registration in the region.

Given that the Serbian Civil Code of 1844 was modelled upon the Austrian Civil Code, it seems to represent the earliest legal source from which the non-translative effect of a real estate contract was concurrently derived. In adherence to the provisions of the Austrian Civil Code,[36] the Serbian Civil Code of 1844 contains the following provision:

> *"[a]s it is determined, the immovable property should be entered in the land books (or land registers) of the district courts, thus with each change of owner, the same immovable property will have to be transferred to the new owner and registered."*[37]

In connection with the cited provision, it is worth noting that distinguished Serbian scholar, Dr. Dragoljub Aranđelović,[38] offered a measured critique of the Code; yet, its role in shaping the foundations of land registration cannot be overlooked.[39]

Notwithstanding the provisions set forth in the Serbian Civil Code, the establishment of a comprehensive land registry system in Serbia remained an aspiration rather than a reality, owing to the absence of the necessary social conditions for fully implementing a general land registry system. However, in the years that followed, real

35 Nikolić (2011): p. 505.

36 In § 380 the ABGB states that: "*[n]o property can be acquired without a title and a legal form of acquisition*." The ABGB can be found on the following website: https://www.jusline.at/gesetz/abgb (accessed on 17.11.2022).

37 § 292, Serbian Civil Code 1844.

38 József Salma: Srpski građanski zakonik (SGZ, 1844) i obligaciono pravo, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 2/2004, pp. 311–335, p. 314.

39 Dr. Aranđelović's critique of the Code primarily focused on the linguistic formulations, which, in his view, were archaic, and out of step with the vernacular language in general use at the time of its adoption. Moreover, he accentuated that the Code is an inadequate, inaccurate translation of the ABGB. A comparison of two provisions (§ 380 ABGB and § 292 Serbian Civil Code) demonstrates that his criticisms were not without merit. First, § 292 is positioned in the fifth chapter of the Code, titled "*About acquiring things by handing over*", whereas § 380 ABGB is titled "*Legal Requirements of Acquisition*." The wording of these provisions indicate that, in the Serbian Civil Code, the transfer of real estate was not effected by transferring ownership rights in the land books (which would be based on an appropriate legal foundation), but rather by the registration of the property itself. Furthermore, § 292, in contrast with the ABGB, makes no reference to the necessary title for the transfer of rights. However, the requirement for a *iustus titulus* can be derived from § 294, which provides that for immovable property to be transferred to another person, the property's owner must personally appear before the court in accordance with the contract or declaration. Although the criticisms levelled by Dr. Aranđelović are not without substance, the author of this article contends that, despite the shortcomings, the Code represents a commendable initiative for the establishment of the non-translative effect of contracts. From its provisions, a legal basis for the non-translative effect of real estate can indeed be derived.

estate—and, more specifically, rights to immovable property, particularly arable land—gained considerable significance in society. Land came to be valued not merely as an object of cultivation but as a stable financial asset, serving as both a secure basis of capital and a means of mortgage security for creditors.[40]

The transition to modern property law in Europe during the 19th century was profoundly shaped by the interests of the burgeoning bourgeoisie. Driven by its economic imperatives, this rising class sought legal regulations that would guarantee the security of real estate ownership while facilitating the transfer of real estate and associated rights.[41] These demands arose from the necessity of enabling capital accumulation, ensuring consistency in real estate transactions, and fostering broader economic activities, including trade, investment, and agriculture.

In response to these shifting social and economic dynamics, most European nations, including the Austro-Hungarian Monarchy, undertook substantial legal and administrative reforms. Among the most important advancements of this period was the systematic execution of land surveys in the last century, culminating in the establishment of land cadastres and land registries as the basic records of real estate.[42] These systems were designed to serve as the foundation for documenting property ownership, boundaries, and recording associated rights in a clear and reliable manner.

As one of Europe's preeminent political powers at the time, the Austro-Hungarian Monarchy spearheaded these reforms. In its various territories—including regions that today lie within the borders of Serbia—it commenced the implementation of land registers and cadastres.[43]

This development proved instrumental in transforming traditional patterns of landholding in regions under Austro-Hungarian rule, such as parts of modern Serbia. Beyond safeguarding private property rights, these registries functioned as mechanisms of governance, affording the state greater control over land use, taxation, and resource allocation. Prior to these reforms, property ownership in these communities was frequently determined by customary practices, oral agreements, and local customs. These informal arrangements were gradually supplanted by standardised, written records, which introduced greater legal certainty and transparency. The process reached a decisive turning point with the adoption of the first legal acts on the subject, the Land Cadastre Act, promulgated on 10 January 1929, followed by the Land Register Act in 1930.[44]

These statutes adhered to the model set forth by the Serbian Civil Code concerning the non-translative effect of real estate contracts. However, in this regard, the latter act appears of particular significance, because it contains provisions for the transfer of real rights. It explicitly provides that "*book rights*" may be acquired, transferred, restricted, or revoked solely through registration in the land registry.[45] The wording of

40 Vladimir Lukić, Mustafa Begić, Jasmin Imamović (1991): *Teorijski i praktični komentar Zakona o premjeru i katastru nekretnina*, Struka, Sarajevo, p. 4.
41 Lukić, Begić, Imamović (1991): p. 4.
42 Lukić, Begić, Imamović (1991): p. 4.
43 Lukić, Begić, Imamović (1991): p. 4.
44 Zeković, Vujošević (2018): p. 38.
45 §4 in connection with §8 and §9 of Land Register Act, 1930 of the Kingdom of Yugoslavia.

this provision strongly suggests the establishment of a direct correlation between the acquisition and registration of ownership rights.

In the southern regions of Serbia, land registers were never introduced, even following the adoption of the aforementioned land register acts in the Kingdom of Yugoslavia. Instead, the deed system persisted as a remnant of Ottoman rule.[46]

As previously observed, the system of publicity was incorporated into Serbian law from the Austrian legal tradition. Prior to the adoption of the Civil Code, the transfer of immovable property in Serbia took place before the courts, meaning that for such a transfer to be legally effected, the contract had to be confirmed by the court.[47] However, with the entry into force of the Civil Code of 1844, full publicity was introduced, envisaging the establishment of heritage books. Since these books were not immediately implemented, a legislative decision, dated 13 July 1850, was appended to § 292 of the Civil Code of 1844.[48] This decision stipulated that, until the introduction of the heritage books, the judicial transfer of property deeds should serve as a substitute for the formal registration of the transfer of ownership rights.[49]

Although this measure was intended as a temporary solution until the introduction of heritage books, as prescribed by the Civil Code, the anticipated system was ultimately never realised.[50] Following the First World War and the formation of the Kingdom of Serbs, Croats, and Slovenes (which adopted the name Yugoslavia in 1929), no comprehensive reform of real estate law was undertaken on the territory of present-day Serbia. Given that no unified system replaced these inherited laws during the interwar period, and considering the limitations of the article's scope, this era will not be examined in detail. The discussion will therefore proceed directly to the post-Second World War period, marked by the establishment of the totalitarian regime and the significant transformations it introduced to property rights and legal structures.

III. CHANGES BROUGHT ABOUT BY THE SOCIALIST REGIME

The socialist system and social structures in Yugoslavia were founded upon the concept of social ownership of the means of production and other instruments of collective labour and self-management, which reflected the ideological and socioeconomic climate of the era.[51]

As a distinct form of property right, social ownership encompassed all the attributes traditionally associated with property—*ius utendi, freundi, et abutendi*—*yet* the social representatives were not vested with the unrestricted authority to dispose of all these rights in the manner of private property owners. Rather, their powers were circumscribed by legal provisions, permitting them to exercise ownership only within

46 Zeković, Vujošević (2018): p. 38.; Cvetić (2002): p. 301.
47 Lazar Marković (1912): *Građansko pravo prva knjiga*, Banka "Slavija", Beograd, p. 353.
48 Marković (1912): p. 353.
49 Marković (1912): p. 353.
50 Marković (1912): p. 354
51 Zeković, Vujošević (2018): p. 38.

the limits prescribed by law and under conditions set forth by legislation.[52] Ownership was not vested in identifiable individuals or corporate entities but was instead conceived as a dispersed right collectively shared by society.

The first legal foundations for the acquisition of social property were established as early as January 1942 in the regulations known as the "Fočan Regulations." These provisions authorised the confiscation of property belonging to enemies of the people, transferring such assets to the National Liberation Fund.[53]

During and after the Second World War, with the emergence of the new administrative-socialist system of the Federal People's Republic of Yugoslavia[54], the legal continuity of the Kingdom of Yugoslavia was effectively severed, bringing about the dismantling of the previous order, including land registry laws of the 1930s.[55]

In particular, the enactment of *Act on Invalidity of Legal Regulations enacted before 6 April 1941 and during the Enemy Occupation* in 1946, formally disrupted the continuity of the Kingdom of Yugoslavia's legal system, rendering the aforementioned land registry laws obsolete. Nevertheless, under the provisions of the Invalidity Act, the legal rules enshrined in the land registry regulations of 1930 continued to apply until such time as land registers were replaced by real estate cadastres.[56]

As the Communist Party of Yugoslavia extended its control over larger territories during and after the Second World War, it began implementing legal measures that profoundly reshaped property ownership.[57] Specifically, the authorities introduced regulations facilitating confiscation of property belonging to individuals deemed to have been associated with the occupying forces and their collaborators.[58] This marked a deliberate effort to restructure property relations in alignment with the new political regime and its ideologies, reflecting the broader social and economic transformations occurring under the dictatorial regime.

One of the most consequential legislative enactments of this period was the Act on Property Confiscation and Execution of Confiscation, adopted in 1945.[59] The Act defined confiscation as the compulsory and uncompensated seizure of property by the

52 Milorad Kukoljac, Tomislav Ralčić (1969): *Priručnik sudske prakse, pozitivnih propisa i pravnih instituta iz oblasti građanskog prava : sa objašnjenjima, pravnim pravilima, obrascima i registrom pojmova*, Savremena administracija, Beograd, pp. 75–76.

53 Kukolac, Ralčić (1969): p. 76.

54 Hereinafter referred to as: FPRY.

55 Zeković, Vujošević (2018): p. 38.

56 Art. 4, Zakon o nevažnosti pravnih propisa donetih pre 6. aprila 1941. godine i za vreme neprijateljske okupacije (Act on Invalidity of Legal Regulations enacted before 6 April 1941 and during the Enemy Occupation), Službeni list FNRJ, br. 86 od 25. oktobra 1946, 105 od 27. decembra 1946, 96 od 12. novembra 1947 – obavezno tumačenje (Official Gazette of the FPRY, No. 86 of October 25, 1946, No. 105 of December 27, 1946, No. 96 of November 12, 1947 – mandatory interpretation), hereinafter referred to as: Act on Invalidity.

57 Marijan Maticka: Zakonski propisi o vlasničkim odnosima u Jugoslaviji (1944–1948), *Radovi Zavoda za hrvatsku povijest Filozofskoga fakulteta Sveučilišta u Zagrebu*, 1/1992, pp. 123–148, p. 124.

58 Maticka (1992): p. 124.

59 Maticka (1992): p. 132.

State, either in its entirety (complete confiscation) or in part (partial confiscation).[60] In practice, confiscation functioned as an ancillary punishment for crimes prescribed by law, serving as a mechanism through which the government, via orchestrated judicial proceedings, condemned the owners of substantial capital as enemies of the people. Those targeted faced long-term deprivation of liberty, coupled with the confiscation of all their property.[61] Through these measures, several pieces of property were converted into social ownership.

The judicial practice of the time further reinforced this transformation. In a landmark ruling, the Supreme Court of Yugoslavia held that, when a criminal judgment imposed the penalty of complete confiscation, the property of the convicted person became social property. The ruling further clarified that such property, regardless of whether it had been explicitly listed in the confiscation order, could not form part of an inheritance, nor could it be claimed as the legacy of the convicted individual.[62]

In 1947, the Decree on the Registration of Ownership Rights on State-owned Real Estate was adopted, introducing a significant deviation from the formal principles governing the non-translative effect of real-estate contracts. This decree disrupted the continuity of the legal framework that had been established by the Serbian Civil Code, as it allowed for the acquisition of social property even in the absence of its registration in the land register—thus permitting *ex lege* ownership.[63] The eminent Serbian jurist Andrija Gams scrutinised these provisions, noting that, in cases where the State acquired social property through a juridical act, the certification of such a contract was not required. Instead, the sole condition was that the contract be in writing, thereby negating the obligation to register ownership rights in the land registers.[64]

This interpretation was reinforced by judicial practice, as exemplified in a ruling by the Supreme Court of the People's Republic of Serbia. In its reasoning behind decision No. Gž.2636/59, the Court stipulated that, for a written contract of sale to be recognised under Article 9 of the Transfer of Land and Buildings Act, it had to be drawn up in writing in the form of a contract, with the seller and buyer explicitly identified, the purchase price clearly specified, and the signatures of the contracting parties affixed.[65]

60 Art. 1, Zakon o konfiskaciji imovine i o izvršenju konfiskacije (Act on Property Confiscation and Execution of Confiscation), Sl. list DFJ, br. 40/45, 56/45 – autentično tumačenje i 70/45 (Official Gazette of the DFY, No. 40/45, 56/45 – authentic interpretation and 70/45).

61 Goran Marinković: Stvaranje državne i društvene svojine na području Srbije i bivše Jugoslavije, *Zbornik radova Građevinskog fakulteta*, 2012, pp. 135–147, p. 141.

62 Supreme Court of Yugoslavia, Rev-1459/63.

63 Marinković (2012): p. 142. Art. 6 Uredba o upisu prava vlasništva na državnoj nepokretnoj imovini (Decree on the Registration of Ownership Rights on State-owned Real Estate), Službeni list FNRJ br. 58/1947 (Official Gazette of the FNRY No. 58/1947).

64 Andrija Gams (1952): *Stvarno parvo*, Nolit, Beograd. *apud* Enes Bikić, Alaudin Brkić: Materijalne i procesnopravne posljedice nedostataka forme ugovora u pravnom prometu nekretnina, *Anali Pravnog fakulteta Univerziteta u Zenici*, 5/2010, pp. 129–159, p. 131.

65 Bikić, Brkić (2010): p. 131.

In 1950 and 1951, the Federal People's Republic of Yugoslavia (FNRY) embarked on the development of an autonomous socialist and self-governing system, underpinned by numerous reforms. At the core of this transformation lay the concept of social property, which was elevated to the status of a fundamental economic and legal principle.[66]

It was during this period that large-scale nationalisation took place, leading to the transfer of private enterprises, hospitality establishments, major warehouses, the land and buildings of foreign nationals into state ownership or social property.[67] Additionally, by 1958, nationalisation expanded further to include rented residential and commercial buildings, as well as construction land situated within the narrower construction areas of cities and urban settlements.[68]

That same year, the FNRY passed the Act on Nationalisation of Rental Buildings and Construction Land in the country,[69] which nationalised all construction land in cities and urban settlements. Construction land was transferred to the State; thus, the State assumed full control.

However, according to the provisions of the aforementioned Act, citizens were still allowed to acquire and own in the territory of Yugoslavia, family residential buildings, a maximum of two apartments as separate parts of the building, two family residential buildings with a maximum of two apartments and a third smaller apartment, or one family residential building, and one apartment as a separate part of the building.[70] Nevertheless, the Act also prescribed a limitation to the aforementioned provisions. Should any citizen, civil legal entity, social organisation, or other association of citizens possess or acquire more buildings and special parts of buildings than permitted under the law, any surplus real estate would automatically be converted into social property by operation of law.[71]

The provisions of the aforementioned regulation signified a partial disruption of legal continuity regarding the non-translative effect of real estate contracts, since they expressly stated that immovable property undergoing nationalisation became social property *ex lege*.[72] In essence, the process of nationalisation of immovable property was confined to property which extended beyond the quantity allowed by law.

Furthermore, the law affirmed that buildings, specific parts of buildings, and land not subject to nationalisation remained in free circulation and could be inherited.[73] Thus, one can observe a partial termination of legal continuity regarding the

66 Zeković, Vujošević (2016): p. 42.
67 Kukolac, Ralčić (1969): p. 81.; Selver Keleštura: Oblici oduzimanja imovine građana i reprivatizacija (privatizacija) u Bosni i Hercegovini, *Geodetski glasnik*, 31/1996, pp. 5–20, p. 8.
68 Kukolac, Ralčić (1969): p. 81.; Keleštura (1996): p. 8.
69 Zakon o nacionalizaciji najamnih zgrada i građevinskog zemljišta (Act on Nationalisation of Rental Buildings and Construction Land in FNRY), Službeni list FNRJ, br. 52/1958 (Official Gazette of the FPRY, No. 52/1958), hereinafter referred to as Act on Nationalisation 1958.
70 Art. 2 of Act on Nationalisation 1958.
71 Art. 4 of Act on Nationalisation 1958.
72 Art. 12 of Act on Nationalisation 1958.
73 Art. 6 of Act on Nationalisation 1958.

non-translative effect of real estate contracts, because the provisions of the Act imply that immovable property unaffected by nationalisation could continue to represent an object in real estate transactions. This suggests that, regarding these properties, the process of transferring ownership remained unchanged.

Further restrictions were imposed with the enactment of the Act on the Transfer of Land and Buildings of 1965.[74] This Act prohibited the alienation of agricultural and construction land, as well as buildings held under social ownership.[75] However, much like the earlier regulation, it permitted the free transfer of privately owned property between individuals and civil legal entities, provided such property had not been incorporated into the nationalisation process.[76]

Under the Act, users of agricultural land in social ownership had the right to use it, but did not have ownership rights, whereas buildings in social ownership could be objects of ownership transfer.[77] Users were entitled to transfer their right of use over immovable property in social ownership to other users, either with or without compensation, in accordance with the conditions determined by law and the normative act of the self-governing body. Such transfers were formalised through a written contract between the existing user of real estate in social ownership and a new user to whom the right of use was transferred.[78] Therefore, in the case of transfer of real estate in social ownership between users, ownership was not transferred, since the users of land were not vested with ownership rights.

The Act on Land Transfer of 1965 also prescribes the legal form of real estate transaction contracts, stating that such legal transactions must be concluded in writing; failure to adhere to this requirement rendered the transaction legally void.[79] By mandating a written form, this Act also established form as an essential element of *iustus titulus*. Notably, however, the Act contained no explicit provision regarding *modus acquirendi*. However, its necessity for acquiring ownership rights over immovable property can be deduced from the text of the provision, which refers to the obligations of the court when registering the transfer of ownership rights. An analysis of the provision of Article 47 suggests that the *modus acquirendi* of the transfer of ownership rights on immovable property was the "land registry" transfer, conducted under the jurisdiction of the competent court.

In the period following the adoption of the Act on the Transfer of Land and Buildings of 1965, the Yugoslav federation experienced a gradual decline in institutional cohesion, resulting in shifts in the distribution of competencies between the federal government and the individual republics.

74 Zakona o prometu zemljišta i zgradama (Act on the Transfer of Land and Buildings), Službeni list FNRJ br. 26/1954, 19/1955, 48/1958, 52/1958, 30/1962, 53/1962, Službeni list SFRJ br. 15/1965, 57/1965, (Official Gazette of the FNRY, No. 26/19, 19/1955, 48/1958, 52/1958, 30/1962, 53/1962, Official Gazette of the SFRY No. 15/1965, 57/1965), hereinafter referred to as: Act on Land Transfer 1965.

75 Zeković, Vujošević (2016): p. 43.

76 Art. 5 of Act on Land Transfer 1965.

77 Art. 1 of Act on Land Transfer 1965.

78 Kukolac, Ralčić (1969): p. 103.

79 Art. 9 of Act on Land Transfer 1965.

With the passing of the Act on Expropriation in 1968,[80] expropriation emerged as a legal mechanism for the acquisition of social property with respect to immovable property, carried out in the public interest and accompanied by fair compensation. Two distinct forms of expropriation can be distinguished: the first involved the transfer of immovable property into social ownership, while the second, an incomplete form of expropriation, established only a temporary occupation of privately owned immovable property for the purpose of constructing a facility. This latter form was executed in the guise of either a lease or an easement.[81]

Although the process of nationalisation of property proceeded under the provisions of this Act, it nevertheless allowed the citizens of Yugoslavia to acquire and retain ownership of family residential buildings. Specifically, individuals were allowed to own either a building with two apartments or three smaller apartments, or a maximum of two apartments as separate parts of the building, or two-family residential buildings with a maximum of two apartments and a third smaller apartment, or alternatively, one family residential building and one apartment as a separate part of the building.[82]

As a consequence of these legislative changes, laws concerning surveying and land cadastres were adopted at the republican level in 1967, 1971, and 1976.[83]

IV. EARLY SIGNS OF DEPARTURE FROM THE SOCIALIST SYSTEM

The gradual shift away from the socialist system gained momentum with the adoption of the Real Estate Transactions Act in 1981, which allowed the conveyance of ownership rights over immovable property.[84] However, this newfound freedom remained subject to significant restrictions. The transfer of ownership of immovable property in social ownership was authorised solely between social legal entities. Exceptions to this rule applied to agricultural and construction land, the alienation of which from social ownership remained strictly prohibited. In contrast, family residential buildings, even if classified social property, could be alienated freely.[85]

In comparison with the Act on Land Transfer of 1965, the Real Estate Transactions Act of 1981 introduced more stringent regulations regarding the form of real estate transaction contracts. To be deemed valid, such contracts not only had to be in written form but also required the signatures of the contracting parties to be formally

80 Zakon o eksproprijaciji (Act on Expropriation), Sl. list FNRJ, br. 12/57 i 53/62 i Sl. list SFRJ, br. 13/65, 5/68, 7/68 – ispr. i 11/68 – prečišćen tekst (Official Gazette of the FPRY, No. 12/57 and 53/62 and Official Gazette of the SFRY, No. 13/65, 5/68, 7/68 – correction and 11/68 – consolidated text), hereinafter referred to as: Act on Expropriation of 1968.

81 Kukolac, Ralčić (1969): p. 86.

82 Art. 2 of the Act on Expropriation of 1968.

83 Zeković, Vujošević (2018): p. 43.

84 Art. 3, Zakon o prometu nepokretnosti (Real Estate Transactions Act), Sl. glasnik SRS, br. 43/81 (Official Gazette of the Socialist Republic of Serbia, No. 43/81), hereinafter referred to as: Real Estate Transactions Act, 1981.

85 Art. 10 and 14 of Real Estate Transactions Act 1981.

accredited by the court.[86] Much like its predecessor, the Real Estate Transactions Act 1981 lacked provisions regarding *modus acquirendi*. However, by that time, the matter had already been addressed in the relatively new Act on Basic Ownership Relations of 1980, which provided that the acquisition of ownership rights over immovable property through juridical acts was contingent upon registration in "public registers."[87]

The Act, however, did not specify which public registers were to be used for such entries. In the absence of other relevant public records at that time, land registers became the default option until the republics and provinces designated specific public registers and established procedures for their maintenance.[88]

The Act was amended in 1987 by the Act on Amendments to the Real Estate Transactions Act, which introduced restrictions on the free alienation of property rights. These restrictions were framed within the context of national equality and other constitutionally established freedoms and rights of citizens. The amendment granted the municipal assembly the authority to temporarily prohibit property transfers, both between citizens and between citizens and civil legal entities, within the territory of the municipality or any of its parts. This prohibition applied when real estate transactions were conducted under conditions of coercion, which endangered national equality or other constitutionally established freedoms and rights. Such measures were specifically aimed at the emigration of members of a certain nation, that is, nationality.[89]

Furthermore, in 1990, the Constitutional Court of Yugoslavia declared the relevant provisions of the Act on Amendments to the Real Estate Transactions Act of 1987 unconstitutional.[90] Subsequently, the Act on Conditions of 1991[91] was adopted, which provided that the land seized and confiscated due to unfulfilled obligations arising from the mandatory purchase of agricultural products, in accordance with the regulations on such purchases, shall be returned to the ownership of the former owner, or their legal successor.[92]

86 Art. 4 of Real Estate Transactions Act 1981.

87 Art. 33 Zakon o osnovnim svojinsko-pravnim odnosima (Act on Basic Ownership Relations, Official Gazette of the SFRY No. 6/1980, 36/1990, Official Gazette of the SRY No. 29/96 and Official Gazette of the Republic of Serbia No. 115/2005 – other statute), hereinafter referred to as Act on Basic Ownership Relations 1980.

88 Tomislav Stevanović: Jedinstvena evidencija nepokretnosti, *Naša zakonitost,* 10–11/1984. *apud* Radenka Cvetić: Domašaj načela upisa i načela pouzdanja u Katastar nepokretnosti u našoj sudskoj praksi, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 3/2015, pp. 1017–1036, p. 1021.

89 Zakon o izmenama i dopunama Zakona o prometu nepokretnosti (Act on Amendments to the Real Estate Transactions Act), Sl. glasnik SRS, br. 28/87 (Official Gazette of the SRS No. 28/87).

90 Decision No. IU-12/I-88, IU-101/1-89 and IU/101/2-89 of the Constitutional Court of Yugoslavia, 27 june 1990.

91 Zakon o načinu i uslovima priznavanja prava i vraćanju zemljišta koje je prešlo u društvenu svojinu po osnovu poljoprivrednog zemljišnog fonda i konfiskacijom zbog neizvršenih obaveza iz obaveznog otkupa poljoprivrednih proizvoda (Act on the Method and Conditions for Recognizing Rights and Returning Land that Transferred into Social Ownership based on the Agricultural Land Fund and Confiscation due to Unfulfilled Obligations from the Mandatory Purchase of Agricultural Products), Sl. glasnik RS, br. 18/91, 20/92 i 42/98 (Official Gazette of the Republic of Serbia, No. 18/91, 20/92 and 42/98), hereinafter referred to as Act on Conditions of 1991.

92 Art. 1 of Act on Conditions of 1991.

V. BEFORE THE AMENDMENT OF THE REAL ESTATE TRANSACTIONS ACT IN 2015 AND CURRENT LEGISLATION

In Serbia, the concept of a unified real estate register was conceived and implemented, involving the cadastral register assuming the role previously held by the land registers.[93] As noted earlier, Serbia had long sought to establish a comprehensive real estate cadastre to replace the land registers and the deed system. However, this objective proved difficult to realise because of certain difficulties. For one, there was no uniformity in the legal records concerning immovable property.[94] Therefore, land registers, while reliable, could not attain the same significance in Serbia as they had in more developed countries.[95] In addition, in areas where they were introduced, the land registers were either poorly maintained or, in some cases, destroyed during the Second World War.[96] Most crucially, there were instances where the data recorded in the land registers did not match the data in the land cadastre, with both of these records differing from the actual condition of the real estate.[97]

The most significant step towards establishing a general database on real estate was taken in 1992, with the establishment of the Republic Geodetic Institute under the State Survey and Cadastre and Registration of Real Estate Rights Act.[98] The Institute was set up as a special State organisation tasked with conducting expert geodetic surveys and administrative duties in the fields of State surveys, land cadastres, and real estate cadastres.[99] The Act effectively reinstated the situation that existed prior to the socialist regime: it provided that rights to immovable property are acquired, transferred, limited, and terminated through registration in the real estate cadastre, with such registration being based on a document eligible for registration according to the provisions of the law.[100]

In 1998, a new Real Estate Transactions Act was introduced,[101] marking a departure from its predecessor, particularly in regard to the form of the contract. Under this Act, the contract for the conveyance of ownership rights on real estate was required to

93 Redenka Cvetić: Nova pravila u postupku upisa u katastar nepokretnosti. Upis zajedničke svojine supružnika, *Zbornik radova Pravnog fakulteta u Novom Sadu*, 4/2019, pp. 1167–1186, p. 1168.
94 Cvetić (2002): p. 301.
95 Cvetić (2002): p. 302.
96 Cvetić (2002): p. 302.
97 Cvetić (2002): p. 302.
98 Zakon o državnom premeru i katastru i upisima prava na nepokretnostima (State Survey and Cadastre and Registration of Real Estate Rights Act), Sl. glasnik RS, br. 83/92, 53/93, 67/93, 48/94, 12/96, 15/96 – ispr., 34/2001 – dr. zakon i 25/2002 (Official Gazette of the Republic of Serbia, No. 83/92, 53/93, 67/93, 48/94, 12/96, 15/96 – correction, 34/2001 – other law, and 25/2002), hereinafter referred to as Cadastre Act 1992.
99 Art. 11 of of the Cadastre Act 1992.
100 Art. 5 in connection with art. 58g and art. 58d of the Cadastre Act 1992.
101 Zakon o prometu nepokretnosti (Real Estate Transactions Act), Službeni glasnik RS, br. 42/1998 (Official Gazette of the Republic of Serbia), hereinafter referred to as Real Estate Transactions Act 1998.

be concluded in writing, with the signatures of the contracting parties certified by the court.[102]

During this period, no *lex specialis* governing the procedure for registration in the cadastre of immovable property and utilities seem to exist. However, this did not impact the rules on the non-translative effect of a real estate purchase contract, as the Cadastre Act of 1992 was still in application.

However, with the adoption of the State Survey and Cadastre Act in 2009, the earlier Act of 1992 ceased to be effective.[103] The new Cadastre Act, while concise, provided minimal guidance regarding the *modus acquirendi*.

Nonetheless, the Act on Basic Ownership Relations of 1980 continued to hold sway, offering the fundamental legal framework for property rights in Serbia. This Act provided that ownership rights on immovable property were acquired by virtue of a juridical act. However, these rights were only effectively transferred upon registration in the public register or in another manner which was under the law directly identified as appropriate by registration in the public register or in another appropriate manner determined by law.[104] Although this provision was in line with the general principles of property law, it continued to be an important feature of the Serbian legal landscape, persisting until subsequent reforms and new legislation, such as the Real Estate Transactions Act of 2014, progressively introduced more sophisticated methods of property registration and legal formalities.

The current legal framework governing the non-translative effects of real estate contracts in Serbia was solidified with the adoption of the Real Estate Transactions Act in 2014,[105] which simultaneously rendered the Real Estate Transactions Act of 1998 obsolete. The primary distinction introduced by the 2014 Act lies in its reform of the *iustus titulus*, or valid title, required for the transfer of property. Under the new law, contracts for the conveyance of ownership rights on immoveable property must now be executed in the form of a notarised document. Failure to comply with this prescribed form renders the contract legally ineffective. Thus, the current legal framework, which brings changes to the form of the *iustus titulus*, provides that the contract on the transfer of real estate is concluded in the form of a notarised (solemnised) document; otherwise, a juridical act not executed in the prescribed manner is devoid of legal effect.[106]

Further developments took place in 2018 with the enactment of the Act on the Procedure of Registration in the Cadastre of Immovable Property and Utilities. This new

102 Art. 4, Real Estate Transactions Act 1998.

103 Art. 199 Zakon o državnom premeru i katastru (State Survey and Cadastre Act), Sl. glasnik RS, br. 72/2009, 18/2010, 65/2013, 15/2015 – odluka US, 96/2015, 47/2017 – autentično tumačenje, 113/2017 – dr. zakon, 27/2018 – dr. zakon, 41/2018 – dr. zakon, 9/2020 – dr. zakon i 92/2023 (Official Gazette of the Republic of Serbia, No. 72/2009, 18/2010, 65/2013, 15/2015 – Constitutional Court decision, 96/2015, 47/2017 – authentic interpretation, 113/2017 – other law, 27/2018 – other law, 41/2018 – other law, 9/2020 – other law, and 92/2023).

104 Art. 33 Act on Basic Ownership Relations 1980.

105 Zakon o prometu nepokretnosti (Real Estate Transactions Act), Sl. glasnik RS, br. 93/2014, 121/2014 i 6/2015 (Official Gazette of the Republic of Serbia, No. 93/2014, 121/2014, and 6/2015), hereinafter referred to as Real Estate Transactions Act 2014.

106 Art. 4 of the Real Estate Transactions Act 2014.

legislation partially repealed certain provisions of the 2009 State Survey and Cadastre Act, introducing vital updates and refinements to the legal process of property registration. Among its key provisions, the Act reinforced the notion that the right of ownership and other real rights concerning immovable property can only be acquired, transferred, limited, or terminated through registration in the cadastre.[107] This underscores the importance of official property records in ensuring legal certainty and transparency of real estate transactions, with the process of registration now recognised as an essential step in conveying property rights.

VI. CONCLUDING REMARKS

The evolution of the non-translative effect of real estate contracts, in parallel with the development of the Serbian real estate registration systems, traces a significant journey from the time of the First Serbian Uprising to the present day, underscoring the crucial importance of due process. Early property transfers, conducted through highly ceremonious means such as *mancipatio*, highlighted the respect for land not only as an economic asset but also in existential significance. These informal agreements eventually gave way to more formalized ownership rights conveyance, especially with the influence of Germanic law, which placed great emphasis on the formality of public transfers of property rights for the sake of publicity and legal certainty.

A major milestone in the establishment of property rights in Serbia came with the Serbian Civil Code of 1844, which marked a significant step forward. Drawing on the Austrian model, it laid the foundation for the creation of land records and emphasized the non-translative character of real estate contracts. Although developing an integrated system of land registers posed considerable challenges in its early stages, the rise of the bourgeoisie class and the increasing economic value of land spurred the development of more sophisticated legal frameworks.

The socialist regime in Yugoslavia, with its introduction of the concept of social ownership, radically transformed property relations. The nature of property rights shifted as a series of legislative instruments were enacted, incorporating socialist ideologies into the legal landscape, often at the expense of private ownership. Property rights were deliberately restructured, with nationalization and confiscation becoming tools for consolidating state control over land and other assets.

The post-socialist transition in Serbia witnessed efforts to re-align the country's property system with broader market-oriented principles. The Real Estate Transactions Act of 1981 marked the beginning of this transformation, enabling the transfer of ownership rights in immovable property, albeit with considerable restrictions. These were further defined in the Act on Basic Ownership Relations and the State Survey and Cadastre Act. Such reforms restored, at least in part, a degree of legal certainty and

107 Art. 6 Zakon o postupku upisa u katastar nepokretnosti i katastar infrastrukture (Act on the Procedure of Registration in the Cadastre of Immovable Property and Utilities), Sl. glasnik RS, br. 41/2018, 95/2018, 31/2019, 15/2020 i 92/2023 (Official Gazette of the Republic of Serbia, No. 41/2018, 95/2018, 31/2019, 15/2020, and 92/2023).

transparency to real estate transactions, lifting much of the ambiguity and impediments created by earlier socialist legislation.

Historically, the establishment of a unified real estate register represented one of the most significant advancements in modernizing the Serbian property system. In 1992, the creation of the Republic Geodetic Institute was a key step towards consolidating property records and ensuring the accuracy and reliability of cadastral data. The Real Estate Transactions Act of 2014, along with the Act on the Procedure of Registration in the Cadastre of Immovable Property and Utilities, further simplified the process of property registration, underscoring the importance of notarised documents and formal registration for changes in ownership rights.

In this connection, the historical trajectory of real estate registration systems in Serbia reflects a dynamic interaction between legal norms, socio-economic transformations, and political ideologies. From the ceremonious property transfers of Roman antiquity to the formalised processes of the 19th century and the sweeping changes brought about by the socialist period, the evolution of property rights in Serbia mirrors broader trends in legal and social development. While contemporary legislation works to overcome the legacies of previous systems, it seeks to establish a process that ensures transparency, legal certainty, and public access to property information, thereby laying the foundation for a stable and reliable real estate market in Serbia.

The evolution of Serbia's system of real estate registration stands as compelling evidence of the crucial role a legal framework plays in safeguarding property rights and fostering economic development. A thorough understanding of historical and legal contexts provides valuable insight into the intricate processes that shape property relations and their broader social and economic implications.

While the current legislative framework governing real estate registration in Serbia represents a commendable effort towards achieving transparency, legal certainty, and public accessibility in property transactions, there remains scope for further refinement. Modern technologies, notarised documentation, and formal registration procedures have undoubtedly streamlined property transfers and bolstered public confidence in the system. However, ensuring the accuracy and completeness of cadastral and personal data, as well as aligning the legal framework with contemporary economic realities, continues to present significant challenges.

While Serbia's existing legislative framework is robust, further enhancements could strengthen its efficiency and reliability. For instance, the introduction of clearer procedural safeguards and improved mechanisms for dispute resolution would inspire greater trust in the system. Additionally, a greater emphasis on digitalisation and interoperability between public records could expedite property registration processes, reducing administrative burdens and increasing efficiency.

In this light, the real estate registration system in Serbia, while promising, requires continuous refinement to maximise its functionality within an ever-evolving property market. Moreover, achieving the broader objectives of sustainable economic development necessitates ongoing adaptation, particularly in light of emerging technologies such as smart contracts and blockchain technology. These innovations offer unprecedented opportunities to increase efficiency, security, and transparency in property transactions, making it imperative for the legal framework to evolve accordingly.

Legal-historical Analysis of the Hereditary Position of the Surviving Spouse in Montenegro

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ABSTRACT
This study traces the evolving hereditary position of the surviving spouse in Montenegro, charting its course from the Middle Ages and the socialist period to the present day. Designed to assist those who have lost their partners, this institution has undergone significant transformations, mirroring broader societal shifts. Viewed through a historical lens, this research delves into the impact of Montenegro's culture on the role and legal position of the surviving spouses, scrutinising the state-driven initiatives and norms that have shaped its succession law. As Montenegro transitioned from socialism to a more modern landscape, this institution adapted, responding to changing social structures, economic progress, and cultural transformations. Notably, this shift seems to hark back to earlier times, before liberal socialist laws, favouring traditional views of how men and women relate rather than embracing progress in their roles. Even though modern regulations aim for equality between spouses, the lived experiences of women often reveal persistent discrimination, largely due to entrenched societal expectations. Through a thorough analysis of both historical context and contemporary challenges, this research sheds light on the process of shaping the hereditary position of the surviving spouse in Montenegro and offers a comprehensive legal-historical analysis of the development of the institution. Finally, the study delves into the assessment of whether Montenegro's current succession law, with its specific provisions governing the status of the surviving spouse, could inadvertently perpetuate discriminatory treatment of women in their capacity as surviving spouses. It also explores effective preventive measures and practical approaches to address and mitigate any such discriminatory practices that may persist within the current legal framework.
KEYWORDS
Succession dynamics, gender disparities, hereditary classes, discriminatory spousal practices, legislative framework assessment, cultural normative influence, legal equity evaluation.

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Analiza juridico-istorică a poziției ereditare a soțului supraviețuitor în Muntenegru

REZUMAT
Acest studiu explorează evoluția dinamică a poziției ereditare a soțului supraviețuitor în Muntenegru, urmărindu-i traiectoria din epoca medievală și perioada socialismului până în prezent. Instituția, concepută pentru a sprijini persoanele care și-au pierdut partenerii, a suferit transformări semnificative, reflectând schimbările mai ample din societate. Printr-o perspectivă istorică, această cercetare analizează impactul culturii muntenegrene asupra rolului și poziției juridice a soților supraviețuitori, examinând inițiativele statale și normele care au modelat legislația succesorală. Pe măsură ce Muntenegru a trecut de la socialism la un peisaj mai modern, instituția s-a adaptat, răspunzând modificărilor structurale sociale, progreselor economice și schimbărilor culturale. De observant este faptul că această tranziție pare să reflecte vremuri mai vechi, anterioare legilor socialiste liberale, favorizând viziuni tradiționale asupra relațiilor dintre bărbați și femei, mai degrabă decât îmbrățișând progresul în rolurile acestora. Deși reglementările moderne urmăresc egalitatea între soți, experiențele reale pot dezvălui existența continuă a discriminării împotriva femeilor, în mare parte din cauza așteptărilor sociale. Prin analiza contextului istoric și a provocărilor contemporane, acest studiu evidențiază procesul de modelare a poziției ereditare a soțului supraviețuitor în Muntenegru și oferă o analiză juridico-istorică cuprinzătoare a dezvoltării instituției. În cele din urmă, cercetarea examinează dacă legislația succesorală actuală din Muntenegru și dispozițiile sale speciale privind statutul soțului supraviețuitor ar putea duce la un tratament discriminatoriu față de femei, explorând totodată măsuri preventive eficiente și abordări practice pentru a combate și atenua eventualele practici discriminatorii din cadrul actualului cadru legal.
CUVINTE CHEIE
Dinamica succesiunii, disparități de gen, clase ereditare, practici discriminatorii în căsătorie, evaluarea cadrului legislativ, influența normativă culturală, analiza echității juridice.

I. INTRODUCTION

Montenegro's position within the Western Balkans underscores its historical and legal ties to a region often described as a "*tipping-point*" of disparate influences.[2] The country's past is notably complex, warranting comprehensive scholarly investigation. Any attempt to encapsulate such a multifaceted history within a single text is inherently constrained. Therefore, while the introduction chapter offers a succinct historical overview, it does not aspire to present a condensed history of Montenegro in its entirety. Rather, it seeks to provide the necessary context for understanding Montenegro's historical evolution, thereby illuminating its legal development.

This corner of the Western Balkans was shaped not only by Byzantium and Eastern Christianity but also by the influence of Catholic Italy and Dalmatia. The rising power of Venice—alongside that of Ragusa (Dubrovnik)—exerted a strong presence along the Montenegrin coast and even further inland. This influence culminated in the late 11th

2 See Gale Stokes (1997): *Three Eras of Political Change in Eastern Europe*, Oxford University Press, New York, chapter 1.

century when the ruling dynasty of Zeta, the "*Vojislavljevićs*" (*Војислављевић*), sought formal recognition from Rome, leading to the appointment of an archbishop in the city of Bar (*Бар*).[3] However, the 12th century saw civil war and internal dynastic struggles within Zeta, which the neighbouring Serbian "*Nemanjić*" (*Немањић*) dynasty swiftly exploited.[4] The ascent of the Nemanjićs dynasty marked the end of Zeta's 173-year period of independence, during which it had established a state, Church, and cultural identity profoundly influenced by the Western world.[5]

A pivotal moment in the region's history occurred on 28 June 1389, when Prince Lazar Hrebeljanović (*Лазар Хребељановић*) led the Serbian forces against the formidable Turkish army commanded by Sultan Murat I at the Battle of Kosovo Polje. This historic confrontation became deeply ingrained in the collective consciousness of the Serbian people and, by extension, the Montenegrins. The Battle of Kosovo was instrumental in shaping both Serbian and Zetan historical trajectories. During this period, the Zetans found themselves increasingly isolated, yet they managed to retain their autonomy, aided by temporary alliances that offered fleeting support.[6] In the face of Ottoman rule, Montenegrin society adapted to its circumstances through a system of tribal cohabitation, a structure that endured until the emergence of the theocracy and the subsequent rule by the Petrović (*Петровић*) dynasty in the 17th century.[7] This period witnessed the consolidation of Montenegro's tribal framework, which would remain the bedrock of its societal organisation for centuries. It stands as a testament to the resilience and endurance of the Montenegrin people, who, despite the shifting tides of history, preserved their unique identity and communal traditions.[8]

During their prolonged struggles and coexistence with the Venetians and the Turks—as well as with the Albanians from Bosnia—the Montenegrins absorbed many

3 Zuzana Poláčková, Pieter van Duin: Montenegro Old and New: History, Politics, Culture, and the People, *Studia Politica Slovaca*, 1/2013, p. 61.

4 Hailing from present-day Montenegro, Stefan Nemanja initiated the Serbian royal lineage and the Serbian practice of constructing churches and monasteries. Nevertheless, Zeta held a distinctive position, akin to a sub-state within a state, notably characterized by the prevalence of Catholicism. Over time, the Orthodox Church gradually gained ground in this established religious framework.

5 Elizabeth Roberts (2007): *Realm of the Black Mountain*, Hurst & Company, London, pp. 58–63.; Kenneth Morrison (2009): *Montenegro, A Modern History*, I.B.Tauris & Co Ltd, London&New York, p. 15.

6 John Allcock (2000): Montenegro, in David Turnock, Francis W. Carter (ed.): *The States of Eastern Europe, South-Eastern Europe*, Aldershot, Ashgate, pp. 185–188.

7 Given the broader political context, the necessity for Montenegrin tribes to unite became imperative to evade complete Turkish dominance. In the War of the Holy League, Montenegrins actively backed and cooperated with Venice in its efforts to resist the expansion of the Ottoman Empire. However, this decision backfired, leading to significant repercussions as it paved the way for an extensive Ottoman invasion. This invasion resulted in the occupation of Cetinje and the destruction of its monastery. See Momir Bulatović (2004): *Pravila Ćutanja*, Alfa Kniga, Belgrade, p. 82.

8 Morrison (2009): p. 17.

of their customs.[9] Before achieving full independence from the Ottoman Empire at the Congress of Berlin in 1878, Montenegro took shape as a unified entity through the consolidation of Zeta, Lake Skadar, and Boka Kotorska.[10] This process was symbolically crowned by the enactment of the renowned "*Act of Montenegro and the Hills*" (*Zakon Crnogorski i Brdski/Законик Црногорски и Брдски)* in 1803. Promulgated by bishop Petar I, the leader of the country at that time, this legislative document can be considered as Montenegro's earliest form of a constitution.[11] However, with the outbreak of the First World War, Montenegro was swiftly drawn into the conflict. When Austria-Hungary declared war on Serbia, Montenegro stood in solidarity with its neighbour, disregarding overtures suggesting that Montenegro's neutrality might result in potential territorial gains.[12] This shared historical path with Serbia ultimately shaped the long-standing union between the two nations—a union that endured until the dissolution of the state union of Serbia and Montenegro in 2006.[13]

To elucidate and comprehend the mechanisms of law-making in both medieval and modern Montenegro, it is essential to recognise the aforementioned overlapping influences that have shaped its legal landscape. Despite numerous scholarly reviews addressing the importance of the multicultural background of the Montenegro's legal system, none of the recently published works have undertaken a comprehensive examination of the pivotal role of succession law and its evolution in the context of the Montenegro's diverse social and legal background. A closer analysis reveals that, at least in the case of Montenegro, alternative approaches may lack the precision necessary for a nuanced understanding of historical developments. For instance, two years after the dissolution of the state union of Serbia and Montenegro, the newly independent Montenegro adopted the Inheritance Act of 2008. This legislative reform was expected to sever the remaining ties with the archaic and outdated principles of medieval

9 See Vladimir Jovićević: Uticaj prava primorja na zakonik opšti crnogorski i srpski, *Pravni vijesnik*, 4/1988, pp. 425–430.

10 Marko Pavlović (2013): *Srpsko pravo*, Pravni fakultet, Kragujevac, p. 172.

11 Although the attainment of liberation and independence appeared to be momentous achievements, these ostensibly favourable advancements also ushered in substantial challenges. The swift territorial expansion occurred at a pace that some scholars highlighted as "too rapid", hindering the proper integration of the population from the newly acquired regions into the ethnic core of Montenegro. See Branimir Anzulović (1999): *Heavenly Serbia*, New York University Press, New York, p. 36.

12 Morrison (2009): p. 36.

13 The first 1918 unification—or assimilation, as some contend—of Montenegro and Serbia at the Assembly of Podgorica remains a highly debated topic. Theoretically, this process should have been less problematic than other national mergers due to several reasons: a slim majority supported the union, cultural differences were minimal, language was not an issue, both shared the Eastern Orthodox religion, and they had common myths and symbols. However, controversy surrounds how Montenegro was integrated into Serbia and the subsequent Kingdom of Serbs, Croats, and Slovenes, primarily due to the debated methods employed. The Assembly of Podgorica, seen as a tool of forced assimilation, is a central point in the contemporary Montenegrin nationalist argument. See Srdja Pavlović (2003): Who are the Montenegrins: Statehood, Identity and Civic Society, in *Montenegro in Transition: Problems of Identity and Statehood*, Nomos Verlagsgesellschaft, Baden-Baden, pp. 83–107.

inheritance traditions that had persisted, even through the socialist period. Yet, did it truly achieve this? Or could this legislative shift, paradoxically, have reinstated Montenegro's succession law to a framework reminiscent of medieval succession relations, particularly concerning the hereditary status of the surviving spouse? Moreover, insights derived from socio-empirical studies—briefly discussed in a dedicated subchapter—will aid in unravelling this intricate legal conundrum.[14] The subject remains, and will likely continue to be, a matter of intense debate and controversy. However, above all, it presents an extremely captivating issue from a legal historical point of view. To bridge the existing gap in the literature, this study will explore how the "*zadruga*" heritage[15] as an ingrained perspective on relationships in Montenegro, has contributed to the decline of the hereditary position of the surviving spouse.

This paper is structured into three main sections. The first deals with the medieval period, briefly highlighting key milestones in the development of the institution where necessary. The second addresses the crucial changes that happened after the Second World War, with the imposition of a Soviet-type dictatorship in Yugoslavia—a period in which Montenegro shared the same legal framework as other Yugoslav republics (modern-day Croatia, Montenegro, Serbia, Bosnia and Herzegovina, and North Macedonia). The final section discusses the legal adjustments that were spurred after Montenegro declared its independence from Serbia in 2006. In the conclusion, a critical response to these issues will be presented, accompanied by reflections on the matter within the broader context of *de lege feranda* legislative prospects.

II. MEDIEVAL PERIOD

Montenegrin medieval sources of law offer scant systematic treatment of succession law. As Taranovsky reiterated, the medieval succession law in territories of present-day Serbia and Montenegro was largely confined to scattered provisions and isolated references to inheritance.[16] Until the adoption of Saint Sava's *Zakonopravilo* (*Законоправило*)

14 Jennifer Zenovich: Willing the Property of Gender: A Feminist Autoethnography of Inheritance, *Montenegro, Women's Studies in Communication*, 1/2016, pp. 28–46.

15 The concept of "*zadruga*", named by Vuk Karadžić in 1818, emerged in the scholarly research and social-political discussions of the nascent Balkan nations in the 19th century. It denoted the diverse historical manifestations of the "*complex family organization*" prevalent among the South Slavic peoples in the region. Typically constituted by an extended family or related clans, the zadruga collectively managed property, livestock, and finances. Generally, the eldest (patriarch) governed and made decisions for the family, occasionally passing this responsibility to one of his sons in old age. Given its patrilocal structure, when a woman married, she transitioned from her parental zadruga to her husband's. Members within the zadruga cooperatively laboured to fulfil the needs of every individual in the family unit. About the concept and evolution of zadruga, see Aleksa Jovanović (1896): *Istorijski razvitak srpske zadruge, prinosioci za istoriju starog srpskog prava*, Štamparija Svetozara Nikolića, Beograd.; Živojin Perić (1912): *Zadružno pravo po građanskom zakoniku kraljevine Srbije*, Štamparija Dositije Obradović, Beograd.

16 Teodor Taranovski (2002): *Istorija srpskog prava u Nemanjićkoj državi*, Lirika, Beograd, p. 512. It is worth mentioning that the main sources of law in medieval lands of Montenegro were almost the same as in medieval Serbia due to historical reasons, and they were in force in both lands.

in 1219,[17] succession customs were shaped by a dual influence: indigenous Slavic traditions and legal principles derived from Byzantine law. The oldest known term reliably attested in Montenegrin law to denote bequest is *Zavet* (*Завет*), which appears in Old Serbian translation of Byzantine regulations concerning wills.[18] This expression likely referred to an orally declared last will (nuncupative will), a practice bearing significant resemblance to a formal testament. Consequently, this form of bequest aligns with Petranović's theory of property division, as it aligns with an act of "*distribution*" or "*arrangement*" of assets.[19] Scholars have long posited that, in the earliest times, various Slavic tribes saw property as an indivisible unit collectively owned by the extended family—a principle that was particularly rigid in relation to immovable property.[20] The circumstances may have differed in the case of a limited category of movable, personally owned property. However, such possessions were likely interred alongside their owner, rendering them ineligible for bequest.[21] This familial and property structure suggests that property was preserved within the extended family or *zadruga*,[22]ensuring its transmission to successive generations. Hence, composing a will would have been superfluous, as the estate remained undivided even beyond the following generation.[23] Similarly, the "paterfamilias" of the *zadruga,* called *đed* (*ђед*) or *starac* (*старац*), was not empowered to dispose of communal property independently without the explicit consent of the other adult members—an early manifestation of the principles of co-ownership. Women were barred from inheriting or acquiring property, largely due to the family's concern that allowing women to possess property might lead to the potential fragmentation of family assets particularly if the property were taken outside the family through marriage, divorce or separation.[24] However, historical evidence suggests that individual property disposal was not entirely precluded, even in cases where the heirs and relatives withheld their approval. Certain sources indicate that a portion of personal property, often considered a fraction of the family estate, could be sold, or bestowed upon another individual, frequently between spouses. In such instances, relatives are unable to invalidate this

17 This legal code, created in the early 13th century, is an adaptation and expansion of the early teachings of Saint Sava, combined with Byzantine canonical law and specific regulations tailored for the Serbian Orthodox Church. It encompassed ecclesiastical and secular laws, aiming to govern both religious and civil matters within the territory of today's Serbia and Montenegro.

18 See more in Nomocanon of St. Sava, Urban Code, art. 21 in Miodrag Petrović (1991) (ed.): *Zakonopravilo ili Nomokanon Svetog Save, Ilovički prepis*, Dečje Novine, Gornji Milanovac. On other terms used in Serbian medieval charters to denote the disposal of property in wills, see Aleksandar Solovjev (1928): *Zakonodavstvo Stefana Dušana, Cara Srba I Grka*, Pravni fakulteta, Beograd, p. 138 and following.

19 Branislav Petranovic (1873): *O pravu nasledstva kod Srba*, Rad JAZU, Zagreb, p. 29 and following.

20 Karlo Kadlec (1924): *Prvobitno slovensko pravo*, Izdavačka kuća Gece Kona, Beograd, p. 84.

21 Tamara Matović (2019): Bequeathing in medieval Serbian Law, in Wouter Druwé, Wim Decock, Paolo Angelini, Matthias Castelein (ed.): *Ius commune graeco-romanum: Essays in Honour of Prof. Dr. Laurent Waelkens*, Peeters, Leuven/Paris/Bristol, p. 134.

22 See footnote 14.

23 See Valtazar Bogišić: De la forme dite Inokosna de la famille rurale chez les Serbes et les Croates, *Revue de Droit international et de legislation compare*, 16/1884, p. 17.

24 Petranovic (1873): p. 29 and following.

transaction.[25] Thus, succession during this period served a dual function: it safeguarded the continuity of the traditional *zadruga* property system while simultaneously facilitating a gradual transition towards a more individualised, nuclear family structure.

However, with the promulgation of the *Zakonopravilo* in 1219, Saint Sava broadened the scope of social justice, albeit without achieving full equality between male and female surviving spouses. Notably, while a widow who remarried within twelve months of her husband's death did not see her subsequent marriage invalidated, she nevertheless suffered *infamia* as a consequence.[26] Moreover, she was entirely excluded from inheriting any portion of her late husband's matrimonial estate. Furthermore, her capacity to dispose of her own property was significantly restricted. In the absence of children, she was permitted to bequeath only one-third of her personal estate—specifically, the dowry she had received prior to marriage—to her second husband.[27] The institution of dowry was a well-established practice in Montenegro at that time, serving as a fundamental component of matrimonial arrangements. For instance, Chapter 149 of the Statute of the City of Kotor,[28] dating from the year 1316, bore the title *De dote et parchivio* (*parchivium,* derived from the Greek word προίξ = *prikija*, meaning dowry). This chapter reflects the influence of Justinianic legislation, which regarded the dowry as the wife's property, originating from her *pater familias*.[29] Upon the wife's death, the dowry was to pass to her children; the husband had no right of inheritance over it. In cases where the wife died without issue, the dowry was to be returned to her natal family. Any agreement between spouses granting the husband the right to inherit the dowry, was deemed null and void.[30] Furthermore, according to Dušan's code (*Душанов законик*) of 1349, a surviving wife had no legal claim to inheritance, as she was not recognised within the hereditary order. However, she could be a beneficiary of her husband's will. In practice, the principle of "*usus-fructus*" came into effect concerning the position of the widow: she was permitted to enjoy the use of the property, but only until she remarried, and at no

25 Taranovski (2002): p. 503 and following. This form of the alienation of property is similar to *peculium* in Roman law, which represents the possibility for a person in someone else's power to dispose of their own property without consent.

26 Srđan Šarkić: Family Law in Medieval Serbia, *Glossae, European Journal of Legal History*, 2022, p. 626.

27 Šarkić (2022): p. 626. In this period, Montenegrin legal sources did not contain rules on gifts before marriage and gifts on account of marriage.

28 During the Nemanjić rule, Kotor acquired a level of autonomy, enjoying numerous privileges and maintaining its republican structures. This status is evidenced by a 1301 statute, affirming Kotor's city status under Serbian governance. In the 14th century, the commercial activities of Kotor, also known as *Cattaro* in Latin scripts (in Serbian *Котор, град краљев* /Kotor, city of the King), rivalled the trade of the Republic of Ragusa, provoking envy from the Republic of Venice. Throughout the Kingdom of Serbia and Serbian Empire eras, Kotor retained its prominence as the primary trading port of subsequent Serb states until its decline in 1371 when the Ottomans conquered this land.

29 Ilija Sindik (1950): *Komunalno uredenje Kotora od druge polovine XII do pocetka XV stoleća*, Naučna knjiga, Beograd, p. 130.

30 Stojan Novaković (1907): *Matije vlastara sintagmat: azbučni zbornik vizantijskih crkvenih i državnih zakon i pravila slovenski prevod vremena dušanova*, Državna Štamparija Kraljevine Srbije, Beograd, p. 466.

point could she gain ownership of it. This right, though classified as a *ius in re*, but distinctly weaker than outright ownership, as it excluded *ius abutendi*—the right to dispose of the property. In this respect, it bore a resemblance to the modern legal concept of easements.[31] According to Article 40 of the Code, a nobleman possessed the freedom to dispose of his inheritance property as he saw fit, and it is possible that a spouse might inherit through such means.[32] This suggests that, in the medieval Montenegrin lands, inheritance was primarily viewed through the lens of property division. Considering the fact that a woman's role was perceived as being that of childbearing and maintaining the household, she was not considered a participant in productive labour. Therefore, she was not deemed capable of assuming the burden of property maintenance.

Until the 19th century, courts rendered judgments not only in accordance with established law but also by drawing upon customary practices when these more closely reflected the prevailing societal norms. Alternatively, they sought guidance from other legal sources deemed more suitable for the particular circumstances of a case. This practice persisted well into the period preceding Yugoslavia, at which point specific statutes pertaining to succession matters were formally introduced.[33] Moreover, Montenegro's legal landscape was marked by a fragmented and disorganised system of legal particularism, a condition that played a decisive role in the promulgation of "*Prince Danilo's Code*" (*Danilov zakonik/Данилов законик*) in 1855. This code was established as the primary and exclusive source of private law in Montenegro.[34] Notably, it introduced a significant innovation concerning the legal standing of the surviving spouse. The relevant article reads as follows:

> *"[a] widow, be it sooner or later that she be left without a husband, shall, so long as she taketh no other, enjoy the whole share of her late lord, should she bear no offspring. Yet, should she wed anew, her portion shall be but ten thalers yearly. If children she hath, then shall her due be thus: for a son, one sequin per annum; for a daughter, two. And let it be understood that for as many years as she dwelled with her husband, and for as many more as she abided a widow beneath his roof, so long shall she receive the sum appointed for each case."*

31 Pavlović (2013): p. 134. The easement can be defined as a right of owner of one immovable property (dominant estate) to perform certain activities for the benefit of this property on an immovable property of another (servient estate), or to demand from the owner of the servient estate to refrain from doing something otherwise lawful on his estate.

32 Solovjev (1928): pp. 133–140. Art. 40 of the Dušan's Code read as follows: "*[a]nd those charters and decrees which my majesty hath granted and shall grant, and those inheritances, are confirmed, as also those of the first Orthodox Tsars: and they may be disposed of freely, submitted to the Church, given for the soul or sold to another.*"

33 See Mihailo Konstantinović: Stara "pravna pravila" i jedinstvo prava, *Anali pravnog fakulteta*, 3–4/1982, pp. 540–548. Individual provisions on inheriting were incorporated in the Basic Marriage Law of April 3, 1946, the Law of the Protection of Copyright of May 25, 1946, the Law of Adoption of April 1, 1947, the Basic Law of Agricultural Co-operatives of June 6, 1949, and certain other laws, besides the general Inheritance Act form 1955.

34 This fact is emphasized in the preface of the Prince Danilo's Code: "*[...] this code is being established for the people of Montenegro and Hills serving as an eternal source of legal judgment for the Montenegrin populace.*" See *Zakonik knjaza Danila* (1855). Available at: https://www.ucg.ac.me/skladiste/blog_7137/objava_106772/fajlovi/DANILOV%20ZAKONIK.pdf (accessed on 14.10.2023).

Therefore, according to Article 52, the surviving spouse was granted the right of "*usus-fructus*"; however, should she become a widow, she was entitled to a form of recompense, the amount of which was determined by the duration of her life together with her late husband. This provision represented a compromise between the long-held belief that a woman should not remove property from the family and the emerging principle that she was nonetheless deserving of some form of compensation. From a legal standpoint, this constituted a significant advancement, particularly when viewed in light of the fact that, under the same Code, divorce was expressly forbidden.[35] Articles 47–51 of *Prince Danilo's Code* provide for the rules that govern inheritance, both by operation of law and by testamentary disposition. As may be concluded from Article 52, these provisions adhered to the same rationale that had prevailed in the period before the 19th century.

During the late Middle Ages, a discernible transformation took place within the zadruga system in the Serbian and Montenegrin regions. This evolution became especially pronounced with the enactment of the Serbian Civil Code, which redefined the zadruga from a communal structure—wherein property, labour, and subsistence were shared—into a model more closely resembling the Austrian co-ownership principles. Specific provisions, such as Articles 514 and 521, enabled the disposal of the entire family estate.[36] While some perceived these legal reforms as an attempt to undermine the distinct and deeply rooted role of the zadruga in Serbian and Montenegrin cultural identity, the forces of an emerging market economy gradually eroded its prominence. Nevertheless, the zadruga persisted as a fundamental cornerstone, continuing to shape interpersonal relationships within these societies.[37]

III. THE YUGOSLAV PERIOD (20TH CENTURY)

Having established the historical framework, the following section will focus on changes that took place after Montenegro became part of the Kingdom of Serbs, Croats, and Slovenes in 1918, as well as after Yugoslavia's transition into a socialist republic following the end of the Second World War. Two significant legal acts concerning succession were enacted: the Federal Inheritance Act of 1955 and the Inheritance Act of 1975.

In the aftermath of the Second World War, the former Yugoslavia emerged as a Soviet-type dictatorship, adopting its first socialist Constitution in 1946. Article 1 of the aforementioned Constitution declared that "*all people are equal in rights*."[38] Article 21 reinforced this principle by stating: "*[a]ll citizens of the Federal People's Republic of Yugoslavia are equal before the law and enjoy equal rights regardless of nationality, race, and creed*."[39] The language of these provisions reflects a fundamental ideological shift in both legal

35 Article 67 of the Prince Danilo's Code (1855).
36 Pavlović (2013): p. 132.
37 Pavlović (2013): p. 132.
38 Article 1 of the Constitution of the Federal Peoples Republic of Yugoslavia from January 30, 1946.
39 Article 21 of the Constitution of the Federal Peoples Republic of Yugoslavia from January 30, 1946.

and social philosophy, embodying the worldview that had come to define the new state. This inaugural Yugoslav Constitution was drawn up under the strong influence of the Soviet theory of State and law, and of the Soviet Constitution of 1936. Consequently, it introduced no original doctrinal innovations but did exert a certain technical influence on the first constitutions of several so-called "*People's Democracies*."[40] Once these foundational principles were established, lawmakers sought to devise an Inheritance Act capable of resolving the legal and ethnic particularism that had long characterised this area of law before the socialist revolution. Their objective was to codify comprehensive regulations governing inheritance law, although it is not the first legal instrument to regulate these matters, since post-war legislation in Yugoslavia had already provided for the basic principles of succession.[41] Within the broader framework of general inheritance law, this new Yugoslav legislation exhibited certain distinctive features that set it apart from similar statutes in other countries.[42] It represented the striking synthesis of the new socio-economic order of the country and the *Volkgeist* of the Serbian and Montenegrin people.

In the following discussion, we will reflect on the changes that completely cast an entirely new light on the succession law in Montenegro. Foremost among these was the elevation of the surviving spouse to the first hereditary order, thereby excluding the grandfather, grandmother, and all more remote descendants from inheritance. Likewise, we will analyse other provisions that are in connection with the altered legal status of the surviving spouse, with particular emphasis on their designation as a necessary heir—a development of singular interest. The principal source for this section of our study is the commentary on the Inheritance Act, published in the New Yugoslav Law journal series in 1955.

Under the Inheritance Act of 1955, the first hereditary order consisted of the direct descendants of the deceased—his children, grandchildren, and great-grandchildren—alongside the spouse.[43] The spouse and the deceased's issue, including their descendants, were entitled to equal portions of the estate.[44] However, if the deceased had children from earlier marriages, and the independent property of the surviving spouse exceeded the share which would otherwise be allotted to them in the division of the estate, then the children of the deceased—irrespective of the marriage from which they were born—were entitled to a portion double that of the spouse.[45] To illustrate: if the deceased had two children from his later marriage and one from an earlier union, and his estate was estimated in value at 70,000 dinars,[46] then—assuming the surviving spouse

40 Ivo Lapenna: Main Features of the Yugoslav Constitution 1946–1971, *International and Comparative Law Quarterly*, 2/1972, p. 215.
41 Nikola Srzentić: Notes on the Law on Inheritance, *New Yugoslav Law*, 4/1955, p. 19.
42 Srzentić (1955): p. 20.
43 Association of Jurists of the Federative People's Republic of Yugoslavia, Law on Inheritance, *New Yugoslav Law*, 6/1955, p. 23
44 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 23.
45 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 24.
46 Before the inflation in 1990s, 56,4 dinars were equal as 1 US dollar. See http://singidunum-online.com/metalni-novac-jugoslavija-kraljevina-jugoslavija-c-1_9_33.html (accessed on 14.10.2023).

possessed property of their own—the distribution would be as follows: 10,000 dinars would be allocated to the spouse while each child would receive 20.000 dinars.[47]

Similarly, the spouse was placed within the secondary hereditary order alongside the parents of the deceased. However, the parents were entitled to inherit only in cases where the deceased left no direct descendants, as prescribed by law. Should the parents themselves have predeceased the *de cuius*, their share would pass to their children—the deceased's siblings—and, in turn, to their descendants by right of representation. The division of the estate followed an equitable principle: one half was allotted to the surviving spouse, while the other half was distributed to the parents and/or their descendants. In instances where neither parent survived the deceased and they had left no descendants, the entire estate devolved upon the surviving spouse. The third and fourth hereditary orders included the deceased's grandparents and great-grandparents, likewise inheriting by right of representation. However, the surviving spouse was not included within these two classes.

Beyond the general framework governing statutory inheritance, the law also contained distinct provisions addressing the special legal status of certain heirs, most notably that of the surviving spouse.

As previously mentioned, the general principles of inheritance prescribe an equal division of the estate between the surviving spouse and the parents of the deceased in the absence of direct descendants. However, a particular provision allows for judicial discretion in cases where the spouse lacks essential means of sustenance. In such circumstances, the court may award the spouse a larger portion of the estate. Similarly, should the estate be of modest value and its division would risk imposing undue hardship upon the spouse, the court might decree the entire estate to be granted to the spouse. Conversely, under comparable conditions, if the parents of the deceased are themselves without essential means of support, the court may rule that one or both parents shall receive either a larger share or even the entirety of the estate, thereby leaving nothing to the surviving spouse. In reaching such decisions, the court is required to take into account various factors, including the financial resources and earning capabilities of both the spouse and the parents, as well as the estate's overall value. Another special provision seeks to favour, as statutory heirs, those descendants who actively contributed to the deceased's wealth. Descendants who assisted in enhancing the deceased's estate—whether through labour, wages, or other means—may claim a portion of the estate corresponding to their contribution.

Additionally, the law includes a special provision safeguarding the rights of the surviving spouse and the deceased's cohabiting descendants to retain household items essential for daily life, including furnishings and bedding.

Moreover, the principle of necessary heirship is upheld, limiting testamentary freedom in cases where specific relatives survive the deceased.

This institution, designed to strengthen familial cohesion, imposes restrictions on the right of testamentary disposition, ensuring that where specific relatives survive the deceased, a portion of the estate must necessarily be reserved for them.[48] In

47 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 24.
48 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27.

defining the scope of necessary heirs, the Act distinguishes between two categories. The first includes the direct descendants of the deceased, adoptees and their progeny, parents, and spouse, all of whom qualify as necessary heirs provided they are entitled to inherit under the law.[49] To be recognised as necessary heirs, these persons have to comply with three mandatory conditions. Firstly, they must be eligible to inherit according to the statutory order of succession. Secondly, they must suffer from a lasting incapacity for work. Thirdly, they must lack the means necessary for subsistence. If these conditions are met, such persons could not be eliminated from inheritance through a testamentary disposition.[50] Finally, in relation to the size of the statutory minimum share, the law distinguishes between two groups of necessary heirs. The first group comprises the deceased's descendants, adoptees, and spouse, while the second includes all other necessary heirs.[51] The statutory minimum for heirs within the first group amounts to one-half of the portion that would have fallen to them under intestate succession, whereas for those in the second group, it equals one-third thereof.[52] In determining this statutory minimum share, all gifts bestowed by the deceased upon necessary heirs during his lifetime, as well as the gifts the deceased made to other persons in the final year of his life, shall be taken into account.[53] Where it is established that the statutory share has been violated, testamentary dispositions shall first be curtailed to rectify the imbalance. However, the deceased retains the right to disinherit certain necessary heirs, provided that lawful grounds for such exclusion exist.[54]

When it comes to succession case law during this period, only a limited number of judgments were published. The available rulings predominantly concern matters such as agrarian division of property—an issue characteristic of socialist governance—and inheritance on the basis of law.[55] Few cases specifically address the position of the

49 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27.
50 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27.
51 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27.
52 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27.
53 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27. In cases of statutory share infringement, priority is given to restraining testamentary dispositions. If the statutory share remains unfulfilled, gifts will be subject to reversal. The reversal process begins with the most recent gift and proceeds in reverse order of their issuance. The right to initiate actions for restraining testamentary dispositions and reclaiming gifts is subject to a three-year statute of limitations.
54 Association of Jurists of the Federative People's Republic of Yugoslavia (1955): p. 27. "*In the cases provided by the Law, the testator may disinherit the necessary heirs. Such cases are: a) where the heir committed a major offence toward the devisor by violating some legal or moral obligation; b) where the heir committed some major criminal offence toward the devisor, his spouse, child or parent; c) where the heir committed a criminal offence aimed at undermining the people's authority, the independence of the country, its defence capacity or socialist construction; and d) where the heir took to idling and a dishonest life.*"
55 In the People's Republic of Yugoslavia, it was prohibited for anyone to possess an excess of agricultural land beyond the legally permitted limit. This restriction also applied to citizens inheriting land, preventing them from acquiring more than the prescribed maximum. In the event that an heir received agricultural land through inheritance that, combined with their

surviving spouse, and those available for analysis through alternative sources suggest that judicial practice remained largely aligned with codified legal provisions. It may thus be concluded that the status of women as surviving spouses was, for the most part, duly recognised and upheld.[56]

The constitution amendments of 1971 and 1974 transferred jurisdiction over civil law matters to the republics, thereby granting them the authority to enact their own civil law legislation. Montenegro introduced the Inheritance Act in 1975. However, with regard to the hereditary position of the surviving spouse, this Act largely mirrored its predecessor. Moreover, this Act was promulgated at a time when private property had been relegated to the margins of economic and legal life. Although the Act sought to secure the full and unlimited freedom of private property, its provisions proved largely ineffective, given the socio-political climate imposed by the socialist constitution of 1974, which upheld a fundamentally different ideology regarding property and social life.[57] We shall now turn to the period following the decline of Soviet-type dictatorship in Yugoslavia when "*things started to reverse*."

IV. THE INHERITANCE ACT OF 2008: HAVE THINGS REALLY CHANGED?

The Inheritance Act of 2008 sought to modernise succession law in Montenegro; however, in our view, it failed to achieve this objective. While it did clarify the position of the surviving spouse within both the first and second hereditary orders—whereby, in the absence of offspring, the spouse is moved to the second order, meaning they do not automatically belong to the first *a priori*, but must competing within it—the Act left it to the courts to decide whether there were grounds to reduce the surviving spouse's share of the inheritance.[58] Conversely, the Act also allows the surviving spouse to inherit a larger portion of their statutory entitlement should they be found to lack sufficient means of subsistence. In such cases, they may be granted lifelong "*usus-fructus*"

existing holdings, surpassed the lawful limit, they had the right to select specific plots they wished to retain. However, any surplus exceeding the established maximum would revert to the collective ownership of the people. The heir was eligible for compensation, following prevailing regulations, for the surplus land relinquished.

56 Miloš Stevanov: Judicial Practice in Application of Law of Succession, *Zbornik Pravnog fakulteta*, 1/1966, p. 43.

57 Dejan Đurđević: Aktuelna reforma naslednog prava u Crnoj Gori, *Anali Pravnog fakulteta*, 1/2009, p. 265. For example, Art. 194 par. 3 of the 1974 Constitution provided that no individual could inherit and possess a greater number of real estate or means of labour than specified by the particular law. This provision was manifestly contrary to the "liberal" rules from the 1975 Inheritance Act, which means that by the *lex superior derogat legi priori* interpretation, it may be inferred that the provision enabling the heirs to acquire property freely would be deemed invalid.

58 Art. 13 par. 1 in conjunction with the Art. 23 of the Inheritance Act from 2008. Art. 13 par. 1 reads as follows: "*[t]he estate of the deceased who left no descendants is inherited by his spouse and his parents*."

rights over the entirety or a portion of the deceased's estate.[59] Furthermore, the Act introduced the concept of the "*contract of renunciation of inheritance that has not been opened*" which provides a mechanism for a spouse to relinquish their part in favour of the other heirs in exceptional cases. According to Article 135, paragraph 1, such a contract is permissible when concluded between a descendant and an ancestor, whereby the descendant renounces their prospective inheritance that would have accrued to them after the ancestor's death based on the rules of legal inheritance.[60] The Montenegrin legislator foresees that, for this contract to be valid, it is necessary that it be drawn up in writing and certified by a notary. Moreover, under Article 136, the declaration of renunciation of inheritance is irrevocable. If not expressly stated otherwise, this renunciation also extends to the descendants of the person waiving their inheritance (Article 138).[61] In practice, this may lead to the violation of the principle of equality enshrined in the Constitution. Research has shown that women continue to feel obliged to renounce their share of the inheritance in favour of male descendants due to entrenched traditional expectations.[62] Furthermore, certain analyses indicate that a significant number of women remain unaware of their fundamental inheritance and divorce rights, often opting to waive their inheritance share rather than assert their rights.[63] It should be emphasized that Article 58 of the Montenegrin Constitution guarantees property rights, stating: "*[p]roperty rights shall be guaranteed. No one shall be deprived of or restricted in property rights, unless required by the public interest*."[64] Moreover, by Article 27, paragraphs 1 and 2, of Inheritance Act of 2008, the deceased's children, adopted children and their descendants, surviving spouse, and parents are considered absolute heirs, whereas siblings and grandparents of the testator are classified

59 Art. 24 par. 1 reads as follows: "*[w]hen a spouse who does not have necessary means of living is invited to inherit with other heirs, the court may, at the request of the spouse, decide that the spouse is entitled to lifelong enjoyment over the entirety or a portion of the deceased's estate*."

60 Art. 135 par. 1 reads as follows: "*[e]xceptionally, a descendant who can dispose of his rights independently can waive the inheritance that would have accrued to him after the death of the ancestor by contract with the ancestor*."

61 It should be stressed that Art. 133 provides that the heir who disposed of the property that represents the deceased's estate cannot renounce his/her part. However, the significance of this provision in the spousal context is negligible because the spouse is not entitled to dispose of the joint property of her own, which means that the deceased can bequeath only his own property.

62 See Predrag Tomović: Nestaje običaj muškog nasljeđivanja u Crnoj Gori, *Radio Slobodna Evropa*, 3 April 2019. Available at: https://www.slobodnaevropa.org/a/pravo-na-imovinu-rod-%C5%BEene-dom/29859105.html (accessed on 14.10.2023); Mirjana Dragaš: Zašto se žene odriču nasljedstva: "Neću stavljati nož među braću", *Antena M*, 21 March 2019. Available at: https://www.antenam.net/drustvo/114083-zasto-se-zene-odricu-nasljedstva-necu-stavljati-noz-medju-bracu (accessed on 14.10.2023).

63 Sigurna Kuća Report (2019): *Attitudes towards property rights of women in Montenegro*, pp. 36–60. Available at: http://szk.co.me/publikacije/ (accessed on 14.10.2023).

64 Constitution of Montenegro, available at: https://www.paragraf.me/propisi-crnegore/ustav-crne-gore.html (accessed on 16.09.2023).

as relative necessary heirs.[65] Additionally, Article 11 of the Montenegrin Family Law states that "*[p]roperty relationships in the family are based on the principles of equality, reciprocity, and solidarity, as well as on the protection of the interests of children*."[66] Despite these legal safeguards, the practical enforcement of such provisions remains inadequate, as deeply ingrained societal norms continue to favour male heirs. These longstanding, male-centred social structures—rooted in historical tradition—will be further addressed in the following subsection.[67]

Reports and initiatives undertaken by both international and local organisations rely on studies conducted by demographers, statisticians, and economists, offering valuable insights into the prevailing situation.[68] These studies present quantitative data on the skewed sex ratio at birth and discuss the demographic and socioeconomic underpinnings of the so-called "son preference" in Montenegro with regard to succession law. According to these findings, women continue to be primarily expected to raise children, manage household responsibilities, and, above all, give birth to a son.[69] Despite Montenegro's ostensibly progressive trajectory during the socialist period, patriarchal structures governing male-female relationships remained deeply entrenched, as did the disparity in societal attitudes towards male and female children.[70] In 2011, Doris Stump drew international attention to the issue of sex selection and gender imbalances in Europe, sparking political concern within both the Council of Europe and the European Union. She identified Montenegro among the countries where prenatal sex selection was taking place.[71] In 2014, Nils Muižnieks echoed worries about gender imbalances, citing a UNFPA report that documented an unnaturally high proportion of male births in several countries, including Montenegro.[72] In 2017, Montenegro's Women's Rights Center, in collaboration with McCann, launched the social campaign "*Neželjena*" (unwanted), addressing the deeply ingrained perception that daughters are less desirable. This campaign not only raised awareness of

65 Inheritance Act (2008), available at: https://www.paragraf.me/propisi-crnegore/zakon-o-nasljedjivanju.html (accessed on 16.09.2023). Being absolute heirs according to law means that those heirs cannot be deprived of their compulsory share irrespective of their financial status, while relative heirs are grandparents and brothers and sisters under the condition that they don't have sufficient means for life.

66 Family Act (2007), available at: https://www.paragraf.me/propisi-crnegore/porodicni-zakon.html (accessed on 16.09.2023).

67 It is also important to note that Article 18 of Montenegro's Constitution guarantees gender equality.

68 See Zenovich (2016): pp. 26–48, 38.

69 Diana Kiščenko: An ethnographic exploration of son preference and inheritance practices of Montenegro, *Comparative Southeast European Studies*, 1/2021, p. 75.

70 See Mirjana Morokvasić (1983): *Institutionalised equality and women's condition in Yugoslavia*, Emerald Publishing Limited, Bingley, pp. 9–17.

71 Doris Stump (2011): *Prenatal Sex Selection, Report, Council of Europe, Parliamentary Assembly*. Available at: https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp? (accessed on 14.10.2023).

72 Nils Muižnieks (2014): *Sex-Selective Abortions Are Discriminatory and Should Be Banned. Human Rights Comment*. Available at: https://www.coe.int/en/web/commissioner/-/sex-selectiveabortions-are-discriminatory-and-should-be-bann-1. (accessed on 14.10.2023).

gender discrimination but also advocated against the misuse of prenatal testing in Montenegro.[73] Some argue that the discriminatory position of the spouse in Montenegro is solely a consequence of women's broader disempowerment. This, however, is a highly contested claim. While it is true that private property—as both a legal institution and a discourse—acts as a mechanism that reinforces gender roles in Montenegro by positioning women symbolically as objects or possessions, the voluntary relinquishment of property by women in favour of male heirs is a discursive act that further entrenches male dominance, often under the guise of serving the "public interest."[74] The aforementioned analyses highlight both the symbolic and tangible dimensions of discrimination against women in Montenegro, rooted in the *zadruga* worldview. In a society where daughters are expected to marry and become dependent on their husbands and in-laws, any deviations from traditional norms governing housing, family planning, and inheritance do not provide women with greater security but instead place them at an even greater disadvantage. Married women, being economically reliant on their husbands and in-laws, frequently face housing insecurity in the event of divorce.[75] Moreover, when the law itself establishes conditions for gender inequality—irrespective of the wording of a given provision—the situation is all the more dire. The previously discussed institution of the contract of renunciation of inheritance that has not been opened is a prime example of how legal frameworks can facilitate abuse. This provision allows an heir—particularly a spouse—to renounce their own inheritance share in advance. While statistical data explicitly linking this legal mechanism to an increase in female spouses renouncing their inheritance shares is lacking, the concerns remain both legitimate and pressing. Considering the irrevocable nature of such renunciations, the extent to which this contract will be employed in practice remains to be seen. Beyond this specific contract, heirs, including the spouse, retain the option to forgo their inheritance share during inheritance proceedings conducted before a notary.[76] As indicated by previous analyses, this practice is widely utilised.[77]

73 See *Otkrivena ploča neželjenim djevojčicama* (2017). Available at: https://womensrightscenter.org/otkrivena-ploc%C2%8Da-djevojc%C2%8Dicama-koje-nijesu-dobilepriliku-da-budu-rodene/. (accessed on 14.10.2023).

74 Zenovich (2016): p. 29.

75 See Ivana Petričević (2012): *Women's Rights in the Western Balkans in the Context of EU Integration: Institutional Mechanisms for Gender Equality*. Available at: https://ravnopravnost.gov.hr/UserDocsImages/arhiva/images/pdf/Izvješće_Womens%20Rights%20in%20the%20Western%20Balkans%20in%20the%20Context%20of%20EU%20Integration.pdf (accessed on 14.10.2023).

76 Art. 131 of the Inheritance Act from 2008.

77 According to statistics from 2017, only 4% of women in Montenegro owned a house, 8% owned land, 14% owned weekend houses and 23% owned a flat. See Montenegrin Employers Federation, E3 Consulting LLC (2017): *Women in Management in Montenegro*, Montenegrin Employers Federation, Podgorica, p. 9. Available at: http://poslodavci.org/en/publications/women-in-management-in-montenegro (accessed on 14.10.2023).

V. CONCLUSION

The inheritance rights of the surviving spouse in Montenegro have undergone various stages of development. While legal provisions have evolved over time, Montenegrins have remained steadfast in preserving their traditional views on gender dynamics within inheritance matters. Although lawmakers in Montenegro have sought to align spousal inheritance provisions with more progressive and egalitarian standards, their efforts have yet to yield comprehensive recognition or practical enforcement. The deeply ingrained perception of women primarily as "child bearers", especially of a male offspring, has persisted, without ensuring an environment in which they can exercise their rights on equal footing with men. As a result, despite succession laws theoretically providing for equal inheritance rights, patriarchal attitudes have resurfaced, reinforcing long-standing social hierarchies.

There are two possible approaches to resolve this situation. The first involves enacting targeted reforms in Montenegro's succession laws to eliminate lingering legal provisions that enable systemic misuse. Chief among these is the abolition of the contract of renunciation of inheritance that has not been opened, which remains a vehicle for reinforcing gender disparities. Additionally, it requires a collaborative effort between lawyers and sociologists to comprehensively address social relationship issues, analyse and compare them, and assess their relative importance. Through rigorous analysis and comparative assessment, policymakers could identify solutions that not only address the specific needs of the population but also foster genuine progress in the inheritance rights of surviving spouses and succession laws as a whole. The alternative option is to allow social change to take its natural course. The complexity of the Montenegrin situation, deeply rooted in historical traditions, presents a significant challenge to immediate reform. As discussed in this article, Montenegro's ongoing efforts to achieve peace within its territory and assert an undisputed, unique identity have contributed to the preservation of its cultural heritage, which serves as a direct connection to its foundational values. However, a careful and patient approach to these matters may gradually lead to a shift in societal attitudes, ultimately fostering meaningful gender equality in Montenegro's inheritance system.

EVOLUȚIA SISTEMELOR ELECTORALE ÎN EUROPA CENTRALĂ: IDEOLOGII POLITICE ȘI STRUCTURI LEGISLATIVE ÎN SECOLELE 19 ȘI 20

THE EVOLUTION OF ELECTORAL SYSTEMS IN CENTRAL EUROPE: POLITICAL IDEOLOGIES AND LEGISLATIVE STRUCTURES IN THE 19TH AND 20TH CENTURIES

The Imprint of Political Ideologies on the Composition of the Legislative – the Electoral Systems of Romania in the 20th Century

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ABSTRACT
Throughout the 20th century, Romania has experienced profound social, economic, and political transformation, each leaving its mark upon the nation's constitutional framework. Among the most striking manifestations of these changes is the evolution of the electoral system, which has consistently sought to reflect and adapt to prevailing political currents. These electoral mechanisms have played a pivotal role in shaping the composition of the political elite, employing various methods to influence its formation. This contribution endeavours to scrutinise the distinctive characteristics of these electoral systems, with particular focus on the methods by which the political elite has been moulded over time. The principal instruments employed in the 20th century to influence the composition of the Romanian legislature included age requirements, wealth census (i.e. property qualification or property-based voting qualification), special electoral procedures, professional and occupational criteria, and exclusion from political rights.
KEYWORDS
Wealth census, special electoral procedures, corporative parliament, restriction of political rights.

Amprenta ideologiilor politice asupra compoziției legislativului – sistemele electorale ale României în secolul al 20-lea

REZUMAT
România a trecut prin multe schimbări sociale, economice și politice în secolul al 20-lea. Toate aceste schimbări au avut un impact și asupra sistemului constituțional al țării. Una dintre cele mai evidente forme de manifestare a acestui fapt poate fi observată în evoluția sistemului electoral, care a încercat întotdeauna să răspundă tendințelor politice actuale. Aceste sisteme electorale au străduit să influențeze formarea elitelor politice într-o varietate de moduri. Acest articol intenționează să examineze trăsăturile specifice ale acestor sisteme electorale, acordând o atenție specială evoluției metodelor folosite pentru a forma >>

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>> elita politică. Principalele metode folosite în secolul al 20-lea pentru a influența componența legislativului românesc au fost: limite de vârstă, cerințe de avere, proceduri electorale speciale, cerințe profesionale și ocupaționale și excluderea din drepturile politice.
CUVINTE CHEIE
Cenzul bazat pe avere, proceduri electorale speciale, parlament corporatist, restricționarea drepturilor politice.

I. INTRODUCTION

It is asserted in academic circles that "*[i]n a democratic state, the definition of the parliamentary electoral system is of paramount importance, as the indirect exercise of the people's sovereignty is realized through the electoral system.*"[2] Moreover, the electoral systems in force today are deeply influenced by the historical traditions of each nation, with the political ideology of each era leaving its imprint upon their structure. A thorough examination of these systems, weighing both the positive and negative aspects of each historically relevant electoral model, is indispensable for a comprehensive understanding of the present-day electoral framework.

Throughout history, elites have sought to shape political power in a variety of ways, with these methods often shifting in accordance with the dominant ideology of the time. This contribution aims to explore the impact of such methods on the shaping of the political elites, focusing on the parliamentary electoral systems in 20th-century Romania. Given that parliament constitutes one of the most crucial arenas for the emergence of political elites, its electoral mechanisms warrant particular scrutiny.

As Romania underwent significant ideological transformations during the period under review, a diverse array of electoral systems emerged, each employing distinct strategies to shape the composition of the political elite. The principal methods utilised included age requirements for the exercise of electoral rights, wealth census, special electoral procedures, professional and occupational criteria, and exclusion from political rights. In the following sections, after a brief historical overview, I would like to illustrate how these methods were practically implemented.

II. THE CONSTITUTIONAL HISTORY OF ROMANIA IN THE 20TH CENTURY

At the turn of the century, the 1866 Constitution remained in force in the Romanian Old Kingdom (which was composed of the Romanian Principalities of Wallachia and Moldavia). Adopted shortly after the ascension of Carol I to the throne, this constitution

2 Gábor Kurunczi (2022): Electoral Systems, in Lóránt Csink, László Trócsányi (ed.): *Comparative Constitutionalism in Central Europe,* CEA Publishing, Miskolc–Budapest, p. 423.

was modelled on the Belgian Constitution of 1831, widely regarded as one of the most liberal of its time.[3]

The conclusion of the First World War placed Romania in a distinctive position, siding with the Allies. Following the union of Transylvania (1 December 1918), Bessarabia (27 March 1918), and Bukovina (27 October 1918) with the Romanian Old Kingdom, it became imperative to adapt public law to the new geopolitical reality. The legal framework, previously fragmented, required unification and harmonisation—a necessity that culminated in the adoption of the 1923 Constitution. Although largely rooted in the provisions of the 1866 Constitution,[4] this new fundamental law held particular significance in Romania's constitutional history, since it was the first to extend its binding force across the whole territory of Greater Romania, thus fostering the process of legal unification and harmonisation.

A further critical juncture in the constitutional history of Romania occurred in 1938. In the aftermath of the 1937 elections, King Carol II entrusted the National Christian Party (*Partidul Național Creștin*)—which had secured only the fourth place in the polls—with the task of forming a government. However, this minority government failed to garner parliamentary support and was swiftly overthrown. Determined to establish an authoritarian monarchy, the King took the initial step of appointing a non-party government under the leadership of Patriarch Miron of Romania.[5] In order to constitutionally consolidate the public structure thus established, on 20 February 1938 the King issued a manifesto to the people, proposing the adoption of a new constitution and seeking popular endorsement. The full text of the draft constitution was made public, and a referendum was scheduled for 24 February 1938. At the referendum, an oral vote was taken, with separate lists recorded for those in favour of and those opposed to the adoption of the new constitution. After the referendum, on 27 February 1938, King Carol II promulgated the new Constitution of Romania by royal decree.[6]

On 4 September 1940, in the wake of territorial losses and diminishing authority of the royal power, King Carol II appointed General Ion Antonescu to form a government. The following day, on 5 September, the King suspended his own 1938 Constitution, by Royal Decree No. 3052 of 5 September 1940.[7] At the outset of his rule, Antonescu governed with the backing of the Iron Guard (also known as the Legionary Movement); however, tensions between them escalated, culminating in the Iron Guard's rebellion in January 1941. Antonescu swiftly suppressed the uprising and dissolved the movement, consolidating his authority. This period of Antonescu's military dictatorship endured until August 1944.[8]

3 Eleodor Focșeneanu (1992): *Istoria constituțională a României. 1859–1991*, Editura Humanitas, București, p. 29.
4 Focșeneanu (1992): pp. 61–62.
5 Zsolt Fegyveresi (2020): A királyi diktatúra és az Antonescu-diktatúra közjoga. Észak-Erdély státusa (1938–1945), in Emőd Veress (ed.): *Erdély jogtörténete*, HVG-Orac Könyvkiadó–Forum Iuris Könyvkiadó, Budapest–Kolozsvár, pp. 498–490.
6 Focșeneanu (1992): p. 74.
7 Focșeneanu (1992): p. 80.
8 Fegyveresi (2020): p. 494.

The conclusion of the Second World War ushered in further political transformations, culminating in the proclamation of the Romanian People's Republic (*Republica Populară Română*) on 30 December 1947. This moment marked the dawn of a new era, with the removal of King Mihai I and the imposition of a totalitarian regime.

As a consequence, the new Constitution of Romania was adopted on 6 August 1948. Nevertheless, prior to its adoption, a law was passed on 23 January 1948 (Law No. 9 of 1948), providing for the dissolution of the Assembly of Deputies and the convening of the Great National Assembly (*Marea Adunare Națională*). The 1948 Constitution was short-lived, as it was replaced by a new constitution on 27 March 1952. This 1952 Constitution "*was established through consultation with Joseph Stalin and the leading Soviet lawyer, Andrej Wyszyński.*"[9] On this basis, the 1952 Constitution was founded primarily on the class nature of the state and reinforced Romania's close alignment with the USSR.[10] The final constitution of the regime was proclaimed on 21 August 1965, substantially expanding the personal authority of Nicolae Ceaușescu. Notably, the 1965 Constitution underwent a total of ten amendments between 1968 and 1986.[11]

During the period under review, however, not only did the constitutions change, but a succession of electoral laws was also enacted. The following table presents a summary of the principal electoral laws that governed 20th-century Romania.

Constitution	Electoral Law
1866 Constitution	· 1866 Electoral Law (amended on 23 April 1878); · 1884 Electoral Law; · In the first years after the union: Decree-Law No. 3102 of 14 November 1918 for the Old Kingdom and Bessarabia, Decree-Law No. 3620 of 24 August 1919 for Bukovina, Decree-Law No. 3621 of 24 August 1919 for Transylvania, Banat, Crișana, Satu-Mare and Maramureș
1923 Constitution	· 1926 Electoral Law
1938 Constitution	· 1939 Electoral Law
1948 Constitution	· 1946 Electoral Law (prepared the adoption of the Constitution, abolished the Senate etc.) · 1948 Electoral Law
1952 Constitution	· 1952 Electoral Law; · 1956 Electoral Law
1965 Constitution	· 1966 Electoral Law; · 1974 Electoral Law

Table 1: Electoral Laws of Romania in the 20th century

9 Ewa Korzeska, Tomasz Scheffler (2022): State and Criminal Law of the East Central European Dictatorships, in Pál Sáry (ed.): *Lectures on East Central European Legal History*, CEA Publishing, Miskolc, p. 222.
10 Korzeska, Scheffler (2022): p. 222.
11 Korzeska, Scheffler (2022): p. 223.

All these electoral systems have, at various times, employed the aforementioned methods—age requirements for the exercise of electoral rights, wealth census, special electoral procedures, professional and occupational criteria, the exclusion from political rights—to shape the political elite and determine the composition of parliament. In the following sections, I intend to describe the evolution of these methods in the formation of the political elite.

III. AGE AS A REQUIREMENT FOR THE RIGHT TO STAND AS A CANDIDATE IN ROMANIA

Regardless of whether Romania was governed by a unicameral or a bicameral parliamentary system, certain eligibility requirements for election remained in place. Over time, these requirements underwent various transformations—some were substantially modified, while others disappeared entirely.

Yet one of the most fundamental and enduring prerequisites has been age. Under the 1866 Constitution, candidates for the Assembly of Deputies were required to be at least 25 years old, while those seeking election to the Senate had to be at least 40. The 1923 Constitution upheld these age limits without alteration. Nonetheless, the 1938 Constitution introduced a significant change by raising the minimum age for the members of the Assembly of Deputies to 30 years.

A pivotal shift occurred on 15 July 1946, when Law No. 560 on the Assembly of Deputies abolished the Senate, branding it a "*citadel of reaction*", and established a unicameral parliament.[12] The law also lowered the minimum age for deputies from 30 to 25 years, a threshold that was further reduced to 23 years by Law No. 9 of 1948.[13] This 23-year age limit was retained in the 1948 Constitution, which granted all citizens over 23 the right to be elected. Notably, neither the 1952 Constitution nor the 1965 Constitution altered this requirement, preserving the 23-year minimum age for parliamentary candidates throughout the Soviet-type dictatorship.

The age requirement presupposed a certain degree of maturity on the part of parliamentary candidates. It would therefore appear logical to expect that those entrusted with legislative duties should possess a measure of life experience, enabling them to represent the citizenry effectively and to govern the nation with sound judgement. At the same time, it is undeniable that an excessively high age threshold—such as the 40-year minimum imposed on members of the Senate—effectively excluded a considerable segment of the population from active participation in public life. The rationale behind this elevated age requirement for senators imposed by the 1866 Constitution was twofold: on the one hand, it served to reinforce the Senate's status as an upper house, on the other, it functioned as a deliberate mechanism for shaping the political elite.

12 Lajos Takáts, János Demeter et al. (1957): *A román Népköztársaság alkotmánya. Népi demokratikus alkotmányunk fejlődése 1947-től 1957-ig*, Tudományos Könyvkiadó, Bukarest, p. 222.
13 Takáts, Demeter et al. (1957): p. 222.

IV. THE WEALTH CENSUS AS A METHOD OF SHAPING THE POLITICAL ELITE AT THE TURN OF THE CENTURY

The 1866 Constitution and its accompanying electoral laws placed great emphasis on wealth, establishing it as a fundamental criterion for both active and passive suffrage.

The electoral system governing the election of the Assembly of Deputies was set out in Articles 58 to 63 of the 1866 Constitution, which divided the electorate into four colleges within each county. The first college was composed of citizens whose land income amounted to at least 300 galbens,[14] while the second college included those with a land income ranging from 300 to 100 galbens. The third college, representing urban interests, was composed of merchants and industrialists who contributed a state donation of 80 lei,[15] whereas the fourth college encompassed all other citizens who paid any donation to the state. Each county elected one representative from the first two colleges, while the third college elected a varying number of representatives in each city, the precise allocation of which was determined by Article 62.

As for the Senate,[16] each county elected two members, one from each electoral college. The first college was composed of rural landowners with a land income of at least 300 galbens, while the second college was composed of urban citizens with a land income of 300 galbens or less (Article 68). These constitutional provisions clearly illustrate that, at the turn of the century, the right to vote was reserved exclusively for the wealthy. As a direct consequence, the legislature acted predominantly in the interests of the affluent, as it was they who conferred its mandate.

Regarding passive suffrage, several criteria were in force during this period. In addition to age requirements, wealth constituted a particularly significant criterion. Notably, Article 66 of the 1866 Constitution did not impose a specific wealth condition for membership in the Assembly of Deputies, meaning that, in theory, anyone could become a deputy irrespective of wealth, provided they met the other eligibility conditions. However, since the electoral system itself restricted voting rights to those who met financial criteria, wealth still played an indirect yet crucial role in shaping the composition of the lower house.

The requirements for membership in the Senate differed significantly from those applied to the Assembly of Deputies. Under Article 74 point 5) of the 1866 Constitution, eligibility for election as a senator was contingent upon possessing an income of at least 800 galbens, derived from any source. The candidates were required to substantiate this wealth, demonstrating their 800-galben income in accordance with the provision

14 Contemporary currency, in the form of coins.

15 Romanian currency, in the form of banknotes.

16 In the Senate, in addition to the elected representatives, the Universities of Iași and Bucharest each delegated one senator, elected by the professors of their respective universities. Interestingly, the appointment of the first female university professor, Vera Myller, was delayed for a few months in 1918 precisely because as a woman she did not have the right to vote, which raised the question of what would happen to the senator elected by the University of Iași. For details, see: Lucian Boia (2016): *Capcanele istoriei. Elita intelectuală românească între 1930 și 1950*, Editura Humanitas, București, pp. 101–102.

of Article 64 of the Constitution. This article provided that proof of the 800-galben income could be provided through contribution forms, receipts, and debtor warnings from both the current and previous year.

These wealth requirements for both active and passive suffrage aligned seamlessly with the prevailing ideology of the era, which maintained that wealthy citizens comprised the intellectual elite, and thus, only they were deemed fit to influence the governance of the state. The period's dominant belief system closely associated wealth with virtue, holding that material prosperity was an indication of intelligence and capability. In fact, one of the leading constitutional scholars of the time asserted that such wealth qualifications were essential, as only the affluent possessed the strength and awareness necessary to participate in public affairs. However, he also noted that should the intellectual and financial elite become separated, the wealth census would cease to have meaning.[17] The stricter wealth requirements for senators, in contrast to those for deputies, further suggest that within the public law system established by the 1866 Constitution, the Senate held a symbolically superior role to that of the Assembly of Deputies.

The adoption of the 1923 Constitution, however, marked the abolition of the wealth census. The new constitutional framework eliminated income requirements for both voting rights and candidacy, ensuring that wealth was no longer a formal prerequisite for holding public office. Consequently, under the 1923 constitutional order, access to representative roles was no longer legally tied to financial standing.

V. THE SPECIAL ELECTORAL PROCEDURE INTRODUCED BY THE 1926 ELECTORAL LAW

Beyond the abolition of the wealth census, the 1923 Constitution introduced no significant reforms to the organisation of elections. However, a new electoral law, adopted in 1926, thanks to its specific distribution of mandates, sought to reshape the political composition of the parliament through a procedural mechanism rather than direct constitutional changes. This law, with its distinctive allocation of mandates, was widely regarded by scholars as a sophisticated and intricate system, one that subtly reconfigured the legislative framework.[18]

The most consequential innovation of the 1926 Electoral Law was that "*the principle of proportional representation has been replaced by that of the first majority.*"[19] Under Article 90 point b) of the new law, the political party receiving the highest number of votes nationwide—provided it secured at least 40% of the total vote—was designated as the majority group, whereas all other parties were classified as minority groups. Should a minority group attain an absolute majority within an electoral district, it was awarded a number of seats proportional to its share of the vote. In accordance with the provisions of Article

17 Győző Concha (1907): *Politika. I. kötet. Alkotmánytan*, Grill Károly Könyvkiadó Vállalata, Budapest, p. 456.
18 Focșeneanu (1992): p. 70.
19 Emil Cernea, Emil Molcuț (2006): *Istoria statului și dreptului românesc*, Universul Juridic, București, p. 320.

92, the mandates allocated to these minority groups were deduced from the total number of seats, with the remaining mandates then distributed among all political groups. Pursuant to Article 93, this distribution followed a specific formula: firstly, the majority group was granted half of the total mandates, while the other half was divided among all groups, including the majority, in proportion to their respective vote shares.

Through this legislative framework, the 1926 Electoral Law sought to consolidate the dominance of larger political parties, and "*at the same time to remove smaller political groups from the political scene.*"[20] According to scholarly analyses, these new provisions effectively guaranteed between 60% and 70% of parliamentary seats to a party that secured merely 40% of the vote.[21] As a result, the electoral system facilitated the emergence of overwhelming majorities for dominant parties, thereby distorting the representational balance of the legislature.

This electoral model was directly inspired by the 1923 electoral reform in the Kingdom of Italy, known as the Acerbo Law. Under this system, two-thirds of the seats in the lower house of the parliament were awarded to the party that secured a plurality of votes,[22] a measure explicitly designed to ensure Mussolini's fascist party's control.

At the time of its adoption in Romania, the 1926 Electoral Law was crafted to benefit the National Liberal Party. It was for this reason that the opposition parties of the era, namely the Peasants' Party and the National Party, refused to participate in the final vote.[23] This mechanism of plurality compensation became one of the most striking examples of political elite formation in 20th-century Romania. While the specific method of seat allocation under this electoral law was ostensibly designed to ensure parliamentary stability, it did so at the cost of diminishing the democratic integrity of the elections.

Despite these provisions remaining *de jure* in force, they were ultimately abolished with the adoption of Law No. 560 on the Assembly of Deputies of 15 July 1946, which formally rescinded the principle of plurality compensation.[24]

VI. PROFESSION AND OCCUPATION AS A REQUIREMENT FOR THE RIGHT TO VOTE AND TO BE ELECTED UNDER THE PROVISIONS OF THE 1938 CONSTITUTION

In stark contrast to the 1923 Constitution, the 1938 Constitution of the royal dictatorship brought significant changes to the electoral system governing the election of members of the Assembly of Deputies.

20 Cernea, Molcuț (2006): p. 320.
21 Gábor Balás (1982): *Erdély jókora jogtörténete. 1849–1947 közti időszak*, Magyar Jogász Szövetség, Budapest, p. 42.
22 Alexander J. De Grand (1997): *Fascist Italy and Nazi Germany. The 'fascist' style of rule*, Routledge, London–New York, p. 26.
23 Gheorghe Iancu (2012): *Drept electoral*, Editura C. H. Beck, București, p. 102.
24 Tudor Drăganu (1972): *Drept constituțional*, Editura didactică și pedagocică, București, p. 282., Ioan Deleanu (1980): *Drept constituțional*, Editura didactică și pedagocică, București, p. 429.

One of the most notable amendments was the restriction of voting rights to citizens engaged in specific professions—namely persons engaged in agricultural and manual labour, trade and industry, and intellectual occupations had the right to vote. Under the revised electoral system, these three professional groups each formed separate electoral colleges, with every college electing an equal number of representatives to the Assembly of Deputies.[25] Nevertheless, this system effectively excluded a significant portion of the population from the right to vote.

Regarding passive suffrage, the 1938 Constitution introduced requirements that stood in direct opposition to those of the 1923 Constitution. According to Article 62 point b), eligibility for election to the Assembly of Deputies was explicitly contingent upon active engagement in one of the professions enumerated in Article 61—namely, agricultural and manual labour, trade and industry, and intellectual occupations. Thus, under this framework, the right to stand as a candidate for the Assembly of Deputies was not a universal right but was instead strictly tied to specific professional affiliations. The provisions on active and passive suffrage of the 1938 Constitution contributed to the creation of a corporative Assembly of Deputies, in which each professional sector was represented exclusively by its own members.

The emergence of corporative chambers across Europe in the first half of the 20th century was by no means an anomaly. Rather, their development can be understood as a response to the crisis of bourgeois liberal parliamentarism.[26] A notable example of such a corporative lower house was the Chamber of Fasces and Corporations in the Kingdom of Italy, established under the leadership of Benito Mussolini. Similarly, the Austrian Constitution of 1934 introduced chambers based on the principle of corporative representation.[27] At its core, corporative representation centralised the defence of occupational interests, granting certain professions a public status and incorporating them into the legislative process.[28] Nonetheless, in Romania, the corporative lower house established by the 1938 Constitution was less a response to genuine social demands than a practical manifestation of a political ideology.

While the eligibility criteria for membership in the Senate remained largely unchanged, subtle indications of the prevailing political ideology could be discerned in the revised provisions. According to Article 63 of the Constitution, the Senate was composed of three categories of members: Senators appointed by the King, *ex officio* Senators, and Senators elected by the constituted bodies of the State. A noteworthy departure from the previous constitutional framework—in which *ex officio* Senators were typically former dignitaries (as stipulated in Article 73 of the 1923 Constitution)—was that, under the new provisions, only current holders of high office could attain *ex officio* membership. These dignitaries, having been "*appointed by the executive branch and remained dependent on it.*"[29] This dependency was further underscored by the oath of

25 Fegyveresi (2020): p. 491.
26 Attila Varga (2019): *Román alkotmányjog*, Forum Iuris Könyvkiadó, Budapest–Kolozsvár, p. 347.
27 Varga (2019): p. 347.
28 Varga (2019): p. 348.
29 Focșeneanu (1992): p. 77.

allegiance sworn by *ex officio* Senators to the King, reinforcing the monarch's influence over the Senate.[30]

Furthermore, since *ex officio* senators concurrently held public offices, a professional requirement was evident in the Senate as well. This professional requirement was, nevertheless, very different from that imposed upon the Assembly of Deputies. The professional requirement for deputies gave rise to a corporative Assembly of Deputies, whereas, in the case of senators, the *ex officio* membership derived from holding a specific public office was intrinsic to the very nature of the Senate during that period, Consequently, this system led to the Senate being, to some degree, influenced by the King.

In conclusion, it can be said that the requirements established by the 1938 Constitution for the right to vote and to stand as a candidate were a clear reflection of the spirit of that time and the ideology of the political system. The Constitution of the royal dictatorship favoured the establishment of a corporative Assembly of Deputies, where professional affiliation became a prominent criterion. Moreover, this professional requirement significantly shaped the composition of the parliament, serving as yet another distinct method of moulding the political elite.

The corporative lower house, alongside the professional requirement formed the political landscape until 1940, when—following the suspension of the previous constitution—the King also dissolved the legislature.[31]

VII. RESTRICTIONS ON THE EXERCISE OF POLITICAL RIGHTS AND PROCEDURAL LIMITATIONS OF THE NOMINATION OF CANDIDATES DURING THE YEARS OF SOVIET-TYPE DICTATORSHIP

Following the Second World War, the extension of electoral rights began by Law No. 506 of 15 July 1946. The provisions of this law expressly granted women the right to vote and to stand for election on equal terms with men.[32]

The 1948 Constitution further extended the right to vote by lowering the voting age to 18.[33] To better understand the prevailing perspective on this extension of the right to vote, it is insightful to quote a relevant opinion from the period, which stated:

> *"[t]he electoral system of our country does not know the restrictions which, in spite of all the loud declarations, in reality, ensure the effective exercise of the right to vote in bourgeois systems only for a handful of citizens, excluding the great majority of the broad working masses."*[34]

30 Ioan Scurtu (2010): *Istoria românilor de la Carol I la Nicolae Ceaușescu*, Editura Mica Valahie, București, p. 80.
31 Moreover, some scholars considered that the legislative was not simply dissolved, but it was abolished. See: Dumitru V. Firoiu (1992): *Istoria statului și dreptului românesc*, Facultatea de Drept din Cluj-Napoca, Cluj-Napoca, p. 349.
32 Drăganu (1972): p. 282., Deleanu (1980): p. 429.
33 Takáts, Demeter et al. (1957): p. 223.
34 Takáts, Demeter et al. (1957): p. 224.

This ideologically charged perspective, however, did not entirely mirror the reality. Some restrictions on the right to vote had already been introduced in the years preceding the adoption of the 1948 Constitution. For instance, the 1946 Electoral Law imposed restrictions on those who were members of fascist or Hitlerite organisations, who had volunteered to fight against the United Nations during the war, or who were deemed responsible for the *"disaster of the country."*[35] Furthermore, the list of individuals affected by these restrictions was drawn up by the Ministry of Justice, which led to questionable deprivations. A notable example was the disenfranchisement of Ion Mihalache, vice-president of the National Peasants' Party.[36]

Moreover, while the 1948 Constitution proclaimed universal suffrage, the final clause of Article 18 made it clear that citizens who were sentenced to interdiction, the loss of civil and political rights, or who were deemed "unworthy", would be denied the right to vote. The latter category excluded a significant portion of the population from the right to vote, such as former landowners, industrialists, bankers, kulaks, and merchants.[37] Consequently, despite the Constitution's claim of universal suffrage, in practice, a considerable number of citizens were denied the right to vote, thereby weakening effective representation. Moreover, this restriction on the right to vote reflected the political ideology of the time, as those most affected were often individuals who could be perceived as adversaries to the regime's ideology, such as the kulaks.

Regarding passive suffrage, it is evident that Article 17 of the 1948 Constitution conferred upon all citizens, irrespective of sex, nationality, race, religion, education, or profession—including soldiers, judges, and civil servants—the right to stand for election to any state body.[38] Thus, the requirement of belonging to a particular profession as a condition for becoming a representative was abolished in the 1948 Constitution.

Furthermore, the 1948 Constitution did not include wealth as a condition for candidacy. In addition, after the electoral reform of 1950, the declaration of candidacy was no longer contingent upon the payment of any monetary sum. The expenses incurred in organising elections were borne *"entirely by the workers' state."*[39] Nonetheless, members of the Great National Assembly were limited to choosing candidates from a single party.[40] Moreover, the elections themselves were organised and conducted by this party, which held responsibility for the governance of the society, of which elections formed an integral part.[41] Furthermore, the Great National Assembly was composed of revocable members. As a result of all these constitutional provisions, representatives became to a large extent subordinated to the party.

35 Scurtu (2010): p. 81.
36 Scurtu (2010): p. 81.
37 Emőd Veress (2002): Az 1950-es néptanácsi képviselőválasztás mechanizmusa, in Gusztáv Mihály Hermann, András Lajos Róth (ed.): *Aeropolisz. Történelmi és társadalomtudományi tanulmányok II.*, Litera Könyvkiadó, Székelyudvarhely, p. 200.
38 The extension of the right to vote and to be elected to these professions had already been provided for in a law in January 1948, therefore, the Constitution just reaffirmed these provisions. Takáts, Demeter et al. (1957): p. 226.
39 Takáts, Demeter et al. (1957): p. 226.
40 Scurtu (2010): p. 82.
41 Deleanu (1980): p. 421.

As one can observe, the provisions on the Great National Assembly bore the unmistakable imprint of the political ideology and ethos of the era. For example, Article 47 stated that the Great National Assembly was to be composed of the representatives of the people, suggesting that the 1948 Constitution was intentionally crafted to ensure that the Great National Assembly embodied the working people as a collective, rather than a specific profession or class defined by wealth. Thus, there was an unmistakable inclination to shape the electoral system to reflect the class structure of the state.[42]

> *"The Great National Assembly achieved sociological representation in the sense that the composition of the parliament reflected the composition of the society. On this basis, it was claimed to be the true representation."*[43]

It is equally important to emphasise that, despite the noble intentions behind the provisions, a significant number of citizens were disenfranchised for various political reasons.

The 1952 Constitution did not introduce any substantial alterations to the requirements for the right to stand as a candidate. Pursuant to Article 94, any working person, a citizen of the Romanian People's Republic who possessed the right to vote and had reached the age of 23, could be elected as a deputy of the Great National Assembly and of the People's Councils. At the same time, there were some minor adjustments in the process of nominating candidates. Article 100 permitted organisations of the Romanian Workers' Party, professional unions, cooperatives, youth organisations, and other mass organisations, along with cultural organisations, to propose candidates. However, the right to nominate candidates remained firmly within the party's grasp. This amendment also suggests that the candidate selection process remained under stringent ideological control, since, on the one hand, only organisations subordinate to the party could propose candidates, and on the other, the nominated individuals had to pass the party's vetting process, as the final nomination was ultimately made by the party itself.

A new provision was introduced by Law No. 9 of 27 September 1952, which deprived former landowners, industrialists, bankers, large merchants, and capitalist elements from both towns and villages (including owners of private businesses with more than 5 employees or landlords) of the right to vote and to stand for election. Additionally, those convicted of war crimes, crimes against peace, or humanity were also excluded.[44] These amendments had a profound effect on the composition of the political elite, as they stripped a significant number of citizens—many of whom had previously held public roles during earlier historical periods—of their electoral rights. As a result, a new political elite emerged, albeit one with limited experience.

42 Takáts, Demeter et al. (1957): p. 221.

43 Emőd Veress (2020): A szovjet típusú diktatúra közjoga (1945–1989), in Emőd Veress (ed.): *Erdély jogtörténete*, HVG-Orac Könyvkiadó–Forum Iuris Könyvkiadó, Budapest–Kolozsvár, p. 506.

44 Drăganu (1972): p. 284.; Deleanu (1980): p. 432.

However, a Law passed in November 1956 repealed these restrictions, stating that only individuals deemed mentally incompetent, or those sentenced to the loss of electoral rights, were barred from voting or standing for election.[45] In practice, though, the latter category continued to affect a significant number of citizens, thus perpetuating the restriction of political rights as a means of shaping the political elite.

The relevant provisions of the 1965 Constitution were similarly crafted to uphold the political spirit embedded in the earlier constitutions. Pursuant to Article 25 the right to nominate candidates was entrusted to the Socialist Unity Front, political and social forces, and mass and public organisations. Once again, only the party or institutions closely affiliated with the party were permitted to nominate candidates.

Under Law No. 28 of 29 December 1966, the exercise of the right to vote and to be elected was conditioned upon possessing both mental and moral aptitude—the latter being interpreted as loyalty to the people and the fatherland.[46] Once more, based on the requirement for moral aptitude, numerous citizens found themselves excluded from electoral rights.

When we consider the entirety of the electoral regulations under the Soviet-type dictatorship, it becomes apparent that the abolition of the material or professional requirements for candidacy, the lowering of the age limit, and other amendments designed to expand suffrage, all reflected a political will to establish a legislative body that represented all citizens, regardless of their social, professional, or financial status. These aspirations are eloquently captured in an article published in *Korunk* in 1961:

> *"[t]he consistently democratic character of the supreme forum of state power is expressed by its social composition, which is radically different from that of the parliament of bourgeois-landowner Romania. In 1932, for example, the bourgeois-landowner parliament was composed of 235 landowners, bankers, and large capitalists, and of 145 'liberal professionals' (politicians of dubious reputation) in the service of the landowners and capitalists. [...]*
> *Out of the 465 members of the Great National Assembly elected last time, 335 (72,04%) are workers and peasants, and 130 (27,96%) are intellectuals. The most conscious workers of the main industries, collectivist peasants from all the regions of the country, scientists and artists—including 24 academics—engineers, technicians, teachers, lawyers, doctors, journalists, soldiers, people who devote their working capacity, talent, and knowledge to the service of the people are among the deputies."*[47]

In another issue of *Korunk*, the same author commented on the electoral system of the Soviet-type dictatorship:

> *"[i]n the electoral system of the bourgeois states, there is also a wealth constraint on the right to be elected. [...] The democracy of our electoral system is also expressed by the fact that it is not bound by any financial constraints, and the election costs are paid by the workers' state."*[48]

45 Drăganu (1972): p. 285.
46 Deleanu (1980): p. 433.
47 Sándor Tóth Zs.: *A pártvezetés – a demokratikus centralismus alkalmazásának legfőbb biztosítéka államépítésünkben*, Korunk, 5/1961, pp. 531–539, p. 534.
48 Sándor Tóth Zs.: *Választási rendszerünk demokratizmusa*, Korunk, 2/1961, pp. 146–151, p. 148.

Although, as one might observe, the ideologically driven opinions of the time were largely favourable towards the electoral system during the years of Soviet-type dictatorship, the reality of its practice has considerably tempered this positive outlook. Primarily, many citizens who opposed the prevailing political ideology were disenfranchised for various reasons. In the initial stage, as outlined above, former landowners, industrialists, bankers, kulaks, and private business owners were stripped of their electoral rights. Later, this exclusion was extended to all citizens deemed morally unfit. These restrictions led to the disenfranchisement of a substantial number of citizens, thus preventing the establishment of truly universal suffrage. The restriction of political rights became one of the main methods used to shape the political elite during the presented era.

Furthermore, only the party and organisations closely affiliated with the party were permitted to nominate candidates. As a result, only those loyal to the party could stand as a candidate, and the Great National Assembly was composed only of these loyal citizens. Contrary to the beliefs of the time, these members were unable to represent society as a whole, since the composition of the Great National Assembly reflected only one ideology. Hence, proportional representation of social views was completely missing.

Moreover, it is salient to note that the practical role of the Great National Assembly in governing the country was negligible. The constitutions adopted during the years of the Soviet-type dictatorship departed from the traditional principle of separation of powers, replacing it with the principle of centralism.[49] At that time, the separation of the legislative and executive powers was seen as a flaw within the parliamentary system, hindering the participation of the masses in public life.[50] The theoretical framework set out by the constitution diverged significantly from reality, for, as one commentator observed, *"[i]n practice the executive power was the only power in the state."*[51]

The authority of the Great National Assembly was significantly diminished by the brevity of its sittings. In the intervals between these gatherings, legislative functions were assumed by the Presidium, which exercised its powers through the issuance of decrees. Elected from among the members of the Great National Assembly, the Presidium wielded considerable influence—indeed, as has been observed, its *"influence was practically higher than that of the National Assembly itself."*[52] The sheer volume of decrees issued by the Presidium leads to two compelling conclusions. Firstly, it is evident that the state leadership had no intention of allowing the Great National Assembly to exercise genuine power. Secondly, given that the majority of its members were workers, it appears that the Assembly lacked the capacity to legislate effectively.

Furthermore, the constitutions adopted during the Soviet-type dictatorship played little more than a nominal role in the governance of the state. As certain scholars have noted, although *"the constitutional texts were formally in force, they were not meant to*

49 Korzeska, Scheffler (2022): p. 221.
50 György Kepes, Max Lupan: *Népi államunk fejlődéséről*, Korunk, 12/1957, pp. 1605–1615, p. 1607.
51 Focșeneanu (1992): p. 133.
52 Veress (2020): p. 507.

constrain and to obligate the power elites."[53] Besides, during these years *"the personal rule of the (de facto) party leader was a crucial factor."*[54] All these considerations are essential to forming a clearer understanding of the composition and function of the Great National Assembly.

VIII. CONCLUDING REMARKS

In 20th-century Romania, political ideologies deeply permeated the electoral systems, seeking to shape the composition of parliament and, by extension, the political elite through various means. Some of these methods took the form of specific requirements governing electoral rights, whilst others were embedded within procedural regulations. The following table provides a summary of these methods.

Constitution	Methods used to shape the political elite
1866 Constitution	Wealth census
1923 Constitution	The special electoral procedure introduced by the 1926 Electoral Law (plurality compensation)
1938 Constitution	Professional requirements (corporative Assembly of Deputies)
The constitutions of the years of the Soviet-type dictatorship (1948 Constitution, 1952 Constitution, and 1965 Constitution)	Restrictions on the exercise of political rights and procedural limitations on the nomination of candidates

Table 2: Methods used to shape the political elite

The criteria for eligibility to stand for election underwent significant changes throughout 20th-century Romania. At the century's outset, under the 1866 Constitution, wealth played a decisive role in the formation of the legislative, since only citizens meeting certain financial thresholds could vote, and only those of certain wealth were eligible for election to the Senate. Although the 1923 Constitution abolished the wealth requirement, the 1938 Constitution introduced an even more restrictive measure: under the royal dictatorship, membership in the Assembly of Deputies was tied to specific professions, effectively transforming the lower house into a corporatist body.

By contrast, the constitutions enacted during the Soviet-type dictatorship pursued the opposite objective, stripping many members of the former wealthy classes of their voting rights. These constitutional provisions sought to establish a Great National Assembly that ostensibly represented the working population. However, during these

53 Jon Elster, Claus Offe, Ulrich K. Preuss (1998): *Institutional Design in Post-Communist Societies: Rebuilding the Ship at Sea*, Cambridge University Press, Cambridge, p. 63., apud. Attila Horváth (2022): The Executive Power, in Lóránt Csink, László Trócsányi (ed.): *Comparative Constitutionalism in Central Europe*, CEA Publishing, Miskolc–Budapest, p. 294.

54 Horváth (2022): p. 294.

years, the shaping of the political elite was to be achieved through the systematic restriction of political rights. Moreover, while the Great National Assembly was deprived of genuine authority, the state itself came under the absolute control of a single political entity—the ruling party.

These transformations vividly illustrate the turbulent ideological shifts of the 20th century. The aristocratic spirit of the early years was gradually replaced by totalitarian political ideologies. As political ideologies, forms of government, and ruling systems evolved, so too did their attitudes towards wealth and professional status—principles that were consistently reflected in the regulations governing both the right to vote and the right to stand for election.

Beyond these eligibility requirements, procedural mechanisms were also used to influence the composition of the parliament. Thus, for example, the 1926 Electoral Law introduced a distinctive system for allocating of parliamentary seats, one that heavily favoured the victorious party. Furthermore, during the years of the Soviet-type dictatorship, the process of nominating candidates gave the party a special role, as it could essentially shape the political elite on its own.

Other aspects of the legislature likewise mirrored these ideological transformations. Both during the years of the royal dictatorship and during the Soviet-type dictatorship, the role of the legislature was somewhat marginalised. In the former period, the King assumed extensive powers, thus weakening the legislative branch, while in the latter, the legislature was in fact completely subordinated to the party and the dominant ideology.

It follows that electoral systems serve as one of the most overt manifestations of a given era's political ideology. Every method by which the constitutions of the 20th century sought to regulate, limit, and shape the composition of the legislative body stands as a tangible expression of the prevailing political doctrines of the time.

Electoral Laws for the Chambers of the Polish Parliament in the 20th Century

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ABSTRACT
This article explores the right to vote and to stand for election in parliamentary elections in Poland throughout the 20th century, against the backdrop of evolving constitutions and electoral laws. Each constitution, together with its associated electoral ordinances, not only determined the framework governing the election of parliamentary representatives but also served as a reflection of broader political, ideological and social transformations. The purpose of this contribution is to analyse the requirements set forth by electoral laws, which played a decisive role in shaping the representation of citizens within parliament.
KEYWORDS
Electoral systems, right to vote, right to be elected, age censuses, elites in society, political party affiliation.

Legile electorale pentru camerele parlamentului polonez în secolul al 20-lea

REZUMAT
Acest articol examinează dreptul de a vota și de a fi ales în alegerile pentru camerele parlamentului din Polonia în secolul al 20-lea, în contextul schimbărilor constituționale și al legilor electorale. Fiecare constituție și ordonanțele electorale aferente nu doar că au reglementat regulile de alegere a reprezentanților în parlament, ci au reflectat și schimbări politice, ideologice și sociale mai ample. Scopul acestei contribuții este de a analiza cerințele legislației electorale, care au avut un impact semnificativ asupra reprezentării cetățenilor în parlament.
CUVINTE CHEIE
Sisteme electorale, dreptul de vot, dreptul de a fi ales, cenzul electoral de vârstă, elite în societate, apartenența la partide politice.

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I. INTRODUCTION

Poland's history in the 20th century is inextricably linked to a series of dynamic and tumultuous events, including the First and Second World Wars, the German and Soviet occupations, and the period of Soviet-type dictatorship. These pivotal moments profoundly influenced the development of the political system, shaping both the constitutional provisions adopted and the electoral mechanisms that determined the selection of parliamentary representatives. Such transformations were particularly evident throughout the various stages of the evolution of the Polish state, from the restoration of independence in 1918 to the systemic transformation of 1989.

This article focuses on the electoral systems in operation in Poland between 1918 and 1989, with a particular focus on the methods employed to shape the composition of parliament. Among the aspects under scrutiny are the electoral requirements related to age, education, and occupation, the nature of the electoral system itself, the role of political party affiliation, and the restrictions imposed on the right to vote, both in terms of active and passive electoral rights. The study will also consider the broader political transformations that influenced the electoral process, as well as the constitutional provisions that governed elections at various stages of Poland's 20th-century history. Through this analysis, a clearer understanding will emerge of how the evolution of electoral systems shaped the composition of parliament during this period.

II. AN OVERVIEW OF THE HISTORY OF CONSTITUTIONS AND ELECTORAL LAW IN POLAND IN THE 20TH CENTURY

In the aftermath of the First World War, efforts commenced to establish the legal foundations of a state reborn after 123 years of subjugation. A pivotal moment in shaping the newly restored democratic Polish state was the adoption of its constitution. On 22 November 1918, the Chief of State, Józef Piłsudski, issued the Decree on the Supreme Representative Authority of the Republic of Poland.[2] According to Article 1 of this decree, Piłsudski was to serve as Interim Chief of State until the Legislative Sejm was convened. Shortly thereafter, on 28 November 1918, he issued two further decrees concerning the elections to the Legislative Sejm: the Decree on the Electoral Law to the Legislative Assembly[3] and the Decree on the Elections to the Legislative Assembly.[4]

2 Dz.U. 1918 Nr 17 poz. 41, Dekret Naczelnika Państwa o najwyższej władzy reprezentacyjnej Republiki Polskiej z dnia 22 listopada 1919 r. (Decree of the Head of State on the Supreme Representative Authority of the Republic of Poland of 22 November 1919); Marek Dobrowolski, Dorota Lis-Staranowicz (2022): (Im)permanence of Polish Constitutionalism: in Search of an Optimal Vision of the State, in Lóránt Csink, László Trócsányi (ed.): *Comparative Constitutionalism in Central Europe*, CEA Publishing, Miskolc–Budapest, p. 92.

3 Dz.U. 1918 Nr 18 poz. 46, Dekret o ordynacji wyborczej do Sejmu Ustawodawczego z dnia 28 listopada 1918 r. (Decree on the Electoral Ordinance for the Legislative Assembly of 28 November 1918).

4 Dz.U. 1918 Nr 18 poz. 47, Dekret o wyborach do Sejmu Ustawodawczego z dnia 28 listopada 1918 r. (Decree on elections to the Legislative Assembly of 28 November 1918).

These decrees set the date for the elections, which were to take place on 26 January 1919.

The principal task of the newly established Legislative Assembly was to draft and adopt a constitution. After fifteen months of constitutional work,[5] the Constitution of 1921, commonly known as the March Constitution, was enacted.[6] This document laid the foundation for a democratic state governed by a parliamentary system. Sovereignty resided with the people, who exercised their authority through their elected representatives in a bicameral parliament, consisting of the Sejm and the Senate.[7] The March Constitution remained in force without modification until 1926, when it was amended following Józef Piłsudski's *coup d'état*. Adopted on 2 August 1926, the Act Amending and Supplementing the March Constitution[8] significantly reinforced the powers of the President, while curtailing the authority of both the Sejm and the Senate.[9]

A defining moment in Poland's constitutional history came with the introduction of the Constitution of 1935,[10] commonly referred to as the April Constitution. This new framework marked a decisive shift from a parliamentary to a presidential system, establishing the President as the supreme authority in the state. While the Sejm's powers were further diminished, the role of the Senate was considerably strengthened.[11] As A. Ajnenkiel observed, the April Constitution:

> *"brought the person of the President to the fore. This was a clear borrowing from the fascist doctrine placing at the head of the state an unaccountable leader before anyone, to whom the entire state apparatus was subordinated."*[12]

During the Second World War, Poland fell under the occupation of both Germany and the Union of Soviet Socialist Republics, rendering the proper functioning of the state impossible. In the aftermath of the war, Poland came under the influence of the USSR, leading to the establishment of a Soviet-type dictatorship.[13] Two years after the end of the war, in 1947, elections to the Legislative Assembly were held under the

5 Andrzej Ajnenkiel (1968): *Sejmy i konstytucje w Polsce 1918–1939*, Państwowe Zakłady Wydawnictw Szkolnych, Warszawa, p. 45.
6 Dz.U. 1921 Nr 44 poz. 267, Ustawa z dnia 17 marca 1921 r. – Konstytucja Rzeczypospolitej Polskiej (Act of 17 March 1921. – Constitution of the Republic of Poland).
7 Zbigniew Łakomski (1975): *Sejm PRL*, Krajowa Agencja Wydawnicza, Warszawa, p. 8.
8 Dz.U. 1926 Nr 78 poz. 442, Ustawa z dnia 2 sierpnia 1926 r. zmieniająca i uzupełniająca Konstytucję Rzeczypospolitej z dnia 17 marca 1921 r. (Act of 2 August 1926. amending and supplementing the Constitution of the Republic of 17 March 1921).
9 Grzegorz M. Kowalski: The Amendment of August 1926 to the first Polish Constitution of the Second Republic, *Krakowskie Studia z Historii Państwa i Prawa*, 2/2014, p. 318.
10 Dz.U. 1935 Nr 30 poz. 227, Ustawa Konstytucyjna z dnia 23 kwietnia 1935 r. (Constitutional Act of 23 April 1935).
11 Ajnenkiel (1968): pp. 116–119.
12 Ajnenkiel (1968): p. 116.
13 Marek Borucki (2002): *Konstytucje polskie 1791–1997*, Wydawnictwo MADA, Warszawa, p. 159.

provisions of the electoral law of 22 September 1946.[14] The newly elected Sejm swiftly passed a constitutional law on the System and Scope of Action of the Supreme Organs of the Republic of Poland,[15] which was intended to serve as a temporary constitutional framework until the final constitution of the so-called "people's state" was introduced. This law nominally adhered to the fundamental principles of the March Constitution, retaining certain provisions and maintaining, at least in theory, democracy, the tripartite division of power, and the parliamentary system of government.[16]

However, the process of drafting a new constitution continued until 22 July 1952, when the Legislative Assembly adopted the Constitution of the Polish People's Republic.[17] This document encapsulated the political transformations that had taken place between 1949 and 1952 and served as a direct reflection of socialist political ideology.[18] The Montesquieu-inspired principle of the tripartite separation of powers was formally abandoned in favour of the doctrine of the unity of state power, with the Sejm of the People's Republic of Poland designated as the supreme governing authority. As a consequence, the Constitution of the Polish People's Republic brought about the definitive transformation of parliament into a unicameral legislative body.[19]

The Polish constitutions of the 20th century, briefly discussed above, all contained provisions governing the procedure for electing representatives to the legislature. However, they were not the sole legal instruments addressing this matter. Throughout this period, numerous electoral laws were enacted to elaborate upon and refine the constitutional norms. The following table presents a summary of the most significant constitutions and electoral laws that shaped Poland's political landscape in the 20th century and will serve as the foundation for this study. On the basis of the electoral systems outlined therein, an analysis will be conducted to examine the requirements that influenced the composition of parliament.

Constitution	Electoral Law
	1918 Decree on the Electoral Law for the Legislative Assembly
1921 Constitution (March Constitution)	1922 Electoral Law to the Sejm 1922 Electoral Law to the Senate

14 Dz.U. 1946 Nr 48 poz. 274, Ustawa z dnia 22 września 1946 r. – Ordynacja wyborcza do Sejmu Ustawodawczego (Act of 22 September 1946. – Electoral Ordinance for the Legislative Assembly).

15 Dz.U. 1947 Nr 18 poz. 71, Ustawa Konstytucyjna z dnia 19 lutego 1947 r. o ustroju i zakresie działania najwyższych organów Rzeczypospolitej Polskiej (Constitutional Act of 19 February 1947 on the organisation and scope of action of the supreme authorities of the Republic of Poland).

16 Stanisław Bożyk (2020): Etapy rozwoju współczesnego polskiego konstytucjonalizmu, in Stanisław Bożyk (ed.): *Prawo konstytucyjne. Wydanie czwarte uaktualnione*, Wydawnictwo Temida 2, Białystok, p. 58.

17 Dz.U. 1952 Nr 33 poz. 232, Konstytucja Polskiej Rzeczypospolitej Ludowej uchwalona przez Sejm Ustawodawczy w dniu 22 lipca 1952 r. (Constitution of the People's Republic of Poland adopted by the Legislative Assembly on 22 July 1952).

18 Łakomski (1975): p. 15.

19 Bożyk (2020): pp. 58–59.

Constitution	Electoral Law
1935 Constitution (April Constitution)	1935 Electoral Law to the Sejm 1935 Electoral Law to the Senate
	1946 Electoral Law to the Legislative Assembly
1952 Constitution (Constitution of the Polish People's Republic)	1952 Electoral Law to the Sejm 1956 Electoral Law to the Sejm 1976 Electoral Law to the Sejm and National Councils 1985 Electoral Law to the Sejm

Table 1: Selected Electoral Laws of Poland in the 20th century

III. EVOLUTION OF ELECTORAL RIGHTS IN THE SECOND REPUBLIC OF POLAND

1. Electoral law for the Legislative Assembly of 1918

The 1918 Electoral Law established the principles governing the election of a unicameral Legislative Assembly. Under its provisions, the right to elect members to the Legislative Assembly was granted by the ordinance to every citizen, regardless of gender, who had reached the age of 21 by the date the election was announced. As a result, for the first time in the history of Poland, women were granted the formal right to participate in elections to the Sejm.[20] To exercise this right, a citizen was required to be a resident of the district in which they intended to vote, with residency being a prerequisite from at least the day prior to the election's proclamation. The Ordinance imposed restrictions on suffrage, excluding two groups from the right to vote: active-duty military personnel and those who had been judicially disenfranchised.[21]

Eligibility for election to the Legislative Sejm extended to all male and female citizens who held the right to vote, regardless of their place of residence, as well as to members of the military (Article 7 of the Electoral Law of 1918). However, as K. Kacperski observed, this provision raises certain ambiguities. The Electoral Law provided that the right to stand as a candidate was contingent upon possessing the active electoral right, which itself was subject to the requirement of permanent residence. This, in effect, barred individuals without a fixed residence prior to the election's announcement from candidacy. Furthermore, Poles residing beyond the territorial boundaries defined by law were likewise ineligible to stand for election.[22] Additional restrictions applied to those seeking election, particularly in relation to professional roles. Officials serving in state administrative, fiscal, and judicial bodies were prohibited from standing as candidates in the district in which they performed

20 Kamil Kacperski: Prawo wyborcze do Sejmu Ustawodawczego, *Przegląd Sejmowy*, 6/2018, p. 62.
21 Kacperski (2018): p. 83.
22 Kacperski (2018): p. 83.

their duties. However, this limitation did not extend to officials and military central authorities.

The Electoral Law further delineated the rules governing electoral committees, the nomination of parliamentary candidates, the voting process, and the determination of election results. Notably, it introduced multi-mandate constituencies, from which several to a dozen members of parliament were elected, employing the d'Hondt method for the allocation of seats among competing individual lists. These lists could be proposed by citizens residing within a given electoral district, provided they had secured at least fifty supporting signatures.[23] It is particularly worth noting that the law did not specify either a minimum or maximum number of candidates that could be proposed on such lists. The absence of such a provision could have given rise to a situation in which a list contained no more candidates than there were seats available in a given constituency, or, in extreme cases, even fewer.[24] This regulatory gap posed a potential risk: political parties might have chosen to nominate only as many candidates as there were seats to be filled, thereby eliminating any real electoral competition.

2. The March Constitution of 1921 and related electoral laws

With the adoption of the March Constitution, a bicameral parliament was established, comprising the Sejm and the Senate as the organs of legislative power. Although both chambers were formally equal, the constitutional provisions clearly conferred broader powers upon the Sejm, positioning it as the dominant legislative body.[25] The method of election of deputies and senators was pre-defined in the provisions of this constitution; however, the specific regulations clarifying these constitutional provisions were set forth in two electoral ordinances passed by the Legislative Assembly in 1922—the Electoral Ordinance for the Sejm[26] and the Electoral Ordinance for the Senate.[27]

The March Constitution did not introduce significant changes with regard to the eligibility criteria for participating in elections to the Sejm compared to the Decree on Elections to the Legislative Assembly.[28] Thus, the right to be elected remained granted to every citizen who had reached the age of 21 by the date of the election announcement and had resided in the relevant electoral district for at least one day prior to that announcement. Furthermore, the 1922 Electoral Ordinance for the Sejm, in Article 3,

23 Wojciech Sokół (2007): *Geneza i ewolucja systemów wyborczych w państwach Europy Środkowej i Wschodniej*, Wydawnictwo Uniwersytetu Marii Curie-Skłodowskiej, Lublin, pp. 268–269.
24 Kamil Kacperski (2007): *System wyborczy do Sejmu i Senatu u progu Drugiej Rzeczypospolitej*, Wydawnictwo Sejmowe, Warszawa, p. 95.
25 Anna Hadała, Damian Wicherek: Evolution of the Senate institutions based on the Constitutional Act of March 17th 1921 and the Constitutional Act of April 23rd 1935, *Przegląd Prawa Konstytucyjnego*, 6/2018, p. 119.
26 Dz.U. 1922 Nr 66 poz. 590, Ustawa z dnia 28 lipca 1922 r. – Ordynacja wyborcza do Sejmu (Act of 28 July 1922. – Electoral Ordinance for the Sejm).
27 Dz.U. 1922 Nr 66 poz. 591, Ustawa z dnia 28 lipca 1922 r. – Ordynacja wyborcza do Senatu (Act of 28 July 1922. – Electoral Ordinance for the Senate).
28 Piotr Chrobak: Systemy wyborcze na ziemiach polskich od II do III Rzeczypospolitej, *Zeszyty Naukowe Uniwersytetu Szczecińskiego Acta Politica*, 2012, p. 104.

introduced additional categories of individuals who were disenfranchised, including those deemed wholly or partially of unsound mind, bankrupt debtors, and those who had been judicially stripped of paternal authority. On the other hand, the age requirement for the right to stand for election to the Sejm was raised. Prospective deputies now had to be at least 25 years old. A further restriction was imposed on civil servants, who were barred from standing for election in the districts where they were professionally active. This measure was implemented to prevent officials from unduly influencing voters, thereby safeguarding the integrity and freedom of the electoral process.[29]

Under Article 36 of the March Constitution, the right to vote for the Senate was granted to any Sejm voter who had reached the age of 30 on the day the election was announced and had resided in the relevant constituency for at least a year prior to that date. However, this rule did not apply to three groups: newly settled colonists, workers who had changed both their place of work and consequently their place of residence, and civil servants who had been transferred on official business.[30] In contrast, the passive suffrage was granted to all citizens who met the requirements for eligibility to vote for the Senate and had reached the age of 40. Notably, candidates could stand for election irrespective of their place of residence, whether at home or abroad. The age requirement for Senate candidates was slightly higher than that for Sejm candidates, a rule which was designed to ensure that the second chamber would represent voters with strongly held conservative views. This assumption was confirmed by practice.[31]

Both Sejm and the Senate elections were based on fundamental democratic principles, such as universality, directness, equality, secrecy and proportionality, which were explicitly outlined in Articles 11 and 36 of the March Constitution. Similar to the 1918 Electoral Ordinance, lists of candidates were proposed by citizens, which aimed to give the public a real influence on the composition of representative bodies. However, the 1922 Electoral Ordinance introduced a significant innovation: the addition of so-called state lists. This mechanism introduced a new structure for the allocation of seats, based on a two-tier system. In the first stage, seats were allocated in individual constituencies according to the principles of proportional representation. Then, in the second stage, seats from the state list were allocated to political parties that had obtained the highest number of seats nationwide.[32]

3. The April Constitution of 1935 and related electoral laws

The Constitution of 23 April 1935, together with the newly enacted Electoral Laws—the Electoral Ordinance for the Sejm[33] and the Electoral Ordinance for the Senate[34]—su-

29 Andrzej Ajnenkiel (2001): *Konstytucje Polski w rozwoju dziejowym 1791–1997*, Oficyna Wydawnicza RYTM, Warszawa, p. 177.
30 Kacperski (2007): p. 146.
31 Ajnenkiel (2001): p. 178.
32 Sokół (2007): p. 269.
33 Dz.U. 1935 Nr 47 poz. 319, Ustawa z dnia 8 lipca 1935 r. – Ordynacja wyborcza do Sejmu (Act of 8 July 1935. – Electoral Ordinance for the Sejm).
34 Dz.U. 1935 Nr 47 poz. 320, Ustawa z dnia 8 lipca 1935 r. – Ordynacja wyborcza do Senatu (Act of 8 July 1935. – Electoral Ordinance for the Senate).

perseded those of 1922. While the April Constitution upheld the bicameral structure of parliament, its standing within the state underwent a profound transformation. In a decisive departure from the tripartite separation of powers, authority was transferred to the President, thereby significantly diminishing the role of the legislature.[35] The Constitution introduced a series of modifications to the state system, while both Electoral Ordinances brought substantial changes to the process of electing legislative representatives.[36]

Under the revised Electoral Law, the age census for both active and passive voting rights was markedly increased. Every citizen above the age of 24 was granted the right to vote in elections to the Sejm.[37] As one scholar has noted, raising the voting age from 21 to 24 resulted in the disenfranchisement of approximately 10% of those previously eligible.[38] Furthermore, the active right to vote could be curtailed in certain circumstances listed in Article 3 of the Ordinance. These included, *inter alia*, restriction or revocation of legal capacity, the loss of parental or guardianship rights, judicial placement in a medical institution, a house of compulsory labour, an institution for the incorrigible, or a closed asylum for the mentally ill, as well as subsistence through prostitution.[39] Similarly, the minimum age for candidacy in elections was raised from 25 to 30.[40] Moreover, certain individuals were explicitly barred from standing for election to the Sejm under Article 5 of the Electoral Ordinance. These included voivodes, prosecutors of general courts, superintendents of school districts, directors of treasury chambers, as well as officers and privates of the State Police within the districts where they exercised their duties.

The regulations governing the nomination of parliamentary candidates also underwent significant alterations. Under the 1935 Electoral Law, the authority to nominate candidates was vested in pre-election assemblies, composed of representatives from various sectors of society, including trade unions, social organisations, and both local and economic self-governments. However, it must be noted that these assemblies operated under the influence of the ruling power, as the administration exerted control over the composition of candidate lists. Another major change concerned the number of lists—whereas multiple lists had previously been in use, a single list system was introduced. Consequently, the electorate's role in the voting process was reduced to selecting two candidates from among those pre-approved by the pre-election assemblies.[41]

Even more profound changes were introduced regarding the Senate, particularly in comparison to the regulations of 1922. The active electoral right to the Senate was vested in individuals who had reached the age of 30 and belonged to one of the several

35 Dariusz Górecki: Sejm w ustawie konstytucyjnej 23 kwietnia 1935 roku, *Przegląd Sejmowy*, 2/2005, p. 79.
36 Marek Woźnicki: Wybory do Sejmu i Senatu w świetle ordynacji wyborczych z 1935 r., *Studia Iuridica Lublinensia*, 2014, p. 393.
37 Maciej Starzewski (1938): *O ordynacji wyborczej do Sejmu 1935 roku*, Kraków, p. 4.
38 Ajnenkiel (2001): p. 226.
39 Woźnicki (2014): pp. 395–396.
40 Starzewski (1938): p. 4.
41 Ajnenkiel (1968): p. 120.

designated groups: those who had been honoured with an order or state decoration for personal merit; individuals who had completed higher education at a pedagogical high school, cadet school or held an officer's rank; and those deemed to possess the confidence of society, such as councillors.[42] The right to vote was thus restricted to what was termed the "privileged social classes."[43] Due to the stringent limitations imposed, fewer than 2% of the population held the right to participate in the election of senators.[44] As for passive electoral rights, eligibility for candidacy in the Senate was reserved for those who met the criteria for active electoral rights and had reached the age of 40 by the day preceding the official announcement of the election (Article 4 of the Electoral Ordinance to the Senate).

Senate elections were conducted through an indirect, two-stage process. Citizens possessing the active right to vote for the Senate elected delegates to the provincial electoral colleges, which in turn elected the senators representing each province. It is important to highlight that voting only took place if the number of candidates exceeded the available seats. Otherwise, the nominees were automatically declared elected without the need for a vote.[45]

IV. ELECTORAL LAW FOR THE LEGISLATIVE ASSEMBLY OF 1946

The departure from the provisions of the 1935 regulation was set in motion by the Electoral Ordinance to the Legislative Assembly of 1946. The solutions adopted therein closely mirrored those of 1922, with the notable distinction that the parliament was now structured as a unicameral body.[46] The right to vote was granted to all citizens who had reached the age of 21, provided they had not been disqualified by the restrictions imposed under the Electoral Ordinance. Certain categories of individuals were explicitly excluded from suffrage. These included citizens who had been deprived of their legal capacity or public rights under a final court judgement issued after 22 July 1944; those who had declared their affiliation with the German nationality during the Second World War and had not subsequently rehabilitated themselves; as well as individuals who had profited from collaboration with the occupying forces or had been involved with underground fascist organisations (Article 2 of the 1946 Electoral Law).

Similarly, in the case of passive electoral rights, the Ordinance reinstated the lower age threshold of 25 years, as had been the case under the 1922 regulations. Any citizen wishing to stand for election to parliament was required to meet this age requirement and possess the active right to vote. However, the Ordinance also allowed for

42 Marcin Zakrzewski, Alicja Woźniak (2015): Naruszenia prawa wyborczego w świetle wyborów parlamentarnych w 1935 roku, in Aldona Rita Jurewicz, Tomasz Kuczur, Monika Piekarska, Damian Wąsik (ed.): *Wybory i nieprawidłowości wyborcze wczoraj i dziś. Wybrane zagadnienia*, Materiały z Ogólnopolskiej Konferencji Naukowej, Olsztyn 12 maja 2015 r., p. 102.

43 Ajnenkiel (1968): p. 120.

44 Ajnenkiel (2001): p. 226.

45 Dariusz Górecki: Wybory parlamentarne w Polsce w 1935 i 1938 roku, *Acta Universitatis Lodziensis Folia Iuridica*, 2023, p. 42.

46 Michał Siedziako (2018): *Bez wyboru. Głosowania do Sejmu PRL (1952–1989)*, Warszawa, p. 92.

exceptions, granting passive electoral rights to individuals below the required age in recognition of special merit in the struggle against the occupying forces or contributions to the nation's post-war reconstruction. Conversely, those who had occupied leadership positions, either within the country or in exile, and had sought to obstruct resistance against the occupation during the war, could be stripped of this right. The authority to grant or revoke passive electoral rights rested with the State Electoral Commission.[47]

The elections were to be conducted according to the principles of universality, equality, directness, secrecy and proportionality. Voting took place in multi-member constituencies, and the electoral law reintroduced the system of two lists—district and state. Candidates could be nominated by groups of citizens, with a minimum of 100 signatories required for a district list and 500 for a state list.[48]

V. ELECTORAL RIGHTS IN THE PEOPLE'S REPUBLIC OF POLAND

The provisions of the Constitution of the People's Republic of Poland established the unicameral Sejm of the People's Republic of Poland as the supreme organ of state power, embodying the will of the working people of both towns and villages (Article 15 of the Constitution). The rules governing elections were set forth in Chapter 8 of the Constitution and further elaborated in the Electoral Ordinance, adopted on 1 August 1952.[49]

The 1952 Constitution lowered the minimum age requirement for the active right to vote to 18 years. Suffrage was granted to all citizens above this age, regardless of sex, nationality, race, religion, education, duration of residence within the voting precinct, social background, occupation, or financial standing. The only exceptions were individuals diagnosed with mental illness, those deprived of legal capacity, or those stripped of their public rights. Meanwhile, the passive electoral right was conferred upon all citizens who met the criteria for suffrage and had reached the age of 21, thereby qualifying them to stand as candidates for the Sejm.[50] The reduction of the age thresholds to 18 and 21, respectively, was a reflection of the principle of universal suffrage and did not impose any restrictions upon the electoral right.[51]

The 1952 Electoral Law was founded upon the principles of universality, equality, directness, secrecy and the majority system, which replaced the previously employed

47 Siedziako (2018): pp. 92–93.

48 Wojciech Sokół (2014): Systemy wyborcze w Polsce Ludowej – uwarunkowania, mechanizmy i konsekwencje polityczne, in Sebastian Ligarski, Michał Siedziako (ed.): *Wybory i referenda w PRL*, Szczecin, pp. 31–32.

49 Dz.U. 1952 Nr 35 poz. 246, Ustawa z dnia 1 sierpnia 1952 r. – Ordynacja wyborcza do Sejmu Polskiej Rzeczypospolitej Ludowej (Act of 1 August 1952. – Electoral Ordinance to the Sejm of the People's Republic of Poland).

50 Janusz Kolczyński, Stanisław Bednarski (1969): *Demokracja, Rady Narodowe, Sejm PRL*, Wydawnictwo ISKRY, Warszawa, pp. 79–81.

51 Zdzisław Jarosz (1969): *System wyborczy PRL*, Państwowe Wydawnictwo Naukowe, Warszawa, p. 183.

system of proportional representation. Elections were conducted in multi-member constituencies, and the right to propose candidates was vested in political, professional and cooperative organisations, as well as in mass social bodies such as the Union of Peasant Self-Help and the Union of Polish Youth. In addition, the number of candidates on any given list could not exceed the number of parliamentary seats allocated to the constituency. Although the Electoral Law technically permitted the submission of multiple lists, in practice, citizens could only cast their votes for candidates affiliated with the National Front.[52] It is noteworthy that this Front was subordinate to the ideological directives of the communist party, the Polish United Workers' Party (*Polska Zjednoczona Partia Robotnicza*).[53] As S. Rozmaryn observed, the elections took on a plebiscitary character, whereby voters were effectively limited to expressing support "for" or "against" candidates from the list of the National Front.[54]

In 1956, a new electoral law was passed for the Sejm of the People's Republic of Poland.[55] While it did not introduce fundamental alterations to the electoral system, two significant changes were made. Firstly, the number of candidates permitted on an electoral list was increased, though it could not exceed two-thirds of the total number of parliamentary seats allocated to a given district. This adjustment afforded voters a somewhat broader selection of candidates.[56] Secondly, the positioning of candidates' names on the ballot paper, previously inconsequential under the 1952 law, became a matter of greater importance. Under the revised system, voters indicated their choices by crossing out the names of those they did not wish to elect. If a voter left more names unmarked than the number of seats available in the constituency, the vote was deemed to have been cast in favour of the candidates listed in the top positions.[57]

52 "*The National Front was a formalised, structured mass organisation, created and functioning with the political consent of the Communist Party. Operating within the framework of the system of 'people's democracy' (people's leadership), it comprehensively supported the political programme of the Communist Party in consolidating socialist ideology. Being a mass organisation, it grouped together co-participants: satellite political parties, social organisations, trade unions, societies and, in some socialist countries, individual citizens, on the basis of universal and declarative recognition of the Communist Party as the leading political force. Given the limited (by the will of the Communist Party) scope of political activity, the National Front was also involved in initiating socio-cultural activities in the country.*" – This comprehensive definition was proposed by Paweł Skorut (2015): *Front Jedności Narodu. Od narodzin idei do upadku politycznego pozoru*, Wydawnictwo Attyka, Kraków, p. 38; Sokół (2014): pp. 32–33.

53 Lech Mażewski: Polska Zjednoczona Partia Robotnicza a lud pracujący miast i wsi w Konstytucji Polskiej Rzeczpospolitej Ludowej i prawie wyborczym (1952–1989), *Przegląd Prawa Konstytucyjnego*, 1/2020, p. 252.

54 Stefan Rozmaryn: O zmianach w prawie wyborczym Polskiej Rzeczypospolitej Ludowej, *Państwo i Prawo*, 1956, p. 968.

55 Dz.U. 1956 Nr 47 poz. 210, Ustawa z dnia 24 października 1956 r. Ordynacja wyborcza do Sejmu Polskiej Rzeczypospolitej Ludowej (Act of 24 October 1956. Electoral Ordinance to the Sejm of the Polish People's Republic).

56 Rozmaryn (1956): p. 968.

57 Lech Mażewski (2011): *System rządów w PRL (1952–1989)*, Wydawnictwo Capital, Warszawa–Biała Podlaska, pp. 70–71.

The 1976 Electoral Ordinance for the Sejm and National Councils,[58] along with the 1985 Electoral Ordinance for the Sejm,[59] mandated that elections be conducted under a single programme dictated by the Unity Front of the Nation.[60] Officially, the principle of voting for a single list was enshrined within the Ordinance, further providing that candidates for parliamentary office could only be nominated by those who adhered to the Unity Front's common programme. Consequently, all individuals featured on the electoral list represented the same platform and were members of the same political party.[61]

Thus, it is evident that during elections to the Sejm of the People's Republic of Poland, citizens were limited to selecting candidates from a list submitted and controlled by the Front for Unity of the Nation, and thereby, in practice, by the ruling Polish United Workers' Party.[62] This effectively meant that eligibility for candidacy in the Sejm was contingent upon affiliation with the aforementioned party. Although the Polish United Workers' Party maintained direct control over the lists of candidates and the electoral process itself, additional mechanisms of oversight were employed to safeguard its dominance within the Sejm. From the outset, party authorities ensured that only carefully chosen individuals were appointed to sit on election committees. These members of the election commissions played a crucial role, overseeing the registration of the district lists of candidates, supervising the voting process, and ultimately counting the ballots.[63] Moreover, the authorities resorted to various forms of manipulation and coercion to compel citizens to participate in the elections. Beyond this, they issued explicit directives on the expected conduct at polling stations:

> *"[c]lear instructions on how one should behave at the ballot box, i.e. a 'true' citizen, i.e. a Pole who is a patriot and loves the Homeland, etc..., votes without deletion and openly, and thus does not use the place (curtains, booths) for secret voting."*[64]

Such conditions exemplify the realities of how the Sejm was composed under the Soviet-type dictatorship in Poland.

58 Dz.U. 1976 Nr 2 poz. 15, Ustawa z dnia 17 stycznia 1976 r. Ordynacja wyborcza do Sejmu Polskiej Rzeczypospolitej Ludowej i rad narodowych (Act of 17 January 1976. Electoral Ordinance to the Sejm of the Polish People's Republic and National Councils).

59 Dz.U. 1985 Nr 26 poz. 112, Ustawa z dnia 29 maja 1985 r. Ordynacja wyborcza do Sejmu Polskiej Rzeczypospolitej Ludowej (Act of 29 May 1985. Electoral Ordinance to the Sejm of the Polish People's Republic).

60 Renamed National Front since 1957 – Siedziako (2018): p. 348.

61 Mażewski (2011): pp. 76–77.

62 Siedziako (2018): p. 244.

63 Siedziako (2018): p. 169.

64 Andrzej Zaćmiński, Michał Zaćmiński: Zasada tajności głosowania w wyborach do Sejmu PRL I kadencji z 26 października 1952 r., *Przegląd Sejmowy*, 4/2023, pp. 191–192.

VI. CONCLUDING REMARKS

Throughout 20th-century Polish history, the evolving nature of the state's political system played a pivotal role in enacting a particular form of electoral system, which, in turn, significantly influenced the structure of the legislature. From the democratic March Constitution to the authoritarian regime imposed after the May coup, and then to the socialist framework of the Constitution of the Polish People's Republic, electoral law in Poland adapted in response to broader political shifts.

A key factor that profoundly impacted both the right to vote and the right to stand for election was the age census. As observed during the interwar period, there was a notable upward trend in the lower age limit, effectively limiting the participation of certain segments of the population in elections. In contrast, under the Polish People's Republic the age limit was significantly lowered, broadening electoral participation. The table below provides a summary of the changes that took place in relation to this issue, based on the examined legal acts:

Period	Constitution/ Electoral law	The right to elect	The right to be elected
Interwar period	Decree on the Electoral Law for the Legislative Assembly of 1918	Legislative Assembly – 21 years	Legislative Assembly – 21 years
	March Constitution of 1921	Sejm – 21 years	Sejm – 25 years
		Senate – 30 years	Senate – 40 years
	April Constitution of 1935	Sejm – 24 years	Sejm – 30 years
		Senate – 30 years	Senate – 40 years
After the Second World War and during the Soviet-type dictatorship	Electoral Law for the Legislative Assembly of 1946	Legislative Assembly – 21 years	Legislative Assembly – 25 years
	Constitution of the People's Republic of Poland of 1952	Sejm – 18 years	Sejm – 21 years

Table 2: Required age to elect and to stand for election to parliament

During the period in which the April Constitution and the Electoral Ordinances enacted alongside it were in effect, eligibility to elect or stand for election to the position of senator was largely determined by one's membership in the social elite. This elite comprised a select group of citizens who possessed the requisite education, were recognised for their state service, or enjoyed public trust. This system significantly narrowed the segment of society with influence over the formation of one of the chambers of parliament.

The method of candidate nomination and the nature of the elections played a decisive role in shaping the composition of parliament under Soviet-type dictatorship. The candidates were aligned with the single electoral programme of the Unity Front of the

Nation, which was controlled by the Polish United Workers' Party. Furthermore, the elections had a plebiscitary character, whereby voters were merely given the option to express their support or opposition to candidates who had, in effect, already been selected by the ruling party. This system served to curtail political pluralism.

> *"The shape of the electoral system is to a serious extent the result of the game of political party interests. The party arrangement in the parliament may cause the legislator, guided by the anticipated political gains in the elections, to introduce instrumentally favourable regulations of the electoral law. The introduction of new regulations in the electoral law is caused by calculations and predictions of party leaders that the system will work in favour of their party."*[65]

This perspective aptly encapsulates the preceding discussion. As evidenced by the subsequent political developments in 20th-century Poland, the rules governing parliamentary formation reflected the state of the Polish political landscape at the time, which was characterised by dynamic and often turbulent changes.

65 Andrzej Krasnowolski (2010): *Koncepcje systemów wyborczych*, Biuro Analiz i Dokumentacji Kancelarii Senatu, Warszawa, pp. 4–5.

The Influence on the Structure of the Legislature: Examining Hungary's Electoral Rights Throughout the 19th and 20th Centuries

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ABSTRACT
This article explores the evolution of electoral rights in Hungary in the 19th and 20th centuries, uncovering the pivotal historical moments, legislative reforms, and social transformations that have shaped the country's electoral system as it stands today. Placing particular emphasis on the central role of members of parliament, the study seeks to trace the arduous journey towards the establishment of universal suffrage for all eligible citizens. From 1848, when parliament enacted the first modern civilian electoral law, to the absolute control of the Party under the Soviet-type dictatorship, electoral law in Hungary has undergone a dynamic metamorphosis, shaped by shifting social norms and the volatile political and military climate of each era. The entire process encapsulates the ongoing struggle between democratic aspirations and the evolving legal framework.
KEYWORDS
Electoral system, electoral rights, parliaments, national assembly, right to vote, right to be elected, requirements to be a representative, Hungarian electoral history.

Influența asupra structurii legislativului: examinarea drepturilor electorale ale Ungariei de-a lungul secolelor al 19-lea și al 20-lea

REZUMAT
Acest articol explorează evoluția drepturilor electorale în Ungaria în secolele al 19-lea și al 20-lea, evidențiind momentele istorice cheie, reformele legislative și schimbările sociale care au modelat sistemul electoral al țării așa cum există astăzi. Punând accent pe rolul esențial al membrilor parlamentului, studiul își propune să analizeze procesul de obținere a sufragiului universal pentru fiecare cetățean eligibil. Începând cu anul 1848, când parlamentul a aprobat prima lege electorală civilă modernă, și până la dominația absolută a Partidului sub dictatura de tip sovietic, legislația electorală din Ungaria a trecut printr-o transformare dinamică, influențată atât de schimbările sociale, cât și de situația politică >>

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>> și militară agitată a vremii. Întregul proces reflectă lupta continuă dintre aspirațiile democratice și cadrul juridic în schimbare.
CUVINTE CHEIE
Sistem electoral, drepturi electorale, parlamente, adunare națională, drept de vot, drept de a fi ales, cerințe pentru a fi deputat, istoria electorală a Ungariei.

I. INTRODUCTION

The fundamental human right to vote empowers individuals to influence government decisions and safeguard their other human rights. Transparent and equitable elections are vital in averting conflict and violence, fostering peaceful transitions of power. Conversely, the infringement upon voting rights can provoke unrest and social turmoil.

Modern states in Central Europe, grounded in constitutional principles, operate on the tenets of the rule of law,[2] democratic governance, and, by extension, universal suffrage. The history of Hungary offers a compelling narrative—one marked by the evolution of electoral rights and the preconditions for parliamentary representation. The nation underwent profound political transformations in the 19th and 20th centuries, with each era leaving an indelible imprint on Hungary's electoral framework. From 1848, which sparked ambitions for a broader political enfranchisement, to the seismic changes after the Second World War and the eventual collapse of the Iron Curtain in 1989, Hungary's political trajectory is a testament to the enduring resilience of democratic principles.

This article seeks to address questions such as: *what qualifies an individual to determine national representation? Should every citizen, regardless of wealth and education, possess this right?* The approaches of various states to these issues have evolved dramatically over the past two centuries, as have the criteria for individuals seeking to become active members of parliament or to participate in the electoral process. Though the answer to this question may seem self-evident today, what is now considered a standard and fundamental civil right had to be fought for through decades of legal reform, against the backdrop of the dynamic history of the 19th and 20th centuries.

The purpose of this article is to analyse the evolution of voting rights in Hungary in the 19th and 20th centuries. Central to this exploration is an in-depth examination of the requirements and qualifications that individuals needed to meet in order to become deputies—those entrusted with representing the diverse voices of Hungarian society. In addition, the article looks at the process by which universal suffrage was eventually granted to all eligible citizens.

2 There is a doctrinal dispute about the concept known as the *rule of law*, concerning the extensive interpretation of the term and its use to legitimise all sorts of political and legal actions in various states. As regards this see for example: Timothy A. O. Endicott: The Impossibility of the Rule of Law, *Oxford Journal of Legal Studies*, 1/1999, pp. 1–18.; Judith N. Shklar (1987): Political theory and the rule of law, in Allan Hutchinson, Patrick J. Monahan (ed.): *The rule of law: Ideal or ideology*, Carswell, Toronto, pp. 1–16.

II. THE ELECTORAL SYSTEM IN HUNGARY BEFORE THE FIRST WORLD WAR

1. General overview

Hungary's institutional framework operated without a formal written constitution, with the authority, prestige, and influence of various bodies moulded predominantly by historical precedents and the shifting political landscape during the Reform Age (1825–1848), amidst the protracted struggle for autonomy from Austria. This struggle unfolded both on the battlefield and within the realm of political discourse between 1848 and 1867.[3] For a comprehensive analysis of the contemporary electoral system, it is crucial to recognise that Hungary's parliamentary structure prior to the First World War, unlike its current form, adhered to a bicameral model. This system comprised two chambers: the Upper House, known as the House of Magnates (or House of the High Estates), and the Lower House, referred to as the House of Representatives.[4] Significantly, membership in the Upper House was not contingent upon direct electoral processes but instead arose from hereditary nobility, prominent official positions, or royal appointment.[5] As a result, the restricted electorate of the time wielded minimal influence over the composition of the House of Magnates, a composition intricately linked to socio-economic status and aristocratic lineage.

One of the more regrettable alterations to the electoral system came in 1874, culminating in its full implementation through Act XV of 1899, which excluded individuals with tax arrears from the right to vote. This restriction led to a sharp decline in parliamentary representation, reducing the electorate to less than 6%. In the following decades, the percentage of Hungarian citizens eligible to vote fluctuated only slightly, reaching 6.2% in 1906.[6] This figure was strikingly low by European standards, especially when considering that the electoral law in 1848 had once been considered progressive. By contrast, in more advanced European countries, the proportion of enfranchised citizens had already risen to between 20 and 30%, with Austria itself reaching this range following electoral reforms in 1896. Meanwhile, many Western European countries, though still lagging in democratic development, had extended suffrage to 15–30% of the population, typically accompanied by the introduction of secret voting procedures. The Electoral Reform Act of 1874 shaped the parliamentary

3 András Joó (2014): Governments-Parliaments and Parties (Hungary), in Ute Daniel, Peter Gatrell, Oliver Janz, Heather Jones, Jennifer Keene, Alan Kramer, Bill Nasson (ed.): *International Encyclopedia of the First World War*, Freie Universität Berlin. Available at: https://encyclopedia.1914-1918-online.net/article/governments-parliaments-and-parties-hungary/ (accessed on 11.02.2025).

4 György Képes: The question of universal suffrage in Hungary after the First World War, 1918–19, *Parliaments, Estates and Representation*, 2/2020, pp. 201–217, p. 202.

5 Róbert Hermann, Sándor M. Kiss (2011): Hungary's Parliament, in Róbert Hermann et al. (ed.): *The Hungarian National Assembly*, Office of the National Assembly, Budapest, pp. 21–31, p. 27.

6 Ignác Romsics: Huszadik századi magyar politikai rendszerek, *Korunk*, 4/2010, pp. 5–17.

elections in Hungary from 1875 to 1910. The newly formed ruling party, a merger of Deák's Party and Kálmán Tisza's political faction, secured over 80% of parliamentary seats in the 1875 elections and maintained its dominance until 1905. Kálmán Tisza himself held the office of prime minister for an extended period, resigning only in 1890. The first amendment to the 1874 law occurred 25 years later in 1899, when the exclusion of tax debtors was repealed, resulting in a modest increase in parliamentary representation—from 5.6% in 1896 to 6.1% in 1901. However, the pre-1848 representation level of 7% was not restored until the final years of peace before the outbreak of the First World War.[7]

In the early 20th century, efforts were made to expand the electorate and enfranchise a greater portion of the citizenry. On 16 December 1905, József Kristóffy, serving as Minister of the Interior in Fejérváry's "extra-parliamentary" government, proposed a bill seeking to extend suffrage to male citizens who had attained the age of 24 and possessed the ability to read and write. This measure would have effectively doubled the proportion of eligible voters, raising it from a mere 6.2%. In 1908, Interior Minister Gyula Andrássy Jr. advanced a proposal advocating a universal yet pluralistic electoral system, wherein the right to vote would be tied to wealth and education criteria. Under this scheme, voters would be allotted double or triple votes based on these criteria. Nonetheless, the proposal also sought to extend the right to vote more broadly granting a single vote to all literate men aged 24 and above. Strikingly, it made provision for illiterate citizens as well, permitting them to participate as "primary voters" by collectively electing a single electoral delegate, or elector, whose vote would carry a fractional weight of 1/10th. Although the proposal would have expanded the electorate to 2.6 million, it faced considerable criticism from various quarters, chiefly due to its pluralistic design. In the face of such criticism, Andrássy ultimately chose to withdraw the proposal.[8]

The Electoral Act of 1907, widely known as the István Tisza Act, stands as a defining moment in Hungary's electoral history in the years preceding the outbreak of the First World War. Though formally enacted under László Lukács, there is little doubt that István Tisza played a crucial role in its drafting. Aware of his unpopularity, Tisza took deliberate steps to ensure his name remained absent from official records. Nonetheless, his substantial involvement becomes evident upon examining his correspondence with Károly Némethy, the government official responsible for drafting the bill. As Prime Minister, Tisza introduced the legislation to remedy shortcomings in the existing electoral framework and to promote fairer representation within the Hungarian parliament. Although the reform sought to implement a more proportional electoral system, providing a more equitable representation for various political factions, it notably fell short of introducing universal suffrage, affecting only a modest expansion of the electorate.

The eligibility criteria, primarily based on wealth and educational qualifications, remained intact, yet efforts were made to increase the number of eligible voters. Despite these efforts, the electoral system retained its intricate and layered structure,

7 Képes (2020): p. 204.
8 Képes (2020), pp. 206–207.

requiring multiple rounds of voting. Local delegates were first elected and subsequently participated in further rounds to elect members of the Hungarian parliament. In addition, the reform sought to bridge the gap between rural and urban eligible voters by affording greater electoral weight to urban constituencies. While the 1907 electoral law represented a step towards broader inclusivity and proportionality, it failed to meet growing demands for universal suffrage and faced criticism for its complexities and limitations. In the years that followed, Hungary underwent profound political changes, leading to further electoral reforms, particularly in the aftermath of the First World War and the disintegration of the Austro-Hungarian Empire. Tisza's opposition to universal suffrage was well-documented. In a lecture published in September 1912, he unequivocally asserted that universal suffrage presupposed a high intellectual and material standard—one he believed Hungary had yet to attain.

The Hungarian parliamentary system of this era bore the hallmarks of a highly centralised governance structure, its restrictive framework curtailing genuine political competition. A striking testament to this rigidity is the fact that the ruling party was displaced only once, in 1906—and even then, only on the condition that opposition parties pledged allegiance to the fundamental tenets of the existing political order. Yet, despite this anti-democratic backdrop, the liberal and pluralistic ideals of the 19th century persisted, both within parliamentary discourse and in intellectual realms. Additionally, the judiciary remained steadfastly independent, upholding the rule of law without yielding to external pressures or political interference.

2. The right to vote and be elected on the basis of an analysis of the provisions of selected legislation

Just a month after the outbreak of the revolution of 1848, the Hungarian parliament passed the first modern civil electoral law (Act V of 1848).[9] Despite conferring voting rights on just 7.2% of the population, it was regarded as progressive for its time. The legislation introduced an individual, single-tier, relative majority electoral system, granting the right to vote to Hungarian men aged twenty and above, provided they adhered to a specific religious faith and met certain property or intellectual property requirements. As such, eligibility for voting was determined by factors such as age, gender, and religion. Moreover, the law explicitly emphasizes the significance of the property status and the leased profession of those eligible to vote, considering these criteria on an equal footing with age, gender, and religion. As indicated in § 2(b), eligibility to vote requires employment in specified professions outlined in the law, such as artisans, merchants, or industrialists, but also those listed in subsection (d) such as surgeons, lawyers, engineers, academic artists or teachers. Nevertheless, should an individual meet all other conditions but not be employed in one of the listed professions, they were not automatically excluded from the voting process. Provided they could demonstrate a certain income, thus maintaining a defined property status, they were still granted the right to vote. Following the enactment of this law in 1848, the initial deputy election was held in

9 1848. évi V. törvénycikk az országgyülési követeknek népképviselet alapján választásáról (Act V of 1848 on the election of the emissaries to the Diet on the basis of popular representation).

the summer of that year. After the war of independence was lost, the April Laws (among which Act V of 1848 as well) were repealed, with subsequent elections taking place in 1861 and 1865, in accordance with an imperial decree.

Article V, Paragraph 3 of Act V of 1848 explicitly delineates the provisions regarding passive voting rights, adjusting the age threshold for active voting from twenty to twenty-four years. Beyond this amendment, all other conditions remain unchanged. However, the legislation emphasises the imperative of adhering to the law, specifying that compliance must be exclusively conducted in the Hungarian language. This requirement, though ostensibly a matter of legal formalities, implicitly presupposes not only proficiency in the language but also an intrinsic connection to Hungarian culture. In a deeper sense, it signifies an obligation to be nurtured within, and intellectually anchored to, this specific cultural milieu.

As mentioned earlier, Act XXXIII of 1874,[10] adopted after the Austro-Hungarian Compromise of 1867, amended and supplemented Act V of 1848 as well as Act II of 1848 of Transylvania, represents yet another piece of legislation that modified Hungary's electoral law preceding the First World War—albeit in a manner that regrettably curtailed the number of eligible voters. This new law introduced three key provisions: the imposition of a tax qualification, the disqualification of tax debtors from electoral participation, and the mandate for obligatory open voting across all constituencies.[11]

The amendments to Hungary's electoral law at the turn of the 20th century can, without doubt, be considered restrictive. Indeed, by the dawn of that century, the number of eligible voters had dwindled compared to 1869. In stark contrast to the evolving parliamentary systems elsewhere in Europe, the Hungarian electoral framework did not seek to enshrine a universal right to vote but rather to curtail it as stringently as possible. This deliberate restriction served to concentrate political influence within a narrow elite, ensuring that only a select group of individuals could exert meaningful sway over the country's legal and political affairs. At the time, Hungarian liberals maintained that property, education, and even gender-based qualifications were the sole legitimate determinants of the right to vote and its proper exercise.[12] In light of this, one cannot help but form the unmistakable impression that the contemporary approach to electoral rights is a world apart from that of the past. Then, suffrage was perceived not as an inherent civic entitlement, but as a privilege to be earned—a reward rather than a fundamental democratic right, enabling individuals to exert genuine influence over the course of events, irrespective of education, wealth, or ability. The Hungarian electoral system of the time unquestionably curtailed opportunities for competition among different social groups and interests, thereby maintaining the supremacy of the landed aristocracy and nobility.[13]

10 1874. évi XXXIII. Törvénycikk az 1848: V. törvénycikk és az erdélyi II. törvénycikk módositásáról és kiegészitéséről (Act XXXIII of 1874 amending and supplementing of Act V of 1848 and Act II of Transylvania).

11 Képes (2020): p. 204.

12 Zoltán Szente (2010): *Kormányforma és parlamentáris kormányzás a XIX. századi európai és a dualizmus kori magyar közjogban*, p. 219. Available at: https://real-d.mtak.hu/403/4/dc_42_10_doktori_mu.pdf (accessed on 11.02.2025).

13 Szente (2010): p. 220.

III. THE ELECTORAL SYSTEM IN HUNGARY IN THE INTERWAR PERIOD

1. General overview

A more democratic House of Representatives, in which ethnic minorities (as well as Hungarian workers) would enjoy significantly stronger representation, played a pivotal role in shaping the stance of Hungary's pre-war conservative political elite. It is hardly a revelation to state that the principal factor underpinning this position, not only in Hungary but also across other nations of the time, was the deep-seated fear of an emerging social order that might arise from altering the composition of one of the legislative chambers.

A milestone in the history of suffrage in Hungary was undoubtedly 21 December 1917. The significance of this date lies in the introduction of a bill that marked an early step towards extending voting rights to women. By its very premise, the enactment of this proposed legislation would have had a profound effect on the number of eligible voters in Hungary. The proposal to enfranchise women in Hungary formed part of a broader international suffrage movement that had gained considerable momentum in the late 19th and early 20th centuries.[14] Across various nations, women were demanding equal political rights, including the right to vote. The Hungarian suffrage movement was strongly influenced by similar movements elsewhere in Europe and in the United States, with Hungarian women, like their counterparts abroad, advocating for political equality and recognition of their status as full citizens.

The inaugural proposal for granting Hungarian women the right to vote was put forward by Vilmos Vázsonyi, a government official. However, the criteria for women's suffrage diverged from those applied to men. While male voters were required to be at least 24 years old and possess a minimum of four years of elementary—or alternatively, fulfil specific tax or military service requirements—women faced a more stringent standard. They, too, had to be at least twenty-four, yet they were expected to have completed four years of secondary education. An exception to this educational prerequisite was granted to war widows, acknowledging their unique social circumstances.[15]

In January 1918, the House of Representatives convened a special committee to scrutinise the electoral law. Departing from Vázsonyi's initial proposal, the committee specifically opposed the provisions related to women's suffrage. In its report of 25 June 1918, the Special Commission report argued that women's engagement in politics might distract them from familial responsibilities. Consequently, the majority of the Special Commission recommended the removal of all clauses concerning women from the Act. When the House voted on the women's suffrage law on 17 July 1918, all proposed titles, including those regarding educational qualifications were rejected by a

14 Törvényjavaslat az országgyűlési képviselők választásáról, in *Képviselőházi Irományok*, vol. LVIII from 1910, Document No. 1413.

15 Képes (2020): p. 210.

vote of 161 to 96, revealing a lack of support from the political majority. Ultimately, the new suffrage law, Act XVII of 1918, was approved by both Houses of Parliament—the House of Representatives on 19 July 1918, and the Upper House on 31 July 1918. In its final form, the Act excluded women's suffrage entirely, while male suffrage was slightly curtailed, requiring six years of primary education instead of the four years stipulated in Vázsonyi's original draft. Tisza's party also removed provisions for a secret ballot, not only in Budapest and cities with municipal government but also in several other urban centres. Under the final version of the Act, a separate law would be required to determine which constituencies would conduct elections by secret ballot and which would resort to open voting.

The post-First World War electoral landscape in Hungary was marked by significant upheaval and attempts at democratic reform. Following the dissolution of the Austro-Hungarian monarchy in October 1918, the Hungarian National Council was established in Budapest, mirroring similar bodies formed by other nationalities of the former empire. Comprising Károlyi's Party, the Social Democrats, and Radicals led by Oszkár Jászi, the council sought to redress longstanding grievances, including the demand for universal suffrage. On 25 October 1918, with Károlyi elected as its Chairman, the Hungarian National Council announced a program centred on democratic electoral reform. Subsequently, on 23 November 1918, Károlyi's government issued the ground-breaking "People's Act", an electoral decree that abolished nearly all voting qualifications, retaining only literacy requirements and a slightly higher age threshold for female voters. This decree signalled a decisive break from prior traditional electoral norms, most notably by introducing secret balloting across all constituencies, extending it beyond urban centres to rural regions as well. The overarching aim of the People's Act was to confer legitimacy upon the emerging regime through the election of a Constituent Assembly, which would be tasked with adopting a democratic and republican constitution. The anticipated expansion of the electorate under this Act was vast, potentially encompassing up to nine million voters—a striking contrast to the narrow male suffrage granted under Act XVII of 1918.[16]

However, despite the democratic aspirations embedded within the People's Act, the actualization of the envisioned electoral process was fraught with delays. The government, led by Károlyi, hesitated to hold elections promptly, fearing that the volatile social climate, exacerbated by post-war economic crises and widespread unrest, might lead to the radicalisation of the masses.

In 1919, as the Paris Peace Conference exerted mounting pressure on the Hungarian government, Archduke Joseph August was compelled to resign. His departure paved the way for Ödön Beniczky, the newly appointed Minister of the Interior, to propose an electoral decree (No. 4245/1919 M.E.), which largely mirrored the provisions of the People's Act 1 of 1918. This proposal was approved by the cabinet on 29 August 1919, yet its publication was initially hindered by paper shortages. It was only officially released on 17 November 1919 as Decree No. 5895/1919 M.E. While maintaining the fundamental principles of the People's Act, the decree introduced several minor changes. Among these was the establishment of a uniform voting age of 24 for both

16 Képes (2020): p. 215.

men and women, along with an exemption for soldiers who had served for at least 12 weeks.[17]

Other modifications included a six-month domicile requirement, an increase in the eligibility age to 30, and a transition from proportional representation to a majority voting system in single-member constituencies. Despite these changes, the decree upheld important features of the People's Act, such as women's suffrage without property or tax qualifications, the guarantee of secret balloting across all constituencies, and the principle of broad democratic representation. As a result, approximately 87% of Hungarian citizens of voting age were enfranchised, representing 39.7% of the total population.[18]

The parliamentary elections, initially scheduled for 21 December 21 1919, were postponed by the newly formed government of Károly Huszár to January 1920. Eventually held on 25–26 January 1920, the elections were marred by the withdrawal of Social Democratic candidates in protest against widespread campaign atrocities. Nevertheless, Hungary witnessed an unprecedented level of democratic representation, with 39.7% of the population enfranchised—a proportion comparable to contemporary Denmark and Norway, and surpassed only by post-war Austria and Germany.[19]

During the Hungarian Soviet Republic, two constitutional laws were enacted, the latter being adopted on the 19th of June 1919, so a little bit more than one month before the fall of the short-lived communist state. Therefore, these acts did not have the time to alter society in the socialist manner envisaged by its drafters, as they were repealed together with the end of the Hungarian Soviet Republic. Despite this fact, the examination of the latter constitutional act from the point of view of electoral law is a worthy endeavour. The Constitution of the Hungarian Socialist Federative Republic of Councils[20] embedded class-based principles within its electoral framework, explicitly defining active and passive voting rights. Articles 66 and 67 granted suffrage exclusively to those engaged in economic life, such as labourers, civil servants, Red Army soldiers, and individuals performing domestic work for the collective. Conversely, Article 68 excluded from the franchise all those who did not conform to the socialist ideal of the working class, including entrepreneurs employing wage labourers, people reliant on non-labour income, the clergy, and merchants. This form of legal norms led to a far-reaching selectivity of the electoral system, eliminating from participation in the political process those considered classist, which was in line with revolutionary communist ideology. Notably, voting rights under the 1919 Constitution were not bound by the criterion of citizenship. Article 67 extended voting rights to foreigners, provided they met specific economic criteria, reflecting the internationalist character of revolutionary politics, wherein allegiance to the state was determined by social status rather

17 István Szabó (2013): A választási rendszer az 1920-as nemzetgyű lési választásokon, in Gábor Máthé, Mihály T. Révész, Gergely Gosztonyi (ed.): *Jogtörténeti Parerga*, ELTE Eötvös Kiadó, Budapest, pp. 348–355, p. 348.

18 Miklós Ruszkai: Az 1945 elötti magyar választások statisztikája, *Történeti statisztikai közlemények*, 1–2/1959, p. 13.

19 Romsics (2010): p. 8.

20 1919. évi alkotmány a Magyarországi Szocialista Szövetséges Tanácsköztársaságról (1919 Constitution of the Socialist Federative Soviet Republic of Hungary).

than nationality. Another defining feature of this electoral system was its centralised administration. Article 69 placed the electoral process under the direct supervision of election commissions appointed by the Central Executive Committee of the Federation, thereby ensuring stringent state control over both the conduct and outcomes of elections. In addition, Article 75 empowered the Central Committee to review and annul elections, creating an additional safeguard to align electoral results with the regime's interests. Although theoretically designed to foster social mobilisation, this electoral system, which prescribed six-month terms for councils and allowed for the recall of elected representatives (Article 77), in practice, warned of a profound political instability.

2. Parliamentary elections of 1920, abolition of the bicameral system

By January 1920, István Friedrich's short-lived government initiated the "National Assembly elections", coinciding with the elimination of the Lower House. The National Assembly was temporarily renamed until the Upper House was reinstated in 1926. Over three million voters participated, marking the first time Hungarian women took part in parliamentary elections. In 1922, Kunó Klebelsberg introduced a bill to reregulate voting rights, but its implementation was delayed. Instead, Count István Bethlen enacted Decree No. 2200/1922 M.E., which heightened property and education qualifications for voting. This measure reduced the percentage of eligible voters to 29% of the total population, and the voting age for women was increased to 30. A noteworthy change was the reintroduction of open voting, except in Greater Budapest and, later, a reduced list of seven cities. Consequently, 245 out of 199 deputies were elected through open voting. About 20% of the entire population could only cast their votes using ballot papers. Bethlen's electoral decree was endorsed by the National Assembly in 1925, with minimal alterations, becoming Act XXVI of 1925, which governed the election of parliamentary members.[21]

In 1938, parliament approved a new electoral ordinance (Act XIX of 1938), which officially recognised secret balloting. Concurrently, the voting age was raised to 26 and 30 years, and modifications were made to other voting eligibility conditions. In metropolitan areas, only named elections were conducted, while both named and individual elections took place in rural regions, creating disparities in the value of votes. The 1938 parliamentary elections were conducted under the electoral law of 1939, reflecting broader legislative and political transformations in Hungary's electoral system.

The National Assembly, elected in early 1920, had a two-year mandate, the conclusion of which led to its dissolution by Governor Miklós Horthy in February 1922. In the wake of this dissolution, fresh elections were convened in Budapest, spanning the days of 1 and 2 June 1922. As the preceding parliament had failed to approve the electoral law proposed by Prime Minister István Bethlen, the electoral system was subsequently revised after the government's dissolution through decrees issued by the Prime Minister and the Minister of the Interior. These revisions, which entailed a tightening of

21 Romsics (2010): p. 10.

both census and age qualifications, brought about a marked reduction in the number of eligible voters, leaving only 38% of the capital's population with the right to participate in the electoral process. Moreover, the brevity of the census period resulted in an even greater number of citizens being disenfranchised, a circumstance that fell with particular severity upon the Social Democrats in Budapest. Distinct from the majority of the country, Budapest retained the practice of secret balloting. However, in 1920, the city's 22 individual electoral districts—Buda, North Pest, and South Pest—wherein the electoral system underwent a transformation, shifting from a majority-based framework to one of proportional representation.

IV. THE LEGAL-PARLIAMENTARY CONTEXT DURING THE SOVIET-TYPE DICTATORSHIP IN HUNGARY

The outcomes of the nine parliamentary elections in Hungary between 1949 and 1985 marked a notable departure from previous practices in the country. As was the case across the socialist bloc, this era bore witness to unprecedented voter turnout and an overwhelming prevalence of "yes" votes. As István Feitl observed, these election results not only failed to reflect the political diversity inherent in society but, paradoxically, functioned as a mechanism to obscure the absence of genuine political pluralism. Rather than serving as an expression of democratic will, they became an instrument through which those in power could legitimise themselves under the guise of national unity. The pre-election period was invariably characterised by an emphatic appeal to national solidarity and the necessity of collective purpose in the construction of Socialist Hungary. This ideal found its embodiment in the Popular Front, a vast mass organization whose apparent influence extended beyond the electoral process to the very composition and operation of the Hungarian parliament itself.[22]

1. General overview

The aftermath of the Second World War did not usher in a period of enduring democratic growth in Hungary or continuous modernisation for the country. Instead, a distinctly different trajectory unfolded. In the final stages of the war, the east-central and eastern regions of Europe, including Hungary, came under the occupation of Soviet forces. Following a transitional phase and with the consensus of the major powers, these nations embarked on constructing a "socialist" system, rooted in the Eurasian geopolitical relationships characterising the worldview of the Soviet Union. In Hungary, the introduction of this unique Eastern European structure and its corresponding legal framework unfolded over a remarkably brief period. New laws—often not quite formal legislation—began to evolve with the purpose of reshaping social relations. Naturally, this period also saw the repeal of earlier disenfranchisement

22 István Feitl (2010): Pártvezetés és országgyűlési választások 1949–1988, in György Földes, László Hubai (ed.): *Parlamenti választások Magyarországon 1920–2010. Harmadik, bővített, átdolgozott kiadás*, Napvilág Kiadó, Budapest, pp. 283–304.

laws, marking the commencement of the dismantling of the pre-existing state apparatus.[23]

The process of nationalization gradually extended to encompass a broader spectrum and eventually large swathes of private property. Small-scale industries and retail businesses were absorbed into cooperative structures, signalling a shift from the earlier concept of "people's democracy" to a model of socialism aligned with the Soviet system. Being elected in 1945, the National Assembly proved ineffectual in carrying out the desiderata of the Soviets, despite mounting pressure from leftist political factions employing the aforementioned unconventional methods and the presence of Soviet forces. Consequently, in 1947, the President of the Republic dissolved the National Assembly and scheduled elections for 31 August 1947, governed by a new electoral law, which led to the disenfranchisement of around 400,000 voters. In the 1947 elections, the leftist electoral coalition—comprising the Hungarian Communist Party, the Social Democratic Party, the National Peasant Party, and the later on "purged" Independent Smallholders' Party—secured over 60% of the vote, with the Hungarian Communist Party emerging as the dominant force within the coalition.[24]

The passage of Act XX of 1949 on the Constitution of the People's Republic of Hungary on 20 August 1949[25] (largely modelled on the 1936 Constitution of the Soviet Union) explicitly stated in its preamble that the Constitution reflects "*the already achieved results of the struggle and work for state building, the fundamental changes in the economic and social structure of our country, and further indicates the path of development*." Despite undergoing numerous amendments, the most significant of which occurred in 1972 before the complete overhaul of the constitution in 1989 under Act XXXI of 1989, its provisions and essence played a substantial role in shaping Hungarian law during specific periods of its history.[26]

The content and essence of the 1949 Constitution significantly influenced the evolution of Hungarian law, primarily in the realms of public law and administrative law. In the section on the social order, the Constitution delineated the fundamental characteristics of the newly established society, placing particular emphasis on state and public or cooperative ownership, while also acknowledging the potential for private ownership of the means of production. It also underscored the commitment of the Hungarian People's Republic to the implementation of socialist principles. As previously discussed, although the constitution designated the National Assembly as the foremost organ of state organization, theoretically endowed with wide-reaching powers, in practice it typically convened only twice a year for brief sittings. This limited frequency of meetings resulted in a significantly reduced volume of laws, many of which were more general in nature compared to earlier periods. Chapter IX of the 1949 Constitution laid out the basic electoral rules, in line with Soviet thought. However,

23 Kálmán Kulcsár (1996): Jogalkotás és jogrendszer, in István Bekény et al. (ed.): *Magyarország a XX. században I.: Politika és társadalom, hadtörténet, jogalkotás*, Babits, Szekszárd, p. 473.
24 Kulcsár (1996): p. 474.
25 1949. évi XX. törvény – A Magyar Köztársaság alkotmánya (Act XX of 1949 – The Constitution of the Hungarian Republic).
26 Kulcsár (1996): p. 475.

this topic (which I will address in more detail in the following sections of this article) demands a more thorough analysis than can be captured in a mere mention here. For now, it is important to highlight that this section of the Basic Law directly referenced the communist structuring of the state and, by extension, the formation of the electoral system.

In the intervals between sittings of the National Assembly, the Presidential Council, comprising heads of state in a collective capacity, assumed nearly all of the Assembly's powers. Its primary authority lay in its ability to issue decrees carrying the force of law. This innovative legislative approach shifted control over legislation from the National Assembly to the Presidential Council, with legislative decrees taking precedence over laws, even possessing the power to amend them—until the introduction of Act XI of 1987 on legislation.

2. The National Assembly and its status in Hungary under the Soviet-type dictatorship

Under Soviet dominion, Hungary existed under an oppressive regime where widespread intimidation and social terror served as instruments of control. Any semblance of dissent was systematically eradicated, with the members of parliament serving the purposes of the party-state. Still, during the regime of Mátyás Rákosi, as many as one-third of parliamentarians were imprisoned, a stark testament to the regime's repressive measures.[27] A defining feature of this Soviet-type dictatorship was the complete subjugation of social, cultural and political life. To achieve this, in accordance with communist ideology, a meticulously orchestrated series of measures was enacted, all aimed at legitimising Soviet power.

As per S. Kubas,[28] the period between the end of the Second World War and 1990 in Hungary can be divided into two notable phases, each marked by the Communist Party's endeavour to consolidate its authority. The first, spanning from 1945 to 1956, was characterised by efforts to establish socialism, while the second followed the suppression of the Hungarian national uprising of 1956. In the former, the process of legitimising power unfolded along both normative and social dimensions; in the latter, the focus shifted primarily towards attempting to regain public support.

Following the 1945 National Assembly elections, Zoltán Tildy ascended to the position of prime minister, strategically allotting four key ministerial posts to members of the Communist Party, both for propagandistic and practical ends. Among them, László Rajk assumed the office of Minister of the Interior, thereby endowing the Party with the authority to take action not only against war criminals but also against those suspected of obstructing the regime's initiatives and resisting its ideological imperatives.[29]

27 Sebastian Kubas: Węgierski parlamentaryzm od narodzin do stanu obecnego z uwzględnieniem konstytucji z 2011 r., *Przegląd Sejmowy*, 5/2012, 194–214, p. 201.

28 Sebastian Kubas: Legitymizacja i alternacja władzy na Węgrzech, *Studia Politicae Universitatis Silesiensis,* 2017, pp. 43–59, p. 45.

29 Kubas (2017): p. 46.

In its relentless pursuit of absolute power, the totalitarian regime employed the strategy known as "salami slicing."[30] The ultimate goal was to consolidate complete authority, a process that entailed forming temporary coalitions with leftist or centrist parties, gaining control over key state positions. Subsequently, through a potent combination of propaganda and a refined system of terror, the Communist Party accused coalition partners of harbouring fascist and anti-Soviet sympathies, thereby justifying their suppression and paving the way for an undisputed Communist takeover.[31]

Between 1945 and 1949, legal proceedings were initiated against approximately one-third of Hungary's population—some three million individuals—on charges of engaging in activities deemed inimical to the state.[32] This reign of terror paralysed not only the National Assembly and its members, but also the broader populace, silencing all who dissented from the dictates of the ruling authorities. It is a cruel paradox that a state system ostensibly designed to serve the interests of the people instead imposed a machinery of repression on an unprecedented scale.

3. Analysis of the chosen legal acts in force at the time governing the electoral law for the National Assembly

Under the Soviet-type dictatorship, elections to the Hungarian National Assembly were held on nine occasions, consecutively in the years 1949, 1953, 1958, 1963, 1967, 1971, 1975, 1980 and the last, in 1985. Over the course of this time period, the principles governing active and passive electoral rights and issues related to the exercise of the mandate were regulated in a number of legal acts. Notable among these were Act I of 1957 extending the term of office of the Parliament elected on 17 May 1953;[33] Act III of 1966 on the Election of Members of Parliament and Council Members; [34] Act III of 1970 amending Act III of 1966 on the Election of Members of Parliament and Council Members[35] and Act III of 1983 on the Election of Members of Parliament and Council

30 The salami tactics were a strategy employed by the regime to gradually eliminate democratic party representation and establish the Communist Party's control in nations occupied by the Red Army during the Second World War, falling within the sphere of influence of the USSR. Coined by Mátyás Rákosi, the Stalinist plan aimed at leveraging the Red Army's presence to bolster the weak communist party organizations in these countries. For more, see Antony Best (2008): *An International History of the Twentieth Century and Beyond*, Routledge, Abingdon, p. 220.

31 Steve Phillips (2001): *The Cold War: Conflict in Europe and Asia*, Heinemann, Harlow, p. 33.

32 István Szent-Miklóssy (1988): *With the Hungarian Independence Movement. 1943–1947: An Eyewitness Account*, Praeger, New York, pp. 88–93.

33 1957. évi I. törvény az 1953. évi május hó 17. napján megválasztott országgyűlés megbízatásának meghosszabbításáról (Act I of 1957 extending the term of office of the Parliament elected on 17 May 1953).

34 1966. évi III. törvény az országgyűlési képviselők és a tanácstagok választásáról (Act III of 1966 on the Election of Members of Parliament and Council Members).

35 1970. évi III. törvény az országgyűlési képviselők és a tanácstagok választásáról szóló 1966. évi III. törvény módosításáról (Act III of 1970 amending Act III of 1966 on the Election of Members of Parliament and Council Members).

Members.[36] However, all these statutes—as explicitly reaffirmed within their provisions—adhered to the principles set forth in the Basic Law of Hungary Act XX of 1949, more commonly known as the Constitution of the Hungarian People's Republic.[37]

Parliamentary elections in Hungary were first held under Act VIII of 1945. On 31 January 1946, a provisional constitution was introduced that abolished the monarchy and introduced a republican form of government.[38] By 1949, power had been fully seized by the Hungarian Workers' Party, and on August 20 of that year, a new constitution was introduced, marking the inception of a national public holiday. The document was characterized as a "*faithful replica of Soviet constitutions, incorporating adjustments to account for historical and political distinctions between Hungary and the USSR*" (with the Hungarian constitution primarily drawing from the USSR's 1936 constitution). Henceforth, Hungary was redefined as a state ostensibly dedicated to serving workers and the broader working populace.[39]

The Hungarian Basic Law sets out the rules governing elections in Chapter IX, providing that elections were to be conducted guided by the principles of secrecy, universality, equality, and direct elections—whereby representatives were chosen directly by the citizens of the Hungarian People's Republic. The chapter goes on to state that both the right to vote and the right to stand for election were granted to all adult citizens barring those explicitly excluded from suffrage. At the time, the minimum voting age was set at 18 years.

What strikes me as most remarkable in this chapter is the content of Article 63, paragraph (2) in Chapter IX of the Constitution. In Hungarian, the precise wording of this provision reads "*[a] dolgozó nép ellenségeit és az elmebetegeket a törvény a választójogból kirekeszti*", which may be rendered into English as: "*[t]he enemies of the working people and the mentally ill are excluded by law from the right to vote*." No equivalent provision can be found in the constitutions of modern states, whether in Central Europe or elsewhere on the continent. One might be inclined to argue that the mere inclusion of such a regulation in the Basic Law of a state is, in itself, the most unequivocal reflection of the form of government prevailing at the time. The wording of this provision invites multiple interpretations; foremost among them is its function as an explicit and unambiguous articulation of the relationship between the ruling party and the elected deputy. Under such a legal framework, a member of the National Assembly, having been elected on such a basis, is by law bound to adhere to the directives imposed from above by the Communist Party. The very phrase "*enemy of the working people*" carries profound implications, for it suggests that any alleged action not sanctioned by the *de facto* ruling party is, by definition, an attack on the citizenry. Such a conception fosters an atmosphere of absolute submission, wherein a deputy is precluded from allowing personal conviction to guide their decisions and judgments unless those convictions

36 1983. évi III. törvény az országgyűlési képviselők és a tanácstagok választásáról (Act III of 1983 on the Election of Members of Parliament and Council Members).

37 1949. évi XX. törvény – A Magyar Köztársaság alkotmánya.

38 András Körösényi (2000): *Government and Politics in Hungary*, Central European University Press–Osiris, Budapest–New York, p. 169.

39 Rett R. Ludwikowski (1997): *Constitution-making in the Region of Former Soviet Dominance*, Duke University Press, Durham, pp. 31–32.

are fully aligned with the will of the Party. Additionally, the regulations make provisions for the dismissal of a deputy from office. It is particularly striking that the legislator employed a rather peculiar approach in addressing, within the same provision, the exclusion of individuals with mental illness alongside the exclusion of so-called "*enemies of the working people*." By contemporary standards, these are patently distinct and unrelated matters, yet they were treated as equivalent under the legal framework of the time. Mental illness is defined as a pathological impairment of the mind in a fundamental respect, characterised by a certain abnormality—whether transient, prolonged, or permanent—manifesting as a disorder rather than as a natural reaction of a healthy organism to external stimuli.[40] Without delving more deeply into what is somewhat tangential to the present discussion, it is nevertheless beyond question that a person's mental illness or psychological instability can be objectively determined based on medical evidence, clinical records, and an assessment of their actual condition. The same, however, cannot be said of the second criterion contained in Article 63, paragraph (2) of the Constitution. A state of hostility towards working people is, by its very nature, an entirely subjective notion—one that lends itself to manipulation by the ruling party and invites the risk of gross over-interpretation, shaped entirely by the regime's shifting political objectives. Such a provision is thus inherently flawed, for it fails to establish concrete and verifiable grounds for exclusion, offering instead a legal framework that is vague, arbitrary, and open to abuse. Indeed, one might even put forward the theory that the deliberate juxtaposition of these two distinct categories—mental illness and political opposition—creates a troubling rhetorical effect, subtly encouraging the perception that they are somehow analogous. In doing so, the law implicitly equates dissent against the Communist Party with a form of intellectual deficiency, reducing political opposition to a pathological condition rather than acknowledging it as a legitimate ideological stance.

As previously noted, a number of laws regulating electoral law in Hungary can be identified within the period in question. The first law I wish to discuss concerning this matter is Act VIII of 1945 on Elections to the National Assembly,[41] which directly addresses matters of verifiability and eligibility to stand for election to the Hungarian Parliament. It is crucial to underscore, however, that this law predates Hungary's Basic Law of 1949. Nevertheless, its provisions are of considerable significance to the present analysis, as they engage with issues that remained central to the evolving political landscape.

The overarching theme of the entire law revolves around the conduct of elections to the National Assembly, encompassing aspects such as the duration of the parliamentary term and the general principles governing electoral procedures. Of particular interest is a provision found in Chapter I, which pertains to the participation of individual parties in the elections. Article 2, paragraph (2) contains a sentence confirming that

40 Filip Bolechała: Mental state and the criminal responsibility – legal regulations and medical criteria in Poland and other countries, *Archiwum Medycyny Sądowej i Kryminologii*, 4/2009, pp. 309–319, p. 316.

41 1945. évi VIII. törvénycikk a nemzetgyűlési választásokról (Act VIII of 1945 on elections to the National Assembly).

only those parties deemed eligible by the National Committee—following what is described as a *democratic examination* of their objectives, leadership, and composition—may stand for election. What emerges from this formulation is a clear indication that the National Committee functioned as the *de facto* gatekeeper of the electoral process, wielding ultimate authority over which political actors were permitted to participate. The law lists vague and unspecified criteria, leaving ample room for interpretation and application to be moulded at the regime's discretion, in accordance with its shifting political imperatives.

Act III of 1970[42] marked a significant shift in Hungary's electoral framework, replacing the electoral system that had previously favoured the nomination of candidates exclusively from the Patriotic People's Front.[43] Under this new legislation, all citizens, including those unaffiliated with the organisation, were granted the right to propose candidates through civic nomination meetings. Subsequently, Act III of 1983[44] introduced further modifications, including the obligation of multiple nominations, the possibility of recalling deputies, and the establishment of a national list. These reforms allowed larger public bodies and social organisations to gain formal representation within the political system. The only elections held under this law took place in 1985, where 71 out of 387 candidates nominated by civil society organizations successfully secured 41 seats in the parliament, serving as non-affiliated deputies.

V. CONCLUDING REMARKS

The transformation of Hungary's electoral system between 1848 and 1989 was profoundly shaped by political turmoil, social change, and competing visions of representative government. This turbulent era saw a gradual, and often fraught, progression towards democratic ideals, struggling against authoritarian regimes and external pressures. The revolutionary ambitions of 1848 sought to expand political engagement and lay the foundations for parliamentary representation. However, subsequent historical events, including the Austro-Hungarian Compromise and the aftermath of the First World War, triggered changes in the electoral field, often highlighting tensions between democratic principles and authoritative influence. The fleeting democratic initiatives of the interwar period were soon eclipsed by the Horthy regime, while the post-Second World War period ushered in Soviet dominance, consolidating a permanent dictatorial system that lasted until the defining events of 1989. This pivotal transition stands out as a watershed moment in Hungarian history, particularly in relation to universal suffrage. The move towards a more transparent and democratic electoral

42 1970. évi III. törvény az országgyűlési képviselők és a tanácstagok választásáról szóló 1966. évi III. törvény módosításáról.

43 The Patriotic People's Front (*Hazafias Népfront*) was a Communist-dominated political alliance in Hungary that controlled elections by presenting a single list of approved candidates, ensuring the Hungarian Socialist Workers' Party's monopoly on power from 1949 until the end of communist rule in 1990.

44 1983. évi III. törvény az országgyűlési képviselők és a tanácstagok választásáról.

framework was underscored by reforms eliminating one-party rule, clearing the path for multi-party politics and genuinely competitive elections.

The evolution of Hungary's electoral system encapsulates the dynamic interplay between democratic aspirations and the constraints imposed by authoritarian forces. From the revolutionary fervour of 1848 to the struggles experienced under successive regimes, Hungary's journey toward a more open and representative political system in 1989 can attest to the enduring strength of democratic ideals and the nation's ability to adapt under changing global and domestic conditions. The historical period analysed thus far represents the most dynamic and revolutionary in the history of Hungarian electoral law. The entire process of transformation of this law from 1848 to the fall of the Soviet-type dictatorship demonstrates not only the fluid nature of electoral law but also the evolving understanding of electoral rights—who may exercise them and on what grounds. In today's European reality, electoral rights are something citizens take for granted, yet a retrospective analysis of their development over the past two centuries shows how long a road the perception of parliamentary representation as well as electoral rights themselves had to trave the long and arduous path that led to their present form. The concept of parliamentary representation, as well as the very nature of electoral rights, has undergone profound changes—changes that underscore the significance of the struggles that ultimately secured the democratic freedoms enjoyed today.

EVOLUȚIA ISTORICĂ A LEGILOR MINIERE ȘI A DREPTURILOR DE PROPRIETATE ASUPRA RESURSELOR ÎN EUROPA CENTRALĂ

HISTORICAL EVOLUTION OF MINING LAWS AND PROPERTY RIGHTS OVER RESOURCES IN CENTRAL EUROPE

The Development of Mining Laws and Property Rights over Natural Resources in Hungary Since the 19th Century

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ABSTRACT
The recent discoveries of potential gold deposits in the Börzsöny Mountains has ignited intense legal and political debate in Hungary, raising fundamental questions about the ownership of mineral resources and the rights to their extraction. This article, therefore, holds not only historical importance but also provides valuable insights into the current issue by analysing the legal framework governing mining rights from the 19th century to the present. The study explores three distinct mining regimes that shaped the 20th century: the 1854, 1960, and 1993 Mining Acts. The article begins by defining key terms and addressing fundamental legal questions pertaining to mining law. The discussion then turns to the 1854 "General Mining Act", highlighting its pivotal provisions, which will shed light on the legal traditions governing the mining sector. The third section examines the profound impact of Hungary's territorial changes after the First World War and the influence of the totalitarian regime established after the Second World War on the aforementioned Mining Act, which led to the adoption of a new Mining Act in 1960. This section also provides an analysis of the broader legal framework imposed during the Soviet-style dictatorship, particularly its aggressive nationalisation and socialisation of mineral resources. The article proceeds to trace the development of the current regulatory framework, focusing on the liberalisation of the mining industry during Hungary's transition to a free market economy in 1989, with particular emphasis on the significance of the 1993 Act. Finally, it compares the three legislative regimes, offering a comprehensive overview of the legal evolution that has shaped the governance of Hungary's mining sector.
KEYWORDS
Natural resources, mining rights, exploitation of minerals, post-socialist legal systems, rights of future generations.

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Dezvoltarea legilor miniere și a drepturilor de proprietate asupra resurselor naturale în Ungaria din secolul 19-lea până în prezent

REZUMAT
Descoperirile recente ale unor posibile depozite de aur în Munții Börzsöny au stârnit dezbateri juridice și politice intense în Ungaria cu privire la proprietatea asupra resurselor minerale și drepturile de exploatare a acestora. Prin urmare, acest articol nu are doar o importanță istorică, ci oferă și perspective valoroase asupra problemei actuale, analizând cadrul juridic care reglementează drepturile miniere din secolul al 19-lea până în prezent. Studiul examinează trei regimuri miniere distincte care au fost în vigoare în secolul 20: Legea Minieră din 1854, Legea Minieră din 1960 și Legea Minieră din 1993. Articolul începe prin definirea unor termeni-cheie și abordarea unor întrebări juridice esențiale legate de dreptul minier. Ulterior, analizează „Legea Generală a Minelor" din 1854, evidențiind dispozițiile sale esențiale, care oferă o perspectivă asupra tradițiilor juridice ce au guvernat industria minieră. A treia secțiune examinează impactul schimbărilor teritoriale ale Ungariei după Primul Război Mondial și influența regimului totalitar instaurat după cel de al Doilea Război Mondial asupra Legii Miniere adoptate anterior, ceea ce a condus la adoptarea unei noi Legi Miniere din 1960. Această secțiune explorează, de asemenea, cadrul juridic general sub legislația dictaturii de tip sovietic și analizează naționalizarea agresivă a resurselor minerale sub regim. Articolul prezintă în continuare evoluția actualului cadru de reglementare, concentrându-se pe liberalizarea industriei miniere în timpul tranziției Ungariei către economia de piață liberă, în 1989, subliniind importanța Legii din 1993. În final, sunt comparate cele trei regimuri miniere, oferind o imagine de ansamblu asupra evoluției juridice a guvernanței industriei miniere.
CUVINTE CHEIE
Resurse naturale, drepturi miniere, exploatarea mineralelor, sisteme juridice post-socialiste, drepturile generațiilor viitoare.

I. INTRODUCTION

What distinguishes the ownership of mineral resources from the right to extract them? To what extent should minerals be considered state property, or ought they fall under the ownership of private landowners? Which legal and administrative bodies are responsible for granting authorisation for resource extraction?

In Hungary, where mining regulations have long been regarded as particularly detailed and transparent, such questions have arisen repeatedly throughout the country's history. Surprisingly, they remain just as pertinent today, especially in light of recent geological research suggesting the presence of a significant gold deposit in the Börzsöny Mountains—yet authorities remain reluctant to grant companies the necessary extraction rights.[2]

This article, therefore, seeks to explore and provide answers to these pressing legal and economic questions. While primarily employing comparative and historical methodologies to examine key mining regulations from the 19th century

2 Website of Varga's Invest and Consulting Zrt. on Gold Mining. Available at: https://aranybanyaborzsony.hu/about.php (accessed on 11.02.2025).

onward, it not only offers a comprehensive overview of Hungary's historical mining traditions but also yields insights that may illuminate contemporary regulatory practices.

The Mining Acts of 1854, 1960, and 1993—each of which governed the sector at different points in the 20th century—represent distinct phases in Hungary's legal traditions concerning mining. These acts not only chart the evolution of the country's mining sector but also reflect unique elements specific to each regulatory framework. Accordingly, this article is structured around these legislative milestones: first, it examines the period covered by the Austrian General Mining Act of 1854, which remained in force until 1960. It then turns to the Soviet-style dictatorship and its impact on both the mining industry and legislative framework (1960–1989). Finally, it explores the 1993 Mining Act, which continues to regulate the sector to this day.

1. An overview of mining law and key definitions

Mining has long been a cornerstone of human civilisation, serving as a fundamental driver of economic and social development across nations. During the medieval period, the Kingdom of Hungary rose to prominence as Europe's foremost gold producer, maintaining this position until the 16th century. At its peak, Hungary accounted for nearly one-third of global gold production, estimated at around 1,000 kilograms annually. By the latter half of the 16th century, the country's output represented approximately five-sixths of Europe's total gold production and continued to supply one-third of global production.[3] As a result, mining emerged as a driver of Hungary's economic prosperity during the medieval era. It is, therefore, no coincidence that this sector became the first in Hungarian industrial history to come under formal state regulation.[4]

This regulatory intervention was necessitated, first and foremost, by the need to safeguard the ruler's treasury revenues, prompting the introduction of written economic and technical regulations.[5] Additionally, given the inherently hazardous nature of—requiring specialised technical expertise and rigorous professional training—specific safety protocols and strict oversight became indispensable.[6]

These considerations continue to be relevant today, embedded within mining laws, which continue to fulfil vital social protection and security functions. Beyond regulating industry practices, these legal frameworks include safety provisions designed to

3 Béla Nagy: A magyarországi aranytermelés története, *Természet Világa*, 2/1998, pp. 57–60. Available at: https://www.aranypiac.hu/tudastar/tudnivalok-a-nemesfemekrol/a-magyarorszagi-aranytermeles-tortenete (accessed on 11.02.2025).

4 Rita Gyurita, Dominika Borsa, Gábor Hulko, Tamra Tóth (2016): A bányászati igazgatás, in András Lapsánszky (ed.): *Közigazgatási jog II.*, Wolters Kluwer, Budapest, pp. 105–164. Available at: https://mersz.hu/dokumentum/wk51__72/#wk51_69_p1 (accessed on 11.02.2025).

5 István Izsó (2004): *Magyar bányajog*, Miskolc Egyetemi Kiadó, Miskolc, p. 8. Available at: https://mek.oszk.hu/21100/21156/21156.pdf (accessed on 11.02.2025).

6 Izsó (2004): p. 7.

safeguard human life and health, as well as measures aimed at the preservation of both the built and natural environment.[7]

But how, precisely, can mining regulations be defined, and what fundamental legal principles underpin the framework of mining law? In broad terms, mining law may be described as a "*set of rules that define the relationships between individuals engaged in mining, the state, and other citizens*."[8] But, it also refers to the legal framework governing

> *"the exploration of natural resources and subterranean materials, as well as the processes involved in their extraction and preparation for human use, while also addressing ownership-related legal considerations."*[9]

In Hungary, as in other countries with significant mining operations and advanced legislative systems, the most effective means of regulating the sector is typically through a distinct mining code (*lex specialis*), distinct from general legal regulations. This ensures a comprehensive and specialised approach to the governance of mining activities.[10]

2. Mining regulatory models

The historical analysis of Hungary's mining industry reveals two fundamentally opposing legal approaches to mineral resource ownership, forming a spectrum that ranges from "*full mining lordship*" to "*unrestricted freedom to mine*."

The principle of "*full mining lordship*" asserts that all natural resources are the exclusive property of the state, entirely independent of land ownership. In early legal traditions, mineral resources were not regarded as belonging to the landholder but were classified under the jurisdiction of the king's sovereign lordship rights.[11] These sovereign rights granted the monarch authority over mineral extraction, including the power to transfer and grant mining rights—though these rights did not constitute ownership in the modern legal sense.[12] A notable example of full mining lordship is found in the patrimonial system, where mining rights fell within the monarch's private economic domain. Under this arrangement, the king exercised control over all land, forests, and mineral resources within the realm. During the reign of Stephen I of Hungary, the crown had absolute control over the nation's entire territory, ensuring a

7 Árpád Sipos (1872): *Magyar bányajog, tekintettel a franczia, szász, porosz bányajogokra, a magyar bányatörvényjavaslatra és az ujabb igazságügyi reformtervekre,* Edition of Hügel Ottó, Nagyvárad, p. 4. Available at: https://mek.oszk.hu/06700/06762/06762.pdf (accessed on 11.02.2025).
8 Sipos (1872): p. 4.
9 Mór Katona (1903): *A magyar bányajog vázlata*, Edition of Stampfel Károly, Pozsony–Budapest p. 1. Available at: http://real-eod.mtak.hu/8120/2/MTA_Konyvek_EncyclO52_110.pdf (accessed on 11.02.2025).
10 Sipos (1872): p. 4.
11 Gusztáv Wenzel (1866): *A magyar és erdélyi bányajog rendszere*, Királyi Egyetemi Nyomda, Buda, p. 27. Available at: https://mek.oszk.hu/05200/05273/05273.pdf (accessed on 11.02.2025).
12 Gyurita, Borsa, Hulko, Tóth (2016).

steady flow of royal revenues. This led to the establishment of the "*mining regalia*"—a sovereign right requiring landowners to surrender mining areas to the royal treasury unless they had been granted a special mining privilege by the monarch.[13] Therefore, while all minerals belonged to the ruler, only the monarch retained the right to grant extraction privileges.

Conversely, the doctrine of full mining lordship, the principle of "*full freedom to mine*" takes an entirely different stance, asserting that land ownership encompasses not only the surface but also the subsurface, granting landowners the unrestricted right to extract mineral resources without external interference. Under this principle, no formal authorisation was required for mining activities.[14]

This approach gained prominence with the expansion of the Árpád dynasty, particularly following the donation of royal lands. During this period, barons were free to exploit the mineral wealth within their domains and retain the profits, all without state oversight. This shift marked a weakening of royal authority, the emergence of individual rights, and the establishment of special privileges for certain mining towns.

Clearly, these two classifications stand in stark contrast to one another, yet modern mining regulations tend to occupy an intermediate position along this spectrum. Nevertheless, it is noteworthy that, when viewed through a contemporary lens, medieval mining regulations appear remarkably sophisticated, as they laid the groundwork for later regulatory frameworks, sifting inspiration from these historical precedents, and building upon their foundational principles and practices. By positioning each Hungarian Mining Act of the 20th century within this conceptual spectrum—between full mining lordship and complete mining freedom—the article explores the historical evolution of mining regulations and the legal and economic forces shaping these regulatory developments.

II. THE ERA OF THE 1854 MINING ACT

The Industrial Revolution in the 19th century ushered in an era of unprecedented and rapid exploitation of natural resources, necessitating the establishment of a modern legislative framework to regulate mining activities. To facilitate large-scale mining operations, a decisive departure from the feudal system was required. Therefore, on 23 May 1854, Habsburg King Franz Joseph exercised his autocratic authority to promulgate the Austrian General Mining Act in Hungary—then a part of Habsburg Monarchy—through an imperial decree.[15] This legislation marked a turning point in the evolution of mining law.

13 Izsó (2004): p. 9.
14 Izsó (2004): p. 68.
15 Ödön Alliquander, Imre Bán, Ernő Tassonyi (ed.) (1931): *Magyar bányajog. A bányászatra vonatkozó törvények, rendeletek, döntvények és elvi jelentőségű határozatok teljes gyűjteménye*, Atheneum, Budapest, pp. 4–8. It refers to the General Mining Act of the Habsburg Empire from 1854. The Hungarian translation of the law is available at: https://mek.oszk.hu/06800/06871/pdf/banyajog2.pdf (accessed on 11.02.2025).

At the heart of the Mining Act lay the principle of "general freedom" to mine,[16] which ensured that mining activities were open to all, thus eliminating mining as a privilege and instead establishing it as a right granted to anyone who met the legal requirements.[17] This principle sought to guarantee equal access to mining rights[18] while simultaneously regulating resource extraction within a structured legal framework.

However, the Act also introduced significant limitations to this freedom through the principle of Mining Lordship.[19] The second section of the Act declared: "*[t]he princely right*[20] *confers exclusive disposal rights over certain minerals occurring in natural deposits to the prince.*"[21]

However, unlike "*full mining freedom*", which placed no restrictions on private extraction, "*general freedom to mine*" was considerably constrained by state authority over resource extraction. The fifth section of the Act specifies that "*extraction of reserved minerals can only commence after obtaining a license, which is issued by the mining authorities.*"[22]

Thus, while the right to extract resources was theoretically available to all, it is not without limitations, and does not imply that the state lacks intervention mechanisms within the sector. In practice, the exercise of mining freedom was carefully regulated, with administrative authorities overseeing operations to protect the state's interests. These authorities possessed broad discretionary powers, including the right to designate the extractable mineral resources and determine the specific mining plots where extraction could take place.[23]

Additionally, the Mining Act imposed strict restrictions on the free disposal of certain mineral resources by designating them as "*reserved minerals*"[24] and providing an exhaustive list of those subject to state control. The exploration and extraction of these minerals could only proceed under a state-issued mining license, as ownership of these resources remained exclusively within the framework of Mining Lordship.

As a result, any mineral not explicitly classified as a reserved mineral fell into the category of "*bound minerals*", which were legally tied to land ownership, and were regarded as accessories to the land itself. Therefore, their extraction required the landowner's consent, thereby preserving a clear distinction between state-controlled and privately-owned resources.[25] This category primarily encompassed raw materials of relatively low economic value or limited occurrence and, crucially, remained within

16 In German: *Bergbaufreiheit*.
17 Gyurita, Borsa, Hulko, Tóth (2016).
18 Kristóf Szívós: A kőszénbányászati jog adományozásának egyes kérdései, *Acta Universitatis Szegediensis: Publicationes Discipulorum Iurisprudentiae*, 1/2018, pp. 627–658, p. 630. Available at: http://publicatio.bibl.u-szeged.hu/20275/1/forum-banya.pdf (accessed on 11.02.2025).
19 In Hungarian: *bányaúrjog*.
20 In Hungarian: *fejedelmi jog*.
21 Alliquander, Bán, Tassonyi (1931): p. 4.
22 Alliquander, Bán, Tassonyi (1931): p. 2.
23 Gyurita, Borsa, Hulko, Tóth (2016).
24 In Hungarian: *föntartott ásványok*.
25 Katona (1903): p. 8.

the domain of the landowner's proprietary rights. Unlike reserved minerals, bound minerals were not subject to explicit regulation under mining law; instead, their extraction was governed by general private law principles. This regulatory absence reflected the enduring feudal elements within the broader mining framework, as such minerals were traditionally considered common resources, accessible at the discretion of the landowner.

1. The impact of the World Wars and the Treaty of Trianon on the mining industry and its regulations

After the First World War, the Treaty of Trianon (1920) had profound and far-reaching consequences, not only redrawing Hungary's territorial boundaries but also fundamentally changing its industrial and economic landscape. Designed to weaken Germany and its allies, the treaty imposed severe war reparations and dismantled multinational entities such as the Austro-Hungarian Monarchy.[26] For Hungary, the treaty resulted in the loss of two-thirds of its pre-war territory, including vast mountainous regions rich in mineral resources. Overnight, the country was transformed from *a stronghold of mining activity into a predominantly lowland nation.* The consequences were devastating: approximately 80% of Hungary's mining areas were ceded to successor states, leading to a drastic decline in production levels—99% reduction in ore production, 96% in iron ore production, 70% in coal production, and 100% in rock salt production.[27] The treaty therefore marked a significant turning point in Hungary's industrial history, severely undermining its resource base and economic potential.

Surprisingly, the mining industry underwent a rapid and effective reorganisation in the wake of war and territorial losses. In a pioneering move, Hungary became the first country in the world to implement a highly detailed annual monitoring system for its manufacturing sector—an initiative that played a crucial role in fostering industrial recovery and laying the groundwork for future advancements.[28] Furthermore, several ore mines transitioned to a more efficient state supervision due to the country's altered geography, with the Recsk ore mine emerging as the country's sole metal mine during the interwar period.[29]

Political developments also played a significant role in reshaping the administrative structure of Hungary's mining sector. The *First Vienna Award* (1938), restored parts

26 Treaty of Peace between the Allied and Associated Powers and Hungary and Act XXXIII of 1921 adopted on 4 June 1920, concerning the North American United States, the British Empire, France, Italy, Japan, Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Romania, the Serb-Croat-Slovene State, Siam, and Czechoslovakia.

27 László Benke (1996): Bányászat, in István Kollega Tarsoly (ed.): *Magyarország a XX. században*: *IV. kötet. Tudomány 1. Műszaki és természettudományok*, Babits Kiadó, Szekszárd, pp. 433–452, p. 436. Available at: https://mek.oszk.hu/02100/02185/html/904.html (accessed on 11.02.2025).

28 László Halkovics (1996): Ipar, in István Kollega Tarsoly (ed.): *Magyarország a XX. században*: *II. kötet. Természeti környezet, népesség és társadalom, egyházak és felekezetek, gazdaság*, Babits Kiadó, Szekszárd, pp. 572–587, p. 583. Available at: https://mek.oszk.hu/02100/02185/html/904.html (accessed on 11.02.2025).

29 Nagy (1998): pp. 57–60.

of the Highlands to Hungarian control from Czechoslovakia, while the Second Vienna Award (1940) re-annexed Northern Transylvania, including Szeklerland (or Székely Land), from Romania. Subsequently, Hungarian mining legislation was extended to these reclaimed territories, necessitating the establishment of new Mining Departments to oversee operations in these regions.[30]

2. The path to the nationalisation of the mining sector

In stark contrast to the profound economic and societal changes that followed the Second World War, the Austrian Mining Act, although formally retained, gradually lost its practical relevance and regulatory efficacy. Its provisions became increasingly obsolete, unable to meet the demands and challenges of the evolving landscape. As economic life transformed, the growing demand for mining materials swiftly elevated the importance of mining—particularly coal mining—making it one of the most vital sectors of the national economy. This shift in priorities necessitated the creation of new mining regulations, often introduced through mechanisms outside the scope of the Mining Act, such as decrees from the National Assembly or constitutional provisions, which effectively supplemented or bypassed the existing legal framework.[31]

The most substantial regulatory changes emerged in connection with coal mining. Coal, once regarded as part of real estate ownership (classified as a bound mineral), could only be extracted within the confines of the regulatory system outlined by the Mining Act. Significant changes to the mining sector emerged with the nationalisation policies introduced through a 1945 decree of the Hungarian National Assembly,[32] which placed the most significant coal mines under state control. This process continued in 1946, when all coal mines were fully nationalised, consolidating state ownership and administration of the entire industry.[33] These legislative measures shifted coal mining rights—formerly granted to landowners—back to the state, while exploration and mining rights were strictly reserved for government control. The rationale for these legal actions lay in the urgent need for coal to facilitate the country's post-war reconstruction and sustain its economy. The broader justification for nationalisation also extended to the management of all mineral resources, with the government arguing that even the most industrially advanced nations could not afford to relinquish control over coal, given its essential role as a key industrial and economic resource.[34] Remarkably, nationalisation efforts were illustrated by events such as the "coal battle" held in Tatabánya on 8 February 1946, where miners competed to meet the nation's

30 Izsó (2004): p. 50.
31 István Izsó (2021): *Bányatörvény-alkotásunk krónikája (1545–1945)*, Miskolc, p. 131. Available at: https://mek.oszk.hu/21700/21740/21740.pdf (accessed on 11.02.2025).
32 12200/1945 M.E. (Decree of the Prime Minister). Available at: https://library.hungaricana.hu/hu/view/OGYK_RT_1945/?pg=196&layout=s&query=sz%C3%A9n (accessed on 11.02.2025).
33 Act XIII of 1946 on the Nationalization of Coal Mining. Available at: https://net.jogtar.hu/ezerev-torveny?docid=94600013 (accessed on 11.02.2025).
34 Izsó (2004) p. 52.

coal requirements, with promises of significant rewards for those who excelled in fulfilling the demanding quotas.[35]

The nationalisation of the complete mining sector was finalised with the enactment of the first and last Constitution of the Soviet-style dictatorship,[36] which laid the foundations for a socialist society. Article 6 of the Constitution declared that "*the treasures of the earth and the mines are the property of the state as the property of the entire people*." By classifying all mineral materials as exclusive state property, the Constitution effectively brought all usable minerals under the category of "reserved mineral materials" in line with the terms defined by the Austrian Mining Act.[37] This provision ensured that all minerals were uniformly owned by the state,[38] extending its ownership over every mineral resource and the rights to extract them. Additionally, Workers' Committees were established,[39] granting miners a degree of influence over issues directly affecting them, including wages, workplace safety, social benefits, assistance programs, and other welfare-related matters.[40]

The legal system deriving from the Soviet Constitution imposed an unsustainable economic model on Hungarian society, characterised by the *forced development* of the military-industrial sector to meet Cold War demands, far exceeding the nation's actual capabilities.[41] Consequently, the mining industry experienced such accelerated development that its regulatory framework increasingly diverged from traditional mining laws, relying primarily on government decrees and ministerial directives. This shift favoured the use of lower-level legal instruments offering greater flexibility for decision-making, thus prioritising the goals of forced industrialisation over the creation of a cohesive and comprehensive legislative framework.[42] During this period, the focus of mining regulation was not on developing comprehensive legislation but on reconstruction efforts, the establishment of a state-driven economic management system, ensuring economic stability, and meeting the demands of central planning, which aimed at achieving continuous increases in production volumes. Additionally, the legislative process was heavily influenced by the communist party's ideology, which downplayed the importance of regulatory law, favouring instead the guiding influence and political directives from key figures.[43]

35 See *Széncsata* in the Hungarian online lexicon. Available at: https://mek.oszk.hu/adatbazis/magyar-nyelv-ertelmezo-szotara/szotar.php?szo=SZ%C3%89NCSATA&offset=57&kezdobetu=SZ (accessed on 11.02.2025).
36 See Article 10 of Act XX of 1949, the Constitution of the Republic of Hungary. Available in English at: https://static.valasztas.hu/ujweb/alk_en.htm (accessed on 11.02.2025).
37 Izsó (2004): p. 60.
38 Izsó (2004): p. 53.
39 In Hungarian: *Üzemi Bizottságok*.
40 Péter Korompay, Zoltán Králl: *Bányász anekdoták*. Available at: http://banyaszmult.uw.hu/drkp001.pdf (accessed on 11.02.2025).
41 László Bernát Veszprémy: A legsötétebb kommunizmus: utazás a bányászperek mélyére, *Mandiner*, 29th of August 2019. Available at: https://mandiner.hu/belfold/2019/08/banyaszperek (accessed on 11.02.2025).
42 Izsó (2004): p. 54.
43 Izsó (2004): p. 54.

Even criminal laws were enacted to support this economic policy, frequently enforced against workers who failed to meet the regime's expectations. During the post-Second World War reorganisation of social relations, targeted efforts were made to penalise individuals carrying out traditional economic practices, leading to court proceedings that culminated in numerous so-called "Miner Lawsuits." These trials were highly orchestrated, serving as showcase proceedings designed to advance the regime's ideological agenda. Furthermore, during the Rákosi and Kádár regimes, criminal law was instrumental in legitimising the use of mining labour camps for both political prisoners and common law offenders. These camps operated in Komárom-Esztergom County, notably in Csolnok, Oroszlány, and Tatabánya, where the punitive legal measures intersected with forced labour practices within the mining sector.[44]

In response to the state's strict regulations and the oppressive nature of the dictatorship, the unexpected revolutionary events of 1956 exposed a fundamental flaw in Stalinist policies: the absence of legislative safeguards and predictability. Recognizing this shortcoming, the regime acknowledged the necessity of initiating legal reforms, including the mining law. Beginning in 1957, the National Mining Inspectorate and the Ministry of Heavy Industry undertook preparatory efforts to draft Hungary's first comprehensive mining legislation.[45] This initiative was further shaped by developments in neighbouring socialist states, where mining activities were being regulated to align with the socialist economic framework.

Notable examples include Poland's adoption of mining regulations in 1953, followed by similar legislative advancements in Romania, Bulgaria, and Czechoslovakia in 1957. These developments underscored the urgency of modernising Hungary's mining legal framework in order to remain consistent with the regional shift towards state-directed economic planning.[46]

III. MINING LAW DURING THE SOVIET-STYLE REGIME AND THE TRANSITION PERIOD

1. Mining regulation in the dictatorship

Under the pressure of Soviet leadership, the Hungarian Parliament finalised and enacted the 1960 Mining Act.[47] This legislation consolidated regulatory processes that had evolved over centuries, while also incorporating internationally recognised legal principles, such as the concepts of mine sites, mine damage, and the responsibilities of technical managers. Furthermore, the Act introduced provisions that aimed to morally

44 Ferdinánd Cservenka: A föld mélyén egyenlők – Bányamunkatáborok, *Újkor*, 2nd of May 2020. Available at: https://ujkor.hu/content/a-fold-melyen-egyenlok-banyamunkataborok (Accessed: 17 November 2023).

45 In Hungarian: *Országos Bányaműszaki Főfelügyelőség és a Nehézipari Minisztérium*.

46 Izsó (2004): p. 55.

47 Act III of 1960 on Mining. Available at: https://jogkodex.hu/jsz/bt_1960_3_torveny_5513057?ts=1961-07-01 (accessed on 11.02.2025).

recognise and financially remunerate miners, thereby formalising their professional and social standing.

Chapter 1 of the Act outlines the purpose and scope, stating: *"[i]n order to build socialism and meet the needs of the national economy, this law regulates the safest and most economical extraction of the country's mineral resources."*[48] This foundational principle suggested that all mineral raw materials deemed essential to the national economy were the exclusive property of the state, with mining rights reserved solely for the state's control. The Act also introduced a precise legal definition of mineral materials, encompassing those found both in the Earth's crust and on the surface. While it sought to establish an exhaustive list of mineral materials within its scope, the Act ultimately failed to regulate these resources comprehensively. As technological advancements expanded the range of exploitable materials, new mineral raw materials emerged, consequently rendering a static list insufficient for the Act's ever-expanding remit.[49]

Chapter 2 of the Act focuses on "Mining Rights", asserting that "*the right of mining belongs to the state*."[50] Within this framework, only socialist economic entities, such as state-owned enterprises and production cooperatives, were permitted to acquire mining rights for the extraction of mineral raw materials. However, the Act did include a narrowly defined exception, permitting property owners

> *"to extract construction mineral raw materials by hand without an official permit to satisfy their personal needs or smaller local needs, if the state issued a mining permit for these occurrences otherwise, he did not assert his right."*[51]

This provision underscored the state's commitment to maintaining centralised control over mineral resources while granting limited concessions to individual property owners.

Interestingly, much like contemporary regulations, the mining law categorised mining activities into three distinct phases: exploration, mine development, and landscape planning. The concept of landscape planning involved restoring mined areas to a condition suitable for reuse, addressing the environmental impacts caused by mining operations. This approach to landscape planning aimed to gradually rehabilitate areas to a state fit for recycling, a practice that remains integral to modern mining systems.[52] To ensure compliance with safety regulations, the Mining Act introduced stringent requirements for state oversight of mining activities. It specified that *"[t]he research activities of state bodies are determined by the national geological research plan, coordinated by the central geological authority, and approved by the Council of Ministers*."[53]

48 Act III of 1960 on Mining, Section 1 §.
49 Izsó (2004): p. 57.
50 Act III of 1960 on Mining, Section 3 §.
51 Act III of 1960 on Mining Section 5 § (1).
52 Izsó (2004): p. 59.
53 Act III of 1960 on Mining, Part Geological Research Mining.

Furthermore, the law mandated the regular preparation of a technical plant plan for all mining operations, subject to approval by the mining authority.[54]

For more than a quarter of a century, this mining law faithfully upheld the fundamental requirements upon which it was founded. Mineral resources *were governed by a unified regulatory framework*, mining operations the exclusive domain of *socialist economic organisations*—such as state companies and cooperatives—and the exploration and exploitation of the country's mineral wealth was assumed as a direct responsibility of the state.[55] However, with the tide of legislative reform that gathered momentum in the latter half of the 1980s, coinciding with the gradual weakening of the Soviet Union, a succession of new statutes were introduced. These encompassed regulations on business companies, corporate transformations, and concessions, which introduced a broader and more flexible interpretation of mining law. Among the most significant of these changes was the provision allowing non-state economic entities to acquire mining rights, contingent upon obtaining the requisite permits. This development gradually expanded the principle of mining freedom, marking a decisive shift from the law's previously rigid constraints and, for the first time, enabling entities beyond the sphere of state-controlled organisations to secure mining rights under clearly defined conditions.[56]

2. The end of state-controlled mining and the shift to a free-market economy

Although the mining sector enjoyed considerable favour under the socialist regime, its forced development often disregarded the country's actual economic and resource capacities. By 1988, the growing tension in the sector over unpaid wages, coupled with the continued reliance on outdated, *production methods* heavily reliant on manual labour, led to widespread miners' strikes. These upheavals not only severely destabilised the industry but also played a crucial role in undermining the regime itself.[57]

As the structural fragility of the mining sector became increasingly apparent, with a growing wave of bankruptcies and liquidations, the newly formed government sought to steer the economy towards a free-market model, aiming to reconstruct the mining industry on a market-driven foundation.

However, privatisation within the mining sector lagged behind that of other industries, as foreign investors initially favoured medium-sized and smaller enterprises over the large-scale companies that had long dominated Hungary's mining industry. This protracted transition precipitated a wave of industrial bankruptcies and corporate dissolutions, resulting in extensive job losses and the closure of numerous mines. The collapse of the socialist regime, the dissolution of Comecon market opportunities and the downsizing of large enterprises precipitated a sharp decline in industrial

54 Izsó (2004): p. 59.
55 Izsó (2004): p. 53.
56 Izsó (2004): p. 62.
57 In August 1988, a miners' strike broke out at the István mine belonging to the mines around Pécs.

production,[58] with the mining sector bearing the brunt of this downturn—suffering a staggering 45% contraction between 1990 and 1994.[59]

It is essential to recognise that, as a consequence of these developments, certain companies gained even greater autonomy, successfully engaging in market operations and sustaining strong economic ties with Central and Eastern European countries. Meanwhile, as state-owned entities, their primary function remained the execution of state investments and the advancement of government interests. Consequently, during the privatisation process, these operational companies also encountered significant challenges in adapting to a market-driven economic framework.[60] One of the most profound and disruptive consequences of the regime change was the extensive liquidation of enterprises, resulting in substantial and, in many cases, irreversible losses of assets. This necessitated direct governmental intervention. For instance, in the latter half of 1989, efforts to restore the financial viability of the Mecsek Coal Mines prompted a collaborative investigation conducted by foreign companies British Mining Consultants Limited and the Operational Research Executive in partnership with the Central Mining Development Institute. Their objective was to provide expert analysis and recommendations for developing a new regulatory framework for preventing the liquidation of mining enterprises—an imperative societal need to ensure the continuous production of coal.

Furthermore, the stability of the mining industry was crucial for safeguarding domestic energy security and preserving employment levels in the sector. To achieve these objectives, the government recognised the necessity of a systemic transformation within the Hungarian coal mining industry. This entailed ensuring the sector's profitability by eliminating all forms of state subsidies, creating a self-financing and self-sustaining operational model. Such a transformation could only be realised through the *modernisation of organisational and management systems*, shifting away from a highly centralised bureaucratic system towards the creation of independent economic units and establishing industrial business cooperation.[61] These structural reforms could only be realised through the implementation of a new legal framework for mining activities, underscoring the imperative need to revise the existing Mining Act adopted during the Soviet-style dictatorship to align with the evolving economic landscape and market-oriented principles.

58 Vera Nyitrai (1996): Az ipar helyzetének alakulása 1985–1996 között, in István Kollega Tarsoly (ed.): *Magyarország a XX. században*: *II. kötet. Természeti környezet, népesség és társadalom, egyházak és felekezetek, gazdaság*, Babits Kiadó, Szekszárd, pp. 587–622, p. 615. Available at: https://mek.oszk.hu/02100/02185/html/356.html (accessed on 11.02.2025).

59 Nyitrai (1996): p. 618.

60 Máté Tóth, Gergely Baksay, Péter Bilek, Veronika Czakó, Pál Gáspár, Gábor Orbán (2003): *A privatizáció összehasonlító elemzése a csatlakozó és egyes átalakuló gazdaságokban*, ICEG Európai Központ, Budapest, p. 15. Available at: http://www.icegec-memo.hu/hun/kutatasi_projektek/privatization.pdf (accessed on 11.02.2025).

61 Erzsébet Sipos (as Sipos Antalné): A mecseki szén, *ArchívNet*, 3/2010. Available at: https://www.archivnet.hu/gazdasag/a_mecseki_szen.html (accessed on 11.02.2025).

IV. OVERVIEW OF THE MODERN MINING ACT

The enactment of the 1993 Mining Act[62] heralded a fundamental shift in the regulatory framework, transferring the financial and operational risks of mining activities from the state to private enterprises and thereby facilitating the transition to a market-oriented system.[63] While mining activities remain subject to state supervision, the codification of the Act was carefully designed to align with the principles established in the 1991 Concession Act, which permits the temporary exploitation of state-owned natural resources.[64] Together with its implementing regulations, the Mining Act forms a comprehensive and structured legal framework governing mining operations within Hungary's legal system. However, neither the Mining Act nor its enforcement mechanisms operate in isolation; rather, they constitute the cornerstone of a broader regulatory framework that integrates additional legislative provisions.[65] This interconnected approach enhances its effectiveness in addressing historical regulatory challenges while ensuring comprehensive governance of the mining sector.

The overarching objective of regulation, as articulated in the preamble of the Mining Act,[66] is to govern mining activities in a manner that upholds the protection of life, health, safety, the environment, and property, while also ensuring the responsible management of mineral and geothermal energy resources, which means that it establishes certain fundamental limitations to ensure that the freedom to conduct mining operations extends only insofar as it does not imperil other societal values.[67]

1. State property and limits

The Act firmly upholds the state's monopoly over mining activities, granting it exclusive control and regulatory authority over the exploration and extraction of these resources. Consequently, individuals or entities may only engage in mining operations through concession contracts issued by the state.

A key priority for the legislator is the precise definition of the law's scope, distinguishing specific categories of raw materials from the general concept of mineral

62 Act XLVIII of 1993 on Mining. Available at: https://net.jogtar.hu/jogszabaly?docid=99300048.tv (accessed on 11.02.2025).

63 Gyula Koi (2019): Bányászati igazgatás, in Imre Miklós (ed.): *Szakigazgatás I.*, Nemzeti Közszolgálati Egyetem Államtudományi és Nemzetközi Tanulmányok Kar, Budapest, pp. 207–224, p. 208. Available at: https://antk.uni-nke.hu/document/akk-copy-uni-nke-hu/Szakigazgat%C3%A1s_Tank%C3%B6nyv_2019_09_06.pdf (accessed on 11.02.2025).

64 Act XVI of 1991 on Concessions.

65 See, for example: Government Decree 267/2006 on the Hungarian Mining and Geological Office, as well as Government Decree 203/1998 on the Implementation of Act XLVIII of 1993 on Mining, and Decree 81/2012 on the Mining Concession Tender Procedure.

66 In accordance with the Preamble of the Act XLVIII of 1993 on Mining.

67 Gyurita, Borsa, Hulko, Tóth (2016).

resources. These distinct classifications are typically governed by dedicated provisions, often set out in separate chapters of the Mining Act.[68]

This principle is closely aligned with the provisions of the new Civil Code,[69] which explicitly designates subterranean natural resources as state-owned assets that cannot be privately traded. As set forth in the legal framework: *"[t]he ownership of real estate property shall not extend to the treasures of the earth, nor does it extend to natural resources."*[70] Thus, ownership of surface real estate does not equate to ownership of mineral resources beneath it. This legal distinction serves to dispel any misconceptions that might lead landowners to assume an unfounded right to exploit underground minerals based solely on their property ownership. By clearly delineating property rights and resource management responsibilities, the legislation ensures that the extraction of mineral resources remains subject to strict state oversight and regulatory control.

Even in contemporary legal practice, a recurring issue arises when certain property owners, labouring under the mistaken assumption that their ownership rights extend to the natural resources beneath their land, engage in the unauthorised extraction of mineral materials without securing the requisite official permits. However, property rights are legally confined to the surface of the land and extend downward only to the "*extent required for the intended lawful use of the property*." This typically includes the right of use, permitting individuals to utilise the land and its resources in a manner that does *not exceed personal needs or those of immediate household members*.[71] Accordingly, the acquisition of real estate does not confer ownership rights over the treasures of the earth or the natural resources that emerge from it. Such resources remain the exclusive property of the state, which acquires ownership by virtue of the law itself.[72]

2. The reflection of the free-market economy in the Mining Act

Within the legal framework established by the Public Finances Act,[73] exclusive state-owned property is classified as treasury assets. The administration and management of these assets fall under the jurisdiction of the minister responsible for treasury assets, who exercises ownership rights on behalf of the state through the Treasury Assets Directorate.[74] This centralised administrative structure raises a critical legal and economic question regarding its compatibility with free market principles, particularly in the context of natural resource management. The continued state ownership of mineral resources, despite the broader adoption of market-oriented economic policies,

68 Gyurita, Borsa, Hulko, Tóth (2016).
69 Act V of 2013 on the Civil Code. Available in English at: https://faolex.fao.org/docs/pdf/hun209514.pdf (accessed on 11.02.2025).
70 Act V of 2013 on the Civil Code, Section 5:17 (2).
71 Act V of 2013 on the Civil Code, Sections 5:17 (2) and 5:159 (1).
72 Izsó (2004): p. 74.
73 Act CXCV of 2011 on Public Finances. Available at: https://net.jogtar.hu/jogszabaly?docid=a1100195.tv (accessed on 11.02.2025).
74 In Hungarian: *Kincstári Vagyoni Igazgatóság*.

exposes the inherent tension between state control and the principles of private enterprise and competition.

Under the pertinent legislation, the sale or transfer of treasury assets requires prior approval from the Treasury Assets Directorate before they can be removed from state ownership. If such approval is withheld, or if mineral raw materials are extracted without the necessary authorisation, they remain subject to the non-tradability provisions outlined in the Civil Code. Consequently, the status of state ownership remains intact, and any assets unlawfully transferred must be restored to their original ownership status.[75] In cases where restoration is not feasible, liability is determined according to civil law principles.

This raises the inevitable question: how can a system be deemed market-based when natural resources remain under state ownership? In much the same way as the principle of "*general freedom to mine*" reflected in the 1854 Mining Act, the exploration, extraction, and commercial exploitation of mineral resources are permitted under the Concession Act, despite state ownership, so long as all legal requirements and necessary permits are obtained.[76]

This regulatory framework ensures that individuals and entities can engage in mining activities within Hungary while complying with established legal provisions.[77] Additionally, the Civil Code allows for the transfer of exclusive state-owned property under specific statutory conditions. In this regard, the Mining Act serves as a key legal instrument, facilitating concession agreements wherein mineral materials extracted by a licensed mining contractor become their property upon extraction and subsequent utilisation.[78] This regulatory mechanism demonstrates how state control over natural resources is balanced with commercial enterprise, ensuring compliance with legal standards while fostering economic activity within the mining sector under strictly regulated conditions. Moreover, it is important to highlight that, under the Mining Act, ownership of otherwise non-tradable mineral materials can only be transferred to mining entrepreneurs—individuals with legally acquired rights to extract specific mineral resources. Consequently, individuals *not classified as mining entrepreneurs* do not have the ability to acquire ownership rights over mineral raw materials.[79]

According to the Hungarian Concession Act,[80] a concession is a form of legal authorisation through which the state or local government temporarily transfers the right to conduct certain activities, as defined by law, within the framework of a reciprocal contract. Concession agreements are typically established for a fixed term, with a maximum duration of 35 years, extendable by an additional 17.5 years under

75 Izsó (2004): p. 76.
76 Act XVI of 1991 on Concessions.
77 Izsó (2004): p. 70.
78 Act XLVIII of 1993 on Mining, Section 3§. (1): "*[t]he mineral material extracted by the mining contractor shall become the property of the mining contractor upon extraction and utilization.*"
79 Izsó (2004): p. 75.
80 Act XVI of 1991 on Concessions.

exceptional circumstances.[81] A notable characteristic of concession contracts is that, in most instances, they do not result in a transfer of ownership, with the notable exception of mining activities. In the case of mining, the entity awarded the concession gains ownership rights over the extracted mineral raw materials and geothermal energy, subject to the obligation of paying a mining royalty to the state.[82] This arrangement effectively allows non-state entities to temporarily hold a limited market monopoly over the exploitation of specific resources.

The introduction of the new Mining Act enabled mining to be conducted under a licensing regime, thereby making various entities eligible to engage in concession-required activities. This includes not only the state and local governments but also state or municipal institutions, business organisations established for this purpose, and both domestic and foreign individuals or legal entities.[83]

In summary, within the existing legal framework, mineral resources in their natural state remain state property. However, the right to extract these resources can be conferred through a concession. In essence, the state bestows the right to extract, while the mining enterprise assumes the responsibility of paying royalties for the minerals extracted. Ownership of the extracted resources passes to the mining company as part of the extraction process.[84]

V. CONCLUDING REMARKS

In response to the fundamental questions surrounding the ownership of mineral resources buried deep within the Earth's crust—whether they belong to the state or the landowner—Hungarian legislative history offers varying answers:

The 1854 Mining Act embraced the principle of "*general mining freedom*", permitting landowners to exercise property rights over mineral resources that were considered accessories to their land. This legislation also introduced certain restrictions on specific types of mineral extraction.

In the aftermath of the two World Wars and the Treaty of Trianon, mining regulations became progressively more restrictive, moving towards a model of absolute state ownership over natural resources. This trend reached its zenith under the Soviet-style totalitarian regime, during which all natural resources were declared the exclusive property of the state, with only a few minor exceptions.

In the current legal landscape, the regulatory framework occupies an intermediate position between full state ownership and unrestricted mining freedom. The current mining legislation is fundamentally structured around the principle of mining royalties, where the rights associated with these royalties are vested in the state itself rather

81 Gyula Koi: A bányajog és a bányászati szakigazgatás jellegzetességei (jogelméleti-jogtörténeti vázlat), *Magyar Közigazgatás*, 8/2006, pp. 475–492, p. 12. Available at: https://www.academia.edu/8870314/A_b%C3%A1nyajog_%C3%A9s_a_b%C3%A1ny%C3%A1szati_szakigazgat%C3%A1s_jellegzetess%C3%A9gei_2004_ (accessed on 11.02.2025).
82 Koi (2006).
83 Koi (2006).
84 Gyurita, Borsa, Hulko, Tóth (2016).

than in the sovereign.[85] Thus, the existing system bears greater resemblance to state ownership than to absolute mining freedom. However, it remains more liberal than the mining laws enforced under the Soviet-style dictatorial regime, while still being more restrictive than the provisions of the 1854 Act.

In summary, while mining law may seem arcane and insignificant, it has played a pivotal role in shaping Hungary's economic, historical, and legal development. A comparative analysis of mining legislation across political regimes reveals crucial insights into the extent to which a well-functioning society is reliant on its natural resources, and how the legal framework governing these resources reflects broader regulatory and governance structures that strive to balance economic interests with sustainable resource management.[86]

Looking to the future, mining law will continue to be a crucial component of regulatory developments. Hungary's Fundamental Law, which references natural resources on three distinct occasions, underscores the state's responsibility to ensure their preservation and sustainable use, as well as their importance for future generations.[87] Beyond national concerns, mining law extends its influence to international regulatory frameworks, affecting diverse legal domains such as energy law, deep seabed mining regulations, and the legal governance of space resource extraction and utilisation. As such, mining law remains a critical and evolving field with far-reaching legal, economic, and environmental ramifications.

Finally, as a student at the University of Miskolc, nestled in one of Hungary's most historically rich mining cities, I am convinced that this succinct examination of mining law highlights the pivotal and distinctive role that natural resources hold within the regulatory structure of any nation.

85 Magdolna Gedeon (2017): Bányajog, mint természeti erőforrások jogának történeti áttekintése, *Agrár- és Környezetjog*, 23/2017, 21–35, p. 35. Available at https://ojs.mtak.hu/index.php/JAEL/article/view/2448/1763 (accessed on 11.02.2025).

86 The Fundamental Law of Hungary from 2011. Available in English at: https://njt.hu/jogszabaly/en/2011-4301-02-00 (accessed on 11.02.2025).

87 The Fundamental Law of Hungary from 2011, Article P) (1) stipulates that: "*[w]e bear responsibility for our descendants and therefore we shall protect the living conditions of future generations by making prudent use of our material, intellectual and natural resources*."

The Impact of Poland's Democratic Transition on Mining Law: the Evolution of Mineral Resources Ownership and Extraction Rights

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ABSTRACT
This research paper delves into the evolution of mining legislation in Poland, with a particular focus on the ownership of mineral deposits and the rights associated with their extraction. The analysis centres upon two pivotal periods in the nation's history: first, the era of the Polish People's Republic (hereinafter PRL), during which the political and economic order was dictated by Soviet-style totalitarian regime; and, second, the subsequent transition to democracy, marked by the ascendancy of private ownership and the establishment of a free-market economy. The study commences by examining the nationalisation of the mining industry after the Second World War and the enactment of the 1953 Mining Act. This Act reinforced state dominion over mineral extraction, yet notably failed to address the issue of mineral ownership. The inquiry then proceeds to consider the transformative repercussions of the democratic transition upon these issues. Legislative reforms in this period provided clarity on mineral ownership and introduced a concession licensing system, thereby enabling private entities to engage in mining activities. This regulatory shift proved instrumental in facilitating the engagement of non-state actors in the extraction of minerals of critical importance to Poland's economic growth and national strategic interests. By juxtaposing the legal frameworks of the PRL with those of the democratic transition, this paper underscores the enduring significance of mineral deposits in Poland's development, while illuminating the nation's progression towards economic liberalisation—albeit tempered by the continued supervisory role of the state over key resources.
KEYWORDS
Mining law, ownership of mineral deposits, extraction of mineral deposits, property rights, Polish People's Republic, democratic transition, economic transformation.

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Impactul tranziției democratice a Poloniei asupra legislației miniere: evoluția proprietății resurselor minerale și a drepturilor de exploatare

REZUMAT
Această cercetare explorează evoluția legislației miniere în Polonia, cu un accent deosebit pe proprietatea zăcămintelor minerale și drepturile asociate exploatării acestora. Analiza se concentrează pe două perioade din istoria Poloniei: epoca Republicii Populare Polone (denumită în continuare PRL), unde sistemul politic și economic a fost modelat de o dictatură de tip sovietic, și faza ulterioară a tranziției democratice, caracterizată prin trecerea către proprietatea privată și o economie de piață liberă. Studiul începe prin examinarea naționalizării industriei miniere după cel de-al Doilea Război Mondial și introducerea Legii Miniere din 1953. Această lege a consolidat controlul statului asupra extracției minerale, fără a aborda problema proprietății resurselor minerale. Cercetarea analizează apoi impactul transformator al tranziției democratice asupra acestor aspecte. Reformele legislative au clarificat regimul proprietății asupra resurselor minerale și au introdus sistemul licențelor de concesiune, care a facilitat implicarea entităților private în activități miniere. Acest sistem a fost esențial pentru a permite actorilor non-statali să extragă resurse minerale semnificative pentru creșterea economică a Poloniei și pentru interesele sale strategice naționale. Comparând cadrele juridice ale PRL și ale tranziției democratice, această lucrare subliniază rolul zăcămintelor minerale în dezvoltarea Poloniei și tranziția către liberalizarea economică, menținând totodată rolul de supraveghere al statului asupra resurselor esențiale.
CUVINTE CHEIE
Dreptul minier, proprietatea zăcămintelor minerale, exploatarea resurselor minerale, drepturi de proprietate, Republica Populară Polonă, tranziție democratică, transformare economică.

I. INTRODUCTION

Poland is a country endowed with a considerable wealth of mineral resources,[2] and accordingly, the mining industry has long stood as one of the most vital sectors of its economy. The earliest traces of mining on Polish lands date back to the 2nd–5th century B.C., when flint was quarried and fashioned into tools.[3]

By the mid-13th century, the extraction of rock salt had commenced in Bochnia and Wieliczka. Both mines operated under the enterprise *Żupy krakowskie*[4] and emerged as

2 The notion of *mineral resources* will be used interchangeably with the term *mineral deposits* in this research paper.
3 Kazimierz Piesiewicz (1981): Górnictwo, in Antoni Mączak (ed.): *Encyklopedia historii gospodarczej Polski do 1945 roku*, Wiedza Powszechna, Warszawa, p. 209.
4 *Żupa* is the Old Polish word for salt mine, meanwhile the adjective *krakowskie* was used because both salt mines were located close to Kraków – the city that was the capital of Poland from 1038 to 1795.

the largest production facility in Poland, serving as a principal source of revenue for the Polish Crown across the centuries.[5]

During the period of the partitions in Poland, the mining industry—particularly the extraction of hard coal in Upper Silesia—underwent significant expansion, marking a defining phase in the region's industrial growth.[6] It is therefore unsurprising that, following Poland's restoration of independence, considerable efforts were made to unify the fragmented mining legislation, a legacy of the partition era.[7] These efforts culminated in the enactment of the 1930 Regulation of the President of the Republic of Poland—Mining Law.[8]

This regulation introduced the concept of *mining property,* which, in principle, could be acquired through vesting by any individual legally capable of acquiring ownership of the land, as determined by the prevailing legislative framework.[9] The notion of mining property encompassed minerals classified under the category of *mining will*—those not intrinsically tied to land ownership. However, an exception to this principle applied to minerals enumerated in Article 1 (2) of the 1930 Mining Law, which could only be vested as mining property to the state. Consequently, during the period of the Second Polish Republic, the legal framework governing mining rights was relatively liberal, permitting private individuals to obtain mining property beyond the confines of land ownership, save for minerals deemed of strategic significance to the state.

With the outbreak of the Second World War, the Second Polish Republic effectively ceased to exist. Throughout the war, communist factions gradually consolidated their influence within Poland, marking the nascent stages of a profound political transformation. As part of this ideological shift, ownership structures in Poland were redefined in alignment with the Soviet-style dictatorship's ideological opposition to capitalism, which sought to curtail private property. These changes extended to the mining industry, a sector of paramount importance to the Polish economy. Following reforms to mining legislation, the constructs of *mining property* and *mining will* were abandoned, supplanted by alternative legal mechanisms. *The right to extract* mineral deposits was introduced, yet the matter of mineral ownership was largely disregarded.

During the late 1980s and early 1990s, Poland embarked upon a democratic transition that ultimately precipitated the collapse of the Soviet-style dictatorship. Though this transformation was chiefly political in nature, it also served as a catalyst for

5 Marek Tarabuła (2017): *Historia Wyższego Urzędu Górniczego na tle dziejów nadzoru górniczego na ziemiach polskich*, Wyższy Urząd Górniczy, Katowice, p. 11. Available at: https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwioud7YsK-CAxX22QIHHTRVCwEQFnoECA0QAQ&url=https%3A%2F%2Fwww.wug.gov.pl%2Fdownload%2Fhistoria_nadzoru_broszura%2C3722.pdf&usg=AOvVaw0i7gWSXH0hQZHUsLRoJdxp&opi=89978449 (accessed on 29.11.2023).

6 Jerzy Jaros (1973): *Historia Górnictwa Węglowego w Polsce Ludowej (1945–1970)*, Państwowe Wydawnictwo Naukowe, Warszawa–Kraków, p. 18.

7 Aleksander Lipiński, Ryszard Mikosz: Rozwój Ustawodawstwa górniczego w Polsce w latach 1918–1939, *Prawne problemy górnictwa*, 6/1983, pp. 83–105, pp. 83, 93.

8 The Regulation of the President of the Republic of Poland of 29 November 1930 Mining Law, Dziennik Ustaw (Law Gazette)1930, No. 85, item 654.

9 Art. 16 of 1930 Regulation of the President of the Republic of Poland – Mining Law.

far-reaching economic reforms. Central to this economic realignment were the establishment of a free-market system, the influx of foreign capital, and a restructuring of ownership models with an emphasis on the expansion of private property rights. These sweeping changes extended to the legal frameworks governing mining law, particularly with respect to the ownership of mineral resources and the rights pertaining to their extraction. New legal mechanisms were introduced to facilitate greater participation by private entities in this vital sector of the economy.

The impact of Soviet-era political doctrine, as well as the subsequent democratic transition, upon the legal arrangements concerning mineral ownership and extraction rights, will form the subject of further analyses.

II. MINING LEGISLATION DURING THE PERIOD OF THE POLISH PEOPLE'S REPUBLIC

1. Nationalisation of the mining industry after the Second World War

On 1 January 1946, an Act came into force mandating the transfer of key sectors of the economy into state ownership.[10] The new law led to the nationalisation of mining and oil industry enterprises, as well as mining and oil property. Although the pre-war legal framework governing remained formally intact, the creation of new mining or oil property was henceforth restricted to state entities—effectively, state-owned enterprises. Notably, the mineral deposits themselves were not nationalised, leaving their legal status unresolved.

Contrary to public perception, the situation remained unchanged after the adoption of the Constitution of 1952.[11] While Article 8 did declare that "*national property: mineral resources, waters, national forests, mines [...] is subject to the special care and custody of the state and all citizens,*"[12] scholarly consensus held that this provision did not, in itself, effect nationalisation.[13] Rather, its purpose was to establish the state's and the wider community's obligation to safeguard and manage national property in the broadest sense.[14] Additionally, the described provision identified those means of production that, if not already in state ownership, ought to become the exclusive state

10 Act on taking over the essential branches of the economy into state ownership of 3 January 1946, Dziennik Ustaw (Law Gazette) 1946, No. 3, item 17 with amendments.

11 The Constitution of the Polish People's Republic of 22 July 1952, Dziennik Ustaw (Law Gazette) No. 33, item 232 with amendments.

12 After the 1976 amendment to the Constitution, this provision was expressed in Article 12.

13 Antoni Agopszowicz: Prawo wydobywania kopalin, *Ruch Prawniczy Ekonomiczny i Społeczny*, 3/1966, pp. 21–45, p. 21.; Aleksander Lipiński: Własność złóż kopalin, *Studia Cywilistyczne*, 1977, pp. 175–200, p. 186.

14 Jan Wasilkowski (1969): *Prawo własności w PRL. Zarys wykładu*, Państwowe Wydawnictwo Naukowe, Warszawa, p. 41.; Emanuel Iserzon: Prawo państwa do dysponowania kopalinami, *Annales Universitaitis Mariae Curie-Skłodowska*, *Sectio G, Ius*, 3/1957, pp. 155–266, p. 239.

property. It follows, therefore, that the precise scope of scope of state-owned property could not be inferred from constitutional provisions alone but had to be determined through specific legislative enactments.[15]

Another step in the modernisation of mining law and its alignment with the framework of a centrally planned economy was the adoption of the Mining Act[16] in 1953. This new legislation was founded upon the principle of the socialised management of mineral resources and their extraction. The whole regulatory framework was designed to be fully compatible with the prevailing economic plans and political ideology, which prioritised industrialisation and projected a significant expansion in mineral extraction, especially in hard coal production.[17]

2. The right to extract mineral deposits

One of the main controversies widely debated in legal scholarship following the introduction of the new Mining Act was the absence of a clear determination regarding who exactly the owner of the mineral resources is.[18] Rather than addressing this fundamental question, the provisions of the Mining Act focused primarily on the right to extract mineral resources. According to Article 5 of the 1953 Mining Act, "*the right to extract minerals serves exclusively for the state, unless the Mining Act provides otherwise.*"[19] However, the opaque nature of this provision, combined with the prevailing system of property relations that strongly favoured state ownership, rendered it impossible to ascertain which entity was legally entitled to ownership of mineral resources.[20]

A critical question, deemed essential for an adequate understanding of the legal norm expressed in Article 5, was raised in the literature shortly after the introduction of the 1953 Mining Act. The debate centred on whether the exclusive right of the state to extract minerals applied to all mineral resources or only those explicitly governed by the Mining Act. Some legal scholars argued that the discussed norm concerned all mineral resources, including those not expressly covered by the Mining Act.[21]

15 Wasilkowski (1969): p. 41.; Lipiński (1977): p. 187.

16 Decree of 6 May 1953 on mining law, Dziennik Ustaw (Law Gazette) 1953, No. 29, item 113 with amendments. Although this legal act was formally issued as a decree, it is frequently referred to as the "*Mining Act*" in academic literature. To ensure consistency with prevailing nomenclature in the subject literature, this terminology will be adopted throughout this text.

17 Aleksander Lipiński (2019): *Prawne Podstawy Geologii i Górnictwa*, Wolters Kluwer, Warsaw, p. 24 et seq. Available at: https://sip.lex.pl/#/monograph/369457093/8?keyword=w%C5%82asno%C5%9B%C4%87%20&tocHit=1&cm=SREST (accessed on 29.11.2023).

18 The issue has been addressed, among others, in: Aleksander Lipiński: Uprawnienie do wydobywania kopalin, *Prawne Problemy Górnictwa*, 1979, pp. 107–130, pp. 107–108.; Jan Stefanowicz: Regulacje prawa geologicznego i górniczego a efektywność wykorzystania zasobów złóż kopalin, *Polityka Energetyczna*, special issue 2/2007, pp. 159–175, p. 165.; Agopszowicz (1966): p. 24 et seq.

19 In the primary version of the 1953 Mining Act, indicated regulation was expressed in Article 4.

20 Ryszard Mikosz: Ewolucja prawnej regulacji dotyczącej korzystania z zasobów naturalnych wnętrza ziemi w kontekście przemian ustrojowych w Polsce, *Górnictwo i Geoinżynieria,* 3/2010, pp. 17–31, p. 21.

21 This legal assertion was adopted in: Agopszowicz (1966): p. 27.

This interpretation was founded on the belief that the principle expressed in Article 5 constituted a fundamental legal rule, referring to Article 8 of the 1952 Constitution. According to this view, the omission of such a principle from Article 1 of the 1953 Mining Act was merely a legislative oversight.[22] Proponents of this argument pointed out that, like Article 5, Article 8 of the Constitution made no distinction between the mineral resources subject to the Mining Act and those falling outside its scope. Additionally, they maintained that if, pursuant to Article 1 (4) of the Mining Act,[23] the Council of Ministers was empowered to determine by decree which mineral resources were subject to the Mining Act, this authority could derive solely from Article 5. In fact, the Council of Ministers could exercise this power expressed in Article 1 (4) without restriction only if the state's exclusive right to extract minerals extended to all mineral resources.[24] Ultimately, however, this interpretation was refuted after the legislative changes of the Mining Act, which clarified the issue and provided a definitive resolution to the uncertainty.

3. The scope of applicability of the Mining Act after the 1977 amendment

The legal uncertainty surrounding Article 5 of the Mining Act appears to have stemmed from the flawed legislative technique employed during its drafting.

Fundamentally, aside from Article 1 (4), the only provision that could be interpreted as defining the scope of the Act's applicability was Article 1 (1). This provision stated that the Mining Act set out the rules and conditions for the extraction of minerals found in natural deposits. Based on this wording, one might have reasonably assumed that all mineral resources fell within the Act's purview.

However, in 1977, the Mining Act was amended,[25] which notably altered its approach to this issue. One of the most consequential revisions was the introduction of the new content of Article 3 (1), which named *expressis verbis* mineral resources subject to the Mining Act. Furthermore, Article 3 (2) paragraph 1 granted the Council of Ministers the authority to expand or narrow the list of minerals falling under the Act's jurisdiction. The described change clarified the prevailing uncertainties, reinforcing the interpretation that the state's exclusive right to extract minerals, as expressed in Article 5, applied solely to the mineral resources expressly listed in the Mining Act.

4. Ownership of mineral resources

As noted at the outset of this chapter, the Mining Act did not determine who held ownership of mineral resources within the country. Furthermore, the 1977 amendment to the Act introduced no provisions that would have clarified this matter. This legislative

22 Agopszowicz (1966): p. 27.
23 In the primary version of the 1953 Mining Act, the indicated regulation was expressed in Article 1(2).
24 Agopszowicz (1966): p. 27.
25 The Act of 26 November 1977 on the amendments to the Mining Law, Dziennik Ustaw (Law Gazette) 1978, No. 4, item 12 with amendments.

ambiguity might not have posed a significant issue had the right to extract mineral resources been an exclusive prerogative of the state, entirely independent of land ownership.[26]

However, such an assumption would be erroneous in light of Article 30 of the Mining Act. This provision implied that a mining entity was required to hold a legal title to the land from which mineral resources were to be extracted.[27] Such an approach corresponds to another view presented by the legal doctrine, according to which mineral resources located within the boundaries of a landholding might be considered an integral part of that land.[28] Consequently, unless a particular mineral deposit was not exempted from the scope of land ownership by a *lex specialis*, it remained part of this land. In practical terms, this meant that the landowner was simultaneously the owner of any mineral deposits situated beneath their property.[29]

This conclusion finds support in an analysis of the provisions of the 1964 Civil Code[30] on the matter of land ownership and property. Two provisions, in particular, were of relevance: Article 46 § 1 and Article 143 of the Civil Code. According to Article 46 § 1, land was defined as a section of the earth's surface constituting a separate object of ownership. On the other hand, Article 143 stipulated that within the limits set by socio-economic use of land, ownership of land extends to the space above and below its surface. In the second sentence of Article 143, it was provided that this regulation was without prejudice to the provisions regulating rights to water and rights to mineral resources. This wording indicated that if property rights related to waters and minerals were to be shaped differently under separate legal acts, those provisions would take precedence. Regarding the water resources within the borders of Poland, the exclusive ownership belonged to the state. This principle was explicitly derived from Article 1 of Water Law,[31] which established that all waters constitute state property.

As previously noted, the 1953 Mining Act did not introduce analogous provisions which would determine *expressis verbis* whether mineral resources were owned by the state or any other entity. Therefore, the property rights over mineral deposits had to be determined by reference to the Civil Code provisions, as outlined above.

From this legal framework, it follows that ownership of the mineral deposits located within the boundaries of privately owned land, in principle, belongs to the landowner. However, this conclusion gives rise to a more complex question: who owns mineral deposits situated outside of any land ownership within what is known as the Earth's crust? Some legal scholars posited that minerals found within the Earth's crust were

26 This view was presented by some of the representatives of the Polish legal doctrine, e.g. in: Wiktor Pawlak (1963): *Podstawowe systemy prawa górniczego*, Wydawnictwo Naukowe Uniwersytetu Adama Mickiewicza, Poznań, p. 153.

27 Antoni Agopszowicz (1974): *Zarys system prawnego górnictwa*, Państwowe Wydawnictwo Naukowe, Warszawa, p. 68.

28 Zygmunt Nowakowski (1969): *Prawo rzeczowe. Zarys wykładu*, Państwowe Wydawnictwo Naukowe, Warszawa, p. 33.; Agopszowicz (1966): p. 29.; Lipiński (1977): p. 187.

29 The only exception to this rule was groundwater, which was exclusive state property. This rule could be derived directly from Article 1 of the 1974 Water Law; Lipiński (1979): pp. 114–116.

30 The Act of 23 April 1964 Civil Code, Dziennik Ustaw (Law Gazette) 1964, No. 16, item 93.

31 The Act of 24 October 1974 on water law, Dziennik Ustaw (Law Gazette) 1974, No. 38, item 230.

not subject to ownership by any entity and should therefore be regarded as *res nullius*—ownerless property.[32]

This interpretation, however, was not widely accepted in legal doctrine. The first and most fundamental objection stemmed from the principles underpinning the economic and political system of the Polish People's Republic. It was inconceivable that mineral deposits in the Earth's crust, which are of decisive importance for the economic development of the country, could exist without an owner in a socialist state.[33] A further counterargument was rooted in civil law principles. It was based on the premise that the Earth's crust should be considered immovable property. Under Article 180 of the Civil Code, only movable property could constitute *res nullius.* Additionally, pursuant to Article 179 § 2 of the Civil Code, immovable property that had been effectively relinquished by its owner automatically became state property.

By this reasoning, immovable property must always be a subject of ownership, whether an owner is a private entity or the state. In consequence, since the Earth's crust, which constitutes immovable property, could not be owned by any private entity, it belonged to the state.[34]

Regardless of the precise legal reasoning adopted, the prevailing consensus among legal scholars during the era of the Polish People's Republic was that mineral resources located outside privately owned land, within the Earth's crust, constituted state property.[35]

5. Extraction of mineral resources by mining companies and private entities

Building upon the conclusions drawn in previous subchapters, it is necessary to clarify how the rule on the extraction of mineral deposits, as set forth in Article 5 of the Mining Act, should have been applied.

A systemic interpretation of the Mining Act's provisions suggests a general rule: the entities entitled to extract the groups of minerals subject to the Mining Act were mining companies. As mentioned earlier, following the adoption of the 1946 Act on the nationalisation of key economic sectors, all mining companies were brought under state ownership.

However, in the versions of the Mining Act preceding the 1977 amendment, mineral resources could also be extracted by cooperatives and non-socialised economy units,[36] provided that they obtained special permission. Such permission could only be granted if the extraction served socially legitimate economic needs and was issued

32 Jan Wasilkowski (1972): *Pojęcie własności we współczesnym prawie polskim*, Książka i Wiedza, Warszawa, pp. 98–99.
33 Agopszowicz (1974): p. 66.
34 This argument was presented in: Lipiński (1977): p. 195.
35 Agopszowicz (1966): p. 29.; Lipiński (1977): p. 192.; J. Ignatowicz: Przemiany prawa własności w świetle przepisów kodeksu cywilnego, *Studia Cywilistyczne*, 13–14/1969, p. 77.
36 The notion *non-socialised economy units* referred to an economy unit in which the dominant form of property was the private property.

by the competent authority of the praesidium of the provincial national council.[37] Additionally, the Council of Ministers retained the authority to issue executive orders specifying which minerals, in which areas, that is, in the whole territory of the state or within particular areas of the state, and under what conditions, a landowner was permitted to extract for personal use.[38]

The 1977 amendment to the Mining Act brought significant *novum,* especially regarding the extraction of minerals by cooperatives and non-socialised entities. In the amended version of the act, Article 5 (1) non-state units of the socialised economy were permitted to extract only those minerals explicitly indicated in Article 3 (2) of the Mining Act. This effectively meant that the mineral resources of strategic and economic relevance, listed in Article 3 (1), could only be extracted by the state-owned companies. Despite these changes, the provision that enabled a landowner to extract the minerals—subject to the conditions outlined in an executive order of the Council of Ministers—remained in force.[39]

6. The mining area

A legal act that had a significant influence on the exercise of certain rights by landowners was the decision on the establishment of a mining area. This act delineated a zone within which a mining company was authorised to extract the deposits of indicated minerals.

The boundaries of the mining area were defined by the surface lines of the land and the vertical planes passing through them, extending to the depth of the mineral deposit.[40] The commencement of mining operations and the extraction of minerals could only take place once the mining area had been established.[41] The authority responsible for creating a mining area was vested in the Minister of Mines.[42] The legal act of the establishment of the mining area was understood as an administrative decision, grounded in the provisions of the Code of Administrative Procedure.[43]

37 Article 5(1–2) of 1953 Mining Act, Dziennik Ustaw (Law Gazette) 1953, No. 23, item 113.
38 Article 6 of the 1953 Mining Act, Dziennik Ustaw (Law Gazette) 1953, No. 23, item 113.
39 Article 6 of 1953 Mining Act (after 1977 amendment), Dziennik Ustaw (Law Gazette) 1978, No. 4, item 12.
40 Lipiński (1977): p. 196.
41 Article 22 of the 1953 Mining Act, Dziennik Ustaw (Law Gazette) No. 4, item 12.
42 § 15 and §20 of Regulation of the Council of Ministers of 27 March 1954 on mining areas, Dziennik Ustaw (Law Gazette) 1954, No. 14, item 52. Later, the Regulation of Council of Ministers of 30 November 1965 on mining areas, Dziennik Ustaw (Law Gazette) 1965, No. 54, item 332, slightly amended the existing provisions in such a way that the authority responsible for the decision to establish a mining area for a specific mineral occurring in a natural deposit or a deposit was the minister with jurisdiction over the intended extraction of that mineral in economic plans (§ 10); subsequently, another regulation on mining areas slightly amended the existing provisions, specifying that the authority responsible for the decision to establish a mining area for a specific mineral, found in a natural deposit or geological formation, would be the minister with jurisdiction over the intended extraction of that mineral as outlined in economic plans. (§ 10 of the Regulation of the Council of Ministers of 30 November 1965 on mining areas).
43 The Act of 14 June 1960 Code of Administrative Procedure, Dziennik Ustaw (Law Gazette) 1960, No. 30, item 168; Lipiński (1977): p. 96.

The conclusions drawn from the preceding section indicate that, with the exceptions specified in the Mining Act, the mining company was the only entity authorised to extract mineral deposits. Moreover, the right to extract minerals was intrinsically linked to land ownership, in that the exercise of this right required a separate legal title to the area from which mineral deposits were to be extracted. It could not be exercised only on the basis of the decision concerning the mining area.

In light of these considerations, if the landowners wanted to extract the minerals subject to the Mining Act, they would need to *become* a mining company, for which a decision establishing a mining area would need to be issued in their favour. In practice, however, most private—particularly natural persons whose land contained mineral deposits subject to mining law—were unable to extract such minerals. This, in turn, meant that they were effectively precluded from exercising some of the rights covered by the land ownership.[44]

Nevertheless, this did not signify that the right to extract minerals had lapsed for the landowner. The circumstances in which an owner was unable, due to factual or legal reasons, to exercise certain rights did not lead to their termination. The right remained intact and could be exercised once the adverse conditions had ceased.[45]

Another critical consideration was that the establishment of the mining area within the boundaries of certain land did not result *ex lege* in the transfer of land ownership or mineral deposits' ownership to the mining company. A mining company could only acquire ownership of the land through a separate, appropriate legal act.

III. MINING LEGISLATION IN POLAND DURING THE PERIOD OF DEMOCRATIC TRANSITION

1. General information and provisions

In the late 1980s and early 1990s, Central and Eastern Europe embarked on the process of democratisation, a shift that was profoundly reflected in social and political landscapes. Poland stood at the forefront of this transformation. The ideas of democratisation began to take tangible form with the enactment of the Act of 29 December 1989 on amendments to the Constitution of the Polish People's Republic.[46]

The direction of changes was immediately evident in Article 1 (1) of the aforementioned act, which renamed the Polish Constitution from the Constitution of the Polish People's Republic to the Constitution of the Republic of Poland, thereby founding the Third Republic.

44 Lipiński (1979): p. 116.
45 Wasilkowski (1969): p. 106.
46 The Act of 29 December 1989 on amendments to the Constitution of the Polish People's Republic, Dziennik Ustaw (Law Gazette) 1989, No. 75, item 444.

Regarding the political system, the most significant provisions were found in Article 1, Article 2 and Article 5 of the amended Constitution.[47] The first of the provisions stated that "*[t]he Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.*" From Article 2, it could be derived the norm, which established that "*supreme power in the Republic of Poland shall be vested by the Nation*" (section 1) and that

> *"the Nation shall exercise such power directly or through their representatives elected to Sejm, Senate and national councils, while the exercise of power is also carried out through the expression of will by way of referendum, the rules and procedure for the holding of which shall be specified by legal act" (section 2).*

The final key provision in this transformative process was Article 5, which affirmed that "*[t]he Republic of Poland guarantees the participation of local self-government in the exercise of power and the freedom of other forms of self-government.*"

The Constitution of 1952 lost its validity with the enactment of the so-called Small Constitution of 1992[48]. Ultimately, this was superseded by the 1997 Constitution of the Republic of Poland,[49] which remains in force to this day.

In order to maintain a proper course for the democratic transition, changes at the constitutional level had to be followed by adjustments in the lower levels of the hierarchy of the legal acts among various branches of law. On 1 January 1989, the Act on Economic Activity came into force,[50] which established the rule of "economic freedom." The primary goal of this legislation was to stimulate economic expansion by encouraging private-sector growth. More specifically, it allowed state-owned enterprises, private entities, or individuals to engage in economic activities. Furthermore, the law emphasised the equal significance of all the sectors within the economy. However, certain activities, owing to their specific nature or strategic significance to the country's economy, or due to their hazardous practices, required a concession licence issued by the state authorities. Most of the activities governed by the Mining Act were subject to this licensing requirement.[51]

Another key aspect of the democratic transition in Poland was the introduction of foreign capital. Foreign investments were regulated by the 1991 Act on Companies with Foreign Participation.[52] The act facilitated foreign investments and provided a more flexible

47 Mikosz (2010): p. 18.

48 The Constitutional Act of 17 September 1992 on mutual relations between the Legislative and Executive Powers of the Republic of Poland and on self-government, Dziennik Ustaw (Law Gazette) 1992, No. 84, item 426.

49 The Constitution of the Republic of Poland of 2 April 1997, Dziennik Ustaw (Law Gazette) 1997, No. 78, item 483.

50 The Act of 23 December 1988 on Economic Activity, Dziennik Ustaw (Law Gazette) 1988, No. 41, item 324 with amendments.

51 Aleksander Lipiński, James Otto: Polish Mineral Legislation and Policies in Transition, *Journal of Energy and Natural Resources Law*, 1/1993, pp. 17–26, p. 18.

52 The Act of 14 June 1991 on Companies with Foreign Participation, Dziennik Ustaw (Law Gazette) 1991, No. 60, item 263 with amendments.

approach than was allowed under the prior legislation. According to its provisions, creating a company with foreign investment did not require government approval, and most activities were regulated similarly to those of Polish-owned companies. The 1953 Mining Act also treated Polish and foreign investors equally, with concession licence rights and obligations remaining unchanged regardless of the owner's nationality.[53]

2. Ownership of mineral resources

The political and economic changes also had a profound impact on the Mining Act, culminating in its amendment in 1991.[54] The revised version of the act provided greater clarity regarding property issues considering mineral resources.

A pivotal provision introduced by the amendment to the Mining Act was Article 5. Article 5 (1) explicitly stated that mineral resources were the property of the State Treasury, thereby imposing a limitation on the rights of landowners. This limitation applied to the extent that mineral resources were components of the given plot of land, they remained subject to the property right vested in the land.

Conversely, the State Treasury's ownership extended to all deposits located beneath the lower boundary of the real estate, namely, in the Earth's crust.[55] This principle found further legal grounding in the provisions of the Civil Code.[56] According to Article 46 § 1 of the Civil Code, real estate was defined as a section of the earth's surface constituting a distinct object of property (i.e., land). However, Article 143 of the Civil Code specified that ownership of land extended both above and below its surface, but only within limits determined by the socio-economic purpose of the land. From this, it followed that real estate was a spatial entity only to a finite depth beneath the earth's surface, beyond which ownership rights did not apply.[57]

In Article 5 (2), the legislator further defined the scope of the mineral resource property rights vested in the State Treasury. The aforementioned provision stated that

> *"within the limits established by legal acts, the State Treasury, with the exclusion of other persons, shall use mineral resources mentioned in section 1, in accordance with the social and economic purpose of its right and may issue the concession licence[58] for mining to other subjects."*

When comparing these legal provisions to those implemented under the Soviet-style dictatorship, it becomes evident that the structure of ownership over mineral resources did not undergo substantial transformation. While it was systematised and *expressis*

53 Lipiński, Otto (1993): p. 18.
54 The Act of 9 March 1991 on the amendments to the Mining Law, Dziennik Ustaw (Law Gazette) 1991, No. 31, item 128.
55 Mikosz (2010): pp. 21–22.
56 The Act of 23 April 1964 Civil Code, Dziennik Ustaw (Law Gazette) 1964, No. 23, item 96 with amendments.
57 Tomasz Dybowski (ed.): *System Prawa Prywatnego. Prawo rzeczowe*, C.H. Beck, Warszawa, p. 286 et seq.
58 The right obtained by the holder of a mining concession was a so-called *mining usufruct*.

verbis indicated in the act, it was not significantly liberalised. This continuity underscores the strategic importance of mining in maintaining state stability. As previously emphasised, mineral resources play a fundamental role in ensuring the country's sustainable development. Therefore, the state has a vested interest in retaining control over resources critical to maintaining its proper functioning and economic growth.

Nevertheless, one notable development signals a shift in the paradigm concerning private equity in the post-democratic transition era: the introduction of the concession-granting mechanism. This innovation facilitated the participation of private entities in mining activities, marking a departure from the previous centralised model. The details of this mechanism will be explored in the following subchapters.

3. Applicability of the Mining Act after the 1991 amendment

To fully grasp the changes introduced to the Mining Act following the period of transition, it is necessary to delineate the scope of applicability of the Mining Act after its 1991 amendment. The same fundamental question arises as was posed concerning the legal framework during Soviet-style dictatorship: which mineral resources fell under the jurisdiction of the Mining Act?

Before addressing this issue, it is worth recalling the legal solution adopted when the 1977 amendment to the Mining Act came into force. The legislator, in Article 3 (1) of the act, introduced an exhaustive list of the mineral resources that were subject to the Mining Act. Furthermore, Article 3 (2), paragraph 1, conferred upon the Council of Ministers the authority to expand or narrow the range of minerals governed by the Act. This approach resulted in the distinction between two categories of minerals: those to which the Mining Act applied and those falling outside its scope. This distinction carried significant implications, as it determined whether certain minerals were exempt from state control under Article 5 of the Mining Act. Additionally, it reinforced the principle that minerals not subject to the Mining Act constituted an integral part of land ownership. Notably, this fundamental distinction remained unchanged following the 1991 amendment.

However, the legislator introduced an additional provision to refine the regulatory framework. A new section, Article 3 (3), was appended, stating that for the extraction of mineral resources not listed in Article 3 (1) or those excluded from the Mining Act under Article 3 (2) paragraph 1, the provisions of Article 4 would apply.

Article 4, in turn, set out a procedure for obtaining authorisation to mine such mineral resources. In cases where a legal entity sought to extract a mineral not explicitly included in the exhaustive list of Article 3 (1) or recognised by an executive order, it was required to draft a comprehensive development plan for the mineral deposit. This plan had to be submitted for approval to a designated regulatory body. The specific requirements for drafting the project, as well as the procedural steps for its approval, were to be determined by the Minister of Environmental Protection, Natural Resources and Forestry through an executive order.

This solution marked a conspicuous departure from the legal framework established under the Soviet-style dictatorship. Under the previous legislation, there existed a lack of clarity regarding the extent to which the provisions of the Mining Act applied to mineral resources that were neither enumerated in Article 3 (1) nor included in the executive

orders of the Council of Ministers. This ambiguity left the legal status of such unlisted resources uncertain and failed to establish a clear procedure for their extraction.

4. Introduction of concession licence

Another notable transformation brought about by the 1991 amendment to the Mining Act was the introduction of the concession licence. This regulatory instrument had not been recognised during the period of the Polish People's Republic by the Mining Act. Previously, the sole avenue for a private entity to obtain the right to extract mineral resources was through an executive order issued by the Council of Ministers, which enabled the extraction of certain minerals by private entities or by gaining permission. However, the latter option was strictly limited to minerals not exhaustively listed in Article 3 (1) and such permits were granted exclusively to non-state socialised economy units. Therefore, private entities found it exceedingly difficult to exercise any right to mineral extraction. Furthermore, those minerals deemed essential to the state's economy and thereby subject to the Mining Act remained entirely beyond the reach of private enterprises.

A concession licence was introduced to organise and simplify the process of mineral extraction by private entities, granting them the ability to exploit even those minerals falling within the remit of the Mining Act.

This shift had already begun towards the end of the preceding socio-economic era and was closely related to the emerging economic freedom in Poland. The Act of 23 December 1988 on Economic Activity laid the groundwork for this development, with Article 11 (1), point 1, prescribing that any economic activity involving the exploration and extraction of minerals subject to the Mining Act would require a licence.[59]

The 1991 amendment to the Mining Act subsequently reinforced this principle. In the amended version of the act, Article 5 (2) the State Treasury was empowered to confer its mineral extraction rights upon other parties through the granting of a concession licence.

This mechanism significantly facilitated the participation of private entities taking part in the mineral extraction market. The licensing framework led to the creation of mining *usufruct* in favour of the concession holder, thereby formalising private sector involvement in resource extraction. Notably, the concession licence conferred upon its holder an exclusive right to extract mineral resources within the boundaries defined by the concession.[60]

5. Character of the rights granted by concession licence

The introduction of the possibility to obtain a concession licence for mining, as provided by the 1991 amendment to the Mining Act, was accompanied by a degree of legal uncertainty. In the legal literature, questions arose regarding the basic character of the rights obtained by a concession holder under the Mining Act.[61] Article 12a sought to

59 Mikosz (2010): p. 23.
60 According to Article 12a of the Mining Act after the 1991 amendment.
61 Lipiński, Otto (1993): p. 21.; Mikosz (2010): p. 23.

clarify this by prescribing that "*a concession licence grants an exclusive right to the concession holder to mine a mineral within the prescribed area.*"

The relevant provisions of the Mining Act fostered the understanding that the right to engage in a specified activity existed as an independent right vested in the state. Thus, the concession agencies, acting on behalf of the state, upon granting the concession, effectively transferred the right to undertake the designated activity to the concession holder.[62]

However, in case the concession licence pertained to the mineral resources that were located within the State Treasury property, then the concession's character could be perceived as dichotomous. On the one hand, such a concession constituted an act that conferred upon the concession holder the right to utilise a specific parcel of land. On the other, it served as a mechanism through which the state could exercise its supervisory authority over the activities undertaken by the concession holder.

This issue did not arise when a concession licence was granted to the owner of the land upon which mining operations were to take place. In such an instance, the concession licence was only an act on the basis of which the state could exercise its supervisory role, since the property rights to mineral resources derived from the landowner's existing rights over the land itself.[63]

6. The licensing procedure

In light of the ambiguities surrounding the nature of the rights conferred upon the concession holder following the issuance of the licence, the process of obtaining such a licence was, for the most part, well-defined, though certain aspects remained unclear.

The 1991 amendment to the Mining Act identified three activities for which a concession was required: the extraction of mineral deposits,[64] the tankless underground storage of liquids and gases, and underground storage of waste, including toxic and radioactive debris.[65]

In the case of concession licences for mining mineral deposits, the issuing authority varied depending on whether the deposits were regulated by the Mining Act or fell outside its scope. For the mineral deposits which were subject to the Mining Act,[66] a concession licence was granted by the Minister of Environmental Protection, Natural Resources and Forestry in consultation with the Minister of Industry, planning authorities and competent self-government bodies. The issuance of the licence

62 Lipiński, Otto (1993): p. 21.

63 Lipiński, Otto (1993): pp. 20–21.; Mikosz (2010): p. 23. It is necessary to mention that the concession licence was introduced during the transition period also in another act, namely in the Act of 16 November 1960 on Geological Law, Dziennik Ustaw (Law Gazette) 1960, No. 52, item 303 with amendments. The norm established in Article 16b(1) of this act constituted that the concession licence provides an exclusive right to an economic entity to conduct geological activities, listed in Article 16a, within the prescribed area.

64 Article 12b(1) of the Mining Act after the 1991 amendment.

65 Article 12b(4) of the Mining Act after the 1991 amendment.

66 The same authorities also issued a licence for the extraction of minerals located within the Polish maritime areas [art. 12b(2) of the Mining Act after the 1991 amendment.]

also required the opinion of a concession commission appointed by the concession authority.[67]

By contrast, the extraction of minerals not governed by the Mining Act, as well as the recovery of minerals from post-mining waste accumulated in mining dumps, fell under the jurisdiction of the competent voivode, who issued the relevant concession licence following consultation with the appropriate self-government bodies.[68]

It is crucial to consider this framework within the historical context of the Soviet-style dictatorship. Under the legal order of that era, the extraction activities concerning minerals subject to the Mining Act were exclusively reserved for state-owned companies, with private entities strictly prohibited from engaging in the extraction of minerals deemed essential to the national economy. The legal framework established by the authorities back then did not provide for the involvement of private capital in such operations, reflecting the centrally planned economic policies of the time.

Given these historical and regulatory considerations, the role of self-government in the process of issuing concession licences deserves particular emphasis. The approval of local self-government was a mandatory prerequisite for the issuance of concession licenses not only for the mining of mineral resources but also for other activities regulated under the Mining Act, namely tankless underground storage of liquids and underground storage of wastes, including hazardous and radioactive debris.[69]

The significance of local governments in the licensing process is a clear reflection of the broader trajectory of political transformation following the 1989 transition. During the Soviet-style dictatorship period, local government institutions were relegated to the periphery, with power concentrated in the hands of national councils. The Act of 20 March 1950 on Territorial Organs of Uniform State Power introduced solutions drawn from the Soviet model, abolishing the offices of voivodes and starosts, restricting the principles of self-government, and transferring the powers of these abolished bodies to the national councils.[70] Representatives on these councils were not elected by popular vote, but instead delegated by the Polish Workers' Party and associated organisations.[71]

The political shifts of 1989 were also manifested in the reform of municipal self-governance, initiated by the enactment of the Law on Municipal Self-Government on 8 March 1990.[72] This systemic transformation enabled the reconstruction of local self-government, culminating in the first free local government elections on 27 May 1990. On the grounds of mining law, the restoration of the local self-government's legal and institutional significance was exemplified by its enhanced role in the licensing process for mining activities, which was highlighted by significant scholars.[73]

67 Article 12b(2) of the Mining Act after the 1991 amendment.
68 Article 12b(3) of the Mining Act after the 1991 amendment.
69 Article 12b(4) of the Mining Act after the 1991 amendment.
70 Waldemar Janosiewicz: Samorząd terytorialny w Polsce – zarys historyczny, *Homo Politicus*, 2018, pp. 7–21, p. 14.
71 Gracjana Dutkiewicz: Dzieje Samorządu Terytorialnego w Polsce po II Wojnie Światowej, *Colloquium Wydziału Nauk Humanistycznych i Społecznych*, 2/2010, pp. 193–206, p. 196.
72 The Act of 8 March 1990 on Municipal Self-Government, Dziennik Ustaw (Law Gazette) 1990, No. 16, item 95.
73 See: Lipiński, Otto (1993): p. 22.; Mikosz (2010): p. 25.

Another element in the procedure of issuing the mining concession licence, which indicated the turn in the Polish system and opening up to private capital participation in the state economy, was the introduction of the provision Article 12j in the 1991 amendment to the Mining Act. This provision allowed for the possibility of a bidding round prior to the granting of a concession licence. The rules governing this process were to be specified by the Regulation of the Council of Ministers. However, the concession agency was not bound by the result of the bidding round. Therefore, the agency was not required to grant a winning bidder the concession licence.[74]

The element that brought some uncertainty to the licensing procedure for the mining activities, including the extraction of mineral deposits, was the requirement to conclude a contract between the applicant and the issuing agency. According to the provisions of the amended Mining Act, this contract should have contained specific regulations on the rights and obligations of the parties. The contract shall also be null and void unless made in writing.[75]

This provision faced criticism in the legal literature, as the notion of a quasi-administrative contract preceding an administrative decision was unfamiliar to Polish law and, in some cases, seen as incompatible.[76] The contract had no binding authority and could not serve as a foundation for any claim to obtain a concession licence. One of the primary purposes of a concession granted under the Mining Act was to ensure state supervision over specified geological and mining activities, and this supervision could not be established by contract. All provisions of such a contract had to be incorporated into the concession licence.[77]

Mining concession licences were issued for a fixed term as specified in the licence itself and could be revoked if the concession holder, following notice from the concession agency, failed to comply with the law, neglected environmental protection, or violated the obligations stipulated in the concession licence.[78]

It is important to note that the mining concession licence was considered an administrative decision, which meant it could also be withdrawn, cancelled, or amended under the 1960 Code of Administrative Procedure.[79]

IV. CONCLUDING THOUGHTS

The comparative analysis of the issue of mineral ownership and the right to mineral extraction during the periods of the Polish People's Republic and the democratic transition offers a profound insight into the broader scope of political and economic changes in Poland after 1989.

74 Lipiński, Otto (1993): p. 23.
75 Article 12c (1–2) of the Mining Act after the 1991 amendment.
76 See: Lipiński, Otto (1993): p. 22.
77 Lipiński, Otto (1993): pp. 22–23.
78 Article 12 (k) of the Mining Act after the 1991 amendment.
79 The Code of Administrative Procedure of 14 June 1960, Dziennik Ustaw (Law Gazette) 1960, No. 30, item 168; Lipiński, Otto (1993): p. 24.

The 1946 nationalisation of mining companies reflected the increasing role of the state in controlling the key sectors of the economy. The process of nationalisation of the mining industry culminated in 1953 with the introduction of the Mining Act, which established the state's exclusive right to extract mineral resources governed by the Act. However, somewhat paradoxically, the legislator did not conclusively address the issue of mineral deposit ownership, especially in relation to landowners.

The legal doctrine sought to address this inconsistency in the provisions of the 1964 Civil Code by concluding that mineral deposits located within the boundaries of private land ownership were deemed to belong to the landowner. In contrast, mineral deposits situated beyond the confines of private land, particularly those found in the Earth's crust, were regarded as the property of the state.

However, it should be emphasised that, in connection with Article 5 of the Mining Law, which provided for the state's exclusive right to mineral deposits, private entities were essentially deprived of the ability to extract minerals subject to the Mining Act. While Articles 5 (1) and 6 of the Mining Act did allow for potential private sector involvement in the extraction of minerals, this applied only to minerals not governed by the Act and required the acquisition of a permit or adherence to regulations issued by the Council of Ministers. Accordingly, private entities were entirely excluded from the extraction of minerals of state interest, and the extraction of other minerals was also strictly controlled by the state.

This raises the question of whether the omission of defining mineral ownership under the Soviet-style dictatorship was intentional—in order to create the impression of apparent respect for private property, especially concerning landowners, and prevent potential conflicts between state and private entities—or whether it was simply due to legislative errors.

Considering the political doctrine of the Polish People's Republic and the provisions of the 1952 Constitution of the country[80] and other legal acts,[81] which were, in principle, unfavourable towards capitalism and private property, one must conclude that the first hypothesis is unlikely. Thus, it appears more plausible that the lack of clarity

80 See for example: the Preamble of the 1952 Constitution of the Polish People's Republic, Article 3 (4) of the 1952 Constitution of the Polish People's Republic, which provided that "*Polish People's Republic restricts, displaces and abolishes social classes, living off the exploitation of workers and peasants*."

81 See for example: the Decree of the Polish Committee for National Liberation (PKWN) of 6 September 1944 on carrying out land reform. The Soviet-style dictatorship, under this legislative act, expropriated the properties of many owners, transferring their assets to the State Treasury. Public authorities abused their power by taking legal and factual actions that violated the laws in force at the time. See more: Agnieszka Gralewicz (2015): *Problem własności, przekształceń własnościowych oraz reprywatyzacji na tle dekretu Polskiego Komitetu Wyzwolenia Narodowego*, Uniwersytet Kardynała Stefana Wyszyńskiego w Warszawie, Warszawa, p. 61 et seq. Available at: https://www.academia.edu/66693855/Problem_własności_przekształceń_własnościowych_oraz_reprywatyzacji_na_tle_dekretu_Polskiego_Komitetu_Wyzwolenia_Narodowego_z_dnia_6_września_1944_roku_o_przeprowadzeniu_reformy_rolnej (accessed on 29.11.2023). The resolution of the full Civil Chamber of the Supreme Court of Poland of 26 October 2007, III CZP 30/07. Available at: https://www.saos.org.pl/judgments/86751 (accessed on 20.10.2024).

regarding mineral ownership was a result of negligence in the drafting of legal acts. There remains a third possible option, according to which the legislator, by not explicitly stating that mineral resources were state property, aimed to create the impression that mineral resources constituted a common good.

Nevertheless, the political and economic shifts at the turn of the 1980s and 1990s radically transformed the concept of private property and the participation of private capital in the Polish economy. This prompted a comprehensive reform of the Mining Act in 1991, which addressed the interpretational ambiguities of the 1953 Act.

The reform addressed the interpretational issues stemming from the lack of clarity in the 1953 Mining Act by explicitly establishing, as outlined in Article 5 (2) of the Mining Act following the 1991 amendment, that ownership of mineral deposits belongs to the State's Treasury with the limitation to the rights of the owners of the land.

This solution *de facto* confirmed the thesis presented in the scientific literature of the Soviet-style dictatorship period that mineral deposits located beyond the boundaries of private landownership, specifically within the Earth's crust, constitute the property of the state, while those situated within private land boundaries are considered as the property of the landowner. This approach was, without a doubt, the most appropriate, considering the economic and strategic importance of mineral deposits to the functioning and stability of the state. It should be emphasised, however, that the legislator had also explicitly affirmed its respect for property rights arising from land ownership.

The most significant change in the Mining Act, emphasising the shift toward liberalisation and opening the market to private capital, was the introduction of the concession licence. Although it was not an ideal solution—the legal literature highlighted the unclear character of the rights obtained by a concession holder, as well as procedural inaccuracies in the licensing process, such as the requirement for a contract between the licensing authority and the applicant—the transformative nature of this reform is undeniable. The key outcome of this legislative change was the possibility for private entities to be authorised to engage in the extraction of minerals regulated under the Mining Act. Consequently, private companies which obtained concession licenses were granted the right to mine minerals critical to the state economy's functioning.

The procedure for issuing concession licences reflected not only the process of market liberalisation but also the broader movement towards democratisation and increased public participation in state governance. The market liberalisation aspect was exemplified by the introduction of provisions that allowed concession licenses to be issued through a competitive bidding process. Meanwhile, the democratisation dimension was evident in the mandatory involvement of local self-governments in the licensing process, with the requirement that no concession could be granted without their formal consent.

Pentru autori

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- Prin trimiterea unui articol spre publicare către RRID declarați că textul este unul original, care nu a fost încă publicat sau acceptat pentru publicare de către alte publicații; că articolul este pregătit în mod individual de către autor(i); că toate sursele utilizate sunt citate în mod corespunzător; că toate citatele sunt exacte și marcate corespunzător; că sunteți de acord cu verificarea originalității textului de către echipa editorială prin utilizarea unui software specializat, dezvoltat în acest scop.
- Toate articolele sunt publicate sub o licență CC BY-ND.
- RRID nu percepe nicio taxă pentru trimiterea sau publicarea articolelor.
- Limita de caractere pentru articole este de cel mult 50000 de caractere cu spații, respectiv cel mult 15000 de caractere cu spații pentru recenzii de cărți.

Principii etice

- RRID sprijină și urmează liniile directoare ale Comitetului pentru Etica Publicației (COPE).

Termene

- Termenul de trimitere a articolelor sau recenziilor destinate publicării este data de **15 mai** a fiecărui an. Revista este publicată în luna octombrie a aceluiași an.

Evaluare (peer review)

- Fiecare manuscris este supus unei verificări prealabile. Articolele care sunt primite în următoarea etapă de verificare editorială vor fi supuse unei evaluări anonime. Autorii vor fi de regulă informați cu privire la rezultat (acceptat, respins, acceptat sub condiția efectuării unor modificări) în termen de două luni.

Editare

- Acceptăm doar materialele care sunt gata de publicare. Toate materialele acceptate pentru publicare sunt supuse unui proces de editare și de tehnoredactare. Editorii își rezervă dreptul de a modifica limbajul și conținutul lucrării, după o consultare prealabilă cu autorul, atunci când este cazul. Autorul va primi o versiune a articolului în format .pdf înainte de publicare în scop de verificare și acordare a autorizației finale („bunul de tipar"). La acel moment doar modificările minore vor mai putea fi integrate în articol.

Rezumat și cuvinte cheie

- Toate materialele trebuie să includă un rezumat de maxim 1700 de caractere, inclusiv spațiile și 5–7 cuvinte cheie. Rezumatul și cuvintele sunt necesare atât în limba română, cât și în limba engleză.

Titluri și subtitluri

- Vă rugăm să numerotați titlurile cu cifre romane (I, II, III, IV etc.), iar subtitlurile cu cifre arabe (1.2,3,4 etc.). Numerotarea subtitlurilor reîncepe de la 1 după fiecare titlu. Subtitlurile sunt permise până la al doilea ordin (1.1, 1.2 etc.).

Citări

- Folosiți ghilimele („…") pentru citatele literale și ghilimele franțuzești («…») pentru a marca un citat în citat. În citate, se indică omisiunea cu […].
- Vă rugăm să utilizați note de subsol, notele de final nu sunt acceptate. Numărul notei trebuie să vină după punctuație.
- Citați monografiile după cum urmează:
- Liviu P. Marcu (1997): *Istoria dreptului românesc*, Lumina Lex, București, p. 171.
- În continuare în format prescurtat: Marcu (1997): p. 173.
- Citați volumele editate după cum urmează:
- Nicolae Popa (2019): Structura dreptului, în Ștefan Deaconu, Elena Simina Tănăsescu (ed.), *In honorem Ioan Muraru. Despre Constituție în mileniul III*, Hamangiu, București, p. 299.
- În continuare în format prescurtat: Popa (2019): p. 301.
- Citați articolele din reviste de specialitate după cum urmează:
- Ioan Leș: Câteva reflecții asupra reformelor judiciare din Franța, Italia și Spania, *Dreptul*, 9/2020, pp. 11–29, p. 17.
- În continuare în format prescurtat: Leș (2020): p. 19.
- Mai multe publicații ale aceluiași autor din același an vor fi individualizate prin utilizarea de litere mici după data publicării:
- Marcu (2017a)…
- Marcu (2017b)…
- Vă rugăm să nu folosiți Ibidem sau Idem și abrevierile acestora în notele de subsol.

Distingeți una de cealaltă

- Cratima (-).
- Linia de pauză (–) se folosește în interiorul propoziției sau al frazei, pentru a delimita cuvintele și construcțiile intercalate sau apozițiile explicative (de exemplu: Convenția Națională din Franța – creată în 1789 – a condamnat la moarte chiar și un câine).
- Linia de pauză trebuie folosită pentru a indica perioade de timp sau intervale de numere (de exemplu: paginile 112–169 sau anii 1848–1849).
- În limba română nu se folosește semnul ortografic numit em dash (—).

Evidențiere

- Vă rugăm ca la evidențierea unor părți din text să folosiți exclusiv *litere cursive* (*italic*) și nu sublinierea sau îngroșate (aldine, bold).

For authors

Submission guidelines

- RJLH is a forum for legal historians, including all historical periods, fields of law and regions, but with a special focus on Central European and Eastern European legal history.
- To submit an article, please use the system provided by the website of the journal, or alternatively, you can send your article by email.
- RJLH accepts articles written in English and Romanian.
- By submitting an article to RJLH, you declare and accept that the text has not already been published or accepted for publication elsewhere; that the article is prepared independently; that all sources used are properly cited; all quotations are appropriately indicated; that your consent to an originality check by the editorial team using software developed for this purpose.
- All articles are published under a CC BY-ND license.
- RJLH collects neither article submission charges nor article processing charges: authors incur no fees for the submission or processing of their work.
- Character limits for contributions: 50,000 characters with spaces for articles, 15,000 characters including spaces for book reviews.

Ethics

- RJLH endorses and follows the guidelines of the *Committee on Publication Ethics* (COPE).

Submission deadline

- The submission deadline is **15 May** each year. The journal is published in October of the same year.

Peer review

- Every manuscript undergoes a pre-check regarding its general suitability. Those that make it into the following evaluation round will be submitted for anonymous peer review. Authors will usually be informed of the result (accepted, rejected, revise and resubmit) within two months.

Editing

- We accept only contributions that are ready for publication. All submissions accepted for publication undergo our editing process. The editors reserve the right to amend the language and the content of the work, in consultation with the author when appropriate. The author will receive a galley proof of the piece as a PDF

file prior to publication, at which point only minor changes can still be integrated. No major changes will be possible once the text has been initially typeset.

Abstracts and keywords

- All articles must include an abstract in English not exceeding 1700 characters including spaces, and 5–7 keywords.

Titles and subtitles

- Please use titles with Roman numerals (I, II, III, IV etc.), and subtitles with Arabic numerals (1, 2, 3, 4 etc.). The numbering of subtitles restarts at 1 in each title. Subheadings up to the second order (1.1, 1.2 etc.) are admissible.

Citation

- Use typographic (curly) double quotation marks ("…") for literal quotations and typographic single quotation marks ('…') for quotations within quotations. In quotations, indicate omissions as follows: […].
- Please use footnotes, endnotes are not accepted. Footnote signals should come after punctuation. The footnote signal comes before the dash (—).
- Cite monographs as follows:
- Douglas Morris (2020): *Legal Sabotage. Ernst Fraenkel in Hitler's Germany*, Cambridge University Press, Cambridge, p. 171.
- Second occurrence: Morris (2020): p. 184.
- Cite edited books as follows:
- Marina Gazzini (2020): Guilds and Mutual Support in Medieval Italy, in Phillip Hellwege (ed.): *Professional Guilds and the History of Insurance – A Comparative Analysis*, Duncker & Humblot, Berlin, p. 167.
- Second occurrence: Gazzini (2020): p. 168.
- Cite articles as follows:
- Emőd Veress: Post-Communist Restitution of the Nationalized Reformed and Roman Catholic Church Property in Romania, *Acta Universitatis Sapientiae. Legal Studies*, 1/2018, pp. 109–121, p. 111.
- Second occurrence: Veress (2018): p. 117.
- Multiple publications by the same author from the same year are designated with lower-case letters after the publication date:
- Morris (2020a)…
- Morris (2020b)…
- Please don't use Ibidem or Idem and their abbreviation in the footnotes.

Distinguish one from the other

- The hyphen (-) is used to join words or parts of words (for example: self-restraint, book-loving).

- The en dash (–) is used to indicate spans of time or ranges of numbers (for example: pages 112–169 or the 1848–1849 school year).
- The em dash (—) is used to set off parenthetical information (for example: The Treaty of Paris of 1856—which brought an end to the Crimean War—is presented objectively in all of the works mentioned).

Emphasise

- Please emphasise any text with *italics*, not bold or underlined.