Legal Theory and Political Pragmatism by Legal Transfers – The Case of South-Slavic Collective Property

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Abstract

This article focuses on the conflictual relationship between theoretical and practical influences and factors affecting the legislative activity of the Habsburg Monarchy. It is to give a wide overview of the situation, using the example of South-Slavic collective property ("Zadruga"). The goal of the paper is to encourage a debate about the dichotomy theory/practice in this period and to increase the interest for the subject of South-Slavic collective property in the Monarchy.

Keywords

Collective Property; *Zadruga*; Military Frontier; Pragmatism; Collective Family Structure.

1 Introduction

The conflictual relationship between a consistent implementation of a theoretical model and pragmatism, focused on achieving results, is an age-old phenomenon in the fields of law-making and administration. Achieving the perfect balance of legal security, justice in specific situations and the fulfilment of legislative goals is an art onto itself. In the case of important, often used legal institutes, of which property is a good example, the conflict of the various stakeholders and parties is frequently solved trough the introduction of hybrid systems. These systems represent the result of compromise by the involved parties. In our current times this involves in the most cases a series of exceptions and leges specialis within

a single legal system. In the decentralised and pluralist state of the Habsburgs however, there was another possibility to reach such a compromise. Different crown lands/territories could introduce differing regulations and therefore comply to different interests and goals. This was most evident in the differences between systems of Cis- und Transleithania but was not limited to this well-known example. This paper will try to shine a light on another, lesser-known case. It will therefore focus on the differences and conflictual relationship between the development of the term of property in the Austrian, Cisleithanian discourse and the actual legislative activity and proprietary relations in the military frontier with a special emphasis on the discrepancies of individualisation and collectivisation tendencies.

2 The Military Frontier in Historical Context

The military frontier held a special place in the legal system of the Monarchy. It had come to be in the first half of the 16th century and had grown and expanded constantly during the numerous wars with the Ottoman Empire. Although the newly conquered territory was historically part of the lands of the crow of Saint Stephan the Habsburgs were able, using the political circumstances of the time, to establish direct control over the frontier. This control was free from the influence of the estates and was first wielded by the court in Graz and later that in Vienna. Without the influence of the, for example Bohemian or Hungarian, aristocracy or the German estates the emperor was free to legislate as he pleased, including in the fields of property law and land law (Bodenrecht). Because the inhabitants of the frontier were all soldier-farmers there was no triangle of competition (ruler-aristocracy-bourgeoisie), a base for most of the reforms and debates in other parts of the Monarchy at the time.

The purpose of the frontier within the Monarchy was also a specific one. In the beginning it served, with its armed, soldier-like population, as a barrier against the continuous incursions of Ottoman marauder bands. The area was overwhelmingly depopulated by these raids, which allowed for the colonisation of the territory with combat-ready Christian (mainly Serbian) populations from the Ottoman Empire, incentivised by the bestowment of privileges. Some of these motivational privileges,

aiming at immigration, had a property-law character to them. This was most evident in the adoption and incorporation of customary South-Slavic forms of property and especially the "Zadruga."

The defensive function, made necessary by the Ottoman strategic initiative, changed gradually with the shifting of the balance of power between the empires. As the Ottomans were unable to continue their expansion, so too did the frontier, with its multitude of soldiers cease to be a protective wall and turned into a reservoir of able-bodied men for the endless armies of the emperor. Because of the lasting state of war that the territory was in for such a long time the potential for mobilisation in the frontier was much higher, both in quantity and quality, than in any other part of the empire. The change in concept, from defensive to offensive, did not change the main goal and challenges of the frontier administration. While the frontiersmen were, for the most part, not party to any significant feudal obligations, the frontier brought no tangible economic benefit. The focus was therefore laid on the military resources. The main goal was set as the maximisation of the mobilisation potential, to be achieved through the reduction of the cost of the territory and the maximisation of the percentage of recruitable men in the general population. The property law had to be adapted as to serve this purpose.

Because the paper will use the South-Slavic collective property as an example going forward, it will confine itself to parts of the frontier with a pronounced South-Slavic component and namely the Žumberak-District, Varaždin-Frontier, Karlovac-Frontier, Ban-Frontier, Slavonia-Frontier and Banat-Frontier.

3 The Property Discussion in Cisleithania

The development of the property term is a Europe-encompassing phenomenon. It was marked by a tendency towards abstraction, individualisation and the separation from the influence and elements of public law. In the period before the significant codifications, and especially in the Middle Ages, the German-speaking legal world was marked by a relative property term when it came to real property, characterised trough

differentiation by intensity of attribution and usage rights. On the other hand, the ownership of movable property leaned towards an absolute property term, similar to the roman one[1].

Land was treated differently than movable property because it had a role not only as an institute of private but also public law. The shift towards a more pronounced private law character was visible in the cities as soon as the Middle Ages; outside of the cities it would stay bound to public law, in some cases up to the late 19th century. The importance of land, as the primary and most important means of production was too high to allow the free disposition of one over such property. Especially the idea, that an owner is free to not use the land or use it inefficiently, an important aspect of the absolute property term, was inconceivable at the time. There was also no difference made between property as a "full legal right" ("Vollrecht") and encumbrance (jus in re aliena). A thing could also simultaneously have more than one owner.

This push for reform was led by pioneers[2] such as *Bodin*, *Hobbes* and *Locke* and later, in the German-speaking world *Kant* and *Hegel*. In the timeframe of this paper the debate was characterised by influences from Pandectists and natural law.

Through the gradual implementation of the human rights doctrine propagated by the school of natural law property was separated from its group-connections and turned into a personal right[3]. The owner could now, at least in theory, manage his property as he pleased. The rights on the property, held previously by estate and family found themselves in rapid decline.

An even greater influence on the development of the property term in this direction was had by 19th century liberalism. Property was no longer just a right but an extension, expression, and projection of one's personality[4]. A series of liberal reforms ensued including the abolition of serfdom. The fideicommissum and other family holdings were not yet sent to the chopping

1 FLOßMANN, U. *Eigentumsbegriff und Bodenordnung im historischen Wandel*. Linz: Institut für Komunalwissenschaften und Umweltschutz, 1976, p. 33.
2 MÄDER, W. *Freiheit und Eigentum aus neuerer Zeit*. Berlin: Duncker & Humblot, 2011, p. 22.
3 FLOßMANN, op. cit., p. 40.
4 FLOßMANN, op. cit., p. 44.

block, but their further founding was practically impossible[5]. The tendency was therefore clear; The goal was full individualisation of property. This trend would continue for some time, even after 1881.

4 The system of property rights in the military frontier

There exist two distinct periods in the military frontier when it comes to the system of property rights. The first period, from approximately 1530 to 1754, is characterised by legal pluralism and a dominance of customary law influences. In various parts of the frontier the frontiersmen received different privileges, both personal and territorial in their application. The mix of Germanic and South-Slavic customs and customary law not only introduced integral elements of these customs into legal life but also created new, hybrid forms, especially in the field of inheritance customs. The fragmentation of the legal order and the lack of centralisation did not, in any for this paper relevant sense, differ from the legal situation in the German hereditary lands.

With the introduction of the regulations for the military frontier from 1754 ("Militärgrenzrechte") begins the era of centralisation and codification in the frontier. It was followed by further regulations, and namely the canton-system from 1787 ("Cantonssystem"), the basic law for the frontier from 1807 ("Grenzgrundgesetz ") and the basic law for the frontier from 1850. From these only the regulations for the military frontier from 1754 and the basic law for the frontier from 1807 have relevance for property-law. This period ends with the abolition and reintegration of the frontier in 1881.

4.1 Regulations for the military frontier from 1754

The regulations for the military frontier from 1754[6] were in force in the Karlovac and Varaždin frontier from 1754, the Ban and Slavonia frontier from 1769 and in the Banat frontier from 1778. Their goal was the uniformization of the different rules present in the various frontiers

5 FLOßMANN, op. cit., p. 50.

6 *Militär-Gränitz-Rechten von Ihro k. k. Majestät für das Carlstäder und Varasdiner Generalat vorgeschrieben im J. 1754*. Wien: Johann Peter Ghelen, 1754.

and, in a property law sense, the introduction of a new understanding of the nature of property rights held by the frontiersmen.

According to article 4, all ownership over land was to be seen as a military holding[7] ("Militärlehen"). This institute, which was not present in any other part of the empire, was a form of property limited by the obligation of military service[8]. The holders of these military holdings were not to be individuals, but families, and in the most cases the South-Slavic large families ("Zadrugas"). At this point the regulation treated these in a hybrid form, not completely reliant on South-Slavic customary law. It introduced limitations on the divisions of land-plots and therefore also on the divisions of the large family. The division was only allowed on the condition, that each new family still held enough land to be able to simultaneously support itself and provide one man for military service. As a control mechanism the division needed the approval of the local regiment command.

Although the "Zadruga" was incentivised trough the legislation, and its dissolution was made harder, the property related aspect of its structure were not implemented. This is most evident on the example of inheritance law which based itself on the parentela-system (for example evident in article 37). This not only disregarded the customary inheritance rights by all working, married, male members to receive an equal share but also allowed for the possibility of division according to ideal parts (at this time mainly in theory, because of the restrictions on a practical division) which directly contradicted the customary law and was in accordance with the individualisation tendency in the legal theory of the German hereditary lands. The regulations for the military frontier from 1754 were therefore, although using certain aspects of the "Zadruga" generally in accordance with the individualisation tendency present in the general trend. This is true even considering that the individualisation was not realised in its full scope.

7 UTJEŠENOVIĆ OSTROŽINSKI, O., MARX, K. *Kućne Zadruge Vojna Krajina. Biblioteka Povijesna Istraživanja.* Zagreb: Školska Knjiga, 1988, p. 189.

8 KASER, K. *Freier Bauer Und Soldat: Die Militarisierung der agrarischen Gesellschaft an der kroatisch-slawonischen Militärgrenze (1535–1881). Zur Kunde Südosteuropas: 2; 22*. Wien [u.a.]: Böhlau, 1997, p. 380f.

4.2 The Basic Law for the Frontier from 1807

The shift towards collectivisation was made with the introduction of the basic law for the frontier from 1807.[9] The "Zadruga" was regulated in its own chapter of the law (3. chapter "von den Hauskommunionen") under the name "Hauskommunion." In it the "Zadruga" was regulated as a community of acquisition and of ownership[10]. Everything produced or acquired was considered to be common property. All male members of legal age were owners of the "Zadruga"-property as tenants in common. The inheritance within the "Zadruga" was abolished and the ideal parts replaced by the accretion by all working, married, male members in equal measure, without consideration for parentela or other forms of kinship. This shows a strong emphasis laid on the South-Slavic principles of the community of property in the basic law for the frontier from 1807. The division was made to be even harder to achieve, the ideal parts were removed and the inheritance according to parentela no longer applied. It was a clear sign of recollectivisation.

5 Legal theory vs. practical consideration

As shown in the two previous chapters the development of the property term in the two theatres regarding the tendency of individualisation played out in vastly different ways.

In the heart of the empire property distanced itself ever more from the public law domain. It became an individual right, almost free from any legal limitations. The military frontier shows a different turn of events. With the reforms of 1754, and even more with those of 1807 the tendency took an opposite direction. Property became more restrictive, more encumbered with requirements relating to public law and, most importantly, more collectivised. This process went so far, that the "Zadruga" was introduced

9 Statut für die Militärgrenze, 1807.
10 KASER, op. cit., p. 573f.

even to the Romanian frontiersmen in the Banat frontier, disregarding the absence of such an institute in Romanian customary law[11].

How had it come to such a discrepancy? The realm of the Habsburgs was, at the time, a relatively decentralised state. Such an organisational structure led to different power-political facts on the ground in various parts of the empire. Because the centre of the empire was located in the German hereditary lands, and most prominently in Vienna, they had the most influence on the legal theory of the time but also were the most influenced by the general trends on the European continent. The developments of the property term were therefore much more organically coordinated with the theoretical base. In places where such a development was strongly opposed by powerful interests the theory changed or the progress slowed down to adapt to the political reality. This process is therefore to be seen as a part of the general European development even if it was much slower than that of some other countries.

The situation in the military frontier differed completely. The frontier was, as its name suggests, the most peripheral part of the empire. It had no domestic estates or other powerful interest groups that were able to leverage their influence to impact the political process. Not only that, but politics as such were banned by imperial decree, owing to the fact that the territory was de facto a large military camp. New regulations could be implemented without fear of a serious political backlash. This fact allowed the authorities to follow a practical and pragmatic policy without the need to acquiesce to an often ideologized and politicised legal theory and particular interests. The consequence was a pick and choose behaviour in which practical, but anachronistic institutes were readily combined with necessary modern elements to allow for the most practical, if inconsistent solutions.

11 ŞIŞEŞTEAN, G. Die Entwicklung der Haus- und Hofgemeinschaften im Bereich der Militärgrenze in Transsylvanien und im Banat. *Romanian Journal of Population Studies*. 2011, Vol. 4, no. 1, p. 119.

6 Conclusion

The deviations from the legal theory of the time in the case of property related regulations in the military frontier are not to be seen as a one-of-a-kind exception. They are more an example of the influence of practical necessities of this period on the process of legal regulation. Further examples of this phenomenon are to be seen in other parts of the empire, especially in Hungary. The importance of the analysis of context and the influence of pressure groups can therefore not be overstressed if one wishes to understand the law-making process to its full extent. The overreliance on legal theory in the judgement of legal systems or their constituent parts can therefore lead to a lacking understanding of historical legal processes and the romanticising of certain institutes, especially ones so important for certain ideologies such as that of property.

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