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The Reform of Civil Procedure Law in Central Europe in the Interwar Period

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Civil Procedure Law in Central Europe in the Interwar Period

by *Martin Löhnig*

I. Liberal vs. Social Civil Procedure

After the collapse of the state structure in the centre of Europe as a result of the "Great War", the new nation states often initially adopted the law that had previously applied on their territory. However, they soon sought to create their own legal order by enacting codifications in the central areas of law. The standardisation of national court constitutions and procedural law played a central role in this.

Two very different models were available for the development of a new code of civil procedure. On the one hand, there was the liberal German *Reichszivilprozessordnung* of 1877/79, whose procedural model has its roots in the middle of the 19th century, namely in the *Bürgerliche Prozeßordnung für das Königreich Hannover* of 1851 and the Model Law for a Uniform Civil Procedure Law in the German Confederation of 1866, which was drafted in Hanover. On the other hand, there was the Austrian *Zivilprozeßordnung* of 1895/98, which established the model of social civil procedure. It was not intended to be a code for *Rudolf Ihering*'s "struggle for justice", but to serve "as a state welfare institution" (*Franz Klein*) and a means of social policy. In addition, French civil procedure law (*Code de procédure civile* of 1807), although its codification was more than a hundred years ago, was still an important point of reference in the reform discussion.

II. Drafts and Reforms in the Interwar Period

Countless questions can be asked of the drafts and codes of law that emerged during the interwar period in the newly founded Central European states. In detail, these are the Yugoslavian civil procedural law, which came into being in 1929/32 and was strongly oriented towards the Austrian Code of Civil Procedure (*Mirela Krešić/Dunja Milotić*); it had been refrained from an extension of the scope of Serbian procedural law or at least an orientation towards the Serbian model. In Czechoslovakia, the non-contentious proceedings (Act No. 100/1931) and the bankruptcy proceedings (Act No. 64/1931) were standardised in 1931; the draft of a new Code of Civil Procedure, which was ready for adoption in 1937, failed due to the destruction of the state by the German Reich (*Petra Skřejpková*). In Poland, on the other hand, a new Code of Civil Procedure came into force as early as 1930 (Journal of Laws 1930 No. 83), which may have incorporated influences from various legal systems just as originally

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as the laws on the Code of Obligations and the Commercial Code, which came into force a short time later (*Anna Stawarska-Rippel*). In Hungary, the Code of Civil Procedure adopted in 1911 had already come into force on 1st January 1915 (Law 1/1911), which is by no means based solely on Austrian influence and must also be taken into consideration (*Eszter Herger*).

But drafts were not merely created in the newly founded Central European states. In Austria, the "golden age" (in words of *Heinrich Klang*) of the Austrian Code of Civil Procedure was over in 1918; reforms were discussed (*Kamila Staudigl-Ciechowicz*). In Germany, the question of socialising not only civil law but also civil procedural law had already arisen since the publication of the Austrian Code of Civil Procedure in 1895 (and increasingly after 1918) (*Martin Löhnig*). In Italy, *Giuseppe Chiovenda* presented a draft for a new civil procedural law in the *Commissione per il dopoguerra* as early as 1919, which marked the transition to a procedural structure oriented towards the welfare state; however, it was not until 1940/42 that the old procedural law was replaced by the *Codice di procedura civile.*

III. Questions and Answers

In detail, numerous questions can be asked (and were be asked by the authors of this book) of the draft laws and reform laws of the interwar period.

1. Initial Situation

What law applied after 1918? Was there a fragmentation of law? With regard to the newly founded states: What was the initial situation of the respective new state?

At first glance, the initial situation is quite different. Germany, Austria and Hungary, which had already existed as territorial entities before 1918 and had now lost territory, had codified their procedural law in 1877/79, 1895/98 and 1911/15 respectively. The new (or re-emerging) states of Poland, Czechoslovakia and Yugoslavia, on the other hand, were composed of the territories of several legal orders and therefore had neither their own nor a uniform civil procedural law. The procedural jurisprudence of these states was also initially divided and had to come together, which led to certain rivalries.

On closer inspection, however, the problems were quite similar, because even in the states that already had a uniform civil procedural law, there was agreement after 1918 that fundamental reforms were needed. It was now clear that civil procedural law is not an apolitical matter, but a reflection of the prevailing model of society. In Germany, there was widespread agreement that civil procedural law could not continue to allow the parties complete dominion over all elements of the proceedings according to classical liberal theory; scholars and practitioners called for fundamental reforms along the lines of Austrian law. But even in Austria itself, the birthplace of social civil procedure, the heyday of the new law was over twenty-five years after its creation. What was needed was a continuation of the concept of social civil procedure law, which was by no means a complete success. The main problem in Austria as well as in the Ger-

man Reich was the lack of confidence of the population in the administration of justice. The Austrian legislature sought to remedy this through numerous individual amendments; seven court relief amendments alone were passed in the interwar period. The need for a completely fundamental reform, on the other hand, was judged controversially. Hungary was an exception with its very recent law: the Hungarian Code of Civil Procedure satisfied contemporary reform postulates by eliminating the written trial, by implementing the principles of orality, immediacy, participation of the parties and the public, by the free assessment of evidence, the judicial duty to instruct as well as the acceleration of the trial and the reduction of procedural costs. However, it quickly became clear that the difficult-to-understand regulation of competence and jurisdiction, the compulsory bar and the relatively limited granting of legal remedies suggested reform. To critics, the Code of Civil Procedure seemed to have stopped halfway between German and Austrian law, while other scholars praised the law as the most modern in the world.

In Poland, Czechoslovakia and Yugoslavia, as mentioned above, different codes of civil procedure applied in each case, so that their individual shortcomings were compounded by the major problem of the division of law. In Poland, the Russian Civil Procedure Act of 1864 applied in the eastern and central areas, the Austrian Code of Civil Procedure and the Hungarian Code of Civil Procedure in the southern areas, and the German Code of Civil Procedure in the western areas. Czechoslovakia was divided into Slovakia, where Hungarian law applied, and Bohemia and Moravia, where Austrian law applied. The situation in Yugoslavia was particularly confusing: in the Croatian-Slavonian legal area, the Provisional Code of Civil Procedure of 1852 was in force, which was based on the Austrian Civil Procedure Act of Joseph II. of 1781; in the Serbian legal area, the Serbian Code of Civil Procedure of 1865, based on the outdated French model, was in force; in the Bosnian-Herzegovinian legal area, the Code of Civil Procedure of 1883 was in force; while in the Montenegrin legal area, the Montenegrin Code of Civil Procedure of 1905 was in force. The Hungarian Code of Civil Procedure was in force in the former Hungarian legal territory, which included the jurisdiction of the Court of Appeal in Novi Sad; the Austrian Code of Civil Procedure was in force in the jurisdiction of the Higher Regional Courts in Ljubljana and Split.

2. Forces and Arguments

Which forces have advocated or pushed for the drafting of a new Code of Civil Procedure? With what arguments? Who were the opponents and what did they put forward? Who appointed the respective legislative commission? Who were the members? Scientists, judges, lawyers, ministry officials? What biographies, what ethnicity, what offices, what imprint or political colouring did the individual members have in each case? What connections might have existed (against the background of the members' personal contacts) between the individual commissions in the states? What work (drafts, motives, justifications, memoranda, etc.) did the commissions present in detail?

The reform of civil procedure law was advocated across almost all political camps in Germany. The ministry of the Social Democrat Radbruch published a first draft re-

form in 1922. A first amendment in 1924, named after the conservative minister Emminger of the Bavarian People's Party, was fed from the ruins of this failed draft. In the years leading up to 1931, a new draft was drawn up with detailed justifications, which, due to the political circumstances in Germany, did not stand a chance. In 1933, however, the Nazis made use of this draft and concluded the reform process with another amendment; the irony of history is that this draft had been prepared by a commission composed prominently and in the majority of legal scholars, whom the Nazis now robbed of their existence as Jews. In Austria, the idea of reform was dealt with across wide sections of the political spectrum, above all in connection with the debate on Austrian-German legal harmonisation. Such a unification was sought in various areas of law (but did not succeed) after a state connection had been prohibited by the Allied powers in 1918. In Austria, of course, the amendments aimed at relieving the courts were also created for fiscal reasons and without a broader political agenda. The same applies to Hungary, where, however, a complete recodification was not sought.

In the reborn or newly formed countries, the reform and unification of law was primarily a national matter on which – despite all the conflicts in detail – there was fundamental agreement. Appropriate committees were appointed, staffed with professors as well as high-ranking practitioners from all jurisdictions, and in this way were to fulfil an integrative function. This national dimension of the project also shows that the intention was not to extend one of the existing legal systems to the entire territory, but to draft a new law of its own. In other words, they wanted to create specifically national codifications, at least that is the narrative. In Poland this was successful; the Civil Procedure Code of 1930/33 can be understood as an original new creation and not as a mere modernisation of a partial legal system or compilation. In Czechoslovakia, on the other hand, considerable difficulties arose, although there were only two codes of civil procedure in force, based on similar modern procedural principles. Unification of civil procedural law was not achieved. The draft submitted to parliament in 1937 was rejected because too little consideration had been given to Slovak (Hungarian) law. In fact, apart from a few details, it was a far-reaching adoption of Austrian regulations; thus, the approach was quite different from that in Poland. The conflict shows in an exemplary way that internal peace and legislative success can only be achieved by creating a completely new law, as was the case in Poland in 1930/33. The new Yugoslav Civil Procedure Code of 1929 had also often adopted the solutions of the Austrian Civil Procedure Code of 1895. However, some of the provisions were changed due to a change in economic and social conditions after the First World War. The drafting of the new law was controversial and time-consuming. In the end, it was only the dissolution of parliament and the proclamation of dictatorship by King Alexander in January 1929 that made it possible to pass uniform laws, because the king wanted to achieve legal unity and the ordinary legislative procedure was bypassed, so that conflicts such as those that arose in Czechoslovakia could be avoided.

3. Content

All Central European states had thus set out on the path to a social civil process and broken with the liberal tradition. In Germany, the amendment of 1924, in Baumbach's words, laid axe to the foundations of the existing civil procedural law. The aim was

always to streamline and accelerate the standard civil procedure by strengthening the position of the court at the expense of party rule. In the explanatory memorandum to the German draft of 1931, a "speedy" and "popular" procedure is set against the traditional liberal procedure. The possibility of the court's intervention in the civil process was in line with a trend of that time to approach party autonomy with caution and to emphasise the procedural function of protecting the public interest. Moreover, the phenomenon of publicization of civil procedure was considered one of the most important traits of its evolution and, in the first place, found manifestation in giving poor parties an opportunity to assert their rights. Thus, the most important task was to combine public and private elements in the civil process as accurately and as usefully as possible. The respective legislators were faced with the same questions, but this does not mean that all new laws and drafts would have given identical answers. On a substantive level, the following points in particular played a role:

Does the disposition principle (*Dispositionsmaxime*) apply in civil proceedings as an expression of private autonomy in the process or does the official principle (*Offizialmaxime*) apply, i. e. the state enforces rights even against the will of the parties involved? Does the principle of application (*Antragsgrundsatz*) apply or does the court also act ex officio? Does civil procedure primarily serve the protection of individual rights or does it serve the probation of the legal order, so that the protection of subjective rights appears as a mere reflex?

What is the scope of the principle of orality, and when, in contrast, is there writing in the proceedings (preliminary proceedings, pleadings, purely written proceedings with a decision without oral proceedings)? To what extent does the principle of immediacy of the proceedings apply, when are there exceptions (hearing by delegated judge, utilisation of written statements, admissibility of a reshuffle of the panel during the trial)? Is the publicity of the proceedings guaranteed and what exceptions apply (for example in family proceedings)?

Were the proceedings handled by the parties (*Parteibetrieb*) or are they handled ex officio with control and expediting by the court? What is the role of the negotiation maxim (with the principle of formal truth) and what is the role of the investigation principle (with the principle of substantive truth)? Was there a duty of the parties to tell the truth? Could the parties' arguments be precluded in order to streamline and accelerate the proceedings?

Are there uniform Civil courts for all disputes or are special courts created (commercial jurisdiction, labour jurisdiction, family jurisdiction)? How are the courts staffed? With professional judges alone or with laypersons or external experts (for example merchants)?

What is the relationship between the contentious resolution of a case and the idea of conciliation, i. e. in what way have the parties to work towards an amicable settlement? Are there regulations that ensure "equality of arms" between the parties in civil proceedings, such as judicial obligations to provide information or clarification? Is there compulsory legal representation (*Anwaltszwang*) and how far does it extend?

What are the legal remedies? Do these remedies serve to protect individual rights by deciding the individual legal dispute or do they serve primarily to preserve the unity of

the law and the further development of the law, so that the protection of subjective rights appears only as a reflex? How does enforcement work: Who carries it out? How far does it extend (future wages)? Are socio-political concerns taken into account (garnishment limits)?

The answers to these questions in the individual papers of this book show that the new laws of the interwar period marked the beginning of a new chapter in the book of the history of civil procedural law continuing the path towards a social civil procedural law, as it seems natural to us today. The comparative view promises a further gain in knowledge and aims to finally put the legislative achievements of the interwar period in Central Europe in the light they deserve. All the scholars involved have done pioneering work and state that the path from liberal to social civil process in the interwar period has so far been insufficiently studied. Research desiderata are named – the present work would like to provide the impetus for further intensive research work.

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Battle Rule or Welfare Institution?

German Civil Procedure Law in the Interwar Period

by *Martin Löhnig*

I. Starting Point: The Imperial Code of Civil Procedure of 1879

On 1st January 1879, a uniform code of civil procedure came into force in the German Empire, ending the coexistence of different procedural models that had existed until then. It is the result of a productive competition and synthesis of these models, especially in the long Hanover deliberations in the late phase of the German Confederation (1862 – 1866). In these, the principle of orality, as regulated in the Civil Code of Procedure of the Kingdom of Hanover, prevailed in an expanded form as the defining principle of procedure,[1] whereby a far-reaching consensus on the basic lines of procedural reform in Germany had been reached. After the German Empire was founded in 1871, the Hanoverian procedure, which – based on the model of the common law procedure – was initially divided into two stages, was then transferred into an independent undivided procedure by its originator Adolf Leonhardt himself: a procedure characterized by liberal ideas for the "struggle for justice" (Ihering), describing the dispute between the parties in the free play of forces before the court acting as arbitrator. The *Reichszivilprozeßordnung* thus not only unified the law, but also, as the result of decades of work, brought to fruition a completely new, systematic and principled edifice of civil law doctrine. A building whose shell was erected during the time of the German Confederation and which still exists today despite (or because of) ongoing renovation and reconstruction work. The interwar period appears as a phase of particularly intensive work and hard-fought academic disputes about civil procedure.

II. The Weimar Discourse: Liberal Procedural Law vs. Social Procedural Law

Friedrich Stein, who we still encounter today in the title of the "Stein/Jonas", stated in 1921 in the preface to his *Grundriss des Zivilprozeßrechts*: "For me, the legal procedure is technical law in its very sharpest form, dominated by changing expediency, devoid of eternal values".[2] This statement by the proceduralist, who died in 1923 and whose commentary also shaped the years that followed, is the leitmotif, as it were, of a trend in Weimar procedural jurisprudence. It is the statement of a classical liberal-

1 *Ahrens*, Prozessreform, p. 639.

2 *Stein*, Grundriß des Zivilprozeßrechts, Vorwort, p. III.

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thinking proceduralist and resolute opponent of reforms modelled on Austrian civil procedural law, which as "social procedural law", in the words of its creator Franz Klein, regarded civil procedure as a "welfare institution of the state" and (for all its orientation towards the ZPO in technical matters) formed the counter-draft to the liberal procedural law of the German ZPO, which was twenty years older – strongly opposed by Friedrich Stein, who had already railed against a stupefaction by the "hypnosis of Austriacism"[3] in a speech from 1908. The competition between two models of civil procedure had already begun in the late *Kaiserreich*[4] , and was made more acute by the catalyst of the crises of the war and post-war period in the Weimar Republic. Adolf Baumbach, who founded Baumbach's commentary on the Code of Civil Procedure in 1924, which is still published today, would have strongly disagreed with Friedrich Stein, as the introduction to the second edition of his commentary, published in 1925, shows: "Every procedural system stands in indissoluble relations to the state, social and economic structure of its time, which a cultural historian could develop from it like the zoologist develops the body of a vertebrate from its skeleton."[5] Thus the leitmotif of the other direction of Weimar procedural jurisprudence. For Baumbach, civil procedure is not a matter that obeys only technical necessities, and certainly not one that is self-sufficient and legitimizes itself from within.

With a view to the "structure of time", the question arose in the years after 1918 as to whether civil procedural law, according to classical liberal theory, as an instrument exclusively for the enforcement of subjective rights of the parties, creates a state-free space, as it were, in which the state provides a neutral arbitrator in the form of the judge, but leaves the parties – as a continuation of private autonomy in the process – complete dominion over all elements of the proceedings.[6] And further, whether civil procedural law is simply a "rule of combat for the parties' dispute, which takes place in the free play of forces before a passive court"[7] , with the consequence that – as Erich Volkmar, who had been involved in questions of procedural law reform in the Reich Ministry of Justice since 1919, criticized in 1934 – according to the "liberalist" ZPO often "the refined and unscrupulous remain victors".[8] Or whether civil proceedings also serve state purposes such as the enforcement of certain postulates of justice or the fulfilment of community tasks, i. e. – as Martin Jonas put it in 1925 – that on the basis of a modern view of the state, "alongside the – by the liberal idea of the state solely recognized – idea of security the idea of welfare emerges"[9], the realisation of which requires state intervention in the combat of the parties. Or whether, in addition, civil procedural law is even placed predominantly or exclusively in the service of a state for which the enforcement of the rights of individuals becomes a by-product

3 *Friedlaender*, Lebenserinnerungen, p. 49.

4 Cf. also the debates at *Deutscher Juristentag* on strengthening the power of the judge to conduct proceedings (1902), on court proceedings and the right of appeal (1908) and on orality and immediacy (1912).

5 *Baumbach*, ZPO, 2nd ed., Einleitung, p. 2.

6 Cf. also *Löhnig*, Der Zivilprozess, pp. 417 ff.

7 *Stein/Jonas*, Zivilprozeßordnung, 12th ed., Einleitung § 6, p. XXIX.

8 *Volkmar,* Das Gesetz zur Verhütung, DJ 1934, pp. 1622 f.

9 *Stein/Jonas*, Zivilprozeßordnung, 12th ed., Einleitung § 6, p. XXIX.

of proving the legal order so that – again Erich Volkmar – "the powers of the parties must take a back seat to consideration for the national community"[10] and the adversarial opposite to the liberal basic rule, formulated by Martin Jonas in 1938, who had in the meantime advanced to the presidency of the IV Civil Senate at the *Reichsgericht*, applies: "The master of the proceedings is the judge".[11]

In his textbook from 1927, which is still in use today as "Rosenberg/Schwab/Gottwald", Leo Rosenberg stated the following on the question raised above: "The civil procedure serves […] not only the parties to enforce their rights, but also, through the legally binding resolution of the legal question in dispute between them, in the state interest of proving the legal order, the establishment and maintenance of legal peace, the assurance of the law among the parties. […] The protection of private interests by the ZivProz, which is in the foreground of the parties, is – seen from here – only means and effect, because the private legal order, which confers rights on the individual, is itself endangered or violated by the endangerment or violation of these rights, is itself protected by the protection of these rights."[12] In contrast, the preface of the Civil Procedure Code, which was redrafted on 1st January 1934, changed the weighting of these two purposes quite decisively: "The parties and their representatives must be aware that the administration of justice serves not only them, but at the same time and primarily the legal security of the people as a whole"[13] and the preservation of legal peace. In 1933, Adolf Baumbach, who later brought himself into line and wanted to abolish contentious civil proceedings altogether, showed quite bluntly in the preface to the 8th edition of his commentary what he thought of such motivated reforms (and probably also of the "Führer" of the party who demanded such reforms): One does not even become a good painter by painting on it without having learned the subject; one certainly does not become an art painter in this way.[14]

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10 *Volkmar*, Das Gesetz zur Verhütung, DJ 1934, p. 1623.

11 *Jonas*, Zivilprozeßordnung, 16th ed., Einleitung § 6, p. XXIII [The 16th edition 1938/39 was published under the authorship of Martin Jonas. Max Friedlaender writes: "[Friedrich Stein] was indisputably the greatest civil proceduralist of his time. He 'bequeathed' his main work, the great commentary on the Code of Civil Procedure, which Gaupp had founded in the 1870s, but which in its present form came only from Stein, to the Ministerial Councillor Dr Jonas, who continued it after his death and did so in a creditably conscientious manner. But when a new edition appeared after 1933, the National Socialists considered it impossible for the commentary to continue to be called Stein-Jonas; for even if Jonas was an Aryan, his name was still Jewish; and even if Stein was a neutral name, Stein was still a Jew. So the old Gaupp was brought up from obscurity again and the book was suddenly called Gaupp-Stein-Jonas. In the following edition, however, Mr Jonas drew alone and the intellectual property of the great Stein was ignored; it was indeed "Jewish thought", but seems to have been 'Aryanised' by the suppression of his name.", *Friedlaender*, Lebenserinnerungen, pp. 79 f.

12 *Rosenberg*, Zivilprozeßrecht, 3rd ed., § 1 III. 2.

13 Präambel 2 zum Gesetz zur Änderung des Verfahrens in bürgerlichen Rechtsstreitigkeiten vom 27. Oktober 1933, RGBl. I, pp. 780 ff.

14 *Baumbach*, ZPO, 8th ed., Vorwort, p. V.