The History and Legacy of the Conference of the Justice of the Realm

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I. THE FIELD OF RESEARCH AND ITS ANTECEDENTS IN THE LITERATURE

The genesis of my research on the Conference of Justice of the Realm (in the following: *Conference*) can be traced back to a paper by András Szabó (1928-2011) entitled Reception and Creativity in Criminal Law. In this article, the former judge of the Constitutional Court of the Republic of Hungary associated the body convened by Count György Apponyi on 23 January 1861 with the idea of judicial review, when he stated that it "*essentially acted in the capacity of a constitutional court*".[1]

I came across this novel concept after the enactment of the Fundamental Law of Hungary and the Act CLI of 2011. These laws substantially reorganised the powers of the Hungarian Constitutional Court. Consequently, this judicial body was surrounded by an even more intense professional debate than usual. This was no coincidence since it is probably the most important means of constitutional protection. These two factors motivated me to choose the means of constitutional protection in 19th century Hungary as the subject of my doctoral thesis. This topic included the analysis of § 19 Act IV of 1869, which empowered the Hungarian judges to review the constitutionality of any laws enacted by the executive. Furthermore, the Draft Constitution published by Lajos Kossuth in Küthaya also included the concept of a Constitution Court called "Alkotmány Őr Szék".[2]

As my research progressed, the focus gradually narrowed down, since I have discovered more and more interesting aspects of the Conference of the Justice of the Realm. Consequently, I decided to change to subject of my future thesis, so I could focus singularly on the history of the Conference convened by Count György Apponyi (the contemporary *judex curiae*), together with its proposals, the so-called Provisional Judicial Rules. The fact that no monograph has been written in Hungary on this subject to date, also played a major role in this decision.

From the very beginning, the importance of the historical context seemed clear: the political elite of Hungary, searching for its own future *at the crossroads of revolution and compromise*[3], and the Emperor (Franz Joseph), abandoning the concept of the Gesamtstaat but not yet ready to treat Hungary as equal to Austria, were both necessary for this Conference to convene. It is also worth mentioning the increasingly strong resistance in the counties at the end of 1860, which, in line with the public mood of the time, refused to accept the place assigned to Hungary

[1] „*The history of Hungarian law attributes a role to the Conference of the Justice of the Realm in the analysis of the prehistory of the Compromise, but one very important fact is obscured. I am thinking of the fact that the Conference decided on the question of whether the Austrian laws were valid or the "old Hungarian law", including the legal acts of the Revolution of 1848. This is the first time in our country that a judicial forum decides what legal act is the valid. In essence, therefore, the Conference of the Justice of the Realm acted with the authority of a constitutional court.*" See: SZABÓ, András: Recepció és kreativitás a büntetőjogban. (Reception and Creativity in Criminal Law). In: SAJÓ, András (ed.): *Befogadás és eredetiség a jogban és jogtudományban. Adalékok a magyar jog természetrajzához (Inclusion and originality in law and jurisprudence)*. Budapest, Áron Kiadó, 2004. p. 93.

[2] See: SPIRA, György: *Kossuth and his Draft Constitution*. Debrecen, Csokonai Kiadóvállalat, 1989.

[3] SZABAD, György: *At the Crossroads of Revolution and Compromise 1860-61*. Budapest, Akadémiai Kiadó, 1967.

in the October Diploma[4]. The municipalities made it clear that the *laws of 1848* were the only legal basis to which they were willing to return.

The deliberations of the *Conference* were determined from the very first moment by the changes made to the Hungarian legal system in the 1850s. Their assessment was very controversial, since on the one hand, every legal norm having been introduced after 1849 was in direct violation with the Hungarian constitutional principles. On the other hand, Hungary acquired institutions such as the land register through these laws, many of which were indispensable by 1861. Furthermore, the Austrian Civil Code of 1811 (ABGB) offered a basis which was clearly more advanced than the private law institutions of the pre-1848 period.

In 1861, the issues related to the organization of the domestic justice system were not in the spotlight, as both the Viennese politicians and the Hungarian statesmen were primarily focused on solving the *"public law issues"*, which were settled neither by the October Diploma, nor the Imperial Patent of February. In comparison, the legacy of the *Conference* can be seen as truly significant, since the first important victory in the struggle for Hungarian independence may be found in the administration of justice. Some Hungarian scholars see the creation of the Provisional Judicial Rules as a kind of "judicial compromise",[5] but the *Conference* did not actually harmonise the Hungarian laws with Austrian legal norms, but it examined the possibility of restoring the Hungarian legal order based on constitutional principles such as the continuity of law,[6] the rule of law, the equality before the law and the protection of the rights of individuals.

This process resulted in a few controversial decisions. Therefore, it is inevitable to examine what room for manoeuvre existed for the said *Conference*, since some counties had already declared, in parallel with the reassertion of their judicial powers,[7] that future judgements could only be made on the basis of Hungarian law.[8] On 23 January 1861, the country's most eminent judges, lawyers and legal professionals faced with a number of questions that needed to be answered promptly: what was the purpose of the deliberations? What competences did they give the monarch (who was not yet legally crowned)? What should they do, if the legal provisions enacted prior 1848 are not applicable to the changed circumstances? Finally, in the absence of legislative power, what rules may be proposed?

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[4] *October Diploma of 20 October 1860*. RGBl. No. 226, published in BERNATZIK, Edmund: *Die österreichischen verfassungsgesetze mit Erläuterungen*, Vienna, Manz, 1911, pp. 223-228.

[5] In the context of the Austro-Hungarian „Compromise'. The phrasing first appeared in the work of Károly SZLADITS IN 1904, in his commemoration of the 100th anniversary of the birth of Ferenc Deák. See SZLADITS, Károly: Deák Ferencz és mai magánjogunk (Ferenc Deák and the contemporary Hungarian private law). *Jogtudományi Közlöny*, 1903, 42, pp. 348-351.

[6] KISS, Albert: Az Országbirói Értekezlet félszázados évfordulójához (The half-century anniversary of the Conference of the Justice of the Realm). *Jogtudományi Közlöny*, 1911. 4. p. 37.

[7] See KECSKEMÉTHY, Aurél: *Vázlatok egy év történelméből (1860 october huszadikától 1861 octoberig)*. *Sketches from the history of a year (from October 20th 1860 to October 1861).* Pest, Emich Gusztáv, 1862. p. 64-66.

[8] See: HU-MNL-OL-O 125. Országbírói Hivatal (Office of the Justice of the Realm). 30. sz. Fejér vármegye közönsége üdvözlő irata az országbíróhoz melyben egyszersmind az országbírói értekezlet útján netán hozandó törvények ellen óvást tesz. 1861. március 13. (A letter of greeting from the people of County Fejér to the judex curiae, in which they also protest any laws that may be passed by the Conference of the Justice of the Realm. 13 March 1861.) p. 123.

The greatest burden was the *aviticitas*, the abolition of which was also envisaged by István Széchenyi in 1830.[9] In the spring of 1848, the "last feudal Diet" enacted the abolition of one of the most important legal institutions of Hungarian private law. The makers of Act XV of 1848, however, did not have time to build a bridge to the future while abolishing the past.[10] Therefore, the foundations of modern Hungarian private law were laid down by the Viennese Government during the 1850s. The laws enacted at this time could never claim constitutional status, but their role in the dismantling of feudal social order and the transformation of a modern society was indisputable. Thus, when the *Conference* was convened, the country's most eminent jurists had to find a way between the *Scylla of the Hungarian law* (which did not had the chance to be amended to the ideals of Constitutional Revolution of 1848), and the *Charybdise of Austrian law* (which had the mark of modernity but had been introduced unconstitutionally).

The adoption of the Provisional Judicial Rules has been a long and winding road. It was debated in twice by the Viennese Government, which was named after *Archduke Rainer Ferdinand*, but was in fact led by the Minister of State Anton Schmerling. The proposal faced serious opposition also the Hungarian House of Representatives, and even Franz Joseph was reluctant to accept it until July 1861. The *proposal envisaged for four months*[11] formed the basis of the Hungarian legal order and the judiciary, since in the absence of a legally crowned king, the Hungarian Parliament was unable to enact laws until 1867.[12] In the meantime, practising lawyers, together with eminent legal scholars, tried to fill its gaps.[13]

Although the importance of the *Conference* has been commemorated on major anniversaries, as I already mentioned, no monograph has yet been published in Hungary[14] to provide a comprehensive account of the workings of the *Conference*. Research focused on the analysis of the Provisional Judicial Rules,[15] and less on the body that proposed them. Still, reference shall be made to Tomáš Gábriš's monograph from 2014, which is the first monographic work to focus on certain aspects of the *Conference*, in addition to the Provisional Judicial Rules. The author's aim was to present the source of law, which has been mentioned even in recent judicial verdicts in Slovakia.[16] Furthermore, it includes the full Slovak translation of the Provisional Judicial Rules.

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[9] See SZÉCHENYI, István: *Hitel (Credit)*. Pest, Petrózai Trattner és Károlyi István, 1830.
[10] RADY, Martyn: *Customary Law in Hungary. Courts, Texts, and the Tripartitum*. Oxford, Oxford University Press, 2015. 228. p.
[11] *Sürgöny*, 11 April 1863. p. 1.
[12] RADY 2015. 229-230. p.
[13] See HOMOKI-NAGY, Mária: A nemesi magánjog szabályainak tovább élése a neoabszolutizmus idején (The survival of the rules of private noble law under neo-absolutism). In: MEZEY Barna (szerk.): *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrásában*. Budapest, Gondolat Kiadó, 2021. pp. 130-140.
[14] In Slovakia, Tomáš Gábriš's monograph, published in the last decade, is the most comprehensive work on the Conference of the Justice of the Realms, but focuses more on the analysis of the PJR. See GÁBRIŠ, TOMÁŠ: *Dočasné súdne pravidlá Judexkuriálnej konferencie z roku 1861 (The Provisional Judicial Rules of the Conference of the Justice of the Realm).* Bratislava, Wolters Kluwer, 2014.
[15] See MESZER, Artur: *Országbírói értekezlet (21. és 156. §) és Osztrák polgári törvénykönyv (Conference of the Justice of the Realms (§ 21 and § 156) and the Austrian Civil Code)*. Budapest, Politzer, 1897. pp. 5-9.
[16] See judgment in Case 2Sžr/4/2019: https://obcan.justice.sk/infosud/-/infosud/i-detail/rozhodnutie/1305e5f7-44ee-4715-84f7-5199bf933696%3A5f43d36b-fcf2-459b-bf74-6b09ca1c251f

In 1861, the challenge was not only to settle public law relations with Austria, but also to find reassuring answers to the nationality question.[17] The Croatian-Hungarian relations had to be put on a new foundation. The unity between Hungary and Transylvania, declared in 1848, had to be settled, since it was not recognised by the October Diploma. Furthermore, there was the issue of the April Laws, since the majority of which was regarded invalid by Franz Joseph. Resolving these problems proved to be a major challenge, and the members of the *Conference* had to face all the lingering question regarding the administration of justice in the shadow of the October Diploma, which was not as well received in Hungary as its makers had hoped. As a result of all these considerations, domestic judicial issues were relegated to the background in the public interest.

The analysis of the *Conference* is inseparable from the October Diploma, which can only be interpreted in the context of the events of 1848 and the so-called neoabsolutist *regime*[18] that existed in the 1850s. It is also essential to review the changes in the Hungarian legal system in the 1850s. I also analyse the ambitions of the Viennese government towards unifying the legal order within the Austrian Empire. The reports of the *Conference* contained references to the public mood, so I could not refrain from presenting the aspirations of the municipalities, since these manifested in the restoration of *the Hungarian laws*[19] *in the judiciary.* In Pest County, the *security of the estate and stability of private law relations*[20] were almost eclipsed by the rapid repeal of the laws introduced during the neoabsolutist period.*[21]*

The present thesis focuses on a public law analysis of the *Conference*, together with its deliberations and the proposals that emerged as a result. In presenting the circumstances of its convening*,* I had to analyse the imperial manuscripts of 20 October 1861. This document, in conjunction with the historical context and the memoirs, may provide an answer to the question, which has been little addressed so far: what the original purpose of the convening of this Conference was and whether this changed between October 20 to the actual start of deliberations. The final set of problems relating to the antecedents was the appointment of the Justice of the Realm.

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[17] According to Dorottya Andrási, the publications of the statistician Elek Fényes in 1867, shocked the leading figures of Hungarian public life with the fact that the percentage of Hungarians in the countries of the Hungarian Holy Crown was only at 37.4 percent. See ANDRÁSI, Dorottya: Az 1868-as nemzetiségi törvény és a magyar-horvát kiegyezés (The Nationalities Law of 1868 and the Croatian-Hungarian Compromise). In: *Erdélyi jogélet* 2020. 2. sz. 142. p. The cited work: FÉNYES, Elek: *A Magyar Birodalom nemzetiségei és ezek száma vármegyék és járások szerint (The Nationalities of the Hungarian Empire and their numbers by counties and districts)*. Pest, Eggenberger, 1867. pp. 32-77. See also: SOKCSEVITS, Dénes: *Horvátország a 7. századtól napjainkig. Szomszéd népek történelme*. (Croatia from the 7th Century to nowadays. The History of neighbouring nations.) Budapest, Mundus Novus, 2011. pp. 370-372.

[18] RÁTH, György*: Az Országbírói Értekezlet a törvénykezés tárgyában (The Conference of the Justice of the Realm in the Administration of Justice)* Pest, Landerer und Heckenast, 1861. I. (hereinafter: CJR prot. 1861. I.) p. 43.

[19] In this thesis, I use this phrase in the light of the text of the Provisional Judicial Rules and the Hungarian vocabulary of the time, and this meant not only the restoration of Hungarian acts made by the Parliament, but also Hungarian legal norms in general, which were largely of a customary nature until 1848.

[20] *Preliminary debates of the Conference of the Justice of the Realm.* CJR prot. 1861. I. p. 6.

[21] For an interpretation of neoabsolutism, see RÉVÉSZ, László: *Die Bedeutung des Neoabsolutismus für Ungarn. Donauraum*. 1969. no. 3. pp. 142-159.

From the first two days of the *Conference*, I highlight the process of defining the principles governing each sub-committee, and then I turn to the debate over the provisions of hereditary law. This proved to be most difficult during the drafting of the PJR. The gap created by Article XV of 1848 (the abolition of aviticitas) made a clash of public and private law principles inevitable, which is why I have chosen to focus on this part of the negotiations.[22] I conclude this chapter by reviewing the other bodies of law covered by the *Conference*, examining the extent to which efforts to restore Hungarian law were successful and its consequences.

The adoption the proposals of the *Conference* has not yet been elaborated in the domestic literature. I have presented this process in the context of the available archival sources, the official reports of the Council of Ministers and the Hungarian Parliament, as well as the memoirs of a contemporary statesmen. Moreover, I considered to be necessary to examine the legal source character of the Provisional Judicial Rules.

In the last two chapters of the thesis, I discuss the question of whether the *Conference* had any impact on Transylvania and Croatia-Slavonia. Finally, I describe the efforts made between 1861 and 1865 to revise the Provisional Judicial Rules.

II. RESEARCH METHODOLOGY AND SOURCES

Because of the necessary inclusion of the historical context, the thesis can be considered interdisciplinary in nature. I have chosen to utilize both the works of historians and legal historians, in addition to contemporary sources of jurisprudence. As a result, a significant part of the hypotheses derives from a synthesis of the research methods of these two disciplines.

In discussing the historical background, I have used the positivist, chronological method of event history. In evaluating the proposals made by the *Conference*, the subjective teleological methodology was used alongside the descriptive one to bring the arguments expressed during the debates into a coherent whole. I have relied on the dogmatic, analytical methodology to determine the character of the Provisional Judicial Rules in the context of the sources of law. In analysing the effect of the *Conference* on Transylvania and Croatia-Slavonia, I have applied the comparative method. This becomes particularly important in the context of Croatia-Slavonia, since the Sabor of 1861 did not have to deal with the same constitutional constraints as the *Conferences* both in Hungary and Transylvania.

The two-volume work published in October 1861 by György Ráth, to which Dezső Márkus refers as an almost authentic collection of the decisions of the *conference* (entitled *The Conference of the Justice of the Realm on the administration of justice*), is an inevitable starting

[22] Albert Kiss' 1911 memorial states that it was up to the Conference of 1861 to "*find the Ariadne's thread that will lead us out of the labyrinth of legal confusion*", is apt in this respect. KISS 1911. p. 37.

point.[23] It includes not only the protocols of the *Conference*, but also the proposals made by the various subcommittees. The latter can be found in the Hungarian National Archives, among the materials of the Hungarian Royal Chancery.[24]

I analysed the primary sources, in addition to the available scientific literature. A significant part of the documents of the Office of the Justice of the Realm between 1861 and 1869, which were held in the Hungarian National Archives, have been destroyed, but many of the remaining documents[25] have also proved to be valuable. I paid particular attention to the official reports of the Viennese Government and the Parliamentary Journals to illustrate the process which helped the PJR to become a legally binding rule. In the interest of historical accuracy, I have also consulted the memoirs of contemporary politicians. These diaries and written memoirs preserved facts, information and opinions, which were not included in official records. Unfortunately, György Apponyi did not write any memoirs (although some of his letters have survived),[26] but the documents, letters and diaries left behind by Kálmán Ghyczy, Miklós Vay, Menyhért Lónyay and László Szőgyény-Marich[27] provided important contributions to my research.

Furthermore, I relied mainly on the works of Albert Berzeviczy, György Szabad, Péter Hanák, Ágnes Deák and András Gergely in describing the constitutionally relevant changes between 1849 and 1861. The works of István Stipta have been of great help in presenting the county movements that played an important role in the debates of the *Conference*. In addition to the publications of Endre Varga and István Stipta, I also utilised the most recent research findings (the works of Judit Balogh, László Papp and Máté Pétervári) to gain an insight into the judicial reforms of the 1850s.

Regarding the influence of Austrian law on the Hungarian legal system, the works of Béni Grosschmid and Károly Szladits are unavoidable. Szladits even examined the role of the Austrian Civil Code in the development of Hungarian private law in a separate monograph. Mária Homoki-Nagy analysed the contemporary judicial practice through many actual cases in her many publications.

Among the Austrian historians and legal historians, the works of Stefan Malfèr and Christian Neschwara are highly relevant. The former is credited with the publication of several bands of the Protocols of the Austrian Cabinet, while Christian Neschwara has presented the fate of the

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[23] MÁRKUS, Dezső: *Magyar Jogi Lexikon hat kötetben. V. kötet*. (*Hungarian Legal Encyclopaedia in six volumes. Volume V.)* Budapest, Pallas Rt., 1904. p. 717.

[24] HU-MNL-OL-P 90-5.-e-2.; HU-MNL-OL-P 1830-10.-4.; HU-MNL-OL-P 1873-3.-98.-a; HU-MNL-OL-P 1873-3.-98.-b; HU-MNL-OL-P 90-5.-d-1.

[25] As Count György Apponyi opened the Diet in the absence of the Elector and presided over the Diet, a significant part of the surviving documents of the Office of the Justice of the Realm relate to the Diet of 1861. See HU-MNL-OL-O 125. p. 4919. p. 201-202.

[26] See: HU-MNL-OL-P 90-5.-e-2; HU-MNL-OL-P 1830-10.-4; letter from György Apponyi to Vince Szentiványi HU-MNL-OL-P 1873-3.-98.-a; reply to György Apponyi by Vince Szentiványi HU-MNL-OL-P 1873-3.-98.-b; letters from Emil Dessewffy to György Apponyi HU-MNL-OL-P 90-5.-d-1.

[27] Szőgyény-Marich, László (1806-1893). Vice-chancellor of the Hungarian Royal Chancery, under the leadership of Baron Miklós Vay in 1861.

ABGB in the Lands of the Hungarian Holy Crown in his comprehensive work published in 2010.

The present thesis is the first to examine the impact of the *Conference* of 1861 on Transylvania and the Croatian-Slavonian countries. Regarding Transylvania, since a significant part of the relevant archival sources have been destroyed, I relied mainly on the contemporary periodicals[28] which preserved the official reports of the *judicial conference in* Klausenburg and the Transylvanian Saxon University in Hermannstadt for posterity. Furthermore, relevant information was to be found in another contemporary records. Regarding Croatia-Slavonia, I have used the Journals of the Sabor of 1861 to present the activities of the judiciary commission and the fate of its proposals. Furthermore, I have used both the works of contemporary legal historians (Dalibor Čepulo), and sources written closer to the period under discussion. I examined a paper of Ivan Maurović, who assessed the impact of the ABGB in 1911 from a 60-year perspective. For the historical context, I utilised the works of László Heka.

In the final chapter of the thesis, I aimed to present the efforts to revise the PJR between 1861 and 1865. Doing so, I relied on the Protocols of the Austrian Government and the writings of Christian Neschwara and Stefan Malfèr[29] mostly. Furthermore, I present the proceedings of the "second" *Conference* of the Justice of the Realm in 1863. It convened in response to the dissatisfaction arising from the restoration of the 1840 Act on bills of exchange. During its debates, legal, social, and economic arguments collided.

III. THE SUMMARY OF THE RESULTS OF THE RESEARCH AND THEIR POTENTIAL USAGE

The *Conference of the Justice of the Realm* was both an important milestone and a paradox in the development of Hungarian law in the 19th century. The changes in the Hungarian legal system following 1848, the crisis of the neoabsolutist regime, the October Diploma and its reception, made the outcome inevitable. A professional body of lawyers was required to ensure that *the Church of Themis did* not collapse in Hungary in early 1861. To what extent can we attribute to *fate* the fact that this body was convened by the very Hungarian statesman who was fighting against the reforms on the side of the dynasty in 1848,[30] cannot be answered. However,

[28] *Kolozsvári Közlöny*, 1861, Vol. 119, No. 120, No. 123, No. 142, No. 145, No. 146, No. 147, No. 151, No. 152, No. 153, No. 156, No. 157, No. 159, No. 164, No. 165, No. 177, No. 179; *Kronstädter Zeitung*, 1861, Vol. 94, *Korunk*, 1861. No 158, No 159. No. 180.

[29] Malfèr was the first to present the efforts to re-enact the ABGB in Hungary. See MALFÈR, Stefan: Das österreichische Allgemeine bürgerliche Gesetzbuch in Ungarn zur Zeit des „Provisoriums" 1861–1867. *Zeitschrift für Neurere Rechtsgeschichte*, 1992. 14. pp. 32-44.

[30] In my opinion, Gyula Szekfű's assessment that Apponyi proved to be a bad and clumsy politician already in '48, in the context of 1860–1861, is exaggerated. See: SZEKFŰ, Gyula*: Magyar történet. VII. kötet. A tizenkilencedik és huszadik század (Hungarian History of Hungary, Vol. VII. The nineteenth and twentieth centuries)*. Budapest, Királyi Magyar Egyetemi Nyomda. 1938. The nineteenth and twentieth century. 1938. p. 279. Apponyi's life is objectively presented by Szilcia Czinege. "*His obituary clearly confirms our impression, textually: A historical figure whose memory is venerable is buried with him*." CZINEGE Szilvia: Gróf Apponyi György a kortársak

I can say with certainty that Count György Apponyi's role was fundamental in the restoration of Hungarian legal order in 1861,[31] since the former *judex curiae* fought heart and soul for the resurrection of the Hungarian laws, defying even the will of the Franz Joseph on several occasions. At the early 1860s, Apponyi became an important representative of national interests, who (to quote Boldizsár Horvát) never for a second lost sight of the interests that are the *most important task of law*.[32]

Fate (perhaps) also presented itself in the fact that Apponyi could only convene the *Conference in the* second half of January 1861. One thing is certain: Apponyi was right to state that the Conference could deliberate with complete freedom on matters concerning the administration of justice. This had given its meetings real substance. After all, issues relating to the organisation of the courts could have been discussed in a day. Yet, this would not have provided real answers at a time when most counties were concerned with the restoration the Hungarian laws. The municipalities saw the Hungarian laws as a vital part of the constitutional identity, so the abrogations of the 'hated Austrian laws' seemed inevitable. Kálmán Ghyczy argued on 23 January 1861 that there had never been a stronger guarantee to the Hungarian independence than the different legal systems in Cisleithania and Hungary.[33]

The laws enacted after 1849 drew a lot of criticism in Hungary. Some of them deserved it, especially in the field of criminal law and press law. Yet, the reforms envisaged in 1848 were carried out based on the said legal norms. Even if the principles of the Imperial Patent on Aviticitas and the Urbarial Patent differed somewhat from those originally conceived. Even Ferenc Deák noted that the hatred against these laws was not fuelled by their provisions, but by the *absolute power* that had crushed the War of Independence in 1849 and suspended the constitutional order for a decade. Still, many projected this hatred onto the legislative acts. Emotion and reason belong to different dimensions of human existence: it is no coincidence that the public sentiment became an obstacle to the imposition of legal logic. I fully share the views of Christian Neschwara and Mária Homoki-Nagy, who argue that it is essential to review the actual impact of said laws to render an accurate judgment. As a result of the passive resistance, we cannot state with absolute certainty that some contemporaries (including even some members of the Conference) had adequate knowledge of the positive and negative aspects of these laws, nor do I find it inconceivable that some contemporary scholars would have formed their opinions in the context of the public opinion. I must emphasize, I do not intend to defend the *neoabsolutist regime*. However, the enactment of Austrian laws, especially in the field of private law, was by no means as black and white as many saw it, especially in the 19th century.

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személével (Count György Apponyi in the eyes of contemporaries). *Történelmi Szemle*, 2018. 4. p. 14. quotes: *Budapesti Hírlap,* 2 March 1899.

[31] According to Gusztáv BEKSICS, Apponyi "*surprised the public with his patriotic attitude at the opening of the Conference of the Justice of the Realm. As the managing spirit of the Conference, he could rightly count on public recognition, especially when he courageously defended the results of this Conferenc against Schmerling's imperial patents.*" MÁRKI, Sándor – BEKSICS, Gusztáv: *A modern Magyarország (Modern Hungary) (1848-1896).* Budapest, Athenaeum, 1898. p. 348.

[32] *Second meeting of the Conference of the Justice of the Realm*. CJR prot. 1861. vol. I. 33. p.

[33] *First meeting of the Conference of the Justice of the Realm*. CJR prot. 1861. vol. I. 13. p.

The weight of the public sentiment was felt even by some members of the Conference, and that brings us to the paradox. The public demand to fully restore the Hungarian laws has apparently led some members of the Conference to "solutions" that were politically palatable but legally impossible. All those who, in the absence of the legislative authority of the Conference, opposed the creation of the PJR, adhered to an undoubtedly important constitutional principle. Still, said rules were essential for the restoration of Hungarian law. Without them, either the legal certainty would have been harmed or the administration of justice would had been suspended. In the end, the members of the Conference made the wise decision. The drafting of the PJR required some creative legal thinking, but said provisions ensured the fullest possible restoration of Hungarian laws.[34] Still, this approach required compromises. It is abundantly clear that the Provisional Judicial Rules have modified the laws that existed until 1848 in several instances. The proponents saw this approach necessary, while other members sharply criticised the process since it infringed the Parliament's legislative competences. Nevertheless, the drafters of the proposals are to be commended. The rules of the PJR truly reflected the Hungarian traditions, and their creation is legitimised by the mere fact that the lineal inheritance[35] is still to be found in the current Civil Code.[36]

The Provisional Judicial Rules were far from perfect. Still, the logic behind their creation may provide an explanation to some controversial decisions. This may be illustrated with the operation of a double scale. On one side of the scale lies the principle of legality, embodied in the restoration of Hungarian law. On the other side of the scale lies the prohibition of ex post facto legislation in close connection with legal certainty, the protection of the rights of individuals, the prohibition of a moratorium on judicial processes and the concept of legal equality. The paradox of the situation is that these constitutional principles should have reinforced each other, but the opposite was the case in 1861. The concept of legality was in more than one case in conflict with some or all the other principles mentioned above. The Conference had to determine, step by step, where the balance was to be struck. Consequently, the Provisional Judicial Rules embody that *equilibrium.*

The last major principle meant that the Conference was prohibited from making laws,[37] which meant that the scales could only be tipped carefully. If the restoration of Hungarian legal norms seemed feasible, this did not pose a fundamental problem. However, when it did become necessary to amend the legal provisons or to keep the Austrian legislation in effect, the conflict

[34] Even Deák had to speak out against all efforts that were willing to sacrifice even the reforms of 1848 on the altar of "mere" legality.
[35] In György KÉPES' view, Béni GROSSCHMID played a major role in this. KÉPES György: Az ősiség intézményének felszámolása és a modern magánjog létrejötte Magyarországon (The abolishment of aviticitas and the birth of modern private law in Hungary). In: Menyhárd Attila – Varga István (szerk.): *350 éves az Eötvös Loránd Tudományegyetem Állam- és Jogtudományi Kara: a jubileumi év konferenciasorozatának tanulmányai*. II. kötet. Budapest, ELTE Eötvös Kiadó, 2018. 2017. p. Vö: GROSSCHMID Béni: Öröklött s szerzett vagyon. Budapest, Politzer Zsigmond, 1897. 97-99. p.
[36] See Title IX of Book 7 of Act V of 2013.
[37] KISS 1911. p. 37.

between the commitment to legality[38] and the "*law of necessity*" caused a visible discrepancy, as the participants could rightly feel that they had to choose the lesser of two evils.[39]

The Provisional Judicial Rules have been criticised in the years following their creation, but time has made up for these shortcomings. When the 50th anniversary of the Conference of the Justice of the Realm was celebrated, many people commemorated the achievements and focused on one thing: the creation of the Provisional Judicial Rules made it possible to restore domestic law. Were the proposals of the Conference necessary for the "resurrection" of Hungarian law? In 1897, Artur Meszer argued that the first paragraph of the PJR had "*[a]n important error (...) [that] cannot be denied: the phrase "shall be restored" (...). It is as if the old Hungarian law had not revived by the restoration of that great principle of public law[40] of its own force! According to the conf., this revival could not have happened on its own: this work was done by the conference.*"[41] In the author's view, the reintroduction of Hungarian constitutional order also meant the "restoration" of Hungarian judicial laws in October 1860. The question he raises may also be interpreted as whether the dimension of law can be considered independent, autonomous and mature in the sense that the partial restoration of Hungarian constitutionalism could be considered sufficient for the reassertion of Hungarian legal institutions.[42]

The Provisional Judicial Rules never entered into effect either in Transylvania or Croatia-Slavonia, but as we have seen, their adoption was on the agenda. The main difference between Hungary and Croatia was that the committee responsible for settling judicial issues in Zagreb was not at all hampered by restrictions such as those of the Conference in Pest. Although the committee had been instructed by the Sabor to follow in the footsteps of the PJR, they changed course almost after reviewing said provisions. The proposals they had prepared differed in fundamental ways from the PJR. Moreover, the repeal of the ABGB's was not on the agenda since its perception was way more nuanced than in Hungary.

The situation of Transylvania may also be considered somewhat unique. Both leaders appointed by the Emperor supported the Union between Hungary and Transylvania strongly. The judicial conference convened in Klausenburg declared its intention to settle the administration of justice in Transylvania based on the PJR. After lengthy discussions, the proposal to adopt the said rules was made, but it was rejected by Franz Joseph. The decision may be attributed to the growing

[38] MEZEY Barna: Az Országbírói Értekezlet legitimitásához (To legitimise the Conference of the Justice of the Realm). In: MARGITTAY-MÉSZÁROS Árpád (szerk.): *Ünnepi tanulmányok Siska Katalin 60. születésnapjának tiszteletére – Viginti Quinque Anni in Ministerio Universitatis et Iurisprudentiae.* Debrecen, Debreceni Egyetem Állam- és Jogtudományi Kar, 2021. p. 31.

[39] I can mainly attribute the extremely cautious wording of the resolution adopted by both Houses of Parliament, which recommended the Provisional Judicial Rules to the courts as a temporary rules, to the provisions, which kept certain Austrian laws in effect, in addition to the critical reaction of the counties.

[40] He meant the (partial) restoration of the Hungarian constitutional order by the October Diploma.

[41] MESZER 1897. p. 8.

[42] This was the view of Mátyás Ónossy during the debate in the House of Representatives in June 1861, when he states that "*the Hungarian private laws exist voluntarily, which I would prefer to have respected by all, rather than needing to be confirmed by anyone*". See *Képviselőházi napló*, 1861. II. kötet. XLIX. ülés 1861. június 22-én. p. 207.

disagreements between the Transylvanian leaders and the Viennese government and the different objectives of the Saxon National University. I see this as one of the strongest arguments in favour of my hypothesis that Franz Joseph in October 1860 did not aim to restore the Hungarian legal order.

Could the Conference have formulated a different proposal from those found in the Provisional Judicial Rules? In principle, yes. As we may see in the case of the law of succession, or the compensated emancipation, the respective committees specifically proposed the maintenance of the Austrian laws. Based on the public mood at the time, I believe that some counties would not have complied with this decision, which could have led to the very judicial anarchy that George Apponyi and the participants in the Conference aimed to avoid. Dezső Márkus argued that "*[t]his was the big question: would it not be more expedient to maintain, the Austrian Civil Code in effect temporarily, with only some modifications in the area of succession law, which had already given the country all the advantages of a uniform codification of private law and whose maintenance would protect the legal system from further shocks, rather than to restore the Hungarian private law, which was not only incomplete but also, and above all, out of date? The decision to restore the Hungarian private civil substantive laws was a very wise one, despite its many major drawbacks, not the least of which is the permanent lack of training in private law of our most recent lawyers. Béni Grosschmid is right in his view that the reception of Austrian law, at the expense of the autonomy of our national legal development, would have made the bond which connects us with Austria even stronger. Furthermore, it would not have encouraged the codification of Hungarian private law independently of Austria.*"[43]

Secondly, they could have suspended justice in all matters where the restoration of Hungarian laws did not seem possible, based on Article XV of 1848. I consider the chances of the adoption of such proposal to be astronomically low, as it would not only have been contrary to the declared position of Franz Joseph but would have also deeply harmed the interests of private individuals. And even if the argument was valid that these issues would have affected only a small proportion of the country's population, the consequences of such decision would have been unforeseeable.

The third (also theoretical) option would have been to remit these issues to the Parliament. Yet, in the absence of a legally crowned king, the Parliament could not have made any laws in 1861. Consequently, only the judges, independently from each other would have been able to decide on these issues – which would certainly have led to judicial anarchy. Agreeing with Ferenc Deák, I too see that "*since the laws on private relations are needed every day, necessity would force the authorities to fill the gap, and they would impose these rules, only to do so differently, and the uniformity required in the administration of justice would be replaced by a variety of rules.*"[44] Consequently, the only real solution was to go down the road actually followed, which in turn presented many challenges.

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[43] MÁRKUS, Dezső: Az Országbírói Értekezlet emlékünnepe (*The Commemoration of the Conference of the Justice of the Realm*). *Jogtudományi Közlöny*, 1911. 4. 35. p. cites: GROSSCHMID, Béni: *Jogszabálytan. Magánjogi előadások (Lectures in Private Law)*. Budapest, Athenaeum, 1905. pp. 869-870.

[44] See the *twelfth meeting of the Conference of the Judges of the Nation*. CJR prot. 1861. volume II. p. 274.

This is reflected in the very diverse positions on the nature of the Provisional Judicial Rules. If we try to determine, what kind of source of law represent the PRJ, we hit an obstacle. Their adoption has been rather rhapsodic and unique. It was first discussed by the Viennese Government. Then, it was submitted to the Parliament, which declared it *temporarily usable*. It was then put on the agenda again by the Viennese government and approved by the Emperor. Finally, on 23 July 1861 it was adopted by the Curia *as a binding standard in its own future proceedings. While the* binding force of the Provisional Judicial Rules was clearly ensured by their customary nature, the process by which these legal norms became a source of law was nevertheless important.[45] Acknowledging the decisive role of custom, I believe that the Provisional Judicial Rules are a unique source of law, the like of which cannot be found in Hungarian legal history. It also differs from the Tripartitum, since the latter was originally intended as a bill, whereas this proposal was not. Werbőczy's work was mainly intended to collect the already existing law, whereas the PJR restored the Hungarian laws based on constitutional principles. In cases, where it deviated from this principle, it did so to uphold another constitutional principle: the protection of the rights of individuals.

I conclude this abstract by referring to the notions of Albert Berzeviczy, who considered the proposals made by the Conference of the Justice of the Realm to be the last remaining achievement of the limited constitutionalism introduced by the October Diploma and the short Parliament convened in 1861.[46] Reversing this idea, the work of the Conference led by count George Apponyi can also be seen as the first real success to be recorded in the period between 1849 and 1867.

IV. LIST OF PUBLICATIONS IN THE FIELD OF THE THESIS

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[45] MESZER 1897. p. 9.
[46] See BERZEVICZY, Albert: *Az absolutismus kora Magyarországon (The Age of Absolutism in Hungary)*. Volume 3. Budapest, Franklin, 1932. p. 364.

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