

Modern Hungarian Legal History

Changes in Family Law I-II -> Prof. Dr. Eszter Cs. HERGER
Changes in Public Law I-II -> Prof. Dr. Gábor SCHWEITZER
Changes in Public Law III -> Assistant Dr. Dominika NIKLAI

Assessment methods

The students will write **an essay of approximately one-page** in the final class session offering their personal reactions to whichever materials or topics covered in class that they find most important or personally engaging.

They will have **wide latitude** here and they may draw on any of the materials covered, including the initial literature or any of the instructor's presentations.



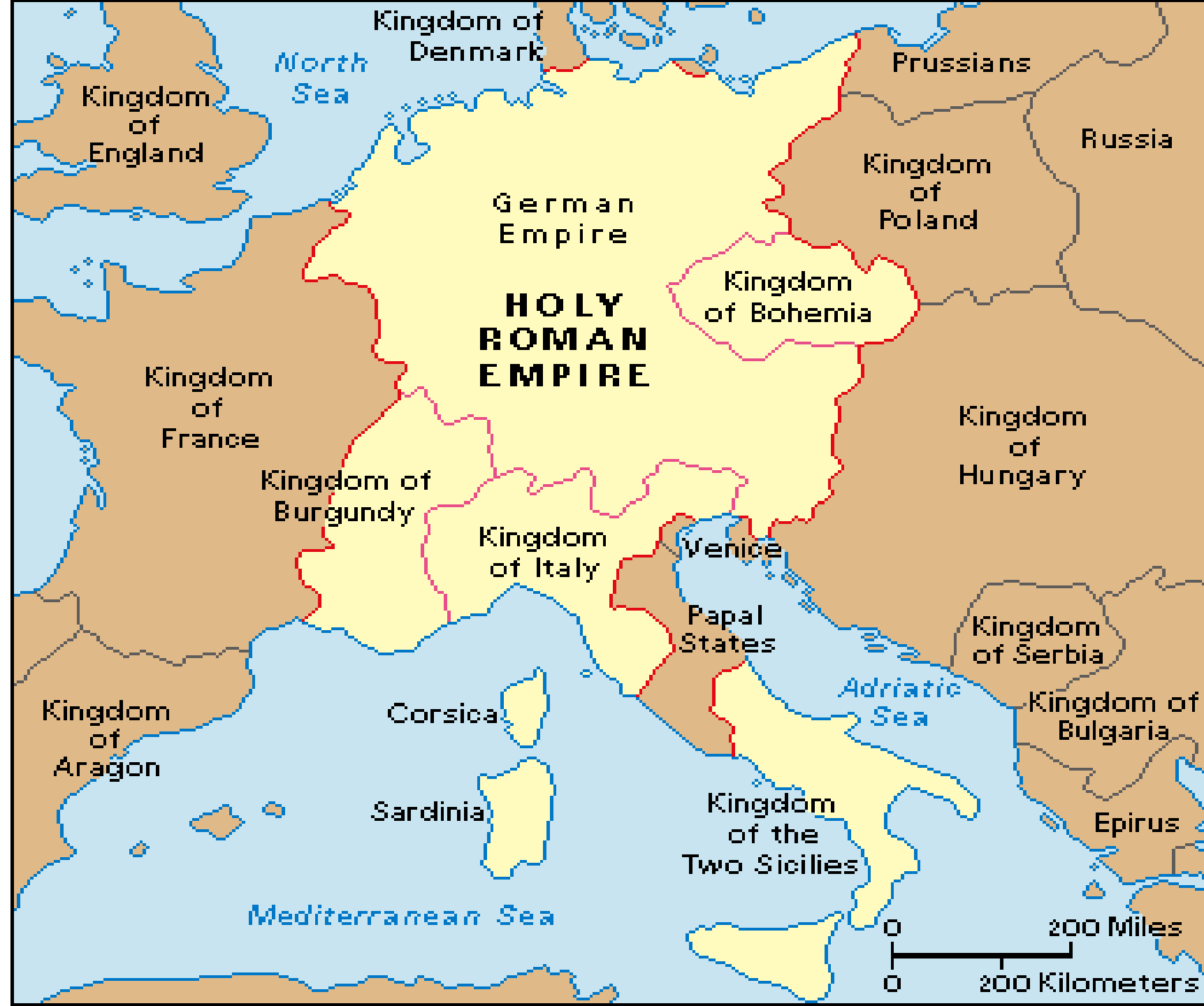
Interpretative framework

5 facts about Middle Europe's nations

Fact 1

"More than forty years ago, Theodor Mommsen already pointed out in his speech at the Rectorate that it is indispensable to know a nation's language and its law in order to judge it. (...) one must demand that the jurist also make an effort to recognize the law as it applies and is practiced outside the borders of our state."

Richard Zehntbauer 1916



Fact 2

1905 Hans Schreuer:
„specifically Germanistic
discipline”

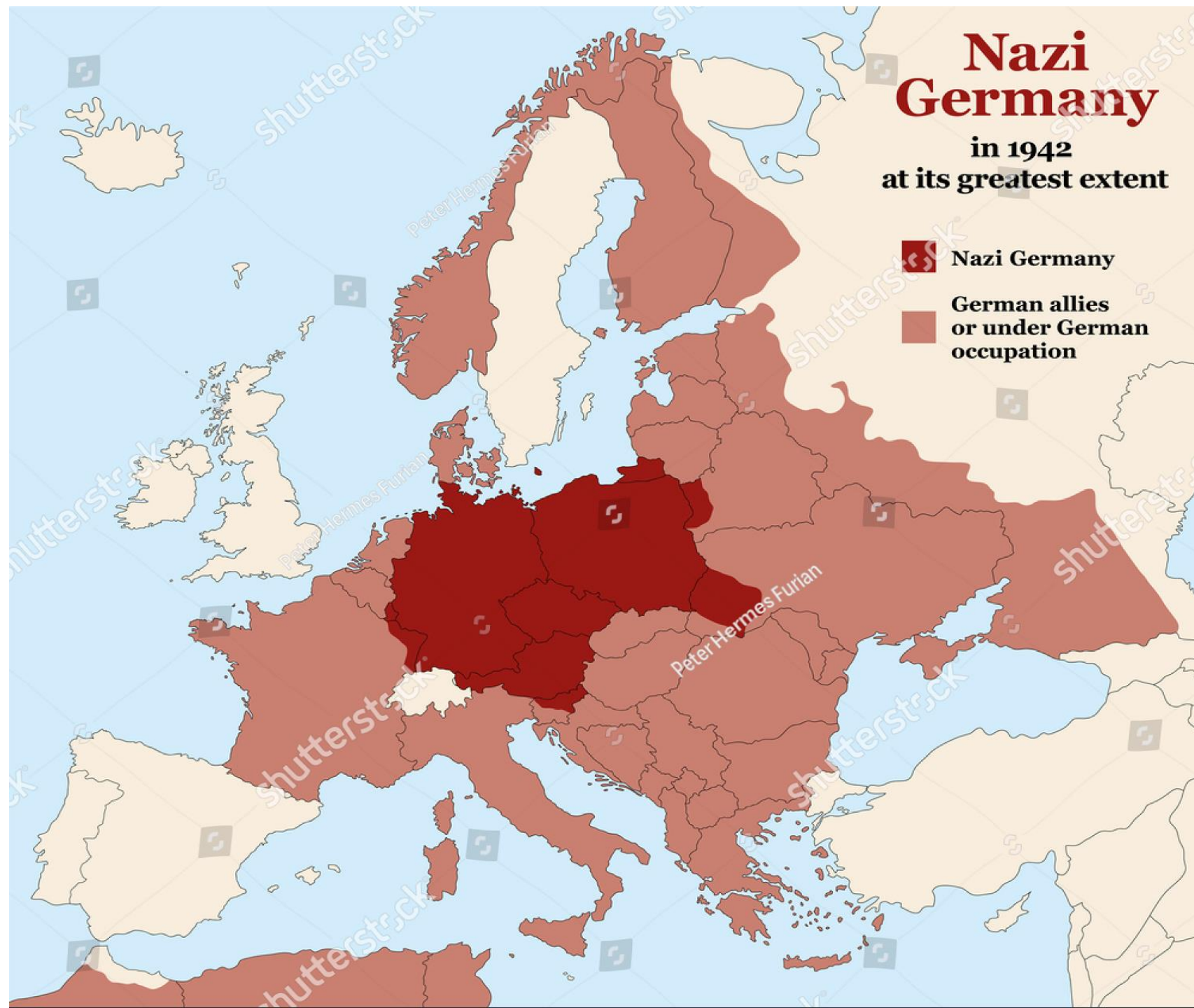
1917 Ernst Heymann
"somewhat stubbornly
developed German particular
law"

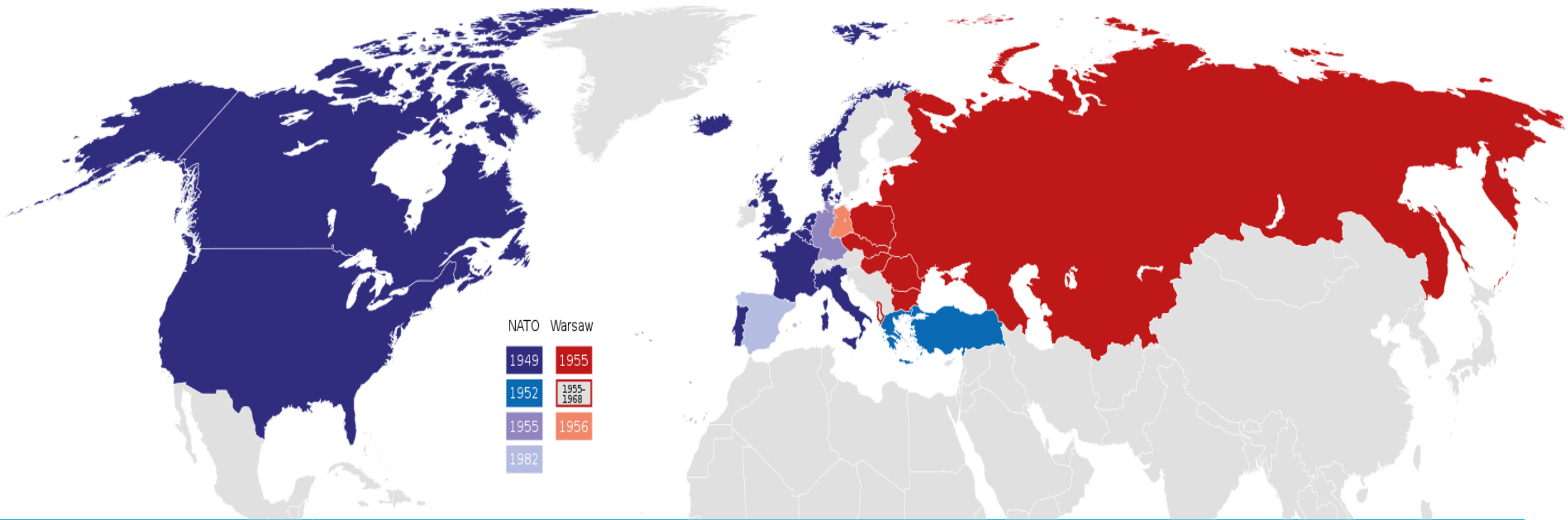
"has its own strong life
connected with the character of
the Hungarian people".



Journal of the Academy of
German Law
(ZaFDR)
Joachim Ribbentrop 1935

"The foreign countries today face this tremendous change in the political shaping of Germany partly strangely, partly even still rejecting it. (...) This will change, and one of the most beautiful and grateful tasks of the Academy of German Law is to pave the way for the understanding and international recognition abroad of the coming new German law, and to build the bridge before this new legislation to the administration of justice of other peoples."





Fact 4

Boundaries of NATO and Warsaw Pact
from 1949 (establishment of NATO) to 1990

Fact 5 Harmanisation of Family Law

Commission on European Family Law



Historical method

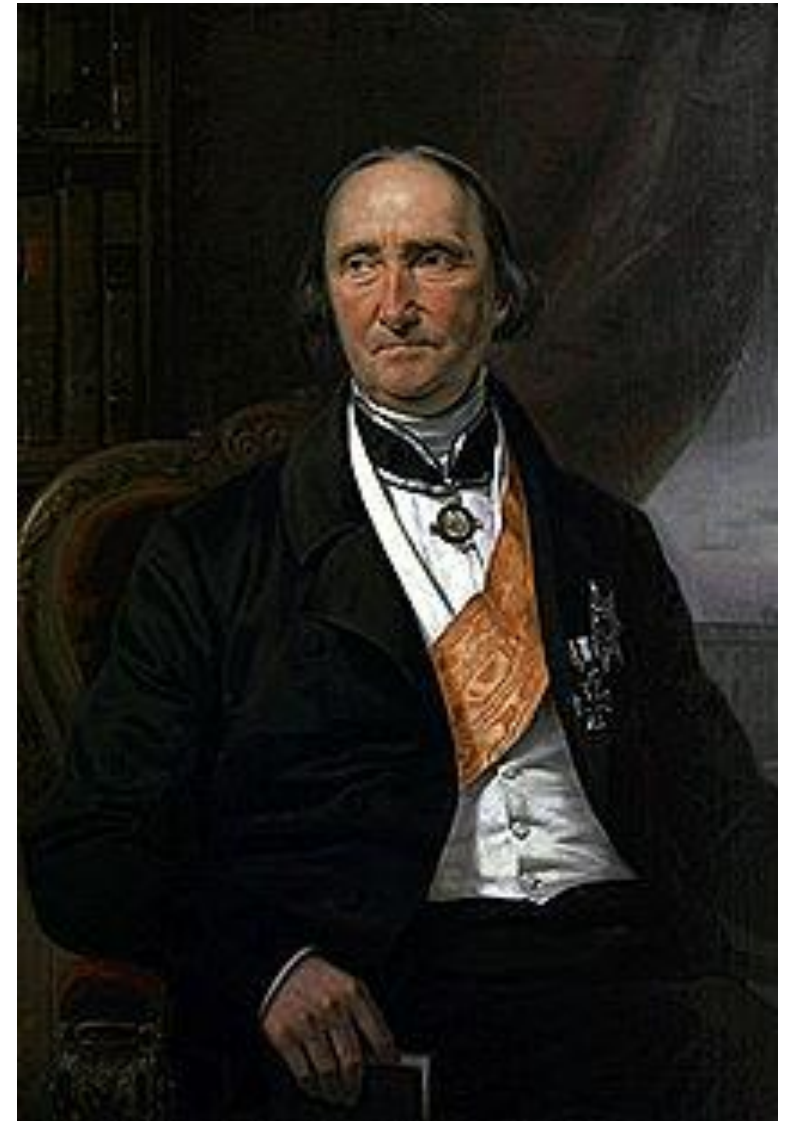
„...to disconnect historical development from the living legal institution is - from the point of view of understanding the law - pointless.”

Savigny 1809

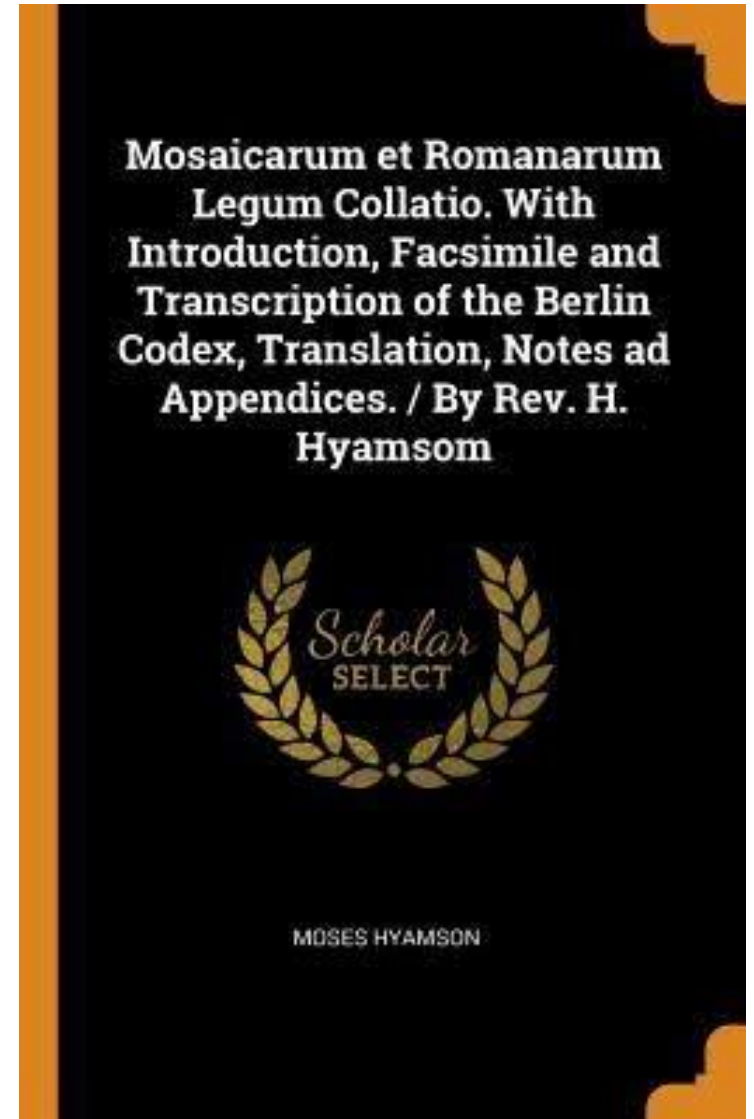
Comparative method

"(...) there is some justice" in the demand for a general legal history, but legal comparison can also give rise to "serious errors", because research not carried out with sufficient thoroughness "under the name of great and powerful views" leads to "superficial half-truths".

Savigny, 1840



- § 1 On Accidental or deliberate homicide (*De sicariis et homicidis casu vel voluntate*)
- § 2 On serious assault (*De atroci iniuria*)
- § 3 On the treatment and cruelty of slaves (*De iure et saevitia dominorum*)
- § 4 On adultery (*De adulteriis*)
- § 5 On raptist (*De stupratoribus*)
- § 6 On incestuous marriages (*De incestis nuptiis*)
- § 7 On thies and their punishment (*De furibus et de poena eorum*)
- § 8 On false testimony (*De falso testimonio*)
- § 9 Exemption of family members from the obligation to testify (*De familiaris testimonio non admittendo*)
- § 10 On deposits (*De deposito*)
- § 11 On abductors (*De abactoribus*)
- § 12 On arsonists (*De incendiariis*)
- § 13 On moving the boundary stones (*De termino amoto*)
- § 14 On kidnappers (*De plagiariis*)
- § 15 On astrologers, witches and Manichaeans (*De mathematicis, maleficis et manichaeis*)
- § 16 On the right of succession (*De legitima successione*)



Changes in Family Law I

The secularisation of marriage law.

The obstacles to marriage and the form of marriage in the light of canon law.

Models of divorce law in European legal culture.

The practice of Hungarian divorce law in the civil era and its impact on contemporary Hungarian marriage law.

European models of matrimonial property law.

Modern Hungarian matrimonial property law in the civil era and its impact on contemporary Hungarian matrimonial property law.

Dead roots?

The system of marriage obstacles in (former) Western legal culture and in and secularised marriage law

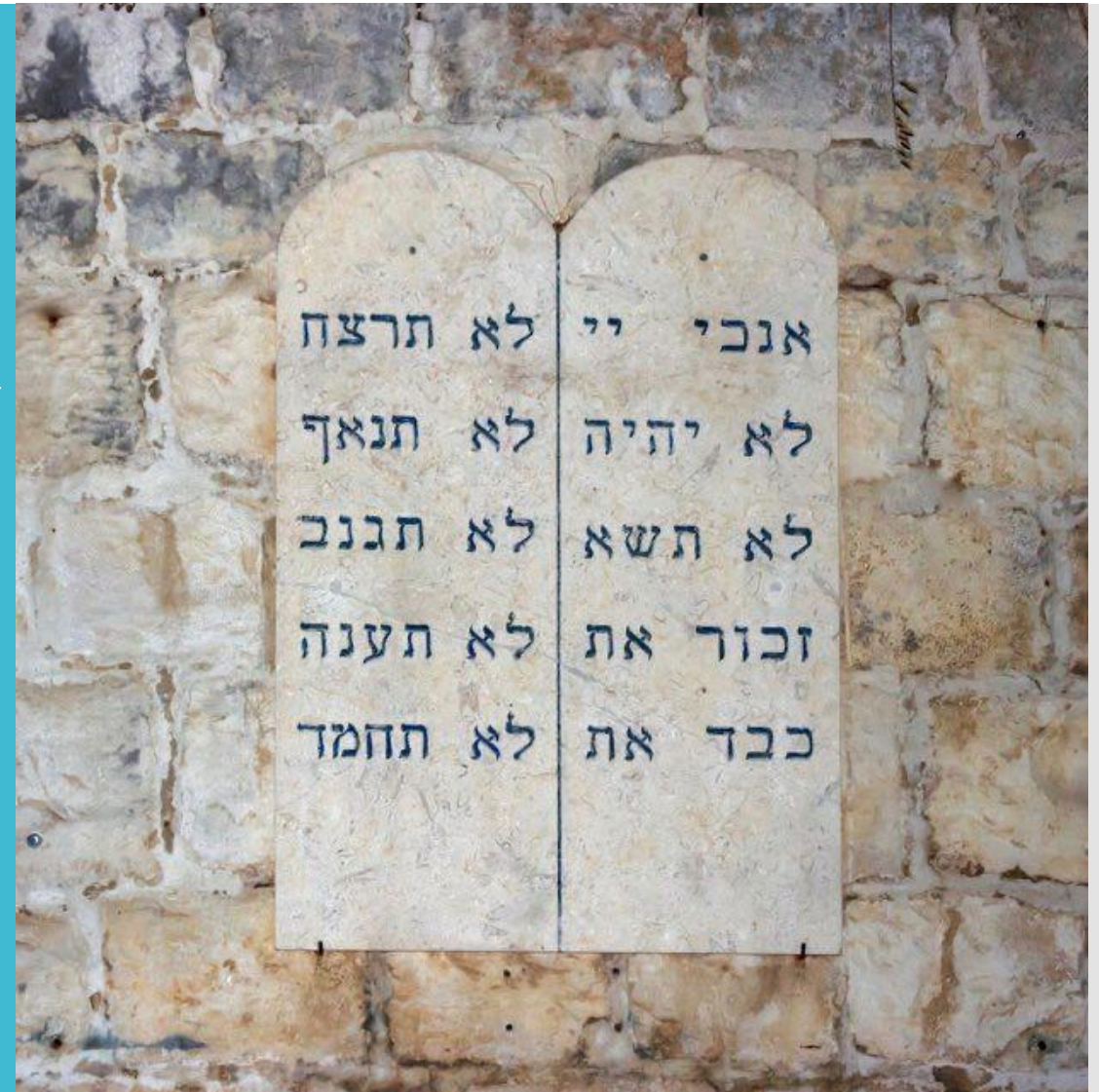
§ 1-2-3: Do not kill!

§ 4-5-6: Do not fornicate!

§ 7: Do not steal!

§ 8-9: Don't be a false witness!

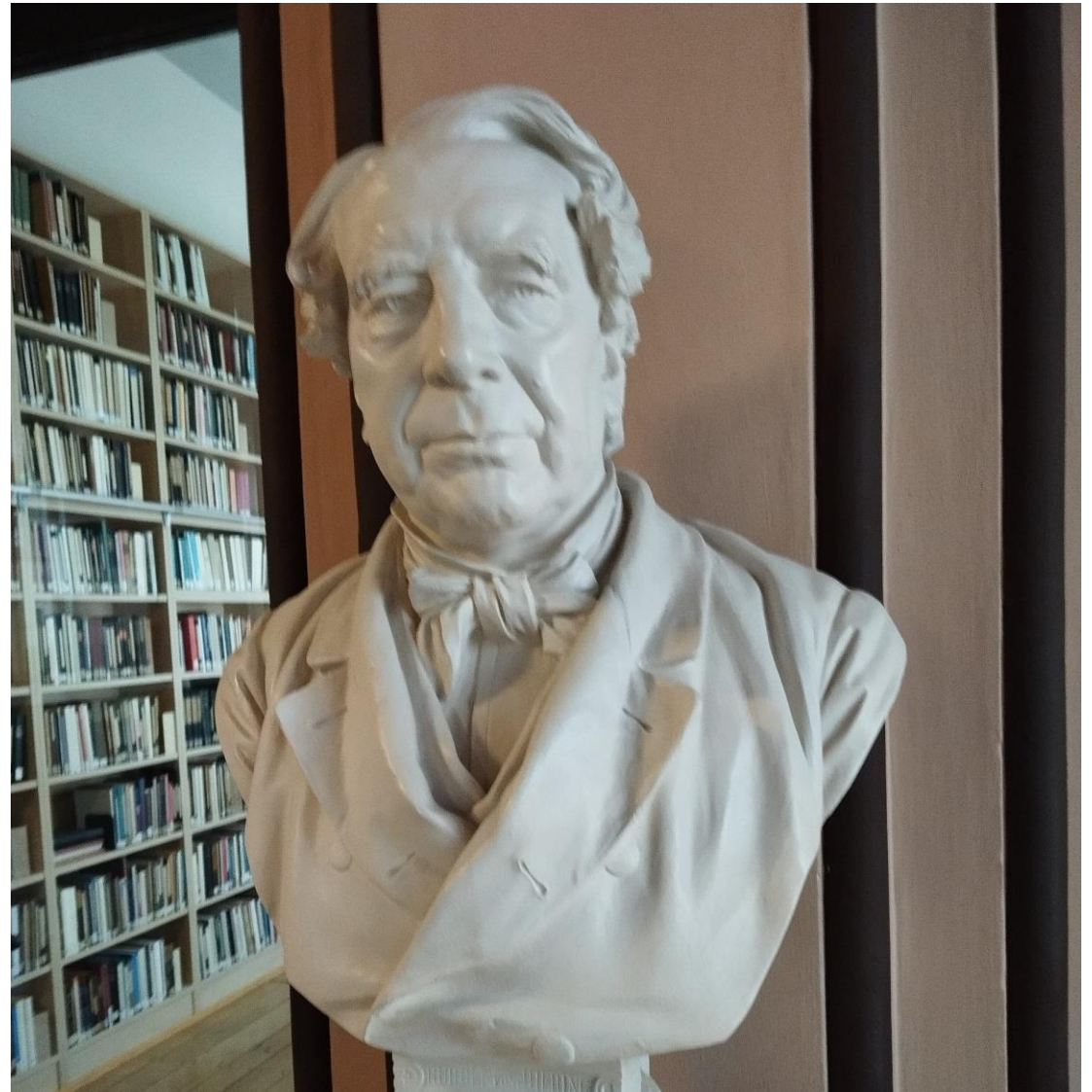
§ 10-16: Do not covet the other's



The Roman lawyer on marriage

"It proves again the truth of the remark often made that marriage is the barometer of the morality of a people."

Rudolph von Jhering 1880



Time bands

-

continuity

unified western canon law
(13th c.)

the age of secularisation
(reception of Protestant canon law)

postmodern family law

Unformal marriage 1
-> religious ceremonies have no legal significance

matrimonium iuris civilis

Unformal marriage 2
-> cohabitation for the purpose of marriage
-> has the same legal effects as marriage
Common law marriage

Compulsory religious marriage
->state church system

Optional church wedding
->secularised marriage law, but in facie ecclesiae marriage (Pl, Gr, E, I)

Compulsory civil marriage
->equal rights of the denominations

Optional civil marriage->the right of religious minorities

Compliance with the legal formalities is a condition of validity

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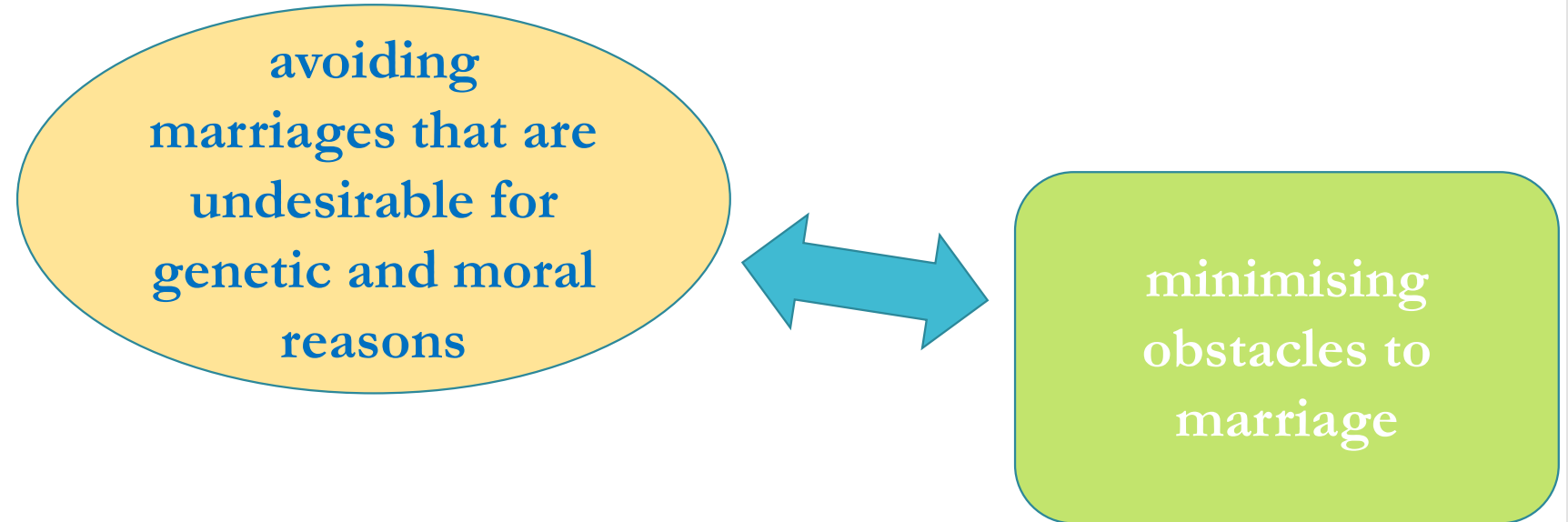
Common law marriage, USA

1. Alabama
 2. Colorado
 3. Georgia until 1997
 4. Idaho until 1996
 5. Iowa
 6. Kansas
 7. Montana
 8. New Hampshire
 9. Ohio until 1991
 10. Oklahoma until 1998
 11. Pennsylvania until 2005
 12. Rhode Island
 13. South Carolina
 14. Texas
 15. Utah
- + District of Columbia
- divorce: the same rules as for an ordinary m.

"After living together for 10 years, we now realize that the only thing we have in common, is common law."

The importance of marriage obstacles

CURRENT CHALLENGE



LEGAL HISTORICAL SIGNIFICANCE

-> lies within the doctrine of the divorceability of marriage

What is the difference between annulment and dissolution of marriage?

Annulment

The marriage is void with retroactive effect to the date of the marriage, as if it had never been contracted.

divortium totale of the canon law

Dissolution

1. death

presumption of death

2. Divorce: The marriage is dissolved from the date of the final judgment of dissolution, with effect for the future.

European models of divorce

Catholic model

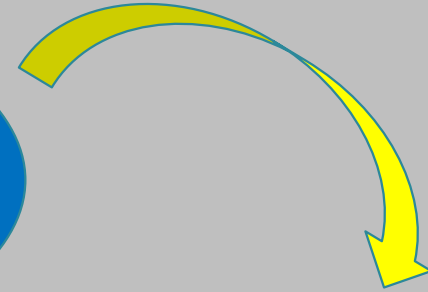
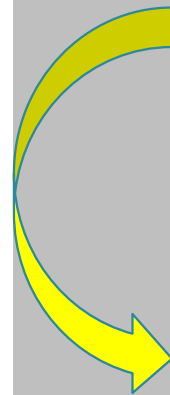
divortium particulare = separatio a thoro et mensa

Protestant model

fault principle

Liberal model

fault principle + objective reasons
+ mutual agreement





Thomas Aquin: „Summa contra gentiles” „De regime principum”

sacramentum	-	ius divinum
officium naturae	bonum naturae	ius naturale
officium spirituale	bonum ecclesiae	statuta ecclesiae
officium communitatis	bonum politicum	ius civile

State competence in the Middle Age:

- > regulating the legal effects of marriage
- > regulation of obstacles to marriage
- > but the sanctity of character limits secular legislation
- > aim: uniform (Christina) marriage law

Secularisation of marriage law: in the 18th and 19th centuries

Types of canonical marriage

- **MATRIMONIUM LEGITIMUM**

- lawful marriage
- > based on a bilateral contract
- > it is still only an engagement
- contractual nature

- **MATRIMONIUM RATUM**

- full marriage
- > new consent is required
- > without parental consent!
- > if blessed by a competent minister,
it becomes a sacrament

- **MATRIMONIUM CONSUMMATUM**

- consummated marriage



Marriage obstacles in Corpus Iuris Canonici

I. IMPEDIMENTA MATRIMONII IMPEDIENTIA PREVENTS THE MARRIAGE FROM TAKING PLACE

1. "holy times,,
from the beginning of Advent to the feast of the three kings
Epiphany
Ash Wednesday to the White Sunday after Easter
2. „spiritual ban”
lack of proclamation
wedding in a place under a religious curse
3. previous engagement to another person
4. vow of chastity (votum simplex)
breach of oath = sin
after marriage only with the consent of the spouse
5. Ignorance of the basic principles of religion

II. IMPEDIMENTA MATRIMONII DIRIMENTIA

-> DISSOLVE A MARRIAGE THAT HAS ALREADY CONSUMMATED

lack of will

1. lack of capacity
-> at least adolescence
2. coercion/threats/misrepresentation to the person or the person's legal status

kinship (cognatio)

1. blood relationship (cognatio carnalis)
-> lineal relatives / collateral relatives up to 4th degree
2. legal relationship (cognatio legalis)
-> adoption
3. spiritual relationship (cognatio spiritualis)
-> godparents



Tamar is raped by his half-brother Amnon

brother-in-law (affinitas)
prohibition of mixed marriages (cultus disparitas)

crime (crimen)

1. murder of a spouse (conjugicidium) with the intention or promise of remarriage, if the future spouse knew about the act or was a partner
2. adultery (adulterium) with the promise of remarriage

valid marriage (ligamen)

rape (raptus)

impotence

sacred orders (votum solenne)

-> dispensation

-> the marriage contracted by prior dispensation is valid



Extension of the "misleading" ground for invalidity

1941
in the 3rd
„Jewish Act ”

1. sickness
2. „Jew” (race-based concept since 1939)
3. an incurable mental illness at the time of marriage, if the other spouse did not know this and could not have inferred it from the circumstances

„A marriage entered into (...) in contravention of the prohibition may be **challenged** on the **ground of misleading** if the deception relates to a fact which is relevant to the assessment of the personal status of the spouse (...) and the deception was knowingly caused by the other spouse or the other spouse knew of the deception, which originated from a third party.”

Invalidity of the marriage

Civil Code 2013

LIGAME

- > the new marriage can only be valid after the previous marriage has ended
- > if the court declares the previous marriage invalid, the new marriage is valid from the date of the marriage

UNDERAGE

- > in the absence of prior dispensation from the guardianship authorities, only the marriage will be annulled

INCAPACITATING GUARDIANSHIP / INCAPACITY

COGNATIO CARNALIS

- > no dispensation (between lineal relatives and collateral relatives up to 1th degree)
 - not dependent on the good faith of the parties
 - the obstacle does not disappear with the passage of time
 - their sexual relations are a criminal offence
- >dispensation: a brother's marriage to his brother's blood descendant is not invalid
 - a, if it was contracted with prior/ex-post notarial authorisation
 - b, if the health of the child is not endangered

COGNATIO LEGALIS, if the marriage is concluded „during the period of adoption”

The personal effects of marriage

- a set of non-pecuniary rights and obligations
- moral in nature
- derive from the fact that the parties have entered into a valid marriage

5th Draft of Civil Code 1928

I. cohabitation

§ 111 (1) the spouses are mutually bound to live in a community of life corresponding to the marriage

(debitum conjugale = claim for "marital debt")

§ 111 (2)

- fidelity
- mutual support, working for their common welfare

Civil Code 2013

I. cohabitation

-> -

§ 4:24

- fidelity (togetherness/solidarity)
- personal and marital cooperation and support

5th Draft of Civil Code 1928

II. The head of the family is the husband

§ 112 (a) the husband has the right to decide on the affairs of married life

-> choice of the place of residence?

Marriage Act 1894: the wife must accompany her husband to the place of residence of his choice

1st Draft 1900: the wife is only obliged to follow her husband if the husband pays the family expenses

§ 112 (b) in his decisions, the husband shall give fair consideration to the reasoned advice and suggestions of the wife, if she contributes to or pays the marriage expenses

Civil Code 2013

II. –

§ 3 Equal rights for spouses

§ 25 decide together on family matters

decide on personal matters alone, but in the best interests of the family


§ 26 choice of residence in agreement

-> permanent place of residence / habitual residence

-> this can be a separate residence

Council of Europe, Committee of Ministers

Resolution (78) No 37 (II/5)



"Among common peasants, beating a wife twice in the mouth for backbiting is not a wrongful act that would make it legal for the wife to leave the house of the husband."

Royal Hight Court, 1895

5th Draft of Civil Code 1928

III. Naming

§ 1154 The wife bears her husband's name with the marriage suffix.

- she may add her own name to it
- this also applies to widows and divorcees until remarriage
- if the woman has been declared guilty at the time of the divorce, she can no longer bear her husband's name (Marriage Act 1894)

Civil Code 2013

III. Naming

Decision 58/2001 (XII.7.) of the Constitutional Court

- recognition of the right to self-identity
- personal autonomy

§ 27 The wife shall bear the name of her choice after the marriage (...)

- >the same
- but the name of the ex-husband with -né suffix cannot be used in the new marriage
- if the marriage is declared null and void by the court, the woman bears the name of her choice
- if the wife has been sentenced to a prison term for intentional crime, she may be forbidden to bear the husband's name

5th Draft of Civil Code 1928

Civil Code 2013

IV. Obligation of the wife

§ 115 management of the common household

§ 116

- housework

- supporting the husband in his work

- but she also obliged to earn independently and to contribute to the marriage expenses from her income, if their living conditions so require

V. § 113 Maintenance of a wife

IV.

§ 24 mutual support, working for the common good

V. § 113 mutual right and obligation for maintenance

5th Draft of Civil Code 1928

VI. the right and obligation of the surviving spouse to bury his or her spouse according to his or her social status.

VII. the spouses may enter into a legal transaction between themselves or with others which is permitted to others and is not contrary to the essence of the marriage. This also applies to betrothed couples.

Conclusion:

1. No Munt
2. Full legal capacity or personal and financial autonomy for the woman
3. But the traditional family model, in which the husband is the head of the family, has survived.

Civil Code 2013

-> -

-> evidence, property law issue

Conclusion:

1. Ensuring equal rights as far as possible.
2. The question is to what extent this has been implemented in social relations and whether the mindset has changed.

de Juribus foemineis
(survival of the traditional law before 1952)

- **Daughter quater / de quartalio seu quarta puellari**
- **Right of the widow / de Jure viduali**
- **Statutory or contractual widow's gift / dos scripta vel contractualis**
- **Husband's gift / contrados**
- **Participation from the common property / de coaquisitione conjugali**
- **Dowry and marriage gift / de allatura et parapherno**
- **Right of the girl child to marry off / de Jure capillari**

**Matrimonial
property law
5th Draft 1928**

**Matrimonial
inheritance law
5th Draft 1928**

Statutory matrimonial property regimes in Europe

REGIMES BASED ON COMMUNITY OF PROPERTY

<->

REGIMES BASED ON SEPARATION OF PROPERTY

Germanic model
(Gütergemeinschaft)



1. general community of property
(NL)

2. partial community of property
(B, F, Lux, Port, I, E)

the countries of the former Soviet bloc

Roman model
(Gütertrennung)



1. dotal regime

2. management „community” regime

3. postponed „community” of property
(Zugewinnngemeinschaft in Austria)

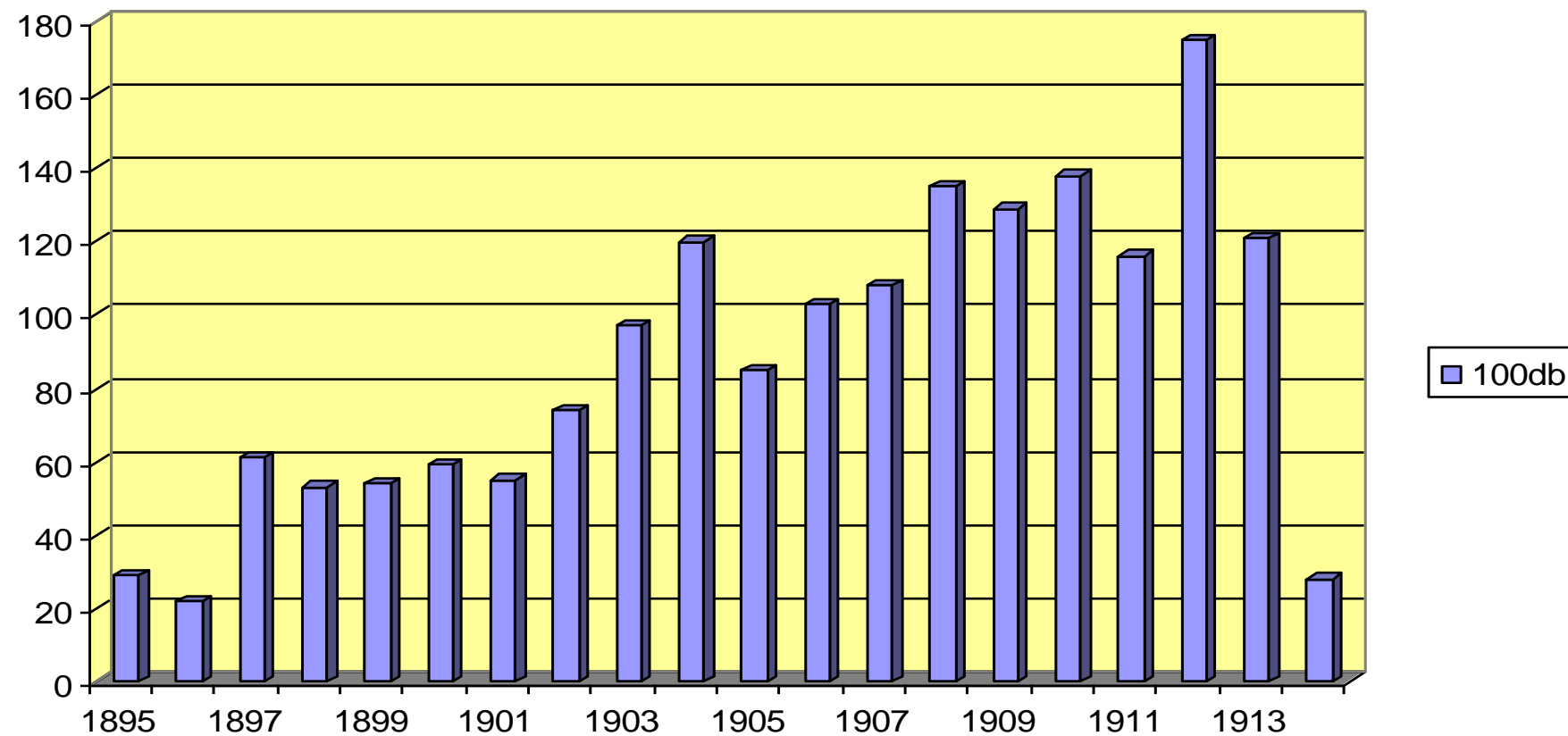
4. participation from acquisitions
(Zugewinnngemeinschaft in Germany)

5. separation
(England, Wales, Ireland, Scotland, Espania)

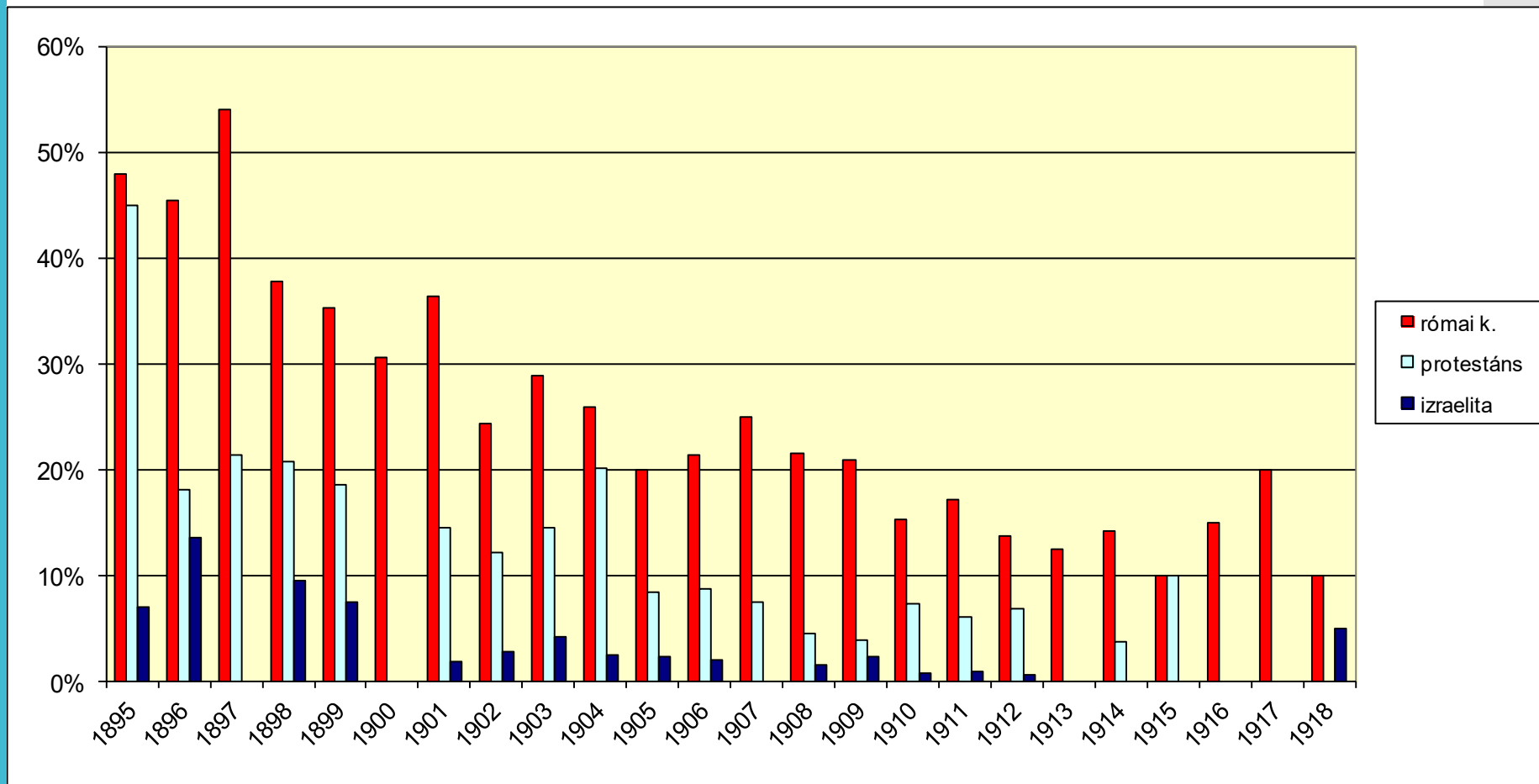
	Confessional laws	Marriage Act 1894	Decree 1945	Family Law Code 1952
subjective (fault-based) divorce reasons	adultery	adultery, sodomy, bigamy	same	-
	evil abandonment	intentional and unjustified abandonment	same	-
	attempt on your spouse's life	attempt on your spouse's life	same	-
	religious conversion	-	same	-
	imprisonment	Imprisonment at least for 5 years, death penalty	same	-
	adortion		-	-
objective divorce r.	incurable mental illness	-	5 years of separation incurable mental illness	
	mutual agreement	-	joint request	
irretrievable marriage breakdown	unforgiving hatred	wilful and serious breach of a marriage obligation imprisonment		serious and substantial reason

Number of
marriage
trials before
the Royal
Court of
Pécs
(1895-1918)

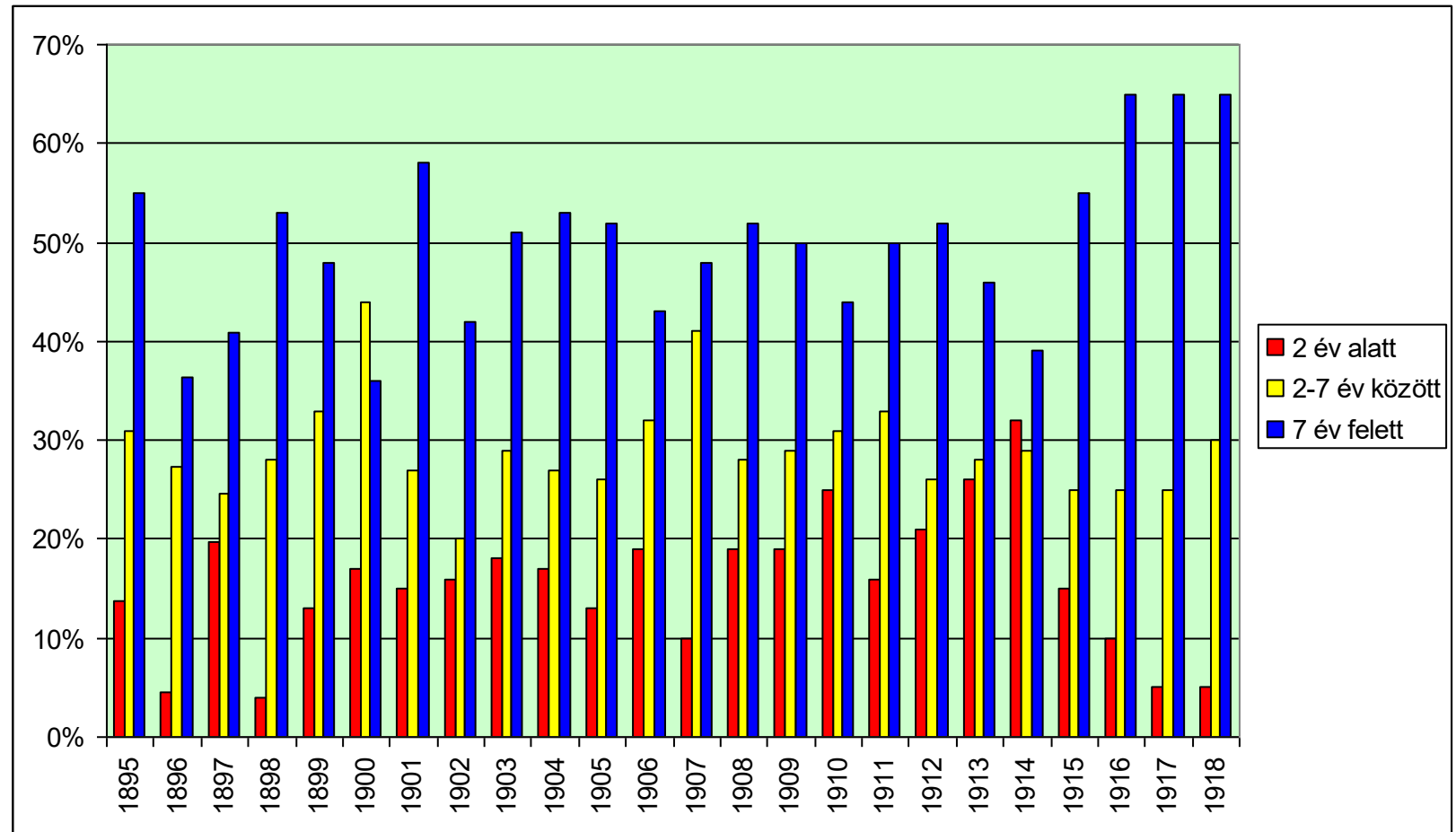
A pécsi királyi törvényszék előtt folyamatba tett házassági
köteléki perek száma (1895-1914)



Religious affiliation in marriage trials before the Royal Court of Pécs (1895-1918)

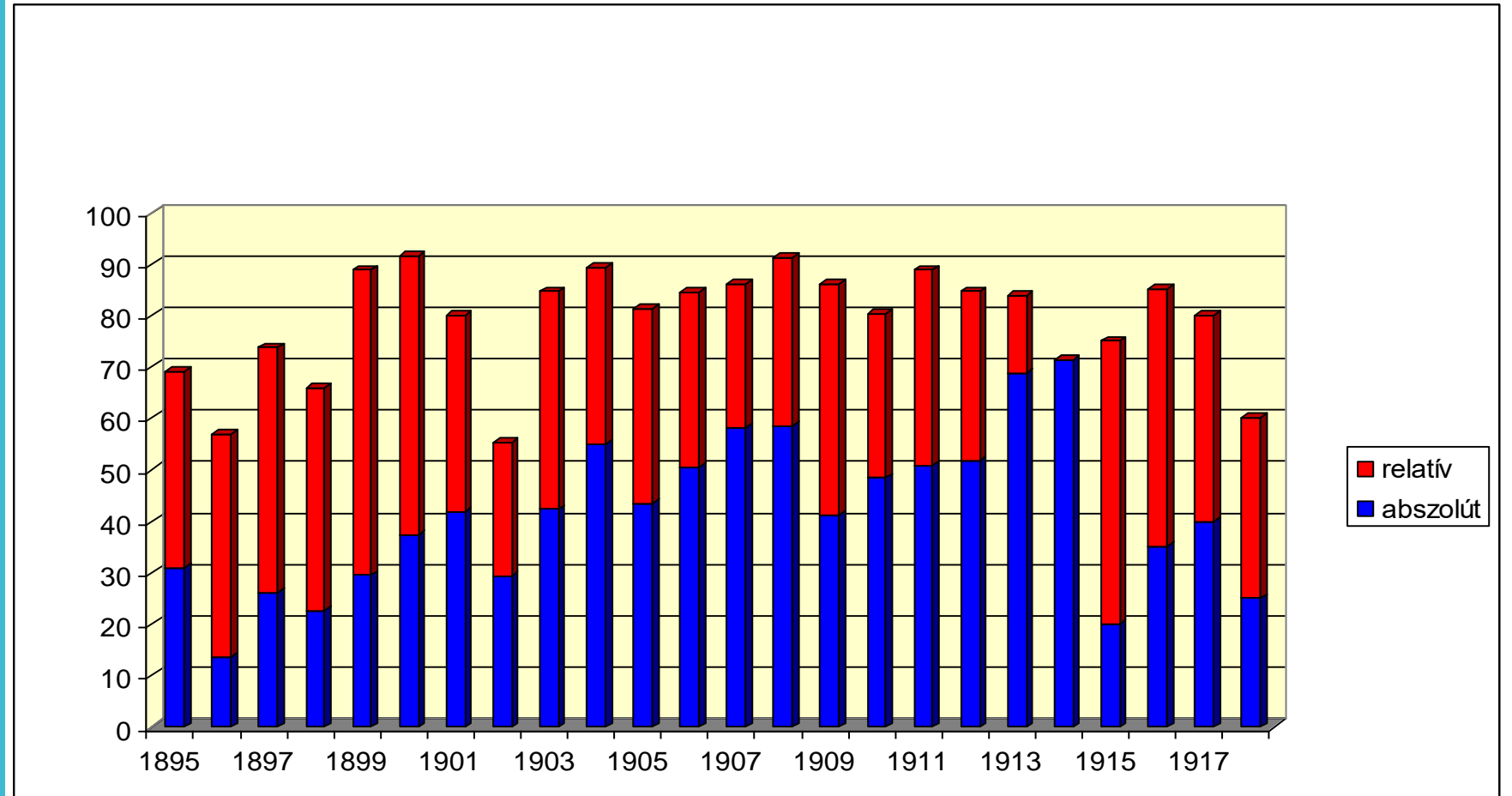


The time between the marriage and the divorce before the Royal Court of Pécs (1895-1918)



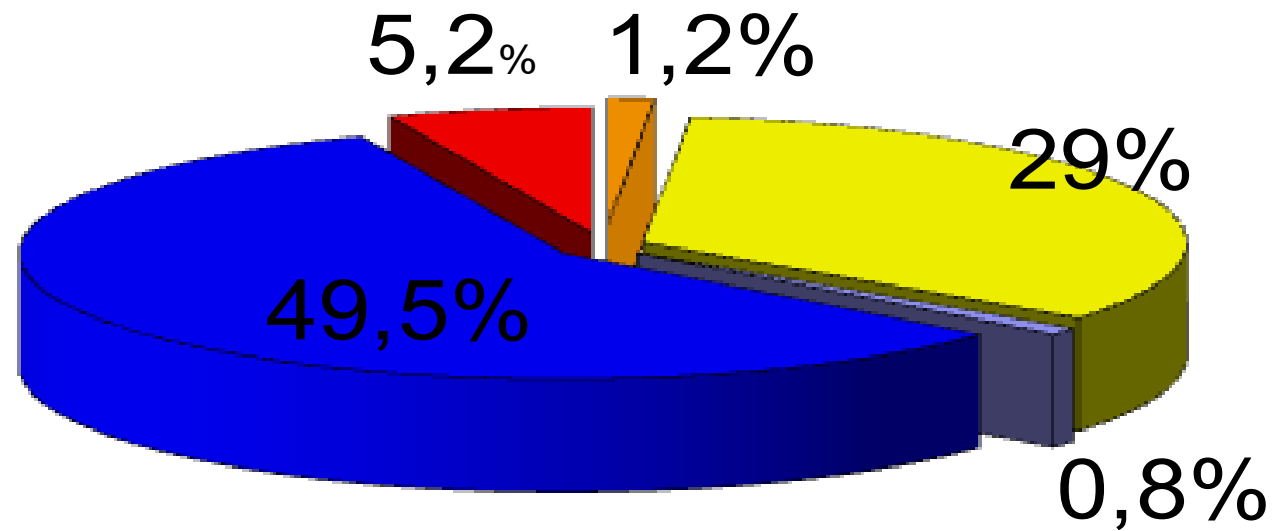
The proportion of
relative and absolute
divorce reasons
in trials before
the Royal Court of
Pécs
(1895-1918)

->hidden mutual
agreement



Distribution of
guilty by gender
before the
Pécs Royal Court
(1895-1918)

female defendant	49,5%
female plaintiff	0,8%
male defendant	29,0%
male plaintiff	1,2%





Is it legitimate to interfere **in the private sphere** through legislative means?

- family law: at the border between private and public law

- social law institutes

- public protection of children and youth

Is public power responsible for shaping **personal value judgements** and **collective value orientations**?

Is there a **balance** between interference and personal freedom?

Can **social crises** be solved by legal policy instruments?



Mediation in
Hungarian
Divorce Law
before 1952



Sources of historical comparison

I. Marriage Laws of the Denominations

Codex Iuris Canonici (1983)

Ordinance of Joseph II (6 March 1786)

Curial Ordinance (2 November 1863)

Marriage Act No. XXXI of 1894

Civil Procedure Code No. I of 1911

Civil Procedure Code No. III of 1952

II. Mediation Act No. LV of 2002

Civil Code No. V of 2013

Civil Procedure Code No. CXXX of 2016

Questions

What is the difference between mediation and consiliation?

Which types of consiliation were used in the Hungarian/European divorce law?

What about the efficiency of consiliation?

What can mediators learn from consiliators?



Some errors about consiliation

1. consiliation never did replace divorce
 - in the canon law it was one of the institutions to protect the marriage bond
 - it belonged to the group of principles called FAVOR MATRIMONII
 - it was used in Catholic canon law by DIVORTIUM PARTICULARE (separation from bed and table)
2. canon law protected the marriage as an especially important institution by reason of public interest
 - > that was the reason why consiliation survived in the Protestant confessional laws and in the secular divorce law as well
3. consiliation was used in fall of REPUDIUM (if only one spouse wanted the divorce) and not of DIVORTIUM (mutual agreement)

Basicly differences between consiliation and mediation I.

Consiliation

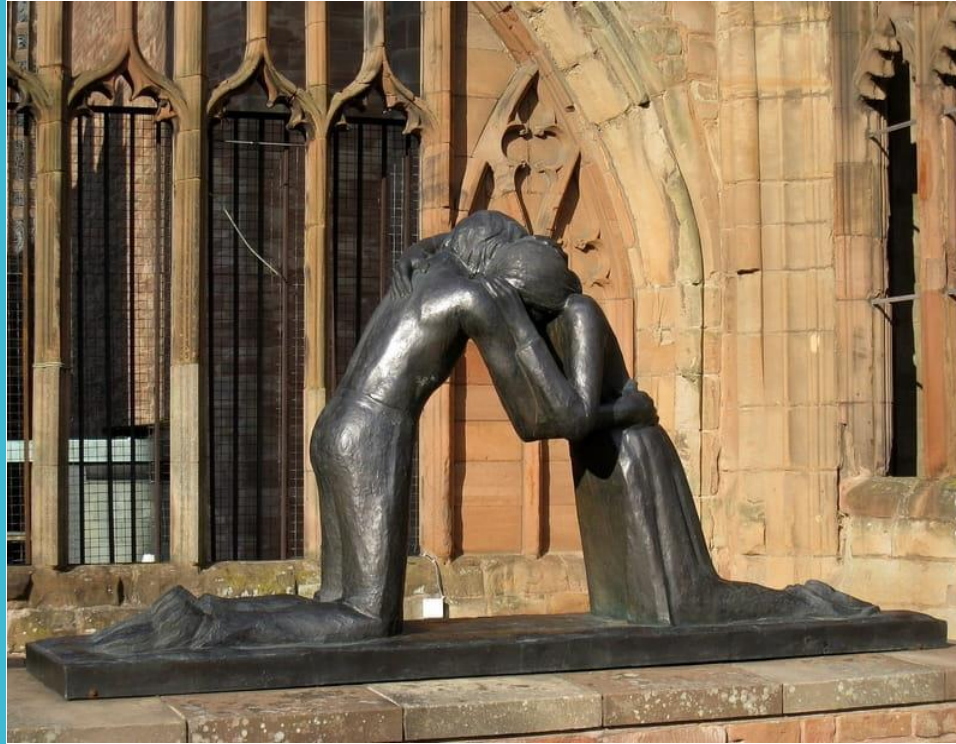
- Neutral third party: vicar
pastor
rabbi
judge
- No special communication
- No special negotiation techniques
- Goals:
 1. to resolve the marriage conflict
 2. to preserve the marriage bond

Mediation

- a dynamic, structured, interactive process where a neutral third party assists disputing parties in resolving conflict through the use of specialized communication and negotiation techniques
- Goals:
 1. In divorce cases to create a written settlement about the disputed questions
 2. It is possible that mediation helps to resolve the marriage conflict between the parties

Basicly differences between consiliation and mediation II.

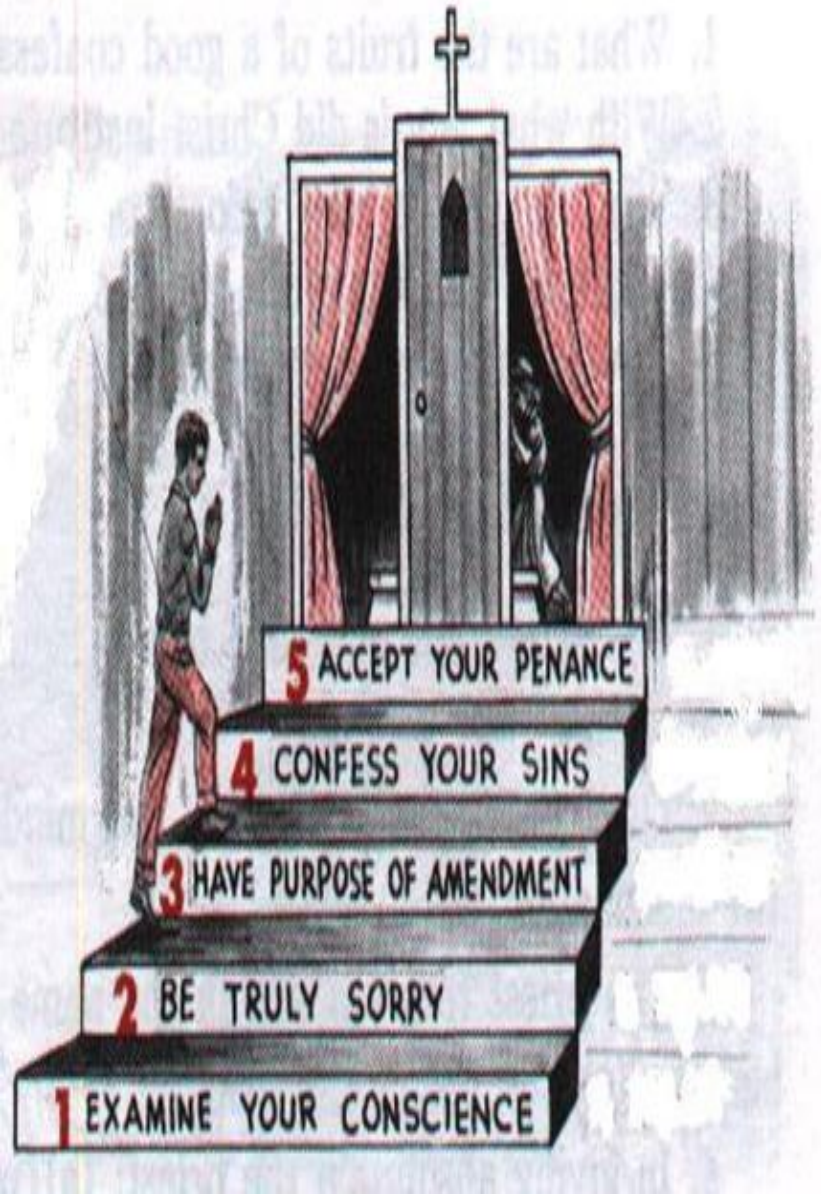
Consiliation -> compulsory



Mediation -> freely chosen

- Before or during the divorce process
 - from own decision or from initiation of the court
 - In questions of parental responsibility or contact between child and parent it can be ordered by court or guardianship authority
- > husband and wife must appear at the mediator
- > they will be informed only about the opportunity of mediation

Consiliation in the canon law



1. Divortium totate/processus vinculare
 - >marriage bond was „protected” by dispensation
2. Divortium particulare/separatio
 - >vicar conjured up the parties
 - >used special religious arguments
 - >informed the court
3. Claim of the confessional prosecutor against:
 - concubines
 - husband and wife living separate
 - adulterous
 - >the substance of these processes was the protection of a valid marriage

Consiliation in the Protestant and Jewish confessional law

- Proceeding belonged to state courts in matrimonial cases of Protestants and Jews in Hungary
- These judged by confessional material law but state process law
- Consiliation by pastor or rabbi was condition to bring an action for divorce
- Pastor or rabbi tried three times (!!) to consiliate the parties
 - >biblical marriage covenant
 - >faithfullness
 - >forgiveness
- Reasons of the parties had to be recorded by consiliator
- He wrote out a certificate about the insuccess of the consilitation
- The certificate had to be attached to the divorce action

A special institute of the Jewish divorce law: Get

(Moshe Rynecki, 1930)



- **Ketubah** (marriage document)
- **Get** (divorce document)
- Both have a contractual nature
- Get: may provide for matters such as
 - 1, custody of the children
 - 2, and their maintenance
 - 3, and property settlement
- > either party may withdraw from it, on the question of the dissolution of the marriage only, if they can satisfy the court of a desire to restore matrimonial harmony
- > in such a situation all the recognised matrimonial obligations continue to apply
- > pecuniary conditions stipulated by the parties in it would still be valid and enforceable, though the marriage state continues to exist
- > reason: interpretation of marriage as covenant

Case of Júlianna T.v. János S.

Pécs, 1872-1879

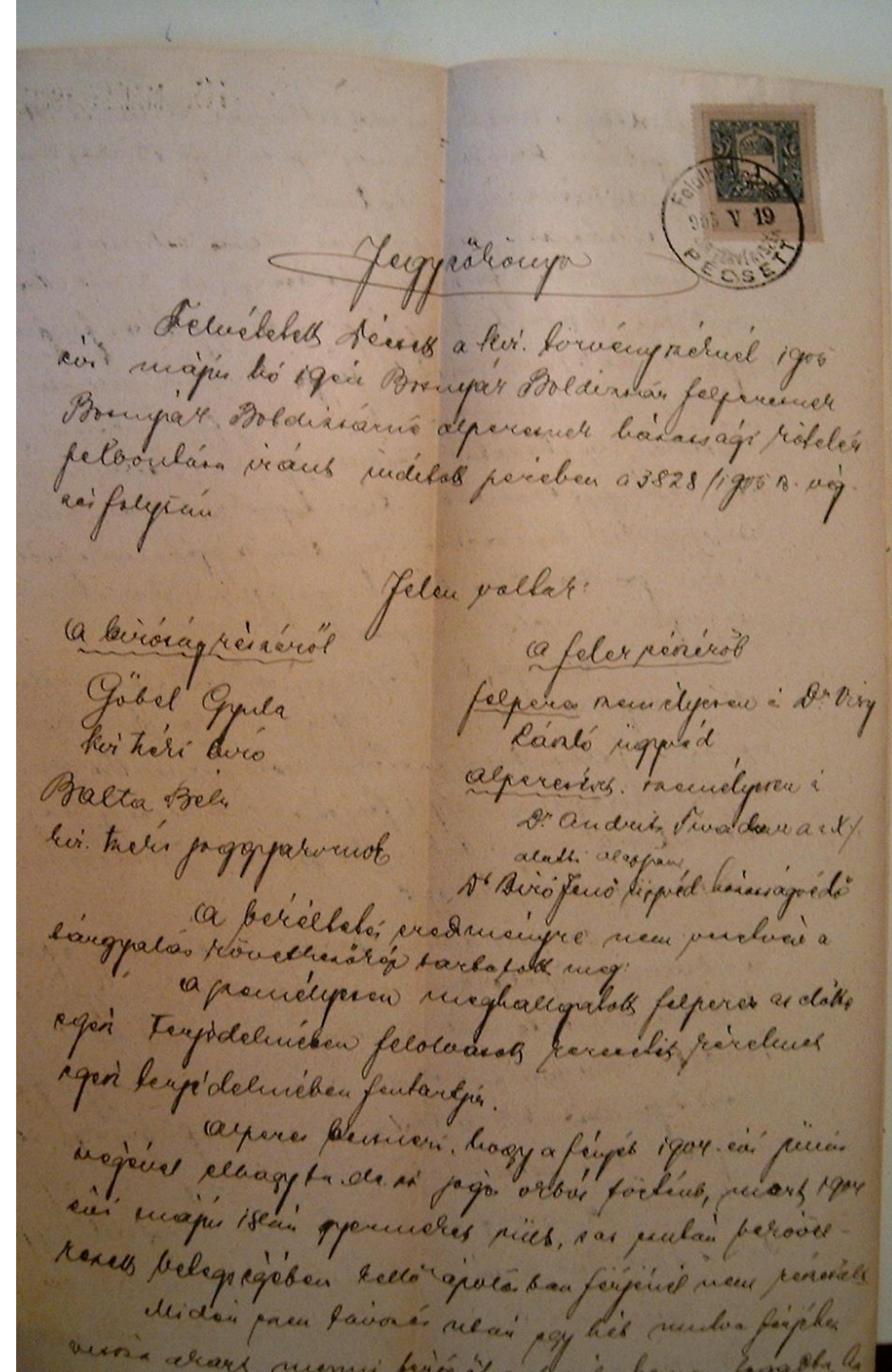
- Parties married 1869, Haraszti
- Evangelica reformata
- **1872: 1th divorce action**
 - divorce causes: 1. adultery
 - 2. unforgiving hate
 - no minor children /property vindication
 - attached certification about the pastoral consiliation (3*) and about the court consiliation (1*)
 - adultery was not witnessed
 - > claim was dismissed by the royal court
 - royal tribunal:
 - separation for 2 month for reconsiliation
 - if they would not reconsiliate during the separation, the court consiliation ought to be repeated
 - royal Curia: affirmed this judgement
- **1879: 2nd divorce action**
 - >separation and the repeated court consiliation did not lead to reconsiliation
 - >legally binding divorce judgement of the royal Curia: 1879



Consiliation in Marriage Act 1894

„I don't love my
wife anymore and I
will not reconsiliate”

- No confessional consiliation
 - Compulsory court consiliation after bringing an action
 1. when the validity of the marriage bond was contested
(no consiliation by nullity processes)
 2. by separation from bed and table
 3. by divorce processes
- > court consiliation was not efficient
- kept on the 1th hearing
- simple question
- simple answer with a short motivation



Civil Procedure Code 1911

Sándor Plósz

„There are two important principles in front of each other: the private autonomy of the parties and the state interest. The second means that we have to preserve the marriage preferably.”

Types:

1. Previous court consiliation **before** bringing the claim
not compulsory
parties were heard together, without accompanying
2. Previous court consiliation **after** bringing the claim
compulsory
if there was no 1th type of consiliation more than 30 days expired since the 1th consiliation
3. Court consiliation **during** the process
compulsory
there was not permitted to held hearing on the day of the consiliation
the judge could order the repeating of the consiliation



What can mediators learn from consiliators?


- Goal of consiliation
 - parties should be very sober-minded
 - divorce should be only the last get-out from a wrong marriage
- Conclusions
 - return to the consiliation is unnecessary
 - confessional mediation was the most efficient type in the past
 - church service can function as voluntary mediation today also
 - >they can really help to dissolve the marriage conflict not only to reserve the marriage bond

Changes in Family Law II


The development of state child protection in the age of modernisation.



The interpretation of children's rights. Changes in the status of legitimate and illegitimate children from traditional law to emancipation.



The enforcement of the "best interests of the child" in the Hungarian divorce law.



The "best interests of the child" in the regulation of parental custody

Kinship (cognatio)

- Traditional social structure:
extended family -> clan
- Community of property
„communio sanguinis et juris”
-> community of blood and rights
division of community property (divisio)
-> each male descendant is also entitled to the property of the other male descendants
-> fratres condivisionales
- Types of kinship
 1. cognati (on the female side) / agnati (on the male side) -> born from valid marriage
 2. ascendentes – descendentes / collaterales
 3. full relationship / half relationship
 4. affinitas
- Degrees of kinship
->a Germanic canon law (how many degrees of descent link the descendant to the common ancestor)

Paternal power (patria potestas)

-> in the extended family and in the undivided (noble) family, the cohesive force is paternal authority

-> a symbol of legal collectivism

- content:

1. Child rearing
2. Domestic discipline
3. He could give his son as a surety for himself, demand him back from everyone
4. Representation of family members
5. If his son died before class (division), he became the guardian of the grandchildren
6. The father administered the property of the deceased mother until the sons' heirs reached the legal age and the daughters were married
7. He marries off his daughters
8. Administration of undivided family property

no obligation to account

limited right of disposal: with consent of sons, except in case of necessity of last resort

father and sons are co-owners (not in a position of succession)



The birth of Vajk
in the Pictorial Chronicle

„Division

The father hands over in kind to the heirs the property left by the first wife, Margit Molker, as a maternal inheritance, valued at HUF 2.945;

Half of the value of land valued at HUF 120 of the common property will be handed over after auction, while half of the value of other property valued at HUF 3,777 50 will be handed over immediately in cash;

Finally, further real property is transferred "irrevocably, with ownership right, but with the right of usufruct until death" to his legal descendants immediately, with the obligation to keep the building in good repair.

In return, the heirs waived all further claims and allowed their father or grandfather to make a free will". Pécs 1863



Guardianship (tutela)

I. until the 13th century

- Representation and care of orphans carried out by the male members of the community of undivided property
- The community of property of brothers/cousins often survived the division
- > no need for guardianship

II appearance of guardianship in 13th century

- Minor orphaned child has a guardian
- The closest male relative / relatives on the paternal side
(they would be entitled to inherit after the child)
- Maternal relatives on the maternal line are the guardians if the child is orphaned in the paternal line
- Guardianship is a right, not a responsibility
 - > asset management
 - > no accounting

III. Guardianship in the traditional customary law (1514 – 1715)

- **Tripartitum I. 112.**
- "Guardianship is a power rightly given and granted for its protection, who, not being of full age, cannot defend himself."
- The reason for the guardianship: inheritance of the property, i.e. not personal protection
- Acting in good faith and with the best interests of the minor in mind
- No detailed rules

-tutor testamentarius

this could be protested by the nearest male relatives
fraud

-tutor legitimus

1. the surviving parent until remarriage
2. the closest heir of the child

-tutor dativus -> from the end of the 16th century
(royal / municipal / landlord order)

IV. Guardianship from 1715

Reason for the creation of the Guardianship Office:

- multiple guardianship in a will
- in case of dispute, the noble county / city decides

Act LXVIII of 1715

"for the relief of the miserable and almost neglected condition of orphans, and for the provision of guardians and caretakers for them"

- In the event of orphanhood, the relatives are obliged to inform the deputy bailiff of the county where the orphan's property is located
- Inspection of the premises (deputy bailiff, slave judge, jury with relatives)
- Inventory -> submission to the next county assembly
- The general assembly appoints a guardian from among suitable persons
- The guardian shall prepare an annual account
- Guardian's fee (1/6th of the annual income of the assets managed)
- If he fails to fulfil his duties, he is dismissed and receives no remuneration
- Orphan is under guardianship until legal age, cannot dispose of property

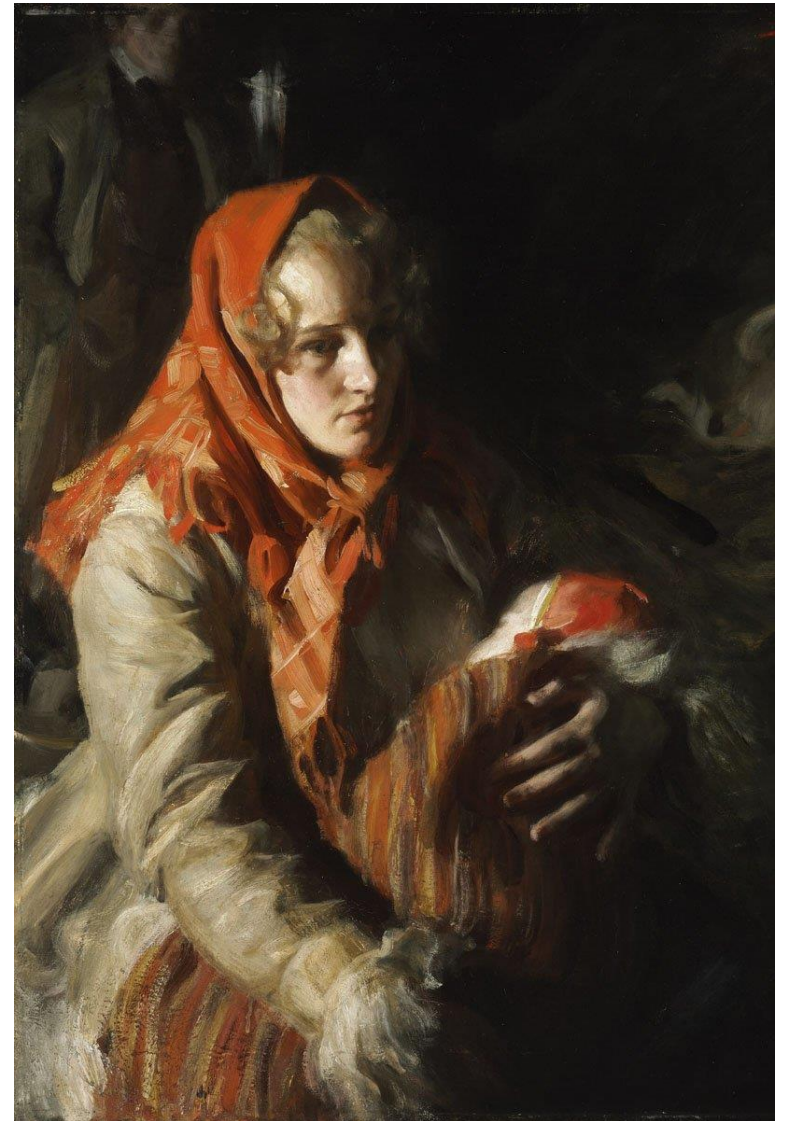


Orphans and abandoned children church care homes

- **Pietist orphanage in Nemescsó 1740**
- **Catholic orphanage in Kőszeg 1741**

The development of state child protection in the age of modernisation

1. mercantilism -> the welfare of the state also depends on the population
 2. extreme infant mortality
 3. the potential of illegitimate children is exploited by the state and the economy
- Vienna: setting up a maternity hospital as part of the general hospital system
 - Decree of 8 September 1784, § 5
- > officials are instructed that parents of girls should inform their children that, even though they became pregnant out of wedlock, it is no longer a public shame





Children's home network in Hungary for about 2000 orphans (1750)

- 9 state-run children's homes
- 4 county children's homes
- 18 municipal orphanages
- 45 church orphanages
- 29 association children's homes

Act XX of 1877

- > Uniform regulation of guardianship

Act XXII of 1886

- > the municipality is responsible for the care of abandoned children

Act XXI of 1898

- > rescuing abandoned children is a public duty
- > the state supports the upbringing of orphans up to the age of 2



**Act VIII and XXI
1901 on child's
protection
institutions**

- foster homes set up for the purpose of public care
- public orphanages
- correctional institutions for neglected children and juvenile offenders
- foster care network (from birth to 7 years)

„angel making”



- abortion
- taking newborn babies into care
- special education network
- church and civil associations for child protection

Adoption

ÖRÖKBEOFAGADÁSI PÓTSZERZŐDÉS,

mely egyrésztől Gerber János építőmester budapesti (Váci-út 102. sz. a.) lakos mint örökbefogadó, másrésztől Gerber Mihály budapesti (Lehel-u. 45. sz. a.) lakos m. kir. pénzügyőri felügyelő mint örökbefogadott között a mai napon a következőkben kötött:

1. Gerber János a Budapesten 1921. május 12-én kötött Budapest székesfőváros árvaszékének 1808/árv.—1921. sz. véghatározatával gyámhatóságilag jóváhagyott és a m. kir. igazságügy-miniszter úr 1921/J. 43.515. I. M. sz. rendeletével megerősített örökbefogadási szerződéssel örökbefogadta Stocker Károly és neje sz. Murber Erzsébet szülőkétől Budapesten 1911. szeptember 6-án született Mihály utónévű gyermeket, aki az örökbefogadási szerződés rendelkezései értelmében a Gerber családnevet volt köteles és jogosult viselni.

Az örökbefogadott Gerber Mihály az eltelt idő alatt nagykorúvá vált, állami szolgálatba lépett és óhajtása az, hogy az örökbefogadás folytán nyert családnevét magyaros hangzású családi névre változtathassa, családnevét azonban egyoldalúan megváltoztatni addig nem állt módjában, amíg az örökbefogadási szerződésnek a névviselést szabályozó rendelkezése hatályban van.

2. Mindezekre tekintettel fentebb megnevezett szerződő felek egybehangzóan és kölcsönösen kijelentik, hogy az örökbefogadási szerződésnek a névviselésre vonatkozó rendelkezéseit hatályon kívül helyezik, ennél fogva az örökbefogadott visszanyeri eredeti Stocker családnevét, a jövőben a Gerber családi név elhagyásával a Stocker családnevet lesz jogosult és köteles viselni, egyúttal pedig az örökbefogadó apa már most kijelenti és beleegyezését adja ahhoz, hogy örökbefogadott fia az ily módon visszanyert Stocker családi nevét tetszése szerint megváltoztathassa.

3. Szerződő felek kijelentik, hogy az örökbefogadási szerződésnek itt nem érintett egyéb rendelkezései továbbra is érvényben maradnak és hogy ezen pótszerződés a kormányhatóság megerősítése után lép hatályba, ennek megtörténteig a pótszerződéstől egyoldalúan egyik fél sem léphet vissza.

Kelt Budapesten, 1941. szeptember hó 5-én.

Gerber János s. k.

Gerber azelőtt Stocker Mihály s. k.

- a means of caring for an heir, not a means of keeping a child in the family
- contractual relationship
- predominantly adoption of adults
- adoption of a minor with parental consent
- partial legislation
 - Act XX of 1877
 - curia decisions
- formal approval
- continuity until 1952

The interpretation of children's rights

Changes in the status of legitimate and illegitimate children from traditional law to emancipation

Origin of the Children's rights in the Western tradition

- 1989 Convention on the Rights of the Child (CRC)
- 1924 Geneva Declaration of the Rights of the Child
- 1959 Declaration of the Rights of the Child
- 1948 Universal Declaration of Human Rights
- 1966 twin covenants on civil, political, and cultural rights

Priority of the natural family I

- **Aristotle (384-322 BCE)**
 - “kin altruism”
 - human “have a natural desire to leave behind them an image of themselves”
 - in the state that separated natural parents and children, filial love would become “too dilutes”
- **Thomas Aquinas (1225-74)**
 - humans are “family animals” before they are “political animals”
 - parentage is not just a natural inclination and duty, aimed to perpetuate the human species in general and one’s own family in particular
 - parentage engenders a Christian privilege and responsibility to participate in the creation of God, to cultivate the uniquely human qualities of children

Priority of the natural family II

- **other medieval theologians and jurists**
 - special care and “justice for the fatherless” and orphan children
 - as the Old Testament, so Jesus warned against harming or misleading children
- **children’s rights in the canonic law**
 - right to life and the means to sustain life;
 - right to care, nurture, and education,
 - later right to contract marriage or to enter into a religious life;
 - right to support and inheritance from biological or adoptive parents
 - illegitimate children: rights to oblation in a monastery or legitimation
 - poor children had special rights to relief or shelter
 - abused children had special rights to sanctuary and foster care
 - abandoned or orphan children: right to adoption / to founding houses and orphanages.
- **early modern Protestant and Catholic polities alike slowly absorbed into the state system of family law born after the Reformation**

Paternal or parental authority?

“conjugal society”

„Children, I confess, are not born in this full state of equality, though they are born to it. Their parents have a sort of rule and jurisdiction over them, when they come into the world, and for some time after; but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapt up in, and supported by, in the weakness of their infancy: age and reason as they grow up, loosen them, till at length they drop quite off, and leave a man at his own free disposal.”

John Locke (1632-1704)

**The Two Treatises of Civil Government
Thoughts Concerning Education**

Protestant natural lawyer about the children's rights

- **Mary Wollstonecraft (1759-97)**

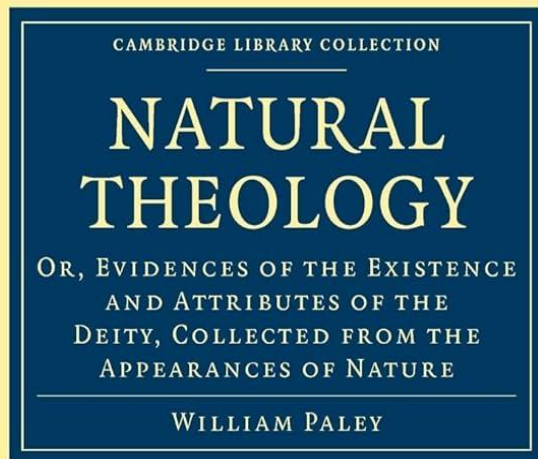
- defense of the traditional family as the ideal place to have and raise children
- “cascade of duties and rights concerning children”
- “natural justice”
- “most sacred duties”

- **William Paley (1743-1805)**

- public education for every child

- **William Blackstone (1723-1780)**

- matrix of natural rights and duties of parents and children
- duties of parents are the correlatives of the rights of children to receive support, education, and care, which continue even after divorce /the parents die



CAMBRIDGE

New approach

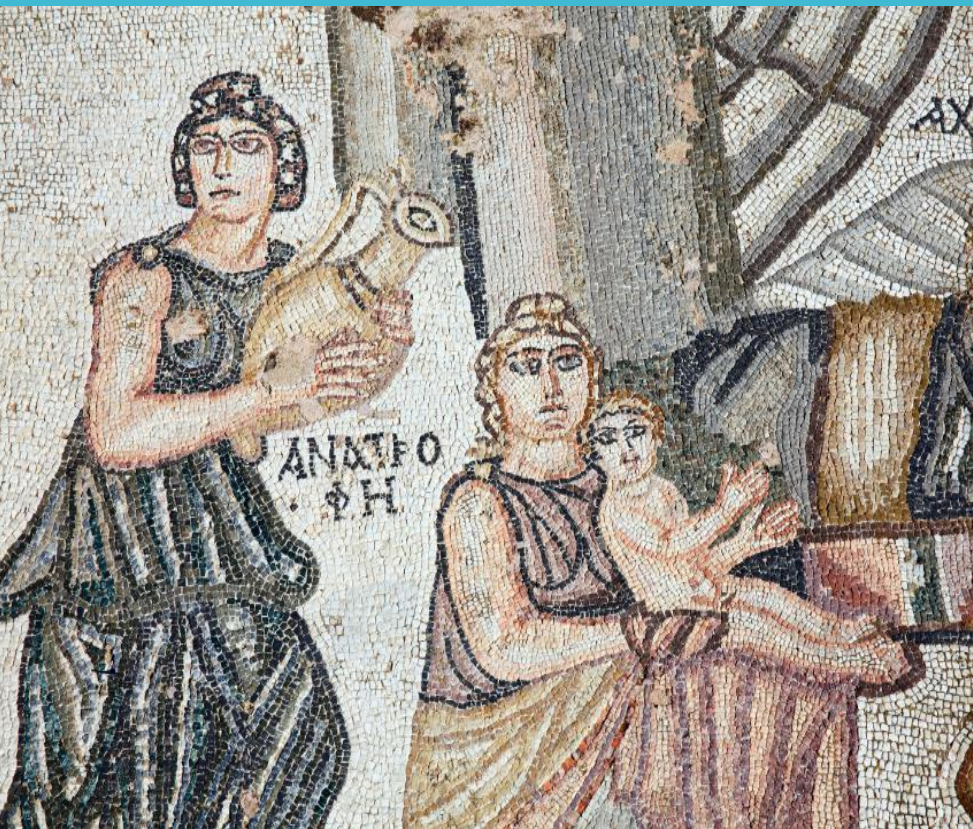
I. personal and property rights of so-called legitimate male and female children with a view to eliminating gender inequality

II. legal relationship of so-called illegitimate children to their mothers, natural fathers and their relatives

Children's rights in Hungarian legal development

- failure of the 1795 draft private law code
- natural lawyer protected the traditional family as optimal place of having children
- Sámuel Dienes: Baron Martini's statement on natural law, 1792
- Benjamin Nánásy: The will according to the Hungarian laws, 1798
- Benjamin Nánásy : The legal, ordinary heir of the Hungarian citizen, 1799
- János Herepei: The rights of women, 1797
- Sándor Kövy: A brief summary of Hungarian laws for children, 1798

Domestic abuse



Michael McGarvey beating his Wife to death.

The possibility
of using the
native legal
language and its
impact between
1805 and 1844

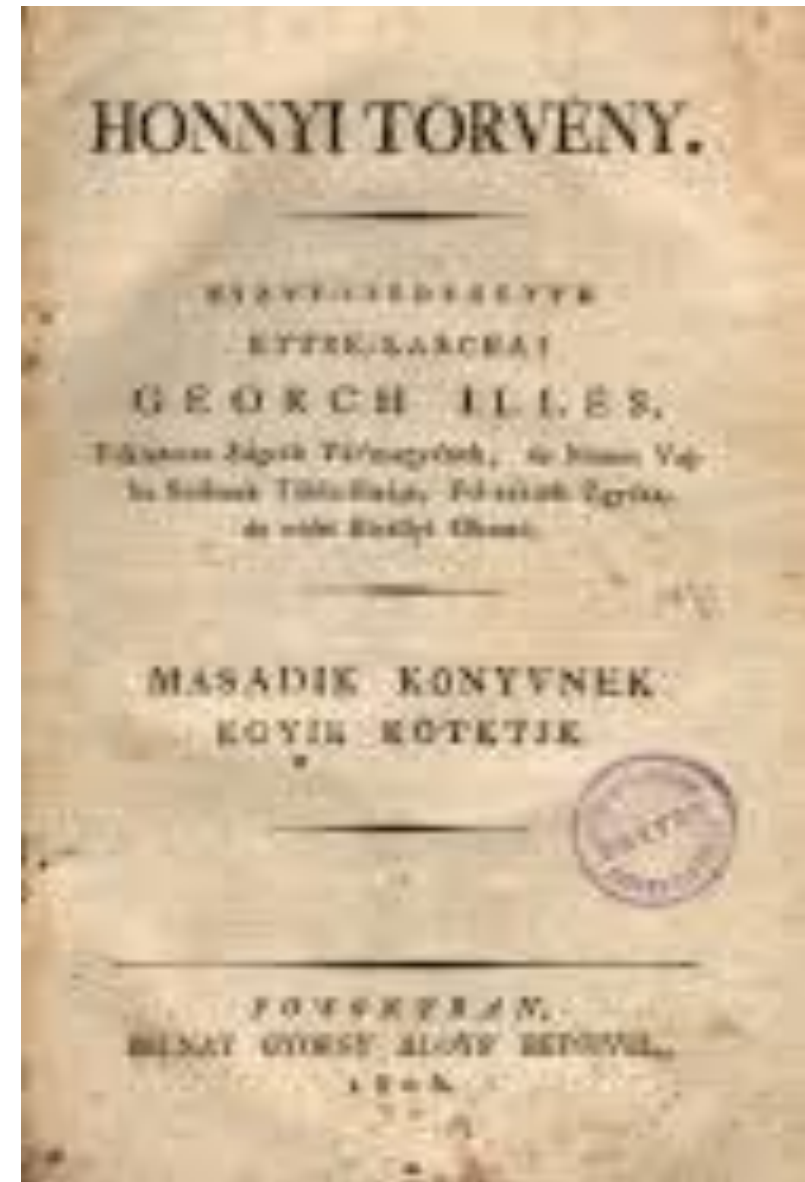
I. Act IV of 1805

II. Dictionaries

- Baranya, Zala, Veszprém
- Private individuals
- Royal High Court 1837
- chancellery 1845

III. Legal literature

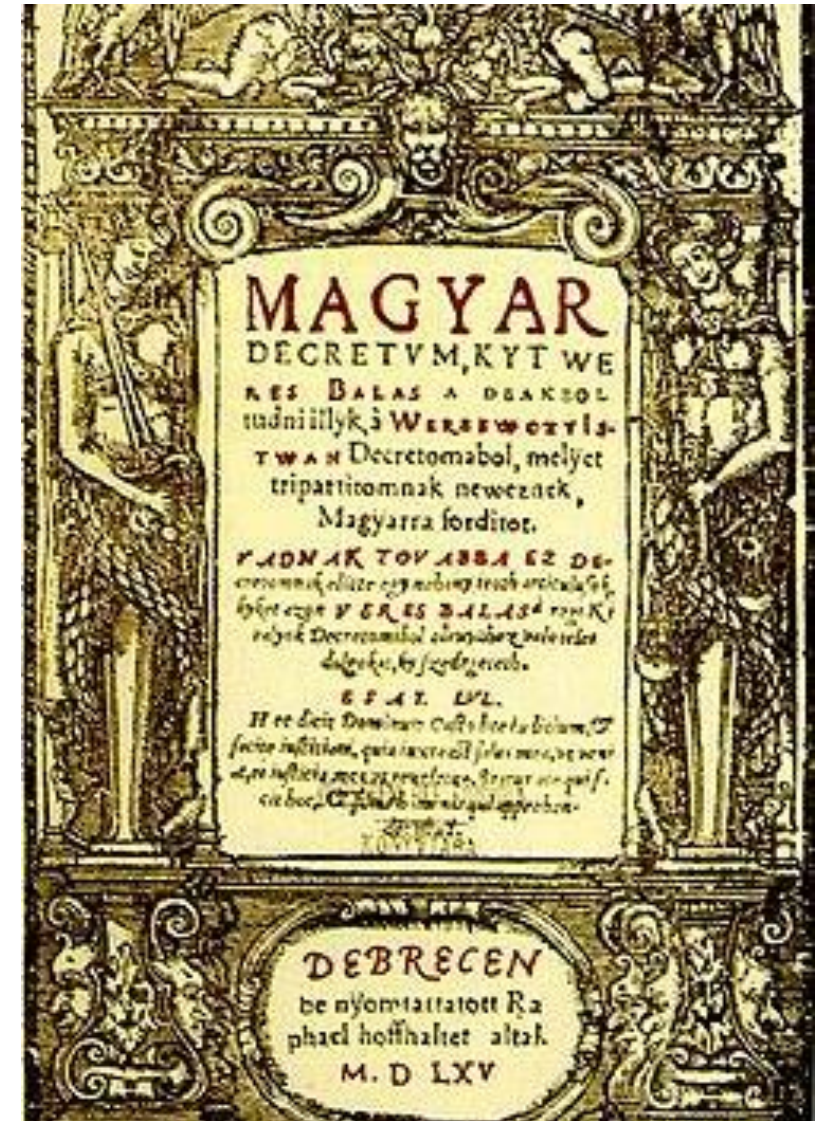
- Illés Georch, 1804
- Pál Szlemenics, 1823
- István Czövek, 1822
- Sándor Kövy, 1822
- János Alsóviszti Fogarasi, 1837/39/62
- János Újfalusy Nepomuk, 1825
- László Soosmezei Vajda, 1830



Equal rights of female children

István Werbőczy's law book, the Tripartitum (1517)

- a child became a member of the family community if the father's will so directed he/she was born in marriage or legitimized
- among legitimate children, girls were freed from paternal authority only by marriage if their fathers had died earlier, the boys were under guardians until they reached the legal age, but the girls, being considered of easy mind, until they were married
- personal and property autonomy of married and widowed
- daughters of serfs inherited in equal shares with their sons after 1840



Pro memoria

January 17, 1825

- I, István Fábián, a resident of Kis-Sentmárton, (...) have entered into this indissoluble agreement with my daughter Anna, her husband, my son-in-law János Toth, from Vaszjló to my house: after the death of my wife and myself, my house and all my property shall be his.
- And the other half of my goods, since I need another son-in-law, shall go to the daughter, who will be the second one to marry. (...)
- As I have no need of more sons-in-law, my third daughter, that is, the last to be married, shall go out of the house. (...) she will receive 80 Ft in money and a belly of beef. But if she either does not want to marry (...) the two sons-in-law shall have her share, but they shall maintain and clothe her until her death.
- (...) if my son-in-law John of Toth leaves me, he shall receive nothing;
- (...) and if my daughter should die without seed, and my son-in-law should not like to remain in my house, he should get a steer of a year old with a calf. (...)
- And as long as I am the manager of my house, I shall require that both I and my wife shall be honoured until we die, and if we are weak, that we shall be maintain in need, that these things may be so, I will, and will have it so.

István Fábián

Anna Fábián

3 witnesses

Hungarian women's movement

Dezső Márkus: - women's equalization
- problems of the socially deprived people
- legal status of children born out of wedlock

Drafts of Civil Code in Hungary (1900 –1928)

Jogtudományi Közlöny (Legal Gazette)

Ügyvédek Lapja (Lawyers' Journal)

-> encourage the courts applying customary law to adopt a more favorable attitude towards illegitimate children.



Illegitimate or legitimate child

- Legitimate status:

1. Child born to married parents (the husband can contest the legal parentage of the child)
2. marriage after the birth of the child / paternal acknowledgement
3. by a final court judgment (birth within 300 days of the dissolution of the marriage)

"I, János Roßner, swear by the one living God that I have not had sexual intercourse with the mother of natural child Schleicher András (i.e. the plaintiff), born on 5 January 1868, during the 10 months counted backwards from the birth of the child, as the time limit for procreation. So help me God."

->Use of the so-called substitute oath as evidence in a suit for the recognition of paternity (Pécs, 1873)

Statutory inheritance of illegitimate children

Austrian Civil Code in force in Hungary (1853-1861)

ITSZ (1861): partially restored Hungarian law

from the 1870s onwards, case law recognized the right of inheritance of a child born out of wedlock to the mother even if the woman had legal descendants.

Royal Curia ruled in 1905 (6059/1904) that "the illegitimate child is entitled to inherit the father's property, regardless of whether the father has a legitimate child"

Dezső Márkus: punishing a child for life for the sins of the parents is inhumane, unfair and unjust



Legal status of minor children born in and out of wedlock regarding maintenance

- Act IV of 1952 on Marriage, Family and Guardianship
- customary law
- Act XX of 1877 on the Matters of Guardianship
- Act XXXI of 1894 on Matrimonial Law
- Prime Ministerial Decree
- 5th Draft of Civil Code (1928)

Antal Almási



- Equality in family status, but NOT in the form and content of all relevant legislation (custody, parental authority, maintenance)

- **Principle 1**

- to end discrimination on the basis of the origin of children
- the name should not express an evaluation
- born out of wedlock / not born out of wedlock

- **Principle 2**

- have equal status
- a relationship of kinship is established with the father and his relatives
- the relationship of succession between the relatives of a child born out of wedlock is reciprocal
- presumption of legal descent extended every child from the presumed and invalid marriages

- **Principle 3**

the relationship between a child and its father is in principle the same (not enforceable)

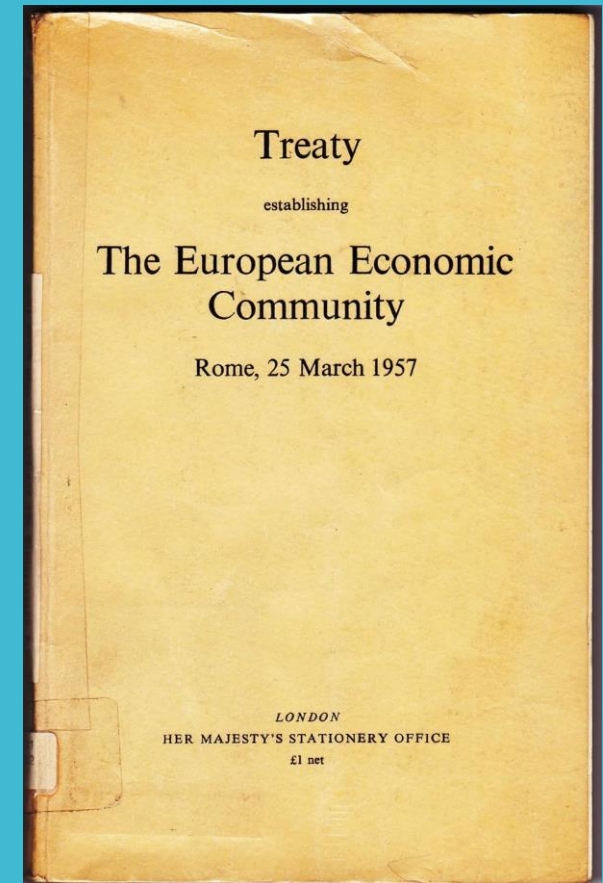
- **Principle 4**

registration of an imaginary father after the age of 3 (guardianship)

Act
XXIX
of
1946

A Conservative Version of European Family Law Thinking

Treaty of Rome establishing the European Economic Community,
signed on 25th March 1957



Is there a case for conservative family law in Europe?

Right to life versus
liberalising the right to abortion



depopulation

Freedom to choose
the legal form of living together



polarisation of society

same-sex marriage



reduction in the number
of children born

'Standing together is our best chance to (...) defend our common interests and values' and 'Taken individually, we would be side-lined by global dynamics.'

'We have built a unique Union with common institutions and strong values, a community of peace, freedom, democracy, human rights and the rule of law, a major economic power with unparalleled levels of social protection and welfare.'

Rome Declaration

signed on 25th March 2017

The legal
justification for
conservative
family policy

and

the protection of
human rights

- Family law is the set of rules of the legal system which
 - (1) regulates personal and property relations
 - (2) arising out of marriage, the family and family-like legal relationships
 - (3) within the limits of state control, but
 - (4) respecting the individual rights of the person and
 - (5) the principles of equality.
- article 8 (Right to respect for private and family life) *‘(1) Everyone has the right to respect for his private and family life (...). (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’*

European Convention on Human Rights (Rome 1950)

Right to life

versus

liberalising the
right to
abortion



A fresco depicts Romulus and Remus, the mythical founders of Rome, being abandoned by a river. Exposing infants was a socially accepted practice in ancient Rome.



A 14th-century miniature painting portrays a Christian baptism, which granted a kind of social personhood to babies in medieval Europe.



Protection in constitutional / family / criminal law

'pregnancy may be terminated only in the event of danger or in the event of a serious crisis of the pregnant woman, under the conditions laid down in this Act' (§ 5, 1)



- "fetal life at conception deserves respect and protection;
- the protection of fetal life can be achieved by providing increased care for pregnant women,
- ensuring conditions for the healthy development of the fetus is the primary responsibility of parents;
- abortion is not a means of family planning and birth control;
- family planning is the right and responsibility of parents".

Act on the Protection of the Life of the Unborn Child

(Act No. LXXIX of 1992)

"The medical report presented shall record that the pregnant woman has been presented by the health care provider with a clearly identifiable indication of the fetal vital signs of the foetus."

2022

- *'a serious crisis situation is one that causes physical or mental distress or social impossibility'*
(§ 5, 2)

Penal Code (§ 163): unlawful abortions

1. artificial termination of pregnancy
-> health /life of the pregnant
2. protection of the foetus under constitutional law
-> the purpose of unlawful termination of pregnancy is the destruction of the foetus.

Freedom to choose the legal form of living together



'Hungary protects the institution of marriage as a community of life between one man and one woman, based on voluntary decision, and the family as the basis for the survival of the nation. The family relationship is based on *MARRIAGE* and the *PARENT-CHILD RELATIONSHIP*. The mother is a woman, the father a man".

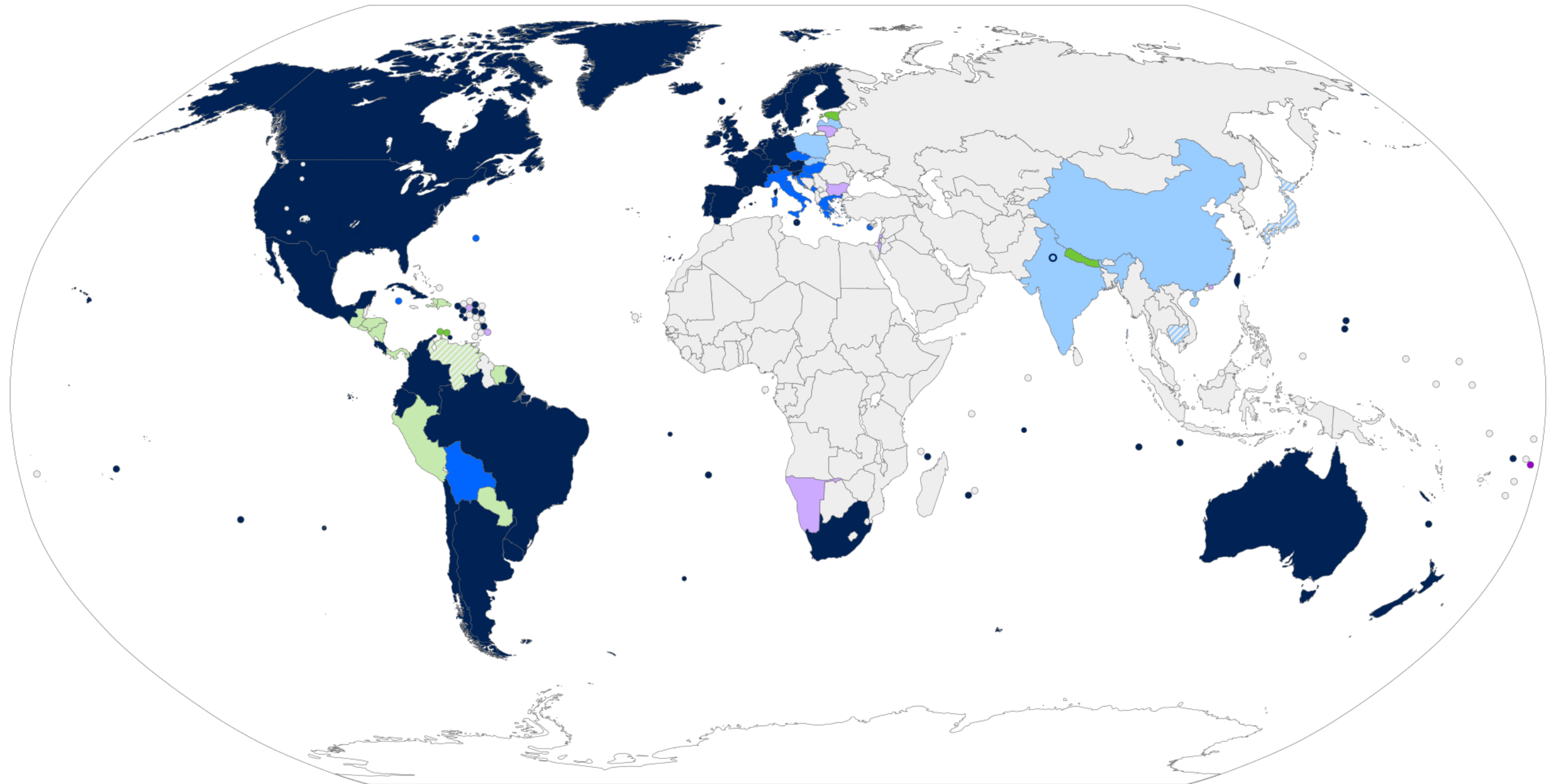


marriage
woman - man

de facto partnership
woman – man
or
same-sex partners

**registered
partnership**
**same-sex
partners**

	From June 2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	2022
Number of registered partnerships														
Man	49	61	24	32	21	30	36	50	49	86	66	80	76	98
Woman	18	19	21	9	9	12	29	34	38	44	43	44	64	53
Total	67	80	45	41	30	42	65	84	87	130	109	124	140	151
Age of the spouse at registration	42,2	38,6	36,0	38,4	36,1	35,2	36,6	39,8	37,3	40,3	38,1	38,0	38,4	39,3
Age difference	8,2	8,1	6,2	6,3	6,1	7,9	7,7	7,6	6,3	8,2	8,4			



The „best interests of the child” in the regulation of **parental custody**

after divorce or separation

The types of custody arrangements

I. Sole custody

- one parent is granted legal and physical custody of the child
- the other has (limited or supervised) access rights and visitation right
- today: no difference by sex of parents
- traditional law: the child has not been placed with the parent who has been found at fault in the divorce reason



Joint custody

- both parents share legal custody and decision-making responsibilities
- both parents must work together to make decisions that are in the child's best interests
 1. child lives primarily with one parent
 2. the child spends equal time with both parents
- postmodern form: bird's nest custody



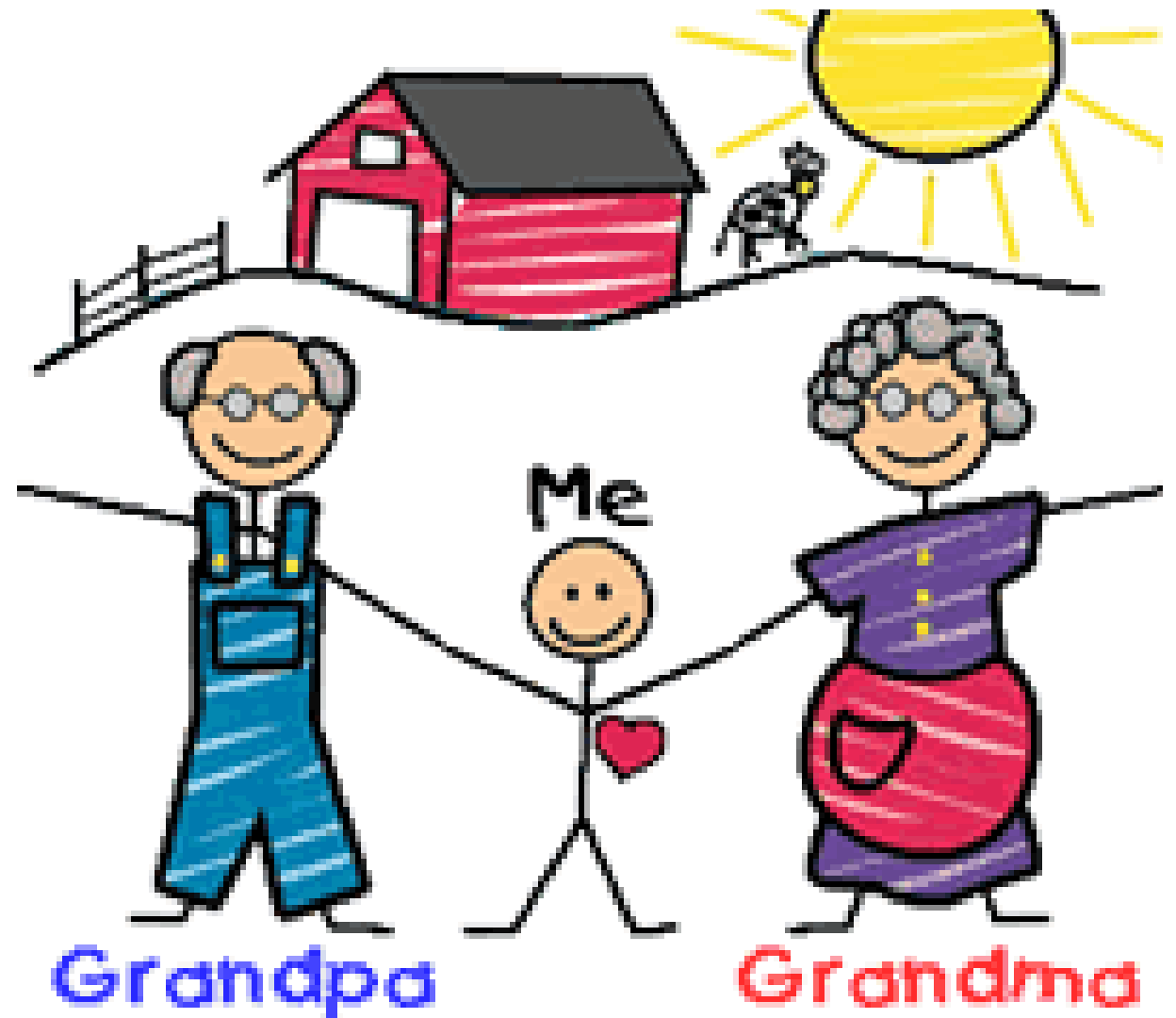
Split custody

- each parent has custody of one or more children
- before the family law codification in the middle of the 20th century it was usually used when parents had girls and boy children too



Third party custody

- when neither parent is considered capable of caring for a child or when the child is in danger due to parental abuse or neglect
- a common solution in secular family law until the mid-20th century
- manifestations of religious discrimination at the turn of the 19th and 20th centuries
- the question of when state power is justified to intervene in family relations



Thank you
for your
attention!