

THE “FIRST” EUROPEAN CODIFICATION OF PRIVATE LAW: THE ABGB

O.Univ.Prof. Wilhelm Brauneder*

UDK: 347(436)“1812”

347.1/.6(436)(091)

Prethodno znanstveno priopćenje

Primljeno: rujn 2012.

Firstly, the author discusses the position of the 1812 ABGB (Allgemeines Bürgerliches Gesetzbuch) among other early codifications, and the legal-theoretical groundings of its time that defined it as a part of the “Verfassung” (constitution), being also termed a “Grundgesetz” (basic law) or “Fundamentalgesetz” (fundamental law). The second point of author’s interest is that, as immediately after the enactment of the ABGB official translations were published, each nationality in the Habsburg Empire could have held the ABGB for a law of its own, making it a contribution not only to the Austrian private law but also to that of all the nationalities, which was also a result of regulatory techniques that gave the ABGB a measure of territorial and chronological elasticity.

Keywords: legal history, Austria, Habsburg Empire, codification, private law, civil law, legal theory

I. THE FIRST CODIFICATION OF PRIVATE LAW?

The Austrian “General Civil Code” (Allgemeines Bürgerliches Gesetzbuch = ABGB) was enacted in 1812 for the non-Hungarian part of the Austrian Monarchy. So chronologically it ranks after the 1794 “General Landlaw” (Allgemeines Landrecht = ALR) for Prussia and the 1804 French “Code Civil”.

* Wilhelm Brauneder, O.Univ.Prof. Dr.jur. Mag.rer.soc.oec., Institut für Rechts- und Verfassungsgeschichte, Rechtswissenschaftliche Fakultät der Universität Wien, Schottenbastei 10-16, Wien, Austria

But the ABGB is, so to say, a second edition, namely of the 1797 “Civil Code” for the Austrian province of Galicia in Poland, and it did also replace another predecessor, the (unfinished) “General Civil Code” (*Allgemeines Bürgerliches Gesetzbuch*), enacted by the emperor Joseph II in 1786. The Galician code was younger than the ALR, but it was the first pure codification of private law, whereas the ALR also regulated more or less the entire legal order. From this viewpoint we may style the 1812 ABGB as the first codification of private law. The ABGB has served and still fulfils the role of central act of Austrian private law.¹

II. “BASIC LAW”

Despite that and its title, which obviously hints to the civil (private) law, contemporary legal sources² have styled it also “Grundgesetz” (basic law) or “Fundamentalgesetz” (fundamental law) and held it for part of the “Verfassung” (constitution). Even Franz von Zeiller, one of the “fathers” of the ABGB, named its predecessor, the 1797 civil code for the province of Galicia, the “Verfassung” (constitution) for that territory. The ABGB itself reads also “Verfassung” (constitution) in connection with the provinces (§§ 1142, 1146). All these terms were used in times when the Austrian Monarchy had lacked a formal constitution in modern sense.

For our legal thinking and with regard to the meaning of these legal terms today the abovementioned characteristics of a civil code look strange, even false. All these terms have now nothing to do with private law. They are used for – so to say – the core of public law, the constitution of the state and, if federally organized, also for those of the provinces.

However, we cannot simply say that the use of these terms for a codification of private law around 1800 was an error – we find them not only in regard to the ABGB, but also in the course of drafting a civil code in Russia, which was also seen as a part of the constitution.³ Therefore these terms obviously meant something specific at those times.

¹ Brauner, W., *Österreichs ABGB – Vom Zentrum an den Rand der Privatrechtsordnung?*, in: Peterson, C. (ed.), *Die Kodifikation und die Juristen (= Rättshistoriska Studier 23)*, Stockholm, 2008, pp. 81 – 114.

² Brauner W., *Die Dauerhaftigkeit einer Kodifikation. 200 Jahre österreichisches ABGB*, in: *Különnvomat a Ruszoly József Emlékkönyvhöl*, Szeged, 2010, p. 237.

³ Reich N., *Kodifikation und Reform des Russischen Zivilrechts im neunzehnten Jahrhundert bis zum Erlaß des Svod Zakonov*, Ius Commune, vol. 3, 1970, p. 172, 174.

Looking into the legal sources from around the Europe from the centuries prior to the enactment of ABGB we can learn that the terms “fundamental law” and “basic law”, similar in different languages, were used for laws of very important (fundamental, basic) meaning⁴, upon which – like on a basis, a foundation – more detailed regulations were expected or upon which legal acts were actually done: e.g. the election of the Roman-German emperor or the hereditary succession of the king of France. At those times the third term “constitution”, also similar in different European languages, “Verfassung” in German, encompassed a very broad meaning. In general, the term “constitution” for a human being expressed its wealthy status – today we are still used to say in German about a person, that he or she “ist in guter Verfassung” (is in a good condition). But “constitution” was also used to express a good organisation. E.g. Goethe expressed by the phrase “constitution of society” that it was composed of well-educated persons avoiding frictions on the basis of recognized (moral or legal) rules.

In the same sense “constitution” was used for states, provinces and communities. So, by the title “Verfassung des Landes Böhmen” (“Constitution of the Province of Bohemia”) Franz Joseph Schopf described in 1847 not only the administrative structure but also, among others, family law and property law – thus private law. “Constitution” in such a usage stood for the whole legal basis of a state or a province upon which the life of the inhabitants functioned in a well-organized manner. Just in that meaning the ABGB used the term “Verfassung” (constitution) in regard to the provinces (§§ 1142, 1146).

From this contemporary viewpoint the characteristic of a civil code (and other codes also) as a “constitution” comes near to the understanding of that term in our days. It is enhanced by the rank of a codification in the eyes of the sciences – jurisprudence and law making – around 1800.⁵ A codification as a specific, outmost important act of legislation was seen as a “chain of juridical truth” (“Kette juristischer Wahrheiten”) made for a “duration of generations” (“Dauer von Generationen”) and was therefore of “eternal” value. All that together meant from a juridical viewpoint a specific guarantee of endurance, a prohibition of alteration. These aims were expressed by Joseph von Sonnenfels

⁴ *Verfassung*, in: Jaeger, F. (ed.), *Enzyklopädie der Neuzeit, 1450-1850*, vol. 14, Stuttgart–Weimar, 2011, column 61 – 81.

⁵ Brauner, W., *Gesetzeskenntnis und Gesetzessprache in Deutschland von 1750 bis 1850 am Beispiel der Habsburgermonarchie*, in: Brauner, W., *Studien I*, Frankfurt am Main–Berlin–Bern–New York–Paris–Wien, 1994, pp. 528 ff.

in terms like quoted before: a codification fastens (“befestigt”) a constitution (“Verfassung”) and therewith secures (“sichert”) the state and the society even against every desire for an alteration.⁶

The guarantee of endurance laid in line with one of the main principles of the science of law making (Gesetzgebungslehre)⁷ – legislation has to avoid amendments because they criticize the previous legislator, which is not expected to be done in a monarchical state. Whilst the predecessors of the ABGB – the unfinished 1786 ABGB and the 1797 civil code for Galicia – regulated the enactment of amendments, the 1812 ABGB dropped such provisions. It should not be amended. Indeed no novellas were enacted in the first half of the 19th century and in the second half only very few.

Also the character of a basic law came true, because the ABGB – like a basis – was completed by additional regulations. After 25 years, in 1837, more than 1000 subordinated regulations on the basis of the code were listed.⁸

Therefore we may draw a first result – in its time the ABGB could indeed be characterized as a basic law or a constitution in the contemporary sense as it offered basic provisions for additional regulations and enjoyed the guarantee of duration.

Also the character of a constitution came true in another aspect. During the elaboration of civil code for the principality of Liechtenstein on the basis of last predecessor of the ABGB it was mentioned in 1809 that such a code should secure the “rights” (“Rechte”) of the “subjects” (“Untertanen”) against “incompetent interferences” (“unbefugte Eingriffe”), so the code will “protect” (“schützt”) “the person as well as the property” (“die Person und das Eigentum”).⁹ When the “Question of Constitution” (“Verfassungsfrage”) for Austria was raised in a book from 1847¹⁰, it held an argument that the ABGB offered a “satisfying law protection” (“befriedigenden Rechtsschutz”). On occasion of the ABGB-anniversary in 1852 the minister of justice Karl

⁶ Adler, S., *Die politische Gesetzgebung in ihren geschichtlichen Beziehungen zum allgemeinen bürgerlichen Gesetzbuche*, in: *ABGB Festschrift*, vol. I/1, Wien, 1911, p. 128.

⁷ Brauner, W., *Die naturrechtlichen Kodifikationen der Habsburgermonarchie als Modernisierungsprozess*, in: Brauner, W., *Studien IV*, Frankfurt am Main–Berlin–Bern–New York–Paris–Wien, 2011, pp. 187 ff.

⁸ Brauner, W., *op. cit.* in fn. 1, p. 81.

⁹ Berger, E., *Eine Zivilrechtsordnung für Liechtenstein*, Frankfurt am Main–Berlin–Bern–New York–Paris–Wien, 1999, p. 79.

¹⁰ Anonym (Koch, M.), *Oesterreichs innere Politik mit Beziehung auf die Verfassungsfrage*, Stuttgart, 1847, p. 217.

von Krauß pointed out that the ABGB served “during forty years as a strong fortress against arbitrariness and injustice” (“fester Schutzwall gegen Willkür und Unrecht”).¹¹ Similar to a modern constitution a civil code in general and in particular the ABGB was seen to give protection to fundamental rights in a manner that constitution does.

III. A CODIFICATION FOR DIFFERENT NATIONALITIES

The character of a “basic law” helps for the better understanding of the usage of ABGB by quite a number of nationalities. The territorial validity of the ABGB stretched from the Rhine in the west to Bug and Dniestr in the east, from the Elbe in the north to the Adriatic Sea in the south. But its influence reached beyond this area – from the French-Swiss border to the Black Sea. That came in the west from its role as a model for the civil codes in Swiss cantons, at least, of Berne, Lucerne, Solothurn and Aargau. Similar situation was in the east – The 1817 Code Callimachus for the principality of Moldavia was a translation of the ABGB, the 1844 Civil Code of Serbia a shortened ABGB as well as the 1888 Code Bogisic of Montenegro.

This large “area of the ABGB” encompassed very different nationalities: Germans in the Swiss cantons and in Austrian provinces, there also Czechs, Poles, Ukrainians, Romanians, people in later Serbia, Croatia and Slovenia, and for some time Magyars and Slovaks. We also have to keep in mind that in this area the ABGB was adopted by very different political systems. On the one hand it was in force in absolute monarchies like Austria and Moldavia, and in constitutional ones with a parliament, e.g. in Austria after 1861, in parts of Bavaria and in Serbia. On the other hand it was adopted in republics, either the conservative ones like the canton Lucerne or the liberal ones like the canton Berne. Therewith the ABGB was used in different societies – on the basis of equality, like in the Swiss cantons, or in societies divided into estates like in most of the monarchies in early times.

Why was such a use among different nationalities, different societies and different political systems possible? The general answer merges three positions: the basic thinking along the lines of Natural Law, the influence of traditional civil law (“*Gemeines Recht*”), and the technique of legislation. For all this a principal distinction was very important – codes/codifications on the one side

¹¹ Walter, F., *Diskussion über das ABGB*, in: Walter, F., *Die Österreichische Zentralverwaltung*, vol. III/3, Wien, 1970, p. 52.

and “political/special statutes” on the other.¹² Whilst the later ones, consisting only of regional or temporary rules, respectively followed such aims, the codifications were to offer – as mentioned above – “chains of juridical truth” and therefore an “eternal” validity. That meant not only a usage all over the times but also all over the European countries, at least – “truth” is everywhere and in all times the same. A code, realizing that “truth” and avoiding special temporary or local rules, could be, so the theory, transferred from one region to another.

That theory was confirmed by the reality. The ABGB was set in force in those Austrian provinces¹³ from which nobody contributed to its content – and no problems emerged. That was the case in the new provinces acquired on the basis of the Congress of Vienna 1814/15 like Salzburg and Lombardo-Venetia. More or less the same happened when Hungary came under the jurisdiction of ABGB in 1853. Of course, such results required a specific technique. That could be demonstrated by following examples.¹⁴

When the ABGB was finished in 1811 the Austrian state suffered from a steep inflation. Therefore the chapter of the ABGB about loan was not sanctioned by the monarch. But that contradicted the makers of the ABGB – the loan-regulations are of eternal value and have to be sanctioned. The problems caused by inflation were only transitory and therefore to be regulated by a special statute, outside of the ABGB and for the time of inflation – what was actually done in the same year by the 1811 “Finanzpatent” (“Financial Decree”). Thus the ABGB served as a “basic law” and upon it the “Finanzpatent” as additional law.

The other example concerns the succession among the peasantry. The ABGB mentioned it only by a reference to “special laws”. In most of the Austrian provinces such statutes existed, but not in Lombardo-Venetia. By that technique the rules of succession among the peasantry differed slightly in some provinces. In Lombardo-Venetia they followed only the general rules of the Code. A technique like this gave the ABGB a territorial elasticity and also temporal.

The ABGB was not part of the struggles of nationalities which dominated more and more the internal affairs of Monarchy towards the beginning of World War I. In addition to the just described character, also the translations

¹² Brauner, W., *op. cit.* in fn. 7.

¹³ See Berger, E., *Österreichisches Bürgerliches Gesetzbuch (ABGB)*, vol. 3, Berlin, 2010.

¹⁴ Brauner, W., *op. cit.* in fn. 7.

of the ABGB in all the languages of the Habsburg Monarchy contributed very much to this success.¹⁵ Immediately after the enactment of the ABGB official translations were published. All in all, translations existed in all languages spoken in the Habsburg Empire so each nationality could hold the ABGB for a law of its own. That shows clearly its contribution to the Austrian private law as well as that of all the other nationalities. The first book about matrimonial law (1813/18) was written by Thomas Dolliner (Dolinar) from Krain. The first complete modern “system” of private law – modern because of following the systematical order of the Pandectists – goes back to Josef Krainz¹⁶, born in Lower-Styria, now part of Slovenia, followed by the Polish work of Ernest Till (1884 and later).¹⁷ Besides, it is remarkable that new official translations in Italian gave an impetus for the articles published in German law-journals.

IV. CONCLUSION

For the contemporaries the ABGB served not only as a civil law-code but also as a basic civil law, which was indeed completed by statutes outside of the code, taking it as a basis. Furthermore, it served as a constitution (in the elderly, broader sense) with the guarantee of endurance. Because of the predecessors – the unfinished ABGB of 1786 and the 1797 civil code for Galicia – the ABGB is not only the oldest codification of private law, but in regard of its “area”, together with its multilingual texts as well as explanations and interpretations in various languages, it is a real European one. In a modern sense we may characterize the ABGB as a constitution for the civil society of quite a number of nations in its time.

¹⁵ Brauneder, W., *Das Allgemeine Bürgerliche Gesetzbuch für die gesamten Deutschen Erbländer der österreichischen Monarchie von 1811*, in: *Gutenberg-Jahrbuch*, Mainz, 1987, pp. 205 ff.

¹⁶ Edited by Ludwig Pfaff in 1885 and later years.

¹⁷ The “System” of Josef Unger, in German language, remained unfinished.

Sažetak

Wilhelm Brauner *

OPĆI GRAĐANSKI ZAKONIK – “PRVA” EUROPSKA KODIFIKACIJA PRIVATNOGA PRAVA

U prvomu dijelu rada autor razmatra značenje austrijskoga Općega građanskog zakonika (OGZ) iz 1812. godine u odnosu na druge rane kodifikacije te s obzirom na pravnoteorijske zasade njegova doba zbog kojih je bio određivan kao dio ustava (“Verfassung”), kao osnovni ili kao temeljni zakon (Grundgesetz, Fundamentalgesetz). Nastavak rada polazi od činjenice brojnih službenih prijevoda OGZ-a što su se pojavile ubrzo po njegovu stupanju na snagu, zbog čega su svi narodi Habsburške Monarhije OGZ mogli doživljavati kao vlastiti, zasebni zakon. Slijedom toga, OGZ nije samo značajan prinos austrijskom privatnom pravu već i pravima svih naroda Monarhije, što je također bilo omogućeno nomotehničkim pristupima koji su mu davali određeni stupanj elastičnosti u pogledu prostornih i vremenskih odrednica.

Ključne riječi: pravna povijest, Austrija, Habsburška Monarhija, kodifikacija, privatno pravo, građansko pravo, teorija prava

* Dr.jur. Mag.rer.soc.oec. Wilhelm Brauner, profesor Instituta za pravnu i ustavnu povijest, Pravni fakultet Sveučilišta u Beču, Schottenbastei 10-16, Beč, Austrija