

# AUSTRIAN GENERAL CIVIL CODE (1812) AND THE SLOVENES: THE BLINDING LEGACY OF LEGAL MONISM

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*The aim of the paper is to determine some of the reasons for two deeply rooted assumptions among a wider Slovene public, concerning the nature of the modern law-codes and the ABGB in particular: the first being that the modern law-codes have been successful in exhaustively codifying all law, hence the spread of misleading equation of Law with the Code, and that the ABGB was Austrian in the sense of “foreign”. The conclusion is that what contributed to both of the assumptions was the passing from a pluralistic conception of identity and of the law in the last two hundred years to the monistic ones, accentuated by the dissolution of the old multiethnic polity and the transition to the new arena of the newly conceptualized nation states with only recently conceptualized national legal systems, of which the civil law-codes are the most potent symbols.*

*Key words: ABGB, Slovenes, legal monism, Jožef Krajnc, Tomaž Dolinar*

## I. INTRODUCTION

On July 5th 1811, the Court Commission responsible for producing the final draft of the Austrian General Civil Code<sup>1</sup> dispatched a thank you note

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<sup>1</sup> In the continuation, I will refer to the Code with the standardized abbreviation of its original title, ABGB (*Allgemeines Bürgerliches Gesetzbuch*). In the paper, all English translations of the paragraphs of the ABGB are taken from J. M. de Winiwarter's translation *General Civil Code for all the German hereditary provinces of the Austrian monarchy*, Vienna, 1866.

to Tomaž Dolinar<sup>2</sup> (1760–1839) for his work as one of proof readers (*Hauptkorrektoren*) of the final draft of the Code.<sup>3</sup> It is well known that the draft was adopted and proclaimed law by the Austrian Emperor Francis I only a month earlier. Dolinar, a nationally conscious Slovene originally from the vicinity of Škofja Loka in Carniola<sup>4</sup> and a loyal Austrian citizen at the same time, was appointed professor of canon as well as of Roman law at the University of Vienna by 1810. He had earned himself an excellent reputation especially in the field of matrimonial law, which is the reason why Franz von Zeiller (1751–1828), the last *rédacteur* of the code, had regularly passed on all the matters regarding matrimony directly to Dolinar for scrutiny and advice.<sup>5</sup> Two years later, in 1813 we find words of acknowledgment dedicated in the opposite direction, i.e. by Dolinar to Zeiller in the foreword to his *Handbuch des in Österreich geltenden Eherechtes*<sup>6</sup> which was to become one of the most important references for the Austrian matrimonial law for the most part of the 19<sup>th</sup> century.

It is the aim of this paper to determine some of the reasons for two deeply rooted assumptions among a wider Slovene public and shared by many within the juristic community as well, concerning the nature of the modern law-codes and the ABGB in particular: the first being that the modern law-codes have been successful in exhaustively codifying all law, hence the spread of misleading equation of Law with the Code, and that the ABGB was Austrian in the sense of “foreign”.

It will become clear that the two assumptions are deeply interdependent and that they arose from the same erroneous and ahistoric perception as to

<sup>2</sup> A germanised version of his name, found in the majority of entries is Tomas Doliner.

<sup>3</sup> See Volčič, E., *Tomaž Dolinar*. Slovenski pravnik, Year 21, No. 1/3, 1905, pp. 35 – 74, here p. 46 (the article comprises parts of Dolinar's original autobiography); about Dolinar also Polec, J., *Dolinar Tomaž*, in: *Slovenski biografski leksikon*, vol. 1, Ljubljana, 1925–1932, p. 143.

<sup>4</sup> Carniola, the territory of which is today an integral part of the Republic of Slovenia, was one of the so called hereditary lands of the Habsburgs, but with a tradition stretching to the barbaric kingdom of *Carniola* of the Slavic *Carniolenses* in the Early Middle Ages. See for example Štih, P., *The Middle Ages between the Eastern Alps and the Northern Adriatic. Select papers on Slovene Historiography and Medieval History*, Leiden–Boston, 2010, pp. 123 – 135 (the chapter *Carniola, Patria Sclavorum*).

<sup>5</sup> Volčič, *op. cit.* (fn. 3), p. 45.

<sup>6</sup> The first part of the *Handbuch* was published in 1813, the second in 1818. The second edition, vastly expanded, was published in its entirety only after his death, in the period from 1835–1842.

how the *corpora* of legal rules, encompassed in the codes actually came about, i.e. who were their actual creators. They certainly did not arise and could not have arisen *ex nihilo*<sup>7</sup>, i.e. all of a sudden by any single given solemn act of a ruler. In this respect, the formal validity of the code, gained at a certain date (in the case of ABGB, January 1<sup>st</sup> 1812), set by the act of prescription has to be consciously distinguished from the question of its substance and its pluralistic origins.

## II. LEGAL MONISM IN THE MAKING: THE CASES OF FRANCE AND AUSTRIA

In France, where their *Code civil des Françaises* was adopted in 1804, it was the revolution in its radicalized phase that helped the monistic conception of law (*Droit*) equated – or better, reduced – for the first time wholly to the newly conceptualized system of *Lois* (a system of legislative acts)<sup>8</sup> to triumph, bringing about unprecedented changes, which even if in part short-lived, were extreme. The conviction so deep as to deserve the designation of faith<sup>9</sup> that the law-codes and statutes – that is their *texts* – portrayed as exhaustive and all encompassing, will alone suffice for the French to manage their lives and that of the society at large, led the revolutionaries to abolish not only the law schools

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<sup>7</sup> Compare the indignant voice of Jean-Etienne-Marie Portalis, the most remarkable of the rédacteurs of the French Code civil (1804), against precisely such a widespread notion. Beigner, B., *Portalis, rédacteur du Code civil*, in: d'Onorio, J.-B. (ed.), *Portalis le juste*, Aix-en-Provence, 2004, pp. 109 – 122, here p. 112.

<sup>8</sup> See the article 6 of the French *Declaration of the Rights of Man and of the Citizen*, where it is famously defined as the expression of the general will. The article goes on to state that that every citizen has a right to participate personally, or through his representative, in its foundation, it being the same for all etc.; compare also Grossi, P., *A History of European Law*, West Sussex, 2010, pp. 82 – 83, who points out that the first differentiation in modern sense between the *Droit* and *Loi* was already carried out by Jean Bodin and that the French revolution in this respect really only just carried out the process that was an earnest wish of all the French absolute monarchs.

<sup>9</sup> One can speak of real bursts of veneration of the *Loi* to the extent that in 1790 even a social club of *Nomophiles* was established in Paris and voices that the citizens should religiously observe the *Loi*, sometimes even directly formulated as *le culte de la Loi*, were frequent and powerful. Krynen, J., *L'Emprise contemporaine des juges*, Paris, 2012, p. 31. For the broader overview see also Grossi, *op. cit.* (fn. 9), pp. 64 – 69 (the chapter *The Legal Enlightenment: Legalism and Legal Idolatry, the Age of Legal Absolutism*).

in all of France, which they did in 1793<sup>10</sup>, but to put an end to the profession of jurists as such. Their aim was to deprofessionalise the roles and offices held and exercised by learned jurists, notably, lawyers, opening them completely to laymen, and to reduce the role of the official law courts and court procedures in the society to a minimum. This was established by a series of laws passed in their majority in the period from 1789–1791.<sup>11</sup> At the lowest level, law courts with professional judges were replaced by the lay *juges de paix* and by arbitrated dispute settlements of various sorts.

The enthusiastically embraced idea behind this major judicial reform was that from then on, the needs of the French people – proclaimed citizens, free and equal in the eyes of the law – to resolve their disputes and regulate their lives would be effectively served by the carefully drafted *texts* of the glorious new law-codes and statutes alone. It was widely held and expected that there would be no need any more for the doctrine to interpret the legal texts and even less would there be any room left for the judges, lay or professional, to act in a similar capacity. Theirs was to become the role of being the mere *bouche de la loi*, according to the already proverbial reading of Montesquieu and built into the newly sanctified principle of the division of powers. The faith into these tenets of the rationalistic natural law theory with the cult of the *Loi* at the fore was so strong that the aforementioned laws were swiftly passed by the French *l'Assemblée nationale*, where curiously enough, out of 1139 *députés*, more than 400 (i.e. more than one third!) were learned jurists.<sup>12</sup>

However, it has to be stressed that the *Code civil des Françaises* promulgated in 1804, so a good decade afterwards, was not rooted in the revolutionary laws in its substance. In fact, three previous attempts to pass such a civil law code, elaborated and advanced by Jean Jacques Regis de Cambacères, had failed.<sup>13</sup> Jean-Etienne-Marie Portalis, often nicknamed as the “father” of the *Code civil*<sup>14</sup>, was deeply convinced that any viable code had to be embedded in the tradition, which in the case of the civil law-code meant the classical tradition as well as their very own French one, and only reinterpreted according to the basic tenets of the revolution of 1789.<sup>15</sup>

<sup>10</sup> Krynen, *op. cit.* (fn. 9), p. 47.

<sup>11</sup> *Ibid.*, pp. 21 – 23 and 57.

<sup>12</sup> *Ibid.*, p. 21.

<sup>13</sup> Beigner, *op. cit.* (fn. 7), p. 109.

<sup>14</sup> See for example, Chartier, J.-L. A., *Portalis, père du Code civil*, Paris, 2004.

<sup>15</sup> In this regard, a view of Bernard Beigner that the *Code civil* with Portalis as the most important *rédacteur* could have been adopted also by the short lived constitutional mon-

The developments in France had a profound impact also on the rest of the continent, especially due to the subsequent Napoleonic wars and their exporting of the revolutionary ideas. One should not forget that in the majority of today's Slovene territory, it was the French who promulgated the first civil law code, i.e. their very own *Code civil des Français* (in the edition of 1808 named *Code Napoleon*), in the newly founded French Illyrian provinces (1809–1814)<sup>16</sup>, consisting among others of Carniola and a few predominately Slovene speaking Carinthian districts.

However, it has to be stressed that in the Austrian Empire the French *Code civil* could have had but a very limited influence. That was chiefly so because in 1804 the hereditary provinces of the Hapsburgs could look back onto their very own process of codifying the civil law, at that time already a good half a century long. It could be argued that it was the French revolution with its declared principles of freedom and equality itself and not that much the later *text* of the *Code* that exerted the real influence over the Austrian drafters. It provided them with a necessary push towards embracing the teachings of the rational philosophy of natural law on the inborn rights of individuals and on the equality before the law (at least in the private sphere).

How divisive these fundamental issues still were among Austrian jurists and academics even at the time when the French Revolution took a radical turn, can be discerned from the answers by the courts of appeal of several Austrian hereditary provinces and from the Austrian universities, to which the draft of the code (prepared under Karl Anton von Martini, 1726–1800<sup>17</sup>) was submitted for an expression of opinion in April 1792. According to the opinion from professor Gross from Prague “the citizens of the state should enjoy liberty and equality without exception ... but in accordance with their rank” – a typical answer by someone who still attempted to reconcile the old corporate notions of the hierarchic structure of society with the current ideas of equality of men. However, on the other side of the spectrum, also a more radical view can be

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archy in France, following the constitution of 1791, if the revolution in 1792 had not taken a vastly more radical turn, is particularly telling. Beigner, *op. cit.* (fn. 7), p. 109.

<sup>16</sup> See for example Bundy, F. J., *The Administration of the Illyrian Provinces of the French Empire, 1809–1813*, New York–London, 1987.

<sup>17</sup> On the role of Martini and his principles of codification see Barta, H.; Palme, R.; Ingenhaeff, W., *Naturrecht und Privatrechtкодификаtion* (Tagungsband des Martini-Colloquiums 1998), Wien, 1999, pp. 15 – 90, here pp. 26 – 28. See also Zeiller, F. A. von, *Commentar über das allgemeine Bürgerliche Gesetzbuch für die gesammten Deutschen Erbländer der Österreichischen Monarchie*, Wien–Triest, 1811, pp. XIII and 21 – 22.

found, expressed for example by professor Hupka from Vienna: “all subjects should generally enjoy equal rights without difference of age, rank or sex”.<sup>18</sup>

According to the analysis of Henry E. Strakosch, Franz von Zeiller himself had reservations when it came to the principle of equality and was very careful to prevent a possible misconstruction, that is the possible mistaking of the statement on the principles of natural justice in his version of the civil code with the revolutionary doctrine of the equality of men as the basis of the social and political order. In one of his writings, Zeiller even called the French *Declaration of the Rights of Man and of the Citizen* from 1789 notorious.<sup>19</sup>

However, Zeiller did embrace a somewhat curtailed principle of equality before the law as the principle of his version of the ABGB. In Strakosch’s lucid view, Zeiller resolved the obvious antinomy between a given hierarchical structure of the Austrian society and the principle equality before the law in the following manner: in the sphere of civil law there was to be full equality before the law. However, in the sphere of public law and political administration, it was Zeiller’s understanding that the real diversity in rank and occupation precluded the establishment of the equality of rights and obligations. He was emphatic on the point that the two spheres of law, civil and public, must therefore be kept entirely separate.<sup>20</sup> The reason behind that was pragmatic, his main aim being a successful addressing of the direst political need of the time that was preserving the Austrian monarchy from the revolution. This is also why the earlier Martini’s version of the code, especially its first eight paragraphs on the constitutional principles of the state, was rejected. The famous paragraph 16 of the ABGB on the inborn rights<sup>21</sup> was but one of few remnants that Zeiller included into the final draft. The idea of freedom and equality of an individual was successfully reduced to that of contractual autonomy. Any step in the direction of the equality of all men in the public sphere, as well which is *per se* close to the principle of sovereignty of the people, was simply not acceptable.

If the French and the Austrian civil law-codes differed fundamentally in the question of whose will it was that the two nominally represented, the first the so called general will of the people whereas the latter, the will of the monarch

<sup>18</sup> Strakosch, H., *State Absolutism and the Rule of Law. The struggle for the Codification of civil law in Austria, 1753–1811*, Sydney, 1976, p. 192.

<sup>19</sup> *Ibid.*, p. 210.

<sup>20</sup> *Ibid.*, p. 211.

<sup>21</sup> § 16: “Every man has inborn rights, which are already apparent from reason, and is therefore to be considered a person. Slavery or bondage and the exercise of a power having reference to it, is not permitted in these countries.”

(although expertly couched into the principles of the rationalistic natural law theory), they both shared the enacting of the two profound changes in the actual norm observing process, and perhaps even more significantly, in the profoundly changed perception of the public at large of what the law is, where one finds it and who is it that creates it: the first being that judges cannot and consequently do not create law and the second, that the very essence required of the phenomenon of “law” universally (and not only of the modern law-codes) was the abstract language of its categories.<sup>22</sup> Therefore it is not that surprising that both law codes took away the obligatory force from the other sources of law: from the custom<sup>23</sup>, from the doctrine and especially from the court decision<sup>24</sup> and proclaimed the *Loi/Gesetz* as the only source of the law (*Droit/Recht*).

However, it is telling how the two law codes tackled the position of the judges in relation to the text of the law code, proclaimed *complete*<sup>25</sup>, i.e. exhaustive and all encompassing.

The French Civil code in its paragraph 4 orders the judge to resolve every case at hand under the threat of prosecution should he refuse to do so “sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi”.<sup>26</sup> At a first glance it looks like that this provision leaves the French judges relatively am-

<sup>22</sup> The idea that law had to be abstract – following the ideal of natural sciences – was fundamentally novel. It supported a completely new approach to law, confining it to the written text and abstract categories. It certainly must be seen as a break with a native continental tradition which until then was still the tradition of legal pluralism. For the excellent insights on the topic, among which the view that the abstract categories thus formulated were and still are “very efficient myth making machine”, see Grossi, *op. cit.* (fn. 8), pp. 63 – 64.

<sup>23</sup> ABGB, § 10: “Customs can only be taken into consideration in cases referred to by a law.”

<sup>24</sup> ABGB, §12: “The determinations issued in single cases and the sentences passed by the Courts in particular law disputes, have never the power of a law; they cannot be extended to other cases, or to other persons.”

<sup>25</sup> ABGB, *Imperial Patent of Introduction*, June 1<sup>st</sup> 1811:

“We Francis the First by the Grace of God, Emperor of Austria etc.

From the consideration, that the civil laws, in order to give the citizens full tranquillity as to the safe enjoyment of their private rights, must not only be composed according to the general principles of justice, but also to the peculiar circumstances of the inhabitants; be made known in a language intelligible to them, and kept in continual remembrance by a proper collection – We, since We entered upon the Government, have unceasingly cared, that the drawing up of a complete, homely civil Code, already concluded and undertaken by Our Ancestors, should be fully accomplished. [...]”

<sup>26</sup> Code civil, §4: “Le juge qui refusera de juger sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.”



ple space for their own active (creative) input. Franz von Zeiller, anxious to satisfy the requirements of the natural law theory that a code be “short yet complete”<sup>27</sup>, found the paragraph bizarre (*merkwürdig*) because in his mind, the Code had to prescribe in advance the standard order of interpretation to the judge and not leave him on his own.<sup>28</sup> Indeed, the ABGB, contrary to the French Civil Code speaks of interpretation – one could say, acknowledges its necessity – and dedicates it important attention. It is the famous paragraph 7 of the ABGB that set out the obligatory interpretative order, which the drafters saw as fundamentally instrumental for rendering the Code *complete*.<sup>29, 30</sup>

By their own implicit admission, both Codes reckon with a possibility that the *text* of the Code might appear insufficient and the legal basis for a decision in a particular case doubtful, as a result. On the other hand, both are adamant that the judges in this or in other situations could not create general rules, i.e. Law – Law, understood of course as a set of abstract and general rules, emanated fully in the newly conceptualized *Loi/Gesetz*, structured to match the revealed principles of natural science, especially mathematics (i.e. *more geometrico*).<sup>31</sup> This is provided for in the paragraph 5 of the French Civil Code<sup>32</sup> and in the already mentioned paragraph 12 of the ABGB.<sup>33</sup>

How realistic were these dispositions? Did the judges all of a sudden really become simple *Gesetzesbüttel*?<sup>34</sup> Was it ever at all possible that they would be-

<sup>27</sup> Zeiller, *op. cit.* (fn. 17), p. XIII.

<sup>28</sup> Ofner, J. (ed.), *Der Ur-Entwurf und die Berathungs-Protokolle des Österreichischen Allgemeinen Gesetzbuches*, vol. 2, Wien, 1889, p. 480.

<sup>29</sup> ABGB, § 7: “If a case cannot be decided either from the words, or from the natural construction of a law, similar cases, which are distinctly decided in the laws, and the motives of other laws allied to them, must be taken into consideration. Should the case still remain doubtful, it must be decided, with regard to the carefully collected and well considered circumstances, according to the natural principles of right.”

<sup>30</sup> See the work by Johanna Hörtl on the legal *lacunae* with the introduction of Heinz Barta. Hörtl, J., *Die Lückenfüllung der klassisch-europäischen Kodifikationen: zur Analogie im ALR, Code Civil und ABGB*, Wien, 2005, pp. 15 – 16. The two Austrian scholars are partial to the idea that the ABGB addresses the problem, conceptualised as legal *lacunae*, better as does the French *Code civil*.

<sup>31</sup> See Martini’s work on the notion of the natural law, for example, §. 122: “Die natürlichen Gesetze sind wie mathematische Wahrheiten”. Martini, K. F. von, *Lehrbegriff des Naturrecht*, Wien, 1799, p. 37.

<sup>32</sup> Code Civil, §5: “Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises.”

<sup>33</sup> *Supra*, fn. 24.

<sup>34</sup> Wieacker, F., *Privatrechtsgeschichte der Neuzeit*, Göttingen, 1996 (1967), p. 334.



came utterly passive, following in a completely automated way the method of simple syllogisms?

To an academic community today the answer might seem too obvious and the questions superfluous, but the crude everyday reality in the continental legal systems all over Europe embodied in the *forma mentis* of the vast majority of the people – the addressees of the continental law-codes and statutes – stayed exactly the same. This is the fact, the importance of which cannot be too stressed! In the last two hundred years, the equating of the law to *Loi/Gesetz* (and more widely to *lex scripta*), has prevailed in France as well as in the Central Europe (i.e. in the systems, which built on the ABGB tradition) alike, irrespective of the actual evolution in the legal theory and much more importantly, irrespective of the reality of the everyday legal life.

In my mind, it is crucial to point out what was the enchanting promise that accompanied the birth of the modern law-codes and their introduction into the legal life which had granted them such a sanctified status that its glow continues to blind the addressees to this day. It was the promise that the law-codes, “short but complete” thanks to their abstract norms, expressed in a clear and precise language – an inherent paradox that even Zeiller himself implicitly acknowledged in his *Commentar*<sup>35</sup> – can and will offer the people close to absolute *legal security*. The mythical ideal was enthusiastically embraced and internalized by the general public at large in every country on the Continent irrespective of the fact if the people there already exercised the sovereignty (if only formally) or if they (still) remained loyal subjects of the monarchs.

From this perspective it is revealing and might come as a surprise that the drafters of the ABGB amidst the vehement glorifying of the *Loi/Gesetz* which only a minority in the academia openly and resolutely resisted<sup>36</sup> did not completely succumb to this mythical Siren of the natural law and refused that the judge should only be permitted to decide according to strict letter of the law

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<sup>35</sup> Zeiller, *op. cit.* (fn. 17), pp. 21 – 22: “Die Vollständigkeit eines Gesetzbuches kann also zwar nie durch eine, auch noch so ausgedehnte, ängstliche Casuistik, worin man jeden einzelnen Fall buchstäblich entschieden finden soll, wohl aber durch Forschung nach dem Allgemeinen in dem Einzelnen, deren Anwendung der verständigen Beurteilung der Richter zu überlassen ist, erreicht werden. Nur darf die Vereinfachung nicht so weit gehen, dass ein trockenes, abstraktes Rechts-System, welches dem Bürger unverständlich und unbrauchbar, für die Richter aber ein weites Feld der eigenmächtigsten Beurtheilung sein würde, die Stelle eines bürgerlichen Gesetzbuches vertreten soll.”

<sup>36</sup> It is impossible not to mention F. C. von Savigny and his role in this context. A lucid account of his position and of the subsequent evolution of his ideas, see Grossi, *op. cit.* (fn. 8), pp. 100 – 107.

(i.e. *text*).<sup>37</sup> To form and preserve such a position a very real effort had to be invested on the part of the drafters of the ABGB, the credit for which goes largely to Karl Anton von Martini. One has to bear in mind that according to the very first redaction of the Code (*Codex Theresianus* from 1766, paragraph 84), when faced with a doubtful case for which the Code had not provided for, the judge would have been obliged to turn to the Empress, i.e. to the lawgiver. One finds a similar provision also in its successor, in the so called *Josephinisches Gesetzbuch* from 1786 (paragraph 26), a partial civil law code from the reign of Maria Theresa's son, Joseph II.<sup>38</sup>

It is true that the paragraph 12 of the final version of the ABGB took away the force of law from the judicial decision, however in the concrete cases that remained doubtful, the two redactors, Martini and after him Zeiller, were able to defend the position that in such instances the judge was not required to turn to the lawgiver for a solution, but instead had to apply the final part of the already mentioned paragraph 7 and decide himself "with regard to the carefully collected and well considered circumstances, according to the natural principles of right" (*mit Hinsicht auf die sorgfältig gesammelten und reiflich erwogenen Umstände nach den natürlichen Rechtsgrundsätzen*).

It is obvious why such a solution, that rendered the judge relatively independent from the lawgiver, which in the context of the absolute monarchy was of course the Emperor, must be viewed as an extraordinary achievement. It could be argued that this was probably Martini's most important legacy. The solution was first incorporated into his draft of the code (in paragraph 12) which was due to the extraordinary political circumstances promulgated hastily as a code in Galicia, after the province fell to the Habsburgs and afterwards, only slightly altered, it remained in the final "Zeiller's draft" of the ABGB as a paragraph 7.<sup>39</sup> From Martini, Zeiller also adopted the legal argumentation for such a solution, found in the Martini's version of the natural law theory. It said that in the cases that remained doubtful even after the interpretative order provided by the first part of the paragraph 7 had been applied, the judge himself had to turn to the same source of law as the lawgiver had done – to the natural Reason.<sup>40</sup>

<sup>37</sup> Cf. Zeiller, F. von, *Abhandlung über die Prinzipien des allgemeinen bürgerlichen Gesetzbuches*, Wien, 1816–1820, reprint by W. Brauneder in 1986 (Mainz–Wien). See his introduction, pp. 9 – 23, here p. 23.

<sup>38</sup> Lässer, G., *Martinis Rechtsphilosophie und das österreichische Privatrecht*, Wien–Berlin, 2008, p. 145.

<sup>39</sup> On the genesis of the paragraph 7 of the ABGB, *ibid.*, pp. 140 – 146.

<sup>40</sup> Martini, *op. cit.* (fn. 31), p. 91 (§ 245).

In the eyes of Maritini and Zeiller and according to the classical tenets of the rationalistic theory of natural law, the law was not really the work of those in power and they were therefore not the creators of law (*Das Recht sei kein Machtwerk der Menschen, und die Machthaber seien keine Rechtsschöpfer, keine Rechtsgeber*).<sup>41</sup> The lawgivers and the judges were just the expounders of the legal reason (*Erklärer der rechtlichen Vernunft*). Consequently, the drafters of the ABGB believed that it was an error to seek the primary legal categories (*Urbegriffe des Rechts*) in the texts of the codes.<sup>42</sup> In his second report on the work of the codification, Zeiller explicitly pointed out that there was a need for the judges who could think and revert to the Reason themselves.<sup>43</sup> According to Henry Strakosch, Zeiller was well aware of the danger lurking behind the notion of law as advanced by the natural law philosophy, which culminated in the idea of codes that were to be “complete” – the danger of *furor deducendi* by the judges.<sup>44</sup> In the words of Zeiller himself: judges should not be transformed into “machines that speak the law” (*Recht sprechende Maschinen*).<sup>45</sup>

In my opinion it is very revealing indeed, that the same men who directed the codification process of the ABGB implicitly admitted that the one who could only render a legal system “complete” in the sense of viable, was a person, imbedded in her own place and historic time and not any “immovable” *lex scripta* on its own. I think it is clear that the two drafters were more than aware of the exaggerated optimism that the natural law theory had been promoting in this respect.

Unfortunately, irrespective of that the monistic position which equated the Law solely to the *Loi/Gesetz*, originated first in the context of the absolute monarchy and elaborated further in the bourgeois state by the strict application of the principle of the division of powers, was almost impossible to overcome, especially on a symbolic level (with a legal *text*, most often a *book* as its most frequent icon, promising the security of clear and precise words). In France,

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<sup>41</sup> Ofner, *op. cit.* (fn. 28), p. 6.

<sup>42</sup> *Ibid.*, p. 9.

<sup>43</sup> “[...] Dagegen wenn der Gesetzgeber von den allgemeinen Grundsätzen des Rechtes ausgehe, wenn er über die mannigfaltigen Arten der Rechtsgeschäfte allgemeine und deutliche Begriffe aufstelle, wenn er daraus die allgemeinen Regeln zu Beurteilung der dabei vorkommenden Rechte und Pflichten ableite, wenn er denkende und zu denken fähige Richter bestelle und ihnen gestatte, in der Anwendung stufenweise zur nämlichen Urquelle, von welcher er selbst bei der Abfassung des Gesetzes ausgegangen ist, zurückzukehren, dann dürfe man hoffen, das der Beschwerden über die Unvollständigkeit der Gesetze nur wenige sein werden.” *Ibid.*, p. 6.

<sup>44</sup> Strakosch, *op. cit.* (fn. 18), p. 212.

<sup>45</sup> Ofner, *op. cit.* (fn. 28), p. 6.

even at the beginning of the 20<sup>th</sup> century, the dogmatic school of exegesis was still strong, nurturing the cult of the *Loi* and maintaining that one had to interpret the *Code Napoleon* only with regard to itself.<sup>46</sup> This is the very conviction, albeit a true myth<sup>47</sup>, still held by the vast majority of the general public in Slovenia, and I believe in the rest of the continental Europe as well. According to this belief, such course of action – imagined as actually utterly feasible (sic!) – should be the only one at all acceptable. By many it is also perceived as central to the notion of the *Rechtsstaat*.

However, a hundred years ago, a radically different train of thought gained momentum in the Austro-Hungarian Empire – the so called “school of the free law” (*Freie Rechtsschule*).<sup>48</sup> It imagined the judges “free” from the constraints of the texts of the codes and statutes. It might seem as a paradox that at the turn of the 19<sup>th</sup> century the position of the civil judges appeared to be relatively more autonomous with regard to the will of the lawgiver (understood as necessarily emanated in the “immovable” text of the Code) in the context of a conservative (constitutional) monarchical regime of the Austro-Hungarian Empire<sup>49, 50</sup> than in the milieu of republican France.<sup>51</sup>

<sup>46</sup> After Hörtl, *op. cit.* (fn. 30), pp. 162 – 163, who cites two French jurists, Charles Aubry and Frédéric-Charles Rau, as adherents of this school of thought (“le procédé [interprétatif] le plus sûr sera toujours d’interpréter le Code Napoléon par lui-même”).

<sup>47</sup> Grossi, P., *Mitologie giuridiche della modernità*, Milano, 2005.

<sup>48</sup> See Ehrlich, E., *Freie Rechtsfindung und freie Rechtswissenschaft, Vortrag, gehalten in der juristischen Gesellschaft in Wien am 4. März 1903*, Leipzig, 1903. See also Ogorek, R., *Richterkönig oder Subsumtionsautomat, Zur Justiztheorie im 19. Jahrhundert*, Frankfurt am Main, 1986.

<sup>49</sup> See Schey, J. von, *Gesetzbuch und Richter*, in: *Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches (1. Juni 1911)*, vol. 1, Wien, 1911, pp. 501 – 532. The author describes the civil law judge in Austria at the turn of the 19<sup>th</sup> century as someone between the ancient *judex* who searched for the truth and that of a “worker” (*Arbeiter*) who was trying to re-establish the broken relations between the two litigants.

<sup>50</sup> It is refreshing to see that at the turn of the 19<sup>th</sup> century in the Austro-Hungarian Empire the jurists saw the necessity in differentiating *Gesetz* from *Recht*. In one other paper, published at the 100<sup>th</sup> anniversary of the ABGB, one reads an analysis for the longevity of the Code which considers the legal consciousness of the lay people, i.e. the addressees of the Code, as the criterion for establishing whether the law in the Code had become real Law (“bis sein Recht richtiges Recht wurde”). Klein, F., *Die Lebenskraft des Allgemeinen Bürgerlichen Gesetzbuches*, in: *Festschrift zur Jahrhundertfeier des Allgemeinen Bürgerlichen Gesetzbuches, op. cit.* (fn. 49), pp. 3 – 32, especially p. 23 and 31 – 32.

<sup>51</sup> However, one has to consult the most recent work by Jacques Krynen, *L’emprise contemporaine des juges, op. cit.* (fn. 9), where the author reveals to what extent the judges in the 19<sup>th</sup> century France established their relative autonomy despite all constraints. The book is a sequel to his acclaimed *L’idéologie de la magistrature ancienne*, Paris, 2009, in which Krynen analysis the power of judges in the *ancien régime*.

### III. THE LEGACY THAT BLINDS: THE MONISTIC PERCEPTIONS OF (NATIONAL) IDENTITY AND THE LAW OF THE 19<sup>TH</sup> CENTURY

In this chapter, I am coming back to the person and his work, introduced at the beginning of this contribution, Tomaž Dolinar, a professor of law at the University of Vienna and one of the *Hauptkorrektoren* of the ABGB. It is instructive to see how Dolinar in his efforts to gather together everything from his field of expertise which was the matrimonial law, i.e. the principles and laws then in force, as well as those that preceded them, treated the ABGB, i.e. the Code. From the introduction to his *Handbuch* and from the subsequent chapters, especially from the chapter on the *Quellen, Ordnung der Behandlung und Literatur des Österreichischen Eherechts*, it is clear that Tomaž Dolinar did not equate the provisions regarding matrimony in the ABGB as the only source of the law of matrimony, let alone as a complete and all-encompassing one<sup>52</sup> and that he therefore did not understand the *Gesetz* as the only source of the law (*Recht*) in the actual force.

If the drafters in the Austrian Empire did not differ from their French counterparts in taking away the force of law from the other sources of law, they differed profoundly from the French with regard to the principle of equality in the public sphere. Also from the Dolinar's *Handbuch* it is clear that it was envisaged that this principle was to be exercised only in the private sphere. Dolinar was a partisan of the contract theory, and considered the principles of freedom and equality as a means to conceptualise the marriage as a contract between two private individuals (*contractus matrimonialis*).<sup>53</sup>

Nevertheless, one can argue that a freer individual was indeed a result of the introduction of the ABGB in the context of the Hapsburg monarchy. As the later evolution in the 19<sup>th</sup> century shows, the code proved to be very useful in its main aim of liberalizing the *private* sphere of life for Austrian citizens. However, where the efforts failed, was in the expectation of the monarchy that the interpretation of the principle of equality before the law as elaborated in the ABGB could remain confined to the private law only.

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<sup>52</sup> "Die rechtlichen Bestimmungen über die Ehe, die in den deutschen Österreichischen Staaten gelten, und deren Inbegriff das Österreichische Eherecht ausmacht, sind hauptsächlich in dem allgemeinen bürgerlichen Gesetzbuche I. Th., II. Hauptst., und in den zahlreichen, in verschiedenen Sammlungen vaterländischer Gesetze zerstreuten, politischen Verordnungen enthalten." Dolinar, T., *Handbuch des in Österreich geltenden Eherechtes*, Wien, 1813, p. 1.

<sup>53</sup> *Ibid.*, pp. 25 - 34.

Too slow a process towards realization of the principle of equality in the public sphere as well, lies in my opinion also at the heart of the cluster of reasons which led to the situation that the ABGB is nowadays perceived by Slovene public at large as Austrian in the sense of “foreign” or perhaps better, “not ours”. Needless to say that Dolinar and at least a couple of other Slovene jurists that lived in the 19<sup>th</sup> century, who I am about to introduce, would have been amazed at that. Dr. Lovro Toman, a lawyer and a poet who at the 50<sup>th</sup> anniversary of the ABGB gave a speech at a commemorative sitting of the Ljubljana Jurists’ Association on January 16<sup>th</sup> 1862 would have been one such.

In his speech, Toman stressed the importance of the paragraph 16 on the inborn rights of an individual and of the paragraph 7 on the explication of the code in the last instance also on the ground of the natural law principles. What follows is particularly noteworthy and addresses head on the clearly false expectations that ABGB would have been able to confine the understanding of the equality before the law only to the private sphere. In his summing up, Toman characterised the Austrian civil code as “a forerunner and a wake-up call of our constitution”.<sup>54</sup> It is not insignificant to note that in 1861 Toman was elected to the provincial parliament of Carniola as well as to the lower House of the parliament in Vienna, and was thus one of Slovene representatives in the first convocation of both assemblies.

In the constitution of 1849, following the *octroi* of Francis-Joseph I., as well as in the constitutional acts of the second constitutional period of the Austrian Empire, the principle of equality before the law was formally introduced also in the sphere of public law. However, contrary to France, where in the effort to apply even more radical idea of equality of all men with consciously abandoning the historical regions and, more importantly, merging the concept of a French citizen with that of a member of a French nation, citizenship in the Austrian Empire was never merged with a unitary concept of nationality. Alongside the historical regions, the constitution recognized the fact of the existence of different nationalities (*Stämme*) and conferred upon them certain important rights, as well. It goes without saying that one was faced here with an inherently dualistic communal identity (or better, pluralistic one: apart from national, also that of pertaining to a historical province on one hand and being a citizen of the Austrian Empire on the other), consecrated by the constitution: if one defined oneself as a Slovene, that did not preclude him from

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<sup>54</sup> *Verhandlungen und Mittheilungen der jurist. Gesellschaft in Laibach*. 1. Jahrg. 2. Heft, redigiert von dr. E. H. Costa, Laibach, 1863.



being a loyal Austrian citizen, in the sense of being loyal to the *Haus Österreich* (i.e. to the Hapsburgs).

It is my assumption that what to the large extent contributed to the understanding among the wider public of the ABGB as “foreign” was the passing from a pluralistic conception of identity and of the law in the last 200 years to the monistic ones, accentuated of course by the dissolution of the old multiethnic polity and the transition to the new arena of newly conceptualized nation states with only recently conceptualized *national* legal systems, of which the civil law-codes are the most potent and lasting symbols. Of course, this did not happen overnight. The national tensions linked to these efforts on one hand and harsh resistance to politically accommodate the pluralism of communal identities on the other were already present in the Austrian Empire before 1848 and were intensified in the context of the Austro-Hungarian Empire of the last decades of the 19<sup>th</sup> century. Let me illustrate it with examples of a couple of self-declared Slovenes and loyal Austrian subjects at the same time who were closely linked to the early history of the ABGB with their professional knowledge and work.

The research interests of Tomaž Dolinar already mentioned twice before for his valued expertise in matrimonial law, did not lie just in the field of law. Already during his lifetime, he was praised for his other work to which he consecrated equal diligence and passion: his work in researching Slovene<sup>55</sup> and Czech history. He collaborated intensely with the most prominent researchers and institutions and among the latter, also with the Czech royal society of science.<sup>56</sup> It is particularly telling that this was not looked favourably upon by

<sup>55</sup> Dolinar was particularly interested in the famous historic source *Conversio Bagoariorum et Carantanorum*. In his *Historisch-kritischer Versuch über das angebliche Verhältnis der ostlichen Gränzprovinz und ihrer Gränzgrafen zu Bayern unter den Karolingern* (Wien, 1796) he considered the possible frontier between the early middle age Bavaria and the Eastern March (*marcha orientalis, marchia Austriae*) and the settlements of Slavs, especially Slovenes in this political context. Dolinar’s work in this field influenced also the famous Slovene philologist Jernej Kopitar (in Dolinar’s time also the head of the Vienna university library, where they first met and established their fruitful collaboration). Volčič, *op. cit.* (fn. 3), pp. 50 – 53.

<sup>56</sup> For example, for his *Codex epistolaris Primislai Ottocari II. Bohemiae Regis, complectiens semicenturiam literarum ab Henrico de Isernio ejus Notario partim ipsius nomine, partim ad ipsum scriptarum, quas ex Mspto. Bibliothecae Palatinae Vindobonensis eruit, ordine quantum potuit chronologico disposuit, commentarioque illustravit* (1803), Dolinar was honoured with an external membership of the Czech Royal Society of Science. Volčič, *op. cit.* (fn. 3), p. 45.



the authorities in Vienna and that it contributed to the slow advancement of his professional career as a professor of law.

The other example is that of Jožef Krajnc, a scholar who greatly contributed to the field of civil law in the second half of the 19th century by his *System des österreichischen allgemeinen Privatrechts*, edited and published after his death by his friend and colleague Leopold Pfaff in 1885. Jožef Krajnc lived in what on the paper seemed more liberal times. But in reality, the work and career of Krajnc was decisively hampered by the very fact that his ideas of freedom and equality were not confined to the realm of private law, and that he dared to engage himself for that cause in politics, as well. In the year 1848, Krajnc was elected member of the first constitutional convention, the Vienna parliament, not only as a Carniolan, but already as a politically conscious Slovene.<sup>57</sup> Of course his loyalty to the monarchy was never in question. In the Slovene legal history, Jožef Krajnc is not only credited with having translated a good portion of the ABGB into Slovene (something that the Imperial Patent of Introduction to ABGB from June 1<sup>st</sup> 1811 explicitly envisaged), but also with the fact that he held lectures in civil law in Slovene for a few years at the University of Graz. But despite his excellent professional work at the University of Graz he was denied a professorial post by the political authorities of the province due to his political activity and had to spend most of his subsequent teaching career in a distant Transylvanian town of Sibiù.

Due to the fact that the upholding of the dual identity was met with a palpable opposition in the real life, one could be led to argue that the legacy of the relevant paragraphs of both Austrian constitutions was far less impressive than the legacy of the relevant paragraphs relative to the institution of contractual autonomy and equality before the law in the sphere of private law of the old ABGB. However, one could also simply admit that it is only this much of transformative power a legal *text* can have in reality if the societal changes do not predate it.

I am afraid that what impedes Slovenes as we understand ourselves today to embrace the Austrian civil code of 1812 as inherently ours, too if not even as our constitution before the constitution as Lovro Toman did, and what on the other hand impedes our Austrian neighbors, as they understand themselves today, to embrace the self-understanding (cultural and political) of people as Jožef Krajnc not only as an Austrian but also as a Slovene, is the monistic *ex*

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<sup>57</sup> Polec, J., *Krajnc [Krainz] Jožef*, in: *Slovenski biografski leksikon*, vol. 1, Ljubljana, 1932, pp. 547 – 550.

*post facto* reinterpretation of the past, culminating in a predominant concept of a modern nation (state) and correspondingly of “national laws” – Paolo Grossi speaks of particularism of national laws<sup>58</sup> – that are anachronistically projected back even into a distant past.

#### IV. CONCLUSION

In the last century, the European (nation) states produced immeasurable quantity of law-codes and statutes and even though the saying *summum ius summa iniuria* cannot be too often reiterated one has to acknowledge that in almost every field they regulated, they found solutions well suited for their respective particular circumstances and traditions (matrimonial law being again a good example). One would wish that in the context of the ever larger European polity which is European Union one would not lack the wisdom to keep accommodating the pluralism of (sources of) laws as well as identities by seeing the universal in the particular, only not at the expense of the latter. In this respect, there is still much to be gained from the careful studying of the autonomous voices and reflections by the drafters of the law-codes, the 200<sup>th</sup> anniversary of which we celebrated in the last decade.

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<sup>58</sup> Grossi, *op. cit.* (fn. 8), p. 68.

## Sažetak

Katja Škrubej \*

**AUSTRIJSKI OPĆI GRAĐANSKI ZAKONIK (1812.) I SLOVENCIMA:  
ZASLJEPLJUJUĆE NASLJEĐE PRAVNOGA MONIZMA**

*Svrha ovoga rada jest odrediti neke od razloga za dvije duboko ukorijenjene pretpostavke šire slovenske javnosti u odnosu na opću prirodu modernih zakonika te, napose, Opći građanski zakonik (OGZ). Prva među njima pretpostavlja da su moderni zakonici bili uspješni u iscrpnom kodificiranju svega prava, odakle potječe i neprimjereno izjednačenje "prava" sa "zakonikom", a druga da je OGZ bio austrijski, u smislu "tuđinski".*

*U prvomu dijelu pokazuje se stoga na koji je način spoj prirodno-pravnih ideala s utjecajem Francuske revolucije 1789. (1792.) doveo do štovanja zakona (Loi) bliskoga kultu, koje je posljedično dovelo do izjednačenja između prava i teksta zakonika, raširenoga u javnosti, a povremeno i u pravnoj znanosti, sve do današnjega dana.*

*Usporedbom francuskoga i austrijskoga stanja onoga doba u članku se pokazuje kako su sastavljači OGZ-a bili itekako svjesni proturječnoga teorijskoga zahtjeva, prema kojemu je zakonik trebao biti "sažet, ali jasan", kao i koju su ulogu pridavali sucima.*

*Premda je OGZ oduzeo zakonsku snagu ostalim pravnim vrećama, što je značilo da sucu nije bilo dopušteno ustanovljavati opća pravna pravila, upravo je sucu bilo povjereno da se, u krajnjem slučaju, osloni na načela prirodnoga prava (čl. 7. OGZ-a), tj. na razum umjesto na zakonodavca. Međutim, iako sami sastavljači toga zakonika nisu izjednačavali pravo sa zakonikom, šira javnost potpuno je prihvatila takvo, inherentno monističko stajalište.*

*U drugomu dijelu članka slijede kratki portreti dvojice istaknutih slovenskih stručnjaka, koji su ujedno bili i austrijski državljani, a blisko vezani uz OGZ. Prvi među njima je Tomaž Dolinar, jedan od Hauptkorrektoren (glavnih redaktora) OGZ-a, cijenjen zbog prinosa na području austrijskoga bračnoga prava. Drugi je Jožef Krajnc, zaslužan za razradu prvoga sustavnoga pristupa austrijskom građanskom pravu na osnovu OGZ-a.*

*Zaključno, u članku se ističe da jedna te ista ex post facto monistička reinterpretacija prošlosti, koje je vrhunac u prevladavajućem ali tek nedavno nastalom pojmu moderne nacije (države) i nacionalnoga pravnoga sustava (nacionalnih pravnih sustava), podjednako priječi današnje Slovence da austrijski Opći građanski zakonik iz 1812. prihvate i kao svoj, pa i kao ustav prije ustava, kako je to slovenski pravnik, pjesnik i député (zastupnik) Lovro Toman izjavio na prvom zasjedanju Kranjskoga sabora 1861., i – na drugoj strani – naše austrijske susjede da prihvate (kulturalno i političko) samorazumijevanje naših prethodnika poput Tomaža Dolinara i Jožefa Krajnc, koji se sebe smatrali i Austrijancima i Slovencima.*

*Ključne riječi: OGZ, Slovenci, pravni monizam, Jožef Krajnc, Tomaž Dolinar*

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