

*Liability for Non-material Damage in Hungarian Law in the 19th–20th Centuries in Comparison with Austrian and Polish Codifications**

Abstract

The article describes the regulation of liability for non-pecuniary damage on the example of 19th century Hungarian law, which is based on a long, unbroken tradition, individual legal acts and customary law. Furthermore, the classification of torts and remedies in contemporary Hungarian law is analysed, highlighting their similarities and differences to those used in the present civil law. Particular emphasis is placed on the examination and presentation of the institution of *homagium*, which had a medieval origin and constituted a specific instrument for obtaining compensation for non-pecuniary damage. It is compared with Polish (Code of Obligations of 1933) and Austrian (ABGB of 1811) regulations. The situation allows the author to show the variety of ways in which contract law has developed, especially concerning the pecuniary compensation of harm and pain. Employing comparative and historical methods makes it possible to highlight the timelessness of particular obligation law issues, showing its evolution in Central Europe in the last two centuries.

Keywords: Hungarian law, non-material damage, torts, Central Europe

1. Introduction

Analysing the history of civil law in the various regions of Central Europe, one can see areas where the development of law has been similar, as well as issues where there have

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- **Visegrad Fund**
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The project ‘Continuity and Discontinuity of Pre-war Legal Systems in Post-war Successor States (1918–1939)’ is co-financed by the Governments of Czechia, Hungary, Poland and Slovakia through Visegrad Grants from International Visegrad Fund. The mission of the fund is to advance ideas for sustainable regional cooperation in Central Europe. Visegrad Grant No. 22030159.

been significant differences. An example of the latter situation is tort law, in particular, compensation for non-pecuniary damage. This issue, which still evokes lively disputes and emotions among lawyers and jurists, forces us to answer questions of philosophy and ethics, such as: is human harm measurable? Is monetary compensation for suffering possible? And if so, is it morally (and legally) justified?

These questions have been dealt with in different ways throughout history. For most of its history, European legal culture, as a rule, did not distinguish non-material damage, nor did it provide instruments for its redress. At the same time, however, certain institutions of barbarian law (compositional punishment) and Roman law (*actio iniuriarum aestimatoria*) played such a role indirectly.¹

This article aims to present a particularly interesting approach to non-pecuniary damage, which developed in Hungarian law and survived until the turn of the 19th and 20th centuries. In order to show the historical context and contrast, it will be compared to the Austrian (civil code of 1811, ABGB) and especially Polish regulations from the interwar period (Code of Obligations of 1933, hereinafter referred to as PCO). It is worth noting that both the Austrian and the Hungarian legal systems were also in force in what is now Poland. Hence, such a comparison will not only allow for a dogmatic comparison of the two modes of regulation but will also show the diversity and richness of the legal heritage of Central Europe.

2. Old Hungarian Tort Law – Origins and Systematics

The old Hungarian private law formed a peculiar, uncodified system. This law, shaped uninterruptedly from the beginnings of the Hungarian state, was in force in a significant part of the territory of the Habsburg monarchy until the end of its existence, retaining its power even later – hence it is worth devoting more attention to it.²

First and foremost, one of the sources of Hungarian law was the *Tripartitum* of 1514. This collection of all customary law in force in the lands of the Crown of Saint Stephen did not formally enter into force but was widely used and, by custom, became the principal source of substantive civil law until the 20th century.³ From the end of the 17th century, the whole of Hungary remained under Habsburg rule, but this did not have a significant impact on Hungarian civil law, whose system of sources remained open, dispersed and largely based on precedent and custom.

This situation changed only briefly after the Springtime of Nations and the defeat of the Hungarian national uprising. It was then that the Habsburg government, as part of the repressive measures of the neo-Absolutism era, imposed Austrian private law on the territory of the Crown of Saint Stephen by a patent of 29 November 1852. Although the introduction of ABGB meant a modernisation and unification of private law (especially of

¹ See e.g. Ebert, *Pönale Elemente*, 39.

² See Felczak, *Ugoda*; Ciągwa, “Recepcja”; Ciągwa, “Zniesienie”; Bokwa, Jarosz, “The History of Old Hungarian Private Law”, 69–76.

³ Luby, *Dejiny*, 55ff.

the obligation law), it was nevertheless widely perceived in Hungary as a sign of foreign domination and generally treated with strong resentment.⁴ The change of political situation and the beginning of internal reforms in Austria in 1860 made it possible to reverse this state of affairs. In an unprecedented move, the so-called Judex-Curial Conference of 1861⁵ ordered the repeal of almost all Austrian laws, returning to the old legal system⁶ – although only in the territory of the “proper Hungary”, since in Croatia, Rijeka, the Military Frontier, the Banat and Transylvania, Austrian law remained in force.⁷ It was not considered appropriate to restore the old particularism of those territories, assuming that the (re)created state of affairs would be temporary and that a Hungarian civil code would soon be established; this, however, did not come into being until the Communist era.

In Hungarian legal doctrine at the beginning of the 19th century, there was no generally formulated principle of tort liability, although there were attempts to formulate it.⁸ At the same time, however, there were no doubts, following the Roman influences, about the general obligation to make reparation for the damage caused.⁹ Damage was divided into direct (*damnum positivum*) and indirect (*damnum negativum*),¹⁰ with *damnum emergens* included in the former (i.e. direct material or personal injury), and *lucrum cessans* in the latter.¹¹ The abstract category of non-material damage was unknown, nor was the concept of a general duty to compensate it.

The obligation of repairing the damage resulted from committing one of the torts distinguished by the law. All of them were unlawful acts,¹² for which – apart from the obligation to repair the damage – there were typically penal sanctions¹³ such as infamy, arrest, flogging, forfeiture of property, and even the death penalty by beheading or life-long servitude to the injured party (*jobbagionalis subjectio*). Also, the lack of property necessary to repair the damage could give rise to the right to imprison the perpetrator until he finds the missing funds.¹⁴ Most of these provisions were, however, mitigated or repealed in the 18th and 19th centuries.¹⁵

Particularly noteworthy is that those guilty of a tort – in addition to the obligation to make reparation for the damage – were sometimes threatened with a specific monetary sanction (*homagium*), which in part or in whole fell to the victim. This institution had its

⁴ Neschwara, *Das ABGB in Ungarn*, 85.

⁵ Hungarian *Országbirói értekezlet*, German *Judexkurialkonferenz*, consisting of several dozen lawyers and influential economic and political figures. It issued a *sui generis* act entitled Provisional Judicial Principles (Hung. *Ideiglenes törvénykezési szabályok*), which, although was not a statutory law in a formal sense, constituted the formal basis for the restoration of the former legal system. See Bokwa, Jarosz, “The History of Old Hungarian Private Law”, 72.

⁶ Gábríš, *Dočasné súdne pravidlá*, 49ff.

⁷ See Neschwara, *Das ABGB in Ungarn*, 88ff.; also Almási, *Ungarisches Privatrecht*, Bd. 2, 5.

⁸ Szalma, *Haupttendenzen*, 6.

⁹ Jung, *Darstellung*, Bd. 3, 107–8.

¹⁰ Until the 1830s, Latin remained the official language in the area of the Crown of Saint Stephen, which was strongly reflected in legal terminology.

¹¹ Jung, *Darstellung*, Bd. 3, 113.

¹² *Ibid.*, 111.

¹³ *Ibid.*, 116.

¹⁴ Kadlec, *Verböczyovo Tripartitum*, 280.

¹⁵ Putz, *System*, 290.

origins in the Middle Ages – originally, it was a form of redemption from an adjudged death penalty (*emenda capitis, fejkáltás*). With time, however, it lost this function, becoming a separate sanction.¹⁶ Nevertheless, the archaic nature of Hungarian law meant that there was no clear dichotomy between public and private law sanctions.

Analysing the responsibility for non-material damage, the regulation of liability for private torts (*delicta privata, magánjogi delictumok*) is relevant. Those torts were, in general, prosecuted at the request of the injured party – thus essentially coinciding with torts under civil law, especially bearing in mind the lack of a separation of criminal and civil jurisdiction. Already in 18th century Hungarian legal thought the classification of private torts posed a problem. They were described as “Janus-faced” acts, having the characteristics of criminal offences, but at the same time giving rise to private-law consequences.¹⁷ They were divided into five basic categories:¹⁸

- More significant act of violence (*actus maioris potentiae*).
- Minor acts of violence (*actus minoris potentiae, seu violentiae*).
- Offences committed in writing (*delicta circa litteras*).
- Frauds, false accusations (*delicta falsi*).
- Insults to honour.

3. *Homagium* – a Unique Way to Compensate for Non-material Damage

Particular attention should be paid to the institution of *homagium*. Combining features of the contemporary restitution, fines and compensation, it fulfilled various functions – both repressive and compensatory, also with regard to non-pecuniary damage. What is also peculiar, the amount of *homagium* was regulated as a lump sum and depended on the type of the act and the social status of the victim or offender. In the case of private torts, the *homagium* was often divided between the judge (with jurisdiction depending on the type of act and the social status of the perpetrator) and the injured party.¹⁹ As a result, part of the amount of *homagium* fulfilled a repressive function, while the other part – a compensatory one.

The claim for *homagium* was not hereditary – the death of the perpetrator or the injured party before the action was initiated made it impossible to pursue. On the other hand, the obligation to pay *homagium* could also arise on the side of royal towns, monasteries, etc., which had legal personality; they were treated equally to persons of noble birth.

The obligation of paying *homagium* in particular situations was regulated by the individual, dispersed legal acts. For example, Act No. LIX of 1723 provided for a *homagium*

¹⁶ See *Fejkáltás* [in:] *A Pallas nagy lexikona*, vol. 6, <http://www.kislexikon.hu/fejvaltsag.html> (accessed: 10.12.2021).

¹⁷ Homoki-Nagy, *Szerződésen*, 212.

¹⁸ After Putz, *System*, 288.

¹⁹ *Ibid.*, 296.

of 100 florins for the intentional opening of correspondence addressed to another person. Hence, this norm had both a repressive and a compensatory dimension. It was, from the perspective of contemporary dogmatics, a form of compensation for the violation of personal goods, i.e. the secrecy of correspondence.

However, the *homagium* could have been demanded primarily for different types of personal injury, and its amount usually varied depending on the origin of the injured party. In the 19th century, 400 florins were paid for committing a major offence (*a nagyobb hatalmaskodás*)²⁰ against a magnate or a prelate (higher cleric),²¹ 200 florins against a nobleman, 100 florins against a townsman, and only 40 florins against a peasant.²² In the case of *actus minori potentiae*, however, the amount of *homagium* depended on the perpetrator's condition, not the injured party; besides, actions for this type of torts were considered the most "lucrative".²³ In the case of damage to property, compensation could be awarded for non-material damage in the form of a special personal relationship with the property (*pretium affectionis*), if the damage was caused by qualified wilfulness, i.e. with malice.²⁴ A similar regulation, also making liability dependent on the degree of culpability, was provided for in § 1331 ABGB.

Hungarian case law and partial norms also afforded relatively full protection against private torts in insults and slander (*dehonestatio*), distinguishing them from insults to God, the King or the Church, which were public offences.²⁵ The plaintiff, however, had to prove the intentionality of the perpetrator's action. Moreover, if the plaintiff himself responded to the offender with an insult, he lost the right to bring an action; neither did persons who had been declared infamous have standing. A distinguished type of insult was, inter alia, an insulting or unjustified denial of someone's nobility or accusations of a lack of honour, for which a *homagium* (called in this case *emenda linguae, nyelvéváltáság*) of 100 florins was due in full to the offended nobleman; lower-class persons could only claim 20 florins.²⁶ The same insult, if inflicted on a nobleman during an assembly (*in diaeta*) entailed an obligation to pay a *homagium* of 200 florins.²⁷

Hungarian law also used *homagium* as a form of sanction for unjustified prosecution. In some cases (e.g. *actus minori potentiae*), if the accusation was proved to be unfounded during the trial, the plaintiff was obliged to pay the defendant an amount equal to the *homagium* claimed.²⁸ The obligation to pay *homagium* could also emerge from suing a minor who lacked legal capacity.²⁹ Unjustified litigation could also be considered a separate tort of calumny (*calumnia*) if litigation was brought against the law or without legal basis, or maliciously. Such situations included, for example, simultaneous demands

²⁰ Bató, *Rechtssicherheit*, 39ff.

²¹ Ger. *Floren (Fl.)*, the official currency of the Austrian Empire, then Austria-Hungary, was replaced by the crown in the 1890s, in Hungary, also known as forint.

²² Putz, *System*, 290–1.

²³ Jung, *Darstellung*, Bd. 3, 141.

²⁴ Act XVI of 1492, Act XXVII of 1638, Act XXXI of 1659. In the Hungarian tradition from the Middle Ages to the 20th century, legislative acts were marked with the year of publication and a Roman numeral.

²⁵ Jung, *Darstellung*, Bd. 3, 207.

²⁶ *Ibid.*, 210–1.

²⁷ § 9 of Act VII of 1723. See Kadlec, *Verböczyovo Tripartitum*, 281.

²⁸ § 3 of Act XXIII of 1613.

²⁹ Kadlec, *Verböczyovo Tripartitum*, 149.

for the same thing based on different legal titles (*sub duplici colore*) or before two different courts; it was also a *calumnia* to appear before a court with a demand already satisfied or settled.

Thus, in the above-mentioned situations, the obligation to pay the *homagium* was a form of sanction for the “abuse of procedural law” or disloyalty to the parties and the court by a conscious violation of the principles of *litis pendentio* and *res judicata*,³⁰ present in Hungarian law under the Roman influence. At the same time, the very name of the institution of *calumnia* indicates that its purpose was also to compensate a person wrongfully sued, on whom such accusations could cast an unfavourable light and offend his honour. Thus, in this case, *homagium* (or at least the part of it awarded to the injured party) was a way of financial compensation for personal harm, as well as for the necessity of participating in an unfounded trial.

The amount of the *homagium*, although usually specified in individual acts of statute law, was not, however, absolutely binding. The jurisprudence played an essential law-making role in Hungarian law, especially the jurisprudence of the Royal Curia (the supreme court, whose resolutions gained equal force with statutes at the beginning of the 20th century),³¹ which influenced the modification of customary and even statutory norms. For example, in one of its verdicts from 1869, the *homagium* due to a nobleman for grievous bodily harm was reduced because he did not come from the hereditary nobility and had only been ennobled himself.³²

The Hungarian regulation stood out due to its anachronistic character compared to the other 19th century systems, inter alia, the Austrian one, even when compared to the contemporary *gemeines Recht*. However, regardless of the obsolescence of *homagium* as an institution, it was an original basis for obtaining material compensation for non-property damage – in the absence of a general concept of non-property damage and the obligation to compensate for it in the legal system.

Significant limitations in claiming *homagium* resulted from the introduction of Austrian law in Hungary – by the decree of 1 May 1853, the Ministry of Justice excluded the possibility of adjudicating it in cases under the jurisdiction of criminal courts, stating that the Austrian penal law (imposed on Hungarians) did not know such a sanction, hence the judgments should instruct about the possibility of claiming damages in civil proceedings.³³ Although the Judex-Curial Conference restored the old legal system, the Hungarian doctrine noticed the anachronistic nature of the institution of *homagium*, especially its feudal character. They called for it to be reduced or abolished, which was reflected in Act LII of 1871, which also abolished corporal punishment for private offences;³⁴ soon afterwards Act V of 1878 abolished the existing private-law sanctions for offences against honour.³⁵

³⁰ A similar institution was *poena temere litigantium* – an obligation to pay a *homagium* of 100 florins, which could be imposed by the *Tabula Septemvivalis* (one of the highest courts) on a party who brought an action and lost it in all instances. See Putz, *System*, 297.

³¹ Bokwa, Jarosz, „The History of Old Hungarian Private Law”, 73.

³² Bató, *Rechtssicherheit*, 39.

³³ Verordnung des Justizministeriums vom 1. Mai 1853, zu Folge welcher vor den Strafgerichten auf die Entrichtung des Homagiums (Blutgeldes) nicht mehr zu erkennen ist, RGBI. 75/1853.

³⁴ Bató, *Rechtssicherheit*, 39.

³⁵ Szalma, *Haupttendenzen*, 9.

At the same time, despite its repeal, Austrian civil law retained a considerable jurisprudential and customary influence in Hungary, especially in the areas of property law and contract law, where the deficiencies of the ancient indigenous system were becoming increasingly apparent³⁶. This phenomenon has even been described as an informal “private law settlement”, referring to the Austro-Hungarian settlement of 1867 (*Ausgleich*), which was the foundation of the dualistic monarchy;³⁷ it has also been compared to the reception of Roman law in Germany, e.g. regarding the tort liability, following the example of the ABGB, Hungarian case law differentiated the scope of liability according to the degree of fault (*lucrum cessans* could not have been claimed in cases of simple negligence).³⁸

In Hungarian doctrine at the turn of the 19th and 20th centuries, emerged a dispute about the admissibility of general compensation for non-pecuniary damage similar to that in Austria and Germany. On the basis of the principles of Roman law, either the possibility of compensation for non-pecuniary damage was completely denied in accordance with the *liberum corpus aestimationem non recipit* principle, or, following the Germanic tradition and the letter of the ABGB, it was limited to criminal acts, in particular, insult to honour or deprivation of freedom.³⁹ In the course of the drafting of the Hungarian Civil Code at the beginning of the 20th century, however, it was accepted (following, inter alia, § 1331 ABGB) that non-pecuniary damage was to be compensated if caused intentionally; a later version of the 1914 draft extended this possibility to cases of gross negligence (§ 885 of the draft).

Although this version of the code never entered into force, 1914 saw the introduction of the Press Act (*Sajtótörvény*)⁴⁰ and the Honour Protection Act (*A becsület védelméről*)⁴¹ in Hungary. Both of these acts provided for the possibility of compensation for non-material damage on general terms, regardless of the form of intentionality or punishability of a given act. However, the outbreak of the First World War prevented the application of both acts on a wider scale before the end of the Habsburg monarchy.

4. Polish Interwar Regulation and its Austrian Background

In the 19th century, two approaches to the issue of monetary compensation for non-pecuniary damage developed in European legal systems. French law and the systems based on it accepted the possibility very broadly;⁴² the opposite happened in German law, where, based on the tradition of *ius commune*, such a possibility was allowed based on a complete exception, which had to be expressly provided for by the statutory law.

³⁶ Neschwara, *Das ABGB in Ungarn*, 123–4; see Szalma, *Der Einfluss des ABGB*.

³⁷ Neschwara, *Österreichs Recht in Ungarn*, 110–1.

³⁸ Szalma, *Haupttendenzen*, 4–6.

³⁹ *Ibid.*, 8–9.

⁴⁰ Act XIV of 1914.

⁴¹ Act XLI of 1914.

⁴² See Bokwa, Jarosz, “Monetary compensation”.

The Austrian law found itself in a split between these two approaches. The possibility of compensation for non-pecuniary damage was included in the Austrian Civil Code of 1811 (ABGB). It was clear from § 1293, which contained a definition of damage that it included any injury to property, rights, or person. Personal injury consisted precisely of the infliction of personal harm. It was, however, debatable whether it concerned only pain or also moral suffering. Singular cases of compensation for personal injury were also provided for in §§ 1325–1330, concerning injuries to body, liberty and honour.

Although the aforementioned provisions of the ABGB allowed for compensation of non-material damage in individual cases described therein, they did not provide an answer to the question of whether non-material damage in other situations could be claimed *in abstracto*, i.e. on general principles of tort liability. However, this was (and still is) a highly controversial issue in Austrian law.⁴³ The 19th-century jurisprudence of the Austrian Supreme Court (OGH) was liberal in this respect, but shortly before the First World War there was a shift inspired by German influence.⁴⁴

It is impossible to omit the role of ABGB for the Polish civil law, both pre-war and present – not only because for almost 140 years, it was in force on a large part of the Polish territory⁴⁵. It should also be borne in mind that Galicia was the only place where Polish jurisprudence developed in the 19th and at the beginning of the 20th centuries. It was here that the brightest minds in Polish law were formed, whose work influenced the understanding of law throughout whole Austrian Empire; the same people later played key roles in the work of the interwar Polish Codification Commission – and all of them were educated, practised and thought in the ABGB system.⁴⁶ It is, therefore, hardly surprising that some legal scholars considered Austrian law as the basis and starting point for the study of the emerging new Polish law.⁴⁷

The genesis and history of the Polish Code of Obligations of 1933 (PCO) is well described in the literature.⁴⁸ Therefore, the subject of further consideration will be primarily the way in which it regulated liability for non-material damage. On the example of this modern regulation, the archaic nature of Hungarian law will be clearly visible. It is noteworthy that the above-described regulation and systematics of Hungarian private law were still in force (though in a fragmentary way) in Hungary when the PCO came into force in Poland.

A pecuniary compensation for harm suffered (then described as “moral”) was regulated by Articles 157 § 3 and 165–167 PCO. The first of these provisions formulated a general principle according to which compensation for moral damage was entitled only

⁴³ Cf. Zoll, “Prawa osobiste”, 546ff; concerning Austrian doctrine: Strasser, *Der immaterielle Schaden*; Bydliński, “Der immaterielle Schaden”; Karner, Koziol, *Der Ersatz ideellen Schaden*.

⁴⁴ Ruling of the OGH of 1 April 1908: “Seduction of a female person: conditions and scope of compensation claims”. Pfaff, Schey, Krupský, *Sammlung*, Bd. 45, no. 4185.

⁴⁵ See Sójka-Zielińska, *Wielkie kodyfikacje*, 171–3.

⁴⁶ Malec, “ABGB w pracach Komisji Kodyfikacyjnej”, 34.

⁴⁷ Dziadzio, *Austriacki kodeks cywilny*, 509.

⁴⁸ From the contemporary literature see: Górnicki, *Prawo cywilne*; Górnicki, *Metoda opracowania*; Szpunar, *Czyny niedozwolone*; Szpunar, *Zadośćuczynienie za szkodę*; Lewandowicz, *Is there a Polish Legal Tradition?*; Guzik-Makaruk, Fiedorczyk, “The Achievements of the Codification Commission”. From the interwar period *inter alia*: Chlamtacz, *Sposoby wynagrodzenia*; Jarra, *Szkody moralne*; Łapicki, *Zadośćuczynienie za szkodę*.

in situations explicitly indicated in the act. These were listed, above all, in Articles 165 § 1 and 2 PCO, which corresponded with § 1325 and 1327–1330 ABGB.

Ernest Till used the term ‘moral damage’ already in the recitals to the preliminary draft of the PCO. The description of Article 93 in this draft also read ‘non-pecuniary damage’,⁴⁹ explicitly contrasting reparation of pecuniary damage with compensation for the non-pecuniary one (*zadośćuczynienie*). A different view on this issue was expressed by Ludwik Domański in his counter-proposal of 1927, which did not distinguish between ‘non-pecuniary damage’ and ‘moral damage’. In the end, however, the drafters of the PCO decided to use the term ‘damage’ only in the sense of material damage, contrasting it with ‘moral harm’ (*krzywda moralna*). This gave Polish doctrine and practice the go-ahead to a narrow understanding of the concept of damage, as in the Germanic model. This was not necessarily in line with the intentions of the drafters of the PCO, but it certainly contributed to maintaining an approach similar to the Austrian one in Polish law.

This was pointed out by Eugeniusz Jarra, who, discussing Article 157 § 3 PCO, wrote:

This provision: 1. defines non-material damage as ‘moral injury’, thus emphasizing its subjective character; 2. contrary to the practice of the [Polish – K.B.] Supreme Court, and in accordance with the project of Prof. Till, establishes compensation for moral damage ‘independently’ of material damage, thus also in the absence of the latter; 3. understands this compensation as redress; 4. this compensation is to be imposed by the court at the request of a party; 5. it is to be imposed only in those cases provided for by law, thus adopting not the general French principle of compensation for all damage, but the German principle limiting compensation for non-material damage to a number of special cases.⁵⁰

As Jarra further stated:

While, according to its Articles 157 § 3 and 158 § 1, ‘damages’ (*odszkodowanie*) occurs in the Code of Obligations when compensating for pecuniary damage, the consequence of non-pecuniary damage in the Code of Obligations is ‘compensation’ (*zadośćuczynienie*). In contrast to the French principle of [general – K.B.] civil indemnity, this is to be the equivalent of the subjective state of the injured party, a ‘retribution’ for the harm – in keeping with the ideas that permeate the case-law of the Polish Supreme Court in connection with § 1325 ABGB and in accordance with Prof. Till’s project and the theory of private penalty [Ger. *Privatstrafe* – K.B.].⁵¹

It is, therefore, possible that it was the controversy about the scope of the award of “full satisfaction” and about understanding the phrase “annulling of the offence caused” (*Tilgung der verursachten Beleidigung*) from § 1323 ABGB in Austrian jurisprudence that prompted the drafters of the Code of Obligations to formulate Article 157 § 3, expressly stating that compensation could be claimed only “in the cases provided for by law”. This was a clear similarity with the German concept, which was, however, attacked by certain legal scholars, of whom many were used to the tradition of French law, which was in force in the Central Poland⁵².

⁴⁹ Till, *Polskie prawo zobowiązań*, 125.

⁵⁰ Jarra, *Szkody moralne*, 45.

⁵¹ *Ibid.*

⁵² Matys, *Model zadośćuczynienia*, 45–6.

Professor Roman Longchamps de Bériér – as the main author of this clause – defended it, claiming that separate legal acts already “provide for compensation for the infringement of personal rights protected by these laws in the form of penance”, and that “the point is not to allow claims in doubtful cases, which would give rise to lawsuits, by means of too general a formulation, and to avoid the expression personal relations or personal rights, which is, after all, not entirely clear”.⁵³

A significant difference, distinguishing the Polish pre-war codification from its Austrian predecessor, was also the fact that the right to claim compensation was extended to “all the facts stipulated in the chapter on torts and delicts” – thus (similarly to the present Polish law) compensation could be claimed according to the general principles of tort liability, i.e. not only on the basis of fault or negligence (as in the ABGB), but also on the basis of risk and even equity.⁵⁴ It was a clear departure from the Austrian system, caused by the objections of the legal community – even though in the original draft Prof. Till regarded “wilfulness”, i.e. fault, as necessary for raising the claim. Of course, under both Polish and Austrian law (and contrary to Hungarian law), the origin or social status of the perpetrator and the injured party did not play a role.

Another novelty, clearly referring to the idea of socialisation of law, was Article 165 § 3 PCO, which stipulated that:

[...] in case of death of the victim as a result of bodily injury or health disorder, the court may award an appropriate sum of money to the closest members of the deceased's family or to an institution indicated by them as compensation for moral harm suffered by them.

This was a concept unknown to the Austrian (and, of course, old Hungarian) law, which recognised only the reimbursement of expenses and losses “to the remaining persons, whose maintenance the deceased had to take care of according to the law” (§ 1327 ABGB).

This clause was inspired – according to Longchamps de Bériér himself – by French and Swiss legislations.⁵⁵ The difference between the assumptions of the PCO and the ABGB in this respect was also stressed by the Supreme Court in the ruling of 25 November 1937.⁵⁶ It directly provided for compensation for the deterioration of the life situation and compensation for the family of the deceased, which has long been accepted and widely used in Polish jurisprudence since then.

A new concept, alien to the ABGB and, of course, to the Hungarian tradition, was also the possibility to award compensation not to the injured party but to an “institution indicated by her” (Article 166 PCO). As Longchamps de Bériér wrote, the idea was “to make this compensation practical also in cases in which the injured party does not want to take the money himself for a moral harm, e.g. in case of an offence to honour”.⁵⁷ The same possibility is now provided by Article 448 PCC. As Jarra aptly remarked:

⁵³ Korzonek, Rosenblüth, *Kodeks zobowiązań*, 437.

⁵⁴ Matys, *Model zadośćuczynienia*, 46.

⁵⁵ Korzonek, Rosenblüth, *Kodeks zobowiązań*, 439.

⁵⁶ Ruling of the Polish Supreme Court of 25 November 1937, II C 1306/37. In OSN(C) 8 (1938), no. 374.

⁵⁷ Longchamps de Bériér, *Uzasadnienie projektu*, 246.

[...] this element contrasts even more emphatically institution of the compensation with the general concept of the civil indemnity, which, as compensation of the damage by its material equivalent, makes sense only if it is adjudged in favour of the one who has suffered the damage. It confirms even more eloquently that the institution of compensation for moral damage according to the Polish Code of Obligations has the character of a private penalty. The rigours, provided for by the Polish law in the event of inheritance or ceding of claims for reparation, are the result of this position.⁵⁸

Article 165 § 3 PCO also regulated the question of inheritance of the right to compensation for damage, accepting it only “if it was awarded by contract or by a final judgment during the life of the injured party, and in the case provided for in the first paragraph also when the action was brought during the life of the injured party” (a similar regulation is contained in the current Article 445 § 3 PCC). Although no such provision can be found in the ABGB, this was also the line of Austrian case law.⁵⁹ Hungarian law, as it was stated above, did not provide for such a possibility.

5. Final Remarks

A comparison of the Hungarian legal system from the 19th century and the Polish codification of 1933 shows an undeniable gap between the two systems, despite their temporal and geographical proximity. The Hungarian system, although gradually modernised, until the 20th century was a kind of a “legal living fossil”, preserving the medieval systematic and approach to, inter alia, non-pecuniary damage. At the same time, however, by using these anachronistic instruments, it created unique opportunities for pursuing claims based on non-material damage.

In opposition to Hungarian law, which was based on partial, old regulations, the interwar Polish legislator created an extremely modern codification, in which non-material damage and responsibility for it were treated in an unambiguous way. In this way, it not only distanced itself from the Hungarian regulation but also from the Austrian one, which also belongs to the modern codifications. This proves, on the one hand, the high quality of Polish codification, and on the other hand – it shows the variety of ways of legal development of Central Europe.

The above-mentioned circumstances make the Hungarian *homagium* an even more interesting subject of reflection, especially in the era of unabated controversies concerning both the scope of the protection of non-material goods as well as the methods of this protection. *Homagium* is only an example of an intriguing institution, many of which have survived in Hungarian law until recent times. Its exceptional archaic nature, however capable of functioning in relatively modern society, may prove to be not only a historical curiosity but also an inspiration for solutions to problems faced by contemporary contract law.

⁵⁸ Jarra, *Szkody moralne*, 46.

⁵⁹ Cf. e.g. ruling of the OGH of 17 June 1913: “Indemnity: requirements for the transfer of the claim to the heirs”. In Pfaff, Schey, Krupský, *Sammlung*, Bd. 50, no. 6485.

Bibliography

Legal sources

- Ruling of the OGH of 1 April 1908: “Seduction of a female person: Conditions and scope of compensation claims”. In Leopold Pfaff, Josef von Schey and Vincenz Krupský, *Sammlung*, Bd. 45, no. 4185. Wien: Manz, 1910.
- Ruling of the OGH of 17 June 1913: “Indemnity: Requirements for the transfer of the claim to the heirs”. In Leopold Pfaff, Josef von Schey and Vincenz Krupský, *Sammlung*, Bd. 50, no. 6485. Wien: Manz, 1915.
- Ruling of the Polish Supreme Court of 25 November 1937, II C 1306/37. In OSN(C) 8 (1938), no. 374.
- Verordnung des Justizministeriums vom 1. Mai 1853, zu Folge welcher vor den Strafgerichten auf die Entrichtung des Homagiums (Blutgeldes) nicht mehr zu erkennen ist, RGBl., 75/1853.

Monographs

- Almási, Anton. *Ungarisches Privatrecht*. Bd. 1–2. Berlin–Leipzig: De Gruyter, 1923–1924.
- Bató, Szilvia. “Rechtssicherheit im ungarischen Strafrecht vor 1880”. In *Freiheit – Sicherheit – (Straf)Recht: Beiträge eines Humboldt-Kollegs*, eds. Krisztina Karsai, Ferenc Nagy and Zsolt Szomora, 25–45. Osnabrück: V&R unipress, 2011.
- Beňa, Jozef and Gábriš, Tomáš. *Právne dejiny Slovenska I (do roku 1918)*. Bratislava: Univerzita Komenského v Bratislave, Právnická fakulta, 2015.
- Bokwa, Krzysztof. “Odszkodowanie oraz zadośćuczynienie w prawie polskim i austriackim. Rys historyczny i prawnoporównawczy”. In *Pomniki prawa na przestrzeni wieków*, eds. Kacper Górski, Jakub Pokoj, Damian Szczepaniak and Łukasz Szymura, 131–40. Kraków: Księgarnia Akademicka, 2017.
- Bokwa, Krzysztof and Jarosz, Iwo. “The History of Old Hungarian Private Law: An Unexpected Answer to Modern Challenges?” *Russian Journal of Legal Studies* 7(2) (2020): 69–76.
- Bokwa, Krzysztof Jarosz, Iwo. “Monetary compensation for nonmaterial damage now and then in the perspective of French and Polish legal systems”. *Fundamental and applied researches in practice of leading scientific schools* 40, no. 4 (2020): 9–17.
- Bydlinski, Franz. “Der immaterielle Schaden in der österreichischen Rechtsentwicklung”. In *Festschrift für Ernst von Caemmerer zum 70. Geburtstag*, eds. Hans Claudius Taschner, Marschall von Bieberstein, Hans Claudius Ficker, Detlef König and Hans G. Leser, 785–805. Tübingen: J.C.B. Mohr (Paul Siebeck), 1978.
- Chlamtacz, Marcelli. *Sposoby wynagrodzenia szkody w polskim kodeksie zobowiązań i w prawodawstwach nowożytnych*. Lwów: Drukarnia Zakładu Narodowego im. Ossolińskich, 1936.
- Ciągwa, Józef. “Recepcja prawa węgierskiego na Spiszu i Orawie po roku 1920”. *Studia Historyczne* 39, no. 2 (1996): 199–222.
- Ciągwa, Józef. “Zniesienie pańszczyzny na Spiszu w latach 1931–1934”. *Studia Iuridica Lublinska* 25, no. 3 (2016): 165–78.
- Dziadzio, Andrzej. “Austriacki kodeks cywilny ABGB na ziemiach polskich w XX wieku”. In *Ustrój i prawo w przeszłości dalszej i bliższej. Studia historyczne o prawie dedykowane Prof. Grodzkiemu w pięćdziesiątą rocznicę pracy naukowej*, eds. Jerzy Malec and Waclaw Uruszcak, 501–14. Kraków: Wydawnictwo Uniwersytetu Jagiellońskiego, 2001.

- Ebert, Ina. *Pönale Elemente im deutschen Privatrecht. Von der Renaissance der Privatstrafe im deutschen Recht*. Tübingen: Mohr Siebeck, 2004.
- Felczak, Waclaw. *Uгода węgiersko-chorwacka w 1868 r.* Wrocław: Zakład Narodowy im. Ossolińskich, 1969.
- Gábríš, Tomáš. *Dočasné súdne pravidlá Judexkuriálnej konferencie z roku 1861*. Bratislava: Wolters Kluwer, 2011.
- Górnicki, Leonard. “Metoda opracowania i koncepcja kodeksu zobowiązań z 1934 roku”. *Acta Universitatis Wratislaviensis. Prawo* 3063, no. 305 (2008): 79–94.
- Górnicki, Leonard. *Prawo cywilne w pracach Komisji Kodyfikacyjnej Rzeczypospolitej Polskiej w latach 1919–1939*. Wrocław: Kolonia Limited, 2000.
- Guzik-Makaruk, Ewa Monika and Fiedorczyk, Piotr. “The Achievements of the Codification Commission of the Second Republic of Poland – a Century After Regaining the Independence”. *Internal Security* 2018, special iss.: 17–29.
- Heymann, Ernst. *Das ungarische Privatrecht und der Rechtsausgleich mit Ungarn*. Tübingen: Mohr, 1917.
- Homoki-Nagy, Mária. “Szerződésen kívüli károkozásért való felelősségnél a 18.–19. században”. *Acta Universitatis Szegedensis: Acta Iuridica et Politica* 61 (2002): 214–23.
- Jarra, Eugeniusz. *Szkody moralne a polski kodeks zobowiązań*. Warszawa: Drukarnia Kasy im. Mianowskiego, 1935.
- Jung, Johann. *Darstellung des ungarischen Privat-Rechtes*, Bd. 1–5. Wien: B. Ph. Bauer, 1818.
- Kadlec, Karel. *Verböczyovo Tripartitum a soukromé právo uherské i chorvatské šlechty v něm obsažené*. Praha: Česká Akademie, 1902.
- Karner, Ernst, Koziol, Helmut. *Der Ersatz ideellen Schaden im österreichischen Recht und seine Reform: Gutachten*. Wien: Manz, 2003.
- Korzonek, Jan and Rosenblüth, Ignacy. *Kodeks zobowiązań. Komentarz. Przepisy wprowadzające, wyciągi z motywów ustawodawczych, ustawy dodatkowe. T. 1*. Kraków: Księgarnia Powszechna, 1936.
- Lewandowicz, Maria. “Is there a Polish Legal Tradition? On the Margins of Considerations Regarding the 1933 Code of Obligations”. *Journal on European History of Law* 8, no. 2 (2017): 72–6.
- Longchamps de Bériet, Roman. *Uzasadnienie projektu Kodeksu Zobowiązań z uwzględnieniem ostatecznego tekstu kodeksu w opracowaniu głównego referenta projektu Prof. Romana Longchamps de Bériet. Art. 1–167*. Warszawa: Wydawnictwo Urzędowe Komisji Kodyfikacyjnej, 1934.
- Luby, Štefan. *Dejiny súkromného práva na Slovensku*. Bratislava: VIA, 2002.
- Łapicki, Borys. “Zadośćuczynienie za szkodę niematerialną w projekcie polskiego prawa zobowiązań”. *Palestra* 2, no. 5 (1925): 761–70.
- Malec, Dorota. “ABGB w pracach Komisji Kodyfikacyjnej (1919–1939). Wzorzec pozytywny czy negatywny?” *Czasopismo Prawno-Historyczne* 63, no. 2 (2011): 31–48.
- Matys, Justyna. *Model zadośćuczynienia pieniężnego z tytułu szkody niemajątkowej w kodeksie cywilnym*. Warszawa: Oficyna a Wolters Kluwer business, 2010.
- Neschwara, Christian. “Das ABGB in Ungarn”. In *Österreichs Allgemeines Bürgerliches Gesetzbuch (ABGB). Eine europäische Privatrechtskodifikation. Band III: Das ABGB außerhalb Österreichs*, ed. Elisabeth Berger, 33–134. Berlin: Duncker & Humblot, 2010.
- Neschwara, Christian. “Österreichs Recht in Ungarn – Geltung und Wirkung vor und nach dem Ausgleich”. In *Rechtsgeschichtliche Vorträge, Heft 52 – Der österreichisch-ungarische Ausgleich 1867*, ed. Barna Mezey, 104–12. Budapest: Magyar Tudományos Akadémia, 2008.
- Pfaff, Leopold, Schey, Josef von and Krupský, Vincenz. *Sammlung von Zivilrechtliche Entscheidungen des k.k. Obersten Gerichtshofes* [multiple bands], Wien: Manz, 1896.
- Putz, Carl. *Beiträge zur Geschichte des ungarischen Privatrechtes als Einleitung in das Studium desselben*. Wien: In Commission bei Gotthard Capellen, 1869.

- Putz, Carl. *System des ungarischen Privatrechtes*. Wien: Manz, 1870.
- Sójka-Zielińska, Katarzyna. *Wielkie kodyfikacje cywilne. Historia i współczesność*. Warszawa: Liber, 2009.
- Strasser, Rudolf. *Der immaterielle Schaden im österreichischen Recht*. Wien: Manz, 1966.
- Szalma, József. "Der Einfluss des ABGB in der Rechtsprechung des ungarischen Obersten Gerichtshofes (Curia). Präcedenzen zum Schadenersatzrecht in der zweiten Hälfte des 19. Jahrhunderts". In *Festschrift für Wilhelm Brauner zum 65. Geburtstag. Rechtsgeschichte mit internationaler Perspektive*, eds. Gerald Kohl, Christian Neschwara and Thomas Simon, 671–86. Wien: Manz, 2008.
- Szalma, József. *Rechtsgeschichtliche Vorträge, Heft 33 – Haupttendenzen im ungarischen (Delikt-recht) Haftpflichtrecht*. Budapest: Magyar Tudományos Akadémia, 2005.
- Szpunar, Adam. "Czyny niedozwolone w kodeksie cywilnym". *Studia Cywilistyczne* 15 (1970): 31–112.
- Szpunar, Adam. *Zadośćuczynienie za szkodę niemajątkową*. Bydgoszcz: Oficyna Wydawnicza Branta, 1999.
- Till, Ernest. *Polskie prawo zobowiązań. (Część ogólna). Projekt wstępny z motywami*. Lwów: Komisja Kodyfikacyjna. Rzeczypospolitej Polskiej, 1923.
- Zoll, Fryderyk. "Prawa osobiste w zarysie ze stanowiska prawa prywatnego austriackiego". *Czasopismo Prawno-Ekonomiczne*, ed. Franciszek Xawery Fierich, 535–63. Kraków: Towarzystwo Prawnicze i Ekonomiczne, 1903.

Internet source

A Pallas nagy lexikona, vol. 6. <http://www.kislexikon.hu/fejvaltsag.html> (accessed: 10.12.2021).