PATRIARCHAL LEGALIST UTOPIA IN LATE NINETEENTH CENTURY HUNGARY. A DISCUSSION OF PROCESSES OF "NATIONAL SELECTION" AT WORK IN THE 1877 LAW ON GUARDIANSHIP

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Some Thoughts on the Concept of Utopia

For many of us, the concept of "utopia" brings to mind the political visions of dissident groups, whose common dreams of a better future form part of what Immanuel Wallerstein would call the "anti-systemic" movements against capitalism, against militarism, against patriarchy, against modernity.[1] Perhaps because of the importance they have had (and still have) for anti-systemic thought and practice, utopian visions are rarely explored as *systemic* realities – i.e. integral aspects of existing world historical systems. Instead sociological tradition, following in the footsteps of Frederich Engels and Karl Mannheim, has identified utopian thought with reactions against, and subversions of, systemic reality.[2]

Here I shall explore one aspect of *systemic* utopianism with reference to nineteenth century legal thought and legal systems. Nothing symbolises more powerfully the force of nineteenth century utopian aspirations than the universalist drive towards codification of the civil law that pushed across Europe and, eventually, across the whole world, described by Csaba Varga as a heady ideology of the new: a radical movement of "philosophers undertaking to create a new world out of the void; when philosophical rationalism, a world outlook arranged in mathematical order, the doctrine of natural law and its axiomatic conception combined to construct a unified system of views that could provide the ideology underlying the emerging theory of codification."[3]

[1] For an overview of the "anti-systemic movements" of the nineteenth and twentieth centuries see Immanuel Wallerstein, *Utopistics. Or, Historical Choices of the Twenty-first Century*. The New Press (New York 1998): 1–33.

[2] Frederich Engels, *Socialism: Scientific and Utopian* (1880); Karl Mannheim, *Ideology and Utopia* (1928).

[3] Csaba Varga, *Codification as a Socio-Historical Phenomenon*. Akadémiai Kiadó (Budapest 1991): 99, 14.

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In pursuing the idea of legal codification as a *utopian systemic movement*, I wish to go beyond utopia as anti-systemic dissent or (as in Engels' work) bourgeois ideology masquerading as anti-systemic dissent, and rethink it as the systematic and systemic articulation of new forms of (expanding) state power. Late eighteenth and early nineteenth century legal systems based on the principle of "one state, one code" were utopian programmes seized upon by different administrations as a means of achieving three distinct yet interrelated objectives. Firstly, codes could facilitate the integration of diverse populations within state borders through the abolition of diverse legal sources and the imposition of a single source of law. Secondly, codes could help to establish normative models for the interpersonal relations of the mass population. Finally, codes could function as imperial devices for incorporating border or peripheral zones – in the nineteenth century this was as true for the Tsarist empire and the Habsburg Monarchy as much as it was for the French Republic.[4] Thus the utopian aspirations of legal codification were translated into systemic programmes for imperial and national administrations. Much can (and waits to) be said about codification as a form of systemic utopia, embedded in modern, global processes of homogenisation. In this study I focus on the difficulty legal codification has had defining the proper place and function of women in modern society. Attempts to solve this "problem" resulted in the promotion of a nineteenth century national gender order I have named "patriarchal legalist utopia". I examine how this utopian solution was "sieved" through dominant legal discourses in late nineteenth century Hungary in the absence of a fully codified civil legal system there.

[4] We cannot speak of a "legal system" for the Tsarist empire, since it produced no civil code throughout the nineteenth century and what statute books it managed to compile were far from being implemented uniformly across the whole empire. However, this did not mean that Russian code-makers were not engaged with the same utopian project as their "western" counterparts. For the attempt in the 1820s to draft a Russian civil code along French lines see William Benton Whisenhunt, *In Search of Legality. Mikhail M. Speranskii and the Codification of Russian Law.* Columbia University Press (New York 2001). In the Habsburg Monarchy, although the Austrian *bürgerliche Gesetzbuch* of 1811 failed to impose its "one code" upon all the territories of the empire, the code was certainly a tool of imperial expansion and can be treated as a product of older pushes toward socio-legal bureaucratic integration occuring during the reigns of Maria Theresa and Joseph II. See Heinrich Strakosch, *Privatrechtskodifikation und Staatsbildung in Österreich, 1753–1811*. Verlag für Geschichte und Politik (Wien 1976). Regarding the French Republic, the imperial role of the French *Code civil* (1804) in consolidating the famously ambiguous "natural frontiers" of France during the Napoleonic period is well known.

Patriarchal Legalist Utopia

An incredible amount of energy, the work of whole lifetimes, went into drafting legal codes that (it was hoped) could smooth out the contradictions of modernity. Codifiers were not dreamers and they were certainly not radicals in today's sense of the word; for the most part they were conservative legislators in state employ working to maintain and strengthen existing administrations: i.e. they were part of the system, not against it. What was innovative (and utopian) about the code-makers was their faith that certain contradictions threatening to destabilise state structures could be countered by regulation based upon a universal system of basic rules. *All* human activity could be regulated and, through regulation, stabilised and made productive for the modern state (the very messy and often tedious details of an early code such as the 1794 *Prussian Landrecht* and the clearer, more abstract style of the French and Austrian civil codes indicate the extent to which this tendency had to be modified by codifiers in the interests of clarity).[5]

One particularly tricky area of legal regulation was women's activity (recognised in social reform circles as "the Woman Question"). Since women's work in industrial or industrialising states could be classified as both productive and reproductive, women's labour could be located both inside and outside domestic spaces and it was not imagined that women could fill both functions simultaneously without serious social repercussions. The concern of Frederich Engels that industry was bad for women and the family, and his stark image of women delivering their babies "in the factory among the machinery" presented in *The Condition of the Working Class of England* (1844), was an image haunting law-makers and social dissenters alike in industrial and industrialising states.[6] But "the Woman Question" was addressed as a basic problem by law makers long before it became a pressing social issue in transnational feminist and social democratic movements. In the late eighteenth and early nineteenth century, codifiers and legal commentators in England, Prussia, France and Austria created the basic ground plans for four national legal systems, all of which took steps (of differing degrees) towards removing marriage from church jurisdiction and placing it in state control.[7] A movement was underway to create an

[5] In the words of Franz Wieacker: "The lawmaker's belief that it is possible to find an absolutely correct legal solution (in a given historical situation) made him presumptious enough to try to provide immutable prescriptions for all possible contingencies." See Wieacker, *A History of Private Law in Europe*. (Oxford 1995): 265.

[6] F. Engels, *The Condition of the Working Class in England*. In *Marx & Engels, Collected Works*, Vol 4 (New York 1975): 452.

[7] The ground plans were: the Prussian *Landrecht* (1794); the French *Code civil de francais* (1804); the Austrian *bürgerliche Gesetzbuch* (1811) and the rules underpinning English *Common Law*. English law differed from continental civil systems in that it was never codified and, as grand narrative would have it, was supposedly less subject to radical reform than

important branch of secular law – marriage and family law – which became a major tool in the nineteenth century for constructing the ideal of the national family. Based on a gendered division of labour between the family home (reproductive, unwaged) and the workplace (productive, waged), an idealised vision of national family life was promoted in nineteenth century legislation based on the original ground plans – the codes. This utopian vision revolved on an axis dividing married and single women. Since the codifiers did not wish to leave the potentially productive activity of single women untapped, they relaxed forms of authority that had existed over single women and instituted legal controls over all social classes of married women – making wives subordinate to, and dependent on, their husbands. Ursula Vogel describes this gender order as "the artificial, state-made order of 'husband' and 'wife'."

> **"[**M]arriage envelops both men and women in a web of mutual rights and obligations. … As a husband, a man has not only extensive powers but also enduring obligations towards his wife, be it in the form of maintenance, of protection of her interests towards third parties, of liabilities for her debts or of provisions for the livelihood of the widow. Conversely, a wife is not merely the subject of power in the sense of having no protected rights; she has definite, enforceable claims on her husband's support and on his property. The point is of course, that the pattern of mutuality is not symmetrical. It is structured by a prior norm which the key article of the [French] *Code civil* states as 'the husband owes his wife protection, the wife owes her husband obedience.' [Article 213, in force until 1938!]"[8]

The total financial (and emotional) dependence of a wife upon her husband was intended to unite husbands across class boundaries in their new national

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the systems of the continent since it was based on an evolving system of legal precendent and common law tradition. I cannot help noticing, however, that the famous *Commentaries on the Law of England* by William Blackstone (1765–1769) were compiled and published in the late eighteenth century – the period when across the rest of Europe, committee after committee was being established to codify the civil law: the first great codification wave. The emergence of an "English legal system" corresponded to the emergence of continental legal systems and shared many of their features. (In her engaging study on patterns of inheritance law in Germany, France, England and the United States, Barbara Willenbacher argues that what she calls "legal ideology" has been responsible for obscuring some of the commonalities between civil and common law systems. See Willenbacher, "Individualism and Traditionalism in Inheritance Law" in *Journal of Family History*, Vol 28, No 1 (January 2003): 208–225). Furthermore, it strikes me that as a territory bounded by the sea, "England" and the contested terrain of "the United Kingdom" had less need for codified law since codification, as I have mentioned, played an important imperial role in unifying large tracts of *contiguous* lands (hence the first codification commitees were set up by sovereigns of the expansive eastern empires: Prussia, Austria and Russia). This is, however, for another study.

[8] Ursula Vogel, "The state and the making of gender. Some historical legacies", in Vicky Randall & Georgina Waylen (eds), *Gender, Politics and the State*. Routledge (London / New York 1998): 29–44, here 35.

function: that of maintaining the strict division of labour between husbands and wives and thereby ensuring the healthy reproduction of the national labour force. Immanuel Wallerstein notes: "what occured in the nineteenth century was something new. It represented a serious attempt to exclude women from what would be defined arbitrarily as income-producing work. The housewife was placed in tandem with the male breadwinner of the single-wage family."[9]

In the nineteenth century, *anti-systemic* utopians (including those who considered themselves to be critics of utopian ideas such as Frederich Engels) hoped for the "withering away" of the family as well as the state; reproductive activity within the family was regarded as a bar to the construction of productive social roles for women.[10] Systemic utopians on the other hand (such as codifiers and legislators of law in the nineteenth century industrial nations) hoped to strengthen the family as an important national institution by making marriage the legal basis of the national family and bringing marriage (and the family) under state control. The legal collaboration that they imagined between states and husbands – restricting married women's mobility, their waged activities and their financial and emotional independence – I call patriarchal legalist utopia.[11] As the "answer" to one of the most destablising problems of modern times, patriarchal legalist utopianism was designed to have a stablising function. It is in this stabilising function that laws regulating the family, emerging in different forms across the nineteenth century's industrial and industrialising world, must be contextualised for the purposes of analysis.

Patriarchal Legalist Utopia through the "Ideological Sieve" of Hungarian Family Law

> [T]he nationalist paradigm ... supplied an
> ideological principle of selection. It was
> not a dismissal of modernity but an attempt
> to make modernity consistent with the nationalist project.[12]

If, in the early nineteenth century, dominant nations had produced patriarchal utopian laws, two questions arise regarding Hungarian law. First, were patriarchal utopian laws considered desirable models for the Hungarian state in

[9] Wallerstein, *Utopistics*: 23.

[10] See Wendy Z. Goldman, "The origins of the Bolshevik vision: Love unfettered, women free", in *Women, the State and Revolution. Soviet Family Policy and Social Life 1917–1936*. Cambridge University Press (1993): 1–58.

[11] Ursual Vogel refers to the "intermediary power" of the husband "between the state and his wife". Vogel, "The state and the making of gender": 37.

[12] Partha Chatterjee, *The Nation and its Fragments. Colonial and Postcolonial Histories*. Princeton University Press (Princeton 1993): 121.

the late nineteenth and early twentieth centuries? Second, if so, then were these laws directly transplanted, or was there an "ideological sieve", to borrow a metaphor from Partha Chatterjee, through which Hungarian reformers put imported legal models of family law?[13]

To the first question the answer is simple: there can be no doubt that "the Western legal system" was constructed as a set of models in Hungary. Hungary had no civil legal system as such until the full codification of law along Soviet lines in 1959 and was characterised, for the duration of the nineteenth and early twentieth centuries, by a legal culture located for the most part in the courts and in legal scholarship, supported at the legislative level by a somewhat chaotic set of partial codifications and statutory laws. It is not possible to go into the multiple explanations for this situation, which characterised much of Eastern Europe. What is important for our purposes, is that in the absence of a national legal system, every partial codification of Hungarian law was seen as a step closer to Hungarian national unity, independence and the achievement of a legal state along Western European lines, with Western European codes seen as positive legal models. (The civil marriage law of 1895, for example, replaced eight previously operational matrimonial codes.)[14] The idea of the Western legal model promoted an idealised vision of the West as a place where state and national borders harmonised. Dominant legal discourses in Hungary reinforced an occidentalist vision of the West as a terrain of "happy marriages" between nations and states, where national cultures had "generally matched state borders, and [were] therefore politically more stable".[15] Family law was especially suited to this narrative since in Hungary, as elsewhere, legal discourses emphasised a profound link between the family and the nation state. Hungarian legal scholars in the field of family law summarised tendencies in "dominant European legal systems" before going on to describe basic tenets (and of course "unique features") of Hungarian law. The construct of "Hungarian family law" helped to politically stabilise Hungarian nationhood as a historic unity in need of codification, but depended for its coherence on a parallel construction –

[13] Ibid: 117.

[14] Hungarian Justice Minister Dezső Szilágyi, justifying the new civil marriage bill in 1893, wrote that "legal unity is an expression of civil equality and political and national unity", going on to describe state control of marriage as a step towards full legal codification in tune with the codes of Austria and "the majority of Western European states". See the justification of the civil marriage bill, Documents of the Lower House, 1892–1897 (Vol 15): 26.

[15] Glenda Sluga, "Narrating Difference and Defining the Nation in Late Nineteenth and early Twentieth Century 'Western' Europe", in *European Review of History*, Vol 9, No 2 (2002): 183–197, here 184.

"Western law" – of codified models (reflecting the coherence and stability of Western nation statehood).[16]

In answer to the second question regarding legal transplantation processes, we should refrain from concluding that just because Western law was idealised as a set of models in Hungarian judicial culture, it was therefore "received" without any defined selection process. Across nineteenth century Europe, the premises of codified law regarding the legal and financial dependence of married women and their subordination in the marital home were gradually undermined by economic uncertainties and social instabilities, leading law reformers to consider strengthening "the family" by increasing women's legal independence: protecting poor women from "incompetent, lazy or unprincipled husbands" – as English legislators claimed to be doing with the Married Women's Property Act of 1870 – and protecting upper class women and families from bankruptcy, a phenomenon which was described by the future Hungarian Justice Minister in 1877 as caused by "market forces" and the "personal immorality" of male heads of households.[17] The second half of the nineteenth century saw a series of concerted campaigns against codified law led by women's organisations and law reformers on behalf of married women.[18] This is an important consideration when evaluating the impact of legal currents in family law

[16] In 1885 a leading Hungarian legal scholar of family law, Mihály Herczegh, stated that more than any other branch of law, family and inheritance law reflected "most faithfully" the national character and the organic development of a national legal system. This discourse characterises nineteenth century scholarship in Hungarian family law. See Herczegh, *Magyar családi és öröklési jog*. (Budapest 1885): iii & 144. György Jancsó's *Hungarian Marital Property Law* is typical of nineteenth century scholarship on family law, analysing the "dominant legal systems" of Western European nations in order to set out a distinct "Hungarian legal system". See Jancsó, *Magyar Házassági Vagyonjog* (Budapest 1888): v–vii & 1–45.

[17] For an account of concerns that working class men were ruining families in England see Mary Lyndon Shanley, *Feminism, Marriage and the Law in Victorian England*. Princeton University Press (Princeton 1993): 77. For the similar concerns of Dezső Szilágyi (opposition MP, later Hungarian Minister of Justice) regarding *property-owning* men see the debate in the Lower House of the Hungarian parliament over the bill on guardianship law: parliamentary sitting of June 15, 1877. Vol XI (1875–1878): 102.

[18] In Imperial Germany of the 1890s, where a new civil code was being prepared, the German *League of Progressive Women's Associations* attacked the assumptions of the Prussian legal system regarding married women. Organised protest against the civil law codes began in the 1830s in England and France. See Irene Stoehr, "Housework and motherhood: debates and policies in the women's movement in Imperial Germany and the Weimar Republic", in G. Bock & P. Thane, *Maternity and Gender Policies. Women and the Rise of the European Welfare States, 1880s–1950s*. Routledge (London / New York 1991): 213–232; also Karen Offen & Susan Groag Bell (eds*), Women, the Family, and Freedom. The Debate in Documents. Vol 1, 1750–1880*. Stanford University Press (1983): 143–161; Claire Goldberg Moses, *French Feminism in the 19th Century* (New York 1984): 104; Shanley, *Feminism, Marriage and the Law*: 17.

flowing from "west" to "east" since the increasing equation of married women's partial independence with late nineteenth and early twentieth century "progress" influenced the way in which family legal models were received by "non-western" states – a process I call "national selection".[19] Between 1877 (Hungary's first attempt to codify aspects of family law) and 1928 (the first full draft of a Hungarian civil code to become an accepted legal source in the courts), Hungarian law reformers selected aspects of Western family law perceived to meet the needs of their country in assisting its economic, social and political progress towards what they perceived to be fully united nation statehood.

Local Conditions in Hungary and Statute 1877: XX (Law on Guardianship)

When the 1877 guardianship law was promulgated in Hungary, no comprehensive legislation on the family then existed – no civil law of marriage upon which family legislation might have been based. Although the 1877 law was regarded as a significant step towards full codification of the Hungarian civil law, it concerned only one aspect of family life – guardianship – and emerged as a *temporary* solution in the absence of a comprehensive national framework for family law and other aspects of civil-legal relations, which would have provided legal guidelines for the regulation of marriage and divorce, marital property, inheritance and male and female employment, among other legal issues. When the bill on guardianship law was originally submitted to the Lower House of the Hungarian parliament in 1876, some MPs chose to oppose it (arguing for removal of guardianship-related issues from the legislative agenda) on the grounds that it made no sense to systematise aspects of family law in the absence of a national code.[20] Another important feature of the bill was its primary concern with propertied families. The bill did not address the family as a national ideal, but sought to avoid "unnecessary" legal intervention by the state into the family, a sphere conceived in the main with reference to

[19] Partha Chatterjee has extensively theorised the process of selection with which nation-builders "outside" the core regions of Europe imagined their own national cultures into being in his celebrated work: *The Nation and its Fragments. Colonial and Postcolonial Histories*. Princeton University Press (Princeton 1993). The expression "national selection" I have devised on the basis of Chatterjee's thesis in order to suggest a process of nation-building outside of the European core that is seen to be in tune with general progressive developments of the time ("national selection" being, obviously, a play on words exploiting the inherent idea of progress in the Darwinian notion of "natural selection").

[20] This objection opened the first debate over the bill at the parliamentary sitting of the Lower House, May 1, 1877.

families of the elite.[21] We must bear in mind that by the late 1870s, although the recently unified capital of Budapest had begun an important social, economic, political and cultural role in the general nation-building project – absorbing large numbers of migrants from the surrounding regions of the country throughout the late nineteenth century and facilitating general integration of the population – the capital's law-makers were not yet attempting to define "normative" laws for the nation (this trend would take off in the 1880s, in the years running up to the promulgation of the Hungarian civil marriage law).[22]

The presence of these conditions makes the 1877 law on guardianship an interesting "case study" for analysing transnational legal developments in the nineteenth century, helping to identify contradictions that set up the early natural law codes of Europe as models for Hungary, while at the same time undermining them as inadequate bases for the future development of Hungarian family law. By way of illustrating the more significant aspects of the 1877 law I have chosen to tabulate legal definitions of the most important terms pertaining to gendered authority within the family in nineteenth century "Hungarian" law, before and after 1877 (see Tables 1, 2 & 3 below). The key terms are "paternal authority" (*atyai hatalom*), "parental authority" (*szülői hatalom*), "natural and legal guardianship" (*természetes és törvényes gyámság*) and "statutory guardianship" (*gyámság*).

[21] The law's basic objective was to define legal authorities within the family and within the state administration deemed competent to dispose of the property of legal minors and orphans. The Hungarian Prime-Minister and Minister of the Interior, Kálmán Tisza, outlined the law's basic objectives and drew attention to the legislative reluctance to deal with the private institution of the family in his 1876 justification of the original bill. See the Documents of the Lower House 1875–1878 (Vol 10): 404–405.

[22] On the relation between national development and the capital see György Ránki, "The Role of Budapest in Hungary's Economic Development", in Ránki (ed), *Hungary and European Civilization,* Akadémiai Kiadó (Budapest 1989): 163–180. My understanding of the term "normative" law is here based on the definition by John Eekelaar, who defines law as "normative" when it serves to spread norms "throughout a society viewed as actually or potentially an integrated whole". See Eekelaar, "Family Law and Social Control", in Eekelaar & Bell (eds), *Oxford Essays in Jurisprudence III*, Clarendon Press (Oxford 1987): 125–144, here 126.

1. Legal Definitions of Gendered Authority in the Family in Hungary before 1877

	Father	Mother
Tripartitum (1628–1877)*	Paternal authority (*atyai hatalom*): Authority to punish or lock up a child or claim the child back from a third party. Authority to administrate property in the male inheritance line on behalf of the child.	
	Natural and legal guardianship (*természetes és törvényes gyámság*): Authority to administrate property in the female inheritance line on behalf of the child.	Natural and legal guardianship (*természetes és törvényes gyámság*): Authority to administrate property of child upon the death of the child's father, unless the father excludes the mother from holding this position in his will.
	Both parents obliged to bring up, maintain and discipline the child.	

* Legal definitions existing in written law prior to 1877 are here taken from the primary source of Hungarian noble law, the *Tripartitum* by István Werbőczy: a compilation of received roman and canon law published in 1514 and translated into Hungarian in 1571 under the title of *The Triple Book of Hungarian Noble Customary Law* (*Nemes Magyarország szokásjogának Hármaskönyve*). The *Tripartitum* became a primary legal source for statutory law in Hungary in 1628 and in Transylvania in 1698.

2. Legal Definitions of Gendered Authority in the 1876 Bill on Guardianship Law

	Father	Mother
Draft bill on guardianship law, submitted to the Lower House on November 14, 1876 by Hungarian Interior Minister, Kálmán Tisza.	Parental authority (*szülői hatalom*): Authority to bring up and discipline the child; to claim the child back from the illegal custody of another party. Included within the framework of the father's parental authority is: (i) The *duty* (as head of the household) to act as natural and legal guardian (*természetes és törvényes gyám*) – i.e. to administrate property on behalf of the child; (ii) The authority to exclude the mother from holding the position of natural and legal guardian; (iii) The authority to appoint a statutory guardian (*gyám*).* * Women may not be appointed as statutory guardians.	Parental authority (*szülői hatalom*): In the absence of a legal and natural father, the authority to bring up and discipline the child; to claim the child back from the illegal custody of another party. Included within the mother's parental authority is: (i) The *right* to act as natural and legal guardian (*természetes és törvényes gyám*) in the absence of the father, unless the father excludes the mother from holding this position.* * This right may be extended to grandparents.

3. Legal Definitions of Gendered Authority in the 1877 Guardianship Law

	Father	Mother
Statute 1877: XX (Law on Guardianship)	Paternal authority (*atyai hatalom*): The authority to administrate property of the child (including the holding of usufructory rights over that property) and to act as the child's legal representative. Included within the framework of paternal authority is: (i) The authority to exclude the mother from holding the position of natural and legal guardian (*természetes és törvényes gyám*); (ii) The authority to appoint a statutory guardian (*gyám*);* * Women may not be appointed as statutory guardians.	
	(iii) Parental authority (*szülői hatalom*): Covers the following areas vis-a-vis the child's welfare: – upbringing – discipline and supervision – health – moral instruction – place of residence – occupation	Parental authority (*szülői hatalom*): To discipline the child in the common family home (mother's authority here shared with the father). In the absence of the natural and legal father, parental legal authority covers the following areas vis-a-vis the child's welfare: – upbringing – discipline and supervision – health – moral instruction – place of residence – occupation Mother becomes the natural and legal guardian (*természetes és törvényes gyám*) in the absence of the father, unless the father excludes the mother from holding this position. As natural and legal guardian a mother's authority is not equivalent to paternal authority, but is subject to restrictions by other family members and / or by the state's guardianship authorities (*gyám hatóság*).

A brief glance at the tables is enough to see that the 1877 law brought with it increased legal specification and an expansion of the conceptual frameworks in which both "paternal" and "parental" authority were embedded. Table 3 shows that in 1877 paternal authority became more independent than other forms of authority within the family regarding the financial and legal arrangements of minors. All forms of family authority were explicitly subordinated to paternal authority regarding the basic well-being of, and provision for, minors. On the other hand, the 1877 law emphasised joint forms of parental authority in the area of supervision and discipline of minors within the family home.[23]

Tables 1 and 2 suggest forces of change pulling a legal construction of "the family" based on women's legal and financial incapacity and a subordinated "place" in the marital home into shape. But in Hungary, where no national system of law provided a hierarchical framework for conceptualising male superiority over women *in marriage*, legal constructions of the family such as the 1876 bill on guardianship, which focussed on the rights and duties of "parents" and dispensed with the category of "paternal authority", were fuzzy regarding differences between paternal and maternal legal status and between male-headed and female-headed households. What we see in Table 3 is the "correction" of this tendency. If we refer to the parliamentary discussion that took place over the bill it becomes apparent that the "model" codes were significant factors influencing the process of clarification. Some of the more heated parts of this long debate (March 14 – July 3, 1877) were caused by confusion over the bill's (vague) definitions of "parental authority ", "paternal authority" and "guardian" – resulting in a bombardment of questions and need for clarification on the part of the opposition. "What is meant by 'paternal authority'?" demanded Dezső Szilágyi, "for it must be clearly defined."

> "Through this law 'paternal authority' will be dispensed with and 'parental authority' will enter in its place; 'parental authority' is defined in such a way that we do not find the paternal entitlements which are in place today. What will happen to these entitlements?"[24]

Szilágyi was clearly worried that the bill might dissolve the increasingly exclusive relationship between *male* heads of households and specific spheres of financial and legal activity. Count Albert Apponyi, whose complaint that the bill would grant paternal forms of authority to mothers of illegitimate children and who called the attention of the House to the specific gender order laid out

[23] 1877: XX. 26. §. stipulated that mothers had no parental authority while the father practiced paternal authority over the children; 1877: XX. 10. §. made discipline in the home (*házi fegyelem*) and supervision of minors (*felügyelet*) the exceptions to this rule, granting authority in these respects to both parents equally.

[24] Parliamentary sitting of May 3, 1877. Minutes of the Lower House, Vol X (1875–1878): 376, 360.

in the codes of the "model" states, echoed this fear. "In every codification of law in the world the transference of parental rights to an illegitimate mother is unprecedented." A firm advocate of full codification of Hungarian civil law, Apponyi was one of the strongest critics of the bill; its lack of precision regarding paternal authority and its lack of precision in making paternal authority a *sole* form of authority was central to his justification of codification ("in codified law doubt in such matters is not permitted"). "What is a parental right?" Apponyi asked the House. "According to this bill it is nothing but many different types of legal jurisdiction, a *Protaeus* of family law."[25]

Apponyi's recommendation to the House was that since the bill clearly intended to try and codify basic principles of family law, it should be carefully reviewed by a special committee appointed by the Justice Ministry.[26] Others like István Teleszky (who submitted the accepted modification of the bill reinstating the category of "paternal authority") were less patient and urged that retaining the category of paternal authority was not only desirable because it was codified in European legal systems, but also because it was in tune with Hungary's historic (and organic) development as a nation-state. According to Teleszky, the reinforcement of paternal authority within the family was a gauge of national progress, the codification of this principle in Hungarian family law could be seen as proof that Hungary was as progressive as any Western European state. Paternal authority could also, as we can see from the citation below, be exploited as an imperial tool, emphasising a historic legal union between the territories of Hungary and Transylvania.

> "Why not keep to a proper system, which to the best of my knowledge is in place in the most renowned of the European civil codes and is rooted in our laws from the time of Werbőczy [compilor of the *Tripartitum* – A. L.] and is also operational in Transylvania: namely recognition, on the one hand, of the special right of the family head, the husband and the father as 'paternal authority' and recognition, on the other hand, of the special right of the mother as 'natural and legal guardian'."[27]

Here Teleszky's proposition takes the concept of the "Western model" of family law and filters it through what may be described as the "ideological sieve" of Hungarian national unity and progress. He claims European codes as sources of law whilst at the same time emphasising organic legal development in Hungary.[28] Paternal authority is thus justified as both traditional and modern, a litmus test of Hungary's historicity and progressiveness.

[25] Ibid: 361.
[26] Ibid: 384.
[27] Ibid: 385.
[28] The approach here may also be seen as an intriguing combination of the two dominant schools of nineteenth century legal thought: the Exegetical (French) School and Savigny's

Yet in the late nineteenth century, in the absence of a codified legal system, it was also (theoretically) possible to justify the equality of the sexes on the basis of both historical continuity and progress. Addressing the Lower House during discussion of the guardianship bill Pál Mandel turned the equality of male and female authority within the family into a critique of codification and, again, a celebration of Hungarian national tradition and progress.

What has been 'paternal authority' up until now will become 'parental authority'; the mother will have some paternal authority as well. Since in our legislation the mother, the Hungarian housewife, is revered, I have no theoretical objection to this. I approve the equality of father and mother.[29]

What is striking about Mandel's speech is the fictional equality he claims exists in the asymmetrical gender relation contained in the 1876 bill on guardianship. Following the line of reasoning we find that the nation-building agenda served by Teleszky's patriarchalism is served here by Mandel's "feminism". By filtering the bill through the "ideological sieve" of national progress, Mandel's rhetoric exploits new transnational currents emphasising women's rights in law in order to subvert the idea of the Western legal model, attacking codification in order to promote Hungarian national development as something unique – perhaps even more progressive than Western states! For Mandel Hungarian legal tradition was not, as for Teleszky, one based on paternal authority within the family, but one based on gender equality. "Codification processes ignore centuries of legal development and customary law ... and wish to simply dispense with our organically developed institution of the equality of the mother [*az anya egyenjogusága*]."[30]

Conclusion

In Hungary of the 1870s "the family" was about to become the target of national and transnational civil legal codification processes. But two obstacles hindered this process, one at a transnational level, the second at a local level. Transnationally, family law had reached a crossroads – located between married women's dependence and independence. This meant that a specific direction for Hungarian family law was not clearly provided by Western legal models. Locally, family law could not be codified while the nation building project was still "incomplete". In spite of these obstacles however, the 1877 law's patriarchal division of labour between men and women within the family was a

(German) Historical School. See R. C. Van Caenegem, *An Historical Introduction to Private Law*. Cambridge University Press (1992): 142.

[29] Parliamentary sitting of May 1, 1877. Minutes of the Lower House, Vol X (1875–1878): 331.

[30] Minutes for the sittings of May 1 and 3. Ibid: 332.

step towards a national utopian vision of "breadwinner" and "housewife" in Hungary (contained in the laws of the model states), and the utopian legal assumptions of the model nations helped "correct" dangerous tendencies in Hungarian legal developments straying away from strict patriarchal legalist divisions within the family. While the nineteenth century would not see the codification of Hungarian law, the national patriarchal legalist utopian model remained a powerful influence on attitudes to gender roles in Hungarian legal thought and state policy.

Nevertheless, it is possible to argue that the patriarchal 1877 law reflected the weakness of utopian patriarchal legalism in Hungary rather than the strength of its influence, since the process of drafting the law reflected the difficulties of national codification, which was considered to belong to the distant future. Beyond the perimeters of Hungary, patriarchal utopian visions of family life became increasingly impossible to sustain due to social and economic instabilities and the impoverishment of families – factors which weakened the implementation of these ideas in Hungary, where intensive industrialisation was coupled with national administrative and legal disunity.

PATRIARCHÁLIS TÖRVÉNYHOZÓI UTÓPIA MAGYARORSZÁGON A 19. SZÁZAD VÉGÉN. A"NEMZETI KIVÁLASZTÁS" FOLYAMATÁRÓL VALÓ VITA MŰKÖDÉS KÖZBEN AZ 1877. ÉVI GYÁMSÁGI TÖRVÉNY PÉLDÁJÁN

Összefoglalás

Milyen társadalomképük volt azoknak a férfiaknak, akik felelősek voltak a törvények kialakításáért és kodifikációjáért az újkori Európában? Miért írhatók le azok a társadalmak utópiaként, amelyek a szemük előtt lebegtek? Miben különböztek a kelet-európai utópiák a nyugat-európaiaktól? A szerző Partha Chatterjee[31] érveléséből kölcsönözve feltételezi, hogy a törvényhozás tervezeteit a család utópikus felfogására alapozták, a családéra, amelyet a nemzeti stabilitás alapjának és a társadalmi folytonosság eszközének tekintettek, és amelyet szembeállítottak a családon kívüli, változó, modernizálódó és instabil világgal. A munka nemek szerinti megosztása a házasság intézményén keresztül működött. A családok az egy keresős modellt testesítették meg: a férfiak voltak a kenyérkeresők és a feleségek pedig a háziasszonyok. Ez a felfogás „patriarchális utópia," mivel különböző szerepeket tart fenn a férfiaknak és nőknek a nemzetállam szolgálatában oly módon, hogy felértékeli és tekintéllyel ruházza fel a férfiszerepet. A tanulmány a patriarchális törvényhozói utópiákat vizsgálja az 1877. évi „nem teljes" és kétértelműen patriarchális magyar családjogi törvény megalkotása kapcsán, amikor új törvényt hoztak a gyámságról. Magyarországon a nyugat-európai patriarchális törvényhozói utópia felfogásához való alkalmazkodás nehézségekbe ütközött, mivel 1867 után Európa-szerte változott a jogelmélet. Elmozdulás következett be, amelynek során a hangsúly a szülői (azaz apai és férji) hatalomról és tekintélyről a házasságban élő nők nagyobb függetlenségére, a gyermek érdekeire és az állam esetleges szerepére helyeződött át, amely tényezők új alternatívát jelentettek a szülői (apai) hatalommal szemben. A magyar jogi diskurzusok a következő problémát jelenítették meg: egyszerre kellett volna alkalmazniuk az új jogi paradigmát és a nyugati nemzetállamok már megszilárdult patriarchális jogi alapelveit. A következmény: a férfi kenyérkereső történeti jogi modellje összekapcsolódott a stabil nemzetállam modern utópikus felfogásával. A „Nyugat-Európán kívüli" régiók jogviszonyainak elemzése felhívja a figyelmet a nemzet mint stabil kormányzati ideál gyengeségére és egyszersmind annak patriarchális vonásaira.

[31] Partha Chatterjee, *The Nation and its Fragments: Colonial and Postcolonial Histories,* Princeton University Press, Princeton, New Jersey, 1993.

Táblák: