CHAPTER EIGHT

THE AUTOCRATIC PRINCIPLE OF THE LAW AND CIVIL RIGHTS IN NINETEENTH-CENTURY HUNGARY

The Rights of the Individual

One of the fundamentals of liberal philosophy ever since its inception in the seventeenth century has been the belief that the function of the State is not the promotion of virtuous life but the protection of the rights of the individual. Liberals broke away from the Aristotelian tradition which took it for granted that the State existed in order to enable people to live ‘the good life’. In contrast, liberals were inspired by the idea that the freedom of the individual was the supreme moral good. And it followed that the proper function of the State was the safeguarding of each individual’s right to possess as much freedom as feasible in society.

But how are individual rights to be secured? If the laws of the State by and large restrict (rather than enlarge) individual freedom, the silence of the law (the absence of legal obstacles to the satisfaction of individual wants) may perhaps go a long way in securing individual liberty. Or, alternatively, should the laws themselves define (and if so, in what form) the rights which the individuals were to be endowed with? The response of the liberals to these classical questions, about the right relationship between the law and the citizen, varied. The answers, to a large extent, depended on a presumption which underpinned the different legal systems in the two parts of Europe. A convenient way to examine this question is to contrast the presumption of the law as regards the citizen’s rights in Western Europe with the presumption of the law on the eastern side of the Rhine.

In the law of evidence the rebuttable presumption of law (presumptio juris) is either on the side of the citizen (and the group of citizens) or on

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1 Based on a chapter of my Verfassungsentwicklung in Ungarn 1848–1918.
2 As argued by many early liberals, including Thomas Hobbes.
3 The philosophical problem itself was classical although historians have rather neglected to draw proper attention to the significance of the different presumptio juris in Western Europe and the rest of the Continent.
that of the state authority. In Western Europe, where the enforcement of civil rights was concerned, the presumption was on the side of the citizen. The onus rested on the state authorities to demonstrate that the official’s act against which the citizen sought legal redress for undue interference was in fact authorised by parliament-made law. The germs of this principle went far back to the philosophies of the natural law school. Hobbes’ sovereign, the recipient of the transferred natural rights of the individuals, has no rights except those that have been transferred to it; Locke’s individuals, by putting themselves under government, have given up only some specific rights. The eighteenth-century French philosophes followed Locke. Montesquieu argued that the subject was free when he was not ‘compelled to do things to which the law does not oblige him, nor forced to abstain from things which the law permits’. For Montesquieu it was axiomatic that where the law was silent the citizen should be free (and whenever in fact he was not, his freedom was violated). The principle went into the 1789 Declaration of the Rights of Man and Citizens: ‘All that is not forbidden by law cannot be prevented, and no one can be forced to do what the law does not prescribe.’ This was the presumption of the law on which justice was administered in the liberal states of Western Europe in the nineteenth-century. And correspondingly, the function of the liberal legislator was to confer rights on the individual to increase his liberty. Liberals considered it axiomatic that legislation, by and large, restricted personal freedom. And where the law was silent (as Hobbes had already argued) the citizen was said to be free.

The Autocratic Principle of the Law

In contrast to some west European legal systems, in the Habsburg Monarchy, in imperial Germany and elsewhere, the presumption of the law was on the side of the state authorities: in case of conflict, the burden of proof did not rest with the official but with the plaintiff. Citizens seeking legal redress against an alleged wrong done by the state official had to produce evidence that the law expressly protected their interests on the point at issue. This difference in the presumption of the law between the two parts of Europe had momentous consequences. While

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4 The Spirit of the Laws, Bk. XI, ch. 4.