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Varga, Norbert

Between Public and Private Law: The Foundations of the Regulation of the Hungarian Cartel Law of 1931*

The most significant aspect of the cartel movement of the 20th century lies within the paradox of free competition, for mandates regulating free competition came to be as the result of free competition itself. The only line of defence for the interests of consumers against the aforementioned mandates was the guarantee of the freedom of competition. As a part of the European codification process, the regulation of cartel law, basically cartel public law was introduced by the Act No. 20 of 1931, in which the emphasis was put on national intervention efforts. A unified regulation of cartel private law was scrapped, and due to its omission, the general rules of private law, especially commercial law served as guidelines for the practitioners of law.

1. The problem with the regulation of cartel public and private laws

Knowing the contemporary affairs of private law codification, one must state that the role of courts grew significantly in this era, especially in connection to the establishment of legal security and legal unification. This was prevalent after the beginning of the Great War, for the Curia attempted to reflect upon the legal problems that arose due to the war. Due to the lack of a private law codex, the courthouses were tasked with the decisions in cartel cases based on pre-existing legal precedents. However, it must be stated that even the Act No. 37 of 1875, the so-called Commercial Law did not provide ample legal basis, "nor ample analogy, therefore the courts used the ancient sources of law, fairness and equity to create legal practices for cartels".[1] § 6 of the private law bill of 1928 also cites this task of the courthouses by stating that "in legal matters not settled by law, courts should reach a verdict by taking the spirit of our country's law, the general principles of law and scientific statements into account".[2] Apart from the legal development actions of courthouses, the government

also had to see to the regulation of cartel law in the first half of the 20th century, for the judicial practices of courthouses had less and less effect on economic progression.

The differentiation between cartel private law or, to be more precise, cartel law of public interest and private law only became truly significant after the Cartel Law came into effect. The cartel law basically regulated cartel public law and overshadowed the regulation of cartel private law. This was the specific wish of the legislator, for it only specifically regulated cartel public law in the act.

I agree with the statement of Sándor Kelemen, according to which our law stopped halfway through, for "true legal problems arise specifically in cartel private law".[3] It can also be stated that the operations of cartels resulted in public wrongs most of the time, therefore the regulation or more specifically, the establishment of cartel public law turned out to be vital. By examining the contemporary economic relations, it can be stated that in this area such agreements, cartels were established that private individuals would have been unable to act against their impositions. Therefore, it was necessary that the authority of the state should carry its point against the impositions of the cartels if public interests were on the line. However, this also meant that intervention due to public interests was more of a matter of power, therefore a political matter and not a legal problem for the government. The question was what the regime could do in this situation, whether it was willing and capable of wielding an effective tool to regulate economic conditions.

Where did cartels and public interests connect? By looking at the matter from the perspective of public interests, we can say that the matter of cartels is basically none other than the matter of prices.

> *"Consumer Vendel Savanyú has no legal problems, his only interest lies in the question of whether when he puts on his ragged shoes in the morning to take them to the cobbler for soling, does the asking price contain the overly priced shoe leather of the cartel? When he sits down to have breakfast and contemplates the prices of milk and sugar, he wishes to know whether the overwhelmingly high number is the result of a certain cartel's price formation? Or if he stops for a pint of beer after work, does its price contain the expenditures of a campaign against a competitor outside the cartel?"*[4]

As the example shows, the matter of whether cartel matters mean the examination of pricing matters lies within whether the cartel abuses its monopolistic situation to force the consumer to pay an excessive price.

This is validated by the statement of Baron Zsigmond Perényi published by the *Pesti Hírlap [Pest Newspaper]* on 17 February 1933, according to which he expressed his opinion on the topic of the task of the Cartel Committee as its point is "the examination of price formation and enforcing sufficient actions and the creation of edicts if deemed necessary".

Naturally this is an overly simplified answer to the question if we look at it from the point of view of public interests, for the law was not only for regulating price formation, but also several other complaints of public interests (for example, presentation omission) apart from the reduction of excessive prices.

Even in cartel private law, one can discover several legal problems that affected public interests. Like boycotts that caused private law grievances to the boycotted individual, for stopping his industry practices caused financial losses. Although this topic had direct ties to public interests, for the stoppage of industry practices was against public interests. These cases where the private law grievance fell into the same "formal set" as public grievances the cartel law pushed completely into the background, for it did not provide an opportunity for individual participants to express their needs in lawsuits held in the Cartel Court.[5]

However, the cartel law regulated the cartel matter in connection to public interests by completely removing private individuals from the cases, shrinking its role to turn to the minister of economy with his grievances, although the consideration fell under the jurisdiction of the minister without any contradictory procedure or hearing.[6] The decision to initiate a lawsuit of public interest fell solely to the minister and could order the royal legal director to initiate the proceeding.[7] The private individual who provided the data was excluded from this lawsuit. Therefore, the statement that cartel matters were nothing more than pricing matters according to the public rings so true. However, fundamentally this isn't a legal matter for prices were formed by experts according to government arrangements. "Therefore, the deciding political question was whether or not the government possesses enough independency and power to force the agents of private economy to take public interests into account."[8]

The regulation of cartels should basically be understood by looking at it from the perspective of governmental power. For example, the government strove not to increase coal prices or heating bills, which was exponentially significant in connection to consumers, according to some specific examples in the case of the coal cartel, for the Cartel Court dabbled in answering questions of cartel private law. The respondents formed an agreement on 28 December 1928 and 1 January 1929, according to which from the 1st day of January 1929 all the way to the 30th day of January 1932, establishing regulations binding all parties in connection to the acquisition of firewood, coal, coke and smithy coal, and also the sale in and around the town of P. [Pápa], determining the sales prices and sales conditions of the products, and also in connection to the methodical turnover and payoff of the commerce, and mutual customer protection. This agreement of the respondents did not refer to the opportune arrangement of the transactions, but rather to determine the actions of the participants for a longer period. The obvious purpose of the mutual commitments the participants undertook in the agreement was to regulate economic competition in connection to said products in connection to turnover and price formation. In its decision, the Cartel Court stated that "such an agreement, without taking its personal, economic, or geographical measure into account, falls under § 1 of the Act No. 20 of 1931".[9] Commercial associations also participated in the establishment of the agreement; therefore, according to the reasons listed in connection to the aforementioned case, it should have been

presented to the secretary, but this was also omitted. According to § 2 of the Cartel Procedure Law, the agreement had lapsed, and even the fact that after a secretarial summons, the secondary co-defendant fulfilled the presentational obligation on 1 September 1932. "For a belated presentation does not validate a case invalidated due to the failure to adhere to the legally pre-established deadline."[10]

According to Lajos Gavallér, cartel public law, more specifically, the representation of public interests against the power of the cartels was deemed to be a more vital task then against private interests, for consumers do not care if one of them renders an outsider company impossible but whether the government is strong enough to stand its ground against a cartel and stop sharking abuses. Therefore, the public law part was regulated in the act. However, if one is looking for real legal questions, one must investigate cartel private law.

> *"The aim of the unity of legal theory and judicial practices is to separate how far the freedom of contract of individuals reaches, therefore how long can one legally refuse to serve products to individuals he does not like, but where does the protection of industry practices of individuals begin where the denial of business relationships is considered forbidden boycott."*[11]

Simply regulating cartel public law, specifically settling the case of interjection for public interests, and not taking cartel private law into account was as unsatisfactory solution. Interjection for public interests is purely a power struggle between the government and a cartel: "our cartel law which gave more authorities to the government possessing every available tool of control is basically selling sand to Arabs".[12] However, it left the relationships of the cartel and its members, its competitors or even its consumers unregulated. Because of this, legal mandates created opportunities for state intervention. According to the rules of contemporary private law and economic law, the regulation of cartels proved to be cumbersome, for regulating it as some sort of company statuses. Commercial companies and cartels have different economic backgrounds and target audiences. "Cartels grew over the private and commercial law company statuses."[13] Let's take, for example, public limited liability companies into account, where three interested parties prevail: the company and the state, the company and every other private law entities and the company and its members. Although cartels are built up in a similar fashion, but these represent much wider areas. Significant changes came into effect on the relationship of the cartels and the state, especially in connection to the rights and obligations of the state. This can also be stated referring to cartels and private law entities, but legal relations shifted between the cartel and the supplier, the consumer or even the trader.

> *"Cartel regulation according to contemporary private law and commercial law in a way that takes laws currently in effect and also the greater economic significance of cartels, today's hochcapitalism, the separate lives and requirements of contemporary economic organisms into account is simply not possible."*[14]

To put it bluntly, private law is a legal system built upon free competition with rules protecting individuals from individuals. According to Gavallér, in cartel law, the interests of communities clashed with the interests of other communities which would have needed a so-called "social private law" for mediation. Since contemporary private law would have been unable to stand up to cartels, the regulation of state intervention seemed like an obvious answer, therefore making a matter of public law from this legal regulation. The next step of this regulation is to deal with cartel problems on a private law level. The Cartel Court and the Cartel Committee were tasked with aiding the rational development of cartels, and

> *"promoting their extension according to our contemporary mandates of private law based on a shifting sense of justice due to legal precedents, with social purpose and promoted by today's organised economic life* […] *a legal construction must be established in which all of its dangerous excursions would be rendered impossible".*[15]

"However, cartel private law might be considered a legal problem, and those are completely missing from the act. General principles of private law had to be taken into account, such as the nullification of agreements that are against common morals or the inviolability of the freedom of industry practices."[16] The private law segment of cartel law "is a fallow itself, overran with the weeds of legal insecurities and waiting for legal tilling".[17]

From the point of view of cartel law, there are two separate groups of private law relations. On one hand, if they regulate internal legal relationships, meaning they settle the relationship of the cartel members and the cartel itself. On the other, there are the agreements between cartels and competitors outside the cartel and the consumers. In both cases, a wide array of legal problems might arise, and the participants agree as a sort of "peace treaty" to eliminate them. Members of the cartel reach agreements with each other to confront competitors more effectively, which can give birth to conflicts.

The so-called "internal" conflicts mainly happen due to the circumvention of the mandates of cartel contracts. In this sense the most significant problem was whether the cartel contracts between parties remained valid. In what cases a valid cartel contract can be nullified according to the principle of pacta sunt servanda.[18]

Due to the specific nature of cartel contracts, in most cases the contracts were filled with so-called blank contents, and because of these, the actual contents continuously changed. The easiest method of confirmation is by price cartels. In the cases of such cartel contracts, it is an extremely rare occasion to find an example of a mandatory obligation to keep to specific prices to the whole span of the contract. Instead of this, they established a leading organisation that met at set occasions to establish prices according to market ratios. This meant nothing more and nothing less than the cartel contract only obligated the elimination of competition via keeping the set prices established by the competitors from time to time. These cartel contracts were general agreements.[19]

At times, competitors established a joint sales office to move the merchandise, and entered into an exclusive agree-

ment with said office to sell their merchandise to this joint sales establishment. In this case, either the office or one of its bodies was given the task of price formation by taking market into consideration.

The official paperwork of Victoria Chemical Works Plc. contains the cartel contract that regulated the operation and organisation of the cartel.

In this cartel contract, the participants (Dezső Drucker Pallas Chemical Plant [Pallas Vegyészeti Üzem], United Incandescent Lamp and Electronic Plc. [Egyesült Izzólámpa és Villamossági Rt.], Chemical Factory [Vegyészeti Üzem], Tivadar Helvey DChem's Chemical Plant [Vegyészeti Üzem], Miklós Rosenberg's Chemical Plant [Vegyészeti Üzem], Ernő Rudas Concordia Chemical Industry Plc. [Concordia Vegyészeti Ipar Rt.], The First Sand Lime Brick Factory of Soroksár Plc. [Első Mészhomok Téglagyár Rt.] and the Victoria Chemical Works [Victoria Vegyészeti Művek) settled that, among other things, that the Hungarian Industrial and Commercial Bank Plc. is exclusively responsible for the commission sales of soluble glass (sodium silicate), not to mention they entered into an agreement on the monitoring and Treuhand-tasks,[20] according to which the bank accepted the commission, the monitoring and the Treuhand-assignment.

2. One of the main issues of cartel private law: regulating boycott

Boycott regulation turned out to be an even more significant problem of cartel private law. Here, basically the same principle should be accepted, namely that boycott as a solution could only be considered a legal solution in well-found cases. One example of boycotts was when it hampered joining attempts and impeded industry practices. Most of the times, these agreements were attempted to get across under the banner of "releasing unfitting participants of the market".

Only certain companies and merchants could circulate certain products. The merchants' aim was to rid the market of forced agreements and bankruptcies.[21] However, the situation changes from the point of view of the boycotted. This practice also stopped those individuals from performing their industry practices who managed to acquire licenses with obeying law enforcement and administrative rules. Despite this, any practice of boycott endangered their livelihood and existence. "Therefore, two immeasurable points of view clash here, the freedom of contract on one hand and the freedom of industry practices on the other! The incompatibility of these two points of view defines the problem of the permissibility of boycotts."[22]

Amongst the cartel supervisory agencies[23] the Cartel Committee dealt with boycotts in a more thorough manner. On the session of 20 October 1933 of the Cartel Committee, the items of the agenda included the discussion of the mandates of isolation and exclusion of cartel contracts which the cartels enforced upon non-paying customers.

The Committee's session was opened by President Béla Ivády who then asked committee member Károly Dobrovics to announce the draft of presentation. Dobrovics began his presentation with the description of the preludes of the case and stated that the matter of isolation arose in several specific cases in front of the former Cartel Committee. The cartel contracts contain clauses on the cartels' actions against non-paying customers. After the introduction of this item of the agenda, Miksa Fenyő introduced his statement in which he asked the committee to delay the discussion of the item of the agenda for he made the case that there is simply not enough practice for the objective and thorough judgement of the matter. Fenyő wished to supplement his statement by quoting the German cartel edict's mandates on boycott and isolation, according to which our nation's cartel law deliberately lacked any mandates on this topic.

According to his statement, the Cartel Committee did not possess enough practice yet. Fenyő explained that

> *"a lengthy waiting and examination period is necessary with the reform of genuinely significant acts in order to determine how they adapt to everyday life and how they affect production and economic life as a whole, just look at the Commercial Act, one of the most vital chapters of our nation's economic life, which required 50 years of practice".*[25]

Therefore, Miksa Fenyő's statement of principle stated in connection to the aforementioned matters that the Cartel Committee did not possess the necessary practice and experience, not to mention that the history of cartels is not an especially lengthy one. He emphasized that the only thing that began later than the effect of the cartels' practical actions was the Committee's time spent on dealing with these matters and mandates.

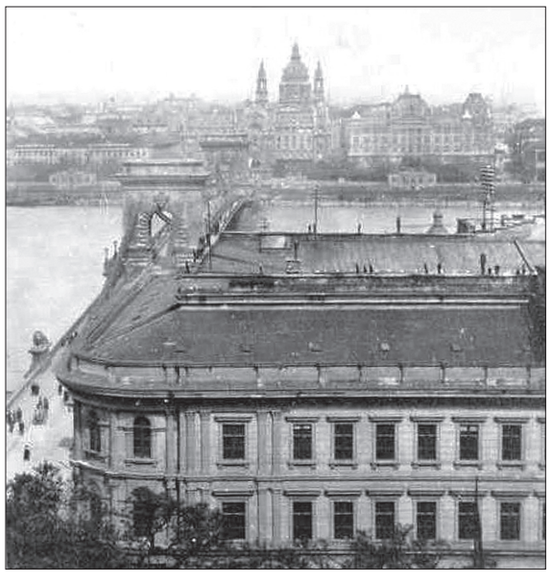
> *"I'm not stating that these are questions we should ignore, but since every day there is a new case, and even more shall happen in the future that touch upon mandates directly related to boycotts, my suggestion would be to state graciously whether the Cartel Committee, in theory, does not deem the matter necessary to deal with."*[26]

After this statement, Fenyő made a promise that the Cartel Committee shall always examine in every specific case whether the case brought forward is against Section No. 6 of the Cartel Law.

To supplement his statement, Miksa Fenyő elaborated that he thinks the Cartel Law does not wish to deal with boycotts specifically. In connection to this statement, it is noteworthy that at the time the Cartel Law was established, it has been over five years since § 9 of the German cartel edict quoted by the minister of agriculture was in use. This fact allowed Fenyő to deduce that adopting this section might not have escaped the attention of Hungarian codificators, the Ministry of Commerce or the Industry Council, but they simply deemed the application of this section as unnecessary due to the conditions prevalent in Hungary.[27] In connection to this, it can be stated that in this sense, the Hungarian Cartel Act doubtlessly bypassed German practices, despite the fact that out Cartel Act adopted a significant amount of the German cartel edicts. The Hungarian act summarized retaliation measures in § 6,

and in it, it did not deem necessary to establish specific actions for boycott and isolation.

According to the general consensus, the Hungarian act emphasized public interests over private interests. In contrast to this, the German edict contains a specific mandate to ensure the protection of private interests. "If an individual's freedom of economic movement is hampered unjustly, the German act allowed interfering rights to the individual, not to mention it deemed secession to be acceptable if the circumstances were justifiable."[28] The Hungarian act did not adapt this. According to the mandates of the Cartel Law, only the minister of commerce and the minister of economy submitted cases to the Cartel Committee and listing the types of these cases exhaustively. According to this, it can be deduced that the Cartel Law specifically wished to avoid the opportunity of bringing a case to the Cartel Court due to a complaint of a private individual.



The Royal Hungarian Ministry of Commerce, the first venue of the Cartel Committee meetings[24]

Committee member Ferencz Marschall joined Heller's point of view and stressed that cartel clauses containing mandates of boycott and isolation might still be against public well-being and public interests, therefore the matter requires the utmost attention of the Cartel Committee. He underlined that even though no specific complaints surfaced in connection to this matter, the question should not be swept under the rug, not to mention mandates that could result in an individual's economic destruction or his economic status to be rendered impossible are simply unacceptable.

In his comment, Ferencz Marschall expressed that in everyday life clauses in connection to boycotts were not exactly common yet based on everyday practices he figured that "certain organisations" were more than keel to use it. According to his testimony companies that made use of such agreements and clauses generally used the reasoning that the manufacturer or consumer had the opportunity to turn to another company who would supply them with their products no questions asked.

> *"Yet by considering that the Cartel Committee reasoned that it gives a votum for its application and understanding, we can only consider this question de lege lata. If we consider this case from this perspective, we should first and foremost bring forward § 6 of the Act No. 20 of 1931 that inhibits all mandates that endanger the interests of public economy or public well-being. Here it states that its existence, meaning every cartel clause should be judged according to its expected effect."*[29]

Marschall's opinion states that accepting an isolation clause based on the pretence that the isolated party still might have an opportunity to purchase the goods outside of the cartel is in no shape or form acceptable according to the intentions of the law. According to Marschall, definite action is also needed in cases of contracts and clauses when an unpunctually paying customer is not allowed to receive goods in exchange for cash. His opinion states that these are harmful for public well-being and public morals, therefore these actions should be considered contestable. He wished to join one of Heller's statement, namely that the Cartel Committee must express an opinion in this matter and avoiding said statement would be a mistake just because the Committee did not receive concrete complaints.

> *"Yes, we should make a statement of principle on this point, I consider the old Cartel Committee's statement on these cases to be a statement of principle and we should move beyond that and say that we consider such clauses to be by all means inhibiting if there is an existence on the line."*[30]

As the representative of the Hungarian Royal Legal Directorate, Antal Serly also supported Farkas Heller's standpoint. Serly expressed that he believes that the aforementioned item of the agenda is in fact vitally important, a so-called backbone of the whole cartel existence, therefore a statement of principle should definitely be accepted. He also referred to the fact that so far, only courts of arbitration dealt with this matter, therefore the statement of principle the Cartel Committee makes should be applicable.

Antal Serly deemed the discussion of this matter substantial because the legal directorate played an extremely significant role in the execution of the law. He stated that in connection to the execution of the law, the legal directorate is especially interested in the statements of principle the Cartel Committee establishes. "The first item of today's list of today's agendas is vitally important for all cases, shall we say, the backbone of all cartel life. Therefore, if I may express my humble opinion, the Cartel Committee should definitely accept a statement of principle."[31] Serly expressed that if the Cartel Committee wishes to reach a verdict in a certain case, the prior acceptance of a statement of principle is definitely unavoidable in order to serve as a guideline to make a decision. Serly expressed that according to the practice established based on the act on unfair competition resulted in resolutions that severely oppose contemporary legal principles. He pointed out that in 1927 one of the decrees of the court of arbitration of the Chamber of Commerce and Industry stated that even the destruction of competitors is allowed in business competition.[32]

"In essence, Hungarian court never even dealt with this topic, only courts of arbitration. Therefore, if the Cartel Committee wanted to establish a statement of principle in this matter, my humble opinion is that it should definitely keep that in mind, and this statement of principle should express an opinion that hopefully will be acceptable for Hungarian courts."[33]

Keeping all that in mind, Antal Serly as the representative of the Legal Directorate wished to support the suggestion brought forward by Farkas Heller. "The statement brought forward by His Excellency Heller does manage to find a middle ground and in the case of its acceptance the Cartel Committee would have a solid foundation to set foot on in each case."[34]

After the statement, Miksa Fenyő expressed his fears that if the Cartel Committee would accept a statement of principle on the matter of cartel contracts containing clauses of boycott and exclusion, it could happen that "in a specific case, they would find themselves on the side that is against the interests of public well-being and the economy even if the cartel only manages to peel away half of the individual's whole existence".[35] Therefore he did not deem stipulating necessary and found § 6 of the Cartel Law to be perfectly adequate.

In order to react to the suggestions and concerns of Fenyő, Farkas Heller described that should the Cartel Committee chose to decide solely based on the general mandates of § 6, then the Committee would never be able to move forward in cartel matters and would never stop examining individual cases instead of making time to establish standpoints of principle within the framework of the law. According to Heller's opinion, this is exactly what business life needed. By forming statements of principle, business life would see the frameworks within which it could move freely without crossing lawfully established boundaries clear as day. Farkas Heller came forward with the following suggestion.

"Exemption, isolation or boycott from business relations are exceptionally sharp weapons of economic struggles which might affect the economic prosperity and even economic life of certain individuals deeply. Therefore, the Cartel Committee relies of § 6 of the Act No. 20 of 1931 to only deem these tools acceptable to use within the interests of the economy and public well-being if there exist a valid reason of general interest for their application. The Cartel Committee deems it against the interests of the economy and public interests if isolation is not only meted out to the participants due to economically reasonable drawbacks but downright capable of the destruction of its economic existence. The Committee wishes to assess each case separately to determine whether or not this endangerment holds true."[36]

The proposition submitted by Farkas Heller and modified by Miksa Fenyő was accepted by the Cartel Committee unanimously.

The following paragraph is a detailed example of the outsider's boycott with the case of the carbonated water cartel.

The cartel of carbonated water makers and carbonated water equipment and component making machine industrialists entered into an agreement to engross all its components and machine needs at the cartel in advance, meanwhile the cartel engaged itself not to set up competitors in certain areas. To put it bluntly, this meant that if an individual would contact one of the cartel members to set up a soda-water factory around certain parts, this commission would have been forbidden to accept under the penalty of 20 000 Pengős. One of the members of the agreement almost instantly, right after the contract was signed accepted and delivered an order of a carbonated factory machine close to the plant of the carbonated water maker. Soon after, heated competition broke out between the two carbonated water factories that resulted in the price of carbonated water sharply declining. The aggrieved party filed for penalty to reimburse its damages due to the pricing competition. At the end, the lawsuit was avoided by the participants' agreement. As it was finally established, apart from the five companies that formed the cartel there was another company producing machines for carbonated water factories. The penalized respondent machine industrialist justified himself by stating that the penalty is used to strengthen an agreement that harms public morals, therefore it is invalidated. "Since the agreement that in a certain area only a certain company should be allowed to produce carbonated water and nobody else is allowed to set up shop in said area – is against the freedom of industry practices."[37] However, the cartel contract did not specify whether an entrepreneur can establish a carbonated water factory, only from who he can buy the equipment. Apart from the machine industrialists in the cartel, there were companies all over the nation that produced factory machinery and would have been allowed to sell the components. The defence also stated that the companies unified by the cartel produce the best quality equipment, but this did not affect the merits of the case. The final verdict turned out to be that since the five companies unified in the cartel did not monopolise the market that satisfies this specific need, therefore signing the contract was not an obligation.[38]

3. Summary

In the field of cartel private law, various other problems could arise apart from the ones that the law did not have clauses for, for the act's only concern was cartel public law. This resulted in a fundamental legal uncertainty in cartel law, therefore it would have been easier to regulate cartel private law as well. In this case, judicial legal practice became the decisive factor, for by taking into the general rules of private law, it shall deal with any legal problems that arise within the field of cartel private law.

The nominal reason of state intervention in private law relations in the period after the war was the transformation of economic relations. In my opinion this resulted in even more problems that touches upon the protection of fundamental rights, the separation of powers and all in all, the existence of constitutionality.

To sum it all up, it can be stated that the regulation of economic relations within the Cartel Act happened in order to protect public interests, however, it did not interfere with the development of free competition and economic development. "The crack of arms does not only silence poetry, but the purity of legal development also weakens in the current economic distress."[39]

Notes and references

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