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eGovernment in the Past Few Years in Hungary

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Abstract. The world keeps changing and we also change with these processes. At the same time, our expectations change and so do certain elements of certain terms, too. Democracy does not mean the same as in the ancient states of Hellas. Citizens expect from a state more than just defending their properties or ensuring the freedom of religion. The model of commanding public administration changed in the first half of the 20th century and the primacy of the hierarchic relationships began to fade.

Keywords: eGoverment, administrative law, interchange of data across administrations, Hungarian public administration

1. Preamble

The hierarchic public administrational structure, formulated by Max Weber, was characterized by administrational professionalism and political neutralism. Its primary objective was to reach the goals settled by the state. The Anglo-Saxon model has other base of the executive authority in contrast with the European public administrational structure. In the face of the unconditional primacy of the public interest that characterizes the European model, the Anglo-Saxon model is characterized by the harmonization of the interests: it emphasizes the primacy of the balance system. Those efforts need to be mentioned which firstly raised the implementation of the economic experiences to the public administration. Just think of the rationalization and efficiency-improving researches in Fayol's and Taylor's works.[1] This development had such a significant effect on administration that it was declared in the 70s and 80s – based on scientific research work – that certain administrational tasks would be worthy to be passed on to the private sector in order to increase effectiveness. This is the beginning of the scientific movement called New Public Management (NPM) or New Governance. The

1 See, e.g., Frederick W. Taylor, The Principles of Scientific Management, New York, Harper Bros., 1911.

salient features of NPM are the systematization of the tools, aims, and experiences of processes in a scientific aspect. It also amends the practical experiences with new methods and theories. Practically, it deals with 'the modernization of the institutional system and the new ways of governance'. Its aim is to modernize the state and public administration in an economic way.

We know that the European Union does not formulate any detailed expectations in respect of the member states' public administration; the only requirements are to be transparent, reliable and to operate on the ground of democratic principles. However, the situation has changed much since this principle was formulated. The European Union's former priorities have changed and are still changing in this aspect. The enlargement had particularly unexpected effects in regard to the Union's operation as a supranational community.

Public administration and the co-operation of administrational systems play an important role in solving the problems of enlargement, the integration co-operating with the Union. As the operation of public administration has a direct effect on the everyday life of the citizens, the Union is not allowed to ignore the objective to harmonize the public administrations of the member states.

2. eGovernmental Regulation in the European Union

2.1. eEurope Programmes

Let us see the most important steps on the way to building a well-equipped e-government in the European Union. First of all, we should take a look at the eEurope Action Plan "families". eEurope is part of the Lisbon strategy to make the European Union the most competitive and dynamic knowledge-based economy with improved employment and social cohesion by 2010.[2] In eEurope 2002, there is a chapter called e-government, which contains – next to cheaper, faster, more secure Internet etc. – the following:

"EU institutions and national public administrations should make every effort to use information technology to develop efficient services for European citizens and business. Public administrations should:

– develop internet-based services to improve the access of citizens and businesses to public information and services,

– use the Internet to improve the transparency of the public administration and to involve citizens and businesses in decision-making in an interactive fashion. Public sector information resources should be made more easily available both for citizens and for commercial use.

2 eEurope, An Information Society For All, Communication on a Commission Initiative for the Special European Council of Lisbon, 23 and 24 March 2000.

– ensure that digital technologies are fully exploited within administrations, including the use of open source software and electronic signatures,

– establish electronic marketplaces for e-procurement, building on the new Community framework for public procurement."

The Action Plan introduced the draft common list of basic public services. For e-government, the following two indicators are the basis for benchmarking:

– percentage of basic public services available online,

– use of online public services by the public.

To make these indicators operational, the Member States have agreed on a common list of 20 basic public services, 12 for citizens and 8 for businesses. Progress in bringing these services online is measured using a four-stage framework:

1.) posting of information online

2.) one-way interaction

3.) two-way interaction

4.) full online transactions including delivery and payment.

Public Services for Citizens:

1.) Income taxes: declaration, notification of assessment

2.) Job search services by labour offices

3.) Social security contributions (3 out of the following 4):

– unemployment benefits

– family allowances

– medical costs (reimbursement or direct settlement)

– student grants

4.) Personal documents (passport and driver's licence)

5.) Car registration (new, used and imported cars)

6.) Application for building permission

7.) Declaration to the police (e.g. in case of theft)

8.) Public libraries (availability of catalogues, search tools)

9.) Certificates (birth, marriage): request and delivery

10.) Enrolment in higher education / university

11.) Announcement of moving (change of address)

12.) Health-related services (e.g. interactive advice on the availability of services in different hospitals; appointments for hospitals.)

Public Services for Businesses

1.) Social contribution for employees

2.) Corporation tax: declaration, notification

3.) VAT: declaration, notification

4.) Registration of a new company

5.) Submission of data to statistical offices

6.) Customs declarations

7.) Environment-related permits (incl. reporting)
8.) Public procurement

As it is seen, the European Union can be much more characterized by the strengthening of service-providing character and not by the definition of such requirements that make us use the attainments of e-government in each segment of the public administration. The European Administrative Space plays a significant role by the change of its duties enabling the member states' legal system to accept this way of thinking. There appears also a new approach in the European Union. Nowadays, the long-term plan is that the public administrational services should be accessible on a same high level in each member state of the European Union. This means that the uniformity should be worked out from the view of the services, not from the view of organizations.

In the next significant step, eEurope 2005 Action Plan included among the key targets the interactive public services, accessible for all and offered on multiple platforms. Under the eEurope 2002 Action Plan, the Member States agreed to provide all basic services online by end-2002. The proposed actions of eEurope 2005 were the following:

– broadband connection for all public administrations;
– interoperability framework to support the delivery of pan-European eGovernment services to citizens and enterprises;
– interactive public services;
– electronic public procurement;
– Public Internet Access Points;
– culture and tourism – e-services to promote Europe and to offer user-friendly public information.

As seen in the list above, much has been achieved in this area, but many services still have limited interactivity.

2.2. Interchange of Data across Administrations

The IDA (Interchange of Data across Administrations) programme was started in 1995 as a result of a Community Decision that helped set up the IT infrastructure, establish common formats and integrate business processes across the EU. In 1999, two interrelated Community Decisions signalled the start of a second phase of the IDA programme, referred to as IDA II. The purpose of the programme, which was managed by the Directorate-General for Enterprise, was to support rapid electronic exchange of information between Member State administrations. Its mission was to co-ordinate the establishment of trans-European telematic networks for the public administrations in the participating countries.

With an annual budget of about € 24 million, IDA II set about encouraging the application of information technologies to sectoral policy areas and promoting

the interoperability of national infrastructure. Initially pursuing a predominantly back-office focus, towards the end of its life span in 2004, the programme began to concentrate on the development of services aimed at businesses and citizens.

The second phase of the IDA Programme (IDA II) entered into force following adoption by the European Parliament and the Council of Decisions Nos 1719/1999/EC and 1720/1999/EC (The Guidelines and Interoperability Decisions) on 12 July 1999. In total, IDA II financed projects of common interest in nineteen different policy areas. The EU's data interchange requirements cannot be met efficiently by uncoordinated actions from individual Member States. There was, therefore, a need to ensure overall co-ordination in order to achieve the integration of the administrative systems across the EU.

By Decision of the European Parliament and of the Council (the IDABC Decision), the five-year programme on interoperable delivery of pan-European e-government services to public administrations, businesses and citizens (the IDABC programme) was launched on 1 January 2005 as a follow-on to the IDA and IDA II programmes.[3]

The objective of the IDABC programme is to identify, support and promote the development and establishment of pan-European eGovernment services and the underlying interoperable telematic networks. It is designed to help to achieve targets set in the area of eGovernment by

– continuing to promote the introduction of information technologies to policy domains, especially where this is facilitated by legislation;

– building a common infrastructure for cross-border information exchanges between public administrations in order to ensure efficient communications;

– encouraging the emergence of novel services for businesses and citizens.

The evaluation report of the IDABC programme was largely positive, describing the programme as being in line with the eGovernment policy priorities of the European Commission as expressed in the i2010 strategy. The programme plays a unique role to foster the integration of Europe through interoperable public administration, and it is on track when assessing the implementation. However, the report on the IDABC programme also offers some suggestions for improvement for future programme management to be taken into account during the implementation of the follow-on programme (ISA – Interoperability Solutions for European Public Administrations).

3 Corrigendum to Commission Decision 2004/387/EC of 28 April 2004 — Decision 2004/387/EC of the European Parliament and of the Council of 21 April 2004 on the interoperable delivery of pan-European eGovernment services to public administrations, businesses and citizens (IDABC).

2.3. The Action Plan of the Commission

The European Commission's eGovernment Action Plan 2011–2015 supports the provision of a new generation of eGovernment services. It identifies four political priorities based on the Malmö Declaration:

– Empower citizens and businesses
– Reinforce mobility in the Single Market
– Enable efficiency and effectiveness
– Create the necessary key enablers and pre-conditions to make things happen[4]

The Action aims at helping national and European policy instruments work together, supporting the transition of the eGovernment into a new generation of open, flexible and collaborative seamless eGovernment services at local, regional, national and European level.

The main goal is to optimize the conditions for the development of cross-border eGovernment services provided to citizens and businesses regardless of their country of origin. This includes the development of an environment which promotes the interoperability of systems and key enablers such as eSignatures and eIdentification. Services accessible across the EU strengthen the digital single market and complement existing legislation in domains like eIdentification, eProcurement, eJustice, eHealth, mobility and social security, whilst delivering concrete benefits to citizens, businesses and governments in Europe. The Commission will lead by example in further implementing eGovernment within its organization.

The objective is to increase the take-up of eGovernment services: the target is that by 2015 50% of citizens and 80% of businesses should use eGovernment services.

3. Hungarian Public Administration and the Modern Technologies

3.1. "Electronic Administration" – A New Definition

The most difficult task is to determine the definition of electronic administration because it is an evolving section of law without recognized concepts shared by the majority of experts. Creating a definition is complicated because the "classical" notions of administrative law cannot be used without modification in the area of electronic administration. The reason for it is the feature of electronic administration (shortly e-administration or eGovernment), that it is not only a concept of administrative law, but it appears in courts – e.g. during the registration

4 Ministerial Declaration on eGovernment approved unanimously in Malmö, Sweden, on 18 November 2009.

of companies – and in every other field where the services offered by the state are combined with the elements of public law.

Before reviewing the prevailing rules of electronic transaction of affairs, we should examine the place of these rules within the legal system. On the one hand, our task is simple as these regulations are in connection with administrative law, so they belong to public law. But, on the other hand, it is not such an evident issue if we examine the question from the point of info-communication law. In this regard, this section of law is a part of jurisprudence, but it is not a separate branch of law which incorporates all provisions of electronic administration.

In order to provide a comprehensive view of electronic administration, we have to examine the relevant notions. According to the preamble of the Act on Administrative Procedures, "The concept of eGovernment has become a universal factor of improving the prospects for the future. Its scope is wider than the central governmental administration; it covers the whole system of administration." János Verebics created the broadest concept. According to him, the electronic administration is "the utilization of info-communication technologies and information tools by state organs".[5] Although this definition is suitable for examining all matters belonging to this subject, this concept is too general. Gábor Polyák defined electronic administration as follows: "The widest sense of electronic government is the utilization of digital information and communication technologies in the relationship between the government and the society. The realization of eGovernment is a modernization process affecting all levels of administration, where the quality of relationships is transformed based on technological development."[6] This concept is precise enough and not too excluding; however, the concepts of government and administration are used as synonyms. So, the final definition is based on this notion: in a wide sense, electronic administration is the adaptation of info-communication technologies in the relationship between the state and the society, while in a narrow sense it is the entirety of legal rules governing the electronic transaction of affairs. Hereinafter, we will examine the latter, to be precise, the provisions of the Act on Administrative Procedures (Ket.).[7]

3.1.1. Electronic Documents in Authority Proceedings

The provisions of the Ket. are milestones in establishing electronic administration in Hungary. However, we have to be aware that the former act, the Act on State Administration, did not exclude the requisition of the electronic way

5 Verebics János, Elektronikus kormányzat és jogi szabályozás. In: Infokommunikáció és Jog, 1. szám, 2004. június, p. 5.

6 Dósa Imre – Polyák Gábor, Informatikai jogi kézikönyv, Budapest, KJK-Kerszöv, 2003.

7 2004. CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól – Act CXL of 2004 on the General Rules of Administrative Proceedings and Services.

theoretically after the adoption of the Act on Electronic Signature (hereinafter called Eat.).[8] Still, the most important step in making the operation of electronic transaction of affairs possible was the recognition of validity and conclusive force of electronic statements by the Parliament through adopting the Eat. This act came into force on 1 September 2001 and amended some provisions of the Act on State Administration at the same time in order to ensure the prevailing of the advantages of authentic electronic communication in administration.

As far as our topic is concerned, one of the most important provisions of the Eat. was the incorporation of the followings in the procedural act: "...legislative provisions shall ensure the option for submitting applications in electronic documents". Besides altering the regulations for applications, the possibility of adopting electronic documents occurred within provisions in connection with documents and resolutions of administrative organs. In contrast with the prevailing rules at that time, the completely electronic arrangement of affairs was exceptional because it required the permission of legislative provisions.

The Ket. views the electronic transaction of affairs from a completely new point. The electronic conduct of administrative authority affairs is the general rule and the traditional transaction of affairs – based on paperwork – is exceptional. These exceptions shall be declared only by acts, decrees of government or local government. Therefore, certain sectors cannot avoid meeting the obligation of establishing electronic administration by departmental orders.

However, excluding all exceptions is unfeasible and the reasons for this are various: one cause is digital illiteracy, particularly among old people in regions lagging behind. Similarly, in underdeveloped regions, the parties concerned are not equipped with suitable technological instruments and internet connection, which are basic and essential conditions of electronic transaction of affairs. Besides these factors, legal rules can also prohibit the exclusive adaptation of electronic documents, e.g. in the section of family law and law of succession.

Local governments are also empowered to prohibit the electronic conduct of issues in some cases by decrees because a great number of Hungarian settlements are not properly equipped with technical tools to establish communication systems with clients in electronic way.

3.1.2. Contacting Administrative Organs

In an electronic transaction of affairs, the recognition of the validity and conclusive force of statements made via electronic way is of crucial importance. But these statements and electronic documents have to meet certain conditions. They have to be appropriate for the authentic personal identification of the client submitting the statement or application and have to ensure the unchangeability

8 2001. évi XXXV. törvény az elektronikus aláírásról – Act XXXV of 2001 on Electronic Signatures.

of documents. It means that the supervision of the content of sent and received documents shall be ensured as well as that statements and these contents cannot be gainsaid (undeniability).

The electronic signature ensures the above-mentioned criteria. In information and communication technology, the public key infrastructure makes them possible and their legal conclusive force is the same as that of the paper ones. In legal regulations, the principle of technology neutrality shall prevail, which means that statements of legal force can be made with any technological process meeting the requirements declared by law; however, there is not known a more appropriate method for these purposes than the public key infrastructure. Now we have to examine the different conclusive forces of electronic documents. The Eat. and the law of civil procedure set up three levels according to the conclusive force. The first category comprises the "simple" electronic signature, which does not have a stated conclusive force. In litigation, the appreciation of the document is based on the free discretion of the court. The client can independently create such an electronic signature. The second category includes the electronic signature of advanced security. It can only be created with the help of an independent organ, the so-called authentication provider, whose task is the identification of the user (by issuing and registering a certificate belonging to the signature) and the insurance of the appropriate technical instruments. Its conclusive force is not declared by law, but a document with this signature is considered as a written document if the writing form is required for the validity of the statement.

The third category is the qualified electronic signature. In technical terms, it is an electronic signature of advanced security, but its certificate is issued by a qualified authentication provider, which has to meet stricter conditions and security requirements. The National Communication Authority registers all authentication providers and supervises their operation. Documents signed by qualified electronic signature have the same conclusive force as private documents representing conclusive evidence. When an authority issues an electronic document with qualified electronic signature in connection with its operation, it has to be regarded as a public/notarial document.

In order to arrange authority cases in electronic procedures, one has to possess at least an electronic signature of advanced security.

Those who have an electronic signature of advanced security can directly get in touch with the authority in electronic way. Besides this option, the client can submit the application via the central electronic system of the Government. Clients, who are not supplied with an electronic signature of advanced security or a qualified electronic signature but would like to arrange cases in electronic way, have to utilize this central system.

3.1.3. The Client Gate

As we could see, it cannot be required that everybody possess electronic signature of advanced security, but accession to electronic transaction of affairs must be ensured for anybody. In order to solve this problem, the client gate was established in the central system. It is an information instrument which ensures the identification of the client and its safe connection with organs providing electronic administration and services through the central system.

The central system can be reached through a website called *www.magyarorszag.hu*. On this site, we can find affairs sorted according to the main topics, offices and types of affairs. To be able to commence administrative authority proceedings, we have to enter the client gate. While entering, we are required to give our user name, registered in advance, and the password belonging to it.

To obtain the above-mentioned user name and password, our personal attendance is necessary at the central organ keeping records of private data and residences or at the document bureau operated by the notary public in charge of district duties or at other organs defined by a government decree. The document bureau is easily accessible by citizens; so, it is frequently visited to initiate the establishment of a client gate.

For the establishment of a client gate, the identification of the client is essential. The client shall prove his identity by an official certificate appropriate for personal identification and give his natural identification data (e.g. his name, place of birth and date, his mother's name etc.). In the case of foreigners, their passport is suitable for identification.

The statutory duty of the client is to give his e-mail address in the course of identification that can be utilized for the electronic transaction of affairs. The authority will send all electronic mails to this address for the transaction of affairs, so it has to be suitable for utilization in official cases. The client is responsible for the disadvantageous consequences deriving from choosing his address improperly.

Following the identification, the registration procedure is as follows: the client may give a user name, which cannot match any other user name given previously. The client shall be given a code via e-mail that can be used only once. The client can only enter with it for the first time, and then he creates a new password. This new password and user name (together with the client gate) is valid for a maximum period of five years. The client can define a shorter period of validity. The password can be changed for an unlimited amount of times within this period and after the termination of the client gate with repeated, personal identification.

In the Ket., it is not explicitly declared that this specific identification code is confidential, but it is stated that the client shall bear the responsibility if the specific identification code is revealed by a third person due to the fault on the

part of the client and if this third person misuses this code. Therefore, it is not obligatory but advisable to keep this identification code in private.

For the electronic transaction of affairs, no other data may be requested from the client getting in touch with the authority through the client gate, but this shall not concern the obligation to provide the data necessary for the conducting of the procedure, as provided for by the rules of law. So, after identification, in the electronic proceeding, the client is handled in the same way as he would be personally attending a certain authority.

In the Ket., the electronic transaction of affairs is the general rule, but electronic administration cannot be applied in some cases – as the Act defines. We have to remark that legislative provisions can make exceptions of these rules, and therefore these affairs can also be conducted electronically.

Conclusions

We tried to present the regulation which can be considered a milestone in the world of administrative law. Beyond the general rules – because of the character of the area –, many partial rules have been created, which were not presented in the study though, but the cognition of the fundamental provisions is the most important step for recognizing the development opportunities. We must not believe that the only way of modernizing public administration is exclusively a question of technology.

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Case Note: Gabčikovo-Nagymaros Project Case 1997 (ICJ)

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Abstract. The Gabčikovo-Nagymaros Project is not just a dispute between Hungary and Slovakia. It had political and historical consequences before, during and after the regime change. Firstly, the complexity of prior events – which led to the escalation of the debate – is outlined. Thus, it is unavoidable to understand the concerns and claims of the parties. Then, the questions submitted to the International Court of Justice and the given answers are analysed while also pointing out the legal consequences of the Judgement. In conclusion, the factors are summarized, answering why it is still an unresolved international dispute.

Keywords: Gabčikovo-Nagymaros Project, International Court of Justice, international law, Budapest Treaty

"Attitude is a little thing that makes a big difference."[1]
Winston Churchill

1. On the Way to Escalation...

The Treaty Concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks (done at Budapest on 16 September 1977;[2] hereinafter: Budapest Treaty) envisioned a cross-border barrage system accomplished in the framework of a joint Hungarian-Czechoslovak project. There were three main reasons for its construction, as the Budapest Treaty also implied. Firstly, it was envisioned to prevent catastrophic floods with the assistance of the system of locks and reservoirs. Furthermore, it is said that the facility could help the navigability of the Danube, helping the interconnections between inland navigations as part

1 Source: http://www.brainyquote.com/quotes/authors/w/winston_churchill.html [accessed: 14.01.2014].

2 Available in Hungarian: http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15 [accessed: 14.01.2014]. On this case, see also the papers of Boldizsár Nagy: http://www.nagyboldizsar.hu/b337s-nagymaros-uumlgye.html

of the Rhine-Main-Danube Canal system. And, last but not least, the hydroelectric power-plants near Gabčikovo and Nagymaros could produce clean electricity.

We must underline the most important conditions of construction and operation on the basis of the Budapest Treaty.

Hungary undertook the obligation to divert a part of the Danube into an artificial canal. Furthermore, the Hungarian party committed itself to deepen the original riverbed. Moreover, the construction of a smaller dam and a smaller power-plant near Nagymaros would be a task for the People's Republic of Hungary.

The core of the Czechoslovakian obligations was the construction of a peaking power-plant close to Gabčikovo. It means that most of the constructions would have been realized on the territory of the Czechoslovak Socialist Republic. Therefore, the participation of Hungary was prescribed in the Czechoslovakian construction according to the Budapest Treaty in order to ensure the equal investment of both parties.

According to the Budapest Treaty, the electricity produced was to be shared equally.

In the 1980s, Hungary started to "export internal affairs". In 1981, the Hungarian party asked to slow down the project due to economic problems. As part of the transition's history, the so-called "Danube Circle" was formed in 1984. They organized a movement against the system of locks in Hungary. The Gabčikovo and Nagymaros Project was regarded as the symbol of the communist regime and the symbol of international "дружба" (friendship). The causes of pillorying the joint project were various. Hence, the most considerable ones are enumerated. Firstly, the government did not provide sufficient information on the project and on its impact. Secondly, the system of locks was seen as a potential danger to the environment, to the unique ecosystem resulting in the ecocide of the middle reaches of the Danube. Thirdly, according to the perceptions of the population, the water supply of Budapest was threatened.

As a result of the chain of events, the Hungarian contracting party decided to suspend the construction on her side in 1989 without informing Czechoslovakia. At that time, most of the facilities were being constructed on the Czechoslovakian side.[3]

As a consequence of the above-mentioned situation, a group of experts elaborated seven proposals for the Czechoslovakian party on what to do with the construction site. The winning project was the so-called proposal "C". It reduced the reservoir, i.e. the Czechoslovakian party intended to build the waterworks solely on her territory. The winning proposal took into consideration the Hungarian approach to the construction, which is postponing the construction

3 Cf. MTI, "A rendszerváltás szimbólumává vált a Bős-Nagymaros elleni küzdelem," *Múlt-kor.* Available at: http://mult-kor.hu/20090513_a_rendszervaltas_szimbolumava_valt_a_bosnagymaros_elleni_kuzdelem [accessed: 26.02.2011].

in Hungary. The proposal suggested splitting the shared reservoir into two with a dam in Czechoslovakia.

All in all, proposal "C" was seen as "temporary" due to the fact that it was technically possible to build a dam in Hungary and flood the Czechoslovakian one in order to finish the system of locks according to the Budapest Treaty.

The construction of proposal "C" started in 1991 on a smaller scale. But the Czechoslovakian proposals were forwarded to Hungary only in 1992. The diversion of the River Danube started in the same year. The power-plant started its operation in 1996.[4]

As it is mentioned above, Hungary abandoned the site in 1989. Then, in 1992, Hungary tried to terminate the Budapest Treaty based on her Memorandum (hereinafter, also referred to as the 1992 Hungarian Memorandum). And Hungary submitted her claim to the International Court of Justice (hereinafter: ICJ) because of the Czechoslovakian diversion of the Danube.

Two days after that, Czechoslovakia and Hungary started consultations involving the European Commission. The results of the negotiations manifested in the so-called London Protocol. Firstly, the parties decided to submit mutual and joint claims to the ICJ to settle the dispute. The judgement was considered to be obligatory. Furthermore, until the judgement, they applied a temporary division of the Danube. And, thirdly, Czechoslovakia promised that at least 95% of the water shall flow in the original riverbed. Actually, this very last point was to be failed to be performed.[5]

Czechoslovakia split up in 1993, and Slovakia claimed to be its successor concerning the dispute.

2. Questions to the ICJ and Its Answers

It must be emphasized that the contracting parties decided to submit their claims to ICJ jointly and mutually according to the London Protocol. In the London Protocol, the parties explicitly mentioned that they would undertake the ICJ judgement as their obligation. Consequently, Hungary and Slovakia concluded the so-called Special Agreement[6] in 1993, which was formally the legal basis of their questions being jointly submitted to the ICJ.

4 Cf. Chronology of the case. Available in Hungarian at: http://www.bosnagymaros.hu/dokumentumok/esemenyek-idorendje/269 [accessed: 14.01.2014].

5 *Ibidem.*

6 Special Agreement for Submission to the International Court of Justice of the Differences concerning the Gabčikovo-Nagymaros Project. (Signed at Brussels on 7 April 1993.) Available in English: http://untreaty.un.org/unts/120001_144071/9/8/00007471.pdf [accessed: 14.01.2014]. Available in Hungarian: http://www.bosnagymaros.hu/dokumentumok/kulon-megallapodas/19 [accessed: 14.01.2014].

The submitted questions were the following: Did Hungary have the right to suspend the Budapest Treaty and abandon the construction near Nagymaros? Did Czechoslovakia have the right to construct and operate the modified version of proposal "C"? The third question was concerned with the legal consequences of the 1992 Hungarian Memorandum on the termination of the Budapest Treaty.

To be more precise, there was one more question in the Special Agreement on the legal consequences of the judgement, too.[7]

The Republic of Hungary claimed the ICJ to state the lawfulness of the suspension and abandonment, to state the unlawfulness of the construction and operation of the modified version of proposal "C," and to recognize the validity of the termination of the Budapest Treaty. Furthermore, Hungary claimed the ICJ to state that the Budapest Treaty had never been in force, to define the responsibility of Slovakia concerning the operation of the modified version of proposal "C," to decide on the responsibility of Slovakia concerning the caused damage and danger, to oblige Slovakia to pay for reparation costs (damage, loss and loss of benefits), to divert the Danube back to the old riverbed, to rehabilitate the Danube and to give guarantees to Hungary.[8]

All the same, the Republic of Slovakia claimed turning the Hungarian claims upside down. Their main point was to oblige Hungary to perform in accordance with the Budapest Treaty. Moreover, the Slovakian party intended to oblige Hungary to continue negotiations on (starting and) completing the constructions.[9]

2.1. Suspension and Abandonment

First of all, it had to be decided by the ICJ whether the 1969 Vienna Convention can be applicable or not. Hungary and Czechoslovakia ratified the 1969 Vienna Convention after the Budapest Treaty had entered into force. Hungary ratified the Convention in 1987. The Convention is applicable if both/all contracting parties have ratified it. Therefore, it is not applicable in the case of the Budapest Treaty, which derives from the *ex nunc* applicability of the 1969 Vienna Convention.

The Court emphasized that the 1969 Vienna Convention codified several customs. After the 1989 Protocol, the Convention is applicable for all treaties. But the responsibility of the states[10] cannot be examined based on the Convention

7 International Court of Justice: Reports of Judgements, Advisory Opinions and Orders. Case concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia). Judgement of 25 September 1997. Available in English and French: http://www.icj-cij.org/docket/files/92/7375.pdf [accessed: 14.01.2014]. Hereinafter: the Judgement.

8 The Judgement.

9 *Ibidem.*

10 Cf. Vienna Convention on the Law of Treaties, 1969, Art. 73. Available in English: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [accessed: 14.01.2014].

since the main legal act, the Budapest Treaty, was concluded well before the parties' ratification of the 1969 Vienna Convention.

Hungary referred to state of emergency in order to justify the lawfulness of suspension of the Budapest Treaty and of the abandonment of the site. The ICJ stated that the state of emergency is recognized by the international customary law. But its scope of application is limited to uncommon use. The Court referred to a proposal of the United Nations International Law Commission on state responsibility. It was stated that the state of emergency cannot be a reference point for excuse. However, there is one expectation if all the four following conditions are approved, i.e. can be justified.

Firstly, a key public interest has to be affected. The ICJ accepted the preservation of ecology as a key public interest.

Secondly, the danger must be serious and direct. The Court stated that the fear of danger is not enough. But the Court recognized that a long-term danger also could be a direct one. However, the case is different here. Concerning Gabčikovo, water quality, water level, flora and fauna were threatened alike. According to the Court, these are long-term and uncertain threats. Therefore, a long-term examination was needed. There was not enough data for its approval; thus, the effects remained unmeasurable. Concerning Nagymaros, the environment and the drinking water supply were significantly threatened. The ICJ stated that the danger was not direct at the time of the suspension. The Court emphasized that there were other available means besides suspension.

Thirdly, there cannot be other means or possibility to remove the direct danger. The ICJ pointed out Article 14 of the Budapest Treaty[11] stating that there were means, i.e. the modification of the Budapest Treaty, for example, the modification of water division between the parties, which could make parties avoid suspension and abandonment.

Fourthly, the state cannot cause the state of emergency on its own. Hungary handled the Budapest Treaty effectively, which was valid until 1992. The core of the statement is the implicit behaviour of Hungary. For example, she asked for the slowdown of the construction in 1983 and for its speeding up in 1989.

It means that the lawfulness of the suspension of the Budapest Treaty and of the abandonment of the construction near Nagymaros on behalf of Hungary is hardly approvable.

11 Treaty Concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks (done at Budapest on 16 September 1977), Art. 14. Available in Hungarian at: http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15 [accessed: 14.01.2014].

2.2. Czechoslovakia and the Modified Version of Proposal "C"

From the Czechoslovakian perspective, the construction and the operation of the modified version of proposal "C" was not unlawful. They referred to the principle of approximate application. Moreover, they referred to the modified version of proposal "C" as a countermeasure to the unlawful behaviour of Hungary, minimizing their damage.

The Court called the attention to the fact that the principle of approximate application could be interpreted only in the frame of a treaty. Therefore, it shall not be examined whether there exists the principle in the practice of public international law or not. The ICJ emphasized that the system of locks was envisioned as a common investment (concerning the construction) and a common property, while its operation should have been common, too. Thus, the operation of the modified version of proposal "C" is unlawful. But its construction as a preparatory event to the realization of the Budapest Treaty is different. These events are not unlawful acts.

The modified version of proposal "C" could be a lawful countermeasure exclusively if it had been carried out against a state violating international law. It was proved according to the Court, since it was against Hungary. Prior to the countermeasure, the affected party has to be warned to discontinue the unlawful action and to compensate for the damage. For several times, Slovakia has called upon Hungary to act in accordance with the Budapest Treaty. The damage and the effect of the applied countermeasure have to be proportionate. The Court cited a precedent from 1921 regarding the legal equality of downstream states. Czechoslovakia (Slovakia) unlawfully expropriated the natural resources of the River Danube. Therefore, she violated the principle of proportionality. Thus, there is no need for further examination. The lawfulness of the countermeasure shall be excluded.

To sum up, Czechoslovakia had the right to construct the modified version of proposal "C," but – according to the Budapest Treaty – she did not have the right to operate it on her own. Furthermore, the diversion of the Danube cannot be accepted as a countermeasure since it is not in line with proportionality. Thus, it is not considered as a lawful act.

2.3. Legal Consequences of the 1992 Hungarian Memorandum on the Termination of the Budapest Treaty

The Republic of Hungary terminated the Budapest Treaty on 25 March 1992. To prove its lawfulness, Hungary referred to the following five reasons.

Firstly, it was a state of emergency as I mentioned above in another context. The Court reminded that there was not any serious and direct danger, which is

one of the prescriptions to a state of emergency. Hence, the ICJ pointed it out that the state of emergency cannot be the ground for termination. It solely excludes state responsibility. Furthermore, the Court stated that in case of state emergency the treaty is not applicable. But it is still in force.

The second Hungarian argument was the subsequent impossibility of performance. The aim/goal of the Budapest Treaty (i.e. the common investment) disappeared according to Hungary. The ICJ stated that it shall not be examined whether the "aim/goal" is equal to the abstract notion of legal order since the legal order had continuously existed. The Court decided that Hungary could not refer to the subsequent impossibility of performance since it derived from her own conduct breaching the Treaty.

The third Hungarian reason was the fundamental change of circumstances. As a main rule, it cannot be cited unless the circumstances were fundamental at the time of the conclusion and these circumstances have been changed; or the obligations have changed radically. The fundamental change of circumstances can never be a reference point if a treaty demarcates boarder or if the change is the result of not carrying out other international obligation(s). Hungary referred to four circumstances which were supposed to change fundamentally the circumstances. The ICJ stated that political change and the questionable economic viability of the joint project are not strongly related to the aim/goal of the Budapest Treaty. According to the Court, the Hungarian references to the deepened knowledge concerning the environment and to the new international legal norms were not unforeseeable. Furthermore, the parties could comply with the latter two based on the Budapest Treaty, too.[12]

Fourthly, Hungary claimed the ICJ to state fundamental breach of law by Czechoslovakia. The core of the problem was that the Court had to decide on whether Czechoslovakia breached Article 15, 19 and 20 of the Budapest Treaty and other conventions and the general principles of public international law or not. The ICJ stated that one party could terminate the Treaty if the other party had seriously breached it. Other treaties, conventions and the general principles of public international law cannot serve as a legal ground for the termination. But the application of certain measures is possible. Hungary stated that Czechoslovakia breached the above-cited articles since she was not ready to start negotiations. The Court said that there was hardly any evidence to prove. Furthermore, it was not the responsibility of one sole party. Moreover, Hungary contributed to the development of such a situation which did not support the effective and successful negotiations. Hungary also referred to the construction and operation of the

12 Treaty Concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks (done at Budapest on 16 September 16 1977), Art. 15, Art. 19 and Art. 20. Available in Hungarian at: http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15 [accessed: 14.01.2014].

modified version of proposal "C" as a fundamental breach of the Budapest Treaty. The Court reminded that Czechoslovakia until the 1992 Hungarian Memorandum (sent to the Czechoslovakian party on 19 May 1992) did not breach the Budapest Treaty. The termination of the Budapest Treaty would have entered into force on 25 May 1992. The ICJ stated that 6 days are simply not enough for well-meaning consultations and negotiations. Furthermore, there was not any violation of the Budapest Treaty on behalf of Czechoslovakia during the 6 days.

The fifth Hungarian reason was the new prescriptions of the public international law on the environment. The Court pointed it out that parties could integrate these new developments into the contractual framework.[13] The ICJ stated that parties were of the same opinion about the importance of environmental concerns. Only their opinion was different concerning the consequences on the joint project. The Court suggested that the involvement of a third-party could be useful.[14]

Highlighting the most important points about the legal consequences of the 1992 Hungarian Memorandum on the termination of the Budapest Treaty, Hungary argued that the Budapest Treaty was mutually refused by the conduct of both parties. The Court found that mutual unlawfulness could not terminate the Treaty and could not be the ground of termination either.

3. Legal Consequences of the Judgment

As I have indicated above, the legal consequences of the Judgement were also a question of the parties submitted to the ICJ on the basis of the Special Agreement. Hence, the most important ones are underlined.

There are three main groups of issues which have to be explained in the following: the issue of legal succession, other legal consequences of the Judgement and the legal consequences of the unlawful acts committed by the parties (reparations).

3.1. The Issue of Legal Succession

After the split-up of former Czechoslovakia, several questions remained concerning legal succession. In the observed dispute, the core issue was whether Slovakia is a successor of Czechoslovakia in connection with the Budapest Treaty. The problem was more complex than it sounds at first glance.

13 Cf. Treaty concerning the Construction and Operation of the Gabčikovo-Nagymaros System of Locks (done at Budapest on 16 September 1977), Art. 15, Art. 19 and Art. 20. Available in Hungarian at: http://www.bosnagymaros.hu/dokumentumok/az-1977-es-szerzodes/15 [accessed: 14.01.2014].

14 The Judgement, Par. 113.

Hungary argued that there is not any rule in international public law which ensures the automatic legal succession. Hungary had never recognized Slovakia as legal successor of the Budapest Treaty. So the Hungarian consent was missing.

Refining the first argument, Hungary implied that there could be certain rules[15] of automatic succession in case of separation. But she did not sign and ratify them (certainly not until the Judgement).

Furthermore, Hungary denied that the Budapest Treaty established rights and obligations to water management on the border of the two countries. She stated that the Budapest Treaty did not affect the border line. And she denied the territorial feature of the Budapest Treaty.

Slovakia argued for the Budapest Treaty which was claimed to be still in force between the parties. She considered herself the legal successor of Czechoslovakia in relation to the Budapest Treaty referring to the 1978 Vienna Convention[16] as the codification of customary law, i.e. the consent of Hungary, was not needed.

On the same basis, she claims that the Budapest Treaty affects territory, and she referred to the border-line.[17]

The ICJ considered the nature of the Budapest Treaty more important. Therefore, it did not examine the parties' arguments for and against the applicability of the 1978 Vienna Convention and the referred customs. The Danube is an international navigation route, since the Budapest Treaty affected the interest of other states, too. The Court referred to the comment of the United Nations International Law Commission stating that succession does not have any effect on territorial treaties. Treaties dealing with water and inland navigation are generally considered to be territorial treaties.

Therefore, the Budapest Treaty established a territorial regime by establishing rights and obligations on a certain part of the Danube. The ICJ decided that the succession did not have any effect on the validity and applicability of the Budapest Treaty.

3.2. Other Legal Consequences of the Judgement

These orders of the Court, being observed below, are prescriptive; hence, they establish rights and obligations between the parties. The first relevant statement is that the Budapest Treaty is still in force and valid, as highlighted previously. It means that the Budapest Treaty governs all relevant treaties between the parties. It derives from the principle of *lex specialis derogat legi generali*.

15 Cf. Vienna Convention on Succession of States in respect of Treaties, 1978, Art. 34. Available in English at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/3_2_1978.pdf [accessed: 14.01.2014].

16 *Ibidem*.

17 See also: the Judgement, Par. 122.

The Budapest Treaty is still in force, i.e. the unlawful behaviours do not result in its invalidity based on the principle of *ex iniuria ius non oritur*.

The Court took seriously into consideration that the Gabčikovo power-plant had been operated for five years (in 1997); there was a smaller reservoir, and it was not a peak-power. Furthermore, Nagymaros had not been constructed. Moreover, the parties rejected the peak-power operation. So, its construction did not make any sense. Therefore, it ruled that the developments had to be taken into consideration.[18]

The Court stated that the parties are obligated to continue the negotiations[19] to achieve real results, modifying their positions. Rapprochement is needed concerning the environmental effects and the division of water.

The ICJ remembered the parties of the *pacta sunt servanda*, i.e. of the obligatory force of the treaties and of their well-meaning performance. The Court implied that a third party may be involved in the negotiations.

Therefore, the system of the Budapest Treaty was ordered to be restored unless there was another agreement between the parties. It means that the operating facility shall be operated mutually. And the modified version of proposal "C" shall be integrated into the treaty system, since a unified and undividable operational system is needed, which would derive from the Budapest Treaty.

3.3. The Legal Consequences of the Unlawful Acts Committed by the Parties (Reparations)

The aim of the reparations is to hide and/or restore the consequences of the unlawful acts, as the ICJ cited the classical definition from the judgement of Permanent Court of International Justice – cf. the case of the Chorzow factory.

According to the ICJ, there has been a possibility to restore co-operative management. Therefore, the mutual maintenance of the facility ruled that it was necessary. Moreover, the parties shall rethink the water and electricity division, and they can decide not to build up the Nagymaros system of locks. Both parties have the right to reparation as a result of the other party's breached international obligations.

The basis of reparation for Slovakia is the fact that Hungary suspended the construction and unlawfully abandoned the site. For Hungary, the basis is the Czechoslovakian (Slovakian) diversion of the Danube and the operation of the modified version of proposal "C". The ICJ proposed mutual renunciation.

18 Cf. the principle of *in integrum restitutio.*

19 Cf. Special Agreement for Submission to the International Court of Justice of the Differences concerning the Gabčikovo-Nagymaros Project, Art. 5. (Signed in Brussels on 7 April 1993.) Available in English at: http://untreaty.un.org/unts/120001_144071/9/8/00007471.pdf [accessed: 14.01.2014]. Available in Hungarian at: http://www.bosnagymaros.hu/dokumentumok/kulon-megallapodas/19 [accessed: 14.01.2014].

But if Hungary wants to operate and use the facility, the proportional part of construction and operation costs have to be paid. These costs are separated from the reparation since they have to be solved (i.e. paid) on the basis of the Budapest Treaty.

Conclusions

By reason of the ICJ judgement, the factors why it is still an unresolved international dispute are the following.

Hungary unlawfully suspended and abandoned the constructions near Nagymaros and her proportional part near Gabčikovo. Czechoslovakia (Slovakia) did not have right to continue the realization of the modified version of proposal "C". Slovakia unlawfully set up the modified version of proposal "C", i.e. she operated it unlawfully. The termination of the 1992 Budapest Memorandum of Hungary was of no effect. Concerning the Budapest Treaty, Slovakia is the successor of Czechoslovakia. Hungary and Slovakia shall conduct a well-meaning negotiation in order to realize the aim of the Budapest Treaty. The Court considered it possible to create a mutual operational system and/or to pay reparations for the damage defined in the Judgment. The costs of construction and operation have to be paid based on the Budapest Treaty. Since 1997, there have been several consultations and negotiations between Hungary and Slovakia. But all the efforts seem to be ineffective. The main point is that there is a lack of political will to resolve this politically highly sensitive case since the intention to avoid losing face is part of human nature. We may ask whether what we could observe in these rounds raising again the issue of enforceability of public international law is in line with the well-meaning negotiations. I think that the power of shame between the parties is hardly enough to handle and to resolve this mutually inconvenient situation.

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Sovereignty – Constitutional State[1]

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Abstract. The basic categories of our times, including sovereignty and the constitutional state have undergone major contextual changes during the last two centuries. In this paper, the following aspects of this question will be analysed: the balance of power in Europe (I), the contextual changes of sovereignty (II), some contemporary dilemmas concerning sovereignty (III), the insubstantiality for sovereignty (IV), and, finally, the definitions of *Rechtsstaat*, of constitutional state and of the rule of law (V).

Keywords: balance of power, sovereignty, *Rechtsstaat*, constitutional state, rule of law

I. Balance of Power in Europe

The economic, legal and administrative literature all agree to the Nietzschean formula, that is "*Die Zeit war reif für Europa, aber Europa war nicht für die Zeit*".

The basic categories of our times, including sovereignty and the constitutional state, have undergone major contextual changes during the last two centuries. In case we believe in the masterpiece construction of the international law, we have to accept that there was a balanced system of states in 19th-century Europe. This situation was preceded by the peace negotiations with Talleyrand in the centre who, in his Memoirs published in 1891, by defining usurpation and legitimacy, the rules of legitimacy in adjudicating and surrendering power – either by deducing from inheritance or the principle of election in the Western world –, unequivocally proved the now trivial thesis that "a government is legitimate if the power is conferred and exercised according to principles and rules accepted without question by those who must obey, and those who give orders respect that".[2] The essayistic arguments of the memoirs explain everything that is essential to the Western world from the French Revolution to

1 The revised version of the paper presented at the Csíkszereda Campus of the Sapientia Hungarian University of Transylvania on 20 April 2012.

2 Ferrero 2002, 56–57.

the present. The tack of exercising power serves the protection of the nations. But no matter how legitimate the power is, those who exercise the power have to adapt to their times. And the times require that in the leading, civilized states the supreme power is exercised through bodies formed from among the governed. And this requires guarantees. These are: the inviolability of personal freedom, the freedom of the press, the independence of the judiciary, justice exercised by the public administration in certain cases, ministerial responsibility, only responsible persons can participate in advisory bodies etc.

This was the essence of Talleyrand's theory: legitimacy of state power is guarded by public law, public order and freedom. That is why Ferrero, Professor of the University of Geneva, in his cited monograph, claims that everything that has happened since 1789 was a huge, successful adventure that finally led to the Big Fear, the wars of the 20th century. Analysing this statement, German publisher Theo Sommer said that World War II had closed a period of 500 years, during which the fate of the whole world was decided in Europe. After that, Europe is no longer a global player, but only a regional actor.

With the American Grand Strategy at the end of the 20th century – the end of the bipolar world –, the West is the guarantee of prosperity, the guarantee of personal freedom. The sovereignty of the countries emerging from the Eastern bloc constitutes the real dilemma of unifying Europe and revolves questions around the future direction of the legitimacy of power such as the right to disagree or the unrestricted right of free elections. Is it really the end of the European balance-of-power politics, of the classical European model? Can the regional actor of today be successful on its path to a federal Europe?

II. The Contextual Changes of Sovereignty

1. The hypothesis of one of the main advocates of European integration – though it also indicates the negation of his statement that "it is impossible to solve Europe's problems between states that obstinately insist on retaining their full sovereignty" – has not yet been proven. Nevertheless, if we have a quick look at the key steps of the integration process, we may see the problems. The first stage is the establishment of the Economic and Monetary Union in 1992 and of the fiscal union in 2001 – with 11 states by the introduction of the common currency, the euro. As the leading economists put it – referring to Professor Ch. Goodhart (London School of Economics) –, the euro was the result of the collapse of the exchange rate mechanism emerged from the death of the European "currency snake". But political motivations also played part in these developments. The common currency, which was a prerequisite of the French-German agreement, was not only the price for the German unity. It may be also viewed as a defensive

"foreplay" that enables the Western states to form a qualitatively distinct group from the Eastern states joining with future enlargements.

Subsequently, the Eastern enlargement of 2004, the financial crisis of 2008 and the internal crisis of the Union all contributed to the crisis of integration. This – with a slow reaction – resulted in a fiscal union with intergovernmental agreements in 2011. According to the analysis of András Inotai, professor of economics, three solutions may arise from this derivative crime:

– community control of the budgetary policy (this has already been realized by the supranational supervision system in 2012);

– ending the differences in competitiveness among the EU member states by transfer mechanisms in the benefit of the weaker periphery (at the moment, the EU allocates 1% of the national incomes to this end)

– further curtailing of functions of the nation-state towards the Unites States of Europe (USE).[3]

We have to note, however, that besides the scientific arguments there are also theories based on political interests. One outstanding example is the statement by British Nigel Farage from the Europe of Freedom and Democracy Group of the EP, who says that we have to help the periphery members to be able to leave the periphery. It is noteworthy that the English do not want to live in a Europe dominated by the Germans: "we have no economic or political interest to be a member of the European confederation".[4]

2. Current developments make unavoidable the revival of the dogmatic concern on sovereignty. I do not intend to debate the extremely rich political science literature of the topic, but to elaborate on some conceptual elements only to discuss the needs justifying the reconsideration of the original meaning. The controversies surrounding the notion are also marked by the uncertainties around its origin. According to some political scientists, the "present tense" category dates back to the 16th century. For others – including myself – the right direction in searching the origin of the concept stems from professor R. C. von Caenegem from Gent, who originates the legal term "sovereignty" from the 12th century, when jurists declared that "*rex est imperator in regno suo*". Any royal government is sovereign only within its own realm and no authority is above the authority of the imperator.[5]

Browsing the latest literature in political science, hereafter we rely on the *Államtan (Political Science)* by professor Péter Takács. This work uses a disciplinary approach for highlighting the scientific history of the legal nature of state and of sate power. A dominant 19th-century German theory says that the subject of sovereignty is not a body but the nation as a whole. At the same time, constitutionalism has divided sovereignty among the different state institutions (bodies).

3 Inotai 2011.
4 Magyar Hírlap, 12 November 2011.
5 Caenegem 2008, 32–33.

Another approach is that of John Austin, who proclaimed the unrestricted nature of the sovereign power. This is extended even further by Dicey, who – in legal terms – describes it as a legally unrestricted legislative power. "In political terms, a body is sovereign in case the citizens follow its will as ultimate" – says Péter Takács in his summary.[6]

3. Finally, we quote the value judgement of F. A. von Hayek, who stresses the misinterpretation of the concept. According to Hayek, such misinterpretation is related to the connection of the concept to the sovereignty of the people. He says that the importance of the sovereignty lies not in its enjoyment by the people but in its unrestricted nature. Sovereignty is based on the preconception that it is an agreement consisting of voluntary subordination, since no power can exist without that.

It can be therefore concluded that the origins of connecting sovereignty and the state comes from the 20th century, from the theory of state sovereignty. It is suggested by this theory that the state is necessarily sovereign, and if it is not, then it is not a state. It follows that, according to the most recent approach, the essence of the state is not sovereignty but power. More precisely, this is about the ability to exercise the functions of the state; that is to have an aim-specific and specifically limitable general mandate. This mandate aims at the promotion of the public good, the enforcement of the public interest and – for the benefit of the citizens – safeguarding public goods, with the classic formula: *salus populi suprema lex esto*.

III. Contemporary Sovereignty Dilemmas

The German political science puts a special emphasis on this topic not only in the 19-20th century but also in recent years. The latest result of this effort is the monograph by Professor Ulrich Haltern, Director of the Institut für nationale und transnationale Integrationsforschung, Leibniz Universität, Hannover, entitled *Was bedeutet Souveränität*?[7] For the European vision, it is essential to know this piece of writing. I will discuss the author's two "theses": the "liquidation" and the "ghost" of sovereignty.

It is well known that after 1918, following the failure of the antagonistic peace system of the Treaty of Versailles and the nearly fatal destruction of WWII, new, integrative forms were being slowly created: the EEC and the European Union. It is an interesting duality that the first beneficiaries of the plans of world leaders were the national market economies. In these nation-states, they defined a post-political order based on the symbiosis of interest and rationality, which is very different from sovereignty.

6 Takács 2011, 144–172.
7 Haltern 2007.

On the other hand, at the time of the first integrations in 1961, the European Court of Justice realized that the legitimacy deficit of the new power structure – the exclusion of popular sovereignty – can be smoothly compensated by the solution that the subjects of community law are not only the member states but also the individuals, who have not only obligations, but also rights. Therefore, a discrepancy arose gradually between the new legal order and the legal order of the nation-states. As a result, the traditional law-making and jurisprudence was forced to the background. What is more, with the preliminary ruling procedure, EU citizens may enforce the community law at their national courts as well. I subscribe to Professor Haltern's view: "Legislative competencies migrate nearly unobstructed from the member states to the centre. (...) The theory of supranational law – according to which the freedom of the state must be restricted as little as possible – has turned upside down with this practice and, as a result, the member states became only the trustees of community law... The primacy of community law shows clearly that sovereignty in the community became <common>, <fragmented> and eroded, or maybe completely disappeared?"[8] It is not surprising that the reactions of the national constitutional courts are the only chance to stop the unconstitutional practices. For that matter, there are only few national constitutional courts that unconditionally accept the primacy. The rest accept the partial transfer of sovereignty subject to legal control (Germany, Belgium, Great-Britain and Hungary).

1. Finally, the so-called identity control has to be emphasized. This is very important in the case of the German constitutional court since it can refuse the enforcement of community regulations in case they contradict the provisions of the national constitutions. Professor Bogdandy, Director of the Max Planck Institute in Heidelberg, refers to the dual-function version of *Identitätskontrolle*, emphasizing that one of the conceptions of democracy, namely the state-centred approach, excludes democracy beyond the scope of state. Therefore, the German position is that it is contrary to the constitution if Europe transforms into a kind of federal state. At the same time, the individualist approach – by accepting the amendments to the treaties – tends to consider the creation of a European-level democracy feasible and promotes it as a contemporary dictate. The same opinion prevails in the French constitutional practice. Oliver Dutheillet de Lamothe, member of the French Constitutional Council, pointed out that the Constitutional Council set out the constitutional constraints in 2006, in which the measures transposing community law may be declared unconstitutional. The dogmatic reasoning behind this is that the Union respects the identity of its member states. Therefore, the constitutional values in the national identity are the barriers to the European integration.[9]

8 Haltern 2007, 98–100.

9 Cf. Somssich 2011, 761–768.

2. It is not surprising, therefore, that the constitutional courts have an aim-specific relationship with the triad of the national courts, the European Court of Justice and the Court of Human Rights. Nonetheless, their intermediary role may be more articulate in case they would adopt the recommendations of the 5th European Jurists' Forum held in Budapest. In 2011, the role of the European Public Prosecutor, cross-border crime, consumer protection and commercial law were discussed, together with the problems of modern sovereignty. A recommendation suggested the establishment of the Chamber for the Delegates of the National Constitutional Courts. This body would deal with the legal problems arising between the given member state and the institutions of the Union, and would disclose its legal solutions in resolutions. A problem of this scale would be laying down the detailed criteria for the primacy and the applicability of the community law. This professional forum would become a valuable resource in the creation of the common European legal area; but so far the relevant leaders of the Union have not shown interest in it.[10]

IV. Insubstantiality for Sovereignty

Ulrich Haltern summarized with "irreplaceable logic" and style everything we now call the EU project. I will make an attempt to highlight four characteristics and four consequences.[11]

The main premises:

– The initial attempt to move from the Europe of sovereignty towards the Europe of markets can be defined as a success story. The move from existentialism to consumerism has created the possibility to shift towards money as the only transmitting channel (e.g. the "derivative success").

– The root of civilization was the money exchange, and along this parallel the world may be narrowed down to the strategy of satisfying our needs.

– Money, as an abstraction, wipes out the process, ignores the identity, the historical narratives.

– It enforces a model based on mobility (mobility of goods, capital, workers); and the obstacles are handled by the Court of Justice, the supreme European judicial forum.

The reality through the spectacles of consequences:

– In the Union, there is an observable lack of social legitimacy, and the democratic deficit is prominent.

– The modern state has moved from the concept of sovereign people and the supplier state communication replaced the substance of the community with the form of community.

10 Máthé - Paczolay 2009, 349.

11 Haltern 2007, 101–109.

– Europe has become uncertain in its values, in its foundation. The failure of the institutional reforms, the ill-thought steps towards integration prove that the European model is not to be followed in the rest of the world.

– The narrative surrounding the legal framework of the integration turned out to be an unhistorical fiction. It must be seen that more law induces more reforms, and more reforms require more justification. The present institutional framework and public goods are in the hands of experts who create a world where function may define identity instead of sovereignty. Therefore, it seems that outside law there is no room for violence either.

But the realities of international relations justify just the opposite. There is a scope of violence that cannot be influenced by law.

According to Haltern's approach on the relationship between the sovereign right and violence, "When dealing with the questions of sovereignty and the state, there are two things that are pragmatically sovereign: the judge and the soldier. Sovereignty gives the two sides of the modern constitutional state: law and violence. It is no surprise that the modern constitutional state is the world of comprehensive legal regulation and unprecedented violence at the same time. The Enlightenment views law as the tool for abolishing violence, but in reality law and violence exist simultaneously and to the same extent. They do not work against each other, law does not precede violence (...); they are both present everywhere. The reason behind that is that the modern state embraces both the Catholic and the Jewish tradition. The Catholic vision creates the idea of the mythical unity, which is the result of the mystery, the miracle and the ritual of the victim and the violence. The Jewish tradition creates the theory of law that is the sacred text from God's sovereign will that takes over the role of prophecy and marks God's alliance with the chosen people. The modern state continuously reproduces both: the mythical unity and the law. We might say that this reflects the duality of the divided substance of the ruler. On the one hand, the sovereign makes the law existent: the law is always the result of the sovereign's political actions; the word of the sovereign always exists. This has changed: the sovereign does not become embodied in the law. The judge is not the embodiment of the sovereign. If the judge dies, the law and the sovereign state live on. Sovereignty is much more embodied in soldiers. They do not take on sovereignty as a law but as power that is ready to kill and die. Everybody can be involved in this, everybody may embody the state".[12]

Finally, we make it clear that the sovereignty of the people has taken on the form of the democratic constitutional state. Therefore, sovereignty is not only an expression strongly tied to the Enlightenment but a concept that connects state, law, identity and politics into a functioning system. In case we consider the democratic and interfering state and the militarized state, it is unquestionable that

12 Haltern 2007, 111–112.

we are always between law and war. The experiences of our present world also confirm that we cannot leave the categories of the saint and the victim behind. The short decade of the new century suggests the same: the world of sovereignty is not disappearing despite the bid for a new power project.

V. Rechtsstaat – Constitutional State – Rule of Law

1. It is an axiom in legal science that the legal state means that its substance is defined by the law. In the doctrine of *Rechtsstaat*, every activity can be expressed legally. The *Rechtsstaatlichkeit* tries to achieve its aim by a comprehensive regulation, building up the guarantees for everything it wants to protect by its rules. Here and now, it is worth to have a look at the transatlantic version of the constitutional state (rule of law). The core idea of the English-American system is justiciability. They institutionalize the idea that every case with legal relevance can be brought before the judicial court, which gives the final answer of the law.

The two systems represent two legal cultures. The constitutional state based on historicity, the German dogmatics, the codification, the procedural law, is also the embodiment of the classical separation of powers. Contrary to the continental approach, the English-American rule of law emphasizes the case law (the precedent) by reconsidering the principles to reach a fair solution. "Therefore, here, the general does not prevail over the individual, and the individual is not chaotic either. The individual is defined in regard to and in correlation with the different generalizations."[13]

The two systems also differ in the separation of powers. The continental constitutional state realizes the traditional separation of powers, favours the model based on parliamentary supremacy, while the American founding fathers were influenced differently by "the oracle" Montesquieu's masterpiece *The Spirit of the Laws*. It says that the executive power should have the means to block or control legislation. It is desired therefore to ensure the socially required balance, ergo: the delimitation between the organizational structure and the staff of the governmental bodies. We have to refer to Professor János Sári, an outstanding expert of the topic, who introduces the differences between the two systems extremely clearly. It is worth paying attention to the distinctions since in the practice and the communication of the EU there is an ever-frequent call to follow them. It is true that the US constitution calls for the separation of the institutions performing state functions, but it says exactly the opposite regarding the state functions themselves. Contrary to popular belief, the founders did not create a governmental system based on separation of powers, but they created separated systems, which mutually benefit from the power of the others, since without

13 Details in Varga 1993, 941–950.

the institutions mutually benefitting from the functions the separation of powers cannot achieve its aim. Summarizing the professor's monograph: ... "the US constitution created the governmental system of checks and balances, and not that of the separation of powers. The checks and balances as a constitutional arrangement is different from the separation of powers since it encompasses the theory that political power can and must be controlled by political power."[14]

2. In 1813 in Europe, C. Th. Welcker described the constitutional state as "the rational state leading towards the highest developmental stage of the forward-looking enlightenment". Therefore, in the 19th century, nation-states become the promoters of the constitutional state, with free and democratic legal order and state structure. And the forming constitutions try to ensure legal certainty by guaranteeing freedom and property as well as human and civil rights. According to contemporary belief, these constitutions are equivalent with "a powerful and honest public administration." It is not surprising that the judiciary control of the contra legem public administration became the quintessence of the constitutional state. As O. Mayer puts it: "The constitutional state is the state of the well-organized administrative law." Although it would be instructive to elaborate on the whole history of the constitutional state, the summary of the references to our present is also a good starting point for evaluating the much-used term of the constitutional state.

The certainty is the guiding principle of our constitutional state and therefore law is the benchmark of the functioning state. The constitutional state is therefore:

– a constitutional state that controls legislation;

– a state of law that controls the behaviour of the individual, creates public bodies and regulates their structure and competency;

– a defender-of-rights state that enforces compliance with the constitution and the laws by appropriate institutions.

As Professor Werner Ogris smartly puts it:

– "The elements and instruments achieving these aims do not constitute a closed canon, and they are not to be considered as *numerus clausus*, but their absence undermine the constitutional state. The determining elements are: the separation of powers; the legislator is bound by the constitution; the executive and judiciary are bound by the law; the fundamental rights and their protection are guaranteed by independent (public law) courts; the public bodies are responsible for compliance with the law; the prohibition of retroactive effect of the law; the prohibition of disproportionality; the protection of legitimate expectations; the clarity of wording and publicity of legal acts."[15]

3. It is a fact that the integration of the nation-states has resulted in an eclectic and complex community law, which is based on the different legal systems of

14 Sári 1995, 44–48.

15 Ogris 2010, 15–33.

the member states, complementing and later modifying them, but the theory of which is still undeveloped.

The structure integrating the Member States that first acted as *sui generis* transforms into a legal entity in relation to the national laws. It is an important thesis, therefore, that a reference to the constitutional state is always of relevance to the member state.

It is also well known that the Union is a system attached to the member states, it is organized along the international law, and its competencies are created from the transferred elements of the member states' sovereignty. Therefore, it does not have its own competence: it can be described by the *Kompetenz ohne Kompetenz* formula. There is a legal system, which is integrated into the legal systems of the member states, and it acts as if it were a federal state where the democratic deficit is combined with a constitutional deficit.

This is complemented with the already mentioned fiscal pact, which calls into question one of the attributes of the constitutional state, the competence of the national parliaments to adopt their budgets, the appropriation, by introducing a supranational control.

These phenomena are a proof for every professional involved that the European Union needs a new legal theory. Together with the creation of new constitutional notions, a new approach to separate the parallel powers is also justified.

Therefore, it is good news that the already cited Professor A. von Bogdandy calls on the nations' jurists in a manifesto entitled *A nemzeti jogtudomány az európai jogi térségben* (National Jurisprudence in the Region of European Law), where he calls for the creation of a new dogmatic system.

He described the area of European law – also in its present state – as a territory defined by the national legal orders, emphasizing at the same time that supranational norms already have a strong influence on the national legal systems. "As a result, EU-membership becomes a significant characteristic of the participating nations' statehood, and their previously closed legal orders become part of a wider legal system."[16] The initiative is welcome since due to the institutional problems of the EU the legal system should be applied differently in the new context and in the former nation-state model. The nation-state model calls for new concepts and new content. An elegant slogan of the professor's call for creating a common European legal area is: "A state, although it is part of the European legal system, is still another part of it, and shows the signs of a different development... The diversity within the European legal area requires us to accept a foreign legal order as different, and we should not interpret it exclusively according to the rules of our legal order."[17] The Professor, who had played an active part in forming the area, pointed out that "the basic structures

16 Cf. Tamás 2009, 57–74.

17 Cf. Lőrincz 2001, 8–17.

of other European legal orders should be examined from the point of view of the developing European legal area, but at the same time we should also respect their historical experiences, their stages of development, their legal and scientific style, and in that light we can improve our traditions as well".[18]

4. This methodology takes into consideration the fact that Europe is a multicultural entity. It is a cliché that the coexistence, the flourishing of the cultural identities is the guarantee of Europe. If this cannot be ensured by the economy enjoying absolute priority, this culture, this civilization is doomed to failure. That is why the final conclusion of the outstanding monograph by Francis Fukuyama – on the world order of the 21st century – is so remarkable.

"What the states and only the states are able to do, is the concentration and the targeted use of the legitimate power. Those who argue for the dusk of sovereignty – let them be the pro-market right or the committed multilateralist left – have to define what can substitute for the power of the sovereign nation-state in our world. In fact, this gap has so far been filled by the mixed group of multinational companies, NGOs, international organizations, criminal networks and terrorist groups." (And we can add the international credit rating agencies, who were able to hibernate the economy at the start of the financial crisis and onwards.)

"In the absence of a clear answer, we have no other options than turning back to the sovereign nation-state and try to understand again how it can be made strong and effective. It is still to be seen whether Europeans are better at squaring the circle than the Americans. However, it turns out that the art of state-building will be a key element of the national power, as well as the capability of traditional military deployment for maintaining the world order."[19]

Conclusions

Finally, we highlight the fact that sovereignty and the constitutional state are complementary notions. But for fulfilling the dream of the core countries that are able and willing to meet the challenges of the global markets, that is the creation of a federal Europe, the persistent implementation of a decade-long legal and economic recovery programme is needed, and its two pillars, the balance-of-power politics and the legitimacy of power, must be re-established.[20]

18 Bogdandy 2012.
19 Fukuyama 2005, 154–155.
20 Máthé 2012, 136–142.

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Der Prozess gegen Methodius und die Conversio Bagorariorum et Carantanorum

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Abstract. The Trial of Methodius and Conversio Bagorariorum et Carantanorum
The protagonists of the Slavonic (and Avar) mission in the 9th century were the Byzantine Empire, on the one hand, and the Frankish Empire, which relied on the Archbishopric of Salzburg and the Patriarchy of Aquilea pursuing fairly independent politics, on the other; this balance was disrupted by the papacy, which was gaining strength, taking firm steps with independent mission policy against the power of the Carolingian dynasty. This threefold-ness provided the background of the activity of Methodius known as the Apostle of the Slavs and of his conflict with the Archbishopric of Salzburg and its diocesan bishops. At the Council of Regensburg held in the presence of Louis the German in 870, Adalwin, archbishop of Salzburg and his bishops passed a judgment on Methodius, a missionary from Byzantium, then papal legate and archbishop of Sirmium, since they deemed that by his missionary activity pursued in Pannonia Methodius infringed the jurisdiction of Salzburg exercised over this territory for seventy-five years, and after that they held him in captivity for two and a half years. It was this lawsuit regarding which the *Conversio Bagoariorum et Carantanorum* was drafted either as a bill of indictment or to legitimate the lawsuit subsequently, it cannot be clarified.

Keywords: Early medieval legal history, Bavarian historiography, Methodius, *Conversio Bagoariorum et Carantanorum*

Auszug. In der Slawen- und Awarenmission des 9. Jahrhunderts spielten Byzanz und das ostfränkische Reich die Hauptrolle, und bei der Ausführung der Missionsarbeit stützte sich letzteres hauptsächlich auf das Salzburger Erzbistum und auf das – eine ziemlich unabhängige Politik betreibende – Patriarchat von Aquileia.[1] Dieses fragile Gleichgewicht wurde durch die

1 Reindel 1981, 249ff.; Löwe 1948, 3f.; Eggers 1996, 19; Bosl 1964, 1–38.

immer stärker werdende Missionsarbeit des Papstes ins Wanken gebracht. Dieses Dreieck diente als Hintergrund für den Konflikt zwischen dem Slawenapostel Methodius und dem Salzburger Erzbistum und dessen Suffraganbischöfen. Der Salzburger Erzbischof Adalwin ließ auf der in Anwesenheit des ostfränkischen Königs Ludwigs dem Deutschen abgehaltenen Regensburger Synode gegen Methodius – Missionar byzantinischer Herkunft, päpstlichen Legaten und Erzbischof von Sirmium – Anklage erheben und behaupten, er hätte die seit fünfundsiebzig Jahren bestehenden Rechte des Salzburger Erzbistums über Pannonien missachtet. Der Prozess artete in ein schmachvolles Urteil aus, aufgrund dessen Methodius zwei Jahre lang in Haft gehalten wurde. Es ist nicht mehr zu ermitteln, ob die *Conversio Bagoariorum et Carantanorum* als Anklageschrift im Prozess selbst, oder aber als später verfasste Legitimationsschrift für das Verfahren des Erzbistums entstand.[2]

Schlüsselbegriffe: Frühmittelalterliche Rechtsgeschichte, bayerische Historiographie, Methodius, *Conversio Bagoariorum et Carantanorum*

Bei der Datierung nahmen Herwig Wolfram und Fritz Lošek die mittelalterliche Datierungsweise in Betracht, und setzten die Entstehung der *Conversio* für das Jahr 870 an. Die Person des Autors lässt sich zwar nicht mit Sicherheit bestimmen, einige Indizien sprechen jedoch dafür, dass der Salzburger Erzbischof Adalwin der Verfasser und Ludwig der Deutsche der Adressat der in Salzburg entstandenen *Conversio* gewesen sein kann. Kahl charakterisiert die Haupttendenzen der *Conversio Bagoariorum et Carantanorum*, die Bekehrungsgeschichte der Bayern und Karantanen, über die Alfons Lhotsky sich in den höchsten Tönen äußerte,[3] folgendermaßen: „Was da getrieben wird, ist nichts anderes als ein waghalsiges Spiel dicht an der Grenze der Wahrheit, gerade noch unanfechtbar für den, der Bescheid weiß, dem Unkundigen jedoch abweichende Kombinationen offenlassend, ja nahelegend, die den Zwecken der Denkschrift ungleich besser entgegenkamen. Man ahnt einen wohlunterrichteten Gewährsmann, der jedoch sehr wohl weiß, was er will, und was nicht, und man bedauert, dass er von seinen Kenntnissen keinen besseren Gebrauch gemacht hat. Raffiniertes Verschweigen unerwünschter oder gar ‚gefährlicher' Zusammenhänge und Fakten, ähnlich raffinierte Zusammenziehung von Ereignissen, die womöglich weit auseinander lagen – das sind auch sonst die Hauptmittel, die der Verfasser für seinen Zweck einsetzt."[4]

Der vom fränkischen Herrscher vertriebene Neffe Mojmirs, der moravische Fürst Rastislav (846–870), schloss sich Karlmann an, der durch einen Aufstand gegen seinen Vater, Ludwig des Deutschen sich eine ziemlich große Unabhängigkeit verschaffte. Zuerst versuchte er von Rom Missionare für sein Land zu bekommen,

2 Lošek 2005, 126f.
3 Lhotsky 1963, 155.
4 Kahl 1985, 112.

aber nachdem dies vom Papst abgelehnt wurde,[5] wandte er sich 862 an den Basileus Michael III., er möge ihm Missionare schicken, die die Missionsarbeit in slawischer Sprache verrichten könnten, da in seinem Fürstentum bereits viele Missionäre italienischer, griechischer und germanischer Herkunft sich betätigten.[6] Natürlich zog Rastislav nicht nur die Liturgie in slawischer Sprache an, ihm schwebte das politische Ziel vor, seine Verbindungen mit Byzanz enger knüpfen zu können, wodurch er gegenüber dem fränkischen Einfluss auf sein Fürstentum ein Gegengewicht setzen wollte. Da sein Fürstentum nicht direkt mit Byzanz, sondern mit Bulgarien benachbart war, brauchte er sich wegen des politischen Bündnisses vor keiner allzu starken byzantinischen Hegemonie zu fürchten.[7] Er versuchte jenen Weg einzuschlagen, den schon viele Herrscher vor ihm gingen: er war darauf bedacht, die Beziehungen mit jenem Land, aus dem Missionäre in sein Gebiet geschickt worden waren, zu lockern, damit die Christianisierung nicht zum Mittel der politischen Annexion werde.[8] Der Basileus wollte – um seine ausgeglichene Beziehung mit dem ostfränkischen König und den bayerischen Bischöfen nicht zu gefährden –, obwohl der mährische Fürst ihn darum gebeten hatte, keine Diözese auf diesem Gebiet errichten. Deswegen entsandte er keinen Bischof oder Erzbischof nach Moravien, sondern das Brüderpaar Konstantin und Methodius.[9]

Methodius und Konstantin (Kyrillos) wurden in Thessaloniki als Söhne einer wohlhabenden Familie geboren, genossen eine hervorragende Bildung, und – da ihr Heimatland hauptsächlich von angesiedelten Slawen bewohnt war – erlernten neben ihrer griechischen Muttersprache auch das Slawische.[10] Der ältere Bruder, Methodius hatte höhere Verwaltungsämter inne, während Konstantin nach Konstantinopel ging um sein Studium fortzusetzen, und um später Lehrer der Philosophie zu werden. Nachdem die Brüder (laut der *Vita Methodii*) drei Jahre,[11] (laut der *Vita Constantini*) vierzig Monate bzw. (laut der *Vita Consantini-Cyrilli cum translatione s. Clementis*, d. h. der sog. *italienischen Legende*) vier und ein halbes Jahr ihrer Missionstätigkeit in Moravien nachgingen,[12] wurde es Zeit für die Schaffung einer von den Franken unabhängigen Diözese. Die Idee einer unabhängigen Kirchenorganisation stammte höchstwahrscheinlich nicht von Konstantin und Methodius, sondern von dem moravischen Fürsten, der die Brüder nach Konstantinopel entsandte, damit sie dort die nötigen Schritte

5 Richter 1985, 283.
6 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 7. Vgl. Schellhorn 1964, 107; Dopsch 1987, 317; Richter 1985, 282; Eggers 1996, 19.
7 Franz Grivec 1960, 61; Dopsch 1987, 318.
8 H. Tóth 2003, 96.
9 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 14.
10 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 1. Vgl. H. Tóth 2003, 10ff.; Bernhard 1986, 24.
11 *Vita Methodii* 5. Vgl. Paskalevski 2006, 65ff.
12 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 7.

unternähmen.[13] Auf dem Weg nach Venedig kehrten sie beim Fürsten Chozil ein, der sie mit größtem Respekt empfing.[14] Der Fürst, der selbst die glagolitische Schrift erlernte, nahm Methodius auch später – im Gegenteil zu Rastislav und seinem Neffen und Nachfolger, Sventolpluk I. (870–894) – in Schutz.[15] Für die Aufrichtigkeit seines Handelns spricht auch jene Tatsache, dass Chozil sich nach dem Tode Konstantins bei Hadrian II. für die Rückkehr des Methodius nach Pannonien einsetzte, und er den Papst bat, den Missionar zum Erzbischof zu erheben, während der moravische Fürst kein Interesse an der Wiederbelebung der Mission in slawischer Sprache zeigte.[16] Papst Nikolaus I. erkannte die Möglichkeit, die die Tätigkeiten der aus Byzanz nach Moravien gesandten Missionäre für Rom bot, nämlich dass Pannonien und Illyrien unmittelbar unter päpstliche Jurisdiktion gestellt werden könnten, und lud die gerade in Venedig weilenden Brüder als Gesandte des Fürsten Chozil nach Rom ein.[17] Als sie aber in Rom eintrafen, war der Papst schon seit mehr als einem Monat tot.[18] Nach der Ermordung Michaels III. und der Absetzung des Patriarchen Photios[19] bot sich für die Brüder keine Chance, nach Konstantinopel zurückkehren zu können. Konstantin starb am 14. Februar 869 in Rom.[20] Papst Hadrian II. wollte die Politik seines Vorgängers fortsetzen, und somit ernannte er Methodius zum päpstlichen Legaten, und beauftragte ihn mit der Mission unter den Slawen in Moravien und Pannonien. Nach dessen Bischofsweihe ordinierte der Papst Methodius zum Erzbischof von Sirmium, der Hauptstadt des einstigen Illyrien.[21]

Durch den Misserfolg der Mission in Bulgarien[22] belehrt zeigte sich Hadrian II. – wahrscheinlich auf Anraten des Anastasius Bibliothecarius – bereit der slawischen Liturgie einen größeren Raum zu sichern.[23] Obwohl die Echtheit jenes an Rastislav, Sventopluk I. und Chozil gesandten Briefes, in dem Methodius als Mann von großem Wissen charakterisiert und die Schändung der in altbulgarischer Sprache verfassten liturgischen Bücher mit Exkommunikation bedroht wird, des Öfteren in Frage gestellt wurde, scheint der diplomatische und kirchenpolitische Hintergrund für die Echtheit des Dokumentes zu sprechen.[24]

13 Kosztolnyik 1997, 212–221, 216; Dittrich 1962, 96ff.; Dopsch 1987, 319.
14 Bosl 1964, 17; Burr 1964, 41; Eggers 1996, 20.
15 H. Tóth 2003, 115.
16 *Vita Methodii* 5; Dopsch 1987, 320.
17 Richter 1985, 286; Schellhorn 1987, 113; *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 8.
18 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 9.
19 Zu den Forschungsaspekten des Verhältnisses zwischen Photios and Konstantin s. Grivec1964, 156ff.
20 Bosl 1964, 17; Schellhorn 1987, Richter 1985, 268; Eggers 1996, 20.
21 Bosl 1964, 17f.; Burr 1964, 42; Bernhard 1986, 25; Richter 1985, 287; Eggers 1996, 21f.
22 Hierzu und zur wichtigsten Quelle der römischen Missionsversuche Bulgarien, zu den *Responsa Nicolai Papae I. ad consulta Bulgarorum* s. Ivan Dujčev 1965, 129ff.; Beševliev 1981, 358ff.
23 *Vita Methodii* 8; H. Tóth 2003, 131.
24 Dopsch 1987, 329.

Wenn Konstantin und Methodius nach Byzanz hätten zurückkehren und dort über die Missionserfolge in Moravien und Pannonien berichten können, dann hätte Rom wahrscheinlich auf beide Gebiete für immer verzichten müssen. Es ist zu vermuten, dass der Papst genau aus diesem Grunde Zugeständnisse an die Missionäre machte und Methodius auf Chozils ausgesprochene Bitte zum Legaten ernannte.[25]

Es lässt sich zwar nicht feststellen, ob Chozils Einsatz von seinem aufrichtigen Interesse an der slawischen Liturgie, oder aber von seinen politischen Ambitionen herrührte,[26] jedenfalls unternahm er Schritte beim Papst, Methodius zum Erzbischof ordinieren zu lassen.[27] Durch die Erhebung des Methodius zum Erzbischof von Pannonien erhielt der Slawenapostel den erzbischöflichen Sitz des heiligen Andronicus,[28] was sowohl Chozils Machtpolitik, als auch dem päpstlichen Absichten bezüglich der Slawenmission entsprach. Sirmium war das ehemalige kirchliche und weltliche Zentrum von Westillyrien: mit seinem Schritt dokumentiert Hadrian II. (ganz im Geiste des Nikolaus I.), dass er Sirmium, das in die bulgarische Machtsphäre gehörte, zum kirchlichen Zentrum des ganzen von Slawen bewohnten Gebietes machen, d. h. dass er die Zuständigkeit des Methodius nicht nur auf Pannonien und Mähren, sondern auch auf Bulgarien erstrecken wollte.[29] Methodius konnte *de facto* nicht an seinem Sitz in Sirmium residieren, das Zentrum seiner Tätigkeit blieb höchstwahrscheinlich Mosapurc, der Fürstensitz Chozils.[30] Mit der Ordination des Methodius erhob der Papst Anspruch auf ganz Illyrien, was aufgrund der in Moravien und Pannonien schon seit Jahrzehnten betriebenen Missionsarbeit des Salzburger Erzbistums Zwist säte. Der Salzburger Erzbischof erfuhr von den faktischen Auswirkungen des päpstlichen Beschlusses von seinem aus Mosapurc geflohenen Erzdiakon Rihpald.[31]

Anfang des Jahres 870, als zwischen Rastislav und seinem Neffen Sventopluk I. ein Machtstreit entbrannte,[32] lieferte Sventopluk Methodius den bayrischen Bischöfen aus, es ist jedoch nicht mit Sicherheit zu ermitteln, ob die Gefangennahme des Slawenapostels in Pannonien[33] oder auf moravischem Gebiet erfolgte.[34] An einem Konzil in Regensburg, das in Anwesenheit des ostfränkischen Königs Ludwigs des Deutschen stattfand, erhoben die bayerischen Bischöfe Anklage gegen Methodius, wobei sie seine Würde als Erzbischof missachteten, und beschuldigten ihn, dass er unbefugt auf dem unter die Jurisdiktion des

25 *Vita Methodii* 8.
26 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 15; vgl. Pirchegger 1912, 307ff.
27 *Vita Methodii* 8.
28 *Vita Methodii* 8.
29 Dopsch 1987, 331.
30 H. Tóth 2003, 133.
31 Bosl 1964, 43; Eggers 1996, 34; H. Tóth 2003, 137.
32 Vgl. Eggers 1996, 31f.
33 Richter 1985, 287.
34 Grivec 1960, 91ff.; Bosl 1964, 18; Burr 1964, 44ff.

Erzbistums gehörenden Gebiet Missionsarbeit betrieben hätte.[35] Methodius berief sich auf seine päpstliche Ermächtigung, bzw. beharrte darauf, dass Pannonien und Moravien als illyrische Gebiete einer unmittelbaren päpstlichen Jurisdiktion unterstanden, und behauptete weiter, dass die bayerischen Bischöfe, insbesondere der Bischof von Passau und der Erzbischof von Salzburg nur aus Ehrgeiz und aus Gier ihre Territorialhoheit überschritten.[36]

Bei der genaueren Untersuchung der päpstlichen und der Salzburger Rechtsansprüche soll folgendes festgehalten werden: Da Salzburg und Passau schon seit mehreren Jahrzehnten eine aktive Missionstätigkeit in Moravien und Pannonien betrieben, waren die Ansprüche des Salzburger Erzbistums aus moralischer Hinsicht zweifellos begründet, doch vom Standpunkt des kanonischen Rechtes aus gesehen fehlte dem Salzburger Erzbistum die päpstliche Genehmigung ihrer Rechtsansprüche auf die besagten Gebiete, da es für Salzburg an der Wende vom 8. zum 9. Jahrhundert hinreichend erschien seine Rechtsansprüche von Karl dem Großen bestätigen zu lassen. Zwar konnte Salzburg mit vollem Recht Karantanien für sich beanspruchen,[37] und sich auf die Dokumente der Päpste Zacharias, Stefan II. uns Paul I. berufen, die aber doch verloren sind, das Papsttum nahm aber jene Privilegien in Hinsicht auf Pannonien und Moravien, die Salzburg von Karl dem Großen erhalten hatte nicht als kanonisch gültige Verordnungen in Betracht,[38] und versuchte die besagte Rechtslücke genauer auszunutzen, um seine Ansprüche auf das ganze Illyricum geltend zu machen.[39]

Im Prozess gegen Methodius, der spätestens Ende 870 in Regensburg stattfand, führte Adalwin – Erzbischof von Salzburg – den Vorsitz höchst zurückhaltend. Außer ihm waren – wie es aus den Quellen zu entnehmen ist – Anno (der Bischof von Freising) und Ermenrich (der Bischof von Passau) aktiv an der Verhandlung beteiligt. Vom Letzteren wissen wir, dass er sich fast zu Handgreiflichkeiten gegen Methodius hinreißen ließ:[40] als der Slawenapostel im Bewusstsein seiner geistigen Überlegenheit seine Ankläger als ungebildet und engstirnig bezeichnete, wollte Ermenrich mit einer Peitsche auf Methodius einschlagen, was jedoch von den anderen Anwesenden – wie es aus dem päpstlichen Brief *Ad deflendam pravitatem* hervorgeht – verhindert wurde.[41] Obwohl sich Methodius auf die ihm vom Papst verliehene Würde und Vollmacht berief, wurde er am Konzil von Regensburg verurteilt, und zweieinhalb Jahre unter unwürdigsten Umständen in einer kalten Klosterzelle ohne Dach – laut der *Vita Methodii* in

35 Schellhorn 1987, 111; Eggers 1996, 32. Vgl. *Vita Methodii* 9.
36 Burr 1964, 50; Eggers 1996, 32f.
37 Löwe 1987, 221–241, 229.
38 *Conversio* 10.
39 Burr 1964, 50f.; Dopsch 1987, 332f.
40 Löwe 1987 232; Eggers 1996, 33.
41 *Vita Methodii* 9; vgl. Burr 1964, 44; Löwe 1987, 233.

Ellwangen[42] – gefangen gehalten.[43] Der Freisinger Bischof Anno verhinderte mehrere Male, dass sich Methodius wegen des erlittene Unrechts an den Papst wendete,[44] was als wahrscheinlich erscheinen lässt, dass er die Aufsicht über den Gefangenen führte.[45] Später gelang es Methodius, sich durch geheime Vermittler und heimlich verschickte Briefe mit Papst Hadrian II. in Verbindung zu setzen, der sich allerdings überaus unentschlossen zeigte, und weder auf die Briefe der bayrischen Bischöfe und Ludwigs des Deutschen, noch auf die des Methodius zu reagieren bereit war.[46] Erzbischof Adalwin versuchte den Anschein zu erwecken, als ob er mit der Gefangennahme des Methodius nichts zu tun gehabt hätte, bzw. dass er darüber nicht einmal unterrichtet worden wäre.[47]

Papst Johannes VIII., der am 14. Dezember 872 den Thron bestieg, griff energisch durch, teilte in seinem Brief, bzw. durch seinen Gesandten, den Bischof von Ancona Ludwig dem Deutschen,[48] dem Salzburger Erzbischof und seinen Suffraganbischöfen mit, dass die Rechte des Heiligen Stuhles über Illyrien nicht von den Gebietsänderungen berührt werden, und als *patrimonium Petri* nur in hundert Jahren verjähren.[49] In seinem Brief *Audacia tua* forderte der Papst den Freisinger Bischof Anno, den Anstifter und Urheber *(instigator, auctor)* des Verfahrens gegen Methodius auf,[50] in Rom zu erscheinen, um sich dort für sein rechtswidriges Verhalten zu verantworten, und enthob ihn seines Amtes für die gleiche Zeit, wie Methodius gefangen gehalten worden war.[51] Im Brief *Ad deflendam pravitatem* rügte der Papst den Passauer Bischof Ermenrich für sein gewaltsames Auftreten, forderte ihn ebenfalls auf, sich in Rom zu verantworten, enthob ihn seines Amtes für eine unbestimmte Zeit, und drohte ihm, falls er sich weigerte nach Rom zu gehen, mit der Exkommunikation.[52] Die gegen die bayerischen Bischöfe erhobenen Vorwürfe richteten sich darauf, dass sie Gericht über den Erzbischof von Sirmium Gericht hielten, ohne dazu berechtigt gewesen zu sein, ihn daran hinderten, bei dem Papst Berufung einzulegen, bzw. ihn unter unwürdigen Umständen in Gefangenschaft hielten.[53] Im Brief, den er an Erzbischof Adalwin richtete, forderte ihn der Papst auf, Methodius nach Pannonien zurückzuführen, und dafür Sorge zu tragen, damit

42 *Vita Methodii* 9.
43 Eberl 2006, 9–11. Zur Lokalisierung des Klosters s. Burr 1964, 48, 52f.; Dopsch 1987, 333; Löwe 1987, 234; Hauck 1954, 724; Ziegler 1953, 369–382.
44 MMFH III, 169; Eggers 1996, 41.
45 Löwe 1987, 236.
46 Schellhorn 1987, 117f.
47 Kosztolnyik 1997, 217.
48 Jaffé 1956, 2970.
49 Jaffé 1956, 2976.
50 MMFH III, 169f.
51 MMFH III, 169f.; Eggers 1996, 43.
52 MMFH III, 168.
53 Schellhorn 1987, 120.

er dort seine Tätigkeit als Erzbischof und päpstlicher Legat fortsetzen könne.[54] Das Recht, im Rechtsstreit das letzte Wort zu sprechen, behielt der Papst sich selber vor.[55] Erzbischof Adalwin konnte mit großer Wahrscheinlichkeit den ihm vom Papst auferlegten Auftrag noch vor seinem Tode am 14. Mai 873 erfüllen, Bischof Ermenrich starb am 26. Dezember 874, Bischof Anno im Jahre 875, somit konnten die letzteren dem Urteil des Papstes entgehen, nicht aber – wie es in der *Vita Methodii* heißt – des heiligen Petrus.[56]

Im Weiteren scheint es angebracht jene Anklagepunkte einer näheren Betrachtung zu unterziehen, die nach der *Conversio* gegen Methodius am Konzil von Regensburg vorgebracht wurden. Wie bereits gesagt, lässt es sich nicht mehr feststellen, ob die *Conversio* als Anklageschrift für den Prozess oder als dessen nachträgliche Legitimitationsschrift entstanden ist.[57] 1979 sprach sich Herwig Wolfram für 871 als Entstehungsjahr der *Conversio* aus,[58] in seiner Monographie aus 1995 jedoch unterzog er den sich auf die Entstehungszeit beziehenden Satzes des vierzehnten Kapitels der *Conversio,*[59] und revidierte seinen früheren Standpunkt, indem er die im Mittelalter übliche Datierungsweise in Betracht zog, und entschied sich für die Datierung aus dem Jahre 870.[60] In seiner Textedition pflichtete Fritz Lošek der Datierung Wolframs bei.[61] Über den Autor der *Conversio* lassen sich ebenfalls nur Vermutungen anstellen. Herwig Wolfram nahm an, dass der Autor Erzbischof Adalwin selber gewesen sein könnte, aber bei der Formulierung seiner Hypothese zeigte er äußerste Vorsicht.[62] Es kann mit ziemlich großer Sicherheit festgestellt werden, da im fünften Kapitel sich eine Formulierung in der ersten Person Plural finden lässt, dass der Autor Salzburger, bzw. bayrischer Abstammung gewesen sein muss.[63] Für Erzbischof Adalwin als Autor spricht Folgendes: auf die Erwähnung Adalwins folgt ein Satz in der ersten Person, daher kann vielleicht angenommen werden, dass der Autor an dieser Stelle über sich selbst gesprochen hat.[64] Ebenfalls verdient es in Erwägung gezogen zu werden, dass im Text der *Conversio* nur zwei Personen

54 Jaffé 1956, 2975.
55 Löwe 1987, 236f.
56 *Vita Methodii* 10; Burr 1964, 56; Eggers 1996, 44.
57 Schellhorn 1987, 118.
58 Wolfram 1995, 15; 141.
59 *Conversio* 14.
60 Wolfram 1995, 193.
61 Lošek 1997, 6; Lošek 2005, 124ff.
62 Wolfram 1995, 197.
63 *Conversio* 5. *…orta seditione, quod carmula dicimus.* Vgl. *Lex Baiuvariorum* 2, 3. *Si quis seditionem excitaverit contra ducem suum, quod Baiuvarii carmulum dicunt.*
64 *Conversio* 9. *…et adhuc ipse Adalwinus archiepiscopus per semetipsum regere studet illam gentem in nomine Domini, sicut iam multis in illis regionibus claret locis.*; 10. *Enumeratis itaque episcopis Iuvavensium conamur, prout veracius in chronicis imperatorum et regum Francorum et Bagoariorum scriptum repperimus, scire volentibus manifestare.*

das Epithet *piissimus* als Attribut tragen, nämlich Erzbischof Adalwin[65] und Ludwig der Deutsche,[66] daher können wir jene Hypothese nicht verwerfen, dass möglicherweise der Autor und der Adressat des Werkes mit diesem Attribut ausgezeichnet wurden.[67]

In der *Conversio* werden die Anklagepunkte gegen Methodius im Folgenden zusammengefasst: *Usque dum quidam Graecus Methodius nomine noviter inventis Sclavinis litteris linguam Latinam doctrinamque Romanam atque litteras auctorales Latinas philosophice superducens vilescere fecit cuncto populo ex parte missas et evangelia ecclesiasticumque officium illorum, qui hoc Latine celebraverunt.*[68] Im *Excerptum de Karentanis* findet sich eine ähnliche Äußerung: *Hoc enim observatum fuit, usque dum nova orta est doctrina Methodii philosophi.*[69] Die auf Methodius bezogene Apposition *philosophus* war ursprünglich ein Epithet des Konstantins,[70] wie es auch aus dem Brief *Industriae tuae* des Papstes Johannes VIII. (872–882)[71] und aus den Briefen des Anastasius Bibliothecarius *(tantus et talis revera philosophus, mirabilis vere philosophus, sapientissimus vir)* hervorgeht,[72] so z. B. nannte Anastasius Bibliothecarius Konstantin in einem im Jahre 875 an Karl den Kahlen über die Beschlüsse des im Jahre 869 gehaltenen Konzils von Konstantinopel verfassten Brief *philosophus magnae sanctitatis vir.*[73] Herwig Wolfram – obwohl er im Falle des Konstantins den Ehrentitel *philosophus* nicht in Frage stellte – interpretierte dieses Apposition des Methodius in der *Conversio* als eine ehrenrührige und abwertende Bezeichnung.[74] Jene Feststellung Wolframs, dass in der *Conversio* die Epithet des Konstantins auf seinen Bruder übertragen wurde, ist zweifelsohne zutreffend, jener These aber, dass diese Apposition einen negativen Beigeschmack erhalten soll, ist – wie es schon von Ludger Bernhard dargetan worden ist – mit Vorsicht beizupflichten,[75] wie im Folgenden zu zeigen sein wird.

Nach dem *Excerptum de Karentanis* sollte Methodius eine *nova doctrina* eingeführt haben, nach dem zwölften Kapitel der *Conversio* wurden aber von den bayerischen Bischöfen drei Anklagepunkte gegen den Slawenapostel formuliert, die ihm eine abweisende Haltung erstens gegenüber die *lingua Latina*, zweitens

65 *Conversio* 9. *…anno nativitatis Domini DCCCXXI Adalrammus piissimus doctor sedem Iuvavensem suscepit regendam.*
66 *Conversio* 12. *Pervenit ergo ad notitiam Hludowici piissimi regis, quod Priwina benivolus fuit erga Dei servitium et suum.*
67 Lošek 1997, 6.
68 *Conversio* 12.
69 *Conversio* 1/E.
70 Wolfram 1995, 138.
71 MGH EE VII. Nr. 255.
72 MGH EE VII. Nr. 15.
73 MGH EE VII. Nr. 5.
74 Wolfram 1995, 23; 138.
75 Bernhard 1986, 28.

gegen die *doctrina Romana* und drittens gegen den *litterae auctorales Latinae* vorwarfen.[76] Diese drei Hauptstützen der westlichen Kirche soll Methodius *philosophice superducens* im Auge des Volkes als wertlos dargestellt haben. Wie schon gesagt, beinhaltete das Adverb *philosophice* keine unbedingte Kritik, da *philosophus* seit dem Antiken als Synonym für den *gelehrten Mann*, gleichsam für den *Intellektuellen* galt.[77] Weiterer Erklärung bedarf aber das Verb *superducere*, was sowohl im engeren, als auch im übertragenen Sinne *bedecken*, bzw. *überziehen* bedeutet.[78] Bei den Wendungen, die sich auf die Vergebung der Sünden beziehen, kommen des Öfteren die Synonyme des *Bedeckens* vor *(abscondere, tegere, operire)*, aber die besagten Verben sind auch – je vom Kontext abhängig – in Sinne *zudecken*, bzw. *verhüllen* vorzufinden. Somit kann die Wendung *philosophice superducere* der *Conversio* als *mit gelehrter Argumentation verhüllen* wiedergegeben werden.[79] Ein gutes Beispiel für diese gelehrte Argumentation bietet jene Debatte, die Konstantin in Venedig mit den lateinischen Bischöfen, Priestern und Mönchen führte, die ihn gleichsam zur Verantwortung zogen, warum er eine eigene Schrift für die Slawen erfunden, bzw. erschaffen hatte.[80] Er beantwortete die Frage einerseits mit bodenfesten – aber mit zahlreichen biblischen Stellen belegten – Argumenten, dass nämlich auch außerhalb der Grenzen des römischen, bzw. des byzantinischen Reiches im Osten mehrere Völker leben, die in ihrer eigenen Sprache Gott anbeten, und auch ihre eigene Schrift gebrauchen; andererseits wies er darauf hin, dass die von Isidor von Sevilla stammende Doktrin der Triglossie,[81] deren Anhänger er *Pilatiani* nannte, im Gegensatz zur Bibel steht, da die Verfechter der sog. drei-Sprachen-Häresie sich mit Pilatus auf die gleiche Stufe stellen.[82]

Nachdem es Papst Johannes VIII. geschafft hatte, Methodius aus der bayerischen Gefangenschaft zu befreien, und ihn in seine alte Würde wieder einsetzen zu lassen,[83] untersagte er ihm die Messe in slawischer Sprache zu zelebrieren.[84] Der Verstoß des Methodius gegen das päpstliche Geheiß bot den bayerischen Bischöfen eine willkommene Möglichkeit, mit Hilfe des Johannes de Venetiis,[85] einem Priester aus dem Hofe Sventopluks wieder Anzeige wegen Verkündung ketzerischer Lehren in Rom zu erstatten. Papst Johannes VIII. bestellte seinen Legaten in seinem Brief

76 Kronsteiner 1997, 117–122; Bernhard 1986, 30; Eggers 1996, 78.
77 Curtius 1961, 215.
78 Notker Balbulus, *Gesta Caroli Magni imperatoris* 1, 21. Vgl. Bernhard 1986, 35.
79 Bernhard 1986, 36.
80 H. Tóth 2003, 121ff.
81 H. Tóth 2003, 92.
82 *Vita Constantini-Cyrilli cum translatione Sancti Clementis* 14ff.; Devos–Meyvaert 1964, 57–71, 68f.
83 Vgl. MMFH III., 169, 191.
84 H. Tóth 2003, 147.
85 Zur Identifikation des Johannes de Venetiis s. Grivec 1960, 105; Boshof 1997, 144.

Praedicationis tuae nach Rom,[86] und wies ihn nachdrücklich darauf hin, dass er die heilige Messe nur in lateinischer oder griechischer Sprache zelebrieren, und nur in der Wortliturgie, d. h. in der Predigt das Slawische gebrauchen dürfe.[87] Bald darauf erreichte Methodius beim Papst, die ganze Messe in slawischer Sprache zelebrieren zu können.[88] In seinem an Sventopluk I. gerichteten Brief *Industriae tuae* erklärt der Papst, dass die von Konstantin dem Philosophen erschaffene Schrift nicht im Gegensatz mit der Bibel steht, da es allen Völkern erlaubt sein soll, Gott in ihrer eigenen Sprache zu loben, und dass er daher es Methodius nicht verbieten will, die Messe in slawischer Sprache zu zelebrieren.[89] Natürlich durfte Methodius in Anwesenheit des Fürsten die Liturgie in Latein halten[90] – das Slawische war nur für das gemeine Volk, das kein Latein verstand, gedacht[91] –, und deshalb sandte der Papst Bischof Wiching zum Slawenapostel, der die Messe in Latein zelebrieren konnte. Wahrscheinlich diente der Ausdruck der *Conversio ex parte* dazu, diese Zweisprachigkeit auszudrücken.[92] Methodius konnte sich auch gegen jenen Vorwurf der bayerischen Bischöfe verteidigen, er betete das Glaubensbekenntnis ohne den Zusatz *filioque*, wie es aus einem Brief des Papstes Johannes VIII. hervorgeht.[93] Es darf nicht vergessen werden, dass – trotz des seit mehreren Jahrhunderten andauernden *Filioque*-Streites Nachweise – einerseits Papst Leo III. es für nicht unentbehrlich hielt, die in der westlichen Kirche als Dogma anerkannte *Filioque*-Lehre in das Glaubensbekenntnis einzufügen,[94] und andererseits unter Papst Johannes VIII. (und sogar mehrere Jahrhunderte nach ihm) das Glaubensbekenntnis selbst in Rom ohne den Zusatz *Filioque* gebetet wurde.[95]

Papst Johannes VIII. bestätigte daher den Rang des Methodius als Erzbischof, der ihm noch von Papst Hadrian II. verliehen wurde, und erlaubte ihm, seine Missionsarbeit in Pannonien und Moravien fortzusetzen. Methodius kehrte aus Rom jedoch nicht nach Pannonien, sondern nach Moravien zurück. Später erreichte Theotmar, Erzbischof von Salzburg (873–907), dass die Bekehrungsarbeit in Pannonien vom Salzburger Erzbistum durchgeführt wurde.[96] Die besagten Ereignisse lassen zweifelsohne auf einen Konflikt zwischen Methodius und dem Fürsten schließen, was den Fürsten dazu veranlasste, Papst Johannes VIII. darum zu bitten, sein Land unter die unmittelbare Jurisdiktion des Papstes stellen zu

86 MGH EE VII. Nr. 201.
87 MGH EE VII. Nr. 201.
88 Bosl 1964, 20; Bernhard 1986, 40.
89 MHG EE VII. Nr. 255; Eggers 1996, 60ff.
90 Kosztolnyik 1997, 219; Zagiba 1946/47, 63f.
91 Zum Begriff *„populus“* s. Hellmann 1964, 161–167.
92 *Conversio* 12.
93 MGH EE VII. Nr. 255.
94 Bernhard 1986, 43.
95 MGH EE VII. Nr. 255.
96 Kosztolnyik 1997, 218.

dürfen.[97] Nicht nur Sventopluk, sondern auch Wiching, der 880 zum Bischof von Nitra ordiniert wurde,[98] erschwerten Methodius das Leben, insbesondere weil der Papst auch nicht immer eine eindeutige Stellung zu seinen Gunsten bezog, wie es aus dem an ihn gerichteten päpstlichen Brief *Pastoralis sollicitudinis* zu entnehmen ist.[99] Vom bayerischen Klerus angespornt startete Wiching, der selber Erzbischof von Moravien werden wollte, mehrere Verleumdungskampagnen gegen Methodius, und hierbei schreckte er auch davor nicht zurück, die Glaubwürdigkeit seiner Behauptungen mit einem gefälschten päpstlichen Schreiben zu erhöhen.[100]

Dem Konflikt mit Methodius lag in erster Linie seine slawische Liturgie zugrunde, denn die bayerischen Bischöfe befürchteten, dass Methodius eine eigene Kirchenorganisation erschaffen wollte. Nach dem Tode des Methodius am 6. April 885 kam für die bayerischen Bischöfe und dem moravischen Fürsten die Zeit, energisch gegen die Schüler und Anhänger des Methodius aufzutreten. In seinem Brief *Quia te zelo* aus dem Herbst des Jahres 885,[101] das unter anderen ein Produkt der von Wiching gegen Methodius geführten Verleumdungskampagne war, schränkte der Papst den liturgischen Gebrauch der slawischen Sprache stark ein.[102] Im Jahre 885 wurde der von Methodius exkommunizierte, vom Papst aber in seinem Brief *Quia te zelo* mit Anerkennung bedachte Wiching zum Erzbischof ordiniert, was zur unabhängigen Stellung Moraviens in großem Maße beitrug.[103] Nach dem Tode des Methodius, der Gorazd, einen seiner Schüler slawischer Herkunft zu seinem Nachfolger bestimmte,[104] wurden die Anhänger und Schüler des Slawenapostels teils hingerichtet, teils aus Moravien vertrieben. Ein Teil von ihnen fand in Bulgarien eine neue Heimat, wo sie das geistige Erbe des Methodius pflegen und entfalten konnten.[105]

97 MGH EE VII. Nr. 255. Vgl. Richter 1985, 289.
98 Boshof 1997, 145; Eggers 1996, 60.
99 MMFH III., 211f.
100 Bosl 1964, 19; H. Tóth 2003, 150.
101 MMFH III., 217ff.
102 H. Tóth 2003, 164.
103 MMFH III., 221f.; vgl. Dittrich 1962, 272ff.
104 *Vita Methodii* 17; Grivec 1960, 142ff.
105 Bosl 1964, 22; Kosztolnyik 1997, 221; Eggers 1996, 69ff.; Dopsch 1987, 335.

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Traditional Features of Hungarian Public Administration

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Abstract. There are at least two main examination aspects of Hungarian public administration and administrative law: first, the approach sketching the main features of the broader *legal* system and of *law enforcement* practice; second – almost as importantly –, the examination which describes and assesses 'reality' in a wider social scientific framework and through (public) *policy* features and processes. It shall be stated that legal approaches and analysis methods are dominant in the self-image of Hungarian public administration, in its practical operation and in its scientific description attempts. Among both the general features of the legal system reflected in administrative law and in its broader public policy features, there are some which are relatively stable – providing a high level of security even in case of certain political and legal changes. We call them "elements of our administrative heritage":
a) The first such "heritage-element" is *tradition*, which is kept alive by social memory and goes beyond itemized law. Today, it may be observed in deep structural continuity, in the further effects of certain civil values, and in typical ways of thinking and attitudes.
b) In the second place, there is the *language* (linguistic) environment, the framework which – with its highly regulated nature – keeps together and, from several aspects, determines certain features of, and the dogma of public administration.
c) As the third factor, we may mention the most obvious heritage-element in close relationship with the first two: *institutions which are permanently present in itemized law, those specific administrative solutions which are stable and – in some cases – returning elements of Hungarian legal history*. Regarding the latter, the issue of the historical constitution may be mentioned, which has become an exciting problem of "living law" in Hungary with the approval of the Fundamental Law of Hungary.
Naturally, there are not only internal, but also (stable) external effects influencing public administration.

Keywords: Hungarian public administration, tradition, historical constitution, state socialism, transition, external effects

I. Introduction

During the presentation of Hungarian public administration and administrative law, the consideration of at least two examination aspects is necessary: first, the approach sketching the main features of the law system, of the broader legal system and of law enforcement practice is reasonable; second – almost as importantly –, the examination which describes and assesses "reality" in a wider social scientific framework and through (public) policy features and processes. At the same time, it makes possible to compare the Hungarian administrative phenomena with the similar phenomena of other countries, which may provide more objective results.[1]

Among both the general features of the legal system reflected in administrative law and in its broader public policy features, there are some which are relatively stable – providing a high level of security even in case of certain political and legal changes.

II. The Traditional Features of Hungarian Public Administration in Public Policy Approach

A starting point of this subchapter is that new Central-Eastern European democracies established after 1989 did not build the political system on layered, sophisticated consultation procedures and institutional systems based on wide-scale social participation but – almost exclusively – on the Parliament-centred formation of political structures based on the principle of representation. Many believe that one of the great problems of societies getting out from under a dictatorship is that due to the lack of civil society filling in the space between individuals and the state during their socialization the members of these societies could never naturally learn to incorporate the identification of problems, formulation of their interests, exchange of their thoughts, the harmonization of different opinions, due to which the various problem-handling methods were not developed either. From the public policy side, it may be stated that in Hungary the legal and institutional requirements of representative democracy were fulfilled after 1990, but since then no material change has happened towards participative democracy; this means that Hungarian democracy "has frozen into" the level of representative democracy.[2]

A "father" tendency, a feature which may be hardly separated from the one mentioned earlier is that the prevailing state – formed after the transition – imitates, reconstructs and replaces the civil sector through its conscious efforts, by this making it weaker *(more about this later)*. During the analysis of this,

1 See, e.g. Künnecke 2010, 266.
2 Jenei 2010, 95.

it must not be forgotten that in the economic and sociological literature of the past one or two decades the state, by undertaking the "replacement" and "simulation" of the organization of market and self-regulating social mechanisms and the political organization of society, it eventually hampers the connection between political decision-making mechanisms and the actual fragmentation of the interests of society.

Based on the main features of public policy/administrative environment, it must be stated about Hungary in advance that *a)* due to the traditional top-down system, a general – and tendency-like – weakness is the lack of democratic control, accountability and transparency; *b)* due to the politicized and unstable practice of the reconciliation of interests, the quality of the decisions made in the public sector is often insufficient, just as their execution; *c)* public policy has balance problems; the weight and co-ordination of the relevant players is disproportionate and incalculable due to the extreme politicization, and political predominance characterizes the relationship of the political-administrative system and society regardless[3]; *d)* the final phase of public policy is missing; public policy processes begin, but they often do not get to the end. There is no evaluation phase and closure.[4] Within the scope of the latter evaluation, the preliminary and subsequent (posterior) impact studies (law-reviews) are determinative, the main goal of which is grounding the decision-making situation of the legislator in so far as the analysis expands the pool of factors, the consideration of which is – or should be – essential for a well thought-through, grounded decision.[5]

It should also be mentioned here that in the modernization of Hungarian public administration – according to the standards of Western reform trends – the deficiencies of the balance of state and market are continuous;[6] and in the Hungarian model of public policy decision-making – as mentioned before – the top-down approach is dominant in so far as the institutional mechanisms of the involvement of interest protection-integrative organizations operate only formally.[7] It is inseparable from the latter fact that the traditional features of Hungarian political culture are paternalism, intolerance and the transformation of personal relations into political ones,[8] and, last but not least, the presence of corruption phenomena, which may be observed at a degree exceeding the average

3 Jenei 2010, 95.
4 Pesti 2001, 206.
5 For more details, see: *A Közigazgatás Korszerűsítésének kormánybiztosa által készített szempontok. „Részletes útmutató a hatályos jogszabályok utólagos és jogszabálytervezetek előzetes felülvizsgálatához."* [Aspects Prepared by the Government Commissioner of the Modernization of Public Administration. "Detailed Guide to the Subsequent Review of Valid Laws and the Preliminary Review of Draft Laws"] 1995, 5.
6 Jenei 2010, 94.
7 Jenei 2010, 95.
8 Kulcsár 1987, 336.

of the surrounding area.[9] Among the classic governmental failure phenomena – which are not traditionally Hungarian, but may definitely be observed here –, the theoretical difficulties of setting and measuring public policy goals may be mentioned as well as the influence of strong interest groups, difficulties related to the size and complexity of governmental activities, and to the causal interconnection of certain public policy problems.[10]

It is also important that in Hungary "[the] all-time present seems to be outstanding because of the strong delegitimization of the all-time past, making it seem worthless, instead of focusing on its own achievements".[11] In this field of force, even the changes of the government are of the significance of "catastrophe history". However, attention must be also directed to the fact that the phenomena of *value crisis* known in sociology often appears in society along such fights for legitimacy…[12]

The processes of the two decades after the Hungarian transition (1990–2010) may be exemplified with two further paradoxes:

1. The integration of the Hungarian economy into the global market happened without the whole Hungarian economy catching up.

2. The continuous weakening of the state and the lack of the material reform of the state budget together led to the result that a large but ineffective state was established. "The Hungarian state model is too large to be a night-watch state, but too powerless to be a welfare state. This model could best be called a *speed bump state* because it spreads out to several fields of economy and society, but it is not where its power and organizational skills would be most needed; regarding its intentions, it protects, but in reality it holds back processes, wants to prevent bad things, but eventually it may be disregarded, passed by."[13]

Parts of public policy models and directions applied since the transition have performed rather ambiguously. Privatization and the realization of public procurement risks have stored up much social deficit, as has the frequent overstepping by executive power of the system of checks and balances, and the depletion of the actual and potential human resources of the public sector.[14] "It may be concluded that the 'market turn' reduced to privatization and outsourcing did not result in real market competition at the end of the 20th century and at the beginning of the 21st. The monopoly of public institutions was often replaced by private monopoly. The privatization of public services resulted in the establishment of the client system and outsourcing often became the source of

9 http://www.ey.com/HU/hu/Newsroom/News-releases/global_fraud_survey_2010_pr [accessed on 11 July 2013]
10 Hajnal 2008, 33.
11 Szigeti 2008, 17.
12 Szigeti 2008, 17.
13 Pulay 2010, 29.
14 Horváth 2011, 92.

increased corruption. (…) This way, the effectiveness of public services was not significantly increased by the use of market mechanisms. The publicly known idea, according to which in public services private enterprises are more effective than public institutions, has not been proven in any countries of the modern world."[15] The embeddedness of such ideas was strengthened by the neoclassic economic approach, according to which the state shall intervene only in the field of those activities and services – like defence, education, public and property safety, protection of the environment – where market is not efficient or does not work at all. "Until very recently, it was assumed in Hungary that regarding their significance, tasks performed by the state are behind the activities fulfilled by private enterprises in line with market instructions."[16]

In the 1990s – after the transition –, there was a regrettable shift: during the transition to a market economy, the state withdrew from a number of fields, but during this "abolishment of the state" several tasks could not be exposed to the profit-oriented processes of the market. These tasks were usually incorporated into the so-called non-profit sector, which was unfortunately mixed up with the sphere of civil organizations both legally and practically: "It often happened that in complete sectors only the signboards were repainted, shifted from state to public utility status, while the old structure, the old system of operation, state financing and the old 'expert' staff remained."[17] This environment, however, had a weakening effect on organized civil society, upholding its – unnecessarily strong – dependent status.

The result of the "abolishment of the state" after the transition was quite odd because, for the establishment of the rule of law, the tool system of public administration was weakened on purpose, while from the other side the need for public services provided or organized by public administration did not decrease.[18] However, the "rediscovery" of the state is not a direction to be absolutized: if the state performed all of its tasks through a central bureaucracy, it could hardly escape critical remarks about a total – and, what is more important, less effective – state. Basically, this is the reason why the tasks acknowledged or undertaken by the state are only partially performed by the state, in line with the principle of subsidiarity; it often relies on the organizations of the economic and civil sector, as well as – with growing significance – on the assistance of church organizations.

In addition to the traditional public policy question asking which activities belong to the catalogue of public tasks, it is also important who performs these and under what authorization and state support. Within the scope of presenting Hungarian public administration ideas, the analysis of the staff number and the

15 Jenei 2010, 95–96.
16 Csáki 2009, 13–14.
17 Pankucsi 2012, 144.
18 Nagy 2011, 203–204.

number of public administration institutions of the past two decades is very important, which – often – presents these as a practical competition between the aspects of efficiency and effectiveness.[19] The governmental cycle after 2010 brought about some novelties in this sense, in so far as it obviously refused some of the solutions favoured by public management: the abolition of PPP-constructions within the solutions of the performance of public services started, the obligatory private pension fund system was abolished and the sector-neutral state approach came to an end, even a sceptical approach may be observed concerning the outsourcing of human public services.[20]

As a summary, it may be stated that in the development of society in the past twenty years the dominance of political and subjective factors may be observed, contrary to other – economic, social, legal and EU integration – factors.[21] This approach may be still upheld even though an important element of the renewal process of governmental goals and methods was the transformation of the financing system of the public sector, and, in general, it is (was) true that public administration reforms usually start(ed) due to budget/financial reasons in Hungary.

III. Traditional Features of the Hungarian Legal System

The Hungarian legal system may be characterized as part of the "Western law legal type," within which it may be put into the continental law family.[22] However, the statements of works[23] raising the issue of belonging to the so-called post-Socialist law family are also justified, in so far as the operational mechanisms typical of the members of this family of law can be seen.[24]

It shall be repeatedly stated that legal approaches and analysis methods are dominant in the self-image of Hungarian public administration, in its practical operation and in its scientific description attempts.[25] It is a tendency which had

19 Gellén 2012, 14.
20 Horváth 2011, 93.
21 Szigeti 2011, 24.
22 Among the characteristics of legal systems belonging to the continental law family, it may be highlighted that written law has primacy over case law. The laws regulate the relations of life in an abstract way; they form a closed system. The functions of the legislator and of the law enforcer are sharply divided. The judge does not make law, but rather precedents only make the application of law clearer. This rule prevails even if some authors correctly point out the precedential features of the uniformity decisions of the Curia, i.e. that they have the characteristics of individual sources of law (see, e.g. Szalma 2011, 41.) As part of the continental legal system, the Hungarian legal system does not recognize binding precedents. However, lower courts are generally bound by the harmonized decisions of the Supreme Court/Curia ("Kúria") and of the interpretations issued by the Constitutional Court ("Alkotmánybíróság").
23 Fekete 2004
24 Fekete 2004
25 For more about this, see Gajduschek 2012

existed earlier, but it was strengthened by Socialism: the transformation of any social fact or conflict into one of legal nature – along with a relatively low level of legal consciousness of citizens, and strengthened by other factors – increases the richness in information of the hierarchical system of relations, it ensures the continuous reproduction of all kinds of dependencies and the upholding of fear/citizens' passivity, as well as the relativization of the personal responsibility of the decision-maker/politician/law enforcer.

The Hungarian legal system, the broader legal system and legal thinking has always been characterized by strong German and Austrian orientation, due in part to the geographical features and certain cultural-historical features of Hungary. However, in addition to this, it is obvious that in the approaches of some of those dealing with the science of law or economics – from the beginning – other directions may also be observed, and therefore we may talk about French, in a given period, Russian and with periodical intensity Anglo-Saxon (American) influence. In Hungarian public law thinking, a certain duality had been observable for a long time – until 1945 –, according to which there was simultaneously a strong legal conservatism, "living in the trance of the Corpus Iuris," and an up-to-date transmission of the most modern European achievements in legal theory and positive law.[26]

IV. Effects on Hungarian Public Administration

IV.1. Introduction

The effects on Hungarian public administration may be outlined in two basic groups. It is worth dividing the elements of the heritage of the past, which have their effects today, and the new – external and internal – challenges of the present.

IV.2. Heritage of the Past

IV.2.1. Heritage of the Far Past

Sketching the (institutional) history and the continuous elements of Hungarian public administration – interpreted in the broadest sense –, which has a history of more than one thousand years, exceeds the scope of this work; instead of this, we wish to direct our attention to some significant circumstances which play an important role in the scientific and political discussions of the present era:

a) The first such "heritage-element" is *tradition*, which is kept alive by social memory and goes beyond itemized law. Today, it may be observed in deep

26 Szabadfalvi 1999

structural continuity,[27] in the further effects of certain civil values and in typical ways of thinking and attitudes. This system of values is not only observable in the latest legislative instruments but also in the sphere beyond itemized law, in the attitude and self-image of the staff of public administration, and in the social expectations placed on public administration.

b) In the second place, there is the *language* (linguistic) environment, the framework which – with its highly regulated nature – keeps together and, from several aspects, determines certain features of, and the dogma of public administration. Language, expert terminology/dogmatic continuities and their role in influencing scientific-professional, scientific-ethical directions are impossible to overrate.[28] It is a determinative fact that the terminology of (still) valid laws – special grammatical structures or certain words and expressions – is often the last example of the old spoken language in the form of the language used today. In this case, the differentiation between terminology used by law and spoken language is very important because the special terminology of law has always shown some difference from spoken language (especially when legal culture used mostly the German or Latin language), but today there is a huge gap also between grammatical structures used in the everyday Hungarian language and in legal texts which are more than 30-40 years old.

Another important relationship in this sense is that the UNESCO's *Guidelines for Terminology Policies. Formulating and Implementing Terminology Policy in Language Communities*, published in 2005, urging the establishment and upkeep of national terminology policy, draws attention to the fact that if the professional terminology of a language does not develop in certain subjects or the development is very slow it may happen eventually that in today's speedy technological development material communication cannot be performed after a while in the given language in certain professional fields (this means that functional loss of language functions may occur), and this may lead to the exclusion of unilingual communities from scientific development. This problem may be raised in relation with the direct use of English-language terminology in the science of public administration – in the lack of Hungarian equivalents.[29]

c) As the third factor, we may mention the most obvious heritage element in close relationship with the first two: *institutions which are permanently present in itemized law, those specific administrative solutions, which are stable and*

27 Hankiss 1986, 92.

28 The National Avowal part of the document placed to the top of the hierarchy of laws states: "We pledge to cherish and preserve our heritage: the Hungarian culture, our unique language, and the man-made and natural riches of the Carpathian Basin," and according to Article H Paragraph (2) of the Fundamental Law "Hungary shall protect the Hungarian language."

29 The conference entitled "The Renewal of the Hungarian Language and Hungarian Legal Language," organized by the Lőrincz Lajos Research Group on 5 December 2013, also drew attention to the importance of that question.

– in some cases – returning elements of Hungarian legal history. Regarding the latter, the issue of the historical constitution may be mentioned, which has become an exciting problem of "living law" in Hungary with the approval of the Fundamental Law of Hungary.

IV.2.1.1. Some Features of the Concept of Historical Constitution

As a feature of Hungarian history, the intensive presence of interruptions has been referred to before, what has always been a problem of legal continuity in relation with public law/administrative institutions. The Fundamental Law defines itself as a basic legal instrument restoring the historical constitution of the nation. Even though this "historical constitution" is one of the main sources of the new structure, its meaning is defined in the preamble in an abstract manner.[30] Legal historical experiences show that in the upkeep and reappearing of traditional law – even nowadays – the phenomenon has an important role, according to which countries which gain their independence or become autonomous somehow sooner or later will incorporate into their own "revolutionary" programme the intention to revitalize traditional law for ideological-political reasons.[31] The straightforward appearance of historical constitution in Hungary in the (new) Fundamental Law – which has become a ground for interpreting itemized law – may be evaluated as a similar development.

Another feature of this is that the historical feature of the constitution has never meant petrifaction, naturally; a historical constitution changes too. "However, this change is never a violent disruption and an introduction of a new system, but a[n organic] development, further building, the [continuous] incorporation of necessary reforms into the constitution."[32]

One possible approach to the historical constitution is the one which gives – at most – symbolic significance to the notion and phenomenon of historical constitution, stating that the relevant parts[33] of the National Avowal of the Fundamental Law and of Article R) Paragraph (3) only wish to establish and strengthen respect for the achievements of the historical constitution: "Such constitutional provisions are clearly self-impulsive norms, the role of which is to

30 As it is stated in the National Avowal: "We honour the achievements of our historical Constitution and the Holy Crown, which embodies the constitutional continuity of Hungary and the unity of the nation" and "We do not recognize the suspension of our historical Constitution that occurred due to foreign occupation. We declare that no statutory limitation applies to the inhuman crimes committed against the Hungarian nation and its citizens under the national socialist and communist dictatorships."

31 Kulcsár 1997, 129.

32 Egyed 1941, 248.

33 According to Article R) Paragraph (3), "The provisions of the Fundamental Law shall be interpreted in harmony with their goal, the National Avowal included therein, and the achievements of the historical constitution".

trigger the effect of strengthening social cohesion, which is a feature of the historical constitution."[34] This is true because the category of historical constitution – an independent type of norms – is difficult to fit into the traditional (valid) hierarchy of norms, primarily due to its undefined content. The representatives of this approach believe that the historical constitution is much more the catalogue of the solutions of legal (public law) culture than of the sources of laws and of individual legal (political) solutions. Among the most cited authors, András Jakab also refuses the idea that within the context of the new Fundamental Law the historical constitution shall receive more role than being a "concept supporting reasoning".[35] Péter Paczolay is of the same opinion: "The Hungarian historical constitution – despite all efforts made for its justification – was a constitution of a rather low value, the building of which was even more destroyed in the storms of the 20th century. Now, some rather symbolic elements of the old Hungarian constitution may be kept. However, legal continuity is practically present only in symbolic elements today like the coat of arms and the Hymn."[36]

However, in addition to the above-mentioned – limited – historical constitution concept, we shall also refer to a more radical concept too, which views historical constitution as a way of establishing itemized law expansion, an independent (and more and more dominant) method of legal interpretation and common political agreements. A "domesticated" form of this concept is an idea which would make an attempt to create an expandable "catalogue of achievements" composed of valid individual legal institutions reappearing in positive law in order to (by taking the Fundamental Law seriously) give the interpreted notion real meaning and to prevent the unlimited, discursive formation of domestic scientific schools which do not understand each other due to the use of diverse legal categories. This opinion identifies the institutional way of getting in touch with the past as the establishment of a careful, partial material continuity. Therefore, this approach may be called the concept of partial material legal continuity. However, this approach also states that the "renationalization" mentioned above and the adoption of certain historical legal institutions "may be possible only in consideration of the constitutional requirements of the past period;"[37] thus, it considers it useful to establish some kind of a *test* in this regard.

Article 28 of the Fundamental Law refers to the obligatory (!) use of the contents of the historical constitution – not quite specified by the legislator – by the law enforcers, as it states: "In the course of the application of law, the courts shall interpret the law primarily in light of their purpose and in accordance with the Fundamental Law. When interpreting the Fundamental Law or any other law, it

34 Csink – Fröhlich 2012, 98.
35 Jakab 2011, 199.
36 Paczolay 2011.
37 Varga 2011, 4.

shall be presumed that they are reasonable and serve the public good and morally right and economic purposes." Based on the comparison of the cited paragraph of Article R) and of Article 28, the only possible conclusion is that during their activities based on the Fundamental Law courts shall view the achievements of the historical constitution as a starting point – in each and every case.

The outlines of the above-mentioned two concepts are strengthened by the polemic which became apparent in Decision IV/2096/2012 ABH of the Constitutional Court. In the reasoning of the decision – examining the retiring age of judges –, the following is stated: "It is a minimum requirement of the consolidated interpretation of the Hungarian historical constitution to accept that the Acts of Parliament constituting the civic transformation completed in the 19th century form part of the historical constitution. These had been the Acts that had created – upon significant precedents – a solid fundament of legal institutions that served as a basis for building a modern state under the rule of law. Therefore, when the Fundamental Law "opens a window" on the historical dimensions of our public law, it makes us focus on the precedents of institutional history, without which our public law environment of today and our legal culture in general would be rootless. In this situation, the responsibility of the Constitutional Court is exceptional, or indeed historical: in the course of examining concrete cases, it has to include in its critical horizon the relevant resources of the history of legal institutions". In this specific case, the Constitutional Court did this, using the provisions of two laws from the 19th century as independent reasons. The separate opinion of Béla Pokol, however, sharply contravenes this new practice introduced in the examined field: "Article R) of the Fundamental Law stipulates interpretation in light of other achievements of our historical constitution as a basis of interpretation, but its present unfinished nature requires us to be careful. The present legal historical citations from these laws in the reasoning shall only be considered as partial rules of a regulation in the past. If these were considered obligatory today and normative force were attributed to them against the will and laws of the present legislative majority, then we would question the concept of the changeable law. In this sense, I believe that Article R) shall not be used because it contravenes the idea of changeable modern law."

Without analysing the relevant regulations of the new Fundamental Law, it is obvious that in outlining the essence and limits of court practice "supervising" the achievements of the historical constitution the Constitutional Court and the Curia will have great roles.

IV.2.2. The Heritage of State Socialism

While the co-operation of the "Western Bloc" after the Second World War may be described as an integration based on common interests, the integration of the Eastern

Bloc showed the picture of "a unified empire," co-ordination put into an absolutistic centralization.[38] The great, comprehensive unification was realized in the region by establishing similar types of states (constitutions) and administration based on central ideas. From the aspects of operation of the system, it is very important that in the Eastern Bloc common political forums worked: the main issues were treated as political, not legal [administrative] questions. Regarding the expectations of the state from public administration, the priority of state interest prevailed against the expectations popular at present (legal security, rule of law etc.).

Nevertheless, by losing its political identity, Hungary did not lose fully its legal and administrative identity.[39] We may talk about some kind of continuity not only in the sense that our public administration has kept some kind of European spirit also in the era of state socialism, but also that "[the] organizational activities of our public administration, the rules of management, its sample documents, moreover, file cover documents in 1989 are very much like the *K. und K.* administration of the era before the Great War."[40] Lajos Lőrincz considers this – if we like, material, if we like, formal – continuity the conservatism of Hungarian public administration: "(…) the advantage of the cursed slowness of Hungarian public administration is shown now, in so far as forty years was not enough to live up to its latest idol: due to its recklessness, it failed to break up all its connections to Europe."[41]

In the previous subchapter, it has been mentioned that in Hungary the certain "deep structural" continuity of civil values was observable as well. Continuing this logic, there are significant reasons to believe that values, attitudes and expectations of Communism have persisted after the political transformation. This "instinctive logic" and often unwitting motivation may not only be observed on the side of administrative clients, but – as referred to before – on the side of the administrative staff, as well.

András Tamás warns from excessive generalizations about Hungarian public administration, saying: "[The] public administration of state socialism is effective and cheap in many respects, while in reality it is absolutist and less democratic: but it would be a mistake to consider it 'underdeveloped'."[42]

The further existence of the practices of state socialism and its "recanonization" in the process of the transition are not only present in the basic elements of public law/political/state organizational establishments but also in the sciences of public administration. *Dogmatic* and *scientific approach* continuity mean, at the same time, the presence of highly similar notions and terminology (specific linguistic

38 Tamás 2001, 102.
39 Tamás 2001, 102.
40 Tamás 2001, 108.
41 Lőrincz 1991, 1064.
42 Tamás 2001, 104.

expressions) appearing at the level of legal norms, and of the continuous revival of scientifically accepted approaches, paradigms, canonized by the few players who know each other well. In addition to the advantages of this (the clear, consistent, "politics and system-independent" use of well-adaptable notions), we shall also consider certain risks: the abolishment of some traditional "forced mechanisms" of healthy science – done in state socialism – led to the situation that from the scientific journals of Hungarian public administration the critical attitude and remarks otherwise present in scientific disputes are missing (e.g. reviews – now traditionally – do not contain parts driving attention to the weaknesses and deficiencies of the given essay), and – with the exception of a few examples – the possibility of categorizing authors into well-separated scientific schools is low. It must be added that the dogmatics of public administration law is only partially worked out; the main sign, consequence and, at the same time, reason that may give that work a scientific character are often limited to the presentation of the content of laws (…).[43] Naturally, the mentioned features only show long-term directions – which may be changed by the practice of decades –, while the identification of real counter-directions and conscious counter-effects is also possible.

IV.2.2.1. The Revival of the Solutions of State Socialism – Mistake or Necessity?

It is a fact that "[the] collapse of an empire-like public administration has a great sucking force, which is able to bury a lot of things underneath".[44] However, it may also be observed that as we are getting further away from the 1980s, instinctive opposition towards the earlier solutions is disappearing: partly the fading of memories, partly the instinct of returning to previous patterns, partly the need for adequate and practical answers given to necessities emerging from the different crises weaken the uniformity of rejection which gave a definite "no" to everything which had been somehow related to the power and administrative solutions of state socialism.

In some fields, the solutions of the *Kádár era* have reappeared, even though, it must be added, not with the intention to return to Kádárism [*many of them were not even evolved (created) within the era of state socialism*], but mainly because these solutions seemed to be adequate answers to the new problems, especially in those fields where the possibility of state – and material – control significantly decreased after 1989: e.g. *in the field of public education* supervision we may experience the return of some important elements of the structure which had existed till 1985.[45]

43 Jakab 2010, 98–101.

44 Tamás 2001, 104.

45 Act I of 1985 on education declared the professional independence of institutions and determined the principles of divisional and institution management supervision. Until that

Within this scope, the disposition of certain tasks towards unsuitable types of organizations or levels after the transition has been another reason. In this regard, it is enough to refer to the notion of district; the name (and partly the institutional structure) abolished in 1984 returned to Hungarian public administration law in 2010 as an old-new institution.

In addition to professionally, properly reasoned conscious steps, the – previously mentioned – unconscious mechanisms work, too: earlier researchers believed that citizens favoured/favour the village meeting and the institution of community debate to a public hearing,[46] the reason of which in the case of the village meeting is probably – in the opinion of the researchers – that the institution

time, the educational institutions operated under the supervision of the minister for education and the direct instruction of the authorities performing the cultural-educational tasks of the councils' executive committee. In professional issues, the institutions did not have decision-making competence; the training and educational tasks were regulated by obligatory education plans, and the issues of operation were defined in the obligatory rules. The directors of institutions were instructable in each sense. [Article 1 of Statutory Rule 14 of 1962; articles 2-3 of Statutory Rule 24 of 1965] In 1985, the authority (the general education supervision and the authority together) was abolished (today, the general opinion is that this was a mistake), and instead of supervision and professional inspection a counselling activity was established which was regionally organized and operated in the competent (county, district) institutions providing pedagogical professional service. The counsellors were requested to perform the tasks given by the schools, or the maintainer commissioned them with an evaluation-analysis task; the services of the counsellors were available for a fee, of course. The counsellors did not supervise but used their professional knowledge to help and develop the work of teachers and public education institutions. The changes of 1993 and 2003 only brought about minor modifications in the system. Public law experts were selected from the list of professionals, but their professional (inspection) activities were not supervised by anyone. The clients usually accepted their opinions, but no one qualified the professional knowledge of public education experts upon a unified criteria system. On the other hand, there were no nationally unified and public guidelines, methods, tools and protocols available for experts, either, for performing their work; therefore, everyone proceeded upon his (or the client's) expectations. This is also why the establishment of a new system was necessary.

From 1 January 2013, education institutions – except for kindergartens – were put under state management, as a general rule. In the new system from 1 September 2013, the expert evaluator will be also evaluated after the completion of his inspection by the evaluated/inspected teacher and/or manager on a special evaluation form, which will not only be a formal gesture. The further employment, commission of the expert will depend on whether s/he receives at least an average 60% of the maximum score with regard to the inspections conducted within five years. In the new system, there will be three separate roles. Experts will participate in the evaluation and training of teachers. Those may apply to become experts who have at least ten years of experience and are registered into the national expert register upon recommendations. They shall successfully complete the training organized for them by the Education Research Institute or the Education Office and shall update their knowledge regularly. Experts shall have up-to-date knowledge of laws, didactic and methodological novelties. The new counsellors and subject referents will support the work of teachers. There is great interest for the positions: five thousand applications arrived for the eight hundred places. Education supervisors will perform the supervisory tasks upon a nationally unified system of aspects, and the third group is composed of those participating in the qualifications, who evaluate teachers within the framework of the teacher career model. Regarding the previous practices, see Szüdi 2008.

46 Hóbor – Varga 1998, 291.

originates from the era of councils (Act I of 1975 on councils introduced it), and thus it has a tradition of several decades in villages, and it has been built into public knowledge as a "classic" legal institution.[47]

However, in summary, it may be stated that a return to models and institutions similar to the administrative solutions of the *Kádár era* does not result primarily from nostalgia for Socialism but from two other factors: on the one hand, it is the result of a special and continuous "swinging;"[48] on the other hand, the forces of the global economic crisis lead to solutions which shift the diverse administrative institutions (institutional systems) towards the growing need for state control and centralizing solutions. The notion of swinging refers to the phenomena that at the time of the change of regime the rejection of the solutions of the previous system showed constrained forms: staying away from the magnified disadvantages of the previous solutions understated by politics often buried the viable (partial) solutions, well-operating practices, but with regard to these the two decades which have passed clearly showed which elements should be considered really antidemocratic, contrary to real public interests, may be restricting individual freedoms or which are disregardful of the requirements of basic transparency and effectiveness, and which are those the partial reintroduction of which – in line with the requirements of the rule of law (typically ensuring some kind of legal remedy) – may be reasonable.

In addition to the above-mentioned information, the fact of the crisis resulted in the revival and spread of institutions – earlier linked to socialism – such as the conscious support of co-operative forms which existed before, the introduction and strong support of new forms of these co-operatives, also via organization, co-ordination and information supply (naturally, not by the pattern of the forced formation of co-operatives, which happened in two waves in the 50s and 60s).

IV.2.3. The Heritage and Consequences of the Transition of 1989

However, the quick transition from state socialism to capitalism left several social questions unsolved which were present and documented already in the 1980s and generated new difficulties at the level of society. This way, the less controlled and otherwise forced privatization, which affected all sectors, the radical change of consumer habits, the very fast growth of social differences and social tensions (e.g. the obvious fallback of the Roma people), and the presence of large and uneconomical social service systems, which were left unchanged, led to the result that – with some exaggeration – the institution of careless crediting became one of the main tools of individual and community (e.g. self-

47 Kiss 2013, 18–20.

48 In the field of the relationship of administrative reforms and the state, Peters views the "swinging" observed in legal literature in a broader context [Peters 2008].

governmental) "success," and the money was not reinvested into production and into the making of products. In short, this may be summarized in a way that the "price," a sort of political and financial cost of bloodless, peaceful transition was *the complete lack of breaking with the past* (with its institutions, prominent leaders, ways of thinking, "permanent reaction attitudes" and surviving practices). A peculiar feature of this – legally only partial – transition is the survival of the Constitution[49] approved at the beginning of communism – in 1949 –, which remained in force with a completely new content but under the same number and with the same structure.[50]

Another (further) problem of our region – related to our topic and referred to previously – is that "[the] expansion of the capitalist economy to the public service sector and to sectors unilaterally secularized earlier, which are affected by market deficiencies, happened after a mechanical withdrawal of the state. Often, in an emptied, unprepared environment, which has led to the formation of new market failures, it seems that the political sphere sometimes underestimated the related realistic risks (e.g. the creation of new types of monopolies, clientelism), while the public considered it more severe than in reality". [51]

After 1990, the existence of the concept of "3,200 small republics" in the self-governmental sector reflected on the principle which abstains from establishing clear and direct inferior-superior relationships, and *as a counter-effect of the previous system(s)* it tried to define the new "system" as *emphasizing* the various *freedoms*. This approach caused more practical problems than necessary after 1990, both in the relationships of state administration organizations and local governments, as well as in the internal affairs of local governments (e.g. in the relationships of the representative body, the mayor and the clerk), and in the provision of public services.

49 Hereinafter, the word "constitution" refers to the Constitution of the Republic of Hungary (Act XX of 1949) modified with Act XXXI of 1989, which remained in force till 31 December 2011, while the expression "fundamental law" refers to the Fundamental Law of Hungary, which entered into force on 1 January 2012.

50 The constitution which was announced on 23 October 1989 to mark the anniversary of the revolution of 1956 was intended to be temporary (as indicated in the preamble). The establishment of the new constitution was the task of the Parliament formed as result of the free elections. However, the temporary constitution remained permanent and the new fundamental law was not created. Instead, "continuous constitution-making" was typical. During the twenty years which passed between 1990 and 2010, the Parliament modified the Constitution 25 times. Among these modifications, there are some which are minor and less significant, as well as some which may be considered a partial revision.

51 Horváth 2012, 13.

V. External Effects and Patterns

V.1. Introduction

As referred to previously, in general, the political decision-makers and the participating administrative organizations in the preparation phase of decision-making rely less and less often on the results of – partly foreign language – scientific research, often using these selectively and subsequently in order to legitimize their own decisions. Therefore, there is no tight, direct and *in each case* provable relationship and *unconditional* synchrony between the administrative solutions existing in different countries and used in Hungary and the related internal and external scientific views. Nevertheless, topics, models emphasized by domestic legal literature are more or less present in specific domestic solutions – this means that these constructions have definite explanatory force in the examination of domestic phenomena.

To the above-mentioned factors, we shall add that the results of most directions (e.g. *New Public Management*) – which today have clear contents as scientific concepts – appeared in Hungary among the rules of law usually with a certain delay and in a fragmented way (while the description and criticism of the contents of certain directions were available in works analysing the operation of public administration).[52] The ideas which consider the appearance of a particular (legal) institution and practice as a consequence of other similar practices which were known elsewhere may be described as classic economic mistakes, more precisely as *post hoc, ergo propter hoc* type false conclusions.[53] Regarding these contexts, scientific evidence is are often missing (documentations and reasoning of proposals; the existence of statements appearing in parliamentary debates or at least at conferences, showing consideration of different patterns etc.), and if their effect may be observed in some regards, public policy programmes start, but the itemized law norms aiming at their introduction are usually executed in reality as programme norms or are applied – in line with the previous practice – upon the old patterns. Since 1989, the approach of focusing on searching foreign patterns and, more and more, on the review of old (pre-1945) solutions has been dominant in the search for paths and directions to be followed in Hungary.[54] At the same time (existing at the same time), external patterns mean ideal typical models transmitted by "international economic sciences," the suggested solutions for general (global) problems and specific (individual) administrative solutions, and newly created institutions (see e.g. the Tobin tax phenomena and its consequences in Hungary).

52 E.g. Horváth 2002.
53 Samuelson – Nordhaus 1990, 640.
54 Tamás 2001, 102.

The political and political economy approach dominant from the 1980s supposed that it was possible to balance the lack of internal capital necessary for capital market economy with the "import" of foreign investments. In addition to the central legislation supporting this idea, the "economic policy" of local governments was intended to serve this for example with the forced privatization of local public services or with the occasional use of the property of local governments for business purposes.[55] The politicians believed to have found – partially – the proper organizational and operational frameworks and contents of the *administration facilitating economic transition* in the institutionalization of "new public management" (NPM) and aimed – with some exaggeration – at establishing "company-like," not authority-oriented public administration.[56]

Nevertheless, even though *indirectly*, the goals of developing an NPM-type public administration may be observed in what are referred to as government decisions for modernization of public administration [Government decision 1026/1992 (V. 12.); Government decision 1100/1996 (X. 2.); Government decision 1052/1999 (V. 21.); Government decision 1113/2003 (XII. 11.); Government decision 1044/2005 (V. 11.); Government decision 1052/2005 (V. 23.)], formulating the public administration reform ideas (development goals); in these documents – in the opinion of Tamás Horváth M. –, there is no (adequate) terminology in line with which in any cycle the managerial principle was (consistently) undertaken, let alone a public policy strategy built on this (which, with some delay, could have resembled the new public management). Moreover, the "borrowed" notions and institutions often became sources of difficulties (e.g. even though the obligatory impact study of laws was introduced, the regulations were not enforced in reality).[57]

In certain (sub)chapters of this work, we analyse separately the administrative reforms of 2010 and of the subsequent years, their content, as possible answers which may be given to the crisis. Among these reform steps, we especially focus on the Magyary Zoltán Public Administration Development Programme published in the summer of 2011. In Hungarian legal literature, several analyses have been published which focus on the question whether the tools of the Magyary Programme are provenly suitable for establishing a state which is able to withstand the circumstances of the crisis; within this, the preconditions of the efficiency-increasing measures of the Magyary Programme, the possibilities of co-ordination, flexibility and stabilization which have become more valuable during the crisis, as well as their possible hampering factors.[58] The separate analysis of this instrument is reasonable also because it has become one of the

55 Kökényesi 2012, 250–251.
56 Kökényesi 2012, 251.
57 Horváth 2011, 92.
58 Gellén 2012, 12.

frameworks; it has continuously renewed and "updated" foundations of the ideas of the Hungarian government after 2010 about the *good state,* which goes beyond public administration, by making principles, such as adding national aspects into public administration, among others, equal with the requirement of effectiveness, which had been favoured before.[59]

V.2. Possibilities and Effects of "External" Models

When we try to list external directions affecting Hungarian public administration – which may be considered a scientific concept –, we must obviously take into account the public administration reform ideas of influential international organizations and the administrative practices and ideas of the European Union, as an integration composed of nation-states.[60]

In relation with international organizations, it must be highlighted that their different funding programmes – in the past two-three decades – tried to influence the administrative reforms [SIGMA (OECD) programme] of recipient countries (among them, Hungary), sometimes even by competing with each other. "From the view of the role of the state, these organizations were usually interested in the transfer of tasks from the central state to the market, social players or local governments,"[61] and they usually promoted the models formulating these ideas.

However, especially with regard to the *good governance* theories (and models), it is unavoidable to state that this approach does (did) not primarily react on problems originating from Western European development, but on the artificial set of requirements made for developing/catching up countries, the main goal of which (was) to increase the support-receiving and utilization capacity of aided countries in a way that the "proper" regulation methods of the relationship of the state and society were determined, urging the need to introduce proper market mechanisms and models compatible with those of Western democracies.[62] Nevertheless, the notion *good governance* still appears in the description attempts of the economic development features of Western (and post-Socialist) countries.[63]

One of the most delicate issues regarding the models of good governance is whether its notion shall be interpreted from the side of the result or the process; in the former case, governance which is the most effective in the distribution of public goods, and the enforcement of public good is good governance, which

59 *Magyary Zoltán Közigazgatás-fejlesztési Program* [Magyary Zoltán Public Administration Development Programme] 2012, 5.

60 These ideas often appear in detail under the explanation of the expression *good administration*, formulating recommendations for the existence of different types of organizations and the principles of proper office operation and behaviour at the same time. [see e.g. Váczi 2011, 9–22.]

61 Gellén 2012, 13.

62 Hosszú 2010, 53.

63 Bevir 2009, 95.

imposes the question how to handle effective but – in line with our present expectations – not democratic models, state formations (e.g. Singapore).[64] This dilemma is extremely relevant today – at the time of the expansion of neo-Weberian concepts strengthened by the crises –, especially in relation with the division of public and private interests.

The most often mentioned element of the notion of good governance is the programme of handling democratic deficits appearing at different stages; the main goal of the creation of the document "On Good Governance" published by the European Commission in 2001 is to transform the EU's governmental system in order to bring the EU's institutional system closer to citizens through the coherence of common and community policies.[65]

Even though in the primary sources of EU law, the provisions which directly regulate the state organization of member states or the structures of their public administration are rare, it is undoubted that it has "continuous, broad and increasing effect on it: implicitly through *acquis communautaire*, community law, and *expressis verbis* through the EU law, more precisely via Article 4 Paragraph (3) of the EU Treaty,"[66] in so far as the latter one formulates the obligation to enforce community law (a need to provide results), which cannot be interpreted in other way than the state public administration shall be reliable, transparent and democratic.[67]

Another important issue is that the European Union tried to react on growing international economic processes – among others – with the possibility of establishing a (partially) supranational "EU state," and some states have believed that the reorganization of the destroyed balance of economy and state power may be possible through the creation of a "strong nation-state". This process, which was significantly strengthened by the years around 2000, was completed by the financial crisis which started in 2008.[68]

The negative effects of globalization happening in world economy, financial crises and Western public power responses given to them, tend to indicate that the promotion of *strict* models as the only possible solutions is less and less possible. With some generalization, it may be stated that the OECD and the World Bank have not pushed forward any specific models since approximately 2000;

64 Hosszú 2010, 53.

65 Torma 2011, 325.

66 Article 4 Parapraph (4) of the TEU:
"Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."

67 Torma 2011, 317.

68 Kökényesi 2012, 251.

thus, the "context matters" approach is becoming stronger. This is true even if the (economic) policy of Hungary, called – partly officially – "unorthodox" made several international organizations react harshly to it after 2010.[69]

One of the most important questions of the past decades was how much the narratives of the more or less unified Transatlantic legal and political trends – sometimes embodied in specific administrative models – may be spread to the other two-thirds of the world. This idea has become especially relevant within expectations about the handling of terrorism with the tools of law because – seemingly theoretical, and herein analysed – aspects, such as the maintenance of the operability of law, "the suppression of its negotiative features," and eventually the need for "contentual justification," have put classic, liberal legal concepts and expectations about their further expansion under extreme pressure since the beginning of the 2000s.[70] Moreover, the post-2008 crises further emphasize the sustainable and necessary nature of these needs, although we cannot make definite statements about the existence and future of unified Transatlantic narrative(s)…

Nevertheless – in summary –, it may be stated that while due to the different – more and more intensive – crises occurring around the world the establishment and strengthening of catastrophe-prevention (legal) policies may be observed, and, at the same time, there is a greater need than ever for balance, negotiations and sustainable solutions. During severe crisis discussions, partnership and de facto co-operation between determinative players are evaluated – which, obviously, has consequences in positive law.[71]

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69 On this, see, for example Rixer 2012, 81–82.

70 Bainbridge 2006, 170.

71 Miszlivetz 2011, 133.

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Die sozialistische Rechtspersönlichkeit aus gesellschaftsrechtlicher Sicht

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Abstract. Theories of legal personality of the times of Socialism from the view of company law
In this paper the author analyses the history of legal personality (Rechtspersönlichkeit), with a special view to Hungarian legal history. Besides the relevant theories of legal personality a special attention will be paid to tendencies of the development of Hungarian economy in the decades of Socialism in Hungary, too. It should be also highlighted how ideological reasons could make an impact on civil law and how jurists were compelled to elaborate a legal doctrine that could fit both the ideology of that time and the economic reality.
Keywords: legal person, company law, law of economics of Socialism

Auszug. In diesem Aufsatz untersucht der Autor die Entwicklung der Geschichte der Rechtspersönlichkeit aus der Perspektive der ungarischen Rechtsgeschichte. Neben den bedeutenden Theorien der Rechtspersönlichkeit wird auch den wirtschaftlichen Tendenzen der Jahrzehnte des Sozialismus in Ungarn eine besondere Aufmerksamkeit geschenkt. Es soll gezeigt werden, welchen Einfluss die ideologischen Gegebenheiten auf die Entwicklung des Zivilrechts hatten und wie Rechtswissenschaftler sich gezwungen sahen eine Rechtsdogmatik zu erarbeiten, die sowohl den ideologischen Erwartungen, als auch der wirtschaftlichen Realität entsprach.

Schlüsselbegriffe: Rechtspersönlichkeit, Gesellschaftsrecht, sozialistisches Wirtschaftsrecht

Um die vom positiven Recht anerkannte Rechtspersönlichkeit verstehen und systematisieren zu können, müssen die aus der Sicht der Rechtspersönlichkeit relevanten Segmente des zur jeweiligen Zeit herrschenden Rechtssystem zumindest skizzenhaft aufgezeichnet werden. Neben dem positiven Recht ist der Kenntnis des Hintergrundes der jeweiligen Zeit zum Verständnis der Rechtstheorien ebenfalls unerlässlich, da diese Theorien im bestimmten historischen Umfeld ihre Geltung entfalten können. Im vorliegenden Aufsatz versuchen wir zuerst von den Grundlagen der Rechts- und der Wirtschaftstheorie

des Sozialismus einen Überblick zu geben, um dann davon das Verständnis der Rechtspersönlichkeit der Wirtschaftsorganisationen ableiten zu können.

Was die Beziehung zwischen der Wirtschaftspolitik und des Rechtswesens anbelangt, herrschten in der von uns behandelten Zeit zwei gravierend unterschiedliche Meinungen. Nach der einen sind Recht und Wirtschaft zwei grundsätzlich unterschiedliche Sphären, bzw. lässt sich das Recht in erster Linie nicht aus menschlichem Tun, sondern aus der Natur oder Vernunft selbst ableiten. Nach der anderen Meinung, die die sowjetischen Rechtswissenschaft in der 20er und 30er Jahren des zwanzigsten Jahrhunderts erschaffen hat, ist das Recht nichts anderes als eine spezifische Form der Politik des Proletarenstaates.

Statt der zwei gravierend unterschiedlichen Theorien soll in diesem Aufsatz davon ausgegangen werden, dass das Recht als ein Instrument der Wirtschaftspolitik angesehen werden kann. Es gilt jedoch hervorzuheben, dass – da sich die Aufgaben des Rechtswesens nicht ausschließlich auf die Deskription beschränken – die Wirtschaftspolitik oder deren Teile nicht unmittelbar in die Rechtordnung transformiert werden können. Es gibt durchaus Segmente in der Wirtschaftspolitik, die nicht mittels staatlicher Zwangsregulierung, sondern mit anderen, und zwar außerrechtlichen Mitteln verwirklicht werden können. Die Erfahrungen – selbst die des Sozialismus – zeugen davon, dass Wirtschaftsinteressen sich nicht durch staatliche Zwangsregulierung und Geltendmachung der rechtlichen Verantwortung ersetzt werden können. Mit Rechtsmitteln lassen sich die zur Grunde liegenden gesellschaftlichen Gegebenheiten nicht verändern, und daher kann auch der in den wirtschaftlichen Verhältnissen notwendig innewohnende Unsicherheitsfaktor nicht eliminiert werden. Es gilt als Aufgabe die Wirtschaftspolitik so in die Sprache des Rechts zu übersetzen, dass die Wirtschaftspolitik mit Hilfe von Rechtsinstitute und Rechtsbegriffe formuliert wird und somit in das Rechtssystem des jeweiligen Staates integriert werden kann.

Wirtschaftstheoretisch kann es durchaus einfach verifiziert werden, dass die Festlegung der Wirtschaftspolitik sich nicht auf die Festsetzung der wirtschaftlichen Ziele beschränkt werden kann, da dieser Prozess nur mit der Ausarbeitung der hierzu gehörenden Wirtschaftsformen vonstattengehen kann. Es gilt daher die wirtschaftlichen und rechtlichen Momente nicht strikt voneinander zu trennen, weil es dazu führen kann, dass solche wirtschaftspolitische Richtlinien festgesetzt werden, die sich mittels Rechtsinstitute gar nicht, oder nur mit Hilfe solcher Rechtsinstitute umgesetzt werden können, die starke Spannungen innerhalb des Rechtssystems erzeugen. Dies rührt einfach daher, dass in jenem Kreise, wo diese Institute ihre Wirkung entfalten, sich die rechtlichen Formen direkt und die Wirtschaftspolitik nur indirekt Geltung verschaffen können.

Der Gliederung von Miklós Világhy folgend, können wir die wirtschaftspolitischen Mittel des Sozialismus folgendermaßen unterteilen:[1] als direkte, d. h.

1 Világhy 1978, 25.

öffentlichrechtliche Mittel gelten die Gesetzgebung bezüglich der Wirtschaft und die als Eigentümer angewandten direkten Mittel (so z. B. Firmengründungen); als indirekte Mittel gelten die Einführung von Steuern und Preisregelung und die als Eigentümer angewandten indirekten Mittel (so z. B. Subventionen und Investitionen aus Staatskapital zwecks des Einflussgewinns am Markt). Natürlich lassen sich direkte und indirekte Mittel nicht strikt voneinander trennen: sie setzen sich gegenseitig voraus und fließen ineinander über.

Aus den wesentlichen Elementen und Zielen der sozialistischen Wirtschaftspolitik lässt sich die prinzipielle Bedeutung der wirtschaftlichen Zusammenschlüsse und ihrer Rechtspersönlichkeit ableiten. Es kann ohne Zweifel festgestellt werden, dass die Wirtschaftspolitik des Sozialismus sich die Erschaffung solcher Wirtschaftsverhältnisse als Ziel gesetzt hat, die auf der Gesellschaftseigentum von Erzeugungsmittel basierten. Aufgrund der Wirtschaftsmechanismen vollzog sich auch unter den Verhältnissen des Sozialismus eine starke Differenzierung zwischen den Gesellschaften/Firmen. Eine erfolgreiche wirtschaftliche Tätigkeit hat die Aufhäufung von Mitteln bei jener Gesellschaft zur Folge, die eine solche Tätigkeit betrieben hat. Da sich die Aufhäufung nicht immer dort realisiert, wo es ihrer gesellschaftlich bedarf, gilt es möglich zu machen die bei den erfolgreichen Gesellschaften aufgehäuften Mittel auf jene Sphären der Wirtschaft übertragen zu lassen, wo ihrer Bedarf besteht. Ein möglicher Mittel dieses Transfers ist der Zusammenschluss. Ein anderer Umstand, das zur Firmengründung beitragen kann, ist die Erzielung höherer Gewinne, was auch nötig machen kann, dass eine Firma/Gesellschaft sich mit anderen zusammenschließt.

Ein durchaus wichtiges Segment der Wirtschaftspolitik ist, das sie reguliert. Nach Lenins Meinung existieren Waren- und Geldverhältnisse auch im Sozialismus – die sog. NEP gründete sich auf dieses Erkenntnis. Als Stalin die totale Kollektivisierung vollzogen hat, gewannen wieder jene Meinungen Raum, nach denen die Waren- und Geldverhältnisse im Sozialismus völlig aussterben wurden, aber am Ende der 60er Jahre hat das Leben diese Theorien vollkommen entkräftet und haltlos gemacht. Aufgrund der sozialistischen Wirtschaftswissenschaft zog Miklós Világhy jene Konsequenz, dass sich Warenverhältnisse und zentrale Regulierung und Planung durchaus nicht ausschließen, und erachtete es für zweckmäßig, die zentrale Regulierung und die aktive Rolle der Markt aufgrund des Gesellschaftseigentums der Erzeugungsmittel miteinander zu verbinden.

Aus objektiver Sicht gilt es allerdings festzustellen, dass trotz der Kohärenz, der Fundierung und den logischen Schlussfolgerungen seiner Gedanken die Warenverhältnistheorie von Világhy das Produkt einer solchen Ideologie war, die der Prüfung der Realität auf die Dauer nicht standhielt. Der Begriff der Gesellschaftseigentum als eine Grundlage des sozialistischen Rechtssystems verursachte zahlreiche Schwierigkeiten, weil der Staat zum juristischen Ausdruck

seiner Eigentümerposition die traditionelle Definition und das abstrakte Konzept des Privateigentums verwendet hat. In die Berechtigtenposition gelangte nämlich der sozialistische Staat, und ihm gegenüber standen alle Mitglieder der Gesellschaft in der passiven Verpflichtetenposition. Somit wandte sich die Idee der Kollektivisierung in ihren Gegenteil um, weil anstatt alle als Berechtigte zu machen, befanden sich nunmehr alle in der Stellung des Duldenden/Verpflichteten. Karl Marx und Friedrich Engels beschrieben den kapitalistischen Staat als Gesamtkapitalisten,[2] und blieben jener Feststellung schuldig, dass wenn der Staat ausschließlicher Eigentümer aller Erzeugungsmittel wird, der sozialistische Staat zum Gesamtkapitalisten wird. Dies wird auch von der Feststellung von István Bibó unterstützt, nach der der Staat über die mehrfache Unterdrückungspotenz des Privatkapitals verfügt.

Nun gilt es diese – trotz aller negativen Umständen – überaus niveauvolle Theorie von Világhy kurz zu skizzieren.

Warenverhältnisse setzen notwendigerweise drei Momente voraus. Das erste ist, dass in jedem Warenverhältnis die Absonderung der miteinander im Verhältnis stehender Parteien zum Ausdruck kommt. Das zweite ist, dass aus dem ersteren folgend der gegenseitige Tauschverhältnis die Verbindung herstellt. Das dritte ist, dass jeder Tausch aufgrund des zur Herstellung der Ware gesellschaftlich notwendigen Arbeit, d. h. des Wertes zustande kommt. Aus diesen drei Momenten lassen sich wichtige Schlüsse bezüglich der sozialistischen Warenverhältnisse und des bürgerlichen Rechts und damit indirekt der Rechtspersönlichkeit der Wirtschaftsakteure ziehen.

Hierbei soll davon ausgegangen werden, dass jedes gesellschaftliche Eigentum ein mittelbares, d. h. vom Staat oder von der Genossenschaft vermitteltes Eigentum ist. Um falsche Folgerungen zu vermeiden gilt es hervorzuheben, dass der gesellschaftliche Eigentumserwerb nicht nur durch die staatliche Firma/Gesellschaft, sondern durch die ganze Staatsorganisation vermittelt wird. Die Lage der staatlichen Firmen ist dennoch spezifisch, weil sie jene Organe des Staates darstellen, die im Prozess des Eigentumserwerbs als Wareneigentümer auftreten. Ihre weiteren wesentlichen Züge sind die der Einheit des staatlichen Charakters und der Funktion als Wareneigentümer. Staatliche Firmen sind weder im Verhältnis zur als Abstraktion anzusehenden Gesellschaft, noch in der Beziehung zur (ebenfalls abstrahierbaren) Staates, aber nach Außen, d. h. im Verhältnis zu Drittakteuren der Wirtschaft treten sie als Eigentümer auf und sind daher den selben Regeln unterworfen, wie Wareneigentümer im Allgemeinen. Der Fall des genossenschaftlichen Eigentums ist ein einfacherer, da die Genossenschaft bloßer Wareneigentümer ist und über keinerlei öffentliche Gewalt verfügt. Genossenschaften (als Wareneigentümer und Arbeitsorganisationen) und ihre Mitglieder haben jedoch ebenfalls eine zweifache rechtliche Position

2 Lenkovics 1991, 13.

inne, da die Mitglieder einerseits Arbeitnehmer, andererseits Mitglieder der Genossenschaft sind. Daher sind die Mitglieder der Genossenschaft nicht wegen ihrer Position als Arbeitnehmer, sondern wegen ihrer Mitgliederschaft an jenem Eigentumserwerb beteiligt, die von der Genossenschaft zugunsten der Kollektive getätigt wird. Das Eigentum der Einzelperson ist – anders als das staatliche und das genossenschaftliche Eigentum – Verbrauchereigentum, d. h. Naturaleigentum der lebensnotwendigen Waren. Der Warencharakter dieses Eigentums wird neben der *inter vivos* Transfermöglichkeit auch in der Möglichkeit der *mortis causa* Übereignung deutlich. Das sozialistische Privateigentum ist mit dem kapitalistischen Privateigentum durchaus nicht gleichzusetzen: der wesentlichste Unterschied zwischen diesen besteht darin, dass „die Quelle des sozialistischen Privateigentums das Arbeiterdasein der Bürger des sozialistischen Staates ist". Es wäre jedoch unrichtig aus jeder Form des sozialistischen Eigentums den ihm innewohnenden Warencharakter herauszugreifen und diesen von jenem konkreten Bezug gesondert zu analysieren, den der Warencharakter im jeweiligen Fall zur Geltung bringt.

Die Absonderung – und aus dem Aspekt unserer Untersuchung erscheint es als das Wichtigste – zeigt sich nicht nur im Fall des Eigentumsrechts, sondern in der Kategorie der Rechtspersönlichkeit, da das Recht des Wareneigentums von dem Wareneigentum der anderen notwendigerweise abgesondert werden muss. Nach Karl Marx gehen die Waren nicht von sich selber aus auf die Markt, daher müssen die Hüter dieser Waren ins Auge gefasst werden. Die Absonderung des Wareneigentums ist nur dann möglich, wenn auch der Wareneigentümer abgesondert wird. Der Wareneigentümer ist des Öfteren keine Privatperson, sondern eine den Wirtschaftsorganisationen ähnliche rechtliche Formation.

Im sozialistischen Recht zeigen sich zwei wichtige Grundformen der sog. Verknüpfung: die Warenverträge und die Haftungsordnung. Der Warenvertrag ist im Grunde genommen nichts anderes, als die in jedem Warenverhältnis innewohnende Willenserklärung. Világhy ergriff für die Vertragsfreiheit entschieden Partei, weil weder der Kaufvertrag, noch der Unternehmensvertrag jene Möglichkeiten ausschöpfte, die die auf dem Gesellschaftseigentum basierende Tauschverhältnisse in sich bargen. Die immer breiter werdende Selbständigkeit der Firmen zog nach sich, dass die Vertragsfreiheit der Firmen untereinander anerkannt werden musste. Rechtshistorische Beispiele haben gezeigt, dass es praktisch unmöglich ist, alle Vertragstypen der Tauschverhältnisse vorauszusehen, und dass in jenem Fall, wenn der Gesetzgeber dies anstrebt, durch den *numerus clausus* der Vertragstypen zu der Beschränktheit und der Vereinfachung der Warenverhältnisse führen kann.

Im Hinblick auf die Beziehung des Warenverhältnisses und der Haftung kann allerdings – aus der Sicht der Wirtschaftsakteure – die Effektivität der Haftungsordnung von Bedeutung sein. In der sozialistischen Wirtschaftspolitik

war eine ausführliche Haftungsregelung präsent, was sich allerdings als weniger zweckmäßig erwies, weil eine allzu – um mit Világhy zu sprechen – „kleinliche" Haftungsordnung des Öfteren zum Sinken der Verantwortungsmoral beitrug. Eine Haftungsordnung ist nur dann effektiv, wenn sie mit den zugrunde liegenden gesellschaftlichen Gegebenheiten und Verhältnissen im Einklang steht und die Sanktionen, die angewendet werden müssen, mit den Rechtswidrigkeiten korrelieren. In der Praxis heißt es, dass eine Haftungsordnung sich nur dann als effektiv erweist, wenn das rechtmäßige Verfahren auch im Interesse der Wareneigentümer und Wirtschaftsakteure steht. Es ist ein altes Erkenntnis der Gesellschaftstheorie, dass öffentlichrechtliche Gewaltmittel das Interesse nicht ersetzen können, d. h. dass allzu niedrige Sanktionen zur Fahrlässigkeit, allzu hohe wiederum zum Fatalismus führen. Bezüglich des dritten Momentes lässt es sich feststellen, dass die wichtigsten Wertfaktoren, die vom bürgerlichen Recht geregelt werden, der Preis und der Schadensersatz sind.

Világhy zieht aus dem gesellschaftlichen Umfeld des Sozialismus jene Folgerung, dass alle Institute des bürgerlichen Rechts aus den Warenverhältnissen als materiellen Grundlage und deren Widerspiegelung abzuleiten und zu erklären sind.[3] Seine Theorie wurde unter anderen von Gyula Eörsi unter Kritik genommen, dessen Meinung nach diese These zwar historisch *in genesi* wahr sein mag, die historische Grundlage aber mit den gesellschaftlichen und wirtschaftlichen Grundlagen des sozialistischen bürgerlichen Rechts nicht gleichgesetzt werden kann. Die Produktion ist zwar ein Teil dieser Grundlagen, die auch das bürgerliche Recht beeinflusst, die Verbindung ist allerdings nur mittelbar, bzw. übt die Warenproduktion zugleich auf mehrere Rechtszweige mittelbare Wirkung aus. Eörsi weist auch jene These von Világhy zurück, nach der die Eigentümerabsonderung der Genossenschaften auf den Warentausch zurückgeführt werden kann. Seiner Meinung nach ist die Eigentümerabsonderung genauso eine Voraussetzung des Steuerrechts, wie des Erbrechts, und somit kann sie als ausschließliches Erklärungsprinzip auf das bürgerliche Recht nicht angewandt werden.[4]

Im sozialistischen Recht war das staatliche Unternehmen der wichtigste – von den natürlichen Personen abgesonderte – Wirtschaftsakteur. Das Verwaltungsrecht über das staatliche Unternehmen, über die ihm vom Staat zugewiesenen Geldmittel verfügte, warf schon zu Zeiten der Planwirtschaft zahlreiche theoretische und praktische Fragen auf. Das Problem wurde mit der – mit dem Wirtschaftreform eingeführten – Selbständigkeit des staatlichen Unternehmens noch gravierender: die in der Praxis gut funktionierende unternehmerische Selbständigkeit und das Verfügungsrecht des staatlichen Unternehmens ließ sich mit dem einheitlichen und unteilbaren staatlichen Eigentumskonzept kaum in Einklang bringen.

3 Világhy 1978, 243.
4 Eörsi 1975, 90.

Diese zwei Komponente – den theoretischen Ausgangspunkt und die Praxis – versuchte Tamás Sárközy so auf den selben Nenner zu bringen, dass er eine gründliche Umgestaltung der Theorie vornahm: ohne die Unteilbarkeit des staatlichen Eigentums anzutasten, versuchte er die Forderungen der staatlichen Unternehmenskontrolle in sein Konzept einzubauen und zugleich das Verfügungsrecht des staatlichen Unternehmens zu schützen.[5] Seiner Meinung nach lassen sich diese zwei Aspekte nicht mit den Mitteln desselben Rechtzweiges lösen, da die Fragen des staatlichen und gesellschaftlichen Eigentums nur mit der komplexen Anwendung zweier Rechtszweige, denen des bürgerlichen und des Verwaltungsrechts gelöst werden können.

Der Ausgangspunkt der Theorie von Tamás Sárközy war die Ausarbeitung des materiellen Eigentumsbegriffs. Die Eigentumserwerbsverhältnisse stellten im Rahmen dieser Theorie ein relatives Gebrauchsrecht dar, und mit diesem Recht konnte nicht nur der rechtmäßige Eigentümer, sondern auch andere gesonderte Wirtschaftsakteure leben. Die wirtschaftliche Absonderung hatte aber notwendigerweise auch eigentumsrechtliche Konsequenzen, von denen die wichtigste die Spaltung des einheitlichen staatlichen Eigentumssektors war. Einen weiteren Konflikt mit der Grundideologie verursachte die folgende Konsequenz, die die Einführung der indirekten Planwirtschaft mit sich brachte: das Hauptziel der Wirtschaftsreform war eine begrenzte Öffnung der Markt, was zur Folge hatte, dass jene Unternehmen, die früher nicht als Eigentümer galten, im Verhältnis untereinander zu wirtschaftlich selbständigen *de facto* Eigentümern wurden. Die Kollision innerhalb des Systems wurde dadurch verursacht, dass diese Tatsache mit dem absoluten Charakter des Wareneigentums unvereinbar war. Theoretiker wollten die Frage dadurch lösen, dass sie versucht haben eine neue Eigentumskonzeption auszuarbeiten, zu deren Grundcharakteristika die Absolutheit des Wareneigentums nicht mehr hinzugehörte. Aus diesem Aspekt verursachte der absolute Charakter des Wareneigentums das größte Problem damit, dass er sich nicht dazu eignete, die materiellen Verhältnisse, die innerhalb des gesellschaftlichen Eigentums des Sozialismus entstanden sind, im juristischen Sinne widerzuspiegeln. Dies wiederum war darauf zurückzuführen, dass die sozialistischen Eigentumsverhältnisse nicht horizontal, sondern hierarchisch geregelt waren. Der Ausgangspunkt der von den Theoretikern ausgearbeiteten Lösungen war, dass im Hinblick auf die horizontalen Verhältnisse der – von der Wirtschaftsverwaltung gesondert wirkenden – Unternehmen untereinander der absolute Charakter des Wareneigentums weiterhin anwendbar ist. Dieses Konzept hatte zur Folge, dass die staatlichen Unternehmen nunmehr nicht nur *de facto*, sondern auch *de iure* als Wareneigentümer handeln konnten. Wegen der Wirtschaftsverwaltung war dieses Konzept auf das Verhältnis des Staates zu den staatlichen Unternehmen nicht anwendbar: das Eigentum des Staates im

5 Sárközy 1973, 8.

Hinblick auf seine Unternehmen war absolut und unteilbar, d. h. es barg eher ein staatsrechtliches, als zivilrechtliches Element in sich.

Somit ist die Rechtswissenschaft an einem Punkt angelangt, an dem die Frage der Rechtspersönlichkeit der staatlichen Unternehmen zu lösen war, bzw. galt es jenen Widerspruch aufzulösen, dass das staatliche Unternehmen in verschiedenen Relationen auf zweifacher Weise handeln und sich verhalten kann. In der Praxis verhielten sich die staatlichen Unternehmen im Verhältnis untereinander kraft ihres Eigentumsverwaltungsrechts mehr als Eigentümer, als bloße Verwalter, was den praktischen Erwartungen zwar entsprach, den theoretischen jedoch widersprach. Das Ziel der Rechtswissenschaft war es diese Realität mit dem Konzept des einheitlichen und unteilbaren Eigentumsrechts des Staates in Harmonie zu bringen. Am erfolgreichsten wurde diese Aufgabe mithilfe der Theorie des komplexen Eigentumsrechts durch jene These gelöst, dass die wirtschaftlich abgesonderten Unternehmen zugleich als materielle Eigentümer zu gelten haben, was auch *de iure* zum Ausdruck gebracht werden muss. Von den wenigen Alternativen, die zur Lösung dieser Frage zur Verfügung standen, da im sozialistischen Recht das Wirtschaftrecht nicht als selbständiger Rechtszweig galt, erwies sich das Konzept des staatrechtlichen Eigentums als die wirksamste, das auf das Verhältnis des Staates zum staatlichen Unternehmen angewendet werden konnte.

Aus dem oben behandelten eigentumsrechtlichen Konzept folgt direkt die Theorie der sog. komplexen Rechtspersönlichkeit. Den Grundprinzipien der Rechtsdogmatik entsprechend muss die wirtschaftlich eigenständige Eigentümerorganisation als Rechtssubjekt auftreten, um als rechtlich anerkannter Eigentümer handeln zu können. Zwischen der Wirklichkeit und den zweitausendjährigen Rechtsgrundsätzen bestand allerdings eine Diskrepanz, da es des Öfteren der Fall war, dass die wirtschaftlich eigenständig wirkenden Unternehmen im Verhältnis untereinander als Wareneigentümer auftraten und handelten, dem Staat gegenüber, der die verwaltet hat, nicht als Rechtssubjekte galten, und zwar aus jenem einfachen Grund, weil sie von positiven Recht nicht als solche anerkannt worden sind. Hieraus wurde der Gegensatz überaus deutlich: Wie konnten sie Subjekte irgendeines Eigentums werden ohne als Rechtssubjekte anerkannt zu werden?

Diese Diskrepanz versuchten auch schon die frühsten sowjetischen Zivilisten zu beseitigen. Paukanis nahm im Jahre 1927 jenen Standpunkt ein, dass das Recht auf dem Warenaustausch, bzw. Warenhandel basiert und daher sobald diese nicht mehr existieren werden, das auch das Recht selbst überflüssig wird und aus der Gesellschaft eliminiert werden kann. Solange aber der Handel weiterbesteht, wird auch das Recht weiterbestehen – so Pasukanis. Diesem Konzept nach muss der Verwalter der Waren wegen des Warenhandels als Rechtssubjekt gelten, wodurch wiederum seine Qualität als Rechtssubjekt das Wareneigentum personifiziert und

legitimiert.[6] Nach Pasukanis können die das staatliche Eigentum verwaltende staatlichen Unternehmen auch *de iure* als Rechtssubjekte anerkannt werden, was allerdings nur als eine begrenzte Rechtsfähigkeit angesehen werden kann. Diese Begrenztheit ist auch zeitlich zu verstehen, weil mit dem eben visionierten Verschwinden des Marktes auch diese Rechtsfähigkeit aufgehoben und notwendigerweise von der Rechtsfähigkeit des Staates ersetzt wird. Es gab aber in der Sowjetunion auch Juristen, die nicht so weit gingen, wie Pasukanis, und weiterhin jener Ansicht waren, dass im Falle der staatlichen Unternehmen von keinerlei Rechtspersönlichkeit die Rede sein kann, und zwar wegen der über sie ausgeübten staatlichen Verwaltung und Kontrolle.

Das Bürgerliche Gesetzbuch der Sowjetunion aus 1922 deklarierte zwar – gemäß der Doktrin der relativen Rechtsfähigkeit und dem ultra vires Prinzip – auch im Falle der juristischen Personen ihre Rechtsfähigkeit und setzte fest, dass die juristischen Personen eine spezielle Aufgabe und somit einen speziellen Wirkungskreis haben, bzw. dass sie, falls sie von Staat mit einer Aufgabe betraut werden, als juristische Personen rechtsgültig handeln können. Hieraus wird es aber nicht deutlich, wieweit und in welchem Wirkungskreis die staatlichen Unternehmen als juristische Personen gelten können. Nach der Meinung von Gojhbarg verfügt das staatliche Unternehmen in den sog. Außenbeziehungen, d. h. seinen Rechtsgeschäften mit den Akteuren des Privatsektors über eine Rechtspersönlichkeit, diese spielt allerdings im Verhältnis der staatlichen Unternehmen untereinander keine Rolle. Stutschka und Venediktov waren anderer Ansicht: ihrer Meinung nach sind die staatlichen Unternehmen bei ihren Handlungen und Rechtsgeschäften juristische Personen, dem Staat gegenüber verfügen sie allerdings über keine Rechtspersönlichkeit. Diese zweite Meinung erscheint aus heutiger Sicht etwas logischer und konsequenter, denn trotz allen ideologischen Unebenheiten vermag sie darüber Rechenschaft zu geben, wann die staatlichen Unternehmen als Rechtspersonen gegolten haben können und in welchen Fällen sie ihre Rechtsfähigkeit einbüßten.

In den 30er Jahren wurden in der sowjetischen Rechtswissenschaft die Theorien von der Rechtspersönlichkeit nicht erweitert, bzw. wurde der Kreis der Rechtsfähigkeit der staatlichen Unternehmen weiter eingeschränkt. Wie es László Kelemen zutreffend formuliert hat, sanken die staatlichen Unternehmen auf das Niveau der Staatshaushaltsbetrieben.[7] Spätere Theoretiker haben versucht ein zeitgemäßes Doktrin zu erarbeiten: Bratus sprach sich für die traditionelle, d. h. in den kontinentalen Rechtssystemen anerkannte Form der Rechtspersönlichkeit aus, und versuchte diese auf die staatlichen Unternehmen anzuwenden.[8] Seine Theorie hielt aber der Wirklichkeit nicht stand: da die

6 Zitiert von Sárközy 1985, 399–400.
7 Kelemen 1997, 218.
8 Sárközy 1985, 283.

staatlichen Unternehmen nicht als Eigentümer anerkannt wurden, konnten sie den Kriterien der Rechtspersönlichkeit nicht entsprechen.

Als die sowohl mit der sozialistischen Ideologie, als auch mit dem wirtschaftlichen Umfeld des Sozialismus noch am meistens vereinbare Ansicht kann uns die Erschaffung der Kategorie der sog. wirtschaftsrechtlichen Rechtstellung erscheinen. Die wirtschaftsrechtliche Rechtstellung basiert im Grunde genommen auf der Theorie der komplexen Rechtsfähigkeit, da sie nicht nur die zivilrechtliche Rechtsfähigkeit, sondern auch die zur anderen Rechtsgebiete gehörende Rechtsfähigkeiten in sich fasst, woraus wiederum folgt, dass die wirtschaftlich separat wirkende Unternehmen auch dann am Handelsleben teilnehmen können, wenn sie vom bürgerlichen Recht als Rechtssubjekte nicht anerkannt werden. Mit anderen Worten kann somit ein Unternehmen als Rechtssubjekt existieren, ohne als juristische Person anerkannt worden zu sein. Tamás Sárközy erblickte in diesem Konzept den wesentlichen Kern des – auf die sozialistische Verhältnisse Ungarns anwendbaren – komplexen Rechtssubjektbegriffes, weil somit die Existenz der Unternehmen von der Frage des Vorhandenseins, bzw. Fehlens der zivilrechtlichen Rechtspersönlichkeit abgetrennt werden konnte und auch jene Unternehmen als Rechtssubjekte fungieren und funktionieren konnten, die über keine Rechtspersönlichkeit verfügten. Die somit herausgearbeitete, nicht auf dem alten Rechtssubjektkonzept basierende Rechtspersönlichkeit ermöglichte es den Unternehmen als Eigentümer zu handeln – ohne in Wirklichkeit Eigentümer zu sein.

Aus dem Konzept des komplexen Rechtssubjektes folgt es gleichsam zwingend, dass – gemäß der auf die sozialistischen Verhältnisse adaptierten Theorie von Sárközy – die Gleichsetzung von Rechtsfähigkeit, Rechtssubjekt und Rechtspersönlichkeit aufgegeben werden musste, was (zwar ideologiefrei) auch in den westlichen kontinentalen Rechten immer mehr in den Vordergrund rückte. Die mechanische Übertragung der Rechtsfähigkeit des Menschen auf die Unternehmen erwies sich als unhaltbar, was auch durch den Forschungsergebnissen der Organisationssoziologie unterstützt wird. Da sich am Ende des 20. Jahrhunderts die Organisationen/Firmen/Unternehmen sozialisiert und politisiert haben, war es nicht mehr möglich, das einstige Konzept einer ausschließlich zivilrechtlichen Rechtspersönlichkeit aufrecht zu erhalten.

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Remarks on the Reasons of *Commissoria Rescindenda* (CTh. 3, 2, 1 /=Brev. CTh. 3, 2, 1 = CJ. 8, 34, 3/)

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Abstract. On the prohibition of contracting *lex commissoria (commissoria rescindenda)*, there is only one unclear Constantine's constitution. It is unusual because in the post-classical legislation the important measures were repeated several times. Since the preamble of the constitution was cut out by the compilers, the reason of its issuance is unknown. The general opinion is that it was introduced to protect the debtor against the pressure of his powerful creditor. As this prohibition was accepted by modern civil codes and today its effect is questionable, the author is searching for more direct reasons of the issuance of this rule based on other texts and on the social and economic circumstances.

Keywords*: lex commissoria, commissoria rescindenda*, pledge, corruption, Roman law

1. Introduction

Though we have in the annulment of the forfeiture clause *(commissoria rescindenda*) a very important measure which found its place in the modern civil codes, there is only one constitution dealing with it: the Theodosian Code (CTh. 3, 2, 1) issued by Constantine the Great. This is unusual for the post-classical legislation, where the most important measures were repeated several times.

The constitution was taken over by the compilers of *Lex Romana Visigothorum* without changes (Brev. CTh. 3, 2, 1) and it was inserted in the *Codex Iustinianus* (CJ. 8, 34, 3) with some modifications.[1] In the western part of the Empire, the text was followed by the *Interpretatio*[1] (Int. CTh. 3, 2, 1). Therefore, there are three versions of the same constitution.

1 In *Codex Iustinianus* (CJ) 8, 34 (35), 3: after the word *commissoriae,* "*pignorum*" was added and the verb *recipere* was replaced by *recuperare*.

The modern civil codes accepted the version of Constantine's constitution (CTh. 3, 2, 1), which was inserted into the Justinian Code (CJ. 8, 34, 3).[2] This means that the rule on prohibition to the pledgee to contract *lex commissoria*, i.e. to contract a clause that the pledgee would acquire the ownership of the pledged thing if the debtor failed to pay his debt in due time, was accepted.

The prevailing opinion is that the prohibition to contract *lex commissoria* was introduced to protect the debtor against the pressure of his powerful creditor. Some authors added as a motivation the Christian humanity of Constantine.

Since the first version of the constitution (CTh. 3, 2, 1) is imprecisely formulated and its preamble was cut out by the compilers (hence the original text was not preserved), the meaning of the constitution and the reason of its issuance is dubious. The aim of this research is to find out the more direct reasons which could help explain the rule more precisely. For that reason, besides the textual analyses of the constitution, the analysis will also concern other constitutions. Primarily those Constantine's constitutions will be observed which were issued close to the time of the constitution on *commissoria rescindenda* (year 320 AD).[3] Replacing the observed constitution in its own time, using the historical method of research, the more direct reasons of its issuance will be explained.

2. The Texts on the *Commissoria Rescindenda*

The first available version of Constantine's constitution is to be found in the Theodosian Code.

CTh. 3, 2, 1 (=Brev. CTh. 3, 2, 1): Imp. Constantinus A. ad Populum. "Quoniam inter alias captiones praecipue commissoriae legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim, re amissa, iubemus recipere, quod dederunt." Dat. prid. Kal. Febr. Serdica, Constantino A. VI. et Constantino Caes. Coss."[4]

2 The *Interpretatio* was usually called "visigothic". However, I am more inclined to adhere to the general opinion that they emerged in law schools of the West during the 5th century. For more details, see: Sič 1984, 157–167. According to Hänel (1962, XII–XIII), the legal practice applied the *Interpretatio*.

3 However, the problem of finding out the exact date of other Constantine constitutions occurs here. The date of the constitution about the *commissoria rescindenda* is also questionable: in the Theodosian Code, Mommsen gives the date of 31 January 320, with a question mark, because in the subscription of the constitution stays the VII. Consulship of Constantine and his son Constant (Constantio). Consequently, Krüger, in the edition of the Justinian Code, accepts 31 January 326 A.D. In the recent reprint of *Codex Iustinianus* from 1998 by Keip Verlag, the VI. Consulship of Constantine and his son Constantine is accepted. Hänel marked their VI. consulship as well. Therefore, the acceptable date is 31 January 320 because in this year Constantine the Great held his sixth consulship together with his son Constantine. See also Sargenti 1986, 311.

4 In Pharr's translation (1952): "Emperor Constantine Augustus to the People. Since among other

Though the text opens up more questions, its preliminary explanation could be as follows. The text has three parts. In the first part, the Emperor points out the problem that, among others, captious practice (seizures), especially those on the basis of the *lex commissoria*, has increased. Therefore, he ordered that such provisions shall be invalidated. In the second part, he repeated the prohibition more precisely: past and present agreements of that kind were cancelled and any future agreement would be prohibited. At the same time, alluding to the fact that the agreement pressures the debtor, the Emperor emphasized that the debtor shall be relieved by this sanction *(hac sanctione respiret)*. It remains uncertain what the meaning of lex commissoria is and, therefore, which agreement *(tali contractu)* the constitution is speaking about.

The pledge is not mentioned in the constitution. In my opinion, it was not mentioned because the prohibition concerns not only those appropriations of the debtor's property which were based on private contracts of pledges, but also those forfeitures which were made by public officers in the process of tax collection. The treasuries' right of *pignosris capio* was not based on the contract, but it was a right *vice pignoris*, which was *tacite contrahitur*.

The third part of the constitution *(creditores enim, re amissa…)* must neither relate to the pledge. The creditor must not be the pledgee, but it could be every creditor who had taken over the debtor's land or other thing on account of debt payment.

However, despite the fact of oppression emphasized in the constitution, the sanction in its third part is not as grave as it would be expected. Only the annulment of the transaction is foreseen: the creditor will lose the thing (pledge), but the debtor must pay his debt *(creditores enim, re amissa, iubemus recipere*[5]*, quod dederunt)*.[6]

captious practices, the harshness of the provision for forfeiture is especially increasing, it is Our pleasure that such provision shall be invalidated and that hereafter all memory of it shall be abolished. If any person, therefore, is suffering under such a contract, he shall be relieved by this sanction which cancels all such past and present agreements and prohibits them for the future. For We order that creditors shall surrender the property and recover that which they have given".

5 In the Justinian Code, instead of *recipere*, the word *recuperare* was used.

6 Why the sanction was not tougher against the creditor? There are expressions showing that the creditor used the pressure, i.e. some kind of violence against the debtor not honouring the due payment of his debt. The use of any kind of violence is threatened with punishment. For example, according to the constitution of Constantine from 334 A.D. (CTh. 8, 15, 2 /= Brev. CTh. 8, 8, 1/), if the pressure was utilized by the person employed in imperial office staff, he must give the thing bought back to the vendor, and he shall be punished by losing the price paid. (Imp. Constantinus a. ad Veronicianum vicarium Asiae. „Post alia: Damus provincialibus facultatem, ut, quicumque sibi a numerariis, qui diversis rectoribus obsequuntur, conquesti fuerint aliquas venditiones extortas, irritas inanesque efficiant, et male vendita ad venditoris dominium revertantur, amissione etiam pretii illicitis ac detestandis emptoribus puniendis. Dat. XIV. kal. iun. Optato et Paulino coss."). However, on the other hand, according to the constitutions, everybody is compelled to pay debts. The last short and, therefore, unclear sentence (creditores enim, re amissa, iubemus recipere, quod dederunt) shows the conflict of interests of the Empire: on one side, the interest of the Empire was to punish the use of violence and, on the other

The next version of the constitution was inserted in the *Codex Iustinianus* (CJ. 8, 34, 3). Comparing with its first version inserted in the Theodosian Code (CTh. 3, 2, 1), the only differences are the following: after the word *commissoriae* the word *pignorum* was added (*commisssoriae pignorum legis)* and the verb *recipere* was replaced by the verb *recuperare*.

CJ. 8, 34, 3: Imperator Constantinus. „Quoniam inter alias captiones praecipue commissoriae pignorum legis crescit asperitas, placet infirmari eam et in posterum omnem eius memoriam aboleri. 1 . Si quis igitur tali contractu laborat, hac sanctione respiret, quae cum praeteritis praesentia quoque depellit et futura prohibet. Creditores enim re amissa iubemus recuperare quod dederunt".

Therefore, the compilers of Justinian's Code explained the prohibition that concerns the *lex commissoria* in case of a pledge.

The *Interpretatio* (the third version of the text) accepts the constitution as a prohibition to the creditor to buy the pledged thing from his debtor.[7]

Int.: "Commissoriae cautiones dicuntur, in quibus debitor creditori suo rem, ipsi oppignoratam ad tempus, vendere per necessitatem conscripta cautione promittit: quod factum lex ista revocat et fieri penitus prohibet: ita ut, si quis creditor rem debitoris sub tali occasione visus fuerit comparare, non sibi de instrumentis blandiatur,[8] sed quum primum voluerit ille, qui oppressus debito vendidit, pecuniam reddat et possessionem suam recipient."[9]

According to the interpreters, the *lex commissoria* was prohibited in case of a pledge and, while from the text of the constitution one could not notice

side, to compel the debtor to fulfil his obligation. This problem requires more elaboration, and therefore will be dealt with in details in a separate paper.

7 According to Levy (1956, 189), the compilers of the Theodosian Code followed the classical concept about *lex commissoria* as a sale of the pledged thing, and placed the Constantine law "De commissoria recindenda" under the title "De contrahenda emptione". In the edition of Mommsen, it is not under this title but after it, as a separate title.

8 For the sale contract, the special form was needed. C. Th. 3. 1. 2: „Qui comparat, censum rei comparatae cognoscat: neque liceat alicui rem sine censu vel comparare vel vendere. Inspectio autem publica vel fiscalis esse debebit hac lege, ut, si aliquid sine censu venierit, et id ab alio deferetur, venditor quidem possessionem, comparator vero id, quod dedit pretium, fisco vindicante, perdat. 1. Id etiam placuit, neminem ad venditionem rei cuiuslibet accedere, nisi eo tempore, quo inter venditorem et emtorem contractus solenniter explicatur, certa et vera proprietas a vicinis demonstretur: usque eo legis istius cautione currente, ut, etiamsi subsellia vel, ut vulgo aiunt, scamna vendantur, ostendandae proprietatis probatio compleatur. 2. Nec inter emtorem et venditorem solennia in exquisitis cuniculis celebrentur, sed fraudulenta venditio penitus sepulta depereat."

9 In Pharr's translation: "Those written acknowledgements of debt are called agreements for forfeiture in which a debtor through necessity promises in a written acknowledgement of debt to sell to his own creditor a thing which he had pledged for a time to the creditor. This law cancels any such agreement for forfeiture which has been made and absolutely prohibits one to be made. Thus, if any creditor should appear to have bought property of his debtor under such a pretext, he shall not delude himself with written documents, but as soon as the debtor wishes, who sold when oppressed by debt, the creditor shall recover his money, and the debtor shall receive back his property".

which contract was annulled (i.e. what the meaning of *lex commissoria* is), its *Interpretatio* and the interpretations of the *Pauli Sententiae* unanimously accepts that the prohibition concerns the purchase of the pledged thing by the creditor[10].

3. The Romanist Literature on *Commissoria Rescindenda*

The prevailing opinion regarding Constantine's constitution on *commissoria rescindenda* is that it concerns the prohibition of contracting *lex commissoria*, i.e. the acquisition of ownership on the pledged thing by the pledgee. There are only a few academic papers that pay more attention to this prohibition. One of them is the study of Peters, who gives dogmatic analyses of the sources,[11] and the other one is that of Nijmegen,[12] which points onto the development of the conception of *lex commissoria*. The Romanist literature usually does not make any difference between the text inserted in the Theodosian Code and its version accepted by the Justinian Code.

According to the opinion of Burdese[13] and Frezza,[14] the *lex commissoria* has to be considered as a convention *creditoris causa cavetur*. As Frezza points out, in order to protect the interests of the creditors, *lex commissoria* gives them alternative possibilities: to realize the claim for the payment of the debt or to acquire the pledged thing in ownership. Upon acquiring the object of the pledge in ownership on the basis of *lex commissoria (lex commissoria = iusta causa traditionis)*,[15] the creditor has no obligation to pay the eventual surplus *(superfluum)* back to the debtor.[16] Thus, according to Frezza, Constantine prohibited the creditor from acquiring the ownership of the pledged thing; however, he recognized that in practice, as it can be supposed, the utilization of the *lex commissoria* as *conditionalis venditio* could also be used. As reasons of practising *lex commissoria*, Frezza emphasized the economic and monetary difficulties of the time, which Constantine's law intended to bring to an end. Having in mind the *Interpretatio*, he does not negate that the prohibition was applied in practice also on the sale of the pledged thing to the creditor.[17] The

10 See about Szűcs 2011, 67–68.

11 Peters 1973, 137–168.

12 Nijmegen 2011, 109–144.

13 Burdese 1951, 110–118.

14 Frezza 1963, 225–227.

15 Frezza (1963, 225) proves his opinion by: Gaius, Inst. II, 64; Scaev. D. 44, 3, 14, 5. Burdese (1951, 114–115) invokes to D. 21, 3, 1, par. 5.

16 As an argument, he invokes to: Paulus, D. 45, 1, 85, 6 (about the debtor's partial payment): „Item si ita stipulation facta sit: 'si fundus Titianus datus non erit, centum dari?', nisi totus detur, poena committitur centum nec prodest partes fundi 'tradere' cessante uno, quemadmodum non prodest ad pignus liberandum partem creditori solvere." and C. 8, 34 (35), 3 in fine (about *commissoria rescindenda*): "creditores enim re amissa iubemus recuperare quod dederunt".

17 Frezza 1963, 226[5]. He considers the sale of the pledged thing to the creditor as an analogue situation to the *lex commissoria in causam emptionis (*226–227, quoting Tryph. D. 20, 5, 12 pr.; Pap. Vat. Fr.

unclear part of the constitution is: "creditores enim re amissa iubemus recipere (in CJ. recuperare) quod dederunt". In Frezza's interpretation, the creditors must give the eventual partial payment of the debt back to the debtors, which – without the prohibition of *lex commissoria* – they would retain.[18]

Burdese explains *lex commissoria in casusam obligationis* and Constantine's prohibition by the old Roman practice of the pledge and by *fiducia* to which he considers inherent the *lex commissoria*. According to Burdese, regarding the possibility of the creditor to retain the pledged thing if the debtor would not pay his debt, *pignus* was under the influence of the *fiducia cum creditore*. Regarding the *causa* of appropriation, comparing *lex commissoria* in case of a pledge with the *lex commisoria in casusam emptionis,* Burdese finds that the special *iusta causa* was not needed.[19] He accepts as a possible intent of Constantine to embrace with *commissoria rescindenda*, besides the typical *lex commissoria*, the similar clauses customary in the Hellenistic provinces as well. According to Burdese: "colla costituzione del 326 si accelero un processo gia iniziato nel diritto ellenico, diretto al disconoscimento di ogni sorta di clausola commissoria".[20] Being mainly on the same standpoint, Burdese and Frezza left the question unanswered: if the creditor seeks to utilize the prohibited *lex commissoria* and the negotiation would be annulled, does the creditor still have the right to ask for the payment of the debt?

According to Biscardi, the opinion that the pledgee acquires the pledged thing in ownership directly by the clause of *lex commissoria* provided the condition that "the price (debt) was not paid in due time" was fulfilled is not acceptable for the classical period. He argues that this clause could not be accepted as *iusta causa traditionis.* The pledgee could attain ownership on the pledge only based on the title of sale contract *(iusta causa)* by *traditio.*[21] Biscardi's opinion could be confirmed by the fragment of Marcian, which is considered interpolated,[22] and by the fragment of Papinian, which is questionable as well.[23] As Biscardi writes, the contract of sale is one of the sources of *obligatio rei* and "la compravendita in funzione di garanzia" is the same as the "lex commissoria in causam obligationis" (pledge). In his opinion, Constantine's prohibition of *lex commissoria* concerns "cautiones con efficacia reale, relative alla res oppignerata – diffuse assai nell'ambiente provinciale, e soprattutto elenistico;"[24] however, he does not exclude that there were proper historical reasons for this prohibition, as Levy thought.[25]

9; Marc. D. 20, 1, 16, 9). There was some reservation only about Marcian's *conditionalis venditio* because of the estimation of the value of the pledged thing. See, e.g. Korošec 2005, 210.

18 Frezza 1963, 226[3].

19 More Burdese 1951, 110–118.

20 *Ibid.* 125[2]. For the critic on the standpoint of Burdese, see Peters 1973, 162–163.

21 Biscardi 1962, 589; Biscardi 1976, 176–192.

22 D. 20, 1, 16, 9; Biscardi 1962, 585[26].

23 Pap. Vat. Fr. 9; Tryphoninus, D. 20, 5, 12, pr.; see about, Sič (Szűcs) 2010, 155–179.

24 Biscardi 1976, 190[24].

25 Biscardi 1976, 191–192.

Levy's standpoint is that the *lex commissoria* prohibited by Constantine, in essence, was the same as the purchase of the pledge by the creditor of the late classical period. Therefore, it is not surprising that the compilers of the Theodosian Code placed the rule about "de commissoria rescindenda" under the title "de contrahenda emptione" (CTh. 3, 2),[26] and not under the title "de pignoribus" (CTh. 2, 30).[27] According to Levy, in times of military anarchy, the creditors made pressure on the debtors to sell them the pledged thing of higher value than that of the debt. As the sales contract in the vulgar law conception was a cash sale, it means that the buyer (pledgee) became the owner of the pledge from the moment when the contract of sale was made (Verfallsabrede). The *Interpretatio* of the law is about the purchase of the pledge by the creditor, but this is because the sale contract had a translative effect, meaning that, at the same time, it transferred the ownership as well (verkaufen = übereignen). Regarding the sanction, Levy concluded that the creditor should lose the pledged thing *(re amissa)* and the debtor would get only some more time *(respiret)* to pay his debt. Using this time, the debtor himself could find a buyer and sell the pledged thing from which he would get the money to pay his debt to the creditor (PS. 2, 13, 3 and IP. 2, 12, 6).[28] In this purchase, the creditor could not take part, not even through a straw man, "persona supposita" (PS. 2, 13, 4 and IP. 2, 12, 7).[29]

According to Feenstra,[30] Constantine's rule was not influenced by the economic crises of the period of anarchy. He is of the opinion that Levy's evidence is not acceptable. Referring to Kaser, that in the late classical period the creditor could buy the object of the pledge if his claim remained unpaid, he argues that it is not the same as a right to acquire the ownership on it on the basis of the purchase which was made in the circumstances of the anarchy under the pressure of the creditor, as Levy explained it. Feenstra gives no new sources to support his argument, but he applies for help to Papinian's text saved by Fr. Vat. 9. He gives an acceptable explanation interpreting it in the sense that the creditor's claim (for the settlement of the debt from loan) is nothing else than the price of the thing (pledge).[31] According to Feenstra, Constantine's prohibition relates to this case, having in mind the last sentence: "creditores enim re amissa iubemus recipere quod dederunt" (CTh. 3, 2, 1).[32] However, on the other hand, he gives no answer to the questions why Constantine called it

26 More precisely, this constitution was placed under the title "De commissoria rescindenda," separately, but after the title "De contrahenda emtione".

27 Levy 1956, 189.

28 Brev. PS. 2, 12, 6 (= PS. 2, 13, 3): "Debitor creditori vendere fiduciam non potest; sed aliis, si velit, vendere potest: ita ut ex pretio eiusdem pecuniam offerat creditori, atque ita remancipatam sibi rem emtori praestet."

29 Levy 1956, 188–194.

30 Feenstra 1957, 514.

31 Or, according to Kaser (1950, 565), *datio in solutum*.

32 Feenstra 1957, 514.

lex commissoria and why at all he prohibited this practice if the debtor got the estimated value of the pledged thing.

Wieacker is of the opinion that Constantine's prohibition concerns the "Verfallspfand" (the creditor will acquire ownership on the object of the pledge if the debtor would not pay his debt) of the late 3rd century A.D. According to him, it is not a vulgar law concept.[33]

According to Peters, Marcian's fragment[34] is not identical to *lex commissoria*.[35] He submits (accepting Kaser's and Biscardi's opinion)[36] that Constantine's prohibition was not based on the classical clause, but it was a result of the practice of vulgar law as a consequence of crises of the third century, influenced by the Hellenic law.[37] According to him, the modification of the formula of *lex commissoria* in case of a sale is: "si ad diem pecunia soluta non sit, ut fundus inemptus sit (Pomp. 18, 3, 2)" in a sense of the *lex commissoria* in case of a pledge: "si ad diem pecunia soluta non sit, ut fundus emptus sit" permit to suppose that the acquisition of the pledge was levelled with the *lex commissoria in causam emptionis* by the legal practice of Diocletian's time. Therefore, according to Peters, the meaning of the clause is: "Lex commissoria bedeutet nichts anderes als Verfallsklausel".[38]

Nijmegen is of the opinion that under the circumstances of inflation the creditors practised the appropriation of the pledged thing since otherwise they could not realize the value of their claims.[39] Because of the depreciation of money, the value of the debt from the time when it was contracted to the time when it was payable became less, and after a longer period it could become even symbolic.

As Wigmore thought in the third century, both *lex commissoria* and *lex venditionis* were in place not to prevent the pledgor from claiming a restoration of the surplus. The efforts to abuse the *lex commissoria* seem, however, to have continued, and Constantine was obliged to prohibit its use entirely in the following century. Therefore, according to Wigmore, the reason why Constantine prohibited *lex commissoria* was to prevent the abuse of the clauses *lex* or *pactum* for the purpose of evading the duty of returning the surplus.[40]

Observing the Romanist literature on *commissoria rescindenda*, the standpoint is that Constantine prohibited the appropriation of the pledged thing by the creditor (pledgee) on the basis of the *commissoria* clause. In general, it is correct, but there are more unanswered questions regarding the constitution and its

33 Wieacker 1960, 143–144.
34 Marc. D. 20, 1, 16, 9.
35 Peters 1973, 163.
36 Kaser 1950, 565; Biscardi 1962, 584.
37 Peters 1973, 163.
38 *Ibid.* 166.
39 Nijmegen 2011, 113–115.
40 Wigmore 1897, 28–29.

Interpretatio. Concerning the question why the clause was called *lex commissoria*, the standpoint is: because it is a reverted version of the *lex commissoria* in case of a sale. However, it seems that the more questionable is: why was the clause of the sale called *lex commissoria*? According to Peters, the compilers of the Digest under the title "de lege commissoria" of the sale (D. 18, 3) have inserted two fragments related to *fiducia*.[41] Does this mean that the *lex commissoria* practised in case of *fiducia* was the first application of it? The meaning of *lex commissoria* is also unclear. There is no exact answer to the question: why was the appropriation of the pledge covered by the sales contract in the postclassical times?[42] And not less doubtful is: does the first version of the constitution concern only the debt secured by a pledge?

4. On the Meaning of the *Lex Commissoria* in the Theodosian Code

In the constitutions of the Theodosian Code issued close to the time of Constantine's constitution on *commissoria rescindenda* (320), the *lex commissoria* was utilized in case of the *emphyteusis* (long-term tenure). In this case, *lex commissoria* signifies the right of the treasury to forfeit (take over from the possessors as a punishment) the imperial emphyteutic and patrimonial estates if the rent (which was in those times nothing else than the tax of the land) was not paid promptly. This kind of forfeiture in Constantine's constitution from 325 A.D. (issued by reason of preventing the abuses of the officers) can be found as "legem commissi frustratus incurrat" (to become liable to the law of forfeiture) and as "debitam commissi nexu" (the bond of forfeiture because of the debt).

CTh. 12, 6, 2, 1: "Hoc quoque addimus, ut unusquisque quod debet intra anni metas, quo tempore voluerit, inferat et per tabularium apparitorem illatio cognoscatur absque omni mora auro suscipiendo, ne quis in aliena civitate sumptus faciat vel, quod est gravius, *legem commissi frustratus incurrat***.** Nam si solvere volens a suscipiente fuerit contemptus, testibus adhibitis contestationem debebit proponere, ut hoc probato et ipse securitatem *debitam commissi nexu* liberatus cum emolumentis accipiat et qui suscipere neglexerit, eius ponderis

41 Peters 1973, 162. D. 18, 3, 2 „Pomponius libro 35 ad Sabinum Cum venditor fundi in lege ita caverit: 'Si ad diem pecunia soluta non sit, ut fundus inemptus sit,' ita accipitur inemptus esse fundus, si venditor inemptum eum esse velit, quia id venditoris causa caveretur: nam si aliter acciperetur, exusta villa in potestate emptoris futurum, ut non dando pecuniam inemptum faceret fundum, qui eius periculo fuisset." D. 18, 3, 3 „Ulpianus libro 30 ad edictum Nam legem commissoriam, quae in venditionibus adicitur, si volet venditor exercebit, non etiam invitus."

42 Szűcs 2011, 65–72.

quod debebatur duplum fisci rationibus per vigorem officii tui inferre cogatur"[43]. Dat. XIIII kal. aug. Paulino et Iuliano conss. (325 iul. 19).[44]

The constitution is about the problem that the tax receivers refused to accept the payment from the taxpayers who were willing to pay. Their reason for it was to take over the land from the possessor because of his debt in tax payment, and they would retain it illegally afterwards. The punishment of the tax receiver who refused to accept the payment was to pay to the account of the treasury double the amount of the tax which was due.

The reason of the tax receivers to refuse to accept the tax payment was described in the constitution of Valentinian and Valens, CTh. 5, 15, 15 (= Brev. 5, 13, 15) from 364 A.D. According to this law, from the year of the consulship of Leontius and Sallustius (twenty years previously, 344 A.D.), some emphyteutic estates which fell into the fortune of forfeiture *(in commissi fortunam inciderint)* were held in ownership by private persons occupying the estates.[45]

Therefore, the utilization of *lex commissoria* in case of emphyteutic and patrimonial estates, if the rental (tax) was not paid, led to the misappropriation of these imperial lands by private persons.

In the following constitution CTh. 5, 15, 16 (Brev. = 5, 13, 16) which was given in the same year, the emperors have formulated the prohibition as a rule:

CTh. 5, 15, 16 (364 sept. 12): „Idem aa. ad provinciales Byzacenos. Nequaquam emphyteuticos fundos ante commissi vitium ad alterum transire debere sancimus. Et cetera. Dat. prid. id. sept. Aquileia divo Ioviano et Varroniano conss."

43 CTh. 12, 6, 2, 1: "We also add that each taxpayer shall have the right to pay whatever he owes within the limits of the year, at whatever time he may wish, and the apparitors who act as registrars shall acknowledge such payment. The gold shall be accepted without any delay in order that a taxpayer may not incur any expense in a municipality not his own, or on account of any frustrative device he may not become liable to the law of forfeiture, a much more serious matter. For, if the taxpayer should be willing to pay but should be scorned by the tax receiver, he must employ witnesses and file an attestation so that, when the case is proved, he shall be freed from the bond of forfeiture and shall receive the due tax receipt, along with the emoluments. The tax receiver who refused to accept the payment shall be forced through the power of your office to pay to the account of the fisc twofold the sum which was due."

44 There is one more Constantine's constitution about the *lex commissoria* CTh. 3, 30, 5 (=Brev. 3, 19, 3) given a few years later, in 333 A.D., for the case when the possessor *iuris emphyteutici* is a *minor*. If the landholding is being torn from the minor as the result of default involving forfeiture *(vitio intercedente commissi; commissi offensa)* – because the negligence or betrayal by tutors or curators –, they shall restore to the minor the value of the forfeited property from their own resources.

45 CTh. 5, 15, 15: „Idem aa. ad Mamertinum praefectum praetorio. Emphyteutica praedia, quae senatoriae fortunae viris, praeterea variis ita sunt per principes veteres elocata, ut certum vectigal annuum ex his aerario penderetur, cessante licitatione, quae recens statuta est, sciat magnifica auctoritas tua a priscis possessoribus sine incremento licitandi esse retinenda ita, ut quaecumque in commissi fortunam inciderint ac pleno dominio privatis occupationibus retentantur a Leontii et Sallustii consulatu, ius pristinum rursus adgnoscant. Dat. iiii kal. aug. Sirmio divo Ioviano et Varroniano conss." (364 iul. 29).

(We decree that by no means shall an emphyteutic estate pass to another person before the fault of forfeiture has been incurred. Etc.).

In the constitution CTh. 5, 15, 18 (Brev. = 5, 13, 18) from 368 A.D., they prescribed the control of auction of those emphyteutic estates which have incurred the fault of forfeiture *(in vitium delapsa commissi)*. According to the law: "…no person who has outbid all the others shall obtain the strength of perpetual validity for his ownership before the judgment of Our Tranquillity has been consulted in a loyal manner and has prescribed what must be observed in regard to the amount of rent, the name of the lessee and the amount of the inventory".[46]

According to these texts, the *lex commissoria* in Constantine's times signified the law (right) of forfeiture, the right of the treasury to take over the land from the lease-holder if he was in delay with rent/tax payment. On the other hand, regarding the delinquent taxpayer whose all present and future property served as a tacitly contracted pledge in favour of imperial treasury, the treasury had a right of *pignoris capio*, to take over the debtor's things in the amount of tax payment. These rights were not based on contracts.

In the same time, the quoted texts points onto the abuses of these rights of imperial treasury by private persons for their own profit.

5. The Abuse of the *Lex Commissoria* in Favour of the Treasury by Private Persons

The question that emerges is: by which contracts *(tali contractu)* do the private persons manage to take over the debtor's things?

In the Marcian's Novell about the remission of delinquent taxes (Nov. Marc. 2: „De indulgentiis reliquorum" from 450),[47] there is one important part which shows the practice of converting public debts into private contracts.

46 CTh. 5, 15, 18 (Brev. = 5, 13, 18): „Idem aa. ad Florianum comitem. Quotienscumque emphyteutici iuris praedia in vitium delapsa commissi actis legitimis ac voci fuerint subicienda praeconis, super facto licitationis et augmento nostra perennitas consulatur, nec prius eius dominio, qui ceteros oblatione superavit, perpetuae firmitatis robur accedat, quam si super pensionis modo, conductoris nomine, enthecae quantitate nostrae tranquillitatis arbitrium fideli ratione consultum observanda praescripserit. Dat. iiii k. mart. Triveris Valentiniano et Valente aa. conss." (368? 370? 373? febr. 26); The constitutions CTh. 5, 15, 15; 16; 17; 18 are not inserted in the Justinian's Code.

47 This subject-matter is explained shortly by Interpretatio: „Lex ista hoc continet, ut per provincias relaxatae beneficio principis tributorum reliquiae non quaerantur, tamen quod exactum est, si apud exactores residere constiterit, id praecipit, ut publicis debeat utilitatibus non perire, sed quod exactum est, a retentatoribus thesauris inferatur, et a provincialibus vel a possessoribus, quod solutum non fuerit, non quaeratur."

Nov. Marc. 2, 2: „Et ne qua liberalitatem nostram caligo fraudis possit impedire, etsi in privatum contractum vel in cautionem debitum publicum transiisse vel novatum esse dicatur, aut si quis curialis exactor vel cohortalis compulsor pro obnoxio se intulisse commemoret, nihilominus liberalitas nostra firma permaneat". (In order that no obscurity of fraud may be able to impede Our generosity, even if a public debt is said to have passed into private contract or a written acknowledgment of debt, or to have been novated, or if any curial or gubernatorial apparitor as tax collector should allege that he has paid taxes for an obligated person, nevertheless, Our liberality shall remain valid).[48]

According to Pharr: "The tax collectors often contracted, at a good profit, to pay the taxes for taxpayers who were unable to pay. By assuming such obligations, the tax collectors converted public debts into private contracts."[49]

Maiorian's Novell refers to the same practice.

Nov. Mai. 2, 1: "Therefore, by a law that shall remain eternally We sanction that delinquent taxes of all fiscal tax accounts…shall not be required of the landholders…which either remain delinquent in the case of a landholder or have passed to the bond of a private obligation, as customarily happens by the intervention of craftiness, by a written acknowledgement of debt issued to curials or collectors of the regular tax or to any other person whatever, such delinquent taxes shall not be demanded at all, so that the stipulation which was contracted for the reckoning of the fiscal accounts and which was remitted by the humanity of Our Clemency shall be deprived of collection."

This way of chicanery[50] Pharr explains as the taxpayers for the borrowed money from the tax collector signed a note or private stipulation in order that they might meet their tax payments.[51]

Therefore, the unclearly formulated part of the constitution on *commissoria rescindenda* (CTh. 3, 2, 1) "Si quis igitur tali contractu laborat…" covered different agreements by which the taxpayers usually became debtors of tax collectors or of other members of the city and the imperial office.

48 Translation by Pharr.
49 Pharr, CTh. Nov. Marc. 2, n. 7.
50 See also CTh .2.29 (= Brev. CTh. 2, 29) Si certum petatur de suffragiis; Nov. Val. 1, 1, 1.
51 Pharr, CTh. Nov. Mai. 2, n. 8.

6. The Reason for *Commissoria Rescindenda* in Constantine's Time

As the reason for the annulment of forfeiture clause (*lex commissoria*), a few authors emphasized[52] that, although the creditors – if the debtors were in delay with debt payment – had a right to sell the pledged thing *(ius vendendi)* or to buy it from the debtors, because of the depreciation of money (inflation) from the late classical period, the practice of forfeiture of the pledge became frequent. The creditors could realize the value of the landed amount of money (without the revalorization of the debt amount) only this way. As the value of the pledge was usually higher than the amount of the debt, Constantine prohibited this practice. This is one possible explanation, having in mind that Constantine introduced the measure of money stabilization.[53] As Constantine's measure remained without effect and the economic situation became even worse,[54] this thesis could not explain the reason of *commisoria rescindenda*. The fact that during the 5th century the constitution was interpreted as the prohibition to the creditor to buy the pledged thing from his debtor indicates also other reasons.

In my opinion, Constantine's reason to introduce the *commissoria rescindenda* could be explained more exactly by the fiscal policy of the Empire.

Namely, during the classical period, in the provinces which were not liberated from tax payment by the privilege of *ius Italicum*,[55] the amount of the taxes were determined on basis of the land owner's profession.[56] If the owner sold something from the registered property, his successor had to take over the taxes for the purchased thing.[57]

The Empire surrounded by barbarian nations was turned from the end of the second century A.D. into defence. The economy of Rome and Italy based primarily on successful wars, on the subordination and exploitation of provinces, could not overcome the new financial problems. There are opinions that already August had a plan to introduce the equal tax charges on the entire territory of the Empire.[58] August established the new territorial organization of Rome and Italy,[59]

52 For example, Nijmegen 2011, 122.

53 The inflation manifested in the times of Comod (180–192) became a serious problem during the third century. According to Romac (1966, 59), the *antonianus*, which had in the times of Caracalla 50% of silver, by 260 A.D., it had only 5% of it.

54 For example, CTh. 11, 2, 0. *Tributa in ipsis speciebus inferri,* ordered the collection of taxes instead of the money in goods.

55 Italy was freed from basic land-taxes *(tributum)* from 167. B.C. From the time of Augustus, *ius Italicum*, which means liberation from tributum, was given to the provinces as well (D. 50, 15, 1, 6 – 8). Vilems 1898, 538[2]. *Ius Italicum* was firstly mentioned in Plin. III, 3; 25, 21; 139.

56 According to the *forma censualis* from the second century A.D. – preserved in Ulpian's book »*de censibus*« D. 50, 15, 4 –, the population and their whole property was taken in evidence.

57 D. 19, 1, 13, 6 *Ulpianus, 32 ad edictum;* CIL III. p. 945.

58 About the imposts before August, see Vilems 1898, 364–369; De Martino 1967, 336–341.

59 Endeavouring himself to the stronger unification of the Empire, Augustus changed the traditional

and began to realize the project of measuring the entire territory of the Empire and of evidencing its population.[60] The work of making cadastres took more time and it was finished only during the reign of Trajan.[61] The intention of Augustus to unify the Empire, its population not only in rights but also in duties, was not even later realized, in the time when Caracalla introduced in Roman citizenship the whole free population of the Empire.

The divergences between the cities as centres of provincial administration vanished regarding the burden of land taxes only later, after the military anarchy, by the reforms of Diocletian. However, there are many unsolved questions about Diocletian's tax reform (*capitatio-iugatio*),[62] which was even not entirely new,[63] as the most important novelty was its introduction to the entire territory of the Empire. Italy had no more privileges of exemption from taxes,[64] nor the cities and provinces with *ius Italicum*. The *capitatio-iugatio* as a land tax was a good solution to fill up the imperial treasury and to stop military anarchy. The earlier taxes were retained and more new kind of imposts were added besides the land tax,[65] and the Empire had other incomes from mines and state factories. That the fiscal system of Diocletian remained for the most part throughout the late Roman Empire does not mean that in its realization there were no differences and problems. For the majority of the population, the biggest misfortune was the pressure of tax collectors, while for the Empire the independency of *potentiores*, the corruption of the city and higher chancellery officers caused serious problems. According to De Martino, the whole system of taxation was organized, giving the possibility for the internal augmentation of imposts by prefects and governors and not least from the members of the city council. All of these instances were responsible for the ordered amount, but if any problem occurred, the most in charge was the city and its officers (*curiales*). Quoting De Martino: "Si puó immaginare a quali abusi e quali nocive consegvenze desse luogo un sistema predisposto per garantire comunque l'entrata e fondato sulla piú assoluta indifferenza per la realtá dei raporti fiscali con il contribuente."[66]

According to Frezza, as a guarantee to realize the tax payments, from the age of August and in the provinces charged by *tributum*, the *fiscus* had a general privilege

position of Roman civitas (in the limits marked by Romul), dividing the territory of the city into fourteen territorial units (*regiones*). He divided the territory of Italy into eleven regions. See Vilems 1898, 534 and 568. According to Vilems, the new territorial organization of Italy was introduced by reason of making registers for the needs of the financial administration.

60 Vilems 1898, 509. (references and sources in n. 1); St. Luc. Evang. II, 1; Cassiod. Var. III, 52; Isid. Orig. V, 36. It does not mean that there was no such evidence before in the republican times, but it was not uniform.

61 De Martino 1967, IV/2. 824.

62 According to Vilems (1898, 640[8]), it was firstly introduced in the East. (Land 1862, 128.) See also De Martino 1967, V. 344–387.

63 De Martino 1967, V. 348[14].

64 Vilems 1898, 640[7]. Aur. Vict. De Caes. 39; Lactant. De mort. parsec. 23. CTh. 11, 28, 2; 4; 7; 12; 14.

65 See about, Vilems 1898, 637–649; De Martino 1967, V. 366.

66 De Martino 1898, V. 373.

"vice pignoris" for tributary claims.[67] The tributary debtors were registered in public books (*cesualibus paginis, publicis libris*). From the moment of registration, the goods of the debtors were held "veluti pignoris iure" even in case of alienation to third persons. Concurring with the private pledges, the *fiscus* had a priority right according to the principle "prior in tempore potior in iure".[68]

Practically, it was a general hypothec on all present and future goods of the debtors of imperial treasury.[69] We can read in the Fragmentum de iure fisci of the anonym author (2nd-3rd century A.D., Fol. I, 5[70]): "Bona eorum qui cum fisco contrahunt lege uacuaria uelut pignoris iure fisco obligantur, non solum ea quae habent, sed et ea, quae postea habituri sunt."

According to Dubouloz, the *fiscus* has priority right even in competition with the pledges in favour of the municipality.[71] As Dubouloz observes, there were two warranties: *praes* as a personal security right (*fideiussio*) in favour of the city and *praedium*, the real security right in favour of the treasury of Rome. It was expressed in the sources as a *cautio prædibus prædiisque* or *praedium praediorumque obligatio.*[72]

After Diocletian's tax reform, the provincial practice became general.[73] As a consequence of the right of the treasury "vice pignoris," the tax collectors were authorized to take over (seize) the possession of the delinquent taxpayer's thing or patrimony.

The emperors ordered the exactors not to use torture or imprisonment against the debtors;[74] "it shall suffice for a delinquent taxpayer to be summoned to

67 Frezza 1963, 170.

68 *Ibid.* D. 49.14.6 *Ulpianus libro 63 ad edictum pr.*; Dig. 49.14.28 *Ulpianus 3 disp.* „Si qui mihi obligaverat quae habet habiturusque esset cum fisco contraxerit, sciendum est in re postea adquisita fiscum potiorem esse debere Papinianum respondisse: quod et constitutum est. praevenit enim causam pignoris fiscus; CJ. 4.46.1 Imperator Antoninus. Venditionem ob tributorum cessationem factam revocari non oportet neque priore domino pretium offerente neque creditore eius iure hypothecae sive pignoris. Potior est enim causa tributorum, quibus priore loco omnia cessantis obligata sunt."

69 About the general hypothec for all claims of the *fiscus*, Caracalla issued two constitutions: CJ. 8, 14 (15), 1 from 213 A.D.: „Universa bona eorum qui censentur vice pignorum tributes obligate sunt"; CJ. 8, 14 (15), 2 from 214 A.D.: „Certum est eius qui cum fisco contrahit bona veluti pignoris titulo obligari, /quamvis specialiter id non exprimitur/". Also Hermogenian, D. 49, 14, 46 par. 3: „Fiscus /semper/ habet ius pignoris."

70 Fragments of two sheets of parchment discovered by Niebuhr in Verona, Italy, in 1816. See Girard–Senn 1967, 461–464. See also Böcking 1855, 145; Huschke 1988, II/1. 172–182; Kalb 1890, 146; Krüger 1868, 163–165.

71 D. 50.1.10 *Marcianus libro singulari de delatoribus: Simile privilegium fisco nulla civitas habet in bonis debitoris, nisi nominatim id a principe datum sit.* See more, Dubouloz 2003.

72 For example, *Lex Malacitana* (Spitzl 1984). Bruns 1893, 136–148. Also, Vécsey 1893, 332.

73 C. Th. 11. 3. 5 (391): „Quisquis alienae rei quoquo modo dominium consequitur, statim pro ea parte, qua possessor fuerit effectus, censualibus paginis nomen suum postulet annotari, ac se spondeat soluturum: ablataque molestia de auctore in succedentem capitatio transferatur." Also C. Th. 11, 3, 1 (319); 2 (327; 3 (363).

74 It was prohibited even earlier, in 320 A.D., by Constantine in CTh. 11, 7, 3.

the necessity of payment by the seizure of pledges (*satis vero sit debitorem ad solvendi necessitatem capione pignorum conveniri*)."

CTh. 11, 7, 7: Impp. Constantius et Constans aa. Bibulenio restituto praesidi Sardiniae. „Provinciales pro debitis plumbi verbera vel custodiam carceris minime sustinere oportet, cum hos cruciatus non insontibus, sed noxiis constitutos esse noscatur, satis vero sit debitorem ad solvendi necessitatem capione pignorum conveniri." Dat. VIII id. dec. Thessalonicae Constantio VI et Constante III aa. conss. (353 [346?] dec. 6).[75]

What was the consequence of the *pignoris capio* in the postclassical period? Does it mean that the *fiscus* became an owner of the things which were taken from the debtors, or was he only a possessor? And what was the process of the execution? Without going into a detailed explanation, which needs more place, the preliminary answer is: the *fiscus* had only a right to take over the possession of the pledged thing[76] and to sell it under public control. For example, Constantine (CTh.11, 7, 4) 327 or 328 A.D. ordered: the things of the fiscal debtors who are in contumacious delay shall be sold (in controlled proceeding)[77] to the purchaser with the guarantee of perpetual validity of the possession.[78]

It was a regular way to realize the payment of fiscal debts and also the legal way for the payment of private debts secured by the pledge.

75 CTh.11.7.7: "The provincials must not suffer lashes of leaded whips or the custody of prison on account of unpaid taxes due, since it is recognized that such tortures have not been established for the innocent but for the guilty. It shall suffice for a delinquent taxpayer to be summoned to the necessity of payment by seizure of pledges." See also: C.J. 4. 46. 1; C.J. 7. 73. 4, (215); C.J. 7. 73. 6, (240); CTh.11.7.4 [=Brev.11.4.1] (C.J.: 10, 21, 1), CTh.11.9.2 (337).

76 According to Frezza (1963, 128–141), the creditor could realize only the possession of the things even in the classical period. He could manage it if he had contracted the *pignoris capio.* In deficiency of this pact, it was prohibited by the law. Frezza quoted the constitution of Severus and Antoninus CJ. 8, 13 (14) 3 (205): „Imperatores Severus, Antoninus. 'Creditores, qui non reddita sibi pecunia conventionis legem ingressi possessionem, exercent, vim (quidem) facere non videntur, (attamen auctoritate praesidis possessionem adipisci debent.'"; PS. 5, 26, 4; Modestinus, D. 48, 7, 8; Decretum divi Marci, D. 48, 7, 7.

77 C. Th. 11, 7, 1.

78 C. Th. 11, 7, 4. (= Brev. 11, 4, 1): „Imp. Constantinus a. ad Afros. Quoniam succlamatione vestra merito postulastis, ne qua his, qui praestationes fiscales differunt, reliquorum laxitas proveniret, specialiter praecipimus observari, ut res eorum, qui fiscalibus debitis per contumaciam satisfacere differunt, distrahantur: comparatoribus data firmitate perpetua possidendi etc. Dat. XV. kal. iun. Serdicae, Constantino et Maximo coss."

7. The Prohibition of *Lex Commissoria* and the Evasion of Tax Payment

In the constitution CTh. 11, 3, 1[79] under the title "Sine censu vel reliquis fundum comparari non posse," edited in 319. A.D., Constantine informs about one of the problems of the *fiscus* to realize the tax payment.

This constitution is one of the rarest from which the preamble, for reasons of issuance, was not cut out by the compilers. It was addressed to the Governor of the First Province of Lyons in 319 A.D. Constantine explained that, observing the annonarian accounts, delinquent taxes were found. Investigating the reason, the following was noticed: "We learned that the chief cause of delinquent taxes was the fact that some persons are taking advantage of the temporary exigencies of others (*nonnulli captantes aliquorum momentarias necessitates*), and are purchasing rich and choice farms under the condition that they shall not pay to the fisc the delinquent taxes of such farms and that they shall possess them tax-free." The sanction for it was that: if any person has made such a contract, he shall be held liable for the taxes of the purchased farm and for all the delinquent taxes of such landholding.

According to the constitution, the purchase of the lands was made abusing the temporary exigencies of others (*nonnulli captantes aliquorum momentarias necessitates*). The preamble shows the fact that for the purchased lands the taxes were not paid from certain time. Therefore, the problem of the vendor was that he could not manage to pay his debts, among others, those to the *fiscus*. For this reason, the vendor sold his land to the *potentior* (latifundist) or to the officer to get some protection (*patrocinium*,[80] or promised liberation from taxes – corruption). By this constitution, the interests of the Empire regarding the taxes were to be protected.

79 CTh. 11, 3, 1: „Imp. Constantinus a. ad Antonium Marcellinum praesidem provinciae Lugdunensis primae. Rei annonariae emolumenta tractantes, ut cognosceremus, quanta reliqua per singulas quasque provincias et per quae nomina ex huiusmodi pensitationibus resedissent, cognovimus hanc esse causam maxime reliquorum, quod nonnulli captantes aliquorum momentarias necessitates sub hac condicione fundos opimos comparent et electos, ut nec reliqua eorum fisco inferant et immunes eos possideant. Ideoque placuit, ut, si quem constiterit huiusmodi habuisse contractum atque hoc genere possessionem esse mercatum, tam pro solidis censibus fundi comparati quam pro reliquis universis eiusdem possessionis obnoxius teneatur. Dat. kal. iul. Agrippinae Constantino a. V et Licinio c. conss." (319 iul. 1).

80 The *patrocinium* was very harmful for the Empire. The emperors prohibited it without much success. See more, Romac 1966, 96; De Martino 1967, V. 516; Salv. De Gub. Dei, 5, 8: They put themselves under the care and protection of the powerful, make themselves the surrendered captives of the rich and so pass under their jurisdiction.; C.Th. 12, 1, 146 of A.D. 395: "We have noted that many hide under the shadow of the powerful to defraud their country of the payments due;" and, in general, C.Th. 11, 24; St. August. Civ. Dei, II, 10 (translated by M. Dods, Chap. 20 http://www.ccel.org/ccel/schaff/npnf102.iv.html "Let the poor court the rich for a living, and that under their protection they may enjoy a sluggish tranquillity; and let the rich abuse the poor as their dependants, to minister to their pride."; Salv. De gubern. V, 10.

In the next constitution, CTh. 11, 3, 2 from 327 A.D.,[81] Constantine called the attention of the purchaser of a slave or a land to make investigation about unpaid taxes before purchasing. The constitution also informs about the pacts on retention of tax payment. These pacts had to be annulled and, by the purchase, the burden of tax payment would pass to the buyer as the new owner and possessor.[82]

The problem of tax evasion was not resolved even by the registration of owners as tax-payers.[83] There were ways to damage the treasury. From the constitution CTh. 11, 4, 1 of Valentinian, Valens and Gratian from 372 A.D., under the title "Ne collatio per logografos celebretur" (No tax payment shall be made through tax accountants), one can learn about two practised ways of corruption. The first was when the taxpayer entrusted his taxable land to a tax accountant (*collator iugationem suam logografo conmiserit).* In this case, the sanction was that it would be vindicated to the *fiscus* (*eam fisco noverit vindicandam*). The second was when the tax-payer, in order to escape the taxes, gave to the tax accountants some payment in money, products or gold („Quidquid etiam vel in pretiis vel in speciebus aut aurum ordinem delegationis oblitus praetermissis susceptoribus aut horreis ad logografos detulerit."). According to the law, in this case, the tax-payer will lose the thing he has given and he must fulfil his obligation to the fisc. The punishment of the officials was the restitution of a double value of those which they have taken and they remained in ignoble status, which means that they would not be liberated from the investigation under torture („Officiales autem, qui ex huiusmodi commerciis aliquid fuerint accepisse detecti, quae avaritia praecipitante captarant exerta dupli animadversione redhibebunt, ipsis dumtaxat logografis in pristinae condicionis discrimine permansuris, si quidem his pro omnibus poenis sufficiat adsiduo tormentorum periculo subiacere.").[84]

81 CTh. 11, 3, 2: „Idem a. Acacio comiti Macedoniae. Mancipia adscripta censibus intra provinciae terminos distrahantur et qui emptione dominium nancti fuerint, inspiciendum sibi esse cognoscant. Id quod in possessione quoque servari rationis est: sublatis pactionibus eorundem onera ac pensitationes publicae ad eorum sollicitudinem spectent, ad quorum dominium possessiones eaedem migraverunt. Dat. III kal. mart. Thessalonicae Constantio et Maximo conss." (327 febr. 27).

82 The rule was repeated later, CTh.11.3.3 [=Brev.11.2.1]: „Imp. Iulianus a. ad Secundum pf. p. Omnes pro his agris, quos possident, publicas pensitationes agnoscant; nec pactionibus contrariis adiuventur, si venditor aut donator apud se collationis sarcinam pactione illicita voluerit retinere, et si necdum translata sit professio censualis, sed apud priorem fundi dominum forte permaneat, dissimulantibus ipsis, ut non possidentes pro possidentibus exigantur. Dat. XIV. kal. mart. Antiochiae, Iuliano a. IV. et Sallustio coss. (363). Interpretatio: Fundum nullus audeat comparare, sed omnes pro his agris, qui ad eos quoquo modo pervenerint, publici canonis impleant functiones. Nec de solutione tributi cuicumque liberum sit pacisci, sed sive donetur ager sive vendatur, factus dominus integra rei tributa suscipiat." Also: CTh.11.3.4 (363); CTh.11.3.5 [=brev.11.2.2] (391).

83 Salvian (5th Century) testifies about the problem that the new owners were not registered as tax-payers. Salv. De Gub. Dei, 5, 8.

84 CTh.11.4.1 „Imppp. Valentinianus, Valens et Gratianus aaa. ad Modestum praefectum praetorio. Si quis collator iugationem suam logografo conmiserit, eam fisco noverit vindicandam.

8. Conclusion

Salvianus in the 5th century wrote (Salv. De Gub. Dei, 5, 8): "What an intolerable and monstrous thing it is, one that human hearts can hardly endure, that one can hardly bear to hear spoken of that many of the wretched poor, despoiled of their tiny holdings, after they have completely lost their property, must still pay taxes for what they have lost! Though possession has been forfeited, they are without property but are overwhelmed with taxes…"

Taxes were the principle income of the Empire in the post-classical period. Salvianus witnessed that even in the 5th century the adequate registration of tax-payers for tax payment purposes was not solved. After the Diocletian's tax reform, Constantine had a task to apply the reform in practice. In order to realize the fiscal policy of the Empire, Constantine extended the measures that were already in place in certain provinces onto the entire territory of the Empire, and introduced new measures to deal with concrete problems that emerged in practice.

In my opinion, the prohibition of *lex commissoria* was one of the measures that were supposed to provide for efficient tax collection; however, it was not successful.

Having in mind the first version of the text in *Codex Theodosianus* (CTh. 3, 2, 1), which was the closest to the original (even though it cannot be considered authentic due to the cutting of the text by the compilers), it cannot be stated that the contracting of *lex commissoria* was forbidden in case of a pledge. The constitution talks about the fact that the creditor cannot take away the things of the debtor based on some kind of contract (*tali contracu*) and, at the same time, points out the abuse of *lex commissoria* (*commissoriae legis crescit asperitas*). It is only known that the constitution talks about the debtor, from whom the creditor – relying on the contract (evidence of debt) – takes away the things because of the unpaid debt.

Taking a look at the sources form the time when this constitution emerged, the use of *lex commissoria* was allowed for the benefit of the imperial treasury in case the long-term lessee did not pay its debt (tax) in time. The sources show that the debt (tax) collectors used this law in order to make impossible for the debtor to pay his debt, and thereby take possession over the land.

On the other hand, at the time of Constantine, there was a practice, according to which, if the tax-payer did not pay its tax in time, the tax collectors had a

Quidquid etiam vel in pretiis vel in speciebus aut aurum ordinem delegationis oblitus praetermissis susceptoribus aut horreis ad logografos detulerit, omne hoc amissurum se esse cognoscat et exactionem a se debito ordine deposcendam. Officiales autem, qui ex huiusmodi commerciis aliquid fuerint accepisse detecti, quae avaritia praecipitante captarant exerta dupli animadversione redhibebunt, ipsis dumtaxat logografis in pristinae condicionis discrimine permansuris, si quidem his pro omnibus poenis sufficiat adsiduo tormentorum periculo subiacere. Dat. prid. non. april. Seleucia Modesto et Arintheo conss." (372 Apr. 4).

right to seize the debtor's goods in the value of the unpaid tax (*pignoris capio*). The sources confirm that such public debt has been very often transferred into a private benefit of tax collectors (private evidence of debt).

These were the ways to convert public debt into private and, based on such documents (which did not have to be documents on the pledge), to take away the goods of the debtors for the unpaid debt.

Based on the sources, it can be concluded that the practice of transferring the public debt into a private evidence of debt was based on a fraud of private individuals and it also defrauded the interests of the Empire in tax collection.

Therefore, in Constantine's times and afterwards, the main problem regarding *lex commissoria* was that if the creditors took over the debtors' lands or other things on account of the debt (it did not have to be guaranteed by pledge contract) the debtors could not satisfy their obligations to the *fiscus*. Deprived from their property, they became coloni of the latifundists, who intended to evade the taxes by privileges or by power, even military. This problem was constant in the Late Roman Empire, mainly in its western part. On this problem, a good illustration is given by the Novell of Theodosius II and Valentinianus III from 441. A. D.:

Nov. Val. 10, 1: „Justice must be preserved both publicly and privately in all matters and transactions, and We must adhere to it especially in those measures that sustain the sinews of the public revenues, since such measures come to the aid of the attenuated resourches of Our loyal taxpayers with useful equity. Very many persons reject this idea, since they serve only their domestic profits and deprive the common good wherein is contained their true and substantial welfare, although such welfare clearly comes better to each person when it profits all persons, especially since this necessity for tribute so demands, and without such tribute nothing can be provided in peace or in war. Nor can the continuity of such taxpayments remain any further if there should be imposed upon a few exhausted persons the burden which the more powerful man declines, which the richer man refuses, and which, since the stronger reject it, only the weaker man assumes."[85]

85 *Nov. Val.* 10, 1: „Cum publice privatimque in omnibus rebus ac negotiis iustitiam conservari oportet tum paecipue in his tenenda est, quae vectigalium nervos sustinent, quoniam adtenuatis devotorum viribus utili aequitate succurrunt. Quod plurimi respuunt, qui vera ac solida utilitas continetur melius plane ad singulos perveniens, cum profecerit universis, maxime exigente hac tributorum necessitate, sine quibus nihil in pace aut bello curari potest. Neque ultra valebit perpetuitas eorum manere paucis atque defessis inposita sarcina, quam potior detrectat, locupletior recusat et validiore reiciente solus agnoscit infirmior." Also: *Nov. Val.* 4, 1 (440): „Usu rerum frequenter agnovimus specialibus beneficiis generalem devotionem gravari recidente in reliquos tributorum sarcina, quae singulis quibusque subducitur..."

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