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The Possibility and Significance of Legal Guarantees in the Case of Construction Contracts

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Abstract. This paper gives a deeper insight into the possible contract guarantees and safeguards from the aspect of the interests and positions of both the contractor and the customer appearing in the opposite poles of the construction contract.
The customers appear to be stronger, thus – even with the lack of legal guarantees – they are able to force guarantees mitigating the risks in the contract. Apart from the guarantees listed in the Civil Code, the customers also contributed to the practical spread of the so-called performance bonds. Performance bonds are a part of the agreed contractual fee withheld for the period of warranty after performance or for a period specified in the contract, with the intention of covering the expenses resulting from imperfections and flaws. The paper deals with a range of issues related to the question of the practical use of performance bonds.
The contractors, on the other hand, are more vulnerable: for this reason, they have been provided with the protection of statutory lien by the legislator to the extent of the contractual fee. The legal examples regarding the practical application of statutory lien are also presented in detail.

Keywords: construction contract, statutory lien, contractual fee, withholding contractual fee, warranty, contract guarantees, liquidation

1. Introduction

Within the framework of the construction contract, a contractor has two major obligations: performing design work by which the design documentation is completed and handing the resulting design documentation over to the customer.[1] The customer's main obligation is to accept delivery and pay the contracted fees. The design activities in the areas listed above are not only under the provisions of the Civil Code, the regulations are included in Act LXXVIII of 1997 on the Formation and Protection of the Built Environment, Government Decree No 191/2009 (IX. 15) on the building construction activities.

1 Civil Code, Section 6:252.

The two parties of the construction contract, the liabilities of the customer and the contractor are similar to a magnet, they have opposite poles, thus attracting each other: the responsibility of the contractor is performing and transferring the work to the customer, while the customer's right is to demand the work specified in the contract with the responsibility of paying the contractual fee at the same time. Because of the opposite poles, it is in the customer's interest that the contractor perform in time, in accordance with the terms of the contract as well as the legal regulations, that is, the performance must be without any defects, thus lowering the chance and the disadvantages of a possible breach of contract. The construction contractor's interest is to receive the contractual fee from the customer, together with the fees of other possibly occurring works (additional work, extra work, technically necessary work).

Guarantees Aimed at Protecting Customers

Based on the Civil Code, the above-mentioned interests of the customer can be safeguarded by the guarantees determined in the general provisions of contracts, which can be either imposing stipulated payments for non-performance or enforcing such collateral agreements as suretyship,[2] and guarantee contracts.[3] The Civil Code, however, does not provide specific legal guarantees to the customer. Given that, according to the provisions of Government Decree No 191/2009, the general contractor is allowed to take a subcontractor, and thus not only the actual builder is considered to be a customer hereafter but also the general contractor entering a contractual relationship with the subcontractor since in this respect the general contractor actually becomes the subcontractor's customer.

Of the guarantees listed above, the guarantee contract is the only one that is capable of compensating for one of the most significant risks of construction contracts after the technical handover and the payment of the contractual fee, namely for the expenses resulting from imperfections and faults occurring within the warranty or guarantee period. The imperfections and faults of the buildings and structures usually come to surface mostly during their use and are revealed over time even after several years: the lack of roof insulation and roofing failures, minimal water retention due to water insulation faults, the installation of inappropriate materials, sinking of foundation, the appearance of wall cracks or the spread of mould due

2 Section 6:416 [Contracts of suretyship]
(1) Under a contract of suretyship, the surety undertakes the obligation of performance to the creditor in the event of non-performance by the principal debtor.

3 Section 6:431 [Guarantee contracts]
(1) The guarantee contract, and the statement of guarantee, means a guarantor's commitment under which payment is to be made to the creditor subject to the conditions laid down in the statement.

to thermal bridges. Depending on the volume of the building, the correction of imperfections could mount up to millions, not to mention the damage claims that may arise. On the other hand, the financial risk lies in the possibility that during the time after the handover, the financial conditions of the construction contractor in breach of contract may deteriorate, resulting in becoming insolvent, being terminated without a successor or, in the worst case, even being liquidated. For all these reasons, the customer may be left with the costs and damages all alone. In Hungary, the number of both involuntary and voluntary liquidation procedures is one of the highest in the construction sector.

Because of the high fee paid to the guarantor (which is usually a credit institution), maintaining the guarantee contract for years can be a serious burden on the construction contractor, but it can also happen that the construction contractor does not have the financial condition needed for providing guarantee. As a consequence, another solution has reached maturity in the Hungarian practice, which is mentioned as 'performance bond' in most cases. In fact, it is the retention of a certain part of the contractual fee determined by the contract for a specified amount of time.

Depending on the total amount of the contractual fee, the rate of the so-called 'performance bond' is usually between 5% and 10% (the higher the contractual fee, the lower the retention percentage), which is not paid to the contractor upon fulfilment by the customer, but it is retained from the overall contractual fee. The duration of retention ranges between 1 and 3 years in practice in the event that the construction contractor does not fulfil his obligations resulting from the warranty or guarantee contract during the retention period. In this case, the customer can cover the costs of the revealed imperfections and faults by using the retained amount.[4]

4 *Section 6:159*
[Warranty rights]
(1) On the basis of a contract in which the parties owe mutual services to one another, the obligor shall be liable to provide warranty for lack of conformity.
Section 6:163
[Expiry of a right to warranty]
(1) The obligee's right to warranty shall lapse after one year from the delivery date.
Section 6:171
[Commercial guarantee]
(1) Any person who guarantees performance of a contract or is required by law to provide guarantee shall assume liability for lack of conformity during the guarantee period under the conditions set out in the guarantee statement or in the relevant legislation. The guarantor shall be released from liability if he is able to prove that the cause of the defect occurred after performance.
In Hungary, for housing construction, there is a mandatory guarantee provided by law, which was regulated by a separate Government Decree No 181/2003 (XI. 5).
The regulation extends the guarantee to the building structures of a newly built dwelling and residential building, the construction and installation of housing and building equipment, and the areas and parts of residential buildings serving the dwellings.

At the same time, in spite of the amount withheld, the customer's warranty and guarantee claims can be validated, the construction contractor is obliged to cover the incurring expenses and perform the necessary work, and therefore it is not the customer's obligation to cover the incurring costs by using the retained amount. The unused part (or the whole) of the retained amount must be paid to the construction contractor by the customer after the end of the retention period specified in the contract.

The practice described above was also adopted and implemented in Act CVIII of 2011 on Public Procurement, allowing to withhold a certain part of the contractual fee for guarantee purposes. The reasons behind it have already been mentioned and their significance is even higher in the practice of public procurements as the largest investments are mainly financed by public money, the selection of construction contractors takes place in the process of public procurement, because of the magnitude, here is the highest risk of non-compliance with warranty obligations, and, finally, this is the least expensive option for the contractor in contrast to other types of guarantee.

Under Article 126 (1), the contracting authority is entitled to stipulate contractual guarantee with the successful tenderer. In paragraphs (2) and (3), the rate of the stipulated guarantee is also determined; according to paragraph (3), the amount of the retention for guarantee and warranty claims related to defective performance may not exceed five percent of the amount of the contract, the net of VAT.

Paragraph (7) deals with the issue of the 'performance bond': as regards the guarantee for the validation of warranty and guarantee claims, the contracting authority (the customer) may allow in the contract to assure the guarantee or a set part thereof through deduction from the amount of consideration due to the tenderer (construction contractor) for the (partial) performance instead of crediting it to the contracting authority's account.

Based on the Act on Public Procurement, the partial withholding of the contractual fee is for securing guarantee and warranty claim; its maximum rate cannot exceed 5 percent of the contractual fee exclusive of VAT. This legal regulation necessarily determines the actual practice, which means that the determined withholding rate is taken into consideration even in the case of design contracts outside the range of public procurement. It has to be noted that there has not been any legal dispute published before where the subject of the case was the amount withheld from the contractual fee.

Beyond the mandatory guarantee, the contractor is entitled to assume voluntarily guarantee in the contract. Under the terms of the guarantee statement, the contractor is required to take responsibility for any defects. The guarantee is stricter than the warranty to the extent that the burden of proof lies with the person liable, it is exempted from the guarantee if s/he proves that the defect occurred after the performance. The guarantee claim can be enforced within the warranty period. The guarantee period laid down in the Decree ranges from 3 to 10 years.

Judicial Judgements on 'Performance Bonds'

The 'performance bond,' which is withholding a part of the contractual fee specified in the related clause of the contractual agreement, raises some problems in judicial practice when the construction contractor goes under liquidation. In this case, the liquidators launch a lawsuit on behalf of the debtor in order to obtain the withheld amount of the contractual fee, claiming that the withheld part qualifies as collateral regulated in the Civil Code, the claimants can satisfy their claim within three months after the commencement of the liquidation proceedings, and then the collateral has to be given to and the accounts have to be settled with the liquidator.[5]

The courts have therefore had to make a decision primarily on the issue whether the part of the contractual fee retained by the customer as a safeguard stipulated in the contract for performing the contractor's guarantee and warranty obligations qualifies as a collateral or not.

Based on the same state of affairs, conflicting court rulings were born: one of the appellate courts found that the clause on 'performance bond' in the contract did not qualify as collateral,[6] while another court of appeal was of the view in its verdict that the stipulation in the construction contract complied with the rules regarding the content of a collateral, so the retained amount of the contractual fee has to be given to the liquidator after three months if the customer does not have any guarantee or warranty claims to be satisfied from the retained amount.[7]

The Civil Code coming into force in the meantime rearranged the rules of the collateral security; they were integrated into the regulations on liens, mortgages, and other pledges according to which collateral security may be arranged on money and securities in the form of possessory lien.[8] In order to establish a possessory lien, a pledge agreement is needed together with transferring the possession of the pledged property to the lien holder.[9] The pledge agreement

5 Act XLIX of 1991 on Bankruptcy Proceedings and Liquidation Proceedings.
Section 38
(5) If the debtor provides financial collateral under a financial collateral arrangement to secure a claim before the time of the opening of liquidation proceedings, the collateral taker shall be able to realize this financial collateral directly, irrespective of whether liquidation is opened or not, and shall refund any excess collateral to and settle accounts with the liquidator. If the collateral taker fails to exercise his right to direct satisfaction within three months following the publication of the opening of liquidation, he may seek satisfaction as lien holder in accordance with the regulations set out in Section 49/D.

6 Judgement by the Court of Appeal of Győr (2008).

7 Judgement by the Court of Appeal of Szeged (2009).

8 Section 5:95
[Arrangement of collateral security]
(1) Collateral security may be arranged:
a) on money and securities in the form of possessory lien;

9 Section 5:88

becomes effective when the pledged property and the secured claim are properly defined,[10] referring to the amount of the claim as well.[11]

In our point of view, the withheld amount of a contractual fee does not meet the legal criteria for being qualified as collateral security.

First of all, the parties' will is clearly not directed at establishing collateral security because they are aware of its legal aspects of bankruptcy with regard to which the withheld amount would not fulfil the purpose of which it is actually stipulated. As it was stated above, the imperfections and faults of the buildings and structures usually come to surface over time, mostly after the fulfilment of the construction contract; so, it may happen that, when the liquidation proceedings are initiated against the contractor, there are not any guarantee or warranty claims against faulty performance. They only occur much later, when the customer is unable to take part in the liquidation proceedings as a creditor (as a claimant), or when the contractor is terminated without a legal successor. The collateral security would mean a safeguard for guarantee or warranty claims arising before the liquidation proceedings or within the first three months of its duration, although its probability is very low.

Secondly, in terms of the withheld amount, no transfer of property takes place, the contractor does not give a certain part of the actually paid contractual fee back to the customer but an amount which was not and is not in his possession; in fact, it can also happen that the amount is not even in the customer's possession at the time of signing the contract. Its best example is when the contractor pays a certain part of the contractual fee to its subcontractor as a subcontractual fee, from which the contractor will also withhold a defined part as a 'performance bond'. So, the contractor (as a customer in this relation) will possess the withheld part of the amount after receiving the contractual fee from the original customer.

Thirdly, it can be stipulated only in the contract which claims that the customer should be safeguarded by retaining a certain part of the contractual fee, but neither the amount nor its expected rate can be determined in advance since it is uncertain whether, and if so, what kind of guarantee or warranty claims will arise in the future.

[Establishment of a lien]
A lien shall be considered established upon entering into a pledge agreement, and in that context it is necessary:
b) to transfer the possession of the pledged property to the lien holder (possessory lien).

10 *Section 5:89*
(3) The pledge agreement shall be considered effective if the pledged property and the secured claim are defined properly.

11 *Section 5:89*
(5) A claim secured by a pledge shall be determined in a way by which it may be identified, with an indication of the – one or more – underlying relationship and showing the amount, or in any other way suitable for the identification of the secured claim. The description may also pertain to certain claims which do not yet exist.

It should be noted that the challenges of economic life and the responses of the relevant judicial practice develop existing legal practice, which sometimes leads to ingenious solutions. Probably, partly due to the court rulings cited above, an improved version of the stipulation on 'performance bond' has appeared in construction contracts, according to which the withheld part of the contractual fee as a safeguard for guarantee and warranty claims for an unspecified period will permanently be in the possession of the customer if bankruptcy, liquidation, or other proceedings aimed at terminating the company without a legal successor are initiated against the contractor during the period of retention. A court ruling has already been published on this legal matter. The plaintiff of the lawsuit was a liquidator who sought the release of the withheld part of the contractual fee as a collateral from the customer, the defendant, also claiming that the content of the contractual stipulation was contrary to good morals. Both the appeal court and the Curia (the Supreme Court of Hungary) concluded that, under the stipulation of the contract, at the start of the liquidation proceedings, the withheld amount as a redemption for the warranty and guarantee obligations finally became the property of the customer, so it cannot be claimed as a collateral.[12] The courts did not find the reference to the conflict of good morals established either, as the Civil Code does not rule out the possibility of redeeming the obligations originating from faulty or defective performance by the contractor in this way. The defendant (the customer) did not gain any unilateral benefit from the contract because obtaining the withheld part of the contractual fee meant that the contractor's obligations caused by defective or faulty performance also ceased at the same time.

The Legal Guarantees of the Contractual Fee

Since the contractor is in a more vulnerable position than the customer because of the constant competition among businesses, the contractor is rarely able to 'squeeze' the guarantee of paying the contractual fee; therefore, the situation had to be resolved by the legislator. For this reason, a *pledge*, or to be more precise, a *statutory lien* is provided for the contractor by the Civil Code.

The failure of paying contractual fees can be traced back to a number of reasons in the case of construction contracts: it may happen that the customer does not intend to pay at the time of signing the contract or runs out of money during the investment. It may also happen that the customer continually comes up with suggestions for construction changes, demands additional work,[13] but

12 The Curia of Hungary Pfv. V. 20.973/2013.

13 It is governed by paragraph (2) of Section 6:244 of the Civil Code: The contractor shall perform works ordered subsequently, prompted, in particular, by changes in the plans or designs, if carrying out such works is unlikely to impose unreasonable burden upon the contractor (extra work).

unforeseeable and technically necessary work[14] may also arise that is not covered by the contractual fee previously stipulated in the contract, and there is not enough money for covering the additional expenses of the construction. It also happens quite frequently that the main contractors (the contractors directly employed by the customer) during the tendering procedures calculate lower expenses than the actual cost of construction in order to win the bid; thus, the low contractual fee is enough to cover the expenses of the main contractor but is not enough to cover the subcontractors' fee. Partly thanks to the economic crisis, the non-payment of contractual fees, especially that of subcontractual fees, has become widespread in Hungarian construction sector for the last 10 years, so much that this issue has been dealt with at a governmental level.

The practice reflected the fact that in the case of construction contracts the legal statutory lien guaranteeing the contractor's fee claim was not satisfactory. As a solution to this, in 2007, the Civil Code was amended and *legal mortgage* was added to the rules of the construction contract as a subtype of supply contracts, guaranteeing the contractor's fee claim. According to the amendment, in the case of a construction contract, the contractor was entitled to legal mortgage up to the amount of the fee claim on the property owned by the customer where works settled in the contract had to be performed. It was established by the fact of signing the contract and the contractor's request to have an entry in the Land Register.[15]

According to the explanation attached to the amendment, 'the establishment of legal mortgage is made possible for the contractor of the construction contract so as to allow the law to provide a really effective method for satisfying the contractor's claims under the contract'. Until then, the rules of the Civil Code provided legal mortgage only in the case of personal property, which did not give sufficient coverage for the fee claim of a contractor performing works of significant value. The explanation also noted that it was justified to formulate legal mortgage as a mandatory provision so that it could not be ruled out in the contract, which would be contrary to the purpose of making this rule and it would be dependent on the power relations between the contracting parties.

Shortly after the amendment entered into force, a constitutional complaint was submitted against it. The petitioner claimed that the provision amended in the Civil Code violated the right to property because it restricted its content. According to the petitioner, the restriction of rights manifested in not stating it necessary to get the property owner's consent in order to establish legal mortgage as a burden on the property.

14 Additional or technically necessary work is included indirectly in paragraph (1) of Section 6:245 in the Civil Code: the customer shall reimburse the contractor's expenses incurred in connection with carrying out additional works, which could not have been foreseen at the time of conclusion of the contract (technically necessary work).

15 Civil Code, Section 402, paragraph (2).

The Constitutional Court, therefore, examined this legal institution to determine whether it might result in an unconstitutional restriction on the right to property. The Constitutional Court, referring to some of its previous decisions, concluded that the legal requirements of mortgage with a security purpose as a type of restriction on property ownership did not violate the right to property in itself. It also referred to the fact that a similar legal institution is known by the German Civil Code (Bürgerliches Gesetzbuch – BGB § 648) and the French Civil Code (Art. 2103, 4°) as well. These two examples are somewhat better since the legislators developed more detailed rules (mortgage can be registered only on the value of actually performed work, which is also confirmed by an expert).

The Constitutional Court also examined whether the restriction of the new legal solution on the right to property could be considered as of public interest and proportionate.

After investigating the aspect of public interest, the Constitutional Court concluded that the restriction directly served the individual interests of certain contractors, but it also resulted in increasing the willingness of customers to pay for the services settled in the contract and the elimination of circular debt among businesses,[16] eventually serving the overall interests of the national economy. In this regard, the restriction on ownership was justified by the purpose of public interest.

However, the restriction on property ownership for public interest is only constitutional if the importance of the desired goal and the violation of a constitutional right in order to achieve that goal are in proportion with each other. According to the Constitutional Court, the new legal provision does not contain any restrictive conditions either in the nature of constructions or in respect of their value. As a result, the balance is broken down between the parties, putting some contractors (performing less significant work compared to the value of the property) into a highly advantageous position. Based on the text of the Act, it seems as if every contractor, as opposed to every customer, was the weaker

16 In the case of complex construction works, for the sake of easier demand enforceability, and in order to avoid the burdensome task of organizing work, or, in the case of public procurement, due to the prohibition of subdivision of work, the customer does not make individual construction contracts for specified parts of jobs but makes a contract with one contractor (general contractor), who takes this burden from the customer by choosing the appropriate subcontractors for a given work, entering into contracts with them, co-ordinating and supervising their activities, and, last but not least, taking responsibility for all of them toward the customer. As a consequence, so-called contractor chains may develop, meaning that the general or main contractor makes contracts with other subcontractors for a specified part of work, who make further works contracts with other subcontractors for performing less important skilled jobs. Thus, a series of contractor chains is created, which forms the basis of the so-called circular debt or when the customer does not pay the main contractor, which is why the main contractor is not able to pay the subcontractors, or the customer pays the contractual fee but the payment gets stuck somewhere in the chain, sometimes right at the main contractor. This process goes hand in hand with the destruction of subcontractors, the termination of businesses accompanied by rising unemployment, unfortunately even occurring in the volume of billions.

party in every case, therefore requiring stronger guarantees and protection. By registering legal mortgage on a property of high value, the contractor might obtain a disproportionate collateral in the contract against the customer even for a small-scale work (e.g. minor home improvement, cable works). Thus, even properties of high value can be sold up because of a relatively low-value legal mortgage. The law does not take into consideration the possible causes of non-payment by the customer: they can be legitimate reasons or serious breaches of contract.

Using these arguments, the Constitutional Court found that the lack of differentiation led to a disproportionate restriction on the right to property, hence the amendment was annulled.

The new Civil Code did not smuggle back the institution of legal mortgage as a guarantee for the contractor, but it still maintains the *statutory lien* as guarantee for the contractor in the general rules of construction contracts.

According to Section 6:246 of the Civil Code*, the contractor shall be entitled to statutory lien up to the contract price and expenses on the property of which the customer gains possession in consequence of the works contract.*

It might be the case that some of the customer's assets get into the possession of the contractor such as things to be repaired or material provided for construction. This makes it possible for the contractor to obtain collateral security in the event of not paying the contractor's fee, in the form of legal mortgage to the extent of the fee claim. *The statutory lien covers only those assets that are originally owned by the customer and are possessed by the contractor as a result of the works contract.*

The statutory lien applies only to the assets being in the possession of the contractor and it cannot extend to those assets that are already returned to the customer, they cannot be reclaimed.

In the same way, it does not apply to assets that are built into the property of the customer (e.g. built-in kitchen appliances bought by the customer that are built into the kitchen with a suitable furniture). On the one hand, this is because they are no longer in the contractor's possession, while, on the other hand, those assets became a constituent part of the main thing.

The statutory lien does not apply to buildings, only legal mortgage can be established on them with the condition of an entry into the Land Register; the possession of a building does not constitute a right to establish legal mortgage on it.

In the Hungarian judicial practice, the contractor's statutory lien on the assets getting into his possession as a result of the works contract also exists (e.g. a suit left at the dry-cleaner's, a pair of shoes left at the shoemaker's, or a car repaired by the mechanic, etc.) if their value exceeds the amount of the contractual fee.

The statutory lien does not extend only to the things determined in the contract but also to the tools, equipment, and materials provided by the customer.

It also has to be mentioned that the statutory lien on the assets getting into the possession of the contractor as a result of a specific contract does not apply

in connection with a different legal status or in the case of another contract (e.g. deposit or a different works contract).

Conclusions

It can be seen that both parties in the construction contract are exposed to the risks of non-contractual performance. The position of the customers – in the absence of competition – is better; the more preferable it is, the larger orders or jobs they can offer. Thus, if necessary, the customers can force to include such collateral securities into the contract, which reduces their risk. At the same time, the contractors are more vulnerable, on the one hand – there is a fierce competition and the lack of resources are quite frequent –, while, on the other hand, the contractor advances the work or even the material from which the performance of the contract is materialized. Non-payment of the contractual fee might lead to a total shift in the balance of the contract as well. For this reason, the legislator intervened and secured statutory lien for the contractor to the extent of the contractual fee. Seeing that the phenomenon of circular debt – in spite of all attempts – continues to exist with regard to construction contracts, it is regrettable that the legislator has not made an attempt to codify the institution of legal mortgage, securing the contractual fee again in a more thoughtful and more detailed way.

Finally, it has to be noted that the already referred German Civil Code, exceeding the guarantee of legal mortgage, provides the opportunity for the contractor to ask additional guarantees from the customer for the sake of paying the contractual fee, as a result of an amendment, for example, in the form of surety (BGB § 648A).

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Models of Constitutional Courts?

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Abstract. In international comparison, two basic constitutional models are known. In one of the models, the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately overrule the statute in concern. The decentralized constitutional courts deal with the tasks of the traditional jurisdictional litigation, investigation of international treaties, the dignitaries' special impeachment, or the election of arbitration. But most important is to emphasize the institution of the scope of the review of the legal norms. In my view, the conceptual basis for the decentralized constitutional courts is the possibility of ex-post constitutional review. It is clear from the above discussed that the most practical solution for a centralized model is where the Constitutional Court has the right to constitutionally overrule the decisions of ordinary courts. Perhaps some may complement the constitutional complaint with the Ombudsman's basic right to investigation into insulting activities of individual acts. The institution of the Ombudsman was established early, at the dusk of the communist regime by the Hungarian legislator; however, for some political reasons, it had to wait until the mid-90s for the first parliamentary commissioners to be elected. As the Constitution entered into force on January 1, 2012, it changed the Ombudsman system of Hungary, which by then had become monocratic, "one-headed" instead of the earlier model based on four coequal ombudsmen.

Keywords: Hungarian public administration, ombudsman system, constitutional court, constitution, models of constitutional courts

So, what is the Constitutional Court? We could raise the question that is obvious for many. Generally speaking, we could respond that it is a norm-controlling board, which looks at legal norms and state legislation on constitutional grounds.

In international comparison, two basic constitutional models are known. In one of the models, the traditional courts – headed by the Supreme Court of the State – compare the individual legal norms with the standards of the constitution, and ultimately overrule the statute in concern. So, in this scheme, practically all courts implement constitutional judicature, but due to appeals and legal

remedies the Supreme Court of the country is the authentic and principal body of the interpretation of the Constitution. Therefore, constitutional judicature is said to be decentralized in countries of the above range.

The other model is where an individual body is set up to review legal acts, statutes in the light of the constitution. (Only in the latter it is possible literally, and in the classical sense, to speak about constitutional court.) Obviously, besides this, there could be other scopes of authority of the bodies mentioned above.[1]

Classically, there is no separate constitutional court in the *UK*, *US*, *Australia*, *Canada*, *Denmark*, *Norway*, *Sweden*, or *Japan.* Article 120 of the Dutch Constitution is a peculiarity: the courts – so that there is no separate constitutional court – do not rule on the constitutionality of a law!

As far as *Switzerland* is concerned, we might say that it incorporates a particular mix of the classical European and American models. Each court has the right – except the federal level – to examine the constitutionality of the laws. The Federal Court has the power to participate in individual constitutional complaints; however, it is authorized to overrule legal regulations on cantonal level.

The *Greek* form of constitutional judiciary is also a curiosity; among members of the Supreme Court of the State and law professors, judges are appointed by drawing lots. The judiciary only has the jurisdiction to control the acts and there is no authority for lower-level legislation such as statutes. Also, it should be pointed out that other courts in their scope of discretion consider the constitutionality of the statutes.

In Hungary, the mandate period of a member of the Constitutional Court is a twelve-year term. Members of the Court cannot be re-elected. This represents a significant change compared to the previous law, under which, besides a nine-year mandate, there was a one-time opportunity for re-election.[2] However, this created a chance – at least in theory – that the members of the constitutional court were trying – at least, towards the end of their mandate, with their "behaviour" and their votes – to promote their re-election. In several states, the mandate ends at the time of retirement (e.g.: Austria, Bosnia and Herzegovina, Turkey, etc.). In Azerbaijan, the first mandate period is a term of fifteen years! A one-time re-election is possible, but the second cycle can last only for 10 years (see Legény op. cit. 235 p.).

1 We focused on the protection of the four freedoms, noting that the characteristics of individual constitutional courts – focal points – can be judged only on the grounds of all their jurisdiction. We may add that not only the constitutional complaint and the normative control are related with fundamental rights, but the same could pertain to international treaties as well as for consideration of the referendums and election issues. If we refer to the name of the specific bodies, apparently as specific property names, they should be entered in uppercase; however, as abstract doctrinal concepts, we specify these bodies as constitutional courts.

2 In some states, term of office lasts until retirement (e.g.: Austria, Bosnia and Herzegovina, Turkey, etc.). In Azerbaijan, for the first period, it is a 15-year mandate! A one-time re-election is possible, but the second period lasts only 10 years. See Legény 2006. 235.

The following categories of people could not opt for the membership of the Constitutional Court: who were members of the government, were senior party officials within four years prior to the date of the election, or held state leadership positions. At least nine, and no more than fifteen, Members of Parliament that form a nomination committee make a proposal for the Members of the Constitutional Court. The committee must provide a seat for each representative of the parliamentary parties.

Another concern is the election of the judges. International practice usually splits the right of election. In many countries, the head of the state also has the option to delegate members. Bicameral parliaments also provide complex opportunities from this point of view.

In France, for example, the President of the Republic, the President of the National Assembly, and the President of the Senate shall appoint 3 members each out of the possible 9.

A third of the 15 members of the Italian Constitutional Court are delegated by the Parliament, another third by the head of the state, and three colleges are authorized through certain collegiums of the Supreme Court, one by the Council of State and the State Audit Office. This model inherently provides that persons with a professional judicial experience can become members of the body.

In Austria, the president, the vice-president, the twelve ordinary members, and three of the six alternates – who are designated by the government – use to be appointed by the President of the Republic. The Federal Council and the National Council recommends a regular 9–9 and 3 or 6 alternates, one third of whom is also appointed by the President of the Republic.

In Slovakia, it is also the President of the Republic who appoints the 10 constitutional judges recommended by the National Council of 20 persons. The particularity of these two latter models is the plural designation system, that is, a few will finally gain the membership, but there will be some disappointed who are considered – would take the mandate – but will not be inaugurated into office. On the one hand, it partly reduces the prestige of candidacy, and, on the other hand, it results in the fact that the most appropriate persons will probably not undertake candidacy.

In Spain, the judges are appointed by the King. Four of them by the lower, another four by the upper house are appointed based on a two-thirds majority, while another four (2–2) are appointed by the designation of the government and the Judicial Supreme Council.

Three members out of the total thirteen of the Portuguese Constitutional Court are already co-opted by the already elected ten individuals. In my view, this particular solution is welcome because the candidates' expertise can be judged more objectively from the inside, while it is also more perceivable what kind of expertise and skills are needed to get a better distribution of cases.

The Belgian model is very specific. Judges are appointed by the King with a two-thirds majority of the Senate, from two different circles of candidates. Members of one of the groups have at least five years of previous mandates in the high positions at the Court of Cassation, at the Council of State, at the Constitutional Court, or they have been at least university teachers for at least five years. The second group, however, is formed of persons who were members of the Senate or the House of Representatives for at least 8 years. That means that in Belgium politics plays a quite important role in the constitutional court. This situation can be regarded as a contrast to the regulations of other countries that try to eliminate politics from the constitutional court.[3] This solution specifically makes the Constitutional Court part of the system of checks and balances.

The Turkish model is highly specific. It is completely the authority of the head of the state to appoint the 11 regular members and the four deputy members. It is the specificity of the model that public institutions / organizations appoint judges. (These are higher courts, the State Council, the Higher Education Board, administrative professionals' organizations, and bar associations.)[4]

We could consider as a discrepancy from the classic "binary code" the solution that is applied in Bosnia and Herzegovina and that prevents us from the inevitable comparison of the duality of government and opposition. The President of the European Court of Human Rights appoints 3 of the 9 members of the Constitutional Court. A further exception is that these members cannot be citizens of either the given state or of those neighbouring countries.[5]

Costa Rica's constitutional structure is outstandingly interesting. The normative task is implemented by the Sala Courta, an individual plenum of the Constitutional Court. (The two bodies – with a relative autonomy – interlock.) The members are elected by a two-thirds majority in parliament for an eight-year term. Inasmuch as the legislature with a two-thirds decision has not replaced the judges, the mandates will automatically extend. In my opinion, this model provides simultaneous manifestations of independence and control.[6]

In Hungary, judges of the Constitutional Court are elected by the Parliament by a two-thirds majority. The entire origination of the post from the parliament is a substantial nexus between the policy and the body. If one political side has a two-thirds support, then even the most prominent jurists could be stigmatized as "party soldiers". If, however, the proportion of two-thirds is divided among several

3 A specific requirement that Dutch and French language groups give the same number of judges in each group.

4 Legény 2006. 232.

5 Legény 2006. 235. An analogous rule that in Liechtenstein from the six members only the president, the deputy and two other members must be citizens, while the others may be foreigners.

6 Furthermore, in respect of specific constitutional complaints, judges have a great freedom of movement. See Pokol 2003. 39. f.

political powers, the situation is also subject of concern. In general, for the sake of consensus in the commission, both sides mutually agree to the other's candidate, so it can be traced back who recommended the individuals. That is why it would be appropriate to introduce the multi-channel nomination of the members.

The new Constitution and the ACC created the legal ground of the identical nomination method, which is identical with the nomination of members. The parliament elects the chairperson from among the members already in position. Previously, the procedure rules specified the number of member designations, in several rounds and in an absolute-absolute majority system. The chairperson was elected by the members from among themselves (the deputy chairman as well).

The presidential term of office covers the president member's mandate time. That is to say, it could be almost 12 years or even 12 years. (It is not evident whether in the selection process it is a tactical aspect to take into consideration the years of term of office. The current rules, however, foster this.)

Both models have arguments for and against. Members probably know better who is the best and the most prestigious professional under whose leadership they could work best. However, election by members could determine and foster negative factors such as overly patriarchal internal relationships, personal conflicts or co-operations, personal interests may dominate in this model. Mandates attributable to the parliament ensure greater legitimacy for the decision can be traced back indirectly to people's will.

In Lithuania, the judicial power of constitutional court is very much like that of the Hungarian constitutional court. The parliament elects the president, but with the designation of the head of the state. In Germany and Switzerland, it is also the representative body of the people that elects the president, but coming from the inside, after a proposal by the members.[7] (In Germany, by voting in both houses separately and in Switzerland by a joint meeting.) The presidential cycle lasts 2 years in Portugal, 3 in Bulgaria, Spain, and Slovenia, and four years in Croatia. (At the other end of the spectrum is France, where mandate time is nine years.)[8]

It is not accidental that the German Constitutional Court was the role model when creating the Hungarian institution.[9] Its spheres of authority – in international comparison – are quite wide. The land of origin of the real constitutional complaint – recently introduced in our country – is Germany. Furthermore, besides the scopes of powers known in Hungary, we have to emphasize the institution of electoral judging. (It should also be mentioned that constitutional courts operate at member-state level as well!) The body went into operation in 1951. Until 1999,

7 In Argentina, Croatia, Bulgaria, Italy, Portugal, Slovenia, and Turkey, the members elect a chairman from among themselves (Legény 2006. 233.).

8 Legény 2006. 233.

9 In contrast with the Austrian model – as generally regarded the first centralized Constitutional Court –, many see the origin of the institution in the Paulskirche court, set up according to the Constitution adopted in 1848. See Ádám 1998. 185.

it is estimated to have decided in more than 100,000 cases. 96% of them were individual constitutional complaints![10]

An outstandingly important authority of the German committee – that until the annulled act replaced (by a body with jurisdiction) this plenum – has the right to release provisions regulating temporarily unsettled life situations.[11] This is actually a positive legislation, instead of the traditionally negative legislative competence of constitutional courts.

So, the constitutional complaint is applicable against specific judicial decisions or statutes can be applied as well. The criteria in the former case are exhaustion of other remedies and one month of submission deadline. The latter may be enlisted within one year after the legal norm has become effective.[12] The Federal Constitutional Court with "constitutionally conforming interpretation" may determine the correct meaning of a legal norm on constitutional grounds.[13]

In Poland, the Constitutional Court has jurisdiction over the following matters:

a) constitutionality of laws and international conventions;

b) compatibility of laws with international conventions whose ratification requires the prior approval of an individual law;

c) compatibility of the acts of central state organizations with the Constitution and with ratified international conventions and laws;

d) examination of complaints concerning as defined[14] in paragraph (1) of Article 79.[15]

Decisions of the Constitutional Court on international conventions, laws, and of other normative acts as unconstitutional provide a legal ground for a new trial or for the annihilation of the decision / making another decision against the enforceable judicial provision, legally binding administrative court resolution, or other decision based on the Constitutional Court's resolution, according to principles determined in rules applicable to the procedure in question.[16]

Any court could turn to the Constitutional Court in case of legal issues or in matters of normative acts, ratified international conventions, in issues of the constitutionality of an act, inasmuch as the response affects the decision to the case before the court concerned.[17]

In accordance with the principles laid down in the law, anyone whose constitutional right or freedom was violated is entitled to apply to the

10 Legény 2006. 225.
11 Ádám 1998. 188.
12 Ádám 1998. 188.
13 Ádám 1998. 185.
14 Article 79. Polish Constitution (1): Any court could turn to the Constitutional Court in legal question, or in matter of normative acts, ratified international convention, in issue of constitutionality of an act, inasmuch as the response affects decision to the case before the concerned court.
15 Article 188. Polish Constitution.
16 Article 190. Polish Constitution.
17 Article 190. Polish Constitution.

Constitutional Court and ask for a decision on constitutionality of the very law or another normative act which was referred to by the court or another public organ when it had made a non-appealable decision on the person's constitutionally defined freedoms, rights, or obligations.

The decentralized constitutional courts deal with the tasks of the traditional jurisdictional litigation, investigation of international treaties, the dignitaries' special impeachment, or the election of arbitration. But most important is to emphasize the institution of the scope of the review of the legal norms. In my view, the conceptual basis for the decentralized constitutional courts is the possibility of ex-post constitutional review.

As the greatest problem of the centralized model, we may consider that in the practice of the courts one can observe a special coexistence of the dogmatically consistent branches of law (civil law, criminal law, etc.), on the one hand, and of the abstract view of constitutional law, on the other – while providing greater protection against gaps. The centralized model has the advantage that it separates the interpretation of the law from the specific interpretation of the Constitution. The fact has in its favour that the decisions are deployed to a specific body which is an expert on the subject in the field of constitutional law.

It is clear from the above discussed that the most practical solution for a centralized model is where the Constitutional Court has the right to constitutionally overrule the decisions of ordinary courts. (Perhaps some may complement the constitutional complaint with the Ombudsman's basic right to investigate into insulting activities of individual acts.)

After the collapse of the socialist system in Central Europe – despite the American intellectual influence –, almost all centralized constitutional courts have been established. So, this kind of bodies work in Poland, Hungary, the Czech Republic, Slovakia, Croatia, Slovenia, Serbia, and Romania – an exemplary development of the Baltic States. This may be due to the replacement of radical socialism – with the socialized traditional court personnel already gone, the Constitutional Court had to be built from scratch. Interestingly, Lithuania and Latvia have established decentralized constitutional courts. (Moreover, Lithuania adopted the German model of the classical constitutional claim.) In Estonia, there is no separate body for this purpose. Hungary in 2011: the new Constitution created the new Constitutional Court Act, also containing detailed provisions. In 2012, both entered into force.

Latvia operates under the Constitution, the Constitutional Court, which examines the impact within the scope prescribed by law in cases concerning the constitutionality of the law as well as other matters that are referred to the competence of the law. The Constitutional Court is entitled to laws and other acts declared invalid.[18]

18 See Article 85 of the Constitution.

Judges of the Constitutional Court originate from many bodies, namely the Parliament, the government, and high courts. They were all confirmed by the absolute majority in the Parliament. The mandate is for 10 years and cannot be revoked.[19]

The Board has jurisdiction, inter alia, to examine the constitutionality of laws and international treaties prior and subsequent to the control of norms, pronouncing the lawlessness of the decisions of lower-level administrative establishments and also considering constitutional complaints.[20] (Thus, the introduction of the German model includes individual constitutional complaint and concrete norm control).

The Lithuanian Constitutional Court will decide whether they act in accordance with the laws adopted by the Parliament and the Constitution, and whether the actions of the President of the Republic and those of the Government violate the Constitution and the laws.

In relation to these issues, the Government, or at least one-fifth of the deputies, and the courts may apply to the Constitutional Court.

In Slovakia, the Constitutional Court shall consider the complaints of the natural or legal persons who are approved by the fundamental rights and freedoms if those complaints did not belong to the jurisdiction of another court.

In case of a complaint, the Constitutional Court may award appropriate monetary compensation for the injured party![21]

In Austria, in case a law is repealed or the constitutional court finds an act law unconstitutional, all courts and administrative authorities are bound to the decision of the constitutional court. However, except for the actual case, the abrogated law has to be applied for the cases that have been decided before the decision of the constitutional court.[22]

Czech Republic within the competence of the Constitutional Court:

a) annulment of specific laws and regulations when they conflict with the constitutional order;

b) annulment of legal norms and other specific provisions if they conflict with the constitutional order or the law.

So, the possibility of a constitutional complaint against the decision of the individual is also mentioned.

A law may have more than one interpretation, all of which are acceptable; however, it cannot be regarded as untenable. This in itself does not necessarily mean its nonconformity with the Constitution. (Although, in cases of doubt, situations detrimental to legal certainty, and other issues of the Constitutional Court, annulling the decision may take place.)

19 Chronowski–Drinóczi 2007. 302.
20 Chronowski–Drinóczi 2007.
21 Article 127. Slovak Constitution.
22 Article 140. Austrian Constitution.

It is also possible that the courts use many different interpretations of legislation, but one of them is considered especially defective. In such cases – as a last resort –, the Supreme Court will hopefully ensure a remedy to the injured party during the review process, provided that the conditions are met. This particular "mistake" is not sure, though, that it reaches the level of unconstitutionality, and thus it is not certain that the Constitutional Court's jurisdiction may be exercised.

If a rule can only carry a meaning that cannot be an objective for the legislative branch of a constitutional state, it is likely that the decision of the Constitutional Court will have that annulled. The absurdity of such legislation must be detected by the proceeding courts, and it is important that, parallel to the suspension of the procedure, the proceeding of the Constitutional Court's decision is also initiated.

Why is the expansion of the institution of a constitutional complaint a significant development for Hungary?

This has created a significant vacuum legis because the solicitous (but not unconstitutional) act and its rigid and inflexible interpretation have violated the fundamental rights of the parties in many cases, in which neither the Constitutional Court nor the traditional court system have given them any possibility to a legal remedy. So – as we put it earlier –, there was a sort of a vacuum in a narrow field of legal protection. Of course, this narrowness of the vacuum could not console those citizens who were pauperized because of this vacuum legis.

(Although we are somewhat sceptical about courts with the function of American-style constitutional judging, we must add that even ad absurdum may also be a potentially better solution than the model with the "vacuum," where certain matters are regulated neither by ordinary courts nor by separate control panel conducting the legal norms.)

An act, which is not unconstitutional in itself, could still result in offending the fundamental rights of someone very seriously, even if the interpretation itself is not erroneous. If an insufficiently reasoned legislation is interpreted by the courts in a far too inflexible way, then it is most likely that the rights of the involved ones will be violated. So, this was an instructive case in Hungary at the time of the previous Constitution, even when there was no real possibility of the "real" constitutional complaint. For instance, a testament was invalid because, at the time when the previous Civil Code was in effect, it was compulsory to number both sides of the pages. The computer word processing program automatically does not print the first page number. The heirs tried to use an extensive interpretation, in which case the title on the first page could be regarded as a substitute for the page number. The Supreme Court rejected this interpretation with its rigidly textualist interpretation. They only complied with the words of the law. The law itself is not unconstitutional as the significance of the page numbering guarantees that the pages could not be replaced. Therefore, the Constitutional Court could not give a remedy to the problem. So, overall, the fundamental rights of the heirs were

seriously violated. A real constitutional complaint under the new Constitution would allow the effective protection of fundamental rights in similar cases.

In a number of similar legal cases, the victims of the wrongly chosen exercise of rights ended up on "no man's land".[23] Neither the inflexible textualist courts nor the Constitutional Court, which was tendentially refusing individual cases, was lacking the scope of authority to protect our fundamental rights. Due to such problems, the new system is considered to be a significant step forward, away from this aspect.

The real difficulty is in making decisions in those cases where there are many ways of interpretation and one of them is unconstitutional or where the application of all of them results in an outcome with a single item that would comply with the Constitution.

These latter cases can affect the division of the scope of authority in between the Supreme Court and the Constitutional Court. Insofar as the Constitutional Court establishes its own jurisdiction – even in cases of "regular" illegality on the top of unconstitutionality –, it essentially becomes a "Super Court" and actually rises above any specific case in the country's highest judicial forum. With such a function, it would exceed its originally designated scope of power and it would cause a significant instability in the legal system, practically transforming the entire judiciary system into a five-grade system.

This risk could be overcome through constitutional provisions relating to the complaint, through accurate, casuistic regulation, or a very wise and diplomatic practice of interpretation. Because of the very laconic Hungarian regulation, only the second solution could have been applied.

That is a very strong separation of the "anti-Constitutionality" and illegality, through a thoroughly reasoned and fine-tuned strategic partnership of the Constitutional Court and the Supreme Court through strategic partnerships. This evolution is still the big issue of the future.

In other countries with centuries-old cultures of democratic standards, parallel to the law, other norms, morality can also effectively control the society. Therefore, certain issues are not obliged to be regulated by the law. As a result of the customs evolved during the socialist era, the "moral authority" of the ombudsman is particularly important as it actually lies at the crossroads of law and morality. That is why it is important to highlight that a powerful ombudsman also operates complementing the constitution courts. In my view, the system of fundamental rights protection organization should be examined as a whole – we can draw conclusions about the authentic ways of a complex analysis.

23 In a related law case, the end of the will did not include the location (Budapest) next to the date, but it was included in the text. The court refused the basic legal reasoning and declared it invalid; so, the daughter who alone had taken care of her father did not inherit the property 1/1 (only half), so, what is more, she became indebted to the sister who had ignored their parent for years!

It is particularly important that the first Ombudsman was elected from one of the former socialist countries: Poland!

The organization structure is monocratic and the senior commissioner can have up to three deputies. Their task is determined by the Ombudsman, with the provision that one of them should provide legal protection for the soldiers by all means. The office is extremely significant; at the completion of the manuscript, the number of the staff is around 250.[24]

The commissioner is elected by a simple majority of the Sejm for 5 years. The speciality of it is that there is a committee consisting of 35 members who have the right to nominate the candidate together with the Marshall of the Parliament. The Senate confirms or vetoes within 30 days of the candidature. (The deputies are elected the same way.) The nomination criteria – in my view, it is a commendable fact – for Polish citizenship is outstanding legal knowledge and professional experience. The "moral values and the social sensitivity" of the person are also important factors.[25]

In addition to the classical scope of authority, in controlling the classical forms of law enforcement, administration is also entitled to oversee the activity of the bodies performing quasi-administrative tasks, such as social, professional, and co-operative institutions. The categories considered protected are the freedoms and legal rights of the citizens. Its action cannot be provoked only by a complaint, but even ex officio or at the request of the President of the Sejm.

There is no time limit for the petition.[26] Exhaustion of remedies prior to the petition is not a requisite.

At the request of the body concerned, there must be a response within 30 days.

The Commissioner, in addition to the initiation of the procedures, is also authorized to intervene into ongoing cases. S/he may propose subsequent norm control at the Constitutional Court. The Commissioner may initiate a legally binding interpretation from the Supreme Court. In particular, the control of the courts in general is not subtracted from the scope, but in practice it rather means the possibility of investigation. Naturally, the Commissioner has no voice in judicial activity.

Corresponding to the Hungarian system, the Commissioner should make a report to the Parliament, in addition to both of the houses. This is partly discussed verbally but also in writing published in the report. In addition, the Ombudsman

24 Kucsko-Stadlmayer 2010. 187.

25 Kucsko-Stadlmayer 2010. 188.

26 Although this latter practice corresponds to Anthony Adam's theory, it reveals that the Constitutional Court, in comparison to the standard interpretation of the Basic Law, is necessarily – in addition to the Constitution – the relevant norm (see: Adam Anthony. *Constitution and Constitutional Values*. Osiris, Budapest 1998, p. 73). It should be remembered, however, that they even employed private parties, and thus interpreted laws in their daily lives. The specialties, in my opinion, are the binding interpretations of the court.

shall report regularly on the activities of the media to inform the public about the most important issues.

The Commissioner is also entitled to attend the meetings of the Sejm and to initiate a legislative activity and has the possibility of modifying it also.

The Polish model is overall a very commendable way to guarantee the fundamental rights, especially through the considerable Constitutional Court and the Ombudsman's system.

The institution of the Ombudsman was established early, at the dusk of the communist regime, by the Hungarian legislator; however, for some political reason, it had to wait until the mid-90s for the first parliamentary commissioners to be elected. As the Constitution entered into force on January 1, 2012, it changed the Ombudsman system of Hungary, which by then had become monocratic, "one-headed" instead of the earlier model based on 4 coequal ombudsmen.[27] The institution of the Commissioner of Basic Rights was created, which became the only Ombudsman.[28] The Ombudsman is assisted by two deputies, the Deputy for the Rights of Future Generations and the Deputy for Minority Rights. The position of the Data Protection Supervisor was abolished; his former tasks are now carried out by the National Data Protection and Freedom of Information Authority (Nemzeti Adatvédelmi és Információszabadság Hatóság, NAIH).

The Commissioner of Fundamental Rights is elected by a 2/3 majority of the Parliament for a term of 6 years. The commissioner or their deputy can be persons who have at least 35 years of age, finished legal education, have outstanding theoretical knowledge or at least 10 years of professional practice, and significant experience in the conduction, supervision, and scientific theory of procedures related to basic rights (or, in case of deputies, the appropriate field of law).[29]

The Parliament elects the Deputy for the Rights of Future Generations and the Deputy for Minority Rights by a 2/3 majority of votes on the proposal of the Commissioner of Fundamental Rights. With the exception of establishment and termination of mandate, the employer's rights over the deputy of the Commissioner of Fundamental Rights are exercised by the Commissioner of Fundamental Rights.

The task of the Commissioner of Fundamental Rights is to examine anomalies[30] related to fundamental rights and to take initiatives in order to redress them.

Primarily, the Ombudsman examines administrative authorities and other bodies providing public services. However, s/he cannot examine the operation of the Parliament, the Constitutional Court, the president, the courts, and the State Audit Office.

27 Constitution of Hungary, Art. 30.

28 The legal status of the Commissioner of Fundamental Rights is regulated by the 2011. CXI.

29 See 2011. CXI. 5.§.

30 An anomaly is an inappropriate, abnormal, unpleasant situation, detriment, or its direct threat that is related to constitutional rights.

The Ombudsman is required to examine petitions submitted to him, but can also act ex officio. The premise of his inspection is that he can only investigate procedures that were initiated after October 23, 1989 and only if – in case the procedure was started by a petition – the person submitting the petition has already exhausted the administrative remedies available. Furthermore, if a non-appealable decision was made, he can only turn to the Commissioner of Fundamental Rights within one year of the notification of the decision. From this time on, the Ombudsman has the opportunity to examine the case only if the procedure was initiated ex officio.

Conclusions

In relation to the whole issue, the essay is to be finished with the conclusion hereunder. The classification of the fundamental rights protection models cannot be reduced to two categories. The competence of the proper constitutional complaint reaching even the individual case itself takes the centralized constitutional courts, which were originally regarded as "negative legislators," closer to the ordinary judiciary system. The invalidation procedure by the regular jurisdiction courts (so not the throwing back of them) is also a special feature. The election of the Bodies – even together with the co-operation of the judicial branch – adds a new aspect to it. Overall, it can be stated that it is not always possible to understand the operation of the constitutional court system of certain countries without the thorough analysis of its judicial system.

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Regulation of Bankruptcy Offences in German and Hungarian Law

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Abstract. The purpose of our study is to compare the German and Hungarian regulations relating to insolvency-related offences, including bankruptcy offences, to introduce the relevant German regulations, and to highlight their major differences from Hungarian regulations.
A comparison of the Hungarian and German criminal regulations seems expedient – apart from the fact that the legal systems under review belong to the same law group and represent the same "legal style" –, all the more so because the structures of these criminal regulations are largely identical, so an opportunity presents itself to compare the individual factors of crime. Allowing for codification in Hungary, our study of the German legal system, which is often quoted herein by way of example, becomes particularly timely.

Keywords: criminal law, bankruptcy offences, Germany, Hungary

I. Introduction

Zweigert & Kötz claim that the primary function of the comparison of law is to gain awareness, a method of legal science as such, which presents to the researcher an "array of solutions" in order to give aid in the prevention of social conflicts.[1] As a basic principle of methodology of legal comparison, one should highlight *functionality* as it is fairly straightforward that only those legal solutions are fit for comparison that fulfil the same regulatory task. It is natural that different legal systems satisfy the need for regulation in various manners. As a negative aspect of functionality, one should point out that the basic issue is always assessed under the dogmatic framework of the legal system in question. Concerning

1 Zweigert & Kötz 1996. 13.

the positive aspect of the principality of functionality, we are about to find the answer on what domains of foreign law the research involving the comparison of law should focus on. According to the theory of totality, one should seek to expose a great number of elements of society, economy, and culture given the fact that these are the factors that fundamentally determine the legal system.[2] This recognition is especially appropriate with respect to economic crimes such as acts classified under the scope of bankruptcy.

The differences between the domains of legal history and legal comparison are relativistic as the examination of legal history "mandatorily" relies on comparison, primarily along the time dimension. Additionally, the wide concept of legal comparison evidently contains comparative legal history as well. However, as there is a fundamental difference between the two domains, while the research of legal history relates to the past, the comparison of law addresses the present and the future. Another common point is that both sciences have among their objective aspects involving legal criticism and legal politics, yet legal history can be assigned the title of "vertical legal comparison," while the comparison of modern legal systems can be labelled as "horizontal legal comparison".[3]

We seek to conduct the comparative aspect of our research as functional legal comparison. In other words, we assess what type of legal settlement performs a particular function in the legal systems in question. The comparison of Hungarian and German criminal law seems appropriate in the field of bankruptcy crime, to say the least; besides that the legal systems in question belong to the same family of law and represent the same "legal style," the structures of criminal law legislation largely correspond, thus allowing to draw parallels for the particular facts of the case. If we know the currently valid law, we can then rely on this knowledge to assess what sociological or individual interest can be satisfied through such legal regulation, and hence the aspects of jurisprudence of interests (*Interessenjurisprudenz*) can also appear in our research.

II. Offences in the State of Insolvency under German Law

The solution, which appears in German law, i.e. the vast part of economic crimes is regulated in other legal regulations, particularly in the so-called "subsidiary legislation (Nebenstrafrecht)," not in the German Criminal Code, which is quite strange for a Hungarian lawyer.[4] Consequently, for example, the Act on Limited Liability Companies (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG), the Act on Companies Limited by Shares (Aktiengesetz, AktG),

2 Zweigert & Kötz 1996. 42.
3 Zweigert & Kötz 1996. 8.
4 Molnár 2013. 760–775.

and the Commercial Code (Handelsgesetzbuch, HGB) of Germany also include such cases which are relevant for our topic and which are related to the failure of initiation of insolvency proceedings such as postponement of bankruptcy and infringement of the special obligations to be fulfilled in the state of losses, insolvency, or indebtedness. The delayed or omitted filing of insolvency is also punished by the German Insolvency Statute (Insolvezordnung, Inso) as it is a separate element of crime.[5]

III. German Bankruptcy Offences versus Hungarian Bankruptcy Offences

Bankruptcy offences standing in the specific focus of our research are addressed in the German Criminal Code[6] (Strafgesetzbuch, StGB) in a specific chapter (Chapter 24: Offences in the State of Insolvency). A very remarkable difference is that while Hungarian criminal law, particularly (§ 404 of) the Hungarian Criminal Code[7] (Btk.), specifies bankruptcy offences such as one single factum of crime,[8] it is broken down into four offences in German law: Firstly, in German regulations, bankruptcy offences (StGB § 283), which are far more complex than in Hungarian regulations, even at first sight, are addressed in a total of eight paragraphs, indicating the prohibited acts and the formations of conducts of intention, mixed culpability and negligence. § 283a of StGB defines aggravated bankruptcy as a separate element of crime, giving importance to two aggravating circumstances. Extending unlawful benefits to creditors (§ 283c of StGB) is also a separate case. In Hungarian regulations, both aggravated bankruptcy and extending unlawful benefits to creditors are considered basic cases, that is, these crimes constitute a part of Btk., in particular, two separate paragraphs of Section 404 thereof. It is also a novelty for a Hungarian lawyer that in German law extending unlawful benefits to debtors (§ 283d of StGB) is punished as an independent case, namely because it is not regulated – for the time being – in Hungarian criminal law. It has to be noted that this chapter of the German Criminal Code includes "Violation of Book-Keeping Duties" (StGB 283b), which can be compared to the crime of "Infringement of Accounting Regulations" in Section 403 of Btk. The comparison of German and Hungarian regulations on this latter crime is not subject of this study.

5 Kindler-Nachmann 2013.
6 Criminal Code in the version promulgated on 13 Nov. 1998.
7 Act C of 2012 on the Criminal Code (hereinafter: "Btk.").
8 Karsai 2013. 854–859.

Table 1. Comparison of German bankruptcy offences (§ 283 – 283d of StGB) and Hungarian bankruptcy offences (§ 404 of Btk.)[9]

GERMAN BANKRUPTCY OFFENCES	RELEVANT HUNGARIAN REGULATIONS
§ 283 of StGB: the actual criminal conducts of bankruptcy crime that might be committed in a crisis situation or that might bring about a crisis situation are listed in eight paragraphs. (We will define the categories of crisis situations (insolvency, danger of insolvency, indebtedness) in the following paragraphs.)	Similarly, bankruptcy offences within the meaning of Section 404 of Btk. are those that might be committed in a crisis situation or that might bring about a crisis situation. A crisis situation does not have completely the same meaning in the German and Hungarian practice (the concept of indebtedness is not known in Hungarian criminal law). According to the usual classification, bankruptcy offences are committed in a situation involving potential danger of insolvency; those bringing about insolvency and those committed in the state of insolvency can be distinguished.
§ 283a of StGB: aggravated bankruptcy. Aggravating circumstances: acting out of profit seeking or knowingly placing many persons in danger of losing their assets that were entrusted to the offender or in financial hardship.	Aggravated bankruptcy is specified in a separate paragraph (§ 404 (3) of Btk.) within the above mentioned factum of crime. The aggravating circumstances are absolutely different from those set out in German regulations; on the one hand, Hungarian regulations punish offences committed in respect of an economic operator qualified as having strategic priority more severely, and, on the other hand, the crime is deemed more serious if the amount of actual or false diminution of assets is particularly substantial.
§ 283b of StGB: violation of book-keeping duties outside a crisis situation	Similarly, it is regulated in a separate factum of crime in Hungarian law § 403 of Btk.: Infringement of Accounting Regulations. (A crisis situation is not a factor in the case.)

9 The Hungarian regulations are compared to the German solution.

GERMAN BANKRUPTCY OFFENCES	RELEVANT HUNGARIAN REGULATIONS
§ 283c of StGB: extending unlawful benefits to creditors, a privileged case of bankruptcy offences regulated in § 283	Similarly, extending unlawful benefits to creditors (§ 404 (4)) is a crime regulated in a separate paragraph of the bankruptcy offences regulated in § 404.
§ 283d of StGB: extending unlawful benefits to debtors is a crime, whereby a person who may be only an accomplice of a bankruptcy offence under § 283 may be deemed as an offender as well.	No relevant regulation in the laws of Hungary.

Table 2. Comparison of bankruptcy offences described in § 283 of StGB, i.e. the basic case of German bankruptcy offences, and Hungarian bankruptcy offences (§ 404 of Btk.)[10]

BASIC CASE OF GERMAN BANKRUPTCY OFFENCES	HUNGARIAN BANKRUPTCY OFFENCES
The intentional formations of bankruptcy offences are described in § 283 (1-2) of StGB so that the conducts described in Subsection (1) are committed in a crisis situation, and, in respect of Subsection (2), the crisis situation is brought about by the same conducts. Prohibited acts are described in eight paragraphs, the last of which constitutes a general clause which gives a summary of the other prohibited acts not mentioned in the previous seven paragraphs.	Each formation of Hungarian bankruptcy offences requires intention and no act of negligence is punishable. As a result, i.e. the actual or apparent diminution of the assets of the debtor economic operator and partially or entirely the frustration of satisfaction of its creditors or at least one of its creditors should also be determined by the offender's intention. Hungarian regulations mention two groups of criminal conducts specifically (§ 404 (1) paragraphs a) and b)), which are also included in German regulations, and the third paragraph (§ 404 (1) para. c)) constitutes a general clause to punish other committals in a way contrary to the requirements of reasonable management. As we have already mentioned above, aggravated bankruptcy and extending unlawful benefits to creditors are also included in the factum of crime.

10 The Hungarian regulations are compared to the German solution.

BASIC CASE OF GERMAN BANKRUPTCY OFFENCES	HUNGARIAN BANKRUPTCY OFFENCES
According to Subsection (3), the attempt shall be punishable. (In German law, the punishability of an attempt is regulated in particular rules as well.)	The attempt of bankruptcy crime is also punishable. (In Hungarian law, the attempt of an intentional crime is always punishable as stipulated in Section 10 (1) in the General Part of Btk.)[11]
Bankruptcy described in Subsection (4) is an offence of mixed culpability.	The result should also be determined by the intention.
Negligent formations of bankruptcy offences are described in Subsection (5).	Acts of negligence shall not be punishable.
The objective conditions for punishability are described in Subsection (6).	The objective conditions for punishability are described in Subsection (5), which conditions are more limited than in German regulations and apply to both the basic and qualified cases of bankruptcy offences.

IV. Crisis Categories

From the point of view of our topic, not only StGB but also the German Act on Insolvency[12] (Insolvenzordnung, InsO) has prominent importance because it defines the individual "crisis categories". A bankruptcy offence within the meaning of Subsection (1), paragraph 1) of Subsection (4), and paragraph 1) of Subsection (5) of § 283 of StGB can be established on the condition that the offender commits it in a crisis situation. According to Subsection (1) of § 283 of StGB, a crisis situation means the state of insolvency (§ 17 (2) of InsO), the danger of insolvency (§ 18 (2) of InsO), or indebtedness (§ 19. (2) of InsO). A person is in the state of insolvency if he is unable to pay their overdue debts. A danger of insolvency occurs if it is likely that the debtor is unable to meet his payment obligations in due course. The debtor becomes indebted if their assets fail to cover their outstanding debts any longer unless it is very likely, based on the circumstances, that the debtor is able to continue their business activities.

It has to be noted that German regulations preceding InsO had not been uniform; furthermore, there had existed no uniform concept of insolvency, and therefore it was formed and established by the legal practice in relation to bankruptcy offences. According to the judicial practice, insolvency means permanent lack of

11 The person who commences the perpetration of an intentional crime but does not finish it shall be punishable for attempt.

12 Insolvency Statute of 5 Oct. 1994.

assets on the part of the debtor based on the lack of his payment instruments as a consequence of which the debtor is unable to satisfy the material part of their cash debts due and payable forthwith and claimed in earnest.

As far as crisis situations are concerned, German and Hungarian Criminal Codes show a fundamental difference, namely that the Hungarian criminal law assesses only two forms of crisis situations and the concept of indebtedness is not regulated either in Btk. or in Hungary's Act on Bankruptcy Proceedings[13] (Bankruptcy Act). The concepts of insolvency and danger of insolvency are defined in the Bankruptcy Act (§ 27 (2) and § 33/A (1), respectively. The concept of insolvency is defined in Hungarian law far more precisely since the Bankruptcy Act includes the itemized list of the conditions under which a debtor can be deemed insolvent and the court may establish him being insolvent. For example, a debtor is deemed insolvent if he fails to settle or contest his previously undisputed or acknowledged contractual debts within 20 days of the due date, and fails to satisfy such debt even upon receipt of the creditor's written payment notice, or – for example – if the enforcement procedure against the debtor was unsuccessful. Such a situation is considered to carry potential danger of insolvency as of the day when the executives of the economic operator were or should have been able to predict that the economic operator will not be able to fulfil its payment obligations when due.

V. Protected Legal Interests

The protected legal interests of insolvency-related offences (including bankruptcy crimes), that is, protection of the insolvency assets against any uneconomic diminution or use at the expense of creditors' interests, protection of the credit system, protection of operability of crediting, and providing for freedom of movement of capital, are identical in both German and Hungarian regulations.[14]

VI. Is a Result Required for Bankruptcy Offences to Become Consummated?

It is a considerable difference between the two criminal regulations. The basic case of a German bankruptcy offence described in the first section (§ 283 (1)) constitutes a crime of endangerment and it is sufficient to commit a bankruptcy offence in a crisis situation to make it consummated if one of the objective

13 Act IL of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Voluntary Dissolution (hereinafter: Bankruptcy Act).

14 Kindhäuser 2013.

conditions (§ 283(6)) is performed. On the contrary, all formations in Hungarian regulations are "result offences," i.e. partial or entire failure of satisfaction of one or more creditors is indispensable for a Hungarian bankruptcy crime to become consummated. Partial failure means that while a part of a certain group of creditors are satisfied the chances of satisfaction of some creditors would permanently or ultimately become reduced. Reverting to German bankruptcy offences, their forms, which bring about a crisis – more particularly only indebtedness or insolvency –, also require result.[15] A situation carrying the danger of insolvency cannot be the result of such forms of bankruptcy offences. An aggravated bankruptcy has both a danger formation and a result formation.

VII. Objective Conditions for Punishability

Both German and Hungarian regulations include objective conditions for punishability, which are partly overlapping. According to German regulations (§ 283 (6)), the person may be punished if, alternatively, they either suspend payments or are involved in insolvency proceedings[16] or the application for instituting insolvency proceedings is rejected due to lack of assets.[17] Suspension of payments is not necessarily identical to insolvency as it means suspension of payments to creditors. As far as we know, Hungarian legal regulations include no definition of the collective concept of insolvency proceedings. It might be the reason why Btk. includes a list of individual insolvency proceedings (bankruptcy, liquidation, forced cancellation, forced dissolution proceedings) the instituting, ordering or failure of mandatory ordering of which is an objective condition for the punishability of a bankruptcy crime. Insolvency (liquidation) proceedings should be conducted in a simplified form if there are no available assets in a liquidation proceeding and neither this fact nor suspension of payments is an element of a bankruptcy offence under Hungarian law.

VIII. The Object of Crime

One of the most essential differences between German and Hungarian regulations is that a bankruptcy offence is committed in respect of the assets of an economic operator under Hungarian law. The concept of "economic operator" is defined in the Bankruptcy Act (§ 3 a)); in particular, an economic organization and a natural

15 StGB § 283 Subsection (2), Paragraph 2 of Subsection (4), and Paragraph 2 of Subsection (5).
16 Ordering of insolvency proceedings is regulated in § 27 of InsO.
17 According to § 26 of InsO, any application for institution of insolvency proceedings shall be rejected if the debtor's assets will be unlikely to cover the costs of the proceedings.

person cannot become an economic operator even if they pursue economic activities as a private entrepreneur. There is no such limitation in German law, and the German Act on Insolvency is applicable also in the case of economic bankruptcy of natural persons aimed at furthering economic resumption by forgiveness, as the case may be, as part of the debt. The assets of a natural person may also be object of a bankruptcy offence.

IX. Intentional Formations of German Bankruptcy Offences

The bankruptcy offences regulated in Subsections (1-2) of § 283 can be committed intentionally, usually both by a specific and foreseeable intent. In the cases described in Subsection (1), the intent is supposed to be in a crisis situation and the criminal conduct is supposed to be committed by the offender in such a situation, and in the cases described in Subsection (2) the intent is supposed to cover that the crisis situation is brought about by the result of the act. The conducts under Subsections (1) and (2) are identical. The following paragraphs explain these conducts in detail:

The German Criminal Code describes prohibited conducts in a total of eight paragraphs. The first paragraph applies to assets, which, in the case of institution of insolvency proceedings, would belong to the available bankruptcy assets (liquidation assets). It is prohibited to dispose of any parts of assets, which means any withdrawal of property affecting the basis of satisfaction of creditors. This includes the physical hiding of such assets or the conclusion of a legal transaction by means of which a part of the assets becomes inaccessible, e.g. their sale for less than the normal value. Similarly, it is prohibited to conceal, destroy, damage, or render unusable any parts of assets. Concealment means, for example, that the offender fails to comply with his obligation to provide information at the time the insolvency proceedings are initiated by concealing the existence of a part of the bankruptcy assets. Damaging, destroying, and rendering unusable of a thing constitute the various sections of physical interventions affecting the condition of the thing and are punishable acts only if they are not in compliance with the requirement of ordinary management.

All conducts described in the first paragraph are deemed as bankruptcy offences also under Hungarian law (S. 404 (1) a)), except that in Hungary the committal of the above acts is not sufficient, but at least partial frustration of satisfaction of at least one creditor is required in addition to that the bankruptcy assets are diminished actually or fictitiously as a result of the bankruptcy offence under Hungarian law. Similarly, "recognition of a doubtful claim" belongs to bankruptcy offences both under Hungarian law (§ 404 (1) b)) and German law

(§ 283 (1) 4)). It is indicated together with "pretending the existence of another's rights" in German law and together with "conclusion of a fictitious transaction" in Hungarian law. Hungarian regulations require the above result for an offence to become consummated.

The conducts of German bankruptcy offences listed below are not specified in Hungarian regulations and such acts are punishable under Hungarian law only in the case if they belong to the general clause of the Hungarian bankruptcy offences.

According to paragraph 2 of § 283 (1) of StGB, the person who, in a manner contrary to regular business standards, enters into losing or speculative ventures or futures trading in goods or securities or consumes excessive sums or becomes indebted through uneconomical expenditures, gambling or wagering shall be punished. In this section, the legislator declares such an act – which would be legitimate in itself – punishable if it was realized outside a crisis situation; however, if the offender concludes such a transaction in a crisis situation, it will be deemed as gambling at the expense of the creditors.

According to paragraph 3, the person who procures goods or securities on credit and sells them or things produced from these goods, i.e. wastes or sells them substantially under their value in a manner contrary to regular business standards, shall be punished. It is to be mentioned at this point that, according to § 950 of the German Civil Code[18] (Bürgerliches Gesetzbuch, BGB), the title to goods produced through processing shall be due to the processing party and the right for the basic materials perish.

According to paragraph 5, failure to keep books of account – as stipulated, first of all, in the German Commercial Code (Handelsgesetzbuch, HGB) – or keeping them in such a manner that a survey of net assets is made more difficult is declared punishable. The purpose of this section is to provide for the permanent and correct self-information of the enterprise as well as to protect creditors in a crisis situation. § 238 of HGB includes a list of the accounting obligations; however, such obligations apply only to businessmen who hold and bear rights and duties in full scope ("Vollkaufmann"),[19] so the group of offenders is limited at this point. Similarly, the group of offenders is limited also in respect of the conducts described in paragraphs 6 and 7, namely because these sections are related also to correct fulfilment of the book-keeping obligation stipulated in commercial law. According to paragraph 6, disposal, hiding, damaging, or destroying of books of accounts and documentation before expiry of the archiving periods, and thereby making a survey of the assets more difficult, are punishable acts. Paragraph 7 prescribes sanctions if balance-sheets are drawn up in such a manner that a survey of the assets is made more difficult or if the balance sheet or inventory is not drawn up in the prescribed time.

18 Civil Code in the version promulgated on 2 Jan. 2002

19 The group of "Vollkaufmann" is defined in § 1–3 of HGB.

The regulations on criminal conducts regulated in the last paragraph include a general clause including the cases not covered by the previous paragraphs. An offender is punishable if s/he, in a manner which grossly violates regular business standards, diminishes his/her net assets or hides or conceals the actual circumstances of his/her business. Similarly, the regulations on Hungarian bankruptcy offences include a section (§ 404 (1) para. c) of Btk.) which fills a similar function; however, Hungarian regulations are drafted more concisely and punish the diminution of assets carried out in a manner contrary to regular business standards, so that in Hungary an offence is deemed – as mentioned above – as consummated if the satisfaction of at least one creditor has been frustrated. Reverting to the general clause relating to German bankruptcy offences, this section gives simultaneously a summary of the above paragraphs since it prohibits the diminution of the bankruptcy assets in a manner severely contrary to regular business standards (summary of paragraphs 1–4), on the one hand, and it regulates hiding or concealing of actual circumstances of business (summary of paragraphs 5–7), on the other. For example, under this section, the person who takes over a well-paying clientele from one of his companies being in a crisis situation through establishing a new company shall be punished.

X. Punishable Attempt

According to § 283 (3) of StGB, the attempt shall be punishable in respect of bankruptcy offences described both in Subsection (1) and Subsection (2). Similarly, the attempt of aggravated bankruptcy (§ 283a) and extending unlawful benefits to creditors (§ 283c (2)) shall also be punishable. Considering that in Hungarian law the attempt of an act of crime shall always be punishable if it is committed intentionally, the attempt of bankruptcy offence shall be punishable in Hungary. In German law, a person attempts to commit an offence if he takes steps which will immediately lead to the completion of the offence as envisaged by him/her.[20] Similarly to the regulations in the Hungarian Csemegi Code, an attempt is punishable more leniently than a completed offence in German law.[21] However, according to the Hungarian Criminal Code in force, the item of punishment of the finished crime shall be applied for the attempt.[22]

20 § 22 of StGB.
21 § 23 of StGB.
22 S. 10 (2) of Btk.

XI. Acts of Negligence and Mixed Culpability

According to § 283 (4–5), actions whereby the action of the offender is determined by negligence in respect of certain factors of the crime shall be punishable. In the case described in paragraph 1 of Subsection (4), the person who negligently fails to be aware of the crisis situation and shows any of the conducts described in Subsection (1) intentionally shall be liable to punishment. This kind of bankruptcy offences is of mixed culpability and is deemed an offence committed by negligence under German law, so the attempt and complicity are excluded. According to German law, only intentional committal is punishable except if the law provides for punishing also acts committed by negligence.[23] In the case described in paragraph 2 of Subsection (4), insolvency or indebtedness is brought about negligently as a result of an intentional act described in Subsection (1). This section is deemed as intentional crime because the person who committed the act intentionally but who cannot be held liable in respect of the result caused thereby due to negligence is deemed to act intentionally within the meaning of StGB.[24]

According to paragraph 1 of Subsection (5), the person who commits an act described in paragraphs 2, 5, and 7 of Subsection (1) also by negligence, and the offender fails to be aware of the crisis situation due to his/her negligence, is liable to punishment. As concerns paragraph 2, the person brings about insolvency or indebtedness at least by negligence in conjunction with the negligent acts described in paragraphs 2, 5, and 7 of Subsection (1).

XII. Extending Unlawful Benefits to Creditors (§ 283c of StGB)

Extending unlawful benefits to creditors is a privileged case of bankruptcy offences, whereby the bankruptcy assets are not diminished and the intention is to satisfy real creditors' claims. The offender may only be such an insolvent person who is aware of his insolvency and in respect of whom the objective condition for punishability within the meaning of § 283 (6) exists. According to Subsection (2), the attempt shall be punishable. The offender extends benefits to one of the creditors at the expense of the other creditors by granting that creditor a security or satisfaction to which s/he was not entitled at all or not in such a manner or at the time. In German legal literature, such kind of satisfaction or security is called incongruent coverage, which means that the debtor grants satisfaction or security unreasonably or in a manner not supported by law or grants the satisfaction of a claim which is not yet due.[25]

23 § 15 of StGB.

24 § 11 (2) of StGB.

25 Udvaros 1994, 21: *A hitelező előnyben részesítésének bűntette a hatályos német büntetőjogban*, in

Similarly, under Hungarian law, extending unlawful benefits to creditors, which is the kind of bankruptcy offences liable to the most lenient punishment, does not involve diminution of the bankruptcy assets. The scope of prohibited acts is narrower than in German regulations, and such acts may be established only after the liquidation proceeding has been ordered finally and the act of extending benefits in violation of the mandatory order of satisfaction of creditors in the liquidation proceeding[26] is punishable. Therefore, extending benefits violates the statutory order of satisfaction of creditors; otherwise, it is about the satisfaction of expressly justified creditors' claims.

XIII. Aggravated Bankruptcy

In German law, acts committed out of profit-seeking and acts of placing many persons in danger of losing their assets that were entrusted to the offender or in financial hardship can be punished more severely. The offender realizes any of the acts described in § 283 (1) in a recognized crisis situation intentionally or brings about the crisis situation by the same acts himself intentionally. The attempt is also punishable.

In Hungarian criminal law, the offender is punished more severely if two quite different circumstances exist. On the one hand, it punishes offences committed in respect of an economic operator qualified as having strategic priority more severely or, on the other hand, the crime is deemed more serious if the amount of actual or false diminution of assets is particularly substantial. The liquidator and the court should conduct the liquidation proceeding concerning the assets of the economic operator qualified as having strategic priority in accordance with the special rules of procedure allowing for the special role of the economic association in the national econoour. The amount of diminution of assets is particularly substantial if it exceeds five hundred million HUF, that is, approximately EUR 1.7 million.

XIV. Comparison of the Ranges of Punishment

Amounts of punishment are very similar, except that Hungarian criminal law applies no alternative sanctions by imposing fines: Hungarian law applies no punishment for acts of negligence or mixed culpability at all, while German law holds out the prospect of more stringent punishment on aggravated bankruptcy.

English: Offence of extending benefits to creditors in the currently effective German criminal law.

26 Section 57 (1) of the Bankruptcy Act. First of all, the liquidation expenses shall be satisfied from the economic operator's assets.

Table 3. Comparison of the ranges of punishment

RANGE OF PUNISHMENT ON BANKRUPTCY OFFENCES IN GERMANY	RANGE OF PUNISHMENT ON BANKRUPTCY OFFENCES IN HUNGARY
Basic case of bankruptcy offences (§ 283 (1–2)): imprisonment not exceeding five years or fine	Basic case of bankruptcy offences (§ 404 (1–2)): imprisonment from one to five years
Bankruptcy offences of negligence and mixed culpability (§ 283. § (4–5)): imprisonment not exceeding two years or fine	–
Aggravated bankruptcy (§ 283a): imprisonment from six months to ten years	Aggravated bankruptcy (§ 404 (3)): imprisonment from two to eight years.
Extending unlawful benefits to creditors (Section 283c): imprisonment not exceeding two years or fine	Extending unlawful benefits to creditors (§ 404 (4)): imprisonment not exceeding two years.
Extending unlawful benefits to debtors (Section 283d): imprisonment not exceeding five years or fine and imprisonment from six months to ten years	–

Except for acts of negligence and mixed culpability, the attempt of all of the above acts is punishable in the German law as well. Considering that in Hungarian law all acts of bankruptcy offences imply intention, the attempt of such acts is also punishable.

XV. Conclusions

As a summary, it can be stated that the German criminal regulations are far more complex and stringent in respect of bankruptcy offences than the Hungarian ones, with special regard to the followings: in German law, bankruptcy crime (§ 283 (1)) is a crime of endangerment, which does not require diminution of assets or failure of satisfaction of the creditor's claims for becoming consummated; StGB includes a far more detailed (rather "voluble") list of prohibited acts which would lead to a high probability of uneconomic diminution; even acts of negligence or mixed culpability are punishable.

According to our opinion, the more complex regulations can be explained partly by the complete lack of market economy in Hungary, namely in the forty-

year period right after World War II.[27] On the other hand, according to our opinion, it was the bankruptcy offences occurring much more often as a result of over-indebtedness following the 2008 economic crisis which created the first serious challenge to the Hungarian crediting system and the Hungarian legal practice.

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27 Wei 2012. 3–5.

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Some Remarks on the *Responsa Nicolai papae I. ad consulta Bulgarorum*[1]

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Abstract. An outline of the conflict between Pope Nicholas I and Patriarch Photios evolved on Bulgaria's ecclesiastical affiliation will help to understand how the papacy's attention turned towards the Slavonic mission. The Bulgarians assumed Christianity in the second half of the 9th century, during the reign of Khan Boris I. The progress of the missionary work carried out among them faithfully reflects the current conflict between Rome and Byzantium. This paper first describes the historical background of the Bulgarian conversion to Christianity (I.), then it focuses on the historical and legal aspects of two letters: the first written by Photios (II.) and the second by Pope Nicholas (III.) to the Bulgarian ruler, and finally it outlines the legal process, how an independent archbishopric has been established in Bulgaria (IV.).

Keywords: medieval legal history, organization of Church, missionary work, *Responsa Nicolai papae I. ad consulta Bulgarorum*

I. The Historical Background

The Bulgarians, who had a relatively low population, came from a Turk ethnic group, had subjected the Slavonic people to their rule, and settled on the territory of the one-time Moesia, Scythia, Thrace, and Macedonia during the rule of Krum (803–814) and Omurtag (814–831).[2] The proportion of the Christian population that survived the Bulgarian conquest cannot be determined. On the other hand, in order to reinforce his rule, Krum had already tried to rely on the Slavs, who were more open to Christianity, against the Bulgarian boyars. This, however, led to the persecution of the Christians and fierce counter-reaction during the reign of his son,

1 For the Hungarian version of this article see Acta Universitatis Sapientiae Legal Studies, Vol. 4, No. 2, 2015, 239–255.

2 Runciman 1930. 1. sqq.; Angelov 1980. 84. sqq.

Omurtag, since the Bulgarians were afraid that the Christians would establish too close relations with the neighbouring Byzantium having great power. As part of the persecution, Christians living on several territories bordering on Byzantium were transferred to the northern parts of the Bulgar lands. Khan Boris (852–889) took further actions to support Christianity. His decision might have been motivated by the following reasons: Firstly, through the clergy loyal to the prince, he would be able to influence the population, and the centralized ecclesiastical organization could be instrumental in driving back the Bulgarians; secondly, the Christian religion seemed to provide a channel for merging the Slavs and the Bulgarians; thirdly, the Christian ruler's wide power made known to Boris both in Byzantium and the Frankish Empire seemed undoubtedly tempting to the khan.[3]

As he did not want to assign missionary work in his country to the Byzantine Church – by that, he would have strengthened the hegemony of the *basileus* –, the khan of the Bulgarians met Louis the German, East Frankish ruler in 862, in Tulln, and managed to enter into an agreement with him on several points. The Bulgarians would make troops available to the Frankish king against the Moravians, and the Frankish missionaries would begin their missionary work in Bulgaria.[4] In 863/64, however, the famine ravaging the Bulgarians made it impossible to implement these plans. In response to the looting carried out by the Bulgarians on the territory of Byzantium, the emperor, Mikhael III (842–867), dealt Bulgaria a heavy blow both at sea and on land, and forced Khan Boris to unconditional surrender.[5] In the peace treaty entered into force between Byzantium and Bulgaria, they determined that missionaries from Byzantium would soon begin missionary work among the Bulgarians. As the first step of Christianization, Boris assumed Christianity in Byzantium in 864. In baptism, he was given the name Michael as the godfather's duty was undertaken by Mikhael III with political implication.[6] After that, Boris forwarded a letter to Photios, Patriarch of Constantinople,[7] in which he wanted to get answers to his fairly practical questions regarding the missionary work. It is, by all means, worth giving an outline of the content of Photios's aforesaid letter written at the end of 864 or at the beginning of 865[8] and sent to Khan Boris I.[9] It clearly reveals why the highly educated patriarch's reply letter written at a high theological level did not give sufficient answers to the questions concerning the Bulgarians, and why Boris, urged by the dissatisfaction felt over this guidance, turned to the Pope with his problems regarding Christian religion and religious

3 Dopsch 1987. 322.
4 *Annales Bertiniani a.* 864. Cf. Dvornik 1964. 119.
5 *Annales Bertiniani a.* 866; *Annales Fuldenses a.* 863. Cf. Runciman 1930. 104.
6 Dopsch 1987. 323.
7 Dvornik 1963. 94–107; Dvornik 1948.
8 See Dvornik 1926. 190.
9 Photios, *epist.* 8. 102.

life, expecting Rome to give help.[10] The questions addressed by the Bulgarian legation have been lost. The Pope's reply letter (*Responsa Nicolai papae I. ad consulta Bulgarorum*,[11] that is, Pope Nicholas I's letter) written in the autumn of 866, however, has been completely preserved.[12] With some effort, the questions can be reconstructed from the answers.

II. The Letter of Patriarch Photios

Photios's letter consists of one hundred and fourteen chapters and in terms of its content it can be divided into two main units: a dogmatic[13] and a political-didactic[14] part.[15] At the beginning of the letter, the patriarch first expounds that Christianity stands on a much higher level than heathenism, and to present the essence of Christian teachings he quotes the Nicene-Constantinopolitan Creed, then gives a brief survey of the history of the seven general councils.[16] After this historic detour, he seems to forget that his letter's addressee is a khan recently converted to Christianity who is most probably neither interested in the Byzantine theologians' subtle dogmatic argumentation, which he possibly cannot even understand, nor in need of them at all in the given political situation he is facing.[17] In this part of the letter, the patriarch does not fail to emphatically exhort the ruler to be faithful to his decision both to convert himself and to get his people to convert to the Christian faith,[18] and cautions him against giving room to heretical deviations. Also he warns him of the dangers that would be brought about if he yet wanted to return to his forefather's faith. As it was customary for neophyte kings in the Middle Ages, he sets Emperor Constantine to Boris as a role model for a ruler. Furthermore, he exhorts him that his steadfast adherence should be directed to the Byzantine Church, and he should not take any steps towards Roman Christianity, which is referred to by the patriarch in each case with some suspicious detachment.[19]

Although the second part of the letter, which we can safely call a didactic, instructive sort of section – it provides guidance of a general nature for Boris and

10 Dvornik 1964. 121. sq.; Burr, 1964. 41; Ostrogorsky 2001. 112. sqq.; Monge Allen 2010. 118. sqq.; Heiser 1979.

11 For its most important editions, see – Perels, E. (ed.): *MGH Epistolae Karolini aevi, IV/VI.* Berolini 1925. 568–600; Migne, J. P. (ed.): *Patrologia Latina, 119.* Paris, 1852. 978C–1015B; *Fontes Historiae Bulgaricae, VII. Fontes Latini Historiae Bulgaricae, II.* Serdicae, 1960. 65–125; *Magnae Moraviae Fontes Historici, IV.* Brno, 1971. 42–107.

12 Norwood 1946. 271–285.

13 Photios, *epist.* 8, 1–22.

14 Photios, *epist.* 8, 23–114.

15 Dujčev 1971. 108.

16 Bury 1912. 338.

17 Hergenröther 1867. 601.

18 Photios, *epist.* 8, 19.

19 Dujčev 1971. 110.

his people on Christian teachings to be followed –[20] mostly lacks any originality; it amply draws on the works of the major representatives of the mirrors for princes, a genre so rich in Byzantine literature.[21] While writing this peculiar *Fürstenspiegel*, Photios undoubtedly used the sources of the Old and New Testament and certain ecclesiastical authors, but to no less extent can reliance on classical Greek literature be discovered, especially on two speeches attributed to Isocrates (*ad Demonicum, ad Nicoclea*).[22] In his exposition, the patriarch reconciles the instructions of classical philosophy and Christian morality to support his exhortation addressed to the recently converted ruler and his people.[23] He makes the evangelical command of love for God and our fellow men[24] the basis of his guidance on the khan's personal conduct of life;[25] and directly in connection with that he calls the addressee's attention to Aristotle's idea of *kalokagathia*.[26] He emphasizes the importance of prayer in two chapters[27] and specifically underlines that the ruler's primary obligation is to build churches.[28]

He repeats *topoi* adopted also by classical philosophy, which state that the ruler shall pay attention to his conduct[29] and manner of speaking,[30] shall avoid needless giggling,[31] obscenity,[32] cursing and defamatory speech,[33] and shall be very careful in choosing his friends.[34] Whatever he does, the ruler shall premeditate all of his actions,[35] and, if necessary, he shall listen to and accept his advisors' opinion.[36] The patriarch does not fail to emphasize that a Christian ruler shall avoid hatred, which is considered a highly heinous sin,[37] and fraud even against his enemies;[38] he shall make an effort to keep his promises[39] and restrain his temper and anger.[40] He exhorts him to be moderate in the affairs of love[41] and drinking.[42] He proposes

20 Hergenröther 1867. 602.
21 See Krumbacher 1897. 456–457; 463–464; 491; Emminger 1906.
22 See Emminger 1913.
23 Dujčev 1971. 111.
24 Matth. 22, 38–40.
25 Photios, *epist.* 8, 23.
26 Aristot. *EN* 5, 1, 16.
27 Photios, *epist.* 8, 25–26.
28 Photios, *epist.* 8, 27.
29 Photios, *epist.* 8, 30.
30 Photios, *epist.* 8, 31.
31 Photios, *epist.* 8, 32.
32 Photios, *epist.* 8, 33.
33 Photios, *epist.* 8, 35.
34 Photios, *epist.* 8, 36–37; Dujčev 1971. 112.
35 Photios, *epist.* 8, 29; 48.
36 Photios, *epist.* 8, 49.
37 Photios, *epist.* 8, 51–52.
38 Photios, *epist.* 8, 71; 89.
39 Photios, *epist.* 8, 76–77.
40 Photios, *epist.* 8, 84–87.
41 Photios, *epist.* 8, 91–94.
42 Photios, *epist.* 8, 95.

that he should keep away from unabashed and rakish amusement,[43] and urges him to give thanks only to God for all good and success,[44] and that he should endeavour to use his talent given by nature for the benefit of his subjects and fellow-men,[45] and should not pass judgements on others.[46]

The second part of Photios's exhortation expounds the exercise of the ruler's rights. The patriarch attempts to outline the portrait of an ideal ruler composed of a peculiar mixture of Christian and heathen ideas. Boris shall both live his life in the spirit of Christianity and as a sovereign he is primarily obliged to take care of his subjects' salvation;[47] and the subjects' gain in faith will measure and prove the ruler's own virtue.[48] In the recently converted country, the implementation of the model presented by the patriarch must have been utterly helpful for establishing a state organization following the pattern of Byzantine *theokratia* based on the co-ordinated action of a closely intertwined State and Church.

Photios, on the other hand, resolutely marked the limit beyond which the ruler authorized to exercise secular power was not allowed to have any say in the Church's internal affairs.[49] For the avoidance of any doubt, the letter makes it clear that only harmonized action and co-operation between the State and the Church can create the unity, *homonoia*, of a Christian people.[50] The ruler is obliged to make just amends and administer justice to those who have suffered wrong;[51] furthermore, he shall act resolutely and hard against those who have caused damage to the community, and shall be forbearing and merciful towards those who do harm to his own person.[52] Strict laws shall be in force in the country; however, the subjects shall be led pursuant to the principles of humanity.[53] Compliance with the laws shall be enforced merely by threatening with sanctions, that is, by raising awareness of the possibility of being punished rather than by punishment.[54] Excessive rigour shall be avoided by all means; the ruler shall make an effort to win his subjects' benevolence since a government based on that stands on a much safer ground than the one that intends to wring obedience from the people merely by intimidation.[55] In the argumentation on the administration of justice, the author of the letter briefly outlines the key attributes

43 Photios, *epist.* 8, 100–101.
44 Photios, *epist.* 8, 113.
45 Photios, *epist.* 8, 66.
46 Photios, *epist.* 8, 68; Dujčev 1971. 113.
47 Photios, *epist.* 8, 19.
48 Photios, *epist.* 8, 90; Isocr. *Nic.* 9.
49 Photios, *epist.* 8, 28.
50 Photios, *epist.* 8, 27; Dujčev 1971. 113.
51 Photios, *epist.* 8, 34.
52 Photios, *epist.* 8, 38.
53 Photios, *epist.* 8, 42.
54 Photios, *epist.* 8, 43.
55 Photios, *epist.* 8, 41.

of a good judge,[56] and urges Boris to make efforts to come into possession of them.[57] Further on, he gives the ruler advice on political realism stressing that he shall not stop keeping armed forces on the alert because should he fail to do so he might face a lot of problems and unpleasant surprises.[58] Internal quarrels and uprisings shall be strictly put down because the victory thereof would threaten the country with falling back to heathenism and the State with being wound up.[59] No specific advice, however, is given in the Patriarch's letter on actions to be taken in such cases, which makes it probable that the letter was written shortly before the pagan uprising actually taking place in Bulgaria, because it is right to assume that otherwise his guidance regarding this subject area would not stay on the level of mere generality.[60] The forces instigating hostility and discord shall be hammered into unity, and channelled into action against possible external enemies.[61]

After having outlined the patriarch's letter, we can establish that his exhortation and guidance touch on too profound issues senseless and unintelligible for Boris, not well-versed in dogmatics, on the one hand, and – as regards everyday religious life – they move too much on the level of generalities, *topoi* taken over from classical and Christian mirrors for princes, on the other. Consequently, they do not have any practical use for a ruler who intends to Christianize his country. So, it is no wonder that one year after his conversion, in August 866, Boris sent his delegates, his kinsman, Petrus, and two boyars, Iohannes and Martinus,[62] to Pope Nicholas I (858–867).[63] Loaded with rich presents meant to be given to the Pope and the churches of Rome – including the weapons by which Boris had beaten off the recent pagan uprising –, they did arrive in Rome. Simultaneously, Boris turned again to Louis the German in a letter, and informed him that after having converted his people to the Christian faith he would seek to maintain alliance relation with him, and asked him to provide ecclesiastical books and means necessary for liturgy.[64] The delegacy handing over a letter to the Pope and requesting answers to his questions and guidance on both the true articles of faith and the most basic issues of everyday Christian life was received by Nicholas I with great pleasure since he saw it as an assurance that the letter sent by Photios had not solved the khan's questions, and had not dispelled his doubts – and that is why now the ruler desired to approach the Roman Church.

56 Photios, *epist.* 8, 54.
57 Photios, *epist.* 8, 59.
58 Photios, *epist.* 8, 104.
59 Photios, *epist.* 8, 62.
60 Dujčev 1971. 115.
61 Photios, *epist.* 8, 62.
62 Cf. *Iohannis VIII. papae epist.* 67; 192.
63 Dvornik 1964. 123. sq.
64 Dümmler 1887–1888. II. 188.

III. The Letter of Pope Nicholas I

The *Responsa Nicolai papae I. ad consulta Bulgarorum*, i.e., the letter written by Pope Nicholas I in the Autumn 866, has been completely preserved; however, the questions put by the Bulgarians, the *consulta*, had been lost. So, their number, original form can be deduced only from the Pope's responses. As the Pope's letter divides the responses into one hundred and six chapters, researchers were inclined, perhaps too hastily, to assume that the letter of the Bulgarians consisted of the same number of questions.[65] Another point that is worth considering is the language of the questions as we cannot preclude that the ruler sent his questions in Greek to the Pope, who was, of course, familiar with this idiom too. On the other hand, we may assume that the official translation of the letter was made by Anasthasius Bibliothecarius since in documents available to us there are several references to his translator's skills and quite accurate translating technique strictly adhering to the original text.[66] On the grounds of the above, we can accept the system of questions (*consulta*) reconstructed on the basis of the responses (*responsa*) by Ivan Dujčev,[67] which counts one hundred and fourteen questions, to which the Pope summed up his responses in one hundred and six chapters. Albeit the responses lack any system whatsoever, it can be taken for granted that we should not impute this to the Pope. He most probably only followed the order of the questions and gave his responses accordingly. The only modification he made was to arrange his responses to several questions following each other and deemed coherent in terms of content into a single chapter.[68] On the other hand, if two or more questions referred to a single subject, and such questions were scattered in the letter, the Pope kept to the original order, and at the relevant point only referred back to the question already discussed.[69] The phrases *in prima quaestionum vestrarum fronte*, *praeterea*, *porro dicitis*, and *postremo* occurring in the responses make it probable that the original order of the questions (*consulta*) was adhered to.[70]

After determining the order of the *consulta*, we can make an attempt to systematize the questions in terms of subject matter. As a matter of fact, several questions are related to the Christian religion, its everyday practice, the many ways of integrating heathen customs into Christianity, legal order, and ecclesiastical organization.[71] Regarding this subject area, the most cardinal definition of the document is that the ruler's utmost goal is to preserve the unity of faith in his

65 Dümmler 1887–1888. II. 190.
66 *Nicolai I. papae epistolae* 191; 240; 487; 488.
67 Dujčev 1965. 129.
68 Cf. *Responsa* 7; 51; 63; 69; 98.
69 Cf. *Responsa* 36; 39; 45; 47; 63; 100.
70 Dujčev 1965. 138.
71 Dujčev 1965. 139.

country.[72] They ask how they should wear the cross; if they could kiss it;[73] if it is obligatory to receive the sacrament when visiting the church;[74] if those baptized by false priests can be considered Christians or they should be baptized again;[75] if they should have repentance for punishing false priests too strictly;[76] if severe punishment of the subjects revolting against the ruler can be deemed a sin. (Fifty-two heathen dignitaries rose against the ruler putting ideas of heathenism on their banner, and Boris exterminated them and all their offshoots;[77] what should be done with those who refuse Christianity, and remain obstinate to heathenism.[78])

The next group of questions concerns worship. What should be done when they cannot completely perform prayer at the military camp?[79] When sitting at the table, if there is no priest or deacon present, is it allowed to cross oneself, and start eating thereafter?[80] Is it such a great sin indeed, as the Greeks assert, to pray in the church not with arms crossed on one's chest?[81] Is it prohibited – again as Greek teachings claim – to appear to receive Holy Communion ungirdled?[82] In periods of drought, is it allowed to pray for rain and observe fast?[83] Is it considered a sin indeed, as the Greeks assert, to eat from the meat of an animal killed by a eunuch?[84] Should women stay in the church with covered or uncovered head?[85] How many times a day should a layman pray?[86] When is it prohibited to appear to receive the sacrament? Can someone whose nose or mouth is bleeding receive the sacrament?[87] How many days after the birth of a child can a woman enter the church?[88] Should a married priest be expelled or kept?[89] Is a priest sinful of adultery entitled to administer the sacrament or not?[90] What should be done when someone receives news of the enemy's attack during prayer, and does not have time to finish the prayer?[91] What procedure shall be applied against those who have risen against Christianity but are willing to do

72 *Responsa* 106.
73 *Responsa* 7.
74 *Responsa* 9.
75 *Responsa* 14–15.
76 *Responsa* 15–16.
77 *Responsa* 17.
78 *Responsa* 41.
79 *Responsa* 38.
80 *Responsa* 53.
81 *Responsa* 54.
82 *Responsa* 55.
83 *Responsa* 56.
84 *Responsa* 57.
85 *Responsa* 58.
86 *Responsa* 61.
87 *Responsa* 65.
88 *Responsa* 68.
89 *Responsa* 70.
90 *Responsa* 71.
91 *Responsa* 74.

penance voluntarily, which they have been prohibited to do by the Byzantine priesthood?[92] Is it deemed a sin when a widow is forced to become a nun?[93] Is it allowed to pray for parents who deceased as heathens?[94] May a Christian hunt together with a heathen person and may a Christian eat from the meat of the game so killed together?[95] Is it allowed to burry suicides and is it allowed to offer sacrifice for them?[96] Is it allowed to burry Christians in the church?[97] Must those killed in action be brought home if their parents and comrades want to do so?[98] Who may be given alms?[99] Must force be applied against heathens who are reluctant to assume Christianity?[100] What should be done with the Islamic books they possess?[101]

Several questions concern holidays, ecclesiastical festivals, and periods of fast.[102] Is it allowed to wear the sign of the cross also in Lent,[103] and receive the sacrament every day?[104] Is it allowed to perform any work on Saturday and Sunday?[105] On the holidays of which apostles, martyrs, confessors, and virgins must one refrain from serf's work?[106] Is it allowed to sit in judgement and pass death sentence on the holidays of the saints and in Lent?[107] Is it allowed to travel or engage in battle on Sundays and holidays and in Lent, of course, only when it is required by necessity?[108] Is it allowed to hunt,[109] play games and have amusement,[110] and marry and hold a feast in the period of Lent?[111] What should be done with those who have had sexual intercourse with their wives during Lent?[112] Is it allowed for husband and wife to fulfil their marital obligations on Sunday?[113] How many times a year is it allowed to deliver baptism?[114] During

92 *Responsa* 78.
93 *Responsa* 87.
94 *Responsa* 88.
95 *Responsa* 91.
96 *Responsa* 98.
97 *Responsa* 99.
98 *Responsa* 100.
99 *Responsa* 101.
100 *Responsa* 102.
101 *Responsa* 103.
102 Dujčev 1965. 140.
103 *Responsa* 8.
104 *Responsa* 9.
105 *Responsa* 10.
106 *Responsa* 11.
107 *Responsa* 12; 45.
108 *Responsa* 36; 46.
109 *Responsa* 44.
110 *Responsa* 47.
111 *Responsa* 48.
112 *Responsa* 50.
113 *Responsa* 63.
114 *Responsa* 69.

which periods shall one refrain from eating meat?;[115] is it allowed to eat meat on the day of baptism, and for how many days after christening shall one give up eating meat?;[116] and, finally, is it allowed to eat early in the morning?[117]

None the less interesting are the questions from which we can indirectly obtain considerable additional information on the ancient religion and beliefs, way of life and legal order of the Bulgarians. The Bulgarians' dynamistic-manaistic beliefs,[118] that is, the faith in impersonal and mystical vital force abiding in men and animals, most frequently located in the head and carried by the blood, can be deduced from the questions whether animals not killed with a knife but simply struck dead may be eaten.[119] Most probably the same subject area is addressed by the question inquiring whether they may continue to wear their turban-like headwear spun from linen, deemed prohibited by the Greeks especially in the church;[120] and what should they replace with the horsetail used so far in battles as a banner,[121] since primitive peoples' attributed *mana* to the tail of certain animals.[122] The question regarding a stone endowed with curing effect, found during the period of heathenism, might have come from similar ideas too.[123] According to the *consulta*, eating certain animals and birds was considered a taboo;[124] it also concerned taboos when they asked the Pope how long after the birth of a child a woman might not go to church[125] and how long their husbands might not have intercourse with them.[126] The question whether women are allowed to stay in church with covered or uncovered head[127] might have come from the tabooistic nature of hair, especially long hair known from several examples.[128] The issue of sanctioning heathen subjects unwilling to assume Christianity and offering sacrifices to idols – the *Responsa* describes that in certain cases the sacrifice was the first fruits[129] of the produce[130] – was raised by the delegacy before the Pope.[131] They also inquired if the ill might continue to wear certain amulets they attributed curing effect to round their neck.[132]

115 *Responsa* 4.
116 *Responsa* 69.
117 *Responsa* 60.
118 About *manaism,* see Wagenvoort 1956; Rose 1951. 109; Rose 1948.
119 *Responsa* 91.
120 Beševliev 1981. 358.
121 *Responsa* 71.
122 Beševliev 359.
123 *Responsa* 62. Cf. Vámbéry 1879. 249.
124 *Responsa* 43.
125 *Responsa* 68.
126 *Responsa* 64.
127 *Responsa* 58.
128 Cf. Brelich 1972. 17–21; Pötscher 1988. 422.
129 Cf. Nielsson 1911. 71; Beševliev 1981. 386.
130 *Responsa* 89.
131 *Responsa* 41.
132 *Responsa* 79. Cf. Bertholet 1926. 315–317.

They also put some questions to the Pope with regard to the notion of days suitable and unsuitable for fighting and travelling as well as the rituals, magic words, and dances related to them; notably, if this practice could be made part of a people's life converted to Christianity,[133] to which of course the answer was no.[134] In heathen faith, after their death, suicides usually become harmful spirits, and to prevent them from returning they were not given the burial in accordance with customary ceremonies or, in certain cases, were given no burial at all. So, it was not by chance that one of the questions raised the point whether suicides should be buried, and if any kind of *sacrificium* should be delivered for them.[135] They buried those who died by natural death with due tribute to their memory raising a tomb over them; and they brought home the corpses of those killed in action.[136] Christian conversion, however, was not able to wind up the ancient religion immediately – the fact that the mission ran into opposition at several places is unambiguously indicated by the occurrence of a pagan revolt shortly before the delegacy was sent, which was put down and the fifty-two dignitaries involved in it were executed by Boris.[137] This is clearly stated in the *Responsa* too.[138]

At several points, the *Responsa* adverts to the Bulgarians' way of life and customary law before Christianity. So, for example, it unanimously reveals that polygamy was a generally accepted custom, otherwise they would not have asked the Pope if a man might have two wives at the same time.[139] It was customary for the fiancé to give the fiancée gold and silver objects, oxen, horses, and other valuable goods as dowry before the conclusion of the marriage.[140] After the husband's death, a widow was not allowed to marry again, and to prevent that in any case she was forced to live the rest of her life as a nun.[141] However, it was presumably a generally accepted practice that a man who became a widower married again, as the *consulta* includes a question whether this practice might be maintained.[142] With regard to the items of the *consulta* that supply data on religious beliefs, we have already mentioned that the Bulgarians wore a turban-like headgear made of linen.[143] The other typical article of their clothing was the *femoralia*, presumably similar mostly to trousers, which was worn both by men and women.[144] The development of Bulgarian legal order took a decisive turn by

133 *Responsa* 34; 35.
134 Beševliev 1981. 382–384.
135 *Responsa* 98. Cf. Hirzel 1908. 75.
136 *Responsa* 100.
137 Runciman 1930. 105.
138 *Responsa* 18. Cf. Beševliev 1971. 37–41.
139 *Responsa* 51.
140 *Responsa* 49.
141 *Responsa* 87.
142 *Responsa* 3.
143 *Responsa* 66.
144 *Responsa* 59. Cf. Beševliev 1981. 396.

assuming Christianity, but the *Responsa* supplies important information on the customary law of the period preceding it. A slave who escaped from the owner, if caught, was severely punished;[145] a slave slandering his master was treated the same way,[146] but the sources do not reveal anything else about the actual content of the sanction.[147]

Similarly, a free man who fled from his country was severely punished, but the actual sanction is again unknown to us.[148] In this respect, it is worth noting that the frontiers of the country were strictly guarded. Guardsmen failing to fulfil their duty and allowing either free men or slaves to flee were punished by death.[149] Death was the punishment of murderers of kinsmen.[150] Similarly, severe, presumably qualified death penalty was imposed on those who murdered their fellow-soldier,[151] or who were caught committing adultery with a strange woman.[152] They sanctioned negligent manslaughter,[153] theft[154] – if a subject charged with theft or robbery was unwilling to admit his crime, the judge was allowed to wring confession from him by force[155] –, and abduction.[156] They punished those who castrated others,[157] who brought false charges,[158] and who gave deadly poison to others.[159] Women treating their husband badly, committing adultery, and slandering their husband were threatened to be punished by abandonment, also incurred *eo ipso*.[160] Uprising was punished by death, which penalty was inflicted not only on the perpetrators but on their families too.[161]

IV. The First Steps toward the Organization of the Church in Bulgaria

Furthermore, there are several highly important questions in the *Responsa* that concern the ecclesiastical organization: Is it possible to assign a patriarch to the

145 *Responsa* 21.
146 *Responsa* 97.
147 Cf. Beševliev 1981. 414.
148 *Responsa* 20.
149 *Responsa* 25.
150 *Responsa* 24; 26; 29.
151 *Responsa* 27.
152 *Responsa* 28.
153 *Responsa* 30.
154 *Responsa* 31.
155 *Responsa* 86.
156 *Responsa* 32.
157 *Responsa* 52.
158 *Responsa* 84.
159 *Responsa* 85.
160 *Responsa* 96.
161 *Responsa* 17.

head of the Bulgarian Church?[162] Who shall ordain the patriarch?[163] How many patriarchs are there actually?[164] Which patriarch comes right after the Pope of Rome in the church hierarchy?[165] And, finally, is it true what the Greeks assert that chrism is made exclusively in their country, and it is taken from there everywhere else around the world?[166] Special attention should be paid to a certain aspect of the question regarding the assignment of the patriarch: Did it manifest Boris's efforts to attain the establishment of a patriarchy for his country[167] or he simply intended to obtain information on the structure of the ecclesiastical hierarchy?[168] The former option seems to be more probable because by the assignment of the patriarch the Bulgarian Church could have been made completely independent of Byzantium by the ruler, and it would have been much less strictly and closely subjected to the Roman Church.[169] The Pope, however, very diplomatically evaded Boris's request, and not even mentioning the possibility of obtaining the dignity of patriarch he held out the prospect of appointing an archbishop to the head of the Bulgarian Church in the future – as a matter of fact, only in case he received proper report from his delegates on the conditions of Bulgarian Christianity.[170]

Simultaneously with his letter and missionary work, Pope Nicholas began to deal with the issue of developing an independent Bulgarian ecclesiastical organization. (In 860, Photios, Patriarch of Constantinople, in accordance with the practice generally accepted and applied by the five patriarchs, asked Pope Nicholas to acknowledge his own, somewhat contested election. The Pope made the granting of his approval subject to the acknowledgement of the papal claim to the Illyricum and Thessaloniki, that is, almost the whole of the Balkans including Bulgaria.[171] Although until March 862 Photios seemed to be willing to fulfil this claim, at a council held in Rome in 863, the Pope deprived him of his dignity and threatened him with excommunication – presumably, he expected Photios's successor, Ignatios, to be more permissive regarding the issue of the Balkans.[172]) With respect to the Bulgarian mission, Pope Nicholas set out from the conviction that the territory of the Balkans was directly subject to the Pope's supremacy. However, he did not ordain the patriarch requested by Boris to Bulgaria. He merely held out the prospect of setting up an archbishopric independent of

162 *Responsa* 72.
163 *Responsa* 73.
164 *Responsa* 92.
165 *Responsa* 93.
166 *Responsa* 94.
167 Runciman 1930. 110.
168 Dujčev 1965. 142.
169 Hergenröther 1867. II. 650.
170 Obolensky 1999. 116.
171 Dvornik 1948. 91. sqq.
172 Dopsch 1987. 325.

Byzantium.[173] Missionary work was commenced by the delegacy sent off to Bulgaria under the leadership of Formosus of Porto, the later pope (891–896), and Paulus of Populonia.[174]

Louis the German, whom was called upon by the Bulgarian delegacy in Regensburg, also pledged himself to send missionaries to Bulgaria. However, the preparations took too long, and the Frankish delegation led by Ermenich, Bishop of Passau, arrived in the Balkans only in the spring of 867, where the Roman missionaries getting ahead of them had already begun to convert, preach, and baptize.[175] Gravely disappointed in his hopes, Ermenich waited for Louis the German's permission, and returned to Passau.[176] The conflict that manifested itself regarding the Bulgarian mission revealed the tensions between the papacy and the Eastern Frankish Empire.[177] Photios, however, was not willing to tolerate Rome's intervention into his sphere of authority; and, therefore, at a Council of Constantinople in 867, he had Pope Nicholas I removed, of which the Pope, who died in the meantime, was not informed.[178] In the same year, however, the assassination of the *basileus*, Michael III, and the removal of Photios completely changed the political constellation, and the plans of Pope Nicholas I concerning Bulgaria seemed to attain the stage of implementation after his death. Affairs reached a crisis when Rome did not keep Pope Nicholas's promise to set up an independent Bulgarian archbishopric.[179] Khan Boris turned to Pope Adrian II (867–872) with the request to appoint Formosus Archbishop of Bulgaria, but the Pope – saying that he could not transfer Formosus as bishop to another diocese – did not fulfil the claim.[180] Certainly, the actual cause must have been the influence of the anti-Formosus faction in Rome produced on the Pope.[181] A similar thing happened to deacon Marinus, who later became Pope (882–884), when he was not appointed to be the Bulgarians' archbishop due to Adrian II's opposition; and deacon Sylvester proposed by the Pope to take the archbishop's seat was refused by Khan Boris.[182] Besides personal conflicts, most certainly, the Pope's reluctance must have been due to the fact that he wanted to keep Rome's direct supremacy over the Balkans, which would have been hugely limited by setting up the archbishopric – that is why the papacy could not reap the fruits of its missionary policy pursued in this region.[183]

173 *Responsa* 72–73.
174 Grotz 1970. 101. sqq.
175 *Annales Fuldenses a.* 866; *a.* 867; Löwe 1987. 228.
176 *Annales Fuldenses a.* 867; Dvornik 1964. 122.
177 Dopsch 1987. 326.
178 Dvornik 1948. 91. sqq.
179 Dopsch 1987. 326.
180 Kosztolnyik 1997. 215.
181 Grotz 1970. 230. sq.; Dümmler 1887–1888. II. 192. sq.
182 Grotz 1970. 209. sq.
183 Dopsch 1987. 327.

Disappointed in the Roman Church, Khan Boris turned to Basileios I (867–886) and Patriarch Ignatios, and restored his relations with Byzantium. This was made official by the Council of Constantinople 869/70. At one of the last meetings of the Council – after having expelled the delegates of Rome –, Bulgaria was placed under the control of the Patriarchy of Constantinople, and soon Ignatios would ordain an archbishop and several bishops for the Bulgarians.[184] Boris expelled the Roman missionaries from his country, and Bulgaria – already as an independent archbishopric – resisted Pope John VIII's (872–882) later attempts to win the country back to Rome.[185] In the course of the missionary work commenced during the reign of Khan Boris – just like through the stages of Methodius's fate, who performed conversion among the Moravians[186] –, Bulgaria served as a playground for power politics between Rome and Byzantium, and the Eastern Frankish Empire concurring with each other. However, the Roman Church, setting off with better chances owing to the Bulgarian's fear of the hegemony of Byzantium and thanks to Pope Nicholas I's agility and *Responsa*, in a few years' time, lost its advantage gained in this respect because Patriarch Ignatios, the successor of Basileios I and Photios, was willing to raise Bulgaria to the rank of an independent archbishopric, which Pope Nicholas I and Pope Adrian II were from first to last reluctant to do.

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184 Dvornik 1948. 132. sqq.; Eggers 1996. 25.

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Niedergang der Rechtspersönlichkeit? Übergang der Haftung und Durchgriffshaftung im ungarischen Privatrecht

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Abstract. Decline of the Legal Personality? Transfer of Liability and Piercing the Corporate Veil in Hungarian Private Law
What is the difference between piercing the veil and the transfer of liability? We refer to some criteria:
– it can be attached to existent, operating artificial persons;
– it can not only be expanded to business associations but also to any artificial person that has a membership (e.g. society, association, grouping);
– there is no express rule on this in the act;
– the characteristics of the liability (legal basis, extent, nature) are clear and unambiguous;
– the institution in question is not only formed for the "dominant member";
– we can actually move over the separate legal entity of the artificial person since the member committing an abuse with the legal personality (and not with his limited liability) of the existing artificial person has joint and several liability with the artificial person towards a third person, and we do not only transfer the liability – in absence of liability of the company – to the abuser member;
– there is no dogmatic problem of "limited liability of the member" because this institution can also be applied in case of artificial persons with subsidiary, unlimited liability of the members (e.g. grouping);
– it does not depend on the claim made by the creditor during the winding up procedure;
– the rules referring to lapse in case of damages in the Civil Code shall be applied; there is no problem with time dimension;
– in the case of the realization of the above detailed special elements, the piercing of the veil is suitable for applying it as a general clause and for legal development (see above: the newer case law).

Keywords: transfer of liability, piercing the corporate veil, case law

Auszug. Worin weicht die Durchgriffshaftung vom Übergang der Haftung ab? Wir verweisen auf einige Kriterien:
– sie kann sich an existierende, funktionierende Rechtspersonen anschließen;
– sie kann nicht nur auf Wirtschaftsgesellschaften mit Rechtspersönlichkeit erweitert werden, sondern auf jede, über Mitgliedschaft verfügende Rechtsperson (z. B. Genossenschaft, Verein, Interessenvereinigung);
– im Gesellschaftsgesetz existiert keine ausdrückliche Verfügung zu diesem Gegenstand;
– die Charakteristika der Haftung (Rechtsgrundlage, Ausmaß, Charakter) sind geklärt und eindeutig;
– das Rechtsmittel wurde nicht nur für den „bestimmenden Gesellschafter" ausgearbeitet;
– es wird tatsächlich die Hülle des gesonderten Rechtssubjekts der Rechtsperson durchbrochen, da der Gesellschafter, welcher die Rechtspersönlichkeit der existierenden Rechtsperson (und nicht der beschränkten Gesellschaftshaftung) missbraucht, zusammen mit der Rechtsperson und neben dieser (Gesamtschuld) dem geschädigten Dritten gegenüber einzustehen hat, und die Haftung wird – mangels des Einstandes der Gesellschaft – nicht nur auf den missbrauchenden Gesellschafter übertragen;
– das dogmatische Problem der „beschränkten Gesellschaftshaftung" tritt nicht auf, weil der Sachverhalt auch bei Rechtspersonen mit grundlegender, unbeschränkter Gesellschaftshaftung (z. B. Interessenvereinigung) anwendbar ist;
– es ist nicht abhängig von der Anmeldung der Gläubigeransprüche im Auflösungsverfahren;
– die mit der Schadensverursachung zusammenhängenden Verjährungsregeln des UZGB sind dabei maßgeblich, es gibt kein Problem der zeitlichen Dimension;
– die Durchgriffshaftung wird im Falle der Verwirklichung der oben ausgeführten speziellen Sachverhaltselemente für eine Nutzung als Generalklausel, sowie auch für eine rechtliche Weiterentwicklung als geeignet angesehen (siehe unten: neuerliche richterliche Praxis).

Schlüsselbegriffe: Rechtsperson, Missbrauch des Rechts, Übergang der Haftung, Durchgriffshaftung

1. Die Kriterien der Rechtspersönlichkeit[1]

Die juristische Person ist rechtsfähig: sie kann Rechte besitzen und Verbindlichkeiten eingehen. Die Rechtsfähigkeit der juristischen Person erstreckt sich auf alle Rechte und Pflichten, die infolge ihres Charakters nicht nur an Menschen gebunden werden können. Die Regeln zu den Persönlichkeitsrechten sind auf die personengebundenen Rechte der juristischen Person anzuwenden, außer wenn der Schutz seines Charakters wegen nur dem Menschen zustehen kann. Die juristische

1 Der Unterkapitel ist aufgrund des folgendes Aufsatzes verfasst worden: Papp 2010. 274–275.

Person kann in der gesetzlich festgelegten Art, zur Betreibung einer nicht durch ein Gesetz verbotenen Tätigkeit und zum Erreichen eines Ziels gegründet und betrieben werden; ein gegen diese Bestimmung verstoßendes Gründungsdokument ist nichtig. Die juristische Person muss über einen eigenen Namen, einen Sitz, ein von ihren Mitgliedern, bzw. ihrem Gründer abgesondertes Vermögen sowie eine ihre Geschäftsführung und Vertretung ausübende Organisation verfügen.[2]

In Ungarn ist eine Rechtsperson eine Organisation, die vom Staat als solche anerkannt und mit Rechten und Pflichten ausstattet ist.

Die Rechtsperson verfügt über ein gesondertes Vermögen: das Vermögen der Rechtsperson ist nicht identisch mit dem Eigentum, dem Vermögen ihrer Gründer/Mitglieder (das Prinzip der Trennung des Eigentums).

Aus dem gesonderten Vermögen der Rechtsperson ergibt sich deren selbständige Vermögenshaftung: für die Verpflichtungen, die Schulden der Rechtsperson haftet die Rechtsperson, nicht deren Gründer/Gesellschafter.

Ein wesentliches Charakteristikum der Rechtsperson ist die dauerhafte Organisation, unter der wir folgendes verstehen:

– einerseits, dass das Bestehen der Rechtsperson von der Änderung ihrer Gründer/Mitglieder (Tod/Erlöschen ohne Rechtsnachfolger/Umwandlung) nicht berührt wird;

– andererseits, dass administrative und vertretende Organe den „Willen" der Rechtsperson aktivieren;

– zum dritten, dass eine organisatorische Struktur mit einer Hierarchie und Einteilung nach der Funktion aufgebaut wird (welches Organ kann das andere kontrollieren, welches Organ kann sich in die Funktion des anderen einmischen usw.).

Für das Zustandekommen, die Rechtsfähigkeit, die Funktionstüchtigkeit der Rechtsperson ist die staatliche Anerkennung unumgänglich, was bedeutet

– einerseits, dass die Organisation nur zu einem genehmigten gesellschaftlichen, wirtschaftlichen Zweck gegründet werden kann;

– andererseits, dass das Rechtssubjekt auf normativer und individueller Ebene gewährleistet ist.

Damit die Rechtsperson in Rechtsverhältnissen, im Wirtschaftsverkehr auftreten kann, ist ein eigener Name, unter dem sie vorgehen kann, notwendig.

Aus den Kriterien der dauerhaften Organisation und dem Verfahren unter eigenem Namen für die Rechtsperson folgt die „Willens-Artikulierung" über einen Vertreter von natürlicher Person.

Die sich aus dem selbständigen Vermögen und der dauerhaften Organisation ergebende Unabhängigkeit von den Gründern ist auch typisch für Rechtspersonen.

Aus den Kriterien der staatlichen Anerkennung, des selbständigen Vermögens, der dauerhaften Organisation ergibt sich, dass Rechtspersonen für einen lange andauernden Zeitraum gegründet werden (die langfristige Existenz).

2 Gesetz Nr. V von 2013 über das Zivilgesetzbuch 3:1.§.

2. Übergang der Haftung

2.1. Bis dem neuen UZGB

Beim Auflösen einer Gesellschaft mit beschränkter Haftung, einer Aktiengesellschaft und Kommanditgesellschaft ohne Rechtsnachfolger kann sich der GmbH-Gesellschafter/Aktionär/Kommanditist, der selbige missbraucht hat, nicht auf die beschränkte Haftung berufen. Diejenigen, die ihre beschränkte Haftung, bzw. die separate Rechtspersönlichkeit der Gesellschaft missbrauchten, haften unbegrenzt und gesamtschuldnerisch für die nicht befriedigten Verbindlichkeiten der erloschenen Gesellschaft. Die unbegrenzte und gesamtschuldnerische Verantwortung der Gesellschafter lässt sich besonders dann feststellen, wenn sie über das Vermögen der Gesellschaft als über ihr eigenes verfügten; wenn sie das Gesellschaftsvermögen zu ihren eigenen oder zugunsten anderer Personen so minderten, dass sie wussten, oder im Falle im allgemeinen zu erwarteten Fürsorge hätten wissen müssen, dass die Gesellschaft dadurch ihre Verpflichtungen gegenüber Dritten nicht erfüllen kann; weiterhin bei einer Überbewertung des Apports, sowie bei der arglistigen Annahme einer Überbewertung des Apports durch mehrere Gesellschafter.

Nach der Begründung des Gesetzes ist diese Verfügung des Gesetzes über Wirtschaftsgesellschaften die sog. Regel der Übertragung der Haftung, welche laut § 5 UZGB die Konkretisierung des Rechtsmissbrauchs auf dem Gebiet des Gesellschaftsrechts darstellt. Diese Vorschrift ist die sog. Unternehmensausräumung, die eigentümliche und Ausnahmeform der Sanktion der Unterkapitalisierung der Gesellschaften, welche die eigentlich objektiven Regeln des Rechtsmissbrauchs durch das Element der Schuld im Zusammenhang mit dem Gläubigerschutz ergänzt.[3]

Tamás Török betrachtet den Sachverhalt, den er als vermögenstypische, durch das eigene Verhalten bestehende, volle, gesamtschuldnerische, primäre, auf Verschulden basierende, deliktuale Haftung einstuft, als zum Bereich des Konzernrechts gehörenden, institutionalisierten Übergang der Haftung.[4]

Tibor Nochta hält den Inhalt von § 50 Wirtschaftsgesetz für sui generis und nicht für grundlegende Haftung.[5]

György Wellmann bezeichnet das analysierte Kapitel ebenfalls als institutionalisierten Übergang der Haftung, der bei den Formen mit beschränkter Gesellschafterhaftung für einen bestimmten Kreis von Fällen anwendbar ist. Den Sachverhalt legt er als sekundäre, indirekte, grundlegende Haftung aus, weil die Haftung des Gesellschafters zeitlich nur nach dem Mangel des Einstehens der Gesellschaft eintritt. Seiner Ansicht nach bildet „ein rechtswidriges und anrechen-

3 Sárközy 2009; Sárközy 2008. 3–9.
4 Török 2007. 263, 268.
5 Nochta 2011. 279.

bares Mitgliedsverhalten, das den Missbrauch irgendeines Rechtes verwirklicht, die Grundlage" für die Anwendung der Vorschrift des Wirtschaftsgesetzes.[6]

András Kisfaludi reiht den Sachverhalt als grundlegende Haftung ein, auf deren Grundlage die Haftung erst nach der Auflösung der Gesellschaft vorkommen kann, sich nur auf die aus dem Vermögen der Gesellschaft nicht befriedigten Forderungen, die nach Abschluss der Auflösungsverfahrens durchsetzbar sind, erstreckt.[7]

Es besteht kein Zweifel, dass im vorliegenden Fall die unbeschränkte Haftung des GmbH Gesellschafters/Aktionärs/Komplementärs der KG durch eine besondere Verletzung des Verbots des Missbrauchs von Rechten des Bürgerlichen Rechts im Gesellschaftsrecht begründet wird: es wurde nämlich entweder die beschränkte Gesellschafterhaftung (indem allgemein keine Haftung für die Verbindlichkeiten der Gesellschaft übernommen wird), oder die gesonderte Stellung der Gesellschaft als Rechtssubjekt (d. h. die eigenen Rechtshandlungen werden als solche der Wirtschaftsgesellschaft ausgegeben, angezeigt) missbraucht; und die Sanktion ist der Übergang der Haftung auf den Gesellschafter. Die Nutzung des Ausdrucks „Übergang der Haftung" ist in dem Sinne richtig, dass der Gesetzgeber die Haftung mangels gesellschaftlichen Vorhandenseins und gleichzeitig der gesonderten Stellung des Rechtssubjektes auf den ein rechtswidriges Verhalten bezeugenden Gesellschafter „überträgt", weil niemand da ist, der den verursachten Schaden erstattet. Die gesetzlichen Bedingungen des Übergangs der Haftung: bei Auflösung der Wirtschaftsgesellschaft ohne Rechtsnachfolger, wenn die Forderungen der Gläubiger der aufgelösten Wirtschaftsgesellschaft aus dem Gesellschaftsvermögen teils/zur Gänze keine Befriedigung erlangten und die Befriedigung der Gläubigeransprüche erfolgen kann, weil der GmbH Gesellschafter/Aktionär/Kommanditist der KG seine beschränkte Haftung missbrauchte, indem er die Deckungsgrundlage (das Vermögen der Gesellschaft) verminderte/entzog. Die aufgrund des Übergangs der Haftung bestehende unbeschränkte und gesamtschuldnerische Haftung hat Vermögenscharakter und gründet auf der Anlastbarkeit. Bei der Feststellung der Charakteristika der Haftung sind wegen der nicht sehr glücklichen Formulierung der Rechtsvorschrift zwei Kriterien der Kritik ausgesetzt:

a) die Haftung ist als primär zu betrachten, weil der Gesellschafter für seine eigenen missbrauchsartigen Rechtshandlungen haftet; sie ist auch als grundlegend einzustufen, weil sich der Gesellschafter bei der Begehung des Missbrauchs hinter dem gesonderten Rechtssubjekt der Gesellschaft „versteckt" und das Einstehen dafür erst dann eintritt, wenn auch noch nach der Auflösung der Gesellschaft wegen des missbrauchsartigen Verhaltens des Gesellschafters unbefriedigte Gläubigerforderungen verbleiben;

b) die Haftung hat grundlegend deliktualen Charakter, da der Gesellschafter in keinem Rechtsverhältnis zu den Geschädigten steht, solange die Gesellschaft

6 Wellmann 2008. 9; Wellmann 2006. 4–5.

7 Kisfaludi 2007. 269; Kisfaludi–Szabó 2008. 272; BH 1996. 337; EBH 2005. 1228; BH 2004. 194.

nicht ohne Rechtsnachfolger aufgelöst ist; nehmen wir jedoch die hintergründige Einstufung der Haftung (den akzessorischen Charakter, auf dessen Grundlage das rechtliche Schicksal der Haupthaftung geteilt wird)[8] an, hat das Einstehen des Gesellschafters akzessorischen Charakter, der sich an die rechtliche Einstufung der missbrauchsartigen, rechtswidrigen Rechtshandlungen, die im „Deckmantel" der Gesellschaft erscheint und auch kontraktualen Charakter haben kann, anpasst.[9] In diesem Zusammenhang berufen wir uns noch auf András Kisfaludi,[10] der meint „wie über sein eigenes verfügen bedeutet soviel, dass der Gesellschafter für die Außenwelt das Gesellschaftsvermögen als sein eigenes darstellt und als sein eigenes Eigentum veräußert oder belastet – aller Wahrscheinlichkeit nach seinen eigenen persönlichen Interessen entsprechend"; in diesem Fall versteckt sich der Gesellschafter nicht mehr hinter dem „Deckmantel" der Gesellschaft, so wird die Haftung primär und kontraktual.

Wegen des nicht wirklich gelungenen § 50 des Wirtschaftsgesetzes und der Formulierung des Übergangs der Haftung werden in der Fachliteratur viele Probleme beleuchtet:

a) Nach Tamás Török müsste nur die Haftung des über entschiedenen Einfluss verfügenden Gesellschafters vorgeschrieben werden, da nur dieser Gesellschafter in der Lage ist, das Begehungsverhalten zu verwirklichen;[11]

b) Gábor Zoltán Szabó bemängelt, dass die personelle Geltung des Sachverhaltes sich nicht auf den sich noch vor der Auflösung der Gesellschaft von der Gesellschaft trennenden, den Missbrauch vollziehenden Gesellschafter erstreckt;[12]

c) Tibor Kiss ist der Ansicht, dass die Vorschrift nur im Falle einer natürlichen Person als Gesellschafter auslegbar ist, da ein Gesellschafter mit Rechtsperson sich nicht hinter einer anderen Rechtsperson „verstecken" muss;[13]

d) Márta Brehószki hält es für wesentlich hervorzuheben, dass diejenigen, deren Ansprüche der Liquidator nicht registriert hat, auch kein Verfahren auf Schadenersatz gegen den Gesellschafter anstrengen können;[14]

e) Nach György Wellmann wird die Anwendung von § 50 des Wirtschaftsgesetzes dadurch erschwert, dass daraus die Anwendbarkeit des Entschuldungssystems nicht hervorgeht, weiters vermisst er die ausdrückliche Definition des ursächlichen Zusammenhangs (zwischen dem Missbrauch durch den Gesellschafter und der Gläubigerschädigung) wegen deren Notwendigkeit (nur bei einem der besonderen Sachverhalte kommt der Ausdruck „damit" vor);[15]

8 1/2007. PJE; BH 2007. 5.
9 Auer et alii 2011. 356–357; EBH 1999. 118.
10 Kisfaludi 2007. 268.
11 Török 2007. 300.
12 Szabó 1998. 12.
13 Kiss 2010.
14 Brehószki 2010. 46.
15 Wellmann 2008. 5–6.

f) András Kisfaludi weist daraufhin, dass in den Geltungsbereich von § 50 des Wirtschaftsgesetzes nur die Verhaltensformen fallen, die im Kreis der Ausübung von Gesellschafts- und anderen Rechten verblieben und nicht in das Gebiet der Rechtswidrigkeit abrutschten, weiterhin wirft er die Gefahr der Vervielfachung der Verantwortung wegen Absatz (4) von § 13 des Wirtschaftsgesetzes, der in Absatz (2) von § 50 des Wirtschaftsgesetzes einbezogen wurde, auf, und beleuchtet auch die Rechtsunsicherheit, die sich aus dem Fehlen der Zeitdimension des Missbrauchs durch den Gesellschafter (wie lange vor der Auflösung der Gesellschaft ohne Rechtsnachfolger ist der Missbrauch erfolgt, um relevant zu sein?) ergibt, desgleichen hält er die Rechtshandlungen „wie über sein eigenes verfügen" (durch Übertragung kann nur von einem Eigentümer Eigentum erlangt werden) und „zu eigenen Gunsten vermindern" (konkurriert mit § 203 UZGB) über das UZGB für regelbar.[16]

Ich werfe nach unserer eigenen Ansicht weitere Probleme auf:

– unser Vorschlag, der sich einzig auf den Wortgebrauch bezieht, ist lieber statt des eher auf einen geistigen Zustand hinweisenden Wortes „beschränkt" den Ausdruck „eingeschränkt" zu verwenden;

– aus rechtsdogmatischer Sicht ist auch das Operieren mit dem Ausdruck „eingeschränkte Haftung" nicht entsprechend: in der Grundsituation hat der Kommanditist der KG, der Gesellschafter der GmbH und der Aktionär keine Haftung, diese kann nur bei Eintritt besonderer, bestimmter Bedingungen in eingeschränktem oder uneingeschränktem Maße auftreten;[17]

– die Formulierung von § 50, Absatz (2) des Wirtschaftsgesetzes kann gleichermaßen auf die Schuldigkeit und die Arglistigkeit hinweisen, wobei sich das Maß und die Rechtsgrundlage der Haftung nach § 339, Absatz (1) UZGB richtet: in der Fachliteratur und auch in der richterlichen Praxis werden sie trotz der nicht allzu glücklichen Definition wie Formen mit subjektiver Rechtsgrundlage (auf der Anlastbarkeit basierend) und ordentlicher Haftung behandelt;

– das Wort „Sorgfalt" von § 50, Absatz (2) des Wirtschaftsgesetzes ist in mehrerlei Hinsicht problematisch: einerseits kann es nur bei natürlichen Personen angewendet werden, andererseits ist die Erfüllung des Maßes der „allgemein zu erwartenden Sorgfalt" mit einem Inhalt beschwerlich, weil aus dem Maßstab für ein Individuum ein solcher mit generellem Charakter gebildet werden müsste und schließlich die Frage, ob sich der Missbrauch laut Sachverhalt ohne Sorgfalt verwirklichen lässt(?);

– in Absatz (4) von § 13 des Wirtschaftsgesetzes der in Absatz (2) von § 50 des Wirtschaftsgesetzes einbezogen wurde, wird der Kreis der Geschädigten unklar (bei ersterer sind nicht die Gläubiger die Geschädigten des Missbrauchs, sondern die Gesellschaft und höchstens mittelbar – wenn überhaupt – die Gläubiger);

16 Kisfaludi 2007. 268; Kisfaludi 2008. 668–669; 671–672; 270–271.

17 Papp 2011. 390–391; 400–401; 446–447.

– die Überbewertung des Apports nach Absatz (4) von § 13 des Wirtschaftsgesetzes und die Rolle und Aktualität von dessen arglistiger Annahme nach der Auflösung ohne Rechtsnachfolger einer lange existierenden Gesellschaft ist nicht wirklich klar;

– im Bezug auf den Kommandisten der Kommanditgesellschaft ist „der Missbrauch der gesonderten Rechtspersönlichkeit zuungunsten der Gläubiger" – vorläufig – wegen der fehlenden Rechtspersönlichkeit dieser Gesellschaft nicht anwendbar: hinsichtlich der drei Mitgliedsarten mit sog. eingeschränkter Haftung kann das Missbrauchsverhalten des Kommanditisten enger sein, deshalb wäre es ausgehend vom Prinzip des Firmenschutzes glücklicher gewesen, den Ausdruck „gesondertes Rechtssubjekt" anstelle von „Rechtspersönlichkeit" zu benutzen (diese unsere Bemerkung verliert bei Rekodifikation des UZGB ihren Sinn).

2.2. Die Gegenwart

Für ihre Verbindlichkeiten muss die juristische Person mit ihrem eigenen Vermögen einstehen; die Mitglieder und der Gründer der juristischen Person haften nicht für die Schulden der juristischen Person. Wenn ein Mitglied oder Gründer der juristischen Person seine beschränkte Haftung missbraucht hat und deswegen bei der Auflösung der juristischen Person ohne Rechtsnachfolger unbefriedigte Gläubigerforderungen übriggeblieben sind, muss das Mitglied oder der Gründer für diese Schulden unbegrenzt einstehen.[18] Die Füllung des Tatbestandes mit Inhalt ist die Aufgabe der Gerichte und der theoretischen Juristen.

3. Die Durchgriffshaftung

3.1. Bis dem neuen UZGB

Aufgrund der Tätigkeit von István Kemenes[19] kam das Gutachten 1/2005. (17. VI.) des Kollegiums, modifiziert durch das Gutachten 2/2008. (4.XII.) des Bürgerlichen Kollegiums des Gerichtshofes Szeged zustande, welches durch die Bestimmung des Sachverhaltes des Missbrauchs des gesonderten Rechtssubjekts der Rechtsperson das Rechtsinstitut der Durchgriffshaftung entwickelte.

Gegenüber dem Gesellschafter, der im Tätigkeitsbereich der Rechtsperson verfährt,[20] lassen sich die Rechtsperson belastende bürgerlich-rechtlichen Folgen durch die mit der Rechtsperson in einem vertraglichen oder außervertraglichen Rechtsverhältnis stehenden geschädigten Dritten direkt – außer den im Gesetz

18 Gesetz Nr. V von 2013 über das Zivilgesetzbuch 3:2. §.
19 Kemenes 2000a. 315–330; Kemenes 2000b. 2–9.
20 Fejér Megyei Bíróság 5. Pf. 22.104/2009/18.

bestimmten Fällen – ausnahmeweise, nur dann geltend machen, wenn der Gesellschafter die aus der gesonderten Haftung der Rechtsperson stammenden Vorteile, die daraus hervorgehenden Berechtigungen durch vorsätzliches Verhalten schwer missbraucht. Der Missbrauch der gesonderten Haftung der Rechtsperson wird besonders dann verwirklicht, wenn die Rechtsperson mit einem Ziel betrieben wird, das im Gegensatz zur Rechtsordnung steht, die ausgesprochene Schädigung Dritter (Gläubiger) zum Ziel hat. Einen Rechtsmissbrauch bedeutet auch, wenn der Gesellschafter äußerlich den Anschein erweckt, dass er im Namen und Interesse der Rechtsperson verfährt, tatsächlich jedoch Vermögensvorteile zugunsten seines Privatvermögens abzieht. Als Konsequenz des Rechtsmissbrauchs kann sich der Gesellschafter nicht auf die gesonderte Haftung der Rechtsperson berufen. Der in eigener Person haftende Gesellschafter hat nach den Regeln der außervertraglichen Schadensverursachung dem mit der Rechtsperson in einem (vertraglichen oder außervertraglichen) Rechtsverhältnis stehenden, den Schaden erlittenen habenden Dritten gegenüber einzustehen. Die kontraktuale oder deliktuale Haftung der Rechtsperson und die außervertragliche Haftung des Gesellschafters sind in einem solchen Fall gesamtschuldnerisch.[21]

Der Missbrauch der Rechtspersönlichkeit verletzt das Grundprinzip von Treu und Glauben aus dem bürgerlichen Recht und verstößt gegen das gesetzliche Verbot des Rechtsmissbrauchs. Der Missbrauch der Rechtspersönlichkeit richtet sich darauf, dass der Gesellschafter der Rechtsperson unter Ausnutzung der rechtlichen Vorteile, die sich aus dem gesonderten Rechtssubjekt, dem separaten Vermögen und der Haftung der Rechtsperson ergeben, als natürliche Person hinsichtlich seines Privatvermögens von den direkten Rechtsfolgen der direkten zivilrechtlichen Haftung befreit ist. Er übt die aus dem Status der Rechtspersönlichkeit hervorgehende vorteilhafte Kombination von Berechtigungen zu Zwekken aus, die nicht zu deren gesellschaftlichen Bestimmung passen. Durch das vorsätzliche, betrügerische, gezielte Verhalten werden die gesetzlichen Interessen der Personen beeinträchtigt und geschädigt, um unzulässige – Privatinteressen befriedigende – Vorteile zu erlangen.[22]

Mangels eines gesonderten gesetzlichen Sachverhalts bilden die Vorschriften des UZGB zu den Grundprinzipien die Rechtsgrundlage der abgetrennten Durchgriffshaftung (keine selbständige Rechtsgrundlage für die Haftung, zieht nur die Durchgriffshaftung nach sich): die Rechtsausübung nach Treu und Glauben, die gegenseitige Zusammenarbeit und die Anforderungen der allgemeinen Erwartung sowie das Verbot des Rechtsmissbrauchs. Das Verhalten der natürlichen Person als Gesellschafter verwirklicht den Tatbestand des Vertragsbruchs oder Deliktes der Rechtsperson: das Verhalten der beiden Rechtssubjekte ist gleich. Zur Durchgriffshaftung der Rechtsperson wird in der richterlichen Praxis seitens des

21 SZIT PK 1/2005. (VI. 17.) (geänd. 2/2008. [XII. 4.])
22 SZIT PK 1/2005. (VI. 17.) (VI. 17.) (geänd. 2/2008. [XII. 4.])

Gesellschafters ein Mehrheitselement gefordert: die rechtswidrige und anlastbare Verursachung eines Nachteils ist nicht ausreichend, sie muss den Sachverhalt des vorsätzlichen, betrügerischen und gezielten Missbrauchs erfüllen.[23] Das Mehrheitselement ist also nichts anderes, als die schwere Verletzung der aus der Rechtspersönlichkeit hervorgehenden bestimmungsgemässen Rechtsausübung, die Verwirklichung des Missbrauchs des Rechts. Die Rechtsgrundlage für die direkte Haftung des Gesellschafters ist die offenbare, herausragende und grobe Verletzung der Grundprinzipien des bürgerlichen Rechts, dessen Rechtsfolge ist, dass sich der Gesellschafter nicht auf die gesonderte Haftung der Rechtsperson berufen kann. Der in der eigenen Person haftende Gesellschafter hat nach den Regeln der außervertraglichen Schadensverursachung (§ 339, Absatz [1] UZGB: ordentliche Haftungsform basierend auf einer subjektiven Rechtsgrundlage und Anlastbarkeit) einzustehen und die Haftung der Rechtsperson (kontraktual/deliktual) sowie des Gesellschafters (deliktual) ist gesamtschuldnerisch.[24]

In der seit der Meinungsbildung des Kollegiums vergangenen Zeit hat die richterliche Praxis die Anwendbarkeit des Rechtsmittels der Durchgriffshaftung erweitert: sie wird als auch auf Personen ausdehnbar angesehen, die bei der Rechtsperson ein leitendes Amt bekleiden und so mit dieser in einem Rechtsverhältnis stehen. Der Durchgriff der sich auf die allgemeine Regel der gesonderten Haftung bei einer noch existierenden Wirtschaftsgesellschaft (GmbH) bezieht, kann nur in Ausnahmefällen erfolgen, wenn feststellbar ist, dass das Ziel des an der Schädigung beteiligten leitenden Amtsinhabers mit der Gründung bzw. der Betreibung der Rechtsperson die unlautere Ausnutzung der aus dem gesonderten Rechtssubjekt und der Haftung der Rechtsperson stammenden Vorteile war, dass er das gesonderte Vermögen der Rechtsperson ausschließlich für seine eigenen Zwecke, im Interesse der Vermehrung seines Privatvermögens nutzte und mit der Gründung bzw. dem Betrieb der Rechtsperson ausschließlich deren Vertragspartner täuschen wollte.[25]

Dem im Gutachten des bürgerlichen Kollegiums ausgebildeten Standpunkt und der vorangegangenen bzw. darauf aufbauenden richterlichen Praxis stimmen – nach den oben ausgeführten Gründen – Tibor Nochta,[26] Márta Brehószki[27] und auch die Autorin dieser Studie zu.

György Wellmann[28] und – ihm nachfolgend – Tamás Török[29] stimmen der Meinung des bürgerlichen Kollegiums aus nachstehenden Gründen nicht zu:

23 BDT 2003. 840; BDT 2008. 99. II; BDT 2008. 1802; DÍT Gf. IV. 30.044/2010/7; SZÍT Pf. I. 20.409/2011.
24 Papp 2011. 251.
25 DÍT Gf. IV. 30.044/2010/7.
26 Nochta 2011. 279.
27 Brehószki 2010. 49–51.
28 Wellmann 2008. 7; Wellmann 2006. 6.
29 Török 2007. 296–297.

– die Durchgriffshaftung kann nur auf einer ausdrücklichen Gesetzesverordnung gründen, nicht auf einem richterlichen Urteil, weil das zu Rechtsunsicherheit führt;

– einer rechtsbildenden richterlichen Praxis kann nur solange Raum gewährt werden, bis für die Durchgriffshaftung (sic!: Verwaschen des Übergangs der Haftung und der Durchgriffshaftung, Behandlung als Synonym) keine gesetzlichen Sachverhalte vorhanden waren;

– die richterliche Praxis, die die Durchgriffshaftung anwendet, widerspricht den Anforderungen der Rechtssicherheit, der Berechenbarkeit und der Vorhersehbarkeit, und gilt nicht als Ebene der Rechtsquelle;

– was nicht im positiven Recht formuliert ist, hat keine abschreckende Kraft;

– die Verletzung der Grundprinzipien des UZGB bedeutet keine selbständige Haftungsbasis (sic!: durch die Meinung des bürgerlichen Kollegiums wird das auch nicht festgestellt, sondern dass die Verletzung der Grundprinzipien die Durchgriffshaftung zur Folge hat).

Meiner Ansicht nach lässt sich die „Schärfe" der dargelegten Vorbehalte wegnehmen, der Berufung auf die Verletzung der Grundprinzipien des UZGB sollte der Hinweis auf § 9, Absatz (2) Wirtschaftsgesetz vorausgehen; das heißt im Bezug auf die im Gesellschaftsgesetz nicht geregelten Vermögens- und Persönlichkeits-Verhältnisse der Wirtschaftsgesellschaften und ihrer Gesellschafter sind entsprechend die Verordnungen des UZGB maßgeblich. Dadurch wurde zwar kein gesonderter Haftungssachverhalt im Wirtschaftsgesetz konstruiert, jedoch wird damit die direkte Durchlässigkeit zu den Haftungsverordnungen des UZGB geschaffen und die Gefahr der Rechtsunsicherheit abgewehrt.

Worin weicht die Durchgriffshaftung vom Übergang der Haftung ab?; wir verweisen auf einige Kriterien:

– sie kann sich an existierende, funktionierende Rechtspersonen anschließen;

– sie kann nicht nur auf Wirtschaftsgesellschaften mit Rechtspersönlichkeit erweitert werden, sondern auf jede, über Mitgliedschaft verfügende Rechtsperson (z. B. Genossenschaft, Verein, Interessenvereinigung);

– im Gesellschaftsgesetz existiert keine ausdrückliche Verfügung zu diesem Gegenstand;

– die Charakteristika der Haftung (Rechtsgrundlage, Ausmaß, Charakter) sind geklärt und eindeutig;

– das Rechtsmittel wurde nicht nur für den „bestimmenden Gesellschafter" ausgearbeitet;

– es wird tatsächlich die Hülle des gesonderten Rechtssubjekts der Rechtsperson durchbrochen, da der Gesellschafter, welcher die Rechtspersönlichkeit der existierenden Rechtsperson (und nicht der beschränkten Gesellschaftshaftung) missbraucht, zusammen mit der Rechtsperson und neben dieser (Gesamtschuld) dem geschädigten Dritten gegenüber einzustehen hat, und die Haftung wird

– mangels des Einstandes der Gesellschaft – nicht nur auf den missbrauchenden Gesellschafter übertragen;

– das dogmatische Problem der „beschränkten Gesellschaftshaftung“ tritt nicht auf, weil der Sachverhalt auch bei Rechtspersonen mit grundlegender, unbeschränkter Gesellschaftshaftung (z. B. Interessenvereinigung) anwendbar ist;

– es ist nicht abhängig von der Anmeldung der Gläubigeransprüche im Auflösungsverfahren;

– die mit der Schadensverursachung zusammenhängenden Verjährungsregeln des UZGB sind dabei maßgeblich, es gibt kein Problem der zeitlichen Dimension;

– die Durchgriffshaftung wird im Falle der Verwirklichung der oben ausgeführten speziellen Sachverhaltselemente für eine Nutzung als Generalklausel, sowie auch für eine rechtliche Weiterentwicklung als geeignet angesehen (siehe unten: neuerliche richterliche Praxis).

3.2. Die Gegenwart

Verursacht das Mitglied einer juristischen Person im Zusammenhang mit seinem Mitgliedsverhältnis einem Dritten einen Schaden, haftet die juristische Person gegenüber dem Geschädigten. Das Mitglied haftet gesamtschuldnerisch mit der juristischen Person, wenn der Schaden vorsätzlich verursacht wurde.[30] Verursacht die Person mit Führungsaufgaben einer juristischen Person im Zusammenhang mit diesem Rechtsverhältnis einem Dritten einen Schaden, haften die Person mit Führungsaufgaben und die juristische Person gesamtschuldnerisch gegenüber dem Geschädigten.[31] Hier ist die Füllung des Tatbestandes mit Inhalt ebenfalls die Aufgabe der Gerichte und der Theoretiker.

4. Das Auftreten des Übergangs der Haftung und der Durchgriffshaftung in der richterlichen Praxis

In der richterlichen Praxis ist das Rechtsinstitut des Übergangs der Haftung, § 50 Wirtschaftsgesetz wegen der oben dargestellten Anomalien nicht wirklich anwendbar:[32] in verschwindend kleiner Zahl findet man unter den in gedruckter Form publizierten Fallentscheidungen Urteile mit diesem Gegenstand.

Auch bei den auffindbaren Beschlüssen wird versucht, die Sachverhaltselemente von § 50 Wirtschaftsgesetz (nach der Auslösung der beendeten GmbH/AG/

30 Gesetz Nr. V von 2013 über das Zivilgesetzbuch 6:540. § (2), (3), unter dem Abschnitt: Haftung für durch andere Personen verursachte Schaden.

31 Gesetz Nr. V von 2013 über das Zivilgesetzbuch 6:541. §, unter dem Abschnitt: Haftung für durch andere Personen verursachte Schaden.

32 LB Gfv. IX. 30.393/2010; GYÍT Pf. IV. 20.101/2011/8.

KG verbleiben nicht befriedigte Gläubigeransprüche, der Missbrauch des Gesellschafters verminderte/zog das Vermögen der Gesellschaft ab)[33] den Eigentümlichkeiten der aufgetretenen Rechtsstreite zu entsprechen und über die Feststellbarkeit des Übergangs der Haftung zu entscheiden.[34]

Es kommt in der ungarischen Judikatur auch vor, dass das Begriffspaar Übergang der Haftung – Durchgriffshaftung vermischt, als Ausdrücke mit einander ersetzendem Inhalt benutzt werden.[35]

Anfang der 1990-er Jahre kristallisierten sich in der ungarischen richterlichen Praxis im Zusammenhang mit der Durchgriffshaftung zwei Standpunkte heraus:

– dem einen zufolge ist bei Missbrauch der Rechtspersönlichkeit der Gesellschaftsvertrag ungültig, demnach existiert die Rechtsperson nicht, auf die Rechtsperson kann sich nicht berufen werden, der Rechtsstreit kann auf der Grundlage des UZGB entschieden werden;[36]

– der andere befasst sich nicht mit dem Umgehen der Rechtspersönlichkeit, sondern bewertet den Rechtsstreit (z. B. Verstoss gegen die guten Sitten, Dekkungsentzug) direkt auf der Grundlage der im Schuldrechtsteil des UZGB zu findenden Verordnungen.[37]

Ende der 90-er Jahre ging die ungarische Rechtssprechung in die Richtung des oben ausgeführten Gutachtens des Kollegiums des Gerichtshofes Szeged, zur Anwendung der Durchgriffshaftung: es wurde zum Mittel der Verübung einer Serie von Straftaten im Zusammenhang mit einer bestehenden GmbH.[38]

Das Gericht befand die Durchgriffshaftung als feststellbar

– im Zusammenhang mit Wirtschaftsgesellschaften mit Rechtspersönlichkeit, die zur Begehung von Straftaten gegründet[39] und/oder betrieben wurden (mit dem Verweis, dass es keine Vorbedingung für die Durchgriffshaftung ist, dass das gegebene Verhalten auch gleichzeitig einen strafrechtlichen gesetzlichen Tatbestand erfüllt);[40]

– wenn die Gesellschafter ihre Privatinteressen vor die Gesellschaftsinteressen stellen, um ein unrechtmäßiges Wachstum ihres eigenen Privatvermögens hervorzurufen („betrügerische Unternehmensentleerung“).[41]

Ein Grundtitel in der richterlichen Praxis im Bezug auf die Durchgriffshaftung ist die Notwendigkeit des Elementes des mehrfachen Tatbestandes zu deren

33 BH 2011. 72.

34 LB Pf. IV. 24.750/2001/10; EBH 2005. 1228; ÍH 2006. 124; GYÍT Pf. IV. 20.314/2007/7; SZÍT Gf. 30.387/2007/6; SZÍT-H-GJ-2007-43; BH 2007. 418; BH 2008. 64; GYÍT-H-PJ-2008-69.

35 BDT 2005. 1142. I; ÍH 2006. 178; BH 2011. 64.

36 Kemenes 2000a. 326.

37 BH 1994/4/203; BH 1994/4/204.

38 Kemenes 2000b. 7; EBH 1999. 118; BH 1999/10/456.

39 BH 1999. 465; BDT 2002. 83; BDT 2003. 93; BDT 2006. 1475; BDT 2006. 180; GYÍT-H-GJ-2009-14.

40 BDT 2002. 83.

41 BDT 2002. 631; BDT 2003. 840; BDT 2005. 1142; SZÍT-H-GJ-2007-43; SZIT Gf. I. 30.387/2007/6; BDT 2008. 1802.

Feststellung: das kann nur ausnahmsweise und in dem Fall geschehen, wenn der Missbrauch durch den Gesellschafter ein im Gegensatz zur Rechtsordnung stehendes Ziel hatte (zum Beispiel auf die Schädigung außenstehender Dritter gerichtet war) und die Rechtspersönlichkeit ausgesprochen die Abwehr der direkten bürgerlich-rechtlichen Haftungs-Rechtsfolgen für den Gesellschafter als natürliche Person zum Ziel hatte.[42] In den Prozessen im Zusammenhang mit der Durchgriffshaftung konnte der Kläger

– den Missbrauch des gesonderten Rechtssubjekts der Rechtsperson entweder nicht beweisen,[43]

– oder entgegen der Verwirklichung des strafrechtlichen Tatbestandes des Betruges das mehrfache Element (betrügerischer, vorsätzlicher, gezielter Missbrauch) nicht beweisen.[44]

Auf obiger Grundlage können wir zu der Konsequenz gelangen, dass das Rechtsinstitut der Durchgriffshaftung von der ungarischen Gerichtsbarkeit innerhalb streng fixierter „Grenzpfosten" konsequent und einheitlich behandelt wird.

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Diese neueste Regulierung der Rechtsperson sehen wir so, dass die äußeren Persönlichkeitsmerkmale dieser Rechtsperson auf der Ebene der Rechtsvorschrift artikuliert werden, und damit einem nicht abgeschlossenen rechtlichen Gebilde und der Ausbildung eines allzu heterogenen Sammelbegriffes einen Rahmen bieten und eine Grenze setzen. Vor der Rechtswissenschaft in der Gegenwart steht auch weiterhin die ungeheure Herausforderung: die Schaffung des Begriffes der Rechtsperson und die Aufklärung der Haftungsfragen. Auf jeden Fall aber erfordert die rechtsdogmatische Begründung und Ausarbeitung jeder Ausgangsthese eine durchdachte, präzise und anstrengende Arbeit.

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42 Vezekényi 2005. 315.

43 BDT 2003. 93.

44 BH 2001. 103; ÍH 2005. 83; PÍT Pf. III. 20.090/2006/3; SZÍT Pf. I. 20.104/2007; BDT 2008. 1802; FÍT 9 Pf. 20.192/2008/3; SZÍT Gf. I. 30.096/2009.

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Administrative Simplification The Case of Hungary

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Abstract. Simplification is a principle to be interpreted within quality legislation, which is important not only for the European countries, but it has been a priority also for the EU in the last decade. This paper tends to make a catalogue of the simplification measures taken by the government in Hungary in the last few years. It concentrates on rationalization programmes that expressively undertake simplification elements, e.g. the Magyary Zoltán Public Administrative Development Programme in 2010 and the 'State Reform II' programme in 2014. The paper – beyond a taxation of administrative fields involved within these simplification processes – introduces the most frequent methods and legal tools, as well. Moreover, it draws attention to those measures that were successful (integration, accessibility of administrative bodies) and that were not (e.g. linguistic simplification).

Keywords: administrative terminology, deregulation, Hungarian public administration, Magyary Zoltán Public Administrative Development Programme, rationalization, simplification

I. Introduction

The challenge for governments is, on the one hand, to balance their need to use administrative procedures as a source of information and as a tool for implementing public policies, and, on the other, to minimize the interferences implied by these requirements in terms of the resources demanded to comply with them.[1] Administrative simplification is currently high on the political and policy agenda in most countries. It is one of the most effective methods for fighting against regulatory complexity and inflation.

There are different routes to simplification. There is not one single model that can be applied everywhere. Administrative simplification policies can be designed either on an *ad hoc* basis focused in a sector, or on a rather comprehensive and

1 OECD 2009. 6

long-term perspective. Usually, first steps are based on the first type of approach, providing outcomes and instruments to continue in other fields and expanding to reach other policy areas.[2]

Simplification has been a priority also for the EU. It has been going on since 2005 as several initiatives of the Commission have been made to facilitate it. Such initiative for example is the action plan of the EU for reducing administrative burdens [COM(2007) 23].[3] In the EU, one tool of simplification is annulment. In order to make legal acts clearer and more understandable, the Commission recommended the abolition of 1,300 legal acts in 2009, which equals to 10% of the acquis.[4]

It must be added, however, that while the EU's goal of simplification may be achieved by the rationalization of secondary legal acts, the 'unavoidable complexity' is mainly caused by the case law of the Court.

The OECD has been also at the forefront of the work on administrative simplification issues since the 1990s as a unique international forum where officials and practitioners share their experiences and techniques, thus accumulating knowledge.[5] The 2005 Guiding Principles for Regulatory Quality and Performance set the bases for the work on administrative simplification, and advised governments to 'minimise the aggregate regulatory burden on those affected as an explicit objective to lessen administrative costs for citizens and businesses and as part of a policy stimulating economic efficiency,' and 'measure the aggregate burdens while also taking account of the benefits of regulation'. These principles have been endorsed by all OECD member countries.

II. Goals and Challenges for Administrative Simplification

Simplification is a principle to be interpreted within quality legislation, the final aim of which is to increase the efficiency of law by decreasing unnecessary limitations and burdens on the side of both the clients and public administration, and the abolition or replacement of formally or substantially disturbing elements. The special feature of this principle is that it is strongly 'cyclic'; sometimes it is in focus, then it is pushed into the background: it may be observed that – broadly interpreted – simplification and – narrowly interpreted – deregulation procedures are conducted every few years (usually every 3–5 years).[6]

2 OECD 2009. 6
3 Drinóczi 2010. 85
4 Commission 2009.
5 OECD 2009. 10.
6 *Among the legal instruments of simplification attempts, the following may be mentioned as examples: Government Decision 1004/1995 (I. 20.) on reviewing laws upon deregulation requirements, Government Decision 1058/2008 (IX. 9.) on the government programme for the reduction of administrative burdens of market and non-market players and for the simplification*

Simplification cannot be a target itself. In order to achieve permanent results, the performance of previous (and subsequent) impact assessment shall be important, as well as – partly within the before mentioned – consultation with those concerned.[7] Ilona Pálné Dr Kovács considers it one of the greatest general mistakes of domestic reform attempts and new administrative organizational solutions that they are rarely based on systematic, empirical analyses – either regarding local governments or in other fields.[8] It may be also observed in part of the previous simplification attempts that they appeared as politically motivated measurement packages (often) without substantial preparation.

Defining and identifying challenges for administrative simplification is not an easy task since they link on to broader policy issues that are difficult to tackle simultaneously. Some of the key challenges are:

– build a constituency for administrative simplification;
– effective and efficient use of capacities and resources available;
– manage institutional and organizational needs;[9]
– ensure sound multilevel governance;
– involve all stakeholders fairly in administrative simplification strategies;
– develop and improve measurement and evaluation mechanisms.

II. 1. Main (Target) Fields of Simplification and the Related Goals

II.1.1. Application of Suitable Norm Types in the Regulation of Life Situations

With regard to this, it must be stressed that legal simplification also serves the regulatory goal of politics, namely that the use of legal acts is justified only if there is no more efficient tool for regulating life.[10] This means that in those fields in which life conditions may be regulated by *self-regulation* or *co-regulation*, 'withdrawal' may be reasonable – trusting the regulation of life to other forms of normativity (morals, religion, customs, etc.) instead of or in addition to the rules of law.

and speeding up of procedures, Government Decree 112/1994 (VIII. 6) on the tasks of the government commissioner for the modernization of public administration, Government Decree 149/2005 (VII. 27) on the annulment of certain laws and legal provisions, and the already mentioned Act LXXVI of 2012 on the technical deregulation of certain laws and legal provisions necessary for terminating the overregulation of the legal system.

7 Drinóczi 2010. 86.

8 Pálné Dr Kovács 2010. 138.

9 Administrative simplification is not embedded in the mandate of all government institutions; it needs to be pushed forward in a co-ordinated manner. The establishment of administrative simplification units inside government and outside task forces can help with co-ordination and keeping up the path of reforms.

10 Gyergyák–Kiss 2007. 207.

The technique of self-regulation is spreading in several fields. For example, in order to increase consumers' trust, strengthen the client-centred market, facilitate the grounded decision-making of consumers, and make services more transparent, agreements formulating responsible service provider behaviour – concluded within market self-regulation – are getting more significant. Primarily, the concerned institutions and organizations representing professional interests participate in the establishment of agreements, or, in other words, codes of conduct, concluded within self-regulation (or unilateral undertakings). There are some fields of management in which self-regulation is dominant (e.g. sports administration) contrary to other fields of administration.[11]

Regarding the notion of co-regulation, it shall be mentioned that it is a rather new 'set of legal institutions'. It is important that the White Paper on European Governance published by the European Commission mention co-regulation as an example of better and faster regulation.[12] Co-regulation – regardless of its field – builds on the co-operation of state, market, and other players and contains a mix of legal and non-legal elements, focusing on the previous ones only if the latter ones cannot achieve the set target alone: co-regulating systems are usually based on self-regulation, the results of which are continuously supervised and, if necessary, corrected by the state. The main aim of co-regulation is to channel the activities of self-regulating organizations – usually beyond substantive law – into public power procedures.

During co-regulation, public power – normatively – sets achievable targets and self-regulation fills these with content. Co-regulation makes it possible to transfer the goals set by the legislator to interest representative organizations acknowledged at the given field ('regulated self-regulation'), and by this facilitating the channelling of self-regulatory initiatives.[13]

This way of regulation is common mainly regarding different industries and service areas, but it may also be possible to introduce and use its set of tools in other areas. For example, in Hungary, it is extremely important to establish co-operation partly (co-regulation) with cultural, educational, social, and other service provider organizations as well as with those co-operating in the identification, presentation, and representation of Roma (Gypsy) interests.[14] However, the differentiation of the notions of co-regulation and co-decision seems to be unavoidable in this area. Considering a real administrative example, based on Article 190 paragraph (1) of Act CLXXXV of 2010 on media services and mass communication (hereinafter referred to as: Mttv.), co-regulation is realized in the co-operation of the Media Council and self-regulating organizations (e.g.

11 Princzinger 2010. 33.
12 Csink–Mayer 2012. 62.
13 Csink–Mayer 2012. 63.
14 Rixer 2013. 155–159.

media service providers, programme transmitters, professional organizations of press publishers) 'for making the public power law enforcement system of media management more flexible'.[15] The Mttv. gives dual purpose to co-regulation. On the one hand, regarding authority competences, Article 191 paragraph (1) of the Mttv. provides that – within the scope of certain case types – the self-regulating organization may perform self-regulating tasks (e.g. preliminary dispute resolution). On the other hand, self-regulating organizations may assist in the operation of the Media Council in substantial matters in relation with the basic principle-level regulations of Act CIV of 2010 on the freedom of the press and the basic rules of media contents (protection of human dignity, the prohibition of the abuse of making declarations).

From a scientific approach to public administration, the co-regulation system of the Mttv. realizes functional decentralization regarding the media management tasks and competence which may be delegated to self-regulating organizations, therewith that media co-regulation provides for participation in public task performance not for public-law legal persons but for private entities (such as self-regulating organizations like associations). However, it is still important that the media co-regulating organization does not perform, not even indirectly, public power or authority activities.[16]

II.1.2. Simplification of the Legal/Administrative Language

Laws and other legal texts are extremely important tools for forming social narratives also in spheres with significant information demand, and therefore the formulation and comprehensibility of language contents is a very important factor.

It is an important fact – as mentioned above – that the language of the (presently) valid laws is often the last form of appearance of the older spoken language – let it be special grammar structures or certain words or expressions. At this point, differentiation between the 'formally used' and spoken language is important because the special language of law shows some kind of difference from spoken language (especially when the legal culture was mainly in German or Latin…), but the difference between the presently used general Hungarian grammatical structures and the grammatical structures used in 30-40-year-old substantial law texts is also huge. Based on this phenomenon, the danger of the decrease of language capacities may be raised; simply the difference between the unchanged reality of legal terminology (fixing decades-old language conditions) and the daily reality of today's general language may be described as the growing distance of an opening pair of scissors. Solutions and the possible changing and modification tendencies are obviously not limited to the incorporation of

15 Csink–Mayer 2012. 66.
16 Csink–Mayer 2012. 67.

anglicisms and the elements of British/American legal terminology nor to the expressions originating from the special language of the European Union;[17] in the medium term, probably the renewal of the Hungarian legal terminology and of language in general would be timely.

At this point, it must be mentioned that the simplification of legal terminology is very difficult at the level of the European Union because, for example, the 'long sentences' of the Court are needed since the unification and 'simplification' of the applied legal terminology would be limited, especially because of the difference between the legal systems of the member states.

The UNESCO's 'Guidelines for Terminology Policies: Formulating and Implementing Terminology Policy in Language Communities,' published in 2005, urging the establishment and maintenance of a national terminology policy, draws attention to the fact that, if the professional terminology of a language in certain fields develops slowly or does not develop at all, it may happen due to the present pace of technological development that no substantial communication may be conducted in the given language in certain professional fields (thus, the loss of linguistic functionality may occur), and this may lead to the exclusion of monolingual communities from scientific and economic development.[18] It is important that laws (and individual decisions put down in writing) are also significant elements of a collective social (community) memory. Maurice Halbwach's concept of collective memory basically refers to the social feature of remembering: to the fact that remembering is a collective interpretation, i.e. a reconstruction process. It is a question that in what personal scope and at what level this reconstruction may be realized if linguistic abilities (e.g. of understanding the text of laws) are available in a limited way. Within the scope of certain social units, the examinable collective memory is a phenomenon strongly tied to time and environment. In the life of smaller groups – therefore also in families –, there are common stories; 'each family has its own special spiritual life; memories cherished only by it and secrets which are only known by its members'.[19] This statement may be justified not only at the level of families but also at the level of society as a whole. 'The events of the past play a fundamental, crucial role in our lives, giving shape and form to our experiences. Without stories, our experiences would be mere amorphous, undifferentiated flows of events. Storytelling and story – synonyms of our knowledge of the world and our daily experiences – get meaning through them, and we formulate our future expectations through our stories expressed in words'.[20] Who would deny that in a society organized by the state shared and interpretable stories may be reconstructed quite often from

17 Láncos 2012.
18 Bölcskei 2011. 28.
19 Andó 2010. 55.
20 Andó 2010. 55.

written legal norms… and in this sense the renewal of the Hungarian legal system carries the need for a kind of change in narrative.

Attempts at creating new legal terminology in Hungarian legal language (and in legal sciences) may be observed nowadays: for example, the previous act on legislation (Act XI of 1987 on legislation) regulated – in addition to acts – the other legal instruments of governance; in contrast, the new act on legislation – leaving behind the terminology introduced in state socialism, carrying a sort of paternalist 'atmosphere' – introduced the term legal instruments for state administration. It would be a natural need to avoid naming the same way phenomena and institutions appearing in the same field but with different content. Hungarian public administrative law offers several unfortunate examples: e.g. government office (*kormányhivatal*) refers to a type of central state administrative bodies as well as to the territorial bodies of the government.

A special border between written and spoken forms of the language is the so-called SMS (texting) language. Its unique features appear also in laws, in so far as different abbreviations and 'structure-shifts' – which may be considered serious linguistic mistakes – are present in the latest legal instruments. The incomplete structures of the spoken language may be traced back to the simultaneity of expression and reception: the sending and receiving of the message have the same context.[21] Let us present a specific example of the spreading of SMS-language in our legal system: after one of the modifications of the previous Constitution in 2010, Article 61, paragraph (3) received the following text: 'In the Republic of Hungary, public media services contribute in preserving and fostering national identity and European identity, Hungarian and minority languages, in strengthening national togetherness and in satisfying the needs of national, ethnic, family and religious communities.' The serious mistake is not apparent in the spoken language, but it is unacceptable in writing; correctly, it should have been written (…) the Hungarian language and the minority languages (…) because 'Hungarian languages' do not exist.

Another new example is the text of the preamble of Act CCXI of 2011 on the protection of families modified with Article 152 of Act CXXXIII of 2013: 'The protection of families and the strengthening of their well-being is the task of the state, of local governments, civil organization, media service providers and the economy's participants'. In this case, we may face a 'simplified', incomplete grammatical structure resembling everyday language, from which possessive suffixes are missing (because the state or civil organizations do not have 'participants').

It is very interesting to examine when the linguistic revision of Hungarian public administrative legal documents will happen, with regard to the aforementioned fact that certain words and expressions present in the valid provisions have disappeared from everyday language. Civil law and criminal law have some advantage in so far as these have codes of substantial law (which are at the same

21 Andó 2010. 33.

time also new) and they have been linguistically revised upon the conscious intentions of the legislator.[22]

In relation to deregulation, in order to facilitate easier and more efficient law enforcement, for the 'detoxification and clarification' of the legal system in 2010, the Ministry for Justice and Public Administration together with the Balassi Institute employed so-called language guards working for the government, guarding the comprehensibility and linguistic precision of laws.

Unfortunately, efforts made for linguistic simplification were not successful enough in Hungary; it became obvious that the complexity of the legal system makes it really difficult to simplify any normative tool – even linguistically.[23]

II.1.3. Improving Access to 'Law,' Increasing the Accessibility of Public Administration

Citizens shall be allowed to be in touch with public administration substantially and continuously, which is a fundamental precondition for enforcing the rule of law, the realization of constitutional rights, especially of the right to due process.[24] In Hungary, the accessibility of laws through a governmental website, the establishment of district offices, and the development of one-site and electronic case management definitely serve the achievement of these goals. The number of government client service desks [*kormányablak*] is to be risen from 71 to 280 also in 2015.

Direct access is greatly increased by the transparency of the organization and the functioning of public administrative bodies, which is ensured also by the latest elements of legal development which regulate the use and content of websites. Last but not least, the existence and features of applied responsibility bearing and supervisory techniques is of great importance in the public sector – also from the aspects of corruption, especially regarding the use of public funds.

II.1.4. Simplification of Processes, Mainly by Reducing Direct Administrative Burdens

The simplification of procedures primarily means the reduction of administrative burdens (e.g. reduction of procedural steps, of the length of documents, abolition

22 See, for example, the reasoning of Article 219 of the new Criminal Code: '[...] in order to achieve the goal of simplification, the Submission related to the crimes of rape and sexual harassment provides a new title which covers both and is obvious also for civilians. The new name of the crime is sexual violence, which is simpler and more modern.' In addition to the article mentioned, the legislator also changed (abolished) the names of other prohibited sexual acts with regard to the fact that in everyday language they had received uncertain content or they had been abandoned.

23 Nagy 2014.

24 Lőrincz 2009. 51.

of unnecessary documents, obligation to harmonize various pieces of information, publication of understandable case descriptions, increasing the scope of electronic public services, reduction of the frequency of reporting, reduction of other – similar – burdens). Through these, naturally, the reduction of direct and indirect costs and other expenses is also an objective. The spreading method of measuring administrative costs in Hungary is the Standard Cost Model (SCM), which facilitates the establishment of standardized cost data about resources used at companies for the enforcement of certain legal regulations.

It must also be taken into consideration that measures for simplification (e.g. the radical and quick reduction of administrative burdens on entrepreneurs) not only result in narrowly interpreted direct financial savings – both for entrepreneurs and for the state – but also in broadly interpreted economic and political costs, which must also be calculated. In the case of certain simplification steps, the run of all costs of the 'whole system' must also be considered; in our case, for example, the financial (one-shot, large amount severance pays) and political (procedures of interest representations) 'costs' of possible governmental cut-backs.

Simplification, however, cannot always be considered the only or the most effective tool. Referring to the previous example, at the time of recognizing the need for simplification, possible alternative solutions (e.g. motivation of civil servants to provide better services to entrepreneurs, introduction of tax allowances) must also be examined.[25] The latter may be realized through the opportunity cost analysis.[26]

III. Tools of Simplification

Based on Hungarian literature, the tools of simplification may be categorized in several ways on a legislative basis and also upon the content of the regulations.[27] Regardless of the categories, such tools are, for example:

a) *Deregulation*

Deregulation as concept means the annulment of certain regulations of substantial law as well as its formal and material simplification. It is very important to limit the mass of laws in our continental legal system which strives to fully regulate all life conditions.[28] One of the main reasons for the gap between civilians and professional legislature as well as between law enforcement and mistrust towards law is the mass of laws impossible to handle for individuals,

25 Samuelson–Nordhaus 1990. 667–671. Obviously, nothing hampers the simultaneous or gradual realization of these steps (measures), but in practice there may be several political, budgetary, and other difficulties.

26 Vigvári 2007. 169.

27 Drinóczi 2010. 28–29.

28 Gyergyák–Kiss 2007. 207.

which is unsuitable for individual orientation due to its quantity and to the real or assumed internal complexity of it.

The two basic forms of deregulation are technical deregulation and material deregulation. The former serves the annulment of unused rules, thus increasing the transparency of the legal system, while the latter has actual relevance, making the regulatory environment simpler. It shall be noted that the notion of deregulation may be extended to individual administrative decisions too, not only to normative regulations.[29] During the last deregulation process in 2012/2013, 1,035 parliamentary decisions, 1,971 decrees and provisions of 460 acts were brought ineffective in Hungary. In addition, contrary to the rules before 2010, the automatic legal technical deregulation embedded in the legal system today serves technical deregulation built into the legislative process. This measure contributes to a more transparent legislation and improves the quality of the preparation of legislative acts.

b) *Re-regulation* (maintenance and continuous revision of existing rules) and consolidation (repeated enactment of the given law in more interpretable, 'handier' form with different content).

c) *Rationalization* (application of horizontal legislation instead of sectoral, vertical legislation, through which the filtering of parallelities and inconsistencies is possible).

The target group of the reduction of administrative burdens is typically the citizen appearing as client as well as the entrepreneur (business), but lately mainly non-profit organizations and churches have also appeared in this scope. It is important that public administration and its staff may also be the subject and eventually the beneficiary of measures aimed at reducing costs and achieving optimal use of resources. Among these, the governmental integration answer given to large-scale segmentation under the aegis of government offices may be mentioned as a typical example.

However, it must be stated that the simplification of the legal and institutional system at excessive speed (and degree), making them 'more applicable', may violate (constitutional) rules and principles of guaranteed value, even though behind the new regulations is the intention to adjust them to the traditional and actual practices. The previous separate act on cabinet civil servants (Ktjt.) introduced the rule according to which the dismissal of a government servant did not have to be reasoned. According to the reasoning, the new regulation 'provides an opportunity for establishing quality staff and for increasing the quality of work performed for the public,' thus for terminating the contract of unsuitable government servants 'easily'. However, the Constitutional Court did not accept this need, and in its Decision 8/2011 (II. 18.) ABH – as mentioned previously – it considered the provision unconstitutional for several reasons.

29 Gyergyák–Kiss 2007. 208.

IV. Latest Developments in the Simplification of Hungarian Public Administration

In Hungary, the so-called Simplification Programme was part of the public administrative programme. It was started by the new Government in 2010 as part of the Magyary Zoltán Public Administrative Development Programme.[30] The Government wished to simplify the life of citizens by 2014 – gradually – in approximately 230 types of cases.[31] The direct and primary goal of the Simplification Programme was to review authority procedures affecting the population and reduce administrative burdens of citizens which are related to the management of the different cases. 'During simplification, unnecessary bureaucracy is excluded from procedures and the goal is to assist citizens through less paperwork, fewer documents, less queuing and simpler case management procedure, and at the same time to speed up public administration itself.'[32] The goal was to increase the number of those types of cases '[in] which citizens may observe the reduction of bureaucracy in case management process, in the

30 See Government Decision 1304/2011 (IX. 2.) on the approval of the Simplification Programme of the Magyary Programme. Based on its Annex 2, the simplification of procedures shall be realized by achieving one or more targets from the following ones:
a) termination of cases;
b) fusion of cases with other cases;
c) reduction of case management time;
d) development of communication between the client and the office, extension of a client-friendly information system;
e) reorganization of the procedures of the case;
f) reduction of the number of those participating in the management of the case;
g) increasing the online administration of cases;
h) reduction of case documentation and its information needs;
i) preparation of a handbook for participating administrators;
j) preparation and publication of short and understandable case descriptions for clients.

31 Practically, every ministry has been participating in the realization of the programme since 2012, reviewing the procedures in its competence from the aspect of further possible simplification, mainly regarding family and children, in the field of employment, unemployment support, social services, taxation, agricultural issues, public and higher education, issues related to property, authority administration in traffic issues, pension, marriage administration, and health insurance services. Among the already realized measures, it may be mentioned that **requesting motherhood allowance (TGYÁS) and child care contribution (GYED) has become simpler as a result to the fact that, in addition to the reduction of the number of necessary documents, the previous 30-day administrative deadline was reduced to 18 days. But, for example, the deadline for issuing agricultural producer identification card was also reduced to 18 days from the previous 30.** Another material simplification is that instead of the previous three authorities only one acts, for example, in assessing reduced working abilities and health damages, and a similar easement is that in the case of inquiries related to accommodation allowances there is no need for the notary to act anymore; everything may be managed at the Hungarian Treasury. Among the developments of online administration, it may be mentioned that due to the programme decision-making about family allowance and child support (GYET) has been accelerated by an IT development.

32 Retrieved on 22. 2. 2015, from: http://magyaryprogram.kormany.hu/egyszerusitesiprogram.

reduction of the length and costs of procedures'. In its Programme for Bureaucracy Reduction and Better Regulation officially adopted on 25 April 2006, Germany's Federal Government decided to measurably reduce administrative costs incurred by businesses, citizens, and public authorities to an absolute minimum.[33] One of the main goals of the Hungarian State Reform Committee – appointed in the very end of 2014 – is mainly the same.[34]

In parallel with changes occurring from the Simplification Programme, other client-friendly measures have been taken too: for example, since July 2011, clients may automatically receive e-mail or SMS messages about the completion of their document. It may also be mentioned that since January 2011 authorities shall calculate deadlines in calendar days, not in business days, thus restoring the previous practice. The most significant change is undoubtedly the establishment of Government Offices and the start of one-site case management and its continuous extension to new case types – this way facilitating the management of several cases at one place. The establishment of the National Unified Card is also a step forward, allowing for the retrieval of several different – parallel – types of documents.

In addition to the Simplification Programme reducing the administrative burdens of the population, several measures aim at reducing the administrative burdens of domestic businesses, primarily within the framework of the Simple State Programme. Part of this has also aimed at reviewing authority procedures.[35] Simplified company registration, public procurement procedures, investment permissions, and the tenders of the New Széchenyi Plan may also significantly assist the participants of domestic economy. All in all, due to dozens of measures – defined also in the Széll Kálmán Plan –, the burdens of entrepreneurs have been reduced.[36] It must be mentioned that there was a similar programme earlier, resulting in a mass of law changes related to businesses: the 'Tuned for Business' programme was announced by the Ministry of Economy and Traffic in October 2006 and several laws were modified in relation with the programme (reducing the burdens of businesses by making the establishment of businesses easier, reducing the circular debts of businesses, increasing the rate of electronic trade or by increasing the value limit of obligatory audit). Also important in international

33 A foundation for better law: five years of bureaucracy reduction and better regulation. 2011 Federal Government Report pursuant to Section 7 of the Act on the Establishment of a National Regulatory Control Council. Published by the Federal Chancellery Better Regulation Unit, Berlin, 5 April 2012.

34 Government Decision 1602/2014 (XI. 4.) on the Hungarian State Reform Committee.

35 See Government Decision 1405/2011 (XI. 25.) on the Simple State medium-term governmental programme for the reduction of administrative burdens of businesses and Government Decision 1406/2011 (X. 1.) on the modification of certain tasks of the Simple State medium-term governmental programme for the reduction of administrative burdens of businesses, annulling the former decision.

36 *Retrieved on 14. 3. 2015, from:* www.egyszeruallam.hu.

context from the standpoint of business simplification is the implementation of Directive 2006/123/EC on Internal Market Services,[37] aimed at reducing barriers to the movement of services.

V. Results of the Administrative Simplification Process in Hungary

With implementing the administrative simplification process, Hungary succeeded in reducing administrative burdens with 25 percent – according to the Hungarian Government.[38] The promise originally meant to lower entrepreneurial administrative necessities, but the government was able to realize this reduction on the whole population. Unnecessary bureaucratic burdens were eliminated in 228 processes, so less paperwork, forms, and standing-in-lines will burden the citizens. With the simplification of directives and shortening of administration periods, enterprises got rid of useless obligations in 96 processes. Also, formal simplification has been carried out on the legislation process, with which more than 3,400 unneeded parliamentary resolutions and other decisions were repelled.

With the Magyary Zoltán Public Administration Development Programme, the government aimed to reduce bureaucracy and administration to put a curb on complex and unpredictable state regulations. In the content of the Magyary Programme, the government implemented the Administrative Simplification Programme for the reduction of residential administrative burdens and the Simple State Programme to mitigate the administrative burdens of enterprises.

The Simplification Programme reduced administrative burdens in 15 areas and 228 processes (a total of 249 with sub-processes). Among these were affairs of taxation, citizenship, family, matrimonial and property-related matters, employment, pension, and social affairs.

Out of the 114-point Simple State Programme package, 96 points were implemented by the end of December 2013. The simplifications achieved in taxation, employment, construction engineering, food industry, and the field of public administration have significantly reduced the bureaucratic burdens. Implementation of the last ten actions was completed in early 2014.

Prior to this, the government has already carried out steps in order to reduce the administrative burden of the business sphere. With creating the conditions

37 See the framework law implementing the service provision directive, Act LXXVI of 2009 on the general rules of starting and performing service provision activities. The aim of the directive is to establish a real internal market for services by reducing legal and administrative barriers in front of the development of service provision activities between member states.

38 Retrieved on 3. 3. 2015, from: http://2010-2014.kormany.hu/en/ministry-of-public-administration-and-justice/news/simplification-process-of-the-government-reduced-administration-by-a-quarter.

in public services for a One Stop Shop, citizens will soon have the opportunity to deal with administration using this citizen-centric service delivery model; the individual pension insurance registration form is no longer a must, and the flat tax system has been introduced. In addition, the statutory audit threshold has been raised to 200 million HUF, leaving more than 17,000 small and medium-sized enterprises to be exempted from the application of an audit. The actions of the government reduce the bureaucratic administrative costs of entrepreneurs with hundreds of billions of forints.

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The Organization System and Rules of Judicial Execution in Europe[1]

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Abstract. After a short theoretic introduction, this paper deals with the regulation model of a few European countries in short and analyses the duties and proceedings of bailiffs in these countries. The countries in which the organization of bailiffs should be presented are the following: Hungary, France, Estonia, Finland, Austria, Belgium, the Czech Republic, Denmark, Greece, the Netherlands, Poland, Lithuania, Luxembourg, Germany, Italy, Portugal, Spain, Scotland, Sweden, Slovakia, and Slovenia.

Keywords: judicial execution, organization of bailiffs, civil procedure

Introduction

"The bailiff's work means the only lawful, legally fully regulated path to execute court decisions. Bailiffs exercise the above under the complete legal control of the independent Hungarian administration of justice. Judicial officers/bailiffs represent the guarantee in successful, lawful enforcement of court decisions. In the absence thereof, market economy resting on and operating on the basis of contracts might be endangered and this might lead to devaluation of the rule of law."[2]

The above announcement clearly points out that it is not enough for a working legal system to arrange for deciding legal disputes; this may not provide sufficient guarantee by itself. Let us think of the structural setup of civil law norms where, at variance with criminal law norms, the third structural element is more differentiated. Namely, it is unambiguously clear that in the area of criminal law we can speak only about sanctions since the necessity of the material of rules arises only in the event that somebody breaches a norm. The civil law regulation (also in this area) is more complicated. For in this area – at variance with criminal law – one has to reckon not only with the 'possibility' that law enforcers proceed

1 Presentation held at the conference of the Hungarian Chamber of Judicial Officers.
2 10 June 2010, International Union of Judicial Officers (UIHJ) [press release].

differently from legal rules but also that in most of the cases they do not breach statutory provisions or their obligations assumed under contract by their act and the intended legal consequence is incurred.

The "rate" of the law-abidingness of natural and legal persons and other organizations not constituting a legal entity can be, among others, one of the measures of the stage of development of a society. It is almost impossible to examine whether or not and to what extent members of a community engage in law-abiding conduct because statistics can only estimate the number of contracts concluded and performed.

As a matter of fact, everyone develops a picture about the legal security that characterizes specific states or regions. A serious businessman who regularly enters into contracts with foreign persons will most certainly examine the chances for the execution of their contract, for the partner's performance in conformity with the contract in the country of their business partner. This kind of "social development" consists of several components. It depends, on the one hand, on the relevant social establishment, the economic standing of the country, the degree of welfare by which it "coddles" its citizens and, on the other hand, on the legal culture that characterizes it. And in this respect the legal culture by all means includes enforceability, in addition to complexity of regulation, fair and rapid nature of application of law. Legal security requires coercion as a final solution in case of non-compliance with the provisions set out in agreements and non-performance of the requirements set out in the decisions of bodies that decide the legal dispute, which drives persons, who have left it, back to the path of law-abidingness.

"Execution proceedings is nothing else than the form of enforcing the condemnation set out in the final decision stipulated in legal rule." This definition has been left to us from Roman law; however, the provisions set out therein have been valid up to now. The tools of regulation are different from country to country and from time to time; however, it is uniformly typical to take efforts to develop and maintain legal security implemented also through coercion applied by the state.

1. Hungary

The Hungarian name of bailiff is *independent judicial officer (önálló bírósági végrehajtó).* They carry out the enforcement of court decisions and enforceable documents and service of documents. They may make ascertainment of facts, may carry out collection of debts in an amicable manner or in court proceedings, may give legal advice, and may hold auctions.

Bailiffs are independent and carry out their activity independently. They are appointed by the Minister of Justice. The process of becoming a bailiff and the

bailiff's activity are strictly regulated. For the entire territory of the country, there are 203 independent judicial officers, 11 of whom are women. At present, approximately 25 offices perform their activity in the form of a company; bailiffs employ a total of approx. 1,200 employees. *Independent judicial officers* pursue their activity with regional competence that belongs to court. The Hungarian Chamber of Judicial Officers represents bailiffs at national level.

In order to be a bailiff, a person shall be a Hungarian citizen and shall have immaculate morals. It requires 4 years of university studies in law and 2 years of professional practice followed by bar examination. After that, it is necessary to work for 1 year at a bailiff's office. Bailiffs are appointed by the Minister of Justice. Bailiffs attend further training programmes at least once a year. Employees can also attend training courses organized by the profession and courts.

Enforcement of court decisions and enforceable documents are carried out solely by them. Bailiffs shall be responsible for the entirety of execution. The court, which has adopted the decision, sends the document to the competent bailiff. Judicial officers comply with the following hierarchical system in the course of execution proceedings:

1. execution by blocking bank accounts;
2. stoppage of payment of wages;
3. seizure of movable property;
4. seizure of immovable property.

As soon as it is required by law, judicial officers contact the executory judge or the public prosecutor, requesting them to grant necessary authorizations and order the measures to be taken. If execution meets any difficulties, judicial officers will take minutes, which is to be examined by a judge, who decides the case. Judicial officers may request information from every register, except for registers of mobile phones. Information may be requested from registers electronically directly from the office. The costs of the service of bailiffs shall be borne by the debtor, but in case the debtor is unable to do it, the person who requests execution shall pay them.

Solely bailiffs may serve judicial and extra-judicial documents. Courts may send documents by post as well. Bailiffs deliver documents personally to the addressee. They may deliver documents to members of the family found at the address. If they cannot deliver the documents, they will post a notice on the door of the addressee's apartment, calling the addressee to take over the document at the bailiff's office. They will send the document also by post and may try to deliver it again personally. Bailiffs will take minutes on delivery, which later on may serve as evidence. At present, bailiffs do not apply Council Regulation (EC) No 1348/2000. They can carry out amicable collection of claims; this activity shows a growing tendency.

Parties concerned may request collection of debts directly from a judicial officer. They shall contact an independent judicial officer and hand over the documents

to him/her. First, the judicial officer will try to collect the debt amicably; if this is not successful, they will take necessary steps to issue enforceable documents to enable them to effect execution. Judicial officers may freely agree on the fee of the service within the frameworks of amicable collection with the client. In the case of judicial execution, the fee is defined by tariff.

Judicial officers may carry out sale of movable property by auction. They have power of sale and may arrange for sale by court. Ascertainment of facts is limited and may be made mainly upon the request of a judge. Judicial officers may not represent the parties before court, but they are responsible for submitting the application for execution to the competent judge. They may give legal advice to the parties within the frameworks of execution. They may not carry out any other activity.

On the 3rd World Day of Judicial Officers, on 10 June 2010, the Hungarian Chamber of Judicial Officers as a member of the Union joins the press release declared by the organization. On the basis thereof, the community of independent judicial officers declares that in its ruling No 46/1991 the Constitutional Court of the Republic of Hungary pointed out that showing respect for court decisions, execution of final court decisions – including application of judicial execution – belong to constitutional values related to the rule of law. In the course of enforcement of court decisions, judicial officers make efforts primarily to help the dialogue between the parties free from conflicts and to resolve issues amicably within the frameworks provided by law.

2. France

Bailiff in French is called *huissier de justice.* Solely judicial officers may carry out enforcement of court decisions and enforceable documents and service of documents. They may make ascertainment of facts, may carry out collection of debts, and in certain cases determine the estimated value of movable property and carry out the sale thereof by auction. Bailiffs are independent and carry out their activity independently. They are appointed by the Minister of Justice. The process of becoming a bailiff and the bailiff's activity are strictly regulated. They shall comply with professional, ethical, and disciplinary requirements. There are approximately 3,250 bailiffs, including 690 women. They may pursue their activity alone or in a professional union. 2,280 bailiffs operate as members of a company in 1,061 companies and 970 bailiffs carry out their activity on their own. They employ approx. a total of 11,000 employees.

In order to be a bailiff in France, a person shall be a French citizen and shall have immaculate morals. It requires a degree in law (4 years of university studies) and 2 years of professional practice period fulfilled at a bailiff's office and taking a bar examination. After that, they shall find a bailiff's office where they can pursue

their activity or may acquire the position by being appointed by a bailiff to be his/her successor. After that, they will be appointed bailiffs by the Minister of Justice. Education programmes are provided by several organizations acknowledged at international level, specialized in further training of judicial officers (IFOCH), training of employees (ENP), and education of trainees fulfilling their practice period (DFS).

Judicial officers responsible for execution carry out execution and sequestration alone. Concerned parties may freely choose a bailiff, but only a bailiff competent in the location of the execution will effect execution. Bailiffs may carry out execution covering the debtor's total property, be it movable, corporate, or intellectual property. They may sequester movable property. Judicial officers shall be responsible for execution measures. As soon as it is required by law, judicial officers contact the executory judge or the public prosecutor, requesting them to grant necessary authorizations and order the measures to be taken. If execution meets any difficulties, judicial officers will take minutes, which is to be examined by a judge, who decides the case.

Judicial officers' requests are limited to the debtor's address, bank details, and employer. They may request information from the register of real properties and the register of motor vehicles.

The costs of the bailiff's service will be borne by debtors, but if they are unable to cover them then the party requesting execution shall pay them. Bailiffs are entitled to commission on the collected amount, which shall be paid by the party who requests the execution. This amount is EUR 303 for EUR 5,000.

Solely judicial officers may serve judicial and extra-judicial documents. Apart from exceptions, the document that institutes the proceedings shall be also served by bailiffs. Judicial officers serve approx. 10 million documents per annum.

Documents are delivered personally to the addressee by bailiffs or in certain cases by a person designated by them. They may hand over a reproduced copy of the document to the person found at the address, the porter or a neighbour. If nobody can take over the document, bailiffs will place them at the mayor's office. They will leave a notice on the fact of this placement and will send the document to the addressee also by post. If the addressee has moved without any known new address, judicial officers will take minutes on unsuccessful delivery and will send a normal and a registered letter by post with receipt of delivery requested to the last known address. In the minutes taken, bailiffs will write down the circumstances of the delivery of the document, which later on may serve as evidence.

In accordance with the provisions set out in Council Regulation (EC) No 1348/2000, bailiffs qualify as transmitting agencies and the chamber of judicial officers as a receiving agency, which has documents served by bailiffs competent in the relevant territory.

French bailiffs carry out collection of debts through legal proceedings and in amicable manner. This amounts to 20% of the activity of French bailiffs. Judicial officers may be contacted directly and documents may be handed over to them. Bailiffs are responsible for the entirety of the collection. First, they try to collect the debt amicably, and if this is not successful they will take necessary steps to receive enforceable documents and to be able to enforce them.

Judicial officers may determine the estimated value of movable property and may carry out the sale thereof by auction in case no official appraiser and auctioneer is available. This is an important activity of certain bailiff's offices.

Bailiffs may be requested by court to make ascertainment of facts, but they may be requested to fulfil this duty also by private persons. Ascertainment of facts is highly frequent and constitutes one of the important activities of French bailiffs. Judicial officers may represent the parties in certain courts, e.g. in courts of trade and in the case of stoppage of payment of wages in courts of first instance.

They may give legal advice since they have the same qualifications as lawyers, notaries, and judges. In the course of winding up of certain companies, bailiffs may act as liquidators appointed by court after they have completed a special course of training. Subject to having acquired a preliminary authorization, they may pursue real estate agent or insurance agent activities as well.

3. Estonia

The Estonian term for bailiff is Kohtutaiturid. In Estonia, enforcement of court decisions and enforceable documents are carried out solely by *Kohtutaiturid*s. They may serve documents and may carry out sale of property by auction. As from 1 March 2001, *Kohtutaiturid*s are independent and self-employed. The profession and the process of becoming a bailiff are strictly regulated. They shall comply with professional, ethical, and disciplinary regulations. They are appointed by the Minister of Justice. They may not found a company but may pursue their activity on the same premises. Approx. 52 *Kohtutaiturid*s operate divided into 16 regions of Estonia. They have territorial competence. In the region of Tallinn, 19 bailiffs work. Half of the bailiffs are women, their average age is 34. They are controlled by the department responsible for freelancing occupations within the Ministry of Justice.

In order to be a bailiff, a person shall have Estonian citizenship, immaculate morals, and a degree in law (numerous *Kohtutaiturid*s have postgraduate doctor's degree and give lessons at a faculty) and shall take a bar examination.

This is followed by a 10 months' practice, during which they acquire theoretical and practical knowledge. Candidates are appointed by the Minister of Justice, after having meticulously examined the documents on the candidates.

Only *Kohtutaiturid*s are competent in enforcing court decisions. In accordance with the provisions set out in the Civil Code, they are responsible for the entire execution proceedings. Clients may directly contact bailiffs, but only a *Kohtutaiturid* competent in the region may effect execution measures. They may carry out execution covering the total property of debtors, be it movable, corporate, or intellectual property.

Bailiffs are responsible for controlling execution measures. After having been given the consent of the party that requests execution, they effect the accepted execution procedures. In case of difficulties, they may request police help. Within the frameworks of the execution, *Kohtutaiturid*s may request information directly from various registers, e.g. banking registers, property registers, and motor vehicle registers. Bailiffs work in accordance with determined tariff. Debtors shall bear the costs of execution. If the debtor is unable to cover the costs, they shall be paid by the applicant. Bailiffs are entitled to commission on collection, which is to be paid by the debtor. Bailiffs may serve documents, which shall be delivered personally to the addressee or the person found at the address. They may make a report on the form of service, which officially proves the fact of delivery. At present, Council Regulation (EC) No 1348/2000 on the service of documents is not applied. They do not perform collection of claims, do not represent the parties before court, and shall not perform any other activity. As part of the execution, bailiffs may carry out auctions and give legal advice. They do not make ascertainment of facts; this activity has not developed in Estonia yet.

4. Finland

The Finnish term for bailiff is Ulosottomiehet. Enforcement of court decisions and enforceable documents are carried out solely by them. They may sell the seized movable property in public auction.

*Ulosottomiehet*s are employed by the Ministry of Justice and are not independent; they are appointed by the Minister of Justice. They shall comply with global professional, ethical, and disciplinary requirements. The process of becoming a bailiff and the bailiff's activity are strictly regulated. In Finland, approx. 1,500 persons engage in judicial execution: 85 *Ulosottomiehet*s (bailiffs), 700 *Ulosottomiehetassistant*s (deputy bailiffs), who implement most of on-site execution measures, and 700 office employees. This number is assigned to 70 Finnish regions of competence.

The Minister of Justice reviews execution measures but may not intervene in execution acts. Candidate bailiffs shall have a law degree and shall be qualified jurists. After that, they shall work as a deputy, and after several years they are appointed by the Minister of Justice.

The execution document will be sent to the bailiff competent in the region. The bailiff may carry out execution covering the total property of the debtor, be it movable, corporate, or intellectual property. Stoppage of payment of wages and blocking bank accounts are the most frequently applied procedures, contrary to seizure of movable property. Bailiffs are responsible for controlling execution measures. Bailiffs have direct access to all registers with respect to the total property of debtors. The costs of execution shall be paid by the debtor (procedural costs).

Solely in the course of execution do they deliver documents personally to the addressee or the person found at the address set out in the writ of execution. A written document certifies the fact of service of the document and later on will have demonstrative force.

Council Regulation (EC) No 1348/2000 on the service of documents is not applied. They do not collect debts and shall not pursue any other activity. Within the frameworks of execution, they may hold auctions and give legal advice. They do not make ascertainment of facts.

5. Austria

*Gerichtsvollzieher*s are solely competent in enforcement of court decisions, but service of documents is not only their duty. They do not make ascertainment of facts and value appraisement of movable property does not fall within their powers, just as sale of movable property by public auction; they may hold auctions only through court proceedings. They may not collect receivables in an amicable manner. They do not represent the parties in court.

Bailiffs are not self-employed; they are civil servants of the state. At present, no reform is in progress to create an independent status. In Austria, approx. 370 *Gerichtsvollzieher*s pursue activity, of which 10–15% are women. Their office is located within the court. They do not have employees. Their territorial competence is highly limited; one competent bailiff is assigned to each office competent in the territory. The profession is represented at national level by the *Österreichischer Gerichtvollzieherbund*. Bailiffs are not obliged to join a chamber.

In general, *Gerichtvollzieher*s are recruited from civil servants who work in the area of judicature; however, anybody can be a judicial officer. University degree is not required. They shall acquire 4 months of practice at a bailiff's office, and after that they shall work beside a bailiff for 2 months. *Gerichtvollzieher*s are appointed by the Ministry of Justice. Solely judicial officers are competent in enforcement of court decisions. The Ministry of Finance and the municipalities have their own execution officers. Bailiffs may not be contacted directly with requests, only through the court. They may act with respect to debtors' movable property only in case of forced execution procedure; they are not competent in

the foreclosure of immovable property. *Gerichtvollzieher*s control the course of execution but shall adjust to the client's instructions.

No data source is available to them for searching for the debtor's property, but they may oblige debtors to make a declaration of property; refusal to make a declaration or a false declaration will lead to penalty. Costs are borne by debtors; in case debtors are unable to pay costs, they shall be covered by the applicant. In addition to bailiffs, other persons may serve documents. *Gerichtvollzieher*s deliver documents personally to the addressee. They may deliver documents also to other persons who are staying at the address (parent, friend, employee …). If nobody can take over the document, bailiffs will leave a notice on the location and will leave the document in a sealed envelope at the administrative office, where they can be taken over by the addressee. At present, Council Regulation (EC) No 1348/2000 is not applied.

6. Belgium

Enforcement of court decisions is performed by *huissiers de justice* (F), *gerechtsdeurwaarders* (NL), and *gerichtvollzieher*s (D). They may perform service of documents as well. They may make assessment of damages, may engage in appraisal of movable property and furniture, sales by auction. Amicable collection of receivables is allowed, but this activity is still in the process of being developed.

Bailiffs are official persons who are appointed by the King, upon the recommendation of the Minister of Justice. They operate independently and freely. The profession is strictly regulated by disciplinary and operational rules. The number of positions is limited. There are 517 Belgian bailiffs, including 63 women. They are assigned to relevant regions and are under the authority of courts. They can operate alone or in the form of a company. Most of the bailiffs pursue their activity alone. They employ approx. 2,700 persons. The profession is represented at national level by the organization *Chambre Nationale des Huissiers de Justice de Belgique*.

Candidates shall be Belgian citizens and shall have excellent morals, shall acquire a law degree (5 years). This is followed by a 2 years' practice at one or several bailiff's offices. After that, they shall take the examination (which is called registered examination); then they are appointed by the King upon the recommendation of the Minister of Justice. Candidates shall take on a job thereafter.

Solely bailiffs are responsible for enforcement of court decisions. They implement sequestration as well. Applicants may contact bailiffs competent in the region directly. Bailiffs may seize the debtor's total property, including their movable property and immovable property; however, sale of immovable property

by auction is not their duty. Bailiffs will decide the outcome of the execution on the basis of the creditor's instructions; problematic cases will be decided by a judge.

Bailiffs may acquire information on debtors' property, payment documents, data of immovable property and motor vehicles, movable property, and personal details; however, it is impossible to acquire certain documents.

Debtors shall pay for the services of bailiffs, and if this cannot be realized creditors will pay the costs. In the case of amicable execution, the parties will agree on the fee. Judicial officers perform service of documents. At present, the document that institutes the proceedings shall be served by the bailiff. Under the execution, they personally deliver the reproduced copy to the addressee. They may deliver the document to other persons who are staying there (parent, friend, employee …) in the absence of the addressee. If nobody takes over the document personally, it will be left there in a sealed envelope. On the following working day, the bailiff will send the document signed by their own signature also by post, by registered mail to the addressee. If nobody can take over the document, a reproduced copy will be left at the police. In this case, a notice will be given to the addressee to enable them to receive the document.

Bailiffs may intervene in the service of judicial and extra-judicial documents both in commercial and civil matters, pursuant to Council Regulation (EC) No 1348/2000. Bailiffs may carry out amicable collection and forced settlement of receivables. This activity is being developed.

Applicants may contact bailiffs directly. First, they will take efforts to achieve amicable settlement, and if this brings no result they will acquire the necessary authorization from the judge for execution, with the assistance of a lawyer or the creditors. In the case of amicable execution, creditors will pay the costs, upon agreement made with the bailiff.

Bailiffs may carry out sale of property by auction and appraisal of seized movable property. They may make assessment of damages but solely in material respects. This makes up a considerable part of their activity. They may not represent the parties before court. They may give legal advice or fulfil other functions such as guardian ad litem, mediation of debts, or placement into judicial deposit.

7. Czech Republic

Enforcement of court decisions is performed solely by *Soudni exekutor*s and employees of the court. They may serve documents and hold auctions. Bailiffs are independent and operate freely. There are approx. 113 bailiffs, including 30 women. They are appointed by the Ministry of Justice. They employ approx. 1,000 persons. The profession is regulated by strict disciplinary and operational rules. Bailiffs are represented at national level by *Exekutorska komora Ceske Republiky*.

Candidates shall be Czech citizens with an irreproachable past and shall have a law degree (to be obtained by five years' studies); then they shall participate in a three years' vocational practice. After that, they will be appointed by the Ministry of Justice. In the Czech Republic, a permanent optional training programme has been developed to prepare Czech bailiffs.

Enforcement of court decisions shall be the responsibility of *Soudni Exekutor*s and employees of the court. Creditors may elect which of them should carry out execution. Creditors may contact *Soudni Exekutor*s and may freely choose one of them. If a creditor requests a court employee, he/she will be chosen by the court.

Bailiffs may seize the debtor's total property, including movable and immovable property. Bailiffs are responsible for the outcome of the execution. They apply for preliminary authorization for implementing the execution, which requires approx. 15 days. On average, 130,000 execution proceedings are performed per annum. Reforms are going to be in place to enable bailiffs to act without preliminary authorization. If the execution is carried out by a court employee, they shall follow the judge's instruction.

Bailiffs may acquire information on the debtor's property, from social and tax authorities, banks, insurance companies, etc. They shall be bound by secrecy obligation with respect to this information. Bailiff's services are paid by the debtor.

Bailiffs may serve documents under the execution; in other cases, it shall be the duty of the post. They deliver documents personally to the addressee; if they cannot find him/her, they can deliver the documents to the person who is staying there. Bailiffs take minutes on delivery. At present, bailiffs do not apply Council Regulation (EC) No 1348/2000.

Bailiffs may not collect receivables. Bailiffs may carry out auctions under execution proceedings, may not make ascertainment of facts, may represent the parties before court under the execution, and may give legal advice to their clients. Bailiffs may not pursue any other activity.

8. Denmark

Enforcement of court decisions and enforceable documents shall be the responsibility of *Foged*s*, pantefoged*s, or *told-og-skattefoged*s (hereinafter referred to as *foged*). They may perform service of documents. In certain cases, they may fulfil the judge's functions within municipal courts (*foged assistants*). They arrange for collection of debts to the State Treasury.

*Foged*s are court employees. The head of *foged*s is a senior judge appointed by the court; *foged*s are appointed by the judge. The court is regulated by strict ethical, disciplinary, and professional rules. In general, *foged*s are represented in

court by *retsassessor*s. The approx. 1,850 *foged*s are assigned to 82 Danish courts: more than half of them are women and approx. 450 are qualified jurists.

Their territorial competence corresponds with the territorial competence of the court. They are represented at national level by *Dommerfuldmaegtigforeningen*, but they are not obliged to join the organization. In order to be a *retsassesor*, a person shall be of legal age, shall have a law degree equal to the degree of judges. The 3 years' practice period is closed by an examination.

*Foged*s must have overall knowledge of the civil law. Only *foged*s may serve documents. The municipal court assigns the duty of service of documents to particular *foged*s. They receive the fee for this service from the court. They may serve documents at a third party's request as well. They deliver the document personally to the addressee. They may deliver the reproduced copy of the document to a member of the family or an employee whom they find at the address. At places of work, they may deliver the document only to the employer. If the addressee refuses receipt, the document will nevertheless qualify as delivered. *Foged*s take minutes on service of documents, which has demonstrative force.

In Denmark, Council Regulation (EC) No 1348/2000 is not applied. *Foged*s do not collect credits, may not sell property by auction, may not make ascertainment of facts, do not give legal advice, and may not pursue any other activity.

9. Greece

The Greek term for bailiff is *Dikastikos Epimelitis.* Enforcement of court decisions and enforceable documents and service of judicial and extra-judicial documents is performed by them.

Bailiffs are self-employed and carry out their activity independently. They are appointed by the Minister of Justice. The process of becoming a bailiff and the bailiffs activities are strictly regulated. They shall comply with professional, ethical, and disciplinary requirements. The number of bailiffs is regulated by *numerus clausus*. There are approx. 2,100 bailiffs, including 800 women. Most of them work alone without employees. They have territorial competence in accordance with the court. They are represented at national level by the Greek Chamber of Judicial Officers.

It does not require a law degree to be a bailiff. Candidates spend a one-year practice period at a bailiff, and then attend a three-month seminar, and take an examination. After that, they are appointed bailiffs by the Minister of Justice. The profession organizes further training programmes carried out in seminars. Applicants may contact bailiffs directly, but execution proceedings will be implemented solely by a bailiff who is competent in the location of the execution.

Bailiffs may carry out execution measures covering the debtor's total property, be it movable, immovable, corporate, or intellectual property. Bailiffs are responsible for implementing the execution measures after consultation with the client. Bailiffs may request information from the property register and the motor vehicle register. The costs of the bailiffs' service shall be paid by the debtor, but in case the debtor is unable to do it, they shall be paid by the applicant.

Judicial and extra-judicial documents shall be served solely by judicial officers, except for documents received from abroad. Judicial officers deliver documents personally to the addressee. They may deliver documents to the person found at the address, the porter or the person whom they find at the debtor's place of work. In these cases, they post a notice to the door of the addressee's apartment, and on the first working day following this date they send the document by post and leave a copy at the local police. If the addressee disappears, the document will be served to the public prosecutor's office and two advertisements will be published in newspapers. Bailiffs take minutes on the service of documents, which later on may serve as evidence.

Bailiffs do not apply Council Regulation (EC) No 1348/2000. Documents received from abroad are forwarded by the Ministry of Justice. Bailiffs do not collect claims and may not pursue any other activity. They may sell property by auction under execution proceedings. They do not make ascertainment of facts, do not give legal advice, and may not represent the parties in court.

10. The Netherlands

Enforcement of court decisions and enforceable documents and service of documents is carried out exclusively by *Gerechtsdeurwaarders*. They may make ascertainment of facts and are entitled to collect receivables and may sell property by auction. *Gerechtsdeurwaarders* operate independently and freely. There are approx. 300 bailiffs, who are appointed by the Ministry of Justice. Approximately 200 offices are maintained for bailiffs, where 3,000 persons are employed. They may operate as self-employed persons or in the form of a company. The profession is regulated by strict disciplinary and operational rules. At national level, the profession is represented by the *Koninklijke Beroepsorganisatie van Gerehtsdeurwaarders*.

Candidates shall be Dutch citizens with an irreproachable past and shall have a law degree followed by a four-year practice period. After that, they are appointed by the Dutch Ministry of Justice. A continuous training programme has been developed, which is going to be compulsory soon. Creditors may freely choose the locally responsible bailiff as they have national competence.

Bailiffs may seize the debtor's total property, including movable and immovable property. Bailiffs are responsible for the outcome of the execution proceedings; they act in co-operation with the creditor. They may set a term of payment for the debtor in agreement with the creditor. In problematic cases, they may seek intervention of the police.

Bailiffs may acquire information on the debtor's property from the GBA, which is a national database. They may obtain information from the Social Security authority, the debtor's employer, the Land Registry Office, the register of mortgages, Chambers of Commerce, the motor vehicle register, etc. The fee for the bailiff's services shall be paid by the debtor, and if the debtor is unable to do it, by the creditor.

Service of documents shall be the exclusive duty of bailiffs, except for tax matters. They deliver documents personally to the addressee or the person whom they find at the address or at the debtor's place of work. If nobody is able or willing to receive the documents, they will be left in a sealed envelope at the address. If the person has disappeared, they will be made public in a newspaper. Bailiffs take minutes on the service of documents, which serves as evidence unless forgery is proved. *Gerechtsdeurwaarders* are both "transmitting and receiving" agencies, i.e., they may transmit documents to another country and may serve documents received from another Member State.

Bailiffs may collect receivables, which amounts to 40–50% of their activity. Applicants may contact bailiffs directly and hand over documents to them for the purposes of execution. Bailiffs are responsible for the full procedure of the execution. First, they try to resolve the matter amicably, and if this cannot be implemented, they will apply forced execution.

The fee for collection of receivables shall be consulted and agreed upon with the creditor. Bailiffs may sell the debtor's movable property by auction, may make assessment of damages (which represents 2-3% of their activity), may represent the parties in court up to the amount of EUR 5,000, and may give legal advice. Bailiffs may not pursue any other activity.

11. Poland

The Polish term for bailiff is *Komornik Sadowy*. Enforcement of court decisions and service of documents are performed by them. Execution of court judgments is implemented exclusively by them. They may define the appraisement value of movable properties and may sell them by auction. They may make ascertainment of facts, but this is not typical. They do not collect debts out-of-court. They do not represent the parties in court. Bailiffs are judicial civil servants; they are appointed by the Minister of Justice. They have a self-employed status; they carry

out their work independently. The profession is regulated by strict disciplinary and operational rules. The number of bailiffs is limited. There are approx. 585 bailiffs in Poland, including +/- 30% women. They are self-employed and they employ approx. 6,000 persons. Bailiffs' area of competence covers the territorial competence of the district court. At national level, they are represented by the *Krajowa Rada Komornicza*. Judicial officers can be persons who have completed their law studies at a university (5 years), have performed a 2-year practice period at one or several bailiff's offices, and have taken bar examination. After that, they can apply for a vacancy. They are appointed by the Minister of Justice.

It is solely bailiffs who are entitled to enforce court decisions. They may implement safety measures. Regarding tax matters, the Ministry of Finance has its own tax collectors.

They may carry out execution proceeding covering the debtor's total property, be it immovable, movable, corporate, or intellectual property. However, sale of immovable property by public auction does not fall within their powers.

Creditors may elect execution measures to be taken, but only upon the bailiff's proposal. Bailiffs may request information from the register of citizens' addresses, the motor vehicle register, and the Land Registry Office. The fee for bailiffs' services shall be paid by the debtor, and if the debtor is unable to do it, by the creditor. Bailiffs may perform service of documents, but they do not have a monopolistic position in this respect. Bailiffs deliver documents personally to the addressee. They may deliver a copy of the document to other persons who are staying at the address (parent, friend, employee …), persons found at the place of work, or a neighbour. If nobody can take over the document, the bailiff will leave a notice at the address, calling the addressee to take over the document at his/her office. They may post the notice at the mayor's office or may publish it in the press.

Council Regulation (EC) No 1348/2000 is not applied yet. Bailiffs do not collect debts. Bailiffs may sell movable property by court or voluntary public auction and may define their appraisement value. They may make ascertainment of facts, but this is highly rare. They may not represent the parties in court, may not give legal advice, and may not pursue any other activity.

12. Lithuania

Enforcement of court decisions is performed solely by *Antstolių*s. They may proceed in the service of judicial and extra-judicial documents. They may make assessment of damages, may collect receivables amicably or by way of forced collection. They may sell movable property by auction, may represent the parties in court under certain conditions, and may give legal advice.

Lithuanian bailiffs are appointed by the Minister of Justice. They operate independently and freely. The profession is regulated by strict disciplinary and operational rules. There are 123 bailiffs, 50% of them are women. They are assigned to regions and are under the authority of courts, except for some faraway locations where there is a shortage of bailiffs. They may not operate in a company form. The profession is represented at national level by the *Antstolių Kontora.*

Candidates shall be Lithuanian citizens with irreproachable past and shall have a law degree (5-6 years). It is not compulsory to perform a practice period but it is necessary to spend five years in a position in an area of law or one year working with a bailiff. This is followed by an examination, and then they will be appointed by the Minister of Justice. Permanent, compulsory training will be provided for bailiffs and deputy bailiffs.

Enforcement of court decisions shall be solely the responsibility of *Antstolių*s. Applicants may contact the bailiff competent in the relevant location directly and creditors may choose them freely. Bailiffs may seize the debtor's total property, including immovable and movable property.

Creditors decide the outcome of the execution, but implementation of the execution proceedings shall be the bailiff's responsibility. In problematic cases, they may seek intervention of the police. Bailiffs may acquire information on the debtor's property, payment documents, data of immovable property and motor vehicles, personal details, and banking data.

The fee for the bailiff's services shall be paid by the debtor in accordance with a fixed tariff, and if this cannot be implemented, the costs will be covered by the creditor. Bailiffs may serve documents; under the execution proceedings, they deliver documents personally to the addressee. They may deliver the document to other persons if the addressee is not present but only to members of family who have turned 18 years old. If the relevant person does not take over the document personally, bailiffs may leave a notice by registered mail. If the addressee has disappeared, the document will be left at the last known address by registered mail. In the case of amicable resolution of the dispute, bailiffs may deliver the notice only personally or to a member of the family. After that, the bailiff will make a memorandum on service of the notice, which shall be regarded as an official deed. Council Regulation (EC) No 1348/2000 is not applied by bailiffs.

Bailiffs may collect receivables in an amicable form or through court proceedings. This represents a considerable part of their activity. Applicants may contact bailiffs directly. First, they will make efforts to resolve the dispute amicably, and if this brings no result, they will obtain the necessary authorization for carrying out execution proceedings.

In case of forced seizure, they apply the legal tariff and in amicable execution they agree on the tariff.

Bailiffs may sell seized movable property by auction. As from 2003, since the profession has existed, bailiffs may make assessment of damages, may not represent the parties in court, only within the frameworks of execution proceedings. They may give legal advice and shall not fulfil any other function.

13. Luxembourg

Enforcement of court decisions and enforceable documents and service of documents is carried out solely by bailiffs. They may make ascertainment of facts, may define appraisement value of movable property, and may sell them by auction. They may collect debts out-of-court, whereas collection through court proceedings represents a considerable part of their activity. They do not represent the parties in court. Bailiffs are judicial civil servants who are appointed by the Grand Duke. They pursue their activity independently in a liberal form.

The process of becoming a bailiff and the bailiff's activity is strictly regulated. The number of positions is limited. In Luxembourg, there are 19 bailiffs, including 2 women. They may work alone or in the form of a company. They have an area of competence that belongs to district courts. In Luxembourg, there are only two court districts: Diekirch in the north and Luxembourg in the south. At national level, the profession is represented by the chamber of bailiffs. Candidates shall be citizens of Luxembourg with an irreproachable past and shall have a law degree (4 years). They shall perform a 1-year practice period at a bailiff's office and take an examination; after that, they may apply for a vacant job.

Bailiffs have sole competence in enforcement of court decisions and enforceable documents. They may implement official sequestration. In the course of judicial execution, bailiffs with district competence will act. Applicants may contact bailiffs directly. Bailiffs may carry out execution covering the debtor's total property, be it immovable, movable, corporate, or intellectual property. They may seize the debtor's movable property through court proceedings.

Sale of immovable property by public auction does not fall within their powers.

Bailiffs freely control the course of execution but shall adjust to clients' instructions in compliance with legal rules. In case of difficulties, the case will be decided by a judge. Bailiffs may request information from registers (by fax): may apply for information from population statistics, the trade register of companies, the motor vehicle register, and from the data of the social security authority (from the latter, solely upon a court decision). The fee for the bailiff's services shall be paid by the debtor, but if the debtor cannot cover them, the applicant shall pay for the execution. In case of collection, bailiffs are entitled to a fee to be paid by the relevant party. Service of judicial and extra-judicial documents is carried out solely by judicial officers. They deliver a copy of documents personally to the addressee

or the person found at the address (parent, friend, employee ….). If nobody is able to take over the documents, they will be left in a sealed envelope at the address and a photocopy will be sent by post. In accordance with the provisions set out in Council Regulation (EC) No 1348/2000, bailiffs also act as transmitting and receiving agencies, whereas the Chamber does not play any part in this respect.

Bailiffs may collect debts out-of-court. Currently, this is an important activity of bailiffs. Applicants may contact bailiffs directly and hand over documents to them. First, bailiffs will try to collect the debt out-of-court, and if this brings no result, they will request the judge to issue a payment order to enable bailiffs to implement the collection by court. Bailiffs do not represent the parties in court.

Costs of collection and service fees are paid by the applicant. Bailiffs have the opportunity to agree with the client in a contract on the amount of the service fee.

Bailiffs may define the appraisement value and carry out the sale of movable property by auction, but this is not a notable activity. Bailiffs do not give legal advice and may not pursue any other activity.

14. Germany

*Gerichtsvollzieher*s have exclusive competence in the enforcement of court decisions, but service of documents is not only their duty. They do not make ascertainment of facts. Value appraisement and sale of movable property by auction do not fall within their powers; they may sell property by auction only through court proceedings. They may not perform amicable collection of receivables. They do not represent the parties in court.

Bailiffs are not independent; they belong to *Land*s, provinces, and not to the federal state. At present, reforms are in progress to introduce the independent status. However, these reforms are just being developed. The profession and the process of becoming a bailiff is regulated by strict rules, the number of bailiffs is limited.

There are approx. 4,600 *Gerichtsvollzieher*s in Germany, including approx. 1,500 women. They can pursue their activity only on their own, but several bailiffs are allowed to work at the same office. They employ approx. 300 persons. They have territorial competence, which is highly limited. The profession is represented at national level by the *Deutscher Gerichtvollzieherbund*. Bailiffs are not obliged to join he chamber.

In general, *Gerichtvollzieher*s are recruited from civil servants working in judicature, but anybody can become a judicial officer. University degree is not required. Candidates are trained in programmes organized by the ministries of justice of various provinces, in preparatory classes necessary for pursuing the profession. *Gerichtvollzieher*s are appointed by the Ministry of Justice of the relevant province.

Solely judicial officers are empowered to enforce court decisions. The Ministry of Finance and municipalities have their own execution officers. Applicants may contact bailiffs having competence in the region directly.

Bailiffs may proceed with regard to the debtor's movable property only in case of forced execution; they are not authorized to carry out foreclosure of immovable property.

*Gerichtvollzieher*s control the course of execution but shall adjust to clients' instructions. They have no data source available to them for searching for the debtor's property, but they may oblige the debtor to make a declaration of property; refusal to make the declaration or making a false declaration will lead to penalty. Costs are borne by the debtor, and if the debtor is unable to pay them, they will be covered by the applicant.

Service of documents may be carried out by persons other than bailiffs. *Gerichtvollzieher*s deliver documents personally to the addressee. They may deliver documents to the persons who are staying at the address (parent, friend, employee …). If nobody is able or willing to take over the documents, they will be left in a sealed envelope at the address of the addressee or at the office of the court of justice. At present, Council Regulation (EC) No 1348/2000 is not applied; however, bailiffs hope that after obtaining independent status they will be able to act in accordance with the above Regulation. Bailiffs may collect credits under judicial execution, which is limited to 6–12 months. They may not perform amicable collection of credits. They do not give legal advice and shall not make ascertainment of facts or carry out any other activity.

15. Italy

The Italian term for bailiff is *Ufficiali Giudiziari.* Enforcement of court decisions and enforceable documents shall be the bailiff's duty. Creditors of public law debts and banking concessionaires may also implement execution against debts payable to the bodies represented by them. *Ufficiali Giudiziari* are civil servants of the Ministry of Justice, are employed by the courts, and are given instructions directly by the judge. They shall comply with professional, ethical, and disciplinary regulations. Plans are in place to develop an independent and autonomous body of bailiffs. The profession is represented at national level by the *Unione Italiana Ufficiali Giudiziari*.

No special legal qualification is required for becoming a bailiff. The Ministry of Justice recruits candidates and appoints them bailiffs. *Ufficiali Giudiziari* have competence to enforce court decisions, except for debts payable to creditors of public law debts and banking concessionaires; the latter collect such debts through their own officers.

Documents are delivered by the judge to the competent bailiff. Applicants may not contact bailiffs directly. In case of eviction, the lawyer of the entitled party will send the document directly to the bailiff. Bailiffs may implement execution covering the debtor's total property, be it corporate or intellectual property (seizure of movable property, blocking bank accounts).

Bailiffs are responsible for the entire process of the execution measures but are given instructions directly by the judge. It is the judge who decides on suspension of measures. Bailiffs may not receive information with regard to the debtor's property from registers. The costs of bailiffs' services shall be paid by the court. Bailiffs may serve judicial and extra-judicial documents, but this does not mean a monopolistic position since lawyers and court employees are also allowed to serve documents.

Bailiffs deliver documents personally to the addressee. They may deliver documents to another person whom they find at the address. In this case, they send a letter by registered mail with receipt of delivery requested to the address of the addressee. They will leave a copy of the document at the local police. If they do not find the addressee, they will post a notice at the court of the last known address and publish an advertisement in the local newspaper of the settlement of the debtor's place of birth. At present, bailiffs do not apply Council Regulation (EC) No 1348/2000. They do not collect debts, may not sell property by auction, do not make ascertainment of facts, may not represent the parties in court, and shall not pursue any other activity. Solely in the frameworks of execution proceedings are they authorized to give legal advice.

16. Portugal

Enforcement of court decisions and enforceable documents is implemented solely by *Solicitadores de execucao*. They also serve judicial and extra-judicial documents. In civil cases up to EUR 3,750, subjects-at-law may entrust bailiffs to make division of property, prepare documents for the notary public, give advice in tax matters, and apply for registration of mortgage. Also, they may act as secretary of business associations to attest documents. They have pursued the profession since September 2003.

Bailiffs are appointed by the *Camara des Solicitadores*. They operate independently and freely. The profession is regulated by strict disciplinary and operational rules. Application is strictly regulated. There are 430 *Solicitadores de execucao*, including 55 women. They are assigned to regions, except for a few faraway locations such as the Islands of Acores or Madeira, where there is a shortage of bailiffs. They may operate both alone and as an organization. Plans are in place to enable them to set up companies in the future. The area of

competence of bailiffs covers the area of competence of courts, providing that in certain cases the area of competence can be extended. At national level, the profession is represented by the *Camara des Solicitadores*.

Candidates shall be Portuguese citizens with irreproachable past and shall have a law degree (minimum 3 or 5 years). After that, they work as candidates for one and a half years and as *Solicitador*s for 3 years, which is followed by 6 months of specialization. After that, they shall take a bar examination. They are appointed by the *Camara des Solicitadores*. The profession provides optional further training programmes, which are attended by lots of bailiffs.

Enforcement of court decisions shall be the exclusive responsibility of bailiffs. In tax matters, experts specialized in this field will proceed. Applicants may contact directly bailiffs competent in the region. Bailiffs may seize the debtor's total property, including movable and immovable property. If execution is carried out with respect to bank accounts, preliminary authorization from the judge shall be requested. Bailiffs are responsible for the outcome of the execution proceedings; in problematic cases, they may seek intervention by the police. They may grant a respite for payment to the debtor with the creditor's consent.

Bailiffs may obtain information on the debtor's property, payment documents, data of movable property and motor vehicles. They may acquire information on bank accounts, taxation matters and other protected documents only with the authorization of the judge. The fee for bailiffs' services shall be paid by the debtor, and if this cannot be realized, by the creditor.

Bailiffs may carry out service of judicial and extra-judicial documents. Under execution proceedings, documents may be served only by them. They deliver the document personally to the addressee. They may deliver the document to other persons at the address, a neighbour or the porter. If nobody takes over the document personally, they will leave a notice calling the addressee to take over the document at the office of the *Solicitador*. Within two days, they will send the document by registered mail. If the addressee has disappeared, they will publish the document in a local newspaper and will leave a copy at the mayor's office as well as at the last known address of the addressee. After that, the bailiff will make a memorandum on service of the document, which is deemed an official deed. Council Regulation (EC) No 1348/2000 is not applied, but they have taken steps to enable *solicitador*s to act as transmitting and receiving agencies.

Bailiffs may collect receivables out-of-court and through judicial execution. However, once they have agreed on amicable settlement, they may not switch to execution by force. Applicants may contact bailiffs directly. First, bailiffs will make efforts to resolve the case out-of-court, and if this brings no result, they will do everything in order to issue an enforceable document. In the case of collection out-of-court, bailiffs can freely agree on the service fee with the client. In the case of forced execution, they work on the basis of a tariff.

Bailiffs may sell property by auction, may not make ascertainment of facts, may represent the parties in court, and may give legal advice under execution proceedings. Bailiffs may fulfil several functions: they may proceed in civil cases up to EUR 3,750, may make divisions, may be secretaries of business associations, may prepare files for the notary public, may give advice in tax matters, etc.

17. Spain

Collection of debts, service of documents and enforcement of court documents are performed by officers of several professions. Execution shall be controlled and performed by the judge, but usually he/she assigns this task to an *Agente judicial* (court official). Also, the judge may assign this task to a *secretario judicial* (court secretary). Documents are prepared for lawyers and are submitted to the court by a *procurador*. A reform is in progress to enable *procuradores* to enforce court decisions. Under the assignment of the judge, *Secretarios Judiciales* carry out service of documents, but this task can be fulfilled also by *procuradores*.

Agentes judiciales, *Oficiales*, and *Auxiliaires* are court employees. *Procuradores* are independent and have an independent status. Candidates for *procuradores* shall comply with strict requirements. *Procuradores* shall adhere to ethical, disciplinary, and professional rules.

There are approx. 8,900 *procuradores*, of whom 60-70% are women. (1 *procurador* falls on approx. 4,500 inhabitants). With a few exceptions, bailiffs have limited powers on the area of competence of *Partidos Judicial*. (*Partidos* are territorial units and consist of one or several neighbouring settlements that belong to the same province). At national level, the profession is represented by the *Consejo General de Procuradores*.

To be a *procurador*, a person shall be a Spanish citizen with irreproachable past and shall have a law degree (4 years university). Bailiffs are appointed by the Minister of Justice. Plans are in place to organize further training programmes for *procuradores* and their employees.

At present, execution is generally performed by the *Agente judicial* who belongs to the *Partidos Judicial* of the location of the execution, after this task has been assigned to them by the judge. Over EUR 900, solely *procuradores* are entitled to act in enforceable matters; they may also sell property by auction under execution proceedings.

Parties applying for execution or their lawyer shall first request the judge to issue various execution documents, which are implemented possibly with the assistance of a *procurador*. Notices to the debtor are usually written by the *Secretario Judicial*, whereas execution measures are implemented by the *Agente Judicial*.

Execution may be implemented with regard to the debtor's total property (movable/immovable, corporate/incorporeal property), except for assets exempt from execution. It shall be the judge's responsibility to conduct the execution proceedings, by assigning scopes of tasks to the rest of court officials. Apart from a few exceptions, the judge will adopt an executive order calling the debtor to make a declaration on his/her property. In case of failure to make this declaration, the debtor may be fined. The *Agente judicial* responsible for seizure may request information from various offices on the debtor's property. The costs shall be covered by the debtor, and if the debtor is unable to do it, by the applicant.

Procuradores may serve documents to the parties if they are represented by them during the proceedings. In other cases, they will send documents by post with or without receipt of delivery requested.

If there is no evidence that the debtor has taken over the document, it may be delivered personally in court or at the debtor's address. Documents may be delivered to any person who is staying at the debtor's address. If nobody is able or willing to take over the document, a notice will be published in the Official Gazette. If the debtor's address is not known, they will implement search for address, post a notice in court and possibly in an official journal. *Procuradores* will take minutes on service of documents; the form of such minutes is determined in law and shall have demonstrative force later on.

With respect to the provisions set out in Council Regulation (EC) No 1348/2000, the *Secretarios Judiciales de los distintos Juzgados y Tribunales* shall be a transmitting agency and the *Secretario Judicial del Juzgao Decano* shall be a receiving agency.

Collection of debt may be carried out by the bailiff, who can be contacted for these purposes directly; the fees can be determined freely. Bailiffs do not sell property by auction, do not make ascertainment of facts, and do not pursue any other activity.

Procuradores may represent the parties, which is their main activity, and may give legal advice.

18. Scotland

In Scotland, there are two types of bailiffs: *Messengers-at-Arms* (*Supreme Court enforcement officers*), who are under the control of the Supreme Court, and *Sheriff Officers* (*Local Court enforcement officers*), who are under the authority of Local Courts. Enforcement of court decisions are carried out solely by them. They may serve judicial and extra-judicial documents and may sell property by public auction at the debtor's domicile. *Messengers-at-Arms* and *Sheriff Officers* are appointed by the Senior Sheriff.

Scottish bailiffs operate independently and freely. The profession is regulated by strict disciplinary and operational rules. There are 163 Scottish bailiffs (one bailiff falls on approx. 31,000 inhabitants); they may operate alone or in the form of a company. At present, there are 24 companies; 9 female bailiffs are registered in the profession. *Messengers-at-Arms* and *Sheriff Officers* have territorial competence, which corresponds to the territorial competence of the court. At national level, the profession is represented by the Society of Messengers-at-Arms and Sheriff Officers, but it is not compulsory to join it.

Candidates are appointed by the Senior Sheriff. The profession regularly organizes further training programmes; attendance will be compulsory in the future. Candidates shall be British citizens with irreproachable past and shall complete a 3 years' practice period at a bailiff's office and take an examination after that, organized by the Society of Messengers-at-Arms and Sheriff Officers.

Enforcement of court decisions and enforceable documents shall be solely the responsibility of *Messengers-at-Arms* and *Sheriff Officers*. They may implement forced execution with regard to the debtor's assets. Applicants may contact the bailiff with territorial competence directly.

Bailiffs may seize the debtor's total property, including movable and immovable property. Bailiffs are responsible for the outcome of execution; if it is required by law, they shall request the authorization of the judge and instructions for taking measures.

Bailiffs may not acquire information on the debtor's property. The fee for the bailiff's services shall be paid by the debtor, and if this cannot be realized, the costs and fees shall be covered by the creditor. Bailiffs or deputy bailiffs serve documents; they deliver documents personally to the addressee. Documents may be forwarded also by other persons (lawyers, solicitors) but only by registered mail. Documents may be delivered to other persons when the debtor is not present. If such a person does not take over the document personally, the document may be left in their post-box; however, a copy will be sent by post. After that, bailiffs will take minutes on service of documents, specifying their name and address and the date and form of delivery. The minutes shall be valid if the bailiff is a member of the Society of Messengers-at-Arms or Sheriff Officers.

In accordance with Council Regulation (EC) No 1348/2000, bailiffs shall qualify as transmitting and receiving agencies, together with Accredited Solicitors. Bailiffs may not collect receivables; however, they may set up companies for these purposes. Such companies operate mainly in large cities. Negotiations are in progress to enable bailiffs to act in amicable collections.

Applicants may contact bailiffs directly. The fees for collection vary depending on competition. Bailiffs may sell property by auction at the debtor's domicile, may make assessment of damages, but this is not a typical activity. They may represent the parties in court under execution proceedings. They may give legal

advice also under execution proceedings. Bailiffs shall not pursue any other activity as a bailiff.

19. Sweden

Enforcement of court decisions shall be carried out solely by *Kronofogde*s. They may serve judicial and extra-judicial documents and may sell movable and immovable property by public auction.

*Kronofogde*s are employees of the State. The profession is regulated by strict disciplinary and operational rules. There are 260 *Kronofogde*s (more than half of them are women); they employ a total of 2,900 employees. Until the end of 2006, bailiffs belonged to 10 regional bodies; from 1 July 2006, there is one national execution authority (*Kronofogdemyndigheten*). This authority is independent in terms of execution, but administratively it depends on the national tax authority. However, from 2008, it will be administratively independent. Its seat is in Stockholm. Execution is divided into 5 regions and each of them has its own responsible official. Bailiffs may join the Swedish Chamber of Judicial Officers.

Candidates shall have a Master of Laws degree or a degree equivalent to it acquired in Denmark, Finland, Iceland, or Norway. After that, they will be employed by one of the 5 regional offices of bailiffs. Candidates will attend another 1-year education programme. During this period, they study mainly the practical aspects of execution. Theoretical studies take only 5 weeks within the 1-year training course. After its completion, candidates will be appointed bailiffs.

Only bailiffs are entitled to enforce court decisions and enforceable documents. In the case of debts to the State, executive bodies may apply to court seeking institution of bankruptcy proceedings or revision of invoices. From 2008, this right will be transferred to the office of State Treasury, and from that date there will be no difference between debts to the State and private debts.

Applicants may not contact bailiffs directly. They shall apply to one of the 5 regional executive bodies, which decides who shall be responsible for the case. Documents will be handled by the regional body of the domicile of the debtor.

Bailiffs may implement execution covering the debtor's movable/immovable property. Bailiffs shall have responsibility for execution measures. Applicants seeking execution proceedings shall be continuously informed. If necessary, bailiffs may request help from the police. In the case of debts payable to the State, bailiffs may grant a respite of payment. In the case of private persons, bailiffs shall first ask for the consent of the applicant seeking execution for such respite of payment.

Bailiffs may request information on the debtor's property. Debtors and any third parties shall be obliged to supply information to bailiffs on the debtor's property. Bailiffs may request information from electronic registers (motor vehicles, real

estates, bank accounts, wages). Plans are in place to enable bailiffs to receive data electronically; an electronic system is being developed, but use of paper format documents is the typical procedure.

Costs are covered by the debtor. If the debtor is unable to pay, costs will be paid by the applicant. Bailiffs carry out service of documents, but in most of the cases courts send documents by post. In general, documents are served under forced execution proceedings.

Bailiffs deliver documents personally to the address. Documents may be delivered to other persons at places of work and at the address. If nobody is able or willing to take over the documents after several attempts, they may be left at the address, may be sent by post, or a notice will be published in a newspaper. If there is no known home address, the notice will be published in a newspaper. Bailiffs make a written document on the circumstances and conditions of delivery of documents, the legal validity of which is deliberated by the judge.

Pursuant to Council Regulation (EC) No 1348/2000, bailiffs shall qualify as transmitting agencies (i.e., they may transmit the documents to another Member State). The receiving agency shall be the Ministry of Justice (responsible for having served documents received from abroad).

Bailiffs do not collect receivables out-of-court; they implement only judicial collection procedures under certain conditions.

Applicants may request extensive and a narrower scope of proceedings with respect to the debtor's property. They shall pay SKR 500 in the case of a narrower scope of proceedings and SKR 1,000 for extensive proceedings. From 2018, there will be only one proceeding, but its fee is not determined yet. It might include the fees for transport and storage in case of movable property, which shall be paid by the creditor if the debtor is unable to.

Bailiffs may sell the debtor's movable and immovable property by auction. In addition to auction, sale may be carried out by other means (sale entered into by arrangement; sale entered into by the assistance of real estate agent).

Bailiffs may not make ascertainment of facts, do not represent the parties in court, and may give legal advice only under execution proceedings.

They may pursue other activities; so, they may file a claim to the competent court seeking issuance of payment order; they may engage in resolution of debts of private persons; they may pursue and disseminate preventive policy through information campaigns in order to prevent debts.

20. Slovakia

Enforcement of court decisions and enforceable documents is implemented by bailiffs, i.e., *Sudni executori*.

They are independent and have independent status. At present, there are 252 bailiffs, who are appointed by the Minister of Justice. They have national territorial competence. They employ approx. 1,000 persons. One fourth of the bailiffs are women. In their work, they shall comply with disciplinary, professional, and ethical rules. They shall take out professional liability insurance. At national level, they are represented by the chamber of bailiffs (*Chambre nationale des Sudni executori*). Candidates shall have a second-level (master's) law degree (5 years' law studies) and shall complete a 2-year professional practice period. The profession organizes optional further training programmes for bailiffs and their employees. Applicants may contact bailiffs directly; bailiffs have national territorial competence. Bailiffs are responsible for the process of execution; they choose execution measures after having consulted with the creditor.

Bailiffs may request information on the debtor's property from approx. 25 institutes: the central bank, the social security authority, the register of motor vehicles, etc. Data shall be requested in writing and response will be received in approx. 3 weeks.

Bailiffs may serve documents, but they are not in a monopolistic position. They deliver the documents personally to the addressee; if they do not find the addressee, they will send a letter to him/her within the shortest time. Costs of the execution shall be paid by the debtor. Bailiffs may ask for advance payment to cover the foreseeable costs of the execution proceedings.

Council Regulation (EC) No 1348/2000 is not applied, i.e. service of foreign documents is not implemented by bailiffs. These documents shall be sent to the International Private Law and Co-operation Department of the Ministry of Justice of Slovakia. Bailiffs collect receivables. Applicants may contact bailiffs directly and may request collection of claims. The costs thereof shall be negotiated freely with the creditor.

Bailiffs may sell property by auction but do not make ascertainment of facts. They do not represent the parties in court. They may give legal advice only in relation to execution proceedings. They shall not pursue any other activity.

21. Slovenia

The term for bailiff is *Izvrsiteljica*. Bailiffs implement enforcement of court decisions and enforceable documents. They share this activity with bailiffs employed by the court, who are appointed by the judge.

Since 1998, the bailiffs' profession has been independent and autonomous. The profession and the process of becoming a bailiff are strictly regulated. The bailiffs' activity is controlled by courts. Ethical, disciplinary, and professional rules are being developed. Bailiffs are represented by the chamber of bailiffs.

To become a bailiff, a person shall have a law degree equal to the diploma of judges. They shall take a bar examination. They are appointed by the Minister of Justice. After having been appointed, bailiffs shall take examination again in every 4 years. If they fail at the examination, they will be relieved from service. They are controlled by the judge, who assigns the documents to bailiffs having territorial competence. At the same time, creditors may specify in court which bailiff they elect. Bailiffs may implement execution covering movable property and immovable property that has not been registered. Bailiffs are responsible for execution measures, but they shall give account of the measures taken by them to the court and the creditor. With respect to the debtor's property, they may request information only under the control of the judge. The costs of bailiffs shall be paid by the debtor. Bailiffs may serve documents in the manner it is implemented by courts.

They send documents by post or deliver them personally. Pursuant to the provisions set out in Council Regulation (EC) No 1348/2000, the district court shall act as transmitting agency. Bailiffs do not collect debts, do not sell property by auction, do not represent the parties in court, do not give legal advice, and shall not pursue any other activity.

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From Capitalism to Utopia – Communist Nationalization of Companies in Central and Eastern Europe

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Abstract. This article gives an inside look on a current research project regarding the history of company law in Central and Eastern Europe. This project has a special focus on a certain company: the Renner Brothers & CO, later on called Dermata, János Herbák, and finally Clujana. But, on the basis of the particular legal history of this business entity, general questions of company law are also addressed: nationalization, privatization, and present-day effects of the historical evolution.
After a short overview of the research, the pivotal question raised by the present article is nationalization, or more precisely the need to understand better the legal nature of nationalizations in Central and Eastern Europe in contrast to nationalizations in Western Europe, which took place in a very different economic and political context. Nationalization in Soviet-type regimes was totally different as compared to nationalizations realized in democratic societies. There are certain particularities which differentiate the two kinds of nationalizations, and the purpose of this article is to briefly highlight at least some of these disparities and try to design a precise legal theory of nationalization in Central and Eastern European context.

Keywords: history of company law in Central and Eastern Europe, nationalization, effects of nationalization, compensation

I. From Particular towards General – Basic Directions of a Research Project

Cluj (in Hungarian: Kolozsvár, in German: Klausenburg) is a town in the western part of present-day Romania; there are three different names for the same town because of its multi-ethnic character.

In this town was founded the Renner Brothers & CO in 1911, a company limited by shares, practically a leather and shoe factory employing thousands of workers

in its best years and being an important player of leather industry not only at national level. The similarities with the Bata Shoe Company, founded in Zlín in 1894 (that time Austria–Hungary, in present, the Czech Republic) are obtrusive.

At the moment of the company's foundation, Cluj – just as the whole Transylvanian region – was part of the Austro–Hungarian Empire. From a legal point of view, the applicable law for company foundation was the Hungarian Commercial Code (Act No XXXVII of 1875). After WWI, the town became part of Romania and the company subject to Romanian law.

We started in 2013, a small research group having as its purpose an interesting and still ongoing project: to unfold the legal history of this factory, which is functioning even in the present days. We considered that it would be of interest to see how the life of a business organization was shaped by the law in the XXth century. We got the opportunity to observe a very interesting and complex evolution. Human faiths were connected with the factory as well, and we can find a whole frame of marvellous, woeful, and in many cases tragic images, which cannot be neglected if we want a deeper understanding of Central and Eastern Europe.

To highlight our approach and also the elaborated methods, I would like to underline the difficulties of the periodization. In any historical analysis, an important issue is how to divide, based on scientific methods, the time of an investigated period into named blocks. Of course, any result is subjective, but this approach is necessary if we want to systematize our historical knowledge.

We can use in our analysis different techniques and arrangements. First, if we take into account the basic social order and the economic system, we have a first capitalist period (1911–1948), a "communist" period (1948–1989), and a second capitalist period (starting with 1989). But this perspective is not totally accurate or errorless. For example, in the Soviet Union and in the Eastern-European states, there was no communism at all, and not only because the status of communism was not reached by the social and political evolutions; in fact, the status of communism is not reachable due to its – proven – utopian character. Instead of communism, we had something different, a failed social experiment. We cannot call it "socialism" because this term is misleading and has other meanings as well. So, we must refine this periodicity: we have a first capitalist period (1911–1945), a first transition period (1945–1948), a period of leftist dictatorship (1948–1989), a second transition period (1989–2000), and a second capitalist period (2000–present day). Summarized, this research is a journey of legal history of company law from capitalism through utopia and back to capitalism again. But, for sure, the two capitalisms – the first and the second one – are not the same.

Another method is to take into account the state which was exercising its sovereignty over our company. Under this approach, we have a first period in which our company belonged to the Austro–Hungarian Empire and functioned under the Hungarian law (1911–1920). After that, Transylvania became part of

Romania and the company was subject to Romanian law (1920–1940 and 1944–present day). Between 1940 and 1944, based on the Second Vienna Award, a part of Transylvania was reassigned to Hungary and our company was again subject to Hungarian law. This approach is only partial: for example, belonging to the Romanian law gives a homogenous impression. This is not the case: for a certain period, we have a capitalist regulation in its spirit (before 1947/48), but after that, through nationalization, the ownership of the company and its assets were transferred to the state. The organizational structure of the company was also transformed because, from a legal point of view, a state-owned enterprise is something totally different from a company limited by shares. State-owned enterprises in the Soviet-type legislations are structures situated on the frontier between administrative law and private law and being integrated into the administrative structure of the state, subordinated to the resort ministry.

The third way is to use the different names under which the company existed: "Renner Brothers & CO," "Dermata" (after a takeover of a similar company), "Uzinele János Herbák," and finally "Clujana". But this is the most subjective of all the periodization attempts. This method reflects the different changes in the status of the company (for example, János Herbák was a leftist activist employed by the factory for a very short time), but just for the ones who are familiarized with the history of this entity.

We must take into account that our goal is to give a synthesis of legal history of a certain company and through this synthesis to analyse how company law worked in very different economic, legal, social, and ideological backgrounds in practice. The best approach is the combination of the three periodization methods. In this way, starting from a particular history of a company, we can proceed to a general analysis of legislation and legal practice, which will serve as a basis for some broader inductions on comparative company law in Central and Eastern Europe.

II. Nationalization – The Context

From this research, I would like to emphasize some broad issues regarding one of the key changes which influenced the company regulation in Central and Eastern Europe fallen into the Soviet sphere of influence after WWII, namely the nationalization.[1]

Most of the companies, and certainly every middle-sized and major company, experienced the radical transformation of the economic order, based generically on the theories of Karl Marx but more directly on the Soviet practice. This economic transformation was achieved with different means and arrangements,

1 For a previous version of this article, see Veress 2014. For a general overview regarding nationalization, see Katzarov 1964.

nationalization being one of the most important methods for the purposes of these profound changes. A legal theory of nationalization was elaborated, but this theory had a very practical and limited purpose: to legitimate the nationalization. So, we need to re-elaborate such a legal theory in order to understand the real nature of nationalizations and also the present consequences.

To understand the logic behind nationalization, we must start from the notions of capitalism and the economic foundation of capitalism, namely the market economy. Private property – in the concept of Marxism – is the basis of class exploitation; therefore, private property must be eliminated or severely limited. A private property of value-producing assets in the Marxist view is something very negative: if these assets are owned by a class who engrossed them, namely the bourgeoisie, the automatic conclusion is that this class exploits the masses of the workers for their own interests.

The interest of the mass of workers is antagonistic toward the interest of the bourgeoisie. The workers' purpose must be elimination of the private property of value-producing assets, and therefore the elimination of the bourgeoisie, which is, on the one hand, a revolutionary act which will lead to a much fairer society. On the other hand, this is a historical necessity, an inevitable course of history. I do not wish to endeavour to criticize the Marxist theory, the goal is just to analyse its effects on company law.

Marx and Engels stated in the Communist Manifesto (Das Kommunistische Manifest, 1848):

In this sense, the theory of the Communists may be summed up in the single sentence: Abolition of private property.

We, Communists, have been reproached with the desire of abolishing the right of personally acquired property as the fruit of a man's own labour, which property is alleged to be the groundwork of all personal freedom, activity, and independence. Hard-won, self-acquired, self-earned property! Do you mean the property of the petty artisan and of the small peasant, a form of property that preceded the bourgeois form? There is no need to abolish that; the development of industry has to a great extent already destroyed it, and is still destroying it daily.

Or do you mean the modern bourgeois private property?

But does wage labour create any property for the labourer? Not a bit. It creates capital, i.e., that kind of property which exploits wage labour and which cannot increase except upon conditions of begetting a new supply of wage labour for fresh exploitation. Property, in its present form, is based on the antagonism of capital and wage labour. Let us examine both sides of this antagonism.

To be a capitalist, is to have not only a purely personal but a social status in production. Capital is a collective product, and only by the united action of many members, nay, in the last resort, only by the united action of all members of society can it be set in motion.

Capital is therefore not only personal: it is a social power.

When, therefore, capital is converted into common property, into the property of all members of society, personal property is not thereby transformed into social property. It is only the social character of the property that is changed. It loses its class character.[2]

According to the Marxist theory and Soviet-type practice, the working class, or more precisely the revolutionary vanguard of this class, takes over the political power. It is a revolutionary act to rush and enforce something already determined by the historical necessity. The shift to the concentration of political power is just a first step because the exploiting social class keeps important economic, industrial, commercial, and agricultural positions. These positions must be exterminated in order to create the desired ideal society, and the principal mean for this objective is nationalization. Private ownership of companies must be replaced by the ownership of the state through a takeover called nationalization.

III. Constitutional and Legal Basis for Nationalization in Romania

The preparation for nationalizations started in 1947. Between 15 and 24 October 1947, there was conducted a confidential stock-taking of industrial, commercial, and financial enterprises. This stock-taking concerned 56,315 enterprises, from which 47,479 were private and 6,836 state-owned.

The labour force was made up of 976,171 persons, with 649,188 working in private and 326,983 in state-owned enterprises. This means an average of 47 persons per each state-owned enterprise and 16 persons per each private enterprise.[3]

At the end of December 1947, King Michael I. abdicated, and the republic was proclaimed. The full political power was gained by the communists. In the first months of 1948 the first Soviet-type constitution of Romania was adopted.

According to its texts, the Romanian People's Republic was founded by the struggle of the people, led by the working class against fascism, reaction, and imperialism.[4] This marks a totally new era in comparison with all previous periods of history, and the constitution points out these changes. Here we are interested in the economic transformations predicted by this basic law.

This fundamental law gave the legal basis of nationalization. Article 11 from the new constitution stated that "when the general interest requires, means of production, banks and insurance companies that are owned by private individuals

2 Elster 1986, 260.
3 Giurescu 2013, 56.
4 Article 2 of the 1948 Constitution.

or legal entities may become state properties, namely properties of the people, subject to the conditions provided by law."

What can we observe from the analysis of the text of this constitution? There are some mentions of private property, but the legal text had a prognostic value regarding state ownership. The basic change in the optic is signalled by the constitutional texts, and we have to underline the essential predictive elements.

a) Instead of market economy, a planned economy (or command economy) is envisaged. In concordance with the basic law, the state directs and plans the national economy to develop the economic strength of the country, to ensure the good status of the people and guarantee national independence.[5]

b) Private property is mentioned several times, but the forthcoming importance of state ownership ("property of the whole people") is anticipated. In the People's Republic of Romania, as the basic law states, the means of production belong to the state as property of the whole people or to co-operative organizations or particular individuals and companies.[6] Common goods of the people make the material foundation of economic prosperity and national independence of the People's Republic of Romania.[7]

Any kind of underground riches, mining fields, forests, waters, natural energy sources, means of rail, road, water and air communication, the postal services, telegraph, telephone, and radio belongs to the state as common property of the people.[8] A law will determine how to pass into state ownership the goods listed here, which in the moment of the entry into force of the constitution were in private hands.

The previously mentioned Article 11 can be also included here because it gives the basis for the nationalization of any means of production not covered by the constitutionally itemized list.

c) According to the 1948 Constitution, work is the underlying factor of the economic life of the State[9] (in contrast with the capital or with property in general). Work is the duty of every citizen. The State support all those who work to protect them from exploitation and to raise their standard of living.

d) Furthermore, as the basic law outlined, internal and external trade is regulated and controlled by the state and is exercised by state-owned, private, and co-operative trading enterprises.[10] The focus is again on the state-owned trading enterprise, first in this enumeration.

5 Article 15 of the 1948 Constitution.
6 Article 5 of the 1948 Constitution.
7 Art. 7 of the 1948 Constitution.
8 Art. 6 of the 1948 Constitution. Television programmes started in Romania from 1955. On 31st December 1956, the Romanian Television was founded.
9 Article 12 of the 1948 Constitution.
10 Article 14 of the 1948 Constitution.

The 1948 Constitution marks the starting point of the mandatory economic transformation. The communist party before 1948 had as its principal goal the acquirement of power. But once the power was fully seized, they started to put their programme into practice.

The constitutional basis of nationalization was established. Nationalization itself is a propagandistic term, meaning seizure and confiscation.

The law of nationalization was passed with the speed of light. In just one morning, on the 11th June 1948, this law was adopted by the Central Committee, the Government, and the Grand National Assembly. This is Act No 119/1948 on the nationalization of industrial, banking, insurance, mining, and transport enterprises. The official newspaper, Scânteia (The Sparkle), stated that "the nationalized enterprises belong to the state, the state belongs to the working people, and therefore the factories belong to the working people."[11]

As a result of the law, 8,894 enterprises – out of which 3,600 of local interest – were immediately nationalized, and our company at issue, called Dermata, was among them at that time.[12]

After the nationalization, a new stock-taking was conducted. In 1948, there were 18,569 state-owned companies, of which 193 SovRoms,[13] with 911,071 strong labour force, an average of 50 persons per enterprise. The private sector is seriously reduced: 110,036 private entities with 161,222 strong labour force, an average of just 1.46 persons per each entity.[14]

On 2nd July 1948, the State Commission of Planning (Comisiunea de Stat a Planificării) was created. This will work until December 1989, the time when the communist regime is overthrown. One-year plans are adopted for 1949 and 1950, and starting from 1951 until 1989 the foundations of the economic cycles were determined by five-year plans.

Act No 119/1948 was just the first step, followed by other normative acts on nationalization. The most important are the following:

– Decree No 197/13th August 1948 – nationalization of banking and credit enterprises;

– Decree No 232/9th September 1948 – nationalization of nine railway companies;

– Decree No 302/3rd November 1948 – nationalization of private sanitary institutions;

– Decree No 303/3rd November 1948 – nationalization of the entire film industry, including 409 cinematographs, 37 film studios, and 7 film laboratories;

11 Scânteia, 19th June 1948, No 1149.

12 It was nationalized as an enterprise producing various chemicals, according to the Annex 18 of Law No 119/1948.

13 Joint Romanian–Soviet ventures, technically serving the Soviet interests in exploiting natural resources.

14 Giurescu 2013, 57.

– Decree No 61/18th February 1948 – abolition of the Stock Exchange;

– a new wave of nationalization in February 1949 – 1,858 business entities which were not nationalized under Act No 119/1948;

– Decree No 134/2nd April 1949 – nationalization of 1,615 pharmacies, 121 medical drugstores, 198 laboratories, and 95 medicine deposits;

– Decree No 92/20th April 1950 – nationalization of immovable goods of other exploiters, including hotels;

– Decree No 418/16th May 1953 – nationalization of private pharmacies.

The Stock Exchange (Bursa de Mărfuri) was no longer necessary because there were no more companies limited by shares (societăți pe acțiuni).[15]

The period of nationalizations ended in 1953, when all the remaining productive entities were nationalized.[16] The process was very similar in the other CEE countries under Soviet influence.

IV. Towards a Realist Theory of Nationalization

To understand a realist (not ideologically limited) theory of these nationalizations, a comparative approach is needed.

Nationalization is a legal institution as well. As a legal institution, nationalization is very different compared to two similar legal techniques: *nationalization in capitalist market economies*, where it is an extraordinary and exceptional measure, respectively *expropriation by reason of public utility.* Their common nominator is that a certain asset is transferred from private property into state property, without the approval, without the consent of the former owner. But the differences are essential, and it is necessary to discuss these contrasts.

The nationalization we are focusing on is also very different compared to the ways of *acquiring a property by the means of private law*, for example by the means of a contract of sale, exchange contract or even a donation contract. A contractual relation is based on the principles of equality between the contracting parties; so, any transfer of property is not possible without the mutual consent, for example of the seller and the buyer. The consent of the former owner is indispensable for a valid drawing up of such a contract. These means of private law had only a very subsidiary and limited role in the creation of the new social order based on state ownership. There are some cases where state property was acquired by way of donations, but the free will of the grantor is questionable in these cases as well.

We have to differentiate nationalization from *agricultural co-operativization* as well. In the case of agricultural property, the basic concept – achievable in

15 Aktiengesellschaft in Germany, société anonyme in France, società per azioni in Italy. In the common law terminology, there is no perfect match for these types of companies.

16 Bucur 1994, 313–321.

the context of an oppressive dictatorship – is that the agricultural co-operative is constituted based on the free will of the association of peasants, based on the true belief of peasants in the superiority of this form of agriculture why they have transferred their property into common, co-operative property. In reality, the agricultural transformation was made based on oppression, on use of military force, aggressive measures against the "kulaks" (relatively "rich" farmers), crushed peasant uprisings. But there was no need for a legal basis of nationalization because the dictatorship possessed all the methods to say openly that there is a transformation wanted and requested by the peasants and parallel to imposing these goals by force. We must not forget that there is no rule of law anymore. In the words of Gheorghe Gheorghiu-Dej: "Marxism–Leninism teaches that the peasantry has no other way to escape exploitation, needs, and deprivation than the union of smaller households into the co-operative. The only way to train small and medium households on the track of socialism is the belief. Marxism-Leninism condemns any attempt to use violence against small production. Conducting a wider persuading activity in relation to peasants regarding the superiority of socialist agriculture, we will strengthen the idea of collective agriculture."[17] Co-operavitization is a different process in scope, methods, and outcomes compared to nationalization.

V. A Theory of Nationalization in Six Questions and Answers

A legal analysis of nationalization must concentrate on several elements. Maybe we can define the main characteristics of nationalization in Central and Eastern European context and especially in Romania in six questions and answers.

a) What are the legal means of nationalization? Any juridical act requires a manifestation of will. In the case of nationalization – as shown before –, the consent of the private owner is not necessary, but the will of the state must be expressed in a certain form to produce legal effects.

These acts in Romania were the law and the decree of the Presidium of the Grand National Assembly approved later by the Grand National Assembly, transformed into laws by this approval. But if we analyse these acts in particular, we can identify a large variety.

In some cases, these means of nationalization determine their scope only abstractly. They do not name certain enterprises but define general categories. In other cases, there are no categories but an actual listing of the nationalized enterprises. The law in those cases acts through individual provisions.

17 Gheorghe Gheorghiu-Dej was the leader of communist Romania between 1947 and his death in 1965. His successor was Nicolae Ceauşescu (1918–1989).

And third, there are mixed solutions, as is the case of Act No 119/1948, where there are general categories defined by the law (for example, all private slaughterhouses with a daily cutting capacity of at least 100 cattle or 150 pigs) but also enterprises enlisted for nationalization (the case of Dermata).

At first sight, there is another version of the mixed type, but in reality we are in the second category when we encounter set general conditions, but then follows a full listing of the companies determined on the basis of the general categories. In practice, these listings were conceived just to exemplify the general categories, and these lists were extended by individual administrative acts.

In the situation in which only general categories are determined, the nationalization became effective through individual acts issued by the state administration.

There is a huge difference as compared to nationalization in the capitalist context. In Western Europe, in general, the act of nationalization is the law, and the law determines individually which enterprise is nationalized. The administrative authorities had no power of decision in this regard in the sense of formal initiative (we are not talking about legislative initiative but the initiative to determine a certain company to be nationalized based on a set of rules given by the law).[18]

Another difference compared to "capitalist nationalizations" is that there is no appeal against nationalization. The Supreme Tribunal in Romania decided that an appeal against an administrative act exists only in cases where the law establishes such means. If there is a supervising administrative authority, one can complain to that authority, but not to the courts.[19] So, if a certain company was nationalized by an administrative act, but that company did not meet the conditions set by the law, the courts had no power to control the act of nationalization.

b) What are the objects of nationalization? We have a general scope determined by the 1948 Constitution: the means of production. It is based on the Marxist terminology and it refers on productive (value-producing) assets.

This text of the fundamental law envisaged all immovable or movable properties used directly or indirectly in production. There is an interpretation given to this notion, made by a Commission functioning subordinated to the Council of Ministers, namely that the means of production also include the *offices, warehouses, retail stores, canteens, worker homes, or union halls,* and not only the immovable or movable property directly used in production because these all serve the enterprise. The "label" was not important regarding a means of production. For example, if a certain building was only rented by an enterprise, it was object of nationalization because it served the activity of the enterprise.

18 Duez, P; Debeyre, G. 1952, 883. An exception was the Act of 11th August 1936, which made possible the nationalization of war industries by the Government.

19 Decision No 2215 of 31st October 1955 of the Supreme Tribunal of the People's Republic of Romania, Legalitatea Populară, 1/1956, 111–113.

As a conclusion, the object of nationalization is the organized totality of the means of production, namely the enterprise as legal entity and all of its assets.

In capitalist context, the nationalization generally envisaged the shares of a company, and not the means of production. Another primary difference is an issue of scale because in capitalist context the nationalization is a relatively isolated act. On the contrary, as a Soviet-type policy, nationalization was universal and inclusive, affecting the economy as a whole, not just certain and limited sectors of it.

c) What are the effects of nationalization? The effect of nationalization is the transfer of property from the private owner to the state.

In Central and Eastern Europe, the transfer took place free of any burdens. For example, if a mortgage guaranteed a bank loan, the transfer erased the mortgage. The transfer operates, according to the Law No 119/1948, regarding social parts and shares as well. But the result will not be a commercial company owned by a new sole shareholder, the state, but a new type of economic organization: a state-owned enterprise. In consequence, there was not just a simple transfer of ownership but also a transformation of the legal entity into a new organizational form. Certain legal institutions "formerly regarded without question as coming under private law, they became institutions of a mixed or doubtful nature…"[20]

The nationalization in capitalist context is very different. Nationalization is not in all cases a transfer of property, but it can be just a public management of the company or limiting the profits or the activity in general. Another difference is that in capitalist context nationalization transfers also the debts of the company.[21] In capitalist context, only the shares are nationalized, not the means of production and not necessarily totally: the state can simply act as one of the shareholders or as a majority shareholder.[22] Nationalization in capitalist context can also take the form of nationalization of certain assets, without nationalizing the shares or the company, which remains private.

d) Who is the beneficiary of nationalization? The beneficiary is the state. Every means of production belongs to the state, so only the state-owned enterprise has a right of use regarding the means of production.[23] In capitalist context, the beneficiary can be another public entity or another state-controlled company as well. In the Marxist concept, the indirect beneficiaries are, of course, the people.

e) What is the purpose of nationalization? This question leads us back to the ideological backgrounds of nationalization. The purpose of nationalization is the achievement of a socialist economic order, the abolition of exploitation, and

20 Katzarov 1964. 95–96.

21 Vedel 1946, 51; Duez, Debeyre 1952, 885.

22 For example, the aircraft manufacturer Gnome et Rhône from France, nationalized in 1949.

23 It is very interesting that the legislation regarding nationalization made possible that a foreign state according to the Peace Treaty or based on compensations may keep their shares in a Romanian company. So, there was a possibility to have a joint ownership of the Romanian state and especially the Soviet Union regarding a company.

the abolition of the exploiting classes. In the case of nationalization in Soviet context, there is this unique purpose and goal. In capitalist context, creating a new economic order is, of course, not in the scope of nationalization.

For example, the Renault Company in France was nationalized for the reason that Louis Renault collaborated with the Germans during WWII. Furthermore, there can be military reasons or even social ones. And in de Gaulle's own words, there is no reason why Renault should remain nationalized forever, once Louis Renault is dead.[24] The Soviet-type nationalization was intended to last forever, being a revolutionary activity, with the aim to fundamentally transform the social and economic order.

f) Is there any compensation? Article 10 of the 1948 Constitution envisages a just compensation in case of expropriation by reason of public utility. Article 11 on nationalization does not impose such a rule. So, there was no constitutional requirement to give a compensation, and regarding compensation the act of nationalization is decisive. (The necessity of compensation is one of the distinctive characteristics of expropriation in comparison to nationalization).

A set of acts of nationalization contains a general rule that the state will provide compensation, but no further rules were established. In 1948, a mechanism was designed but never put into practice. According to this mechanism, the Nationalized Industry Fund was created, organized through a decision of the Council of Ministers in a form of Autonomous House.[25] Theoretically, this structure had the plan to issue bonds, which could be subsequently redeemed and paid out from a share of the benefits of nationalized enterprises.

At this moment of the research, we do not have sufficient data as to whether this mechanism only served as a message to the former owners that there would be a compensation without any genuine desire to give compensations or there existed an initial intention to give a certain compensation. In practice, compensation was generally not given. The rules on compensation had only a declarative effect, not a normative one, and very easily we can see today just as a premeditated policy to create a reassuring but misleading appearance, in the form of law. Law itself can be a method of manipulation in a dictatorship to ease the nationalization process.

The law excludes some categories of people from the benefit of the (inexistent) compensation, for example those who left the country clandestinely or fraudulently or will not return to the country after the expiry of the validity of travel documents issued by the Romanian authorities.

The explanation of this approach towards compensation is simple: a just compensation is a measure which would lead to a return to capitalism, a revival of capitalism. Compensation has the effect of preservation regarding the exploiting class. Therefore, a real compensation is not possible.

24 Jacquillat 1988, 16.

25 Decision No 1421/1948, M. Of. of 14th October 1948.

Another set of acts of nationalization provides that nationalization took place without any compensation (for example, Decree No 92/1952).

In capitalist context, nationalization is generally based on compensatory mechanisms, on the principle of protection of private property. For example, in the Renault nationalization case, compensation was given to all shareholders, except those who collaborated with the Nazi Germany.

VI. Conclusions

Our research continues to struggle with questions such as how these state-owned enterprises functioned in practice after nationalization, how these enterprises after the end of the rule of the Communist Party in 1989 were transformed into commercial companies again and how they were attempted to be privatized, and if the former, pre-nationalization owners of shares have got any compensation in the context of privatization procedures.

From the point of view of legal theory, nationalization in Eastern Europe was a unique, distinctive institution similar only to the nationalization which took place in the Soviet Union. In this short overview, I tried to provide an insight into our research and into how we try — starting from a particular company and its legal struggles — to reanalyse some general ideas, to verify and make certain their validity or make queries and reject those interpretations of legal reality which are tainted by purposeful ideologies and lack a solid scientific basis.

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Requirements of the International Public Law and the European Convention on the Protection of Human Rights for the Restitution of Confiscated Ecclesiastical Property in Romania

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Abstract
1. Guarantees of the international law of expropriation and of the European Convention on the Protection of Human Rights are generally not applicable to confiscations by the communist and the fascist regime in Romania.
2. The Romanian restitution legislation, however, has to comply with the European Convention on the Protection of Human Rights. Therefore, it has to ensure in particular an effective return of confiscated assets.
3. The specific situation of the churches in Romania and the variety of their confiscated property make it seem sensible to regulate their return by special agreements between the state and the churches.

Keywords: international law of expropriation, confiscations, European Convention on the Protection of Human Rights, agreements between the state and the churches

I. Confiscations by the Communist and the Fascist Regime in Romania

In the past century, countless cultural pieces of value have been lost and destroyed not only by war but also through the communist and fascist unjust regimes. By both political and non-political persecution of groups and individuals, the economic fundament for the preservation of cultural values was taken. In both cases, the pieces could not fulfil their original instrumental intent, and so they were left to decay or destruction. As the most organized destruction of this sort, I call to memory the pogrom night of the 9th to 10th of November 1938, where not only

thousands of Jewish business shops were destroyed both in Germany and in Austria, but almost all synagogues were set on fire and burnt to the ground.[1]

In the same manner, the properties of the citizens of Romania and associations thereof were accessed to by the state of Romania under its communist rule. This was done and justified with the intent to impose the ideology and to disempower class and state enemies. Furthermore, these were measures of transformation of property ownership that so created a people's property, then at the disposal of building a socialist state.

As in practically all states that were built on Stalinist structures, the so-called "land reform" was also implemented in Romania following Decree Nr. 187 of March 23rd, 1945[2] of the communist government under Petru Groza. Not only war criminals as such were prosecuted but also farm owners with properties larger than 50 hectares as well as ethnic German farmers who had no proven history of anti-Hitleristic engagement. Although churches were legally and officially excluded from this measurement,[3] they were de facto subjected to them – for all the Protestant Church A.B. in Romania. Furthermore, a nationalization law of June 11th, 1948 ruled the confiscation of all industrial, commercial, trade, and transport companies as well as banks and insurance companies and beyond that all natural resources.[4] Later on, there had been other nationalization decrees. Applicable in relation to immovable property was Decree No 92/1950,[5] under which buildings belonging to former industrialists, owners of land estates, bankers, and owners of large trading enterprises were nationalized. But these measurements were extended to include other large-scale expropriations of personal and private assets including houses and lands. Subsequently, this had led to the expropriation of church assets and church properties.

The assets of religious communities were not only accessed by the Romanian state under the communist rule, but, prior to that, they were also accessed by the Nazis collaborating with Romania, who confiscated the properties of Jewish religious communities for racial reasons.

In 1941, an agreement, the so-called "Gesamtabkommen," was closed between the Protestant national Church and the ethnic "Volksgruppe". At this time, the "Volksgruppe" had already been recognized via Decree No 3884 of November 20th, 1940 as a public corporation by the Romanian Government. Thereafter, according

1 See Graml 1998; Feinermann–Thalmann 1999; Friedländer 2007. 291 sqq.; Barkai 1987. 146. sqq.; Evans 2010. 702. sqq.

2 Monitorul Oficial, Partea I, No 134 of June 13th, 1946.

3 See Art. 8, Decree of March 23rd, 1945.

4 Legea 119/1948 pentru naţionalizarea întreprinderilor industriale, bancare, de asigurări, miniere şi de transporturi din 11 iunie, Monitorul Oficial, Partea I, No 133 from Juni 11th 1948; see: Ließ, 1962, p. 93, 114 et seqq.

5 Decret 92/1950 pentru naţionalizarea unor imobile din 19 aprilie, Buletinul Oficial; No 36 of April 20th, 1950.

to the agreement, the entire church property, except for the paraphernalia for worship, became the property of the "Volksgruppe". The agreement was concluded after a major shift in the church assembly had taken place favouring and co-operating with the "Volksgruppe" and its ideological background. In 1944, per decree, the Romanian King expropriated all Nazi organizations in Romania, including the assets the "Volksgruppe" had taken from the Church in 1941.

It is out of question that the above stated measurements were – except for the agreements of the "Gesamtabkommen" – not only a cause of extreme injustice but were also responsible for the damage and loss of valuable cultural assets. Therefore, restitution is the state's duty not only on a legislative level but rather as an entity acting to protect and keep the cultural heritage of its people alive and, by doing so, building and maintaining its identity.

II. Development of the Restitution Legislation in Romania

However, the Romanian legislation, after the fall of the communist regime, gave proof of the fact that instead of a fair revision of communist injustice mostly the economic interests of the Romanian state and of its former élite, including members of the *securitate*, were in the foreground. Therefore, there were only limited efforts to admit restitutions of confiscated assets. The legislation of 1991 was exclusively in favour of the Romanian citizens and dealt only with assets expropriated after March 23, 1945. The Real Property Act of February 19, 1991[6] confirmed that former owners and their successors were entitled to the right to partial restitution of 10 hectares of agricultural land.

But for many years there had not been any provision for a restitution of other properties, especially of buildings, developed property, building sites, or enterprises. In absence of a special legislation to lay down rules for governing nationalized immovable properties, Romanian courts initially considered that they had the jurisdiction to examine the issue of the lawfulness of nationalization decisions and to order that properties be returned to their owners if they were found to have been nationalized unlawfully.[7]

Years later, the efforts of Romania to join the European Union has changed the legislative situation. At the beginning of the 21st century, several laws allowed the restitution of further properties and finalized legal restrictions on returning of agricultural lands. Through several laws, Romania established

6 Legea Nr. 18/1990 pentru ratificarea convenției cu privire la drepturile copilului din septembrie 27, 1990, Monitorul Oficial, Partea I, No 37 of February 20, 1991.

7 Overview of the Romanian jurisdiction in cases of the absence of a stable legislative framework: ECtHR, Păduraru v. Romania, No 63252/00, § 96; Atanasiu and Others v. Romania, No 30767/05, §§ 71–76.

the principle of restitution of nationalized immovable properties.[8] Where restitution was no longer possible, the legislation provided a complicate system of compensation.[9] At first, it had been restricted, but the restrictions were subsequently abolished. Therefore, the Romanian legislation introduced as a principle a compensation corresponding with the real market value.[10] But these regulations were not applicable to many of the properties under the rule of the former fascist regime in Romania.

In contrast to the legislation of restitution, the entry into force of Act No 112 of November 25th, 1995[11] authorized the sale of certain residential properties to the tenants. Because many confiscated assets had been sold for cheap prices, restitution was no more possible. This is the reason why the state had to pay oftentimes a compensation equal to the current market value of the nationalized property. According to the Romanian Government, the state has to pay an amount of twenty one billion euros,[12] a sum that might be much too high.

In this situation, the Romanian authorities found a lot of possibilities not to effect the restitution or the compensation. Some authorities never answered to a request, others never acted on decisions of restitution or compensation, even when they were final. Therefore, it is to underline that the system of reparation established by the Romanian state in respect of properties nationalized before 1989 was beset by major legislative, judicial, administrative, and budgetary shortcomings.[13]

These are some of the reasons for a recurring and widespread problem of an ineffective system of restitution and compensation in Romania. Therefore, the Romanian legislation had been attacked many times before the European Court of Human Rights.

Against this background it is, at first, of interest to examine the essential international requirements that Romania had to observe in favour of the victims

8 Overview of the Romanian legislation concerning the restitution of properties nationalized before 1989: ECtHR, Brumarescu v. Romania, No 28342/95, §§ 34, 35; Strain and Others, No 57001/00, § 19; Păduraru v. Romania, No 63252/00, §§ 23–53; Atanasiu and Others v. Romania, No 30767/05, §§ 44–59.

9 Legea Nr. 247/2005 privind reforme în domeniile proprietății şi justiției, precum şi unele măsuri adiacente din iulie 19, 2005, Monitorul Oficial, Partea I, No 653 from July 22nd, 2005; overview of further compensation acts: ECtHR, Atanasiu and Others v. Romania, No 30767/05, §§ 60–67.

10 Calculation of the compensation in accordance with "domestic and international practice and standards on compensation for buildings and houses wrongfully acquired by the State"; see Act No 247/2005.

11 Legea Nr. 112/1995 pentru reglementarea situației juridice a unor imobile cu destinația de locuințe, trecute în proprietatea statului din noiembrie 25, 1995, Monitorul Oficial, Partea I, No 279 of November 29th, 1995.

12 See ECtHR, Atanasiu and Others v. Romania, No 30767/05, § 80).

13 See the description of the ineffectiveness of the Romanian restitution legislation: ECtHR, Atanasiu and Others v. Romania, No 30767/05, §§ 178–194.

of the communist regime. These are, at first, some principles of international public law, especially of international law of expropriation.[14] In addition, there are requirements of the European Convention for the Protection of Human Rights. They are of essential importance for the Romanian legislation of restitution and compensation.[15]

Also in Germany, there were wrongful statutory acts under the rule of National Socialism and Stalinism/Communism. Therefore, the German legislation may be of interest for the judicial situation in Romania because here can be seen some principles of an effective restitution. That is why they will be mentioned at the end of this article.[16]

III. Provisions of the International Law of Expropriation

The principles of the international law of expropriation are part of the international public law.[17] They recognize the right of every country to organize its own legal system within its own territory. This is called the positive principle of territoriality.[18] In contrast, the negative principle of territoriality means that expropriations outside the territory of the expropriating state are refused to be recognized by the community of nations.[19]

Also, if expropriations of a state are recognized as valid by the community of other nations, they are not irrelevant if the international law of expropriation estimates them as illegal. This is the case if they had been effected without an appropriate compensation or in a discriminatory way against foreign citizens.[20] Then all states whose citizens had suffered of such expropriations have the right to demand a compensation, which then has to be distributed to the persons in question.

Moreover, there is an important exception to the general rule of mutual acceptance of expropriations. If measures of the state had severely injured human rights, generally recognized by the community of nations, they are considered null and void. These rights adhere to mandatory law. They belong to the so-called *ius cogens*. However, the nullity of a special measurement can be adopted only when the community of nations has already agreed to recognize them. For that reason, they do not arise from natural law. They are part of international public law

14 See below III.
15 See below IV.
16 See below V.
17 See Haltern 2014. § 34, rec. 41. sqq.; Herdegen 2013. § 22; Herdegen 2014. § 54.
18 See (German) Bundesverfassungsgericht, BVerfGE 84, 90, 123; (German) Bundesgerichtshof, BGHZ 20, 4, 12; 25, 134, 140, 143; 31, 168, 171; 30, 220, 227; Haltern 2014. § 34, rec. 41. sq.; Herdgen, 2013. § 22, rec. 4.
19 See (German) Bundesgerichtshof, BGHZ 25, 134, 143; Haltern 2014. § 34, rec. 63.
20 Haltern 2014. § 34, rec. 55. sqq.; Herdegen 2014. § 54, rec. 1. sqq.

only if they had been accepted by an international convention for the protection of human rights or by customary international law. The first convention, the General Declaration of Human Rights, was adopted by the General Assembly of the United Nations on December 10th, 1948.[21] Moreover, the *ius cogens* does not cover all human rights but only their central areas.[22] But Romania had to observe it only from the moment this country joined the convention. For this reason, the confiscations of the communist regime which happened in the early 1950s cannot be examined as to whether or not they observed the human rights, generally recognized by the community of nations.

Although many applicants invoke the international law in order to prove that the communist confiscations were null and void and that they therefore have a claim to restitution, it is for that reason irrelevant for the redress of communist injustice.

Moreover, also the European Court of Human Rights decided not to be bound by the rules of International Public Law because it only has to examine whether the member states had observed the provisions of the European Convention for the Protection of Human Rights.[23]

IV. Provisions of the European Convention for the Protection of Human Rights

1. Protection of Property Rights

Further international guarantees derive from special provisions of the European Convention for the Protection of Human Rights.[24] The most important one with respect to the confiscations by the communist and the fascist regimes in Romania is Article 1 of the Protocol to the Convention[25] protecting property rights. It provides verbatim: "Every natural and legal person is entitled to the peaceful enjoyment of his possession. No one shall be deprived of his possession except in the public interest and subject to the conditions provided by law and by the general principles of international law."

a) Application of the Convention on Confiscation Acts?

… but the Convention only dates from November 9th, 1950 and the First Protocol from March 20th, 1952. Therefore arises the same problem of non-applicability

21 Universal Declaration of Human Rights from December 10th, 1948, UN-Doc. 217/a – (III).
22 (German) Bundesverfassungsgericht, BVerfGE 95, 96, 134. sqq.; 112, 1, 28.
23 ECtHR, Prince Hans-Adam II von Liechtenstein v. Germany, No 42527/98, §§ 79–85.
24 European Convention for the Protection of Human Rights and Fundamental Freedoms.
25 Protocol No 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

we had to observe in connection with the general principles of human rights recognized by the community of all nations. Consequently, also the European Court of Human Rights held in the case Prince Hans-Adam II of Liechtenstein v. Germany[26] and in many other cases[27] not to be competent *ratione temporis* to examine the circumstances of the expropriations of communist regimes not yet bound by the Convention. The same applies to the continuing effects produced by them up to the present day.[28] This is the result of the fact that no applicant had been able to exercise any owner rights in respect to assets having been expropriated by a communist regime in the early 1950s, when the Convention was not put into force in its country.[29] For that reason, the question never arises as to whether or not an applicant is a holder of existing assets, including claims in respect of which he can argue that he has at least a "legitimate expectation" of obtaining effective enjoyment of a property right. The hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a "possession" within the meaning of Article 1 of Protocol No 1.

b) Examination of the Romanian Restitution Legislation

But the situation changes completely if a contracting state, having ratified the Convention including Protocol No 1, enacts legislation providing for the full or partial restoration of properties confiscated under a communist regime. Such legislation the Court regarded already in the case Kopecky v. Slovakia[30] as a new property right protected by Article 1 of Protocol No 1. This held the Court where the proprietary interest was in the nature of a claim.

This affirms the Court as to whether it may be regarded as an "asset" because there is sufficient basis in national law. If there are different views of the national law, it is not the task of the Court to decide whether there is such a restoration or not. But the Court admits a sufficient basis in national law where there is a settled case-law of the domestic courts.[31]

In the pilot judgment Anastasiu v. Romania,[32] the Court understood that the Romanian legislation of the years 2000, 2001, and 2005 provided a mechanism of restitution of property and of compensation when restitution had been impossible. Moreover, it found that the Romanian legislation had opted for a compensation equal to the actual market value. That is why the Court affirmed in that case the

26 ECtHR, Prince Hans-Adam II von Liechtenstein v. Germany, No 42527/98, §§ 83–86.
27 ECtHR, Janter v. Slovakia, No 29050/97, § 34; Gratzinger and Gratzingerova v. the Czech Republic, No 39794/ 98, § 69; Kopecky v. Slovakia, No 44912/98, § 35.
28 ECtHR, Prince Hans-Adam II von Liechtenstein v. Germany, No 42527/98, § 85.
29 ECtHR, Prince Hans-Adam II von Liechtenstein v. Germany, No 42527/98, § 85.
30 ECtHR, Kopecky ./. Slovakia, No 44912/98, §§ 42–59.
31 ECtHR, Kopecky ./. Slovakia, No 44912/98, § 54.
32 ECtHR, Anastasiu and Others v. Romania, No 30767/05.

establishment of a new property right on restitution or full compensation by the Romanian legislature.[33]

Therefore, the Court also had to decide the other conditions of the property guaranteed in Article 1 Protocol No 1.[34] These are the following:

– Had the interference by the public authorities with the peaceful enjoyment of possessions been lawful?

– Did the interference pursue a legitimate aim which is in the public interest?

– Was there a "fair balance" between the peaceful enjoyment of possessions and the public interest?

The legality of the interference with the peaceful enjoyment of possessions has to be sufficiently accessible, precise, and foreseeable.[35] For the other conditions, the national authorities enjoy a certain margin of appreciation. The Court also held that the notion of "public interest" is necessarily extensive.[36]

Therefore, the Court accepts every decision of the national authorities unless it is manifestly without reasonable foundation.[37] In addition, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure applied by the State.[38] All these principles also apply to fundamental changes in the country's system, even if the Court understands that a procession of transforming the economy and legal system is an exceptionally difficult exercise.[39]

For these reasons, the Court demands that a restitution system grant a compensation which is "reasonably related" to the value of the confiscated asset.[40] In many cases, the Court also accepted that legislation reduced – even substantially – the levels of compensation.[41] Here, the Court even allowed decisions of the national legislation where it was obvious that there was no reasonable relation. This is true, for instance, for the German legislation, which – generally spoken – provides a compensation of 30% for smaller assets but only 3 to 10% of the market value for bigger assets. However, the Court

33 ECtHR, Anastasiu and Others v. Romania, No 30767/05, §§ 162–193.

34 ECtHR, Beyeler v. Italy, No 33202/96, §§ 109–110; Anastasiu and Others v. Romania, No 30767/05, §§ 163–168; see also: Grabenwarter, 2014, Art. 1 Prot. No 1, rec. 8 et seqq.; Kaiser, in: Karpenstein/Mayer, 2015, Art. 1 ZP I, rec. 34. sqq.

35 ECtHR, Anastasiu and Others v. Romania, No 30767/05, § 165.

36 ECtHR, Anastasiu and Others v. Romania, No 30767/05, §§ 169–173; Broniowski v. Poland, No 31443/96, § 182.

37 ECtHR, Broniowski v. Poland, No 31443/96, § 149.

38 ECtHR, Anastasiu and Others v. Romania, No 30767/05, § 167.

39 ECtHR, Anastasiu and Others v. Romania, No 30767/05, § 169. sq.; Broniowski v. Poland, No 31443/96, § 149.

40 ECtHR, Anastasiu and Others v. Romania, No 30767/05, § 174; Broniowski v. Poland, No 31443/96, § 186: total lack of compensation only exceptionally justifiable.

41 ECtHR, Anastasiu and Others v. Romania, No 30767/05, §§ 101–106, 174 et seqq.; Scordino v. Italy, No 36813/97, §§ 95 et seq.; Broniowski v. Poland, No 31443/96, § 183; Wolkenburg and Others v. Poland, No 50003/99, § 63.

accepted even such a distortion between restitution and compensation in the case Maltzahn v. Germany.[42]

But if the legislation establishes a system with a full compensation like in Romania, a total lack of compensation would be deemed as unreasonable.[43]

Therefore, the pilot judgement Anastasiu v. Romania held that there had been a violation of Article 1 of Protocol No 1 of the Convention and that Romania must take measures within the delay of 18 months to ensure an effective protection of the rights guaranteed by Article 6, § 1 of the Convention and Article 1 of Protocol No 1.[44]

As a reaction to the pilot judgement, the Romanian Parliament passed Law No 165/2013,[45] put into force on May 20th, 2013, which had been prepared with the collaboration of organs of the Court.

The main principles of the new law are as follows:[46]

– It establishes strict and realistic delays for every administrative decision.

– It guarantees as a general principle the restitution in nature and a stable, predictable system of reparations in cases where a restitution is not possible.

– It creates new structures for land registration.

– All actual procedures will be suspended until the centralization of inventories are finished.

– If there are several claims for the same property, the Commission of Restitution will cancel the last claims.

– Furthermore, it will be granted that there will be a full compensation corresponding to the market value.

– The law creates a predictable system for the valuation of immovable property.

– The value of an immovable property will be fixed at the date of the enactment of the law, based on the evaluation table for immovable properties, which are also used by notaries.

Finally, the law introduced a new compensation procedure involving a points system that entitled claimants to take part in public auctions.[47] Where the points were not used to purchase property at an auction, the law permitted an award of monetary compensation. The amount is calculated on the basis of the market value of the property in question and is payable in instalments.[48]

42 ECtHR, Maltzahn and Others v. Germany, No 71916/01, §§ 90–94.

43 ECtHR, Anastasiu and Others v. Romania, No 30767/05, §§ 174, 178–192; Broniowski v. Poland, No 31443/96, § 149.

44 ECtHR, Anastasiu and Others v. Romania, No 30767/05, § 193. sq.

45 Legea nr. 165/2013 privind măsurile pentru finalizerea procesului de restituire, in natură sau prin echivalent, a imobilelor preluate în mod abuziv în perioada regimului comunist în România din mai 16, 2013, Monitorul Oficial, Partea I, No 278 from May 17th, 2013.

46 See ECtHR, Preda v. Romania, No 9584/02, §§ 68, 74, 117–129.

47 ECtHR, Preda v. Romania, No 9584/02, § 79.

48 ECtHR, Preda v. Romania, No 9584/02, § 87.

In the case Preda v. Romania,[49] the Court considered on April 29th, 2014 that the law in question provided, in principle, an accessible and effective framework of redress for alleged violations of the right of peaceful enjoyment of possessions. However, it found that the law did not contain any provisions capable of affording redress in cases where there were multiple documents of title for the same building.[50] Moreover, the Court held that it is up to the claimants – who were not subject to these specific problems – to make use of the framework of the Law. Therefore, the Court rejected these complaints for failure to exhaust domestic remedies.[51]

2. Fair and Public Hearing within a Reasonable Time

As a consequence of the judgement, Preda v. Romania applicants must sue first in Romanian courts. Complaint to the European Court of Human Rights without completed proceedings before the Romanian Courts is regularly inadmissible. Based on experience with the Romanian judiciary of the past 25 years, it is not excluded that the courts do not decide effectively on return claims. The right to a fair and public hearing within a reasonable time – as it is granted by Art. 6, § 1 of the Convention – will probably permit to apply to the Court before the restitution proceedings in Romania would be completed.[52] It provides verbatim: "In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time."

V. Foray: Principles of German Restitution Legislation

For a comparison with the situation in Romania, it may be interesting to finally touch upon some principles of German restitution legislation. Here it is important to note that the German Democratic Republic and the Federal German Republic had already come to an agreement on the key points concerning the restitution and the compensation before the reunification of the two republics cleared away the expropriation enacted by the communist regime of the GDR.[53] These were written and included in the so-called *Einigungsvertrag*, the Treaty of Unification.[54] These key points state as follows:

49 ECtHR, Preda v. Romania, No 9584/02, §§ 117–129, 132.
50 ECtHR, Preda v. Romania, No 9584/02, §§ 130. sq.
51 ECtHR, Preda v. Romania, No 9584/02, § 179.
52 See ECtHR Anastasiu and Others v. Romania, No 30767/05, §§ 114–123.
53 Common Statement of the Governments of the Federal Republic of Germany and the Democratic Republic of Germany on the Settlement of Open Property Issues of June 15th, 1990 – Gemeinsame Erklärung.
54 See Art. 41, par. 1 – Treaty of Unification of August 31st, 1990 (BGBl. II, p. 885) – Einigungsvertrag.

All assets are to be returned which had been expropriated without any compensation or in a discriminatory or unlawful manner.[55] A restitution is excluded especially if an immovable asset was purchased bona fide by a citizen of the GDR before October 18th, 1989,[56] if the asset in question was used for an important public interest[57] or if it was needed for a special investment purpose, while the beneficiary had no possibility for such an investment.[58] But expropriations under the Soviet occupation regime give only a right to indemnifications,[59] which may also be a reacquisition of the lost asset or even a restitution of movable property.[60] If the loss of the property was part of the measures of a political prosecution, especially of a politically motivated criminal prosecution, the victim thereof should be rehabilitated.[61] As a result of a rehabilitation, a loss of property under the regime of the Soviet occupation should be also refunded.[62]

These principles were quickly transformed into applicable law in the Federal Republic of Germany. In 1990, as part of the treaty of unification, the property act came into effect.[63] The already adopted criminal rehabilitation act by the GDR continued to exist in the FRG, and it was brought into force again, in a new version in 1992.[64] The Compensation Act,[65] which deals with compensation in cases where restitution is impossible,[66] and the Indemnification Act for expropriations under the Soviet occupation[67] were adopted in 1994. In the same year, the German Parliament passed the Administrative Rehabilitation Act.[68]

The essential difference from the Romanian legislation is obvious. The German law as a whole was declared much earlier. It generally applies to every loss of property contrary to the rule of law and establishes entitlements to their restitution. By contrast, the Romanian law initially offered the return of a very limited extent of agricultural lands and only for certain groups of people. The further development of the return legislation was unclear and arbitrary.

In Germany, return requests could be submitted within a period of two years.[69] The deadline for submitting requests for asset losses through measures of political

55 No. 3 Common Statement of June 15th, 1990.
56 No. 3 lit. b Common Statement of June 15th, 1990.
57 No. 3 lit. a Common Statement of June 15th, 1990.
58 Art. 41 par. 2 – Treaty of Unification of August 31st, 1990.
59 No 1 Common Statement of June 15th, 1990.
60 (German) Bundesverfassungsgericht, BVerfGE 84, 90, 127. sq.; 94, 12, 46. sq.
61 No 9 Common Statement of June 15th, 1990.
62 See Wasmuth, NJW 2015, 3697, 3698. sqq.
63 From August 31st, 1990 (BGBl. I, p. 885, 1159) – Vermögensgesetz.
64 From October 29th, 1990 (BGBl. I, p. 1814) – Strafrechtliches Rehabilitierungsgesetz.
65 From September 27th, 1990 (BGBl. I, p. 2624) – Entschädigungsgesetz.
66 § 1, par 1 Compensation Act.
67 From September 27th, 1994 (BGBl. I, p. 2464).
68 From June 23rd, 1994 (BGBl. I, p. 1311) – Verwaltungsrechtliches Rehabilitierungsgesetz.
69 See § 30a, par. 1 – Property Act.

persecution is December 31st, 2019.[70] In Romania, on the other hand, the time limit was only a maximum of six months. During this time, all the necessary documents had to be submitted, which was also not the case in Germany.

Another essential difference was that in Germany assets involved in a return claim could not be sold or burdened.[71] This was explicitly forbidden to the current owner. All sales and transfers of immovable property in the territory of the former GDR needed a government authorization prior to sale or burden.[72] This was only granted after the land was found clear of any redress demand. In the illegal cases of sale or long-term loan burden, the claimant was eligible for the sales price[73] or in business cases even for the actual market value. In addition, the claimant could demand further compensations.

But in Romania there has never been such a legal prohibition for the current owner of a wrongfully expropriated asset to sell it. Therefore, lots of assets have been sold, in many cases, for an extremely favourable price. This oftentimes has been in favour of the former elites of the communist regime. This is the reason why in Romania there has been an unjustified personal enrichment of wide circles of former communist functionaries at the expense of victims of the former regime. The possibility of the Romanian law to file a nullity action has been in many cases no real instrument in prohibiting the described enrichment.

VI. Final Annotation

Especially for the churches, the knowledge of a required further engagement with the communist injustice may be combined with a speciality of German law. In contrast to the legal situation in France, there is no strict separation between the state and the churches. Therefore, the churches, as well as other organizations dealing with cultural, social, or educational tasks, are sponsored by the state. In Germany, this is granted by various concordats and church agreements. They have their origin in the German secularization of the early 19th century and in the so-called Reichsdeputationshauptschluß,[74] which means in English the "Final Recess of the Imperial Deputation". The recess was adopted on February 25th, 1802 and was followed by agreements between the states and the churches regulating permanent compensations for the loss of ecclesiastic property, payable until today. So, may the injustice of the communist regime that remains for the churches in Romania also after the legislation of the last 25 years, and the

70 § 7, par. 1 – Criminal Rehabilitation Act; § 9, par. 3 – Administrative Rehabilitation Act.
71 § 3, par. 3 – Property Act; §§ 1. sqq. Land Transaction Act of April 18th, 1991 (BGBl. I, p. 899) – Grundstücksverkehrsordnung.
72 § 2 Land Transaction Act.
73 § 3 par. 4 Property Act.
74 Protokoll der außerordentlichen Reichsdeputation zu Regensburg, 1803. tom. 2, 841. sqq.

remaining problems in teh application of the curently applicable law be the beginning of agreements with the Romanian State, to secure a permanent and substantial promotion of their cultural, social, and religious duties in the future.

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János Zlinszky †

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The doyen of Hungarian Romanistics, Professor Emeritus János Zlinszky, the founding dean of the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University, the former judge of the Constitutional Court of the Republic of Hungary, the corresponding member of the Academy of Sciences of Austria died on 18 June 2015, in the eighty-eighths year of his life.

János Zlinszky was born on 7 March 1928 in Budapest. He pursued his grammar school studies from 1938 to 1946 at the Piarist Grammar School of Budapest; from 1947 to 1951, he continued his studies at the Faculty of Law and Political Sciences of the Pázmány Péter University and – owing to the change of name in 1950 – of the Eötvös Loránd University Budapest. Practising the legal profession can be considered traditional in his family: his father, two grandfathers, and three great-grandfathers were also jurists. He took an interest in Roman law during his university studies already, which was noticed by Géza Marton, Professor of Roman law, and he worked as a library assistant – demonstrator beside him from the autumn of 1948 at the Department of Roman Law.

During the period of the dictatorship, in May 1951 – a few months before completing his studies –, on the basis of a show trial conducted on trumped-up charges, he was expelled from all of the universities of the country, and in June he and his family were deported to a compulsory domicile in the village of Zsáka. After that, he was ordered to do labour service for a year by right of military service. After taking the skilled worker examination made compulsory for carpenters, for several years, he was compelled to work as a construction worker. He was able to get back to Budapest only in 1956 by way of getting married with art historian Mária Sternegg-Günther, with whom he had three children later on.

Six years after a forced interruption of his university studies, in 1957, he was permitted to complete his studies: he obtained a degree in law (Dr jur.) in March in that year. From 1957 to 1968, he worked at state-owned companies as an employed jurist. From 1968 to 1983, he worked as a lawyer in the provinces, in Dunaújváros – the regime did not only exclude him from holding

a university chair but did not allow him either to act even as a lawyer at his domicile, in the capital.

The opportunity to teach at a university presented itself at the age of 55: from 1983, he lectured on Roman law as an assistant professor at the Institute for Legal Theory and Legal History of the University of Miskolc. In 1984, he obtained the degree of Candidate of Jurisprudence (C.Sc.), at which he had made several attempts earlier but had been prevented by competent bodies for reasons that could not be deemed as professional. From 1985, he worked as a head of an institution and associate professor in Miskolc.

The change of regime, which befell him over the age of 60, brought a turn in his career. In 1990, he obtained the degree of Academic Doctor of Law and Political Sciences (D.Sc.), and in the same year he was appointed university professor and the Head of the Doctors' School of the Faculty of Law and Political Sciences of Miskolc. In 1991, owing to his organization, the SIHDA congress was organized in Miskolc.

In the autumn of 1989, the Parliament elected him a constitutional court judge; he held this office until he turned 70 in March 1998.

He took upon himself the bulk of founding the Faculty of Law and Political Sciences of the Pázmány Péter Catholic University from the summer of 1994 as head of the organizing committee. He worked here first as a teacher of Roman law and Head of the Institute for Legal History, and then as the dean of the faculty from May 1995 to June 2000.

In 1993, the Academy of Sciences of Austria elected him a corresponding member. From 1992 to 1998, he acted as the Hungarian delegate in the law commission (Venice Commission) of the Council of Europe. He retired in December 2002 and, at the same time, Pázmány Péter Catholic University awarded him with the title of Professor Emeritus.

In the last third of his life, his academic achievements were recognized by numerous official honours and prizes conferred upon him – among others, by the decoration *Order of Merit of the Republic of Hungary Medium Cross with the Star*, the papal decoration *Knight Commander of the Equestrian Order of St Gregory the Great*, the order of merit *Pro Ecclesia Catholica Hungariae*, the *Academic Prize of the Hungarian Academy of Sciences*, the *Deák Ferenc degree of the order of merit Pro Cultura Hungariae*, the *Order of Merit of the President of the Republic*, the *Pro Facultate Diploma*, the prize *Iuris Consulto Excellentissimo, etc.*

He started his academic activities as a university student under the leadership of Géza Marton. The subject in the centre of his interest was the Twelve Table Law, of which he later on made the bilingual text edition and translation supplied with explanations.[1] It was within this scope that he made his academic doctor's

1 Zlinszky, J.: *A tizenkéttáblás törvény töredékei (Fragments of the XII Table Law).* Budapest, 1991.

dissertation four decades later, which was published as a monograph.[2] He treated numerous details of the law of the archaic age in independent studies, which were published in foreign languages as well.[3]

In the period when he was compelled to work as a building industry worker, he devoted his free time to research: in 1954, upon the proposal of Endre Ferenczy, historian of the antiquity, he was entrusted by the Commission on Latin Literature of the Hungarian Academy of Sciences with preparing the edition of János Baranyai Decsi's *História*, supplemented with an introduction and comments. This subject also recurred in his numerous later works.[4]

His first larger work in German discussed the issue of presumption of death in Roman law, which was favourably received internationally,[5] just as his studies treating the beginnings of *praetor*'s law.[6] While preparing Géza Marton's life-work for the press, he published his work on the study of liability,[7] which subject he dealt with in several of his papers.[8] His works analysing the problems of the continuing impact of Roman law, the various ways it was received in Hungary, and the various aspects of this process in the history of science explored these areas of the history of law of Hungary in the Middle Ages and the modern age by filling a gap in this field.[9]

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2 Zlinszky, J.: *Állam és jog az ősi Rómában (State and Law in Archaic Rome).* Budapest, 1996.

3 Zlinszky, J.: Staat und Recht im archaischen Rom. *Helikon Universitas* 1988. 169–182; Familia pecuniaque. *Index* 1988. 32–42; Gedanken zur legis actio sacramento in rem. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 1989. 106–151; Punitions á Rome avant les XII Tables. *Publicationes Universitatis Miskolciensis, Series Juridica et Politica* 1990. 97–115; Consors et domina – filiae loco: la famille romaine archaique. In: Ganghofer, R. (ed.): *Le droit de la famille en Europe. Son évolution depuis l'Antiquité jusqu'à nos jours.* Strasbourg. 1992. 233–240.

4 Zlinszky, J.: Legal Studies and Works of János Baranyai Decs. *Acta Ethnographica Hungarica* 2000. 327–336; Legal Studies and Works of János Baranyai Decsi. In: Barna, G.–Stemler, Á.–Voigt, V. (eds): *Igniculi Sapientiae. Symposium und Ausstellung zum 400. Jahrestag des Erscheinens der Adagia von János Baranyai Decsi in der Széchényi Nationalbibliothek, 1998.* Budapest, 2004. 104–118.

5 Zlinszky, J.: Zur Frage der Verschollenheit im römischen Recht. *Acta Antiqua Academiae Scientiarum Hungaricae* 1960. 95–132.

6 Zlinszky, J.: Die Anfänge des praetorischen Rechts. *Acta Antiqua Academiae Scientiarum Hungaricae* 2005. 35–44; Die frühe Schicht des Edictum praetoris. In: Hamza, G.–Kajtár, I.–Pókecz Kovács, A.–Zlinszky, J. (eds): *Iura antiqua – iura moderna. Festschrift für Ferenc Benedek zum 75. Geburtstag.* Pécs, 2001. 277–283.

7 Marton, G.: *A polgári jogi felelősség (Liability in Private Law).* Budapest, 1992.

8 Zlinszky, J.: Nichtvermögensschaden im ungarischen Recht. In: *Bericht über den fünfzehnten österreichischen Historikertag in Salzburg.* Wien, 1984. 1230–1241; Haftung für immateriellen Nichtvermögens-Schaden im ungarischen Recht. *Acta Juridica Hungarica* 1983. 207–221.

9 Zlinszky, J.: Die Krone als Symbol der Freiheit – Die Freiheit als Sinn des Rechts. In: H. Szilágyi, I.–Paksy, M. (eds): *Ius unum, lex multiplex. Liber Amicorum – Studia Z. Péteri dedicata.* Budapest, 2005. 437–453; Römisches Recht in Ungarn, In: Rainer, M. J.–Schermaier, M. J.–Winkel, L. C. (eds): *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag.* Köln–Weimar–Wien, 2002. 945–963; L'expropriation dans le droit médiéval de la Hongrie. In: Harouel, J.-L. (ed.): *L'expropriation, II. Moyen Âge et temps modernes.* Paris, 2000.

In monographic works with an individual approach, which can be used excellently in university training as textbooks, he treated the material of *ius publicum*,[10] *ius privatum*,[11] and Roman criminal law.[12] He examined and emphasized the issue of Roman rule of law and the significance of instructing *ius publicum* as public law *propaedeuticum* in several papers.[13]

His colleagues paid their respect to him by the ceremonial volume entitled *Iustum, aequum, salutare*[14] on his seventieth birthday and *Sapienti iniuria fieri non potest*[15] on his eightieth birthday. Also on the occasion of his 80th birthday, the volume entitled *Durch das römische Recht, aber über dasselbe hinaus* was published,[16] which provided a representative selection of the celebrated person's works, instead of his colleagues, on Roman law, history of law, and constitutional law.

His life-work, personality, strength of character, and helpfulness made him an unquestionable authority not only of the Hungarian and international scholars of Roman law and legal history but also of the whole community of jurists, which can be characterized the most appropriately by his own words that he said about the jurist and human ideal desired to be achieved – and certainly implemented by him – on the occasion of taking over the prize of *Iuris Consulto Excellentissimo* at the Institute for Jurisprudence of the Research Centre for Social Sciences of the Hungarian Academy of Sciences on 28 November 2013:[17] *vir bonus, dicendi peritus, amicus certus, consors fidelis, dator hilaris*.

297–301; *Wissenschaft und Gerichtsbarkei. Quellen und Literatur der Privatrechtsgeschichte Ungarns im 19. Jahrhundert.* (= Studien zur europäischen Rechtsgeschichte, Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte 91) Frankfurt am Main, 1997; Two Questions about the Adaptation of Juridical Models: The XII Tables and Hungarian Reception. *Acta Juridica Hungarica* 1991. 39–56; Die historische Rechtsschule und die Gestaltung des ungarischen Privatrechts im 19. Jahrhundert. In: Both, Ö. (ed.): *Studia in honorem Velimirii Pólay Septuagenarii.* Szeged, 1985. 1–31; Ein Versuch zur Rezeption des römischen Rechts in Ungarn. In: Horak, F.–Waldstein, W. (eds): *Festgabe für Arnold Herdlitczka zu seinem 75. Geburtstag.* München, 1972. 315–326.

10 Zlinszky, J.: *Ius publicum.* Budapest, 1996.

11 Zlinszky, J.: *Ius privatum.* Budapest, 1998.

12 Zlinszky, J.: *Római büntetőjog (Römisches Strafrecht).* Miskolc, 1992.

13 Zlinszky, J.: Rechtsstaat Rom. In: Schermaier, M. J.–Végh, Z. (eds): *Ars boni et aequi. Festschrift für Wolfgang Waldstein zum 65. Geburtstag.* Stuttgart, 1993. 471–480; Römisches Recht. Beispielsammlung für Rechtsphilosophie und Staatskunde, In: *Theatrum legale mundi. Symbola Cs. Varga oblata.* Budapest, 2007. 599–608.

14 Bánrévy, G.–Jobbágyi, G.–Varga, Cs. (eds): *Iustum, aequum, salutare.* Budapest, 1998.

15 Horváth, A.–Koltay, A.–Máthé, G. (eds): *Sapienti iniuria fieri non potest.* Budapest, 2009.

16 El Beheiri, N. (ed.): *Durch das römische Recht, aber über dasselbe hinaus.* Budapest, 2008.

17 Zlinszky, J.: Életművem? – díjazva! *Iustum, Aequum, Salutare* 2015/2. 7.

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Tamás Nótári: *Handling of Facts and Forensic Tactics in Cicero's Defence Speeches*

Passau, Schenk Verlag, 2014, pp. 304

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In the monograph by Tamás Nótári, edited by Schenk Verlag in Passau in 2014, the author analyses ten forensic speeches (*Pro Roscio Amerino*, *Pro Cluentio*, *Pro Murena*, *Pro Cluentio*, *Pro Caelio*, *Pro Sestio*, *Pro Milone*, *Pro Marcello*, *Pro Ligario*, and *Pro rege Deiotaro*) by Marcus Tullius Cicero, probably the greatest orator of antiquity.

First, the author describes the order of criminal procedure, i.e. the system of the *quaestiones perpetuae*. The author also gives a more detailed analysis of Sulla's jurisdiction reforms that renewed the system of *quaestiones perpetuae.* From that time on, only persons ranked among senators were allowed to participate in the *quaestio* as jurors. In 81 B.C., Sulla also regulated the order of procedure in his *leges*. From these laws, hardly any have been preserved in their original wording, as Cicero's speeches and the *responsa* of the jurists of the classical period of Roman law quoted them as it served their own purposes. The author names the following laws of Sulla that have created or renewed some *quaestiones perpetuae*: *lex Cornelia de sicariis et veneficis*, *lex Cornelia testamentaria nummaria*, *lex Cornelia de iniuriis*, *lex Cornelia maiestatis*, and *lex Cornelia repetundarum*. Concerning the existence of a *lex Cornelia de ambitu*, he stresses out that there might arise some doubts. The author also points out that one of the most important cankers of Sulla's *quaestiones* was their tendency to be bribed, which was enhanced by the low number of members. That is what made L. Aurelius Cotta *praetor* enact *lex Aurelia iudiciaria* in 70 B.C. By this law, the juridical monopoly of the senators was terminated and from this time on the list of jurors was compiled from the orders of senators, knights and aerar tribunes. Cicero reports that in this age three hundred senators were allowed to act as jurors. The lists were compiled at the beginning of his year by the *praetor urbanus*.

After the analysis of the system of criminal procedure in Cicero's age, the ten speeches are grouped according to the facts of the case *(Tatbestand)* and the chronological order.

I. *Parricidium* and *veneficium*

The speeches given in defence of Sextus Roscius from Ameria in 81 and in defence of Aulus Cluentius Habitus in 66 were delivered in lawsuits brought by the charge of homicide (*parricidium* and *veneficium*).

Pro Sexto Roscio Amerino was Cicero's first *causa publica*, i.e. "criminal case," in which he tried to defend Sextus Roscius from Ameria of the charge invented by his relatives and one of Sulla's closest confidant-libertine. Sextus Roscius junior was charged with *parricidium* by his relatives, who claimed that he had his father murdered in June 81 B.C. With help of Sulla's confidant, Chrysogonus, the relatives achieved that the name of Sextus Roscius senior should be included in the list of persons inflicted by *proscriptio*. That made it possible that his property could be sold by auction, of which both Chrysogonus and the relatives had their great share. To enjoy this property in safety, they wanted to get the heir, Sextus Roscius junior, out of the way by a show trial. Because of the dangerous political aspects of the trial, the accusers thought that none of the great advocates would dare to defend Sextus Roscius. However, the twenty-six-year-old Cicero took the case that seemed hopeless for its political reasons. His undertaking was crowned by success. In the long run, this case established the reputation of Marcus Tullius, and from that time he began his career as a successful orator and advocate. First, the author shed light on the historical situation; after that, he outlined the legal background of the crime; finally, he analysed the handling of the facts of the case and the rhetorical tactics by which Cicero gained the acquittal of young Sextus Roscius.[1]

The speech of defence of Aulus Cluentius Habitus was held in 66 B.C., the year when Cicero was *praetor*. Cluentius was charged with poisoning his stepfather, Statius Albius Oppianicus. The other part of the charge was in connection with a criminal proceeding eight years before, when Cluentius charged Oppianicus with a poisoning attempt against him. (As a result of this former case, Oppianicus had to go into exile.) In the current case, the prosecution brought up against Cluentius that the former court had declared Oppianicus guilty only because Cluentius had bribed the judges. The *lex Cornelia de sicariis et veneficis* from 81 served as basis for the trial against Cluentius. First, the author outlines the historical background of the case. Then, he turns his attention to the legal (i.e. statutory) background of *Pro Cluentio*, that is, the *lex Cornelia de sicariis et veneficis*. After that, he

1 See also Nótári, T.: Tatbestandsbehandlung und forensiche Taktik in Ciceros Rede für Sextus Roscius. *Nova Tellus* 2011. 129. ff.

analyses, on the one hand, the charge of bribe arising in connection with the so-called *iudicium Iunianum* (the case eight years before) and, on the other hand, the charge of poisoning allegedly committed by Cluentius. Finally, the author examines the rhetorical tools used by Cicero in this speech.[2]

II. *Crimen ambitus*

The speeches made in the lawsuit of Lucius Licinius Murena in 63 and in the lawsuit of Cnaeus Plancius in 55 were delivered in defence of future magistrates charged of election bribery by their competitors.

The speech in defence of Lucius Licinius Murena was delivered in November 63 B.C. Murena, who had been elected *consul*, was charged by his competitors with election fraud, *ambitus*. In 63, Lucius Licinius Murena and Decimus Iunius Silanus were elected consuls for 62. Apart from them, Lucius Sergius Catilina and Servius Sulpicius Rufus (one of the most outstanding jurists of that age) applied for this office. The act of condemning an elected consul *(consul designatus)* was likely to shake the stability of the Republic. The charge made by Sulpicius went far beyond the usual extent of the possible danger to the Roman State because 63—when Marcus Tullius Cicero and Caius Antonius Hybrida were consuls—was the year of the second conspiracy of Catilina *(coniuratio Catilinae)*. The lawsuit involved four prosecutors (Ser. Sulpicius Rufus, M. Porcius Cato, Ser. Sulpicius Rufus minor, and C. Postumius) and three counsels for defence (Q. Hortensius Hortalus, M. Licinius Crassus, and Marcus Tullius Cicero). The case ended with the acquittal of Murena. In his speech of defence, Cicero compared the personal merits of the competitors (Licinius Murena and Sulpicius Rufus), on the one hand, and then the public use of the profession of the commander and the jurist, on the other *(contentio dignitatis)*. The author first analyses the historical background of *Pro Murena*. After that, he describes the procedure of the election of consuls in the Roman Republic and the laws concerning election bribery. Finally, the author analyses the rhetorical tools used by Cicero in his speech *Pro Murena*.[3]

The speech in defence of Cnaeus Plancius was held in 54 B.C. Cnaeus Plancius was elected aedile, and his competitor (who lost the election), M. Iuventius Laterensis, charged him of bribery *(ambitus)*. Cicero responded to the charges brought up by the prosecution not too extensively. After that, he turned his

2 See also Nótári, T.: Forensic Strategy in Cicero's Speech in Defence of Aulus Cluentius Habitus. *Acta Juridica Hungarica* 2012/1. 48. ff.; Nótári, T.: Tatbestandsbehandlung und forensische Taktik in Ciceros Cluentiana. *Acta Universitatis Sapientiae, Legal Studies* 2012/1. 45. ff.

3 See also Nótári, T.: *Law, Religion and Rhetoric in Cicero's Pro Murena*. Passau 2008; Nótári, T. On the Legal and Historical Background of Cicero's Speech "Pro Murena". *Studia Iuridica Caroliensia* 2009. 125. ff.

attention from the accused to his own person, and the speech became a hymn of gratitude addressed to his friend, Plancius, who had given him a refuge when he was in exile. First, the author describes the historical background of the case. After that, he compares the rhetorical tools of Cicero used in *Pro Plancio* with those applied in his *Pro Murena* held nine years earlier.[4]

III. *Vis publica*

The speeches held in defence of Marcus Caelius Rufus and Publius Sestius in 56 and in defence of Titus Annius Milo in 52 were delivered in lawsuits concerning the charge of *vis*. *Vis (publica)* as a crime containing several statements of facts from violent disturbance of public order to certain cases of murder.

Cicero delivered his speech in defence of Marcus Caelius Rufus charged with *vis* in 56 B.C., on the first day of the *Ludi Megalenses (Megalensia)*. *Pro Caelio* is a very important stage in Cicero's fight against Clodius (and the *gens Clodia*). The feud between Cicero and Clodius produced sometimes fatal impact on Cicero's life and also on the political events of the Roman Republic. The first stage of the hostility dated back to 73, when Clodius accused Fabia, a Vesta priestess *(virgo Vestalis)* and Cicero's sister-in-law of *incestum*. Cicero wanted to take revenge for this scandal in 61 when he made a testimony against Clodius in the so-called Bona Dea trial. Three years later, Clodius as *tribunus plebis* forced Cicero to go into exile and had his house destroyed by the Roman mob. In 56, Cicero was given the opportunity to take revenge for this injury and to treat Clodius and his sister Clodia in the trial with murderous humour. First, the author outlines the background of the Bona Dea trial and the conflict between Cicero and Clodius. After that, he deals with the historical background of the *Pro Caelio* and analyses the rhetoric situation given by the *Ludi Megalenses.* Finally, the author outlines Cicero's rhetoric tools used in the speech in defence of Marcus Caelius.[5]

The speech in defence of Publius Sestius was held in March 56 B.C. Sestius was charged on the basis of the *lex Plautia de vi* with violence offending public order. In this trial, Cicero could prove that the violent acts of Sestius were just a reaction to a similar situation, so he only made use of lawful defence, i.e. of the principle *"arma armis repellere licere"*. As the author stresses, the speech in defence of Sestius can be considered also as a statement of Cicero's philosophy of the state. *Pro Sestio* was the first occasion when Cicero formulated his idea of the Roman *res publica* after his exile. Sestius was acquitted not only due to the brilliant

4 See also Nótári, T.: Election Bribery and Forensic Strategy in Cicero's Planciana. *Fundamina* 2011. 96. ff.

5 See also Nótári, T.: Law on Stage-Forensic Tactics in the Trial of Marcus Caelius Rufus. *Acta Juridica Hungarica* 2010/3. 198. ff.

rhetoric tools used by Cicero but also due to the political programme formulated in the speech. First, the author analyses the historical and legal background of the speech. After that, he pays attention to the philosophy of the state formulated in *Pro Sestio.* In those chapters of the speech, Cicero gave a definition of the term *optimates*, who should govern the State. He also defined the goal of good citizens *(optimus quisque)* in public life: the principle of *cum dignitate otium*. (Dignitas, i.e. moral values and dignity, and *otium*, i.e. the interest in farewell. Finally, the author analyses how the philosophical thought formulated in *Pro Sestio* appeared in one of Cicero's most important theoretical works, his *De re publica*.[6]

In January 52, the leader of the *populares* and Cicero's long-time enemy, Clodius Plucher, was killed by the troop of Milo, the leader of the *optimates.* Milo was accused of *vis* according to the *lex Pompeia de vi*, and his defence was undertaken by Cicero. Cicero delivered the weakest performance in his career: both the Clodian mob and the soldiers of Pompey frightened him, so he could not deliver the speech properly. The speech he delivered was taken down in shorthand as usual, and Pedianus Asconius could still read it in the 1st c. A.D. So, it is beyond any doubt that the speech *Pro Milone* published later could not be identical with the delivered speech. First, the author outlines the historical situation and the political background of the lawsuit. Then, using the *commentarii* by Asconius, he tries to clarify the events around the death of Clodius to give a reconstruction of the trial itself. After that, he analyses the probable reasons of Cicero, why he decided to publish a rewritten version of his speech *Pro Milone*. Finally, the author outlines the elements of political philosophy that appear in *Pro Milone*, paying great interest to the fact that this speech might have been the first occasion when Cicero mentioned the motif of killing the tyrant.[7]

IV. *Crimen maiestatis*

The three speeches analysed in the last chapter of the monograph are connected not only by the charge itself but also by the fact that the addressee of all the three speeches is Caius Iulius Caesar.

The oration in defence of Marcus Claudius Marcellus was held in September 46 in the senate. Therefore, its title does not fully cover the rhetoric situation as it can be also regarded as a political speech. As the author stresses out: *Pro Marcello* seems to be a statement of the defence; however, it is also an important

6 See also Nótári, T.: Cum dignitate otium – Staatsgedanke und forensischen Taktik in Ciceros Rede Pro Sestio. *Revue Internationale Des Droits De L Antiquite* 2009. 91. ff.

7 See also Nótári, T.: Notwehr oder Tyrannenmord? Tatbestandsbehandlung und forensische Taktik in Ciceros Pro Milone. *Revue Internationale Des Droits De L Antiquite* 2010. 331. ff.; Nótári, T.: "Killing the Tyrant" – Remarks on Cicero's Miloniana. *Annals of the Faculty of Law in Belgrade – Belgrade Law Review* 2012/3. 279. ff.

speech containing some thoughts of Cicero on the theory of the state and politics. *Pro Marcello* can be characterized both as *oratio suasoria* and *gratiarum actio* for the pardon granted to Marcellus, one of the leaders in Pompey's army. First, the author gives an account of the relation between Cicero and Caesar. Then, he outlines the historical background of the speech and defines its place in Cicero's philosophy. After that, the author analyses the orator's tactic used in *Pro Marcello*. Finally, he compares the image of Caesar outlined in the speech with the reality of politics, i.e. the image of Caesar drawn by contemporary authors.[8]

The speech *Pro Ligario* was held in 46 B.C. It was Cicero's first oration delivered on the Forum, that is, before the general public, in which he praised Caesar's *clementia* and seemingly legitimized the dictatorship. First, the author analyses the historical background of the speech and the trial. Then, he examines the issue if the proceedings against Ligarius can be considered a real criminal trial. As a result of this analysis, the author claims that the proceedings against Ligarius can be regarded not as a real trial but only as one of Caesar's abusive measures. After the analysis of the genre of the speech, a *deprecatio*, the author investigates the appearance of the term *clementia Caesaris* in *Pro Ligario*. Finally, he pays attention to Cicero's irony and points out how the orator voices his conviction that he considers the dictator's power and clemency illegitimate.[9]

In November 45 B.C., Cicero delivered his speech of defence before Julius Caesar in favour of King Deiotarus *(Pro rege Deiotaro)*. King Deiotarus sided with Pompey in the civil war. By then, in November 45, Caesar had defeated Pompey's sons in the battle at Munda. The grandson of Deiotarus, Castor, and the one-time royal physician, Phidippus, hired by him acted as prosecutors of King Deiotarus. They charged the king with capital offences, an assassination attempt against Caesar – dated by them to 47 – and conspiracy. That is, the charge brought against the King can be described as *crimen imminutae maiestatis*. Cicero had always maintained good relations with the King, so he undertook the defence. First, the author analyses the charge against King Deiotarus to find out if the proceedings can be considered a criminal trial at all. After that, the author pays attention to *Pro rege Deiotaro* with respect to the political programme that appears in it and Caesar's image drawn by Cicero.

8 See also Nótári, T.: Staatsdenken und Rhetorik in Ciceros Marcelliana. *Fundamina* 2010. 64. ff.

9 See also Nótári, T.: Staatsdenken und forensische Taktik in Ciceros Ligariana. *Fundamina* 2013. 12. ff.

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