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ACTA JURIDICA HUNGARICA
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MÁTYÁS BÓDIG*

Hart's Jurisprudence: Its Relation to Philosophy

Abstract. The essay concerns the way jurisprudence adapts to the challenges set by contemporary philosophy concentrating upon the case of Hart's legal theory. Hart produced one paradigm of linking philosophical considerations to jurisprudential analyses. He seemed to believe that the investigation of legal phenomena must itself raise and answer the underlying philosophical questions (only occasionally relying on philosophical sources). Although Hart was well aware of the rising new philosophy of his time, he sought to elaborate an autonomous conceptual framework for philosophical jurisprudence. The essay often takes Wittgenstein as an example for elucidating Hart's relation to philosophy (although criticizing those who believe that Hart is a key figure in the jurisprudential reception of Wittgenstein's later philosophy). The essay justifies Hart's claim to gain theoretical autonomy but points to three mistakes in that respect. (1) He sometimes misconceived his philosophical sources owing to the fact that he refrained from analyzing them. (2) Hart justified some of his crucial claims by a combination of arguments that is not entirely consistent. (3) His standpoint often raised philosophical issues but he sometimes failed to make an identifiable point upon them. The essay concludes that Hart was right in thinking that the time had come to reconsider the conditions of making theories about law but he could not justify his assumption that the reconsideration would lead to a certain kind of comprehensive theory of law.

Keywords: jurisprudence, philosophy, Hart, Wittgenstein, the „open texture" of law, rule-following

1.

What I try to take into account in the present paper is the attitude of jurisprudence or, rather, of one particular conception of jurisprudence to philosophical questions that arise in the course of jurisprudential reflection. It concerns the way jurisprudence adapts to the environment of contemporary philosophy and the challenges set by that environment. However, it does not amount to raising the issue of that adaptation. I concentrate upon the experiences of Hart's jurisprudence with respect to philosophy. Some of my questions could be raised in the context of a basically sociological investigation that concerns the actual circumstances of the birth of Hart's *The Concept of Law* and its characteristic formation of discourse. Although I admit the possibility and the significance of

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that investigation, I pursue different ends. I am interested in the philosophical, conceptual perspectives of a certain approach to theoretical questions.

I firmly believe that one of Hart's most important contributions to the theory of law is that he provided one paradigm of linking philosophical considerations to jurisprudential analyses. He made jurisprudence philosophical in a quite characteristic way. Before Hart, the theorists of jurisprudence were normally engaged in "applying" certain philosophical conceptions. It is not because Austin was simply a utilitarian, Kelsen was simply a neo-Kantian, Pound was simply a pragmatist. However, they relied on philosophers' works and ideas in very explicit ways without claiming that their theoretical efforts are "autonomous" as to their philosophical implications. In this respect, Hart kept some distance from any philosophical school implicitly claiming the theoretical autonomy not characteristic to his predecessors. That is why it is so problematic to establish clear connections between him and certain philosophers (like Wittgenstein and J. L. Austin).

Hart's theoretical autonomy did not mean that he was not content with the available philosophical conceptions or did not know them. On the contrary, as a scholar of jurisprudence in Oxford, he lived in the centre of the rising new philosophy that has proven to be so significant in the recent decades. He held courses in common with J. L. Austin.[1] He was well aware of Ryle's, Wittgenstein's, and Winch's philosophical ideas. Hart acknowledged the importance of the new philosophy taking shape (especially) in Oxford and Cambridge. The reader of *The Concept of Law* can feel the atmosphere of new theoretical (philosophical) perspectives. Hart was confident in his ambitions to provide a "fresh start"[2] for discussing issues of legal theory and accounting for law as such. However, he did not commit himself to any of those contemporary philosophers in an explicit way: he did not attempt to extend any particular conception towards jurisprudence. Hart seemed to believe that the investigation of legal phenomena must itself raise the underlying philosophical questions and that we must find their answers in the context of the investigation. "[I]t seems to me that the common mode of definition is ill adapted to the law (...) and has helped to create the impression that the lawyer cannot hope to elucidate without entering a forbidding jungle of philosophical argument. I wish to suggest that this is not so; that legal notions however fundamental can be elucidated by methods properly

[1] See Bankowski, Z. and MacCormick, N.: Speech Acts, Legal Institutions and Real Laws. In: *The Legal Mind* (ed. Neil MacCormick and Peter Birks), Oxford, Clarendon, 1986, 122.

[2] See Hart, H. L. A.: *The Concept of Law*. Oxford, Clarendon, 1961, 77–79.

adapted to their special character."[3] (It reflects the way the above-mentioned philosophers themselves discussed issues without arguing for or against particular philosophical conceptions.) There was a philosophical background but the concepts and arguments deriving from the philosophical background could be moulded according to the needs of the investigation.

There are several obvious examples of that attitude in Hart's theory. One of them could be the issue of the nature of "social rule". Hart's theory presupposes a philosophical explanation of social rules as he explains law as a system of specific social rules. However, he did not adopt the necessary explanation from a particular book or article (in the strict sense of the word)—he elaborated it himself, although it seems obvious that a theoretical account of social rules does not belong to the domain of legal philosophy. Another remarkable example is provided by his essay, "Positivism and the Separation of Law and Morals" (which already contains many basic ideas of *The Concept of Law*), in which he made a crucial distinction between the "core of meaning" and the "penumbra of meaning" in language as such without referring to any philosophical source.[4]

Hart can rarely be accused of misunderstanding certain arguments in some philosopher's work because he claims his concepts and arguments as warranted by the needs of his own investigation. The works of philosophers that are mentioned may form the background from which certain ideas derive but Hart did not think that they can provide ready-made concepts for his inquiry. It becomes even more obvious when he seems to adopt concepts. For example, the notion of "open texture", the crucial element of his account of interpreting and applying legal rules, derives from one of Friedrich Waismann's articles, "Verifiability".[5] Nevertheless, Hart uses the term in a way that is significantly different from Waismann. In Waismann's essay it was applied to descriptive empirical concepts while in Hart's text rules have "open texture". One would expect that the possibility of that alteration is drawn as a conclusion from the analysis of Waismann's text. Hart, however, delivers no such analysis and restricts himself to briefly mentioning Waismann's article.[6] Hart's attitude towards Peter Winch's ideas seem to reinforce my remark. With respect to the explanation of normati-

[3] Hart, H. L. A.: Definition and Theory in Jurisprudence. In: *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon, 1983, 21.

[4] Hart, H. L. A.: Positivism and the Separation of Law and Morals. 71 (1958) *Harvard Law Review*, 593; see 606–607.

[5] See Waismann, F.: Verifiability. In: *Logic and Language* (ed. Antony Flew), Oxford, Blackwell, 1951.

[6] See Hart: *The Concept of Law. op. cit.* 249.

vity, Hart's crucial claim is the distinction between the internal and the external aspects (of rules). That seems to be parallel to something that is central to Winch's account in his *The Idea of a Social Science*: the "internality of social relations".[7] Hart's conception significantly differs from that of Winch but once again the differences are not brought out by means of an analysis: Winch is mentioned as having a "similar" conception.[8]

I do not think those are mistakes to condemn. Hart's way of handling his philosophical sources belongs to his attitude towards philosophy and to his claim to elaborate an autonomous conceptual framework for philosophical jurisprudence. In a sense, he might have thought rightly that extensive analyses of his philosophical sources would have concealed the originality of his basic ideas. However, if we encounter ambiguities in Hart's theory of law, we cannot return to the sources that may clarify the issue in details. That may summarize the risk that Hart ran in opting for a specific formation of discourse. The theory had to stand for itself against every challenge. (Hart seemed to recognize that: in the "Postscript" attached to the second edition of *The Concept of Law*, he chose to defend his theory without returning to his philosophical background for some "extra help".[9]) The theory itself must contain the answer for the questions concerning the philosophical possibility or plausibility of its conceptual framework.

It would be too easy to draw the conclusion at this stage that Hart is far from successful in establishing his theory within a tenable conceptual framework. Since its first publication, Hart's theory of law (as explicated in *The Concept of Law*) has been subject to criticism and hardly anyone takes it as entirely tenable. I shall pay some attention to the basic shortcomings of Hart's theory but that is not to be taken as the main intent of my text. The main issue is the possibility of and the need for theoretical "depth" in the philosophy of law, the interplay between jurisprudence and philosophy because Hart's influence on this level seems to be more important than on the level of his actual arguments. I try to differentiate between two kinds of issues: the issues of the plausibility of a particular theoretical device and the issue of the formation of discourse. As to the first, I think, the shortcomings of Hart's theory can be pointed out without too many complications. The theory has certain philosophical implications that are

[7] See Winch, P.: *The Idea of a Social Science and its Relation to Philosophy.* London, Routlege and Kegan Paul, 1958, 123.

[8] See Hart: *The Concept of Law. op. cit.* 242.

[9] See Hart, H. L. A.: Postscript. In: *The Concept of Law.* 2nd edition, Oxford, Clarendon, 1994.

open to a critical survey. The criticism may lead us to calling into question the underlying methodology of Hart's theory and not to the final judgment on Hart's jurisprudence. I shall try to follow the line of the former reasoning.

The relation of jurisprudence to philosophy is at the heart of Hart's legal theory. Let me sum up what I find particularly significant in that relation. The discourse in which the theory is formulated establishes a paradigm of facing or handling the challenge of philosophical problems in jurisprudence. This challenge is twofold. The theoretical discourse of law itself raises philosophical problems and the philosophical discourse can change the conditions of "making" theories on law. Hart seemed to use the philosophical discourse as a background that enabled him to handle the philosophical problems inherent in jurisprudence without explicit recourse to any particular philosophical conception—without speaking the language of any particular philosopher. In that respect, Hart's philosophy of law runs contrary to an attempt of placing one philosopher (say, Wittgenstein) into the centre of discourse (as limit and as criterion).

2.

For several reasons, I shall often take Wittgenstein as an example when I try to elucidate Hart's relation to philosophy. I hope that my paper will reveal most of those reasons. The principal reason is that Hart's relation to Wittgenstein is characterized by reception and detachment at the same time. It seems obvious that Hart's legal theory has something to do with Wittgenstein. There are traces of direct and indirect Wittgensteinian influence in his works. However, Wittgenstein's late philosophy is far from central to Hart's theory. In *The Concept of Law* he did not quote and did not analyze a single sentence from Wittgenstein. He mentioned Wittgenstein's *Philosophical Investigations* as a book that contains "many important observations" concerning one particular issue that is of central significance for Hart's work: rule-following.[10] Of course, it is not enough to establish strong connections between Hart and Wittgenstein. It is highly unlikely that Hart intended to produce a "truly" Wittgensteinian philosophy of law.

My introductory remarks throw some light upon the mistake of those who believe that Hart is a key figure in the jurisprudential reception of Wittgenstein's philosophy.[11] In the strict sense of the word, Hart did not promote the juris-

[10] See *ibid.* 249.

[11] See Langille, B.: Revolution without Foundation: The Grammar of Scepticism and Law. 33 *McGill Law Journal* (1983), 451, 498.

prudential reception of Wittgenstein's later thinking. His theoretical efforts are detached from that reception in many respects.

As to the metatheoretical convictions, there are sharp differences between Hart and Wittgenstein. For example, Hart was concerned with giving a theoretical account of the specific conditions of rule-following in an area of life and communication (legal practices). Although Wittgenstein produced a whole series of remarks on rule-following, he did not intend to provide or even encourage such an account. One cannot even extend Witgenstein's remarks towards the problems raised by Hart.[12] As I shall show it below, Hart sometimes referred to certain semantic features of linguistic utterances to support his claims. In that respect, he seemed to be involved in the "linguistic turn" of philosophy. The turn that is often associated with Wittgenstein. However, Wittgenstein was not concerned about listing general features of language.[13] In his later works, he did not seek a single abstract point of view (which was pretty much the fatal mistake of his *Tractatus*[14]). Wittgenstein consistently refrained from using even the word language as an operative term that would embrace the entire scope of the analysis. He preferred to talk about language-games[15] in order to put the emphasis upon the multiplicity of conditions of communication and understanding that surpass the horizon of comprehensive analytic concepts. (And there are further implications of the use of the term. Language-games are not simply tools of describing types of communicative situations but the common name for many invented, imaginary forms of communication that serve to provide illuminating comparisons of sharply differing uses of words or possibilities of understanding. "It is easy to imagine a language consisting only of orders and reports in battle.—Or a language consisting only of questions and expressions for answering yes or no. And innumerable others.—And to imagine a language means to imagine a form of life."[16])

The considerations that lead to those metatheoretical convictions are completely alien to Hart. He was right in detaching himself from Wittgenstein—in never identifying himself as a Wittgensteinian. In that respect, he took advantage of his

[12] As John McDowell seems to suggest in his "Non-cognitivism and Rule Following"; in: *Wittgenstein: To Follow a Rule*, ed. by S. H. Holtzman and C. M. Leich, London, Routlege and Kegan Paul, 1981, see 160.

[13] Nevertheless, one may point to remarks which refer to general features, i.e. Wittgenstein, L.: *Philosophical Investigations.* Oxford, Basil Blackwell; 1958, s. 43. I do not attempt to elucidate here how they fit into Wittgenstein's investigations.

[14] See Pears, D.: *The False Prison*, vol. 2; Oxford, Clarendon, 1988; 424.

[15] See Wittgenstein: *Philosophical Investigations. op. cit.* 7.

[16] *Ibid.* 19.

theoretical autonomy. (And in other respects, he took advantage of keeping some distance from many other philosophers whose works also seem relevant to his efforts.)

Wittgenstein did not seem to answer the "basic" methodological questions in a way that would be appropriate for supporting or establishing the Hartian enterprise—even at the expense of some rectification. He might have opposed the use of operative terms and comprehensive analytic tools. He posed the question of the analytic study in a much more radical sense than we did in our original question. In many respects, Wittgenstein's conception seems to be a challenge to the Hartian theory, rather than a source of ideas. What we have found out during the analysis will be relevant to this challenge and will help to provide a partial characterization of the practice of the Hartian analysis.

3.

As I indicated above, I do not claim that there is no "interference" between Hart and contemporary philosophy. Actually, there are two elements in his theory that could be connected to the philosophy of the "linguistic turn". (1) Hart put an emphasis on analyzing the meaning of some characteristic legal terms. But he did not strive to formulate a theory of the language of law or to find the adequate philosophical account of language that could help us in that analysis. (2) Hart was convinced that any theoretical account of law should be anchored in the existing practices. We are not to present a "heaven of concepts" in which every conceptual element has a clear and consistent meaning. We have got to give an account of what the lawyers do, the way they actually use the terminology of law—even if it is sometimes ambiguous and uncertain. Although it is not justified by textual evidence, he might have thought (pretty much like Wittgenstein) that the only ground for conceptual certainty is the existing practice.[17] Concepts live their authentic lives in practices.

The (partly legitimate) impression that he was somehow involved in the philosophy of language has lead some authors to think that the underlying philosophy of Hart's theory must be a theory of language. Some hoped that a good grasp of the conceptual conditions of his theory can be found in his partly explicit, partly implicit commitment to a view of language. However, that turned out to be a failure: there is no consistent view of language behind Hart's

[17] See *ibid.* 109. and Wittgenstein, L.: *On Certainty.* Oxford, Basil Blackwell, 1979, 102.

arguments – only a number of diverging ideas. The failure was based upon the misconception of Hart's relation to his philosophical sources.

Let me elucidate what I mean. Sometimes it seems that Hart's analytic vision is based upon some theory of language or a general semantic theory.[18] Hart emphasized the central significance of the analysis of legal concepts. He regarded it as the core of his positivist commitment.[19] Some critics, like Lon L. Fuller,[20] tried to point to that theory to reach to the heart of his ideas – but there is no such theory at the basis. Although Hart understood his own commitment to analytic jurisprudence as a task of clarifying the meaning of the characteristic terms of legal communication, that was not meant to be a linguistic analysis. It was (as Hart himself emphasized[21]) more like a sociological inquiry that elucidates social practices by way of throwing light upon the terms used in communicating the practices in question. Of course, it has something to do with some issues of the philosophy of language: it presupposes that at least some words are to be clarified in relation to their use in social practices. However, it is far from attributing central significance to the philosophy of language. Joseph Raz is right in thinking that Hart considered law as a complex political institution that could be explained with reference to some social needs.[22] Hart's approach was basically an institutional one. (In that respect, his *Essays on Bentham*[23] is much less misleading than *The Concept of Law*.) The elucidation of the specific vocabulary of law was a result of taking that conviction as the principal guideline in jurisprudence. And, at the same time, it was an issue that helped to point to the shortcomings of other theoretical approaches which fail to give a tenable account of the specific character of the terminology of law.[24]

[18] See Hart: Positivism... *op. cit.* 607.

[19] See *ibid.* 601.

[20] See Fuller, L. L.: Positivism and the Fidelity to Law – A Reply to Professor Hart. 71 (1958) *Harvard Law Review,* 630, 668–669.

[21] See Hart: *The Concept of Law.* p. v.

[22] See Raz, J.: *Ethics in the Public Domain.* Oxford, Clarendon, 1994, 204.

[23] See Hart, H. L. A.: *Essays on Bentham: Jurisprudence and Political Theory.* Oxford, Clarendon, 1982.

[24] The use of a conceptual analysis as a starting point for a critique of rival theoretical conceptions could be exemplified by Hart's "Definition and Theory in Jurisprudence".

4.

Nevertheless, Hart's decision to claim theoretical autonomy sometimes has its price. As he chose not to establish carefully the philosophical issues concerning his theory, he committed some mistakes. I think there are three serious problems with his standpoint in this respect.

(1) Hart sometimes misconceived his philosophical sources owing to the fact that he refrained from analyzing them. I shall support that claim by considering Hart's reference to Wittgenstein's remarks on rule-following in the context of his theory of rules.

Hart had to formulate a theory of rules and (in some respects) of rule-following, and thought it had something to do with Wittgenstein. For that reason, he referred to Wittgenstein's analysis of the issue of rule-following, making the impression that Wittgenstein provided some basis for his theoretical device. However, Wittgenstein did not have a theory of rule-following, and we have good reasons to believe that he was not inclined to support such an enterprise. I tried to argue that there are some features of Hart's theory of legal interpretation that establishes a conceptual link between him and Wittgenstein. Later, I tried to argue that the importance of those links does not lie in the fact that Wittgenstein provided excellent analytical tools to Hart in any sense. Actually, Wittgenstein did not provide anything like that and sought the answers to significantly different questions than those of Hart's. (When does and does not a certain form of doubt make sense?[25])

It has two crucial consequences for our inquiry. Wittgenstein did not elaborate a comprehensive theory of rules that could be in contrast or in accordance with Hart's theory of legal interpretation. If there are conceptual links between Hart and Wittgenstein, if Hart made use of ideas that he considered as Wittgensteinian, he must have misunderstood systematically the purpose and the significance of Wittgenstein's later philosophy. Something must have been between him and Wittgenstein that hindered him from realizing the problematic character of his (scarce) references to Wittgenstein—a distortion that was necessary to allow him to think that certain Wittgensteinian ideas might support his arguments. What was it? Part of the answer is the peculiar character of the formation of discourse that underlies the Hartian theory-making. I tried to grasp some of its salient features above and I would like to consider them again later. Hart was not engaged in clarifying the conditions of his references

[25] See Pears: *The False Prison. op. cit.*, vol. 2, 442.

in a careful analysis. Some of the tensions might have remained hidden. Moreover, Hart did not try to face and clarify the major ambiguities of his position.

(2) Hart justifies some of his crucial claims by a combination of arguments that are not entirely consistent. Occasionally, he applies arguments without a determinate common character or direction and it allows for providing answers for many distinct problems at the expense of blurring the philosophical conditions of the consistency of his arguments. For example, he provided two ways of clarifying why legal rules are to be taken as "open-textured". He presented his conclusions partly as a consequence of the character of some elements of language, and partly as a result of pragmatic considerations concerning statutory interpretation. "Hart's discussion of 'open texture' in *The Concept of Law* seemed to rest half-way between emphasizing speaker's meaning and emphasizing word's meaning, and half-way between a theory of meaning and a theory of statutory interpretation."[26]

It seems very compelling to conclude that we cannot take the distinction of the "core" and the "penumbra of meaning" and the "open texture" originating exclusively from an underlying philosophy of language. That is exactly what Brian Bix reached as a conclusion about Hart's "open texture": "I do not think that Hart's conclusion of partial indeterminacy—in my view, summarized by more than based upon the idea of 'open texture'—derived from a view of language so much as from a view of how people create and think about rules. Hart was not concerned about creating, elaborating, or defending a particular general philosophy of language. His concern was with the way that legal rules are (and should be) applied. Hart had not proven from the nature of language that judges must have discretion; rather, he gave reasons why legal texts should be interpreted in a way that leaves judges discretion in applying the law."[27] Hart did not insist that the open texture of law and the indispensability of judicial discretion are necessary features of law, and their review in the course of the reflection on law is out of the question. It might be a symptom of an inherent ambiguity in Hart's position. "While Hart at times seemed to argue that something about language makes it inevitable that judges will have discretion, he seemed at other times to concede that judges could interpret rules in such a way that they would rarely need to exercise discretion. For example, he considered and rejected a way of clarifying the meaning of terms within rules

[26] Bix, B.: *Law, Language, and Legal Determinacy.* Oxford, Clarendon, 1993, 22.
[27] *Ibid.* 18.

based simply on language.[28] (...) Hart's argument was couched as often in terms of policy as it was in terms of a meaning theory: he argued that any attempt to reduce judicial discretion significantly would have negative consequences (in particular, an inflexibility—an inability to recharacterize rules to meet changing circumstances)."[29]

It seems as if Hart had been reluctant to treat the "open texture" of law as a presupposition underlying his views on judicial interpretation and kept on seeking further arguments to prove its existence and the necessity of judicial discretion (e.g. the disadvantages of a rigid legal system). We may add another example that suggests that Hart could sometimes argue for the existence of the "open texture" of law without referring to the linguistic conditions of it. In the "Postscript" attached to the second edition of *The Concept of Law* he found it better to allude to some dignified figures of the judiciary who believed in the existence of the indeterminacy in law. "There is no doubt that the familiar rhetoric of the judicial process encourages the idea that there are in a developed legal system no legally unregulated cases (...) But it is important to distinguish the ritual language used by judges and lawyers in deciding cases in their courts from their more reflective general statements about the judicial process. Judges of the stature of Oliver Wendell Holmes and Cardozo in the United States, or Lord Macmillan or Lord Radcliffe or Lord Reid in England, and a host of other lawyers, both academic and practising, have insisted that there are cases left incompletely regulated by the law where the judge has an inescapable though 'interstitial' law-making task, and that so far as the law is concerned many cases could be decided either way."[30]

Hart's standpoint is very confusing. If the "open texture" of rules is justifiable with reference to a theory of meaning, his arguments from policy are utterly irrelevant and misleading. If it makes sense to use arguments from policy it means that the consequences of the "open-texture" raise questions of practical philosophy. They concern our perspective of practical reasonableness. They concern what kind of law we would like to have. I cannot imagine a context in which Hart's two ways of arguing for the "open texture" could be linked together.

(3) Hart's standpoint often raises philosophical issues but sometimes fails to make an identifiable point upon them. Occasionally, the necessary philosophical

[28] See Hart: *The Concept of Law.* 126–127.

[29] Bix: *Law, Language, and Legal Determinacy. op. cit.* 21.

[30] Hart: Postscript. *op. cit.* 274.

standpoint behind Hart's arguments is missing. My example for that of kind mistake will be the issue of the relationship between the context of linguistic utterances and the meaning of words which is closely related to Hart's views on the way general classifying terms figure in the application of rules. As that claim is by far the most serious of the three, I shall support it with an extensive analysis.

5.

The text of *The Concept of Law* suggests that Hart hoped to take advantage of the term "open texture" in relation to his analysis of the formulation of rules: "uncertainty at the borderline is the price to be paid for the use of general classifying terms in any form of communication concerning matters of fact. Natural languages like English are when so used irreducibly open textured."[31] "In all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance which general language can provide."[32] The use of the general classifying term and its consequences is the point of one of Hart's famous examples: the rule "no vehicles in the park". "Vehicle" is a general term and the consideration of it in the context of a rule leads us to recognize the difference between the plain cases and the problematic borderline cases. By means of the standard instances ("If anything is a vehicle a motor-car is one.") we can grasp the plain cases (i.e. "Motor-cars are excluded from the park.").

The plain cases have characteristic features—some of which the borderline instances may either possess or lack. Actually, the lack of some relevant features makes them borderline cases. In some respects, they seem to be vehicles, in some others, they do not. However, that does not seem to account for our problem. Hart surprises the analyst with treating here "airplanes" and "bicycles" as borderline cases. Does he mean that it is dubious whether they are vehicles or not? No. Hart treats them as dubious only with respect to the given rule. "Does 'vehicle' *used here* include bicycles, airplanes, roller skates?"[33] The rule as such has something to do with our recognition of plain and borderline cases. Hart does not recommend to interpret the general term as such, independently of its context determined by the rule.

[31] Hart: *The Concept of Law. op. cit.* 125.
[32] *Ibid.* 123.
[33] *Ibid.* Italics are mine.

We would need further clarification of the interplay between the context and the general term—but it is nowhere to be found in *The Concept of Law*. The plain cases do not represent an ideal semantic element that can be found by way of contemplation. A kind of familiarity in the practice of action and communication renders them plain: "There will indeed be plain cases constantly recurring in similar contexts."[34] "The plain case, where the general terms seem to need no interpretation and where the recognition of instances seems unproblematic or 'automatic', are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."[35]

At that point, Hart seemed to take into account the interplay between the context and the general term but it was his only step in that direction. Nevertheless, it enables us to rule out Fuller's criticism which took the distinction of the "core" and the "penumbra of meaning" as based upon a certain semantic theory that isolates the meaning both from the use and the internal structure of language.[36] At least, it allows for an important conclusion: Hart's position cannot be clarified or supplemented by a view of language in which meaning and context are in any sense independent.

That is worth noting because there is a conception that would supplement Hart with a semantic theory of that kind. Frederick Schauer, in his *Playing by the Rules*, analyzing Hart's views on rules and their interpretation, contended that meaning must be in a sense "acontextual". "My analysis of the concept of a rule ... assumes ... that the meaning of language is not wholly explained by the unformulated purposes for which a speaker employs that language, nor wholly explained by the particular context in which that language is used. In other words, the potential divergence between rule and justification assumes that both language and meaning are at least partially acontextual."[37] Schauer claimed that the point of his analysis was that particular contexts in themselves cannot account for the meaning of the linguistic utterances.

He considered an example of finding a group of shells on the beach looking something like "C-A-T". The group of shells makes me think "cat". "My ability to think cat when I see 'C-A-T', and the fact that all speakers of English would have

[34] *Ibid.*

[35] *Ibid.*

[36] See Fuller: Positivism and the Fidelity to Law... 668–669. It does not mean that Fuller is to blame for a mistake here: Hart's "Positivism and the Separation of Law and Morals" upon which he reflected seems to be much less subtle than *The Concept of Law*.

[37] Schauer, F.: *Playing by the Rules*. Oxford, Clarendon, 1991, 55.

a rather closely grouped array of reactions to that same shell pattern, demonstrates the phenomenon I call semantic autonomy, the way in which language carries something by itself, independent of those who use it on particular occasions."[38] Instead of acontextuality, Schauer preferred to put the emphasis on the difference between particular and universal (or baseline) contexts.[39] The universal contexts make us think of certain things despite the particular contextual conditions: whenever I see "C-A-T" I think cat. In Schauer's theory, the role of practices and constantly recurring instances is secondary to that of the semantic contents (fixed in language). The meanings that exist independently of particular contexts enable us to formulate, understand, obey and disobey rules. That leads Schauer to regard the distinction of formulated and unformulated rules as crucial. The formulation of the rule "activates" the semantic contents that specify the requirements of the rule for us. "[T]he ability to explain the constraints of an unformulated or unformulatable rule is a difficult task, and one quite different from the task of explaining the potential constraints of a formulated rule."[40] "We have seen in this section that formulated rules can guide because the formulation provides the semantic content by virtue of which we can say that a rule is followed or broken."[41]

One can see the way it can be connected with Hart's arguments in *The Concept of Law*. His concern is very much the formulated rule that contains general terms. The features of general terms produce the plain cases and, at the same time, are responsible for the "open texture" of law. If Hart insisted that the use of general terms in formulating rules is an indispensable condition of the existence of law,[42] Schauer could offer a philosophical explanation of what that condition consists in. As I argued above, Hart did not seem to subscribe to a semantic theory like that of Schauer's. But it is not necessarily a good news and a sign of subtlety. It may well imply that Hart failed to see the consequences or the implications of his own theoretical device. I concluded that Hart seemed to assume the interplay of general terms and contextual conditions but that interplay was not clarified. But can it be clarified in his conceptual framework anyway? If

[38] *Ibid.* 56

[39] See *ibid.* 57.

[40] *Ibid.* 68.

[41] *Ibid.*

[42] "If it were not possible to communicate general standards of conduct, which multitudes of individuals could understand, without further direction, as requiring from them certain conduct when occasion arose, nothing that we now recognize as law could exist. Hence the law must predominantly, but by no means exclusively, refer to classes of person, and to classes of acts, things, and circumstances." Hart: *The Concept of Law. op. cit.* 121.

someone takes it as a personal mission to provide the missing elucidation, can he opt for a solution that is not parallel to that of Schauer's? It is possible that any further step to clarify the conception leads to formidable tensions. Is it right seeking the solution in the interplay between general (classifying) terms and contexts? It seems obvious that the clarification must concentrate upon the features of general terms and their significance in formulating rules for the conception is based upon those features and that significance. However, it is not at all obvious that the solution can be found there.

Hart's conception seems to be heavily dependent upon the idea that, if there are plain cases, it is because the general classifying terms mark out standard instances of their meaning. "General terms would be useless to us as a medium of communication unless there are such familiar, generally unchallenged cases."[43] At this stage, it is worth considering one of Fuller's arguments against Hart. Although Fuller wrongly attributed a comprehensive semantic theory to Hart, the way he tried to show the absurdity of presupposing standard instances behind the general terms, remains interesting. The argument is targeted upon the whole idea of plain cases which do not require the consideration of the aim or purpose of the rule, and can guide only by virtue of the meaning of its constitutive words. "Is it really possible to interpret a word in a statute without knowing the aim of the statute? Suppose we encounter the following incomplete sentence: 'All improvements must be promptly reported to...' Professor Hart's theory seems to assert that even if we have only this fragment before us we can safely construe the words 'improvement' to apply to its 'standard instance', though we would have to know the rest of the sentence before we could deal intelligently with 'problems of penumbra'. Yet surely in the truncated sentence I have quoted, the word 'improvement' is almost as devoid of meaning as the symbol 'x'. The word 'improvement' will immediately take on meaning if we fill out the sentence with the words, 'the head nurse', or, 'the Town Planning Authority', though the two meanings that come to mind are radically dissimilar. It can hardly be said that these two meanings represent some kind of penumbral accretion to the word 'improvement'. (...) It should be noted that in deciding what the word 'improvement' means in all the cases, we do not proceed simply by placing the word in some general context, such as hospital practice, town planning, or education. If this were so, the 'improvement' in the last instance might just as well be that of the teacher as that of the pupil. Rather, we ask

[43] *Ibid.* 123.

ourselves: What can this rule be for? What evil does it seek to avert? What good is it intended to promote?"[44]

One could remark that Fuller's criticism is highly unfair as Hart seemed to concentrate upon the standard instances *in the context* of rules, *for the purpose* of rules. In other words, at the end of the day, certain cases appear to be plain. The truncated sentence deprives us of the rule to be interpreted with respect to the words. However, the main point of Fuller's argument is very much relevant to Hart: the consequences of glimpsing the interplay between the meaning of words and the contextual conditions of their use. It calls into question his emphasis on a "general feature of language" as to the use of general classifying terms. The main issue raised by Fuller is whether that "general feature" belongs more to the varying contexts of linguistic utterances than to the semantic features of general terms. As I tried to argue, Hart's arguments lead to that question. If we can answer it, we can get rid of some ambiguities that cast doubt on Hart's position.

Fuller's argument implies an explanation of the interplay between the term and its context. Contrary to what Hart contended in the "Positivism and the Separation of Law and Morals",[45] the general term has no standard instance as such. The meaning of the rule and its terms must be elucidated by virtue of interpretation with respect to contextual conditions like the purpose of the rule. Every act of application involves an act of interpretation. It is a well-known line of argument as to our given question. It is a typical alternative to Schauer's standpoint that we already found inadequate to Hart's likely intentions. So, is that route of explanation open to Hart? Probably not, but, at least, it brings out an important feature of Hart's position. He admitted that the interplay between the term and its context cannot be found in the universal horizon of interpretation constantly mediating between the given words and the present situations. With the idea of plain cases, Hart seemed to wish to escape from the universality of interpretation: "The plain case, where the general terms *seem to need no interpretation* and where the recognition of instances seems unproblematic or 'automatic'..."[46]

If Hart rejects the universal need for interpretative mediation between the words and their contexts, how can we account for his (slightly ambiguous) recognition of the interplay of general classifying terms and their contexts? Where could he find a middle position between universal contexts, acontextual meanings

[44] Fuller: Positivism and the Fidelity to Law... *op. cit.* 665.

[45] See Hart: Positivism and the Separation of Law and Morals. *op. cit.* 607.

[46] Hart: *The Concept of Law. op. cit.* 123. Italics are mine.

(of Schauer's) and the universal horizon of mediating interpretation (as Fuller contended it)?

6.

It is not to suggest that there is no middle position to be found. The whole issue is connected with Wittgenstein's famous remarks on following a rule that seemed to seek right that middle position. At first glance, it may be promising. There is an indirect link between Hart and Wittgenstein in respect to the "open texture" of law. Waismann (who invented the term "open texture") knew Wittgenstein and was strongly influenced by him.[47] One can even point to the parallel between certain arguments of "Verifiability" and some remarks of the *Philosophical Investigations* that date back to the 1930's. Waismann writes: "There is no need to inquire into the verification of such sentences as 'The dog barks', 'He runs', 'He is playful', and so on, as the words are then used as we may say in their normal way. But when we say 'The dog thinks', we create a new context, we step outside the boundaries of common speech, and then the question arises as to what is meant by such a word series."[48] Compare it to the *Philosophical Investigations*: "It is only in normal cases that the use of a word is clearly prescribed; we know, are in no doubt, what to say in this or that case. The more abnormal the case, the more doubtful it becomes what we are to say."[49] It does not mean that Waismann's article can be seen as revealing "authentic" Wittgensteinian ideas before the publication of the "original thoughts". Waismann's position is controversial in this respect.[50] What is crucial to us is the difference of the contexts of the apparently parallel thoughts cited above. For

[47] Waismann witnessed the development of Wittgenstein's philosophy when it was in transition in the early 1930's. He had recorded his conversations with Wittgenstein since 1929 until 1931. These conversations were published under the title *Wittgenstein and the Vienna Circle* (edited by Brian McGuinness, Oxford, Blackwell, 1979) and represent what may be called the "verificationist period" in Wittgenstein's philosophy. That was the last phase before the "turn" that resulted in Wittgenstein's later views. Waismann saw the verificationism collapsing in Wittgenstein's thoughts and giving way to radically new ideas. It may elucidate why the issue of verifiability was so important for Waismann and why certain elements of his terminology (e.g. hypotheses) date back to his recorded conversations with Wittgenstein.

[48] Waismann: Verifiability. *op. cit.* 118.

[49] Wittgenstein: *Philosophical Investigations. op. cit.* 142.

[50] See Bix: *Law, Language, and Legal Determinacy. op. cit.* 14–17.

Waismann it serves to characterize our use of the empirical terms (as being "open textured").

For Wittgenstein, that remark is the very last before the famous examination of following a rule.[51] In some preceding sections one of Wittgenstein's main concern was the exactness or inexactness of our use of words. "I say 'there is a chair'. What if I go up to it, meaning to fetch it, and it suddenly disappears from sight?—'So it wasn't a chair, but some kind of illusion.'—But in a few moments we see it again and are able to touch it and so on.—'So the chair was their after all and its disappearance was some kind of illusion.'—But suppose that after a time it disappears again—or seems to disappear. What are we to say now? Have you rules ready for such cases—rules saying whether one may use the word 'chair' to include this kind of thing? But do we miss them when we use the word 'chair', and are we to say that we do not really attach any meaning to this word, because we are not equipped with rules for every possible application of it?"[52] The issues point forward to the discussion of rule-following, posing the question "what enables us to follow rules whatsoever if we are not equipped in advance for every possible application?". Part of the answer is the difference between normal and abnormal cases (in section 142)—our use of the words is "calibrated" on normal cases.[53] However, it would be far too ambiguous without the clarification of the rule-following activity. By what means can we be equipped with rules at all? The difference between Wittgenstein and Waismann lies in this direction of questions in the *Philosophical Investigations*. Although the initial problem can be treated as similar (the possible ambiguities of the use of this or that word), for Wittgenstein the questions reach far beyond the problem of final "undefinability" which was Waismann's main point in his paper "Verifiability".

The irony of the difference is that by way of picking up Waismann's ideas, Hart had problems with adopting the basically descriptive term of "open texture" to an analysis of rules.[54] Hart did not seem to overcome the ambiguities of his use of the term while Wittgenstein's treatment of the parallel problem led right to the analysis of rules. Was it a secret to Hart? In a sense, not. There are remarks that suggest that Hart saw some kind of connection between his idea of "open texture" of law and Wittgenstein's analysis of rule-following. Those

[51] Wittgenstein: *Philosophical Investigations. op. cit.* 143–242.

[52] *Ibid.* 80.

[53] David Pears took it as one of the crucial conclusions of Wittgenstein's analysis of rule following. See Pears: *The False Prison. op. cit.* vol. 2, 434.

[54] See Bix: *Law, Language, and Legal Determinacy. op. cit.* 18–19.

connections, however, are not strong enough to indicate that he relied upon Wittgenstein in order to overcome the ambiguities. The notes to the relevant chapter of *The Concept of Law* refer to Wittgenstein's observations as important concerning the notions of teaching and following rules[55] but that is not connected clearly to Hart's own analysis.

With respect to the relevance of "open texture" to legal reasonig, Hart also mentions his "Theory and Definition in Jurisprudence".[56] The text comprises many arguments familiar from "Positivism and the Separation and Law and Morals" and *The Concept of Law*. "The substantial question therefore is: Does this presented case resemble the standard case of a vessel more than it resembles what is plainly not a vessel in respect to which a lawyer would acknowledge the legal system attaches weight?"[57] The reasoning concerning some features of legal interpretation begins with a clear reference to Wittgenstein. "In what sense are legal rules vague, uncertain and unclear? Of course no legal rules can determine their application and the cases where no difficulty arises are simply those where there is general agreement that a case alls within the rule."[58] The footnote to this paragraph reads as follows: "see the elaboration of the theme that no rules can determine their application in Wittgenstein: Philosophical Investigations."[59] That may indicate that the recourse to the "agreement in judgments" concerning the plain cases in *The Concept of Law* represents Hart's interpretation of Wittgenstein (although it is not much more than mere speculation).

However, once again we see Hart committed to the idea that the heart of the matter is the use of general (classifying, descriptive) terms. "Most of the difficulty in applying legal rules to concrete cases arises where (a) there is no difficulty in citing clear or standard cases to which the case undisputably applies, but (b) in a given case a difficulty is precipitated because some feature present or absent in the standard case is absent or present in this case. (...) The crucial question presented to a court in all such cases is always one of *classification of some presented particular*. We cannot say that the object is clearly a vessel, a signature or a vehicle, or clearly not a vessel, etc., because it shares with both features to which the legal

[55] See Hart: *The Concept of Law. op. cit.* 249.–Hart refers to sections 208–238 of Wittgenstein's *Philosophical Investigations.*

[56] See 29 (1955) *Proceedings of the Aristotelian Society* (supplementary volume) 239. The paper is not identical with his inaugural lecture, "Definition and Theory in Jurisprudence". It is actually Hart's reply to Cohen's criticism of the inaugural lecture.

[57] *Ibid.* 259.

[58] *Ibid.* 258.

[59] *Ibid.*

system attaches importance."[60] "[U]ntil the meaning of the legal rule is settled it is impossible to refer to the facts of the case in its terms."[61]

The paper seems to throw some light upon Hart's views on legal interpretation that cause problems to us. He seemed to incorporate some ideas that may have Wittgensteinian origins into his conception and that intention can be traced in *The Concept of Law* as well. Hart used them to strengthen his account of the plain cases. "[The plain cases] are only the familiar ones, constantly recurring in similar contexts, where there is general agreement in judgments as to the applicability of the classifying terms."[62] This might be connected to the concluding remarks of the analysis of rule-following in the *Philosophical Investigations*. "'So you are saying that human agreement decides what is true and false?' It is what human beings say that is true and false, and they agree in the language they use. That is not agreement in opinions but in forms of life."[63] "If language is to be a means of communication there must be agreement not only in definitions but also (queer as this may sound) in judgments."[64]

Hart seems to contend that the agreement making possible the existence of plain cases is reached by way of the common human activity (plain cases—"constantly recurring in similar contexts"). However, Hart's reliance upon those ideas appears to be secondary when he attempts to clarify the conditions of legal interpretation itself. At that stage, he prefers to concentrate upon the significance of the general classifying terms and operates with the transciption of Waismann's "open texture". The 1955 paper suggests that Hart "suspected" the possible links between his and Wittgenstein's problems but did not actually recognize them. He picked up a certain idea that he regarded as crucial ("no rules can determine their own application") and insisted upon its consequences without building his theory of legal interpretation upon them. As I argued above, he might have had no philosophy of language that could guide his way of making theories and that could explain why he was not capable of overcoming the multiple ambiguities of his ideas. He relied upon a mixture of significantly differing ideas on certain features of rules, using general classifying terms, etc.

That is what I meant in claiming that Hart sometimes has no clearly identifiable position. In certain respects, his arguments are built upon a mixture of

[60] Hart: Theory and Definition in Jurisprudence. *op. cit.* 258–259. Italics are mine.
[61] *Ibid.* 260.
[62] Hart: *The Concept of Law. op. cit.* 123.
[63] Wittgenstein: *Philosophical Investigations. op. cit.* 241.
[64] *Ibid.* 242.

differing thoughts that is hardly consistent. He cannot be reconciled with the straight and sometimes simplistic views of Schauer's and Fuller's.

7.

It seems that the inquiry into some of Hart's ideas blurred the initial point I made about his legal theory. I argued that he is committed to a kind of theoretical (philosophical) autonomy. Later, I drew several conclusions about Hart's failure to provide a consistent philosophical ground to his theory. I tried to point out that failure in several respects. Sometimes Hart seems to subscribe to problematic doctrines that are responsible for tensions around some of his basic ideas. In some cases (as I am inclined to conclude after the analysis of Hart's theory of judicial interpretation) the underlying philosophical doctrines are not identifiable or clarifiable and there is much to suggest that sometimes there are no underlying philosophical doctrines that could support his position.

However, by making that point we do not have to withdraw the initial point. The initial point was not about the viability of Hart's actual arguments or their consistency. It was about a certain approach to making theories about law and coping with the arising philosophical questions. The matter of that approach is, at least partly, independent of the viability of the actual arguments. In this respect, the tensions I tried to point out in Hart's arguments were supposed to serve a purpose going beyond the mere criticism of the arguments in question: to justify that we are not faced with a "good old theory".

So far, I have examined formal objections that concern the philosophical character of Hart's arguments: the way he reached some of his conclusions. I deliberately avoided explicating a substantial criticism that would call into question the central elements of his legal theory. However, in the last section of my analysis, I shall try to indicate the way my formal objections affect substantial elements of Hart's theory.

Hart's entire theory of law is based upon a given division of the field of inquiry that enables him to talk about law in general. (As if he tried to answer a question suggested by Winch:[65] How can we elucidate the peculiar nature of the form of life called "law"?) Hart was engaged in the presupposition that law has

[65] "[W]hereas the philosophies of science, of art, of history, etc., will have the task of elucidating the peculiar natures of those forms of life called 'science', 'art', etc., epistemology will try to elucidate what is involved in the notion of a form of life as such." Winch: *The Idea of Social Science. op. cit.* 41.

one distinctive nature: law is an analytic unit. He did not raise the issue of a possible diversity in the uses of the word "law" that rules out the search for the nature of law as a unit of analysis. Hart was committed to disclosing the "general nature of law".[66] The problems I raised stand in the way of that disclosure.

In a sense, Hart falls short of the theoretical perspicuity of, say, Kelsen's "pure theory of law".[67] Kelsen's theory is not weakened by as many internal tensions as Hart's theory. Of course, that perspicuity is not an advantage if it means that the theory is committed to several obscure metaphysical doctrines. Hart was right in thinking that certain philosophical ideas of the 20th century may help to reconsider the conditions of making theories about law and that legal theory can develop ways of coping with its inherent philosophical problems. At the same time, he could not justify his assumption that the reconsideration would lead to just another comprehensive theory of law.

Hart's theory is an unfortunate compromise between two differing ideas. On the one hand, it shows the power of a discourse that does not put forward ready-made philosophical doctrines but tries to develop the suitable arguments in the course of the investigation. It does not guarantee the "right" outcome and does not mean that Hart's actual arguments are viable. It concerns not only this question of plausibility. Rather, it is about the search for the best available ways of clarification without recontextualizing the problems by means of a grand theoretical machinery. Hart often unfolds his position by way of considering various examples that run contrary to certain theoretical expectations and does not lend themselves to the abstract, comprehensive explanations. (He does not explicate his views on the issue of the imperative theory of law or the obedience to law by opposing a range of doctrinal statements to another range of doctrinal statements. He constructs examples that can be compared to different situations with different implications.[68]) On the other hand, Hart's enterprise implies the conviction that the various considerations on law can find a point of reference in the nature of law—disclosed in the analysis.

I do not wish to argue that any of the two is prior or primary to the other. It is more important to contend that those ideas are in tension and their tension is a basic one in Hart's legal theory. To justify that claim I would like to refer to one

[66] See Hart: Postscript. *op. cit.* 275.

[67] See Kelsen, H.: *Introduction to the Problems of Legal Theory.* Oxford, Clarendon, 1992.

[68] In the case of the criticism of the impertative theory of law the example is the "gunman situation" (first mentioned on p. 7 in *The Concept of Law*). With respect to the obedience to law, the example is an imaginary king, Rex II, who inherits his father's kingdom—see *ibid.* 51–52.

of our conclusions on Hart's theory of legal interpretation. Hart relies upon differing arguments that have diverse philosophical implications and some of his arguments have no clear philosophical character. One could hardly determine his position in comparison with either a strong interpretationism (of Fuller) or a view on language that presupposes acontextual meanings (see Schauer). That "slipperiness" may cast doubt on the consistency of Hart's theory of legal interpretation but it certainly does not exclude or degrade the merit or the significance of his particular arguments and considerations. Nevertheless, this philosophical "elusiveness" is extremely damaging to the idea of a comprehensive legal theory. A clear philosophical standpoint should mediate between the particular arguments and the disclosed nature of law—showing the inherent connection of the implications of the arguments and the statements on law as such. If the philosophical character of the arguments is not accommodated to the general statements on law by means of a philosophical conviction, one can hardly tell by means of what they could be accommodated. Hart seems to set a criterion to himself without taking its consequences seriously in his theory. He never considered the criterion in its own terms and never compared it to the features of his own arguments.

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The Legal Character of the Optional Clause System**

Abstract. In international legal writing the term "optional clause" is construed to mean Art. 36. para. 2. of the Statute of the International Court of Justice, which allows the states parties to unilaterally declare that they recognize as compulsory, in relation to any other state accepting the same obligation, the jurisdiction of the Court in specified categories of legal disputes. The above mentioned declarations form a special system called the system of compulsory jurisdiction. The legal character of the optional clause and the system of compulsory jurisdiction deserves attention not only because it embodies a theoretical issue, but also because it is of great practical relevance, considering that the answers to be given to a number of important matters associated with declarations of acceptance—such as the rules governing withdrawal or termination of declarations or its admissibility, the legal effects of reservation and restrictions attached to declarations, interpretation of declarations—depend on how one looks on the legal character of the clause. The article analyses the two main views about the legal character of the clause. One trend will emphasize the unilateral nature of the system of the clause, while the other will conceive of the resultant relations as between states accepting the compulsory jurisdiction of the Court as a contractual relationship.

Keywords: International Court of Justice, compulsory jurisdiction, optional clause

I.

In international legal literature, the term "optional clause" is construed to mean Article 36. para. 2. of the Statute of the International Court of Justice. It allows the states to unilaterally declare that they recognize the jurisdiction of the Court as compulsory in specified categories of legal disputes, in relation to any other states accepting the same obligation.

The optional clause itself is the result of a compromise, after the first world war, which was achieved during the negotiations in the Committee of Jurists

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drafting the Statute of the Permanent Court of International Justice.[1] This clause does not in itself impose any obligation on states parties to the Statute; it merely creates a possibility for them to assume, by a unilateral declaration, additional obligations in excess of those contained in the Statute with respect to the jurisdiction of the Court. It was in consideration of this that Kelsen wrote, the jurisdiction referred to in Article 36. para. 2. of the Statute „is not 'compulsory' in the true sense of the word. In order to establish true compulsory jurisdiction of the International Court of Justice, the Statute would have to provide that any member of the judicial community, party to any case whatever, is obliged to recognise the jurisdiction of the Court if the other party refers the dispute to the Court."[2] Judge McNair described the machinery provided by Article 36. para. 2. in the *Anglo-Iranian Oil Co.* case as of *contracting-in,* not of *contracting-out.*[3]

In addition to para. 2. of Article 36, paras. 3. to 5. are also frequently consigned to the optional clause insofar as they set out yet more elements of the additional obligations related to the so-called compulsory jurisdiction of the Court. Consequently, there is in fact a broader concept of the optional clause, namely one that comprises not only para. 2 of Article 36. but all the provisions concerning the conditions for and the manner of making declarations of acceptance as well as the validity and other aspects thereof within the meaning of Article 36 of the Statute.

The features of the optional clause in the broader sense can be summed up as follows:

– the additional obligations are effective in relation to other states accepting the same obligation (reciprocity);[4] in other words „A declaration under this clause undoubtedly constitutes an international engagement binding on the state concerned in relation to any state also making a declaration under the Optional Clause."[5]

[1] See Hudson, M. O.: *The Permanent Court of International Justice.* New York. 1934.

[2] Kelsen, H.: *The Law of the United Nations.* Stevens and Sons Limited, London, 1951. 522.

[3] Cf. *ICJ Reports* 1952. 116.

[4] On the reciprocity see Thirlway, H. V. A.: „Reciprocity in the Jurisdiction of the International Court". *Netherlands Yearbook of International Law,* 1984. 97-137.; Brown Weiss, E.: „Reciprocity and the Optional Clause" In: *The International Court of Justice at a Crossroad* (Ed. Lori Fisler Damrosch) Transnational Publishers, Inc. Dobbs Ferry, New York, 1987. 82–105.

[5] Anand, R. P.: *Compulsory Jurisdiction of the International Court of Justice.* Asia Publishing House, New York, 1961. 143.

– additional obligations may not be assumed except with certain reservations or limitations, of which para. 3. of Article 36 mentions but two: reciprocity and a certain period of time;

– the legal effects of declarations containing such additional obligations, which were made between the two world wars and are still in force recognizing the compulsory jurisdiction of the Permanent Court of International Justice, pass on to the United Nations International Court of Justice by virtue of para. 5.;[6]

– declarations accepting the International Court's compulsory jurisdiction must be deposited with the Secretary-General of the United Nations, who transmits copies thereof to the states parties to the Statute and to the Registrar of the Court.

The declarations made by states under Article 36. para. 2. of the Statute form a special system, which is some times called the "system of compulsory jurisdiction", or "optional clause system". That denomination is not completely correct and it would be more precise to say that the "optional clause system" or "system of compulsory jurisdiction" consist of two elements: the optional clause of the Statute and the declarations made under Article 36. para. 2. of the Statute. Although, as it was mentioned before, the Statute itself does not impose any obligation on the states parties to the Statute concerning the compulsory jurisdiction of the Court.

The question concerning the legal character of the optional clause system deserves attention not only because it embodies a theoretical issue, but also because it is of great practical relevance, considering that the answers to be given to a number of important matters associated with declarations of acceptance—such as the rules governing modification or termination of declarations or their admissibility, the legal effects of reservations and limitations attached to declarations, interpretation of declarations – depend on how one looks on the legal character of the clause.

For that matter, the legal character of both the optional clause system and declarations accepting the compulsory jurisdiction have lately attracted the interest of international lawyers once again, not least by reason of the fact that the International Court of Justice has repeatedly been seized on these issues in several of its more recent decisions.

[6] On the differences between the original Statute and the present Statute see Rosenne, S.: *The Law and Practice of the International Court of Justice.* A. W. Sijthoff-Leyden; 1965. 367–368.

In the literature on international law, there are two views to be distinguished about the legal character of the optional clause system. Both poits of view start from the proposition that states recognize the clause by lego-technically unilateral declarations. However, a difference between the two approaches is revealed in one's perception of the system resulting from the declarations. One view emphasizes the unilateral nature of the optional clause system, while the other conceives the resultant relations as between states accepting the compulsory jurisdiction of the Court in a treaty-like relationship. As a third category of opinions one can mention those authors who are saying that the relation between states established by their declarations is a *sui generis* international engagement having bilateral and multilateral elements.[7]

Proponents of either the unilateral or the treaty-like nature cite various decisions of the two Courts, each of which undoubtedly contains a half phrase, isolated from its context, that may appear suitable to support one or the other point of view.

The problem of the optional clause is put by Anand in this way: "The question is whether such an 'international engagement' is constitutionally to be regarded as founded upon a unilateral legislative act done vis-à-vis the Court, or as founded upon a bilateral, consensual transaction effected by the joining together of the declarations of any given pair of states through the Optional Clause."[8]

The uncertainty of the views on the relations established using the basis of declarations of acceptance is well reflected in the separate opinion of Judge Sir Robert Jennings submitted in the case concerning *Military and Paramilitary Activities in and against Nicaragua*, „Obviously, the making of a declaration under the Optional Clause establishes some sort of relationship with other States that have made declarations; although it is not easy to say what kind of legal relationship it is."[9] According to the British judge, that relationship is created by a great variety of unilateral declarations, all having the common element of being made within the framework of Article 36. para. 2. of the Court's Statute. „The declarations are formal statements of intention; and statement of intention made in a quite formal way. Obviously, however, they do not amount to treaties or contracts; or at least, if one says they are treaties, or contracts, one immediately

[7] Cf. Szafarz, R.: *The Compulsory Jurisdiction of the International Court of Justice.* Martinus Nijhoff Publisers, Dordrecht/Boston/London, 1993. 80.
The author of the present article, as it will be explained latter on, do not think that this is a separate category of opinion.

[8] Anand: *op. cit.* 143.

[9] *ICJ Reports*, 1984. 547.

has to go on to say they are a special kind of treaty, or contract, partaking only of some of the rules normally applicable to such matters."[10]

In the beginning of the 1970's, Iglesias Buigues wrote that neither the views of legal scholars, nor the Courts rulings or the opinions submitted by the Court's members have taken a clear point of view on the legal status of the declarations of acceptance.[11] Nowadays it is difficult to agree with that statement, especially because, as it will be seen later, in the last years the Court unquestionably adopted a clear position on the legal character of the declarations and the system established by the declarations of acceptance.

II.

The view that a multilateral treaty-like relationship is established as between states accepting the optional clause is widely held in international legal literature. It should be added that, in this case, the contractual relationship has been formulated by several related instruments rather than by a single one. There is no doubt about the well known postulate of treaty law that a treaty can be embodied in two or more instruments.[12] Obviously, if it is seen as a contractual regime, the system of the optional clause is to be included in this category.

In the legal practice of the two International Courts, it is the *Electricity Company of Sofia and Bulgaria* case and the Case concerning the *Right of Passage over Indian Territory* that are usually relied upon for justifying the contractual character.

In the *Electricity Company of Sofia* case, the Permanent Court of International Justice referred to the date of the establishment of the *juridical bond* between two states, Belgium and Bulgaria, under Article 36 of the Statute.[13] In his separate opinion, Judge Anzilotti wrote: „As a result of these Declarations, an agreement came into existence between the two States accepting the compulsory jurisdiction of the Court, in conformity with Article 36 of the Statute and subject to the limitations and conditions resulting from the declarations...".[14]

[10] *Ibid.*

[11] Cf. Iglesias Buigues, J. L.: "Les déclarations d'acceptation de la juridiction obligatoire de la Cour internationale de Justice: Leur nature et leur interprétation." *Österreichische Zeitschrift für öffentliches Recht.* 1972. 257.

[12] Cf. Preamble of the Vienna Convention of 1969 on the Law of Treaties.

[13] PCIJ 1939 A/B No.77. In: Hudson, M. O.: *World Court Reports*; Vol. VI. Carnegie Endowment for International Peace, Washington, 1943. 408.

[14] *Ibid.* 412.

The other case, frequently mentioned in connection with the contractual character, concerns the *Right of Passage* case. However, this case, as will be treated at a later stage, can be invoked to bear out the contractual character just as it can be cited in support of the unilateral character. In this case, the International Court of Justice certainly had in mind some sort of a contractual relationship between states parties to the optional clause system, declaring that "The contractual relations between the Parties and the compulsory jurisdiction of the Court resulting therefrom are established '*ipso facto* and without special agreement', by the fact of the making of the Declaration".[15]

Statements about the contractual character of the system, established by declarations of acceptance, are also to be found in the separate or dissenting opinions submitted by members of the Court. Judge Anzilotti, answering the question whether the Iranian declaration of acceptance in the *Anglo-Iranian Oil Co.* case (which he calls, not incidentally, a declaration of "adherence") was unilateral or bilateral in character, Judge Alvarez writes: "the Declaration is a multilateral act of a special character; it is the basis of a treaty made by Iran with the States, which had already adhered and with those which would subsequently adhere to the provisions of Article 36. para. 2. of the Statute of the Court".[16]

Also, in his separate opinion given in the case of *Certain Norwegian Loans*, Sir Hersh Lauterpacht touches briefly on the legal character of the declarations of acceptance. What was stated by the Court regarding the unilateral nature of the declarations of acceptance in the *Anglo-Iranian Oil Co.* case is construed by Judge Lauterpacht to mean "no more than that the declaration is the result not of negotiations but of unilateral drafting. Whether it is a treaty or a unilateral declaration, it is—if it is to be treated as a legal text providing a basis for the jurisdiction of the Court – a manifestation of intention to create reciprocal rights and obligations."[17] Lauterpacht goes on to compare the optional clause to a multilateral treaty concluded under the auspices of the United Nations General Assembly, and he visualizes the declarations of acceptance as an accession to a multilateral treaty elaborated by the General Assembly.[18] In the *South West Africa* cases, Judges Sir Percy Spender and Sir Gerald Fitzmaurice in their joint dissenting opinion write that "The quasi-contractual character, which is 'optional clause' declarations made under paragraph 2 of Article 36 of the Statute are

[15] *ICJ Reports*, 1957. 146.
[16] *ICJ Reports*, 1952. 125.
[17] *ICJ Reports*, 1957. 49.
[18] *Ibid.*

sometimes said to posses, would arise solely from the multiplicity of these declarations and their interlocking character, which gives them a bilateral or multilateral aspect. A single declaration, if it stood alone, could not be an international *agreement.* "[19] Then, the two judges stress that declarations of acceptance can in no way be identified with a "treaty or convention", referred to in paragraph 1. Article 36 of the Statute as providing for the Court's jurisdiction.[20]

Again, in a separate opinion given in the *Nicaragua case*, Judge Mosler adverted essentially to the contractual character when he said that the basis of the operation of the Optional Clause is the consensual bond, and that comes into being at the time at which another State deposits its declaration.[21]

Several prominent writes on international law refer to treaty-like relations between states parties to the optional clause system. For instance, Hans Kelsen in his monumental work on the United Nations asserts that "The unilateral declaration of one state together with the unilateral declaration of another state constitute an agreement. This agreement, it is true, has not the character of a 'special agreement' within the meaning of the term used in Article 36. paragraph 1. But it is a general agreement in so far as the states by making the declaration referred to in Article 36. paragraph 2, in relation to one another, agree to recognize the jurisdiction of the Court in all legal disputes, in case one party brings the dispute before the Court. Hence the jurisdiction of the Court under Article 36. paragraph 2, is based on a general agreement of the parties to the dispute, just as under Article 36, paragraph 1, states by a treaty may assume the obligation to refer to the Court certain or all possible disputes which may arise between them."[22] The British Professor, Herbert Briggs, similarly argues for the contractual character, and, in a lecture delivered at the Hague Academy of International Law in the 1950s, he said: "A Declaration accepting the compulsory jurisdiction of the Court pursuant to Article 36. (2) of the Statute is not a contractual engagement undertaken by the declaring state with the Court. It is in the nature of a general offer, made by declaring to all other States accepting the same obligation, to recognize as Respondent the jurisdiction of the Court, subject to the limitations specified in the offer."[23] In the same lecture, Professor Briggs

[19] *ICJ Reports*, 1962. 476.

[20] *Ibid.*

[21] *ICJ Reports*, 1984. 466.

[22] Kelsen: *op. cit.* 521–522.

[23] Briggs, H. W.: „Reservations to the Acceptance of Compulsory Jurisdiction of the International Court of Justice." *Recueil des Cours*, 1958. 245.

also spoke about a "consensual bond accepting compulsory jurisdiction" existing between two declaring states.[24] In connection with the views propounding the contractual character, Iglesias Buigues writes that, in the opinion of most authors, declarations are unilateral acts, which nevertheless have contractual effects (*effects contractuels*) in the sense that declarations contain sufficient elements for them to produce effects of a contractual character, albeit they remain unilateral ones.[25] According to Iglesias Buigues, it is the parties' agreement on the Court's jurisdiction that forms the basis of the contractual relation. This is brought into being by the fact that the declarations of states are actually offers, made to each other and constituting a chain of offers and acceptances thereof, in the sense that when a state deposits its declaration with the Secretary-General it is accepting the offers of those states which have made declarations previously (namely the other states parties within the optional clause system) and is submitting, on its part, an offer to any state making a declaration subsequently.[26] According to the author, that offer can, at this point, be conceived of as being merely a general offer whose real content will be determined when the declarations are applied in a concrete case. The degree to which the declarations of two states overlap will become apparent in that event.[27]

The view that accession to the system of the optional clause is an offer and an acceptance of the earlier offers, is not foreign to the members of the Court either. That idea was expressed by Vice-President Badawi in his dissenting opinion in the Right of Passage in the 1950s, and it was formulated again more than four decades later by Vice-President Weeramantry in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*. In the *Right of Passage*, Judge Badawi says: "When article 36 of the Statute uses the words 'ipso facto and without special agreement', it stresses the conventional character of Declarations and it confirms that character by the expression 'in relation to any other State accepting the same obligation'". Some lines further he emphasizes the importance of the offers and the acceptances thereof of the declarations of acceptance by saying „But what creates the agreement here, as in every other meeting of wills, is always the basic idea of offer and acceptance. ... Translated into legal terminology, the system of Declarations constitutes a contract by correspondence between the declaring State and the other States through the agency of the Secretary-General as an intermediary who, in these cases, constitutes a stage in

[24] *Ibid.* 267.
[25] Iglesias Buigues: *op. cit.* 259.
[26] *Ibid.* 267.
[27] *Ibid.* 265. and cf. Briggs: *op. cit.* 267.

the transmission."[28] In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, Vice-President Weeramantry analyzed deeply the question of offers and acceptances and, comparing the national legislation of different states, came to the conclusion that *acceptance* of an offer was necessary for a contract to come into being and that a contract was made only if the offeror had been *notified* of the acceptance of his offer. In other words, in the case of mutual obligations created on the basis of Article 36. para. 2. of the Statute in respect to the Court's jurisdiction, the offeror must be informed of whether or not his offer has been accepted, for, failing acceptance of the offer, one cannot speak of agreement.[29] For that matter, some authors interpret the phrase in the Statute "*ipso facto* and without special agreement" in a way that is suggestive of the contractual character of the optional clause. This was indicated in Vice-President Weeramantry's dissenting opinion in the aforesaid *Land and Maritime Boundary* case; in it, Judge Weeramantry stated that "What Article 36, paragraph 2, provides is that where a declaration is filed, no special agreement is necessary, as the declaration has a compulsory force of its own."[30]

The contractual character is emphasized by Stanimir Alexandrov of Bulgaria and Renata Szafarz of Poland in the more recent literature on the subject. In support of the contractual character, Alexandrov refers to the origin of the optional clause and its treaty character, the UN Secretary-General's role in receiving and registering notices of declarations made under the optional clause, and the practice of states in the making their declarations.[31] According to Renata Szafarz, "...the legal system based on the optional clause is a sui generis or quasi-treaty (which is virtually the same thing) legal structure, which consists of contractual and unilateral elements, and which establishes a set of (at present) 1431 parallel bilateral relationships. Every relationship consists of contractual (both multilateral and bilateral) elements and a unilateral element. The provision contained in Article 36(2) of the ICJ Statute constitutes the multilateral element. Owing to the reciprocity principle reservations constitute the bilateral element. Non-symmetrical formal conditions contained in declarations constitute the unilateral element."[32]

[28] *ICJ Reports*, 1957. 154–155.

[29] Cf. *ICJ Reports*, 1998. 370–373.

[30] *ICJ Reports*, 1998. 366.

[31] Alexandrov, S. A.: *Reservations in Unilateral Declarations Accepting the Compulsory Jurisdiction of the International Court of Justice.* Martinus Nijhoff Publishers, Dordrecht–Boston–London. 1995. 12–13.

[32] Szafarz: *op. cit.* 81–82.

Edith Brown Weiss from the USA similarly argues for the contractual character.[33]

After emphasysing the contractual character of the optional clause system, Alexandrov describes certain specific features of the declarations of acceptance which are the following: the declarations are not treaty texts resulting from negotiations, unilateral declarations include an element of vulnerability and unpredictability, the mutual consent of the parties under the optional clause is determined on the basis of reciprocity, obligations assumed by declarations of acceptance arise only when a special dispute is submitted to the Court.[34]

With respect of the above mentioned characteristics, it is difficult to agree not only with Alexandrov's conclusion, but with the element vulnerability as well. He sees the elements of vulnerability and uncertainty in the fact that, as they involve *erga omnes* obligations, the declaring state runs the risk, as the Court found in the *Right of Passage* case, of being immediately sued by a newly declaring state.[35] The author exemplifies the elements of vulnerability and uncertainty by the *Nicaragua case*, claiming that in making its declaration accepting the Court's compulsory jurisdiction, the United States was not in a position to foresee that by the 1980s its relations with that small Central American State were to worsen so much as to cause Nicaragua to bring an action against it before the International Court of Justice. One can argue that the said element is in fact an attribute not only of the optional clause system. It may happen in the case of any treaty that relations between the contracting parties come to deteriorate markedly over time and that, in the space of perhaps a few years, let alone decades, the relationship of two states may undergo a change precluding any application of a treaty they signed earlier. A long list of examples could be cited of interstate relations to illustrate other similar situations. In practice, however, states take care of safeguarding their interests in a considerable part of related treaties, and if relations between the contracting parties come to deteriorate to the extent that the parties do not find it desirable to apply a treaty *inter se,* they usually take steps to denounce or terminate the treaty concerned. No such "judicious" steps will normally be taken in respect to declarations of acceptance, and it is not rare that, even when relations with a certain state or certain states tend to worsen, no steps are taken to avoid submission of a dispute to the Court, that is, the elimination of the practical application of the optional clause. What is more frequent, however, is that only when a question or a

[33] Brown Weiss: *op. cit.* 95–96.

[34] Cf. Alexandrov: *op. cit.* 13–16.

[35] Alexandrov: *op. cit.* 14.

complex of problems becomes "delicate" for a state, it resorts to modifying or denouncing its declaration of acceptance either in order to prevent certain delicate matters being brought before the Court or when the dispute is already before the Court it tries to hamper the Court's decision-making process. As an example one can refer to Iran, which in the United States *Diplomatic and Consular Staff in Teheran* case, after the indication of certain provisional measures by the Court's order of July 5th 1951, it terminated the 1933 declaration of acceptance of the Imperial Government of Persia. India did the same owing to the proceeding initiated by Portugal concerning the Right of Passage over Indian Territory. As it is well known, the Court in several cases dealt with the territory of South West Africa and, after the judgment of 1967, South Africa gave notice of the withdrawal and termination of its declaration of acceptance made in 1955.[36] In the 1970's, Australia and New Zealand submitted applications instituting proceedings against France in respect of the dispute concerning the holding of atmospheric tests of nuclear weapons in the Pacific Ocean, consequently, the French Government withdraw its declaration accepting the Court's compulsory jurisdiction.

This is what the United States practically did in the Nicaragua case with a notification on 6th April 1984 signed by the United States Secretary of State, Mr. George Schultz, by which the Washington Administration wanted to modify its declaration of acceptance.[37] The whole matter stirred up a storm because the United States was actually "late" taking that step and did amend its declaration after it had suspected or had learnt from some source that Nicaragua was to submit an application against the USA to the Court.[38] However, as is known, the Schultz-note became effective after half a year when the proceedings instituted

[36] *CIJ Annuaire* 1966–67. 44.

[37] On 6 April 1984 the Government of the United States of America deposited with the Secretary-General of the United Nations a notification, which, referring to the 1946 declaration of acceptance stated that:

„the aforesaid declaration shall not apply to disputes with any Central American State or arising out of or related to events in Central America, any of which disputes shall be settled in such manner as the parties to them may agree.

Notwithstanding the terms of the aforesaid declaration, this proviso shall take effect immediately and shall remain in force for two years, so as to foster the continuing regional dispute settlement process which seeks a negotiated solution to the interrelated political, economic and security problems of Central America."

[38] On 9 April 1984 the Republic of Nicaragua filed in the Registry of the Court an Application instituting proceedings against the United States in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua.

by Nicaragua were under way, owing to the reservation containing the 1946 US declaration of acceptance and expressed "to remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration".[39] Had the State Department of the United States acted in due course, that is, had it modified its declaration at an earlier stage of deterioration in its relations with Nicaragua, the legal dispute in reference would not have come before the International Court of Justice on the basis of the optional clause.

Moreover, the plea of deterioration in relations as an unforeseeable element in connection with declarations of acceptance is misleading for the added reason that such declarations relate to acceptance of the jurisdiction of an international judicial forum, which is clearly tantamount to states reckoning with the emergence of disputes and having in mind future recourse to the particular judicial forum for the purpose of achieving settlement of their disputes. Therefore, the element of uncertainty as a source of specific problems ensuing from deterioration of relations is hardly acceptable in the case of declarations of acceptance, for, by making such declarations, states count *a priori* on the emergence of disputes, which nevertheless entail, as it were, deterioration of relations between the parties. Of course, the picture varies from case to case with regards to the degree to which relations between the parties worsen before submitting their disputes to the Court. One can undoubtedly cite numerous examples from the practice of the International Court of Justice to demonstrate a spectacular worsening of relations between two states and instituting of proceedings before the Court under such circumstances; relevant instances are, among others, the *Right of Passage* case, the *Nicaragua* case and recently the cases brought by Yugoslavia, concerning the *Legality of the Use of Force*, against ten NATO states. Obviously, when a dispute between states is bought to Court on the basis of diplomatic protection accorded to natural or legal persons, the deterioration of relations is less spectacular than in the above mentioned cases.

From the foregoing it becomes clear that the conception of the system of the optional clause as a contractual relation based on unilateral declarations is a rather widespread approach. Incidentally, most of the quoted authors fail to provide a really incisive analysis of this question, confining themselves to summary statements instead. The related aspects are given fuller treatment by authors like Iglesias and Alexandrov.

[39] Cf. Reisman, M.: „Termination of the United States Declaration under article 36(2) of the Statute of the International Court." In: *The United States and the Compulsory Jurisdiction of the International Court of Justice*. University Press America Inc. Lanham. 1986. 71–103.

III.

The views emphasizing the unilateral character of the system of the optional clause likewise invoke various decisions of the two International Courts, such as those handed down in the *Phosphates in Morocco* case, the *Anglo-Iranian Oil Co.* case, the *Norwegian Loans* case, the *Nuclear Tests* case, the *Nicaragua* case and, among the latest disputes, the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* and the *Fisheries Jurisdiction* case between Spain and Canada.

In the *Phosphates in Morocco* case, the Permanent Court of International Justice found, in respect to the unilateral character of the declarations of acceptance that "The declaration, of which the ratification was deposited by the French Government on April 25th, 1931 is a unilateral act by which that Government accepted the Court's compulsory jurisdiction.[40]

In the *Anglo-Iranian Oil Co.* case, the International Court of Justice took a similarly clear stand, emphasizing that "... the text of the Iranian Declaration is not a treaty text resulting from negotiations between two or more States. It is the result of unilateral drafting by the Government of Iran, which appears to have shown a particular degree of caution when drafting the text of the declaration."[41] This is confirmed by Judge Hackworth's dissenting opinion in the same case (the Anglo-Iranian Oil Co. case) to the effect that "when a State has filed a declaration under the Optional Clause of Article 36 of the Statute accepting jurisdiction, it has performed a voluntary act. Is has voluntarily and unilaterally notified the world that it is prepared to submit certain classes of disputes to judicial examination by this Court."[42]

As often as not, the literature on the subject offers the comment that, in contrast to the process of treaty-making, no negotiations take place when declarations of acceptance are made and that the text by which a state recognizes the Court's compulsory jurisdiction is not a matter of negotiations.[43]

It is obvious that these statements were reflecting the unilateral character of the declarations and not the unilateral character of the optional clause system itself.

[40] Hudson, M. O.: *World Court Reports. op. cit.* Vol. IV. 321. (*Phosphates in Morocco* case, Judgement of June 14, 1938, PCIJ 1938, Series A/B, No.74. 10. and 23.)

[41] *ICJ Reports*, 1952. 105.

[42] *ICJ Reports*, 1952. 139–140.

[43] Rosenne, S.: *The Law and Practice of the International Court of Justice.* A. W. Sijthoff, Leyden. 1965. 371.

As mentioned earlier, the *Right of Passage* case can also be invoked in proof of the unilateral character of system of the optional clause. There is no doubt, that in the judgement delivered concerning the preliminary objections in this case, one can find statements of the Court that, as quoted previously, suggest the establishment of a *contractual relation* (*rapport contractuel*) between states parties of the optional clause system. However, regarding the process in which such a relation is established, the Court leaned to the unilateral character in rejecting India's second preliminary objection and pointed out that the only requirement for the validity of declarations of acceptance was that the parties should deposit them with the Secretary-General, there being no further obligation such as notification to the states parties to the Statute or lapse of a specified period of time after deposit.[44]

All this leads one to raise questions about whether the Court, in referring to contractual relations, really had in mind contractual relations between states parties within the optional clause system. If the Court had indeed conceived of the system of the optional clause as a contractual relation, it would have accepted the argument of the Indian Government that the declaration of acceptance not only had to be deposited with the Secretary-General, but the Secretary-General had to transmit copies thereof to the states parties to the Statute and that the declaration was not valid until the Secretary-General had fulfilled this obligation.[45] This contradiction gives rise to the question of what the Court really meant by the terms "contractual relation" (rapport contractuel) and "consensual bond" (lien consensuel).

In the *Nuclear Tests* case (Australia v. France), the Court, while recognizing the unilateral character of the declarations of acceptance, stressed that they may have the effect of creating legal obligations.[46] Ten years later in the Nicaragua case, the Court came to address rather extensively the legal character of the declarations of acceptance and the admissibility of formulating reservations to them, emphasizing: "Declarations of acceptance of the compulsory jurisdiction of the Court are facultative, unilateral engagements, that States are absolutely free to make or not to make. In making the declaration the State is equally free either to do so unconditionally and without limit of time for its duration, or to qualify it with conditions or reservations."[47] After a few lines, the Court went on to pronounce that „The coincidence or interrelation of those obligations thus remain in a state of flux until the moment of the filing of an application instituting proceedings. The Court has then to ascertain whether, at that moment, the two

[44] *ICJ Reports*, 1957. 147.
[45] Cf. *ICJ Reports*, 1957. 146, 154–163, 166–180.
[46] *ICJ Reports*, 1974. 267.
[47] *ICJ Reports*, 1984. 418.

States accepted 'the same obligation' in relation to the subject-matter of the proceedings...".[48] This quotation is a quite clear indication that in the Court's interpretation the states parties to the system of the optional clause undertake, by accession to the clause, a unilateral obligation, which will create a bilateral legal relationship at a later stage. This is activated when concrete disputes are referred to the Court, and the content of such legal relationship is clearly determined by the conditions, reservations and other limitations, which the parties may have formulated in their respective declarations.

The question concerning the legal character of system of declarations of acceptance has lately been addressed in more depth by the International Court of Justice in two cases, notably the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* and the *Fisheries Jurisdiction* case. In both cases the problem of the legal character of the system of the optional clause arose by the question whether the Vienna Convention on the Law of Treaties is applicable to the declarations of acceptance.

In the *Land and Maritime Boundary* case, Nigeria as defendant submitted eight preliminary objections, with the first one affecting the legal nature of the system of declarations. In that objection, Nigeria contended that Cameroon had accepted the Court's compulsory jurisdiction on 3 March 1994 and that the United Nations Secretary-General had transmitted the Cameroon declaration to the parties to the Statute eleven-and-a-half months later. Nigeria maintained, accordingly, that when Cameroon filed the application on 29 March 1994, Nigeria did not know nor was in a position to know that Cameroon had acceded to the optional clause system. Hence, so the Nigerian argument went, Cameroon had "acted prematurely" and had breached its obligation to act in good faith had "abused the system instituted by Article 36, paragraph 2, of the Statute" and had disregarded "the condition of reciprocity". In contrast Cameroon referred to the *Right of Passage* case where the Court held that "the Statute does not prescribe any interval between the deposit by a State of its Declaration of Acceptance and the filing of an Application by that State."[49] Nigeria argued that the judgment in the *Right of Passage* case is an isolated one, and the interpretation given in 1957 to Article 36, paragraph 4, should be reconsidered in the light of the evolution of the law of treaties which has occurred since, and with special regard to Article 78(c) of the 1969 Vienna Convention on the Law of Treaties.[50]

[48] *ICJ Reports*, 1984. 420–421.
[49] *ICJ Reports*, 1998. 290.
[50] *ICJ Reports*, 1998. 290. and 293.

The Court, for its part, upheld its ruling in the *Right of Passage* case and reiterated its statement that the declaring state need not deal with the Secretary-General's functions or with his fulfillment or non-fulfillment thereof, "The legal effect of a Declaration does not depend upon subsequent action or inaction of the Secretary-General. Moreover, unlike some other instruments, Article 36 provides for no additional requirement, for instance, that the information transmitted by the Secretary-General must reach the Parties to the Statute, or that some period must elapse subsequent to the deposit of the Declaration before it can become effective.[51] The Court stated that its decision in the *Right of Passage* case, in contrast to what Nigeria contended, could not be considered an isolated one and that, for its part, it had confirmed it in the case concerning *Temple of Preah Vihear*[52] and in the case concerning *Military and Paramilitary Activities in and against Nicaragua*.[53] The reference to Vienna Convention on the Law of Treaties is not relevant since the International Law Commission in its final draft in connection with the deposit of instruments of ratification, acceptance, approval of treaties turned to the judgment of the Court in the Right of Passage case (Preliminary Objections) in which the Court in the analogous situation held that the deposit itself of instruments of acceptance of the optional clause establishes the legal nexus with other states parties to the system of the optional clause.[54]

With regard to the system of the optional clause, the Court pointed out the following: "Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance the consensual bond is established and no further condition needs to be fulfilled."[55] Thereupon ensues the situation, which the Court described in 1957 as one whereby "every State which makes a Declaration of Acceptance must be deemed to take into account the possibility that, under the Statute, it may at any time find itself subjected to the obligations of the Optional Clause in relation to a new Signatory

[51] *ICJ Reports*, 1998. 146–147.

[52] *ICJ Reports*, 1961. 31.

[53] *ICJ Reports*, 1984. 420.

[54] Cf. *The Vienna Convention on the Law of Treaties. Travaux Préparatoires.* (Ed. Dietrich Rauschning) Afred Metzner Verlag GmbH. Frankfurt am Main. 1978. 159.

[55] *ICJ Reports*, 1998. 291.

as the result of the deposit by that Signatory of a Declaration of Acceptance."[56] This notwithstanding, the Court unequivocally ruled out the requirement to give any notice to the state making an offer. That was reflected in its finding that "There is no specific obligation in international law for States to inform other States parties to the Statute that they intend to subscribe or have subscribed to the Optional Clause."[57]

In their dissenting opinions appended to the judgement, several judges expressed the view that the Court should revise its findings in the *Right of Passage* case. That view was shared by Vice-President Weeramantry[58] and Judges Koroma and Ajibola, who, in their respective dissents, similarly stressed that it was time to reappraise the relevant provision of the Statute and the Court's findings in the *Right of Passage* case.

In connection with the legal character of the optional clause, Judge Koroma writes that declarations made under the clause cannot be deemed to be contracts, which does not mean, however, that the relationships thus established by them exhibit no peculiarities of contractual relations and that in certain contexts the rules governing contractual relations equally apply to declarations made under the optional clause. According to Judge Koroma, a so-called consensual link between states concerning the Court's jurisdiction comes into being on the basis of declarations of acceptance only after the Secretary-General has transmitted such declarations to the states parties to the Statute. Declarations do not by themselves substantiate the Court's jurisdiction until their transmission by the Secretary-General to the other states parties to the optional clause system, and publication of declarations in the Journal of the United Nations cannot replace the statutory duty of the Secretary-General's under Article 36, para. 4, of the Statute.[59]

Thus, in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the International Court of Justice upheld its position stated in its earlier decisions, although, as has been mentioned, Nigeria tried to achieve a revision of certain findings of the *Right of Passage* case. It should be noted that such efforts of the Nigerian Government revealed no small measure of naivety, for if the Court had accepted the position that the declarations of acceptance become effective, not on the deposit thereof with the Secretary-General, but after "a reasonable time" from that date, and should such reasonable

[56] *ICJ Reports*, 1957. 146.
[57] *ICJ Reports*, 1998. 297.
[58] Cf. *ICJ Reports*, 1998. 363.
[59] Cf. *ICJ Reports*, 1998, 386.

time be somehow related to the date of the transmission of declarations to the states parties to the Statute, the question arises of exactly how much time is to be regarded as "reasonable". One thing is sure, namely that the period of eleven and a half months, which elapsed from the deposit of Cameroon's declaration of acceptance with the Secretary-General's Office to the transmission thereof to the states parties to the Statute, exceeds any reasonable length of time. The conclusion to emerge from this could easily have been that the Secretary-General's Office wasted quite some time in transmitting Cameroon's declaration, a reason that might give rise to questions about whether the legal relationship concerning the Court's compulsory jurisdiction under the optional clause did exist at the time Cameroon filed its application. Obviously, in the interest of preserving the prestige of the World Organization, the Court could in no way have come to such a conclusion, so the Court could be expected to maintain its view formulated in its earlier judgements, namely that the effect of declarations of acceptance is not conditional on their transmission by the Secretary-General to the states parties to the Statute.

The legal character of the system of declarations of acceptance in the *Fisheries Jurisdiction* case involved a difference of views between Spain and Canada about the rules on the interpretation of reservations made to declarations acceptance.[60]

Spain held that interpretation of reservations to declarations of acceptance is subject to the law of treaties, whereas Canada emphasized the unilateral nature of declarations and reservations and contended that the reservations should be interpreted in a natural way, with particular regard for the intention of the reserving state.[61]

For its part, the Court came out once again in favor of the unilateral nature of declarations when it explained that such acceptance is a unilateral act of state sovereignty regardless of whether or not special limitations are placed on acceptance, and then it reiterated its finding in the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria* half a year earlier. Concerning the interpretation of declarations of acceptance, the Court held that the rules on interpretation of declarations are not identical with those established for the interpretation of treaties by the Vienna Convention on the Law of Treaties, and that those provisions of the Convention may by analogy be applied only to the extent

[60] Canada, the respondent state, challenged the Court's jurisdiction on the basis of the terms of the reservation in para. 2 (d) of the Canadian declaration of 10 May 1994. Spain contended that the Canadian reservation was invalid or inoperative by reason of incompatibility with the Court's Statute, the Charter of the United Nations and with international law.

[61] *ICJ Reports*, 1998. 452.

compatible with the *sui generis* nature of a unilateral acceptance of the Court's jurisdiction.[62]

The unilateral character of declarations was reaffirmed in a separate opinion appended to the judgement by Judge Oda, who wrote: "It is clear, given the basic principle that the Court's jurisdiction is based on the consent of sovereign States, that a declaration to accept the compulsory jurisdiction of the Court under Article 36, paragraph 2. of the Statute, and any reservation attached thereto, must because of the declaration's unilateral character, be interpreted not only in a natural way and in context, but also with particular regard for the intention of the declaring State. Any interpretation of the respondent State's declaration against the intention of that State will contradict the very nature of the Court's jurisdiction, because the declaration is an instrument drafted unilaterally."[63]

Most recently, the International Court of Justice has again been confronted with a situation similar to that which Portugal created in the 1950s and which brought into the limelight the *Right of Passage* case, namely that a state filed an application with the Court a few days after its declaration accepting the Court's compulsory jurisdiction had been deposited. That situation emerged in spring of 1999, when during the air strikes by NATO forces, on 25 April 1999, Yugoslavia deposited its declaration accepting the Court's compulsory jurisdiction and then, four days later, on 29 April, it instituted proceedings before the Court against ten NATO member states separately, "for violation of the obligation not to use of force", and accused these states of bombing Yugoslav territory.[64] In the case of six states (Belgium, Canada, Netherlands, Portugal, Spain, and United Kingdom), the Belgrade Government based the Court's jurisdiction on the optional clause in addition to the Genocide Convention and, in the case of some states, on other treaties in force between the parties, e.g. in the case of Belgium Yugoslavia invoked, as an additional ground of jurisdiction, Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia, signed in Belgrade on 25 March 1930.

Simultaneously with the application, Yugoslavia submitted requests for indication of provisional measures, asking the Court to order the ten NATO states to "cease immediately its acts of use of force" and to "refrain from any act of threat or use of force against Yugoslavia". By Orders of 2 June 1999, the International Court of Justice rejected the Yugoslav request for indication of provisional

[62] *ICJ Reports*, 1998. 453.

[63] *ICJ Reports*, 1998. 479.

[64] For NATO's military actions in Kosovo, see „Editorial Comments: NATO's Kosovo Intervention" *American Journal of International Law*. 1999. No.4. 824–862.

measures. The Court in the cases of two states, the United States and Spain, found that it "manifestly lacks of jurisdiction to entertain Yugoslavia's application" and that "it cannot therefore indicate any provisional measures"[65] while in respect of the remaining eight states, including those that are parties to the optional clause system, it adopted the position that is was *prima faciae* without jurisdiction.[66] In the cases whereby Yugoslavia invoked the optional clause beside the Genocide Convention as a basis for the Court's jurisdiction, the Court based its conclusions on a reservation of the Yugoslav declaration of acceptance on 25 April 1999, limiting the Court's compulsory jurisdiction to "disputes arising or which may arise after the signature of the present Declaration, with regard to situations or facts subsequent to this signature." According to the Court, the legal dispute arose between Yugoslavia and the NATO respondent states well before 25 April 1999, the date when Yugoslavia accepted the Court's compulsory jurisdiction.[67]

As for the Court's decisions, of greatest interest to our subject is the fact that, in dismissing the Yugoslav request for the indication of provisional measures, the Court did not even touch on the question that Yugoslavia had recognized the Court's compulsory jurisdiction only a few days before the filing of applications. Considering the political background to this case, we think that if the Court had wished to depart in the slightest degree from its position as stated in

[65] See the Orders of 2 June 1999 in cases concerning the Legality of the Use of Force (Yugoslavia v. United States and Yugoslavia v. Spain). *International Legal Materials*, 1999. 1149–1166 and 1188–1203.

In the case of Yugoslavia v. the United States, the Court based its conclusion on a reservation made by the United States to the Genocide Convention which provides that, with reference to Article IX., before any dispute to which the United States is a party may be submitted to the jurisdiction of the Court, "the specific consent of the United States is required in each case".

Spain, too, upon accession to the Genocide Convention made a reservation "in respect of the whole Article IX." and that reservation was not objected by Yugoslavia. Moreover, the Spanish declaration of acceptance contains a reservation aimed at preventing "surprise" applications, asserting that the Court's compulsory jurisdiction did not apply to states filing an application with the Court within 12 months from the deposit of their declaration of acceptance.

[66] See *International Legal Materials*, 1999. 950–1058 and 1101–1148.

[67] The Court held this view, practically in the same wording, in the Yugoslavia v. Belgium, Yugoslavia v. Netherlands, Yugoslavia v. Canada, and Yugoslavia v. Portugal cases. In the case of the United Kingdom, the Court furthermore invoked the limitation aimed at preventing "surprise" applications, but it did not deal with the reservation to the British declaration to the effect of excluding from compulsory jurisdiction any disputes with those states, which had made declarations accepting the compulsory jurisdiction for the very purpose of submitting a particular dispute to the Court.

the *Right of Passage* case, the NATO's air strikes case would have provided a good opportunity for the Court to break away from its earlier findings. In all likelihood, the international community would have approved of the Court's finding that the matter of whether Yugoslavia was a party to the system of the optional clause at the time of filing the applications was under serious question, since it had deposited its declaration of acceptance only a few days before. However, the Court did not consider that aspect, taking it for granted that Yugoslavia was a party to the system of the optional clause, and in five cases–Yugoslavia v. Belgium, Yugoslavia v. Netherlands, Yugoslavia v. Canada, Yugoslavia v. Portugal, and Yugoslavia v. United Kingdom–it gave judgement on the basis of a *ratione temporis* reservation to the Yugoslav declaration, which excluded the retroactive effect of the declaration, without ascertaining the validity of the declaration itself.[68] This course taken by the Court reminds us in many respects of what happened in the *Norwegian Loans* case, in which the Court similarly gave judgement on the basis of a reservation, the validity of which was strongly questionable.[69]

As it was mentioned before there is a third category of opinions saying that the relations established by the declarations of acceptance is a *sui generis* system having multilateral and bilateral elements.[70] In that concept the Statute is the multilateral element and the declarations are the bilateral. That approach is rather misleading especially because the Statute itself (although it is the bases of the unilateral declarations of acceptance) is not comprised in the system established by the declarations accepting the compulsory jurisdiction of the Court.

IV.

The foregoing goes to show clearly that, in the view of the International Court of Justice, declarations of acceptance are unilateral acts and that the system constituted by them cannot be regarded as relations of a contractual nature. The question arises (all the more so, since several authors of the pertinent literature

[68] In the *Legality of the Use of Force* cases, several respondent states argue that since Yugoslavia was not a member state of the United Nations pursuant to the General Assembly resolution 47/1 of 22 September 1992 adopted on the recommendation of the Security Council, it could not, in spring of 1999, make a declaration accepting the Court's compulsory jurisdiction either. This question was treated in the opinions of several members of the Court.

[69] *ICJ Reports*, 1957. 66.

[70] Cf. Szafarz: *op. cit.* 80.

consider the system of the optional clause to be a contractual one) as to the aspects in which this system differs from treaty based relations between states.

To answer this question, we should like to subject to scrutiny two peculiarities of the optional clause system, notably the practice of states in making, terminating or withdrawing declarations of acceptance and the Court's reactions on the one hand, and the states' practice in making reservations to declarations of acceptance and formulating objections to reservations, on the other.

1) The legal character of the system of the optional clause is shown by the existing practice adopted by states in making, terminating or withdrawing declarations as well as by the Court's attitude on them.

As is known, both the Statute and the Court's Rules of Procedure are silent on the termination of declarations of acceptance and how states parties to the optional clause system can get rid of their obligations concerning the Court's compulsory jurisdiction, that is, it is entirely left to the decision of the declaring state how and under what conditions to break free from the "bonds" of the clause. Several states have certainly included in their declarations various provisions on termination, denunciation or withdrawal, but not a single reference to them is to be found in a no negligible part of the declarations of acceptance. It should be noted that in a considerable part of declarations not even such provisions imply any real restriction, for what the declaring states do is no more than reserve the right to denounce their respective declarations with immediate effect. States have in practice availed themselves of this possibility and have often modified or denounced their declarations of acceptance. In fact, the Court itself has never taken a definite stand on this matter, and all it did in the *Nicaragua* case was to confine itself to spelling out that "...the right to termination of declarations with indefinite duration is far from established. It appears from the requirement of good faith that they should be treated, by analogy, according to the law of treaties, which requires a reasonable time for withdrawal from or termination of treaties that contain no provision regarding the duration of their validity."[71] For all these reasons it would be difficult to term this system of commitments undertaken on the basis of the optional clause as being of a contractual character, one that a state may freely choose to leave at any time. The same point was made by Judge Oda in his separate opinion submitted in the *Nicaragua* case when he stated that "For a treaty containing such a clause containing conferring a unilateral right entirely to alter or terminate terms of the treaty with immediate effect would surely be impossible: it would not be treaty.

[71] *ICJ Reports*, 1984. 420.

Yet this is now almost normal practice in declarations of acceptance of the Optional Clause."[72]

True, there exist quite a few known declarations which contain provisions on certain time-limits, periods of notice, etc, on the termination or denunciation of the instruments, but it should be stressed that it is left in every case to the declaring state to decide whether or not to include such provisions in its declaration. Should a state choose to subject termination of its declaration to certain conditions, e. g. a period of notice, its act amounts to nothing else than *self-limitation of its own will.* This is well illustrated by the 1946 US declaration of acceptance, which contains the clause that to "remain in force for a period of five years and thereafter until the expiration of six months after notice may be given to terminate this declaration." In the Nicaragua case the Court held that the clause of the six months' notice was freely and by its own choice added to the US declaration of acceptance and that was a formal condition concerning the creation, duration and extinction of the US declaration of acceptance. "The notion of reciprocity is concerned with the scope and substance of the commitments entered into, including reservations, and not with the formal conditions of their creation, duration or extinction. It appears clearly that reciprocity cannot be invoked in order to excuse departure from the terms of a State's own declaration, whatever its scope, limitations or conditions."[73]

In other words, a state may not invoke reciprocity to depart from the provisions on the formal conditions, entry into force, duration or extinction of its own declaration of acceptance. By this ruling, the Court clearly confirmed the tenet that the States are free in formulating all the conditions of validity, termination etc of their declarations of acceptance. If, however, a declaring state has, of its own will, incorporated any limitation in its declaration of acceptance it will be bound by them.

In contrast to the foregoing, the entry into force of treaties, the conditions for their denunciation or termination are subject to the agreement of the contracting states determined in the course of the elaboration of the treaties, or, failing relevant provisions or agreement, the general rules of international law will apply, meaning that the said matters are in reality determined by the members of the international community and are governed by the rules of customary or treaty law.[74] In the case of the optional clause, as is indicated by what has gone

[72] *ICJ Reports*, 1984. 510.

[73] *ICJ Reports*, 1984. 419.

[74] Cf. especially Articles 24, 54 and 56 of the 1969 Vienna Convention on the Law of Treaties.

before; all these matters are for the declaring state to decide, the decision not to be restricted in any way by the will of other states or any rule of international law.

2) The differences between relationships established under the optional clause and the treaty like relations can be disclosed in respect of both reservations to declarations acceptance and objections to reservations. It should be observed that the whole plethora of questions concerning reservations to declarations of acceptance goes far beyond the scope of the present study and therefore only a few aspects thereof will be discussed.[75]

A) Reservations to or limitations on declarations of acceptance differ from reservations made to treaties primarily in that, as mentioned above, in the case of declarations there is no agreed text elaborated by the parties, from which a state making a reservation decides to depart, i.e. modifing the terms of the treaty as adopted. That was expressed by the Court in the *Fisheries Jurisdiction* case by saying: "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court."[76] So what we have here is not exclusion or modification of a right or an obligation included in an agreed text reflecting the common will of the contracting parties, and the reservation is not subject to the consent of the other parties to the treaty.[77] As is shown by eight decades of practice, states are completely free to make reservations under the optional clause and have a discretion as to both the obligations they undertake in their declarations of acceptance and the conditions under which they do so (i.e. which disputes, relevant states and period of time they accept the compulsory jurisdiction of the Court). For declarations of

[75] The present study is not concerned with the admissibility of reservations to declarations of acceptance, the compability of reservations with the object and purpose of the optional clause, and other important issues.

[76] *ICJ Reports*, 1998. 453.

[77] We refer in this context to both acceptance of reservations and eventual objections to reservations.

At first sight one might even raise the point, particularly if one is not fully aware of the distinctive features of the system of the optional clause, whether Article 36. paras. 2. and 3. of the Statute, that is the optional clause itself, can be deemed to be a "basic text" of some sort open to exclusion, modification etc. by states in making reservations to declarations of acceptance. Such an approach is by all means mistaken. As a contractual text mutually accepted by the contracting parties, from which a state may depart by making a reservation to it, Article 36, paras. 2. and 3., of the Statute could be taken into consideration if the Statute provided for the Court's compulsory jurisdiction, which states might choose to "contract out" from.

acceptance there are no rules whatever to prescribe any sort of uniformity or similarity of content in any aspect. This was expressed by the Court in the *Fisheries Jurisdiction* case (Spain v. Canada), by stating that "Conditions or reservations thus do not by their terms derogate from a wider acceptance already given. Rather, they operate to define the parameters of the State's acceptance of the compulsory jurisdiction of the Court."[78]

B) The effect of reservations to declarations of acceptance are always restrictive in nature. It is a declaration of acceptance without any reservation or limitation that represents the broadest scope of commitment concerning the Court's compulsory jurisdiction, and it is by such a declaration of acceptance that a state recognizes the Court's compulsory jurisdiction—without any limitation, whether *ratione materiae* or *ratione personae* or *ratione temporis*—in all disputes covered by para. 2, subparas. a) to d), of Article 36 of the Statue. In the case of a reservation to a treaty, it can happen that the reservation modifying or excluding a provision of a treaty will actually result, for the reserving state, in a right or perhaps an obligation broader in scope than that originally embodied in the treaty.

3) Reservations to declarations of acceptance contain much more elements of uncertainty than do reservations made to treaties.

Given the principle of reciprocity, which can be deemed to be the basic element of the entire system of compulsory jurisdiction, reservations to declarations of acceptance serve to modify the obligations and rights not only of the declaring state, but, in theory, also of the rest of states parties to the optional clause system whenever a state party to the system submits to the Court a dispute with a state, which made the particular reservation or limitation. The principle of reciprocity means that the reservation or limitation made by the applicant state can be relied upon against it by the respondent state and visa versa. All this carries in it the element of uncertainty that not a single party to the optional clause system is in a position to know whether, in a future concrete dispute, it may get advantage or disadvantage from a reservation or limitation to the declaration of another state party to the system. This possibility is undoubtedly not foreign to treaty law either. Thus, in the case of declarations of acceptance, reservations or limitations offer a possibility for exclusion with respect to practically unforeseen, or very much foreseen, disputes, with the eventual benefits or disbenefits of that possibility, both to the state making a reservation or posing a limitation and to the state or states as adverse litigants (s) in a concrete case, being subject to change depending on the subject-matter of a particular dispute. One can state that it is not

[78] *ICJ Reports*, 1998. 453.

so far from the truth in supposing that also lying behind the rather rare practice of raising objections to reservations or limitations by states parties to the system of the optional clause is perhaps the fact that preclusion of certain issues or of disputes relating to a certain period from compulsory jurisdiction meets with approval by other states parties to the system. Of course, all this is very difficult to exemplify, but it can easily be supposed that, for instance, reservations excluding disputes connected with certain armed conflicts can be placed in this category and that preclusion of such disputes from submission to the Court meets with the approval of all states involved in a particular armed conflict.

Numerous instances could be cited of a reservation or limitation by a party to the system of compulsory jurisdiction being subsequently "advantageous" or "disadvantageous" to the rest of states parties to the system. In fact, as for when the reservation or limitation made in a declaration will result in advantage or disadvantage to another party of the system is likely to vary from case to case. The latter case is met with whenever the Court admits the respondent state's preliminary objection based on a reservation contained in the applicant state's declaration of acceptance. This can be instanced by, *inter alia*, the case of *Certain Norwegian Loans*, in which Norway, as the respondent state in the preliminary objections relied upon a reservation placed by France upon its undertakings. In that case, the Court stated: "In accordance with the condition of reciprocity, ... Norway, equally with France, is entitled to except from the compulsory jurisdiction of the Court disputes understood by Norway to be essentially within its national jurisdiction."[79] Thus, the Court admitted Norway's objection and ruled that it was without jurisdiction to pronounce upon the merits of case.[80]

V.

What has been discussed previously permits the following summary of conclusions.

Declarations of acceptance are unilateral acts interconnected by Article 36 of the Statute and allowed by the provisions thereof to grow into a system of rights and obligations. Under specified conditions, the declarations set up consensual link between states[81] that are parties to the system, which concerns

[79] *ICJ Reports*, 1957. 24.

[80] See Judgment of July 6th, 1957. Certain Norwegian Loans. *ICJ Reports*, 1957. 9–28.

[81] Cf. Waldock, C. H. M.: "Decline of the Optional Clause". *British Yearbook of International Law*, 1955–56. 263.

acceptance of the Court's compulsory jurisdiction. It should be stressed, however, that the *mutual rights and obligations* created by that link *remain suspended until the submission of a concrete dispute to the Court.* Until an application is filed in a concrete dispute, the mutual rights and obligations of states parties to the optional clause system mean nothing more than that these states being *qualified for lawfully filing applications with the Court.* In other words, the legal possibility exists of litigation between them before the Court. As can be seen, this is only a possibility for establishment of bilateral relations, a possibility which, in fact, depends on becoming a reality through the overlapping of declarations of acceptance of the states that are parties to the given case.

The specific feature of the optional clause system is evidenced more clearly by the fact that it is not impossible in principle for the declarations of two states to be prevented by different reservations and limitations, from overlapping at all, so that the declarations virtually "walk past each other", coexisting without the two states being bound by any concrete bilateral relationship. Where declarations overlap, the date of filing an application can be seen as a kind of critical point. The Court examines, during the proceedings, the existence of its jurisdiction with an eye to that point of time. This was manifested in the *Nottebohm* case, in which the Court ruled that once the Court had been approached in the prescribed manner, it must exercise its powers conferred by the Statute. "An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established."[82] The Court adhered to this principle in the *Nicaragua* case as well, when it continued the proceedings after the expiration of the six-month period as specified in the American declaration of acceptance, thereby giving effect to the modification of its declaration by the Note of 6 April 1984, which excluded the Court's compulsory jurisdiction in its disputes with any Central American state or arising out of or related to events in Central America.

The unilateral nature of declarations of acceptance or the system established by them is evidenced by the practice of making, terminating and modifying declarations as well as by the legal practice of the Court in respect of reservations made to declarations of acceptance and of objections raised to reservations.

[82] *ICJ Reports*, 1953. 123.

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The Dayton Peace Agreement and Human Rights in Bosnia and Herzegovina

Abstract. The article provides a short insight into the functioning of one of the most interesting institutions established by the Dayton Peace Agreement, that is the protecting machinery of human rights. It examines why and how the Agreement on Human Rights has been adopted within the Dayton structures, reflects on the role of the established quasi international organs within the Bosnian legal system. It pays special attention to the competence and practice of the Human Rights Chamber, which is the highest judicial body in the country protecting human rights.

Keywords: Dayton Peace Agreement, Human Rights Chamber of Bosnia and Herzegovina

Introduction

The General Framework Agreement for Peace in Bosnia and Herzegovina, usually referred to as the Dayton Peace Agreement has not only put an end to one of the bloodiest conflict in the Balkans but created the state of Bosnia and Herzegovina as a new international legal entity. This Agreement in fact is a new type of modern international agreements, which not only creates a state but provides for a radically new mode of institutional state-building process based on an international treaty. At the very heart of this Agreement lies the state-building agenda, the constitution itself of the new state forms an integral part of the Agreement (see Annex IV of the Agreement). In the history one can hardly find such a bizarre situation, when an international legal instrument intrudes so deeply into the process of state-building agenda, imposes so detailed internal rules on the structure and institutions of an emerging state.

The Dayton Peace Agreement was initialled on 21 November 1995 in Dayton (USA) and signed in Paris on 14 December 1995 by the representatives of the Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic

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of Yugoslavia. The signing of the Agreement was witnessed by the representatives of the European Union, French Republic, Federal Republic of Germany, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America. The instrument in fact is the result of the USA involvement into the recent peace-making efforts in the Balkans: following the failure of different EC and UN sponsored negotiations over the issues of former Yugoslavia (including Bosnia) between 1992–1995, in July 1995 the USA assumed a leading role and within a short period of time forced the parties in the conflict to sign the Peace Agreement, which is a rather complex legal document. It contains 12 separate annexes, several side-letters and different concluding statements.[1]

The Agreement established a vast network of international commitments of different nature, involving individual states of the Balkans, entities of Bosnia and Herzegovina and international institutions. Apart from the three Balkan states directly involved into the conflict (Republic of Bosnia and Herzegovina, Republic of Croatia and the Federal Republic of Yugoslavia) the two entities of the newly emerging state, that is the Federation of Bosnia and Herzegovina and the Republika Srpska have also accepted binding commitments on the basis of the provisions of the Agreement.[2] In addition to all these, a great number of international organisations (different UN institutions, NATO, OSCE, Council of Europe) received special mandate under the Agreement and its annexes.

The system of documents called as the Dayton Peace Agreement consists of the followings:

1) The General Framework Agreement for Peace in Bosnia and Herzegovina (which for the most part contains articles on the approval of the listed annexes)
2) Annex 1/A — Agreement on Military Aspects of the Peace Settlement
3) Annex 1/B — Agreement on Regional Stabilisation
4) Annex 2 — Agreement on Inter-. Entity Boundary Line
5) Annex 3 — Agreement on Elections
6) Annex 4 — Constitution of Bosnia and Herzegovina
7) Annex 5 — Agreement on Arbitration
8) Annex 6 — Agreement on Human Rights
9) Annex 7 — Agreement on Refugees and Displaced Persons

[1] The text of the documents adopted at the Dayton conference see in International Legal Materials, Vol. 35. 1996.

[2] Thus for example, in almost all of Annexes adopted to the Agreement the Federation of Bosnia and Herzegovina and the Republika Srpska are signatory parties.

10) Annex 8 – Agreement on Commission to Preserve National Monuments
11) Annex 9 – Agreement on Establishment of Bosnia and Herzegovina Public Corporations
12) Annex 10 – Agreement on Civilian Implementation of the Peace ettlement
13) Annex 11 – Agreement on International Police Force.

It is not easy to summarise the extremely complex legal and institutional innovations introduced by the Agreement. On the one hand, it produced some immediate positive results in the region by ending the military conflict, stopping the atrocities and upholding the independence of Bosnia and Herzegovina. On the other hand, its long term aims related to the institutional compromises raise many questions and seems to be far from being perfect and long-lasting. Hereby I would like to point out only some of the most interesting institutional innovations.

Firstly, as a result of the Agreement the name of the state has been changed, the term "Republic of Bosnia and Herzegovina"(which was in use from 6 April 1992 when Bosnia became an independent state; before 6 April 1992 the term "Socialist Republic of Bosnia and Herzegovina" was in use) was dropped and the official name of the newly emerging state has become "Bosnia and Herzegovina".[3] But it was not just a simple change of names, because the internal structure of this state has been modified also. The new State of Bosnia and Herzegovina has become a complex state consisting of two units, that is the Federation of Bosnia and Herzegovina and the Republika Srpska. These units are being referred to in the provisions of the Agreement as entities. The establishment of these units was in fact a recognition of the actual situation in the country, which at the beginning of the 1990s lost practically its integrity due to the creation of different self-proclaimed independent territories. On 7 April 1992 the new "Serb Republic of Bosnia and Herzegovina" was proclaimed at Pale, a small village outside Sarajevo. On 8 April 1992 the Croatian Defence Council was formed and on 3 July 1992 the "Croatian Community of Herceg-Bosna" was established. The Federation of Bosnia and Herzegovina is a result of some latest events. It was established by the Washington Agreement of 1 March 1994 signed by Haris Silajdžic and Mate Granic with the aim of putting an end to the Croat-Muslim conflict and detaining the Serb Republic expansion in Bosnia by establishing a

[3] See Article 1 (§ 1) of the Constitution of Bosnia and Herzegovina.

Croat-Muslim Federation.[4] The Dayton Peace Agreement in fact sanctioned these earlier developments, legitimised the accords reached in Washington and recognised the de facto events related to the Serb Republic. The only exception is the issue of the Herceg-Bosna Community or Republic: it is not mentioned in the Dayton Agreement because it is considered to cease to exist legally after the entering into force of the Washington Agreement.

Secondly, The Dayton Peace Agreement is based on the idea of recognising and maintaining Bosnia as a multi-ethnic state. Considering the historical development of the country there was in principle no other option left for the peace-makers. The population of this small country has always been mixed, consisting basically from three dominant nationalities, that is Muslims (Bosniacs), Serbs and Croats. At the beginning of the 1990s the population of the country included 44% Muslims, 33% percent Serbs and 17% Croats. The Agreement recognised the earlier notion (used also by the Tito regime) of the constituent peoples: the new Constitution of the State states that Bosniacs, Croats and Serbs are constituent peoples and citizens of Bosnia and Herzegovina.[5] The idea of multi-ethnicity has received a very clear recognition in the structure of the main state institutions. Both of the two Houses of the Parliamentary Assembly are structured on this idea: the House of Peoples comprises 15 delegates, two-thirds from the Federation and one-third from Republika Srpska, and the House of Representatives consists of 42 members, two-thirds elected from the Federation and one-third from the Republika Srpska. The Presidency of the new State consists of three members, one Bosniac, one Croat and one Serb, who are directly elected from the respective territories, the Bosniac and Croat from the Federation, the Serb from the Republika Srpska. In the Council of Ministers two-thirds of the ministers should be appointed from the Federation and one-third from the Republika Srpska. The deputies of all ministers should not be of the same constituent people as their ministers. Among the nine members of the Constitutional Court there should be two Bosniacs, two Croats and two Serbs (the remaining three members are judges from foreign countries). The same applies to the Governing Board of the Central Bank, where the Governor is a foreigner appointed by the International Monetary Fund and the members are representatives of the three constituent peoples.[6]

Thirdly, on the basis of The Dayton Peace Agreement the structure of the new State of Bosnia and Herzegovina is rather peculiar due to establishment of

[4] The Constitution of the Federation of Bosnia and Herzegovina was adopted by the Constitutional Assembly of the Federation at the session held on 24 June 1994.

[5] See the Preamble.

[6] See Articles IV, V, VI and VII of the Constitution of the State.

a pyramid of competing sovereignties having several layers. The two constituent units mean not only a simple territorial partition of the administration in the country (the Croat-Muslim Federation encompasses 51% and the Republika Srpska 49% of the country's territory) but they are both de jure and de facto some sort of mini-states with all attributes of sovereignty. On the other hand, the newly established central State of Bosnia and Herzegovina is an extremely weak state with very limited attributes of sovereignty many of which are just formal ones because the powers of the entities serve as a stumbling block to realise them in practice. Thus, for example, the State has no army, has no police forces, has no judiciary. Until recently only the Constitutional Court and the Human Rights Chamber were the only judicial bodies at the level of the State.[7] The powers of the institutions established at the level of the State has been specified in a rather restrictive manner. The following matters are within the competence of the State: *a)* foreign policy, *b)* foreign trade policy, *c)* customs policy, *d)* monetary policy, *e)* finances of the institutions and for the international obligations of Bosnia and Herzegovina, *f)* immigration, refugee and asylum policy and regulations, *g)* international and inter-entity criminal law enforcement, including relations with Interpol, *h)* establishment and operation of common and international communications facilities, *i)* regulation of inter-entity transportation, *j)* air traffic control. All other powers and competencies not listed above belong to the entities.[8] Both of the entities have their own constitutions establishing their separate governmental structures possessing all attributes of an independent statehood (starting with the symbols characterising a state, such as flag, anthem, coat of arms, capital, and continuing with such vital elements as the legislature, the executive branch, the judiciary, the constitutional courts, the ombudsmen, the army, the police, the municipality system etc.).

In addition to all these, while dealing with the peculiar features of the structure of the State of Bosnia and Herzegovina, one should mention also the recently solved dispute over the inter-entity boundary line in the Brcko area. The two entities were unable to reach agreement as to which entity should control the Brcko area in northeastern Bosnia, therefore an arbitral tribunal was established to decide where to place the responsibility for the future governance of the area. The tribunal issued its final award on 5 March 1999 and on 7 December 1999 the Statute of the Brcko District of Bosnia and Herzegovina was adopted (enacted

[7] Recently the High Representative imposed a law on the creation a third type of Court at the State level, which would have limited competence.

[8] See Article 8 (§ 1) of the Constitution of the State.

on 8 March 2000).[9] According to the rulings of the final award the Brcko District is a single administrative unit of local self-government existing under the sovereignty of the State of Bosnia and Herzegovina. But a closer look to the Statute of the District reveals a rather perplexing fact. The District appears to be a third entity within the State. The functions and powers of the District are much wider than those of the State of Bosnia and Herzegovina, it has its own legislative body, government, police, courts and public prosecutors.

Fourthly, The Dayton Peace Agreement has established a wide-ranging international controlling mechanism in Bosnia, which fulfils not only the simple task of supervision and guidance but functions as a real decision-making authority. The international community is involved into almost all vital fields of institutional state-building activity in the country, including both military and civilian aspects of this activity. Ultimate military authority lies with the international peace-keeping forces, presently the NATO-led Stabilisation Force (SFOR) and for the implementation of the civilian aspects of the Agreement responsibility rests with the Office of the High Representative(OHR). The High Representative has become the principal actor of the international community in Bosnia, who is being assisted by a staff of more than 700 people. His powers in the latest years have been considerably widened, in case of need he is entitled to adopt and enforce laws and has the right to dismiss any public official in the country.[10] The OHR is assisted by a range of other international institutions, such as the OSCE, the United Nations Mission in Bosnia and Herzegovina (UNMIBH), the UNCHR, the European Commission Monitoring Mission (ECMM), the International Police Task Force (IPTF), the Council of Europe. Bosnia's stability largely depends on the activity of these international institutions, the quasi-protectorate system seems to be in need for a longer period of time.

[9] The Final Arbitration Award and the Statute of the Brcko District see in: Bosnia and Herzegovina. Essential texts. Third revised edition. Office of the High Representative, 2000.

[10] The post of the High Representative has been established on the basis of Annex 10 of the Dayton Peace Agreement. His Office has become the supreme civilian authority in the country. He is entitled not only to impose new laws but can also modify directly any laws adopted by the parliaments of the entities or the State. Within Bosnia no authority can judge his actions, there is no possibility of appeal by anyone or anybody against hid decisions. The Human Rights Chamber has also acknowledged that that it is not competent *ratione personae* to deal with complaints directed against the High Representative.

Annex 6 as the Main Human Rights Instrument within the Dayton Structure

The Dayton Peace Agreement has put an end to one of the most violent conflicts which emerged as a result of the disintegration of former socialist Yugoslavia. The events which happened between 1991 and 1995 in this dismembered country are still in need of explanation and careful study. The events of these years shocked Europe, which after 45 years of relatively peaceful development suddenly realised that a part of the continent was set ablaze, that the long-forgotten scenes of destruction and sufferings of the Second World War came alive. In Europe for the first time after 1945 there was a war again, with all its frightening and horrendous consequences. We still do not have reliable data on these consequences, but the estimated figures speak for themselves. About 4 million people moved from the place of their residence, seeking refuge, permanent of temporary either abroad or in other parts of Yugoslavia. More than 200.000 lost their life in the bloody conflict, and the number of missing persons account for more than 25.000. Apart from these so-called visible signs of suffering and loss, there was another shocking experience also: it turned out that it is very easy to manipulate the psychology of European nations and nationalities, to turn them against each other with the help of nationalistic ideologies within a very short period of time, and to generate national hatred leading to unimaginable atrocities. Torture, arbitrary executions, crimes against humanity, ethnic cleansing which is simply a nice euphemism for genocide, were widely used by the participants of the conflict. It is probably not an exaggeration to state that in these years "exactly half a century after the Nazi holocaust, a second genocide occurred in Europe".[11]

In light of these events it is not surprising that the issue of human rights occupies a prominent place within the whole Dayton peace settlement. In Article VII of the General Framework Agreement it is stated: "Recognising that the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving lasting peace, the Parties agree to and shall comply with the provisions concerning human rights set forth in Chapter One of the Agreement at Annex 6." Annex 6 which is called as Agreement on Human Rights provides for a detailed system of human rights protection in the newly established State of Bosnia and Herzegovina, including the catalogue of rights to be protected and the machinery taking care of this protection.

[11] See Nowak, M.: Lessons for the international human rights regime from the Yugoslav experience. *Collected Courses of the Academy of European Law*, Vol. VIII. Book 2. 2000, 147.

The Agreement on Human rights has been signed by three parties, by the Republic of Bosnia and Herzegovina (predecessor of the State of Bosnia and Herzegovina), the Federation of Bosnia and Herzegovina and the Republika Srpska. In other words, it establishes binding obligations both for the State and its entities, and in the proceedings before the established enforcement bodies these three signatory parties are the respondent parties.

The catalogue of rights to be guaranteed and protected at the first glance seems to be extremely far-reaching. Article I of Annex 6 reads: "The parties shall secure within their jurisdiction the highest level of internationally recognised human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex." The Appendix mentioned above contains a list of 16 international human rights agreements, including the Genocide Convention, the 1949 Geneva Conventions on the war victims, the Refugee Convention, the two UN Covenants on Human Rights, the Convention against Torture, the Convention on the Rights of the Child, the Convention on the Protection of Migrant Workers, the European Charter on Regional or Minority Languages etc. However, Article II of Annex 6 has established a clear limitation as to the applicability of rights provided by the instruments listed in the Appendix: the violation of these rights can only be considered if the issue of discrimination is also present. On the other hand, the rights provided in the European Convention and in all of its Protocols should be secured without any condition or limitation. Furthermore, the European Convention and its protocols are directly incorporated into the Bosnian legal system and they enjoy priority over all other law.[12]

On the basis of Annex 6 the Parties with the aim of assisting them in honouring their obligations related to the protection of Human Rights have established the Commission of Human Rights. The Commission consists of two parts: a) the non-judicial part, that is the Office of the Ombudsman, b) the judicial part, that is the Human Rights Chamber. The Ombudsman – who is appointed by the chairman-in-office of the OSCE and who may not be a citizen of Bosnia and Herzegovina – carries out the usual functions of an ombuds-

[12] Article II (§ 2) of the Constitution of the State reads: "The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law".

man.[13] He or She investigates alleged human rights violations, issues finding and conclusions following the investigation, presents reports and recommendations to the competent governmental bodies, publishes reports on the established violations. The Ombudsman has no competence of issuing binding decisions.

The Human Rights Chamber is the judicial part of the machinary, its decisions are final and binding. The Chamber is composed of 14 members, of which six are nationals of Bosnia and Herzegovina and eight are internationals. The six national members are appointed by the Federation and the Republika Srpska. The Federation is entitled to appoint four members (two Bosniacs and two Croats) and the other two national members are appointed by the RS. The international members are appointed by the Committee of Ministers of the Council of Europe for five years.[14] All members should posses the qualification required for appointment to high judicial office or should be jurists of recognised competence. Both the Ombudsman and the members of the Chamber cannot be held criminally or civilly liable for any acts carried out within the scope of their duties, and the international members are accorded the same privileges and immunities as are enjoyed by diplomatic agents under the Vienna Convention on Diplomatic Relations.

The law enforcement machinery under Annex 6 is in fact a copy of the European Convention machinery. The drafters of the Dayton Peace Agreement being aware of the fact that Bosnia and Herzegovina in the forseeable future would not become a contracting state of the European Convention decided to establish temporarily, at least until Bosnia joins the Council of Europe, the Commission of Human Rights substituting the system functioning in Strasbourg. That explains the very particular situation of Bosnia and Herzegovina, which is not a member state

[13] The first Ombudsman appointed was Ms. Gret Haller (formerly a Swiss ambassador) of and at present Mr. Frank Orton (formerly Swedish Ombudsman against Ethnic Discrimination) has been appointed as the second Ombudsman of the State.

[14] At present the composition of the Chamber is the following: Ms. Michele Picard (from France, President), Mr. Giovanni Grasso (from Italy, Vice-President), Mr. Dietrich Rauschning (from Germany, Vice-President of Panel I), Mr. Rona Aybay (from Turkey), Mr. Jakob Möller (from Iceland), Mr. Manfred Nowak (from Austria), Mr. Andrew Grotrian (from Great Britain), Mr. Viktor Masenko-Mavi (from Hungary, Vice-President of Panel II), Mr. Hasan Balic (from the Federation, Bosniak), Mehmed Dekovic (from the Federation, Bosniak) Mr. Zelimir Juka (from the Federation, Croat), Mr. Mato Tadic (from the Federation, Croat), Mr. Miodrag Pajic (from Republika Srpska, Serb), Mr. Vitomir Popovic (From Republika Srpska, Serb). At the end of 2000 the mandates of all judges had expired, however they all have been re-appointed for another 3 years up to 31 December 2003.

of the Council of Europe, formally not a contracting party of the European Convention, but at the same time is bounded by the provisions of the Convention and has an enforcement institution with competence similar to that enjoyed by the Convention organs. The Office of the Ombudsman should have been the substitute of the European Commission of Human Rights and the Human Rights Chamber should have functioned in the capacity of the European Court of Human Rights. In practice, however, it has not been materialzed fully, the two parts of the Commission developped their practice seperatly, the Office of the Ombudsman has never become a body similar to that of the European Commission of Human Rights. For the sake of objectivity one has to mention that its mandate under Annex 6 has been formulated differently than that of the European Commission of Human Rights mandate.

Following the initial difficulties faced by both parts of the Commission of Human Rights (related to financies, facilities and staff) in the years of 1996–1997, nowadays both institutions have aquired a solid reputation within the Bosnian legal system. The rise of the efficiency of the Human Rights Chamber is especially striking: in the years of 1996–97 it was dealing with a couple of dozens of applications, however, by middle of 2001 it has adopted more than 1000 decisions, including decisions on the merits, decisions on admissibility, strike-out decisions, decisions on compensation claims, decisions on request for review.[15] The increase in the case-load of the Chamber is also a clear indication of its rising importance: by the end of August 2001 the number of the applications registered with the Chamber exceeded 7,500.[16] The Chamber presently during its monthly sessions is capable of dealing with more than 100 applications. One has to point out two other factors which contributed to the efficiency of the Chamber. By the year of 2000 it has managed to establish a small but dedicated and professionally well-prepared staff in its Sarajevo Office (The Registry of the Chamber), the number of which is about 30 persons, including both domestic and international lawyers (the latter are either recruited or seconded by the governments taking an active and leading role in the maintenance of the Dayton accords). By this time the Camber has managed to adopt its leading decisions in repect of all of the so-called complex type of cases. These cases posed considerable difficulties for the Chamber

[15] The Chamber publishes its decisions annually in special volumes both in English and in Bosnian languages. These volumes can be obtained from the Registry of the Chamber: Bosnia and Herzegovina, Sarajevo, ul. Musala 9.

[16] The monthly statistics are available from the same address: E-mail:chamber.humanrights@ohr.int.

because of their legal complexity and because of the weight of their consequences for the respondent parties. They include such issues as the death penalty in Bosnia, the fate of the appartments possessed by the former Jugoslav National Army, the nature of the so-called occupancy right over the appartments and the right of return of occupancy right holders, the frozen bank accounts issue (accounts kept in hard currencies by the citizens before the war and frozen during and after the war), the pension cases (the right to a pension acquired on the basis of provisions existed in the former Socialist Yugoslavia), the freedom of religion (the right of religious communities in the country), the independence of the judiciry, the notion and content of discriminatory practices in labour relations, the criminal jurisdiction in respect of war crimes (in light of the Rules of the Road Agreement).[17] In deciding these type of cases the Chamber all the time has been facing serious difficulties connected with the complexity of the Bosnian legal system. This legal system encompasses laws enected in the former Socialist Yugoslav Republic. Many of these laws are still valid, because both the independent Republic of Bosnia and Herzegovina and the entities have incorporated into their legal system these formerly adopted legislative acts; and even after the adoption of the Dayton Peace Agreement they were kept in force. Annex II of the Constitution of the State on Transitional Arrangements clearly states that "all laws regulations and judicial rules of procedure in effect within the territory of Bosnia and Herzegovina when the Constitution enters into force shall remain in effect to the extent not inconsistent with the Constitution, until otherwise determined by a competent governmental body of Bosnia and Herzegovina". The work on cheking the whole legislation in the country in order to eliminate inconsistencies has never been performed in a systematic manner, hence it quite a challenging task to establish which laws are still in force and which were repealed. Thus for example, nobody can answer what is the fate of the laws and regulations adopted by the former Herceg-Bosna

[17] On 18 February 1996 The Signatory Parties of the Dayton Peace Agreement in Rome signed a special agreement (called Rules of the Road) which establishes some limits on the criminal jurisdiction of the Parties in respect of war crime trials. In order to prevent arbitrary arrests and detentions the Parties agreed that the prosecution of war crime criminals would be carried out by them on the basis of prior consent of the International Criminal Tribunal for the Former Yugoslavia. The second subparagraph of § 5 of the Rules of the Road Agreement reads: "Persons, other than those already indicted by the International Tribunal, may be arrested or detained for serious violations of international humanitarian law only pursuant to a previously issues order, warrant or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal...".

Rebublic.[18] The existing legal system includes also the laws adopted by the State and the entities after the entering into force of the Dayton Peace Agreement, and in addition to that there is an extensive set of laws imposed by the High Representative.

The Chamber as a sui generis instititution (being neither a pure domestic institution, nor a classical international body) has been empowered with competencies which were not similar to that of the Strasbourg organs. From the very beginning of its existence it was entitled to receive applications directly from the applicants and not only via the referral of the Ombudsman (as it is known the European Court of Human Rights before the acceptance of Protocol 11 had no such competence). It was empowered also with the right of review: if the application is decided by a panel of the Chamber the Plenary on the motion of the concerned parties in the case may review the decision (this possibility was introduced into the Strasbourg system only after the adoption of Protocol 11). The nature of orders of the Chamber is also differs from those enjoyed by the Strasbourg bodies: the Chamber has the power to order provisional measures (involving both negative and positive actions to be taken by the respondent parties) and in its decisions on the merits with the aim to remedy the breach established can adopt orders related not only to monetary compensation but also orders to cease and desist (Article X of Annex 6).

The applicants can address their complaints against any of the three Signatory Parties to the Annex (Respondent Parties) and the Parties themselves are entitled to file complaints (inter-entity complaints) before the Chamber. In Article VIII (§ 1) of Annex 6 there is a clear specification of those who can apply to the Chamber: "any Party or person, non-governmental organisation, or group of individuals claiming to be a victim of violation by any Party or acting on behalf of alleged victims who are deceased or missing...".

Any application made under the above-mentioned paragraph should be submitted in a written form and should set out the followings:

a) the identity of the applicant
b) the name and the address of his representative, if any
c) the name of the respondent party against which the application is lodged
d) a statement of the facts

[18] The Chamber in its proceedings made some attempts to clarify from the Agent of the Respondent Party the so-called issue of the "Herceg-Bosna laws", but received no clear answer. See for example, Case No. CH/OO/5480 Aziz Dautbegovic and 51 other villagers from Duge against The Federation of Bosnia and Herzegovina.

e) the statement of the rights alleged to have been violated
f) a statement of any provisional measure or other remedies sought.[19]

For the applicants it is necessary also to demonstrate that they had taken all necessary actions and steps to have the matter complained of settled before the competent domestic organs (the requirement to exhaust domestic remedies) and to show that the application has been submitted to the Chamber within six months from such date on which the final decision was taken (the six-months rule). The Chamber in deciding which of the filed applications should be accepted apart from these two very important requirements takes into account other criteria also. thus, it would not deal with those applications which: a) contain substantially the same matter which has already been examined by the Chamber or has already been submitted to another procedure or international investigation; b) which it considers incompatible with the Agreement, manifestly ill-founded, or an abuse of the right of petition; c) which are pending before any other international human rights body responsible for the adjudication or any other Commission established by the Annexes of the Dayton Peace Agreement.[20]

All of the applications should be examined whether they are compatible or not with the Agreement, and the Chamber in its practice distinguishes three types of compatibility issues, namely: compatibility *ratione temporis*, compatibility *ratione materiae* and compatibility *ratione personae*. The Chamber is entitled to examine only those complaints in which the applicants claim that the alleged violations are connected with the facts and actions occurred after 14 December 1995. According to the generally accepted principles of international law, it cannot decide whether events occurring before the entry into force of the Agreement involve violations of human rights.[21] The applicant's should always be related to the rights protected by the Agreement, hence complaints alleging the violation of those rights which fall outside the scope of the protected rights would be declared as incompatible ratione materiae.[22] The Chamber should clarify also the issues related to the standing of the parties in cases reaching it (*ratione personae* issues), in other words, to establish the Respondent Party which is responsible for the alleged

[19] These requirements are set forth by the Rules of Procedure.

[20] See, Article VIII of Annex 6.

[21] See the Chamber's first decision in the case No. CH/96/1 (Matanovic).

[22] See for example the cases No. CH/98/548 (Ivanovic), CH/99/189 (Vujovic), CH/99/2340 (Zivanovic).

violation[23] and to find out whether the applicant can be considered as a victim or not.[24]

The majority of the cases are being decided by the Chamber without public hearings, on the basis of written procedure. Public hearings are held only in the leading cases and cases in which the facts are not clear. To the hearing, apart from the parties, the applicant (who is entitled to have a representative) and the Agent of the Respondent Party, the Chamber summons witnesses and experts and sometimes the relevents institutions to act as *amicus curiae*. Following the public hearing the Chamber in camera proceeds with the deliberation of the case.

The organisation of the work of the Chamber, its structure and the procedure before it are regulated by the Rules of Procedure.[25] These rules specify the independent and judicial nature of the Chamber, the solemn declaration to be taken by the members and the order of precedence among the members, the duties of the President, Vice-President and Vice-Presidents of the Panels (there are two panels each consisting of seven judges), the composition and duties of the Secretariat, headed by the Executive Officer and the Registrar, the issues related to the place, time and date of its sessions (the Chamber holds its one-week-long monthly sessions in Sarajevo), the procedures to be followed during its deliberations, including the voting patterns, the procedure to be followed in registering the cases, in the conduct of the public hearings, the procedure related to the decisions on the admissibility and merits, review proceedings, the delivery and publication of its decisions

Conclusions

Considering the fact that more than five years have passed since the adoption of the Dayton Agreement, one has to put the question: is it a success story or a failure. There is no simple answer to this question. The main objective of this peace agreement has been undeniably achieved: it has put an end to madness, established peace in the country. But the long-term aims have not been realised.

[23] The Chamber is not bound by the applicant's choice of Respondent Party, it has the right to designate in light of circumstances of the case such a Party by itself. See case No. CH/96/31 (Turcinovic).

[24] See case No CH/99/2339 (The Islamic Community), case No. CH/99/2339 (Commission concerning the location of a graveyard in Banja Luka).

[25] See, Human Rights Chamber. Rules of Procedure (adopted on 13 December 1996).

There is a very limited progress in the domain of ethnic reconciliation, everything in the country is ethnicised (politics, business, education, culture) and the existing state institutions are simply a playing-ground of nationalist policies. The rule of law is not respected and human rights violations are part of everyday life. Not in the sense of some kind of shocking atrocities, but in the form of all-pervasive and tacitly tolerated bureaucratic practices. The process of cleaning up the consequences of ethnic cleansing is extremely slow, the issue of the return of refugees and displaced persons is an unresolved one. It is still about 1,4 million persons(either refugees or displaced persons) are waiting for a better opportunity in order to return to their homes. To sum up, the Bosnian society is still far away from democratic governance.

The human rights machinery established by Annex 6 of the Dayton Peace Agreement was invented with the aim of introducing democratic values into the post-war Bosnian society, including the respect for human rights, immediately after the conflict, without waiting for a longer period of time, until the date when the country would become an integral part of the family of European democratic states. However, this noble intention of the framers of the Agreement has not been realised for several reasons. The consequences of the destruction were so profound and so far-reaching that no machinery can cope with them in the foreseeable future. The country has been fractured politically, socially, economically and ethnically, and the corrosive and all-pervasive nationalism has extended its roots deeply in all spheres of the Bosnian society. And unfortunately the country is being ruled by the same nationalist forces which were behind the confict, such nationalist parties as the Serb SDS, the Muslim SDA and the Croat HDZ. The Dayton Agreement in fact legitimised their war-time territorial gains and upheld the ethnic segregation of Bosnia. The machinery established by Annex 6 is not adapted to deal with such wide-scale abnormalities, it is physically impossible for one institution to remedy all those violations stemming from this overall situation. The Dayton quasi international institutions cannot overtake the functions of domestic bodies, it is first of all the latter would have been in a position, provided they would have the will, to quarantee a real progress in realising the concept of the framers. However, the ethnicised and politicised domestic institutions, including the judiciary, the police and organs of local administration, are frustrating all efforts aimed at establishing a real rule of law in the country. The institutions of Annex 6 do remedy some of the violations, and those few who are lucky enough that their cases are decided by them are in a position to become familiar with the notion of the rule of law. But these institutions can set up only a general trend, can provide an example for the domestic institutions how rights should be protected and safeguarded within a framework of a functioning democracy. The process of democratisation within

the Bosnian society depends basically on the domestic institutions themselves, it is up to them to create a functioning democratic state, and the Dayton structures can oly facilitate this process. It would probably take a longer period of time, and one cannot rule out the possibility that these structures would be replaced by something more workable and viable.

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Fighting the Sirens' Song: The Problem of Amnesty in Historical and Contemporary Perspective

Abstract. As much of the world gears itself to fight terror, uncomfortable questions may soon need to be asked. What is to be done with terrorists who are often more popular in their countries that those countries' leaders? Can these states afford retribution and punishment, even at the risk of provoking forces that may lead to further bloodshed and violence? Or, alternatively, should they seek reconciliation and grant offenders amnesty? Or, is the proper solution somewhere in between? It may be comforting to know that these questions are not new, and by examining the historical and contemporary debate between the proponents of punishment and those of amnesty, we will be in a better position to make an informed decision when our turn inevitably comes to choose. We should pay particular attention to: what amnesty is, including the problems inherent in its definition; amnesty's roots in the virtue of forgiveness, which is found in most of the world's major religious traditions; amnesty's historical manifestations in cultures that have adhered to those traditions; the three types of amnesty (moral, just and political) and the historical shift toward exclusively political justifications for amnesty; and classical and contemporary criticisms of and justifications for institutionalized forgiveness, including amnesty. Understanding these issues will not tell us whether it is better to amnesty or not to amnesty, but it will make us better equipped to answer that question for ourselves.

Keywords: amnesty, Rule of Law, forgiveness, punishment

> [H]ere the great art lies, to discern in what the law is to bid restraint and punishment, and in what things persuasion only is to work.
>
> John Milton, *Areopagitica*[1]

In Homer's The Odyssey, the hero Odysseus faces a vexing dilemma. His ship must pass the island of the Sirens, whose beautiful song entrances sailors and lures them to their deaths. Odysseus knows that he and his crew cannot resist the urge to follow the song, and if they give in they will die on the island. Odysseus devises a clever solution: he straps himself and his crew to the masts of their ship.

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[1] Reprinted in The Norton Anthology of English Literature 1463 (M. H. Abrams et al. eds., 6th ed., 1993).

Even though the Sirens' song entrances him and he strains against his bonds in a painful attempt to break free, Odysseus and his crew are prevented from following the song to the island and survive.

Societies sometimes face situations like the one that threatened Odysseus. During and after times of especially intense crises such as civil war, military dictatorship, massive public disobedience or state terror, prosecution and retribution against those responsible for atrocities becomes an extremely attractive option. It may also lead society down a road fraught with death. Retribution may at the least drain resources that are needed to rebuild society in other areas, and may at the most provoke those responsible for crimes to new violence or hang as a specter over their heads and thus make it less likely they will relinquish power. If the ultimate goal society seeks to reach is social harmony, then prosecution and retribution may be like the Siren's song, leading society in a direction from which it might never reach its destination. In such a circumstance a very painful decision may have be made: society may have to strap itself to the masts by granting amnesty and thus avoid costly retribution.

I. The Foundations: Communities and the Rule of Law

Failing to punish lawbreakers is a troubling proposition because it strikes at the very foundation of civilized societies. Every human society represents an attempt to create order out of disorder. One of the great achievements of humankind has been the subjugation of the state of nature and the creation of interactive communities governed by rules. This is based on the uniquely human realization that the freedom of action which exists in the state of nature is ultimately destructive; since losing the natural game often means death, and no individual can always win, a reasonable individual very quickly realizes that it is in his or her best interest to join a community with other individuals, all of whom accept certain restrictions on their freedom of action. Adhering to such restrictions is only beneficial to an individual, however, if the other members of the community obey those same restrictions. If others do not obey the rules then an obedient individual is placed at a serious disadvantage; ultimately such an individual incurs the same detriment that he or she sought to avoid by accepting restrictions in the first place.

Why do individuals obey? There is both a carrot and a stick. The carrot is the escape from a Hobbesian life that is "nasty, brutish and short." When the members of a community follow rules it creates the regularity and security that facilitates the development of family, creativity, wealth, and other things that improve the quality of life. The stick is the threat of punishment, the knowledge

that breaking the rules will yield retaliation from the community that decreases the offender's quality of life. The forms that punishment takes are myriad, as are the justifications for punishing. But whether punishment be for deterrence, retribution, rehabilitation or any other reason, the result is the same: breaking the rules results in retaliation by the community that creates an unpleasant situation for the offender. Since, as noted *supra*, obeying the rules is of benefit to an individual only if those same rules are obeyed by the other members of the community, it logically follows that *any* offender within the community must be punished, no matter where that offender falls in the community's hierarchy. This principle is known as the rule of law.

Abrogating the rule of law by failing to punish certain lawbreakers is a very serious matter indeed. A policy of amnesty seeks to accomplish precisely this, and thus its importance cannot be overstated. Indeed, amnesty is one of the most important policy choices any society can make. Should the rule of law be forgiven or is it so sacred that exceptions should never be made? This question has aroused spirited debate not only in the scholarly community, but also in societies themselves. A comprehensive answer, in either case, would certainly fill many volumes, and is thus well beyond the scope of this short study. Indeed, though a great deal has been written on the debate over amnesty, the literature often overlooks several important preliminary questions: What is amnesty? Where did it come from? How and why is it used? The answers to these questions help form an understanding of the nature of amnesty, and understanding the nature of amnesty is necessary if we are to become informed participants in this grand debate.

II. A General Definition of Amnesty

The fact that different legal criteria exist in each country makes it impossible to provide an all-encompassing definition of amnesty. A general definition is possible, though even this is not an easy task. *Webster's* defines amnesty simply as "the act of an authority (such as a government) by which general pardon of an offense is granted, often before trial or conviction, esp[ecially] to a large group of individuals,"[2] and one legal encyclopedia defines amnesty as "an exercise of the sovereign power by which immunity to prosecution is granted by wiping out the offense supposed to have been committed by a group or class of persons prior

[2] Webster's New International Dictionary 71 (3rd ed. 1971).

to their being brought to trial."[3] Both of these definitions include four salient features. First, amnesty wipes out a particular past offense so as to exclude the possibility of punishing the offenders. Second, amnesty is granted by the government or sovereign power, not by ordinary individuals. Third, amnesty is granted generally, meaning it is granted to a group of individuals who have committed the same offense and *not* to a specific individual. Finally, amnesty is granted before conviction, presumably in order to prevent the trial and punishment of the offenders.

Black's offers even more features. It defines amnesty as:

1. A sovereign act of oblivion for past acts, granted by a government to all persons (or to certain persons) who have been guilty of crime or delict, generally political offenses—treason, sedition, rebellion—and often conditioned upon their return to obedience and duty within a prescribed time.

2. A general pardon or proclamation of such pardon from subjects' offenses against the government; while usually exerted on behalf of certain classes of persons, subject to trial but not convicted, it is not confined to such cases.

3. A declaration of the person or persons who have newly acquired or recovered the sovereign power in a state, by which they pardon all persons who composed, supported, or obeyed the government which was overthrown.[4]

Black's demonstrates something very important about amnesty: the term does not easily lend itself to a single, universal definition. While affirming the aforementioned focus on groups, governments and the erasure of past offenses, *Black's* suggests that amnesty may also be used to wipe out offenses for which individuals have already been convicted and punished. Also, *Black's* stresses the political nature of the offenses, which are generally covered by amnesty in modern societies.

The confusion among lexicographers as to what amnesty actually means is reflected in the application of the concept in the real world. Indeed, acts termed "amnesty" take different forms in different countries at different times, and often the term itself has become interchangeable with other terms such as pardon and clemency. However, there are a few common themes that do emerge and that do make it possible to craft a general definition. Amnesty is an action, undertaken by the sovereign (or representatives of the sovereign), by which a class of individuals who have committed certain political offenses—either against the sitting regime or as a means of maintaining a prior regime—have their offenses legally forgotten, though not necessarily forgiven, and are granted immunity from prosecution,

[3] 67A C.J.S. *Amnesty* § 29 (1955).

[4] Black's Law Dictionary 76 (5th ed. 1979).

punishment or further punishment.[5] Obviously this definition leaves a great deal of leeway in the administration of specific amnesty policies. Amnesty may affect those who have committed a political offense but have not yet been convicted and punished or those who have already been punished. Amnesty may be directed at those who have offended against the sitting regime or those who committed offenses in the name of a prior regime. Amnesty may be very broad and granted in "blanket" form, without regard to the special circumstances of each offender, or may be very specific, requiring a case by case analysis of each offender to determine whether he or she meets all of the criteria. Amnesty may or may not be layered with conditions, such as loyalty oaths and restitution. These options allow policies of amnesty to be tailored to meet the peculiar demands of individual circumstances. The core definition of amnesty offered *supra*, however, has remained the same.

III. The Foundations of Amnesty

The word "amnesty" is derived from the Greek *amnestia*, meaning forgetfulness and forgiveness.[6] Though some efforts have been made to distinguish the concepts of forgiveness, mercy, forgetfulness and the like,[7] these distinctions are more of semantic interest than real importance. Such terms are certainly used interchangeably in practice.[8] Thus, let us consider the foundations of amnesty

[5] The emphasis on political offenses is of more contemporary relevance, since ancient amnesties were often granted to all types of offenders. *See infra.*

[6] Webster's, *supra* note 2, at 17. The word amnesia is also derived from this Greek root.

[7] *See, e.g.*, Murphy, J. G. and Hampton, J.: *Forgiveness and Mercy* (1988). Murphy argues that forgiveness and mercy are two separate concepts. Forgiveness is granted to a wrongdoer only by the person against whom the wrong was committed (*Ibid.* at 21). Mercy, on the other hand, is something granted by the person or body charged with punishing the wrongdoer, usually the state (*Ibid.* at 167). Under this categorization, amnesty could only be an act of mercy and not of forgiveness, since amnesty is granted by the state and not by the individuals directly wronged as a result of the offender's acts.

[8] This raises one of the largest problems in examining the practical application of amnesty; namely, those charged with granting it are rarely as careful in choosing their words as scholars such as Professor Murphy are. As shall be seen *infra*, amnesty is often viewed and referred to as a form of forgiveness, mercy, forgetfulness, pardon, clemency, reprieve, reconciliation, oblivion, absolution, impunity, forbearance, etc. *See generally* R. Newton Barger: *Amnesty: What Does It Really Mean?* (1974). While it may be possible to draw philological distinctions between these terms, practically it becomes impossible. *See* Knote v. United States, 95 U.S. 149, 152–153 (1877).

from the perspective of those who have granted it in modern times. This entails, in particular, an examination of the roots of forgiveness and mercy (generally found as virtues in the world's major religious traditions and then reflected as cultural and social values in human societies subscribing to those religions) as well as historically important grants of amnesty.

A. The Religious Virtues of Forgiveness and Mercy

1. The Judeo-Christian Tradition

The values of forgiveness, reconciliation and mercy are central to Judaism and Christianity. In the Old Testament, God is widely described as "merciful and gracious, slow to anger, ... forgiving iniquity and transgression and sin."[9] The Bible extols this virtue in humans as well. Consider, for example, the story of Joseph. Joseph is sold into slavery by his brothers, who are jealous of the special favor their father, Jacob, shows him.[10] Joseph becomes ruler of Egypt, and upon Jacob's death Joseph's brothers petition him for forgiveness.[11] Joseph not only forgives them, but welcomes them into his home and agrees to provide for them and their families.[12]

The New Testament, of central importance to Christians, is also replete with examples of forgiveness and mercy. Consider Jesus' famous exhortation to his followers "Love your enemies, do good to those who hate you, bless those who curse you, pray for those who abuse you. ... Be merciful, even as your Father is merciful. ... [F]orgive, and you will be forgiven."[13] Or consider Paul's Letter to the Hebrews, in which he proposes that by following these teachings and being merciful one may "draw near to the throne of grace, [and] receive mercy."[14]

2. The Islamic Tradition

Forgiveness and mercy are equally important characteristics of Islam. Indeed, one of the names of Allah is *Al-Rahman*, which means "The Merciful One."[15] Muhammad teaches throughout the *Qur'an* that forgiveness from Allah is a person's reward for his or her forgiveness of others. For example, Muhammad

[9] Exodus 34:6–7. *See also Nehemiah* 9:17–19 and *Psalms* 86:5. All references are to the Revised Standard Version of the Bible (1952).

[10] *Genesis* 37:27–28.

[11] *Ibid.* at 50:15–17.

[12] *Ibid.* at 50:19–21.

[13] *Luke* 6:27–28, 36–37.

[14] *Hebrews* 4:16.

[15] 8 Encyclopædia of Religion and Ethics 559 (ed.: James Hastings, 1915).

acknowledges that "The recompense for an evil is an evil like thereof," yet holds that there is an act of even higher virtue than retaliation: "[B]ut whoever forgives and makes reconciliation, his reward is due from Allah."[16] Likewise, "Those who spend [i.e., give charity] in prosperity and adversity, who repress anger and who pardon men; verily, Allah loves."[17] Later, Muhammad appeals to his followers to behave as Allah Himself would behave: "[L]et those among you who are blessed with graces ... pardon and forgive. Do you not love that Allah should forgive you?"[18]

3. The Eastern Religions: Hinduism, Buddhism and Confucianism

Forgiveness and merciful behavior are not only characteristics of the eligious tradition encompassing Judaism, Christianity and Islam. In Hinduism, righteous conduct (*dharma*) is defined principally in passages from two scriptural works, *The Bhagavad Gita* and *The Brihadaranyaka Upanishad.*[19] Chapter 16 of *The Bhagavad Gita* distinguishes between the divine (righteous) and demoniac (evil) natures. "Charity, self-control, ... absence of anger, ... majesty, forgiveness [and] absence of malice ... are the endowments of one who is born with the divine nature,"[20] while "[h]ypocrisy, arrogance, ... anger [and] harshness ... are the endowments of one who is born with the demoniac nature."[21] This theme is supplemented in *The Brihadaranyaka Upanishad*, which lists as the three cardinal virtues self-restraint, charity and compassion.[22] By refraining from anger and vindictiveness, restraining oneself, and acting with charity, compassion, forgiveness and mercy, one may hope to attain a higher level of existence.

Buddhism, too, views forgiveness and mercy as a means to attaining happiness and Nirvana. In the *Dhammapada*,[23] the Buddha sets down the conditions for achieving happiness. "We live happily indeed, not hating those who

[16] Ch. 42, verse 40. All references are to The Noble Qur'an (Muhammad Taqi-ud-Din Al-Hilâli & Muhammad Muhsin Khân trans., 1993).

[17] Ch. 3, verse 134. *See also* Ch. 42, verse 37.

[18] Ch. 24, verse 22.

[19] *See generally* Morgan, K. W.: *The Religion of the Hindus.* 1953.

[20] Ch. 16, para. 1–3. All references are to The Bhagavad Gita (Eliot Deutsch trans., 1968).

[21] *Ibid.* at para. 4.

[22] The Thirteen Principal Upanishads 150 (Robert Ernest Hume trans., 1949).

[23] Meaning "The Way of Truth," this is a collection of speeches composed by the Buddha. It is a part of the *Sutta Pitaka*, the basic canon of Buddhism. All page references are to The Teachings of the Compassionate Buddha: Early Discourses, the *Dhammapada*, and Later Basic Writings (ed.: Edwin A. Burtt, 1955).

hate us! ... He who has given up both victory and defeat, he is contented and happy. ... Let a man overcome anger by love, let him overcome evil by good."[24] The Buddha goes on to exhort his followers to refrain from punishing those who have done wrong, for "[b]y one's self one suffers. ... The wicked man burns by his own deeds, as if burned by fire."[25] "He who, seeking his own happiness, punishes beings..., will not find happiness after death."[26]

Confucianism also incorporates the value of forgiveness. Indeed, the highest Confucian value is *Jen*, benevolence toward others that necessitates compassion, love and mercy.[27]

All of the above religious teachings affected the cultures in which they gained prominence, and thus it is unsurprising that the exercise of amnesty, as a manifestation of the general socio-cultural recognition that forgiveness and mercy are virtues rather than vices, is found in so many different societies. Of course, the desire to fulfill religious obligations has not been the only consideration of those who have granted amnesty, as we shall see presently.

B. The Historical Roots of Amnesty

The exercise of mercy by the sovereign is not a modern phenomenon. Indeed, for as long as there have been written laws there has been an institutionalized power of mercy, pardon and amnesty. The Code of Hammurabi (c. 1700 B.C.E.), the first written law code, provided that the king could pardon adulterers.[28] In the Eastern Roman (Byzantine) Empire, general amnesties were granted to all offenders (except sorcerers, murderers and adulterers) on religious occasions such as Easter.[29] Let us consider in particular the circumstances of three especially developed traditions of amnesty: Athens, China and England. We shall consider the implications of these amnesties when we consider the different types of amnesty discussed *infra*.

[24] *Ibid.* at 62–64.

[25] *Ibid.* at 60.

[26] *Ibid.* at 59.

[27] McKnight, B. E.: The Quality of Mercy: Amnesties and Traditional Chinese Justice 3 (1981).

[28] Moore, K. D.: *Pardons: Justice, Mercy and the Public Interest* 15 (1989).

[29] McKnight: *op. cit.* at *intro.* x.

1. Amnesty in Athens

Among the earliest and best-recorded amnesties of the ancient world were those granted by Athens.[30] The first was granted in 481 B.C.E., and though it was not explicitly termed an amnesty it did lay the foundation for amnesty in the future.[31] In Athens, politicians who happened to fall out of favor were frequently classified as enemies of the state and ostracized. In 481 B.C.E., with a large proportion of its most prominent political leaders in exile, Athens was threatened with invasion by the Persian Emperor Xerxes I. Faced with this prospect, and fearing that the exiles would aid the Persians, the major political factions in Athens offered to allow the exiles to return with full restoration of their civil rights. The offer was accepted and the Persian invasion was repulsed.[32]

Building on this precedent, the Athenians tried amnesty once again to aid the city-state in a time of great turmoil. In 404 B.C.E., Athens capitulated to the rival city-state of Sparta following the Peloponnesian War. The Spartan general Lysander established a council of Spartan sympathizers to rule Athens. Known collectively as the Thirty Tyrants, these rulers exiled thousands of Athenian democrats and imposed a harsh dictatorship on those who remained. Several political parties that had originally supported the Tyrants revolted, leading to the outbreak of civil war in 403 B.C.E. Realizing that they could not win without the help of the democrats, these parties invited the exiled general Thrysabulus to return to Athens. Upon his return, Thrysabulus agreed to aid the rebels in exchange for a promise by the parties to grant amnesty to the remaining exiles. The deal was struck, the Tyrants were overthrown and the exiles returned home. The amnesty was credited with "restor[ing] civil peace in [Athens] after revolutions and counter-revolutions,"[33] and earned the Athenian government the respect of other city-states who had withdrawn their support following Sparta's victory.[34]

2. Amnesty in China

Perhaps nowhere was the system of amnesty more highly developed than in Ancient China. Indeed, amnesties were granted in China more frequently than in any other ancient civilization.[35] Amnesties were first recorded in 1027 B.C.E.

[30] Dorjahn, A. P.: *Political Forgiveness in Old Athens: The Amnesty of 403 B.C.* 1 (1946). *See also* Damico, A. J.: *Democracy and the Case for Amnesty 24–26* (1975).

[31] Dorjahn: *op. cit.* 2–3.

[32] *Ibid.*

[33] Balogh, E.: *Political Refugees in Ancient Greece* 63 (1943).

[34] Dorjahn: *op. cit.* 53.

[35] McKnight: *op. cit. intro.* xi.

under the emperors of the Western Chou dynasty and quickly became a staple of Chinese leadership.[36] Influenced by the teachings of Confucius, Chinese emperors believed that the Mandate of Heaven included an obligation to behave mercifully, "to cleanse the wicked so that they might have the chance to begin afresh."[37] If an emperor failed to fulfill the Mandate it was believed that the gods would withdraw the Mandate and transfer it to another, who would then overthrow the old dynasty and establish a new one. Thus, Chinese emperors issued amnesties and granted mercy with almost competitive zeal.

For example, in the ten years of his reign (205 B.C.E.-195 B.C.E.) Emperor Han Kao-tsu proclaimed eight universal amnesties forgiving the transgressions of all offenders in the empire.[38] Emperor Ch'eng (r. 33 B.C.E.-6 B.C.E.) believed that a total eclipse of the sun was a sign from Heaven of his failure to fulfill the Mandate by being sufficiently merciful, and thus he granted a universal amnesty in order to prove his worth and appease the gods. In a rare acknowledgment of the fallibility of the emperor, the edict pronouncing the amnesty stated "The blame [for the eclipse] lies upon Us Ourself. ... Our faults and errors [must] be pointed out."[39]

In 1 B.C.E. Emperor P'ing issued a tract explaining the necessity of amnesty in China. "[A]n ordinance of amnesty," he explained, "is for the purpose of giving the empire a new beginning. ... [It allows criminals] to purify their hearts and renew themselves."[40] As time progressed, however, such enlightened benevolence gave way to more practical concerns. For example, amnesties were often granted when prisons became overcrowded.[41] The Ming Emperor Yung-lo (r. 1403-1425) began granting amnesty to certain classes of offenders in the summer and winter to relieve them of the extreme temperatures those seasons brought to the prisons, a practice that continued until the Ch'ing dynasty began to collapse in the 19th Century.[42]

3. Amnesty in England

The exercise of mercy in ancient England is very similar to that in other parts of Europe and thus serves as an excellent example for this part of the world. In

[36] *Ibid.* 2.

[37] *Ibid.* 2–3.

[38] *Ibid.* 16.

[39] *Ibid.* 17. As with European monarchs, Chinese emperors traditionally referred to themselves in the plural.

[40] *Ibid.* 30–31.

[41] *Ibid.* 116.

[42] *Ibid.* 101–103.

England, in contrast to China, broad grants of amnesty were eschewed in favor of pardons in individual cases.[43] Ine of Wessex (r. 688 C.E.-725 C.E.) is the first English king to have recorded the use of a royal pardon,[44] though it was not until the reign of Edward the Confessor (1042 C.E.-1066 C.E.) that the "royal prerogative of mercy" was established, vesting the power to forgive breaches of the law in the king alone.[45] When the Normans under William the Conqueror overthrew Edward's successor Harold, they retained the prerogative of mercy and it became traditional for a general amnesty to be proclaimed each time a new Norman monarch was crowned.[46]

As the monarchy grew more stable and centralized the use of the royal prerogative of mercy became more frequent and far-reaching. It became common, for example, for kings to entice soldiers into their service by promising them a general amnesty for any crimes they might commit (such as murder, rape and looting) while in His Majesty's service.[47] In time the power became absolute, extending to every case under the law. It was not until the ascendancy of Parliament in the 17th Century that civil cases, murder and rape were removed from the scope of royal pardons.[48]

The English Civil War, however, provided another opportunity for the broad use of the royal prerogative of mercy. The defeat of the Royalists by Parliament in 1648 led to chaos as various factions scrambled to fill the void in leadership. Order returned under the lord protectorship of Oliver Cromwell in 1653, only to evaporate again upon Oliver's death in 1658. His son and successor, Richard, proved incapable of managing the affairs of the state and the monarchy was restored in 1660 under Charles II. Yet an important question remained: what was to be done with the thousands of royalists and counter-revolutionaries who had been hunted and imprisoned under the Cromwell regime? And further, what

[43] While there seems to be no settled explanation for this, it is most probable that early English kings simply lacked the power and centralization that Chinese emperors enjoyed, making it very difficult to issue a broad grant of amnesty. Enforcing an individual pardon is far easier than enforcing a pardon granted to thousands of people, so English kings likely could not have granted general amnesties even if they had wanted to. Note, however, that broad grants of amnesty do appear later under more powerful and centralized monarchs such as Charles II following the English Civil War. *See infra.*

[44] Humbert, W. H.: *The Pardoning Power of the President* 31 (1941).

[45] Rolph, C. W.: *The Queen's Pardon* 16 (1978).

[46] Dorjahn: *op. cit.* 1.

[47] Duker, W. F.: *The President's Power to Pardon: A Constitutional History*, 18 Wm. & Mary L. Rev. 475, 478 (1977).

[48] *Ibid.* 485.

should be done with Cromwell's supporters now that the royalists had returned to power? Charles saw an opportunity to assert royal authority while simultaneously restoring normality to the state, and in 1682 he issued the Declaration of Breda: "[So] that those wounds which have [for] so many years ... been kept bleeding may be bound up, ... we do grant a free and general pardon ... to all our subjects."[49] Parliament acquiesced and the royal prerogative of mercy was reestablished.[50]

III. Criticism of Amnesty

The foregoing examples of amnesty may give the impression that the decision to grant mercy is easy and free from detractors. This is false. Granting mercy defeats the normal outcome that enforceable laws are designed to effectuate. Rules need to be enforced, for otherwise they are useless as rules and instead become mere guidelines that are recommended but not required. Thankfully, no society has ever reached a point where it was so merciful, where pardon and amnesty were so frequent, that any offender could be assured of forgiveness regardless of the crime. Such a society would certainly degenerate into chaos and the rule of law would be at an end.[51] Yet social systems around the world have found a place for mercy. As shall be seen, striking a proper balance between amnesty and retribution, between impunity and justice, is not an easy task.[52]

[49] Lord Owen, D.: Reconciliation: Applying Historical Lessons to Modern Conflicts, 19 *Fordham International Law Journal*, 324, 325 (1995). As noted in note 39 *supra*, English monarchs traditionally refer to themselves in the plural.

[50] This acquiescence ended in 1679 when Charles II extended a pardon to the Earl of Danby, then under impeachment and trial in the House of Commons for treason. Parliament was infuriated and following the Glorious Revolution of 1688 (in which William and Mary of Orange came to the throne), Parliament enacted new restrictions on the exercise of the royal prerogative of mercy. Today, the prerogative can only be exercised when the Home Secretary deems it necessary. *See* Duker: *op. cit.* 489–490.

[51] Orentlicher, D. F.: Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 *Yale Law Journal*, 2537, 2543 (1991). *See generally* Quinn, R. J.: Will the Rule of Law End? Challenging the Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model, 62 Fordham *Law Review*, 905 (1994).

[52] This sentiment was expressed nicely by Morris Abram, the former U.S. Ambassador to the United Nations in Geneva, speaking about crimes committed during the 1993 conflict in Bosnia. "As a lawyer, of course, I would like to prosecute everybody who is guilty of these heinous things. As a diplomat or as a politician or as a statesman, I also would like to stop the slaughter, bring it to a halt. You have two things that are in real conflict here. ... I don't know

A. Classical Arguments Against the Exercise of Pardon and Amnesty

Given the destructive impact tampering with the rule of law can have, it is little wonder that pardons and amnesties have been much maligned. Indeed, distaste for the concept of sovereign mercy was common among classical theorists of government, law and crime.

Montesquieu, for example, argued that state mercy was proper in monarchies where offenses are considered to be against the crown, but that state mercy was anathema in a republic. Republics, Montesquieu argued, recognize the sovereignty of all the people, and thus an offense can only be forgiven or overlooked by the people themselves.[53] William Blackstone agreed, arguing that "one of the great advantages of monarchy [is] that there is a magistrate, who has it in his power to extend mercy, wherever he thinks it is deserved. ... In democracies, however, this power of pardon can never subsist; for ... nothing higher is acknowledged than ... the laws."[54]

Cesare Beccaria took a much harder line against pardon and amnesty, arguing that laws should be absolute and no one, even a monarch, should possess the power to abrogate the rules. "See to it that the laws are clear and simple," Beccaria instructed, "and that the entire force of the nation is united in their defense, and that no part of it is employed to destroy them."[55] Immanuel Kant took a similar hard line, though out of concern for the subjects of the laws and not for the laws themselves. First, Kant saw pardons granted by the sovereign as necessarily furthering the sovereign's own interests and thus treating the recipient as an object.[56] Second, Kant argued that individuals had a right to have the state punish wrongs done to them. "With respect to a crime of one subject against another, [the sovereign] cannot exercise this right [of pardon], for in such cases exemption from punishment constitutes the greatest injury towards his subjects."[57]

the proper mix." Gutman, R.: War Crime Unit Hasn't a Clue: UN Setup Seems Designed to Fail, *Newsday*, March 4, 1993, at 8.

[53] Montesquieu, Ch. de Sécondat: *The Spirit of the Laws* 94–95 (Anne M. Cohler, trans., Cambridge 1989) (1748).

[54] Blackstone, W.: *Commentaries on the Laws of England* 390 (U. of Chicago 1979) (1769).

[55] Beccaria, C.: *On Crimes and Punishments* 94 (Henry Paolucci, trans., Bobbs-Merrill 1963) (1764).

[56] Kant, I.: *The Metaphysical Elements of Justice* 97–98 (John Ladd, trans., Bobbs-Merrill 1963) (1795).

[57] *Ibid.* at 108.

B. Contemporary Arguments Against the Exercise of Pardon and Amnesty

Criticism of amnesty and pardon has persisted to the present day. The desire to see justice done, to see offenders punished and the law vindicated, is as powerful today as it has been in the past. Today, however, an international legal system and a heightened consciousness of human rights bolster this desire. Governments are regarded as having an "obligation to ... investigate [offenses], to prosecute those responsible [no matter who they may be], and to compensate the victims."[58]

Pardon and amnesty would seem to vitiate this obligation. "[Amnesty] ... for systematic and widespread violations of human rights is a betrayal of our human solidarity with the victims..., to whom we owe a duty of justice, remembrance, and compensation."[59] The rights of victims, it is argued, cannot be "bartered away" by national authorities who grant amnesty to the offenders,[60] but can only be forgiven and mitigated by the individual victims themselves.[61] The duty of the state is to prosecute and punish unless the individual victims tell it otherwise.

Amnesty critics rely extensively on the obligations of states under international law. For example, Articles 4, 12 and 14 of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) require states to criminalize the use of torture, investigate allegations of torture and ensure legal redress for the victims of torture, respectively. Article 5 of the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) requires states to criminalize genocide, and Articles 1, 4 and 6 of that convention require states to try those suspected of genocide and, if found guilty, to punish them. Clearly, it is argued, states may not grant amnesty to those that international law expressly requires states to punish. Similar arguments have been made regarding the Geneva Conventions of 1949 (as well as the First and Second Protocols of 1977), since the violation of such international obligations is considered an offense against humanity and not simply against a single state's victims.[62]

[58] Quinn: *op. cit.* 909.

[59] Bassiouni, Ch. M.: Searching for Peace and Achieving Justice: The Need for Accountability, 59 *Law and Contemporary Problems* 9, 27 (1996).

[60] *Ibid.* 18.

[61] *Ibid.* 19.

[62] *See ibid.* 18–19. The ramifications of international law on national amnesty policy is a fascinating subject worthy of more detailed study. For an excellent discussion of this issue, see Orentlicher: *op. cit.* 51.

IV. Types of Amnesty

Despite the objections to amnesty noted *supra*, states persist in granting it. Why? What concerns can there possibly be that override enforcement of the law? We may identify three types of amnesty: moral amnesty, just amnesty and political amnesty.

Before we examine each of these types, it should be noted that they are not mutually exclusive. In practice no amnesty is entirely consistent with one type or another, simply because the factors and feelings that motivate human beings to engage in certain acts are always numerous and complex. In determining which type of amnesty is applicable to a given situation, therefore, we are concerned with the *primary* motivation behind it, not the *only* motivation.

A. The Three Types

"Moral" amnesties are those that are granted primarily because of a perceived moral or religious obligation to be merciful on the part of the grantor. Moral amnesties do not portend to condone the actions for which the offenders are amnestied, nor do they have as their primary purpose the accomplishment of some other goal. Rather, they are granted out of a belief that mercy is a legitimate end in itself. Often the sovereign who grants a moral amnesty feels a sense of obligation to be merciful in order to fulfill the expectations and mandate of a higher power. Mercy is viewed as a necessary part of the social fabric that the sovereign has a duty to provide; failure to do so would be akin to the sovereign failing to rule.

"Just" amnesties are those granted to offenders who have committed acts that should not have been criminal; there is a sense that the amnestied offenders "did the right thing."[63] The primary motivation for this type of amnesty is a belief that justice (i.e., punishment for offenders and freedom from punishment for non-offenders) can only be served if amnesty is granted. Thus, the recipients of a just amnesty are treated as if they were non-offenders because their offense is deemed by the sovereign to be either unworthy of punishment or not properly an offense at all. Just amnesties condone the offense. They are not granted out of any sense of moral obligation to be merciful, nor are they granted as a means to bring about any result other than relieving the offenders from an unjust situation.

"Political" amnesties encompass everything else. They are granted as a means of achieving an ulterior goal. They represent a determination by the sovereign or

[63] Murphy and Hampton: *op. cit.* 178.

the sovereign's representatives that mercy and forgiveness of offenders is an efficient tool to accomplish a goal that has very little to do with the amnesty itself. They do not condone the target offense, nor are they designed to remedy an unjust situation, nor are they granted out of a sense of moral obligation as an end in themselves. Political amnesties often take the form of attempts to promote healing and recovery following a period of acute social stress and division, with those who are seen as the cause of the stress granted amnesty in order to avert a cycle of injury and retaliation.

B. Categorization of Examples

Having identified the features of the three types of amnesty, let us now attempt to categorize the examples of amnesties discussed *supra*. Consider: (a) the Athenian amnesties of 481 B.C.E. and 403 B.C.E.; (b) the Eastern Roman amnesties on religious holidays; (c) the amnesties of the Chinese Emperors Han Kao-tsu, Ch'eng, P'ing and Yung-lo; (d) the Norman practice of granting amnesty at the ascension of a new monarch in England; and (e) Charles II's amnesty following the English Civil War.

The amnesties of Emperor Ch'eng and the Eastern Roman amnesties on religious holidays are moral amnesties because their primary motivation appears to have been a moral or spiritual conviction that mercy was appropriate given the occasion. Emperor Ch'eng believed that a solar eclipse was a reflection of Heaven's displeasure with him and thus he felt compelled to engage in a merciful act to satisfy what was perceived as a requirement the gods had attached to the Mandate of Heaven. The issuance of amnesties on religious holidays in the Eastern Roman Empire likewise seems to have fulfilled a perceived obligation to God. In neither case was the *primary* motivation to condone the offenses for which amnesty was granted, nor was it to achieve an ulterior goal beyond securing the pleasure of a higher power. Given the extraordinary frequency and universal character of the amnesties of Han Kao-tsu at a time when China was at relative peace, it seems likely that these amnesties were moral as well, a result of taking to an extreme the perceived need to be merciful in order to fulfill the Mandate of Heaven.

It is harder to classify the amnesties of Emperor P'ing and the Normans. Both contain elements of moral and political amnesties. P'ing granted amnesties with the avowed purpose of purifying criminals and allowing them to begin afresh. Perhaps he viewed amnesty as a necessary step in the spiritual redemption of an offender which, as the embodiment of Heaven on Earth, he was obliged to foster. This would make his amnesties primarily moral in character. However, P'ing could *also* have meant that amnesty gave criminals an opportunity to return to

society, make restitution to their victims and begin contributing and producing within society again. If this was P'ing's primary motivation then his amnesties would be political, since he sought to use amnesty as a tool to promote some other goal. Likewise, the granting of amnesty by Norman kings upon their ascension to the throne might have been primarily designed to prove to God their benevolence and capacity for mercy and behave as it was perceived God wanted them to behave. If this were the primary motivation, these amnesties would be moral. However, it is equally likely that such amnesties might have been used by "[n]ewly enthroned rulers ... to reassure potential enemies, [since amnesty could help] men on shaky thrones ... to strengthen their position."[64] Amnesties primarily motivated by such concerns would be political.

The amnesties granted by Emperor Yung-lo, Charles II and the Athenians all represent political amnesties. Yung-lo amnestied prisoners in the summer and winter, thus saving them from the extreme temperatures of those seasons. Such an altruistic action might at first seem to denote moral amnesty, but scholars have convincingly demonstrated that amnesties such as these were primarily designed to relieve prison overcrowding and save tax revenue at times when it was needed elsewhere.[65] As one scholar has noted, "The genius of ... Chinese statesmen [was their ability to] transform inevitable and distasteful acts into the quintessence of benevolent free will."[66]

The other two examples of political amnesties are clearer. Charles II's avowed purpose, to "[bind] those wounds which have [for] so many years ... been kept bleeding," clearly shows an attempt to promote national healing and stability, and shows no signs of condoning the actions of the offenders or fulfilling a moral obligation to be merciful. The Athenian amnesties of 481 B.C.E. and 403 B.C.E. are even more clearly political. They were granted at a time of social danger and strife with the express purpose of allowing offenders to "contribute to the fullest possible mobilization of national support against the enemy."[67] There was no recognition of the rightness of the offenses and no moral belief in the necessity of mercy. The purpose of these amnesties was clearly to achieve an ulterior goal.

None of the above examples offer an amnesty that is just. The Athenian amnesty of 403 B.C.E. might have been a just amnesty had the political parties which agreed on the amnesty done so because they believed that the exiled

[64] McKnight: *op. cit.* 113.
[65] *Ibid.* 116.
[66] *Ibid.*
[67] *Ibid.* 113.

democrats had been right in opposing the Thirty Tyrants and their punishment was thus unjust. However, the parties that agreed on the amnesty had supported the expulsion of the democrats, so the amnesty had to be political, not just. The just form of amnesty is rare because it is often not recognized as amnesty. For example, the decriminalization of subversion and the release of those imprisoned for that crime in post-apartheid South Africa and post-communist central and eastern Europe are policies of just amnesty, though they are rarely viewed in those terms. An example of just amnesty that may strike the reader as even more strange is the liberation of German concentration camps by Allied forces near the end of World War II. In a sense, however, Allied commanders determined that the "offenses" committed by the prisoners held in those camps (being a Jew, Roma or Slav, being a German who was not sufficiently cooperative, etc.) were not in fact offenses at all and therefore punishment was, to put it mildly, unjust. It is telling that Allied commanders did not, as a rule, liberate true criminals from German prisons, since it was determined that they were indeed deserving of punishment.

C. Amnesty in the Modern Age

All modern amnesties are political amnesties. This statement may seem strange given the foregoing discussion, but consider the alternatives. Amnesties are simply no longer granted primarily on moral grounds. An examination of the reasons for this would certainly fill many volumes and is far afield of the focus of the present study. Let us at least suggest, however, that a general trend toward secularization in world societies, coupled with a greater reliance on worldly rather than spiritual explanations for human behavior, has led to a decreased belief that moral and spiritual obligations of mercy should guide state policy.[68] Just

[68] In some modern societies amnesties for minor offenses are still granted when a new leader or administration comes to power, which could be viewed as a merciful act done solely for the sake of mercy. In France, for example, it is still customary for an amnesty to be granted for all crimes that were not committed against "honor, honesty or morals" (i.e., only light offenses) upon the ascension of a new head of state or parliament. Interview with Roger Errera, Member of the French *Conseil d' État* (Council of State), in Budapest, Hungary (Apr. 14, 2000). These amnesties are not properly moral, however, because like those granted by the Chinese Emperor Yung-lo noted *supra*, these amnesties are clearly and primarily motivated by a desire to relieve the justice system of the burden of so many minor cases. This is an ulterior motive that makes these amnesties political. The same situation is found in Hungary. Interview with Árpád Erdei, Justice of the Hungarian Constitutional Court, in Budapest, Hungary (Apr. 19, 2000) [hereinafter Interview with Árpád Erdei].

amnesties are still granted yet they are rarely if ever recognized as amnesties. Instead they are often characterized as liberations, as was the case with the "liberation" of German concentration camps in World War II. In other words, amnesty carries with it "connotations of guilt and absolution. ... [I]t may be inferred that some real crime was committed and is being pardoned."[69] Since a just amnesty would be given for an act that is to be condoned, there would generally be no "real crime" and thus it would seem strange to think in terms of amnesty. Even when the concerns of just amnesty are present when a recognizable amnesty is granted, political considerations usually overshadow them.[70] Why? Again, a thorough study of this question would require an examination far beyond the scope of this study. However, let us suggest the possibility that political leaders can only safely condone violations of the law when there is an overwhelming consensus in the society that the law is wrong. Such a consensus is extremely hard to achieve in modern societies in which information and political consciousness are far more widespread than in the past. And in democracies especially, such a consensus on the impropriety of the law would most likely lead to the law being changed anyway, making amnesty unnecessary.

The political nature of modern amnesties is evidenced further by the debate over amnesty. As was discussed *supra*, modern criticism of amnesty targets political amnesties exclusively. The notion that states have a duty to do justice and punish offenses rather than "barter away" the rights and lives of the victims by granting amnesty to offenders would not be a valid criticism of just amnesties, since in such cases there is a social consensus that those offenses should not have been criminal in the first place. It also would not be a valid criticism of moral amnesties, since moral amnesties do not view amnesty as a trade off but rather as a justifiable end in itself. Furthermore, there is no indication among modern critics of amnesty that they have considered a duty on the part of the sovereign that runs counter to the duty to do justice, namely the duty to be merciful that is central to moral amnesties.

[69] Kader Asmal et al., *Reconciliation Through Truth: A Reckoning of Aparthied's Criminal Governance* 56–57 (2nd ed. 1997).

[70] Consider, for example, the amnesty granted to Vietnam War draft resisters in the United States. Many considered the Vietnam War to be immoral and wrong, and thus those who refused to participate in it were widely believed to have done the right thing. However, the amnesty draft resisters received was justified by its grantor, President Carter, not by condoning their offenses but by appealing to the need to heal and stabilize the nation. *See* Proclamation No. 4483, 42 Fed. Reg. 4391 (1977) and Exec. Order No. 11967, 42 Fed. Reg. 4393–4394 (1977).

Furthermore, consider the arguments advanced by those who argue in favor of amnesty. Overwhelmingly they speak of a difficult choice, a "cruel paradox" in which "settlement [of social division] is impossible without amnesty."[71] As one proponent of amnesty writes, amnesty critics must consider the "view from the trenches"[72] and realize that "the factual context may frustrate a government's effort to promote the prosecution of persons responsible for human rights abuses, except at the risk of provoking further violence."[73]

These arguments contemplate a state that must make a choice between amnesty and peace or retribution and possibly further war. Amnesties made as a result of that choice are, by definition, political.

V. Summary

Amnesty is a difficult concept to define, given that it means so many different things to scholars and practitioners and is often used interchangeably with terms denoting other forms of mercy and forgiveness. Nevertheless, it is possible to say that, in general, amnesty is an action, undertaken by the sovereign (or representatives of the sovereign), by which a class of individuals who have committed certain political offenses—either against the sitting regime or as a means of maintaining a prior regime—have their offenses legally forgotten, though not necessarily forgiven, and are granted immunity from prosecution, punishment or further punishment.

As difficult as amnesty is to define, however, it is even more difficult to put into practice. Indeed, amnesty is a concept wrought with contradictions and paradoxes: on the one hand, it conjures feelings of benevolence and virtue that

[71] Torricelli, R. G.: Amnesty—A Nasty Necessity for Peace in Haiti: A Settlement is Close, But Only a Pardon Will Get the Military to Accept Aristide, *L. A. Times,* May 6, 1993, at B7.

[72] Nino, C. S.: The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina, 100 *Yale Law Journal,* 2619, 2622 (1991).

[73] *Ibid.* at 2639. *See also* Zalaquett, J.: Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations, 43 *Hastings Law Journal* 1425 (1992) and Goldstone, R.: Exposing Human Rights Abuses: A Help or Hindrance to Reconciliation? 22 *Hastings Constitutional Law Quarterly,* 607 (1995). In the French legal tradition this is known as the conflict between the *legalité principe* (the principle of legality, which dictates that all crimes, no matter how small, must be prosecuted and punished) and the *opportunité principe* (the principle of opportunity, which dictates that prosecution and punishment should only be undertaken when they will have good results for society). Interview with Árpád Erdei, *supra* note 68.

are extolled by the religious and cultural traditions of most societies; on the other, it contradicts the rule of law and seems to violate basic notions of justice. This apparent assault on the anticipated course of justice has inspired a great deal of criticism from both classical and contemporary sources. And yet, despite this criticism, amnesty has persisted throughout recorded history on three grounds: moral, just and political. In contemporary practice, all amnesties are political, and it is around political amnesties that the modern debate between critics and proponents of amnesty revolves.

In *The Odyssey*, Odysseus made the right choice: by strapping himself and his crew to the masts of their ship, as painful as that was, they were able to resist the Sirens' song and survive. In times of intense crisis, should states follow Odysseus' lead? Even though the rule of law generally commands the ship of state along a course toward punishment for offenders, are there times when that course should be altered for the sake of peace, lest the ship itself be dashed to pieces among the rocks of retribution and further violence? These are very difficult questions, and there is no need to attempt a definitive answer here. By understanding more about the nature of amnesty, however, we are better equipped to attempt one in the future.

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The Idea of the "Third Reich" in the German Legal, Philosophical and Political Thinking in the 20th Century

1. The idea that after the Nazi takeover the German political propaganda machine strongly supported the naming of their land the "Third Reich" (*Drittes Reich*) is a misperception shared by many historians, political scientists as well as lawyers all around the world even today. It is much less known that Hitler himself was never in full support of this expression even tough it proved quite effective both before and after the NSDAP (*Nationalsozialistische Deutsche Arbeiterpartei*) takeover.[1] A circular letter that was issued by the Ministry of People's Education and Propaganda of the German Empire (*Reichsministerium für Volksaufklärung und Propaganda*) on 10 July, 1939 explicitly forbade the official use of "Third Reich". According to this circular letter Germany's official name is from this point on "Greater German Empire" (*Großdeutsches Reich*).[2] It is worth pointing out that the "Greater German Empire" (*Großgermanisches Reich*) used by the SS cannot be considered official either.

Years later on 21 March, 1942 the Ministry of People's Education and Propaganda issued a circular letter with provisions for the official name of the "new Germany". It was to be called "Empire", quite possibly modelled after the British Empire.[3] The goal of using the expression of "Empire" was to illustrate to the world that the newly acquired lands include territories annexed or occupied by

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[1] During Hitler's official visit to Italy in May 1938, the German press repeatedly referred to the Holy Roman Empire of the German nation (*Heiliges Römisches Reich Deutscher Nation*). See Klemperer, V.: LTI. La langue du IIIe Reich, Paris, 1996. 158 (In German original: LTI – Notizbuch eines Philologen. Leipzig, 1975.)

[2] In contemporary German legal textbooks the term "Greater German Empire" (*Großdeutsches Reich*) was used instead of Germany. See Huber, E. R.: *Verfassungsrecht des Großdeutschen Reiches*, Hamburg, 1939.

[3] It is noteworthy that the name of the weekly paper released by Germany for foreign countries between 1940 and 1945 was *Das Reich*. This paper of the Nazi Germany contained a wide range of political, historical and literary information and was in print even in April 1945.

Germany without any international validity, altogether ca. 841 000 sq. km.[4] The same circular letter limits the use of the expression to Germany, emphasizing that there is only *one* Empire and that is Germany.[5] The use of the term "Third Reich", however, implied a serial empire which is comparable both in deeds and leaders to the empire, an idea that was entirely incompatible with the self-conscience of the imperialistic national socialism which fancied to be looked upon as the pinnacle of German history.

2. In a historical sense the First Empire was estabilished by Otto I in 962 who was crowned emperor by Pope John XII in Rome. This empire is also known as the Holy Roman Empire (*Sacrum Romanum Imperium, Heiliges Römisches Reich*) which existed till 1806.[6] The "Second Empire" was founded on 18 January, 1871 in Versailles after the Franco–Prussian War and remained the most influential political and military power in Europe until its dissolution in November 1918. In a sense the Weimar Republic can be considered an "intermezzo" (*Zwischenreich*) between the "Second Empire" and the "Third Empire".[7]

Following the Christian doctrine of Trinitarianism the three empires can be thought of in a religious and messianic way as follows: the "First Empire" is related to the Father, the "Second Empire" to the Son, while the "Third Empire" to the Holy Spirit. According to such an interpretation the "Third Empire" would

[4] According to a German official statement the territory of Germany in 1942 without Elsace, Lorraine, Luxembourg, the Czech-Moravian Protectorate (*Reichsprotektorat Böhmen und Mähren*) and Poland (the total size of these lands was 160 000 sq. km) was 681 000 sq. km. Previous to the Peace Treaty of Versailles the size of the "Second Reich" (which is often called "altes Reich") was 540 000 sq. km. This substantial change is primarily due to the annexation of Austria (*Anschluß*), the Czech-Moravian regions following the Munich Agreement and the Polish regions (e. g. Warthegau) after the beginning of World War II. After the creation of the "Social Republic of Salò" (*Repubblica Sociale di Salò*) a part of Northern Italy, the so-called "*Voralpenland*" which includes Southern Tirol and the coastline of the Adriatic ("*Adriatisches Küstenland*"), became part of Germany. It is, however, difficult to decide whether these territorial acquitisions, from a legal viewpoint, were occupied or annexed.

[5] In legal terminology, primarily in administration, one comes across the euphemistic expression "Verreichlichung" quite often.

[6] For the international legal status of the Holy Roman Empire see F. Berber: Internationale Aspekte des Heiligen Römischen Reiches. In: *Festschrift für Th. Maunz zum 80. Geburtstag*, München, 1981, 17–25. Regarding the relationship between the idea of the renovatio imperii and the Holy Roman Empire see Földi A.–Hamza G.: *The History and Institutes of Roman Law*, 5th revised and enlarged edition, Budapest, 2000, 114.

[7] For the most recent literature see Dufraisse, R.: Le Troisième Reich. In: *Les empires occidentaux de Rome à Berlin.* ed. J. Tulard, Paris, 1997, 449.

constitute the zenith of history and the perfect symbiosis between the real and ideal, satisfying the profetic requirement of Ibsen and Lessing[8] that the contradiction between Christianity and Antiquity be dissolved. This "Third Empire" would follow a distorted era of Christianity that would be realized by the arrival of a new Messiah.

3. It is furthermore worth mentioning that in Ernst Krieck's *Die deutsche Staatsidee* (1917) the "Third Empire" appears not as a historical or political, but rather as a moral idea. Krieck alludes to Johann Gottlieb Fichte, the author of *Reden an die deutsche Nation*, a work that was rather influential in the latter's era. By 1919 Dietrich Eckart uses the "Third Empire" with a political and nationalistic content.[9]

Ernst Fraenkel (1898–1975) a lawyer who immigrated after the National Socialist takeover, quite rightly uses the term *Doppelstaat* ("Dual State") to describe the autocratic national socialist system, emphasizing the double nature of the national socialist political rule. To insure the normal functioning of the economy a *Normenstaat* is in effect in the areas of civil, trade, corporate and tax law. On the other hand only professional experience i.e. knowledge plays a part in securing political power (*Maßnahmenstaat*).[10]

4. In the preface of his work Arthur Moeller van den Bruck (1876–1925) emphasizes that the notion of the "Third Empire" is ideological (*Weltanschauungsgedanke*), that rises above reality. Moeller van den Bruck's work quickly becomes widely known in Germany and has a large influence on the thinking of the young intellectual class with nationalistic feelings.[11] The disappointment felt after the very harsh political and economic terms of the Peace Treaty of Versailles that were imposed on Germany after the First World War undoubtedly helped shape the thinking of this class. The same work only very

[8] In his work "L'education du genre humain" (86.) *Gotthold Ephraim Lessing* foretells the "new eternal Gospel", which means the "third era" (90.).

[9] It is worth pointing out that the title of Stefan George's (1868–1933) work is "Das neue Reich" in which the expression "völkisch" occurs.

[10] See: Fraenkel, E.: *The Dual State*, New York, 1941. (reprint: 1969). This work only appeared in German translation in 1974 (*Der Doppelstaat*, Frankfurt am Main–Köln). For Ernst Fraenkel's view of the state see: Brünneck, A. v.: Ernst Fraenkel (1898–1975), Soziale Gerechtigkeit und pluralistische Demokratie. In: *Streitbare Juristen, Eine andere Tradition*, Baden-Baden, 1988, 415–425.

[11] In the 3rd edition of *Das dritte Reich* (1931) Hans Schwarz emphasizes that national socialism accepts the name "Third Reich" and named the federation's paper *Oberland* based on the title of Moeller van den Bruck's work.

slowly becomes known outside of Germany. The Solingen born author, who came partly from a traditional Prussian military family, was greatly influenced by the philosophy of Nietzsche. His affinity to the Pan-German ideas is also quite strong. He is rather well acquainted with the most influential European countries, since he visited England, France, Austria, Italy and Russia between the turn of the century and the outbreak of the First World War. He was never really concerned about the unique ethnic problems of the Austro-Hungarian Monarchy. With the exception of the Dual Monarchy and Germany he vehemently criticizes the major Western European powers, especially their political system and structure. To him the ideal "power" is Germany, his homeland, without which—according to him—no stability can or will exist in Europe.

The conservative philosopher feels antipathy for the Western democracies primarily towards France and England. He introduces the democratic system of these countries in an ironic belittling way. According to him it is only a fiction that the nation (*natio*) is made up of formally equal individuals. Moeller van den Bruck is convinced that Germany is predestined to lead Europe for the historical ties it has with the Holy Roman Empire (*Sacrum Romanum Imperium*). He states that in its history the Holy Roman Empire was never able to amalgamate itself into a real political community (*politische Gemeinschaft*). The Holy Roman Empire is almost exclusively dominated by the notion of territoriality (*territorialitas*), the result of which is centurial territorial dismemberment. This limits the development of German ethnic identity. The birth of the "Second-Empire"—despite the involvance of the political unity—failed to change this situation. The state further remains autocratic and is viewed as a "foreign body" by its citizens.

Moeller van den Bruck also condemns the Weimar Germany, in which all of the political views are superficial and not reflective of society. He strongly criticizes the Weimar constitution of 1919 as well, since in his opinion it is unable to provide the united Germany with an acceptable constitutional framework. Only with the elimination of its pseudo-values can Germany fulfill its mission of reviving Europe, something it is obligated to do with its rich ties to the Holy Roman Empire. It is the duty of the young generation to revitalize the dormant German intellectuals. They have to intuitively oppose and revolt against the deceiving values. Only as a result of such a "revolution" can the "Third Empire" come into existence.

The birth of the Third Empire, however, automatically assumes the territorial unification of the German ethnic group, that is the termination of the system of the Treaty of Versailles. The substantial growth of the German population can provide the nation with the necessary strength to attain its goal.

5. It is quite interesting from the viewpoint of the "Third Reich" to briefly analyze the Article 61 of the Weimar Constitution. According to this article German-Austria after joining Germany receives proportional representation in the Imperial Council (*Reichsrat*). Even till the accession German-Austria (*Deutsch-Österreich*) is endowed with the right of consultation. Later Germany was forced to declare the passage void. According to Article 80 of the Treaty of Versailles Germany binds itself to acknowledging and respecting the independence of Austria. Austria's independence is inviolable. Only with the consent of the League of Nations (*Völkerbund*) can the status of Austria be modified. This condition, however, led the peace conference to the inclusion of Article 88 in the text of the third draft of the peace treaty signed with Austria on 2 September, 1919. According to this article Austria's independence is inviolable and is always dependant on the consent of the League of Nations. This article of the treaty is in unison with the decree that Austria must make a commitment to refrain from any action that could directly or indirectly threaten its independence.

It must be emphasized that this section opens the floor to a very wide range of interpretations. The expression "Jesuit section" used by John Maynard Keynes is quite telling of this section.[12] It was viewed positively by the followers of Pan-Germanism, since it left the door open for the unification with Germany (*Anschluß*) through a rather peculiar interpretation.

6. The emphasis of Moeller van den Bruck's philosophy is on the social or more specifically nationalistic demagogy. According to Moeller van den Bruck the integration of the pheripherial classes into society and the German nation would be the solution to serious differences within the society of the Weimar Republic. Closely related to this idea, of course, is the goal of developing a national identity as soon as and as efficiently as possible. All this is a kind of anti-capitalist reaction and a significant contribution to the conservative and heterogeneous trend of both the conservative and the popular revolutions. The author of *Das dritte Reich* is an active supporter of only the first one.

Moeller van den Bruck's idea of a "perfect" empire has already been present in Lessing's and Ibsen's thoughts concerning the "Third Reich", but was influenced primarily by Gerhard von Mutius' value-ideal world view.[13] Despite

[12] The decision, formulated by the Supreme Council on 16 December, 1919 deals with the interpretation of the mentioned article. It was sent to chancellor Karl Renner on the same day with a *lettre d'envoi*, that included the Allied Powers' guarantee for the territorial integrity of Austria.

[13] See Mutius, G. von: *Die drei Reiche*, Berlin, 1920, 226. Von Mutius writes: "One who frees himself of his own self stands in the Third Reich." (Wer sich von seinem Selbst geschieden hat, der steht im dritten Reich.)

the rejection of modern liberalist ideals and the formulation of a plan for a "new European order", the leaders of Germany's political and ideological life refused to accept Moeller van den Bruck's idea of the "Third Empire" that was originally trademarked by idealistic rather than politically relevant thoughts. This general hostility was further reinforced by the publication of a strong critique of Moeller van den Bruck's views in 1939. It is also worth mentioning that the expression "Prussian style" (*Preußischer Stil*) comes from Moeller van den Bruck. The ideas of the conservative intellectual philosopher are especially popular with the conservative German "national" intellectuals.[14] During the Great Depression of the early 30's Moeller van den Bruck is often cited by many adherents of this group.

7. Followers of the idea of conservative revolution are the writers, historians, economists and lawyers who had close ties with the *Die Tat* cultural journal published by Ernst Horneffer in Jena between 1909 and 1939. A majority of these people consider themselves to be the intellectual successor of Horneffer in some way.[15] After Horneffer, Eugen Diederichs (1867-1930) takes over as the magazine's editor. During Diederich's editorial years the paper gains a more religious, social and cultural political appearance. From April 1913 the sub-title of *Die Tat* becomes "Social-religiöse Monatschrift für deutsche Kultur", well reflecting the changes in ideology of the paper. During the First World War the paper is out of print. In 1921 the sub-title of *Die Tat* is changed by Diederichs to "Monatschrift für die Zukunft deutscher Kultur", implying a change in style once again. The goal of the paper is changing Germany's political and cultural life.[16] The articles published in the *Die Tat* welcome the fall of the empire and follow a new socio-religious aristocratic thinking. Diederichs provides space for both the national socialists and the liberals.[17] The "community of people" (*Volksgemeinschaft*) wishes to bring a halt to the social and political decline of the bourgeoisie through the simultaneous creation of a national socialist and

[14] Carlo Schmid writes in his memoirs, that in the 1930's the members of Tübingen Wiking-Bund, a nationalistic student group, read the works of Moeller van den Bruck. See Schmid, C.: *Erinnerungen,* Bern–München, 1979, 143.

[15] Essays and critiques are published by distinguished writers and philosophers such as Hermann Bahr (1863–1934), Paul Ernst (1866–1933) and George Simmel (1858–1918) in the *Die Tat.*

[16] According to Diederichs the current leading bourgeoisie (bisher geistige Schicht des Bürgertums) cannot be the carrier of culture in the future. (Träger der Kultur nicht walten kann). See: Diederichs, E.: Die neue "Tat". In: *Die Tat,* Heft 7, October 1929, 481.

[17] Fritsche, K.: *Politische Romantik und Gegenrevolution. Fluchtwege in der Kriese der bürgerlichen Gesellschaft: Das Beispiel des "Tat"-Kreises,* Frankfurt am Main, 1976, 45.

authoritarian state. He furthermore demands a "revolution from the top" (*Revolution von oben*).

8. It is necessary to mention Eugen Rosenstock who further developed the ideas of Diederichs. His work on the European revolutions, published in the early 1930's is quite influential. The same can be said about economist F. Fried who uses facts to demonstrate the serious crisis of capitalist production. According to him the solution to this problem is an authoritarian economic system. Rosenstock is further disturbed by the gradual impoverishment of the middle-class, and the drastic strengthening of a rather small elite in the political and cultural life of Germany. This evermore powerful group barely constitutes one-tenth percent of a 60 million large Germany, yet it seems to create an unabridgable gap between itself and the rest of society. He believes that the only solution to this problem is not only economic expansion, but also a substantial increase in exports. In order to achieve this Germany needs to become self-sufficient economically and must switch to an authoritarian system politically.

9. Carl Schmitt (1888-1985), a renowned professor of law and the author of the well-known work *Der Hüter der Verfassung* (1931) was also a person with close ties to the *Die Tat*. In this greatly influential work, through closely studying the Weimar Republic, he reaches the conclusion that in historic dimensions the state becomes "overpowering", directly leading to the rise of a totalitarian state. In many respects Carl Schmitt's *Gegenspieler* is *Hermann Ignatz Heller* (1891-1933) who quite appropriately writes that "the need for a strong person is the bourgeoisie's way of expressing its desperation. Through the strenghtening of the working masses they feel that not only they own political and economic interests, but also the entire European culture is threatened... The only thing left for the desperate bourgeoisie is to place all their faith into a strong person."[18]

Heller, who becomes a full professor of public law at Frankfurt am Main University in 1932, is a committed supporter of the Weimar Republic. The fact that in the same year he was the legal representative of the faction of the social democrats of the Prussian provincial diet in the so-called *Preußenschlagverfahren* seems to only reinforce this fact. It must be pointed out that Heller thinks that the

[18] Hermann Heller writes: "Von grosser Wichtigkeit ist es, dass neufeudale Kraftpose und den Schrei nach dem starken Mann als den Ausdruck einer Verzweiflungsstimmung des Bürgers zu erkennen. Erschreckt durch das Avancieren der Arbeitermassen, glaubt er nicht nur seine eigenen politischen und ökonomischen Herrschaftsansprüche bedroht, sondern sieht zugleich das Ende der gesamten europäischen Kultur nahe. [...] Begreiflich, dass diesem verzweifelten Bürger nur die Hoffnung auf den starken Mann übrig bleibt." See Heller, H. I.: *Rechtsstaat oder Diktatur?* Tübingen, 1930, 17–18.

modern state and its era are entirely incompatible with the class-stratification. As he indicated in his rather fragmented work, *Staatslehre* which was published after his early death, a modern state is both a social and democratic constitutional state, that by definition excludes the possibility of a strong person-led authoritarian state.[19]

10. Certainly worth mentioning is Hans Zehrer, who became the editor of the *Die Tat* in October 1929.[20] He is regarded as a supporter of the "conservative revolution" and the opponent of parlamentary democracy. After World War II Zehrer becomes the editor-in-chief of the *Die Welt*, and modifies the sub-title (*Monatsschrift zur Gestaltung neuer Wirklichkeit*) established by his predecessor Adam Kuckhoff. In 1932 he adds the adjective "independent" (*unabhängig*) to the original subtitle. The *Die Tat* becomes the intellectual interpretative forum for national socialist ideas although keeping a distance of from Hitler and underestimating the dangerousness of the NSDAP. As the solution to the instable political and economic system of the Weimar Republic, Zehrer envisioned a new system, the "Third Reich", as a fundamentally different, religion based corporate political system.

This new system, which is in essence a 20th century version of Luther's directorate, would be led by a new elite with "folk roots". In Zehrer's opinion only a return to the Lutheran Reformation can stop both communism and national socialism from fulfilling their ultimate goal of establishing an authoritarian system. In accordance with Zehrer's interpretation the "Third Reich" would have an eschatologic political structure that had its foundations in the Reformation.

11. The intellectuals of the *Die Tat*, especially Giselher Wirsing, the person who becomes the editor of the review after the Nazi takeover in 1933, concentrate on Germany's relations with Central Europe. Starting 1934/35 Wirsing shortens the review sub-title to "Unabhängige Monatsschrift". This is "confirmed" or seems to be confirmed by the unique, yet already true fact that the "transformation of reality" has already taken place. From 1936 the ord "independent" disappears and only "Deutsche Monatsschrift" appears on the cover of the paper. In March 1939 the publication of the *Die Tat* comes to an end by merging with the "*Das XX. Jahrhundert*" magazine. Despite the political,

[19] For the importance of Heller's view of the social state with respect to the German constitutional thinking see: *Staatslehre in der Weimarer Republik.* Hermann Heller zu ehren, Hrsg. von Ch. Müller und I. Staff, Köln, 1985.

[20] Adam Kuckhoff takes over the editing of the *Die Tat* from Diederichs in April 1928. Kuckhoff only works at the journal for one year. In August 1943 he gets executed by the Nazis as a member of the "Rote Kapelle".

ideological changes it has gone through the years the *Die Tat* becomes very popular in Germany, especially during Zehrer's editorial years. The circulation of the paper reaches a yet unprecedented 30 000 copies. In addition Tat-clubs (*Tat-Kreise*) are born all throughout Germany, forming intellectual debate forums.

According to Wirsing, Germany's future is primarily influenced by South-eastern Europe (*Südost-Europa*). He is convinced that the goal of Germany's enemies or perceived enemies is to encircle the country. It is for this reason that Germany needs to establish a closed national "living-space" (*Lebensraum*). He is convinced that self-sufficient German economy should open towards Southeastern Europe instead of the increasingly hostile financial world. At the same time Wirsing, similarly to most of his colleagues of the *Die Tat*, does not wish to continue or renew the old policy of annexation. Wirsing essentially revives the *Mitteleuropa-Plan* (1848-50) which states that Germany's expansion should be directed towards Central Europe instead of the West. This latter option has been limited, anyway, by the Locarno Treaty in 1925. The ultimate goal of the expansion is to establish the so-called *Großwirtschaftsraum* (Greater Economic Space). The *Mitteleuropa-Plan* is generally associated with Friedrich Naumann (1860-1919), however, it was the Prussian-born Karl von Bruck (representative of Trieste in 1848 in the Viennese Parliament and financial minister of Austria between 1855-1859) who first developed the financial aspect of the plan.[21]

12. Moeller van den Bruck was the intellectual center for the other group of intellectuals who sympathized with the idea of "conservative revolution". These people were united under the Berlin-based *Juni-Club* and were led by Moeller van den Bruck's friend Heinrich von Gleichen. There is a close relationship between the *Juni-Club*, organized around figures of Moeller van den Bruck, Heinrich von Gleichen and Martin Spahn from Berlin and the *Deutscher Hochschulring* (DHR), an organization established and actively participating at most German universities after World War I.[22] The *Ring-Bewegung* is primarily characterized by conservatism, a nationalistic attitude and—due to disorientation—a

[21] It must be mentioned that Constantin Frantz, a political opponent of Bismarck, feels nostalgic towards the Holy Roman Empire. According to Frantz the three "Germanies" (Prussia, Austria, and the "third Germany"), which include the South and Central German states, may provide the real defense against the French and Russian expansion. Frantz's idea is anti-Nazi and was rather popular in German circles outside of Germany. See: Genton, F.: *L'Europe Centrale, une idée d'Europe,* Dijon, 1997, 362.

[22] At some universities the name of the *Deutscher Hochschulring* is *Hochschulring Deutscher Art* (HDA).

trend-seeking at the beginning. The ties are particularly strong in Berlin which is illustrated by the fact that the centers of the *Hochschulring* are in the headquarters of the *Juni-Club*. The *Juni-Club* is rather active in Berlin, in particular it exhibits educational activities of political nature. In November 1922 Martin Spahn, one of the leading figures of the *Juni-Club* establishes a "Political Collegium", where he regularly organizes lectures. From 1923 the Collegium's name changes to "Hochschule für nationale Politik", where he holds private "university" classes. These classes are visited primarily by youth who sympathize with nationalist ideals, such as Werner Best, a lawyer and one of the most well-known national socialists having a law degree.[23]

A prominent member of the *Juni-Club* is Edgar Jung. The Austrian economist, philosopher and sociologist, through the influence of Othmar Spann (1878-1950), propagates the rebirth and revival of the Holy Roman Empire of the German Nation.[24] This view is quite similar to Moeller van den Bruck's call for the establishment of the "Third Reich", since both of them reach back to the Holy Roman Empire for ideological support. Without going into an extensive analysis of the question, it must be pointed out that the linking of the Holy Roman Empire with the Germans as an ethnic group is entirely unhistorical.

13. Even based on this brief summary it can be ascertained that the idea of the "Third Reich" dates back a long time. In traces it is already present in Fichte's ideas. The idea of the "Third Reich" has quite an influence on the thinking of the conservative cultural philosophers, primarily Arthur Moeller van den Bruck. It is also present in the works of the era's influential literary, political and economic scholars. However, not even the often eschatologic "Third Reich" is a uniformly interpreted idea. For political and philosophical reasons the national socialist regime isolates itself from the idea of "Third Reich" already by the end of the 1930s. The "conservative revolutionary" branch of the *Deutsche Bewegung* (German Movement) – including all branches of the "conservative revolution" – as unacceptable as an ideological base for the national socialist rulers.

[23] See: Herbert, U.: Best. *Biographische Studien über Radikalismus, Weltanschauung und Vernunft.* 1903–1989, 2. durchg. Aufl. Bonn, 1996, 55.

[24] In contrast with Adam Smith and David Ricardo's liberal economics Othmar Spann, the founder of social economics and universalism in philosophy, develops a new view for studying the so called *Ganzheitslehre*. In his opinion the construction of a "real state" (*wahrer Staat*) assumes the new, profession based establishment of the economy and the state (*Ständestaat auf berufsständiger Grundlage*). Through opposing the various trends of liberalism and marxism Spann exerts great influence on the conservative Austrian thinkers. Following the *Anschluß* Spann was stripped of his professorship in Vienna. Thereafter he took an active part in the formulation of the so-called *Korneuburger Eid*, an oath of the Austrofascist *Heimwehr*.

The "völkisch" branch of the *Deutsche Bewegung* is an entirely different matter. This latter one cannot be considered a uniform movement either, since it includes the *Schwarze Front* trend that later came into conflict with the national socialist ideals and the *Landvolkbewegung*,[25] a movement unfolding at the end of the 1920s in Schleswig-Holstein and one that wobbles between anarchy and corporatism as well. Of all these different movements the *Führerprinzip* idea, symbolized by Hans F. K. Günter, Richard Walter Darré and Alfred Rosenberg became the official ideology of the national socialist Germany, in which the idea of the "Third Reich" no longer played a role.

[25] Here we point out that the trend represented by Ernst Niekisch is part of the *Deutsche Bewegung*'s "völkisch" revolutionary branch. Ernst Niekisch is also one of Moeller van den Bruck's students.

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ALF MASING *

Networking and Basic Ideas to Understand Constitutional Adjudication in Europe

One thousand years ago the first Hungarian King, *King Stephen the Saint,* wrote in his admonitions to his son the following sentence:
"Time esse iudex, gaude vero rex esse et nominari".[1]

In a time the king was empowered to both: to govern and to judge, this sentence expresses a reflection on the usage of power. The wisdom of the sentence is that a successful government needs courage and good mood, whereas the adjudication needs an increased rationality, a specific imposed rationale. The differentiation between governance and jurisdiction that is expressed in this sentence might be among the first references to the differentiation of power in midaeval thinking. This differentiation envolved to the principle of separation of powers and this principle opened the way to the idea of constitutional adjudication and is still today one of its fundamentals. Therefore constitutional adjudication can be characterized as a review of an already taken decision by a state organ on the grounds of arguments that already should had guided the decision-taking, but the claiments argued that than these arguments have not taken into proper consideration. The constitutional court is the organ to decide the supposed neglegence.

The establishment of separate independent constitutional courts in various European country marks one of the major achievements in the institutionalisation of legal reflexion and adjudication in the 20th century. The first constitutional courts were founded in the aftermath of the First World War in Czechoslovakia and Austria. The mastermind of the idea of an independent constitutional court was the legal scholar *Hans Kelsen* from Austria, who took part in the drafting of the Austrian Constitution and it is said that the establishment of the constitutional court was his most beloved child. In his own words he gives the following reasoning about the implementation of a separate constitutional court:

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[1] In English: *"Be afraid to be judge, but enjoy to be King and to lead".* Tibellus Secreti Stepani Regis de Institutone Morum ad Emericum Ducem, 1930. Fitz József (editor): caput V § 4, Seite. 10. OK. 350.103.

"The law-giving-body understandably sees himself only as a free creator of law and not as an by the constitution bound organ of application of law, although it is the latter according to the idea. In order to realize this latter insight, it should not be the parliament the garantee of this idea. Only a from the legislator separated body, a from him and from every other authority independent body must be set apart, to nullify the unconstitutional acts of the legislative. This is the institution of the constitutional court."[2]

During the course of the 20th century the independent constitutional court was established in Germany (1952), Italy (1956), Yugoslavia, Spain (1979) Portugal (1982), Polen, Hungary (1990), Russia and many more now democratic countries of the former communist hemisphere.

The special feature in Germany's constitutional jurisdiction is the constitutional complaint that everyone can ignite, who feels hurted in his/her rights or interests and can make a reasonable claim on constitutional grounds against a given law or administrative or judicial decision. This showed up as a powerful instrument that provides the constitutional court with the possibility to influence the legislature and common court's adjudication substantially.

The special feature in Hungary's constitutional jurisdiction consists in the possibility that every citizen is entitled to turn directly to the constitutional court with the argument that a specific provision of a statute or decree of the government or city council is not in conformity with the constitution. Through this *actio popularis* there are a lot of cases brought before the court and so the court got an exceptional opportunity to contribute and to influence the building up of the rule of law in Hungary.

Already in the beginning of the 1970s the constitutional courts, specially these of Germany, Italy, Austria with the initiative coming from Yugoslavia, started networking together. These courts established a series of conferences that are now taking place every three years with alternating sites and topics. In nower days the series of conferences is a quite institutionalised undertaking named "*The Conference of the European constitutional Courts*". One of the constitutional courts is choosen as the organizer of the following conference. Every conferences has a specific topic and all participating constitutional courts send a lengthy report about their respective case law and deliberations, whereas the organizing court writes a summarizing report that serves as basis for further discussions. The penultimate conference took place in Budapest in 1996 and addressed the jurisdiction on the freedom of expression and the separation of powers (see web-site:

[2] Kelsen, H.: Wesen und Entwicklung der Staatsgerichtsbarkeit, in: *Hans Kelsen oder die Reinheit der Rechtslehre*. Ed.: Friedrich Koja, 1988, 130.

www.mkab.hu). the most recent conference was held in Warsaw (Poland) in the year 1999. At the Warsaw conference 23 constitutional courts took part in full member status and the choosen topic was the jurisdiction in matters of freedom of conscience and religion (see web-site:www.trybunal.gov.pl). During the conference a task force reported to the conference about the further institutionalisation of the conference and their proceedings and the organisation of the mutual cooperation in the time between the conferences and with other international organisations.

The best counterpart and partner for strenghening the network of constitutional courts is the *Commission on Democracy through Law of the Council of Europe* (called the *Venice Commission*).[3] The Venice commission was founded in 1990 with the task to provide the necessary advice for implementing the rule of law and mastering the change to democracy in Central and Eastern Europe countries. The Commission consists of delegates from the, in the European Council participating countries and many delegates are personally experienced in matters of constitutional adjudication. The Venice Commission meets annually in Venice and is engaged in many projects of advising the legislature in European countries. In reference to the constitutional jurisdiction the Venice Commission gives advice toward the proper setup and implementation of constitutional jurisdiction. The commission takes also care about the building up of a computer aided database on constitutional jurisdiction. The inspiring insight of the work is that the commitments of the European States according to the European Declaration of Human Rights require good working conditions of constitutional in all member states.

The Venice Commission and the conference of the European Constitutional Courts are planning to coordinate and to harmonize their effort and started talking about to establish a well organised network for consultation purposes in constitutional jurisdiction. These consultation efforts and the undertaking of comparative constitutional law lead to deliberation basic ideas of constitutional adjudication. According to the results of my research the basic ideas of constitutional adjudication can be summarized and extracted from four concepts that are reflecting the constitutional jurisdiction in the constitutional framework and societal reality in the nowadays European Countries.

Firstly *Hans Kelsen* himself developed the *concept of purity of lawdoctrine* and an understanding of constitutional jurisdiction in order to advocate the decision to implement this jurisdictional institution. The basic insight of *Hans Kelsen* is the legal nature of the state. Every official doing of the state can be

[3] See web-site: www.venice.coe.int.

reflected on the basis of legal reasoning and this legal reasoning is done within the framework of the pyramid of norms. The exercise of state-power is bound in the vessels of law. The usage of governmental power is simultaneously an enactment of possibilities that are provided by law and is placed in the proper place of the pyramid of norms. In this understanding not only the administrative exercise of power is application of law, but also the legislation and the adjudication in the courtroom. Letting here aside the famous basic norm the constitution is on the top of the pyramid of norms and the basic task of the constitutional court is the repressive control of legislative actions refering to their character as application of the constitution. Consequently *Kelsen* refers to the work of the constitutional court as a negative legislator and systemizes the rulings of the constitutional court as legislative actions. The main quality standard that derives from this concept is the quest for the purity of the legal arguing. The constitutional court is committed to legal rationality. The convincing power of its rulings is mainly deriving from the purity of the legal reasoning that applicate a higher norm towards the creational process of a minor norm. Transparency of the decision-taking may open a reflection on the question, what is guiding the decision and whether the decision is sufficiently based on legal arguing.

The second here depicted concept is the *concept of open society* created by *Sir Karl R. Popper.* Popper outlined the basics of democratic society based on his experience as an scientist of physics. The starting point is for him the ethos of the scientist. The basic task of the scientist is to detect unkown fields and to confront the challenges created by unexpected experimental results to the so far reached knowledge. The best attitude for the scientist is therefore to be open-minded and ready to accept falsifications to presumed deliberations.

In his political thinking *Popper* refuses the standard question of politics "Who should reign?" and formulates instead the question:

"How can we so organize political institutions that bad or incompetent rulers can be prevented from doing too much damage?"[4]

The answer is originating from the guidelines of the citizen-participative democracy. In line with *Popper* it can be argued that the constitutional court is one possible institution within the citizen-participative democracy. On request of the citizen the constitutional court can overturn bad normsettings before they can do too much damage.

Popper estimates institutions as consciously creatable entities with specific goalsettings and supplements of means. *Popper* formulates in the following way:

[4] Popper, K.: *The Open Society and its Enemies.* 1950. 120.

"Institutions are like fortresses. They must be well designed and properly manned."[5]

Equally the constitutional court can be seen as a consciously planable social institution that follows a specific goalsetting and can be optimized according to this goalsetting in a piecemeal approach. According to *Popper* the plan for the constitutional court would be to have an institution that might be directly accessible to people and is acting in the overall task to hinder damage resulting from bad governance and normsetting. This is done not only by direct interventions like the handling and judging of accusations against ruling men, but mainly by strenghening the rule of law in its both understandings: to foster the implementation of human and to secure the binding power of law.

The concept of open society according to *Popper* contains implicitly a certain notion of freedom. As an element of direct democracy the constitutional court stands in close relationship to the citizen. On the one hand by turning to the constitutional court citizen might get a solution against a norm that is endangering his persuit of happiness by unfair rules, on the other hand the citizen gives a feed-back to the legislator, how he understands a specific norm and how this norm affects him. This provides the rulings of the constitutional court with a specific task and quality standard of customer orientation that includes the task to mediate between citizen and legislature. The quality control question is, whether the court's ruling and procedure are responding with good understanding and care to the quest of the citizen and are hereby fostering the openness of the society.

The third concept is the concept of the *critical theory* of society that is mainly the concept of the Frankfurt school of social philosophy initiated by *Max Horkheimer* and *Theodor W. Adorno.* The critical theory takes a starting point from the abhorrence about the possibility of fascist and humanity denying governance and postulate the educational task of hindering humanity denying governance. This task is fulfilled through emancipatoric efforts. This main goal of the critical theory is therefore to detect hidding or open violence expressing behaviour and to enhance fields of communication by enlightenment. The rationalisation of unreflected violent behaviour creates an emanzipatoric gain. The found consent after going through a structered dialogue imposes the antizipation of the other as an trustworthy being and creates mutual trust to a responsible usage of freedoms. *Jurgen Habermas* formulates the starting point in the following way:

[5] Popper, K.: *The Poverty of Historicism. ARK*, edition 1986, 66.

"After a century that, more than any other, has taught us the horror of existing unreason, the last remains of an essentialist trust in reason have been destroyed. Yet modernity, now aware of its contingencies, depends all the more on a procedural reason, that is, on a reason that puts itself on trial."[6]

According to Habermas the rechtsstaat is not achievable and not preservable without radical democracy. In awareness of a presumly unlimited recognition of acting according to self interests the communicative acting is the decisive road to integration within the society. Norms are therefore on the one hand real limits that guide to alignments of behaviour, on the other hand they unfold social-integrative power on the basis of intersubjective acknowledged normative assumptions that are offers for commitment to the addressees.
Habermas formulates the basic task of a constitutional court in this way:

"However one thinks the interpretation of the constitution with direct influence to the operation of the legislature should be appropriately institutionalized, the detailing of the constitutional law done by a constitutional court of last instance increases the clarity of law and safeguards the coherence of the legal order".[7]

The constitutional court is therefore chicken and egg of the rechtsstaat in the same time. It is the product of the commitment to the rechtsstaat by the constituante and is an institution that enshrines procedures towards the development and fostering of the rule of law. Concerning the improvement of the clarity of law and the preservation of the coherence of the law system the constitutional court is in a kind of pioneer situation. The rulings of the constitutional court take part in specific discourse situations that are found in the society and show an impact on the longterm societal development. In formulation of quality standards it can be said that the rulings contribute to the clarity of law and safeguard the coherence of the legal order, if they reflect a sensitive sensibility towards the needs and challenges of the ongoing process of societal discourses about the fostering of the rule of law and develop an educational force in these ongoing processes towards multiplying and deepening the emancipatoric gains.

Goal of the fourth here mentioned concept, the functional-structural system theory that was manly developed by *Niklas Luhmann*, is enlightenment. The starting point is the presumption that societal systems are acting similar to living specimens that are self-organizing and communicating with their environment. The society as a whole creates a system that possesses the ability to communicate and to develop and contains important partial autopoietic systems that are possessing

[6] Habermas, J.: *Between Facts and Norms.* 1996, preface: XLI.
[7] Habermas, J.: *Faktizität und Geltung.* 5th edition 1997, 297.

an independent own ability to communicate and to develop. Equally the constitutional court can be seen as an autopoietic system, because it develops its own internal organisation, stands in reference with the society and other systems and is functioning under observance within is given functional description in the societal system.

Luhmann stresses that the signs of modernity in the modern society are only here and now being developed. The main attention gets therefore the question how best to gain and prepare the future. The creation of a set of values that is motivated by coming from the future and towards the enabling of future and their constant development creates a process, all systems of the society are engaged in. The constitutional court can be seen as a relief for the constantly overworked legislature that cannot anticipate the extrem dynamic developments within its codifications. Codification is therefore only one part of the legislation. Based on the legislative power of its decisions the constitutional court can bring together the processes of value creations that are ongoing in the society aiming at the creation of an higher level of identity and its formulation with binding authority. *Luhmann* formulates the maxime that is guiding the process of value creation in this way:

"Basic thesis of the above deliberations was that the form of differentiation—today: primarly orientated on functions—must be harmonized with the norm structure in such a way that operative closure and autonomy of the systems is not blocked but on the other hand it is made clear that the systems are bound to the society and therefore imply for them external reverence towards the society"[8]

The substantial result of this understanding in the constructive putting together of the process of value generation that is under way in the society and can be put into legal language by the constitutional court. Constitutional jurisdiction is therefore a value generating voice n the framework of the society. Constitutional jurisdiction is not alone the decision about constitutional/unconstitutional, but also a closer interpretation of the values found in the constitution. Substantial quality control standard for the constitutional court is therefore the appreciation of the value settings in responding to the actual needs of the modern society. Constitutional jurisdiction is substantially taking part in the endeavour to create a successful future for the society.

Overviewing the four here presented concepts it can be said that there is considerable variance within the different concepts in the way of thinking and describing constitutional jurisdiction. This paper aimed to show that every

[8] Luhmann, N.: *Gesellschaftstheorie und Normentheorie*. 1993, 26.

concept is suitable to provide a valuable insight in the basic ideas of modern constitutional jurisdiction. Common to all concepts is the implicit or outspoken trust in the values of reasoning and enlightenment. Within the two described networks, the Conference of European Constitutional Courts and the Venice Commission, a substantial discourse about the preliminaries of quality control in constitutional adjudication may take place based on these outlined basic ideas. The so far quite abstract principles could be made more operational through comparative analyses of court-rulings and reflections on the organisation of the court's procedures. Nevertheless the establishment of a constitutional court presents the opportunity to increase rationality and enlightenment within the society and therefore is a support for the endeavours to strenghen the society to meet the challenges of the future of modern society with their increased sensitivity to peaceful settlements of conflicts and the increasing better implementation of human rights.

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Some Reflections on the Anglo-Saxon Influence in the Hungarian Legal Philosophical Traditions

When analysing the Hungarian traditions of legal thinking, we generally emphasize two remarks.[1] Firstly, as a characteristic feature deriving from the geographical conditions and historical-cultural ties of Hungary, the adaptation and interpretation of the achievement of Austrian and German jurisprudence are to be mentioned. Secondly, the dual nature of the legal thinking of this region of Europe is stressed, which comprises a tendency towards legal conservatism and an uptodate interpretation of the most current legal philosophical trends. The

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[1] See from the literature on the subject of History of hungarian legal philosophy: Somló, B.: "Die neuere ungarische Rechtsphilosophie" *Archiv für Rechts- und Wirtschaftsphilosophie*, 1, 1907–08, 315–323; Finkey, F.: *A tételes jog alapelvei és vezéreszmei* [Principles and ideas of positive law], Budapest, 1908; Horváth, B.: "Die ungarishe Rechtsphilosophie" *Archiv für Rechts- und Wirtschaftsphilosophie*, 24, 1930, 37–85; Szabó, I.: *A burzsoá állam- és jogbölcselet Magyarországon* [The bourgeois philosophy of state and law in Hungary], Budapest, 1955; Hanák, T.: *Az elfelejtett reneszánsz. A magyar filozófiai gondolkodás századunk első felében* [The forgotten renaissance. Hungarian philosophical thinking in the first half of our century], Bern, 1981; Szilágyi, P.: "Fejezetek az ELTE Állam- és Jogelméleti Tanszékének történetéből" [Chapters from history of ELTE's Department of theory of law] in *Acta Facultatis Politico-Iuridicae Universitatis Scientiarum Budapestiensis de Rolando Eötvös Nominatae*, Tomus XXVI, Budapest, 1984, 105–153; Samu, M.–Szilágyi, P.: "Az állam- és jogelmélet oktatásának története egyetemünkön" [Teaching history of theory of state and law in our university] in: Horváth, P. (ed.): *Az Állam- és Jogtudományi Kar szerepe a magyar jogtudomány fejlődésében*, Budapest, 1985, 313–392; Loss, S.–Szabadfalvi, J.–Szabó, M. -H. Szilágyi, I.–Ződi, Zs.: *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Sketches from the history of Hungarian legal philosophy], Miskolc, 1995; Perec, L.: "A belátásos elmélettől a mezőelméletig. A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth" [From the theory of discretion to the theory of law field. Half century of hungarian legal philosophy: Pikler, Somló, Moór, Horváth] *Századvég*, 1998, 10, 73–94; Szabadfalvi, J.: *Jogbölcseleti hagyományok* [Traditions of legal philosophy], Debrecen, 1999, and "Transition and Tradition. Can Hungarian traditions of legal philosophy contribute to legal transition?" *Rechtstheorie*, 1999, Beiheft 20, 1–19.

most outstanding Hungarian philosophers of law have been characterized by the latter specific feature. In the following, I will describe the lesser-known Anglo-Saxon influence while giving an overview of Hungarian legal philosophical thinking.

Three great periods—natural law, legal positivism and neo-Kantianism—are to be distinguished in the history of legal philosophy in Hungary up to the mid-twentieth century, mostly following the traditions of legal thinking in Europe. The interpretation of the remarkable contemporary English scientific attitude and its achievements first appeared in Hungarian legal philosophy through the work of *Ágost Pulszky* (1846–1901) in the last decades of the 19th century.[2] In his early works Pulszky was mainly concerned with the theories of More, Bacon, Hobbes and Locke, the classical representatives of English social philosophy. Later in his career Pulszky focused on the ethnological attitude represented by Lubbock, Waitz, McLennan, Tylor, Morgan and Maine. In 1875 Pulszky completed the translation of Henry Maine's Ancient Law. He also attached over a hundred-page notes of their own scientific value to Maine's work.[3] Afterwards he wrote a critical review of Herbert Spencer's philosophy, who was considered as innovator of the contemporary social scientific thinking. His major work titled *The Theory of Civil Law and Society* was published in Hungarian in 1885, and in English in 1888.[4] Inspite of a favourable reaction to his work, he was not able to achieve his main goal, i.e. to enter and be accepted in the English scientific public life. However, Pulszky's work, according to Hungarian legal philosophy, is still fundamental, since the publication of this book laid the cornerstone of legal positivism in Hungary. In his work Pulszky considered Maine's comparative-historical attitude and his theoretical theses were based on Spencer's ideas. In a chapter on the questions of legal philosophy he mentioned names of English authors such as Clark, Holland, Lightwood and Pollock, whose achievements he

[2] Pulszky's main works of legal philosophy: *A római jog, s az újabbkori jogfejlődés* [Roman law and modern legal development], Pest, 1869; "Az angol jogbölcselet történetéhez" [On history of english legal philosophy] *Budapesti Szemle*, 1875, 126–148; *A jog és államböl-csészet alaptanai* [The fundamental doctrine of philosophy of law and state], Budapest, 1885; *A jog és államböl-csészet feladatai* [The tasks of philosophy of law and state], Budapest, 1888.

[3] Maine, H.: *A jog őskora, összeköttetése a társadalom alakulásának történetével, s viszonya az újkori eszmékhez* [Ancient law, its connections with the early history of society and its relation to modern ideas], (A Magyar Tudományos Akadémia megbízásából fordította, bevezette és jegyzetekkel kísérte Pulszky Ágost [Ágost Pulszky translated, wrote introduction and notes on Hungarian Academy of Sciences's authority]), Budapest, 1875.

[4] Pulszky, Á.: *The Theory of Civil Law and Society*, London, 1888.

considered in his work. When analysing legal concepts, he attempted to create definitions similar to analytical explanations.

The positivist doctrine reached the peak of its history in Hungary with the work of *Gyula Pikler* (1864–1937) at the turn of the century.[5] In his early works Pikler devoted attention to the inner contradictions of Spencer's theory against the intervention of state. Pikler did not consider Spencer's classical liberal attitude, which was based on biological conceptions as acceptable, and he emphasized the need for increased state intervention for the sake of society. Pikler's later works are all characterized by a discussion with Spencer whose theories he, on one hand, analyses for the support of his own theories, but on the other hand, he criticises and evaluates them. Spencer's influence is revealed in his theory of the evolution of law, or in his theory of 'discretion'.

The period after the turn of the century brought a significant change in the history of both the European and Hungarian philosophy of law. This process in the Hungarian legal philosophy is reflected in the activity of *Bódog Somló* (1873–1920), the most remarkable representative of Hungarian legal philosophical thinking.[6] His career of a quarter of century can be divided into two stages. The positivist first stage is viewed as the one under the influences of Spencer's evolutionist sociology, Pikler's doctrine of discretion, and partly the materialistic philosophy of history. During the second stage of his scientific career, he turned to neo-Kantian philosophy establishing the most prospering period of Hungarian legal philosophy so far. At the turn of the century Somló belonged to the group of scientists who occasionally criticised, and at the

[5] Pikler's main works of legal philosophy: *Bevezető a jogbölcseletbe* [Introduction to philosophy of law], Budapest, 1892; *Az emberi egyesületek és különösen az állam keletkezése és fejlődése* [The origin and development of state in particular], Budapest, 1897; *A jog keletkezéséről és fejlődéséről* [About the origin and development of law], Budapest, 1897.

[6] Somló's main works of legal philosophy: *Állami beavatkozás és individualizmus* [State-intervention and individualism], Budapest, 1903; *Jogbölcselet* [Legal philosophy], Pozsony, 1901; *Jogbölcseleti előadások* [Lectures on legal philosophy], Kolozsvár, 1906; "Masstäbe zur Bewertung des Rechts" *Archiv für Rechts- und Wirtschaftsphilosophie*, 3, 1909–10, 508–522; "A jog értékmérői" [Values standards of law] *Huszadik Század*, 11, 1910, 1–14; "Das Wertproblem" *Zeitschrift für die philosophie und philosophische Kritik*, 1912, 66–95; "A jog alkalmazásáról" [About legal application] *Jogállam*, 10, 1911, 2–3, 97–103, and 177–189; "Die Anwendung des Rechts" *Zeitschrift für das privat und öffentliche Recht der Gegenwart*, 38, 1911, 55–74; "A szokásjog" [The legal custom] in: *Farkas Lajos emlékkönyv*, Kolozsvár, 1914, 339–369; *A helyes jog elméletéről* [About right law theory], Kolozsvár, 1912–13; *Juristische Grundlehre*, Leipzig, 1917 [2. ed: 1927, and reprinted: Aalen, Scientia Verlag, 1973]; *Jogbölcsészet* [Legal philosophy], Budapest, 1920.

same time attempted to improve Spencer's doctrines. In his book on state intervention Somló introduced the increasing role of state as the consequence of the development of contemporary monopolistic capitalism. Somló was capable of revising Spencer's remarkable views ans also tried to find innovative explanations.

Juristische Grundlehre, Somló's major work, published in German in 1917 approaches the realm of law from the standpoint of contemporary neo-Kantianism.[7] In the introduction of his work, he devoted a separate sub-chapter to the connection between his own theory and John Austin's, the most outstanding representative of English analytical positivism, who revealed his legal philosophy in his Lectures on Jurisprudence. Somló considered the way of creating concepts as common in the two theories. He, when introducing a number of legal concepts, established his own conceptual apparatus through refining Austin's concepts. The strict positivism and consistency of Austin's theory may have appeared attractive for Somló, and also appeared suitable for corresponding to neo-Kantian theses.

In the prevailing neo-Kantian philosophy, from the early 1930s *Barna Horváth* (1896–1973) established a new colour in the Hungarian traditions of legal philosophy.[8] The originality of his views was revealed in his synoptic

[7] Somló, B.: *Juristische Grundlehre*. Lipcse, 1917.

[8] Horváth's main works of legal philosophy: "Die Idee der Gerechtigkeit" *Zeitschrift für öffentliches Recht*, 7, 1928, 508–544; "Természetjog és pozitivizmus" [Natural law and legal positivism] *Társadalomtudomány*, 8, 1928, 212–247; "Gerechtigkeit und Wahrheit" *Internationale Zeitschrift für Theorie des Rechts*, 4, 1929, 1–54; "Die Gerechtigkeitslehre des Sokrates und des Platon" *Zeitschrift für öffentliches Recht*, 10, 1930, 258–280; "Die Gerechtigkeitslehre der Vorsokratiker" *Studi Filosofico-Giuridici dedicati a Giorgo Del Vecchio*, Modena, 1930, 336–372; *Die Gerechtigkeitslehre des Aristoteles*, Szeged, 1931; "Hegel und das Recht" *Zeitschrift für öffentliches Recht*, 12, 1932, 52–89; *Bevezetés a jogtudományba* [Introduction to jurisprudence], Szeged, 1932; *Rechtssoziologie. Probleme des Geselschaftslehre und der Geschichtslehre des Recht*, Berlin-Grunewald, 1934; "Sociologie juridique et Théorie Processuelle du droit" *Archives de Philosophie du Droit et de Sociologie Juridique*, 5, 1935, 181–242; "Macht, Recht, Verfahren" *Archiv für Rechts- und Sozialphilosophie*, 30, 1936, 67–85; *A jogelmélet vázlata* [Sketch of legal theory], Szeged, 1937; "Der Sinn der Utopie" *Zeitschrift für öffentliches Recht*, 20, 1940, 198–230; "Der Rechtsstreit des Genius. I. Sokrates" *Zeitschrift für öffentliches Recht*, 22, 1942, 126–162; "Der Rechtsstreit des Genius. II. Johanna" *Zeitschrift für öffentliches Recht*, 22, 1942, 295–342; "Der Rechtsstreit des Genius, II. Johanna" *Zeitschrift für öffentliches Recht*, 22, 1942, 395–460; "Prolegomena zur Soziologie" *Archiv für Rechts- und Sozialphilosophie*, ("Ungarn-Heft") 37, 1943, 50–67; *Angol jogelmélet* [English legal theory], Budapest, 1943; "Between Legal Realism and Idealism" *Northwestern University Law Review*, 48, 1954, 639–713; "Rights of Man: Due Process of Law and Exces de Pouvoir" *The American*

attitude and the functionally related procedural legal view. His achievement is represented in conforming two basic paradigms. The parallel existence of neo-Kantian and pragmatic-empirical attitudes, and their relation to each other was regarded as a breakthrough not only in Hungarian but also in European legal thinking. Horváth's study trip in England in 1929 resulted in his being concerned with English legal culture. He became involved in studying the works of Hobbes, Bentham and Austin, among the remarkable figures of English legal philosophy, as well as those of Roscoe Pound, a most outstanding philosopher in American jurisprudence. His connection with Leonard Hobhouse, English sociologist, and Moris Ginsberg, his student, influenced the elaboration of his procedural legal attitude since Horváth adapted from their views the division of four types of social evolution. After coming home from England, Horváth reported in a number of papers on the achievements of both American and English jurisprudence. The experiences and impressions he gained in England urged him to complete the history of English legal philosophy.

From the late 1930s *József Szabó* (1909–1992), one of the most gifted contemporary legal philosophers, got to know the achievements of Anglo-American jurisprudence through the work of Horváth.[9] In his works on legal philosophy, Szabó attempts to discredit the neo-Kantian model by using the outcomes of criticism, according to Hume, and the American legal realism. Szabó, in his works published in the early 1940s, attempted to create a 'neo-realistic' approach to the concept of law. Citing the ideas of Jerome Frank, Edward Robinson and Thurman Arnold, the most outstanding personalities of American legal realism, Szabó abandoned belief in legal security, which was, in his opinion, revived by a faulty logical philosophy of law. In his theory he also used Frank's doctrine of fact-sceptics and rule-sceptics. When appreciating Szabó's work one can suggest that, in a similar way to the evaluation of

Journal of Comparative Law, 4, 1955, 539–573; "Field Law and Law Field" *Österreichische Zeitschrift für öffentliches Recht*, 8, 1957, 44–81; "Moral, Recht und Politik" *Österreichische Zeitschrift für öffentliches Recht*, 14, 1963, 218–252; "Comparative Conflicts Law and the Concept of Changing Law" *The American Journal of Comparative Law*, 15, 1966–67, 136–158; "Twilight of Government of Laws" *Archiv für Rechts- und Sozialphilosophie*, 64, 1968, 1–26.

[9] Szabó's main works of legal philosophy: *A jog alapjai* [The foundations of law], Budapest, 1938; *A jogászi gondolkodás bölcselete* [Philosophy of lawyer's thinking], Szeged, 1941; "Hol az igazság? A bírói lélektan problémái" [Where is the justice? Problems of judge's psychology] *Társadalomtudomány*, 22, 1942, 1, 1–55; "Wahrheit, Wert und Symbol im Rechte" *Archiv für Rechts- und Sozialphilosophie*, ("Ungarn-Heft") 37, 1943, 101–121; "Der Rechtsbegriff in einer neutralistischen Beleuchtung" *Österreichische Zeitschrift für öffenliches Recht*, 1, 1948, 3, 291–331.

Horváth's work, he also gave particular pragmatic explanations to classical neo-Kantian problems. Doing so, he created the possibility for a prolific interrelation of two legal cultures, and abolished the previous one-sided Austrian and German orientation in the Hungarian legal philosophical thinking. Regretfully, however, Szabó was not able to create a further systematic explanation to his theory of legal philosophy called 'neo-realistic'.

From the early 1950s, neither the achievements of Anglo-Saxon legal thinking, nor the leading theories of Western European philosophy of law were to be mentioned without denunciation.[10] Theories and legal philosophers called 'bourgeois' were merely appreciated, with few exceptions, by the philosophers of law who were deprived of publicity.

We can claim that in the establishment of Hungarian positivist legal philosophy, and in the natural law theories having been discredited, Maine's and mainly Spencer's doctrines played a decisive role. Without the prolific influence of the representatives of English philosophy and legal philosophy, the process of Hungarian legal philosophy becoming independent could not have been boosted. In this respect, the general statement cited previously, is definitely to be revised. However, while Hungarian legal positivist attitude was not able to avoid the influence of Spencer's theory, neo-Kantian legal philosophers, with some features of eclecticism, were capable of including the achievements of contemporary English-American jurisprudence in their theories. We can, with good reason, claim that from the establishment of legal positivism to the mid-twentieth century, English and American philosophy of law exerted profound influence on the theorists of Hungarian philosophy of law, and played a significant role in the continuous renewal of Hungarian jurisprudence.

The mid-1980s signalled the revival of Hungarian legal philosophy. By this time the Soviet type Marxism has lost ground in legal philosophical literature. Further confirmation of the previously unquestionable paradigms have not put researchers' existence into risk any longer. For jurists concerned with legal theory, it was only a choice of values to decide which paradigm would be fundamental for them. One of the forms of finding new ways was provided by studies in Hungarian traditions of legal philosophy before the year of change, which were carried out by the concerned researchers still alive and the younger generations who view this kind of tradition as a

[10] See about this Szabó, I.: *A burzsoá állam- és jogbölcselet Magyarországon* [The bourgeois philosophy of state and law in Hungary], Budapest, 1955.

neglected value and take responsibility for the rehabilitation of their predeccessors' work.[11]

[11] See from the literature on the subject: Karácsony, A.: "Jog és erkölcs. Kelsen és Verdross szerepe Bibó jogfelfogásának alakulásába" [Law and moral. The role of Kelsen and Verdross in the legal concept of Bibó] in Dénes, I. Z. (ed.): *A szabadság kis körei. Tanulmányok Bibó Istrván életművéről*, Budapest, 1999, 166–187; Kupa, L.: *Pulszky Ágost bölcselete* [Ágost Pulszky's philosophy], Budapest, 1996; Loss, S.–Szabadfalvi, J.–Szabó, M.–H. Szilágyi, I.–Ződi, Zs.: *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből* [Sketches from history of Hungarian legal philosophy], Miskolc, 1995; Nagy, E.: "Erény és tudomány. Vázlat Somló Bódog gondolkodói pályájáról" [Virtue and science. Sketch of Bódog Somló's philosophical career] *Világosság*, 23, 1981, 12, 764–772, and "Pulszky Ágost társadalom- és államtana" [Ágost Pulszky's theory of society and state] *Szociológia*, 5, 1977, 2, 207–213, and "Bevezetés Horváth Barna: Demokrácia és jog című tanulmányához" [Introduction to Barna Horváth's Democracy and Law] *Medvetánc*, 1985, 2–3, 294–303, and "Lehet-e tudományos a világnézet? Pikler Gyula értékmentes jogszociológiája" [Can ideology be scientific? Gyula Pikler's value-free legal sociology] *Világosság*, 33, 1991, 2, 81–92, and "Elhajló pályaképek. Bibó és Horváth Barna" [Divergent careers. Bibó and Barna Horváth] in Dénes, I. Z. (ed.): A hatalom humanizációja, Pécs, 1993, 84–90; Perec, L.: "A belátásos elmélettől a mezőelméletig. A magyar jogfilozófia fél évszázada: Pikler, Somló, Moór, Horváth" [From the theory of discretion to the theory of law field. Half century of hungarian legal philosophy: Pikler, Somló, Moór, Horváth] *Századvég*, 1998, 10, 73–94; Paczolay, P.: "Moór Gyula jogfilozófiája" [Gyula Moór's philosophy of law] *Jogtudományi Közlöny*, 44, 1989, 10, 505–512; Pokol, B.: "Moór Gyula és Horváth Barna jogkoncepciója" [The legal conception of Gyula Moór and Barna Horváth] *Magyar Jog*, 40, 1998, 5, 257–267, and "A XIX. századi magyar jogelmélet" [The 19th-century of hungarian legal philosophy] *Jogtudományi Közlöny*, 53, 1998, 7–8, 287–293; Solt, K.: "Moór Gyula jogfilozófiájáról" [About Gyula Moór's philosophy of law] *Holmi*, 6, 1994, 12, 1850–1862; Szabadfalvi, J.: "Moór Gyula pályakezdése" [The beginning years of Gyula Moór's career] *Jogtudományi Közlöny*, 44, 1989, 10, 497–504, and "'Demokrácia és jog'. Adalékok Horváth Barna politikaelméletéhez (1945/46.)" ["Democracy and Law". Some aspects on the political theory of Barna Horváth] *Magyar Közigazgatás*, 40, 1990, 7, 605–613, and *Gyula Moór Egy XX. századi magyar jogfilozófus pályaképe* [Gyula Moór. A sketch of a 20th-century hungarian legal philosopher], Budapest, 1994; "Vonzások és taszítások – Moór Gyula és Horváth Barna kapcsolata" [Attractions and repulsions – the relations between Gyula Moór and Barna Horváth] *Magyar Jog*, 44, 1994, 11, 654–660, and "'Coactus tamen volui!' Bibó István jogbölcseleti munkássága" ["Coactus tamen volui!" István Bibó's activity in legal philosophy] *Forrás*, 22, 1995, 12, 13–21, and "Egy derékba tört életmű margójára: Szabó József jogbölcseleti munkássága" [On a margin of interrupted life-work. József Szabó's legal philosophical activity] *Jogtudományi Közlöny*, 53 1998, 12, 493–504, and *Jogbölcseleti hagyományok* [Traditions of legal philosophy], Debrecen, 1999, and "Bibó István és a szegedi iskola" [István Bibó and the school of Szeged] in Dénes, I. Z. (ed.): *A szabadság kis körei. Tanulmányok Bibó Istrván életművéről*, Budapest, 1999, 125–152, and "Wesen und Problematik der Rechtsphilosophie. Die Rechtsphilosophie on Gyula Moór" *Rechtstheorie*, 30, 1999, 1–25, and "Transition and

A key precondition for us for being included in the European scientific life again is to know our traditions in legal philosophy and to apply all the research finds that our predeccessors have accumulated. However, we also have to be careful about fragmented oeuvres and they are to be compared to the scientific level of the concerned period. If we realise that there is a lack of original ideas and the theories only belong to the second line, we have to express this. On the other hand, however, we should be proud of what is valuable even today.

Finally, we must clarify that, from the end of the 19-th century, Hungarian legal philosophical thinking have supported the bourgeois transformation and the establishment of a modern civil society, according to the demand for modernisation of the society. Ágost Pulszky, Gyula Pikler, Bódog Somló, Gyula Moór, Barna Horváth, József Szabó and their students have become fighting representatives of Hungarian progress and they visioned a modern 20th-century Hungary. In this ambition a great role can be attributed to the 'empirical state', which is the driving force of modernisation, to the realisation of what kind of development can satisfy the needs of society, to 'correct law' required for achieving the goals, to the investigation of the nature of law supporting the regime, and also to the comparison of empirical reality and the related norms, and to everything that can provide the widest

Tradition. Can Hungarian traditions of legal philosophy contribute to legal transition?" *Rechtstheorie*, 1999, Beiheft 20, 1–19; Szabó, J.: "Moór Gyula emlékezete" [Memory of Gyula Moór] *Polis*, 1989, 3, 17–21, and *Ki a káoszból, vissza Európába* [From chaos to Europe], Budapest, 1993; Szájer, J.-Tóth, Á. (ed.): *Moór Gyula 1888–1950* [Gyula Moór 1888–1950], Budapest, 1988; Szilágyi, I.: *Bibó István (1911–1979). Vázlat pályafutásáról és életművéről* [István Bibó (1911–1979). A sketch of his career and life-work], Miskolc, 1990; Varga, Cs.: "Somló Bódog esete a pécsi jogakadémiával" [The affair of Bódog Somló with the law school of Pécs] *Jogtudományi Közlöny*, 35, 1980, 8, 543–546, and "Bevezetés Hans Kelsen: Tiszta Jogtan c. művéhez" [Introduction to Hans Kelsen's Pure Theory of Law] in Kelsen, H.: *Tiszta jogtan*, Budapest, 1988, XI–XVIII; Varga, Cs. (ed.): *Aus dem Nachlass von Julius Moór*, Budapest, 1995, and Somló, F.: *Schriften zur Rechtsphilosophie* (Ausgewählt und eingeleitet von Csaba Varga), Budapest, 1999; Zsidai, Á.: "Tény és érték. Moór Gyula és Horváth Barna jogfilozófiai vitája" [Fact and value. A legal philosophy debate between Gyula Moór and Barna Horváth] *Jogtudományi Közlöny*, 44, 1989, 10, 513–519, and "A perspektíva tüneménye. Horváth Barna jogfilozófiája" [Phenomenon of perspective. Barna Horváth's philosophy of law] *Világosság*, 32, 1991, 12, 917–927, and "Bibó István a jogfilozófus. Horváth Barna és Bibó István szellemi közössége" [István Bibó as legal philosopher. Barna Horváth and István Bibó's spiritual community] in Dénes, I. Z. (ed.): *A hatalom humanizációja*, Pécs, 1993, 91–108, and "A Tiszta Jogszociológia" (Bevezető tanulmány) [Pure legal sociology. An introduction] in Horváth, B.: *Jogszociológia*, Budapest, 1995, 11–58.

scope of freedom in the Kantian view. This list could be continued but even so we might perceive what kind of ambition our predeccessors had taken upon themselves. Although they could not provide a safe recipe but they have established the starting-points for us, since even today we often face the same problems and we do not have divergent goals, though we tend to achieve them by drawing on different paradigms.

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BOOK REVIEW

ANDRÁS FÖLDI and GÁBOR HAMZA: **A római jog története és institúciói** (History and Institutes of Roman Law). Nemzeti Tankönyvkiadó, Budapest, Hungary, 2000, XL + 715 p.

This textbook on Roman law—which can be viewed as a 'Handbuch' in German sense, rather than a usual textbook—was first published in November 1996 by András Földi and Gábor Hamza and was recently published in its fifth revised and enlarged edition in September 2000. [An English translation of the textbook will be published by the Kluwer Law International.] The authors make a great first impression with their choice of book cover, showing a lifelike, colorful reconstruction of the *Forum Romanum*. The depiction suggests that Roman law is not a ruin of the past but is to be reconstructed as part of our present and future.

The original character and the broad theme covered by this remarkable book are reflected in its title: *History and Institutes of Roman Law*. The History of Roman Law, which is a mandatory discipline of the law school curriculum in many European and other civil law countries outside of Europe, treats the external history or *äußere Geschichte*, comprising the history of constitutional framework as well as the history of legal sources of ancient Rome. In this text, autonomous chapters are devoted to such topics as the international relations of ancient Rome, the Roman concept of law, and the subsequent history of Roman law in the Middle Ages and in the Modern World. András Földi and Gábor Hamza go beyond history and address institutes, the systematic and dogmatic presentation of Roman law, which should not be confused with legal institutions.

The size and the coverage of this textbook significantly exceeds any Roman law textbooks previously published in Hungary, and considering its exceptionally rich documentation, the text takes an illustrious place in the bibliography of international treatises on Roman law. Among today's handbooks, it can be compared with the revised version of the classic Jörs–Kunkel–Wenger textbook (reworked by Honsell, Mayer-Maly and Selb). [H. Honsell et al., Romisches Recht, aufgrund des Werkes von P. Jors, (1987).] The Hungarian textbook, however, gives the reader considerably more than the Jörs–Kunkel–Wenger textbook by treating a number of Roman legal institutions also from the viewpoint of their contemporary significance.

The textbook's exceptional advantage is its logic and consistent classification of the material, which is fortunately stressed not only by the hierarchical system of titles, but also by the consistent high quality typography.

In the introductory section of the book, the authors list an extensive general bibliography of Roman law related works, including a number of the most recent publications. [András Földi & Gábor Hamza: A Római Jog Története és Institúciói (History and Institutes of Roman Law) XXVI–XXXIV (5th ed. 2000).] The special bibliographies before each of the sixty chapters contain some works published even in 2000.

In the historical part of the treatise [at 3–150.], the authors present the Roman state and administration in a detailed way, considering every single period. The discussions, which are in many ways original, help serve the researchers of the history of public law and the history of administration with considerable information.

The main novelty of the historical part of the textbook is, however, the surprisingly wide-ranged and data-rich presentation of the continuity of Roman law. The chapter embracing the subsequent history of Roman law begins with the Middle Ages and continues through our modern era. Geographically speaking, the textbook extends to all of the continents except Australia and Antarctica. This voluminous section's approach to the subsequent history of Roman law differs from the well-trodden paths. It can be viewed as a brief comparison of different jurisdictions retaining significant Roman law influences. This chapter can be used as a concise encyclopedia of comparative law.

The reader can find out, for example, which sources have been taken into consideration during the process of drafting the Civil Codes of Louisiana, Quebec, and different Latin American countries. Readers also can follow the way Roman law has reached South Africa and Sri Lanka, and the role Roman law played in influencing Roman-Dutch law in these countries. The authors also have analyzed the various forms of the effects of Roman law on the development of law in the United States. The authors have managed to condense almost all of the European and some non-European countries' private law history into only a few pages, including names, data, and an abundant bibliography.

It is remarkable how much work is concentrated into this chapter. Further, the information, which was collected from a wide range of authoritative sources, is properly arranged. This section of the textbook is equal to or surpasses the value of an encyclopedia of comparative private (civil) law. In this regard, the authors have achieved a unique synthesis, even on the international level. They emphasize the remarkably enduring and embracive influence of Roman law on the European legal tradition. Here, we learn that the center of the Roman law-cultivation has returned to a considerable extent in the twentieth century from its age-long

wandering to Italy, after its partial reception and high-level cultivation in France, the Netherlands, and Germany.

Additionally, within the frame of the historical section, the authors pay attention to the history of canon law and private international law. Also in this part, the authors provide precise definitions of a number of legal notions having fundamental relevance like legal (juristic) relation and legal institution (*Rechtsinstitut* in German, *institution juridique* in French). Finally, the attention of the reader is turned to the thought-provoking discussion about the relations of law and morality, particularly regarding the concept of equity.

The major part of the textbook is about the presentation of the Institutes, with the following structure: Procedural Law, including an outline of criminal procedure; Law of Persons and Family Law; Law of Things; Law of Obligations, with an Appendix on Criminal Law; and Law of Succession. All five institutional sections contain an autonomous chapter on the continuity and subsequent fate of the legal institutions discussed.

The authors combine historical and dogmatical methods in their presentation of the "Institutes." The historical method primarily appears in the presentation of the legal institutions' formations and the special stages of their development. The dogmatical analysis is not neglected, but instead it takes an almost absolute priority. The dogmatical analysis considerably relies on the classical dogmatical system, worked out mainly by the representatives of the German historical school of jurisprudence. The analysis undertaken by the authors of the textbook not only imitates, but in some instances reconsiders, the achievements of the German historical school of jurisprudence.

In the section entitled Procedural Law [151–202.], discussions about the term *actio* are brought to light as important to contemporary lawyers. The understanding of different judicial procedural forms is presented by publishing one dozen "praetorian formulas." These formulas, which can be likened to the writs in English medieval law, are essential in understanding not only the procedural law, but also the system of substantive law rules. From the modern jurist's point of view, special attention should be paid to the comprehensive analysis of the subjective and objective meaning of the term *bona fides*. The way of looking at the presentment of executive procedure and non-judicial procedure is original. The textbook describes the Roman antecedents of the public notary (*tabularius, tabellio*) by sketching the continuity of this institution from the Middle Ages to our modern era.

In the section entitled Law of Persons and Family Law [203–272.], the discussions about the concept of family and kinship contain many original ideas, especially by the accurate presentation of the terms *familia proprio iure* and

agnatio. In the part treating the Law of Things [273–378.], the wide analysis of the term *causa*, which extends to the continuity as well, is truly notable.

In the part dealing with the Law of Obligations [379–592.], the authors have shaped a logic and modern system. The discussions about validity and efficacy of the legal transaction, damages, and civil liability are important, even from the point of view of the modern civil law and legal philosophy. The presentation of *actiones adiecticiae qualitatis* is also valuable and original. Discussions about the rules and continuity of *societas* or partnership should attract the modern corporate lawyer's attention. From the other parts of the section Law of Obligations, the detailed presentation of *crimina* or crimes in the Appendix on Criminal Law is particularly worthwhile.

In the section treating the Law of Succession [593–668.], the authors provide remarkable discussions about the legal relationships in the law of succession and about the validity and efficacy of the testament that are based on a detailed research of sources. Here, the authors raise some basic questions that should be answered by experts of civil law. The presentation of the background of the conceptual history of the law of succession is also unique.

The most important virtue of the dogmatical sections is the answering of questions which emerge on the basic level but whose answer cannot be found in other textbooks. In this way, the authors skillfully link problems of Roman and present day law, leading to a better understanding of several institutions of contemporary legal systems.

The authors emphasize that the Roman jurists had an advantage over the lawyers of our era. This advantage was due to their way of thinking, which was less determined by legal rules of strict implementation. Their approach to law was, as a result, considerably more flexible.

Despite the rigorous scholarly effort made by the authors, the textbook also has a few shortcomings. For instance, the Roman regime of the law of inheritance was not exhaustively analyzed. Hopefully, the authors will treat this extremely large subject in later editions of the textbook in a more detailed manner. Similarly, the reception and the subsequent fate of the Roman law is to some extent unevenly dealt with. The authors paid less attention to the subsequent fate of the law of persons than the analysis of the subsequent fate of the law of obligations.

Summing up the characteristics of the work under review, the textbook of András Földi and Gábor Hamza is impressive in erudition and imaginative in argument and offers the reader an up-to-date treatment of the Roman law and a partial treatment of the history and dogmatics of the modern private law that is outstanding, even on an international level. The authors have combined the

scholarly and systematic treatment of the material, displaying an astonishing range of their knowledge with clarity of exposition. Differing views or opinions are quite often alluded to and contrasted when the occasion demands.

This work is outstanding not only because of its modern and original character, but also because it contains an astonishing array of information. One of the greatest strengths of the *History and Institutes of Roman Law* lies in the copious collection of the sources, which are not limited to antiquity or of pure Roman law. The volume's three indices include a long and valuable index of sources, an index of names, and a subject index. Both practicing lawyers and those who are interested in theoretical questions of law will find this textbook an indispensable reference work.

As for the recognition of this textbook in Hungary, the reviewer has to mention the fact that this work is referred to in the judicial practice as if it were a "book of authority". Moreover, it is worth mentioning that this textbook recently received the Award "The Best Legal Textbook" granted by the Eötvös Loránd University in Budapest.

Francis A. Gábor

GÁBOR JOBBÁGYI: **Személyi és családi jog** (Law of Persons and Family). Pázmány Péter Egyetem, Jog és Államtudományi Kar, Vol. 8. Szent István Társulat, Budapest, 2000, 347 p.

In 2000 a new textbook was added to the pool of books in Hungarian law education. Gábor Jobbágyi's work was published by Szent István Társulat in a high quality form with the objective to give an overview of the law of "persons" and "family law" to be used by students at the university. Compared to previous textbooks, it represents a new approach covering the subject matter and attached areas in a deeper and extended way. The author rather means to elucidate theoretical and practical gaps than to present a brand new system of the law of persons. Since the work was intended to be used by students, it gives a clear and understandable outlook of the subject facilitating understanding and studying. Its logic follows the respective statutes (Hungarian Civil Code and Family Code).

The scope of civil law respecting private-autonomy is surpassing its limits in regulating financial relations only. On the other hand, the provisions of the effective Hungarian Civil Code contain the opposite statement. "This Act governs the financial and certain personal relations of the citizenry, the state, local governments, economic and social organizations, and other persons. Other statutes pertaining to the aforementioned relations shall, unless otherwise

stipulated, be construed in concert with this Act and in consideration of its provisions". Considering the definition, it may seem that in addition the Act may seem to emphasize the priority of the financial relations and to protect and regulate nothing but the personal relations connected to the financial relations. Notwithstanding more than fifty years ago it was clarified in European law development that protection provided by the civil law had to be independent from the financial relations, which are dominant and thus the difference remains quantitative rather than qualitative. We have to realise that financial and personal relations are equal. We could summarise the present statement as a fraction in mathematics. Financial and personal (family) relations would make up the numerator and autonomy characterising such relations would be the denominator. Although there are some differences between the two relations it does not cause any problem to find the common feature of them however, as mathematics also accepts the difference between the numbers in the numerator (even-odd; positive-negative; prim-non prim; etc.). Returning to law, we can find basic distinctions indeed between the two different kinds of legal relations, however they are co-ordinated and supplement each other (there is no bracket before or after them which would put them in a subordinated position). That is why it is a necessary and significant venture to summarise the law of Persons and the Family law in a comprehensive and consistent manner.

In the past decade numerous comprehensive studies and textbooks have been published in the law of contracts and law of things, adjusted to the rule of law, however the law of persons and family law has been neglected so far by Hungarian scientists. Necessary and essential change of approach (both in the attitude and in the law dogmatic) has been urged both in this area and in financial relations from the beginning of the 1990s but the above fact is true indeed. Although, the relevant regulations were amended in several relations, the recodification of this field of law in the scope of the constitutionality (rule of law) did not take place, the application of law and jurisprudence are destined to adopt the "inheritance" adequately. The theory of law and the jurisprudence are essential means of this work. Appropriately the education of law should communicate a modernized, adapted law of persons and family law reflecting the principles of the new legal system based on regulations in power. The book considers again the Family law as an integral part of civil law (law of persons) with a relative independence, which is the main feature of the book. This approach is based on the history of law being in harmony with the dogmatic of almost all west-European effective legal systems (Bürgerliches Gesetzbuch-BGB, Viertes Buch: 1297–1921§§; Code Civil, Livre Premier- des persones, Titre V–XI. etc.), however it is still regarded as controversial in Hungary. According to the above approach, the author attempts to extend and apply the basic institu-

tions and view of the civil law to the relations of the family law, and to reveal existing points of contact between the two laws. This explains why the book considers marriage as an agreement between a man and a woman.

It is more typical for the legal institutions of the family law (marriage, family) than other legal institutions that they are primarily regulated by moral norms and not by legal ones, and the necessity of following such norms is of enormous importance. For this reason the author endeavours to explain the exact content of the referred moral grounds.

Irrespective whether the reader can accept each part of the textbook or not, presumably everyone agrees that the goal is a unified, constitutional and up-to-date treatment of the issues of the personal and family relations, that the author's wish to accomplish it is a timely and necessary venture.

With this reflection I would recommend this book to all students and all interested instructors and researchers of the profession.

Zsuzsanna Martonyi

CSABA VARGA: **The Place of Law in Lukács' World Concept.** 2nd ed., Akadémiai Kiadó, Budapest, 1998, 193 p.

The book discusses George Lukács and law from three aspects. First, it attempts to bring to the surface bibliographical and theoretical motives that point to Lukács' early encounter with problems of law, and also to define the sources of his legal education. Secondly, it analyses within the context of his oeuvre those trends that amounted to the nihilization of law, as well as those that subsequently led to the approval of the sets of institutions of modern formal law. Third, it discusses the theoretical importance of problems raised by the philosophical exposition of modern formal law.

The sphere of problems covered by the author's ambitions is not limited only to classical ones, such as the duality of morality and legality, or that of natural law and positive law, but also involves questions of legal theory that have perhaps exclusively been expressed in philosophical terms by Lukács' posthumous Ontology. These questions include, among others, the understanding of legal phenomenon as a complex of mediation, and, within it, the place of legal objectification; the way in which the dialectics of the use of coercion appears in law; the role of the logical, the formal and the systematical in the processes of law, and the ways in which manipulation shapes them in actual practice; what to regard as characteristic of the formation of concepts in law; how all these are embroidered by the ideology of the legal profession; and, finally, what the rela-

tive autonomy of law consists of, together with its manifestations, consequences, and also manifold limitations.

As one of its first critiques, Eugene Kamenka (Canberra) has noticed, the author's fundamental theme is the contrast between the epistemological approach (condemned as simplistic and leading to unmediated antinomies) and the ontological one. On this basis, the author elevates what is in effect a historical and sociological approach to law, which has to be comparative. Consequently, it is to describe the actual workings, regularities and effects of the legal system, instead of its preferred or projected principles. Continuing the early criticism's line, Paul Browne (Ottawa) has remarked that using the method and categories of a late Marxist Ontology, the author concludes law to be a dynamic, contradictory and complex process, which by the same stroke must both fulfil the social need for a set of abstract and all-encompassing norms and respond to specific concrete needs not readily reducible to an abstract system. And to achieve this, all administration of the law must homogenise and manipulate those heterogeneous cases with which it deals, in order to attain conformity with both the enacted legal norms and the dominant social imperatives. Concretely, law is determined by the dialectic of the formal system of legal norms (which codifies prescriptions embodying social needs) and the concrete practice of the law as manifested in the behaviour of the citizenry and the organised activities of the branches of the state responsible for promulgating and enforcing laws. That is the reason why as early as in 1987 Frank Benseler (Paderborn) identified the whole undertaking as an autopoietical synthesis, born within legal theorising at a pioneering time.

As to its conclusions, law is expected to mediate in such a way that social determinations involved in law should be asserted through the peculiar autonomy of the law. For law has its goal beyond itself, embodied in the mediated complexes. At the same time it has its own system of fulfilment, that is, it is expected to realise social targets, transformed into legal ones, by fulfilling its own system of requirements. This equals to saying that in the functioning of law the formal rationality, carried by the organising principles of validity and legality, has to realise material rationality in a socially concrete way. Due to such a contradiction, law only be a manipulated mediation at the most. For neither validity, nor legality is a definition prevailing in the field of the total complex. As principles of construction and functioning within the legal complex, they are but postulates with a restricted sphere of operation only. If the motion of legal complex comes into conflict with other complexes, only their interrelationship may decide whether the social total motion will go on as influenced by the tendencies of motion of the legal complex temporarily, or the superiority of strenghts of those other complexes ends by subduing the legal one. Nevertheless, dramatic

moments are not of common occurrence in the life of law. Still, manipulation seems to be its everyday form of existence. For as a socially existing phenomenon, law itself is process-like; its practice is equal to its continuous formation. This unbroken formation manifests itself in actualising those meanings of the legal norm that are—within the given process—a function of diverse social and legal factors concretely given at those time. Since genuine definition of meaning in language can be approximate at best, there always remains a certain scope for motion. And therein every displacement and shift of emphasis, maybe indiscernible in itself, can add up to substantial changes in the long run.

The reality and the ideology of law co-exist in a contradictory unity. The ontological description of legal functioning may cast light on the basis of manipulation at any time: on the social forces channelling legal mediation through the total process in a given way, independent of the kind of formal surrounding and logical ideal law-application has. This reality conflicts with the lawyers' ideology about the autonomy of law and its logical application. The ideology in question is based on false consciousness, yet, from an ontological point of view, it has a real task; namely, as a kind of professional ideology, it is expected to transmit and help implement in practice the rules of game, i.e., the declared principles of operation of a given profession. Or, in another formulation, the law's ideology is expected to force the lawyer to seek the service of society through the satisfaction of the system of fulfilment proper to law, that is, to maintain on-going functioning in the name of law as a functioning within the framework of the law. Hence it follows that Janus-facedness, i.e., the practice of double talk, is a necessary corollary of lawyers' activity. They are to talk of law whilst they are to transfigure real social conflicts of interests into conflicts within the law, then to refine even these into conflicts of a mere appearance. In other words, they are settling real conflicts while they seem but to operate with legal enactments in a logical way.

N. N.

CSABA VARGA: **Lectures on the Paradigms of Legal Thinking.** [Philosophiae Iuris] Akadémiai Kiadó, Budapest, 1999, vii + 279 p.

The author, known for his achievements in legal philosophy and methodology, has polished and refined this series of lectures for over two decades. In their present form they introduce the reader to reasoning in law by leading him/her through the possibilities, boundaries and traps of assuming personal responsibility and impersonal pattern adoption that have arisen in the history of human thought

and in the various legal cultures. The author seeks to disclose the actual processes hidden by the veil of patterns followed in thinking, processes that we encounter both in our conceptual-logical quests for certainties and in the undertaking of fertilising ambiguity. When trying to identify definitions lurking behind the human construct of facts, notions, norms, logic and thinking, or behind the practice of giving meanings, he discovers tradition in our presuppositions, and our world-view and moral stance in our tacit agreements. Recognising the importance of the role communication plays in shaping society, he describes our existence and institutions as self-regulating processes. Since law is a wholly social venture, we not only take part in its oeuvre with our entire personality, but are also collectively responsible for its future.

In quest for the methodological directions of thinking—through surveying legal development (with instances such as classical Greek antiquity, the *dikaion*-period, praetorian law, and Justinian's codification in Rome, as well as enlightened absolutism, and the codificational idea of the *Code civil*), the formation of the vision of geometry (with Euclid, the challenge by Bolyai and Lobachevsky, as well as Einstein's revolutionary turn), and the basic trends of the development of thought itself tending towards either autonomy (as exemplified by the New Testament argumentation, Cicero's rhetoric, Augustine, the Talmudic teaching, Orthodox Christianity, as well as modern "irrationalism") or heteronomy (exemplified by Thomas Aquinas, Grotius and Leibniz)—, fertilising ambiguity and axiomatism are defined as ideal patterns corresponding to the former, respectively the latter, alternative. In the way in which language is used and ordering representations, schemes, as well as sequences of and links to conclusion are formed, creative uncertainty, standing for the former alternative, is characterised by responsiveness, personal responsibility, flexibility and evolutive development, with autopoietical world-view in the background, served by a concept of law open to principles but having no gaps, therefore reasoned inductively as if patterned by the logic of problem-solving, on the one hand, and geometrical thinking, standing for the latter alternative, is characterised by predetermination, personal irresponsibility, rigidity and revolutive change, with mechanical world-view in the background, served by a concept of law objectivated, although full of gaps, therefore applied deductively as if demonstrated by the logic of justification, on the other. Within this duality in the approach to law as text, paradigms of thinking—its conventionality and cultural dependence—are considered with special emphasis on understanding underlying notions like fact, concept, logic, thinking, as well as the existence of a norm. Facing with dilemmas of meaning, both theories of meaning (lexicality, contextuality, hermeneutics, open texture, deconstructionism) and the social construction of meaning (by speech-acts and in social institutionalisation) are treated so that

autopoiesis lurking behind the scenes and the overall systemic response gained eventually through autopoiesis can be outlined. In conclusion, the nature of law (taken as a process, constituted multifactorally, and built up from individual acts) and of legal thinking are defined. Enclosed in appendix, some of the author's earlier papers question whether or not law can at all be conceived as a system and as a set of enactments, inquire institutions as systems, and outline the notion of legal technique.

According to the author's conclusion, anything can exclusively be qualified as 'legal' or 'non-legal' in one or another recognised sense in which law has originated (posited as a rule, taken as an authoritative decision and/or as actually practised), and, respectively, it can only be qualified as 'more legal' or 'less legal' in any (combination) of the above senses. Being formed in an uninterrupted process, neither the totality nor individual phenomena of law can at any time be taken as uniform or complete, or unchangeably identical with itself/themselves. In other words, law can only be identified through its motions and computable states of 'transforming into' or 'withdrawing from' the distinctive domain of the law, and in a relative sense at the most, as it is measured to the aforementioned levels of qualifying either 'more legal' or 'less legal'.

Thereby both society at large and its legal professionals, especially judges, actually contribute to—by shaping incessantly—what presents itself as ready-to-take, according to the law's official ideology. For our initiation, play, role-undertaking and human responsibility lurks behind the law's mask in the backstage. Or, this equals to realise that all we have become subjects from mere objects, actors from mere addressees. And despite the huge variety of civilisational overcoats, the entire culture of law is still exclusively inherent in us who experience it day by day. We bear it and shape it. Everything conventional in it is conventionalised by us. It has no further existence or effect beyond this. And with its existence inherent in us, we cannot convey the responsibility to be born for it on somebody else either. It is ours in its totality so much that it cannot be torn out of our days or acts. It will thus turn into what we guard it to become. Therefore, as the author concludes, we must take care of it at all times since we are, in many ways, taking care of our own.

N. N.

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VILMOS PESCHKA*

The Removal of Ethical and Moral Content from Tort Liability

Abstract. The essay deals with the moral and ethical content of the tort liability in connection with the treatment of the problem in the works of professor Ferenc Mádl. First of all, the author outlines the legal historical background of the issue. Later, he concerns with the ethical bases and justification of the tort liability. In this respect, the author attempts to point out that the moral element of the tort liability–culpability–is getting pushed to the background and has lost much of its importance. Later, he touches upon the attempts to preserve those moral grounds. Finally, the author reveals the tendency that subjective, morally based liability is overshadowed by strict liability in respect to the civil law tort liability.

Keywords: civil law tort liability, liability and ethics, moral and ethical responsibility, strict liability

"Draw beginning and end
together in the union."
(J. W. Goethe)

Legal History: A Bird's Eye View

Tort liability in civil law is in a crisis. László Sólyom's words[1] capture the essential point aptly: "The modern role of culpability–limiting liability–finds itself more and more at variance with the principles and practice of increasing the strictness of liability, while at the same time, in an effort to uphold the principle of education, the resulting, almost too demanding requirements have to be couched in the rhetoric of subjective responsibility." This makes the provision of new theoretical foundations for tort liability, analysing and understanding the present crisis of such liability an inevitable task. This task,

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[1] Sólyom, L.: *A polgári jogi felelősség hanyatlása (The Decline of Civil Tort liability)*. Akadémiai Kiadó, Budapest, 1977, 175.

in turn, cannot be tackled to any satisfactory degree unless we cast an at least cursory glance at the history of the limitation of tort liability, with special regard to the not insignificant role played therein, by the moral category of culpability. The confines of the present contribution allow us space sufficient only for a mere outline of the major tendencies of legal history, an outline which is easy to glean from the detailed and thorough-going monograph written by Professor Mádl.[2]

The general tendency emerging from the history of the regulation of tort liability chimes with the motto of the present paper. "Materials from the most ancient sources of Roman legal history", Géza Marton writes,[3] "generally confirm the view, which is widely known and, indeed, beyond doubt among comparatists: that liability began, in Rome as well as with other ancient peoples, as objective liability, i.e. as liability for the effect. The tortfeasor is liable on the basis of the harmful effect of his act, and to the actual extent of the result of his act rather than in terms of his intentions (Erfolghaftung). As early as in the course of the evolution of Roman law, this objective understanding of liability changes into a conception of subjective liability, i.e. liability understood as culpability. According to Jhering, it is one of the greatest achievements of Roman lawyers "to have given the upper hand to the view that liability for an act, and thus tort liability, can only be ascertained on the basis of culpability rather than merely the resulting damage."[4] The appearance and growing preponderance of the idea of culpability and subjectively grounded responsibility in legal regulation is one of the first stages in the important social-historical process which we may call as the influence of ethical considerations upon the law.[5] This consists in the attempt to involve the internal aspects of actions such as culpability, intention, negligence, particular motives etc. in the range of legal regulation, all of which are undoubtedly moral categories, both historically and in character. At the dawn of historical development, when primitive rights focus almost exclusively on the external aspects of forms of human conduct, i.e. regulation takes the perceivable, external manifestations and consequences as its point of reference, there is no indication of any relevance attributed to

[2] Mádl, F.: *Deliktuális felelősség (Liability for civil Wrongs)*. Akadémiai Kiadó, Budapest, 1964.

[3] Marton, G.: *A polgári jogi felelősség (Liability in civil Law)*. Triorg, 1993. Budapest, n.d., 36.

[4] Jhering, R.: Das Schuldmoment im römischen Privatrecht. In: *Vermischte Schriften juristischen Inhalts*, Breitkampf und Härtel, Leipzig, 1879. 199.

[5] Lukács, Gy.; *Az esztétikum sajátossága (Aesthetics)*. Vol. II., Akadémiai Kiadó, Budapest, 1965, 199.

intentions, motives and the culpability, i.e. the internal aspects of acts. "This indifference originally sprang from the fact that the existence of people living in a social community was a solely communal existence in which conduct required by the community counted as the only natural form of conduct."[6] The individual was immersed in natural communities, he or she was a dependent part of a larger whole. This had two consequences, on the one hand, people knew each other well so they were mutually aware of each other's motives,[7] and they had an undeveloped, diffuse awareness of themselves as personalities, on the other.[8] All these social facts explain the indifference of early, primitive rights to the inner aspects of human conduct. This situation changes as a result of a number of economic and intellectual developments including the accelerated growth of a culture of individual personality, a concomitant of the powerful progress of private property and the exchange of goods, the rise of the individual from natural communities, as well as the growing influence of intellectual manifestations of economic and social changes such as the Byzantine-Christian emphasis on the mental,[9] Hellenisation, the appearance of the ideal of humanity, the spread of the Christian conception of man as a being endowed with free will.[10] In light of these social and ideological factors the exclusive attention of the law to the external aspect of human conduct, the exclusion of the internal aspect (intention, motive, culpability etc.) from legal judgement, proved much too rigorous and the process of the ethical influence on law, i.e. the intrusion of the internal aspects of conduct into legal regulation started. However, the influence of ethical considerations upon the law, i.e. the removal of legal indifference to the internal aspects of conduct, commenced only when the smooth functioning of law had been disturbed, i.e. when legal rules, instead of being flatly asserted in their most direct meaning, began to be applied indirectly, i.e. via a preliminary elaboration of illegal forms of conduct and processes - a historical precondition to which Georg Lukács drew attention.[11]

[6] Eörsi, Gy.: *Jog-gazdaság-jogrendszertagozódás (Law, Economy and the Divisions of the Legal System)*. Akadémiai Kiadó, Budapest, 1977. 36.

[7] Lukács: *op. cit.* 213–214.

[8] Eörsi: *Jog-gazdaság-jogrendszertagozódás. op. cit.* 36.

[9] Marton, G.: *Kártérítés. Kértérítési kötelmek jogellenes magatartásból (Compensation. Liabilities for Damages Arising From Unlawful Conduct)*. Általános Nyomda és Grafikai Intézet, Budapest, 1942. 49–50.

[10] Sólyom: *op. cit.* 69–70.

[11] Lukács: *op. cit.* 213.

The influence of ethics on the legal regulation of tort liability continued in feudal times—as is pointed out by Mádl[12] both in the early and the late middle ages. In this period of legal history "The majority of rules regulating liability for delicts make the finding of liability in principle and consistently conditional on the culpable conduct of the doer."[13] No change in this situation can be recorded in the late 18th and in the 20th centuries when the principle of responsibility for civil wrongs as based on culpability reigns triumphant. As Mádl shows in detail,[14] the systems for the regulation of tort liability evolved in late 18th century Prussia and early 19th century France and Austria are based on the principle of culpability. Important civil codes of the 20th century—such as German BGB, Swiss ZGB and CO as well as the Italian Codice civile—also treat culpability as the basis of responsibility for delicts. "The basis, or general rule of responsibility in these codes ... is culpability."[15]

The trend in legal development which emerged at the end of the 19th century brought with it a setback in the progress of culpability-based responsibility, i.e. responsibility on a moral basis, and a gradual decline in its influence. The contemporary trend in positive legal regulation ushered in objective liability and other, more rigorous forms of liability. This should not be taken to mean that earlier systems of regulation had rested completely on foundations defined by culpability, completely lacking any traces of objective liability. Indeed, analysing the Roman lex Aquilia and the regulation of custodia responsibility in Roman law Géza Marton showed that objective liability was a concept not unknown to classical Roman law.[16] The increasingly powerful presence of objective liability in legal regulation in the late 19th and the 20th century (whose most important stages are the provisions of the Rechtshaftpflichtgesetz of 1871 concerning the objective liability of dangerous industrial activities, the legal regulation of damages caused by motor cars in 1909, the set of regulations defining the liabilities of railway companies which became effective in 1874[17]) and the trend toward absolute liability to which Mádl drew attention in 1964,[18] are all signs of a decline and crisis[19] of culpability-based responsibility for

[12] Mádl: *op. cit.* 282–288, 302–307.
[13] *Ibid.* 286.
[14] *Ibid.* 345. passim.
[15] *Ibid.* 403.
[16] Marton: *A polgári jogi felelősség. op. cit.* 47–48.
[17] See in detail in Mádl: *op. cit.* 383–396.
[18] *Ibid.* 435.
[19] Sólyom: *op. cit.* 175.

civil wrongs, i.e. of the retreat of ethical content from tort liability. Rodiere[20] had every reason to write that the instruments derived from the traditional concept of liability prove insufficient in face of the requirements of the nuclear age. The causal link in the traditional sense as an absolute criterion of responsibility becomes doubtful, culpability even more, and *vis maior* seems to be a relic of the stone age: individual, only individual responsibility, be it of a capitalist enterprise, provides no guarantee for the compensation of the damage caused. The decay of culpability-based responsibility, the weakening of ethical influence and the retreat of moral content from liability is indicated not only by the growing influence of objective liability as evidenced in positive legal regulation, but also by the beginning transformation and re-interpretation of culpability, an important conceptual element in responsibility or civil wrongs. Before I outline this latter development, however, I need to make a brief but useful detour.

An Ethical Intermezzo

In this passage we need to consider the ethical or moral component of tort liability in civil law. The appearance of the subjective element, the triumph of culpability in tort liability celebrated by Jhering, aimed at a relaxation of the rigour of law. Legal regulation hoped to attain this goal by giving room to the subjective aspect, the moral ingredients of action, by re-establishing civil tort liability on the subjective foundation of culpability. With this we have arrived at the most vulnerable point of responsibility for civil wrongs, at the moral, ethical, i.e. subjective basis of responsibility or, more specifically speaking, at culpability. Culpability is beyond any doubt a moral category. Legal history clearly shows that the idea of culpability comes from morality into the law where it becomes the foundation of responsibility for civil wrongs. But let us stop for a moment and ask: what does "culpability" mean in the context of civil responsibility for civil wrongs? What we have here is a precipitation of an ethic of intention and consequence in legal regulation. While formerly legal regulation pivoted on the act and its consequence, the causal link between the two, now attention is directed at the subjective aspect of action, intention, negligence, motives and moral ingredients, at a consideration not only of the act and its consequence but also of what the actor's will or intention aimed at. But

[20] Rodiere, R.: Responsabilité civile et risque atomique. In: *Revue Internationale de Droit Comparé*, 1959, No. 3., 505–518. See also Mádl: *op. cit.* 429.

the question is: what does culpability mean in civil law dealing with wrongful acts to begin with? That the question is not a simple one is shown by the vehemence with which Géza Marton, an eminent expert on civil tort liability, objects to the idea that moral categories could have a part to play in civil tort liability.[21] According to him, moral categories such as culpability, negligence etc. have no place in tort liability in civil law; their application in civil legal regulation and practice is "an abuse of the notion, which is originally of a moral substance, a conceptual forgery resulting in self-delusion." Géza Marton's diagnosis is correct: notions such as culpability, mens rea, malice, negligence etc. which have come to be incorporated into civil tort liability do not have the same content as they have in the moral sphere. Brought into the realm of legal regulation with the content they originally had in the moral sphere, these moral concepts, principles and categories proved untenable in their new context and underwent substantial transformation and transfiguration. Marton states with indignation that these moral categories undergo such a radical transformation by the time they emerge in their legal form that their use in legal regulation amounts to an abuse of moral notions.

The removal of moral content from tort liability in civil law is manifested in the above-mentioned increasing preponderance of objective liability, on the one hand, and in the transformation of the moral component, i.e. culpability, on the other. The subjective component of responsibility, i.e. culpability, undergoes such a pervasive transformation in legal regulation that it has hardly any link left with what is called culpability in ethics and morality. The transformation we are speaking of is best described as an objectivisation of the notion of culpability.[22] The primary locus of the removal of moral content from civil tort liability is not the increasing prevalence of objective liability, but the disguised transformation of culpability, of the subjective component. Transplanted into the realm of civil tort liability, the moral notion of culpability undergoes a change, acquiring new content and a new point. The legislator has no choice but to tie "culpability" or "no culpability" to abstract and typical objective criteria, in the same manner in which the abstract, objective standard of due care expressed in the model of the "bonus pater familias", which was faithfully adopted by later regulation,[23] applied to everybody.

[21] Marton: *Kártérítés. Kártérítési kötelmek jogellenes magatartásból. op. cit.* 64–67.

[22] Marton: *A polgári jogi felelősség. op. cit.* 114.

[23] *Ibid.* 61.

It is worth pausing for a moment at this point. Marton is right in seeing a digression from the moral notion of culpability[24] in the emergence of the notion of "what can be expected from somebody" in law in the form of general expectability (e.g. good family father, merchant) or particular expectability (i.e. general in the given context – see Hungarian Civil Code Article 339) i.e. the determination of the degree of culpability in terms of class, society, certain professions, social status etc. rather than of the individual. What happens in reality is that moral terms and categories originally adjusted to the needs of individual cases are re-formulated in law at the levels of particularity and generality, and with this culpability, negligence etc. lose their moral character in legal regulation. Moral notions are transformed into ethical ones, and paradoxical as this may sound, this entails a removal of moral content from responsibility for civil wrongs, a purification of the same. Appearances point to the contrary: in order for these moral categories comprising internal aspects of human acts to exert their influence in law, i.e. a sphere of activity geared primarily to the external features of those acts, they have to be assimilated to this external objectivity and thus their other second essential characteristic – uniqueness, individuality –, has to be given up and they have to be made to conform to the generality prevalent in law. Thus the legal appreciation of the alleged internal aspect of the act in legal regulation involves a transformation of the individual import of these inherently internally directed moral categories into the particular and the general.

This transformation, however, is no longer performed in a direct relationship between morality and law. It was Hegel's important insight that the mediating sphere of particularity between morality and law is the ethical.[25] This appearance of the ethical in civil tort liability involves not only a removal of moral content from responsibility for civil wrongs but also a rather special regulation of such responsibility. A closer look at the categories serving as expressions of and standards for evaluating the internal aspects of acts in law reveals that these categories, i.e. culpability, mens rea, negligence etc. derive from ethics and social mores rather than being moral in nature. The individuality and subjectivity of moral categories expressing and regulating the internal aspects of acts are transformed in the ethical into particularity, on the one hand, and into a definite union between the subjective and the objective, on the other. In social mores the act is defined not by the internal components of conduct,

[24] Marton: *Kártérítés. Kártérítési kötelmek jogellenes magatartásból. op. cit.* 65.

[25] Hegel, G. W. F.: *A jogfilozófia alapvonalai (Philosophy of Right).* Akadémiai Kiadó, Budapest, 1971, 135 §, 151, 11 §, Appendix, 175.

let alone its aspect which is exclusively internal to the individual person. The decisive moment, which produces a paradoxical result in the legal regulation of responsibility for civil wrongs, is that the act is defined by the consonance between the external and the internal, where the connection between morality expressing the internal and the norms of social mores determining the external is but a further consequence and expression of that harmony. The role played by the norms of social mores and the transposition into the social in the individual sphere result in a socialisation and generalisation of exclusively and purely moral categories. Thus, here, the locus of the moral standard of culpability, negligence etc. is not the individual but some sort of social (family, class, group) standard guideline (norm). Moral categories are made subordinate to the norms of mores (society), they dissolve into the ethical. It is this form of moral norms transformed in the ethical and invested with a particular content that intrude into legal regulation, e.g. responsibility for civil wrongs in civil law, driving out the subjective, moral component. Consequently, the legal categories expressing and evaluating the internal components of acts (culpability, negligence etc.) are no longer simply the same corresponding moral categories. Géza Marton is right in asking "What element of culpability is there in somebody's personality deviating from the norm? Is there a point in, can there be any justification for, shifting the meaning of a concept, for the purposes of a narrow profession, until it has nothing in common with the original? After all, the concept of culpability is an ethical, not a legal concept, which has only an auxiliary part to play in legal scholarship.[26] An attitude of Kierkegaardian scepticism is most appropriate here: are we enriching or dethroning the concept of responsibility or civil wrongs and its subjective basis in extending it and stretching it to such extremes?[27] The transformation of moral categories into a standard of some sort – even if, not always legitimately, it is considered ethical – in responsibility for civil wrongs means that beside the fact of harm caused, which is prohibited by law, the judge has to take into consideration another norm in his judgement on responsibility for wrong done, but this other consideration is not the wrongdoer's subjectivity, culpability, intention or negligence. Let us think of the standard of the bonus pater familias, the carefulness of the good merchant etc. or of "general expectability in the given situation" indicated in Article 339 of the Hungarian Civil Code. Géza Marton hits the tail on the head when he writes that "The culpability which the judge will thus pronounce will have very little in common with genuine moral

[26] Marton: *A polgári jogi felelősség. op. cit.* 65.

[27] Kierkegaard, S.: *Vagy-vagy (Either-Or).* Gondolat, Budapest, 1978. 179.

culpability."[28] For whether the alleged subjective basis of civil responsibility is the generality of the bonus pater familias or the particularity of general expectability, it will by no means be the subjective, moral culpability of the wrongdoer, the individual as against what can be expected of him. What we have is a judgement of the conduct causing damage on the basis of a social and ethical norm which is rather loosely and widely formulated and elevated into the sphere of legal regulation. Marton's unfavourable verdict on this system and theory of legal regulation captures the absurdity of the attempt flippantly: "The standard of the bonus pater familias and this can be said about all other alleged subjective standards , which is erroneous in its internal concept, is just as wavering and leading to inconsistency in its practical application. It lacks what is an ineluctable ingredient of a standard: being constant, unchangeable and easily perceptible. You cannot use a rubber tape for measuring."[29]

A Rear-Guard Fight

It must not be left unnoticed that there have been important attempts to uphold culpability, the subjective basis of responsibility for civil wrongs. The scholarly literature on the subject is enormous, and the confines of the present essay cannot be extended as far as to give space to their recapitulation. This is, indeed, unnecessary, since we have a profound analysis of the subject from Géza Marton,[30] yet Gyula Eörsi's argument in defence of the subjective basis of the theory of responsibility enunciated in the Hungarian Civil Code deserves to be analysed. Eörsi writes that "Subjective and objective responsibility are no opposites, "objective" is the terminus of a continuum of responsibility".[31] The contrast between subjective and objective civil responsibility dissolves in the determination of the extent of responsibility, of culpability: "The threshold of liability, in principle, lies where it begins that what is objectively unavoidable."[32] Thus the final terminus and measure of civil liability is objective avoidability, more specifically the fact that it is objectively possible

[28] Marton: *A polgári jogi felelősség. op. cit.* 66.

[29] *Ibid.*

[30] *Ibid.* 59–93.

[31] Eörsi, Gy.: Tézisek a polgári jogi felelősségről (Theses on Civil Liability). *Állam- és Jogtudomány* XIX/2. 1976. 192.

[32] Eörsi, Gy.: Szubjektív és objektív felelősség (Subjective and Objective Liability). *Állam- és Jogtudomány*, XXII/4. 1979., 560.

to avoid causing damage, or in other words, the tortfeasor had a pair of alternatives from which he could have chosen the line of conduct which does not lead to the causing of harm. To sum up, the final terminus of civil liability is the existence of a choice between alternatives. If the causing of harm was objectively unavoidable, i.e. the wrongdoer had no alternative, one cannot meaningfully speak of civil liability.

It cannot be disputed that civil liability and responsibility in general can only be understood against a background of social ontology, more specifically the condition that the individual actor always acts within and chooses between a range of alternatives defined by social existence, since conditions set by society never determine the person's will and activity completely. "The particular person may make a bad decision and may ruin himself as a result of it. Thus the determination which springs from social existence is always 'only' the determination of some alternative decision, the scope of his various opportunities, a mode of influencing, something that never occurs in nature."[33] Clearly, if a person, determined by the network of social conditions, could act only as he in fact acted, there can be no talk of responsibility, even responsibility under civil law, of blaming him for the act. The possibility of choice, the pattern of choosing between alternatives is a precondition of responsibility in general and responsibility in civil law matters in particular, a precondition which is provided by the ontology of social existence.

With this Gyula Eörsi seems to get to the antithesis of his original thesis, i.e. the two kinds of responsibility founded on a subjective basis, since one of its ultimate poles, or its terminus in principle, is the objectively unavoidable, i.e. not innocence. Of course, he is perfectly aware of this fact, and that is exactly why he writes, while trying to keep objective liability within the realm of responsibility based on a subjective foundation, that "culpability makes no sense without personal and internal aspects", and "nor does liability without internal aspects".[34] He therefore makes an attempt to keep within the range of subjectively based responsibility the various forms of objective liability such as activities involving enhanced degrees of risk, tort liability caused by ultra hazardous activities, and to place them on subjective foundations, in other words, to save the subjective foundations of civil responsibility in this area. For unless these norms and forms of liability can be regarded as one end of the scale of subjectively based concepts of responsibility, unless as he says– the

[33] Lukács, Gy.: *A társadalmi lét ontológiájáról (On the Ontology of social Existence).* Magvető Kiadó, Budapest, 1976. Vol. III. 346.

[34] Eörsi: Szubjektív és objektív felelősség. *op. cit.* 564.

subjective aspect can be understood as a necessary component of liability, there will be no justification for placing the objective forms of liability, and the complex institution of liability in general, within the institution of responsibility for civil wrongs: their placement will be conceptually equivocal and both theoretically and practically untenable.

Seeing this danger, Eörsi tries to save the subjective basis of responsibility for an account of so-called objective liability and develops a remarkable and inventive theory. The conceptual move underlying his account boils down to the claim that the subjective basis of responsibility is to be seen not only in the subjective aspects which lead to the external act, the internal aspect (e.g. culpability, intention etc.) which contributes to the judgement on the act, but also in the change effected in the tortfeasor's mind by the application of objective civil liability, i.e. in the subjective aspect involved in causing damage and its legal regulation which Eörsi ingeniously adapting an aesthetic category borrowed from Georg Lukács calls (for the sake of argument) "the- state-after-the-effect"[35] of the legal regulation of civil liability. The "state-after-the-effect"—according to Lukács[36]— is "the additional content by which a person returning from the world of the work of art into the world of ordinary, everyday concerns is enriched". Adapted to the concept of civil liability this reads as "the additional content by which the person held for damages or informed of a judgement to that effect, is enriched in his ordinary, everyday world."[37] This additional content is a transformation of the mind (education) which will prevent the person from performing acts which lead to civil liability. Thus civil liability is seen to retain the subjective character of responsibility. The difference is that while this was previously located in the subjective aspects (culpability etc.) which lead to the performance of the wrongful act, now, replacing retrospection by a future-oriented approach, the subjective nature of civil liability is seen as founded upon those subjective processes and elements which enter the scene after judgement is passed, after the actor is found liable under civil law, appearing as the "state-after-the-effect" of civil law liability: holding someone liable for damages under civil law effects a transformation of the actor's mind which will prevent him from committing similar acts in the future. Thus civil liability has a place only where there is a chance for the educational-preventive effect to set in, in other words, where

[35] *Ibid.*

[36] Lukács: *Az esztétikum sajátossága.* Akadémiai Kiadó, Budapest, 1965. Vol. II. 814, in detail see Vol. I. 774–790.

[37] Eörsi: *Tézisek a polgári jogi felelősségről. op. cit.* 189.

civil law qualifies the act as something that can be laid to someone's account, i.e. "optimistically qualifies it as unfavourable",[38] imposing some disadvantage on the doer in the hope that his mind will take a favourable turn in consequence. Accordingly, civil tort liability emerges as subjective because it has the potential for fulfilling an educational-preventive function. Thus the subjective basis of civil liability is no longer seen in culpability or in morality, nor even in ethics (if that is what we have in the case of a social standard such as the bonus pater familias, general expectability in the given situation etc.): it is supposed to lie in blameworthiness, which is basically a moral category, but that is not what is meant in this context. Blameworthiness does not rest on subjective processes and aspects of the act prior to, and leading up to, the act: it is based on processes and aspects which may materialise after the act, which are optimistically judged as bringing about a transformation of the mind which is subservient to the prevention of similar acts. Thus objective liability falls within the range of subjectively based responsibility for civil wrongs because it builds on blamewirthiness, the "optimistically unfavourable" assessment of the act, on the preventive educational function. That is, we no longer have a case of the removal of moral or ethical content from responsibility for civil wrong. This argument tries to save the subjective basis of civil liability by founding its subjective character on the subjective processes and aspects which emerge after the act under consideration rather than on those before the act, its consequents rather than its antecedents, on its future rather than its past.

Propounded by Gyula Eörsi, these arguments once inspired me to write an essay in which I tried to preserve and uphold the subjective basis of responsibility for civil wrongs.[39] The gist of those arguments and efforts boils down to the claim that the locus of the subjective basis of responsibility in civil law is the ethical rather than morality, and that forms of liability which are not influenced by this impact of ethics on the law, with both ethical and moral contents removed from them (e.g. objective liability), i.e. liability no longer resting on the subjective basis of culpability, are to be banished from the system of civil liability, all of which was supported by reference to the need for the range of present-day objective liability to be located in an area of the legal system outside the institution of responsibility. Gyula Eörsi had every reason to be amazed at this argument,[40] since such a philosophical account of civil

[38] *Ibid.* 194, passim.

[39] Peschka, V.: A polgári jogi felelősség határai (The Limits of Civil Liability). In: *Jogtudományi Közlöny* XXXVII. No. 6. 1982, 425–433.

[40] Eörsi, Gy.: Elmélkedések és álmélkodások a Jogtudmányi Közlöny tulajdonjogi és

liability was based on the error (inspired by the inebriation with the concept of responsibility for civil wrong based on culpability, which was enthusiastically upheld for several centuries) that responsibility makes sense only when the actor is negligent or culpable, i.e. is internally in the wrong. Fortunately, my argument succeeded not only in amazing Eörsi but also in provoking him to further thought, as a result of which he substantially modified his previous defence of the subjective basis of responsibility and placed risk allocation? In the centre of his conception of civil responsibility. "The antagonism between 'sub' and 'ob' vanishes and is replaced by degrees or nodules of risk allocation along a continuum, tolerantly dragging with it traditional, established, inadequate terms."[41] What is more, subjective responsibility is no longer moral, or ethical: it is a technical term with an etiolated content. In speaking of responsibility for civil wrong, Eörsi writes, "by virtue of its practical orientation, law employs the terms 'culpability' and 'negligence', knowing that they often mean something different from their ordinary or philosophical meaning."[42]

Legal Liability

With responsibility for civil wrongs having lost its moral and ethical contents, the question arises as to what is left for civil liability to be based on? The internal mental world of the subject, culpability and negligence and other subjective motives become increasingly faint and irrelevant to legal regulation. The error I committed in my earlier paper was due to my failure to distinguish between legal liability and ethical responsibility, and to my restricting the understanding of liability (while not disregarding existing civil regulation, see Hungarian Civil Code Article 339) to what I saw as ineluctable components of responsibility for wrong, to the wrongdoer's fault or culpability . This internal component, this subjectivity, whether of a moral or ethical nature, is undoubtedly a result of ethical influence on the law. However, law is primarily directed toward practical purposes, and developments in the economy, in traffic, motor transport and engineering had exploded such a concept of civil responsibility as based on a subjective understanding. The question arises: if

felelősségi jogi száma kapcsán (Reflections in Amazement at the Special Issue of Jogtudományi Közlöny On the Law of Property and Liability). In: *Jogtudományi Közlöny* XXXVII. No. 11. 1982. 838–840.

[41] *Ibid.* 840.

[42] *Ibid.*

the subjective basis of responsibility for civil wrong has evaporated and discarded, what is civil tort liability based on? My earlier argument was clearly aimed at philosophically explaining and thereby theoretically upholding these subjective foundations of civil responsibility. It is equally clear today that this attempt was both historically and theoretically mistaken. The theoretical mistake consisted in restricting responsibility, and thus legal liability to notions based on moral or ethical foundations, failing to distinguish between various forms of responsibility, despite earlier attempts by Géza Marton to ground those distinctions.[43] Equally mistaken was the civil law regulation effective at the time which relied, and still relies, on a putative subjective basis available for finding responsibility for wrong in civil law cases. The jurisprudential error consisted primarily in supposing that civil responsibility stands if it is grounded in moral or ethical considerations, i.e. of culpability, otherwise it falls. This claim seems to be substantiated by the influence of ethics on law, which can be verified from legal history. Yet, it can be shown that responsibility is viable not only on a moral or ethical basis.

Considerations of social ontology—to which I referred earlier—indicate that responsibility, and thus civil liability, is grounded in an aspect of social ontology which can be described as choice between alternatives. The subject's fault can be seen in having chosen the wrong alternative. Whether he did it intentionally, negligently, culpably etc. is immaterial to his liability as long as he was in the position to choose, if he could have acted otherwise. To find someone liable for damages under civil law, the ultimate starting point to which recourse must be taken is the fact of damage done. The ground of liability, however, is the breach of the legal norm which prohibits persons from causing damage, thus illegality. The problem of responsibility is thus transposed to a different level of consideration: the question is no longer whether the causing of damage can be seen as blameable or culpable; it is whether the subject-at-law has breached the rule which prohibits him from causing damage, whether he had the possibility of avoiding causing damage, of choosing a lawful line of conduct, i.e. of not causing damage. In so far as there was a possibility of choosing between the alternatives of lawful and unlawful conduct, the subject-at-law is liable for his unlawful act. In this perspective, undoubtedly, the problem of responsibility for civil wrong becomes directly focused on unlawfulness and causality, consequently on reparation, and the idea of preventing unlawful conduct enters only as an indirect consideration. At the same time, the need for a proof of innocence, the difficulty and delicacy of Beweisnotstand

[43] Marton: *op. cit.* 15.

analysed so meticulously by Géza Marton[44] disappears. It would be a misunderstanding to think that this amounts to absolute liability. The breech of the legal norm which prohibits subjects from causing damage results in tort liability only if the alternative of abstaining from causing damage was open to the tortfeasor. As long as such a pair of alternatives is not available, i.e. the actor is not in the position to choose between a lawful and an unlawful line of conduct, he cannot be held liable for damages under civil law. This is recorded and safeguarded by the rules which set out conditions of necessity, circumstances beyond control, vis maior, lawful defense, contributory conduct of the aggrieved party etc. These rules translate the general prohibition against causing damage into particular and typical terms.

Thus we arrive at a problem of legislation which cannot be left unanalysed since it sheds light on the self-contradiction involved in culpability-based responsibility. The attempt to regulate responsibility for civil wrong via the concept of culpability, i.e., in fact, via a social standard (bonus pater familias, expectability in the given situation etc.) actually presupposes and applies two norms for the purpose of defining and finding responsibility for wrong. One is the general prohibition against, and the unlawfulness of, causing damage, the other is the general expectability of a certain kind of conduct in the given situation. If it is agreed that the content of a legal norm optimally concentrates on the particular and typical, then we may legitimately suppose that the legislator introduces a general prohibition against causing damage because subjects can be generally expected to conduct themselves in specific social situations in such a manner as to avoid causing damage, to abstain from acts which will cause damage. The general prohibition against causing damage, while importantly qualified by the circumstances exempting the actor from tortious liability, lives up to the requirements on the particular content of legal norms. It is therefore pleonastic and superfluous to repeat this norm, i.e. a norm with a particularised content, in another norm, i.e. the rule of general expectability. Eörsi draws attention to the fact that in as many as 90% of cases of objective liability it can be shown that the wrongdoer is culpable, i.e. can be seen to have deviated from what can be generally expected in a situation of the kind in question.[45] However, if causing damage is prohibited because the subject can be generally expected—under consideration of the exempting circumstances—to avoid causing damage, then it is completely pointless to appraise and judge the tortious conduct a second time, by the norm or standard

[44] *Ibid.* 60–61.

[45] Eörsi: *op. cit.* 639.

of general expectability in the situation given. This only provides scope for the legislator to set the standard of expectability in a given situation. Let me quote Marton's words again: "You cannot use a rubber tape for measuring."[46] I must honour Eörsi's ironic request[47] and state, on the basis of the foregoing considerations and arguments pointing toward the retreat of moral and ethical content from responsibility for civil wrong based on a subjective foundation has no justified place in the system of civil tort liability.

Beginning and End

On the basis of the history of civil tort liability and the theoretical conclusions which can be drawn from it, we can state that the beginning and the present, post-modern end of tort liability have met again to form an union, albeit this union does not lie at the same level and is not to be understood in the same sense as before. Of course, history has not ended, so the history of civil tort liability is not over, either. Whether in the sense of Hegel's "triadic" schema, or in the sense of Nietzsche's "eternal return of the same", everything is starting anew, and, even if certain tendencies can be guessed, the future remains beyond human foresight and calculation. Horace's admonition – "Quid sit futurum cras, fuge quarere..." – applies to the future course of the development of civil tort liability, as well.

[46] Marton: *op. cit.* 66.
[47] Eörsi: Elmélkedések és álmélkodások. *op. cit.* 838.

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Constitutional Law in Twenty Years from Now **

Abstract. The principles of constitutional law as those of many other disciplines seem to develop and to be replaced by new paradigms in the light of globalization. The present article using the genre of constitutional futurology—attempts to determine whether this change is real or an illusory impression, and to predict the future of constitutional law and of scholarship reflecting on constitutional issues. A mighty forecast emerges from the interplay of opposing forces. While the withering away of the constitutionalist paradigm is unlikely partly because of the lack of a new generation of legal scholars following new patterns of thinking, partly because there is no reason to assume that the prevalent socio-economic order would cease to exist , the essay maps a number of possible challenges like genetic engineering or personal computers interconnected in the World Wide Web , which constitutionalists shall expect to face in theory and in practice alike.

Keywords: Constitutional Law

Following the professional attitude of market forecasters, I would like to offer two perspectives on the constitutional law of the next two decades.

I.

The first perspective is based on the immortal French commonplace: "Plus ça change...". The more it changes, the more it is the same thing. This might be true in the case of constitutional law, too. What creates, than, the impression that constitutional law is changing? The legal profession requires original publications. The easiest claim to originality is in writings about novelty. Academics have to write many articles. So we have constant reports of development. But is constitutional law changing? As far as constitutionalism, the essence of modern constitutional law is concerned, namely constitutiona-

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lism, there were not it was not subject to too many intellectual developments in the past 250 years. Constitutionalism is a long-term paradigm. Even constitutional review which is perhaps the single most efficient characteristic and influential development of constitutional law in the past eighty or so years or so was already perceived as an intellectual need by the Abbe de Sieyès and others in during the French Revolution. The constitutionalist paradigm survived some of the most important challenges one could imagine, namely among them the crisis of parliamentarism, attempts of corporativism and various forms instances of totalitarianism. It constitutionalism survived even its apparent insignificance. What has been changed genuine developments in constitutional law concerned mostly democracy and the underlying concept of equality. The result was the extension of the electoral basis. A few constitutions recognize the constitutional importance of parties; and many constitutions incorporate equality. But many political changes were not, or only very superficially reflected in constitutional law, if at all. A few constitutions recognize the constitutional importance of parties; and many constitutions incorporate equality.

The stability of the constitutional paradigm creates self-confidence. The self-deception is understandable: it is very difficult to invent a new utopia about a living, though paralyzed, utopia.

If one looks into the socio-economic factors influencing constitutional arrangements there seems to be no reason to believe that a new paradigm will emerge in the next twenty years. One can assume that the current socio-economic order—a global market based on enormous disparities—is good for another twenty years. There are no known internal conflicts that would suggest a fundamental and successful challenge to the current mode of life. Self-confidence suggests that constitutionalism will operate under our present-day assumptions, and partly due to these conditions. It will operate in those countries where it has already good social and cultural chances of existence.

As there is no reason to assume that the prevalent differences of the world will cease to exist in the allegedly global economy, therefore the chances of further successes of thick (non-superficial) constitutionalism are poor. Some forms of intellectual resistance to constitutionalism are known already. Among these challenges "Asian values"-type objections are the most successful prevalent today. Other phrases denouncing the imperialism of constitutionalism as an "alien or foreign" force will come in due course from autocrats to be.

Because constitutional law is so closely related to the core notion of the constitutionalist paradigm, the legal mind cannot expect changes in constitutional law other than incremental and quantitative. At first glance there are no sufficient institutional interests, no decisive political actors, no economic forces which have sufficient interest stake or enough destabilizing power to make one

think that constitutional law will be fundamentally different from what we know today. To imagine a different constitutional law fundamentally different of what we know today is in a way the denial of lawyer's logic, which is based on the cult of the existing status quo. The legal mind might be critical but it is hardly imaginative in the sense of daring to go beyond the existing system. The legal mind dictates that the change will be quantitative, or secondary from the perspective of constitutionalism. The prevailing forms of constitutional reasoning will continue to reign, partly because new Denkforms, topoi, new legal arguments have enormous difficulties in a stare decisis oriented, consistency based system like lawsystem based on respect for stare decisis and a search for consistency, such as law. It is not an by accident that many if not most constitutional arguments were known at the time when constitutional adjudication begiun; most of our topoi are inherited. The change is produced by the abuse of topoi.

Strong challenges to the state of affairs come at moments of deep social crisis: this is what happened at the time of the Great Depression when scientific considerations and consequentialism was advocated to the detriment of constitutional legal values. This phenomenon, however, turned out to be short lived, or perhaps, simply became a new legitimation for judicial deferentialism in matters of state administration.

A similar inertia is expected in regard to constitutional argumentation. Changes of arguments require, as a minimum, a whole generational change. At the moment I don't see an emerging new generation of legal scholars, nor judges influenced by them, who would follow new patterns of thinking that would eventually result in a paradigm change once this generation comes to social domination in twenty years. In fact, if one peruses the topics topoi and key arguments of twenty some years old legalaw reviews and judicial decisions of the United States Supreme Court or the German Constitutional Court these articles and decisions would not look antiquated today.

As to the internal structures of constitutional law, there will be quantitative changes without a revolution of quality. The quantitative change herein this sense means not only a further increase of in the constitutionalization of disputes (not without necessarily entailing more activist courts). The increased constitutionalization will be primarily be geographic. As to positive law, I assume that constitutional texts continue to change more or less in line with the prevailing trend. According to the prevailing trend in twenty years most constitutional texts will be on the average 20 per cent different from what they are today. Perhaps 50-100 countries will have one or more new constitutions, including a fair number of states creating their first constitution ever, for the

simple reason that these states did not exist before. (Currently Africa is having a constitution-rewriting exercise that might be repeated in the future.)

There will be probably be slightly more countries with rather deep constitutionalist structures, and there will be many more states with superficially constitutionalist arrangements. A somewhat shallow acceptance of certain ornamental elements of constitutionalism, however, does not entail respect for the anti-authoritarian spirit of constitutionalism. There might be more constitutional democracies in twenty years from now but it is not to be taken for granted that emerging or even existing democracies will be stable, or that their constitutional structures will resist authoritarian and other anti–constitutionalist pressures. There is no guarantee that as a result, there will be more people living in constitutional regimes than today, even if there might be more states adhering to constitutionalism.

Constitutional law will be more international, or even intellectually more global. There will be more countries may be expected to which give up more of their national sovereignty. This, however, is not likely to result in fundamentally new structures, simply it will bring up give rise to new forms of federalism, primarily ethnic federalism.

In light of long term trends and paradigms there is little constitutional futurology has to offer. Today historians are dealing with contemporary history, even present history. Here from this perspective even the future looks to be past history. It is not accident that no great constitutionalist utopia (like that of Rousseau's about the glass-wall city) was written construed in the last couple of centuries.

I am not saying that constitutional law has not changed in the past scores, or that (or because of that) it will not change in the future. After all, one would have difficulties in any country of the world to pass a constitutional law exam using a ten-year-old textbook. People and scholars rightly feel that there are new problems and new solutions. Most of those solutions, however, use existing intellectual and constitutional techniques, represent returns to long existing or may be forgotten paths, or copy– with enormous impacts in a given society– what is long established and or passe elsewhere.

II.

It is time to turn to the counter-forecast. To indicate the level of change:

So, as it is always the case in social meteorology, there is area different readings of the data. After all, according to Thomas Jefferson every new generation should have a new be able to create its own constitution. From the

perspective of nations and states, there is certainly a lot of change is to be expected if one assumes that generational changes will bring constitutional changes. The last score has seen the disappearance of many pseudo constitutions, allowing for the development of constitutional structures in East Central Europe. Such changes were unforeseeable. One cannot rule out similar unforeseen events, even if the new constitutional regimes did not result in new forms of constitutional law. The social situations and challenges were unique- the constitutional answers did not show much originality. Nor did the actors wish to attempt originality. The process was one of both democratization and nation-state building. (Unfortunately, modern nationalism, by its nature, does not favor liberal constitutionalism.) It is likely that some African countries may move in the same direction, although the stability of these emerging regimes will remain questionable.

One can foresee new developments in constitutionally motivated equality. After all, this is the more apparent trend of the last fifty years–namely increased formal equality. But it will not result in an equality revolution. It will perhaps bring us closer to the gender equality; there might be more protection to minority and disadvantaged groups. However, constitutional law will not become the tool of redistributive egalitarianism.

Less authoritarianism (less formalism), more privacy, more consumerism, these are the values of the generations to come to power in twenty years. Institutional needs and complexities might trigger some other changes. In particular, constitutional institutions and actors have their own needs which dictate special growth patterns of constitutional law.

Certain demographic predictions indicate that many societies will face poverty, a phenomenon that undermines constitutionalism, or at least results in state dependence. Thus, poverty which makes individual autonomy based constitutional regimes based on individual autonomy unlikely. The pressure for growing immigration to better to do regions will grow. This either results in greater heterogeneity of societies, a projected trend which will challenge existing concepts of citizenship and entitlements, or it will in increase barriers to immigration (free movement of people) which to some extent brings a restrictive element into the constitutional regimes. A happy combination is that there will be an increase of heterogeneity, which may open the constitutional systems to creative multiculturalism. More likely, heterogeneity will increase social and possibly legal discrimination.

The taken for granted national homogeneity of the constitutional self, once taken for granted, will become more and more problematic. New constitutional differences of identity will beg constitutional accommodation. Religion might represent a new tension for the project of modernity as represented in the

constitutional state. The revival of religious fundamentalism tends legitimizes accommodationist forms of church and state relations. The increasing accommodation may increase social and legal fragmentation, undermining the neutral state project of state neutrality. Such accommodationism, however, has the tendency to impose restrictions on freedoms as we know them in public life in the name of religious sensitivities. At the end of this trajectory competing intolerances may to some extent replicate (and reinforce) ethnic division.

In addition to factors of change in the socio-economic system there is a crucial ongoing institutional phenomenon which will continue in the future in the economically developed countries and perhaps to a lesser extent in other countries joining the club of the well to do. This ongoing process is commonly described as the privatization of the state. Even if this privatization will go on at a much slower pace it will have a continued impact on constitutional structures. The privatization phenomenona entails the risk that the public domain will shrink, resulting in increased private power and domination. Private police and private distributive and security services (from food safety to health care) may result in increased social risk, unfairness and inequality. The constitutional system runs the risk of becoming insignificant. There are well-known answers to this challenge, which in a way predate the increased privatization of the state.

The German doctrine of third party effect and the much more restricted "state action" doctrine of the United States indicate that constitutional law (and, hence, the concept of the public) intended to penetrate private spheres perhaps to guarantee the constitutional promise of equal citizenship. These doctrines are of limited power, partly because of the built in respect of for the private autonomous spheres, and, partly because of the limited capacity of the constitutional legal system and even of the public authorities, which tried to implement these public concerns in the non-governmental sphere. Given these shortcomings the constitutional actors might not be able to steer the increased private domain. It is also possible, of course, that there will be additional resources dedicated to supervision with increased bureaucracies which have their own constitutional problems. The EU anti-discrimination initiatives in regard to the private sphere indicate that there might be a need for additional bureaucracies which than again require additional resources to supervise the constitutionality of their activities.

As a reaction to totalitarianism, and partly as a solution to socially divisive inequality and discrimination, fundamental rights protection became a major enterprise of constitutionalism in the last fifty years. This enterprise relies on specialized actors like constitutional courts, supreme courts, special agencies of rights protection and special procedural measures, like generous rules of

standing. The Supreme Court of India has demonstrated courageous imagination in that regard. In addition, there is growing internalization in the area of human rights turned into fundamental rights (freedoms, liberties). In this sense, the internationalization means refers to both source and procedure. To the varying extents the national constitutional rights originate in international conventions and practices. There is a growing tendency to recognize the jurisdiction of supranational agencies (including courts) in the protection of such rights. This trend is likely to continue and grow. It is much less predictable to what extent these trends will become universal: how global the universalism of human rights will become. On the one hand many great powers (United States, China) may continue to resist the formal recognition of the trend in practice, although they may play lip service to it. Other countries will insist on reservations, which will make the universalism apparent. This trend is noticeable in the case of many Islamic countries. Increased social heterogeneity will result in growing domestic tensions. It is quite likely that a localist criticism of universal human rights will retake some of the advances of universal human rights. The emerging rhetoric of globalization as imperialism and that of "Asian values" illustrates this trend.

In those countries where the rights revolution will continue a different problem may arise. The mushrooming of fundamental rights will result in mutual restriction of rights. Traditional freedom enhancing rights will be restricted to favour other interests elevated to rights. The institutional equivalent of the rights revolution is the phenomenon called 'government by judges'. It seems that the delegitimation of the political branches helps this trend to continue, but within twenty years it will reach its limits everywhere. Government by judges cannot survive its own success. The success of this technique was based on the partisan delegitimation of the political branches, but once the courts will take too many costly political decisions they will share the fate of the more visibly directly political branches. Moreover, lack of accountability and the related erosion of judicial integrity may result in a rethinking of the constitutional meaning of the current arrangement of judicial independence in the next twenty years.

All the above socio-economic challenges and needs of adoption, as well as the possible changes dictated by internal and institutional forces of constitutional law remain within the confines of the long-term constitutionalist paradigm of constitutionalism. There are, however, two major technological changes under way which might influence the choices of the generations coming to maturity. Genetic engineering and new information technologies are the two most often mentioned examples. The first one is challenging bioethics as we know and it may result in the constitutionalization of a new bioethics

of unknown contents. Human genetic engineering may reshape human relations in a fundamental way, which may reformulate basic concepts of human dignity. The second major technological change resulting in reshaping social interaction is based on synchronic, decentralized electronic communication and information.

Personal computers interconnected in the World Wide Web may create radically new forms of social communication including political communication, bringing in opening a new chance for participatory democracy based on daily referenda. This, of course, might completely reshape political representation as we know it; and this in fact may result in a radically different constitutional arrangement. Traditional forms of representative government including parliamentarism as well as elected officials who struggle with legitimacy deficit will face a fundamental challenge. In ten years computer based referenda on a daily basis will be available to all in most mature democracies at no additional cost. Therefore the free mandate of the delegates and even the necessity of delegation can be questioned and will become problematic.

I am not advocating teledemocracy or electronic direct democracy. But one cannot deny that these new technologies of permanent referendum challenge the traditional paradigm of constitutionalism based on the representativeness of government. If legislation and even executive decision-making is replaced by home computer voting, if the "one day freedom" on election day ridiculed by Rousseau becomes obsolete, because elections and elected bodies as decision makers are superfluous, constitutionalism will be about agenda setting and reasonable limits on the amendability of the outcomes of electronic voting. Legislation as we know will become obsolete.

This is not to say that parliaments and other assemblies will not be able to resist the temptation. The technology-based criticism of impotent and corrupt government will be there. The technology to replace this kind of decision-making by direct participation will be there. It is much less clear who are the politically interested power groups, which will successfully mobilize people for electronic democracy. But after all, who had foreseen that the ruling elites of the 19th century will move towards to extension of the franchise, a move which prima facie seemed to be against their class interests and male chauvinism? These changes have nevertheless occurred for specific reasons. Among the unintended consequences one finds the creation of the opportunity or need of modern parties.

Electronic democracy, if it occurs, has the potential to restructure the organization of political will formation and will maximization. Interest groups will be in the position to bypass political parties, and new forms of political

dialogue and influencing will emerge. This is, certainly, the greatest challenge to constitutional structures as we know them. New constitutional design has to provide for arrangements that guarantee stability among the conditions of electronic chaos (call it responsivity, if you wish). There will be an increased need to provide protection against the tyranny of the majority of the moment, or, (actually, the a faction of the minute).

Is there a conclusion to be drawn for the next twenty years? As good post-modernists, let us combine the wisdom of the meteorologist with that of the market analyst. It will be sunny, but there is a market for umbrellas, raincoats, and new constitutional commentaries.

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Regulation in Sport as a Borderline Case between State and Law Regulation and Self-Regulation

Abstract. The study deals with the basic questions of a new field of law: the sports law. Sport is traditionally the world of self-regulation, since the sport-associations do create and apply law as well. The state has interfered in this monopolistic world in the last fifty years, so did, on the basis that intrusion, the law. Where are the limits of the regulation by law, and under which conditions can the state and its courts supervise the norms of sports, these questions are dealt by the study.

Keywords: regulation in sport

1. The object of the sport regulations

According to the commonplace definition, the law regulates social and legal relations, establishes general rules of behaviour for them and the adherence to them is ensured ultimately and potentially, directly or indirectly, through coercion of public power by the state.

The object of those rules that concern sport is the sport itself, the activities of sport generally. It seems to be simple at the first sight, and the relevant initial questions are: what is sport at all, *what qualifies as sport,* who is a sportsman?

It could be an initial point that as the years go by the scope of sport is being constantly *extended.*[1] Originally, only the *competitive sport* was called sport and those who have participated in the organized games were called sportsmen. Actually the public opinion regards only the best ones, the professionals, as sportsmen. Why should we call a sportsman as someone who goes to swim or run before worktime? This "European aristocratism" was blown away by the American *free time sport movement.* Today the non-organized, non-competitive physical exercise and mass sport also qualifies *as sport activity.* However, free

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[1] See: Földes, É.:–Kun, L. Kutassi, L.: *A magyar testnevelés és sport tankönyve.* (The textbook of Hungarian physical education and sport), Tankönyvkiadó, Budapest, 1982, Chapter I.

time sport brings several new kinds of sport into the sphere of sport: e. g. nature walking tours bicycle endurance races and rowing, eventually the *speleology (cave research)* or climbing of hills or rocks qualify also, which can be hardly placed among the traditional branches of sport. On the other hand, we can see the more and more fashionable so-called recreation, which is placed somewhere between sport and health care. At one time, the term of sport was connected to the requirement of performance, which is actually absent in recreational sport.[2]

The term of sport can be extended by the various sports of *social strata.* Among them, student sport is the oldest, but for instance, the sport of children or seniors also shaped particular ways of sport, or went along with the adaptation of the rules of traditional sport branches to the given stratus. A special kind of sport is *the sport of the disabled,* of which a certain part is professional (e.g. the so-called Paraolympics, the World Games of Deaf and the Games of Organ Transplant Recipients), the rest of it is mass sport or recreational sport. The sport of the disabled also brought about several special sports, e.g. the racing of wheel-chairs is a kind of athletic competition, etc.

Originally, sport meant amateur sport, whereby people carried out various sports for fun, they were regarded as improductive activity, although there were also professional box fighters in ancient Rome. Originally, the Olympic Games started as the world festival of amateur sport and perhaps we can recall that in the 1950s and 1960s the American millionaire Avery Brundage, the President of the International Olympic Committee, deprived some sportsmen and took away their medals for minuscule amounts of expenses paid to them. According to his measurement, in the Sydney Olympic Games there were no amateurs at all. However, the second half of the twentieth century brought along a spectacular advance of *professional sport* in the Olympic Games, the very well paid star basketball players of NBA and the super stars of the NHL ice hockey also appear. In other words, the sport that is performed for money based on a job contract or enterprenurial contract is also a sport, the regular income for sport activity today does not cause any kind of discrimination. In the team sports today mostly a mixed (amateur and professional) competition system exists, and the professionalism more and more spread to the *individual* sports too. 20–30 years ago we would not have called golf aerobics or fitness, as sport however today nobody would dipute their sport characteristics.

[2] The sport without achievements is termed wittily by the German literature "nichtsportliche Sport". See: Knut, D. Heinemann, K.: *Die nichtsportlichen Sporte.* Schorndorf, 1989.

Unquestionably, sports are the technical sports, e.g. car racing or motor racing, sail glides, parachuting, motor boat racing, etc. Along side the development of technics the types of technical sports increase too, e.g. the jet ski or surf world championship. Although the managers of the International Olympic Committee constantly preach against a gigantic olympic games, in the last decades the sphere of olympic sports grew too, including e. g. tennis, badminton, beach volley ball, and triatlon. More and more popular are the so-called extreme sports, which are made to sport through television broadcasting and displays e.g. the various roller blade sports, climbing or cliff jumping.

Furthermore, the notion of sport is largely dependent on *the geographic location and historical traditions of the given country.* Dog sled racing is an outstanding sport in Greenland, but it will hardly become popular in Hungary. Namely the Japanese and other Far Eastern countries bring more and more ancient sports to the world, today not only the judo or the karate is well-known but the sumo wresting is getting a foothold too. The English originating soccer has its alternative overseas, the American football, the English cricket pairs with the American baseball.

For a Spaniard a bull fighter is also a sportsman. *Varietas delectat.*

In such circumstances, the definition of sport becomes more dubious. Professional boxing is a sport, but why not the free style wrestling? Ice dancing is a sport, but why not dancing? Allegedly artist productions or *jongleur* shows are arts and not sports. The public opinion does not regard hunting or fishing competition as sports. Prize jumping or harness racing are sports, but horse races are not sports. Why not? Maybe due to the fact of bets? However, in the framework of betting agencies one can bet on the results of various sports (e.g. football championship matches). It can be seen that the diferentiation is rather arbitrary indeed.

According to the § 2. of the European Sport Charter "the sport is every kind of such physical activity, which occasionally or in organized form serves the advancement of physical and spiritual strenght, development of social relations or achieve results at various levels of races." It is obvious that this definition includes both the recreational and the competitive sports, it is neutral in the question of amateurism and professionalism it integrates the sport with the body culture, partly with the health care and healthy way of life. Meanwhile this definition includes only the physical sports, it excludes from this sphere the *intellectual sports*, which e.g. went along with the Olympic movements in ancient Greece. Of course, the sphere of *intellectual sports* is also debated as only chess is an unequivocally accepted "olympic sport" but if bridge is a sport, why not other kinds of card playing, which also involve *races* as bridge does?

Followingly it is hardly a task for the law to decide in an arbitrary way what is a sport by the strength of a law regulation. (Therefore the regulations of sport law with respect to their subject strive to differentiate more and more, use general clauses, establish framework rules.) In certain countries the rules of sport law do not even define what is a sport, it a "degrades" the question to a problem of applier of law.[3]

According to the Act LXIV of 1996 in Hungary (§ 1/1): "The sport activity is a physical exercise ruled by established rules as recreation or competition, or furthermore intellectual activity, which is a part of universal culture and includes both the advancement of recreational sport and the competitive sport." According to the recently valid Hungarian sport law, Act CXLV § 88. the notion is shorter than that in the Act of 1996, although similar in its content: "(23.) Sport activity is physical exercise or intellectual activity along certain rules which happens in recreation or profession, which serves the advancement and maintenance of physical or intellectual condition."

The specialty of the two valid Hungarian legal regulations:

a) Contrary to the European Sport Charter, it unambiguosly includes the *intellectual sports* to the sphere of regulation without putting limits to them.
b) It includes both the *recreational sports* and the *competitive sports*. Since 1998, it explicitly refers to the professional sports too. In the definition of the valid sport law there are such notions as "amateur sportsman" (1.) "team sport" (3.) "disabled" interestingly it does not mention any sport (6.) "professional sportsman" (7.) Sportsman is a natural individual, who performs sport activities" (18.) "recreational sportsman" (25.) "competitive" sportsman (30.) "alien sportsman with foreign citizenship" § 93 (6.)
c) However, the reference to *certain rules*, implicitly, but necessarily connect the sport activity with those who establish these rules. These can be only some kinds *of sport associations.* (A non-competitive recreational sportsman performs sports contrary to the established rules. Therefore such recreational activity falls out of the sphere of sports. [The literature of international sport law basically connects the sport law to the organized sport (Verband-sport)].[4]

[3] Ketteler, G.: Sport als Rechtsbegriff. *Sport und Recht*, 1997. 74–75.

[4] See: Deutsch, E. (Publisher): Teilnahme am Sport als Rechtsproblem. *Recht und Sport* 16, 1993) or Greyson, E.: *Sport and the Law*. London, 1988. 11–23.

There is no such Hungarian law, which would circumscribe the sphere of sport activities. The "sport activity" as such can be accepted by any association (social organisation or business company) to its activity sphere in the so-called TEÁOR-Index which determines the activities in branches or statistically the sport activities are listed only sporadically as examples, such as soccer. It is another question that from January 1, 2001, a sport association can be registered as only such provided tat if fulfills to the listed criteria in § 20. of the Act on sports (among these criteria, reference could not be found along with any other substantial criteria which refer to any branch of sports), respectively according to the § 88. of the Act on sports (24.) sport enterprise can be a certain kind of association (the substance of sport activity is missing here, too.) Meanwhile only competitive sportsmen belong to the sport association, company or enterprise. (*The professionals in labour relation or as individual enterpreneur, amateaurs as association memebers or "based on sport contract" based on civil law, see § 88/1. and 7.) of the Act on sports.*

The constructors of these "certain rules" are basically the *sport associations* (special branches of sports). It is certain that those sport branches which have "nation-wide special association", qualify as sport. This sphere according to the § 24. of the valid sport law necessarily includes the olympic sports, chess and those branches of sport, whose international association is a member of the Association of International Sport Societies (AFGIS). If a sport branch does not possess nation-wide association, does not mean that it cannot have a sport association, as it is not adequate to the rules of § 24 of sport law which create rules for that sport. According to the Civil Law (Ptk.) or the Act II of 1989 on association law such sport associations can operate too, which are not listed by the special branch associations according to the § 24. (7–9) of the sport law.

Summarising: on the basis of the Hungarian sport law, it cannot be decided in substance from the viewpoint of national legal regulation what qualifies as sport activity, e.g. the sport of "street fighters" which have sport association or the "strong men competition" which is shown by the Eurosport television. There are no clear limitations, the modern society is a complex one. On one hand, sport grew out of physical education and physical culture, and in that sense it is part of *education and culture* (Notice the desperate struggle of those educators, who perform physical culture education against the naming by laymen, which was formed historically: namely they are not simply *sport teachers, but physical educators*, trainers too.) On the other hand, sport united together with *health care*, the healthy way of life, and social welfare. In this sense, sport is not only an interior affair of the excellent sportsmen, but a part of *everyday life*. Therefore the substantial difficulty from the view of sport

law - although the openness is a factor which promotes development - is the impossibility of establishing the contents of sport, namely the sport involves state, and public administration regulated by law, in given cases it may receive state subsidies, and, if it does not qualify as sport, it cannot receive them, etc.

2. The self-regulation of sport

According to those individuals, who deal with sport history, sport has developed in spontaneous way, actually it grew out of the natural need of the human being to move and of its playful nature (homo ludens). Therefore turning suddenly to the contemporary times, the constitutional right of the human being to perform sports, the state supposeo create to possibility to satisfy his needs to move around, can be regarded *as human natural law.* However, following the need for movement of the human being, the following consequence arises that

a) originally it was clearly *private activity*, in other words a part of the *civil sphere*
b) it has developed as a part of non-profit sphere, separately from the business enterprises (the sport enterprises are the products of the 20th century or rather the products of the second half of century).

Originally, non-competitive sport did not get any regulation on behalf of the state and law and, competitive sport was almost exclusively an object of civil self-regulation. Namely in the second half of the 19th century, sport organisations (originally sport societies appeared) were aiming to organize the sport activities for such individuals, who intended to perform sports (i.e. natural persons). Therefore these individuals established them and they became the members of their "sport club" at the same time. Historically, a part of the sport societies were not even legal entities, actually they operated as *civil law associations* (the German law - contrary to the Hungarian law - till today does not recognize such a society, which is not a legal entity and is not registered by the state administration), however, the bigger and stronger clubs *required legal entity status*, a relative detachment from their members. The sport associations—aimed at the professional organisation of competitions - combined their efforts, established the sport branch association as assemblies of sport societies from the turn of the 20th century. These are generally associations of legal entities, sport associations, however they take the form of association, (the sport societies became *legal entity sport associations*). It was easy as originally the majority of sport associations were established not as "diversified monster

society" of several sport branches, but only one kind of sport was involved, as the English rowing or soccer clubs.

The creation of private law entitity sport clubs and sport associations have started the *autonomous self-regulation of sport*. The sport associations and clubs established their characters, i.e. organisational and operational regulations. Only such a person could be the member of a sport club or association, who obliged himself to adhere to these rules by civil law declaration of intention, *one-sided legal act*. The sport associations created the basic rules—or the occasion of championships or cups, the sport associations or eventually the indiviual sportsmen had to submit themselves to the *rules of competition*. The rules of competition later involved *administrative operative rules*—the order of entry, the rule of transfering someone to an other sportsclub, etc. The rules of play are good, if they adhere to them—the competition courts, and disciplinary regulations appeared, etc. According to the international sport law literature, one of the most typical characteristics of sport is the *creation of rules, norms,* the establishment of competition rules in their *narrower or wider meaning*. The rules are "quasi legal norms" and for the participants of a given branch of sport these are often more powerful than state norms.[5]

Competitors can become, anxious, and would like to travel and compare their strength and ability everywhere in the world. Therefore the national sport associations combine their efforts further and create an *international association of sport branches*, which are legal entities of the country of their *establishment (registration)* in such way that their members are the national sport associations of various countries. This way the rules of competition became really international (the English soccer rules are used in the whole world as football rules), furthermore the *races* became international—championships of continents, world championships. The sport of the 20th century is a global, international phenomenon, which was emphasized even more powerfully by the *international olympic movement* resurrected by Baron Coubertain (actually the International Olympic Committee itself is a civil law association registered according to the Swiss law). The general assemblies and presidential bodies of the international associations accept rules of play and these are unambigously *supranational self-regulating norms of the given branch of sport.* On both the national and international level, the sport associations intended to be *exclusive*, using a modern term of competition law they wanted to create a *monopoly* and this intention mostly succeeded as it originally met with the interests of sportsmen, sport associations and fans of the sports as well. Actually

[5] See: Kummer, M.: *Spielregel und Rechtsregel*. Stämpfli, Bern, 1973.

the Olympic Games themselves became a worldwide success as there is only one Olympic Committee (instead of three), which arranges summer and winter olympics according to certain rules, namely for its members and not for everyone. The popularity of professional boxing is significantly jeopardized by the fact that various, feuding and awkwardly organized world organisations exist, which dedicate world champions, the rules are different and constantly change. Therefore the monopoly of sport associations is supported by the *interest of sport politics too.*

Therefore the international and national sport branch associations in the competitive sports are autonomeus civil organisations.

a) They possess a monopoly of setting rules of competition, i.e. they can decide and actually determine the conditions of operating sport activities.
b) The member organisations and, through them or occasionally directly, the *sportsmen submit themselves* to these competition rules. However, here an indirect compulsion exists, because in case a sportsman does not submit himself to the norm of the association, he may perform sport in his free time, but cannot participate in the competition system of the sport branch. (The same principle applies to the sport associations as well.)
c) The competition rules cannot be controlled, or supervised by outside state *organisations* either officially or upon request –according to the viewpoint of the sport organisations. (This priciple is more and more *broken down* by the European Union, mainly in professional sports.)
d) The debates concerning the competition rules according to self regulation *cannot be taken out of the organisation.* (This rule is more and more debated by the countries). The members, ultimately the sportsmen, submit themselves to the decisions of the association, different organs of it (transfer or disciplinary committee, presidential body, etc.) or a specially organized inner "court of honour". On one hand, this way the sport associations evade the supervisory control of the state courts in substantial matters of sport. On the other hand, they become *legislative and law applier organs at the same time*, very much against the principles of the rule of law. However, the rule of law refers to *state and public power, which have public law character*, whilst the sport associations., and societies are civil law entities, which are protected by civil autonomy, the principle of legal contracts. It is not accidental that in such countries where there is a theoretical chance to present sport associations as legal entities under public law, or public bodies (e.g. France, Germany, Austria, Switzerland), *none of the sport associations ever intended to do this*, and all of them wanted to

remain mere civil law formations. In such a case, the security of constitutional basic rights is not aimed at the sport associations as they stand outside public law obligations.

The defenders of the self-organisation / civil character function of legislation and law application as well as, the monopolistic and hierarchical structure of the sport, refer to the *special ethical character of sport* besides its private autonomy.[6] They refer for example, to the spirit of fair play, i.e. the victory is not important, but the participation, and the sport rivals are sport friends at the same time, etc. This ethical standard contradicts only the element of sport that the substance of sport is the increase in performance, competition, and triumph. They could refer more or less to the *power of sport ethics substituting norms.* During the last third of the 20th century, the fair play principal was grossly distorted by the enormous incomes related to professional sports. The results of sport and the friendship with other sportsmen, unfortunately frequently collide with each other. The competitive struggle of sportsmen and the original aim of the international sport that aims at the deepening of the friendship among the nations are reconciled with each other less and less successfully.

In the last decades, this closed system of sport self regulation has been receiving more and more sharp criticism, there has been more and more emphasis on the *"democracy deficit" of sport.*[7] On one hand, the states respect the norm-setting monopoly of sport associations, less and less i.e. they create norms related to sport. Furthermore, in a given case they intend to supervise the self-regulating norms. Not only the state has launched an attack, but this monopoly as also been criticized by the *business community which term* the sport associations as organisations that intend to be "quasi cartels", and they urge competition authority actions against them.[8] This organisation as form is also criticized by the so-called activist lawyers as well as, who intend to make them responsible as a civil law organisation for *constitutional basic rights,*[9] which is a terminological nonsense according to the traditional notion of law.

[6] See: Gerhardt, V.: Die Moral des Sports. *Sportwissenschaft Moral.* 1991. 127–128.

[7] See this expression by Pfister, P.: *Praxishandbuch Sportrecht.* Beck Verlag, München, 1998. 10.

[8] See: Fikentscher, A.: Kartellrecht im Sport. Ökonomische und rechtvergleichende Betrachtungen. *Sport und Recht,* 1995.

[9] Essentially this opinion combines the legal remarks by György Kolláth published in "Sport plusz" weekly, criticizing the various decisions of the Hungarian Football Federation.

3. The causes of the sport regulation role of the state

Originally, the liberal state in the name of "laissez fair", fulfilling the function of "night watch state", did not intend to intervene in this autonomous sport and civil sphere. It influenced sport at the most in the framework of school education and the physical education of the pupils. (It is not accidental that the first sport regulations were not actually sport laws, but physical education laws in Hungary, see the ACT LIII of 1921, which will be mentioned later.) The other area is the armed forces some sports were hardly performed within the civilian framework, such as a large part of technical sports, (e.g. marksmanship, or equine sports), therefore riding and the pentathlon were army officer sports until the 1960s. In many cases, the state intended to connect the school physical education program with the preparation for compulsory military service – see, for example, in Hungary, the ministerial degree connected to the Act on physical education (1921) about the compulsory setup of junior corps.[10]

In the second half of the 20th century, the more powerful intervention of the state to sport was induced by the following factors which strengthened each other in the capitalist societies.

a) This aspect is the first in history, although it lost actually its importance due to the collapse of Soviet Union, though there are still some remnants (North Korea, Cuba)- the *state sport politics of the militarist totalitarian dictatorship* (See the Berlin Olympics of Hitler in 1936), especially the *state sponsored sport of the socialist countries*. The sport successes of the Soviet Union or East Germany (and we may mention the 16 gold medals of the Hungarian team in the Olympic Games of 1952 which was the peak achievement of Hungarian sport in the time of "Comrade" Rákosi) had some foreign political importance as *they had legitimated power in front of international public opinion*. In these countries, the *sport associations* were not civil self-governments, but units of the army, police or trade unions. Furthermore, socialist state enterprises, producing cooperatives or units related to various levels of public administration, and councils. (In many socialist countries, such as in the Soviet Union, there was generally law concerning assoctiations, and even if there was, the sport clubs did not qualify as associations.) The *sport associations* which were maintained mainly for the sake of international

[10] See: Nemes, A.: A magyar sportjog történeti fejlődése. (The historical development of Hungarian sport law). In: *A magyar sportjog alapjai.* (The bases of the Hungarian sport law), HVG–ORAC, Budapest, 2000. 20–21.

relations, were incorporated in a to the *state supervision organ of the sport.* The leading officer of the national olympic committee was also a state official (generally the president of the sport office or one of his deputies).

There was no civil sport life in the classical socialist countries (the Hungarian "goulash communism" of the 1960s and 1980s, with a quasi market economy and soft dictatorship, was an exemption, which strengthens the rule). The mass sport, the sport in the residential areas or enterprises, was also organized by the state (see the so-called MHK movement in the 1950s) and the sport facilities were nationalised. Professional sport was officially eliminated, and the prime sportsmen were pseudo-amateurs, who received their salary in their non-existent job (see Ferenc Puskás, "the flying major"). The Western states considered that, due to the legitimative power of sport, they have to compete with the socialist countries—in 1952, England and France got one olympic gold medal together and the public opinion blamed the government for it. Therefore the free countries had "to invest in sports", and the "public money" character of state subsidies involved the requirement of legal regulation.

b) In the second half of the century, we arrived to the *Western European welfare state*, which takes care of the *corporal* health of its citizens as well. Together with the political and economic human and citizen rights, the *so-called third generation constitutional rights* also appear, such as: the right to the proper environment, approach to culture or information, and the right to a healthy life (of course, mainly in the literature, and not in the legal regulations).

The classical political rights require the active role of state, such as the right to protection against the state, and the right to culture and health, including the *culture of movement and the healthy, dynamic life style*, e.g. the state should build sport facilities, gymnasiums etc. It should, in other words, *distribute services* (Leistungverwaltung the famous slogan of Forsthoff from the 1930s), and *give something to its citizens.*[11] In the welfare states, sport became a *mass phenomenon,* (an organic part of everyday life) as a fulfillment of free time. Protanged lifespans due to better medical care and drugs has meant that the sport became a *part of the quality life*, which can be performed in any age category, e.g. those tens of

[11] See: Burmeister, J.: Sportverbandwesen und Verfassungsrecht. *Die Öffentliche Verwaltung*, 1978, 1–10. In the Hungarian literature Nemes, A.: A sportjog alkotmányos alapjai, a sporthoz való állampolgári jog. (The constitutional bases of sport law, the right of the citizen to sport.) In: *A magyar sportjog alapjai. op. cit.* The bases of Hungarian sport law. 32–33.

thousands who participate in marathon races in the big cities or the fact that I could have seen myself in the icehockey world championship inVancouver of the "old boys" seven team in the above 80 years category and the oldest participant was 87 years old. Sport became a kind of *entertainment*, due to the shortened worktime, a widely popular tool of spending time, (motice the mass proliferation of residential sport clubs in Western Europe.)[12] If recreational sport is on the mass scale, then the state subsidy of sport becomes an *important factor of domestic politics* too. The support of sport will be a part of the election program, and the movement of politicians will starts towards the management of sport associations, and clubs on the national and local level, because this way they can become well-known, and popular.

c) In the second half of the 20th century, a large part of sport became a component of *business life.*

It involved several factors: The mass sport movement should be supplied with sport clothing, sport equipment, sport facilities, etc. The sport-induced *mass production and sale*s started, as *mass consumption* took shape. Many sport equipment factories were created. The retail and wholesale sport stores constituted a special empire within the malls. Besides sport becoming a *part of tourism*, it becames integral part of it (holiday complexes similar to sport clubs).

Professional sport and the *professional championship* (competition system) becames a basic factor in the life of the most outstanding sportsmen. An amateur is unable to achieve the highly expected sport results due to the lack of time and support. The professional sportsman performing on the basis of civil law contracts or as an employee, or in any other form basically is an *enterpreneur* himself, and sport is the source of his income. The professional competition system dissociates, and breaks up the legal cover of the traditional non-profit society. In such countries, which are more bound to legal traditions. the term of business association (see the German and Austrian Wirtschaftsverein), is less spectacular, (the professional department remains inside the association, and it is separated only economically and for bookkepping). However, the trend is becoming stronger to establish an economic, *business association for professional sport* (generally a public share company, in continental Europe with limited liability), which has either completely

[12] See: Mathieu, T.: Sport und Freizeit. In: *Handbuch der kommunalen Wirtschaft und Praxis.* Ed.: G. Puttner, II. edition, Berlin, 1983. 82.

independent owners or is loosely connected to some sport association from the aspect of ownership or goodwill. Professional sport in this sense becomes a kind of business venture.

— *The establishment, and operation of sport facilities, organisation and its management becomes a business as well.* The construction of a stadium is a real estate investment, which has multiple functions with restaurants, stores, playgrounds, etc. Sport is a fundamental area of advertisement ,the name and logo of famous professional clubs and outstanding sportsmen are valuable in terms of goodwill, which can be sold as an immaterial product, copyrighted, and licenced. The *sponsorship business* has emerged as well as a merchandising with its market-building character, called by Ferenc Dénes as "gadget management"—sport *garbs*, caps, key chains, jugs, etc. branded with a sport logo.[13] One of the more important sport events becomes a whole day excursion for the family with playgrounds and play areas, cinemas, meeting famous sportsmen, etc.

The international competitions such as, the world championships, and the continental championships attract *multinational enterprises*, banks, insurance companies, which sponsor sport more and more, and use ads in the sport. (The "sport show" character, which will be presented later has inceased the interest of the transnational giants towards investments in sport).

d) All of these involve the revolution of the *media and informatics*. Sport was always intertwined with the broadcast of news and mass communication. An overwhelming majority of the male population in the developed European and American countries "read the newspaper from the last page" since the 1930s, i.e. they start at the sports page. The television created spectacular *show sports*, which made sport a part of show business.[14] It is obvious that only a part of professional sport became show sport (mainly team sports such as soccer, ice hockey, basket ball, and some individual sports too, e.g. boxing, tennis, athletics.) At these sport branches, one of the most valuable parts of the intaglible goods concerning sport events was the *rights of television presentation* and to a less extent radio broadcasting as well. Today, for, instance about 75% of the income of the American professional basketball (NBA) and the professional ice hockey association

[13] See: Dénes, F.: *Sportvállalkozások.* (Sport enterprises) ISM, Budapest, 1998. 5–7.

[14] See: Blödorn, T.: Das magische Dreieck: Sport–Fernsehen–Kommerz. *Neue Medienstrukturen — neue Sportberichterstattung?* Nomos Verlag, Baden-Baden–Hamburg, 1988.

(NHL) comes from television rights. In Rome (1960) the television company paid US $ 1 million to the International Olympic Committee for the broadcasting rights of the "olympic package". This right in Atlanta (1996) surpassed the US $ 1 billion. In recent times we meet other wonders of technological progress: space satellite sport channel, independent sport television stations, the connection of sex pay television with the sport channel, sport transmitted and the Internet, etc. Sport sponsorship –mainly carried out by the banks and multinational giant enterprises– increasingly presumes the existence of sport broadcasting.

e) If sport is a part of everyday life of human beings, (an object of mass interest and consumption), if it has a significant profit-making ability and is part of the media power, then it provokes a *great change of interpretation of politics in sport.* Sport facilities and events can be used for a political campaign. Sport is one of the means of lobbying, and both national and local politicians intend to be top managers in the sport associations, increasing their fame and popularity (see Berlusconi or József Torgyán in Hungary, not to mention President Chirac's appearence at the latest soccer world championship in Paris). The increasingly excessive political aspect of sport disfunctional which has to be reckoned with by both the state and sport investors. Essentially the previous five factors cause state intervention within sports. During *the last third of the 20th century in the capitalist societies, the monopolistic legislative and norm application function of sport autonomies has finished.* Sport is not only the world of private interest any more, but it *partly* gets transferred to the sphere of public interest, (*i.e. it becomes a public task).*

4. The sport functions, tasks of the state

Essentially the tasks of the state in the field of sports are the following:

a) *Ensuring the realization of the constitutional basic right of citizens*–related to physical culture and healthy way of life, depending on the economic situation and cultural traditions of the given country (i.e. there is no abstract law for every form of sport activity, etc.).

b) Recreational sport and competition sport, are *supported through budgetary policy of the state.*

c) Complementing the self-regulation of sport with legal regulations of the state and, in this framework, the eliminating of the adverse *excesses of the modern sport for public interest* (vulgarisation, commercialism, too much

show business and negative aspects of over-politisation). Neither the national, nor the international sport associations, are able to stand up against the usage of unhealthy drugs without the help of state legislation i.e. *dopping* or taking effective measures against self-defeating trends of sport (e.g. the coercive sport star cult of minors). Today sport clubs and organisers of sport events are not able to guarantee the *security of the larger sport events* without the help of the state and organs, cannot step up against the sport hooliganism, etc. The relation of sport and environmental protection is becoming stranger. Sport does not suppose to destroy the environment, but to improve it, and be a part of the rational management of environment (e.g. the technical sports, water sports, golf, etc).[15]

d) *The supplementation of the self-management of sport by state administration,* namely on national, regional and local (municipal and village) level as well. Since the Middle Ages, the management of sport appeared in the administration of education, culture or health affairs. However in the 20th century the administration of sport became relatively independent *the sport ministries or offices* appeared in the governmental management independently or mixed with other state tasks, as organs with nation-wide competence. In the territorial self-government system were institutionalized also (e.g. in the Hungarian counties), and independent special sport organs appeared.

e) *Inter-state and international* tasks related to sport. The international sport life is so complex recently that the civil organisation of sport cannot perform its tasks. E.g. today it would be hardly possible to organize olympic games or world championships of a main branch of sport without the guarantees of the state. The so-called sport diplomacy is becaming more mixed, as it becomes a civilian and state task.

f) *The dissolution of the monopoly of sport self-organisations and the limitation of related abuses.* Civil self-regulation cannot be unlimited, and the self-management of sport also requires *democratic legal supervision.* If a sportsman is tied to a civil law contract, the compulsory prescriptions of the Civil Code should be applied to the sport contract. If a sport regulation is contrary to a compulsory state law, this regulation is *null and void.* Furthermore, if the inner law body of a sport association decides against it, then the court of the state is entitled to supervise and correct it despite the contrary decision of the sport body. If a professional boxer is in a labour

[15] See: Tettinger, P. Kleinschmitter, A.: Aktuelle Probleme im Konfliktfeld von Sport und Umweltschutz. *Juristenzeitung*, 1992. 109. et al.

contract, his labour contract may have specialities due to the character of sport activity, and such kinds of rules will appear in the interact but the basic principles of the Labour Code must prevail in the sport as well as. If a sport is an enterprise, the economic law, insolvency law, and competition law created by the state applies to it. The theoretical substance of the so-called Bosman-verdict applies here. If the contract of a scientific researcher or a ballet dancer expires with his scientific institute or opera house, he or she may go "freely" to another employer and his previous employer cannot "claim damages" stressing the fact that they educated him or her. If this is so, then it should apply to every employee or enterpreneur, including professional soccer players (the rightful interests of smaller clubs educating the next generation should be secured bye another way). At the same time, it should be strongly emphasized that in the *capitalist society the covert nationalisation of sport is inadmissible*. The role of the *state in sport can be only a supplementary, supportive and influencing one.* Sport should remain a part of the civil sphere, where the self-organisation and self-regulation comes similar to the science, arts and other fields of cultural life. The public administration should not suppress the autonomy of sport associations, through transforming them into half-state organs by black-mailing them with the state subsidies, supports. The regulation of sport by the state should not be over done thus crippling the self-government of the sport (it should remain *subsidiary*).[16] The main affairs should remain in *the legal contract intention* of the sportsmen, sport enterprise owners, and members of associations. *The legal regulation* of state should be supplementary, completing the basic rules and rules of competition created by the civil law sport association. The state should recognize the characteristics of the given sport activity, e.g. in the case of boxing *corporal* injury cannot be mentioned as main rule, etc. The right behaviour of sportsmen in competition as a main rule cannot be illegal. The judicial practice is inclined to qualify excessive behaviour which goes beyond the rules of the given sport (but come from the specialities of the given sport) as illegal (e.g. breaking of a leg due to irregular tackling). At the same time, if an ice hockey player caused head injury with his stick lifted-up, the court may establish the liability of the player who acted against the rules. The criminal

[16] Especially Professor Pfister from Bayreuth emphasizes the secondary, supplementary role of the state norms of sport beside the sport norms. See: Autonomie des Sports, sporttypisches Verhalten und staatliches Recht. In: *W. Lorenz Festschriften*. Mohr Siebeck, Tübingen, 1991. 171.

responsibility of the player can be established even more so in case of blow to on the head of a referee. The case is similar with respect the settlement *of sport law debates too.* As a main rule, the state should not intervene in the inner reconciliation and court of honour activities of sport associations and clubs, instead the state should not tolerate the tormenting illegalities, and infringement of the basic rights of sportsmen.[17] Therefore as a reasonable compromise of the self regulation and state legislation the *sport law arbitrage* appears, which is both outer and inner, ensuring the prevalence of rule of law principles in sport, and but is also connected to the institutional self-regulating system of sports.

5. The sport law as a mixed special law

In the development of law in the 20th century, the so-called special law categories gained and increasing role as particular kinds of legal impacts of the increasingly complex technical development and social relations.The two main law branches, *public law and private law* remain. On one hand, both of them we differentiated from within, and inner special law branches take shape. On the other hand, the borders of public law and private law are becoming increasingly relative (according to Béni Grosschmid they are becoming jagged or lacy), the so-called mixed special law branches emerge, and in them public and private law elements intermingle (this latter phenomenon was described by Gyula Eörsi as complex legal fields overlapping the basic law branches).[18]

Obviously sport law is not such a kind of law branch as e.g. the civil law, criminal law or the procedural laws. However, as in the second half of the 20th century, the states regulate the social and economic affairs related to the sport in an ever widening sphere. *Sport law* is appearing *as a secondary law branch. namely mixed special law, which is aimed at the satisfaction of practical needs.* In the English, French and German legal field, handbook-type literature is appearing in the form of, special periodicals.[19] An increasing number of

[17] Niklisch, F.: *Inhaltskontrolle von Verbandswesen.* Heidelberg, 1982.; Stern, K.: Die Grundrechte der Sportler. In: *Sport und Recht.* Hrsg.: Schroeder, A. F. Kauffmann, H. Tübingen, 1972. 142–146.

[18] See: Moór, Gy.: *A jogrendszer tagozódása.* (The division of law system), Budapest, 1930.; Eörsi, Gy.: *Összehasonlító polgári jog.* (Comparative civil law), Akadémiai Kiadó, Budapest, 1981.

[19] Among the comprehensiver volumes, see Werner, F.: *Sport und Recht.* Mohr Siebeck, Tübingen, 1968.; Grayson, E.: *Sport and the Law.* Butterworths, London, 1988.; *Sport und*

universities are presenting sport law for law students and for those who are interested in sport management. Essentially, in Hungary, during the mid 1990s, sport law broke away from the framework of sport administration and belonged to a special part of public administration. Meanwhile the requirement to cultivate it was pursued as *a relatively independent branch of law, an indepedent discipline.*[20]

Sport law includes the following areas of law:

a) *The constitutional bases of sport law.* On one hand, that means the main elements of sport legislation, the legal framework of state intervention in the sport. On the other hand, the *basic constitutional right of the citizens to perform sports* and the constitutional duty of the state to establish the conditions for practicing this right in reality. Concentrating on Hungary, the "sport constitutional law" includes the basic themes of our sport law, or the basic constitutional right of the citizens in this area. It is worth mentioning that e.g. § 58. of the Swiss constitution, § 16. of the Greek constitution, and § 79 of the Portuguese constitution explicitly declare the right to sports as citizens' rights. This can be derived from the Hungarian constitution only indirectly, for the most part e.g. from the right to assemble (§ 63), the right of public meeting (§ 62), and most importanitly from the *right to corporal and mental health* declared by § 76/D. A general notion of the constitutional law literature is that in the recently valid Hungarian constitution the third generation basic rights are regulated incompletely and if a new constitution emerges, this deficiency must be corrected. In such a case, *the right to sports would appear independently,* relatively separated from cultural rights and right to health.
b) The most mature part of the sport law is the law of *sport public administration.* Historically this is the oldest part of it, which has developed gradually through several centuries in the border areas of education administration, cultural administration and health care administration. This sphere includes the special central administrative organ of sport on behalf of the state, and

Recht. i. m.; Wise, A.– Mayer, B.: *International Sportslaw and Business.* Cambridge (USA), 1977.; Schimke, H.: *Sportrecht.* Fischer Taschenbuch Verlag, Frankfurt, 1996.; Fritzweiler, J.– Pfister, B.– Summerer, T.: *Praxishandbuch Sportrecht.* Beck, München, 1998.

[20] See: e.g. the university textbooks published by the University for Physical Education, mainly edited by Nemes, A. titled: *Sport Administration* [the chapters on sport administration in the Special Part of Public Law (university textbook ELTE AJK) were mainly written by Sándor Berényi]. Besides–See: HVG–ORAC Edition titled: *Magyar Sportjog Alapjai.* (The bases of Hungarian sport law), HVG–ORAC, Budapest, 2000.

furthermore the rights and duties of the territorial and local self governments related to the sport. In the *modern sport administration*, the creation of rules is becoming increasingly important, e.g. the prescriptions on the construction and security of sport facilities, rules on sport event organisation, the activity of special sport physicians or the rules of dopping control, various other rules and special branch requirements. It is worth mentioning *minor offenses and criminal law regulations on sports* related to sport hooliganism as well.

c) *The sport-related financial law regulations* were originally a part of sport administration, which later become relatively independent. This part of law essentially contains the regulations on state subsidies, aids, and financial support to sports.

d) The points a)–c) dealt with the *so-called public law of sport*. Similar to the Hungarian Act on sport (1996), the various sport laws traditionally include these three areas, especially b)–c). However, if we presume sport to really a part of the civil sphere, then the sportsman and sport organisation should stand in the centre of sport law, i.e. the *civil law of sport* (the personal and property rights of the sportsman, the civil law relations related to his sport activities, the sport clubs and associations as civil law legal entity, and the sport enterprise as a commercial venture). Actually the sport law of 2000 in Hungary –*as far as I know*– is the first in the world among the sport laws of other countries that made a benevolent (but technically less successful) *effort to turn the public law–civil law* relation in the field of sport law: the rules concerning the legal status of amateur and professional sportsmen. The sport clubs and associations precede the tasks of the state in this legislative rule. The fact that the civil law of sport was hidden until recent times is due to the *precious few specialties* of civil law relations of sport compared to the relations of general civil law. The sport clubs were "plain" associations. The sport associations –at least in the Western countries– were "association of clubs", and they did not need alteration and distinction compared to the general law of associations. The amateur sportsman –if his sport activity has reached the level at all, which was regulated as the recreational free time sportsman performing sport without any legal relations or contracts– has performed sports as a member of some sport club, on the basis of civil law commission as a *enterprise kind of "sport contract"* connected to some sport club. The liability of the sportsman and sport club also could be arranged in the framework of the general damage and *delictual responsiblity* regulations of the Civil Code. Due to the special kind of sport activity as "perilous operation", one of the most extensive and

oldest field of the civil law of sport is *sport insurance*, but it also does not require special legal rules compared to the general insurance of injuries or property insurance. Theoretically the spectator can look at a sport event according to the same legal conditions ("fan contract") as the spectator of a cinema or theatre show, visitor of a concert hall, etc.

Meanwhile this situation is slowly changing. The civil law of sport in recent times was stirred up by the *commercial contracts of sport*. Essentially, due to the dispositive nature of the contract part of civil law, these contracts can be constructed without legal regulations also, but the practice is beginning to follow the legal regulations also. E.g. the *contracts* related to the *right of the professional to play*, the sponsorship or *profile transfer* contracts (merchandising,Vermarktung), special kinds of *trademark* or *licence contracts* appear through the sale of the *goodwill* of sport associations, and the "name", the "brand" is purchased. In the course of achievling of television and radio broadcasting rights, *a special kind* of *valuable asset-like right* is sold by civil law contract. The immaterial goods of sport hide several interesting features, e.g. the contracts on the possiblities of playing and the rights to enter the championship transfer, etc. The commercialisation the of sport starts to give special features to the sport associations too, for example the *insolvency possibility* of *sport clubs* appeared (at first in Germany).

e) Related to professional sport, two specially mixed public law and civil law fields emerged in the private law of sport. The first is the *labour law of professional sportsmen* which is theoretically based on civil law labour contracts possessing several specialties. However, this individual labour law is slowly but surely related to *collective labour law* too: trade union-like groupings have appeared, and followingly the need for collective bargaining appeared in the professional football championship in Hungary.

f) The other great problem of professional sport is: to find a place in the competition law. We shall see that the European Union deals with commercial sport basically as a question of competition law. In Hungary, only recently some competition law problems appeared: e.g. can the then-nationalized television be called to competition by a "counter-cartel" such as Hungarian show business assoticiations like "Sport TV Ltd"? Can *economic* companies, which are related to each other, and owners of two soccer teams, FTC and MTK, hold the majority share of the limited liability companies which manage these teams? These types of affairs sooner or later arrive to the Economic Competition Bureau or the courts in Hungary.

g) The points a)–c) dealt with the public law of sport, the points d)–f) dealt with the private law of sport, but both of them from the aspect of *domestic national law.* Meanwhile the international law of sport is emerging more and more. The international character of sport, the creation of norms by the international sport association and the conflicts of domestic laws first of all create several *international private law collision problems.*[21]

Besides the *international public law agreements related to sport* are multiply in their numbers as well. The sport political activity of the United Nations is becaming stronger, and is realized mainly in the framework of UNESCO. In 1978, the general conference of UNESCO adapted the *Charter of Physical Education and Sport.* More concrete than the activity of UNESCO is the sport political activity of the *Council of Europe*–in 1975, they fomulated the Charter titled "Let everybody do a sport"; in 1988, they worked out a convention against dopping; and finally in 1992, they adapted the already mentioned European Charter of Sport and the Ethical Code of Sport.

h) Sport law became a part of integral law of the European Union in a very interesting way. From the Treaty of Rome sport as a cultural activity was excluded from the integral law until 1997. However, if sport is an economic and business type activity, then the competition law of the Community or the regulations related to the free flow of employees affect sport also. The infringement of the Community law means infringement of law in every country of the Union. The regulations of the national and international sport branch associations cannot contradict the law of the Union. The sport associations cannot gather in the form of a cartel, and the principle of free competition should prevail in business sport also. If an operahouse cannot put limits on the number of foreign singers, the soccer association also cannot do the same. Every "citizen of the Union" is entitled freely move, stay and take a job in the area of the Union. For example, the European Court of Justice in the Dona Mantero v. Italian Football Association or in the case of Bosman v. Belgian Football Association declared that the regulations and actual decisions of the branch associations were explicitly illegal.[22]

[21] See: Reuter, D.: Das selbstgeschaffene Recht des internationalen Sports im Konflikt mit dem Geltungsanspruch des nationalen Rechts. *Deutsche Zeitschrift,* 1996, 1–12.

[22] Hornsey, S.: The Bosman Case. The Future of the European Sports Law. *The way forward for the Millenium.* Brussels, 1999.

We have to emphasize that, until the Amsterdam Conference (1997), the Union organs always emphasized that they only dealt with the *commercial, professional sport* and sport enterprises. However, later on the Union declared the whole sport a political question as "the sport is an excellent tool to strengthen the feelings of Europeans to belong to the European integration". However, the economic law of the Union still does not touch the recreational and amateur sports, the non-profit sport activities.[23]

As far as my opinion is concerned, the sport law in the above mentioned content and extent as a mixed special law in Europe has virtually taken shape and in 2000—even if not in every aspect and mature way *emerged in Hungary too*. Our sport laws of 1996 and 2000 have played a significant part, regardless to the fact that they can be justly criticized due to their several shortcomings. Meanwhile we have to emphasize that the *existence and extent of the sport law* (e.g. whether it is an administrative law in the traditional way or not), by itself is *not a decisive factor in the development of sport law.* E.g. in France, Italy and Spain there is a sport law, where as England and Germany have no Act on sports, but certainly the sport law of the two latter countries is more developed than the first two countries.[24] *Therefore the sport law is not related to the Act on sports.* Furthermore, in the theoretical legal disciplines—e.g. in Hungary, Lajos Szamel in the 1960s—a lot of experts disapproved of the existence of such "functional legislation", which regulated science, arts or sport, or even the youth. Namely such laws can be hardly filled with the right content concretely, and from the aspect of legal branches, the regulation of these areas is so *complex*, that the Act disintegrates between the law branches, (it is very hard to keep it in a frame). Therefore traditional sport regulations were generally *administrative laws,* invitally physical education, later on staying in the sphere of education and in recent times relatively independent. The Act on sport of the year 2000 is the first attempt to create a complex Act on sport with law branch character and in my opinion it is a *progressive novelty deserving appreciation from international aspect,* regardless of its rather low legal technical level.

[23] See among the works related to this subject: *Europäische Kommission. Der Einfluss der Tätigkeit der Europäischen Union auf den Sport.* Coopers & Lybrand, Brussels, 1995,; Hohe, S.—Tietje, C.: Europäische Grundrechte auch für Profisportler. Juristische Schulung, 1996. 486.

[24] The national reports on the sports law of European countries.
See: Will, M. (Editor): *Sportrechte in Europa. Recht und Sport.* 11. brochure. 1993.

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Legal Scholarship at the Threshold of a New Millennium

(For Transition to Rule of Law in the Central and Eastern European Region)

Abstract: Scholarship has already warned us to soundness in relation to modernisationist legal reforms. For it consistently (1) emphasised the framework-creating nature of the otherwise prevailing social normativity, and its primordial role in determining social processes, (2) put the possibility and demand of organicity with every step in the limelight, (3) did not consider the effectiveness of initiating elitist actions to influence overall social movements plannable for the long run and with lasting effects. Therefore, it regarded any regulatory legal intervention as the primarily symbolic confirmation with sanctioning of the direction otherwise ongoing movements were taking, (4) warned to the damages caused by any adventurer policy in as much as they not only fail, but discredit even the thought of change itself. Therefore, it (5) gave voice to the advantage of a systematically planned, consistent, convincing, pragmatic, and all-comprehensive social programme, as opposed to the occasional temptations of world-curing intentions, exposed to the alternate danger of sudden forwarding and quick tiring, supported solely by intellectual arguments.

Keywords: Legal scholarship in Hungary; transition to role of law

It is nearly unavoidable nowadays to start concluding anything without mentioning of the cardinal facts of the political system change. Thus, some established claims may come to our minds, such as rule of law, human rights, pluralist constitutional parliamentary democracy, and so on. All these are also expressed by the need to re-establish certain directions and subjects of legal scholarship: constitutional law in place of the law of the state, public administration with a more substantive meaning than mere state administration, human rights as eventually expressing a more serious care, and so on.[1]

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[1] For the variety of aspects and particular features of the transition process in Hungary and the entire Central and Eastern European region, cf. the author's bibliography in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (ELTE Project on Comparative Legal Cultures), Budapest, 1995, 175–182 [Philosophiae Iuris].

The balance-sheet of the socialist legal scholarship in Hungary is yet to be done. Although we might not have any reason to be ashamed of it, moreover to reject it—it did its job as it could, becoming known as the exemplary workshop of the socialist world, both in monographic elaborations, overall outlooks and conceptual analyses, while winning the attention of western scholarship due to the pretentious presentation of its principles, comparative outlook and sensibility to history—still, the entire range of its problems were obviously born within its own medium, that is, within spiritual horizons drawn by the battles against some eastern demigods imposed upon it. However creative it may have been in adapting to the environment, yet what it could display later on in an entirely new spiritual neighbourhood might prove distorted and unilateral. Thus, our legal scholarship yearns for theoretical foundations—preconditioning over-thinking and extending the limits on political-philosophical grounds within a constitutional framework, as substantiated by the presuppositions of social sciences.[2]

Naturally, we could have foreseen this earlier, at a time when no-one would dream about the late collapse of the Soviet empire and western *Realpolitik*. Although, consecutive to the changes, a considerable number of previously known facts struck us as new. For even if we were able to collect deep impressions on the everyday life of western societies during repeated visits to the respective countries, the objectiveness and sharpness of our sight was still altered by the unintentional over-optimisation of our enemy's enemy. We may confess it today that, although unintentionally, yet we have seen them as the embodiments of some ideals or utopianistic dreams, rather than a task to be restarted in everyday life practically from the scratch, to be reassumed despite daily failures and hindernisses. We were responsive rather to the fulfilment of the values denied to us then and there, and not to perhaps questioning the principles and ethos behind the certainly pleasant manifestations of the respective environment towards the visitor, parallel to inquiring about the sufficiency of social organisation, or even the danger of its internal emptying.

[2] As to some of the pre-modern science-philosophical presuppositions of Marxism, cf., from the author, *Lectures on the Paradigms of Legal Thinking*, Akadémiai Kiadó, Budapest, 1999, especially para. 4.2.1, 118–121 [Philosophiae Iuris].

Despite clear warnings,[3] we were less likely to notice that western legal orders, considered then the standards of normality, were undergoing a change in paradigms themselves: with social processes channelled towards a juridified path while abandoning traditional legal positivism by taking the stand of a new, militant kind of social engineering, in which the jurist can be a mediator at the most. At the same time, the fora and the procedures requiring a judicial decision were multiplied as they were increasingly becoming the subjects to the merciless rule of supra-national principles, decision-making bodies and pressure groups, to an extent that the outside viewer might see the illusion of sovereign change of law sheerly as the internal enforcement of external pressure.[4]

We must note: the system change and the dawning on laws of the outside world came as two processes mutually supporting one another. For the urge for reconsideration deriving from the former only strengthened the effects of seeing and perceiving the overwhelming gain in ground of changes in the outside world and the consequences thereof.

Nevertheless, our foreseeing capabilities[5] proved to be very much limited. At the time, we were able to think only in the following way: we are facing a learning process which we must start with open hearts. As to myself, I tried to express a rather shocking and apparently radical conviction that from the Marxism of our socialist legacy not simply the unproved and unprovable theses were left behind drawing us back to the past, but also everything

[3] For the most conspicuous examples, see Unger, R. M.: *Law in Modern Society* Toward a Criticism of Social Theory, The Free Press, New York London, 1976. ix + 309 p., as well as Nonet, Ph. and Selznick, Ph.: *Law and Society in Transition* Toward Responsive Law, Harper Row, New York, 1978. vi + 122 p. [Colophon Books].

[4] For an overview of the contradictions emerging from the realisation of the institutional expectations of the rule of law in a way over-fulfilled but sheerly sectorally, and, therefore, resulting inexorably in a kind of practical anarchy, cf., from the author, 'Megvalósulatlanul megvalósult, avagy megvalósultan megvalósulatlan jogállamiság' [Rule of Law as Realised without its Realisation or Unrealised with its Realisation]. *Magyar Nemzet* [The Hungarian Nation: a daily] (8 April 2000), 8 and 'Önmagát felemelő ember? Korunk racionalizmusának dilemmái' (Man Elevating Himself? Dilemmas of the Rationalism of our Age). In: *Sodródó emberiség* (The Human Kind in Drift) ed. K. Mezey, Széphalom Könyvműhely, Budapest, 2000), 61–93, as well as 'Jogállamiság kihívások keresztútján' (Rule of Law At the Crossroad of Challenges). In: *Nemzet és jogállamiság* (Nation and its Rule of Law) ed. T. Király and S. Lezsák. Antológia Kiadó, Lakitelek, 2001.

[5] Cf., from Varga, Cs.: Trumbling Steps of the New Constitutional State: Everyday Constitutional Process [&] Question Marks of Local Legal Tradition. In: *Transition, op. cit.* 78–89.

hopelessly outworn which the entire approach, ethos, methodological and scientific-philosophical bases of our Moscow-controlled Marxism relied on. Since, each of us can deny or neglect any principle through a simple expression of will, but the underlying approach, the system of presuppositions on scholarship to which Marxism offered an answer could hardly be left behind without denying our former intellectual self, or surpassing previous inclinations.

Today, it must be considered naive that, despite our concerns, we still believed: these are the only difficulties. Although, as soon as we started to breath the same air with the European and Atlantic world, which let us down some decades ago, it started displaying a different picture, more complex than their former considerations. By now, the face of our brave new world started to slowly become outlined by very much familiar features (reminding of the surpassed ones from many points of view). Rational arrogance, enlightened Utopianism, world-saving universal panacea -all refurbished from all-curing patterns reminding of the French 18th century- in the minds, and the rule of abstract principles in practice compete for listeners. And all these are coming from the opposite direction this time. Their omni-present predominance, crushing theoretical arguments and self-imposing manner (through experts and aid-programmes) can not only push the relevance of practical experience into the background, but, as a result of continuous pressure, even the compulsory scepticism by scholarship can be silenced for a while as well.[6]

Only wisdom may suggest that self-confident certainties often hide deep internal uncertainty. Indeed, nothing else can be taken for granted under currently changing conditions. For we may state[7] that both actions and their theoretical backing are pervaded by

(1) intellectual unpreparedness (notwithstanding the apparent certainty of measures still enforced in practice),

[6] From the richening literature, cf., first of all, Brietzke, P. H.: Designing the Legal Frameworks for Markets in Eastern Europe. *The Transnational Lawyer* 7 (1994), 35–63, as well as, from Ajani, G.: La circulation des modèles juridiques dans le droit post-socialiste. *Revue internationale du Droit comparé* 46 (1994), 1087–1105 and By Chance and Prestige: Legal Transplants in Russia and Eastern Europe. *The American Journal of Comparative Law* XLIII (Winter 1995), 93–117.

[7] See, from the author: A jogváltás paradoxonai (Paradoxes of Legal Change). *Magyar Szemle* V (1996) 12, 1186–1196, and also in his *Jogállami átmenetünk* Paradoxonok, dilemmák, feloldatlan kérdések (Our Transition to Rule of Law: Paradoxes, Dilemmas, Question Marks). Pázmány Péter Katolikus Egyetem, Budapest, 1998, 177–186. [A Pázmány Péter Katolikus Egyetem Jog- és Államtudományi Karának Könyvei 5.]

(2) blindness and miracle-expectation (through interventions imposed as a *deus ex machina*, hardly becoming the organic part of the overall process),

(3) the so-called Bibó-syndrome (that is, after bitterly experiencing dictatorship, the spasmodic approval without criticism of every principle and procedure opposable to its danger even if the present lack of our ability to keep distance cool mindedly would lead to some sort of practical anarchy),[8] and, finally,

(4) the trap of choosing between the West and the West (without any further consideration and reflection, due to the undertaking of axiomatic patterns).

The point is by far not to take an attitude of scepticism making us question the results (maybe provisional, yet surely influencing our shifting points for the future) of these processes of accelerated change. Notwithstanding all these, we ought to understand (through establishing the fact and thinking its consequences over) that by the unreflected realisation of imported patterns, scholarship fails to fulfil its genuine task, that is, reflection. Thus, if a situation arises in which abstract principles, derived by others under different conditions at some distant time, are granted continuous priority over local experience and everyday knowledge, this will betray even the best and, indeed, lasting message of our past Marxism, namely, historicity. For no matter how satisfied we are to have universal principles declared and undertaken finally, we should not forget that even the most universal principles were initially born under historically particular conditions to answer historically particular challenges in practice.[9]

Therefore, it is high time to put the question: is our scholarship truly prepared to make a survey of reality? Does it have the empathy, the ethos of service and the humbleness to speak on the basis and in the interest of it? Or, is it conceivable that all the namings and set of concepts, our entire thinking, problem-sensibility, moreover, the thought pattern itself within the framework of which we raise our questions, well, according to their methodology, these are nothing more than the projections of western thinking, thus, as to their

[8] Cf., from István Bibó [(1911–1979), philosopher of law and political essayist, first silenced after the communist take-over in 1948, then imprisoned as the last Secretary of State of Imre Nagy's government on duty when the Soviet troops invaded Hungary in 1956], *Democracy, Revolution, Self-Determination* Selected Writings, ed. K. Nagy (trans. A. Boros-Kazai). Columbia University Press, New York, 1991. [Atlantic Studies on Society in Change, 69] [Social Science Monographs, Boulder, Co., Atlantic Research and Publications, Highland Lakes, N.J.].

[9] Cf., Varga, Cs.: Law and History: On the Historical Approach to Law. In: *Historical Jurisprudence* ed. J. Szabadfalvy. Osiris, Budapest, 2000, 280–285 [Philosophiae Iuris].

origin and evolvement, they are the products of different cultures, life-conditions, experience, ideals, and expectations?

Obviously, it would be rather silly to search for any hidden justification of any opinion in the inquiry. History, as the *magister vitae*, usually speaks of the respect for everything what medieval and modern scholars could suggest for Europe in their metaphorical explanation to the functioning of both the universe and human society with the invention of the mechanical clockwork: 'brakes', 'checks and balances', 'demand and supply', 'feedback', and also *prudentia*. That is, organised life as such is composed of continuous balancing, mutuality, and co-efficience.[10] This was true then and there for God's world as one system. Our present problem is different by its structure from the very beginning. That is to say: in a set, in which each component is evolving individually, their contact being slow and incidental, without any effects whatsoever, well, may we start the description of the whole from a self-imposing self-characterisation, calling it-self even if only in the so-called world-economic sense 'the centre', and its environment, just simply, 'the periphery'? When admitting the facts of the global village, do we also undertake the gesture of unscrupulously expanding the centre's otherwise existing (political, financial, economic and social) hegemony into a scientific monopoly? I think that at the time when Marxism was being enforced as a state religion, our scholarship fought enough with fake universalisms and uncovered extrapolations, so that now when new temptations challenge us from different directions, we should be able to know how we can and should fight them.

Do we own the resources, independence, and strong past so that if we must choose between patterns in peripeteic times, with our old conventions already gone but the new ones not born yet, we can do it with the certainty of an over-thought thought?

Our faltering steps and over-certainties implying uncertainty might make us feel like babies over and over, starting everything from the scratch under new conditions, without making use of the experience of past generations and our earlier self. This can hardly satisfy us, and our scholarly past does not imply this either. It is only a side effect that a number of former products of socialist scholarship, especially sociology and ontology of law[11] will be subsequently

[10] See Mayr, O.: *Authority, Liberty and Automatic Machinery in Early Modern Europe* Johns Hopkins University Press, Baltimore London, 1986. xviii + 265 p. Cf. also, Varga: *Lectures... op. cit.*, para. 2.3.3, 83–97.

[11] As to a legal philosophical foundation, see Kálmán Kulcsár's sociological studies on modernisation through the law, as well as the message of George Lukács' late *Ontology of the Social Being* in relation to the irreversibility of the effects of social acts institutionalised

glorified by it. For in today's perspective, they could display a more exalted, responsible, rational, satisfying behavioural pattern and scholarly ethos, *sine ira et studio* proven by theory—as opposed to most of the fashionable (i.e., the mainstream) ideals of the present era.

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If scholarship intends to take part in today's tasks, and intends to participate in determining potentialities in development and their day-to-day implementation, some further considerations should also be taken into account.

1.

First of all, we must continue our scholarly past. Scholarship ought to form opinions only by building on reliable philosophical grounds, supported by social-theory and macrosociology, taking the historical experience and traditional values of our nation, as well as the related practical considerations, into account.

Our scholarship has already warned us to soundness even under socialist conditions in relation to modernisationist legal reforms. In its relevant manifestations, it consistently

(a) emphasised the framework-creating nature of the otherwise prevailing social normativity, and its primordial role in determining social processes;

(b) put the possibility and demand of organicity with every step in the limelight;

(c) did not consider the effectiveness of initiating elitist actions to influence the overall social movements (by means of political stands, legal decisions or press campaigns) suggestible or plannable for the long run and with lasting effects. Therefore, it regarded intervention as the primarily symbolic confirmation (and sanctioning) of the direction otherwise ongoing (organised or spontaneous) movements were taking;

in the course of development, on the one hand, and the preservative significance in social ontology of the communitarian memory, on the other. For the former, cf. Kulcsár, K.: *Modernization and Law.* Akadémiai Kiadó, Budapest, 1992, for the latter, from the present author, *The Place of Law in Lukács' World Concept.* 1981. Akadémiai Kiadó, Budapest, 1985, (reprint 1999) 193 p., especially ch. VI, as well as 'Towards the Ontological Foundation of Law (Some Theses on the Basis of Lukács' Ontology)' *Rivista Internazionale di Filosofia del Diritto* LX (1983) 1, 127–142, and also reprinted in his *Law and Philosophy* Selected Papers in Legal Theory (ELTE Project on Comparative Legal Cultures), Budapest, 1994. 375–390. [Philosophiae Iuris).

(d) warned to the damages caused by any adventurer policy – that is, utopianistic, uncovered, unserious or fake reforms – in as much as they not only fail, but they necessarily discredit even the thought of change itself, and destroy the prestige of the state and its legal instrumentalities. Therefore, as the utmost consequence, it

(e) gave voice to the advantage of a systematically planned, consistent, convincing, pragmatic and all-comprehensive social programme, forwarding a means in its partial legal solutions – as opposed to the sometimes accessive occasional temptations of world-curing intentions, exhausted in very limited elitist group-actions, exposed to the alternate danger of sudden forwarding and quick tiring, supported solely by intellectual arguments.

2.

As a consequence to the fortunate changes in our conditions, the new intellectual undertakings of Europeanism and the system of relations opening towards new dimensions give our scholarship a reformatory task—in laying theoretical foundations, providing methodological clarification, as well as in revealing hidden presuppositions. Some preparatory work has already started in legal fields, but, being the first sparrows, we may speak of them only as of temporary.

Although the goal is not to reformulate scientific-philosophical and methodological presuppositions, but in general: we must prepare a critical survey of the new results born subsequent to WWII on the European continent and in the Anglo–American scholarship, and we ought to rethink their exploitable trends filtering them through the tradition inherent in our domestic scholarship. We must consider reconstruction from the philosophical, socio-theoretical, historical, comparative foundations towards public, private, criminal and economic laws, to their respective procedural schemes, and even interstate legal orders, which obviously must be complemented by the rebuilding of the entire legal-conceptual system (from the bases of law to sectoral legal dogmatics), never performed before. We must also pay our debts to the theoretical-legal scholarship of the local past, discontinued and neglected for more than half a century.[12] We have

[12] Cf., e.g., Szabadfalvi, J.: *Moór Gyula* Egy XX. századi magyar jogfilozófus pályaképe (Julius Moór: The Oeuvre of a 20th Century Hungarian Legal Philosopher). Osiris-Századvég, Budapest, 1994. 199 p. (Jogtörténet); S. Loss [et al.]. *Portrévázlatok a magyar jogbölcseleti gondolkodás történetéből.* (Portrait-Sketches from the History of Hungarian Legal Philo-

to reconsider the genuine bases of the theory of the state and *Staatslehre*. We should be able to reformulate the laws of interdisciplinary areas, thus the legally justifiable demands of policing, national security, national defence and emergency and exceptional situations. We ought to provide scholarly backing to practical tasks, for instance, legislation. We also must forward on the unfulfilled areas of the relationship between law and morality, as well as of the ethics of the legal profession, and other hopes close to law.

3.

Our general demands to refound scholarship cannot make us forget about the compelling nature of revealing some especially timely social problems. For in a process of system change some things cease to exist, their place to be taken by others, but new unbalances are also born as a by-product to them. The unilateral and distorted things of socialism are replaced by other unilateral and distorted outcomes.

The foundational principles of community organisation–'public interest', 'public order', 'public security', as well as 'national security' and 'national defence'– have been shaken, and finally emptied by political and media intellectuals, moreover, by a widening strata of population as well, for they can hardly offer a call-word any longer if they degenerate into the function of mere opinion or personal preference. The rich western literature

sophical Thought). Pulszky, Pikler, Somló, Moór, Horváth, Bibó. Bíbor Kiadó, Miskolc, 1995. 310 p. Prudentia Iuris 3; Somló, B.: *Jogbölcsészet* (Felix Somló: Juristische Grundlehre, selftrans. 1917. ed. P. Takács). Bíbor Kiadó, Miskolc, 1995. 160 p. (Prudentia Iuris 1.); Somló, F.: *Schriften zur Rechtsphilosophie* hrsg. Cs. Varga. Akadémiai Kiadó, Budapest, 1999. xx + 114 p. (Philosophiae Iuris); Moór, J.: *Schriften zur Rechtsphilosophie* hrsg. Cs. Varga. Szent István Társulat, Budapest, forthcoming. (Philosophiae Iuris); Horváth, B.: *The Bases of Law* (1948), ed. Cs. Varga, append. I. H. Szilágyi. Szent István Társulat, Budapest, forthcoming. (Philosophiae Iuris / Jogfilozófiák); Losonczy, S.: *Grundriß eines realistischen rechtsphilosophischen Systems* (1948) ed. Cs. Varga. Szent István Társulat, Budapest, forthcoming. (Philosophiae Iuris / Jogfilozófiák); Losonczy, I.: *Jogfilozófiai előadásainak vázlata* (Outlines of Lectures in Legal Philosophy) 1948. ed. Cs. Varga. Szent István Társulat, Budapest, forthcoming. (Jogfilozófiák]; *Die Schule von Szeged* Rechtsphilosophische Schriften von I. Bibó und J. Szabó, hrsg. Cs. Varga. Szent István Társulat, Budapest, forthcoming. (Jogfilozófiák).

expressing communitarian concerns, or communitarian assertion of interests,[13] has had almost no echo in our part of the world whatsoever.

The previous balance between rights and duties has been broken. The law is freed from its moral support. The political elite, entrepreneurs, tax-payers, minorities conscious only in demanding, furthermore, even criminals remember only the pieces of regulation meeting their interests. It is shameful that neither the law-maker nor the law-administrator does support the overall achievement of law and order, but, following some prevailing trends, concentrates on piecemeal elements. There is no extensive social policy, nor a uniform legal policy; the national legal protection and interest safeguarding activity not considering it an own task to tackle with it. Furthermore, press publicism, which substitutes the numb scholarship in these matters, often strengthens the tendencies of disintegration without providing theoretical explanations.

The idea of human rights, once created as an ideology to restrict arbitrary power by setting limits to authoritative action, through its present positivation (while preserving some of its original ideological elements) has turned into a multi-faceted and multi-functional weapon, under the banner of which battles against each other or the state, by this time made a public enemy by these fighting groups, can be fought successfully. At the time of its conception, the idea of human rights served for social integration through raising the oppressed, but today one can already use it also for disintegration and deconstruction. At a time when rights were scarce, scholarship in criticism of totalitarianism were rather busy to condemn the alleged over-assertion and abuse of rights. At present times, built upon the extension and rather aggressive assertion of abstract constitutional principles, taken in short-cut as rights, legal scholarship continues to remain stubbornly silent (despite the fact that the

[13] The former already has some classic Hungarian foundations born in emigration. See, e.g., from Bolgár, V.: The Public Interest: A Jurisprudential and Comparative Overview of the Symposium on Fundamental Concepts of Public Law. *Journal of Public Law*, 12 (1963) 1, 13–52; L'intérêt général dans la théorie et dans la pratique' *Revue internationale de droit comparé*, 1965/2, 329–363; and, on the common foundations, The Concept of Public Welfare: An Historical-comparative Essay. *The American Journal of Comparative Law*, 8 (1959) 1, 44–71; The Magic of Property and Public Welfare. *Inter-American Law Review* II (1960), 283–316, as well as The Magic of Freedom. In: *XXth Century Comparative and Conflicts Law* Legal Essays in Honor of H. E. Yntema. Sythoff, Leyden, 1961, 453–462. The latter is a recurrent topic especially in *Journal of Public Law* and *Revue de Droit public*.

principle of *summum ius, summa iniuria* was once used to emphasise the virtue of soundness already in ancient times).[14]

4.

In the meantime, the contradiction wedging socialism from the inside was replaced by another contradiction wedging it again from the inside, and this is nonetheless problematic.

Up to the nearest past, in socialism, according to its official ideology, jurisprudence was still dominated by rule-positivism, with the rule of brute facts only complementing it. Accordingly – and reminding somewhat of the dual-structure institutionalisation of national-socialism[15] –, the enforcement of own interests at any given time could go on freely (with brutal force, through unlawful interference or even by silencing the law), while in neutral areas of mass application the petty-minded rule of regulations prevailed. Today's world-wide practice is dominated by abstract principles, somewhat balanced out by the rule of facts. For law has come to overwhelming predominance and has become the mastering power as an autonomous social sub-system. Yet, it became emptied from moral support and sterilised into a sheerly procedural pattern, offering nothing but a juridified framework for free competition and subordination games. The result is some sort of anarchy. Freely available rights can now easily be torn to pieces and scattered in all directions by those most capable of self-assertion. Both avoiding and abusing the law have turned into a pattern rewarded by society, without limits as to its misuse or over-use. No scholarly voice speaks of the ones who have broken the law and gain rights notwithstanding, for instance, by humiliating once more their past victims through the privilege the new rule of law conditions granted to them by reinforcing both statutory limitations and, as implied by it, also the legality of totalitarianism as a *sine qua non* of any so-called 'constitutional' criminal law set-up. "Nobody can profit from his wrong!" – the legal maxim once commonly

[14] Recognising the destructive effects of boundless yearn for justice is one of the basic features of early legal cultures. For the legal anthropological treatment of *shalom* in Jewish and Islamic legal cultures, as well as of the Chinese and Japanese ideals of law, and of *Michael Kohlhaas*' story by H. von Kleist, cf., from the author, *Lectures... op. cit.*, para. 2.3.1.8, especially at 169 et seq.

[15] Cf. Fraenkel, E.: *The Dual State* A Contribution to the Theory of Dictatorship (trans. E. A. Shils). Oxford University Press, New York, 1941. xvi + 248 p.

accepted in Europe seems to be already doomed to the trash-bin of new conditions.

In socialism, at least the regulation was somewhat own: the product of the own parliament, the expression of the own autocracy. Ever since there is a flood of new fashion products, which others have invented some other time, under some other conditions in another environment, yet they have been imposed upon us ready-made, without any adaptation whatsoever.

We must be aware of the fact that there has always been legal transplantation, and what we are concerned about today is only the silence of scholarship, maintaining the illusion of not encountering any problems. What is added today is a loss of conventions and self-emptying. For changes occurred so unexpectedly and stormily, and happened without any commonality in action and conviction that they could not generate any organic process, nor could they claim proper foundations, or be supported by established principles of organisation.

Therefore, there can be no surprise if no social order is created from isolated actions running against each other, mutually weakening or neutralising each other's effects not becoming an organic entity as a common order of values, coherent practice (beyond meeting the requirements of a formal procedural rule, that is, all of them being the products of a pluralist constitutional parliamentary democracy), or from various pieces of law (thus statutes, judicial decisions, local governmental decisions, commissioners' standpoints, or procedures lost in the maze of endless processual relevancies), pushed through by parliament debates and outside pressure. If law-enforcement is not secure and foreseeable, the outcome can only be practical anarchy under the aegis of an alleged rule of law.

Obviously, these are all professional issues: questions of the unity of social and legal order, and legal coherence[16] but, at the same time (and this makes it particularly interesting here and now from a theoretical point of view), questions of conventionalisation as well. Although, researches of legal sociology, legal philosophy and legal methodology have supported it clearly and even in socialist times that

(a) the relative independence of law can be shown only by the homogeneous applicability of its technicality.[17] Filling it with any contents, or actually

[16] Cf., for instance, Kulcsár, K.: A konzisztencia problémája a jogi rendszerben. (The Problem of Consistency in the Legal System.) In: his *Gazdaság – társadalom – jog*. Közgazdasági és Jogi Könyvkiadó, Budapest, 1982, 123–139.

[17] This is eventually equivalent to the statement of the law's autopoietical self-reproduction, i.e., to the response expressed by the binary code of 'lawful' and 'unlawful', to bipolar

making use of it can only be done on the exclusive ground of social practice, dissolved in it (as part of social values, social conceptualisation, sensibility, tradition, culture and learned abilities), thus sharing its fate.[18] Therefore,

(b) in the medium of the eventually prevailing social normativity, the most spectacular components of law, so the official sources of law, are nothing more than tips of icebergs, which can indicate any reasonable (interpretable) direction only together with other (mostly informal) components of the legal functioning. Legal professionals' morals, ethos, willingness and skill to work, professional style, public conviction built upon prevailing doctrines, and the ways to proceed on within reasonable and officially acceptable procedure: all these may crucially shape practice, which, according to its underlying ideology, can (could) be created exclusively from and as materialisation of the official sources of the law.[19] As a result,

formalism of the exclusive options between 'yes' and 'no' (which I have once described as the Manichean negation of dialectic). Cf., for the former, Luhmann, N.: The Coding of the Legal System. Florence: European University Institute. 1985. 63 p. [EUI Colloquium Papers, Doc. IUE 342/85, Col. 94. and, from the present author, Judicial Reproduction of the Law in an Autopoietical System? [abstract] in *Law, Culture, Science and Technology* In Furtherance of Cross-cultural Understanding. Kobe, 1987, 200–202, and (text) in: *Technischer Imperativ und Legitimationskrise des Rechts* ed. W. Krawietz, A. A. Martino & Kenneth I. Winston, preface E. Kamenka. Duncker & Humblot, Berlin, 1991, 305–313 (Rechtstheorie, Beiheft 11), as well as in the author's *Theory of the Judicial Process* The Establishment of Facts (1992). Akadémiai Kiadó, Budapest, 1995. 193 p., especially para. 5.4.1 at 157–161. For the latter, see, from the author, A joglogika vizsgálódási lehetőségei az újabb megközelítések tükrében (Potentialities of Inquiry by Legal Logic in the Mirror of New Approaches). *Állam- és Jogtudomány*, 1971. 4, 713–729, reprint in his *Jogi elméletek, jogi kultúrák* (Theories and Cultures of Law). (ELTE Project on "Comparative Legal Cultures"), Budapest, 1994. 90–106 (Jogfilozófiák) and also in his *A jog mint logika, rendszer és technika* (Law as Logic, System and Technique). Osiris, Budapest, 2000, 54–57. (Jogfilozófiák).

[18] Cf., from the author, Comparative Legal Cultures: Attempts at Conceptualisation. *Acta Juridica Hungarica*, 1997. 1–2, 53–63 in its first version as a comment in *Changing Legal Cultures* eds. J. Feest E. Blankenburg. International Institute for the Sociology of Law, Oñati, 1997. 207–217 (Oñati Pre-publications) , and, for a wider selection of examples, *European Legal Cultures* eds. V. Gessner A. Hoeland Cs. Varga. Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1996. xviii + 567 p. (Tempus Textbook Series on European Law and European Legal Cultures I).

[19] Cf., on the logical necessity of counting with, formulating and introducing presuppositions, from Nowak, L.: *Próba metodologicznej charakterystyki prawoznawstwa* Poznan, 1968. 205 p. (Uniwersytet im. Adama Mickiewicza w Poznaniu Prace wydzialu prawa 38) and De la rationalité du législateur comme élément de l'interprétation juridique. In: *Études de logique juridique* III, publ. Ch. Perelman. Bruylant, Brussels, 1969, 65–86. (Centre Nationale de Recherches

(c) despite that the casual steps of legislation give a boost to legal development, the medium and contexture in which legal application leads its everyday life is still composed from huge a mass of conventionalisations. Common behaviour assisting to the actual implementation of the law, or the failure thereof, formation of tacit agreements and actually enforced customs providing the organising force even in lack of laws, and the legitimising force of professional and social consent standing behind them allow us to state: there is constitution in England, although not a written one; the legal status of the Queen is clear, although not posited; and for the same reason we say it about ourselves that, for instance, our legal practice may have undergone a change in direction (let us say, in case of divorce unequally for the genders).[20] Consequently,

(d) when this substrate is hurt, and becomes incapable of fulfilling its conventionalising job (expressing a majoritarian system of values to standardise everyday legal practice), chaotic situations may emerge. In a process of system change, into which some atomised acts of legislation (eventually, encouraged by some external pattern without any former domestic precedents, experience or training) are being wedged as *deus ex machina* gestures, a divided social substrate, missing direction in a number of perspectives (with a standardising support of dubious value, reliability or efficiency), can hardly lead to a better result. Therefore,

(e) in want of other results, some sort of absence of direction, temporarily becoming constant, is bound to happen, just as the transitory legitimisation of zigzags deriving from unregulated individual and group influences, capable of controlling and exploiting unclear situations. Although, as a side-effect, but through the accessory dysfunctions undoubtedly asserting themselves in the

de Logique); on interrelations between the social and the legal, Kulcsár, K.: *Jogszociológia* (Legal Sociology). Kulturtrade, Budapest, 1997. ch. VII, 259–287, as well as, from the present author, e.g., Logic of Law and Judicial Activity: A Gap between Ideals, Reality and Future Perspectives (1982). In: *Legal Development and Comparative Law* ed. Z. Péteri V. Lamm. Akadémiai Kiadó, Budapest, 1981, 45–76 and also in his *Law and Philosophy*, 257–288.

[20] Regarding its ultimate effects although parallel to deteriorating the law's prestige , the situation is the same if constraining considerations from the outside are being used for competing with the law and replacing it, as, for instance, the variable, yet strictly enforced (at the same time restricting the respective domains of the freedom of thought, freedom of speech, freedom of education) set of requirements, known as *political correctness*, in the disciplinary practice of American orders of profession (media organisations, publishers, universities, scientific workshops, as well as public services and service-providers in general). Cf., e.g., Hollander, P.: Political Correctness is Alive and well on Campus Near You. *Washington Times*, December 28, 1993, A19.

long run, all of this (even without any concrete grievances) can preserve and actually forecast the destruction of the law's own ethos, the shattering of confidence, and, as the only viable response from wider strata of the population, choosing the avoidance of law, transposing popular hopes into a new reform movement to be launched by the state in the re-emergence of a new fetish of statism, once believed to have been surpassed for ever.

5.

In socialism, legal thinking has done a lot to make the institutional set-up and functioning of the state and law and also the various reforming attempts more humane and liveable within the prevailing framework, at the same time trying to make them serve some common fundamental social goals. How much does our scholarship assume of the tasks accumulated ever since?

Under these new circumstances, the clarification of the necessary preconditions has at the most arrived at publicistic recording of exploratory impressions; not making mention of the fundamental issues, as if it had stopped at the analyses conducted under socialist conditions. At present there are no answers to the limits of transplantability of the means of legal technicalities, neither to the natural barriers to the universalisation of ideas and techniques.[21] Moreover, exhausted in its everyday routine, scholarship seems to have already forgotten to even deign to disprove some doubts previously formulated by it.

In the meantime, foreign literature is flourishing remembering of the unsuccessful American legal export to Germany after WWII,[22] of the shameful billions of dollars committed to South America (sacrificing them on the altar of social modernisation to be implemented according to the claim of having

[21] The first ombudsman E. Letowska, with J. Letowski, warns us –under the heading of "The State of Law Is Not a Gift" in their *Poland* Towards to the Rule of Law (Wydawnictwo Naukowe Scholar, Warsaw, 1996) on 10 that "The belief that in order to change the world one must first and foremost change regulations and then the rest will automatically take care of itself is an expresison of similar thinking based on a belief in the magical force of the law. We have a state of law in the constitution, and so we irrevocably will also have one in life. Nothing of the kind... Even the program for creating a real state of law in Poland in the fullest possible form still has not been drawn up, while its implementation does not have to end in success."

[22] Cf., e.g., Hoeland, A.: Évolution du droit en Europe Centrale et Orientale: Assiste-t-on à une renaissance du "Law and Development"? *Droit et Société*, 1993. 25, 467–488.

founded a scientific social theory,[23] or arguing with the World Bank under the banner of rationality[24]) –: putting questions, expressing doubts, giving voice to the unchanged/unchangeable validity of ancient truths, furthermore, providing us with new realisations. Well, in these days, when international legal export is at its peak, and on the ruins of collapsed socialisms, various salesmen and tradesmen of the law's technicality are circulating as experts, it seems that the academies and universities of the target countries remain stubbornly silent and shyly turn their heads. Is it possible that right in these moments they feel the urge to live or rejoice over their freedom uncontrollable by anyone?

The caravan of legal renovation is following its own route ever since, even though neither of us know what balms to use when, and under what conditions. How should we establish the conditions and criteria of healthy functioning? What does historicity mean in today's post-modernity? What are the features of the global village? What is that theoretically justifies a process in which patterns born under historically particular conditions and in specific places are recorded in the first round, then the results are exported as a universal and timeless *panacea*, to finally announce it with the *tel est notre plaisir* gesture as universally valid for every human condition?

The road of cognition and conceptualisation from the initial problem sensitivity to its institutional solution is extremely complex. Subsequent practical actions must necessarily deal with both more variety and more local specialities.[25] Let us recall here the experience of the near past:[26] in this century, even the most successful ventures of legal reception have proven very limited validity and sphere of authority;[27] others have failed very early on due to local

[23] Cf., e.g., Gardner, J. A.: *Legal Imperialism* American Lawyers and Foreign Aid in Latin America. The University of Wisconsin Press, Madison, 1980. xii + 401 p.

[24] Cf., e.g., Mattei, U.: *Introducing Legal Change* Problems and Perspectives in Less Developed Countries. (Manuscript of an address to World Bank Workshop on Legal Reform on 14 April 1997.) Berkeley Trento, 1997. 19.

[25] Cf., from Varga, Cs.: Institutions as Systems: Notes on the Closed Sets, Open Vistas of Development, and Transcendency of Institutions and Their Conceptual Representations. *Acta Juridica Academiae Scientiarum Hungaricae*, 1991. 3–4, 167–178, and also in his *Law and Philosophy. op. cit.* 413–424.

[26] For a summary, see, from Varga, Cs.: The Law and its Limits. In his *Law and Philosophy. op. cit.* 91–96.

[27] In Turkey, the local version of the *Schweizerisches Zivilgesetzbuch* exerted influence mainly within the metropolitan environment, despite the consistent decades-long efforts at establishing its roots. Cf. Starr, J.: *Dispute and Settlement in Rural Turkey* An Ethnography of Law. Brill, Leiden, 1978. xvi + 304 p. (Social, Economic and Political Studies of the Middle East XXIII.)

resistance;[28] the attempts of the WWII victors could only count on moderate and temporary success from the very beginning, specifically because of the political pressure inherent in them.[29]

So, what is the basis of our miracle-expectation? Naiveté, ideological character, interest, foolishness, or simply the emptying of the historical memory? Or, perhaps, common-sense in the world of various rationalities organised into one irrational, that is, the shameful loss of credit of human experience and their replacement with post-modern clips of new idols?

Speaking of ourselves, we can only say that after the collapse of the socialist system in the world, in the immense internal diversity of the Central and Eastern European region, as a uniform demand, attempted endeavour and partly traversed path, we can meet a new and ambitions creation of law and institutions everywhere. Rule of law, consistent enforcement of maximum human rights after the disintegration of the past social and legal order: this is a programme which here and there (and, luckily, especially in Central Europe proper) gave way to considerable institutionalisation and traditionalisation, already building itself into socio-political processes. At other places, this unambiguously led to the increasing predominance of the stronger and the more unscrupulous, to the intertwinement of Mafiosi and the state, and to practical anarchy reminding of the weak and atomised Western European statehood having existed a thousand years ago.[30]

[28] E.g., in Ethiopia and Iran. For the former, cf. J. Vanderlinden. In: *Introduction au droit de l'Ethiopie moderne*. Librairie Générale de Droit et de Jurisprudence, Paris, 1971. especially 212ff, and Scholler, H. und Brietzke, P.: *Ethiopia* Revolution, Law and Politics. Munich, 1976. 80ff, as well as *Transplants Innovation and Legal Tradition in the Horn of Africa* Modelli autoctoni e modelli d'importazione nei sistemi giuridici del Corno d'Africa, ed. E. Grande. L'Harmattan Italia, Torino, 1995. 403. (Non Solo Occidente / Studies on Legal Pluralism 1.)

[29] E.g., in Germany and Japan. For the former, see Hoeland, passim.

[30] Background materials in international security policy on the true nature and dangers of the Russian variant to "rule of law" are rather pessimistic, depicting the recalled conditions as reminiscent of 12th–13th centuries' Europe with week statehoods and disintegrated, unorganised powers (using Pierre Corneille's *El Cid* as an illustration). See, e.g., from Shlapentokh, V.: *Russia* Privatization and Illegalization of Social and Political Life. Michigan State University Department of Sociology: 25th September 1995. 44 p. [CND (NATO: Chris Donelly) (95)459] and *Decentralization of Fears* Life in Post-Communist Society. 1997. 5 p. [CND (NATO: Ch. Donelly) (97)026]. For its historical components and their unbroken continuity, see also Smith, M. A.: *Russia's State Tradition*. Camberley, Surrey: Royal Military Academy Sandhurst, June, 1995. 12 p. (Conflict Studies Research Centre E78), McDaniel, T.: *The Agony of the Russian Idea*. Princeton University Press, Princeton, New Jersey, 1996. and Hedlund, S.: *Russian Roots of the Russian Crisis* Return to an Anti-modern Society. Uppsala: September 1999. 26 p. (Department of East European Studies: Working Papers 49). In the light of statistical data (five

6.

Our legal scholarship has always been aware of its triple link, even in socialist times, and has successfully strived for standing all demands of its tasks. Firstly: it immersed in the country's problems; secondly: it fought with the overall questions of our region (the socialist block at the time) remarkably; and thirdly: it proved successful in providing universal views, searching for answers to global concerns, or responding international dilemmas.

At the end of the millennium, the world itself is changing. Its global village, both on the European continent and in the Atlantic region, is announcing the formation of a new law, legal style and culture. Yet, our spiritual choices do never stand in and of themselves: they imply practical consequences, which are naturally seldom thought through by our intellectualising inclinations.[31] Thus, the contextuality of our problems may be spiritual, concerning its inspiration of thoughts, yet real in its practical consequences (effectiveness, cost implications).[32]

Would our scholarship be able to meet the requirements of this triple task today? The experience of the past few years does not seem to reveal the intentions of a new start and the actual efforts to materialise them. Concerning global dilemmas, thus far our legal scholarship has rather proven to be pattern-follower, and striving for standing all demands. In debates requiring creative thinking, the place of open-chance reflection is mostly taken by the invention of some mainstream opinions considered relevant (and preponderantly brought from a

times more occurrence of robbery and murder, six times more theft and violence, a quarter of million cases of both corruption and economic crimes, etc.), see Ilynsky, I.: Law and Order. In *Russian Society in Transition* ed. Ch. Williams V. Chuprov V. Staroverov. Dartmouth, Aldershot, Brookfield USA, Singapore, Sydney, 1996. 219–240. For an ultimate account, see Cohen, S.: *Failed Crusade* America and the Tragedy of Post-communist Russia. Norton, New York, 2000. 305 p. and, as an admission-*cum*-criticism, also Holmes, S.: Transitology. *London Review of Books* 23. 19 April 2001. 8, 32–35. We hold less knowledge regarding farther regions, e.g., the nature of the Tche-Tchen variant to "rule of law".

[31] As a refreshing example, see *Western Rights?* Post-communist Application, ed. K. Lauer A. Sajó. Kluwer, Dordrecht, 1996. 386 p.

[32] See, for example, the comparative analysis of American and Japanese ways of policing, where the ethos developed from individualism, respectively communitarianism, providing the differences in techniques, and resulted in the poorness of results despite immense invested sources, in the first case, and the optimum effects despite low costs, in the second. Szabo, D.: *Intégration normative et évolution de la criminalité* [manuscript]. Institut de France, Paris, 1995. 51 p.

different environment), then followed with a prejudiced compulsion and enforced blindly.

*

At the threshold of a new millennium, when our nation is at cross-roads again and must constantly choose from an entire range of patterns, techniques and tools, with these choices influencing the shifting points of the future; well, will our legal scholarship be capable of influencing the way of thinking and imagination of politicians, citizens, media and the professions? For we can appraise situations, prepare statistics, yet we ought to inquire about ideas and the media of reception to prepare comprehensive decisions. At this point, we can still face some initially unclear circumstances. Sometimes we even forget to put the basic questions.

We should just demand the answer, even if we may not be able to make up for the negligence: Is the nation a *tabula rasa* to be filled with contents at please? Did it have, does it have values, sensibilities, skills, ties, practical successes at all, from which extra strength could be gained to build more securely, daringly or decidedly?[33]

We should know a lot more, things that we did not know yesterday or know today. The historical prospects in legal scholarship are deficient, rhapsodic, and superficial even about yesterday. Our past is missing, unrevealed and non-assumed. Bibliographies on legal literature are available only for the last fifty years. *Corpus*es (compilations of sources, volumes of documents on legal sources, on state-level and local jurisdiction, initiatives, bills of law), which have filled up entire rooms throughout the legal history of luckier European nations, in our case were not elaborated yet except for the *Corpus Juris Hungarici*, and some other fragmentary compilations. There are no plans, no scientific policy, no money, nor any individual initiative to at least launch this work which has not been done for about a century. Neither are there any chances to start this compilational work, or to publish them at least in fragments, since a new generation is yet to grow up, which has a proficiency in Latin, is prepared to research the sources (available

[33] Between the two rounds of the first free elections in Hungary, as a staff to the European Academy of Legal Theory in Brussels, I have conducted memorable talks with Professor Boaventura de Sousa Santos, a legal sociologist from Coimbra. Both in his quality of a Marxist social scientist and social democratic politician, he formulated almost personal concerns towards integrating particular local traditions, values and memories of past successes into one scheme of launching and substantiating a new political, social and economic development, consciously as one kind of psychological support that could ease the complex transformation process leading to it.

exclusively in Latin until the mid-19th century), and can claim the necessary serving disposition to prepare the foundational work, and is able to undertake the survey of the sources in Hungarian legal history and legal tradition. Otherwise how could these incidental fragmentary elaboration be put together to give one uniform picture? How could researches be organised which beyond data-like institutional incorporations, could launch the accounting worthy of humanities, or the evaluation requiring juristic creativity of processes and performances (legal styles, methods, individual local *trouvailles*)? How could an elevated spirituality be born, which would provide thinking achievements, intellectual delicacies, joy and spiritual excitement beyond the dry facticity of events—similarly to, for instance, English legal historical thoughts always promising some vibrating spiritual recharge?

What can be learned from the tying force of history, tradition, organicity, and feeling at ease, if nobody cares about them? When has social theory, legal philosophy or history addressed tradition for the last time as the foundation of processes of organic human practice? Or its mediatory capacity, its role of handing down the body of experience accumulated throughout generations, its integrative ability, its exclusive potentiality to merge various movements and subtle changes into one enormous move?[34] Or, about tradition and reason complementing each other? Or the non-subsidiary nature of rationality and everyday experience,[35] especially the theoretical function of rationality in the logic of justification, and the ontological function of practical experience in the logic of taking a decision?

Marxism was only a compulsory garment. A lot of us could not make peace with its science-philosophical presuppositions, neither with its simplifications and unjustified extensions, but especially with its only politically justified autocracy. Yet, it was still liveable, allowing the respect for history. In want of anything better (since we could not use a different conceptual framework), we

[34] Although all these considerations have already been developed in Max Weber's rationality-theory. Cf., e.g., Szacki, J.: *Tradycja*. Panstwowe Wydawnictwo Naukowe, Warszawa, 1971; Friedrich, C. J.: *Tradition and Authority*. Praeger, New York–Washington–London, 1972. 144 p. (Key Concepts in Political Science); Shils, E.: *Tradition*. University of Chicago Press, Chicago, 1980; Krygier, M.: Tipologia della Tradizione. *Intersezioni* 5, 1985, 221–249; and, as applied to law, see Krygier, M.: Law as Tradition. *Law and Philosophy* 5., 1986, 237–262.

[35] Cf., e.g., Oakeshott, M.: *Rationalism in Politics* and Other Essays. Methuen, London, 1962. vii + 333 p., especially at 1–36; and, in a practical context, Kirkpatrick, J. J.: *Dictatorship and Double Standards* Rationalism and Reason in Politics. Simon & Schuster, New York, 1982. 270 p., in particular Sources of Stability in the American Constitution, 215–235.

could still make use of it to serve life as a *magister vitae*. It may be destructive if abstract principles in a universalised ahistorical context are conceptualised now again as exclusive. The mind can be emptied and systematically detached from its everyday substrate, and from foundations of human experience and practice as a result.

We ought to talk about the messages worthwhile to be messaged, and about what only vanity makes us message we may as well remain silent.[36]

[36] For the variety of components, layers (in function of varying approaches), and chances of contradictions while the undifferentiated use, of some mainstream notions, cf., as an exemplary case study, Fallon, R. H., Jr.: "The Rule of Law" as a Concept in Constitutional Discourse. *Columbia Law Review* 97, January 1997, 1, 1–56.

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Legal Cultures in the European Union

Abstract. The introductory part of the essay deals with the notion of legal culture and its categories. Later, the author sets forth the characteristics of the common law and the Roman-German legal cultures, including the legal families within them. He also touches upon the tendencies of the development of the German legal and political culture. With respect to the integration of the legal systems into the EU, the author argues as an advocate of convergence. Both basic legal cultures are being modified as, besides statutory law, judicial law becomes significant in the continental legal systems and statutory law complements case law in the common law systems. As to the integration of the Hungarian legal culture into the EU, the essay points to two principal considerations. On the one hand, when working on making our legal culture "euro-conform", we must not forget about maintaining our own legal culture. On the other hand, the Hungarian legal culture can contribute to the development of the legal system of the EU, e.g. with some of the regulations of our statute on the ethnic minorities. At the end, the author shows that the efficacy of the European law is heavily dependant upon the national legal systems.

Keywords: legal cultures, European law

I. Introduction

In the international literature concerning European integration, it seems to be a commonplace that there are some "break lines" or "dividing lines" in the European Union. These "lines" separate: a) the countries of the centre from the periphery; b) the Eastern and the Western member states; c) the Protestant and the Catholic nations.[1]

I would add a fourth break line to the list: the differences in respect to *the political and legal cultures.*

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[1] See e.g. Page, E. C.: Patterns and Diversity in the European State Development. In: *Governing the New Europe.* Eds.: I. Haywood E. C. Page. Duke University Press, Durham, 1995. 39.

It is well known that from the middle ages to the end of the 18th century the European continent shared a unified law and a single jurisprudence.[2] They were based upon the *Corpus Iuris Civilis* and the *Corpus Christi Canonici* which were later supplemented by several important legal institutions of territorial rights and customs. These elements constituted the content of the so called *ius commune.*

However, by the *19th century the law had equated with the law of the singular nation states.* This is to be taken as the origin of our problem at issue. Although the legislative efforts of the European Community outlined a unified European law in the past decades.

I hasten to emphasize that the term "break line" is not to be taken in a pejorative sense here. I just wish to indicate that the basis for a firm European identity could be provided by the maintenance of right exactly these differences of legal cultures.

2. The notion of legal culture and its categories

The relationship of culture and law is characterized by permanent interaction and interdependence.[3] The nature of the relationship could be summed up in two tenets: on the one hand, law is an element of the culture of a society, and on the other hand, there can be no law or legal system not penetrated by the culture of the society.

Legal culture, just like political culture, is a result of historical development. The political culture can influence or even mould the characteristics of the legal culture.[4] The current state of legal culture is always between tradition and innovation. The development of a legal culture is a long process. It is not simply organic growth it sets the task of preserving the given culture. Having a legal culture is neither the insistence upon the given nor change for the sake of change only.[5]

[2] Rousseau was right in writing at the time that "Il n'y a plus aujourd'hui de Francais, de Allemands, d'Espagnols, d'Anglais meme, quoi qu'on en dise; il n'e que des Européens." Rousseau, J. J.: Considerations sur le Gouvernement de Pologne, et sur sa réformation projetée. In: *Ouvres Completes.* Vol. 3. Gallimard, Paris, 1964.

[3] See e.g. Mayer, M. E.: *Rechtsnormen und Kulturnormen.* Schletter, Breslau, 1903. 24. Fezer, K. M.: *Teilhabe und Verantwortung.* Beck, München, 1986, 22.

[4] Tarello, G.: Atreggiamenti dottrinali e mutamenti strutturali dell' organizzazione qiuridica. *Materiali per una storia della cultura giuridica.* Vol. XI. (1981) No. 1. 157–166.

[5] Schäffer, H.: Társadalmi környezet és jogi kultúra. (Social Environment and Legal Culture), *Magyar Jog,* Vol. 43. (1996) No. 1.

The composing elements of legal culture are the following: a) written law and "living" law; b) institutional infrastructure (judicial system, legal profession); c) the models of legally relevant behaviour (e.g. legal actions); and d) legal consciousness.[6]

In some respects, legal culture can be divided into two parts: "external" (lay) and "internal" (professional) legal culture.[7]

Some even find it apt to talk about *legal "subcultures"*. The possible use of the term could be exemplified by the fact that those unwilling to serve in the armed forces are normally found guilty in Northern and South Norway, while acquitted in Western and Central Norway.[8]

On a global scale, we could distinguish between *regulative* and *orientative* legal cultures.[9]

In regulative legal cultures (typically characteristic of the societies of the "euro-atlantic" culture) law is accepted as a rule actually and normatively guiding behaviour[10] but not always to the same extent. In the common law systems, for instance, courts have much greater prestige than in other countries. Even the continental legal cultures are far from being homogeneous. Let me indicate this with only two examples: as opposed to the German legal culture (traditionally setting high value on law and having sophisticated civil procedures) the Dutch legal culture is often characterized with the term *beleid*. It means that subjects follow the advantageous laws and evade (circumvent) disadvantageous ones at the same time. This might well be illustrated by the fact that until the enactment the Ethanasia Act of 1993 (exceptionally permitting aid to suicide), the Criminal Code had prohibited but the medical institutions practised active euthanasia. Besides, the Dutch seek to solve their conflicts without turning to courts.

The legal culture of the region of Central Eastern Europe could be characterized by a deeply (historically) rooted attitude manifested in the faith in legal

[6] See Visegrády A.: *A jog- és állambölcselet alapjai.* (The Grounds of the Theory of Law and State.) Janus Pannonius Egyetemi Kiadó, Pécs, 2000. 2.

[7] See Friedman, L. M.: *Law and Society.* Prentice Hall, Englewood Cliffs, N. J., 1977. 76.

[8] Podgórecki, A.: Dreistufen-Hypothese über die Wiksamkeit der Rechts. In: *Studien und Materialen zur Rechtssoziologie.* Hrsg.: E. Hirsch M. Rehbinder. Opladen, Köln, 1967. 40–43.

[9] Kulcsár K.: *Jogszociológia.* (The Sociology of Law.) Kultúrtrade Kiadó, Budapest, 1997. 137–147.

[10] Its main characteristics are individualism and rationalism. See Hoecke, M. van Werrington, M.: Legal Cultures. Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law. *International and Comparative Law Quaterly.* Vol. 47. (1998) No. 3. 503–505.

regulation and excessive expectations concerning legal regulations. This is accompanied (and has been accompanied) by an inclination to perceive social problems in a certain legal framework. The efficacy of law was also affected by the fact that (besides overcomplicated legal regulations) norms of behaviour generated by the actual practice gained primary significance.

3. European legal families

The national legal systems integrated by the European Union belong to different legal families[11] within the regulative legal culture.

I. The common law systems

Common law systems can be found on five continents and have three representatives in Europe: English law (practised in England and Wales); Irish law (which is a kind of "modified" English law); Scottish law (which has a "mixed" character).[12]

As the English law provides the model for the common law systems, we concentrate upon its features. The characteristics features of the English law are the following:

a) The English law *resisted* the reception of *Roman law* in the 15th and the 16th century (unlike continental legal systems) following its own way of development.

b) It must be treated as another essential feature that the English law is *not codified*: most of its rules are not incorporated in statutes.

[11] See David R.: *A jelenkor nagy jogrendszerei.* (The Major Legal Systems of Our Age.) Közgazdasági és Jogi Könyvkiadó, Budapest, 1977. de Cruz, P.: *Comparative Law in a Changing World.* Cavendish, London, 1995. Zweigert, K. Kötz, H.: *Einführung in die Rechtsvergleichung azf dem Gebiete des Privatrechts.* Mohr, Tübingen, 1996. The way I outline the legal families of Europe here combines the conceptual devices developed by Zweigert Kötz and R. David. Although Zweigert and Kötz heavily criticized David's analysis, I find it apt to link together the two categorizations. In this respect, I follow the line of argument put forward by Zsolt Ződi. See Ződi, Zs.: A jogrendszerek csoportosítása The Classification of Legal Systems. In: *Bevezetés a jog- és államtudományokba.* (Introduction to the Science of Law and State.) Ed.: Szabó M. Bíbor Kiadó, Miskolc, 1998. 99–101.

[12] See Visegrády A.: *Angolszász jog és politika.* (Anglo–Saxon Law and Politics.) Dialóg–Campus Kiadó, Budapest Pécs, 1999. As to the Irish law see Doolan, B.: *Principles of Irish Law.* Gill–MacMillan, Dublin, 1986. As to the Scottish legal culture see Watson, A.: *Legal Transplants.* Scottish Academic Press, Edinburgh, 1974. passim.

c) The English law is *judge-made law.*

d) It follows from the previously mentioned feature that the rules of the English law are *less abstract and generalized* than the rules of continental legal systems as they always refer back to the decision in a particular case.

e) The English law is an *open system.* It is based upon a method that allows for answering all sorts of legal questions, but does not contain material legal regulations that are to be applied without respect to the circumstances.

f) And last but not least, as opposed to the Romanistic-German legal systems, the English law has a *historical* character, its development was never interrupted, it always kept its unity. So we cannot talk about old and new English law; every legal regulation, no matter how old it might be, belongs to the present legal system unless it was repelled by a statute or by custom. Moreover, the older the legal regulation, the higher the prestige it has.

II. Romanistic-German (continental) legal systems[13]

The Romanistic-German legal system formed the first legal family in the world. Its history dates back to the distant past. It stems from the law of the ancient Rome but its long development resulted in not only the modification of most of its material and procedural norms its underlying conception of law and legal norm has also been significantly altered since the time of Augustus and Justinian. The legal systems that belong to this category are descendants of the Roman law but they carried on its development and brought its institutions to perfection. They have never been mere copies of Roman law as many of their elements stem from other sources.

In the continental Europe every contemporary legal system belong to this category. It does not mean that Romanistic-German legal systems are not to be found on other continents. Reaching well beyond the former boundaries of the Roman Empire, it conquered every Latin American country, most of Africa, the countries of the Middle East, Japan and Indonesia. This expansion could be explained partly by the inluence of colonization and partly by the advantages associated with the reception of the legal technique of codification generally applied in the Romanistic legal systems in the 19th century.

The characteristic features of the Romanistic-German legal systems could be summed up as follows:

[13] This section is based upon Ződi's explication of the issue. See Ződi: *op. cit.* 101–109.

a) The pillars of these legal systems are the *written sources of law* (statutes, decrees, ordinances). Statutes are primary to other sources of law.

b) Their law is relatively abstract which means that legal norms are not created in association with deciding particular cases (with the intention of their application in further cases, like in Anglo-Saxon legal systems) norms determine certain patterns of behaviour without respect to the concrete circumstances of particular cases.

c) Legal norms are characterized by a kind of *optimal generality*: they are not too general (as too general norms would throw difficulties in the way of the application of law) but general enough to be applied to certain type-situations.

d) *The spheres of the creation and the application of law are strictly separated* unlike in common law systems.

e) In these legal systems the primary task of lawyers is the interpretation of legal norms. Every possible specification that was left out of the legal norm, automatically opens the way to interpretation. Thus, in Romanistic-German legal systems, the law consists of not only the legal norms enacted by the legislator but the *"secondary legal norms"* as well, developed by the legal practice.

f) The material of law forms an *independent, closed system* in which at least in theory all sorts of questions could or should be answered by way of "interpreting" existing legal norms.

The Romanistic-German legal systems could be divided into three legal families.

European countries that belong to the *Romanistic legal family* are:

1) France (as the "cradle" of the legal family);

2) Belgium, Luxembourg, the Netherlands (that came to touch with French law as a result of French military expansion);

3) Italy, Spain, Portugal (that were also heavily influenced by the German and the Swiss codes which makes them representatives of an intermediary type).

The characteristic features of the Romanistic legal family could be summed up as follows:

a) The code of central significance is the *Code Civil* (1804) in the legal family. This code has a clear-cut structure, free of any feudal elements, any "compromises". It leaves almost no room for judicial discretion, its formulations are concise and simple. It is often called the "most *bourgeois*" civil code that laid the foundations for European codification.

The Code Civil is in force in Belgium, in four Italian regions, two Swiss cantons and with some modifications in Baden. Replicas of the Code Napoleon were

enacted in the Netherlands (1838), in Sicily (1812), in Parma (1820), in the States of Sardinia (1837) and in Modena (1842). As an adapted translation of the original, it was instituted in Greece (1841), in the unified Italy (1865) and in Romania (1865). And finally, although not as the exclusive source but as primary inspiration, it influenced the Portuguese (1867) and the Spanish (1889) civil law codification, just like Louisiana and Quebec in North America.

However, the success of the Code Civil peaked in South America. It was took over in its original language in Dominica (1825), and later in translation in Bolivia (1831). The creative adaptation of European models (as mediated by French patterns) was first achieved in Chile (1825) that encouraged some countries to follow the lead (Ecuador 1861, Columbia 1873) and others to create their national code based on the Code (Uruguay 1867, Argentina 1869).

In Asia, the Code Civil made an impact on almost the same scale but in a far less homogeneous way. Its principles are applied in Japan, and all four French codes were adapted in Turkey. In Egypt, the first codes (1867, 1883) were replicas of the Code Napoleon, the present code (1948) is a developed version based on it (which inspired Syria for adapted reception). The civil codes of Lebanon (1934) and Venezuela (1942) are also of the French origin, although both are to be taken as significantly different to it.[14]

aa) The Code Civil regulates the relationship of the statute and the judge in a rather radical way. Judges are not allowed to interpret the statute "arbitrarily", in matters of legal interpretation they have to turn to the authority of *referé legislatif* (established in 1790).

ab) The Code Civil is the code of the "owner". It was based upon the idea of a citizen who makes rational decisions, who is aware of the relevant information and the norms of law. The Code strives to guarantee the freedom of property and contract as much as possible.

ac) The Code finds a middle way between abstract principles and concrete (casuistic) norms. It determined the paradigmatic style for civil law codifications as well as codes on other fields of law for the future.

b) The Romanistic legal family (unlike the Germanic and the common law systems) is characterized by the prevalence of legislature. The influence of Roman law– quite paradoxically because of the early reception of Roman law—is much weaker.

The second legal family of the Romanistic-German systems is the *Germanic legal family*, its "members" are the following countries:

[14] See Varga Cs.: *A kodifikáció, mint társadalmi-történeti jelenség.* (Codification as a Social–Historical Phenomenon.) Akadémiai Kiadó, Budapest, 1979. 117–118.

1) Germany;
2) Austria;
3) Switzerland;
4) the countries of Central Eastern Europe (especially the Chech Republic and Hungary).

As characteristics of this legal family, the following features are to be pointed out.

a) With respect to the development of the Germanic legal family, it proved to be a significant factor that, compared to other legal systems, *the influence of the Roman law* asserted itself rather late (only in the 15th century), although when came across *it was very strong*.

b) The code of central significance in the legal family is the *Bürgerliches Gezetzbuch* (1900) which is a conservative code (unlike the Code Civil).

The BGB was used in the recodification of the Greek civil law (1940), and in the codification of the law of contracts in Poland (1933). It provided the basis for the Brazilian (1916), the Mexican (1928), and the Peruvian (1936) Codigo Civil as well as the codification of civil law in Japan (1898), Siam (1925), China (1929), and Thailand (1962). It also inspired the Italian Codice Civile (1942) which is quite remarkable as the Codice Civile of 1865 was formulated in French spirit.[15]

ba) The law of the BGB is the law of lawyers, it is characterized by a style that strives for accuracy, subtlety and abstraction. Its addressees are not citizens but primarily lawyers (of course, in the sociological sense of the word). Its institutional constructions and terms are artificial, its language is technical (only professionals can understand its true meanings). As its primary focus is not conciseness but accuracy, the code is often very complicated.

bb) The norms of the code are ordered in a specific way that more or less follows the structure of the Institutions of Justinian (personal and family law, the objects and types of property, the ways of acquisition of property, etc.).

Many think that the *Austrian Civil Code* (ABGB 1811) finds a kind of middle way between the lawyers' law of the BGB and the application-oriented law of the Code Civil.

The famous *Swiss Civil Code* (ZGB, 1912) has a distinguished position in the Germanic legal family. The ZGB is "deliberately vague" at certain points to allow the judge to search for the solution that is the most appropriate in the given case. The code is characterized by the extensive use of general clauses that are to be interpreted by the judges in the particular cases.

[15] See *ibid.* 120–121.

At last, *the Nordic legal family* consists of the following countries:

1) Denmark;
2) Finland;
3) Iceland;
4) Norway;
5) Sweden.

The legal family can be characterized by the following features.

a) This legal family is often regarded as *a kind of intermediate version between the common law and the Romanistic-German legal systems.*

It resembles the common law systems as it was hardly influenced by the Roman law and the wave of codifications in the age of the Enlightenment (e.g. the comperehesive codification of the civil law has not taken place yet). On the other hand, the similarity to the Romanistic-German systems can also be pointed out: judges do not have a central role in the system and there is no normative precedent-doctrine.

The Nordic countries had lived in relative isolation for a long period. Their legal institutions were influenced by the French law in the 19th century, the German law at the beginning of the 20th century, and the common law (especially the law of the USA) mainly after World War II. However, despite all these influences, they kept their original character.

b) The co-operation of the Scandinavian countries is manifested in their laws as *they make efforts to integrate the content of their legal systems.* It could be exemplified by the Scandinavian Sales of Goods Act that was passed in every Nordic country (Sweden 1905, Denmark 1906, Norway 1907, Iceland 1922). The act is influenced by both the British Sales of Goods Act (1893) and the German BGB. The co-operation is facilitated by their common legal and linguistic traditions.

c) Last but not least, it should be mentioned that *judges of higher courts and jurists of high authority play an important role in Scandinavian legislatures.*

But let us take a look at the discrepancies with respect to the political cultures of the EU member countries as well. In my opinion, political culture points to the subjective side of politics,—directly or indirectly—to the political consciousness of citizens. If we talk about the political culture of a society, we refer to the political system internalized in the knowledge, emotions and evaluations of the population. Just like the political system moulds the political culture, the latter—as an essential element of the environment—"conditions" the functioning of the political system including the efficacy of the legal system.

Instead of the traditional Scottish, Welsh, Basque, Irish, and Catalan examples, I would refer to *Germany* which, once again, has become a unified

state but will consist of two distinct political cultures for a long time. These political cultures are more different than, say, the political cultures of West Germany and Denmark or France. According to some scholars' predictions, it will take two generations before we can speak about one common political culture in Germany.

As an indication, let us point to some relevant differences.[16] East-Germans are still stronger advocates of "law and order" than West-Germans. They regard the state as more responsible for illness, scarcity, and unemployment. Most East-Germans would support a system in which no one up high and down deep, life is on safe and regulated track. On the other hand, West-Germans are advocates of a system in which everyone has a chance to achieve more than most of the others, taking the risk of gaining less than the rest. *The East-Germans' demands on welfare state are in association with their inclination to accept authoritarian leadership or, at least, reacting to it in a rather lethargic way.* This corresponds with the German political traditions. They agree that the state must have a deep impact on the economy. They are hostile to the political parties which was also typical of the German tradition before 1945. In East Germany one can experience the affection for "round-tables" instead of the sense for party pluralism.

According to Greiffenhagen, the disconsolate picture is alleviated by a ray of hope concerning the young generations. There are some indications that a kind of change in value perceptions has taken place in East Germany as well. This would explain why the values of the East- and West-German youth are rather close to one another. This will obviously have a positive effect upon the deepening of European integration, the realization of the rule of law, and the efficacy of the legal system.

4. The possibilities and limits of the approximation of legal systems in the European Union

As it is well known, the European Union launched the most comprehensive legal harmonization programme of all times. It concerns not only the 15 member states but—as a point of orientation the members of EFTA and the

[16] Grieffenhagen, M.: Politikai kultúra Németországban. (Political Culture in Germany), *Friedrich Ebert Stiftung, Tallozó.* Tizenötödik Füzet, 1995. 4.7. Quint P. E.: *The Imperfect Union.* Cloth, Princeton, 1997. See also Ádám A.: *Alkotmányi értékek és alkotmánybíráskodás.* (Constitutional Values and Constitutional Court Practice.) Osiris, Budapest, 1998.

countries of Central and Eastern Europe as well. The goal of the Union is not some kind of a "unified law" but the co-ordination of the legal regulations of the member states, the elimination of excessive deviations with preserving the national legal systems to a certain extent.[17]

With respect to this issue, we should touch upon the old debate on the applicability of the convergence theory on the European law.

The advocates of the convergence of the legal cultures of the EU point to the common history, common values and traditions.[18]

On the other hand, many hold the view that the common law and the continental legal cultures are so different to one another that there can be no approximation between them.[19]

And finally, according to the third view, the above mentioned conceptions take legal cultures in a formal sense. We would rather need a sociological approach that concentrates upon identities. For example, civil law is often a symbol of national identity or a manifestation of national legal culture. This might explain why the member states are so reluctant to "harmonize" their civil laws. However, the EU set its heart on this harmonization.[20]

Without entering the debate here, we deal with some issues of it in brief.

The first question could be formulated as follows: to what extent does the European Union make use of the institutions of national legal systems? Well, for example, that incorporation of human rights in the community law is mainly due to the German Constitutional Court. As the community law consists of mostly norms of administrative nature, many of its basic principles trace back

[17] See e.g. Evans, A.: *A Textbook on EU Law*. Clarendon, Oxford, 1998. 465. Cabero, M.: *Fundamentos de Derecho Communitario Europeo*. Colex, Madrid, 1989. 177–180. Cartou, L.: *L'Union européenne*. Paris, 1994. 155–158. Gulmann, C. Hagel-Sorensen, K.: *EF-ret*. Djof, Kobenhavn, 1988. 287–297. Lourin, F.: *Manuele di diritto della Communité Europee*. Torino, 1992. 172–190. Kecskés L.: *EK-jog és jogharmonizáció*. (EC Law and the Harmonization of Law.) Közgazdasági és Jogi Könyvkiadó, 1998. 211.

[18] See e.g. Gerven, W. V.: Bridging the Gap between Community and National Laws: Towards a Principle of Homogenity in the Field of Legal Remedies. *Common Market Law Review*. Vol. 32 (1995) 679-702. Joerges, C. Ch.: The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective. *European Law Journal* Vol. 3. (1997) No. 4. 378–406. De Cruz: *op. cit.* 99.

[19] See e.g. Legrand, P. European Legal Systems are not Converging. *International and Comparative Law Quaterly* Vol. 45. (1996) 52–81.

[20] See Paasilehto, S.: Legal Cultural Obstacles to the Harmonisation of European Private Law. In: *Function and Future of European Law*. Eds.: V. Heiskanen et al. Helsinki, 1999. 101–104. De Cruz: *op. cit.* 99.

to the highly developed administrative law of France and Germany. Recently, however, the European Court derived some principles—mostly procedural ones—from the "natural justice" of English law. This is how the the "right to hearing", the "duty of justification", the "right to due process" became part of the community law. The community law also borrows from the economic law of other member states.[21]

Secondly, we have got to talk about the European Court. This is the forum functioning as a kind of "forge" of Anglo-Saxon and continental legal cultures. Comparative law is a permanently used "tool" in the hands of the European Court.[22]

The amalgamation of the two legal cultures is also manifested in the fact that the European Court applies (basically) the method of case law, although its verdicts do not function as precedents.

The next problem to be explicated concerns the common law. *In concreto*, I have in mind the ever more obvious tendency that the practice of British courts—although the efforts to synthesize the Anglo-Saxon and the continental legal cultures could also be noticed—assimilates with the American model in which decisions are based upon principles rather than rules.[23]

Finally, we cannot avoid posing the question: is the Hungarian legal culture mature enough to European integration, or can the former contribute to the latter in any respect?

Of course, within the bounds of this essay, we cannot answer this question in details. What we can do is raising some thoughts concerning the issue.

We should take it as a starting point that during the thousand years of the development of our law, besides national aspirations, some factors of harmonization were also present.[24] The latter tendency was driven by aspirations to join up to the economic and social structures of the Western countries. In this respect, European integration is not the first challenge of harmonization of law in our history.

In the development of the Hungarian legal culture, some positive tendencies pointing to "euro-conformity" could have been felt since the political transitions. Thus, for example, the fact that the transitions remained within the

[21] See Kecskés: *op. cit.* 128.

[22] See *ibid.* 127.

[23] See e.g. Levitsky, J. E.: The Europeanization of European Private Law. *American Journal of Comparative Law,* (1994) No. 2. 380.

[24] See Mádl F.: Ius Commune Europae. *Jogtudományi Közlöny*, Vol. 45. (1990) 3.

boundaries of legality and the consequent practice of the Constitutional Court had a positive impact on our legal culture.[25] Besides, the harmonization of law plays a key role in respect to the consolidation of our regulative legal culture.

I would just refer to the fact that since 1990, we have harmonized most of the legal norms listed in the White Papers,[26] and we have a good chance to complete this process in 2002.

The linguistic and human rights education of judges and public officials has begun but it is quite obvious that the final solution could be expected from the mass application of the new generation of law students.

I would like to emphasize, however, that European integration is not incompatible with the preservation of the uniqueness of our legal culture.

The integration has a double rationale. On the one hand, it must ensure the attainment of certain common goals; for this reason, it must develop the institutional guarantees of reaching similar results from similar springing. "As far as law is concerned, it means that, with respect to the basic goals to be realized by all means, we can and in some cases must–'unify' only those elements of our legal culture that has only a quasi instrumental significance."[27]

So, when we work upon making our legal culture "euro-conform", we must not forget about fostering our given culture! I believe it is not an exaggeration to claim that even Hungarian legal culture can contribute to the development of the legal system of the European Union. Hungarian authorities of legal policy could take an initiative about the reception of some of our legal conceptions to promote the development of some not well elaborated European legal institutions. One candidate could be our statute on ethnic minorities.[28]

[25] See Kulcsár: *op. cit.* 147–148. Recent surveys on legal consciousness justify the same point. See Visegrády A. Schadt Gy.: Egyetemi hallgatók jogtudata. (The Legal Consciousness of Law Students, jogismerete), *Magyar Jog*, Vol. 47. (2000) 9.

[26] Kecskés L. Szécsényi L.: Szemléletváltás az EK-magyar jogharmonizációban The Change of Perspective in the European Harmonization of Hungarian Law. Vol. 53. *Jogtudományi Közlöny*, (1998) 2. 60.

[27] Varga Cs.: Európai integráció és a nemzeti jogi kultúrák egyedisége. (European Integration and the the Uniqueness of National Legal Cultures.) *Jogtudományi Közlöny*, Vol. 47. (1992) 10. 446.

[28] Mihály Samu makes a similar point on this issue. See Samu M.: Az európai jog és az európai jogpolitika szükségessége. (European Law and the Necessity of a European Legal Policy), *Magyar Jog*, Vol. 44. (1997) 7.

5. Concluding remarks upon the perspectives the *ius commune Europaeum*

The law of the EU is not the "European legal culture"[29] but the product of the *European legal cultures*. The new "European legal culture" is in the making and manifested by e.g. the proliferation of technical norms and the growing unity and vertical plurality of the legal system.[30] However, the future common law of Europe means much more than the growing harmony of different fields and norms of law. The "euro-centrism" of European law does not involve that it relies upon only the legal systems of the countries of Western Europe. It is also influenced by the legal institutions of e.g. the USA, Australia, New Zealand. One of the questions of the future is how can this complex but homogeneous legal order integrate the legal traditions of the countries of Eastern Europe.[31]

The pledge of the future of the *aquis communautaire* is the extent of efficacy of its rules.

It is a complex task to measure this efficacy that includes among others the inquiry into the following factors:

- the way the legislatures of the institutions of the community reflects the policy of the community;
- the application of the community law in the member states;
- the translation of the community directives into national laws;
- the effectiveness of secondary community legislature and national "naturalization" in respect to the systems of public administrative;
- the effectiveness of the community law in respect to the activity of economic and other organizations, or even private persons;
- the legal actions concerning the community law at national courts;
- the enforcement of the community law by national courts.[32]

[29] See Gessner, V.: Wandel europäischer Rechtskulturen. In: *Lebensverhältnisse und soziale Konflikte im neuen Europa*. Hrsg.: B. Schäfer. Westdeutscher Verlag, Frankfurt, 1993. 5–18.

[30] See Kulcsár: *op. cit.* 139.

[31] Burrows N.: European Community: The Mega Mix. In: *Studies in Legal Systems: Mixed and Mixing*. Eds.: E. Ösücü E. Attwoll S. Coyle: Kluwer Law International, The Hague London–Boston, 1996. 312.

[32] See Snyder, F.: The Effectiveness of European Community Law: Institutions Processes, Tools and Techniques. *Modern Law Review*, Vol. 56. (1993 January) 25–27. On the notion of the efficacy of law, its factors and its measure, see Visegrády A.: *A jog hatékonysága*. (The Efficacy of Law.) Unió Kiadó, Budapest, 1997.

One can see that the efficacy of European law is heavily dependant upon the national legal systems.

As far as the perspectives of the approximation of the legal systems are concerned, I join the advocates of the convergence of continental and common law models. Both systems will be modified as judicial law becomes significant besides written law, and statutory law gains strength in relation to case law.

Just like in the past, the European states will undoubtedly follow the same legal principles in the future. The root of the tree of European law is the Roman law, its bole is the ius commune, and its branches that grew in different directions will be grown in the same direction by the slowly evolving, unifying will of the European people.[33]

[33] Schrage, E. I. H.: Utrumque Ius. Über das römisch-kanonische ius commune als Grundlage europäischer Rechtseinheit in Vergangenheit und Zukunft. *Revue Internationale des Droits de l'Antiquité*, 3e Série, Tome XXXIX. (1992) 407.

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The Notion of eEurope within the EU from a Legal Perspective. Challenges for the Candidate Countries after the Swedish Presidency**

Abstract. The article titled the notion of eEurope within the EU from a legal perspective challenges for the candidate countries after the Swedish presidency addresses one of the most recent developments in the constantly evolving European community acquis communautire, namely the newly formulated legal and institutional frameworks for the electronic (digitalised) communication networks in the context of further completing the EC single market. The author has divided his paper into four chapters. The first part of the article deals with a descriptive introduction in relation to the main cornerstones of the historical transition process in the EU from establishing the single internal market to building up a knowledge-based information society by 2010 as decided in march 2000 at the European Council summit in Lisbon. The second chapter analyses firstly the well-known commission communication on "eEurope action plan 2002" adopted in June 2000 in Santa Maria de Freira and then addresses in more detail the scientific and the practical reflections on this programme brought by the developments under the Swedish EU presidency in the first half of 2001. The third part of the thesis covers the most important challenges stemming from the new EU concept of "eEUROPE" in terms of the Central and Eastern European applicant countries. Under this heading, the author dedicates special attention on the one hand to exploring the relevant and related Hungarian experiences (with special regard to the on-going legal alignment process to the described EC acquis in Hungary) secondly to the Goteborg European Council summit, held in June 2001. Where the famous action plan for the candidate countries on "eEurope 2003" was adopted and published by the EU member states. In the final chapter of the paper, the author tries to draw up a number of conclusions and proposals as far as the required effective and proper implementation by the candidate countries of this new type of acquis is concerned with special regard to the forthcoming codificatory difficulties and challenges in particular in terms of legal dogmatics. The paper is well-documented, logically easily followable, and based on a really wide-ranging secondary literature in terms of the explored subject.

Keywords: eEurope, Swedish presidency, Candidate Countries

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"eEurope+ is expected to have a positive impact on the adoption and effective implementation of the 'acquis communautaire' in a number of areas. Moreover the undertaking of political commitments in the Candidate Countries similar to those of the EU is a concrete sign of the growing maturity of our relationship."

(Günther Verheugen, Brussels 16 June 2001)

I. From Lisbon to Goteborg. Transition to a knowledge-based information society

1.1. The main messages of the Lisbon EU Summit

It is beyond doubt that one of the most prepared Summit in the last 10 years was the EU Summit held in Lisbon on 23–24 March 2000. Before this Summit the European Commission issued a Report on "eEurope–an Information Society for all" in which paper the Commission made several proposals and developed important initiatives for the Lisbon Council Summit.

What the Commission did then was that it prepared an inventory on what weaknesses the Union should face in the next decade as well as what challenges should be addressed by the EU in the foreseeable future in order that it could properly cope with the process of globalization in the XXI century.[1] This is why 'employment, economic reform and social cohesion' was given the most important political priority in Lisbon in the context of 'developing a long-term strategy for the next decade'.[2]

[1] See an excellent overview about the economic implications of the 'new economy' concept, wrote in Hungarian by Veress, J.: 'Új gazdaság–Internet gazdaság'/eEurope–eMagyarország–eSikerül?' ('New economy-Internet economy'/eEurope-eHungary-can it succeed?'), published as a supplement of the Európa 2002, II/1 volume, Budapest 2001 Március, iii.–xxii.

[2] In the Presidency conclusions the relevant heading is titled: "The new Challenge". And then it reads: "The European Union is confronted with a quantum shift resulting the challenges of a knowledge-driven economy. These changes are affecting every aspect of people's lives and require a radical transformation of the European economy. *The Union must shape these changes in a manner consistent* with its values and concepts of society and also *with a view to the forthcoming enlargement.* The rapid and accelerating pace of change means it is urgent for the Union to act now to harness the full benefits of the opportunities presented. Hence the need for the Union to set a clear strategic goal and agree a challenging programme for building knowledge infrastructures, enhancing innovation and economic reform, and modernising social welfare and education systems.", points 1–2 on page 1., SN 100/00. See: also the Commission Report on 'eEurope-An information society for all', submitted to the Lisbon Summit (6978/00). From a

The Commission pointed out the following weaknesses at EU level:

"More than 15 million Europeans are still out of work. The employment rate is too low and is characterised by insufficient participation in the labour market by women and older workers. Long-term structural unemployment and marked regional unemployment imbalances remain endemic in parts of the Union. The services sector is underdeveloped, particularly in the areas of telecommunications and the Internet. There is a widening skills gap, esepcially in information technology where increasing number of jobs remain unfilled." (point 4 on page 4).[3]

At Lisbon the European Council finally defined an ambitious strategy for change. A strategy to make the European Union by 2010 *"the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth and better jobs and greater social cohesion"*.[4] The Council also defined a *"new open method of coordination at all levels, coupled with a stronger guiding and coordinating role of the European Council to ensure more coherent strategic direction and effective monitoring of progress. A meeting of the European Council to be held every Spring will define the relevant mandates and ensure that they are followed up."* (point 7. of the Presidency conclusions in Lisbon). This is an important institutional guarantee, and added value in practical terms built in the Lisbon Strategy itself.[5]

The European Council also adopted a well-detailed programme in Lisbon at strategic level describing all the necessary implementing measures (more than

historical point of view, see. e.g. Green Paper from the Commission on Commercial Communications in the Internal Market, "Making the most of the Internal Market". Strategic programme. Communication from the Commission to the Council 22. 12. 1993, COM(1993) 632 final or Europe's way to the Information Society. An action plan Communication from the Commission, 9.8.94, COM (1994) 347 final.

[3] For more statistics with regard to the 'eEurope concept', see for example the speeches of Commissioner Erkki Liikanen before the Lisbon Summit like: (i) 'An Information Society for all', delivered by Liikanen in the 'Infoworld Conference -The liberalisation of the telecommunications sector in Greece' held in Athens on 21st January 2000, or (ii) Liikanen's speech delivered just before the Lisbon Summit on 9th March 2000 with the title: 'The Commission's top eEurope priorities for Lisbon'.

[4] See in more detail: Communication from the Commission on 'Realising the EU's potential: consolidating and extending the Lisbon Strategy'. Contribution of the European Commission to the Spring European Council, Stockholm 23–24th March 2001., COM(2001) 79 final, Volume I (Brussels, 7. 2. 2001) 2 et seq.

[5] Reassured under the Feira Summit (Presidency conclusions, point 39), as well as under the Nice Summit by the French Presidency (Presidency conclusions, points 25., 34.).

60 measures, not only legal measures, but institution-building ones as well, see: Annex I). wich need to be made until end 2002 in order that the Lisbon Strategy could be successfully completed (under points 5–19 in the Presidency conclusions). From legal point of view the following fragement needs to be quoted:

"The European Council calls in particular on:- the Council along with the European Parliament, where appropriate, to adopt as rapidly as possible during 2000 pending *legislation on the legal framework for electronic commerce,*[6] *on copyright and related rights,*[7] *on e-money, on the distance selling of financial services,*[8] *on jurisdiction and the enforcement of judgements, and the dual-use of export control regime, the Commission and the Council to consider how to promote consumer confidence in electronic commerce, in particular through alternative dispute resolution systems."* (point 11).

[6] See: Directive 200/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market. Similarly see: Directive 99/93/EC on electronic signature. A good summary of the implications of this Directive on the Internal Market is in the article of Emmanuel Crabit: La directive sur le commerce électronic. Le projet "Méditerraneé" in *Revue du Droit de l'Union Européene* 4/2000, 749–832. Further literature in the EU: Graham Pearce-Nicholas Platten: 'Promoting the Information Society: The EU Directive on Electronic Commerce', *European Law Journal*, Vol. 6 Issue 4. December 2000, 363–379., or Roeder, E.: 'Services in the Information Society. A Commentary on the EC-Directive on Electronic Commerce', EBLJ, Nov.–Dec. 1999, 472–481. From the Hungarian literature: Zsuffa, Á.: 'Gondolatok az e-kereskedelem (szabály)rendszeréről' ('Thoughts about the regulatory framework for e-commerce'), or Jambrik, G.: 'Contract formation via the Internet-legal problems and legislative questions'. Both articles were published in *'Europa 2002'*, II. No. 2. (2001 June) Annex C.

[7] Good summary can be found in Single Market News, No. 6–January 1997, article on 'Copyright: Communication on a legislative framework for the Information Society' on page 17 et seq. See also as background materials: Commission Green Paper on Combating counterfeiting and piracy in the Single Market, COM(98)569 final, or Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on Creating a Safer Information Society by improving the security of information infrastructures and combating-computer related crime, COM(2000)890 final, published in Brussels on 26. 01. 2001. For legal text see: Proposal for a directive on the harmonisation of certain aspects of copyright and related rights in the Information Society (SEC/2000/1734 final).

[8] Not yet adopted even under the Swedish Presidency. See for more information: Proposal for a directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EE C and Directive 97/7/EC and 98/27/EC, COM(1998)468 final, (OJ 385 of 11. 12. 1998, 10–17.), completed and modified by Opinion 1999/C 169/15 of the Economic and Social Committee (OJ C 169 of 16. 06. 1999, 43–48.). Amended proposal see: (COM(1999) 385 of 23. 07. 1999).

Then "*the Council and the European Parliament to conclude as early as possible in 2001 work on the legislative proposals announced by the Commission following its 1999 review of the telecommunications regulatory framework. The Member States and, where appropriate, the Community to ensure that frequency requirements for future mobile communications systems are met in a timely and efficient manner.* Fully integrated and liberalised telecoms markets should be completed by the end of 2001."

All these tasks show that the adopted Lisbon Strategy in March 2000 set out a really burdensome legislative programme for the Union to complete in order that the envisaged eEurope vision from a legal perspective could be put in practice by end 2002.

1.2. The Santa Maria de Feira EU Summit. The eEurope Action Plan 2002

The Freira Summit was a logical follow up of the Lisbon Summit, at which the Heads of State and Governments dealt with the eEurope concept in more detail under the II Chapter of the Presidency conclusions. (points 19–39).

The key-sentence that should be quoted is: "*The European Council endorses the comprehensive eEurope 2002 Action Plan and requests the institutions, the Member States and all other actors to ensure its full and timely implementation by 2002 and to prepare longer term perspectives for a knowledge-based economy encouraging info-conclusion and closing the numeracy gap. As a short term priority, the necessary steps should be taken to bring down the cost of accessing the Internet through the unbundling of the local loop. A report should be presented by the Commission to the European Council in Nice, and on a regular basis thereafter, on progress in achieving the Action Plan's objectives.*" (point 22).

Following point 8. of the Lisbon Summit Conclusions, and this should be underlined, the Feira Summit finally adopted the Action Plan on eEurope 2002. This was a great achievement.

1.3. Progress achieved during the French Presidency

Not too much under the French Presidency can be reported in terms of the eEurope concept. This is primarily because during the French Presidency special attention was devoted to the successful completion of the institutional reforms of the EU which step was considered by the policy-makers in the EU as one of the most important preconditions for enlargement. (Adoption of the Nice Treaty in December 2000). For political reasons another priority was the adoption of the European Charter for Fundamental Rights. That is why the Presidency

Programme of France for the period of 1st July 2000 and 31st December 2000 anticipated just little progress on the fulfilment of the Feira Action Plan on eEurope 2002. The main points were:

- quick adoption of the Directive on VAT[9] on electronic commerce (page 4, finally not completed),
- see: more than 12 measures, envisaged for adoption on pages 4–9 in the Presidency Programme (like for example: *"In line with the conclusions of the Lisbon European Council, the French Presidency will work to secure political agreement on the proposal for a Directive on the distance selling of financial services..."* (page 6) or *"The French Presidency will hold discussions in the Telecommunications Council on the new regulatory regime for communications services (telecommunications and radio/TV) with the aim of reaching political agreement on at least some of the main Directives on the table.*[10] *Following the communications adopted by the Commission, the focus will also be on Internet governance and the creation of a 'eu' domain name (dot EU)"* (page 7) but with poor results.[11]

[9] See: Proposal for a Directive amending Directive 77/338/EEC as regards the value added taxes arrangements applicable to services supplied by electronic means, COM(2000) 349 final. As background material see: Communication from the Commission to the Council and the European Parliament on 'A strategy to improve the operation of the VAT system within the context of the Internal Market', COM(2000) 348 final. For the debate of the draft amending Directive on VAT see: Report on Proposed Directive COM(2000) 349 final, European Parliament session document, 28 November 2000 (Final A-5-0362/2000).

[10] See as background material: Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of Regions on 'Fourth Report on the Implementation of the Telecommunications Regulatory Package', COM(1998) 594 final.

[11] Where considerable progress can be reported under the French Presidency is the area of 'e-money'. See: Directive 2000/28/EC (OJ L 275, 27.10.2000, 37–38.) and Directive 2000/46/EC (OJ L 275, 27. 10. 2000, 39–43) on e-money which legal measures provide that electronic money may be issued only by supervised institutions meeting certain legal and financial conditions, ensuring technical security. Similarly as an important step forward we should notice of the meeting of the Ministers of Civil Service in November 2000 in Strasbourg in which Council meeting a Resolution was adopted on e-government too. Other developments under the French Presidency were: the eEurope update in November 2000 concerning the Action Plan, see: COM (2000) 783 final and Towards the e-Commission-Action 7: Definition of a Strategy towards the e-Commission (Better use of ICT and Communications Networks), Note d'Orientation, version of 11/7/2000.

Nevertheless, it should be noted, that the French Presidency fulfilled its mission, from the viewpoint of the candidate countries, by the fact that the Nice Treaty was finally agreed and parafied by all Member States.

1.4. The legislative implications at Community level of the adopted Lisbon Strategy[12]

Following the Lisbon Summit, it turned out that the most important task for the Commission as well as for the forthcoming Presidencies before 2002 would be to establish the necessary regulatory frameworks for the proper implementation of the adopted Strategy and eEurope Action Plan. The Commission put therefore the question: 'what we need in order that the legislative foundations of our eEurope concept could be put in place ?' In its Action Plan adopted in June 2000—the Commission answered in fact to this question as follows: we need (1) a supportive legal environment, (2) favourable tax measures, and (3) a positive social framework.[13] This approach requires from a legal point of view a *'six-pillars based regulatory framework'*, which the Union should efficiently implement in the next years to come. Namely: (i) the establishment of a new regulatory framework for electronic communication services, (ii) the rapid implementation by the Member States of the two new framework Directives (on e-commerce and on electronic signatures) including 'the country of origin approach' as far as the applicable law and 'forum-shopping' is concerned in e-commerce, (iii) developing a cross-border on-line out of court dispute settlement mechanism plus preparing for a code of conduct for e-commerce players,[14] (iv)

[12] An excellent description on the relevant Community regulatory framework can be found in the Commission Communication to the Council and the European Parliament on 'E-commerce and financial services', Brussels, 07. 02. 2001, COM(2001) 66 final, in particular on pages 6–10. As far as services in general are concerned, see: Communication from the Commission to the Council and the European Parliament on 'An Internal Market Strategy for Services', COM(2000) 888 final, in particular 13–14. Similarly see at regulatory framework level: Single Market News, No. 8–July 1997, article on 'Electronic Commerce: A framework for future action' on pages 23 at seq. Or as a broader-rather policy-based- presentation on the subject see: Green Paper on Commerce, in Bulletin of the EU, Supplement 2/97 (good summary is Annex C on the relevant acquis).

[13] This means also a great challenge in terms of that eEurope should become implementable for all the EU citizens, including those suffering with disabilities. They should also have interactive access to all services of this new economy.

[14] As for the implications of the eEurope concept vis-a-vis the consumers, this paper cannot address them in more detail, nevertheless as further literature see e.g.: Council Resolution 1999/C23/01 of 19. 01. 1999. on the consumer dimension of the information society, OJ C 23

the establishment of an appropriate regulatory framework for digital television services with Internet capabilities, (v) the establishment of the security network of the eEurope concept from an IPRs point of view (e.g. unsolicited mails, viruses, or credit-card abuse etc.) as well as addressing its criminal law implications at EU level,[15] in addition to this, this pillar covers also the data-protection related issues of the new economy (vi) finally the establishment of an appropriate regulatory framework for (3G mobile) radio spectrum in the Community.

We have to bear in mind all the above-referred regulatory pillars when addressing the legal issues of the process aiming at building up an EU completing a knowledge-based information society by 2010.

2. The Swedish Presidency's contribution to the 'eEurope Action Plan'

2.1. Preparing the Stockholm Summit

Sweden took over the Presidency from France on 1st January 2001. As known this was for the first time that Sweden after her accession to the EU in 1995—could hold the Presidency. That is why in the Semi-annual Presidency Programme, Sweden underlined the following:

"On 1 January 2001, Sweden will for the first time assume the Presidency of the EU Council of Ministers. Sweden's foremost ambition is to serve the interests of the whole of the Union and its citizens, to ensure openness and continuity and to carry the issues on the EU's agenda forward. Three areas share top priority on the Goverment's agenda: Enlargement, Employment, Environment. These three Es will be distinguishing features of the Swedish Presidency." (page 2).

One could say, that eEurope was not, therefore, addressed by the Swedish Presidency as one of the Presidency's priorities. But based on the concrete results of the last six months—we can contradict to such a presumption by

of 28. 01. 1999, 1–3. From the scientific literature: N. Reich: Consumer law and e-commerce, *Competition and Consumer Law Journal,* 2000, 180–200.

[15] See e.g. the proposed Framework Council Decision on harmonisation of certain Member State criminal law provisions relating to fraud and counterfeiting involving all non-cash means of payment (including electronic payments) so that they are recognised as criminal offences throughout the Union and punished with appropriate sanctions, COM(1999) 438 final. Similarly see: 'Commission Communication on fraud prevention', Written procedure (2001) 03.

arguing for that on the contrary, *eEurope was in fact the fourth E in the completed priorities* which brought also together with the political breakthrough achieved with regard to the enlargement process a great success for the Presidency as we will see below.

We can develop the following elements of the Presidency programme which may prove that further implementing the eEurope Action Plan 2002 was, indeed, a priority for Sweden:

a) (on page 4 under the heading 'Full employment and high growth in a competitive Union') it is stipulated: *"At its meeting in Lisbon in March 2000, the European Council established a new strategic goal for the Union: the creation within a decade of the most dynamic and competitive knowledge-based economy in the world with the potential for sustainable economic growth, more and better jobs and greater social cohesion. It was established at the same time that* ***full employment should be a goal of the Union's economic and social policy****. These (the implementation J. Cz.) measures* are to be followed up at annual spring summit meetings, the first of which is to take place in Stockholm in March 2001 during the Swedish Presidency. *The Stockholm Summit must show both Europe's citizens and the world that the Union's objective defined at Lisbon is being taken seriously* and that the work of modernising the European model continues" (page 5).

b) (on page 7, ad. 'Education and research'), stipulated: "Increased broadly based investments in universal education and vocational training of high quality are preconditions for achieving the new strategic goals for the Union's work set out in the conclusions of the Lisbon Summit. *The Report of the Education Council to the European Council in Stockholm should lay the foundation for a comprehensive strategy aimed at creating a learning Europe* and raising the general level of knowledge in the Union. In this strategy, Sweden would particularly like to contribute to progress in equipping young people and adults to be able to utilise the potential of information and communication technology and in developing the different components of lifelong learning. Sweden intends to contribute to the *succesful implementation of the action plan for e-Learning*. The importance of equality between men and women will also be emphasised in this context. Another objective is to complete the preparation of the Commission's proposal for a recommendation on mobility of students, researchers and teachers, and to follow up the action plan approved by the European Summit in Nice."

c) (on page 9., ad. 'The internal market and consumer interests') stipulated: "Sweden intends to take *various steps to promote an efficient internal market that operates in the interests of the consumers*. The aim is that the internal

market should offer concrete advantages in the form of more safe products and services at competitive prices.The legal and economic interests of consumers will be promoted and protection against health hazards and hazardous products enhanced. In this way, consumers will acquire greater confidence in the Union and the internal market.... *Sweden intends to devote attention to intellectual property law*—e.g. copyright, trademarks, patents, particularly *Community patents* and design registration—one of the internal market's most crucial areas. IPRs will be of growing importance for growth, not least against the backdrop of new technology. An important issue that Sweden intends to pursue during its Presidency is the formulation of clearer and simplier rules for the Internal Market.

As the presiding country, *Sweden will strive to ensure* that the European Parliament and the Council can *adopt the new package of legislation on public procurement not later than in June 2001.*"[16]

(on page 10) "Work is in progress to adjust the rules for VAT ... work on *a Directive concerning value-added tax and e-commerce*[17] may be mentioned in particular" or "Great importance is also attached to the Commission's Green Paper on security of energy supply".

d) (on page 11 ad. 'Telecommunications and IT') stipulated: "The significance of telecommunications and IT for growth and employment is steadily increasing and special attention will be devoted to this area at the meeting of the European Council in Stockholm. Greater ability to exploit the new technology is crucial if we are to provide effective communications services for citizens, create new, and develop existing, businesses in goods and services, and promote innovation and research and development in Europe. Furthermore, the European telecommunications and IT industry needs to be able to assert itself in the face of tough global competition. In order to contribute to effective competition in the telecommunications sector, *work will focus on the formulation of Community legislation on electronic communication during the Swedish Presidency. Sweden will follow up the Commission's eEurope initiative and the Action Plan adopted at the European Council in Feira. At the Summit meeting in Stockholm, a first report will be discussed on the contribution of this action plan to the development of a*

[16] Unfortunately, the legislative package on public procurement to my information couldn't have been adopted by the time when the Göteborg Summit was held. See: the proposal for a Directive on the co-ordination of procedures for the award of public supply contracts, public service contracts and public works contracts, COM(2000)0275 final.

[17] The draft amending Directive on VAT (within the framework of e-Europe notion) couldn't have been adopted either by the end of the Swedish Presidency.

knowledge-based information society and the priorities that should be established for its continued implementation. The Presidency will energetically strive to ensure that the new information society and all the new technology are available to all and that the new information technology is fully utilised in all sectors of society."

e) (on page 16 'A Union close to its citizens') stipulated: "Regarding cooperation in the area of civil law, Sweden is particularly interested in making progress in issues that are crucial to the ordinary citizen. The realisation of the internal market presupposes that *the rights of people and businesses have legal force accross national borders.* Measures to simplify and speed up *execution of judgements in other Member States* are important in this context. *Cooperation between courts of law in the Union when evidence is to be taken in another Member State will also be improved.* Another high priority issue is the *establishment of networks* which, inter alia, will give citizens *easy access to information about the court procedure in Member States and concerning the material rules that apply*, for example in connection with purchasing products or leasing a holiday home (vide: so-called EEJ–NET 'clearing houses'—J. Cz.)"[18]

f) (on page 22 ad. 'An open, modern and effective Union/Transparency') stipulated: "Sweden attaches great importance to ensuring that the relevant legal instrument that is to be adopted not later than May 2001 leads to improved access to documents kept at EU institutions".

All the above shows that while Enlargement (number 1 priority) was about 1,5 page in the Presidency's Programme, the eEurope-related issues covered more than 4 pages, and set out very concrete actions/tasks to be made or to be carried out. Consequently I believe that eEurope was really a priority for Sweden, which Member State is anyhow one of the most advanced frontrunners of the eEurope idea.

[18] In this field, Sweden has achieved a great deal in the last six months, because all the earmarked legal acts and other measures have been enacted: (1) further steps on implementing Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, OJ L 160 (30. 06. 2000) 37., (2) similarly further steps in implementing Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlements of consumer disputes, OJ C 155 (06. 06. 2000), 1, (3) adoption of Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes, OJ L 109 (19. 04. 2001) 56. (which is in fact a revision of the similar Commission soft-law measure adopted still in 1998), (4) adoption of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L 012 (16.01.2001) 1.

2.2. Commission Communication 'eEurope 2002' Impact and priorities'

This Paper is an excellent summary of the state of play where the EU stands at completing the eEurope Action Plan (See: Annex I).[19]

It can be submitted that while the Goteborg Summit was deemed/planned by the Presidency to be an 'Enlargement-focused Summit', it is also clear that the extraordinary Summit, held in Stockholm[20] was –according to the Presidency schedule devoted to the progress-reporting on what has been achieved from the Lisbon Strategy, and how to further proceed with its implementation!?

The Commission Communication on eEurope 2002/Impact and Priorities, adopted in Stockholm, is a very important summary document on what has been done so far as well as on how to go on. In this respect, the following points should be stressed:

- good progress on e-government (adoption of a Work Programme on e-government /establishing electronic market places for e-procurements in the public sector/ see: on page 15, or adoption of a list of possible public services at net, see: point 3.6. and Annex I on page 19)
- good progress on institution-building (IB) actions (chapter 2)
- clear-cut programming for the future (chapter 5)
- specific chapter about how to involve the Candidate Countries (chapter 4)
- decided that eEurope should reach the EC financial scheme as well so that it could be gradually in an efficient way reflected in the implementation of the structural policies till 2006 (pages 11–13).

[19] The annexed tables are taken from the 'Communication from the Commission to the Council and the European Parliament on Realising the EU's potential: Consolidating and extending the Lisbon Strategy/Contribution of the European Commission to the Spring European Council Summit to be held in Stockholm on 23–24 March 2001, COM(2001) 79 final, 30–33 (see also: pages 18–20). This was an important supplement to the 'Impact and priorities eEurope 2002' Communication paper. A Third Paper, which was submitted to the Stockholm Summit, is a Commission Staff Working Paper on the 'First Report on progress towards the European Research and Innovation Area', which Report reflected also on the implementation of 'Commission Communication on Innovation in a knowledge-driven economy', COM(2000) 567, 20. 9. 2000.

[20] See: in more detail: Presidency conclusions of the Stockholm Summit, Chapters VI. VIII.

2.3 Progress achieved in establishing the earmarked regulatory frameworks

Under the Swedish Presidency, as explored above, good progress has been made in terms of successfully completing eEurope Action Plan. Nevertheless some delays/problems should be also mentioned in order that a correct picture could be put in place in this respect. The Swedish Presidency couldn't reach progress in the following areas:

- the earmarked regulatory framework for radio spectrum not established,
- the telecoms package not adopted (although the deadline is end 2001),
- the new regulatory framework for public procurements in the classical sectors not adopted despite the fact that foreseen under the Swedish Presidency, the amending Directive on VAT (in the context of the e-commerce including the use of electronic invoicing for VAT purposes) not adopted (although the final deadline again is end 2001),
- the Directive on distance marketing of financial services not adopted,
- the proposed Directive on copyrights and neighbouring rights in the information society not adopted,
- an 'eu.'Internet domain name is not yet available.

We hope that under the Belgian Presidency further progress can be reached in the above fields too.

2.4. Goteborg Summit, Involvement of the Candidate Countries

At the Goteborg Summit, the Swedish Presidency completely fulfilled the tasks, defined in the Commission Communication on 'eEurope 2002/Impact and Priorities' under the point 4. (eEurope+ an initiative by and for the Candidiate Countries).[21] In the Presidency conclusions, the following reads: *"Taking into account of their particular situations, candidate countries are invited to translate the Union's economic, social and environmental objectives into their national policies. The intention of candidate countries to adopt eEurope+initiative is a successful example. Starting from Spring 2003, the Commission will begin covering the candidate countries and their national policies in its annual synthesis report"* (point 11.). This conclusion is a very good message for the candidate countries, because this means that they will be actively involved in the policy cooperation of the eEurope concept since 2003 as if they were already Member States. The Goteborg Summit also adopted the 'Common Action Plan on eEurope 2003' which sets clearly out those tasks (including the corresponding

[21] See: COM(2001) 140 final on pages 17–18.

deadlines as well) which the candidate countries must consider before accession and shall complete in order that they could be also ready by the time of accession from this point of view.

The above e-Europe Action Plan for the Candidate Countries aims to help in accelerating reform and modernisation of the economies in the acceeding Central and Eastern European Countries (hereinafter: CEECs), encourage capacity and institution-building, improve overall competitiveness, and allow the CEECs to leverage their strengths to the advantage of their citizens. In particular, e-Europe+ recognises that there is a basic need to ensure that all citizens are offered the possibility of access to affordable communications services in order to avoid a digital divide the Western part and Central-Eastern part of Europe in longer terms.

The Action Plan is based on four objectives:

- accelerate the putting into place of the basic building blocks of the Information Society,
- a cheaper, faster, secure Internet,
- investing in people and skills,
- stimulate the use of Internet.

Tha Action Plan consists of 27 pages, it embodies more than 100 concrete actions the Candidate Countries should carry out before 2003 (with clear-cut deadlines and fund-raising-schedule) plus we can find therein a well-designed monitoring regime.

This Action Plan is really a good paper for the CEECs to fit their on-going economic transformation– which is far away not yet completed– into the process of globalisation and in terms of how actively becoming a Member State of a knowledge-based information society– like the EU envisaged to be by 2010.

3. Challenges for the Candidates Countries after the Swedish Presidency

3.1. The notion of an 'information society' in Central and Eastern Europe

It should be stressed that the Central and Eastern European Countries they are all in practical terms now in transition. This is the process what we call 'economic transformation' in the post-communist rgeion in Europe. In other words what we at present all are living in *it is a transition process from a state-ownership-based central planning (command) economy into a functioning market economy in which the private ownership must be dominant.* Beyond doubt this is a historical process which–as generally believed– far away not yet finished. The new challenges brought into this historical transition process by the forthcoming EU accession and within this accession process by the new notion of 'eEurope' (new economy) is

really a 'great endeavour' the transition CEECs will have to cope with in the next decade to come. The gap, however, is still too big, for this reason see a comparative analysis, published recently in Uniting Europe (Attached as Annex II).

3.2. A new dimension of the 'constantly evolving acquis"

As well-known from the scientific literature, the accession acquis of the EU which the CEECs should take on by the time of accession the latest is a given acquis (a 'lex date'[22] using the ancient Roman law term). Even this acquis is one being 'constantly evolving'. A good proof for this characteristic is the recently-occured EC acquis following the Lisbon Strategy on 'building up a knowledge-based Information Society' or enacted so far in terms of the evolving new 'eEurope concept' within the EU. Undoubtedly this new acquis is an additional burden put/imposed on the Candidates "uniletarelly" by the EU (since the Europe Agreements obviously didn't even mention this), which burden—and this is also clear—will be further developing.

Since March 2000 (or if one wishes since April 1998 when the accession negotiations with the CEECs started) more than 20 new secondary legal measures have been adopted (or being currently under discussion) within the EU. This leads me to suggest that a post-screening meeting would be advisable to be held in the near future with the Candidates despite the fact that the relevant negotiating chapters have been provisionally closed with all of them.

A good summary of the situation was given in Gothenburg in June 2001 by the European Council in the Action Plan of eEurope 2003 for the Candidate Countries:

"While not interfering with the negotiation process, eEurope+ is expected to have a positive impact on the adoption and effective implementation (by the Candidates—J. Cz.) of the 'acquis communautaire' in telecommunications, electronic commerce, areas of financial services and transport services, and several other areas of economic activity".[23]

Let's hope in this.

[22] See in more detai: Czuczai, J.: Some thoughts about Hungary's process of accession to the EU' in: *Magyar Jog*, July 1999, 390–397., or Czuczai, J.: 'Von der Rechtsstellung eines assoziierten Staates zum Status eines Mitgliedskandidaten im Ausschnitt des Prozesses der Rechtsangleichung' in: *Magyar Jog*, September 2000, 513–523., in particular on page 517.

[23] See: Press Release issued on 16 June 2001 (http://www.europa.ei.int/comm/gothenburg council/eeurope2 en.htm website) on 'Heads of Government of EU Candidate Countries agree on common action to address the challenges of the Digital Economy, page 2.

3.3. Challenges and difficulties for the CEECs

On this occasion, I would like to highlight only two main challenges (or difficulties) the Candidate Countries should confront with in the next years to come:

(i) the first problem is with the new legal terminology, the 'eEurope acquis' has thus far developed (or will further bring in the EC legal phraseology). This legal terminology is brand-new because it doesn't comply with the legal and linguistic traditions of the Candidates, and I am convinced that the interpretation of the adopted national transposition measures in the CEECs will be not easy in the future.

(ii) another problem relates to the codification on e-commerce etc. and the necessary codificatory techniques. Difficult issue is where and how to regulate the law on IT technology or e-commerce etc? In the Civil Codes, or in the Commercial Codes, where available, or in the Consumer Protection Codes, where available?[24] By one framework law with several lower-level implementing measures, or in one very detailed Act? What about the role of the standards (EN, CEN, ETSI as well as the domestic ones?) in this law-making domain? It is almost unavoidable that the transposing national regulatory framework be fragmented, undesirably comprehensive and over-structured, whereby making the practical implementation (the application and the interpretation of the relevant laws) thus sometimes very difficult. That is why I think that the concerned judges, law-enforcement agents, prosecutors, attorneys, notaries should be trained in this new branch of law as early as possible. Special vocabularies/glossaries and law-dictionaries are also needed to be developed in my opinion.

3.4. Legal implications from a Hungarian perspective

Hungary was among the first Candidate Countries, which reacted very promptly on the new challenges brought by the fact that the Action Plan eEurope 2002 was adopted in June 2000 at the Feira EU Summit.[25]

[24] See: Vékás, L.: 'The problems of preparing a new Civil Code in Hungary' in Annales 2000 October of the Hungarian Law Society, Budapest, 173–208, in particular on pages 181. et seq.

[25] See as further literature in Hungarian: (1) Újváriné Antal E.: "Az elektronikus aláírás és a hitelesítés-szolgáltatással összefüggő felelősségi szabályok" (The electronic signature and the rules on responsibility for accreditation-related service). In: *Jogtudományi Közlöny*, 2001 április, Budapest, 179–192., and Csenterics Á.: "Az elektronikus aláírás, elektronikus irat szabályozásá-

The Hungarian Government reached operative decisions after the EU Lisbon Summit like for example:

- setting up a special Government Commissioner post within the Prime Minister Office,[26]
- setting up a special (standing) Parliamentary Committee on Information Society,
- adopting a "Strategy for National Information Society", with an allocation of 40 Billion HUF in the Act on Two-years Central Budget for implementation,[27]
- adoption of an intensive legislative programme in relation to building up an information society in Hungary,[28]

nak kérdései" (The electronic signature, the questions about regulating on the electronic documents). In: *Napi Jogász*, Budapest 2001/2. 17–18, or special supplement of *HVG* (Weekly World Economy) on 'Business at Net', issue of 2001, published on the 3rd of March, 65–90. as well as the article on electronic signature, written by Imre Tevan, in the same issue of *HVG* on 117–120.

[26] See: 1045/2000 (V. 31.) Korm.h. informatikai kormánybiztos kinevezéséről, illetve 1050/2000 (VI. 23.), and Korm.h. az államigazgatási informatika koordinációjának továbbfejlesztéséről szóló 1066/1999 (IV. 11.) Korm. határozat módosításáról, and 1051/2000 (VI. 28) Korm.h. a kormányzati munkamegosztás megváltozásával összefüggő egyes feladatok ellátásáról. (Government Resolution No. 1045/2000 (V. 31) on the appointment of a Government Commissioner for Informatics and the Government Resolution No. 1050/2000 (VI. 23) on the amendment to the Government Resolution No. 1066/1999 (IV. 11) on further developing the coordination on informatics in terms of public administration, plus Government Resolution No. 1051/2000 (VI. 28) on certain tasks relating to the changes in the division of government responsibilities.) Similarly see: "Elektronikus közbeszerzés/Digitális tender: Az informatikai kormánybiztos (Sik Zoltán) első terve a közbeszerzés minden láncszemének elektronizálása." (Public procurements by electronic means/Digital tendering: the first plan of the Government Commissioner for Informatics, Mr. Zoltán Sik, about digitalizing all chains of the public procurement process.) *Figyelő*, issue of 2000 június 29–július 5, page 25.

[27] See: Teván, I.: "Informatikai fejlesztési program / Civilek a pályán" (Development programme for informatics / ordinary people on the track), *HVG* (Weekly World Economy), issue of 26. 05. 2001, 120–121. As far as the most recent statistics in Hungary are concerned in terms of the eEurope concept see: "IDC-felmérés a visegrádi országok internetpiacáról – hozzáférésben már az élen járunk" (IDC survey on the Internet-related market-segmentation in the so-called Visegrád countries – regarding access, we are already at the frontline). *Világgazdaság*, july 12 2001, page 7, or Gecse, M. Szabó, B.: "Ezerféle ügyintézés a világhálón" (Wide-ranging administration of matters on the world-net). *Népszabadság*, july 24 2001, 17.

[28] See: in: *Európa 2002*, Vol. 2001, issue No. 2, Annex B, pages I–XXXII, in particular on page XXII.

after the Czech Republic, Hungary is the second Candidate where national transposition measure was enacted on electronic signature (Act No. XXXV. of 2001 on electronic signature),[29]
adoption of the Act No. XL on Telecommunication ('A Hírközlésről').[30]

But, there are also deficiencies/problems, which need to be overcome in the near future, like for example:

- delay in the implementation of the Government Resolution relating to the establishment of the central government IT system which can make the public procurements institutionally possible through electronic means by the 1st February 2002 the latest,[31]
- the Hungarian National Programme for the Adoption of the Acquis (NPAA) doesn't really reflect on the eEurope Action Plan 2002, in fact there is only one page addressing this topic,[32]
- delay in legal approximation like for example amendment to the Act No. XC of 1995 on public procurements, amendment to the 1992 Data Protection Act,[33] or in the field of the consumer protection, delays in amending

[29] For further literature see: 1075/2000 (IX. 13.) Korm.h. az elektronikus aláírásról szóló törvény szabályozási alapelveiről és az ezzel kapcsolatban szükséges intézkedésekről (Government Resolution No. 1075/2000 (IX. 13.) on the legislative principles of the bill on electronic signature and the other necessary measures related,....), also Jambrik G.: "Mérföldkő, de nem varázsszer: E-aláírás-aláírás-e?", and "Elekronikus aláírás Szignált törvény" (Cornerstone, but not black magic: e-signature, is it really a signature?'. (Electronic signature-signed Act), *Figyelő*, 2001, issue of június 7–13, 43–45.

[30] It should be noted that according to Article 107 of the recently adopted Act more than 50 implementing Decrees will have to be adopted till 23rd December 2001 when the whole Act will enter into force (Article 103(1)). I doubt whether such a domping law-making could succeed by the given deadline. Similar problem can be identified with the new Act on electronic signature (Article 27, more than 10 implementing Decrees should be adopted by September 2001 when the new Act will enter into force).

[31] See: Article in Hungarian in: *Világgazdaság* of 21. 02. 2001 on "Kérdéses az elektronikus közbeszerzés startja – Több hónapos késésben a programme" (The beginning of public procurements by electronic means is questionable. The programme is delayed with many months..., on page 8.

[32] The revised Government Resolution No.: 2184/1999 (VII. 23.) on the NPAA, in particular Vol. I. 18.

[33] See: "Digitális bukta/Internetcégek nehéz helyzetben-Kalauz az Internethez" (Digital cake / Net-companies are in difficult position Guidance to the Internet), special Supplement to the June 2001 issue of *HVG* (Weekly World Economy), 4–8., in particular the interview with Majtényi, L. former Ombudsman for Data Protection in Hungary on page 5. See also: Directive 95/46/EC (OJ L 281, 23. 11. 1995, 31–50.) and Directive 97/66/EC (OJ L 24, 30. 01. 1998,

the 1997 Framework Act on Consumers' Rights, or the 1993 Act on Product Liability, or the 1959 Act on the Civil Code etc. (not talking about the still prevailing tasks relating to e.g. the full transposition of the new injunctions' Directive[34] for the protection of consumers'interests, or of the new Directive[35] on certain aspects of the sale of consumer goods and associated guarantees, or of the whole e-commerce Directive from a consumers' point of view, or of the Directives on e-money etc.),

Concerning protection of consumers' rights, I should underline in more general terms that I don't think that in Hungary 'the consumers' would be really placed in the centre of the law-making processes, which is a huge problem in my view (e.g. reconciliatory committees are very poor, NGOs are under-financed, court proceedings are time-consuming and not efficient etc.).[36] I am convinced that this should change otherwise the necessary trust on the consumers'side in the service-providers and in general in the 'new economy'will be aborted (not in place), which trust is a pre-condition of the success of our 'eEurope' project.

similarly no significant progress in amending the laws on taxation (e.g. VAT) with regard to implementing the eEurope Action Plan in Hungary,

there are still regulatory loopholes in Hungary for example in the field of financial services where further law-making is needed (see: distance marketing or electronic payments etc.),

Hungary should also make further efforts to prepare for the proper implementation of EEJ-NET (European Extrajudicial Network for Alternative out-of-court dispute settlements) as well as for FIN-NET.[37]

1–8.) the Data Protection Directives deal with the protection of individuals with regard to the processing of personal data and the right to privacy in the context of electronic commerce. The full transposition of these Directives requires in Hungary for the amendment to the 1992 Data Protection Act (adoption of this amending law was originally scheduled by the Government by end 2001. This modification, however, requires for 2/3 majority in the Parliament. No draft bill made yet public!?).

[34] See: Directive 98/27/EC of the European Parliament and of the Council of 19. 05. 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11. 06. 1998, 83–87.

[35] See: Directive 1999/44/Ec of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171, 07. 07. 1999, 12–15.

[36] See: the last Regular Report 2000 of the European Commission on Hungary's progress towards accession, COM(2000)705 final, 67–68.

[37] See: also Council Resolution of 19 January 1999 on the consumer dimension of the information society, OJ C 023 (28. 91. 1999.), 0001–0003. From the scientific literature, see: for example Reich, N.: "Consumer Law and e-commerce", *CCLJ*, 2000, 185–200. Here I also have

4. Conclusions

I think that the following conclusions can be drawn up:

following the adoption by the Gothenburg Council Summit of the *"Common Action Plan on 'eEurope+2003 A cooperative effort to implement the information society in Europe"*—which programming paper was prepared by the Candidate Countries with the assistance of the European Commission, now the main challenge/task for the candidate countries is to get this Action Plan properly and as soon as possible converted/transferred into their own domestic legislative schedule as well as IB-programming system (icluding certainly the relevant financial implications);

- in my view, it will be essential that in the Candidate Countries before accession the "protection of comsumers" rights be given a political priority.[38] This will claim/require from the Candidates for a remarkable change in way of thinking (how they approach the consumers' affairs). Without this the implementation of the Common Action Plan on eEurope +2003", it appears to me, cannot be successful;

final conclusion or rather suggestion can be that I think that in the implementation of the Community legislative programme on eEurope2003, the Candidate Countries should be involved already in the formulation process of the proposed secondary legal measures (maybe in the status of an "observer"), since following Gothenburg, building up an "eEurope" is now a common great challenge, and in fact a joint project for a "Re-united Europe".

to note that in my view the Hungarian Code on Civil proceedings (Act No. III of 1952) should be amended too, and still before accession. This is because the current procedural rules are still not 'consumers'-focused' in the public administrative litigations, they still in fact protect the interests of the economic operators, especially by virtue of putting the 'burden of proof' on the shoulders of the poor consumers who are anyway out of possession. This approach must change. I think that the economic operator who is in stronger position in almost all aspects should prove that it did its best to obey with the relevant laws protecting the interests of the consumers.

[38] Like recently in Slovenia, where in 2000 the Slovenian Parliament discussed and adopted a 'Two-years Policy Programming Paper on Consumer Protection', submitted by the Slovenian Government. When the Hungarian Parliament discussed such a programme?

ANNEX I.

LISBON CONCLUSIONS	COMMISSION LEGISLATIVE AND POLICY PROPOSALS	ADOPTED LEGISLATION	BENCHMARKING AND OTHER INITIATIVES
AN INFORMATION SOCIETY FOR ALL	✓ eEurope Action Plan ✓ eEurope 2002 Update (Nice) (Report) ✓ Telecoms Package (7 measures) ✓ Creation of.eu Internet domain name (Regulation) ✓ Amendment of VAT rules for e-commerce electronic invoicing (2 Directives) ✓ eLearning Intiative (Action Plan) ✓ Communication on organisation and management of the Internet	✓ e-Commerce Directive ✓ Directive on supervision of electronic money institutions ✓ Regulation on local loop unbundling ✓ Dual Use Regulation (eases export of high tecnology products) ✓ Brussels Regulation (Rules for jurisdication and recognition of judgements)	✓ European Extra Judicial (EEJ) Network created in April 2000 ✓ Econfidence Web Site launched by the Commission. (http://econfidence.jrc.it) ✓ Commission awarded funding for the Géant network (10 fold upgrading in speed of research networks by end 2001 ✓ eEurope Scoreboard (Feb. 2001)
CREATE A EUROPEAN AREA OF RESEARCH AND INNOVATION	✓ Community Patent (Regulation) ✓ Community Design (Regulation) ✓ Communication on the European Research Area and future orientations for research (2002-2006) ✓ Staff paper on science, society and the citizen		✓ Benchmarking research policy
CREATING A FRIENDLY ENVIROMENT FOR STARTING UP AND DEVELOPING INNOVATIVE BUSINNESSES ESPECIALLY SMES	✓ Communication on Enterprise Policy ✓ Competitiveness Report 2000 ✓ Communication on innovation in a knowledge-based economy ✓ Communication on financial instruments supporting SMEs	✓ Multiannual Programme for enterprise (2001–2006)	✓ Small Business Charter (endorsed at Feira) ✓ Benchmarking Enterprise policy: first results from Scoreboard ✓ Innovation Scoreboard ✓ Launching of new Best procedure

ISBON CONCLUSIONS	COMMISSION LEGISLATIVE AND POLICY PROPOSALS	ADOPTED LEGISLATION	BENCHMARKING AND OTHER INITIATIVES
ECONOMIC REFORMS FOR A COMPLETE AND FULLY OPERATIONAL INTERNAL MARKET	✓ Public Procurement Package (2 measures)	✓ European Company Statue (Adoption following further reading in EP in Spring 2001	✓ Single Market Scoreboard
	✓ Proposal on modernisation of the rules implementing Articles 81 and 82 (Regulation)	✓ Commission Regulation on state aid for SMEs	✓ Report High Level Group on Single European Sky
	✓ Proposal on a further stage of postal liberalisation (Directive)	✓ Commission Regulation on state aid for training	
	✓ Regulation on public service obligations in passenger transport	✓ Commission framework for state aid for environment	
	✓ Regulation on the creation of a European Air Safety Authority	✓ Commission framework for state aid for employment	
	✓ Cardiff Report		
	✓ Communication on general interest services (Updating 1996 Communication)		
	✓ Communication on an internal market strategy for services		
	✓ Communication on progress on building the internal market for electricity		
	✓ White paper on a revised strategy for the common transport policy		
EFFICIENT AND INTEGRATED FINANCIAL MARKETS	✓ 3rd Progress Report on the Financial Services Action Plan		✓ Creation of Wise men (Lamfalusssy) group (July 2000) Interim Report (Nov 2000) Final Report (Feb 2001)
	✓ Communications on the modernisation of the Investment Services Directive		✓ Implementation on 1997 Code of Conduct on harmful tax treatment

LISBON CONCLUSIONS	COMMISSION LEGISLATIVE AND POLICY PROPOSALS	ADOPTED LEGISLATION	BENCHMARKING AND OTHER INITIATIVES
	✓ Mid-term report on the implementation of the Risk Capital Action Plan ✓ Communication on accounting strategy ✓ Proposal for a directive on supplementary pension funds		
COORDINATING MACROECONOMIC POLICIES: FISCAL CONSOLIDATION, QUALITY AND SUSTAINABILITY OF PUBLIC FINANCES	✓ Communication on the contribution of public finances to growth and employment, the quality and sustainablity of public finances	✓ Broad Economic Policy Guidelines 2000 (Commission Recommendation)	
EDUCATION AND TRAINING FOR LIVING AND WORKING IN THE KNIWLEDGE SOCIETY	✓ Recommendation on mobility for students, trainees and teachers ✓ Communication on e-Learning ✓ Memorandum on education and lifelong learning		✓ Mobility Action Plan for students, trainees and teachers
SOCIAL POLICY AGENDA	✓ Towards a new social policy aganda (Communication)		✓ European Social Agenda and related scoreboard (European Council Nice)
MORE AND BETTER JOBS FOR EUROPE: DEVELOPING AN ACTIVE EMPLOYMENT POLICY		✓ Employment Guidelines 2001	✓ First stage of consultation of the social partners on work organisation
MODERNISING SOCIAL PROTECTION	✓ Communication on safe and sustainable pensions		

LISBON CONCLUSIONS	COMMISSION LEGISLATIVE AND POLICY PROPOSALS	ADOPTED LEGISLATION	BENCHMARKING AND OTHER INITIATIVES
PROMOTING SOCIAL INCLUSION	✓ Communication on an equal opportunities framework strategy (2001-2005) ✓ Proposal for a Community action programme on exclusion	✓ Equal opportunities action programme (2001-2005) ✓ Antidiscrimination Action Programme (2001-2005) ✓ Directive on equal treatment irrespective of racial or ethnic origin ✓ Directive on a general framework for equal treatment and employment	✓ Agreement on appropriate objectives to combat exclusion (Nice)
MOBILISING THE NECESSARY MEANS		✓ MEDIA PLUS programme (2001-2005) ✓ eCONTENT programme (2001-2005)	✓ EIB Innovation 2000 Initiative ✓ Funding under RTD programme, European Social Fund, Structural ✓ Funds

ANNEX II.

EUROSTAT REPORT ON INFORMATION SOCIETY IN THE CANDIDATE COUNTRIES

Brussels, (Uniting Europe) The number of personal computers (PCs) and Internet hosts per 100 inhabitants in the candidate countries of Central and Eastern Europe (CEECs) is still relatively low compared with the EU, according to a report by Eurostat, the EU statistical office.

In 1999 it was only about ¼ of the EU average.

However the CEECs record a strong growth of the number of PCs (+19% in 1999) and the Internet hosts (+34% in 1999). The number of mobile phone subscriptions is also growing strongly (+85% in 1999).

Differences between the candidate countries are considerable: while the density of PCs in Slovenia and of Internet hosts in Estonia is close to the EU average, it stands at only about 1/10 of the EU average in Bulgaria and Romania.

Information Society 1999/2000

in million	CEECs	EU-15	USA	World
Number of PCs (Dec.1999)	7	93	141	387
– per 100 inhabitants	6%	25%	52%	6%
Internet hosts (Oct. 2000)	0.8	15,4	67.4%	6%
– per 100 inhabitants	0.8%	4.1%	24.2%	99.2
Internet users (Nov. 2000)	8	88	144	360
– per 100 inhabitants	7%	23%	52%	6%
Mobile phones (Dec.1999)	11	147	86	481
– per 100 inhabitants	10.7%	39.1%	31.7%	8%

Source: Eurostat (ITU, Netsizer, NUA).

'Information Society Statistics: Data for Central European Candidate Countries.' Eurostat, Statistics in focus, industry, trade and services. Theme 4–6/2001-0-21.

For further information: http://www.europa.eu.int/conn/eurostat/.

This report is also available from the Office of Official Publications of the European Communities, 2 rue Mercier. L-2985 Luxembourg Tel. +352.2929.41.118, Fax: +352.2929.42.709, http://eur-op.eu.int/fr/general/s-ad.htn, E-mail: info.info@cec.eu.int.

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KATALIN PARTI*

Domestic Violence in Hungary, Concerning the Public Opinion, the Researches and the Data Available**

I. The Public Opinion

There are no more serious public talks on domestic violence than those are published in weekly magazines for women. People usually don't go deeper in this field since this issue is a taboo, they like the police—cannot exactly determine the phenomenon. It isn't defined where to split the private sphere and the right of the state to interfere. While there is an urgent movement all over the world to raise consciousness about gender-based violence as the most obvious form of discrimination against women, in a post-communist society such as Hungary there appears to be a contrary tendency: a withdrawal of the state from the areas of "private" violence.[1]

The question of what grade of violence must be tolerated by women in order to maintain peace in the family is one of the untouched taboos, and so this is the least mentioned media issue.

Creating the peace of the family is said to be the most important obligation of women in the recent public society. If a woman happens to seek divorce that prooves her total incapability for her simple role. Getting surrendered is the victim's shame.

In the field of violence domestic type is the mostly uncultivated: in the 1970–1980s the fact of domestic violence itself was denied. Though in 1997 rape committed by the spouse was introduced into the criminal code, 45% of the surveyed don't know if it was a crime. On the other hand many consider that the

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** The lecture was presented at the Workshop of Domestic Violence on 12th October 2001, Paris.

[1] This part follows the words of Krisztina Morvai's paper "Why Doesn't She Just Leave? Research Policy Recommendations for the Prevention and Response to Domestic Violence in Hungary", *SOCO Project Paper* No. 101 Vienna 2001. 2.

crime of spouse-committed rape is another weapon in women's hand against their husbands to have the children after the divorce as well.

The abused wife is not very rarely said to provocate the assault herself, moreover, it sounds from some of the reasons of judgements. The public opinion blames the offended party not to leave their abuser. If the woman remains beside her abuser instead of abandoning him from her free will they take it as a legal ground of abusing. Unfortunately there isn't only the wide public considers it so, but the relatives and the family of the abused also.

In a traditional patriarchal society – that is for example in Hungary – upgrowing generation has socialized for a special behaviour: for hundreds of years it was a strict obligation for women to satisfy their husbands' (even sexual) demands. This view still keeps alive in the handicapped rural regions. Those who haven't been suffered for family abuse tend to keep away themselves by speeches like *"this couldn't happen to a (so-called) neat woman"*. This "someone-to-blame mechanism" is typically owned by today's Hungarian society.

According to Olga Tóth's survey,[2] though 37% of the interwieved consider that the abuser and the abused party knows each other most of the time, there are only a few who consider domestic violence a "real" crime. The public policy takes it more serious sin if someone drank drive than if someone beats his wife sometimes. Child-beating is considered almost the least serious sin: they take beating a very useful method to keep a child under discipline. Just a few (17%) refuse child-beating unambigously.

As there is no exact state in Criminal Code for domestic violence we can point out that domestic violence is still considered a private problem in Hungary.

II. The Statistics

The Supreme Prosecution and Ministry of Justice publish statistical issue on the offended party and on their relation to the offenders every year. According to this, relatives had an outstanding role in crimes in 1999: in the case of homicide 23,2%, in the case of rape 16,8%. Cathegory of close acquintance is relatively high (24,25%) in the case of aggravated battery, while that is much lower (9,7%) in the case of crimes against property.

[2] Tóth, O.: *Erőszak a családban (Violence in the Family)*. TÁRKI Socio-political Issues, 1999.

The Department of Children and Juvenile Protection, Prosecution of the Capital looked all the juvenile offended cases started in 2000, and as a part of it, they studied the frequency of domestic violence as an affecting matter of crimes committed by youngsters. They also studied how often the Public Guardianship Authority had to be/was involved, and also when they weren't involved, though they should have been (if they could prevent crimes caused by domestic violence).

According to the statistics, traditionally and significally women act much less as a perpetrator or an offended party. In Hungary women's role in committing crimes permanently remains under 14%. (Though among the violent crimes against person there's just a few committed by women, we must admit that some of these crimes are homicides committed within the family and motivated by a sudden anger, predicted by violence against wives.) Though women's rate is low on the perpetrators' side, that is higher on the side of the offended party, particularly measuring the latency that might be rather high in this field of crimes. To go further: there is higher victimization of women in some of the crimes but, taking all the crimes men's victimisation is higher. According to the estimated data, ¼ of the homicides and ½ of the batteries are committed within the family all over the word, plus, most of the victims are women. The Supreme Prosecution measured that there is a high rate of female victims of violent crimes against life and limbs victimized within the family (22% of the female offended party of homicide and 17% of the female offended party of felonies of aggravated battery are victimized by their husbands/partners). Most of the victims are female not only in violent crimes against person but also in robberies, thefts and frauds.

While the interest in the field of domestic violence has increased in the last two years, thanks to the few surveys, will be mentioned in the following chapter, that might be the reason of the lack of specific statistics available.

III. The Researches Available

III.1. The methodology used by Krisztina Morvai in her 1998 research[3] on domestic violence was to examine all criminal court decision finalized in the year 1995 which dealt with criminal responsibility for homicide. Having identified the

[3] Morvai, K.: *Terror a családban (Terror in the Family)*. Kossuth, Budapest, 1998. (This book publishes the consequents and quotes in-deepth interviews based on the data of the research mentioned in subtitle No.1.)

sex of the perpetrator and the victim, plus the relationship between them (e.g. stranger, friend, spouse, former spouse), she identified the proportion of "domestic" homicide cases. She looked only those homicide cases, where there is basically no latency, as opposed to non-lethal forms of violence. She could proove that the frequency of domestic abuse in Hungary is not less than in "Western" societies. The most important conclusions of her research are:

The proportion of women among homicide victims is 40%. The fact that almost as many women as men are killed in violent crimes is surprising and alarming, given that the media as well as crime prevention policy, textbooks for law students and academic literature tend to present and target "violent crime" as a fundamentally male issue.

While the proportion of male victims in relation of male perpetrators is 68% (the number of male victims is 68% of the male perpetrators), the same proportion is 400% in the case of women (the number of female victims is 400% in the case of female perpetrators). It follows that violence against person is predominantly male in origin and disproportionately female as regards its victims. Consequently violence cannot be effectively approached as a "gender neutral phenomenon".

More than half of all homicide victims lost their lives in "family violence", meaning that the offender and the victim were relatives or were living in an intimate relationship without any formal family links (106 of the victims: 54%). It follows that violence in the family must be taken very seriously by the authorities and by society as a whole.

After the group of male neighbours friends and acquintances (mainly drinking partners) the second largest group of homicide victims is wives and female partners. On the basis of the number of offenders, the single largest group is that of spouses and partners.

Almost every third homicide victim was married or lived in domestic partnership with the offender.

More than half of all female homicide victims were killed by their husband/partner. This means that an adult woman is more likely to be killed by her husband/partner than by any other perpetrator. In other words, a woman has one and a half times more "chance" to be killed by her husband/partner than by anybody else.

The probability of a woman being killed by a husband or a male partner is eight times greater than that of being killed by a stranger. Consequently the media and crime prevention emphasize on "stranger danger" simply doesn't reflect reality.

Almost once a week a women in Hungary is killed by her husband or partner (48 cases in the examined year). This means that approximately 2600

women have been killed (tipically beaten to death) by their husbands/partners since the II. World War.

– The number of men killed by their wives or female partners is 14, while the number of female victims killed by their husbands/partners is 48. The "anecdotal evidence" indicating that domestic homicide is not gender-related and occurs equally in both sexes does not, at least in the case of Hungary, reflect relaity.

– Of all male homicide victims, 12% were killed by their wives or female partrners, typically in the joint family home. The ratio is 60% for female homicide victims killed by their husbands or male partners typically in the joint family home or in the woman's new home following divorce or separation.

– In 77% of cases of women killed by their husbands/spouses the court found that the victim had been previously battered (physically assaulted) by the perpetrator. There is a very close correlation between "wife battery" (domestic abuse of women) and homicide against women.

– Surprisingly the presence of wife battering was similarly frequent in the history of relationship in cases of women who killed their husbands/partners: 79%.

– 57% of all the homicides by men against their spouses/partners were committed without any weapon. These victims were basically beaten to death by the perpetrator (using his bare hands, fists and feet).[4]

III.2. Olga Tóth arranged a socio-political type survey in 1999, embracing 1010 questionnaries.[5] However 37% of the interrogated persons assume that the assaulter and the assaulted know each other, rather less consider these acts as real crimes, as real punishable crimes. This means that they consider ill-treatment in family as a tolerable movement. In the same time those who consider the phenomenon a tolerable act mostly haven't finished even the primary school (81%). This means that in this social level every 5th women claim wife-abuse is tolerable. In sum, the younger and the more qualificated a person is, he/she claims wife-abuse the less tolerable. As it is already mentioned in Chapter I. there's just a few (17%) who consider child-beating a tolerable method of enforcing the child to behave him-/herself. Tóth points out that 30% of those women who were beaten as a child were sexually abused either (this rate is 7% in the group of unbeaten). Those who are the two opposite poles of employment hierarchy (leaders, skilled workers versus trained, physical workers) are the most endangered.

[4] Formerly quoted papers of Morvai K.: Why Doesn't She Just Leave? *Op. cit.* 2.

[5] Tóth: *op. cit.*

Those who divorced are 4 times more "experienced" domestic violence by their partners. This number draws one's attention that in the background of divorces and decreasing of marriages we can find physical assault and sexual slavery. If the assaulted revealed her (physical or mental) pain the audience was her relative or friend, but only 13% of the assaulted preferred charge.

The survey proved that because it is a social taboo only 45% of the adult women considered domestic (sexual) violence a punishable act. As a result of it, only every 3rd act were reported to the police. Even less became a "case" (criminal file). Those who haven't made charge reasoned it with the followings: they were afraid of the further results (revenge) (20%), they hoped that everything would turn right (16%), they didn't want to separate their children from his father (14%), they thought there would be nobody to help (14%), or they felt ashamed of the phenomenon (9%). More than half (55%) of the cases where the police were involved the authority (police officer) seemed helpful, in 45% that seemed refusing. The police could offer specialized support organisation providing individual help (NGOs, self-government, children, women, and victim supporter organisations etc.) only in 31% of the reported cases. This rate is rather low why it takes only 5% of all the wife-beating cases.

III.3. In the year of 2000 the National Institute of Criminology arranged a monitoring-type survey on the perpetrators of violent crimes against person committed by women (who are sentenced now) against their husbands/partners.[6] We studied if there is any relating point between former victimisation by the husband/partner and latter becoming a perpetrator of violent crime against the husband/partner. It is significant, that ¾ of the crimes against life, limbs and health was committed against relatives (9/10 of it was committed against spouse/partner), and only ¼ was against stranger. This is quite different from the statistics of the whole country, which shows that 23% of homicide and attempted homicide was against relatives, and 21% of them was against spouse/partner. This outstanding difference could be explained with the random selected little sample of the interviewed persons, as well as that we interviewed only those who were under inprisonment in 2000. Moreover, it might shows that

[6] The survey is titled Female Inmates. Research and total workout by Lenke Feher and Katalin Parti. The research embraced the 3 prisons for women of the country, we took interviews and in-depth interviews with 10% of the female inmates and with all the warders and leaders. Our aim were to measure the special needs of sentenced women, how they can bear confinement, which are the similarities and the differences between the behaviour of the female and the male inmates, etc.

those who commit or attempt homicide against their partners due likely to be sentenced to inprisonment, whether the homicide was from self defence whether it was intended, whether it was preceded by wife-abuse for decades. This number lets us assume that the court more likely to examine the crime as one single act than a reason-result flow, in its context.

The study observed the former alcoholic and psychical/physical terror by the latter offended party as an indicator of a violent crime against him. Almost the half of the perpetrators of crimes against life, limbs and health admitted that they were stressed, 1/3 of them admitted to have been alcoholic when committed the crime. 1/3 of the victims were under the influence of alcohol, and 1/3 were alcoholic when assaulted. More than 1/3 of the offenders (the interviewed female inmates) were not only humiliated but also psychically and physically abused by their partners/husbands, in 42% through the former few decades (!). Only 15% of the interrogated inmates claimed strictly that they weren't abused at all. So we can point out that violent crime within the family is mostly committed by those who were humiliated and abused for years/decades by their partners, and this kind of behaviour of the abuser is indicated by drinking alcohol or the alcoholic of him.

III.4. Over the first half of this year there was an observing survey at the NIC on the topic of domestic violence. The survey was examining how to cooperate the NGOs and the authorities such as police, prosecution and the court in handling domestic violence and in preventing violent crimes within the family. We studied papers at the Department of Children and Juvenile Protection, Prosecution of the Capital, and interviewed policemen, prosecutors, NGO leaders, social workers, children, women and victim supporting organisation workers, employees of the public guardianship authority. The survey showed out that there is a rather low level cooperation which is not enough to be really effective in preventing violence in the family, and so preventing abused children/youngsters to become criminals.

IV. What is Missing

– There are no specific statistics on domestic violence provided by the police as domestic violence has not been introduced into the code yet.

– The level of connection and flowing of information between the authorities (self-government, public guardianship authority, police, prosecution and court) and NGOs is rather low.

There are no special shelters for battered women in Hungary. For those who escape violence with their children there are mother-homes and they still can be accomodated in homeless shelters, but just temporarily (two months in average) and non the less, they have to pay for the accomodation. But for those who escape without children homeless shelters are the only choice. In addition, there are no skilled workers in shelters to protect victims from the husband/former husband/partner's agressive manner they often act in (separation abuse). Social workers very rarely have the special knowledge how to lead/support victims to construct their private life.

– There is no equal, strict rules in police departments for handling domestic violence– how to act when there is a wife/child battery reported: they don't know when they have the right to intervene, to take the assaulter in custody, etc. Moreover, they considers domestic violence as a private affair, that should be influenced by the authority only when "there is bleeding". By this they mean if there are life-threatening, open injuries caused some kind of weapon or instrument such as knife. Though, several researches prooved that most of the women who die as a result of domestic abuse are "simply" beaten to death.

V. One Step Forward

There is a recommendation to record the statement of domestic violence and stalking in Criminal Code and/or Code of Offences, as well as in police rules. This recommendation is still Ministry-level discursion. Due to the lack of restraining/protecting orders at this stage, the arrest of the perpetrator, in cases which are sufficiently supported by evidence, is the only way to protect the victim. Responding to that, one part of the recommendation is addressed to the National Police Chief Constable and to the Home Office Minister to issue a circular on rules of conduct which are obligatory for each and every police force, with the active involvement of women's NGOs. A tougher arrest police were recommended at least as a temporary measure until the instruments of restraining orders/protecting orders are introduced into the legal system. Moreover they also recommended that, even before the necessary of other legal and political changes, all emergency calls for invention in domestic violence must be registered, the measures taken by the police must be documented and a list of available sources including hotlines and emergency accomodation facilities must be handed over to the women who report domestic violence. Another of the recommendations was to immediately introduce the practice of notifying the victims about the release of the arrested suspect, as a crucial element in the protection of victims. The recommendation is also the introduction of a new

criminal offence into the Criminal Code or/and the Code of Offences which would focus on the actual characteristics of domestic violence. Obviously the charge on domestic violence would carry a tougher sentence than separate, ad hoc battering incidents. Court must take domestic violence in its complexity, without taking it out of its context. Because violence in the family usually does not end with ending the relationship itself, stalking as an apparing form of abuse after the separation (divorce or escape from home) "stalking" itself also should be criminalized.[7]

There is a poster campaign on domestic voilence starting 17th October 2001 invented, supported and totally worked out by NANE,[8] a famous Hungarian women supporter NGO. There are posters pasted up over the territory of Budapest railway stations. The campaign due to last for 5 months, until next March. The posters are pasted on well-known, spectacular places (e.g. on the platform) where travellers can easily notice the attentions that are addressed not only to abused persons but also their relatives as well as those who are aware of the assaults arised in other families. The organizers' aim is to call up the attention for domestic violence as an existing, widespread, real problem in Hungary and moreover that ill-treatment in family is not a common method of "training" for the right behaviour but an unrighteous, punishable act (a forceful method of ruling) instead.

VI. Summary

Domestic violence is still a private problem in Hungary. People cannot define and as a result of it they cannot validate what takes ill-treatment in the family. This kind of haisy consideration of violence and sexuality could be cleared mostly by the media. Press should sold the controversions of what is reality and what is believed. If the statistics of domestic violence were known by the public women might be less charged with "seeking divorce after every tiny affairs".

There are no established and formal (written) guidelines and rules of conduct or protocol for the police on what to do in cases of domestic

[7] This chapter follows the words of Morvai's K. former quoted papers Why Doesn't She Just Leave? *Op. cit.* 11–12.

[8] NANE: (Nők a Nőkért Együtt az Erőszak Ellen) Non-Governmental Organisation named Women for Women Together Against Violence.

violence.[9] There is not even an expression like "domestic violence" or "crime committed within the family", but there is "family scandal" (appearing abbreviation "FS" in the minutes) instead, suggesting that there are two physically equal parties within the family who agrue. It assumes that woman has a leader role in starting domestic violence: she provocated violence against herself by making her husband angry.

That calls media to introduce the phenomenon of domestic violence into the public opinion in its severe reality, not as a scandal instead.

[9] See Hoyle (1998) on the role of the police in responding to domestic violence.

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SZABOLCS KOPPÁNYI *

Highlights of the New Telecommunications Regulatory Framework in Hungary

The new Communications Act (Act 40 of 2001) was adopted by the Hungarian Parliament on June 2001. Some provisions of the Act are already in effect, but most provisions will become effective on December 23, 2001. Its aim is to open up the telecommunications market by the end of this year. The act, in accordance with current EU directives and regulations, provides the framework for the liberalized telecommunications market in Hungary for the next decade. It regulates telecommunications services, frequency management, cable services and postal services in one unified act, and it also authorizes the relevant ministries to enact further detailed rules with respect to approximately 20 regulatory issues.

Infrastructure-based competition

The act generally favours infrastructure-based competition rather than service-based competition, with an aim to accelerate network development in Hungary. However, recognizing that new entrants may not have the necessary resources to develop their own networks, the act prescribes the right of interconnection as a general rule and also as a special obligation for service providers that own or control a network.

Licensing regime

A new (EU-compatible) licensing regime has been introduced, the most important provision of which is that it removes almost all administrative barriers for entering the market. New service providers need only notify the relevant authority that they intend to commence provision of communications services and are permitted to start providing the service after 30 days from the date of such notification. Licences will only be required for construction of

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telecommunications infrastructure and for utilization of scarce resources (ie, frequencies and identifiers).

Regulation of significant market power

One major objective of the new legislation is to regulate the activities of dominant communications operators, so as to prevent abuse of market dominance and create a level playing field for new entrants (including existing alternative service providers). The provisions regarding market power are not contained in a single section, but appear throughout the Act in conjunction with other provisions. However, the core provisions on market power are grouped in a specific section entitled "Rules applicable to identification of service providers with significant market power". "Significant market power" is regarded as a characteristic of those who control the market, and constitutes the only definition of "market dominance" in the Act. The definition corresponds with the criteria in the EU telecommunications framework directives, in particular open network provisioning directives such as Directive 98/10/EC (ie, in practice, a 25% share of the relevant market). The new regulation follows the EU concept of asymmetric regulation by applying different rules for new entrants to the market and for the ex-monopolists. The act uses the concept of significant market power (SMP) in accordance with current EU legislation.

Service providers that enjoy SMP will be obliged to:

- cooperate with other players in the market so as to provide access to their networks;
- interconnect their networks with those of other service providers;
- prepare a reference interconnection offer;
- The SMP providers must grant access to the local loop to all parties, including their own affiliated companies, in a non-discriminatory way, that is they must apply the same technical, legal and economic terms and conditions to all parties;
- In addition, SMP providers are subject to a universal service obligation.

A special body of the Communications Authority, the Communications Arbitration Committee identifies service providers with significant market power in a formal decision. Service providers which have a market share of at least 25% in respect of a particular service in the geographic area where the service is provided are identified by the regulator as service providers with significant market power. The Communications Arbitration Committee may apply different criteria for the identification of service providers with significant market power in certain cases. The national carrier (MATÁV) and all the local telephone operators (the "LTOs") are, by virtue of the Act, identified as service providers with significant market power.

The Act states that universal service providers will be selected by means of public tenders or auctions, but does not lay down any special rules regarding the provision of universal services by service providers with significant market power (in events where such service providers are obliged to provide universal services due to the failure of a public tender). However, it is likely that universal services will initially be provided by service providers that currently operate under a concession and are therefore subject to universal service obligations. (Under the existing regulatory regime, public voice telephony service providers operate on the basis of concessions, while many other communications services, such as those to closed user groups, are provided on the basis of licences).

Potential problems of designating significant market power

Although the Act distinguishes between service providers with significant market power and other service providers, and imposes specific obligations on operators deemed to have significant market power, it draws no distinction between the duties of new entrants to the market and incumbent operators. This approach will not necessarily provide protection against abusive market practices by incumbent operators, for the following reasons:

At the start of the liberalization process, it will probably be necessary to impose special obligations on incumbent operators, particularly with regard to universal service, interconnection and the like. However, even if new entrants to the market succeed in winning a significant market share relatively quickly, they may have difficulty in achieving sufficient critical mass and profitability to build up their infrastructure in order to compete with the incumbent service providers if they are subject to equally stringent obligations. It would probably be wiser to begin by imposing special duties on incumbent operators, under a more stringent but narrower umbrella regulation.

Some experts consider that the significant market power test is not an appropriate method of controlling the market. They view it as a rigid approach which leaves the telecommunications authorities too much discretion and has proved to be ineffective in practice. These arguments were the main reasons why the European Commission has shifted to a new and more flexible definition of 'significant market power', which is closer to the concept of a dominant position in competition law. However, Hungary has apparently decided to follow the commission's former, more rigid approach.

Moreover, the European Union's former regulatory measures based on significant market power were not applied in isolation, but were often used in parallel with the general competition rules regarding a dominant position. The exact relationship between the new Communications Act and the existing Compe-

tition Act with respect to the applicability of competition rules has not yet been clearly determined, and further clarification will be needed by virtue of jurisdiction of the Competition Office. However, the Act seems to rule out the possibility of applying traditional competition rules to the telecommunications industry in Hungary. According to the draft, the relevant authority will be the Competition Office, and not the Communications Authority, in cases involving competition issues (eg, exercise of abusive market practices by telecommunications service providers). However, the Competition Office will have to apply the specific provisions of the Act, and not the general rules of the Competition Act, in such cases.

Rules for LTOs

Under the Act, local telecommunications operators (LTOs) are subject to special rules. In Hungary, under the former concession regime, local telephony was provided by various operators in so-called "primer districts" (ie, regions of Hungary), where the LTOs enjoyed monopolist rights. However, the LTOs were not allowed to enter into the market of national and international voice telephony (due to MATÁV's monopoly with respect to national and international voice telephony services). As a result, the local loop is currently characterized by a number of LTOs in the primer districts (MATÁV, in addition to its role as the national and international voice service provider, has been the local telephone operator in several primer districts as well.). The act states that the LTOs will be required to convey any local loop, in whole or in part, for each service provider so requesting. However, the LTOs are not required to open the local loop to service providers that have significant market power and enjoy considerable advantages compared to the LTOs on a national level, or if the conveyance is technically not feasible (ie, if there is a risk that the integrity of the network cannot be maintained). Although this regulation is intended to avoid 'cherry picking' by telecommunications service providers, it is unclear how it will be applied in practice.

Access to the local loop

The Act provides for, among other things, a general framework for local loop unbundling. The detailed rules regarding unbundling and the agreements related thereto were regulated in the Government Decree 175/2001. (IX. 26.) ("Decree").

According to the new Act and the Decree, telephone service providers with significant market power ("SMP providers") are required to grant full or partial

access to their local loops upon request of other service providers if the other service provider attaches the bond with the consumer intending to use its services. In case of a full access, the incumbent SMP cannot provide services to the subscribers. In case of a partial access, the incumbent SMP may continue to provide services pursuant to its existing subscriber contracts and the new service provider may provide additional subscriber services, by utilizing the transmission capacity available on the loop of the incumbent SMP.

Reference offer

The SMP providers are required to file a reference offer with the Communications Arbitration Committee for approval and publication 80 days prior to the expiry of their exclusive right for the provision of telephone services as granted by their respective concession contracts. The content of the reference offer is regulated generally by the Act and the specific rules are to be found in the Decree. According to the Decree, the Reference Interconnection Offer must contain among others the duration of co-location, which must be at least one year, the detailed rules of the process of conclusion, modification and the expiration of the contract, the quality requirements and the price calculation method diverging from the provisions of the Communications Act, which divergence is possible only after two years of the unbundling. The calculation of the price of the unbundling must be transparent and nondiscriminatory, and must be in observation of the LRIC (Long Run Incremented Costs) pricing scheme, the reasonable coverage of general costs and the reasonable profit of the invested capital.

If the reference offer cannot be approved, the Communications Arbitration Committee must provide the service provider with the specific reasons and request the service provider to file a new reference offer. If the new reference offer is not filed within 30 days of receiving the request the Communications Arbitration Committee may impose a fine on the service provider amounting to 0.1% of the service provider's gross turnover but not exceeding HUF 25 million (approx. USD 87,000). The Communications Arbitration Committee will determine the terms and conditions of the reference offer if the second reference offer filed by the service provider is still not in compliance with the provisions of the Act and other relevant regulations.

Exceptions

If more than one service providers request access to the local loop, the SMP provider owning the local loop is entitled to accept, in a transparent procedure, the most favorable offer.

The SMP provider is not obliged to grant access to its local loop if it is technically not feasible or the other service provider requesting the access also has significant market power and "is in a significantly better position in terms of assets, finances and revenues and its influence on the development of the international communications market than the owner of the local loop or the other eligible parties". This latter provision is intended to allow the LTOs to refuse MATÁV's request for access to their local loops. However, this provision will probably generate serious debate as it can be argued that MATÁV is not in "a significantly better position" in relation to Vivendi, the second largest LTO in Hungary. On the other hand, one also can argue that Vivendi is in "a significantly better position" in relation to the other LTOs.

The new regulation of unbundling is partly in line with the relevant laws of the EC. Hungary received derogation concerning number portability until January 1, 2003.

Price regulation

With respect to price regulation, the Act follows the principle that no price regulation is needed as long as there is effective competition in the market. Therefore, under the Act, only universal services and SMP providers are subject to price regulation. The price regulation is based on the long-run incremental costs model price cap regulation, and is cost based (ie, the service providers are required to calculate their prices in a cost-oriented way). The provision of dial-up internet access services will also be subject to price regulation.

Regulatory authority

The Hungarian Communications Authority (HIF) has been designated as the entity responsible for market regulation. The Communication Arbitration Committee, as a part of HIF, is responsible for various tasks, including identifying service providers with SMP, mediating between telecommunications operators and deciding legal disputes regarding cooperation of telecommunications operators. In matters involving competition law issues, the Competition Office remains the exclusive regulatory body.

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TÍMEA FRANK *

Democracy and Human Rights in Bosnia and Herzegovina: the Peace Treaty of Dayton

Reflections in the Wake of a Conference

On 30 March 2001 Budapest was host to an international conference held under the joint auspices of the Institute of Legal Sciences of the Hungarian Academy of Sciences and Friedrich Ebert Foundation. The conference addressed the above topic under the presidency of Ambassador *Dr. István Horváth*. It concerned itself with the Bosnian war still in the focus of world attention as well as with the Dayton Agreement closing that war. Although since the events of six years ago a new bloody conflict has taken place in the territory of former Yugoslavia, the situation in Macedonia has become uncertain again and the issues that arose in the course of the Bosnian settlement have remained ones of current concern. Some of the papers read at the conference sought to explore general interrelationships, while others focussed on the characteristics of certain legal institutions called upon to ensure the assertion of human rights and fundamental freedoms. The participants received up-to-date information on the present status of the settlement from the speakers at the conference, who hold important posts in the state life of Bosnia and Herzegovina. Among them, the paper of Viktor Masenkó-Mavi, a senior research fellow at Institute of Legal Sciences of the Hungarian Academy of Sciences and a member of the Human Rights Chamber for Bosnia and Herzegovina, conveyed a picture of the path which had led to the present-day situation, of the Yugoslav process of disintegration. Manfred Nowak, a professor of the Verwaltungshochshule in Vienna and also a member of the Human Rights Chamber, provided an exposition of the role played by the international community in the settlement of the conflict. The conference, which attracted a high interest, was attended by Ambassador Madame Amira Kapetanovič, who had herself participated in the peace negotiations, and she outlined the Government's efforts to stabilize the situation. Mr Frank Orton, formerly Sweden's ombudsman for against ethnic discrimination and currently federal

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human rights ombudsman of Bosnia and Herzegovina involved in the Bosnia settlement, called attention to the specific features of this legal institution Srpska Republika. Professor Madame Snezana Savic, President of the Constitutional Court, explained the major provisions of Bosnia and Herzegovia's Constitution designed to ensure observance of human rights and funamental freedoms. Justice Minister Biljana Maric of Serbia drew attention to the specific state structrue, and Peter Neussel as legal adviser to the Representative described the past activity of that office.

It is important to stress that, in contrast to the former Soviet Union and Czechoslovakia, the Yugoslav process of disintegration and the rise of new states did not run its course in a peaceful way, but was accompanied by a bloody armed conflict that shocked all Europe and was the gravest the continent had seen since World War Two. The figures speak for themselves: over 200.000 people lost their lives in the fightings, 20.000 persons are declared still missing, and 2 to 2.5 million people were displaced during the bloody conflict of three and a half years. Ethnic cleansings took place across Bosnia and Herzegovina between 1992 and 1995, adding up in fact to the first genocide committed since the holocaust. The reasons are to seek in the extraordinary heterogeneity of the Balkans, with different republics and nations at different levels of economic development, with different religious and cultural backgrounds, and with different historical traditions determing their identities as well. Bosnia and Herzegovina deserves special mention in this respect as it forms by itself a "mini-Yugoslavia", consisting of Muslims (43,7%), Croatians (17,3%) and Serbs (31,4%), none of whom are in absolute majority.

It was obviously necessary to settle such an explosive situation of grave proportions as soon as possible, and the efforts to be made in that direction were clearly voiced on the European continent particularly affected as it was. The initial goal was to localize the war, but that course of policy did not produce but few results for years. From January 1993 the UN and EU peacemarkers Cyrus Vance and Lord Owen were pressing for adoption of a peace plan which was to divide the country's territory into ten, basically autonomous parts. Although the plan won US support, the belligerents disagreed with it. In May 1993 there were established six UN security zones to provide protection for Muslims fleeing from the Serb aggression. Those efforts reached an impasse, howewer. The concert of thes West European great powers was unable to find definite and coherent solutions for the management of the crisis, albeit the OSCE undoubtedly took on a significant role in reaching a democratic settlement. It was in that phase that the United States entered the swirl of events, and, with the parties compelled to sit down to the conference table, a cease-fire of 60 days was agreed upon in October 1995 and Serbs in Bosnia recognized sovereignty of the Croatian-

Muslim federation. The Foreign Ministers of Bosnia, Croatia and Serbia held talks on the postwar constitutional structure of Bosnia and Herzegovina, leading in November 1995 to the signing of the Peace Treaty of Dayton as an instrument of historic significance.

This agreement is an extremely complex legal instrument, with 10 articles, 11 annexes and 102 maps, which is called upon to ensure a democratic and peaceful solution of the situation. The content of traditional peace treaties is limited to cease-fire, arms reduction and demarcation of frontiers. The Dayton Agreement goes much further by closing the war, guaranteeing international recognition for Bosnia and Herzegovina, containing the constitution of the new state, and envisaging a settlement to be achieved at long term. The agreement is, in essence, a delicate balance of compromises, compared to which an even more efficient one might be conceived of in theory, but in practice it can be considered to reflect a state of equilibrium under the conditios previling.

The new state created by the Agreement is a special hybrid entity, a multinational "quasi federeation", virtually a binational "state" within the state. One is the Muslim-Croatian federation of May 1994 occupying 51% of the territory at present, while the other is the Srpska Republika of Serb dominance. The international status of the new federal state of Bosnia and Herzegovina is equally peculiar in that it represents a *sui generis* type of international administration without precedent, the leading role being played by the High Representative, also called the "beneficent dictator", who, contrary to public opinion, is acting on behalf of the international community as a whole rather than of the United Nations. The establishment of this institution is provided for by the section of the Dayton Agreement concerning the enforcement of its civil aspects. Under Art. 5, the High Representative is the ultimate and supreme interpreter of the Peace Treaty of Dayton and exercises control over the process of implementing the peaceful settlement. In performing this function he coordinates the activities of the civil organizatoins and authorities, submits periodic reports on his activity to the United Nations, the European Union and all other governments and organizations concerned. Once an institution with a small staff, the High Representative's office has grown into a 671-strong body. At present, its work is concentrated on three priority areas: buliding a democratic state organizatoin of Bosnia and Herzegovina, carrying out economic reforms, and promoting the return of refugees. A most important benchmark event of the peace process was the Bonn Conference of 1997 as Art. IX of its Final document empowers the High Representative to relieve of office any person who violates the provisoins of the Dayton Agreement in performing an official function and to adopt binding decisions in any matters calling for a decision which the Bosnian authorities fail to take. Such legislative decisions of binding force have been

adopted in the fields of property law, the legal reform, the media, and the protection of minorties.

For all these aspects, Bosnia and Herzegovina cannot be said to be a "protectorate", for it is not under the administration of any particular state, but represents a case in which supervision over the settlement is exercised by the international commmunity as a whole. (This is also supported by the fact the foreign experts participating in the working of state organs act independently rather in representation of their own governments.)

The primary goal sought in the course of the settlement was to ensure the enjoyment of human rights and fundamental freedoms. Formulated as fundamental values in the very preamble to the Constitution are the obligation to respect human freedom, dignity and equality as well as the democratic method of governance, without which one cannot speak at all of a state organization under the rule of law. Special emphasis should be laid on Art. 2 (2) of the Constitution providing that the rights and freedoms as set forth in the European Convention on the Protection of Human Rights and Fundamental Freedoms as well as in the Additional Protocols thereto are to directly apply in the territory of Bosnia and Herzegovina and that they enjoy priority over all other laws and regulations, including the Constitution itself, namely they are accorded *ipso iure* supremacy. This settlement is significant and interesting for the added reason that Bosnia and Herzegovina is not a member of the Council of Europe, but participates in its activity in observer status. Another point of interest is that the framework agreement of Dayton makes it mandatory for the internal law to incorporate the application of those human rights conventions to which Bosnia and Herzegovina is not a party. This, in point of fact, seems to reinforce the universal character of human rights.

The Constitution itself provides on the establishment of institutions called upon to guarantee attainment of the goals formulated in the preamble. The Constitutional Court is a body of 9 judges, 4 of them to be appointed by the federal House of Representatives and 2 to be elected by the National Assembly of the Serb Republic. The remaining 3 members, to be exclusively of foreign nationality, are appointed by the President of the European Court of Human Rights. Any court may request the Constitutional Court to eshablish whether a law or regulation on the validity of which its judgement depends is in conformity with the Constitution, the European Convention on Human Rights and the Protocols thereto. The institution of Ombudsman similarly exhibits peculiar traits as it did not come about as the result of development but was introduced artificially. Moreover, this organ as a general institution of legal protection had to be created in a society to which the concept of ombudsman had been completely unknown. Its most conspicuous feature is its extraordinary complexity as the federal

Constitution provided for the establishment of other entities, i.e. its structural arrangement was not made by fields of competence (e.g. ombudsman for protection of data, parliamentars ombudsman for civic rights), but was based on the territorial pronciple. In February 2000 the law on the Ombudsman for Human Rights was also passed by the Serb Republic. The function of the ombudsman for human rights is to protect human rights, fundamental freedoms, and human dignity as enunciated in the federal Constitutional and in the documents referred on its annexes as well as in the fundamental law of the entities, with paricular emphasis on redress of grievances arising from violations of human rights.

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BOOK REVIEW

LUCAS, A. – LUCAS, H. J.: **Traité de la propriété littéraire et artistique (A Treatise on Literary and Artistic Property).** 2nd edition, Litec, Paris, 2001.

French literature and art has influenced deeply the culture of mankind in the past centuries. For that reason, it is not surprising that French literary property law (and its literature) also had a significant impact on the development of literary property law in several countries. It has been four decades since Világhy contended about intellectual property law that "it was the French natural law movement that broke through the feudal forms of regulating intellectual property law (based on privileges)..., the first consistent (bourgeois) way of regulating intellectual property rights was provided by two statutes by the revolutionary legislature in France: the Patent Act of 1791 and the Literary Property Act of 1794." (More exactly, it was the French act on the utilization rights and copyrights of playwrights in 1793.) The French legislator has developed constantly the literary property law ever since, recently with statutes in 1957 and 1985, and with the Intellectual Property Code of 1992.

As an indication of the fecundity of the literature upon the French literary property law, it is well enough to note that in the last decade of the 20th century nine comprehensive monographs were published on the subject. The one written by the Lucas brothers is the most prominent of them. Its new edition (published in the first months of the new century) is not only an honourable and comprehensive piece of work but an enjoyable piece of reading as well. The civil law chapters were written by A. Lucas (professor at the University of Nantes), while the chapters on international matters by H. J. Lucas (professor at the University of Poitiers).

In the introductory parts (as it could be expected from a French jurist), André Lucas seeks an answer to one of the basic theoretical questions of literary property law: how to decide between *monism* (the unity of *droit moral*) and dualism (separate regulations for personality and property rights) (section 29). Following Desbois, the author argues for the theory of modified dualism saying: "the moral and property rights of the authors are separable for reasons both from rationality (*raison*) and the observation of facts (*observation des faits*)." He believes that this solution is the dogmatically tenable one if we put literary property law to the test in 2000. It should be noted, however, that this

is the dominant view in French jurisprudence, and it must be taken as a sign of modesty (or precaution) that the jurist leaves open the possibility that possible new revelations might force him or the later generations to abandon it.

In the discussion of protected works, we encounter one of the basic criteria of literary property rights: "authenticity" (ss. 77–99). It is quite surprising to me that the French statute remains silent on this issue, leading the judiciary to the conclusion that it is to be treated very carefully. In this respect, theory had to take the "pioneer" role, and it was (once again) Desbois who explicated the criterion of authenticity some fifty years ago. Of course, the "authenticity criterion" has become widely accepted since then.

The criterion is a rather subjective one, contrary to the objective novelty criterion required with respect to industrial property. The Supreme Court (*Court de cassation*) explicitly laid down in a verdict of 1994 that only authenticity and not novelty can be required from literary or artistic works, as novelty is irrelevant in literary property law. The extent of authenticity is also irrelevant: minimal authenticity is well enough. It could be exemplified by the statute itself that provides protection to translation, adaptation, revision, collection of works as well.

The evidence of authenticity is required case by case, but only if it is doubted by the opposing party in the judicial process. The courts are not bound by the standpoints of the several literary property associations. Typically, the question of authenticity is raised regarding "plastic" or "spacial" works. In those cases, it is usually enough to prove that the piece of work in question is more than the result of mere mechanic reproduction. Nevertheless, the Supreme Court expects the lower courts to analyze the features that they consider in settling the issues of authenticity. The author of the monograph contends that the English practice based on the principle "what is worth copying is prima facie worth protecting" is incompatible with the concept behind the French regulations. However, he regrets that (in this respect) French judicial practice is often influenced deeply by contingent circumstances and certain interest groups, instead of an objective approach.

According to the French law (that is based upon a concept of personality rights), the *right to authorship* is conferred upon those whose personality is expressed in the given work (ss. 142–143). It should be noted, however, that some regard this concept as "romantic" in an era when multimedia corporations produce works on an industrial scale. The traditional concept of authorship is also contested by those who refer to the consumer who can become an author himself by way of manipulating the work available to him (*utilisateur-manipulateur*). But their arguments are not convincing: despite the unpredictable development of the informatic environment, the concept of authorship remains

unaffected, as it was convincingly explicated in the Green Book of the EC Committee on Literary Property and Related Rights.

It is remarkable that the authors wrote whole chapters on the literary property rights of spouses (ss. 146–154), on the literary property rights of natural persons and employed authors (ss. 155–167) (also discussing the legal status of the authors of computer works–s. 158), and on the several forms of multiple authorship (ss. 169–234).

With respect to property rights, the copyright and the right to performance are presented in a synthetic way. According to André Lucas, before the emergence of utilization by means of the Internet, the problems of utilization (ss. 241–245) were raised only in cases of marginal significance (like plastic works made of snow or gas). Publication on the Internet requires "fixation points" (that transmit the information) both on the parts of the users and the service providers. For this reason, the definition of utilization (sale or other transfer of ownership of the original or the copy of the work) ignited a heated debate that the Diplomatic Conference (on certain copyright and neighboring rights questions) of 1996 in Geneva could not settle: the parties could not reach an agreement even about the draft of a common declaration.

The right to public performance (ss. 262–274) is given a rather abstract definition in the statute: it mentions public performance "by any means" which might include satellite broadcasting or coded broadcasting as well. However, in French judicial practice the material loaded onto a server is not to be taken as publicized. (Contrary to the opinion of the Belgian courts that take loading onto a server as analogous to the public performance of a musical composition on a concert.)

In the discussion of the right to public performance, we find some statements of principle that could be applied to other forms of intellectual property and are true of several other legal systems. Let me mention only two examples:

the extent of protection is necessarily dependant upon the extent of the authenticity of the work (s. 282);

in judging imitations the similarities and not the differences are decisive.

Droit moral is a pivotal institution in French law. Moreover, it is a "shining page" ("Ruhmesblatt" as the German jurist, *Ulmer* called it) in the Bern Convention. In this respect, French law is quite different to the American law (and the English law before 1988) that does not contain it (which raised problems in the negotiations about international agreements).

It should be noted that the moral rights of authors are still unregulated in the European Union, as the subject stretches beyond the competence of common institutions. As to its characteristic features, *droit moral* is personal, inalienable, imprescriptible. The criteria of the moral rights of authors were

developed by the French judicial practice step by step, in an empirical way, and in connection with famous cases. That development provided the basis for the theories. The elements of *droit moral* are the right to publicization, the right to mark the author's name, the right to the respect of authorship. These elements are not to be taken as absolute: judicial practice may put restraints upon them case by case.

As to the *utilization of literary property rights*, it is a new development (compared to the way it was even a few decades ago) that the author can distribute his or her works by way of the Internet or by turning to organizations for the common administration of rights. Besides, the traditional institutions for utilization (publishers, producers, media corporations) are also available. These traditional institutions usually support the utilization with substantial investments. One of the outstanding (and often contested) novelties of the Literary Property Act of 1985 is the way it regulates the utilization of works created for the purpose of advertising (ss. 657–687). In this respect, the problem lies in the fact that the advertising agency (as a third party) steps into the originally bipolar relationship of the author and the user. There are other cases that raise the problem of collisions between literary property law and trade mark protection (or even competition law the reviewer). The "slogan" created by the author, as a consequence of its utilization in commercials, becomes associated with the product or the service in the eyes of the members of the public. The party who ordered the commercial has a justified claim for the right to mark his name and the right of disposition over the slogan, while the author can claim the property rights as well. Actually, it is a case of the well known collision of interests between the investor and the author, further complicated by the triple pole character of the legal relationship (by the claims of the advertising agency).

The rest of the first part centres around the discussion of the relating (neighboring) rights the protection of the rights of the producers of sound recordings, television corporations, databases. Finally, we find a summary the general rules of the protection of the related rights (ss. 818–900).

In the second part of the book, *Henri-Jacques Lucas* deals with the issues of international literary property law. Following the traditions the French literature on private international law (arguably dating back to Roman law), he begins the discussion with giving an account of the legal status of foreigners. In the judicial practice, the VERDI verdict was the first landmark in which the Supreme Court dismissed the action of the famous Italian composer who claimed the prohibition of the performance of his operas in France. It was a long process of development, before the Supreme Court (more than a hundred years later), in the RIDEAU DE FER (Iron curtain) verdict of 1959, granted the

legal protection to the Russian composers of the music of a movie picture. The verdict, reflecting the current French approach, is mentioned again and again in several respects in the analysis (s. 908, 932).

The statute that incorporated the "period of protection" Directive of the EU into French law (enacted on the 27th of March in 1997) also contains a clause that is discriminative to foreign authors (who are not citizens of members of any of the member states of the EU). For these authors, the longer period of protection can be granted only if it corresponds to the period of protection provided by the laws of the author's home country. In the analysis, this regulation is taken as a partial return to the judicial practice before the RIDEAU DE FER verdict.

As to the traditional private international law (the norms of collision), the guiding principles are once again to be found in the RIDEAU DE FER verdict. In judging the infringement of rights in France in connection with works created by foreign authors in foreign countries, French law is to be applied (which is—as Debois pointed it out—the *lex fori* and the *lex loci delicti* at the same time). The analysis leads here to the explicit conclusion that most of the literary property rights disputes are settled without reference to the norms of collision laid down in private international law (s. 933). It is interesting that even in countries of high legal culture, both the authors of civil law and the judges are rather reluctant to apply the norms private international law. The statement formulated by the German Nussbaum many years ago and being cited ever since ("Heimwertsstreben des Richters"), seems to be true of the French jurisprudence as well.

The primacy of the French law is explicitly declared by the statute itself (L. 122–2) with respect to satellite broadcasting if the source of broadcasting is on French territory. It is true, however, as H. J. Lucas rightly points it out, that this solution is not to be taken as "new". Its only benefit is that it sets up a clear norm of collision. Later, the author reaches the conclusion that the same norm applies to cases in which broadcasting takes place on demand, on account, or under the control of a company dealing with audio-visual activities and having its main seat in France (ss. 934–945).

The analysis of *lex mediatica* is an interesting part of the book (ss. 1009–1012). The issue, as far as I know, was first explicated by H. J. Lucas, and is further developed in this book. By *lex mediatica* he means the problems of protection of literary property rights in connection with works broadcast by means of satellites. The issue has become even more significant recently owing to the new possibilities of transmission by way of international computer networks. Lucas points to a parallel between this issue and the *lex mercatoria* (well known in international trade); the latter is also based upon custom. He

mentions as relevant aspects of the problem: (a) the responsibility for literary property rights in association with satellite broadcasting (as regulated in the French statute: L. 122–2/3); (b) the extension of responsibility to those operating cabel netwoks (that would allow for wider options of law enforcement of the author's rights); (c) the efforts to settle the problems of literary property rights by way of contracts concerning satellite broadcasting. However, the impact of *lex mediatica* (pretty much like the impact of *lex mercatoria*) makes its way in the world only on a voluntary basis or in arbitration procedures. As soon as the dispute is brought before regular courts, *lex mediatica* becomes irrelevant (ss. 1009–1012).

The analysis of the Bern Convention (ss. 1035–1125) and the international treaties derived (*derivées*) from it is quite remarkable. The latter include the Universal Copyright Convention (in French terminology: the Geneva Convention), the International Rome Convention on the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the WIPO (World Intellectual Property Organization) administered treaties (not in force yet–ss. 1124–1126). Lucas justifies his decision to regard these conventions as "derivatives" by referring to the fact that the Bern Agreement for the Protection of Literary and Artistic Works provided the basis for international literary property law. It vas the model for the derived conventions: they all rely upon it to a certain extent. (Although, according to the official terminology, they are "separate" conventions.)

For the contemporary Hungarian reader, the discussion of the literary property law of the EU is of utmost practical importance. Although the relevant Directives of the EU Council are listed in section 113 in the Act LXXVI of 1999, and discussed in a nutshell in the preamble to the bill, the average reader knows not much about the practice of literary property law in the EU.

I regard it as a merit of the monograph that the topic is approached from the aspect of European law–and not literary property law. The issues are divided into three categories:

- the prohibition of discrimination based upon citizenship;
- the free trade of goods and services;
- the freedom of competition.

As to the prohibition of discrimination based on citizenship, Lucas mentions the decision concerning the *Phil Collins* case, in which the European Court had to consider section 125 in the German Literary Property Act of 1965. It discriminated foreign artists by not allowing them to prevent the trade of sound recordings in Germany if their permission is not given (while the right to such an action was granted to German performers).

With respect to the free trade of goods and services, the European Court had to answer the question of exhaustion of rights in the *Deutsche Grammophon* case. The decision was quite similar to verdicts in patent and trademark (Centrafarm) cases. The institution of exhaustion of rights became part of the European law (based on the practice of the European Court). It is manifested in the EU Council Directive of 1991 on the Legal Protection of Computer Programs and the Council Directive of 1996 on the Legal Protection of Databases.

Among the forms of infringement of the freedom of competition, the abuse of superior strength seems to be by the most typical one. It is exemplified by the *Magill* case (also known in Hungary). In this case, the European Court contended that persons gaining rights from companies broadcasting radio and television programs enjoy *de facto* monopolistic position, and the defendant who gained such rights takes advantage of this situation. The facts were quite similar in the *Tiercé Ladbroke* case, in which the defendant denied the transmission right of a horse-race to the Belgian Television.

The examples from the practice of the European Court elucidate that in cases where substantial financial interests are at stake in a literary property rights dispute, the parties and the national courts exhaust all possibilities of legal interpretation.

The work I reviewed is an interesting piece of reading owing to its logical and methodical way of explication and its critical attitude. Compared to the commentaries, it is quite refreshing. The reviewer was glad to see that, besides the frequently cited German, English, American and other foreign authors, he could find the name of the Hungarian *Boytha* several times.

Alexander Vida

CSABA VARGA: **A jog társadalomelmélete felé** [Towards a Social Science Theory of Law]. {Jogfilozófiák [Philosophiae Iuris]} Osiris, Budapest, 1999, xi + 326 p.

The title of the work itself is reminiscent of the socialist period, casting a light behind the false scenes of its prevailing ideology and the author's attempts at challenging it. For at the time when official Marxism had praised the perfection of the demands of theoricity and sociability in the researches in law, the author started publishing papers taking cognizance of such demands as failed promises exclusively, by proposing his papers to be taken as expectations heralding that the theoretical reformulation they undertook could result in a genuinely

academic advance, a pattern of future scholarly thought. At the same time, the title also indicates a claim of politics being elevated into a co-ordinate and complementary status to logic in law. For the socialist ideology was purist and non-compromising notwithstanding. For instance, when communist dictatorship had come to abuse and practically negate by the eventual annihilation of the law, the official administrators of "socialist legality" had felt as their obligation to cry out for its freeing from disturbing and undue interferences already when scholarship came close to observing anything more in the applied law than the mechanical outcome of an untouchedly sterile logic, working on nothing but the merely enacted laws.

As to the scholarly development, the author's attempt at ontologically reconstructing the laws construction and functioning upon the bases patterned by George Lukács' late posthumous *Towards the Ontology of Social Being* aimed already in the early 70's at reconsidering the legal-theoretical problems of Marxism through a new terminology, introduced within the framework of a reformated philosophical background and methodology. Its further aim was to re-formulate former theoretical dilemmas within its own new scheme, on the one hand, by integrating into its proper system having in view their reconsideration and re-interpretation, instead of mere criticism or negation all those issues, theories and conceptualisations, that had been originated in the western hemisphera in our contemporary world, on the other. The individual papers collected in the present volume are conceived to have been instrumental to such a theoretical renewal, transforming its general philosophical and socio-scientific claims into concrete issues in concrete terms mostly in form of case-studies. By doing so, social science theory of law is taken as an ideal goal and, at the same time, as a touchstone of how and why to overcome by transcending—Marxism. Accordingly, the characterisation of the social nature of law in one of the papers proves the misery of legal culture under socialism, as contrasted to overall legal security in the past. Or, drawing parallels between linguistic mediation and legal one in another paper points to the continued and ever growing self-emptying of socialist law. Also the destiny of the pair of categories of the economic basis and the ideological and institutional superstructure is shown within the much revealing framework of the gradual degeneration and self-sterilising rigidification of Marxism.

The volume itself is a collection of papers re-edited in an enlarged, revised and corrected form originally published by the author in the period spanning from the beginning of his academic carreer in the mid-60's through two decades on.

Its preface is followed by topics on (and individual papers dedicated to) Marxism and law (on the definition of law in the socialist theory of law in

general and in the 60's in particular, as well as on law taken as a mere superstructure), Legal formalism and its theory (on validity and efficacity of law as viewed from Lukács's ontological viewpoint), Law-making (on creation of law, as well as on codification and its limits), Motives of the rationalisation of law (on rationality and codification of law, as well as on rational utopias in legal development), Law-application (on politics as a component to be controlled and channelled by logic, as well as on judicial activity and its logic viewed from the perspective of internal contradictions between ideals, reality, and future perspectives), Legal system and legal policy (on law as a system, as well as on the want of an autonomous legal policy), Law and morality (on law and its internal morality, as well as on law, society, language and values), Towards a social science theory of law (on theses about legal theorising upon the basis of Lukács's Ontology, as well as on macrosociological theories of law arriving from the lawyer's world concept to a social science theory of law), and, finally, Perspective (on the question whether is—or is not law in transition?). The volume ends by indexes according to subjects, normative staff used, and names.

N. N.

CSABA VARGA: **A jog mint folyamat** [Law as Process]. {Osiris könyvtár: Jog [Osiris Library: Law]} Osiris, Budapest, 1999, 430 p.

Today it is a common understanding that our respective view of law is fitting within the framework of modern social scientific thought, albeit a long period of gestation preceded the time in Europe when its primitive idea was actually received. For legal scholarship had its turn to run the same path which for the science-philosophical and science-methodological reformulation of scholarship itself—had been run, first, by natural sciences, and, secondly, by all the humanities. Covering the path said was by far not free from tensions and contradictions. For it had to touch upon foundational issues, and its stake was at the same time the scientific value of legal scholarship, on the one hand, and the chances to preserve the specificities and the particular autonomy of thinking in law and on law, on the other. Moreover, the new start after World War II has had to experience and overcome counter-running tendencies as well, mostly as a morally justified answer by the jusnaturalist reaction to the self-surrender of the legal profession and the almost completed internal emptying of law during the national-socialist regime.

Recently, the decisive turn was signalled by the introduction of linguistico-philosophical analysis and ontological approach in legal thinking. The law's

new concept is rather sensitive to the communicational foundations of our social practice, including the formative role played by the recurrently repeated and ceaseless series of our acts of (re)conventionalisation. It offers also a theory ready to reflect the ontological significance of linguistic games, that is, in law, first of all, of the deontology of the legal profession (i.e., "*juristische Weltanschauung*", the lawyers' world concept, which had once provoked Engels to exert nothing but exclusively ideological—or, to be sure, purely epistemological—criticism, with no regard to any guidance it might exert in actual practice).

The final stage of the theoretical development formulated in the present book is an autopoietical understanding of law which, instead of interpreting the original methodological insight of autopoiesis in a systemic way in order to draw some internal dividing lines of any societal structure (as Luhmann and Teubner did), attempts at regarding our social world (made up by our daily conceptualisations and linguistic games) as a process in which ontological and epistemological approaches are unified in one view, that is, taken as a self-structuring process in which also the differing methodological levels and professional ideologies of, e.g., problem-solving and justification in law, moreover, even the primitive ambivalence of all means of legal technique, can equally be explained. For the author's conception, this is the point where—on the one hand and as a source of inspiration the recognition of the importance of historical human practice serving as a criterion (in the Marxist tradition in general and in the ontology of law as formulated by the author upon the basis of George Lukács's late posthumous social ontology in particular) and—on the other hand and as a pressing claim the contemporary methodological change-over (in the English–American and Western European tradition, including, among others, speech-act theory, post-Wittgensteinian linguistico-philosophical analysis and cognitive sciences as well) can meet.

The volume is a collection of papers—thoroughly revised and updated—published originally by the author during the last two decades. Its preface is followed by topics on (and individual papers dedicated to) Theoretical legacy (on the development of philosophying about law in Central and Eastern Europe, as well as on the legal theory of Marxism), Modern formal law (on the culture of modern formal law with its challanges and limitations, as well as on Kelsen's Pure Theory of Law yesterday, today and tomorrow), Existence and validity of law (on the ontology of law, as well as on validity, on the law's ontological validity, and on ex post facto regulation as well), Law and history (on law and history, as well as on law as history), Anthropological foundations (on the path to have taken from legal customs to legal folkways, as well as on the question of anthropological jurisprudence based upon the study of Leopold

Pospíšil and his comparative legal development), Legal techniques (on legal technique in general, as well as on presumption and fiction as means of legal technicalities in particular), Law-application (on Kelsen's theory of law-application with its development, ambiguities and open questions, as well as on the components of judicial process, and also on law and logic viewed in a societal contexture mediated through legal reasoning), and, finally, Perspective (on the law's borders upon the basis of Antony Allott's study on the limitations of any effective legal action, as well as on European integration and the uniqueness of national legal development). The volume is closed by indexes of subjects, normative materials, as well as of names.

N. N.

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IN MEMORIAM

KÁROLY NAGY
(1932–2001)

The Hungarian's science of international law and thus the Hungarian jurisprudence in general suffered a grave loss: on April 13th 2001, Károly Nagy, Doctor of the Academy and Professor at the University of Szeged, Faculty of Law, Department of International Law passed away.

His course of life led from Mezőberény through Gyula to Szeged where he stated his carreer at the Department of International Law—the headed by László Buza – in 1957 and where he carried on his valuable educational and research activities for 44 continuous years.

He advanced step by step in the hierarchy of university faculty: heading the Department of International Law from 1969 as an associate professor and as Professor between 1982 and 1996. his lectures introduced thousands of law students to the realm of positive international law and he examined their proficiency according to the high standards set by himself. He strived to promote a better understanding of international law among students by participating in the creation of various textbooks as co-author, writing several chapters, In 1995, he published a textbook on the history of international law [Nagy Károly: A nemzetközi jog, valamint Magyarország külkapcsolatainak története (A History of International Law and the External Relations of Hungary); Antológia Kiadó és Nyomda, Lakitelek, 1995.; 208 p.] followed by a comprehensive textbook on international law appearing in 1999 and providing ever since the best source of data and information available in Hungarian [Nagy Károly: Nemzetközi jog (International Law); Püski Kiadó, Budapest, 1999.; 68/0 p.]

His scholarly activities featured numerous problems of international law: 5 monographies, 28 major studies and dozens of other publications indicate that the law of international treaties, the relationship between international and national law, the institution of recognition, the protection of the environment by international law, the status of minorities in international and constitutional law all alike arose his interest as a jurist. But his most significant contribution to the science of international law is certainly related to the questions of state responsibility. Besides several studies concerning the topic mentioned above

he published an entire monography analysing the subject of international responsibility in its complexity [Nagy Károly: Az állam felelőssége a nemzetközi jog megsértése miatt (State Responsibility for Internationally Wrongful Acts); Akadémiai Kiadó, Budapest, 1991.; 243 p.]. His achievements in this field were acknowledged worldwide not only by academic circles: the propositions developed by Károly Nagy were cited on several ossasions during the ongoing codification process in the International Law Commission of the United Nations.

Being a worthy successor of László Buda, his teaching and scientific methods are characterized by a positivist approach. The views expressed in his university lectures and in his writings were always based on positive law regardless of their compatibility with the actual political expectations. He handed down this attitude to his university colleagues and to his former students practising international law, as well. One should also mention that he was on friendly termes with practically each member of the small community of international lawyers in Hungary and this friendship was not confined to professional matters.

He wanted to continue to teach and write until many years to come but these plans were shattered by the serious illness he had. The manuscript of his last study was already completed but he couldn't live to see it published. His professional heritage, his personality will not be forgotten but remembered and preserved in our hearts.

László Bodnár

ACTA JURIDICA HUNGARICA, Vol. 42

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